The collective disputes resolution

1. Introduction

Ladies and Gentlemen,

Thank you for the floor. At first, I would like to thank warmly to our Hungarian colleagues for their kind invitation to this conference, held on the occasion of the tenth anniversary of the collective dispute resolution mechanism in their country; and let me wish them a lot of success in continued utilisation of these institutes in future.

I am pleased to extend greetings to you on behalf of the Czech Ministry of Labour and Social Affairs. Unfortunately, the author of this lecture, Miss Eva Vozábová, could not come in this term to Budapest, so I will take her place.

Our conference today is a convenient venue to have a look at the legal provisions on and so-far experiences in collective dispute resolution in various countries and, possibly, also to exchange views with those assisting in collective dispute resolution. Let me therefore make our addition on the topic and introduce to you national legal provisions and experience of the Czech Republic relevant to collective dispute resolution over the last 15 years of effect of the Czech Act on Collective Bargaining. As you can see, our system is an older brother of the Hungarian one. I can remember very well at one conference, where we were talking very thoroughly about labour conflicts and Mrs. Marie Lado was explaining us how Hungaria prepares the new system. I was very glad that our work has been done and listened with great respect about your efforts and very thorough preparation.

I would like to open my speech with a brief overview of the legislation in force, governing collective dispute resolution in the Czech Republic, and on the approach to collective disputes in general.

Afterwards, I will describe the forms of collective dispute resolution recognized under the Czech legal system, their practical treatment and also benefits of respective institutes.

2. Legislation in force

The legislation in force on collective dispute resolution is represented by Act No. 2/1991 Coll., On collective bargaining. The Act came into effect on the 1st of February 1991, that is, shortly after the so called Velvet revolution of November 1989, that marked the turn of the Czech Republic towards an extensive reform of the country's national economy, state administration and of course also of the legal system.

The main task was to find the system of conciliation of collective disputes, which would be

- rather simple,
- as far as possible informal and still effective,
- voluntary for the parties.

And though in these times it was supposed, that perhaps it would be necessary to make changes, since that time the Act has undergone only several minor amendments.

The Act has been implemented by two decrees:

- firstly , Decree No. 16/1991 Coll., on mediators and arbitrators,
- and secondly, Decree No. 114/1991 Coll., on fees to mediators and arbitrators.

There are certain other legal provisions closely related to the Act on Collective Bargaining, such as

- Act No. 120/1990 Coll., regulating relations between trade union organisations and employers, if there are more trade unions operating by one employer,
- Act No. 83/1990 Coll., on citizens' associations
- and of course, Labour Code.

3. Collective dispute

A collective dispute has been defined by a provision of the Act on Collective Bargaining. The definition is quite brief and it reads: "Collective disputes under this act shall include disputes on concluding a collective agreement and disputes

on performance of commitments under a collective agreement, from which no entitlements arise for individual employees." However, a collective dispute is additionally understood to include a dispute on a change of an already valid collective agreement, providing the option and scope of such change have been agreed in the collective agreement.

Let me note, that the theory of law recognises also collective disputes in a more general sense, while these include other disputes concerning a collective of employees or a relationships between both social partners. Such broader-sense disputes, however, are out of focus of this lecture.

The Act on Collective Bargaining therefore recognises two principal types of disputes:

- disputes on concluding a collective agreement
- and disputes on performance of commitments under a collective agreement

Both involve company-level collective agreements or higher-level collective agreements.

Yet another classification may be based on the type of a commitment, performance of which is a subject matter of the conducted dispute. It is important to emphasise that, for a dispute to qualify as a collective one, it must always be a collective commitment. The point is, that collective agreements may stipulate also individual commitments, but these are resolved by bringing them to court.

Collective agreements may also stipulate other than commitments ruled by labour law, the only restriction being that such commitments may not contravene legal regulations; otherwise, a collective agreement would be invalid in its respective section.

But of course collective agreements contain, in particular, wage entitlements, scheduling of working hours, determination of work breaks, determination of an aggregate scope of overtime work, creation of working conditions, training and education of employees and so on.

You can guess, which disputes are most frequent: those dealing with wage commitments, as far as we at the Ministry have recorded.

4. Contending parties

Specification of parties in collective disputes is based on the classification by collective agreement type. The most frequent disputes on company-level collective agreements include a trade union organisation and employer as contending parties. Parties in disputes concerning higher-level collective agreements include a higher-level trade union organisation on one side and an employers' organisation, such as unions or associations, on the other side.

Let this suffice to briefly describe collective disputes in general.

5. Methods of dispute resolution

Democratic countries elsewhere in world use various means of collective dispute resolution that should be understood to constitute part of the collective bargaining process in a more general sense. Basing on this assumption, I would expect that the institutes I am describing will often show clear resemblance of your own institutes, adopted by the legal system of your country, although they may bear different names. The element of inspiration may however dwell in the requirements and methods governing use of the institutes, as these, I would think, will be specific from country to country.

In the Czech Republic, the parties may, with respect of a potential dispute, agree the method of such dispute resolution on their collective agreement, such as through a special conciliation committee. Application or avoidance of application of such procedures laid down in the collective agreement shall cannot however prohibit procedural means provided by the Act on Collective Bargaining.

Relevant institutes include:

- proceedings before the mediator,
- proceedings before the arbitrator.
- Further, they include a strike and layoff as extreme means of a collective dispute resolution that may only be used in the disputes on concluding a collective agreement.

The Act on Collective Bargaining does not specifically stipulate further institutes of dispute resolution, while there are additional types of dispute resolution existent in practice that I will mention in conclusion of my speech.

5.1 Proceedings before the mediator

Proceedings before the mediator are the first step in resolving any collective dispute, i.e. whether it is a collective dispute on concluding a collective agreement or a collective dispute on performance of commitments under a collective agreement.

If the contracting parties fail to reach an agreement on a way of resolving their dispute they may appoint a mediator upon mutual agreement. That means it is left to their decision if they choose to approach a mediator, similarly as each individual may decide, whether or not to file an action.

So the proceedings before the mediator are quite voluntary – but it must be mentioned, that the extreme means of resolving a dispute on concluding a collective agreement – that is, a strike or layoff – may be used only after the proceedings before the mediator.

Who can be a mediator? A natural person, on the condition that he (or she) is of legal age and legally capable, and agrees to perform this task. A mediator may also be a foreign natural or legal person. Performance of the mediator office excludes any proxy. The law has not further requirements concerning the mediator that the parties appoint upon their agreement.

If the contracting parties fail to agree who will mediate their dispute, any of the contracting parties can ask the Ministry of Labour and Social Affairs to appoint the mediator The Ministry will appoint as a mediator only a natural person or legal person that has been recorded in the list of mediators maintained by the Ministry. There are additional requirements applied to these persons, in order to ensure that they will perform the office in a qualified manner. The requirements include university-level

education of the person and its integrity. A legal person – mediator must employ the staff suitable for the mediator work, who meet the same requirements which are applied to the natural person.

A mediator is entitled to a fee under the Act and such fee shall be included in the costs of the proceedings. The costs shall be split in half and borne equally by each of the contracting parties. The fee is determined by an agreement between the contracting parties and mediator. If no such agreement is reached, the mediator becomes entitled to the fee at the amount specified by a legal regulation (5000 Kč - that is 180 EUR – 49 000 forint).

The role of a mediator is to bring the collective agreement parties to a peaceful resolution of the matter. It means, in other words, that the mediator makes no decision with respect of a collective dispute. He will only furnish the contracting parties, within a statutory term, a written proposal for the dispute resolution, which shall be based on the discussions with the contenting parties and collective analysis of the dispute essence. In this case, the Act requires a proposal for a matter-of-fact resolution of the subject of the dispute, not any proposal of a procedural nature, let's say requesting the parties to continue their negotiations.

If the contending parties accept the mediator's proposal, the proceedings are deemed successful.

In case of unsuccessful proceedings before the mediator, i.e. the parties do not agree with the proposal, they may request dispute resolution before the arbitrator. Or they agree that there is no collective agreement for this time.

5.2 Proceedings before the arbitrator

Proceedings before the arbitrator therefore represent next round of collective disputes resolution, including both collective disputes on concluding a collective agreement and collective disputes on performance of commitments under a collective agreement, providing the contending parties will choose to continue. So again, this solution is vulnerable.

But one should be aware that the proceedings before the arbitrator cannot be commenced, if no precedent proceedings before the mediator were completed.

Likewise with the mediator, the parties may again choose to select the arbitrator upon their agreement.

If the contracting parties fail to agree on the person of the arbitrator, it shall be appointed by the Ministry of Labour and Social Affairs upon motion by any of the contracting parties, on one condition:

The Ministry cannot determine an arbitrator for a dispute on concluding a collective agreement in the workplace where striking is permitted. In this case, the parties shall be bound to reach an agreement on the resolution through an arbitrator which they mutually agree, or they can resort to an extreme means – a strike or layoff.

An arbitrator, identically to a mediator, is prohibited to use a proxy in performing his office.

An arbitrator, unlike a mediator, may only be a natural person entered in the list of arbitrators maintained by the Ministry of Labour and Social Affairs. Prior to being entered into the list, the arbitrator must undergo an exam or better to say a test of her or his professional knowledge before the committee that serves as an advisory body to the Minister. A review of the arbitrators' professional knowledge is repeated every three years.

It is therefore obvious that conditions governing performance of this office are much stricter that in case of the mediator. It is because a decision by the arbitrator within a statutory term is more binding than a proposal by the mediator. In disputes on concluding a collective agreement, the arbitrator's decision is final, conclusive and uncontestable. The collective agreement is concluded by delivery of the arbitrator's decision to the contending parties. It suitable on practical terms that the contracting parties draw up the entire wording of the collective agreement, once it has been concluded in the above manner. This, however, does not constitute a legal act, only an administrative and technical measure.

In case of a dispute on performance of commitments under the collective agreement, the arbitrator's decision may be reviewed by the regional court, if a party

delivers a motion for a review of the arbitrator's decision. Otherwise such decision shall become final, conclusive and enforceable.

On the other hand, if the court cancels the decision on the grounds of its contradiction to the legal regulations or valid collective agreements, the dispute shall be returned for a new decision and the arbitrator shall be bound by the legal position of the court.

Arbitrator's fee (10 000 Kč) and the costs of the proceedings before the arbitrator are not paid by the contending parties, as arbitrators are compensated by the Ministry of Labour and Social Affairs from the state budget.

With respect of means of collective dispute resolution according to the Act on Collective Bargaining, the following summary may be made:

In case of a collective dispute on concluding a collective agreement, the first proceedings shall be those before the mediator. If the proceedings before the mediator are unsuccessful, next proceedings shall be before the arbitrator, based on an agreement, or, if the parties fail to reach such agreement, the matter may be resolved through a strike or layoff.

In case of a collective dispute on concluding a collective agreement in the workplace, where strikes are forbidden or where no layoff may be declared, it is also possible to bring the case before the arbitrator. If the contracting parties fail to agree on a person of an arbitrator, the proceedings shall be before the arbitrator appointed by the Ministry of Labour and Social Affairs, upon motion by any of the contracting parties. The arbitrator's decision in the dispute on concluding a collective agreement is final and cannot be reviewed by the court.

As for a collective dispute on performance of commitments under a collective agreement, the proceedings are first before the mediator. If the proceedings before the mediator are unsuccessful, next proceedings are taken before the arbitrator, based on an agreement between the contracting parties or based on determination by the Ministry of Labour and Social Affairs. No strike or layoff is admissible with this type of dispute. The arbitrator's decision may be reviewed by the court under conditions stipulated by law.

5.3 Experiences of activities of mediators and arbitrators

Let me now mention practical experiences obtained by the Ministry of Labour and Social Affairs in connection with using these institutes in collective dispute resolution:

The Ministry has currently 30 arbitrators and about 60 mediators recorded in its lists. Out of the latter however, a half act as arbitrators at the same time, therefore the total number of persons recorded in the lists of the Ministry amounts to approximately 60. However, with respect of one and same dispute, the same person may only act as either a mediator or arbitrator.

On average, there are about 20 applicants for determination of a mediator or arbitrator each year. Some of them were doing this office from the very beginning and have resigned only now because of their age; we are glad to have also quite young colleagues.

Determination of an arbitrator in collective disputes is a procedure that occurs but very rarely.

It should be noted on the other hand, that the Ministry does not record all the disputes, but only those in which it has been directly involved. Such unrecorded cases will include those when contracting parties approach a mediator or arbitrator directly, without involvement on the part of the Ministry.

The law does not require mediators or arbitrators to convene a hearing of the contending parties for the purposes of the dispute resolution. It is therefore left to them and to the involved parties if they agree to have such joint hearing or if discussions will be held separately with each of the parties.

You will not hesitate with the answer to the question, which kind of disputes dominate. Of course – all kinds of wages disputes. They are followed by the disputes on information and consultations. The other areas worth noting include the disputes concerning working conditions.

Disputes on concluding a collective agreement and disputes on its performance are represented more or less equally. They mostly include company-

level collective agreements. Disputes addressed by an arbitrator have been exclusively disputes on performance under company-level collective agreements.

The role of mediators should be emphasises in the first place. Thanks to their successful negotiations, many dispute were successfully completed before the situation could reach really acute level, that is, before a serious injury could be caused to the relations between the contracting parties or even before physical damages. Mediators have been successful in forestalling several strikes. What is more, mediators also persuade the contending parties, that are no longer able to accept a solution proposed by mediators, to continue by the proceedings before the arbitrator and to avoid their dispute resolution trough a strike. In practice, the institute of mediators and arbitrators has become an often-used means of collective dispute resolution and mostly with a successful result, one should note.

5.4 Strike

In addition to the above institutes, the Act on Collective Bargaining has laid down also extreme means of collective dispute resolution, which include a strike. The right to strike has been generally guaranteed by the Charter of Rights and Freedoms.

A strike, in the meaning of the Act on Collective Bargaining, is a legal tool of a collective dispute resolution in case of bargaining for and conclusion of collective agreements. With respect of disputes on performance under the collective agreement, their subjects mostly include interpretations of contractual commitments, and the Act does not permit their resolution through a strike, basing itself on the assumption that legal relationships between the parties have been stipulated by an already signed agreement and, therefore, it is unnecessary to resort to a highly dramatic means, as certainly represented by the strike.

For the purposes of collective bargaining, the Act has defined a strike as a total or partly interruption of work. Exercise of the right, that brings material loss to the employer, is intended to make the employer change its attitude in accordance with the requirements of the strikers. A precondition to a strike however is that all rules are complied with as stipulated by the Act on Collective Bargaining. In addition to a strike

as an extreme means of resolution of disputes on concluding a collective agreement, the Act has defined also so-called solidarity strike; it is understood, for the purposes of the Act on Collective Bargaining, as a strike in support of requirements of employees who have been already on strike with respect of a dispute on concluding another collective agreement. The legality of such solidarity strike requires that the employer of the strikers is able to impact the process or results of the strike of the employees, in whose requirements support such solidarity strike has been declared, for example with an account of business relations.

A strike is declared and a decision of its start is taken by the respective trade union organisation. The institute may only be applied if already preceded by the proceedings before the mediator that have been ended without a success and, further providing, that no proceedings before the arbitrator have been commenced. A strike would be illegal if declared in the workplace where striking is prohibited. Such strikes would include for example strikes of employees who operate nuclear power plants, judges, armed forces members, and the like. Commencing of a strike must win support by a majority of the employees who should be affected by the collective agreement. Also, the respective trade union organisation has a notification duty towards the employer and the duty in particular involves information on the date of start and end of the strike, and on reasons and objectives of the strike.

A trade union organisation that has decided to go on strike is required to provide the necessary cooperation to the employer throughout the whole period of duration of the strike, in order to ensure the necessary activities and operation of facilities where so required by their nature and purpose, taking account of heath and security protection and possible occurrence of damage to such facilities.

In case of a legal strike, the law required additional obligations, both of the respective trade union body and employer: no employee may be deterred to take part in the strike but he or she may neither be forced to participate in the strike; participation on a strike is considered a justified absence from the work; an employee is not liable to the employer for any damage or loss suffered solely due to an interruption of work because of a strike; in the course of the strike, the employer must not hire any

replacement labour to fill the jobs normally performed by the strike participants, including outsourcing in order to ensure such works.

If a strike has been declared at the employer, different criterions shall apply to the industrial relations between the employee participating in the strike and the employer, than those normally in force outside the strike. The purpose of the strike is to develop a pressure on the employer. It is therefore impracticable, while respecting the right to strike, require performance of all duties of such striking employee, specifically his or her duties arising from the employment contract and from relevant provisions of the Labour Code. However, if an employee, in the course of a strike, behaves in a manner not foreseen in such situation, for example, he or she works in a manner contradictory to the declared form of the strike, or behaves in a manner that is not fit or is even contradictory to a regular strike conduct, the above exemption shall not apply. Only such conduct is protected that results from the direct exercise of the right to strike. Participants of strikes that are illegal from the perspective of the Act on Collective Bargaining are not entitled to any “benefits” of the legal strike. That is to say that participants of such strikes are exposed to potential penalties by their employers, for example up to a dismissal. The authority to decide if a strike is illegal rests solely with the court that may decide on the matter upon motion by the employer or prosecuting attorney.

A strike participant is not entitled to wage or wage compensation over the period of strike. Participation in a strike is deems a justified absence from the work. Employees who are not participants of a strike shall be enabled to perform work by the employer. If an employee cannot work due to strike he or she shall be entitled to a wage compensation equal to his or her average earnings.

5.5 Layoff

A layoff on the employer’s part is another extreme means stipulated by the Act on Collective Bargaining with respect of resolution of disputes on concluding a collective agreement. A layoff may be used under conditions similar to those applicable to a

strike, for example it cannot be applies to any employees of health service facilities if that would pose a threat to the lives or health of the public, subject to an invalidity sanction. A layoff is understood to include a partly or total interruption of work on the part of the employer.

An employer has a notification duty towards the respective trade union organisation, the same as the trade union organisation has towards the employer in case of strike.

Also in this case, only the regional court of relevant jurisdiction has the exclusive right to decide on the possible illegality of a layoff, upon motion by the trade union organisation or prosecuting attorney.

In case an employee was unable to perform his or her work because he or she was subjected to a layoff, it is considered an impediment of work on the part of the employer. If the layoff is legal the employee shall be entitled to the wage compensation equal to a half of his or her average earnings. This provision is quire often dissuading employers from making use of the institute.

5.6 Other institutes

I have already mentioned the existence of still another instruments to deal with industrial disputes. There are however no legal regulations within the Czech system of law to stipulate them, and they have only an insignificant legal effect. These institutes include, for example, informal discussions between social partners, protest demonstrations and meetings or strike alerts. In case of a strike alert, no interruption of work occurs. It is, in its own right, a warning made to the other party of but a tactical value. Alerts are used in cases where it is obvious that the other types of trade unionist rights have failed and a strike is being considered as an extreme means of the dispute resolution.

5.7 Conclusion

It may be summed up in conclusion that institutes of collective dispute resolution have been operating successfully in the Czech Republic and that they have been stipulated by the Act on Collective Bargaining, in force for 15 years already.

Also, strikes as extreme solutions to an industrial collective dispute are declared only absolutely exceptionally in the Czech Republic. I have never heard about any lay-off in practice – nor in my country, nor elsewhere.

On the other, institutes of a mediator and arbitrator are frequently and successfully used. The role of mediators should be emphasised in particular because thanks to their successful acting numerous disputes were finished before the situation could become truly acute, that is, before relations between contracting parties were seriously injured, physical damages caused or a strike declared.

Ladies and Gentlemen,

thank you for your kind attention and let me wish to all participant countries good will and good luck in operation of their institutes of collective dispute resolution.