

THE ADR OF EMPLOYMENT LAW - IN ITALY AND IN CANADA -

LEXELLENT intern, Kadriye Merve Bilgic, from the McGill University Law School in Canada, presents an investigation of the application of Alternative Dispute Resolution techniques, in terms of employment relationships, in both Italy and Canada.

Canada and Italy share mutual and strong commercial interests promoted through investment, innovation and technology-based commercial activities. The Canadian Government has revealed that trade between the two countries has now reached a total approximate value of CAN\$7.8 billion, which renders Italy as Canada's 9th largest trading partner. With such a strong trade partnership between Italy and Canada, one wonders about the similarities and the differences in the way in which these two countries deal with business and in particular the legal side of it. Here we will explore the handling of labour and employment issues - and more specifically different alternatives to labour / employment disputes in each jurisdiction.

Italy is one of the main countries in the world where ADR – Alternative Dispute Resolution mechanisms – are frequently used especially in the field of employment law where a case can take up to 1 to 2 years to be heard in the courts. Conciliation and Arbitration are the most frequently used routes to avoid going in front of a judge. In Canada we also find that Conciliation and Arbitration are the two pivotal means to solve labour and employment disputes. However, one needs to keep in mind the differences in the judiciary systems of Canada and Italy.

Canada has several sources for employment and labour law, because Canada consists of the Federal Government, the 10 Provinces and 3 Territories. For to this reason, Canada possesses not just one legislation that governs labour and employment relations, but instead it also has provincial and federal statutes that are designed to rule labour and employment relations. There is also the existence of Common Law regulations in the Anglophone provinces, and Civil Law in the province of Québec. Hence, unlike the Italian side of the story, Canada's employment and labour law consists of various sources that act almost as the branches of a single tree – the tree of employment and labour law – where the branches represent the employment and labour law sources coming from different jurisdictions.

If Canada is a tree, then Italy's employment and labour law resembles more of a complex compact tumbleweed – apparently scary at first site but in fact no more complex than Canadian employment and labour law field.

Before examining the use of ADR in the field of employment and labour law in Canada and Italy, one must note that there is a big distinction, also at the international level, between the terms Conciliation and Arbitration:

Conciliation refers to the process in which the parties, the employee and the employer, are seeking to re-establish and repair their employment relationship that is established via the employment contract that they entered into. This procedure is conducted through an impartial and autonomous intermediary. This third party intermediary does not rule a judgment or come up with a solution, but the mediator listens to both parties and works through the issue with the employer and the employee in order to be able to make them come up with a feasible solution. The mediator does not suggest a solution – instead the mediator's role is only to guide the parties. In some jurisdictions, employment law requires the matter to be brought before a mediator before taking the case to a labour court or a tribunal.

Arbitration, on the other hand, has different characteristics, in that, the two parties present their arguments and their evidence before an Arbitrator, and the Arbitrator provides a ruling on the final outcome. In this sense, Arbitration can be perceived as a real alternative to the Tribunal and to the Court structure.

Labour Boards, Commissions, & Courts

In Italy, there are Labour Courts. However these Labour Courts have different particularities when compared to labour courts in other jurisdictions – such as Canada – in that the Italian Labour Courts can be depicted as specialized chambers within Italy's civil court system where parties adjudicate their rights arising out of their employment relationship. In Canada, we find that each Province, as well as the Federal Government, has instead their own Labour Boards and Commissions that are specifically established to hear employment and labour related disputes.

The exception to this, in Canada, are disputes tied to federally regulated jobs. Here an employee who works under a federally regulated company, must file their complaint with the Canadian Industrial Relations Board (hereinafter "CIRB"). CIRB is defined as an independent quasi-judicial tribunal that has two essential duties:

- (1) Supporting labour-management relations as governed under the Canada Labour Code; and
- (2) Assisting and improving the professional relationship among artists and producers in federally regulated businesses.

To this end, CIRB offers various dispute resolution mechanisms - such as providing mediation services during all phases of a dispute.

For disputes concerning employees of publically listed and private companies we find, in Québec, the Labour Relations Board ("*Commission des Relations du Travail*") - which was founded in 2002 as an independent administrative tribunal that has specialization in provincially regulated employment and labour related disputes. This Board provides, if necessary through conciliation, solutions for both non-unionized employee problems and the problems arisen between a unionized employee and their employer out of their signed collective agreement.

As mentioned above, the use of the Labour Boards and Commissions in Canada for extra-judicial dispute resolution is becoming a more and more frequent method of resolving disputes arising from the breach of employment contracts and collective labour agreements – a trend we also see developing in other foreign jurisdictions.

For example, in Italy there are two types of important dispute resolution mechanisms: Conciliation and Arbitration. Here Conciliation is divided into two distinct categories in the field of employment and labour law: (1) Administrative Conciliation; and (2) Trade Union Conciliation.

As by way of comparison, in Canada, there is no such decisive distinction in the term 'conciliation' per se. The single term 'conciliation' encompasses both types implicitly. Provincially regulated employment law in Canada does not impose conciliation as a mandatory dispute resolution mechanism in those issues – as it does in Italy. However, this story is completely different when one is discussing labour relations.

For example, in federally regulated labour relations, there is a timeline and there are various phases to solve disputes, and for this reason, the Canada Labour Code renders conciliation a

mandatory phase for labour disputes. More specifically, the collective bargaining process starts with a written notification provided either by the Union or the employer in order to commence the procedure to bargain for revising or renewing the collective agreement. If the negotiations are not commenced within a reasonable time period as established under the section 50 of the Canada Labour Code, then the applicant could file a notice of dispute with the Canadian Ministry of Labour. In this scenario the Ministry of Labour would appoint a conciliation officer within 15 days upon the receipt of the notice of the dispute. As illustrated under 75. (1) of the Canada Labour Code, the conciliation officer has 60 days to solve the dispute; yet, a 60 day mandate could be subject to an extension if agreed by both parties.

As one can see when observing Italian and Canadian regulations in this field, Italy has a much stronger sense of conciliation. Whereas in Canada, there is only one type of conciliation, and conciliation being a mandatory stage differs from provincially regulated employment/labour law and federally regulated labour law.

Going back to the Italian conciliation mechanisms:

Administrative Conciliation in Italy occurs when an employee or trade union alleges an infringement of employee(s)' rights protected under the provisions of the Italian Labour Code, or when a labour inspector identified a violation of an employee's rights. Under these circumstances, a conciliation panel is established that consists of a local labour inspector, 2 employee representatives and 2 employer representatives before a special board inaugurated at the Local Offices of the Ministry of Labor ("*Direzioni Provinciali del Lavoro*"). If successful, Administrative Conciliations result in legally binding agreements signed by a labour inspector. Italian Law 92 of 2012 stipulates that dismissals for economic reasons that involves a company with more than 15 employees - will render administrative conciliation as a mandatory precondition to start the proceedings ("*Giustificato motive oggettivo*").

Trade Union Conciliations, on the other hand, occur when the employee has requested to be represented by his / her trade union. This conciliation mechanism is not subject to Italian employment law, because the collective agreement is the one that governs the procedure for this type of conciliation method. For a labour dispute to be settled using the Trade Union Conciliation route, an agreement needs to be signed by the parties. However, unlike in the case of Administrative Conciliation, the agreement reached under the Trade Union Conciliation does not have to be ratified by the Provincial Labour Directorates. One of the key elements of Trade Union Conciliations is that, as governed under the Article 2113 of the Italian Civil Code and the Article 410 of the Italian Code of Civil Procedure, being read together, this type of conciliation waives any rights and claims of that the parties possess, because the decision reached under this conciliation cannot be made subject to any appeal procedure. This makes the decision-making process faster and more efficient, and renders the judiciary free from the burden of hearing the cases that might be easily solved through conciliation.

Another instrument for dispute resolution in Italian employment law is conducted through Arbitration. If attempts for conciliation cannot trigger successful results, then the parties may resort to Arbitration instead of going to the local Labour Court. Nevertheless, even though arbitration has the capacity to be legally binding, it needs to fulfil three conditions:

- (1) Resorting to Arbitration needs to be provided by law or by the collective agreement;
- (2) Both parties willingness to participate in the Arbitration;
- (3) The matter at hand should not be related to constitutional rights.

In Italian employment law, when the matter is related to sanctions, instead of going to Conciliation, the parties address the issue through Arbitration as stated in the Articles of the Law no 300/1970 of the Italian Workers' Statute.

The sense of arbitration is much stronger in Canada, and is always used as a final stage in the collective agreement process. Section 57. (1) of the Canada Labour Code states that “Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to, or employees bound by, the collective agreement, concerning its interpretation, application, administration or alleged contravention”. Even the power of the mediator cannot exceed the power of the arbitrator as demonstrated under section 60 (1.2) “At any stage of a proceeding before an arbitrator or arbitration board, the arbitrator or arbitration board may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the arbitrator or arbitration board to continue the arbitration with respect to the issues that have not been resolved”.

In Canada, when the relationship between employees, who work under federally regulated sectors, and their employers fails - arbitration is the final and binding stage of the dispute. Here arbitration is used in all labour and employment related issues, not just when it comes to sanctions as the Italian example shows us. Even in Québec, under the section called the Settlement of Disputes and Grievances of the Québec Labour Code - Article 74 imposes the obligation of the submission of the disputes to an arbitrator upon the written application of both parties to the Minister after the unsuccessful first collective agreement conciliation attempt (article 93.1.). When it comes to grievances, grievance disputes also have to be brought before an arbitrator as the manner agreed in the collective agreement.

Conclusion:

No one can claim that the Canadian system is more efficient than the Italian system or that the Italian system should be perceived as a role model for its introduction of laws that render the usage of conciliation mandatory.

A hybrid system of employment and labour law – taking the best of the regulations of each country would be a dream. However an impossible dream – not only due to the complexities of combining a common law system with a Napoleonic one – but also due to the profound difference which exist in the very fabric of each county.

Each system has its own unique complexities and patterns - branching out like a tree or inward like tumbleweed - integrating thousands upon thousands of minute regulations into a specialized organism which regulates life... our working life.

Instead of claiming one system prevails over the other, we should each appreciate the ability of the two systems, which are equal in their complexities and intrigues, to facilitate business across borders – from Ancona to Alberta, Bologna to British Columbia, Milan to Manitoba, and Venice to Victoria.

A Mari usque ad Mare

About the author:

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Through research conducted, together with LEXELLENT’s Avv. Serena Muci, she presents an investigation of the application of ADR, in terms of managing a workforce, in Italy and in Canada.