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ACCESS TO JUSTICE IN PORTUGAL: THE LABOUR MEDIATION EXPERIENCE

ACESSO À JUSTIÇA EM PORTUGAL: A EXPERIÊNCIA MEDIAÇÃO LABORAL

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Abstract: The present article focuses on the legal regime of labour mediation in Portugal, dealing in particular with the Public System of Labour Mediation. Besides a revisitation of this whole system, its positive and negative aspects are treated, namely, regarding the duration of its procedures; its cost for the parties; the geographical distribution of the structure on which it is based; the demand for this system by the citizens; its objective scope of application; the attribution of enforceability to the mediation agreements, and the suspension of the statute of limitations for the exercise of labour rights.

Keywords: Labour Mediation. Dispute Resolution. Public Labour Mediation System. Labour Rights.

Resumo: O presente artigo debruça-se sobre o regime jurídico da mediação laboral em Portugal, abordando, em particular, o Sistema Público de Mediação Laboral. Para além de uma revisitação de todo este sistema, são tratados os seus aspectos positivos e negativos, nomeadamente, quanto à duração dos seus procedimentos; ao seu custo para as partes; à distribuição geográfica da estrutura em que assenta; à procura deste sistema pelos cidadãos; ao seu âmbito objectivo de aplicação; à atribuição de força executória aos acordos de mediação e à suspensão da prescrição do exercício dos direitos laborais.

Palavras-chave: Mediação Laboral. Resolução de Litígios. Sistema Público de Mediação Laboral. Direitos Laborais.

1. Introduction

Mediation is one of the means of dispute resolution admitted in the Portuguese legal system; moreover, its importance led the constitutional legislator to refer to it in the Fundamental Law, allowing ordinary law to create instruments and forms of non-jurisdictional conflict resolution.

This institutionalised form of dispute resolution benefits from the assistance of an impartial third party, the mediator, who helps the parties reach an amicable solution[1]. Mediation is presented as an alternative and/or complementary way[2] of resolving disputes[3]. In our opinion, it is above all a complementary means of the administration of justice, since *alterity means* exclusion or taking the place of the other, which would lead one to understand that this means would not be compatible with the administration of State justice and this is not the case; rather it presents itself as a complementary means to the judicial process. A complementary means that can act before or during the procedural *iter* (suspending the process for it to take place) and that can be *intra* or *extra* judicial[4].

Mediation is presented as another measure for the necessary metamorphosis of the administration of justice, revealing a realisation of the jurisdictional equivalent[5]. From this perspective, mediation can be seen, on the one hand, as a procedural step and, on the other hand, as a suitable means for the resolution of certain conflicts[6].

Facing the potentialities of mediation, the Portuguese legislator opted in the decade of 2000 to create three public systems of mediation. Thus, discounting the mediation that takes place in the Courts of Peace, which will also be dealt with below, the System of Labour

[1] See, inter alia, ARTHUR L. MARRIOTT/HENRY J. BROWN, *ADR principles and practice,* 2005, p. 127; MICHÈLE GUILLAUME-HOFNUNG, *La mediation,* 2007, p. 71, and MAURO BOVE, *La conciliazione nel sistema dei mezzi di risoluzione delle controversie civili*, *Internet,* consulted on 2022-09-16, p. 8.

[2] Insisting on the complementary character, see HANS-GEORG MÄHLER/GISELA MÄHLER, "Streitschlichtung - Anwaltssache, hier: Mediation", *NJW* p. 1262-1266, and HANNS PRÜTTING, "Schlichten statt Richten?", *JZ,* , p. 1263.

[3] In addition to the means presented here, there is no lack of hybrid means of alternative dispute resolution in other legal systems, such as in the USA, which are situated between arbitration and mediation. About these, FRANK E. A. SANDER, *The Multi-door Courthouse*, 1983, *passim.*

[4] For its part, extra-judicial mediation may be *spontaneous* (that is, entirely subject to the availability of the parties), *institutional* (organised in the framework of an organism created for this purpose) or *instituted* (in which it is required that the parties develop it, as a rule, through organisms supported by the State, before resorting to the judicial route). See LOÏC CADIET, "I modi alternativi di regolamento dei conflitti in Francia tra tradizione e modernità" *in L'altra Giustizia,* 2007, pp. 79ff.

[5] See FERNANDO HORTA TAVARES, *Mediação e Conciliação*, 2002, p. 74.

[6] This adequacy is based on the fact that different disputes require different means of resolution. In this sense, among others, RORY HOGAN, "ADR: adding extra value to law", *Arbitration,* p. 247-255.

Mediation, the System of Family Mediation and the System of Criminal Mediation were created.

The basis for the implementation of this means of dispute resolution lies in the possibility that it provides quick and inexpensive solutions and that the resulting decisions tend to be more respected by the parties (since they represent an embodiment of the will of the parties) and may contribute to greater stabilisation of social peace.

The present study focuses on the Labour Mediation System, analysing the legal regime in question and assessing the positive and negative aspects of this dispute resolution system.

2. Regulatory Framework

2.1 Mediation

Mediation, as a means of dispute resolution, is permitted by the provisions of Article 202(4) of the Constitution of the Portuguese Republic which states that "The law may institutionalise instruments and forms of non-jurisdictional conflict resolution".

This is a particular means of dispute resolution, particularly in view of its own method, which aims to resolve disputes by agreement, in a logic of self-composition of disputes[7].

With the publication of the Law of the Courts of Peace ("LJdP")[8], in 2001, mediation assumed a new impetus insofar as it has been disciplined that in each justice of the peace there is a mediation service that makes mediation available to any interested party, as a form of alternative resolution of disputes.

According to Article 16(2)(3) of the LJdP, the service aims to stimulate the resolution, with preliminary character, of disputes by agreement of the parties and is competent to mediate any disputes that may be subject to mediation, even if excluded from the jurisdiction of the justice of the peace.

The admission and promotion of mediation arises insofar as it is understood that it contributes "to the promotion of social peace, reducing conflict and the recourse to the

[7] See RICARDO PEDRO, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça: fundamento, conceito e âmbito*, Coimbra, Almedina, 2016, pp. 262ff and RICARDO PEDRO, A mediação de conflitos no Direito interno: traços gerais, in Tutela extrajudicial de direitos fundamentais, Carla Amado Gomes, Ana F. Neves (Eds.) Lisboa, AAFDL, 2022, pp. 11-33.
[8] Law No. 78/2001, of 13 July, amended and republished by Law No. 54/2013, of 31 July.

courts and thus reducing their costs, while allowing conflicts to be resolved that would never reach the courts"[9]-[10].

Mediation as a means of dispute resolution has received great support and encouragement from European Union law, as can be seen from reading Directive 2008/52/EC of the European Parliament and of the Council, of 21 May, on certain aspects of mediation in civil and commercial matters[11], which presents as its objective "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings".

For the purposes of that directive, mediation should be understood as "a structured process, however named or referred to, 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, suggested or ordered by a court, or imposed by the law of a Member State".

The affirmation of mediation in Portugal got a major boost with the approval of Law No. 29/2013 of 19 April ("LdM"), which establishes the general principles applicable to mediation conducted in Portugal, as well as the legal regimes of civil and commercial mediation, mediators and public mediation.

For the purposes of the referred diploma, in terms of its Article 2, paragraph a), mediation should be understood as "the form of alternative resolution of disputes, carried out by public or private entities, through which two or more parties in dispute voluntarily seek to reach an agreement with the assistance of a mediator of conflicts".

On the other hand, the LdM establishes a set of principles that govern, in general, the mediation activity, applying, therefore, also in the Public System of Labour Mediation. Moreover, the LdM provides a chapter dedicated to the Public Mediation Systems, establishing in addition to general rules, rules relating to mediators and rules on the supervision of the mediation activity.

[9] CÁTIA MARQUES CEBOLA, "A mediação pré-judicial em Portugal: análise do novo regime jurídico", *Revista da Ordem dos Advogados*, Volume 70, 2019, p. 442.
[10] However, it should already be clarified that, under Article 151 of Law No. 62/2013 of 26 August "the Courts of Peace are an alternative form of dispute resolution, exclusively civil in cases of low value *and in cases that do not involve* family law, inheritance law and *labour law*" (emphasis added).
[11] OJ L 136, 24.5.2008, pp. 3-8.

2.2 Labour Mediation

Labour mediation is foreseen in several regulations, in Articles 526 to 528 of the Labour Code ("CT")[12] , therein providing for the type of mediable conflicts and the mediation procedure.

According to the provisions of article 526(2) of the CT, mediation can take place (i) by agreement of the parties, at any time, namely during conciliation or (ii) by initiative of one of the parties, one month after the beginning of conciliation, through written communication to the other party.

Regarding mediability, collective labour disputes, namely those arising from the conclusion or revision of a collective agreement, may be subject to mediation[13].

As regards the mediation procedure, as results from Article 527 of the CT, in synthesis: (i) the mediation, if requested, is performed by mediator appointed by the competent service of the ministry responsible for the labour area, assisted, whenever necessary, by the competent service of the ministry responsible for the activity sector, (ii) will be based on a request that must indicate the situation that justifies it and the object of the same, enclosing proof of communication to the other party if subscribed by one of the parties, (iii) the mediator must send the proposal to the parties within 30 days of his appointment and, during the period referred to in the following paragraph, he may contact any of the parties separately if he considers it convenient for reaching an agreement, (iv) acceptance of the proposal by any of the parties must be communicated to the mediator within 10 days of its receipt, (v) on receipt of the replies or after the time limit set out in the preceding paragraph, the mediator shall simultaneously inform each of the parties of the acceptance or refusal of the proposal, within two days.

About the general characterization of this mediation regime, according to some legal doctrine, it will be in question "a form of resolving collective conflicts that can be said to be halfway between conciliation and arbitration"[14].

This is, in summary, a structure of resolution of collective disputes supported by the Directorate-General for Employment and Labour Relations ("DGERT"), to the extent that (i), according to its organic law, this entity "pursues, in the area of professional relations,

[12] Law No. 7/2009, of 12 of February (with multiple alterations).
[13] PEDRO ROMANO MARTINEZ, MARTINEZ, PEDRO ROMANO, "Soluções alternativas de resolução de conflitos, em especial a arbitragem", in *Estudos em memória do Prof. Doutor J. L. Saldanha Sanches*, Paulo Otero, Fernando Araújo, João Taborda da Gama (Org.), Coimbra, Coimbra Editora, 2011, 2 Volume, 864ff.
[14] PEDRO ROMANO MARTINEZ, *Direito do Trabalho,* 8.ª ed. Coimbra, Almedina, 2017, p. 1288.

namely, mediation of collective labour disputes, namely those resulting from the conclusion or revision of collective agreements"[15], (ii) according to Article 527(1) of the CT, mediation is carried out by a mediator appointed by the competent service of the ministry responsible for the labour area, assisted, whenever necessary, by the competent service of the ministry responsible for the sector of activity, (ii) According to Article 527(1) of the CT, the mediation is performed by mediator appointed by the competent service of the ministry responsible for the labour area, assisted, whenever necessary, by the competent service of the ministry responsible for the sector of activity.

Moreover, in accordance with article 528(1) of the CT, the parties may request to the Minister responsible for the labour area, by joint application, the use of a person from the list of presiding arbitrators to perform the functions of mediator. The nomination of such mediator shall be from among those on the list of presiding arbitrators existing at the Economic and Social Council for the purpose of constitution of arbitral tribunals in compulsory arbitration proceedings[16].

Finally, in terms of article 528(3) of the CT, if the mediation is not performed by the competent service of the ministry responsible for the labour area, it must be informed by the parties of the respective beginning and end, that is, it can take place by a mediator chosen by the parties[17].

With regard to the resolution of labour disputes within the scope of public employment relationships it is noted that the General Law on Labour in Public Functions ("LGTFP")[18] provides in Articles 387, 391 and 392 a regime of admissibility and operation of mediation dedicated to the resolution of collective labour disputes, namely those resulting from the conclusion or revision of a collective labour agreement.

Under the terms of article 387(1) of the LGTFP it is admitted that collective labour conflicts, namely those resulting from the celebration or revision of a collective labour agreement may be solved through mediation.

For this purpose, under the terms of 391 of the LGTFP, it is allowed that the parties may, at any time, agree to submit collective disputes to mediation, to be carried out by public mediation services or other labour mediation systems. In the absence of the agreement, one

[15] See Article 2(4) paragraph a) of Decree-Law No. 210/2007, of 29 May.
[16] See Article 512 of the CT and Decree-Law No. 259/2009 of 25 September, which regulates mandatory arbitration and necessary arbitration, as well as arbitration on minimum services during a strike and the means to ensure them.
[17] ANTÓNIO MONTEIRO FERNANDES, *Direito do Trabalho,* 18.ª ed., Coimbra, Almedina, 2017, p. 842.
[18] Law No. 35/2014, of 20 June (with several amendments).

of the parties may request, before the Directorate-General of Public Administration and Employment ("DGAEP"), one month after the beginning of the conciliation, the intervention of one of the personalities included in the list of presiding arbitrators, included in the list of arbitrators referred to in Article 384(3) of the LGTFP[19], to perform the functions of mediator.

Lastly, and in very brief terms, as regards the operation of mediation: (i) this is carried out, if requested by one or both parties, by one of the presiding arbitrators referred to in Article 384(3) of the LGTFP, (ii) the arbitrator is drawn by lot by DGAEP, from amongst those on the list of presiding arbitrators, within five working days; (iii) the mediator may carry out all contacts, with each of the parties separately, that he considers convenient and feasible in order to reach an agreement, (iv) the mediator must send his proposal to the parties, by registered letter, within 30 days of his appointment (v) the mediator's proposal is deemed to be rejected if there is no written communication from both parties accepting it within 10 days of its receipt, (vi) once the period of time set forth in the preceding paragraph has expired, the mediator shall simultaneously inform each of the parties, within five days, of the acceptance or rejection of the parties.

2.3 Public System of Labour Mediation

2.3.1 Origin and Justification

Besides the referred mediation structures - and for what this Study is directly concerned - a Public Labour Mediation System ("SML") is foreseen. The SML originated from the Protocol celebrated on 5 May 2006 between the Ministry of Justice and CAP - Confederation of Farmers of Portugal; CCP - Confederation of Trade and Services of Portugal; CGTP-IN - General Confederation of Portuguese Workers - National Trade Union; CIP - Confederation of Portuguese Industry; CTP - Confederation of Portuguese Tourism and UGT - General Workers Union (hereinafter Protocol)[20].

The Protocol provides for obligations:

[19] This article provides that "The list of presiding arbitrators is composed of retired judges or magistrates, nominated, in number of three, by each of the following entities: a) Superior Council of the Judiciary; b) Superior Council of the Administrative and Fiscal Courts; c) Superior Council of the Public Prosecutor's Office".

[20] Available at: http://www.dgpj.mj.pt/DGPJ/sections/leis-da-justica/livro-ix-leis-sobre/pdf7307/DGPJ/sections/leis-da-justica/livro-ix-leis-sobre/pdf7307/protocolo-de-acordo/downloadFile/file/Protocolo_de_Mediacao_Laboral.pdf?nocache=1182243469.36 Accessed 8 February 2022.

— For the Ministry of Justice (through the General Directorate of Extrajudicial Administration - currently DGPJ[21]), with emphasis on: (i) to ensure the operation of the Contact Point at its premises, providing the necessary human and logistical resources; (ii) to promote the training of conflict mediators specialized in labour mediation; (iii) to select, organize and keep updated a list of mediators; (iv) to endow the Contact Point with a list containing the name of the conflict mediators, organized alphabetically and by geographical area where they provide activity, also guaranteeing the randomness in their designation; (v) to disseminate and provide information to the general public, about the activity and operation of the SML; (vi) to appoint a representative for the Advisory Board; (vii) to monitor and evaluate the functioning of the SML; (viii) to collect the amounts paid by the parties as user fees; (ix) to take the necessary steps to ensure the human, logistical and financial resources are provided for the full and regular functioning of this System; (x) to provide suitable locations for the mediation sessions; (xi) to promote all the necessary regulatory changes for the creation of the SML.

For the other subscribing entities to the Protocol: (i) disseminate and provide information to their associates or represented parties about the activity and operation of the SML, namely by raising their awareness of the advantages of its use; (ii) promote public information campaigns, including through the publication of articles in the magazines published by the subscribing entities; (iii) designate, under the terms of No. 2 of Clause 3, its representatives on the Advisory Board;(iii) designate, under the terms of Clause 3.2, its representatives for the Advisory Board; (iv) follow up and evaluate the functioning of the SML; (v) endeavour to assure, together with the other subscribers and according to its possibilities, the human and logistic resources necessary for the full and regular functioning of the SML, namely by making available adequate premises for the mediation sessions.

The justification for the SML is found in the recitals of the Protocol itself when they refer that "The labour legislation in general and, in particular, the actions arising from individual labour contracts, have specificities that justify the creation of a Labour Mediation System".

It further clarifies that "actions regarding individual employment contracts represent a significant percentage of the actions brought before labour courts" and that "the existence of a Labour Mediation System, aimed at the resolution of labour disputes, in particular those arising from individual employment contracts, may contribute to an

[21] See Article 24(4)(d) of Decree-Law No. 123/2011 of 29 December and Article 11 of Decree-Law No. 127/2007 of 27 April.

increase in the number of disputes resolved out-of-court and, consequently, to the release of a considerable number of actions from labour courts".

Lastly, the recitals also state that "both from the employer's and the employee's point of view, there is potential for a justice system in which alternative means of dispute resolution become a real alternative to judicial courts".

2.3.2 Structure

If we read the provisions of the Protocol together with those of the Manual of Procedures and Good Practices of the Labour Mediation System[22] (hereinafter the Manual)[23] we can see that the SML is structured along four fundamental axes:

(i) Point of Contact;

(ii) Corps of conflict mediators;

(iii) Advisory Board;

(iv) Commission for Supervision of the Activities of Mediators.

Firstly, the Contact Point has the following competencies, to be exercised by telephone, fax or e-mail: (i) to provide information related to the functioning of the SML; (ii) to appoint mediators specialised in labour disputes; (iii) to indicate, when necessary, the place and date for the mediation; (iv) to gather information related to the activity and performance of the SML[24].

The Contact Point is responsible for communicating the request for mediation, in particular regarding the parties' acceptance of the mediation procedure[25] and for appointing a mediator from the lists approved and updated by the Ministry of Justice, ensuring their sequential designation[26].

The Contact Point is also responsible for (i) indicating a location for the mediation session(s), favouring the proximity of the SML to its users[27]; (ii) receiving the result of the mediation, within ten days after the mediation agreement has been reached or after the

[22] Available at: http://www.dgpj.mj.pt/sections/gral/mediacao-publica/mediacao-anexos/manual-de-boas-praticas/downloadFile/file/SML_Manuel_boas_praticas.pdf?nocache=1351089425.34,
in the version approved by the SML Advisory Council at a meeting held on 6/5/2008 consulted on 12.03.2018.
[23] See Article 2 of the Protocol and Article 21 of the Manual.
[24] See Article 2(1)(a) of the Protocol. In accordance with Article 2(2) of the Protocol, the point of contact is the Directorate-General for Extrajudicial Administration in the Ministry of Justice (currently DGPJ/GRAL).
[25] See Article 4(1) and (4) and Article 5(1) and (4) of the Manual.
[26] See Article 6(1) of the Manual.
[27] See Article 7(2) of the Manual.

realisation of the impossibility of the same[28]; (iii) managing the computer application that supports the activity of the SML[29]; (iv) receiving various documents[30].

The Contact Point is also competent to organise and coordinate the service provision of mediators who are available to collaborate in the SML[31] and who, following a selection procedure open for that purpose, join the list of mediators of this System.

Finally, the Contact Point is responsible for following up and monitoring the system, gathering statistical data on the activity, and informing the Advisory Council of the SML of any proposals for changes to the Manual that it considers convenient, as well as preparing and submitting the annual activity report to the approval of the Advisory Council of the SML[32].

The Contact Point is currently the DGPJ, since it has succeeded in the attributions of the General Directorate of Extrajudicial Administration.

Secondly, the body of conflict mediators is made up of specialists in labour matters who are on a list approved by the Ministry of Justice and made available by the Point of Contact[33].

The mediators included in the list are selected by the DGPJ, and the conflict mediator who meets the legal requirements and wishes to collaborate with the SML should apply in the selection procedure for mediators to provide services in the SML, opened by order of the Director-General of the DGPJ[34].

To become a mediator the following requirements must be met[35]: (i) be over 25 years of age; (ii) be in full possession of his civil and political rights; (iii) hold an appropriate university degree; (iv) have passed a course in labour mediation recognised by the member of the government responsible for the area of justice; (v) be a person of good repute; (vi) have a command of the Portuguese language.

Mediators of labour disputes are independent professionals who must be adequately qualified to provide labour mediation services, requiring them to act with impartiality, credibility, competence, confidentiality, and diligence[36].

[28] See Article 14(3) of the Manual.
[29] See Article 17(1) of the Manual.
[30] See Article 19(3) of the Manual.
[31] See Article 20(1) of the Manual.
[32] See Article 22 of the Manual.
[33] See Article 2(1)(b) of the Protocol.
[34] See Article 3(1) of the Regulation of the Selection Procedure of Mediators to provide services in the Labour Mediation System, approved as annex III to the Ministerial Order No. 282/2010, of 25 May (hereinafter Regulation).
[35] See Article 4 of the Regulation.
[36] See Article 2(3) of the Protocol.

The mediators who are qualified and selected to collaborate with SML are hired on a service-provider basis. The remuneration to be received by the mediator is fixed for each mediation, regardless of the time spent for the mediation, the number of sessions held or the performance in co-mediation[37]: (i) 120 €, when the mediation is concluded by agreement of the parties reached through mediation; (ii) 100 €, when the parties do not reach an agreement in mediation; (iii) 25 €, when despite the proven diligence carried out by the mediator no consent is obtained, it is verified that the parties do not meet the conditions for participation in mediation, there is some kind of impediment on the part of the mediator or, it is verified during the mediation the incompetence of the SML to intervene in the labour dispute in question.

These mediators are subject to the impediments and suspicions foreseen in the Manual[38] which prevents them, namely, (i) to intervene, by any means, in any procedures subsequent to the mediation, such as the judicial process or the psychotherapeutic accompaniment, whether or not an agreement has been reached and even if such procedures are indirectly related to the mediation carried out; (ii) to be a witness in a judicial action that opposes the mediated parties and that is related, even if indirectly, to the mediation carried out.

Finally, the coordinating mediator is responsible for: (i) being the interlocutor of the mediators with the Point of Contact and the Advisory Board of the SML; (ii) requesting and providing information to the Point of Contact of the SML on matters related to the functioning of the mediation services; (iii) organizing quarterly meetings between all the mediators registered in the list of mediators of their geographical area, in order to contribute to the exchange of experiences and improvement of the conflict mediation techniques.

To acquire the status of conflict mediator registered in the list of the SML, the candidates must attend with success a "training specifically oriented to the exercise of the profession of conflict mediator"[39] being the training entities certified by the DGPJ and being the respective certification scheme foreseen in the Ordinance No. 345/2013, of 27 November.

The designation of mediators at the SML occurs, pursuant to Article 38(1) of the LdM, by express choice of the parties, from a list specifically created for the SML; however, in the absence of a choice of mediator by the parties, the designation is made in a sequential

[37] See Article 18 of the Manual.
[38] See Article 25 of the Manual.
[39] See Article 24(1) of the LdM.

manner, according to the order of registration in the list and, preferably, through a computer system, pursuant to Article 38(2) of the LdM.

The registration in the said list obeys to a specific procedure, in accordance with the Statute of Article 40(1) of the Mediation Law and is currently included in Annex III of the Ministerial Order No. 282/2010, of 25 May[40]. In this context, according to what is established in Article 39 of the LdM and in Annex III of the Ministerial Order No. 282/2010, of 25 May, it is a requirement to integrate the list of mediators of the SML the fulfilment of the above-mentioned requirements, which are subject to assessment through a selection procedure of mediators to provide services in the SML.

At the SML, to guarantee the principle of independence and impartiality of the mediator, it is required the possibility of the mediator of the SML to invoke that he is in a situation of impediment or to ask for excuses, being that, under the terms of Article 41 of the LdM, the parties must be heard by the managing entity of the SML and, if the grounds foreseen in Article 27 of the LdM are verified, a new mediator of conflicts will be appointed.

The Protocol foresees the existence of a Consultative Council composed of nine personalities with the purpose of following up the activity of the SML[41].

The Consultive Council is responsible for monitoring the activity of the SML and is competent, namely, to (i) submit proposals regarding the evolution of the SML, namely as to the possibility of including new matters in it; (ii) issue opinions on the mediation process of the SML; (iii) assess the Manual; (iv) assess the terms of the training process for SML mediators; (v) issue recommendations on aspects of the SML, whenever it deems necessary and when requested to do so; (vi) designate a mediator to be the mediator of the SML (iv) to assess the terms of the training process for the mediators of the SML; (v) to issue recommendations on aspects of the SML, whenever it deems necessary and whenever it is requested to do so; (vi) to appoint a mediator who will be responsible for ensuring, in each geographical area, the articulation between mediators and the Point of Contact[42]; (vii) to approve the annual activities report[43] .

Lastly, within the context of control of the operation of the SML, there is the activity of the Committee for Supervision of the Activity of Mediators. Although not foreseen in the Protocol, its competencies are provided for in Article 21 of the Manual, which determines

[40] Amended by Ministerial Order No. 283/2018, of 19 October.
[41] See Article 2(1)(c) of the Protocol.
[42] See Article 20(2) of the Manual.
[43] See Article 22(2) of the Manual.

that such tasks are the responsibility of the Supervisory Committee of the Activity of Mediators created under the terms of Order-in-Council No. 202/2002, of 7 March or any other that may succeed it.

It should be noted that, in the light of the Ministerial Order, this entity was created to supervise the activity of the Mediators Registered in the lists of the Courts of Peace of Lisbon, Oliveira do Bairro, Seixal and Vila Nova de Gaia[44] establishing competencies for these mediators.

On the other hand, Article 21 of the Manual identifies the specific competencies for the supervision of mediators of the SML, which are: (i) to supervise the activity developed by mediators within the scope of Mediation; (ii) to ensure the independence of mediators in the exercise of their functions; (iii) to watch over the fulfilment of the duties to which mediators are subject in the exercise of their activity, in particular those foreseen for the SML; (iv) to watch over the fulfilment of the deontological standards applicable to the mediation activity.

This committee meets monthly and whenever necessary[45] and is supported administratively by the Directorate-General for Extrajudicial Administration[46]-[47].

However, because of the amendment of paragraph 3 of Article 33 of the LJP, the supervision of the activity of mediators who exercise functions in justice of the peace courts, is now granted to a service of the Ministry of Justice defined by an ordinance of the member of the Government responsible for the area of justice. In sequence, Ministerial Order No. 283/2018, of 19 October defined the General Directorate of Justice Policy as the service of the Ministry of Justice competent for the supervision of the activity of mediators who exercise functions in justice of the peace.

Thus, it should be mentioned that the conflict mediators of the SML are subject to the power to supervise the professional activity, with the DGPJ acting when a complaint is made against the conflict mediators regarding the same activity or on its own initiative based on a general duty of control in relation to the respective Public Mediation System[48]. In this sense, the DGPJ may apply sanctions to the conflict mediators to sanction the disciplinary offence which may consist in (i) reprimand; (ii) suspension from the lists; (iii) or exclusion from the lists, under the terms of Articles 43(2) and 44(1) of the LdM.

[44] See Article 1 of Ministerial Order 202/2002, of 7 March.
[45] See Article 5 of Ministerial Order 202/2002, of 7 March.
[46] To our knowledge this committee has not exercised any powers.
[47] See Article 7 of Ministerial Order 202/2002, of 7 March.
[48] See Article 43(1) of the LdM.

From a chronological point of view, it must be taken into consideration that, subsequently, the LdM came to welcome the regime foreseen, from the outset, in the referred Protocol, dedicating a chapter to the public systems of mediation. In this regard we must consider that the provision of Article 30 of the LdM disciplines that the public systems of mediation aim to "provide citizens with rapid forms of alternative resolution of disputes, through mediation services created and managed by public entities".

In this context, Article 31(1)(2) of the LdM, provides that each public system is managed by a public entity - identified in the constitutive or regulatory act - which is responsible for its maintenance in operation and monitoring. It should be noted that the Protocol indicates the Directorate General of Extrajudicial Administration of the Ministry of Justice (DGAE), but this reference must be interpreted in an up-to-date manner, if the competence lies with the DGPJ[49].

Additionally, the DGPJ has the function of analysing complaints regarding the public mediation system [see Article 31(4) of the LdM].

The LdM, under the terms of Article 35, provides that the maximum limit of the duration of the mediation procedures must be that foreseen in the constituent or regulatory acts, referring in what concerns the SML, namely, to Article 4, paragraph g) of the Protocol that determines a period of three months, unless the parties expressly establish the renewal of the mediation commitment and the mediator agrees with the extension of the period.

The mediation procedure developed under the SML does not presuppose, on the other hand, the obligation of the parties to attend in person the mediation sessions (since the respective constitutive and regulatory act remains silent on this possibility and, as well, considering the provisions of Article 36 of the LdM), so it is possible that the parties are represented in the respective mediation procedure.

Lastly, the LdM provides, under Article 33, that the value of the fees of all Public Mediation Systems, including the SML, is defined in the respective constitutive or regulatory act. Regarding the SML, they are provided for in Article 4, paragraph c) of the Protocol, which foresees the payment of a fee of 50 € for each party, amounting to a total of 100 €.

On the other hand, the use of the SML will be free of costs for the party that benefits from legal aid for the purposes of accessing alternative dispute resolution structures,

[49] DGAE was created by article 4, paragraph g) of Decree-Law No. 146/2000, of 18 July, succeeding GRAL, under the terms of Decree-Law No. 127/2007, of 27 April, which, in turn, became part of DGPJ, under the terms of Decree-Law No. 163/2012, of 31 July.

according to the conjugated provisions of Article 9 and paragraph b) of the Annex I of the Ministerial Order No. 10/2008, of 3 January.

2.3.3 Territorial and Material Scope

The SML has the national territory as its territorial scope[50], functioning in a de-concentrated manner, on an experimental basis, for one year, in the districts that will be designated by order of the Minister of Justice and will progressively cover the entire national territory[51].

In the referred operation the following rules, in particular, must be considered[52]: (i) the Contact Point receives the request for use of the SML, by telephone, fax, *e-mail* or post, registers the request for mediation, indicates a mediator included in the list approved by the Ministry of Justice, informing, if requested, also of the place and date for the realisation of the mediation session(s); (ii) the choice of the place for the realisation of the mediation, which is free and belongs, by agreement, to the parties and the mediator (iii) the Contact Point makes available, if requested, locations for the realisation of the mediation, favouring the proximity of the system to its users; (iv) the mediation can take place in locations specially created for this purpose or in existing structures, such as decentralised services of the direct or indirect Public Administration, services of the Autonomous Administration, institutionalised arbitration centres or mediation services of the Courts of Peace.

The delimitation of the material scope of the conflicts that may be submitted by the parties is determined, according to Article 32 of the LdM, by the respective constitutive act.

In this sense, Article 1(1) of the Protocol and Article 1 of the Manual provides that the mediators of the SML may be competent to mediate individual labour disputes, provided that they are not related to disputes concerning unavailable rights or industrial accidents.

In short, it is possible to understand that it is possible to mediate "disputes arising from a legal relationship that the parties may terminate by negotiation and waive the rights arising therefrom and that are not reserved by law to the judicial courts"[53], being that collective labour disputes must comply with the provisions of the Labour Code and, subsidiarily, those established in the LdM.

[50] See Article 4 of the Protocol.
[51] See Article 3(2) and 3(3) of the Manual.
[52] See Article 4 a), d), e) and f) of the Protocol.
[53] See preamble of the Protocol.

The SML, although based on the idea that all labour disputes which are not inalienable or relate to accidents at work are abstractly mediable, is especially aimed at resolving individual labour disputes. Therefore, the disputes to be settled by the SML will have as parties the worker on one side and the employer on the other side.

For a better understanding of the material scope, in particular the positive scope, we should take into account the provisions of the Protocol's preamble where it is made clear that one of its objectives is the "existence of a Labour Mediation System, aimed at the resolution of labour disputes, especially those arising from individual employment contracts[54]", namely, the scheduling of holidays, the change of working hours, the transfer of an employee to another location, promotions and aspects related to the legal nature of the employment contract.

In what concerns the negative material scope, it should be considered that it is excluded from the SML the resolution of disputes: (i) arising from accidents at work, (ii) labour disputes when unavailable rights are at stake, (iii) labour disputes with workers under the age of 16[55].

3. Critical Analysis of the SML

3.1 Speed

In terms of Article 4, paragraph g) of the Protocol provides: "Subject to the following paragraph, the mediation is subject to a time limit of three months, unless the parties, expressly, wish to renew the commitment to mediation and if the mediator of conflicts agrees with the extension of the term intended"; and in paragraph h): "The mediator of conflicts may terminate, at any time, the mediation, namely when he verifies the impossibility to reach an agreement;". It is still foreseen in Article 12, under the epigraph Deadline of the mediation procedure, of the Manual that: "1 - Without prejudice to the following paragraph,

[54] The notion of *employment contract* can be gathered from Article 10 of the Labour Code which provides: "An employment contract is one by which a natural person undertakes, for remuneration, to provide his activity to another person or persons, within the scope of organisation and under their authority". The specification "individual" seems to lead to the interpretation that disputes relating to collective labour contracts are excluded from the SML. Moreover, given the private capacity of the signatory entities of the Protocol, it seems that disputes arising from *employment contracts in public functions* whose regime of dispute resolution through mediation results from the LGTFP, in the terms referred *above* (paragraph 11) of this Study, regarding collective conflicts, are excluded. Finally, with regard to *individual public employment conflicts,* the resolution of these may be assumed by private entities that are dedicated to mediation, as is the case of the Centre for Administrative Arbitration which, under the terms of Article 3(2) of its Statutes, which provides that it can "(...) promote the resolution of disputes concerning administrative matters and tax matters, through information, mediation, conciliation or arbitration, under the terms defined by its regulation and that by special law are not subject exclusively to judicial court or necessary arbitration."

[55] See Article 2 of the Manual.

the mediation procedure must be concluded within a maximum period of 90 days, except if the parties, in an express manner, wish to renew the commitment to mediation and if the dispute mediator agrees with the extension of the desired period. 2 - The dispute mediator may at any time terminate the mediation, namely when it is verified the impossibility of reaching an agreement."

Therefore, one of the positive aspects is that the duration of the procedures developed is between 1 and 3 months.

3.2 Reduced Cost

The LdM foresees, under Article 33, that the value of the fees of all Public Mediation Systems, including the SML, is defined in the respective constitutive or regulatory act. Regarding the SML, it is foreseen in Article 4, paragraph c) of the Protocol the payment of a fee of 50 € for each party, amounting to a total of 100 €.

In spite of the low cost mentioned, where an advantage of the SML is its reduced cost, it must be mentioned - in a different sense - that the SML requires the payment of a cost; the cost imposed by the SML, when compared with the cost supported by the workers who solve the labour dispute through conciliation carried out by the Public Prosecution Service (which is free of costs[56]), is higher.

3.3 Geographic Proximity

According to the provisions of Article 7, under the epigraph Place and duration of mediation, of the Manual it is foreseen that: "1 - The choice of the location for the realization of the mediation is free and is up to, by agreement, the parties and the mediator. 2 - If it is deemed necessary, the Contact Point of the SML may indicate a location for the realization of the mediation session(s), favouring the proximity of the System to its users. 3 - The Point of Contact has a list of available places for the realization of mediation sessions, organized geographically".

The fact that the parties do not have to travel great geographical distances should be highlighted as positive points of the SML.

[56] Firstly, in view of the non-inclusion of "administrative cases" in the scope of application of the Regulation on procedural costs (see Article 1).

3.4 Demand of the SML

As the quantitative data shows[57] there is little demand for the SML. The lack of demand for the SML may have several reasons, namely, (i) lack of knowledge of the SML by workers, magistrates, lawyers, etc; (ii) requirement to pay a fee for the services provided by the SML; (iii) the fact that employers do not attend the mediation; (iv) lack of information/advertising on the SML; (v) the lack of training on extrajudicial labour mediation; (vi) the lack of confidence in the SML; (vii) the lack of a fixed place for mediation; (viii) the lack of initiative of Lawyers; (ix) the lack of mediation culture by the Parties and Lawyers; (x) the difficulty in accepting labour mediation, due to personal reasons resulting from the employment relationship between the employer and the employee.

3.5 Scope of Measurable Disputes in the SML

One of the most critical issues is the one regarding the scope of application of the SML the typical unavailability of labour rights, that is, whether there would be room for a mediation system within the scope of labour law that focuses on (partially) unavailable rights.

The question is mostly centred on the topic of unavailable rights and, above all, on the need to determine which concept of (un)available rights should be adopted, in short, a broad or narrow concept of unavailability[58].

The SML includes in its scope, as referred above, (i) disputes arising from individual employment contracts; and namely concerning (ii) holiday scheduling; (iii) change of working hours; (iv) transfer of an employee to another location; (v) promotions and aspects related to the legal nature of the employment contract.

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[57] According to the latest statistical data, the following should be noted:
Movement of requests(a) for SML for the 1st half of 2022

Applications pending 1 January	Incoming cases	Closed cases	Applications pending 30 June
15	41	46	10

(a) Requests for public mediation correspond to the expression of will by interested parties to initiate a mediation procedure.
See https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Mediacao.asp
Consulted on 26 April 2023.

[58] The labour doctrine presents as examples of unavailable rights, the *right to holidays* and the *right to weekly rest days*. See JOÃO ZENHA MARTINS, "O Sistema de Mediação Laboral - Algumas Notas", in *Prontuário de Direito do Trabalho* - Centro de Estudos Judiciários, Lisboa, no. 72, 2005, p. 114. Complementarily, it should be considered that another sector of the doctrine understands that the rights of personality of the worker foreseen in articles 14 and following of the Labour Code are indisposable. See PEDRO ROMANO MARTINEZ, Mediação e arbitragem em direito laboral, *Revista de Direito e de Estudos Sociais,* (Out-Dzc 2015), no. 4, pp. 21ff.

On the other hand, the resolution of disputes is expressly excluded: (i) arising from accidents at work; (ii) labour disputes when unavailable rights are at stake; (iii) labour disputes with workers under 16 years of age[59].

3.6 Judicial Approval of the Settlement Obtained in the SML

Another of the most critical questions in the context of the attribution of enforceability to mediation agreements is the question of the judicial homologation[60] of the agreement obtained in the SML.

In accordance with the provisions of Article 10(2) subparagraph b), of the LdM, Chapter III of that law, which is dedicated to civil and commercial mediation, does not apply to disputes susceptible of being the object of labour mediation. In the referred chapter in Article 14, it is foreseen the regimen of the homologation of the agreement obtained in mediation.

In other words, the regime of judicial homologation of the mediation agreement, as a rule, does not apply to mediation within the scope of the SML.

It can, however, find an exception to this rule in the hypotheses where mediation is determined by the judge himself, under Article 273 of the CPC (*ex vi* Article 27-A of the Code of Labour Procedure[61]), in particular, in light of the provisions of Article 273(5) of the CPC that provides that "reaching an agreement in mediation, the same is sent to court, preferably electronically, following the terms defined in law for the homologation of mediation agreements". That is, it is established a regime of compulsory homologation of the agreement that is reached by the parties, which will follow the terms foreseen in Article 14(2) and following of the LdM, according to what is clarified by the provisions of Article 45 of the LdM[62].

Besides the solution of homologation, and still in the logic of attribution of enforceability to the mediation agreements, the model of enforceability of the mediation agreements is still admissible, that is, of attribution of enforceability without the need for

[59] In addition to the non-measurable matters, foreseen in the Protocol that creates the SML, it should be considered that, according to the provisions of article 387(1) of the Labour Code, the regularity and lawfulness of the dismissal *"can only be assessed by a judicial court"*.
[60] It is recalled that under the terms of Article 705(1) of the Civil Procedure Code (CPC): "Orders and any other decisions or acts of the judicial authority that order the performance of an obligation are equivalent to judgements in terms of their enforceability".
[61] This article under the heading Mediation provides that "to the labour process are applied, with the necessary adaptations, the articles relating to mediation provided for in the Code of Civil Procedure".
[62] The reference to article 279-A of the CPC must be interpreted in an up-to-date way, thus understanding this reference as being made in favour of Article 273 of the CPC.

judicial homologation of the mediation agreement. In the light of the legal system in force it should be noted:

a) In general, the regime foreseen in the LdM for the enforceability of mediation agreements, and

b) In particular, the regime foreseen in the SML.

Thus, as for the first, taking into account the regime foreseen in Article 9 of the LdM, that establishes the principle of enforceability, it is admissible the possibility to attribute enforceability, dispensing the judicial homologation, to the mediation agreements that respect the following requirements: (i) that they concern litigations that may be object of mediation and that, also, the law does not prescribe the judicial homologation; (ii) that the parties have capacity to celebrate it; (iii) that they are obtained through mediation in accordance with the terms legally foreseen; (iv) that the content does not violate the public order; (v) that the mediator is registered in the list of mediators of conflicts organized by the Ministry of Justice[63].

With regard to the second - enforceability of mediation agreements resulting from the SML - the specificity of this public mediation system manifests itself, in particular, in relation to the last requirement referred to, that is, in the fact that it is not required for agreements concluded through a mediation procedure carried out within the framework of the public mediation system[64]. More clearly, it is foreseen in Article 4, paragraph n) of the Protocol that the agreements resulting from the SML are enforceable.

However, the fact that the agreement is enforceable *does not prevent it from being subject to judicial homologation, since,* as the doctrine[65] clarifies, homologation can still be justified in at least two situations: (i) when cross-border effectiveness is sought, since this type of agreement is not usually enforceable in other states, and (ii) when the intention is to attribute a special enforceability to the agreements, by reducing the grounds for opposition to enforcement. Lastly, it should be noted that in addition to the above advantages of the homologation procedure, the disadvantage of this procedure is that the *confidentiality of the agreement is lost*[66]-[67], i.e., it follows the regime of publicity of judgements.

[63] See Article 9(1)(a), (b), (c), (d) and (e) of the LdM.
[64] See Article 9(2) of the LdM.
[65] See DULCE LOPES, AFONSO PATRÃO, *Lei da mediação: comentada*, Coimbra, Almedina, 2016, p. 62.
[66] In this sense, see DULCE LOPES, AFONSO PATRÃO, *Lei da mediação...,* p. 96.
[67] Underlining the need for absolute confidentiality as an essential requirement for the success of mediation, see JOÃO ZENHA MARTINS, "O Sistema de Mediação *Laboral - Algumas Notas*…", p. 120.

3.2.4 Suspension of the Expiry and Prescription Periods in the scope of the disputes covered by the SML

Another critical aspect is whether the SML allows for the suspension of expiry and prescription periods for the exercise of labour rights.

The doubt arises because Article 10(2) paragraph b) of the LdM provides that Chapter III of the LdM does not apply to the SML and the suspension of limitation and prescription periods is regulated in that chapter, in Article 13 of the LdM.

Despite the solution that the systematic element imposes, it cannot be forgotten that paragraph 2 of the Article 13 clarifies that the recourse to mediation suspends the periods of caducity and prescription from the date on which the protocol of mediation is signed or, in the case of mediation carried out in the public mediation systems, in which all parties have agreed to the realisation of mediation.

4. Conclusions

Labour mediation is presented yet another means of resolving certain disputes in the area of labour law - which in itself represents yet another means available to citizens. However, the analysis of the SML regime reveals positive and negative aspects.

One of the positive aspects is the fact that the duration of the developed procedures is within a maximum period of 3 months. Another positive aspect is its low cost; however, the cost imposed by the SML, when compared with the cost supported by workers who resolve their labour dispute through conciliation carried out by the Public Prosecution Service (which is free of charge), is higher. Lastly, another positive aspect of the SML is the fact that the parties do not have to travel long distances.

As far as the negative aspects are concerned, there is a low demand for the SML. Another of the most critical questions is the one related to the scope of application of the SML to the typical unavailability of labour rights, that is, to know if there would be a margin for a mediation system in the scope of labour law that focuses on (partially) unavailable rights. Another main critical question in the context of the attribution of enforceability to the mediation agreements is related to the question of the judicial homologation of the agreement obtained in the scope of the SML - despite some doubts the regime of the judicial homologation of the mediation agreement, as a rule, does not apply to the mediation in the scope of the SML.

Lastly, another critical aspect has to do with the fact that the SML allows or not the suspension of the statute of limitations for the exercise of labour rights.

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