Industrial Relations & Conflict Management

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Mediation in Collective Labor Conflicts

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Contents

Introduction

Conflict is an inevitable part of working life in all its relations. Conflicts appear between individual colleagues, as well as between teams, departments, or between professional units. Of old, conflicts in the relation between employers and employees have received extensive attention and are at the basis of what is called 'industrial relations' or 'labor relations'. Particularly, with the rise of large-scale industrialization in the nineteenth century, conflict between 'capital' and 'labor' has been a central theme, and according to many is of a fundamental nature. Others argue that not conflict, however, cooperation is at the core of industrial relations. Employers and employees negotiate freely an agreement, meeting each other's interests. Negotiations can be made between individual workers and the employer (the so-called i-deals) and between collectives of workers (collective labor agreements). The negotiations can, however, get stuck and the conflicts of interest between employer and employees—or their representatives—can escalate. Power relations, more than mutual interests, might determine the conflict dynamics, resulting in deadlock, strikes, or layoffs. The tough negotiations, for example, in the case of Ryanair for several years, illustrate this. Strikes at different locations are countered by transferring airplanes and flights to other European countries. Collective conflicts also can occur when parties do not feel the agreement which is made, is kept. Such conflicts of rights (the perceived violation of one parties' rights) have also received considerable attention, and many cases are brought to the labor courts, or to alternative forms of dispute resolution, such as mediation, arbitration, or conciliation. Here we are at the central topic of this volume. In academic literature mediation, or other forms of third-party intervention in collective labor conflicts have received surprisingly little attention. Surprising, for at least two reasons. First, the societal impact of escalating collective labor conflicts is large, with often serious 'collateral damage' for others than the primary parties. Second, the field of mediation and third-party intervention is developing rapidly in many domains, and receives more and more also academic attention. Mediation in collective labor conflicts, however, has been neglected mostly and has many different features compared to mediation in other domains, such as divorce mediation or mediation in individual labor conflicts. Mediation in collective labor conflict has a long and also

institutionalized tradition. In most societies, the terminology is different, and is referred to this process as conciliation in labor disputes, as a relative informal process of facilitated negotiation. Alternatively, most societies have long traditions in forms of mediation/arbitration, where a committee of 'wise persons' organizes a hearing, investigates the case, and comes with recommendations to the conflicting parties on the content of the case. Such recommendations can, however not need to be, be binding for the parties. A large variety of third-party regulations and practices have emerged all around the globe. The ILO has done a great job in providing information on many such arrangements.

This handbook aims to provide an up to date and insight view of global regulations, practices, and recommendations for the further development of third-party assistance in collective labor conflicts.

The handbook consists of four parts.

Part I. Chapters 1 and 2 give an extensive introduction of the concepts and current literature. To this aim Chap. 1 offers a new model for the structural analysis of mediation in collective labor conflicts, while Chap. 2 offers a new model for the process analysis of the conflict and related third-party interventions.

Part II. In this part, the procedures and practices in 12 EC member states are presented. This part is the result of an EU-sponsored project investigating the state of the art in the EC. For that purpose, multi-method studies were conducted in each of these 12 countries, and the results condensate in the present volume. The cross-country comparison for these 12 chapters is presented in Chap. 15.

Part III. In this part, five societies are presented with a rich tradition in mediation in labor relations and a highly dynamic and different tradition in industrial relations. With new studies from Australia, China, India, South-Africa, and the USA, this book covers most of the industrialized world.

Part IV consists of an integrative chapter, taking stock of the wide variety of practices and noting good practices and global trends. The chapter makes clear that mediation in collective labor conflicts is a widely used practice, with a need for further professionalization in many societies, to meet the needs of a changing labor force, changing organizations, and changing industrial relations.

We wish this book contributes to that professionalization, and thereby to the cooperative and innovative management of collective labor conflicts.

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Part I
General Framework for Interventions in Collective Labor Conflict

Chapter 1
Mediation and Conciliation in Collective Labor Conflicts

Ana Belén García, Erica Romero Pender, Francisco J. Medina and Martin C. Euwema

A BBC news headline on April 12th 2018 reads: "***Lufthansa and Air France flights grounded by strikes***. *Two of Europe's biggest airlines have been hit by strike action, grounding hundreds of flights and affecting tens of thousands of passengers. Lufthansa has been forced to cancel 800 of its 1600 scheduled flights because of a walkout by public sector workers. At the same time, Air France has cancelled one in four of its flights as airline staff takes action in support of a 6% pay claim*."[1]

KLM-Air France was confronted with actions by their own staff. The conflict continued and escalated further. The CEO tried to force a way out, by making a poll among the employees. On May 7th: "*KLM-Air France shares plunged after its chief executive pledged to resign because he had failed to quell labor unrest, throwing the company's strategy into question. The French president Macron is expected to appoint a mediator now."*[2]

Lufthansa was here facing major losses due to actions of civil servants who went on strike, as part of their negotiations with the government. Lufthansa was not a party in this conflict. "*It is completely unacceptable for the union to impose this conflict on uninvolved passengers" said Bettina Volkens (Lufthansa's head of human resources)*. This however was different one week later.

[1] https://www.bbc.com/news/business-43709807.

[2] https://www.bloomberg.com/news/articles/2018-05-07/air-france-tumbles-as-ceo-departure-strikes-spook-investors.

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April 18th, Munich: "*Today pilots went on strike at Lufthansa, knocking out 3200 flights according to the company's skeleton timetable. The four-day work stoppage will be the biggest stoppage labor disruption in the German airline's history. More than 4000 of Lufthansa's 4500 pilots are members of the Cockpit Association, which in May demanded pay hikes of 6.4%, a no-layoffs promise and commitments from the airline not to outsource operations to lower-pay subsidiaries. With a deadlock after months of talks, Cockpit Association members voted last week to authorize an all-out stoppage*.[3]"

Also in January 2018, media worldwide reported on the public transport in Sydney, which came to a stop. Actions by the drivers—due to changes, quality issues, increasing workload, and for the drivers an unacceptable wage offer—created a deadlock in the negotiations between workers and management. A new strike was blocked by the Fair Work commission. In response the national secretary of the Rail, Tram and Bus Union, Bob Nanva, said "*this decision marks the death of the right to strike in Australia*".[4]

This last case clearly points to the third party in the conflict. The Fair Work commission playing a mediating role, however also ruling against the right to strike in the Sydney case. In each case an important question is: which third party is there to help the conflicting parties to come to a negotiated agreement? And were there third parties available earlier in the negotiations that could have prevented this escalation? Mediators, conciliators, facilitators and arbitrators all might play a role in preventing and ending collective conflicts.

Collective conflicts between employers and employees regularly escalate at high costs, and therefore most countries worldwide offer different third party interventions and mediation services to solve these conflicts. Also, preventive forms of third party training, facilitation, and conciliation are growing in many countries. In Europe, the EC actively promotes such initiatives under the legal framework of social dialogue. Different studies show the need among social partners, employers, unions and other stakeholders, to innovate industrial relations and social dialogue (Cutcher-Gershenfeld, Kochan, & Calhoun Wells, 2001; Euwema, Munduate, Elgoibar, Garcia, & Pender, 2015; Munduate, Euwema, & Elgoibar, 2012; Weltz, 2008). One of the essential components in this innovation is supporting social partners, especially when negotiations are stuck, agreements cannot be reached, or rights are not respected, and conflict escalation might occur. Traditions differ among countries in this sense, having different approaches in providing such mediation assistance. However, there's a lack of knowledge on how these conflict resolution systems work and how to further promote development. This book focuses on the analysis of mediation systems in collective labor conflict, offering ways to prevent and manage these conflicts, bringing some light over the current knowledge gap about: (a) the actual functioning of

[3] https://themunicheye.com/news/Lufthansa-Strike-Update-331.

[4] https://www.theguardian.com/australia-news/2018/jan/25/sydney-train-strike-stopped-fair-work-blocks-union-action.

these services; (b) the conditions to promote the use of mediation; (c) good practices of effective mediation interventions.

1.1 Collective Labor Conflicts

Collective labor conflicts are an inevitable part of organizational life. Tensions between the interests and rights of employees, management and owners, being shareholders or public agents, can easily escalate into destructive levels. For that reason, societies develop legal frameworks to regulate these conflicts. An important element in these regulations is the role of third parties in managing the conflict. In the traditional approach, parties go to court and make a claim towards the other, and the labor court has the final ruling. In the Australian case, the specific labor court decided that the Sydney transport's announced strike was illegal. This leads to important considerations regarding the ongoing negotiations and the high societal costs, among others. Indeed, collective conflicts are frequently costly for organizations as well as for employees, but not less importantly, they can be costly for clients, users and society in general. The example of Lufthansa shows the impact of collective conflicts, not only for travelers, but also for other companies. Patients, students, clients or customers are not served, and communities can be disrupted. In that sense, labor conflicts can further escalate into societal conflicts. Although violence against people is less usual in most industrialized societies, injured and even dead people are not uncommon in labor and social conflicts in countries with a conflictive history and great power distance between companies and employees, for example in many South-American and African countries, including South-Africa (Medina, 2016).

Collective conflict management is a highly regulated process around the world. Most countries have labor laws, that defend the association of workers in unions, and in works councils, representing the employees in the organization. Furthermore, in a majority of countries around the world employees have the right to strike to defend mutual interests. However, in many countries, for example in France, the right to strike is limited or even absent for specific jobs which have high societal impact (such as the police or the military). As strikes and other collective actions have high costs, in many countries these actions are only legal when organized by official recognized organizations, such as unions. Furthermore, in some contexts strikes are only legitimate after serious attempts to negotiate and solve the conflict. Such attempts include negotiations and meetings guided by facilitators or mediators. Usually, parties have the option to go to court, however the judicial system is collapsed in some western countries, is costly for parties and government, and their decision might not solve the underlying issues. For this reason, states facilitate the use of mediation for managing labor conflicts.

The court in Sydney declared the strike by the train drivers illegitimate. The response from the union's side was that the ruling marked "*the death of the right to strike in Australia*". A rather dramatic statement, demonstrating that rhetoric is a key element in escalated conflict. It however also signals a global trend, where the role

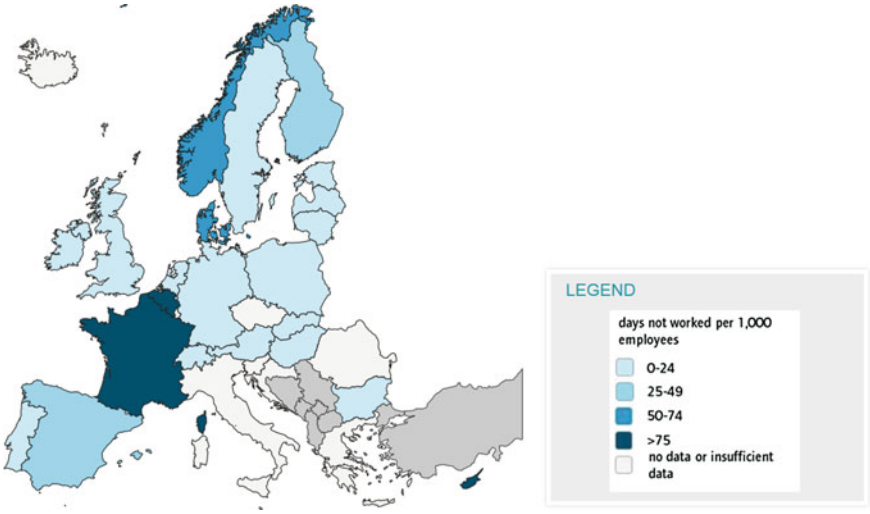

Fig. 1.1 Average amount of days not worked between 2000–2016 in European countries. *Source* https://www.etui.org/Services/Strikes-Map-of-Europe (At the Etui website following this link more detailed information for each country and year is available.)

of unions is shifting (Euwema et al., 2015), and the amount of strikes is decreasing. Brown (2014) reports a strong decline in union membership in most countries over the past 30 years as well as a reduction of strikes. This can be explained by three major trends: the reduced power position of unions; new and more cooperative models of industrial relations; and new models of third party assistance, also aiming at the prevention of strikes. This is clearly demonstrated for example in the UK (Dix, & Barber, 2015; Dix, & Oxenbridge, 2004). In Spain some mediation systems were introduced during 1990's decade as a mandatory procedure for collective conflicts, preemptive to strike announcements or the initiation of a court demand. This substantially reduced costs related to strikes (Martinez-Pecino, Munduate, Medina, & Euwema, 2008; Warneck, 2007) (Fig. 1.1).[5]

In most countries nowadays, also arbitration, conciliation and mediation are part of national conflict management systems, previous to the judicial court. According to Brown (2014), there is a global trend towards greater use of Alternative Dispute

[5]The International Labor Organization (ILO) works to protect labor rights, including the right to strike and the right to freely associate. The "Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation", adopted in 1957, called for the adoption of "laws ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers". Similarly, the "Resolution concerning Trade Union Rights and Their Relation to Civil Liberties", adopted in 1970, invited the Governing Body to instruct the Director-General to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense", with particular attention to be paid, inter alia, to the "right to strike" (ILO, 1970, pp. 735–736).

Resolution systems (ADR), where parties are assisted to come to an agreement, as alternative to the judicial system.

Brown (2014) argues that governments—inside and outside of the European Union—have promoted the creation of quasi-judicial processes, by the mean of institutions that offer conciliation or mediation which facilitate the resolution of these collective conflicts previous to strike. The most notable differences refer to the extent to which they can be considered judiciary as opposed to carried out by non-legal specialists. Despite the different economic and political backgrounds of each country, there are some important commonalities, especially during recent years (Valdés Dal-Ré, 2003). For example, countries which were at some point in time very judicial, such as Spain, are becoming less so. Likewise, systems which relied more on voluntary approaches such as Britain are increasing the regulation of collective disputes. A notable trend in European countries is the preference for voluntary approaches, as encouraged also by the European Commission in the year 2000. We can see a spread of voluntary conciliation, mediation and arbitration procedures for dispute resolution, due in part to the lower costs and fast resolutions that these practices often achieve, and the building, restoration and maintenance of relations between the parties on the long run.

Indeed, third parties in collective conflicts can have many different roles. And all over the globe, we find a large variety of such actors. There is a whole array of arbitrators, mediators and facilitators who might be acting as third parties. When the stakes are high, and the conflict is escalated, often public persons, politicians, religious leaders, or mayors, act as third parties. However, there are also often institutional third parties, professional mediators and facilitators.

Given the high stakes, it is worth to reflect on the design of conflict management systems in relation to these collective conflicts, and to explore how these third parties act and their effectiveness. This indeed is the aim of this book. Initiated by the EC, recognizing the importance of social dialogue and prevention of conflict escalation in labor relations, this book considers third party assistance in different stages of conflicts and aims to learn from good practices across countries and systems.

1.2 Collective Conflicts in Organizations

Conflict is a reality at many levels at work; between individuals, teams, departments and organizations. We define conflict between two or more parties (individuals or groups), if at least one of the parties is offended, or is hindered by the other (Elgoibar, Euwema, & Munduate, 2017). Collective labor conflicts traditionally are focusing on the relation between management and groups of employees (mainly unions). According to the ILO, the topic of these conflicts is often focused on the rights or interests of theses groups. This differs from individual labor disputes, which are those that arise within the relationship between an individual employee and his or her employer. Labor conflicts can take place at different levels within organizations, however also at sectorial level, or even national and international level. The ILO's definition of

labor conflict is essentially referring to only one type of relation within organizations: the relation between employer and employee. The organizational reality evidently presents many other forms of conflicts, such as interpersonal conflicts between colleagues, also at different hierarchical levels. For example, when a schoolteacher has a conflict with a school team leader over how to elaborate a syllabus, this is not a conflict with the employer. In the same school, the department of natural sciences might be in conflict with the department of arts over allocation of resources. Such conflicts between groups of employees also are conflicts where groups participate, but the conflict issues and conflict dynamics are not related to the employer-employee relation. However, when teachers negotiate about an increase of salary with the school owner, this is traditionally seen as a "collective labor conflict", because the conflict parties are employer and employees, and the issue has an impact on a larger group of employees.

There is substantial literature focusing on handling interpersonal and intragroup conflicts in organizations (e.g. De Dreu & Gelfand, 2008; Rahim, 2017; Roche, Teague, & Colvin, 2014). This literature is mostly separate from the literature on intergroup conflicts that try to understand conflicts between groups and also separate from the 'labor conflict' literature, rooted in the employer-employee relationships. This literature is often more related to the legal analysis, formal regulations, social structures, collective bargaining and the influence and role of unions.

1.2.1 Collective Labor Conflicts Over Interests and Rights

In this volume we focus on collective labor conflict, that is focusing indeed on the relation between employees and employer. Many authors differentiate two types of collective labor conflicts: either over interests or over rights (Foley & Cronin, 2015; Martinez-Pecino et al., 2008). Disputes over interests are those in which parties attempt the modification or substitution of existing agreement terms, for instance, the negotiation of a collective agreement. Disputes over rights are those which deal with the interpretation and application of existent rules such as laws or collective agreements. There are differences in the effectiveness of negotiation in both types of conflict, with conflicts of interest easier to resolve than legal disputes (Medina, Vilches, & Otero, 2014). In the same way, third party interventions also differ in effectiveness and strategies in both types of conflict (Martinez-Pecino et al., 2008). Surprisingly, the scarce studies investigating collective conflicts, are limited to conflicts of interest. The social impact of these conflicts for society makes it necessary to gain a deep comprehension of them (Macneil & Bray, 2013). In this book, we certainly stretch beyond collective bargaining, as many conflicts in organizations occur related to different interpretation of rights. For example in the case of the Sydney train drivers, who are forced to work overtime, which in fact is an issue of rights.

1.2.2 Conflicting Parties

The conflicting parties and conflict issues in collective labor conflicts can be highly divers. This can be a first line supervisor in conflict with his or her team over the working hours; the director of a school in conflict with the sport teachers over the sports facilities at the school; management of a bank in conflict with the works council over payment of bonuses; or the top management of a mining company in conflict with unions over working conditions. Conflicting parties can also be at sectoral or national levels. For example primary school teachers went on strike in 2018 for better working conditions in the Netherlands.[6] Conflicts at sectoral and national levels bring usually other actors to the scene. Typically, from both sides, professional agents represent the interests of the primary parties, negotiating on behalf of employers, including governments, and employees. *In this book we primarily focus on conflicts at organizational level*. That is conflict between one employer and a group of employees. These conflicts can be at different levels within the organization, including site or departmental level.

1.2.3 Representing Employees: Unions and Works Councils

When we focus on representatives, in most countries world wide, and certainly within Europe, there are two basic institutional actors on the side of employees: inside the organization we find works councils and health and safety committees, and outside the organization we find unions representing the interests of workers. These bodies are usually involved in different types of conflict.

Unions, strikes and mediation Within the EU, usually unions have the only right to call for a strike. Before going into social action there has to be in many countries an attempt to solve the conflict through conciliation or mediation. Such is for example the case in Spain, Portugal, and Belgium.

Works councils, deadlock in decision making and mediation Works councils are the formal bodies of dialogue between management and elected employee representatives. Organizations in most EC member states have to inform, consult and even need the approval of the works council when it comes to decisions impacting the employees, such as restructuring. For example a Dutch health care organization facing financial losses proposed to restructure. The works council did not approve, which make progress impossible. Organized and free third party assistance to unfreeze these conflicts are offered for example in the Netherlands and Denmark.

[6] https://nltimes.nl/2018/02/14/strike-northern-netherlands-primary-school-teachers-picket-line.

1.3 Mediation and Other Third Party Interventions

The title of this book refers to 'mediation'. Mediation is defined here as '*any third party assistance to help parties preventing escalation of conflicts, helping to end their conflict, and find negotiated solutions to their conflict*.' The third parties in this definition can have different roles and positions, related to the society, culture, as well as level of escalation and specific parties involved. There is a wide array of terminologies used, which contribute to some confusion. In several countries we observe that what is officially called 'mediation', has mostly characteristics of arbitration, and often is a very formal process where representatives of the conflicting parties are negotiating for solutions, and the third party often acts in an evaluative way. This approach differs largely from the ILO promoted form of conciliation. Foley and Cronin (2015), updating the ILO instructions, refer to conciliation and consider this also as mediation, and promote clearly a non-evaluative approach, mentioning the conciliator should not offer opinions (2015; p 59).

Mediating between CEO and works councils

In the fall of 2017, in Germany the conflict between the union IG Metall and ThyssenKrupp over the planned steel merger with Tata Steel is escalating. Oliver Burkhard is asked as mediator and arbitrator.[7]

Trade unionist Oliver Burkhard has demonstrated his negotiating skills during the recent events, and for this reason, the HR director is just the man for the job.

With the assistance of deputy Supervisory Board member and IG Metall secretary Markus Grolms, it is planned that Oliver Burkhard will head a task force, ThyssenKrupp reported on Saturday during a meeting. This task force will then decide for or against the merger. Heinrich Hiesinger's plan is for the two steel companies to join forces, becoming the second-largest steel group in Europe. Thousands of steelworkers demonstrated last Friday against the merger of the two steel businesses. Whether the two steel groups will merge to form a giant still remains to be seen. "I feel cheated, betrayed, but still defiant," said Director of the Works Council for the Steel Division, Günter Back.

The Supervisory Board now has the task of discussing this in depth and providing advice. Alongside Burkhard and Grolms, the task force represents the Management Boards of the two corporations, as well as the employee representatives from the various steel locations.

[7] https://steel.shop/en/blog/steel-merger-causes-conflict-between-ig-metall-and-thyssenkrupp/.

Mediation between employees and the corporation

As mediator, Oliver Burkhard is right in the middle. Now he has to mediate between ThyssenKrupp CEO Hiesinger and the employee representatives. However, he is under particular pressure to prove his skills this time. The mood of the 27,000 steel employees is understandably at rock bottom over the merger plans. If the steel merger goes ahead, this would mean up to 4000 jobs being cut, and thus also 4000 people seeing the ground crumble beneath their feet. Works councils and IG Metall are concerned that the 200-year-old traditional company could now be totally devastated. In early 2018, the Supervisory Board will again discuss further plans, but the whole transaction is expected to take until the end of 2018. If the employee representatives continue to vote "No" to the planned steel division, the Supervisory Board Chairman Ulrich Lehner will have to force the project through using a double voting right—absolutely taboo under normal circumstances!

"The Management Board has ignored all the warnings and bet everything on a single card. This does not mean we are going to endorse their decision," criticises Günter Back, Director of the Works Council for ThyssenKrupp's Steel Division.

According to Back, the Works Council is now obliged to help shape this decision. Back tells us that this should now take place in such a way that "the worst" is prevented. At the same time, he sees by no means just 2000 jobs eliminated in Germany, but far more—a catastrophe for many of those involved.

1.4 Regulations, Roles and Relations: 3-R Model of Mediation in Collective Conflicts

Inspired by Budd and Colvin's (2008) 'geometry of disputes resolution procedures', Bollen, Euwema, and Munduate (2016) developed the 3-R model of workplace mediation. This model has been adapted to fit the analysis of mediation in collective conflicts. The 3-R model refers to three different dimensions that are important to consider when deciding for mediating and what form mediation takes: Regulations, Roles and Relations (Fig. 1.2). The three dimensions together create a three-dimensional pyramid that is built upon different layers, going from the broader context at the bottom, to specific third party tactics at the top.

At the bottom of the pyramid, we find more general characteristics of the context that determine the availability and use of mediation for a specific collective workplace conflict: (a) the wider context of conflict management and conflict in sector and society, (b) the organizational conflict culture and (c) the availability of different

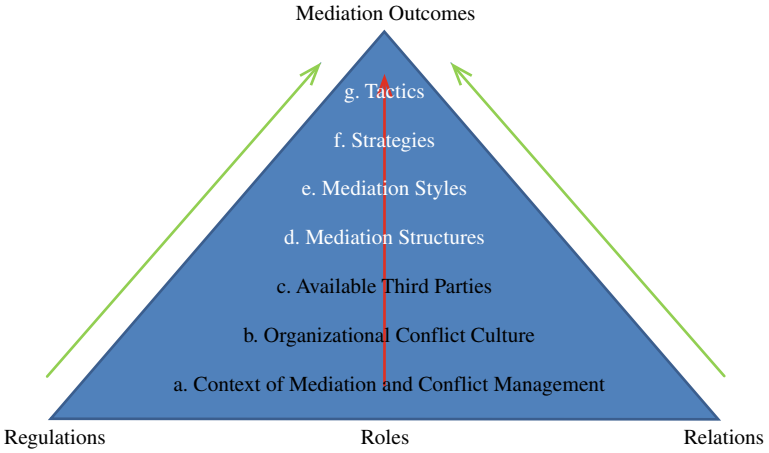

Fig. 1.2 The 3-R model of mediation

third parties. An important feature for example is the right to strike for employees, the position of unions, the role of works councils at organizational and local plant level, and the differences in legislation and practices between public and private sector.

The top of the pyramid represents first (d) the structuring of mediation, (e) mediation styles, (f) strategies and (g) tactics used, that result in a specific mediation outcome.

Structuring of mediation focuses on who acts as mediators; is there a regulated team of mediators, and are these different depending on the level of escalation of conflict? Do mediators always act in pairs, teams, or alone? Mediation styles refer to the different approaches in mediation—sometimes even 'schools' or ideologies—-varying from evaluative and directive styles (Della Noce, 2009), to transformative and facilitative mediation (Folger & Bush, 1996). Traditionally, in industrial relations mediation showed similarities with arbitration or shifted towards this. Styles where mediators (almost) act as arbitrators, contrast with a non-directive and transformative mediation style (Bush, 2002).

The mediator strategy refers to a broad plan of action that may help to decide which actions are needed to achieve some objectives in particular conflict situations. As such, it refers to the mediator's (or mediation team's) general way of working in the mediation itself. An example could be the choice to rely solely on caucusing, work with a few representatives in the joint sessions, bringing in experts, etc. Evidently, the mediator strategy is highly influenced by the mediation style the mediator(s) adhere to. As Foley and Cronin (2015, p. 58) describe: "*Ultimately, the personal style of the conciliator, and their relationship with the parties will influence the types of meetings that take place; but always the decision as regards meeting types should be based on what is most appropriate in seeking to assist the parties to move towards agreement or resolution.*"

In the Netherlands, the Social Economic Council provides free mediation service for collective conflicts. The structure here is, that three different mediation committees are present for different sectors. The mediation style is officially in all cases facilitative. This is an important shift with the 20th century, when mediation was more evaluative, and took form of hearing parties and giving a non-binding advice. Nowadays, joint sessions are the standard where the mediator aims to facilitate a constructive dialogue.

Mediation tactics, refer to the most detailed level and thus the actual mediator behavior: the specific communication techniques and instruments used by the mediator in the pursuit of certain objectives. The tactics used are the behavioral specifics of the mediator strategy chosen by the mediator.

1. Regulations

The dimension Regulations refers to different regulatory frameworks towards collective conflict at societal, sectoral and organizational level. On a societal and sectoral level, this includes labor laws, as well as negotiated agreements on conflict management between social partners. On an organizational level, this refers to specific human resources policies which define conflict management including regulations for mediation, and for example the conditions under which external or internal mediators can be used, also in collective conflicts (Constantino & Merchant, 1996; Pel, 2008). This also relates to legal rights of employers, unions, and works councils. For example to unilaterally ask for third party support.

2. Roles

The dimension Roles refers to the role expectations of the conflicting parties as well as to the roles of all persons potentially involved as third parties in the conflict. Conflicting parties have perceptions and expectations of their own and each other's roles in collective bargaining. In some cases, the intervention of third parties is not an element of the culture of how conflicts are managed: 'We should be able to manage this ourselves' is often the standard, and also part of the negotiation culture 'Professionals are able to solve their own conflict'. Top management particularly might perceive bringing in third parties as loss of face, as they have not been able to manage the employment relations. These cultural norms could affect the acceptance of mediation as a valid resource when conflicts appear.

The second element of this role dimension, explores all possible others who might intervene as third party in the conflict. We see that people occupying different types of functions are involved in management of collective conflicts as well as in mediation: arbitrators, legal counselors, union specialists, judges, as well as coaches and specialized trainers (for the improvement of social dialogue) regularly might be involved in different stages of escalated conflict. Not to mention different types of leaders, from political (party politicians) to societal (mayors, or respected neutral persons),

to religious leaders, regularly act as mediators. This might be particularly the case, when the collective labor conflict transforms into societal conflict.

3. Relations

The last dimension refers to Relations and describes the characteristics of the relations between the conflicting parties, and their relationship with the mediator. What are the formal and informal power structures that influence parties' interaction and as such the mediation? What are the specific needs of the parties in relation to the conflict and what are their expectations for assistance by a third party? All this determines if and what types of mediation are suitable, or that other types of interventions by third party, like conflict coaching, are more appropriate. In collective conflicts, parties are often represented by agents. This creates specific dynamics, also in terms of relationship qualities. Agents might be replaced, and have their own interests and agenda in negotiation and mediation.

It is important to analyze the structural qualities of the relation such as the formal power structure between parties and the legal rights they derive from this. To what extent are parties interdependent and how is the power balance? At the same time, it is important to take stock of the psycho-social qualities of the relationship given that most labor relations are more than just instrumental (García et al., 2016, 2017). How do parties perceive each other? To what extent do they wish to reconcile? What is their attitude: cooperative or competitive? To what extent do they perceive justice? Both structural and interpersonal characteristics will determine what type of mediator, strategy and tactics are used best to come to a mutually acceptable and satisfying solution.

The 3-R model of mediation helps to analyze mediation in its context. First, it helps to understand the extent to which mediation is used, for what conflicts and how the process of entering the mediation is organized and functioning. Secondly, the model offers a framework to understand the choice for certain mediation styles, strategies and tactics based on the interplay of regulations, roles and relations. Finally, the 3-R model offers a tool to understand and explain specific outcomes of mediation, given the characteristics of the Regulation's, Roles and Relations and their interplay.

1.5 Conclusion

Collective labor conflicts are an inevitable part of labor relations. Such conflicts can take place at different levels; from the shop floor, within organizations, up to sectoral, and national levels. Internationally operating organizations might well face cross border conflict. Worldwide there is a decline of escalated conflicts, in terms of industrial actions such as strikes. Also worldwide, ADR is promoted, particularly forms of conciliation and mediation. Many countries, as well as the EC, promote constructive management of collective labor conflicts through legislation, social dialogue and mediation. Currently, academic empirical research is mostly lacking on

the different arrangements for third parties, the perception and expectations of parties involved, and the effectiveness (Wall & Dunne, 2012).

References

Bollen, K., Euwema, M., & Munduate, L. (2016). *Advancing workplace mediation through integration of theory and practice*. The Netherland: Springer International Publishing.

Brown, W. (2014). Third party processes in employment disputes. In W. K. Roche, P. Teague, & A. J. S. Colvin (Eds.), *The Oxford Handbook of Conflict Management in Organizations* (pp. 135–149). Oxford: Oxford University Press.

Budd, J. W., & Colvin, A. J. (2008). Improved metrics for workplace dispute resolution procedures: Efficiency, equity, and voice. *Industrial Relations: A Journal of Economy and Society, 47*(3), 460–479.

Bush, R. A. B. (2002). Substituting mediation for arbitration: The growing market for evaluative mediation, and what it means for the ADR field. *Pepperdine Dispute Resolution Law Journal, 3,* 111–117.

Costantino, C. A., & Merchant, C. S. (1996). *Designing conflict management systems: A guide to creating productive and healthy organizations*. London: Jossey-Bass.

Cutcher-Gershenfeld, J., Kochan, T., & Calhoun Wells, J. (2001). In whose interest? A first look at national survey data on interest-based bargaining in labor relations. *Industrial Relations: A Journal of Economy and Society, 40*(1), 1–21.

De Dreu, C. K., & Gelfand, M. J. (Eds.). (2008). *The psychology of conflict and conflict management in organizations.* New York: Lawrence Erlbaum Associates.

Della Noce, D. J. (2009). Evaluative mediation: In search of practice competencies. *Conflict Resolution Quarterly, 27*(2), 193–214.

Dix, G., & Barber, S. B. (2015). The changing face of work: insights from ACAS. *Employee Relations, 37,* 670–682.

Dix, G., & Oxenbridge, S. (2004). Coming to the table with ACAS: From conflict to co-operation. *Employee Relations, 26*(5), 510–530.

Elgoibar, P., Euwema, M., & Munduate, L. (2016). *Building trust and constructive conflict management in organizations*. The Netherlands: Springer International.

Elgoibar, P., Euwema, M., & Munduate, L. (2017). *Conflict management. Oxford research encyclopedia of psychology* (pp. 1–28). Oxford: Oxford University Press.

Euwema, M., Munduate, L., Elgoibar, P., Garcia, A., & Pender, E. (2015). *Promoting social dialogue in European organizations. Human Resources management and constructive conflict behaviour*. The Netherlands: Springer.

Foley, K., & Cronin, M. (2015). *Professional conciliation in collective labour disputes.* Retrieved from: http://ilo.ch/wcmsp5/groups/public/europe/rogeneva/sro-budapest/documents/publication/wcms_486213.pdf.

Folger, J. P., & Bush, R. A. B. (1996). Transformative mediation and third-party intervention: Ten hallmarks of a transformative approach to practice. *Conflict Resolution Quarterly, 13,* 263–278.

García, A., Munduate, L., Elgoibar, P., Wendt, H., & Euwema, M. (2017). Competent or competitive? How employee representatives gain influence in organizational decision-making. *Negotiation and Conflict Management Research Journal, 10,* 107–125.

García, A. B., Pender, E., & Elgoibar, P. (2016). The state of art: Trust and conflict management in organizational industrial relations. In *Building trust and constructive conflict management in organizations* (pp. 29–51). Cham: Springer.

Macneil, J., & Bray, M. (2013). Third party facilitators in interest-based negotiation: An Australian case study. *Journal of Industrial Relations, 55,* 699–722.

Martinez-Lucio, M. M. (Ed.). (2013). *International human resource management: An employment relations perspective*. London: Sage.
Martinez-Pecino, R., Munduate, L., Medina, F. J., & Euwema, M. (2008). Effectiveness of mediation strategies in collective bargaining. *Industrial Relations: A Journal of Economy and Society, 47,* 480–495.
Medina, F. J., Vilches, V., & Otero, M. (2014). How negotiators are transformed into mediators. Labor conflict mediation in Andalusia. *Revista de Psicología del Trabajo y de las Organizaciones, 30*(3), 95.
Medina, F. J. (2016). Conflicts that increase their intensity. In F. Palací (Ed.), *Work Psychology [Psicología del Trabajo]*. Madrid: Sanz y Torres.
Munduate, L., Euwema, M., & Elgoibar, P. (2012). *Ten steps for empowering employee representatives in the new European industrial relations*. Madrid: McGraw Hill.
Pel, M. (2008). *Referral to mediation: a practical guide for an effective mediation proposal*. Amsterdam: Sdu Uitgevers.
Rahim, M. A. (2017). *Managing conflict in organizations*. Oxford: Routledge.
Roche, W. K., Teague, P., & Colvin, A. J. (Eds.). (2014). *The Oxford handbook of conflict management in organizations.* Oxford University Press.
Valdés Dal-Ré, F. (2003). Synthesis report on labour conciliation, mediation and arbitration in the European Union countries. In *Labour conciliation, mediation and arbitration in European Union countries*. Madrid: Ministerio de Trabajo y Asuntos Sociales.
Wall, J., & Dunne, T. (2012). Mediation research: A current review. *Negotiation Journal, 28,* 217–244.
Warneck, W. (2007). *Strike rules in the EU27 and beyond: A comparative overview*. Brussels: European Trade Union Institute.
Weltz, C. (2008). *The European social dialogue under Articles 138 and 139 of the EC treaty*. Amsterdam: Kluwer Law International.

Chapter 2
Third Party Interventions at Different Phases of Collective Labor Conflict

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In 2018 the UK faced an escalating conflict, resulting in a rather unique strike in many universities over pensions. 27 February 2018, the *Telegraph* headed:

"Lecturers and university leaders enlist conciliation service ACAS but strikes are set to continue".[1]

Lecturers and university leaders have agreed to enlist the conciliation service ACAS to mediate in their bitter dispute over pensions. The full 14 days of strikes are still going ahead, University and College Union (UCU) said, with students facing further disruption and cancelled lectures in the coming weeks.

Strikes will continue on Wednesday, as well as four days from next Monday, and ending with a five-day walkout from Monday March 12 to Friday March 16. The UCU said it was pleased that Universities UK (UUK), the vice-Chancellor membership body, had agreed to another meeting to try to end strike action currently affecting 61 universities.

A spokesman for Universities UK said: "Further talks are being arranged. In the interest of students, we have asked UCU to stop the industrial action while talks continue to find an alternative, viable and affordable solution. Both parties agreed to involve ACAS in facilitating further talks to bridge the significant distance between both sides."

Almost two months later, the *Guardian* headed[2]:

"***UK university strike action to end after staff vote to accept offer***"

[1] https://www.telegraph.co.uk/education/2018/02/27/lecturers-university-leaders-enlist-conciliation-service-ACAS/.

[2] https://www.theguardian.com/education/2018/apr/13/uk-university-strike-action-to-end-after-staff-vote-to-accept-offer.

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The ballot of 50,000 University and College Union members in higher education found a substantial majority in favour of accepting the offer, which establishes a joint committee of experts to evaluate pensions provided through the University Superannuation Scheme (USS).

The conflict in the UK on pensions is a classic example of a collective sectorial conflict, with many institutes for higher education involved. In the UK (see Chap. 14 for details), employees have the right to strike, without previous attempts to find agreement through conciliation or mediation. We see here, that even while the actions continue, also ACAS as third party is invited by parties to mediate in the dispute. ACAS offers different third party services, including facilitation, conciliation and mediation related to the development and escalation of the conflict, and the requests of the parties. Typically, when collective conflicts arise and escalate, different third parties and different interventions are available. In this chapter we first present a model of development of these conflicts, and secondly, related interventions.

2.1 Escalation of Collective Labor Conflicts

Escalation of conflict is the process of intensification of a conflict. According to several authors (Rubin, Pruitt & Kim, 1994), escalation is characterized through different changes: (a) parties use harder tactics (change from promises to threats); (b) the number of issues increases; (c) small issues grow into big and more fundamental ones; (d) number of involved persons and parties increases; (e) the goal of parties shift from realizing own interests to hurting the other.

A main cause of escalation is the denial by one party of the claims of the other. Deutsch (1958) mentioned three main phases of conflict escalation. Firstly, parties' focus on the realization of their own goals, and maximize these. When it becomes clear this is difficult to achieve, competition becomes dominant. The aim now is to win from the other. When this power battle develops further, again a fundamental shift appears. The aim is to blame and shame and hurt the other party. These three phases, (win-win; win-loose; loose-loose), have been further developed by Glasl (1982), into his nine stage model of escalation. There is little empirical evidence conflicts go through all these nine phases, however the essential idea is, that third party interventions should be tailored based on the level of escalation. With facilitation being most useful in relative early stages of escalation, mediation in higher escalated levels, followed by arbitration and legislation, or forms of unilateral power, trying to end the conflict. The intervention of a neutral third party with status or other forms of power (for example a politician, a public figure), is employed in some cases as a way to reduce the social and organizational conflict. An example is the mediation between a mining company and the inhabitants of Cajamarca (Perú), leaded by Miguel Cabrejos, a prestigious priest in Perú. Pruitt and Kim differentiate five ways to end escalation.

(1) One party wins over the other. One of the parties gives in, or simply loses. Such outcomes can be seen after a long battle in labor conflicts, where one the parties gives in. (2) One party gains, manipulates the situation to their own advantage. (3) Parties stop fighting, and move forward. (4) A third party in an authoritative role rules and forces parties to comply to the decision; (5) Parties negotiate towards an agreement, usually supported by a third party. This might include the formation of a joint taskforce, as in the case of the university staff strike in the UK.

Zartman (2000) added three concepts to escalation theory which are highly relevant for the understanding of the development of collective labor conflicts. His core idea is the 'ripeness' of a conflict, needed to come to a solution. This is essentially composed of two criteria: a hurting stalemate situation, and hope. Industrial relations in organizations often develop over time into antagonistic relations. We have seen the example of Air France, where labor relations in France have been intensely conflictive for many years. A change towards social peace requires such conflict to 'ripen', before a more systemic solution can be achieved. For such, according to Zartman, two conditions are needed. First, parties have to experience a 'hurting stalemate', the conflict is costly to the parties, both financially as well as in general terms of threat of survival of the company or relationship. Reputational costs are high, media exposure contributes to that, and social and psychological costs build up. When costs increase, and former strategies don't work, parties are motivated to work on solutions if the second condition also is there: hope. Hope that for example working with a third party, changing the strategies used so far, might bring indeed an improvement of conditions.

As long as parties believe they can win over the other, there is not much incentive to search for a negotiated solution. Such beliefs, also embedded often in beliefs of (moral) superiority, and justice ('the other acts totally unfair and illegal'), contribute to escalation.

Stalemate and hope motivate parties to search for an acceptable solution, helped by a third party.

2.2 Collective Conflicts: Development Through Five Phases

Escalation theories naturally focus on the process of growth of the conflict. And typically start where there is already a conflict present. Also most collective labor conflict models start with the dispute, sometimes even with the threat of a strike, which already involves a high level of escalation.

Therefore, we might best compare the development of conflict, with the development of storms.

Industrial relations have a strong conflict potential, given different interests of employers and employees, in combination with their interdependence. Interdependence means that employers and employees need each other to realize their own goals and they need to continue working together when their conflict disappears. However they also have different and even conflicting interests. These latent phases

Fig. 2.1 Five phases of conflict development

are the perfect condition to build up the industrial relations, so they can endure the winds of change that inevitable come.

Figure 2.1 presents five phases of conflict development.

The cycle represents different possible phases of conflict escalation and de-escalation. Evidently, not each conflict has to go through all phases. Winds of change might be mild. And when handled properly might result in renewed productive working relations and continued social dialogue. However, winds can also develop to storms or hurricanes, with potential to destroy. This destructive side of conflicts is seen too often, although Brown (2014) convincingly argues that the occurrence of escalated labor conflicts such as strikes has become less frequent. This might be due to early warning signals and early interventions (Brown, 2014), which will be discussed in more detail in the next paragraph.

Five phases of collective labor conflict development

Win—Win

1. **Latent conflict**: No visible conflict, however conflicts of interest are latent, problems about misinterpretation or other's behaviors or small discrepancies could appear in this phase.
2. **Early stage**: rise of tensions between parties, debate replaces dialogue, issues at the table, open discrepancies, pressures inside the parties for an open conflict.

Win−Loose

3. **Confrontation**: negotiations are blocked, confronting tactics, forming of alliances, threats, competitive approaches by both parties.

Loose−Loose

4. **Hot conflict**: parties aim to hurt the other, through strikes, unilateral actions, lay-offs etc. Communication bridges are blocked. Parties increase competitive and aggressive actions.

Ending and Restoration

5. **Rebuilding working relations**: ending of conflict episode, searching new ground to work together, if the organization continues to exist. Dealing with damage done, restore relations, replace key actors (fire, prosecute, or change for political reasons)

A conflict might end in different ways. The UK university case shows a classic technique, that is forming a joint task group, which will investigate and work on integrative solutions acceptable for the main parties involved. Alternatively, arbitration or ruling of the court might end this conflict episode. However after the storm, usually parties continue to work together. This does not necessarily have to be the same actors, however employer(s) and employees are there. Unless the conflict ends through dramatic change, the bankruptcy of the company, moving to another country, downfall of union, or massive layoffs. Most conflicts don't result in such damage and then repair works need to be done. This is typically left to the organizations, and usually parties move on, however with low trust and an increased risk for new escalations. If not properly addressed, the aftermath of one conflict episode will be fueling the next cycle, reinforcing a conflict culture. Therefore, investing in preventive interventions as well as measures for trust rebuilding are important steps to take, and not just left to the organizational dynamics.

2.3 Third Party Interventions in Each Phase

The five-phases model offers a stepping stone to reflect on possible third party interventions in each phase. Such possible interventions are presented in Fig. 2.2.

Fig. 2.2 Interventions during the phases of conflict development

1. *Training during the latent conflict phase*.

It is a wisdom of old, that you best build your house in summer, with nice weather conditions. Building constructive and strong industrial relations in organizations also are best done in relative peaceful times. Investing in a clear infrastructure for social dialogue, developing a team spirit, both within a works council, and between the works council, management and HR, as well as with the key players from unions, pays off in times of crisis. Training competences for social dialogue both at individual, team and organizational level are considered among the most important preventive measures (Munduate, Euwema, & Elgoibar, 2012). Foley and Cronin (2015) give several examples of preventive actions, including audits by trusted conciliators.

2. *Facilitation during early stages of conflict*.

When conflicts arise, conflicting parties often benefit from a facilitator, who helps them to focus on a constructive, and problem solving attitude, helps them to define common interests, and assists to search for valid information, and exploration of different scenarios and options. There is a clear trend towards more 'early stage intervention' and training in such 'interest based bargaining', showing very good results in collective labor conflicts (Cutcher-Gershenfeld, Kochan, & Calhoun Wells, 2001). Also, other forms of facilitated negotiation can be seen, for example, in Belgium, for many years, the CLA-negotiations are chaired by mediators who are civil servants, contracted at the ministry of labor (See Chap. 3, this volume).

Resistance to involve third parties

Inviting third parties to prepare for contending, complex and high-stake negotiations usually pays off. However, parties in conflict tend to be resistant to ask for third party assistance. This is observed at all levels in organizational conflicts, including collective labor conflicts, between top management and employee representatives. Reasons for not inviting third parties in early stages of conflict are usually related to the self-definition of primary parties, who believe*; 'we are professionals and it is our core job to manage these situations'*. Inviting a third party often makes the primary party feel less competent, insecure, and less in control (Schein, 1999). Schein advocates therefore a humble attitude by third parties, focused on asking the right questions, instead of giving opinions (Schein, 2013).

3a. *Conciliation when a formal conflict appears.*

When a party perceives a conflict or dispute, they can turn to a third party for assistance. This requires indeed the explicit recognition that there is a dispute. In many societies, such recognition is related to social action (moving from dialogue to action), however also many authors argue the conflict already is there before, and third parties should be involved when no progress is made by parties. In many countries, a first step than is to invite a conciliator, who searches informally with the parties for common ground and solutions. Such conciliation is well described by Foley and Cronin (2015), and Dix and Oxenbridge (2004). Where Foley and Cronin (2015) argue that conciliation and mediation can be seen as essentially the same process, in many countries conciliation is defined and organized as a relative informal process, where conflicting parties participate voluntarily, and search with support of a third party for solutions. Mediation is often described as a next step, more formal, using caucus and in some circumstances giving recommendations to the parties.

3b. *Mediation when the conflict intensifies.*

When the conflict further escalates, and parties threaten each other with unilateral actions, or are using those to increase pressures on the other party to make concessions, the dialogue often is disrupted. Parties refuse to meet at the table, before the other makes a move. In such cases, voluntary conciliation doesn't always work, as parties are not willing to invite a third party. Often, higher authorities then appoint a mediator. Alternatively, legislation provides in such mediation procedures. The voluntary nature is less present, and the third party is also accepted due to the expertise in the area or the trust in the mediation system. Parties might be willing to listen to the considerations of a 'wise person'. Putting pressures on parties to move is not

uncommon, including giving opinions. As such the mediation can take a more evaluative form. And although some describe 'evaluative mediation' as an oxymoron, there is a growing trend to this form of third party intervention (Della Noce, 2009).

4a. *Arbitration when conflict costs run high.*

With tensions rising and more escalated conflicts, the third party interventions also become more authoritative. Traditionally, third party mediation often was characterized by a strong evaluative character. Parties presented their case, and a committee would ask questions for clarification, deliberate, and then came with a recommendation. This form is still present in several countries, and is close to arbitration. Bush (2002) sees hybrid forms, also Jordaan and de Wulf (2016) describe the South Africa practice of med-arb in labor conflicts. The combination of mediation and arbitration offers parties the ability to come to an agreement, however if not successful the mediator can act as arbitrator. This practice also is not uncommon in China in collective labor disputes. Arbitration involves parties accepting the decision of a third party. Such might be helpful to end a conflict when parties no longer are able to find common ground and a negotiated agreement. Typically, this might end the conflict episode, however underlying causes will not be dealt with.

4b. *Court rulings when the conflict needs an ending.*

Most countries have established specialized labor courts. Ruling by the court might indeed end the conflict episode. This can help parties to de-escalate. The ruling however might very well imply also referral to some form of mediation (Pel, 2008). Alternatively, court ruling might fuel new episodes, or take the conflict to other levels, both judicial and societal. For example taking the case to higher courts, or getting sectoral or national actors involved.

5. *Facilitating rebuilding relations*

Who cleans up, picks up the pieces and rebuilds after the storm? Conflicts leave traces. Distrust often is strong, resentment and feelings of revenge might prevail (Elgoibar, Munduate, & Euwema 2016). Key players who have been demonized are hurt, and the negative imagines prevail, fostering the negative stereotypes and intergroup tensions. A conflict-episode might be ended, the aftermath can easily refuel the conflict as we see for example in the Air France case in France. Even after the replacement of several key players, the conflict continues like a smoldering wildfire. Is third party assistance needed to rebuilt trust, to repair and restructure social dialogue, and to start preventive measures to learn from the past? This seems evident, however very little literature gives insights in the actual practices which take place (Lewicki, Elgoibar, & Euwema, 2016). And more so, who should provide such assistance, and after what stage of escalation would this be helpful, and needed? Such questions are part of the exploration in the EC study and this book.

2.4 Conclusion

Collective labor conflicts typically develop through phases. Given the nature of industrial relations, there is always a latent conflict between the interests of employers and employees, also in times of social peace. These latent conflicts might develop into episodes of overt conflict, and escalate to destructive levels. Different third party interventions are available during different phases of conflicts. In most countries some form of third party intervention is available. This is usually limited to specific escalation phases (particularly around threat of strike, or other collective actions) much less seems arranged for preventive third party support, or restorative actions to rebuilt relations after a conflict episode.

References

Brown, W. (2014). Third party processes in employment disputes. In W. K. Roche, P. Teague, & A. J. S. Colvin (Eds.), *The Oxford Handbook of Conflict Management in Organizations* (pp. 135–149). Oxford: Oxford University Press.

Bush, R. A. B. (2002). Substituting mediation for arbitration: The growing market for evaluative mediation, and what it means for the ADR field. *Pepperdine Dispute Resolution Law Journal, 3,* 111–117.

Cutcher-Gershenfeld, J., Kochan, T., & Calhoun Wells, J. (2001). In whose interest? A first look at national survey data on interest-based bargaining in labor relations. *Industrial Relations: A Journal of Economy and Society, 40,* 1–21.

Della Noce, D. J. (2009). Evaluative mediation: In search of practice competencies. *Conflict Resolution Quarterly, 27,* 193–214.

Deutsch, M. (1958). Trust and suspicion. *Journal of Conflict Resolution, 2*(4), 265–279.

Dix, G., & Oxenbridge, S. (2004). Coming to the table with ACAS: From conflict to co-operation. *Employee Relations, 26,* 510–530.

Elgoibar, P., Munduate, L., & Euwema, M. (2016). *Building trust and constructive conflict management in organizations* (pp. 1–13). Cham: Springer.

Foley, K., & Cronin, M. (2015). *Professional conciliation in collective labour disputes*. Retrieved from: http://ilo.ch/wcmsp5/groups/public/—europe/—ro-geneva/—sro-budapest/documents/publication/wcms_486213.pdf.

Glasl, F. (1982). The process of conflict escalation and roles of third parties. In G. B. J. Bomers & R. Peterson (Eds.), *Conflict management and industrial relations* (pp. 119–140). Boston, MA: Kluwer-Nijhoff.

Jordaan, B., & De Wulf, G. (2016). Towards an integrated workplace mediation system: Reflections on the South African experience. In *Advancing workplace mediation through integration of theory and practice* (pp. 127–144). Cham: Springer.

Lewicki, R., Elgoibar, P., & Euwema, M. (2016). The tree of trust: Building and repairing trust in organizations. In *Building trust and constructive conflict management in organizations* (pp. 93–117). Cham: Springer.

Munduate, L., Euwema, M., & Elgoibar, P. (2012). *Ten steps for empowering employee representatives in the new European industrial relations*. Madrid: McGraw Hill.

Pel, M. (2008). *Referral to mediation: A practical guide for an effective mediation proposal*. Amsterdam: Sdu Uitgevers.

Rubin, J. Z., Pruitt, D. G., & Kim, S. H. (1994). *Social conflict. Escalation, stalemate and settlement* (2nd edn.). New York: McGraw-Hill.

Schein, E. H. (1999). *Process consultation revisited: Building the helping relationship*. Reading, MA: Addison-Wesley.
Schein, E. H. (2013). *Humble inquiry: The gentle art of asking instead of telling.* Berrett-Koehler Publishers.
Zartman, I. W. (Ed.). (2000). *Traditional cures for modern conflicts: African conflict "medicine"*. Lynne Rienner Publishers.

Part II
Regulations and Practices of Mediation and Conciliation within the European Union

Chapter 3
Mediation and Conciliation in Collective Labor Conflicts in Belgium

Tijs Besieux, Elisabet Lenaerts, Olivier Van Loo and Valerie Veldeman

The Case

A large foreign owned company has multiple production facilities in Belgium, one of its prime production locations. In the years leading up to the conflict, the company suffers from a drop in demand for production in Europe because of the financial crisis and its own activities in other regions of the world. Restructuring is announced and production is dialed back in Belgium which results in over 200 people becoming temporarily unemployed. There are small-scale employee actions and protests regarding the current situation leading to discussions at the organizational level.

A couple of years later, further cost cutting is announced and one of the facilities stops production for an entire month resulting in economical unemployment of over 400 employees. The company reports a heavy loss and has to fire dozens of employees while announcing further restructuring. Coinciding with the ongoing restructuring, the CEO announces his departure from the company.

During the reorganizations, biennial negotiations commence regarding the Collective Labor Agreement. Unions wanted to connect a strong social plan to regular negotiations, however, these negotiations failed rather quickly as two of the three major unions refuse to sign the proposed Collective Labor Agreement.

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Following the failed negotiations, these unions block the gates of the company and start a general strike. The company accuses the unions of playing power games, using failed negotiations as an excuse while the unions stated that the employer pushes decisions without any decision power or respect for employees.

The company sends a judicial officer to the site to force access to the site and identify several of the people responsible for the strike while threatening with judicial consequences. The company one-sidedly cancels some of the previous collective labor agreements, resulting in general anger among the unions. The company sues several employees but the court does not agree with them. Simultaneously, the company announces further firings unrelated to the current conflict.

After a six-week strike, a first conciliation meeting fails and does not produce any form of agreement.

External pressure is increased as the board implies that closing the facility altogether is an option should problems persist. Employees reach out to government officials in hopes of intervening.

Local management and the employers' federation initiate a second conciliation attempt.

After almost two months of striking, both parties reach an agreement ratified by two thirds of unionized employees in a vote.

The parties agreed to a new Collective Labor Agreement as well as formal arrangements regarding further collaboration. The mediator also advised the company not to pursue further sanctions.

Despite of the agreements and advice, a climate of unrest remains while the parent company announces further restructuring and global cost cutting. A smaller strike occurred the next year after management gave a single employee a written warning. Employees perceived the warning as revenge from management and indicates the conflict's influence more than a year later.

3.1 Introduction

The Belgian Federal Public Service Employment, Labor and Social Dialogue offers conciliation and mediation services to the private and the public sector in collective labor disputes (FOD WASO, 2017). This government agency acts as a third party to mediate collective conflicts at the level of the organization in the private sector, primarily through the Conciliation Board (further referred to as CB), created within a Joint Committee. A Joint Committee is the bi-partite collective bargaining body at sector level, composed by a representation of the social partners and chaired by a Federal Labor Mediator (European Foundation for the Improvement of Living and

Working Conditions, 2006). Collective dispute mediation in the private sector has a long-standing tradition in Belgium. In 1968, a legal framework anchored the system of collective dispute mediation, mandating federal mediators to resolve disputes between employers and employees in the CB (Wet van 5 December 1968).

In the public sector however, mediation is not yet widespread because the government implemented it only rather recently (since 2013). In the public sector, the mediator solely manages the process between the conflicting parties, without the advantage of a Conciliation Board.

In the current research, the terms 'mediation' and 'conciliation' were often found in documents and during interviews as referring to the same underlying meaning. Even the name of the governmental agency in Dutch refers to mediation ('bemiddeling'), whilst in French it refers to conciliation ('conciliation') (FOD WASO, 2017). In the Belgian context, one could distinguish conciliation from mediation based on the stage of the process. That is, conciliation is more referred to in the context of the conciliation board, while mediation is more referred to as a potential next step when the conciliation board does not come to an agreement. However, the techniques and skills underlying conciliation and mediation are referred to by the interviewees in this study as the same.

According to the 'Institut der deutschen Wirtschaft' estimates, in 2016 a total of 79 labor days per 1.000 employees were 'lost' due to strikes. Belgium ranks fourth compared to 21 other OECD countries. Only France (123), Denmark (118) and Canada (87) score higher (Institut der deutscheun Wirtschaft, 2017). Approximately 3.5 million Belgians are member of one of the three major unions, 65% of them are currently employed. This represents a union density of 51.2%. Including smaller, independent unions, the total union density for Belgium is 55.1%.

Private Sector

Belgium's private sector has a tradition of social dialogue involving unions, employers and government (Devos, Mus, & Humblet, 2011). This dialogue expresses itself in several forms, and at different levels. It can be found in (but not limited to) the institution of joint committees, the conciliation board and government policymaking. Joint committees for instance, are institutions where an equal number of the sector's employer and employee organizations negotiate collective labor agreements and are responsible for their supervision (Devos, 2009). Joint committees also advise the National Labor Council and government. These instances of social dialogue occur at the sector, federal, regional as well as organizational level (Humblet & Cox, 2011). In the private sector, there are currently 13 mediators (8 women; 5 men).

The institutional system of social dialogue and negotiation between social partners knows a longstanding history dating back to 1945. This makes the system a fundament in the current corporate and political system. Belgium as a country has a rather strong history and presence of labor unions and unionization with major unions tied to affiliate political parties (Van Gyes, Segers, & Henderickx, 2009). The individuals involved have developed personal relationships and mutual understandings, resulting in a strong informal social network underlying the system's working. Organization

and facilitation of this social dialogue falls under the jurisdiction of the Belgian Federal Public Service Employment, Labor and Social Dialogue. This Government Service reports to the Belgian minister of labor and has its administrative chair in Brussels.

Public Sector

Third party intervention is a recent phenomenon in the public sector and, in contrast to the private sector, has not yet known any significant growth. Policy makers decided to implement a system of social dialogue and opportunities for mediation as an alternative to implementing a system of obligated provision of services during a strike. This makes the origin of mediation and third party intervention by government mediators a politically motivated solution, and thus not necessarily based on demands or needs of the involved parties. The agency hired three mediators specifically for the public sector in 2013, with one of them leaving some time afterwards. The goal of the mediators is to set up a system in analogy to the private sector. Because the mediator does not chair a joint committee in the public sector, utilization of social networks and contacts was relatively limited.

During the set-up of the system, the primary focus was building these social contacts/networks, resulting in a promotional tour of government agencies. Simultaneous to this effort, a conflict arose in one of Belgium's governmental departments. One of the mediators used this conflict as an opportunity to design and test strategies and methods. Strong regional differences appear between Flanders and Wallonia. There was a notably stronger willingness in Flanders than Wallonia to participate in this form of mediation/dialogue, because of earlier positive experiences with mediation in the Flemish region. Within the Flemish government, a well-regarded government official was already experimenting with mediation before official implementation, causing some familiarity with, and a positive attitude towards, the concept.

3.2 Characteristics of the System

Private Sector

The Belgian Federal Public Service Employment, Labor and Social Dialogue almost exclusively organizes collective dispute mediation and conciliation during conflicts. This is a result of the long history of social dialogue in Belgium, further anchored through the law of 1968. Although third parties outside of the government might operate during these conflicts, none of the interviewees mentioned this (Fig. 3.1).

When a conflict arises in an organization between—for instance—local management and the trade union delegation, further steps in the conflict differ. Whilst HR or management enter discussions directly, a local representative (secretary) of the involved union mostly assists employees.

If these negotiations fail, the employer or union representative have the option to contact their corresponding representative organization (employer's federation or

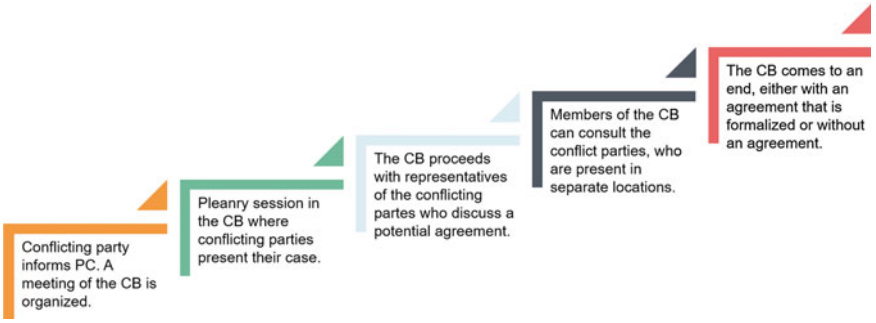

Fig. 3.1 Five-step process of the Conciliation Board (Belgium)

union relevant to sector) and request the formation of a 'Conciliation Board' (CB). In reality, unions primarily request CB's, as they are most often the complainant in these conflicts.

When the representative organization receives the request, they usually make an inquiry about the specifics and context of the conflict to assess whether it is suited for a CB. These organizations will ideally look at previous efforts towards conciliation, subject (collective vs. individual), as well as severity of the current conflict. It thus acts as a second filter, with the first being the management or union representative, in assessing the severity of a conflict and the involvement of 3rd parties.

If the representative organization judges the conflict to be severe enough or a candidate for conciliation, he/she contacts the chair of the sector's joint committee and requests the formation of a CB. The chair will act as both mediator and chair of this CB, assisted by a secretary of the government. Other members of the CB are representatives of unions and the employer organizations. If the conflict is very complex, the mediator can ask for assistance from a colleague from the Belgian Federal Public Service Employment, Labor and Social Dialogue.

After the formation of the committee, the appointed members will enter negotiations concerning the conflict and possible solutions. The conflicting parties will be present at the location but separated from the actual negotiation and each other. Their role is to inform the committee of their viewpoints and problems at the beginning of the session and to be consulted about their willingness to accept proposed solutions.

The conflict is, in a sense, transferred to the committee's members who negotiate on their behalf. The chair/mediator is responsible for the negotiations between the committee's members, and mediates between the present. The committee does not have any strict legal authority to enforce agreements, but does have the necessary moral authority because of the involvement of both government and representative organizations. The conflicting parties therefore generally follow reached agreements—although no exact data are kept. The committee can also give further recommendations concerning dialogue at the organizational level, although enacting and reporting these recommendations is the responsibility of the conflicting parties.

After concluding the BC, the parties generally implement a cooling-off period which dictates a certain timeframe during which no actions/strikes can be taken.

The Collective Labor Agreement stipulates specific guidelines about timing, formation and minimum requirements (number of required representatives for example) of the committee and can thus vary according to sector or level. The CB is however, a necessary procedure if employees wish to take action in the form of for example a strike. Should a CB fail in its attempt to resolve the conflict, the employees are justified in taking action and striking, but no sooner. Spontaneous actions or strikes because of organizational conflict do still occur. When this happens, a CB forms as soon as possible and will skip some of the aforementioned procedural steps.

Public Sector

Because the public sector lacks the history and institutions such as the joint committee, its procedures are not as clear as in the private sector. As mentioned earlier, no strong social network underlies its working and limits the visibility of current conflicts as well as actual conciliation requests. In this case, one of the conflicting parties' representative organizations still requests conciliation, but no formal committee is appointed. However, representatives can still be involved in the mediation and the involved number of people splits up and separates should the group be too large. In comparison to the private sector, the procedure does not stipulate strict regulations regarding the timing of strikes or conciliation as a necessary step.

Evaluation of stakeholders on the system

1. *Mediators/facilitators*

Private Sector

Mediators are satisfied with promotion of and general familiarity with the system in the private sector. They see general promotion of the system's use as a responsibility of the social partners (employer/employee organizations) as they play a crucial part in informing, and guiding their members. The mediators are also generally very positive about the intervention system, and particularly its financial and relational benefits compared to litigation or other judicial processes. According to the mediators, the familiarity with the system gives it a big advantage, as well as the built-up respect and trust in the process due to its long history. Familiarity with the intervention mechanism is also noted as one of the reasons why the different parties generally respect agreements.

An issue however is that there seems to be little structural follow-up of conflicts after the CB has intervened. Mediators however do report that feedback occurs more spontaneously, as they meet the involved parties at other occasions.

Another potential issue is that parties request a CB too late. Every party of the joint committee can request a CB; however, the employee organizations request most of them. The employer also has more decision power and therefore does not feel the same need to use the system, using it only in the most urgent cases.

The mediators themselves do not describe their different structural roles (chair of joint committee, CB and mediator) as a hindrance. Their position allows them to build trust with the social partners more easily through increased contact with relevant individuals. These contacts also allow them to stay up-to-date with the state of affairs in the sector.

Public Sector

At the time of the interviews (2017–2018), the public sector had not implemented the role of the mediator him/herself effectively. The very limited demand for interventions in the public sector, and lack of other responsibilities such as the joint committee, made the workload very unpredictable. Long periods of little work contrasted intense periods with a disproportionately high workload causing problems with planning and work-life balance. Although mediators are, in general, very positive about the mediation process, they indicated higher-level issues regarding the prevalence and demand of interventions. Interviewees described two main factors for these problems. A first explanation was the limited experience parties had with the system. Due to the system's origin in the public sector as a political solution, it did not develop from actual demands and needs of the parties involved in these conflicts. The lack of extensive social network as seen in the private sector hinders the mediator's functioning by limiting access to information regarding current affairs and conflicts. Interviewees said, however, that the success of several cases increased the interest and information requests from involved parties significantly. This might be a sign that through word-of-mouth advertising and experience, the system's usage and popularity can grow over time.

A second explanation for limited demand lies in the reluctance of employees to request interventions due to fear of reprisal. Interviewees note a power imbalance in favor of the involved government agency and fear of their reaction (budget cuts, staffing decrease, demotion, etc.) has fostered a culture where parties keep conflicts in-house. Varying accordingly with the significance of a conflict, the government's role can be problematic as they are both party and have absolute power when it comes to the final decision and its validation. This can lead to a loss of engagement and involvement from the other party in the negotiation. Interviewees described how mediators received many informal requests for information about the system/procedure, but this seldom led to an actual intervention request.

2. *Conciliation board members*

Most of the CB members perceive the conciliation system as very valuable. They see the procedure as an important tool in preventing further escalations as well alleviating some of the conflict intensity. The procedure can be used to sometimes force a discussion between parties where there was no willingness to negotiate beforehand.

In general, there is a strong emphasis on local dialogue and prevention of CBs where possible. The outcome of the CB is always uncertain to the conflicting parties and can legitimize further employee actions if no agreement is reached. CBs can be perceived as a failure of the own dialogue and is thus not always a clear option

for companies leading to many trying to keep the conflict in-house. Although not as expensive as litigation, CBs are still expensive, as they require a substantive number of people including management to spend an entire day at the CB.

Interviewees describe that they use the CB primarily to revitalize dialogue and negotiations at the organizational level by providing indications, recommendations and highlighting common ground between the parties.

A number of CB members indicate that conflicting parties request the CB too early, thus before depleting all opportunities for local dialogue. This is problematic, as the CB is a final step should local negotiations fail, otherwise there is a risk of undermining the CB's authority and relevance. Timing is also used as an important tool during the procedure. Sometimes, members postpone the CB date if they believe the conflict will solve itself at the local level. The cooling-off period after every CB is also very valuable when continuing local negotiations, as possible talking points have already been discussed during the CB.

Committee members relate the general decline in CB's to a current trend of further regulation. As an example, salary increases depended on indicative norms in the past while nowadays there are strict norms in place. Besides the declining number of CBs, respect for the procedure has fallen as well. To exemplify, no strike should occur before the CB has convened. Interviewees indicate that parties respect this agreement less and less. Employees and unions increasingly do not follow the steps outlined by previous agreements leading to frustrations of the employer and employers' federation. Similar to earlier findings, members raise questions regarding investment of resources as CB members perceived the mediators to be understaffed.

3. *Conflicting parties*

All interviewed parties were positive about the existence of the CB and saw its value although they also raised some concerns regarding recent developments. Because of an increased presence of multinational companies, there is an evolution in the mandate of the company representatives at the conciliation board. In the past, involved unions/employees were able to negotiate directly with the people in charge. Nowadays, the present party often has to contact a board of directors or management abroad to get the necessary mandate should new topics arise. This also incorporates the danger of importing different corporate cultures where involved parties do not see social dialogue as essential. Larger companies within a sector also have the added complication that agreements made with them, can be seen as precedents for further negotiations in the smaller companies.

Users of the system agree that the CB should be a last step when confronted with a conflict and that its primary purpose is to revitalize the organizational dialogue.

Additionally, interviewees describe the importance for employers to perceive the system that can help prevent employee actions, as this is not always the case.

A final remark can be made regarding the mandatory nature of the CB, which is generally seen as a positive element but can make CBs useless and seem like a necessary hurdle when for instance parties are set on action or already know that no agreement can be reached.

3.3 Characteristics of the Mediators or Facilitators and the Third Party Procedures

The mediators had an average age of 48 years and out of the 16 mediators employed by the Belgian Federal Public Service Employment, Labor and Social Dialogue, nine were female. The mediators had an average experience of 9 years in their role as a government-employed mediator. Previous experience as mediators varied strongly ranging from an extensive background in mediation to the minimum requirements of the role (stipulated further in the text).

Only two of these mediators are currently active in the public sector. Most mediators have a law degree with a minority coming from different educational backgrounds. In the past, the government provided additional training in negotiation and mediation but current budget restraints have led to the cancellation of these trainings. Thus, further education and training is, in effect, the responsibility of the individual mediator and relies on his/her own initiative. As a result, only half of the interviewed mediators reported to having followed at least one additional training in line with their current function.

The mediators do not actively save data related to their interventions; therefore, it is not easy to identify the precise number of interventions. The reluctance to save data stems from the confidential nature of these interventions, the opinion that the mediators' work is not easily quantifiable and the possible misrepresentation of these numbers (e.g. ending the intervention in a non-agreement does not mean the process failed). Interviewees indicated having vast experience, both with reconciliation and mediation.

Selection, recruitment and evaluation

Recently, the recruitment procedure was reformed. It used to rely exclusively on political appointments without a formal selection process. Social partners were informally consulted during this process.

As of 2009, selection and recruitment takes place through the government recruitment office. To be considered for the position, candidates need to meet the following requirements[1]:

Education and professional experience:

- A master's degree (or similar degree of at least 4 years) and at least 6 years' experience in social matters of which at least 4 years in collective bargaining;
- Or a bachelor's degree (or similar degree of at least 2 years) and at least 10 years' experience in social matters of which at least 6 years in collective bargaining.

The selection procedure consists of an assessment center to test for cognitive abilities, knowledge of collective labor law, and a case presentation for a panel of experts.

[1] Stipulated by a new Royal Decree signed 27/10/2009; promulgated 19/11/2009.

Once recruited, an experienced mediator mentors the new mediator during their first year. The new mediator makes progress reports of experience gained and educational programs completed at regular intervals.

Mediators will also need to deliver a paper at the end of the first year analyzing a topic of interest to the team. The mentor and the director-general provides a final evaluation of the paper and a global report of the first year. This procedure is a condition for becoming a statutory civil servant.

There is no institutionalized evaluation of mediators or the system as a whole, based on a case-by-case basis. Interviewees provide different reasons for the lack of a structural evaluation. A first reason is the reporting line regarding social conflicts. The mediators report to the designated Minister of labor, thus the director-general did not design an evaluation system because he/she did not have the authority to evaluate the work of the mediators. A second reason is the demanding job requirements. Mediators reported having a very busy schedule and thus did not prioritize on evaluation the system. A final reason is involved parties might use the evaluation of the system/mediator during conflicts when it suits them best.

Mediation approach

Based on the interviews, we did not identify a shared mediation style within the well-structured procedures that exist for the CB. Two main reasons account for this finding: (1) no joint training, and (2) lack of structural dialogue and reflection among mediators to assess their mediation style. Their previous work experiences before joining Belgian Federal Public Service Employment, Labor and Social Dialogue result in a pre-existing individual style.

The individual mediators emphasize different aspects or vary in approach but do operate within the same broader structure aligning all mediators along the same procedure and general approach. Because the CB is a de facto partner of the mediator in the conciliation process, the styles and approaches of these players also influence the ultimate approach largely. The majority of mediators did agree that the mediator's role was not to actively propose ideas but to facilitate the discussion, guard the process and empower the social partners in the CB.

All mediators highlighted conversational and interpersonal skills such as empathy, listening and paraphrasing, as crucial to succeed. Although the main goal is to facilitate the discussion, mediators sometimes provide suggestions to the involved parties.

Opinions differed when asked about the preventative aspect of the mediator role. While some mediators did not see this as part of the larger structure, others saw this as an important aspect and referred to their social network as the most important tool in doing so. Maintenance of their social network was also subject to different opinions. Some mediators emphasized informal and constant contact while others preferred a professional distance from their social partners. Many mediators could not compare their own styles with others' because of the limited information shared between them.

Evaluation by stakeholders of the facilitators/mediators and third party procedures

Parties perceive the mediator generally as neutral and competent and all parties had sufficient trust in both the mediator as well as other members of the CB. Members describe the mediator as an important link in the system and as someone who should have sufficient knowledge about the subject matter whilst understanding both sides of the conciliation board. His role as chair of the joint committee is a major benefit in this sense.

Although generally seen as crucial in reaching a qualitative agreement, some downplayed their role and referred to the procedure itself as crucial. This is in accordance with the mediators' own reflections on the CB. The personality of specific mediators does have a substantial influence during mediation but is primarily summarized into taking a more active or passive stance during negotiations.

Mediators describe the profession itself as exhausting and socially isolated, because of the limited amount of contact between colleagues and demanding work-related pressure. This pressure will only increase in the future due to attrition of mediators (retirement and other causes) and the current budgetary restraints preventing or limiting the number of new hires. These budgetary restraints affect the entire system's working, from hiring of mediators and translators to providing training and other support.

3.4 Description of the Facilitation and/or Mediation Process

Private Sector

As mentioned earlier, agreements made in the joint committee result in a well-rounded procedure of requesting a mediation. If a party considers a conflict appropriate or severe enough, the request for a CB is filed. Finding an appropriate date for the committee can be tedious because of the schedules of the committee's members. This can lead to a waiting time of several weeks before the committee itself can take place. Timing also depends on urgency of the current conflict and thus a CB forms faster should employee action be imminent.

The CB usually takes place in Brussels at the Belgian Federal Public Service Employment, Labor and Social Dialogue's offices to ensure neutrality. The CB generally only lasts for one day at the most, sometimes until late at night. The precise procedure may differ slightly with respect to the involved mediator, but can be summarized as follows:

1. One of the conflicting parties requests a CB through the joint committee.
2. The CB starts with a plenary sitting where the conflicting parties present their case and inform the committee-members. The committee members can ask questions for clarification, but cannot take any positions regarding the subject. Conflicting parties generally have around 10–15 min to present their case and the mediator's role is largely to facilitate the discussion and clarify the problems presented. CB

members will generally have already gathered information from their affiliated conflict partners before the CB commences. Given step two, the first step can be seen as 'pre-caucus'.
3. The conflicting parties separate from the committee and each other whilst the committee members initiate negotiations. As a group, they try to supersede the conflict itself—also, representatives from different unions have to overcome potentially differing interests—and try to find an objective solution for both parties.
4. During these negotiations, members of the CB can consult the conflicting party on its position towards proposed agreements. Alternatively, the mediator can also approach the conflicting parties himself and commute between the two parties. Interviewees describe this part of the process as a 'harmonica movement', where representatives move in and out of discussion by checking with their respective conflict party.
5. After finalizing the negotiations, the CB ends in a plenary session. At this time, the chair will present the reached agreement or statement of non-agreement. Who presents the agreement or proposition can be a result of political motivations. For instance, the parties might rely upon the moral authority of the mediator as a government official or can prevent a loss of face with the other parties. Conflicting parties must approve the reached agreement. On rare occasions, the mediator will go to the organization to mediate between the conflicting parties directly. This is, however, far from the norm and depends on the nature of the conflict.

Employee/employer organization's representatives mainly propose the solutions, but alternatively the mediator may propose a solution if he/she sees fit. Because the CB generally lasts only one day, negotiations can continue into the night. Failing to reach an agreement results in a non-agreement that can then lead to employee actions. The outcome itself can be one of four categories:

- Parties reach an agreement. Although not legally binding, the involved parties generally respect the agreements.
- Parties do not reach an agreement. Parties will leave the CB without resolving the conflict. Further action depends on the involved parties and the specific representatives.
- Parties do not reach an agreement but they do make significant towards conciliation. The CB advises the parties and provides recommendations on how to proceed. Sometimes this entails as a form of 'homework' where parties are stimulated to continue discussions at the organizational level base on committee recommendations. Or, parties can decide to organize a vote among the employees to build stakeholder buy-in.
- Parties, the mediator, of the minister of labor request further mediation at the organization. Prevalence of this type of mediation between the involved parties varies according to sector. This category only happens rarely, no official records are kept.

Public Sector

As noted in the previous paragraphs, there is no large presence of structured conciliation when compared to the private sector. There is a less strict regulation or standardization of procedures. The general mediation procedure in the public sector was written down in Committee A (Common committee for all government services), but practical realization of the intervention was left up to the individual mediator. The general procedure, based on our interviews, is as follows:

1. A government agency or union requests mediation. The mediator then assesses the willingness of the other involved party to enter mediation.
2. If there is no danger of immediate escalation, the mediator hears the involved parties individually. The mediator and the parties formulate rules relating to actions in the near future (such as planned strikes) and the subject of the planned intervention.
3. The mediator drafts a document that stipulates the subject of the intervention, agreed rules and requirements. Parties must approve this document before advancing.
4. Plenary meeting led by the mediator is organized with a limited number of participants. If the participant group is too large, some participants remain in a different room for further consultation during the negotiation.
5. Based on this discussion/negotiation, the mediator puts together a report concerning the conclusion or the reached agreement. The mediator has more liberties regarding content and timing of the document in the public sector. It is therefore possible to vary the duration and timing of the intervention and its steps according to specific conflict needs.

The mediator requested the attendance of government/political representatives during these meetings, otherwise negotiations would often falter due to lack of mandate.

Evaluation by stakeholders of the mediators and mediation process

1. *Mediators/facilitators*

The mediators describe that both the system and the mediator are neutral in the interventions and actions. Their role as civil servant means that they do not have an interest in siding with one of their parties in the conflict, while the location in Brussels ensures it takes place on neutral ground.

The mediators credit the success of the conciliation procedure to the working of the system/procedure itself and the other participants of the CB. These members are active at the sector level and their collaboration transcends the organizational conflict in both time and scope. These partners are therefore required to enter future negotiations such as joint committees resulting in attitudes and expectations that are solution-focused. Mediators see a non-agreement in the CB often as a starting point for further talks rather than the end-point, because of the interdependency of the parties involved.

The mediators therefore see their main purpose in facilitating the discussion and guarding the process while they perceive the social partners and structure of the system as the key factor for success. Mediators perceive the organization of interventions at the organizational level directly, instead of having a CB at the sector level, to potentially undermine the relevance of sector dialogue and therefore undermine its functioning (including joint committee).

2. *CB members*

The CB is best suited to handle conflicts regarding a more practical nature such as interpretation of previous agreements as opposed to conflicts based on matters of principle. The committee members were often present when they reached previous labor agreements. Hence, members can therefore provide solutions when conflicts revolve around interpretation or implementation of those agreements.

Interviewees indicate that they put less emphasis on exploring issues/interests underlying present conflicts. Nor is rebuilding of trust and relationships a primary focus of the CB. Interviewees describe this as a responsibility of the conflicting parties although the CB will provide recommendations and advice on how and what to discuss further.

At a CB, the conflict is lifted from the involved parties and their emotional circumstances and evaluated from a "helicopter view". In this sense, interviewees state that CBs not necessarily provide a solution to the conflict, but they do produce new and valuable insights or common ground, which in turn serve as a base for future negotiations. Interviewees describe that the process of coming to Brussels, experiencing the procedure and the fact that a third party takes the conflict seriously reduces emotions and conflict intensity on its own. Members of the CB can see this as a mediation/facilitation amongst the members of the CB themselves; however, parties at the organizational level can also describe it as a form of arbitration by the parties at organizational level.

Although preferences vary according to sector, interviewees perceived active involvement of the mediator as a positive experience. Members expect the mediator to propose solutions when needed; this requires sufficient authority as well as necessary knowledge about the sector and parties.

Interviewees note an evolution towards a more regulated and legislative society in which mutual understanding and trust seem to be of less importance. This can result in an increased presence of legal assistance at CBs. Presence of lawyers is tolerated or denied depending on sector, but universally seen as limiting the margins when reaching an agreement. Interviewees see this standardization and regulation as a threat to the CB's relevance as it would often come down to interpreting already stipulated guidelines.

3. *Conflicting parties*

In accordance to earlier findings, interviewees see the CB is as a tool to provide new insights and perspectives or structural solutions to the conflict at hand. Committee members are too far removed from the conflict and its history to fully immerse themselves in the situation. When conflicts occur revolving around larger problems than

the most recent conflict, current procedure is not an optimal fit. Interviewees perceive the information sharing during the first plenary session of a CB is as insufficient and information is lost in communications between all different levels of involved parties. In these cases, interviewees see direct mediation with conflicting parties as the better option to get to the core of the conflict.

Additionally, interviewees experience the procedure as tiring and long although no mention is made of this having a drastic effect on the reached agreement.

Because of the collective setting, the CB will try to reach an agreement by compromise where all parties are satisfied. Although the goal of compromise is to provide a win-win situation, it is said to often end up in a lose-lose situation. This can be prevented by actively working towards a solution in the time leading up to an CB and proposing this idea to the committee members who will then further discuss and elaborate on this idea.

Because of the moral authority of both the CB and the mediator, solutions proposed by the mediator might be agreed to whereas similar solutions at the organizational level would be rejected by the conflicting parties and can be a solution in politically delicate conflicts or negotiations.

3.5 Effectiveness of the System

As mentioned earlier, the Belgian Federal Public Service Employment, Labor and Social Dialogue does not structurally document specific numbers regarding CBs as they do not want to create the perception that a non-agreement equals to a failure of the social dialogue.

There is no form of evaluation institutionalized and mediators do not structurally discuss cases among each other. A monthly staff meeting exists. Given the workload, mediators usually use this moment to inform each other regarding practical information such as new laws or the department's official standpoint on current affairs. If cased-based knowledge sharing takes place, mediators do so on an ad hoc basis. Due to their busy schedules and constant meetings and involvement in different sectors, mediators are in fact working within their own silo and have limited contact within their own organization.

With regard to evaluations of personal effectiveness, mediators mostly referred to procedural factors such as facilitating the discussion, general atmosphere during the negotiation, guarding the process and ensuring all parties feel that they are heard sufficiently. All these elements are necessarily in order to reach an effective agreement between the parties.

Evaluation by stakeholders of the effectiveness of the mediation

Interviewees see CBs as effective and working properly in their current form, taking into account their often-cited use as a stepping-stone for further negotiations. There are however concerns that the current system will no longer suffice in the future.

Interviewees sometimes describe CBs and the larger procedure concerning social dialogue as conservative institutions that respond slowly to new demands or new types of organizations. Besides concerns towards future effectiveness, CBs are not seen as the optimal fit for acute conflicts due to attendance requirements. In addition, restricting the meeting to one day also limits resolutions in deeper conflicts to a certain extent.

Some interviewees make an additional remark in regards to knowledge about the goals and procedure of the CB. Involved parties note that from their experience education by unions was somewhat lacking and new managers were often not familiar with sector protocols.

3.6 Conclusions

One cannot evaluate CBs without taking the larger system of social dialogue into account. Because of its long history and widespread use, it has become an institution known to all parties in the private sector. Its function of providing solutions as well as helping conflicting parties to deepen negotiations has become one of the cornerstones for the Belgian system in the private sector.

Involved parties support the system who generally see it as a crucial step in conflict development with a focus on prevention of strikes.

The public sector does not have a long-standing tradition of mediation. This provides an opportunity for the public sector, as they can analyze the strengths of the system in the private sector and use it to their own advantage.

Because of the additional responsibilities in joint committees, mediators are stretched thin as it is and further budget-cuts will quite realistically undermine the quality of conflict resolution throughout Belgium.

The current procedure has a very strong focus on resolving the acute nature of conflicts while underlying interests can receive less exposure. It can therefore be worthwhile to explore options allowing for a more direct mediation between parties if needed, greater attention to post-conciliation activities or to have a more flexible approach to timing instead of trying to restrict the CB to just one day.

Concerns are also raised about the system's ability to respond to market changes and organization of tomorrow, companies as Deliveroo for example pose difficulties when trying to fit them into the current procedures.

Instituting a formal way of evaluating the procedures, ideally incorporating perspectives of all parties, could allow the Belgian Federal Public Service Employment, Labor and Social Dialogue to improve on their services and adapt to changes and demands more rapidly.

Finally, investing in mediation training (both for conflicting parties and mediators), and structural dialogue among mediators can further improve a consistent and effective process.

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References

Devos, C. (2009). *Solidariteit in beweging: Perspectieven voor de vakbond van morgen*. ASP/VUBPRESS/UPA.

Devos, C., Carl, D., Mus, M., & Humblet, P. (2011). *De toekomst van het sociaal overleg*. Academia Press.

European Foundation for the Improvement of Living and Working Conditions. (2006). *EIRO thematic feature: Collective dispute resolution in an enlarged European Union*. Retrieved from Eurofound: https://www.eurofound.europa.eu/.

FOD WASO. (2017, October 12). *Sociale bemiddeling.* Retreived from Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg: http://www.werk.belgie.be/defaultTab.aspx?id=516.

Humblet, P., & Cox, G. (2011). *Collectieve conflicten*. Wolters Kluwer Belgium.

Institut der deutschen Wirtschaft. (2017). *Industrial relations report*. Retrieved from German Economic Institut: https://www.iwkoeln.de/en.html.

Nationale Arbeidsraad. (1968). *Wet van 5 December 1968 betreffende de collectieve arbeidsovereenkomsten en de paritaire comités.* Retrieved from Nationale Arbeidsraad: http://www.cnt-nar.be/DOC-DIVERS/Wet-Loi-05.12.1968.pdf.

Van Gyes, G., Segers, J., & Henderickx, E. (2009). In het gelijke onze verschillen … Het Belgische collectieve systeem van arbeidsverhoudingen gespiegeld aan Nederland. *Tijdschrift voor HRM/Nederlandse Vereniging voor Personeelsbeleid.-Deventer, 1,* 67–96.

Chapter 4
Mediation and Conciliation in Collective Labor Conflicts in Denmark

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The Case

The mediation process, mediator role and outcomes

One Danish company—we will call it 'Industry 1'—recently established a co-operative committee. The company employs around 400 people of which approx. 300 employees are organized in a trade union covered by a collective agreement, covering almost all blue-collar workers. During the first years of operating with the new committee structure the HR director and CEO experienced a long period of limited use and value of the committee. In the perspective of the CEO, the committee was known because of its name, and not from the merits gained from engaging in committee meetings and initiatives. The lack of use and differences in the perception of the value of The Co-operation Committee created frustration from both unions and management. The CEO and HR officer describe that they found themselves in a 'locked' situation, in which the relationship between the parties was characterized as an 'us' and 'them' relationship. The situation slowly escalated into a conflict of mistrust between the workplace parties, where the local unions lost faith in the management's ability to collaborate since they experience that the management came to meetings unprepared and were using The Co-operation Committee to inform about management decisions about changes in the workplace without inviting to have a dialogue around the content and consequences of the decisions being made. The unions argued that The Co-operation Committee was used in a wrong way, and that it was not an arena that the management could use to impose solutions. The management on the other hand argued that the committee meetings were

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unproductive and used to discuss minor issues and personal matters without consideration of the problems related to the work organization and production. Both the unions and CEO describe how they saw themselves in a position where they were not able to find a way forward. The workplace parties did agree that they needed help to take the next step. The Co-operation Consultants were then contacted. This contact lead to a joint meeting between the workplace parties that was facilitated by The Co-operation Consultants. At the meeting the consultants were used to set a common agenda for The Co-operation Committee based on a shared understanding of the purpose and specific function of The Co-operation Committee. In addition, the consultants worked with both parties to develop a set of principles that could guide productive discussions that were sensitive to the underlying interests of both parties in operating the committee, and that could help re-establishing trust between the parties.

One of the first issues being emphasized by the consultants was the rules for having and operating a co-operative committee (e.g. number of meetings, setting agendas, productive discussion guidelines, relevant issues etc.). This ensured a common knowledge ground that gave clarity around the goal and use of such committees in industry. Another issue raised by the consultant was the atmosphere around the committee meetings. By working concretely with the priorities to identify what types of collaboration areas that should be prioritized in the company and addressed during committee meetings, the meetings were given new status and mandate. As a result, the consultants put several work groups into action that should provide input to important areas of prioritization. These work groups were then followed up over time to ensure a continued relation between the consultants and the workplace. None of the workplace parties knew the co-operation consultants who facilitated the mediation process beforehand. The consultants were perceived as a neutral mediator-team that were able to get everyone on ‘the same page’, while they sustained a constructive tone during the facilitation of meetings and in mediating the different views about the motives for using the committee between the parties. The intermediary role of the consultants differed from the traditional mediator role. Rather the consultants took the role as a preventive facilitator, by taking part in the meetings and imposing structure and content to the discussions and brought the parties toward mutual understanding and win-win decision-making.

Rather than focusing on the initial positions reflecting the ‘organizational dead-lock’ around the co-operation committee, the workplace parties were guided towards common understanding of the situation and were given some simple and basic things to work with that could help them see things through a focus on the common interests of the company (e.g. collaboration areas that should be prioritized, and competitive position). The focus of the preventive facilitation was to re-establish trust and meaning with the discussions in the co-operation committee. Comprising how to perform good meetings, how to

mediate and reach mutual understanding and avoid focusing on small and personal issues did qualify the discussion in the committee. Importantly, the establishment of work groups with participation of different representatives from the company has helped signal that the management is interested in the input from the workers and that the workers believe that the management will address these inputs and consider them when planning organizational changes. The work groups will provide specific input to three prioritized topics of collaboration; (1) company culture, (2) work retention and (3) the establishment of a new work site. Indeed, both parties develop new forms of interaction and are more capable of managing conflicts and negotiations, due to the mediation. One union member explains how he has become more aware of the management perspective and recognize their concerns although he does not always agree in their perspective. The HR officer recognize how the unions have become better at working with the management without getting stocked in a conflict approach. Both parties explain that a consensus orientation is important to move things forward. Thus, both parties have become more aware of listening to each other's concerns and the common interest of having a joint committee as an arena for addressing selected topics of collaboration.

4.1 Introduction to Collective Conflict Mediation on the Danish Labor Market

4.1.1 The Danish Industrial Relation System

The industrial relation (IR) tradition is often referred to as the 'Danish Model'. The model is based on a tri-partite social partnership between the Danish state, and employers' organizations and employee trade unions. The Danish IR system may be classified within the pluralist IR perspective, where of employer and employee subgroups are organized in associations and trade unions that act on behalf of their member interests to create co-operation, negotiation and facilitate compromise on employment terms (Salomon, 2000). Central to the Danish IR system is the substantial role that employers and employees play in influencing the combination of a flexible employment conditions, welfare schemes and labor market policies through collective bargaining (Scheuer, 1998). The Danish IR system is typically presented as four distinct features, including (1) close links between the social partners of the labor market and the state (2) centralized bargaining to conclude collective agreements between employers' and employee organizations, (3) a high rate of unionization among employees, (4) and collective agreements serving as a basic mechanism for IR regulation (Jensen, Madsen, & Due, 1993).

The Danish labor market is one of the most highly organized (Jensen, 2012). A high degree of organization is essential for the legitimacy and efficiency of the Danish collective bargaining system. In 2015, the percentage of employees organized in trade unions were 67.7%. With a coverage rate of 80%, the collective agreements are ranking comparably higher than seen in other EU Member States. The coverage rate stood at 85% for several decades and has been relatively stable up until 2010. However, in recent years the coverage rate has tended to decline. Today the coverage rate sits at 71% in the private sector and 100% in the public sector (Denmark Statistik, 2018).

Although described as a tripartite structure, the Danish state and political system usually take a relatively limited role in IR regulation, and rely on the ability of the parties to reach an agreement on their own (Jensen et al., 1993). Any collective agreement is binding in accordance with the basic agreements reached between the social partners in the private as well as public sector. Approximately 50% of the private employers are organized with the most comprehensive organization being the Confederation of Danish Employers.

In contrast to other European countries, the Danish IR-system includes an important normative and political alignment with a preference for IR regulation via collective bargaining and agreements, rather than regulation through individual contracts and legislation (Jensen et al., 1993). The convention being that trade unions, private employers, and public employers form an agreement on wages and other working conditions, and that the parties are accountable in relation to these agreements. Quite many non-organized private employers join these collective agreements. Consequently, the legislation, which consists of rules applying to certain groups of employees (e.g. regulation of salaried workers) as well as to specific matters (e.g. regulation on holidays) is of minor importance compared to some other countries.

4.1.2 Institutional Background and Historic Compromise

The Danish IR system-orientation of collective agreements traces its origins to a series of industrial disputes between employers and employees, also referred to as the ‘September Compromise’, 1899 (Jensen et al., 1993). The Danish IR system of collective agreements has evolved as a system, that builds on centralized collective bargaining negotiated at the main organization-level. This historical development has ensured a relatively high degree of homogeneity, regarding pay and employment terms. However, a turn in the Danish IR system has shifted the collective agreement system towards more ‘centralized decentralization’ (Andersen & Mailand, 2005). Importantly, every sector on the Danish labour market have combinations of flexibility and security, but not all employees are covered by both flexibility and security to the same extent (Mailand, 2009). Decentralized collective bargaining give employer and employee representatives increased opportunities to negotiate employment terms at the workplace level (Blanplain, 2007). In 1908, a government body formed the basic principles for the solution of conflicts about collective agreements; and a dis-

tinction was drawn between 'conflicts of interests', where the matter in dispute is not covered by a collective agreement, and 'conflicts of rights'.

In 'conflicts of interests' the parties are free to take collective industrial action (strike or lockout); but when a collective agreement has been concluded, they are under an 'obligation of peace' if the agreement is in force. An alternative procedural system has been set up, and a 'conflict of rights' must be settled through negotiations at either the local, the organizational or the central organizational level. If the dispute is not resolved in this way, a dispute concerning the interpretation of the agreement must be referred to industrial arbitration and a dispute concerning a breach of the agreement must be brought before the Labour Court. The Labour Court is thus the main dispute-resolving body in relation to labour market conflicts. It has existed since 1900 and was established as a proper court of law named The Permanent Court of Arbitration in 1910. There are special rules concerning appointment of judges and powers, as the social partners are involved in this process. Since 1964 it has been named the Labour Court. The regulation has been updated several times and the newest act on Labour Court was passed in 2008 (http://www.arbejdsretten.dk/generelt/labour-court.aspx).

4.2 Characteristics of the Danish Collective Mediation System

4.2.1 Negotiations on Different Levels—The Ladder of Conflict Resolution

The Danish collective mediation system is based on two essential pillars; (i) *the right to use conflicts* in terms of strikes or lock-out when settling a general agreement, and (ii) '*the obligation to peace*', when the agreement is in function. A key feature of the Danish conflict resolution system is that none of the parties can refuse to participate in meetings with the aim of settling a conflict, whether it be a matter of dispute of interest or right. This is stated in 'The rules for the Hearing of Industrial Disputes' adopted by the Employers' Confederation and the Danish Federation of Trade Unions and the Rules for the Hearing of Industrial Disputes' also referred to as 'the Norm'. The existence of the special negotiation procedure means that only a minor part of this type of conflicts are continued before judicial dispute-resolving bodies, and it would normally be regarded as a breach of agreement if a party fails to participate in conciliation (Limborg, Jørgen, Albertsen, & Navrbjerg, 2014).

The *first step* in conflict resolution is to reach for a local agreement on the issue, through negotiations between the employee representative (union) and the management. The negotiations must be documented and of course the take their point of departure from any existing agreement. In the event of failure to settle the dispute by local negotiation, the allegedly injured party will submit a petition for conciliation specifying the subject of the dispute. *The second step* will then be the setting-up of a

conciliation committee, normally each party (Union and employers' association) to the agreement will appoint a member each. The conciliators need not be impartial, but they may not, however, have any personal interest in the matter to be considered. The discussions with the committee are rather informal and should take place on the firm's premises. In this case, the employee representative and the manager are participating as observers. The organizations of the social partners or their appointed conciliators will lead the process. The result of the conciliation is forthwith committed to a minute book, and if the conciliators are unanimous the committee may settle the dispute once and for all at variance with the wishes of the parties directly involved. If the conciliation is ended without a result, the consideration of the dispute may be continued to *the third step*: a 'meeting of the organizations'. These meetings are usually attended by several representatives from each organization and, as in the case of the conciliation committee, the board of negotiators may decide the matter if unanimous.

Most conflicts are resolved within these first three steps. An important element of the stepwise procedure—as it is described in "the norm"—is that all parties are committed to act as fast as possible. In situations where time is of the essence, it is even possible to use an alternative procedure, 'the joint meetings' where everybody, including representatives of the central organizations, participate at the same time. The flexibility of this system and the ability to act fast and bring forth solution to as well trivial as more complex matters, is one of the important strength of the system, and the reason that it is still considered extremely successful even after more than 100 years.

4.2.2 Industrial Arbitration—The Fourth Step

In more complex cases where the mediation sought for in the first three steps is not reached, the case will be brought to 'Industrial Arbitration'. The industrial arbitration tribunals are not covered by the general Arbitration Act but are governed by the Labour Court Act and provisions in the Rules for the Hearing of Industrial Disputes adopted by the Employers Confederation and the Federation of Trade Unions or similar general agreements as well as stipulations in the collective agreements in question. These are usually modelled after the Rules for the Hearing of Industrial Disputes. Usually the arbitration tribunals are set up for hearing a single, already existing case, in which case each party normally appoints 2 arbitrators and the President of the Labour Court one (or in some cases 3) umpire(s) (opmand). Anybody could be appointed as arbitrator if they have no personal interest in the matter. Most often the umpire is a judge with experience from labor disputes appointed from a small circle of legal professionals.

A special area for the industrial arbitration tribunals involves cases concerning dismissals of employee representatives (union), pleading that the dismissal was non-objective. Furthermore, some agreements contain provisions that refer cases to arbitration on a general basis, and, besides, it frequently occurs that the parties specif-

ically agree to have the industrial arbitration tribunal consider the matter of breach of agreement about the question of interpretation. A few permanent industrial arbitration tribunals exist, such as the permanent Board of Dismissals, which was set up in accordance with the General Agreement between the Employers' Confederation and the Federation of Trade Unions to decide cases involving non-objective dismissals.

The industrial arbitration tribunals are concerned, first and foremost, with disputes over the interpretation of the collective agreements, which the parties have been unable to resolve, by negotiation in accordance with the agreement. It is considered as a breach of agreement, if a party fails to co-operate in the implementation of the arbitration proceedings. The industrial arbitration tribunal is presided over by the umpire, and the actual presentation to the tribunal is done verbally and in principle in the same manner as before the ordinary courts of law. However, the representatives of the parties are not always lawyers, and the hearing can be rather informal.

4.2.3 The Labour Court

If a dispute relates to a specified violation of an agreement, the conflict resolution will follow another path, first step again being local negotiations and further a meeting between the central organizations and a final option of being taken up by the Labour Court. The Danish Labour Court is a special court of law. The Court is seated in Copenhagen, but the jurisdiction includes the whole country.

Cases can only be brought by and against the relevant employers and employee organizations, regardless of whether the breach was committed by or against single members of either organization, or the collective industrial action was threatened or commenced by or against single members of either organization. Where an organization is a member of a comprehensive organization, the case must be conducted by and against the latter.

In recent years, less than 20 cases per year were subjected to a full-court hearing. A somewhat larger number of cases about 100 per year, were concluded by the parties entrusting the decision to the judges who considered the cases in the preliminary meetings.

4.2.4 Procedure of the Court

When court is held by the President, one of the vice-presidents or in certain cases the Head of Secretariat alone, the parties (each represented by a comprehensive organizations) exchange complaints and defenses pleas and additional pleas. The judge may ask the parties to obtain further statements or information, and the case may, if necessary, be postponed, setting a later date for a preliminary meeting. This procedure includes an investigation of a possible amicable solution, in a clear majority of cases the parties manage to reach a settlement—sometimes through the intervention

of the judge and are thereby concluded. If the judge can ascertain that it is impossible to reach an agreement between the parties, a date and time is set for a full-court hearing.

After the parties, have presented their case follows the examination of possible witnesses. Immediately after the hearing the Court will discuss what is to be decided and to give their votes. Before this final meeting is held, the presiding judge draws up a draft of the decision and copies of the draft sent to the other members. The decision is drawn from the traditions of the Danish civil law. Finally, the conclusion of the Court is specified. The decision and the final wording are adopted from the majority votes, and the presiding judge pronounces the decision publicly in the courtroom.

4.2.5 The Ability to Handle Urgency

Pursuant to the Labour Court Act strikes or lockouts in contravention of a collective agreement must immediately be reported to the organizations, and a joint meeting attended by the organization must be held the day after the beginning of a strike or lockout. When a current industrial action is brought to the Labour Court, the case will be considered as a case of urgency. As a rule, the presiding judge will appeal to the members of the organization to comply with the request of their organization.

If the members of the organization do not comply with such a request immediately, the fine, which they are to be imposed because of the action, will increase considerably. If the Court cannot deal with all the problems of the case immediately, it can at the end of the hearing deliver an interlocutory order declaring the industrial action in contravention of the collective agreement. If the industrial action is no longer on-going when the case is brought to the Court, the case will be handled as a non-urgent case (Limborg, Jørgen, Albertsen, & Navrbjerg, 2014).

4.2.6 Resolution Before It Ends in Court—Decisions During Preliminary Meetings

In a substantial number of cases the parties and the judge at the preliminary meeting will agree that the matter is not of such a nature as to justify a full-court hearing. If so, evidence is produced at this point or at a subsequent preliminary meeting open to the public and, in conclusion, the parties will present a brief oral review of their points of view. The resolution of the case is thereafter entrusted to the President, vice-president or in certain cases the Head of Secretariat, who is required to meet the general conditions of being a judge and in fact has always been a district court judge. In most cases the judge will promptly deliver and explain the result, which is recorded in the records of the Court. This marks the conclusion of the case (Fig. 4.1).

4.2.7 Additional Third-Party Involvement, and Workplace Co-operative Institutions

Alongside the formalised procedures for labour market conflict resolution, arbitration and labour court, other third parties and less formal institutions guidance and consulting on conflict resolution to companies and institutions. There is a minor private market of consultants offering mediation and conflict resolution to companies, institutions and unions and associations. These services might be growing, however currently there are no available public register or statistics to estimate the development of the private conflict resolution services available, or even to provide an overview of the approach that private consultants would apply. One way to identify private consulting firms and services offered in cases of collective conflict resolution is to perform a Google search. When judging the suite of services and approaches identified a common understanding of conflicts and their resolution is to focus on the interpersonal relations with little or no consideration of the formalised collaboration structures in the workplace.

4.2.8 The Co-operation Agreement

One of the more formalised institutions used for systematic co-operation between employers and employees at all levels is the 'The Co-operation Agreement' between DA (the Confederation of Danish Employers) and LO (the Danish Confederation of Trade Unions). 'The Co-operation Agreement' was first concluded in 1947 and has since been modernized on a continuous basis and, most recently, in the current agreement which dates to 2006.

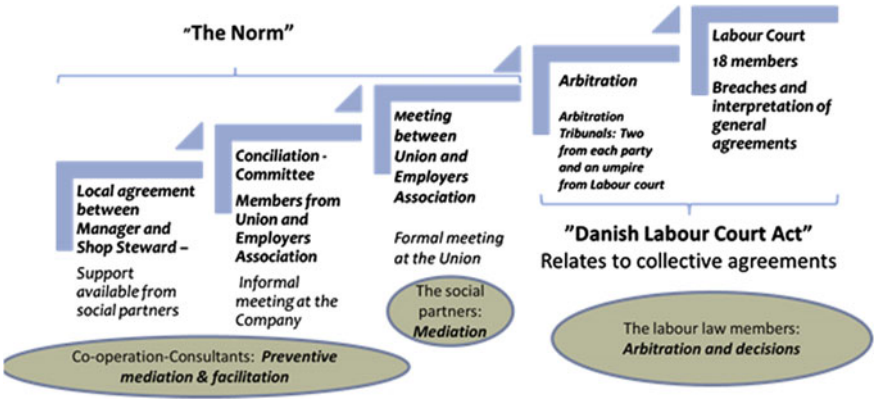

Fig. 4.1 The ladder of conflict resolution on the lowest possible level between agreements

'The Co-operation Agreement' defines the institutional framework for co-operation and social dialogue between the employees and management in all the companies that are members of The Confederation of Danish Employers and contains rules for mutual information on working conditions for employers and employees. 'The Co-operation Agreement' also contains the supplementary agreement on equal treatment and integration as well as the supplementary agreement on Telework. The Co-operation Agreement implements the EU-regulation on information and consultation.

Importantly, The Co-operation Agreement' is operating within the industrial sector, but a similar institution, with a little variety, has been developed as an offer to organizations where the state is the employer. Thus, municipalities and regions (The health care sector) are excluded from such an offer. The institutional framework laid out by the Co-operation Agreement includes three ways to support the day-to-day co-operation and interaction between management and employees; (1) The Co-operation Board, (2) Co-operation Committees, and (3) Co-operating Consultants.

4.2.9 The Co-operation Board

The secretariat supports management and local employee representatives (union) in all matters of co-operation. The board consists of 7 members that represent employers and employees. The following duties summarizes the work of the board (Samarbejdsnævnet, 2006):

1. Provide information, guidance and development for promoting workplace co-operation
2. Assist in establishing co-operation committees and guiding them in their activities
3. Constitute a forum for conflict resolution and mediation in cases of disputes.

When meeting with local Co-operation committees the board secretariat is represented by co-operate consultants from both the employer and employee side.

4.2.10 Co-operation Committees

In companies with more than 35 employees or more, the day-to-day co-operation should be promoted and observed by a co-operation committee composed of representatives from management and employees. In accordance with 'The Co-operation Agreement', the co-operation committee should consider and determine how the committee can promote and coordinate co-operation between management and employees at all levels of the organization.

To ensure the establishment of principles both management and employees are required to actively commit to achieving an agreement by joint consultation and to implement the agreed upon terms in practice. The co-operation committee is free to coordinate its work based on the needs and wishes of the local context if the main aim of the 'The Co-operation Agreement' is in focus, and the work of the committee are observed and complies with the obligations of the agreement. The committee may seek advice from the Co-operation Board if needed. In cases where local committees do not comply with 'The Co-op-operation Agreement' both management and employee representatives have the right to demand a renegotiation of principles and/or terminate the committee and agreed principles.

4.2.11 Co-operation Consulting Units

We have chosen to describe the joint initiative offered by The Confederation of Danish Industry (DI) and Central Unions from—Industry and Food, and Allied Workers' Union (CO-I and NNF) to help companies improve the daily co-operation between management and employees and resolve collective conflicts at the workplace level. A unique possibility, within the co-operative structure of DI and CO-I, is the opportunity for employers and employees to call for the co-operation unit in cases of dispute or conflict resolution at the workplace. 18 consultants work in co-operative units and are trained to visit companies and provide advice on the establishment of co-operation committees, dispute resolution and cooperative development in association with the introduction of new technology or improving psychosocial working environment.

The counselling of the co-operation unit takes place within the framework of the two co-operation bodies TEKSAM (Committee for Technology and Co-operation) and FTS (Committee for the Food Industry and Technology Co-operation), which administrates the 'Co-operation Agreement'. TEKSAM consist of elected politicians who assist the collaboration between DI and CO-I. TEKSAM recognises the co-operation unit and can assist in situations where the co-operation consultants cannot re-establish trust and collaboration between the local workplace parties. TEKSAM will then perform a 'second hearing' in cases where it is not possible to reach compromise or agreement (Fig. 4.2).

An interesting new development among the social partners in the public sector is a trend to include funding to establish and realise consulting units—with to aim to support co-operation at workplace level—in the general agreements. The support is primarily focused on developing a healthy psychosocial working environment and in resolving local conflicts in cases were either side has violated the collective agreements. Such units are currently being established in the municipality sector, in the health care and hospital sector (regions) and in the workplaces of the state.

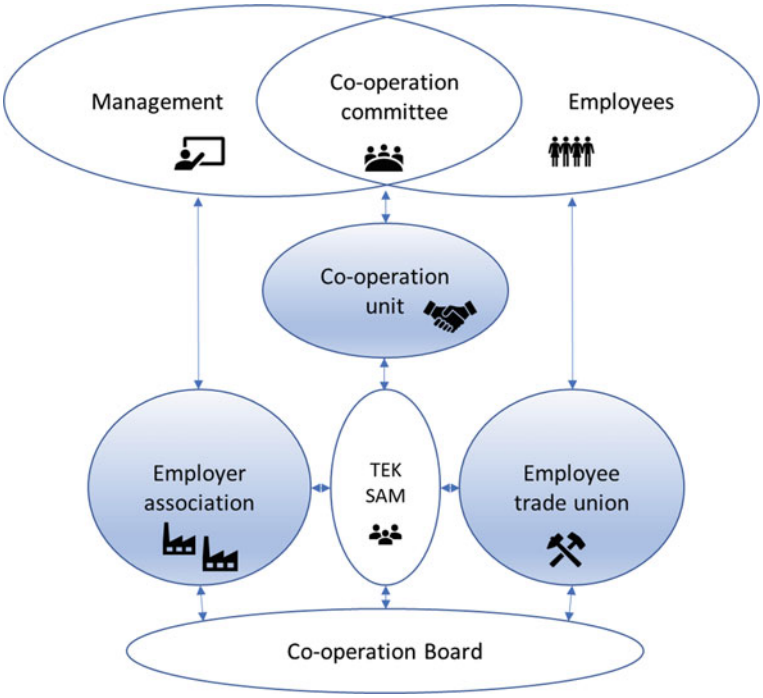

Fig. 4.2 Collaboration structure of the co-operation unit

4.2.12 Stakeholders' Evaluation of the Formal Mediation System and Services

Looking at how parties at company level in the Co-operation Committees and at administration and union level perceive the Danish collective labour mediation system the following issues are found to influence the effectiveness of the mediation services provided:

- As a Co-operation consultant as well as a private mediator it is important to have in-depth knowledge about the Danish model and to value and understand the interest from both parties involved and that both of their interest must be represented, and that this representation is best taken care of through an active collaboration between employers and employees. Often it takes a lot of experience to reach the ability to facilitate and de-escalate conflicts in a timely and respectful manner.
- One limitation to the Co-operation consultants is their limited ability to gather more thorough data and to produce evidence-based and reliable analysis of this data, when a deeper understanding is required to unfold the background of a conflict. In this case private consultants offers a better opportunity.

- The Co-operation consultants are recruited from different disciplinary backgrounds and have gained personal experience in consultancy, mediation and conflict resolution. A common feature of their role in the system is a value-based approach to social dialogue that emphasize humanization instead of authority since a key competence is not to take sides, but to navigate and meet the conflicting parties with respect for their point of departure.
- A common critical issue is that management is very nervous to lose the managerial right when establishing a Co-operation committee, which is something that the consultants work very hard to diminish. Rather the point is that The Co-operation Committee can be an important catalysator for legitimizing the management decisions. To establish this understanding will often be an important first step for the mediators.
- The mediators experience that the system allows them to be consistent in the way they deliver the mediation services and answers during the mediation process. They rely on a high degree of trust in the system, but simultaneously they are continuously evaluated in terms of their ability to act legit and correct according to this.
- Interestingly the Co-operation Consultants do not measure their success from the level of satisfaction from users but from their own ability to maintain the use of the co-operation institutions locally and on institutional level. Particularly Danish companies that has been taking over by international businesses, represent a challenge as these companies do not bring in knowledge and experiences from using the co-operation institutions in the Danish Model. In these cases, it is critical to make them understand how it is possible for employers and employees to decide on collaboration areas that should be prioritized and reach consensus on their implementation in practice.

4.3 Characteristics of the Mediators or Facilitators and the Third-Party Procedures

The co-operation unit is a free service available to members of DI. The costs of having co-operation consultants involved in conflict resolution at the workplace is covered by the DI membership fee of the company. The co-operation unit offer help and facilitate conflict resolution independent of the company location. Currently, no accreditation system exists to monitor or train the co-operation consultants in Denmark. There is no specific profile connected to the consultants working for the co-operation unit. Typically, the consultants are recruited from different backgrounds, but all consultants have experience with workplace consulting and conflict resolution. However, a range of skills, competencies and extensive experience is useful. Co-operation consultants need in-depth understanding of the structure of the Danish labour market, and the mechanisms of the Danish IR system in combination with an ambition to strengthen the current IR system. In addition, the ability to understand

how to represent interest from both 'sides of the table', from the view that these interests are best presented through joint labour and management collaboration, is important.

Another essential competence is the ability to create a feeling of community and common action to move the conflict situation towards a resolution. Here human value skills are needed to facilitate negotiation and achieve commitment and compromise in dispute situations. In sum, the competence profile of the co-operation consultants is very much related to the ability to facilitate, humanize and de-escalate conflict situations. The co-operation units work from a social dialogue and system theory-oriented approach to understand the conflict, and to simplify issues related to the dispute situation. The approach is relational and not individual, in the sense that the consultants look at the relations between the levels of the organization to clarify potentials of collaboration. Here the focus is to give advice and guidance in both the creation of co-operation committees as in issues concerning their daily co-operation.

The co-operation consultants work with the co-operation committees to deal with locked conflict situations in companies, including the improvement of the co-operation practise and culture. Importantly, the task of the co-operation consultants is not to resolve the conflict, but rather to get an understanding of the different interests, and to re-create trust between the local parties. The co-operation unit is always a team from the trade union and the employer association behind the joint initiative. The consultants always work in pairs to underline the idea of joint representation, which also help ease their presence. The task is then to show the local parties how the co-operation consultants collaborate, and that it works.

The consultants do not meet with local workplace parties separately. Importantly, the rationale for their involvement is to avoid creating dependency on the consultants to resolve the conflict but providing the needed help to the parties without overtaking the company and the conflict situation. The co-operation consultants do have methods that they use across settings, but currently no standards exist to guide the conflict resolution process. Instead the co-operation consultants work from the approach that every company is a unique setting, and that applying standards can risk blurring the contextual understanding of the conflict situation.

At What Stages are the Conflict Mediation System Active?

1. Preventive facilitation (Before conflicts): Training of employee representatives (union) and managers. Co-operation consultants are supporting co-operation committees to be able to prevent conflicts to occur.
2. Latent conflicts and early stage: Local co-operation committees supported by union representatives and management act as facilitators.
3. Confrontation: Trade unions and employer associations take over.
4. Hot conflict: Arbitration or labor court.
5. Rebuilding working relations: Co-operation consultants facilitate restoring co-operation committees and local collaboration.

4.4 Description of the Facilitation and/or Mediation Process

Typically, workplace disputes arising from local disagreement about interpretations of the Co-operation Agreement should be resolved by means of the co-operation committee. During the dispute resolution either party is entitled to seek advice from TEKSAM and the co-operation unit to help resolve the dispute and take up negotiations. Figure 4.3 illustrates the typical steps of a conflict resolution process in which the co-operation consultants are involved. Each step is described in detail below.

1. The process starts when the co-operation unit is contacted by a company, which experience a conflict or violation of a collective agreement. Both management and employee representatives on the co-operation committee can take the initiative to ask for and obtain advice from the co-operation unit. When the need and conflict issue has been clarified, a preparatory meeting is scheduled between the co-operation consultants and the management and employee representatives from the company.
2. The aim of the preparatory meeting is to survey the conflict situation and discuss initiatives to act. The preparatory meeting represents a specific intake procedure which allow the co-operation consultants to get a deeper understanding of the conflict by listening to the arguments and frustrations of both parties. At the preparatory meeting the co-operation unit meet up with representatives from both DI and CO-I. The co-operation committee from the company appoints the participants for the preparatory meeting and the following seminar.
3. Following the preparatory meeting the co-operation consultants will draft the content of the seminar, including a program description and presentation of the methods that can facilitate social dialogue and conflict resolution. There is no pre-specified protocol.

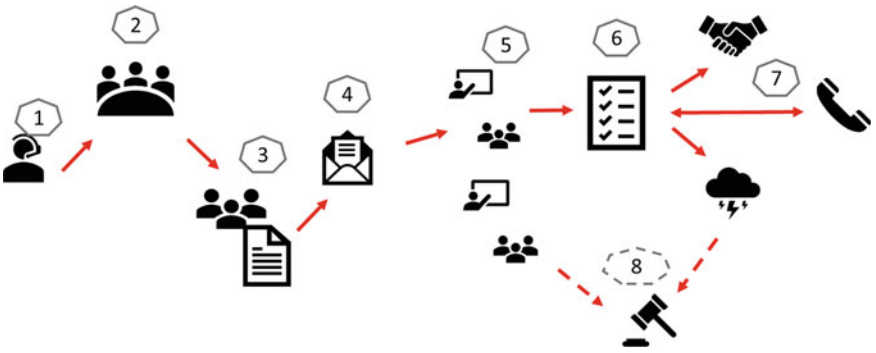

Fig. 4.3 Illustration of the conflict resolution process at the organizational-level

4. Once the content of the seminar program is drafted, the program is send to the company for approval. The chairman and vice-president of the co-operation committee then makes a judgment on the program and develop ownership of the project.
5. If the program is accepted by the company, the seminar will take place. If the parties cannot agree on the first seminar they may agree to plan a follow up seminar to reach a compromise. The seminar process may focus on some or all the following issues:

   – When the co-operation consultants' visits companies, the consultants typically start by outlining some points to arrive at, referring to the core principles of 'The Co-operation Agreement'. The underlying aim is to establish common ground for joint interests.
   – The management is told to repeat what the employees say even though they disagree. This to indicate that the management have listened and are not shifting their frustrations on the employees.
   – The parties are encouraged to reflect on the tasks and responsibilities of the co-operation committee in resolving the conflict and/or as a change facilitator.
   – Some globalized businesses may need assistance to understand the Danish labour market and the tradition and culture of collaboration.
   – All participants have veto power without justification, which means that all parties can express their concerns and dismiss an initiative they do not want to be part of.

6. Seminars are recorded and summaries in a common report drafted by the co-operation consultants and send to the company co-operative committee. Specifically, the report includes a summary of the negotiation process, and action items.
7. If trust is re-established between the parties, and the parties can agree on the content of the seminar report, a compromise can be reached. If the dispute cannot be resolved, or it is impossible to reach a formal agreement, either party can bring the matter to TEKSAM with a description of the dispute and a summary of negotiations process. TEKSAM will then try to reach a settlement and involve the employer associations and trade unions of the parties.
8. Should the parties refrain from any settlement, the Co-operation Board can appoint and industrial arbitrator. In complicated cases the arbitrator is appointed by the chairman of the Industrial Court. The Co-operation Board deal with the specific case in accordance with the procedures of industrial arbitration. If the case is not settled during board proceedings, a potential ruling will be made. If the case is found to violate the Co-operation Agreement, the party in breach can be held liable to pay a penalty (Samarbejdsnævnet, 2006).

Quick Overview of the Conflict Mediation Process

1. First step in conflict resolution is to reach for a local agreement, through negotiations between the employee representative (union) and management.
2. Second step is setting-up of a conciliation committee; normally each party (union and employers' association) to the agreement will appoint a member.
3. Third step: If the conciliation is ended without a result, the consideration of the dispute may be continued with a 'meeting of the organizations'. These meetings are usually attended by several representatives from the organizations on both sides and, as in the case of the conciliation committee, the board of negotiators may decide the matter if unanimous. Most conflicts are resolved within these first three steps, and all parties are committed to act as fast as possible.
4. Fourth step: In more complex cases where the solution sought for in the first three steps through mediation is not reached, the case will be brought to 'Industrial Arbitration'.
5. If a dispute relates to a specified violation of an agreement, the conflict resolution will follow another path, first step again being local negotiations and further a meeting between the central organizations and a final option of being taken up by the Labor Court.

4.4.1 Stakeholders' Evaluation of the Mediators and Mediation Process

The following motives were identified for using the co-operative institutions and mediation services provided by The Co-operation Consultants:

- A common motive for using The Co-operation Consultants relates to differences between workplace parties in the interpretation of collective agreements. In one case a company had disagreements about, which things they should consider in relation to the establishment of a new Works Council (co-operative committee) an issue was if all parties should be unionized. This issue was discussed on a mediation meeting with the union, and the chair of The Co-operation Committee and co-operative consultants. Following the meeting the consultants were invited to monitor the process of the meeting to support the procedure and evaluation. Having the consultants as participants were relevant to help new committee members to decide which concrete issues were suitable to address in the committee and how.
- Another motive relates to situations where the dialogue between the workplace parties is locked. One case reported that the situation between the parties were characterized by an 'us' and 'them' relationship. The Co-operation Consultants

were used to guide productive discussions from a shared understanding of the purpose and specific function of The Co-operation Committee as an arena for social dialogue at the workplace level.

- The Co-operation Consultants are also used to help facilitate meetings about the interpretation and action planning of health and safety audits done at the workplace. In one case the company used The Co-operation Consultants to summarize discussions points and suggestions from the meeting, and what agreements were reached for the company to enhance preventive initiatives related to the psychosocial work environment.
- Yet again, a central motive relates to situations in which there is a history of distrust between the parties at the workplace. In these cases, The Co-operation Consultants are used not only to facilitate discussions on the problems related to the way the dialogue work between the parties, but also to impose a structure and mediation process that is designed to help mutual trust building between the parties and win-win agreements.

4.5 Possibilities to Increase the Use and Quality of Social Dialogue and the Mediation Provided

The mediation service of the Co-operation Consultants is utilized in specific clusters of the labor market. Companies that have gained knowledge of the possibility. The overall knowledge about The Co-operation Consultants among the Unions is poor. The unions on their side wish for more information about how to get in touch with the consultants when facing a conflict situation. The unions believe that it is important to increase awareness and information about the resources of The Co-operation Consultant prospectively to help prevent conflicts at the workplace level. One union member suggest that it is mandatory for every new union member to attend a course about the principles and practices of the co-operation institutions and consultants, as many newly elected employee representatives (union) use their first year to get familiar with the mediation system and the mediation resources. In, addition some companies request that the consultants are more proactive in approaching The Co-operation Committees in the companies directly. Both HR officers and unions agree that many companies could benefit from having some form of interaction with the consultants about the use of co-operation committees and/or interpretation of collective agreements to help support joint employer and employee collaboration. In some cases they even suggest that it would be relevant to install mandatory process for companies that were covered by the collective agreement, in which they interacted with the consultants about their role and resources in connection to a self-imposed subject. Such a meeting is proposed to take place every fourth year to keep the interaction up to speed and ensure that the right competencies and knowledge are in place in situations with replacement of management and/or unions in The Co-operation Committee.

The availability and existence of the very limited group of private mediators is also only known to a limited number of institutions and companies. Mostly they seem to be used by the larger Unions and Employers Associations, and more rarely by private companies.

4.5.1 Ideas for Improving the Use and Quality of the Mediation Process and Social Dialogue

Importantly, some companies anticipate that there will be a more specialized need for mediation processes in the future, since many modern organizations need knowledge and input about how to manage complex organizational changes, and how to address this as a collaborate issue being discussed in the co-operative institutions. In other cases, management assess that there will be an increased need for inter-sectorial collaboration between the various parties involved in mediation processes to help maximize the use of resources and create long-lasting solutions. Thus, a key concern for the quality of the mediation provided is whether The Co-operation Consultants can maintain the high level of mediation, in a situation where the labor market becomes more and more complex (e.g. new employment relations, new forms of EU regulation that could decrease the flexibility on the Danish labor market).

According to The Co-operation Consultants the main concern is to be conscious about the monopoly of their assignment in the sense that they are provided with a responsibility and a huge obligation to promote social dialogue at the workplace. In their perspective, it is their awareness and focus on this responsibility that determines if the mediation will survive or not. In addition, it is a very narrow system with a constant development dynamic, which demands a continuous openness and connectivity to research and other parties in the system to avoid being stuck with old methods and lack of coordination with other relevant initiatives. Providing a development field for more fact-based mediation and for mediators or mediating institution that combine process facilitation with knowledge-based analysis and fact-based conflict illumination.

4.5.2 Stakeholders' Evaluation of the Effectiveness of the Mediation in Organizations

The co-operation consultants experience a high degree of satisfaction from companies regarding the workplace conflict resolution process. The high satisfaction and legitimacy of the co-operation consultants is based on their efforts to act consistently and provide consistent answers when facilitating social dialogue and conflict resolution. In general, the Danish IR system is characterized by authority and a high level of social trust between the parties, and a belief in the ability of the IR system to

reach compromises and promote negotiation. As such, the idea that employers and employee can find common ground and work together to reach joint solutions and compromise is central for understanding the consistency and success of the Danish IR system. In this situation, it is critical for the co-operation unit to constantly be aware of their duties to take joint responsibility, if not the balance of the Danish IR system may be challenged.

In both cases, all participants expressed that they valued the opportunity to use external mediation either through The Co-operation Consultants or the private mediation services that they provided. The following reasons were given to exemplify the satisfaction with the mediation services provided:

- The mediation systems (as well Co-operations consultants as private mediators) were characterized by a willingness to renew themselves and thoroughly understand the concrete context of the potential conflicts. They were able to provide up to date support in terms of areas of importance to the workplace parties, as well as the more political actors in the municipality. They understood conditions in the sectors and they were up to date on regulation and agreements. This was considered important to bring the parties in a position to work with the challenges they face in practice rather than read a conflict as emotional. All the mediators proved to have specific knowledge about the Local Co-operation institutions, collective agreements and relevant regulation, it is an advantage to have the ability to give a clear answer to questions about how to interpret collective agreements.
- An advantage of the mediation system based upon The Co-operation Agreement is, that The Co-operation Consultants always operates in pairs of consultant representing both the trade union and the employer association. According to several cases, this signals a common ground upfront when starting a mediation process, that emphasize the joint commitment between employer and employee side to resolve the situation and strengthen the trust in the facilitation and mediation provided.
- An advantage of the private mediators was for the professional process facilitator a large experience of creating an open process and create trust among the parties. The fact-based mediator group had the scientific capacity that made them able to present thorough data that both parties found evidential and reliable.
- All three types of mediators are recognized as trust worthy for their effort in balancing common goals, and to communicate the interests of both parties involved in the mediation. This is important since several cases did experience situations in which disagreements between workplace parties becomes personalized, and the consultants tried to raise awareness to the organizational issues and common interests.
- Lastly, several cases appreciate the quick response from the time that a company contact the mediator—whether it is The Co-operation Consultants or the private mediators—and to the actual presence in which the consultants sit down together with the workplace parties to have them explain their views to each other about the nature of the problem and how they think it might be resolved. Creating trust is also a matter of timing, timeliness and precision.

4.6 Conclusion

Overall Evaluation of the System

- The Danish co-operation mediation system is based upon the more than 100-year old Co-operation Agreement. It has developed into a type of support system that is based on collective agreements, and work as the first step of the conflict resolution steps included in the Danish Model.
- A key feature of the mediation system is that third party co-operation consultants work together in teams providing mediation services, which installs a joint problem-solving focus in mediation processes at the workplace level. This is different from training individual conflict mediators and relying on individual person's skills and approach to mediation.
- Outside pressures. Politicians might interfere with the system to regulate a conflict situation. This can create a negative trickle-down effect in the system, in which co-operative institutions and workplaces are not given the opportunity to openly discuss the nature of the problem and engage in problem solving together.
- There are few examples of inclusion of professional process facilitators who can work based on the Danish Model and of more scientific fact-based mediators who are able to provide solid data and reliable analysis of the issues of potential conflicts.

The Danish collective conflict resolution system is an essential part of the 'Danish Model' of labour market regulation. The Danish model has a history of more than 100 years and has proved strong because both parties have accepted the conditions for conflict resolution, which comprise a recognition of conflicts and a mutual support to the 'obligation of peace' as stated in the 'Co-operation agreement'. The social partners play an authoritative role in defining law and regulation, make agreements, and create legitimacy behind the institutions. Further they play an active part as conciliators when resolving conflicts at the workplace level. The Co-operation Agreement' has developed into a type of support system that is based on collective agreements, and work as the first step of the Conflict resolution steps included in the Danish Model.

A key feature of the mediation system is that third party co-operation consultants work together in teams providing mediation services, which installs a joint problem-solving focus in mediation processes at the workplace level. This is different that training individual conflict mediators and relying on individual person's skills and approach to mediation. An interesting new development is the use of more professional process facilitators who can work based on the Danish Model and more scientific fact-based mediators that are able to provide solid data and reliable analysis of the issue of potential conflicts.

Almost all conflicts are resolved by following 'the norm' for conflict resolution, strikes and lock-outs are rarely occurring. The norm operates as a 'conflict resolution ladder', taking the conflict to the level where it can find it's resolution. Always starting as near the source of the conflict as possible. First resolution at workplace level is supported, then the social partners form a conciliation committee or if not solved at by this take up negotiations on organization level. The next steps are arbitration or finally the Labour Court. An important attribute to this process is that resolution is often gained within a matter of days, even if the Labour Court is involved. This has kept the costs of conflicts to a minimum. The extensive activities of the social partners in the conflict resolution process is also an important tool in an ongoing fine-tuning and adjustment of the collective agreements and the regulation, which preserve the relevance and the applicability of the specific agreements and of the conflict resolution system.

One thing that can impact this system is if the system is threatened from above. Meaning if politicians decide to interfere with the system to regulate a conflict situation. This can create a negative trickle-down effect in the system, in which co-operative institutions and workplace is not given the opportunity to sit down together to share and explain their views to each other about the nature of the problem and how they think it might be resolved.

The Danish model is under pressure from globalization, new sectors with few or no traditions for unionization and political criticism from right wing parties. But so far Labour Unions as well as Employers Organizations have little doubt of the efficiency and the ability of the model to secure a stable Labour market. Currently we even find that new forms of workplace-oriented support are being developed. If the social partners keep up their competences to fast and relevant conflict resolution the model will sustain. However, improving social dialogue an mediation skills and bringing the Danish Model into the future is an ongoing challenge.

References

Andersen, S. K., & Mailand, M. (2005). *The Danish flexicurity model. The role of the collective bargaining system*. Denmark: Employment Relations Research Centre, Department of Sociology, University of Copenhagen.

Blanplain, R. (2007). *Decentralizing industrial relations and the role of labor unions and employee representatives*. Kluwer Law International.

Danmark Statistik. (2018). *Statistics Denmark*. Retrieved from: http://www.dst.dk/da/Statistik/emner/erhvervslivet-paa-tvaers.

Jensen, C. S. (2012). *Industrial relations in Denmark: From conflict-based consensus to consensus-based conflict*. Copenhagen, Denmark: DJØF Publishing.

Jensen, C. S., Madsen, J. S., & Due, J. (1993). *Towards a European IR-system? The Implications of the Maastricht Treaty for Danish industrial relations*. Paper presented at the Third Biennial Conference of the European Community Studies Association (ECSA). Department of Cultural Sociology, FAOS, Industrial Relation Research Group. Copenhagen, Denmark.

Limborg, J. H., Albertsen, K., & Navrbjerg, S. (2014). m.fl.: Psykisk arbejdsmiljø og samarbejdssystemet inden for LO området. LO-dokumentation nr. 1/2014.

Mailand, M. (2009). *Flexicurity and industrial relations*. European Observatory of Working Life. EurWork.

Nationale Arbeidsraad. (1968). *Wet van 5 December 1968 betreffende de collectieve arbeidsovereenkomsten en de paritaire comités*. Retrieved from Nationale Arbeidsraad: http://www.cnt-nar.be/DOC-DIVERS/Wet-Loi-05.12.1968.pdf.

Navrbjerg, S. E., & Larsen, T. P. (2014) *Dig og den danske model* (You and the Danish Model—A handbook for shop stewards). FIU.

Salomon, M. (2000). *Industrial relations: Theory and practice*. Upper Saddle River, NJ: Prentice Hall.

Samarbejdsnævnet [Coperation Board]. (2006). *Co-operation Agreement 2006*. Copenhagen, Denmark: The Confederation of Danish Employers and the Danish Confederation of Trade Unions.

Scheuer, S. (1998). Denmark: A less regulated model. In A. Ferner & R. Hyman (Eds.), *Changing industrial relations in Europe*. Blackwell: London.

The Danish Labour Court. (2006a). *Introduction to the Danish Labour Court.* Retrieved from: http://www.arbejdsretten.dk/generelt/labour-court.aspx.

The Danish Labour Court (2006b). *Regler for behandling af faglig strid.* Retrieved from: http://www.arbejdsretten.dk/arbejdsretten/regler/normen.aspx.

Whalen, C. (2008). *New directions in the study of work and employment: Revitalizing industrial relations as an academic enterprise*. Edward Elgar Publishing.

Chapter 5
Mediation and Conciliation in Collective Labor Conflicts in Estonia

Mare Teichmann

The Case

27 employees of the HKScani Rakvere meat industry went on strike on October 17th 2017. The key issue at stake on this strike was the low wages. Negotiations between the employees and the employer were not successful. The employer accused the employees of doing an illegal strike, considering it didn't follow the Estonian law prescribes and there was not even a union in the company. The next day, the company informed that the strike was over. Three employees who organized the strike were fired. A head of HKScani Estonia promised that they would start negotiations on working conditions and wages. The next day, the strike promoters requested the Public Conciliator to solve the labor dispute. The employees quickly set up a local chapter of the trade union, which by October 24th had already increased its membership to 30 members. At the beginning of November, a meeting between representatives of the trade union and the management took place, in order to try to reach an agreement regarding the salaries. This did not happen. According to the Public Conciliator, management and employee representatives had often met to negotiate, and HKScani's management had previously informed her that they would do everything to resolve the conflict as quickly as possible.

"I am also disappointed with yesterday's results", the national mediator acknowledged Meelis Virkebau (Public Conciliator from 2017 until 2022) to a news portal on 7th of November 2017, adding that he was not able to foresee such a move. "If one party says that the salary needs to be raised by 50% and the other party says zero per cent, and neither side gives up, they will never reach an agreement", said Virkebau (November 7th, 2017).

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The employees started an untimely strike again on December 14th, 2017, where 3% of the employees joined the strike, and 90 of the 785 employees are members of the trade union in the company. The Industrial and Metal Workers' Trade Union (IMTAL) led the strike and the Estonian Trade Union Confederation (EAKL) supported it. A meeting was held between the board of HKSCani Estonia (the trade union of the company) and the Public Conciliator, which resulted in the closure of the conciliation process, since the parties were not ready to compromise. The strike lasted several months, without any progress.

In conclusion, "The labor conflict in the Rakvere company was caused by the lack of professionalism of the managers. Employees are not compensated enough, they have not been treated well enough and their wishes have not been taken into account. No matter how much you raise the wage, you cannot compensate the negative attitude with money", said national mediator Meelis Virkebau (14.12.2017). Meelis Virkebau, a national mediator, highlights that it is sad to look at the Rakvere company developments. His suggestion has been to raise the salaries about 16–20%.

He is willing to continue negotiations only if the parties are ready to come closer to each other, even if only slightly. In mid-April 2018, the employees decided to stop the strike and return to work. The trade union points out that many problems have not yet been solved.

5.1 Introduction

In 2000 the Trade Union Law was adopted, which guarantees the right to organize unions. Union density is low in Estonia being around 10% (OECD, 2018). Only a third part of employees are covered by collective bargaining in Estonia and by far the most important level for collective bargaining is the company or organization, with unions negotiating with individual employers. However, the minimum wage is set after negotiations between the union confederations and the employers at national level.

The legislation, which came into effect in 2007, allows for the election of employee representatives both where there is a union and where there is not. Estonia has a procedure in place for there to be an appointed working environment representative in more than half (54%) of companies, in almost all (99%) companies with 250 and more employees, and in a third of companies with 5–9 employees. A work environment council operates in 60% of companies with 50–249 employees and in 90% of companies with 250 and more employees. There is a trustee in approximately 18% of companies, which is 5 percentage points more than in 2009. The general meeting of employees normally elects members of local as well as members of European bodies linked with European Works Councils and the European Company.

Employee representation on health and safety is provided through separately elected representatives, who in smaller companies act individually and in larger companies are part of a joint employer/employee committee. These representatives have the power to stop work if there is a direct threat to the employees' safety.

In fact, it is unusual in Estonia to strike. The history of strikes in Estonia is very short and there is no tradition of strikes. The right to strike is an integral part of contemporary labor law. The right to collective action in labor relations in Estonia, as the right to organize a strike, is guaranteed (Tavits, 2014). Moreover, during the past 25 years we have had four strikes, namely, in December 2003 there was an organized one-day teachers' strike demanding an 12% increase of wage; in 2004 there was a 6-days strike carried out by the Estonian Railway Drivers Union' to increase 15% of their wage; in March 2012 there was another strike of the teachers' supported by Estonian Transport and Road Workers' Trade Union; in October 2012 there was a medical doctors' and nurses' strike for higher wages and reduced workload organized by the Estonian Medical Association and the Estonian Health Care Workers Union for a wage increase. The two strikes in 2012 went on for weeks. In total, there were 10 warning strikes over an 11-year period, and the first warning strike took place in 1996 (European Foundation for the Improvement of Living and Working Conditions, 2004). Warning strikes, which can last up to one hour, have only occurred during a specific period (2002–2017) (European Foundation for the Improvement of Living and Working Conditions, 2017). On the other hand, the ban of strikes for public servants was prolonged for 15 years (Docherty & Van der Velden, 2012). Strikes are prohibited for governmental authorities and other state bodies and local governments; as well as for the Defense League, courts, and rescue service agencies.

Since 1993 labor conflicts were resolved according to the Collective Labor Dispute Resolution Act, and labor disputes were resolved based on the Individual Labor Dispute Act (valid until 31.12.2017). The new Collective Labor Dispute Resolution Act was worked out and it came in force on the 1st of January of 2018. The New Collective Labor Dispute Resolution Act regulates the procedure for the resolution of collective labor disputes and the calling and organization of strikes and lock-outs. So, the amended Act brings along considerable changes to the work of the labor dispute committee. The amendments aim to contemporize the rules of settling labor disputes in order to comply with society's expectations. However, the aim is slightly contradictory in essence. On the one hand, more specific rules are required for the more effective protection of persons' rights and it inevitably complicates the dispute resolution rules. On the other hand, there is a desire to guarantee a continually simple, fast, and cheap resolution of labor disputes in Estonia. The labor dispute committee usually consists of three persons—the chairman (a Labor Inspectorate official), a representative of employees, and a representative of the employer. The managing bodies of the central associations appoint the participants. The labor dispute committees shall begin to offer a new type of service—conciliation proceedings. In the case of the conciliation proceedings, the chairman of the labor dispute committee shall act as the sole conciliator, who proceeds with the purpose of concluding a conciliation agreement. In addition to this, collective labor disputes may be resolved in a labor dispute committee or court.

According to the Collective Labor Dispute Resolution Act, a collective labor dispute is a disagreement between an employer or an association or a federation of employers and employees or an association or a federation of employees, which arises upon the entry into, or the performance of collective agreements or the establishment of new working conditions. The parties in a collective labor dispute are an employer or an association or a federation of employers, and employees or an association or a federation of employees. Employees or an association or a federation of employees are represented by the person authorized thereby (hereinafter *representative of employees*). In Estonia, there are four types of employee representatives:

(1) Employee representative as trustee—employee who is elected at the general meeting of employees to represent the interests of the entire staff;
(2) Trade union—an association formed by employees whose main purpose is to protect the interests of its members;
(3) Work Environment Representatives—Work Environment Commissioner and Working Environment Council;
(4) According to the European Parliament directive 2009/38/EU, the representatives of employees of an EU-scale conflict are employees chosen to represent the employees of the whole company. Special laws regulate responsibilities and activities for all four different representatives.

The main task of all different employee representatives is to cooperate and to provide the knowledge and skills needed to better represent employees' interests in all spheres of the working life (Tööelu, 2017).

Our study findings demonstrate that in the very beginning i.e. in an early stage of work-related collective conflicts, employees try to resolve conflicts by using mediators within the organization. It was common to choose a mediator among the direct managers, human resources specialists or HRM, employees' representatives, trade union representatives, etc. If such "home-made mediation" process is not successful, conflicting parties choose among three legal options for work-related conflicts. The first option is to resolve the labor dispute in a Labor Dispute Committee. A labor dispute committee is an extrajudicial authority within the Labor Inspectorate that manages collective labor disputes arising from the application of a collective agreement (collective labor dispute). A labor dispute committee shall be independent and base its decisions on laws and other legislations, or international agreements binding Estonia and other regulations that govern employment relationships, including collective agreements and employment contracts. However, mainly it concerns procedures and conditions for the resolution of an individual labor dispute between an employee and an employer or some employees and employer. A labor dispute committee is active at the local inspection of the Labor Inspectorate.

Local inspectorates of the Labor Inspectorate are:

(1) the Eastern Inspectorate, whose areas of operation are the Ida-Viru County and the Lääne-Viru County—the location is Jõhvi;
(2) the South Inspectorate, whose areas of operation are the Jõgeva County, the Põlva County, the Tartu County, the Valga County, the Viljandi County and the Võru County—Tartu;

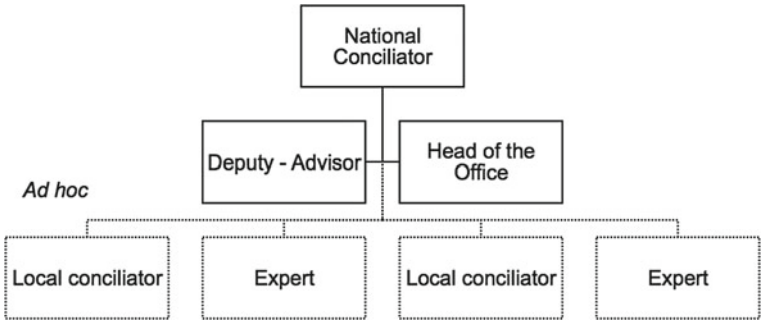

Fig. 5.1 The Public Conciliator Office

(3) the Western Inspectorate, whose areas of operation are the Hiiu county, the Saare county, the Järva county, the Lääne county, the Pärnu county and the Rapla county—location Pärnu;
(4) the Northern Inspectorate, whose area of operation are the Harju County, which is located in Tallinn. It is forbidden to lodge an application both with a labor dispute committee and a court. According to the new Collective Labor Dispute Resolution Act the Labor Dispute Committee shall be empowered to settle the collective labor disputes arising from the execution of a collective agreement.

At the request of the parties in the collective conflict and/or for resolving more serious collective labor conflicts, a Public Conciliator can be called, especially when negotiations between conflicting parties themselves within the organization fail to produce a result and there's a risk of strike. There's an additional option: to ask the Public Conciliator Institution for labor conflict mediation. Apart from the Public Conciliator, there are also local conciliators (Fig. 5.1).

The Public Conciliator in the event of a collective labor dispute (mainly in a dispute regarding the terms of a collective agreement) is an impartial expert who helps those involved in the labor dispute to reach a compromise. The limits of the competence of the Public Conciliator to reconcile employers or employers' associations or associations and employees or associations of employees (hereinafter the parties to the labor dispute). The conciliation procedure is the way and order of organizing the legal acts performed in conciliation between the parties to the labor dispute. The national conciliator shall begin the conciliation procedure with a view to identifying the causes and circumstances of the case:

(1) hear separately the positions of both parties in the labor dispute arising;
(2) requests the documents necessary for the conciliation operations of the working groups, institutions and enterprises and other organizations and officials;
(3) involve experts or other experts and officials competent to resolve the dispute for the assessment of circumstances and documents;
(4) verify and analyze the submitted documents.

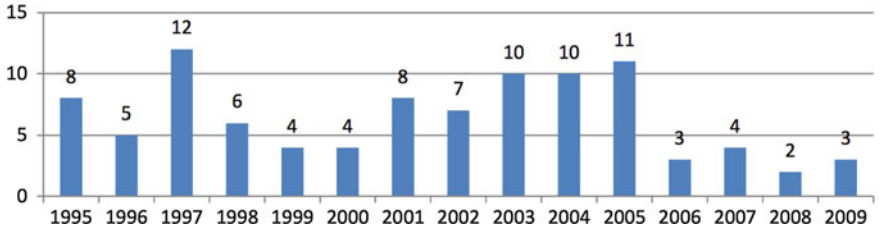

Fig. 5.2 The number of requests for conciliation submitted to the Public Conciliator. *Source* Overview of Public Conciliator Documents (Kallaste & Kraut, 2010)

There are not too many cases resolved by Public Conciliator (Fig. 5.2). For example, the former Public Conciliator Henn Pärn (2001–2003 and 2006–2017) resolved about 100 cases (Employers, 2017). Most disputes over wages and collective agreements managed by the conciliator end with a positive result. According to the Public Conciliator's Office, agreement is achieved in 80% of all cases (European Foundation for the Improvement of Living and Working Conditions, 2004).

And finally, the third option is to turn to court. There are no specialized courts in the form of employment courts in the Republic of Estonia. All labor disputes lay within the jurisdiction of general courts, but in larger county courts there is a trend towards specialization, which also includes labor disputes. In general, the number of labor disputes, including individual disputes brought to court has remained quite similar for some years. For example, in 2013, 451 labor disputes were brought to court; in 2014 the number of cases was 375; in 2015 there were 386 cases (Kohtute statistika, 2015). In respect of labor disputes, no separate court statistics are kept in the Republic of Estonia. The majority of labor disputes concern termination of the employment contract, especially due to a lay-off or failure to manage the probationary period, as well as the claims for underpaid wages/salaries or benefits.

5.2 Characteristics of the System

In the case of labor disputes it is possible to choose among three legal options for resolving work-related conflicts outside the organization: (a) to apply to the labor dispute committee, (b) to ask the Public Conciliator Institution for conflict mediation or, (c) to turn to court. Under the Estonian law, conciliation is voluntary. Despite the fact that there are so many actors, the rights of a significant number of employees in the employment relationship might not be protected enough. The empirical evidence shows that up to one fifth of the employees will not try to solve the problems that may arise in the employment relationship, and about one tenth did not know whom to turn to in order to get help for solving their work-related problems (Masso et al., 2013).

First Step: Internal Mediation.

The most common option when there is a disagreement between an employer and an employee or between employer and the group of employees, as attempts should be made to resolve the dispute by agreement of the parties. Accordingly, in the interviews the parties expressed a clear position that work-related conflicts should be resolved within the company, and bring in external help.

> The main factor hindering the use of mediation is poor knowledge of the subject by managers and also the cultural context. I think that our culture is not very susceptible to change and/or adapt the new forms of resolving company-related problems. Distrust of outsiders and connected business secret, intellectual property and data protection issues also probably have its impact.
>
> Resolving conflicts by using help of mediators is not very popular in Estonia. But nowadays wage pressure and need for better working conditions could make unions and mediators more relevant and necessary.
>
> Third party interventions are usually used in court proceedings, when the court involves specialists to help resolve a conflict between parties. As far as I am aware, professional mediation is seldom used, or if it is, then it is not widely publicized. The alternative form of dispute resolution more often used is arbitration.

It is the main reason why parties look for trustful "home-made" mediators inside the company. It is common to choose a mediator among direct managers, human resource specialists, employees' representatives, or trade union representatives. One of key disadvantage of such "home-made" mediators is that they do not have proper knowledge and skills for mediating work-related conflicts. In the study, the professional qualities of the mediators in general were evaluated as hardly satisfactory. Moreover, "home-made" mediators were sure that mediating and resolving conflicts are tasks of their job and it is not necessarily needed to have special training.

> Mediating conflicts comes within my specialization. It is closely involved with my different job tasks, where as a personnel manager, I have to sometimes find solutions to the collective problems what occur between the employees and the employers, where personnel manager is the so called middle man in between. I haven't been trained as mediator" (HR specialist, elected trustee).

Second Step: Labor Dispute Committee.

If the dispute cannot be resolved by an agreement of the parties and before turning to court, both the employer and the employee or employer and employees have the right to present the case to a Labor Dispute Committee. Labor dispute committees are formed at each local inspectorate of the Labor Inspectorate. Still, it is common understanding that these outside mediators from the Labor dispute committee or Public Chancellor Office are needed when conflicts are too serious and disagreements are related to whistleblowers from the company.

> I think that mediators are invited only when the problem is under high media pressure. Until there is no media attention, the external mediators are not very common.
>
> I know that our company does not use mediators outside the company (no need to). I know that in Estonia there have been cases when to use mediation and it had been also in media (the news). Most of conflicts are solved within organization.

In the case of individual labor disputes, the parties wishing to protect their rights can either approach a Labor dispute committee comprising the representatives of employers and employees or a court of first instance, i.e. a county court. There are no trade union representations in individual labor disputes in Estonia.

A Labor dispute committee is a pre-trial independent body, which operates pursuant to international agreements in force in Estonia, the law, administrative acts and other rules regulating employment relationships, and also collective agreements and employment contracts. A labor dispute committee is competent to resolve a dispute if the chairman of the committee and at least one representative of employees and one representative of employers participate in the work of the committee. The chairman of a labor dispute committee shall invite an equal number of representatives of employees and representatives of employers to participate in the work of the committee. In the cases provided for in this Act, the chairman of a labor dispute committee is competent to resolve a dispute alone. If the parties do not agree with the decision of a labor dispute committee, they have the right to bring a court action within 30 days of the receipt of the decision of the labor dispute committee.

The New Collective Labor Dispute Resolution Act regulates collective labor disputes in Estonia. If there's a failure to reach agreement on collective labor disputes, the employers and representatives of the employees have the right of recourse to federations of employers and federations of employees, which will, within three days after the date following receipt of an application, establish a committee on a basis of parity for resolution of a labor dispute and shall notify the Public Conciliator thereof.

Third Step: The Public Conciliation Institution.

The third option for resolving labor disputes is to involve the Public Conciliator Institution. The structure of this institution includes a Public Conciliator and local conciliators from different counties and cities. The activities of the Public Conciliator institutions are based on the Collective Labor Dispute Resolution Act, the Collective Agreement Act and the Statute of the Conciliator on Collective Labor Disputes. The Public Conciliator coordinates the activities of local conciliators and solves interdependently complicated work-related conflicts, and local conciliators deal with local collective labor disputes. The parties of the disputes related to the conclusion and performance of collective agreements have the right to consult the Public Conciliator. The Public Conciliator is a person appointed by the Government of the Republic, who shall try to identify the reasons for a labor dispute and shall propose resolutions. In case of successful negotiations the conciliation shall be documented and the performance of the agreement is binding for both parties.

The Public Conciliator institution has been operating since 1995. The Public Conciliator is an independent impartial official who helps the parties reach mutually satisfactory resolutions. The Public Conciliator shall identify the reasons for and the circumstances of a labor dispute and propose resolutions.

If there's failure to reach an agreement between a federation of employers and a federation of employees in a dispute arising from the performance of a collective agreement, the federations have the right of recourse to a labor dispute committee or

the court for the resolution of the dispute. The organization of strikes or lock-outs is prohibited as of the date of recourse to a labor dispute committee or the court. Court rulings are made in writing in Estonia. The labor dispute committee shall review an application within one month of the day following the receipt of the application. Upon applying to the court, there is no period for taking consideration of the action provided for in the law. Therefore there are also no sanctions in place. The law prescribes the principle that civil cases shall be taken in accordance to a reasonable period, but it depends on the complexity of the case and the judge's workload.

Forth Step: Going to Court.

It is prohibited to apply for a labor dispute committee in parallel to attending court. The same procedures apply for collective conflicts. The Republic of Estonia has a three-level court system, comprising courts of first instance—county courts, circuit courts, courts of appeal and the Supreme Court—the Supreme Court of Appeals. County courts have separate courthouses. The circuit court has three chambers, i.e. Civil Chamber, Criminal Chamber and Administrative Chamber. Parties don't need a representative in a court of first instance or in a court of appeal. In the Supreme Court the parties must have a representative—an attorney at law. No state fee is applied for this resolution.

Evaluation of stakeholders on the system

The assessment indicates that the system for resolving labor conflicts does not work as well as expected by users. The shortcomings of the collective labor disputes system stakeholders were considered mainly due to: the lack of training i.e. mediator does have not enough competence, poor organization of work-related conflict resolution, belief that only big companies could use outside mediators, mistrust, negative experience with using mediator in work-related conflict resolution, and negative attitude towards third party mediation that means unwillingness to bring conflict outside of organization.

> As far as I understand it is quite badly organized and structured. Many of the mediators do not have any kind of formal training.
>
> In Estonia we have Collective Labor Dispute Resolution Act to regulate collective work conflicts and there is possibility to turn to Employers' Confederation or Employees' Confederation. Unions aren't very common in Estonia and their power is quite low in society compare with other European countries.
>
> In Estonia, I think, we have very little interventions by the third party. This situation takes place sometimes only in the big companies which are also usually international companies. The trained mediators and the national conciliators don't have good reputation and popularity in Estonia. I think it is because our country has grown out from the Soviet Union background, where these kind of labor unions were not respected my people and made its mark to our memories and behavior. Also our media usually don't show the unions in a good tone.
>
> Using third party invention on a conflict situation is maybe not as popular as it could be. Related probably to distrust, general fear of internal things "getting out", low conflict management skills in general. Successful conflict management means acknowledging the difficult situation and the fact that due to a conflict one or the other side (or both sides) needs to either change or even leave.

5.3 Characteristics of the Mediators or Facilitators and the Third Party Procedures

Our study findings demonstrate that in early stage of work-related conflict, employees try to resolve conflicts by finding and using the mediators within the organization. It was common to find a mediator for work-related conflicts among direct managers, human resource specialists or HRM, employees' representatives, trade union person etc. The strength of such "home-made" mediators is trust, but the disadvantage is the lack of special training for mediating.

The boom of Alternative Dispute Resolution initiatives and regulations in Europe has been marked by a slow progress in achieving their potential, even, and apparently more so, in the countries that first implemented the European Union Directive 2008/52/EC: Portugal, Italy, France and Estonia (De Palo and Trevor, 2012). The (Mediation) Directive prompted work on the Estonian "Conciliation Act" that was passed on the 18th of November 2009. The expected increase in the use of ADR and mediation did not follow. This situation can easily be associated to the lack of a consolidated ADR culture in the country, as well as to the actual shortage of experts and/or enthusiasts that could promote mediation as the expedite, effective and non-intrusive assisted negotiation procedure that it could be (Solarte-Vasquez, 2014).

5.4 Description of the Facilitation and/or Mediation Process

According Collective Labor Dispute Resolution Act the collective labor dispute is a disagreement between an employer or an association or a federation of employers and employees or an association or a federation of employees which arises upon the entry into or the performance of collective agreements or the establishment of new working conditions.

At organizational level, a shop steward can be involved in a mediation process, but usually conflicts are resolved in Labor Dispute Commission (see Fig. 5.3).

Since the early 1990s, Estonia has created a system for the resolution of individual and collective labor disputes, involving labor dispute commissions, local conciliators, a public conciliator and the courts. In general, in case of collective labor disputes for conflicting parties there are four options to resolve their conflict with the help of mediator outside the organization. First, to turn to Labor Dispute Committee, as a party of labor conflicts, the second option is to involve Federations of Employers and Federations of Employees, third option is to ask for mediation from Public Conciliator Institution, and finally, always exists an option to turn to court.

The Public Conciliator and local conciliators have the responsibility to conciliate between parties during a labor dispute. The Public Conciliator is appointed for three years by the government on the basis of a joint agreement between the Ministry of Social Affairs and central federations of employers and trade unions. The public

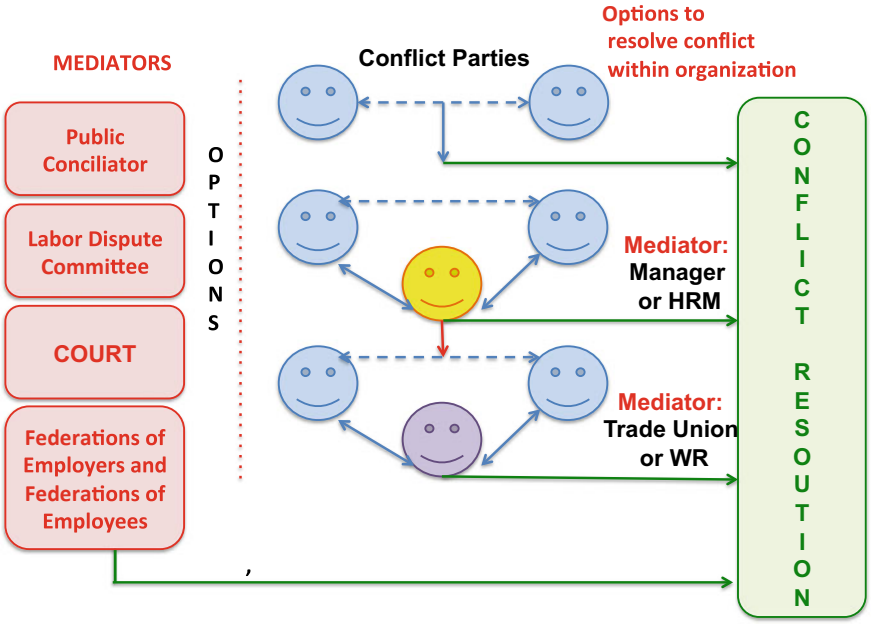

Fig. 5.3 Mediation options

conciliator appoints local conciliators for the resolution of a labor dispute in prior coordination with the local government authorities. Individual as well as collective labor disputes at organizational level are resolved primarily by the local conciliators, while labor disputes between federations of employers and unions are resolved by the Public Conciliator.

The courts may also resolve individual and collective labor disputes. Estonia has a three-tier court system: rural and city courts; district courts; and the state court (which functions as a supreme court).

For getting the third party outside the organization the employer or group of employees have to choose and apply the mediator. For example, in Labor Inspection Web page the applicant can fill an electronic application (see Fig. 5.4).

The duty of a conciliator is to effect conciliation between the parties. A conciliator should identify the reasons for and circumstances of a labor dispute and propose resolutions. Conciliators have the right to invite the parties to participate in conciliation proceedings, and to engage qualified persons or experts and competent officials in their work. Conciliation is effected through the mediation of a conciliator or on the basis of a proposal made by a conciliator. The parties must reply to the proposal made by a conciliator within three days. Parties are required to participate in conciliation proceedings, send their fully authorized representatives to participate in the conciliation proceedings and submit documents necessary for the substantive resolution of the matter by the date specified by the conciliator. The conciliation process is

Fig. 5.4 At Labor Inspection Web page the applicant can find electronic application

documented by a report, which should be signed by the representatives of the parties and the conciliator. A conciliation outcome contained in a signed report is binding on the parties and enters into force upon signature, unless a different date is agreed on. The report should also be prepared in those cases where no agreement is reached.

5.5 Effectiveness of the System

Majority of work-related conflicts are solved at the organizational level. However, half of the disagreements were started off by the employees' dissatisfaction with payment conditions, followed by disagreements with collective agreements, labor legislation, working conditions and social guarantees. Most of the disputes about wages and collective agreements which have been in the conciliators' proceedings ended with positive results.

Also majority of collective industrial disputes are resolved in local industrial dispute commissions or by local conciliators, who are aware of local problems and are able to solve the problems more objectively. In the majority of cases of industrial disputes an agreement is achieved.

However, the satisfaction with mediation process is not high.

> Third party interventions in case of conflicts, regarding work-related conflicts, are needed and have proven to be useful in my experience. At the same time it seems to me that the topic is underdeveloped in Estonia and in one case (it was about employment contract) I was part of I could say that the invited mediator failed to help the case.

5.6 Conclusions

Estonia reformed its industrial relations system during the transition period, establishing new mechanisms for resolving individual and collective industrial disputes and for regulating strikes. Estonian labor laws dealing with organized labor are in accordance with the Constitution of Estonia, ILO Conventions and other international acts.

Mediation is a form of alternative dispute resolution, a way of resolving disputes between two or more parties with concrete effects. Different laws concerning industrial relations were adopted and amended over the transition period and different institutions dealing with industrial relations were established. The main institutions dealing with conflict resolution are the industrial dispute commissions, the public conciliator and local conciliators, and the court. Industrial disputes are generally resolved through direct negotiations between employers and employees. From 1st of January 2018 the new Collective Labor Dispute Resolution Act become in force, it specified significantly how to resolve collective labor conflicts.

The main reason for relatively 'peaceful' industrial relations in Estonia could be the fact that employees are still relatively weak. As noted earlier in this chapter, a considerably body of evidence has shown that exists a strong attitude toward resolve work-related conflicts within organization, even by using unprofessional "home-made" mediators.

References

De Palo, G., & Trevor, M. B. (Eds.). (2012). *EU mediation law and practice*. OUP Oxford.

Docherty, J.C., & Van der Velden, S. (2012). *Historical Dictionary of Organized Labor.* The Scarecrow Press Inc.

Employers (2017). *New Public Conciliator Meelis Virkenbau.* Retrieved from Employers: https://www.employers.ee/uudised/meelis-virkebau/.

European Foundation for the Improvement of Living and Working Conditions (2004). *Social dialogue and conflict resolution in Estonia*. Retrieved from: http://edz.bib.uni-mannheim.de/www-edz/pdf/ef/04/ef0449en.pdf.

European Foundation for the Improvement of Living and Working Conditions (2017). *Living and working in Estonia*. Retrieved from Eurofound: https://www.eurofound.europa.eu/country/estonia.

Kallaste, E., & Kraut, L. (2010). R*iikliku lepitaja dokumentidel põhinev lepitaja tegevuse ülevaade CENTAR*. Retrieved from: http://www.centar.ee/uus/wpcontent/uploads/2011/03/Riikliku_lepitaja_dok_analyysi_raport.pdf.

Kohtute statistika. (2015). Retrieved January 20, 2019, from Eesti kohtud: https://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/i_ja_ii_astme_kohtute_2015.a_menetlusstatistika.pdf.

Masso, M., Järve, J., Nurmela, K., Anspal, S., Räis, M.L., Uudeküll, K., & Osila, L. (2013). *Töölepingu seaduse uuring*. Retrived from Poliitikauuringute Keskus Praxis: http://www.praxis.ee/wp-content/uploads/2014/03/2013-Toolepingu-seaduse-uuring.pdf.

OECD (2018). *Trade Unions: Union members and employees*. Retrieved from OECD Employment and Labor Market Statistics: http://dx.doi.org/10.1787/data-00323-en.

Solarte-Vasquez, M. C. (2014). Reflections on the Concrete Application of Principles of Internet Governance and the Networked Information Society in the European Union Institutionalization Process of Alternative Dispute Resolution Methods. In *Regulating eTechnologies in the European Union* (pp. 251–283). Springer, Cham.

Tavits, G. (2014). The Right to Collective Action in Labor Relations in Estonia: Is the Right to Organise a Strike Guaranteed? *Juridica, 21,* 281–310.

Tööelu (2017). *Representing employees.* Retrieved from: http://www.tooelu.ee/en/Employee/Working-relations/Representing-Employees-and-Collective-Working-Relationships/Representing-employees.

Chapter 6
Mediation and Conciliation in Collective Labor Conflicts in France

Alan Jenkins, Christian Thuderoz and Aurélien Colson

The Case

At the Pont de Chaume Clinic in Toulouse, towards the end of 2015, 130 employees went on strike for 51 days for better working conditions and better pay. Two mediators intervened in order to revive negotiations: Pierre G. from the local labor administration and Michel S. an independent lawyer and mediator. In an interview for the local newspaper Michel S. stated—*"We need to consider much more the possibility of associating independent mediators like myself with local representatives of the labor administration like Pierre, who also plays a mediation role (through his conciliation activities). That would give us different perspectives which would be complementary and mutually enriching; in addition we could profit from the rich networks and resources of the state"*.

Here we find certain typical features of the French recourse to mediation: it is usually brought in to tackle long declared conflicts between parties whose relationship is often oppositional and confrontational, with a history of poor negotiation and little compromise. The local labor administration (often work inspectors) is usually involved in some capacity, but a fourth actor is emerging, apart from the state, unions and management—the independent mediator, a member of a promising but as yet unstructured professional community.

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6.1 Characteristics of the System

Collective conflict: definition and meaning in France

Our study concerns both (what are called in French) "conflits collectifs de travail", such as strikes, with their repertoire of symbols and ritual actions, and "conflits collectifs *au* travail" which can concern a whole range of management—employee tensions and hostilities in the workplace. Study of the first type of conflict has traditionally been linked to that of the unions and the "workers movement" of course. Study of the second "horizontal" type of conflict, where neither top management nor unions may be involved, is relatively recent in France and requires a different conceptual tool box to the first—there is a limited range of material on these subjects in French, as Sainsaulieu (2017) notes.

When questions of honour, status, discrimination or recognition (for example) underlie organizational conflicts, or become involved in them, then their resolution will often be slow and probably painful for the parties. Some form of mediation may well be essential to the process. In France "classical" union-management conflicts are usually handled, if a third party is needed, negotiation failing, by a local labor administration and by local "Inspecteurs du travail" (work inspectors): this is called a process of *conciliation* (see below). Our study concerns both types of conflict and their associated processes or regulation and resolution. But whether they are "vertical" or "horizontal", the same elements are involved: a *space of conflict*, where each actor chooses their enemy and rejects them as a "partner"; a *dynamic of conflict*, which can become chronic, in which the parties become victims of what they have initiated; *facilitating conditions* which maintain the dynamic by preventing pragmatic compromise, and finally *positive conflict functions*, which actually help the emergence of renewed relationships from within discord.

Collective conflicts in France: fewer in number, but more diverse in form

In recent years collective conflicts have both fallen in number and been transformed in nature. The decline in recourse to the *strike* is spectacular: in 1976 more than 4 million days of work were lost to them, in 1986 500,000, in 2006 110,000 and in 2016 only 60,000.[1] In 2015 only 0.2% of French firms of fewer than 50 employees experienced a strike; a little more than 3% in those of 200 employees, but 30% of companies of more than 500 employees. These differences can be correlated with union presence—88% of firms experiencing at least one strike in 2015 had at least one union representative, and 92% of those same firms were undertaking collective bargaining. There is nothing surprising about that—union presence is greater in bigger firms, firms where collective bargaining is most dynamic.[2]

[1] See *Dares-résultats*, No. 65, October 2017: http://dares.travail-emploi.gouv.fr/IMG/pdf/2017-065.pdf.

[2] It is worth remembering that while only 11% of employees in France are union members 50% vote in union elections in their respective organizations (see Colson, Elgoibar, & Marchi, 2015; Dares, 2013).

The "repertoire of collective action" (Tilly, 1986) has become enriched by new forms of protest that complement the older ones, still used periodically (and often ritualistically). So many forms of conflict action can co-exist: short strikes at "strategic" junctures for the firm, individual stoppages, absenteeism, refusal to work overtime, slow down and work-to-rule, participation in national and local demonstrations, signature of petitions, and use of social media and broader critiques of management attitudes and behavior in blogs and other media.

However on the management side much of this seems now to be better anticipated and handled. Going from "early warning" or "alert" systems (used much in the French transport sector), to better use of formal strike warnings ("préavis de grève") in the public sector, to better consultation of works councils and other organisms of representation. Also, there is a tendency to more informal meetings between management and employee representatives to defuse tension and stress, to creating a "Joint employer-union regional committee" in order to help dialogue in small and medium-sized firms, or a "Local agency supporting social dialogue" in each French county. These systems were all implemented during 2017.

The French tradition of collective bargaining and negotiation

Anticipating somewhat, we can say that there is no structured *mediation "system",* as such, in France. There is certainly an *industrial relations* (IR) system of some complexity and inertia in the country and, we would argue, it is the weight of this inertia that in part conditions approaches to mediation, making mediation *marginal*. In this we confirm the conclusions of other researchers like Teissier (2014). This marginality can be partly understood by examining the norms defining the traditional methods of collective conflict management in France—specifically those impacting on *patterns of negotiation*. As Moore (1996) and others have argued, mediation is essentially "an extension or elaboration of the negotiation process".

Despite a seemingly voluminous and intensive negotiation activity at the level of both sector (the "branche") and organization, reflected in the available annual statistics[3] the multiple efforts of successive governments to make collective negotiations *qualitatively richer*, usually through both exhortation and law, have had limited success. In addition, extensive innovation has not come from the actual negotiation experiences of employers and unions "on the ground". A somewhat inert system, inflexible and resistant to change, has been the result. This is one of the central points made by Combrexelle (2015) in his report to the Prime Minister.

In the French tradition negotiation at the sector level has always played a crucial intermediate role in a pyramid of regulation which features, at the apex, a voluminous Labor Code of nearly 3000 pages and, at the bottom, enterprise or organizational agreements and finally, the work contract of the employee. Sector level negotiations have been crucial in the fixing of minima for employees in the associated firms, concerning issues such as wages, training, pensions and retirement provisions. Crucially, a principle of prioritization has governed the relations between these levels (e.g.: the

[3]Direction générale du travail, DGT/DARES (2013 and 2016).

requirements of an agreement at organizational level can legally override those at sector level *only* if they are more favorable for the employee).

It is worth mentioning that 95% of French employees are covered by such agreements but that this high number is related to the fact that when an agreement is reached it will apply to *all* employees in the sector and not just those who are members of the main union signing the accord. A second important point is the sheer complexity and diversity of the architecture and activity of sectors in France, one largely considered in need of reform. The country includes 700 sectors and almost one third of these have not ratified a collective agreement in the last ten years.

The role of the state and the law: inertial?

Without enumerating in detail the successive legal changes enacted since 1982, what have they contributed, overall, to the French IR system and French collective negotiations? Essentially, the greater autonomy accorded to company agreements mentioned earlier has been complemented by three shifts in the law: firstly, more flexibility in the French Labor Code concerning the negotiation of working time; secondly, in the area of employment, the reinforcement of the negotiation of manpower planning, Sunday working, sexual discrimination, contracts between generations, etc.; and thirdly, reorganizing and rationalizing the different obligations of the social partners to negotiate at the organizational level.

The rising density of the Labor Code has generated a kind of "stacking up" of obligations to negotiate, with the perverse result that not only are simplicity and clarity lost, but also the available room for relatively free dialogue and flexible negotiation is actually reduced. Dialogue is saturated by obligations such that the actors involved in negotiation do not appropriate for themselves, openly and voluntarily, the mechanisms and opportunities the state and law are trying to make available. Negotiating can become seen as a purely formal administrative necessity, one among many, that takes employers and employees away from the essential—getting the day-to-day work done in the organization. Arguably this saturation has had the long term effect of framing expectations, regarding negotiation itself as an activity, in a particular way. As Combrexelle (2015) puts it:

> One of the main difficulties lies in the way in which the actors get involved, and not just the unions but companies as well, interpret and undertake collective negotiations. That is to say, *how far they see such negotiation as useful, equitable and efficient and how much they use the resources that the law offers them*. (p. 47, our emphasis).

The "culture of negotiation" and patterns of interaction

In 2018 the verdict of many commentators on *patterns* of negotiation in the French industrial relations system is harsh, highlighting three problems which seem to have remained constant (and perhaps to have deepened) across the decades.

Firstly, there is the issue of how much the French system—in its fundamental nature and despite different state reforms—has actually encouraged and *facilitated* negotiation in companies in the different strata of the economy. Combrexelle's view is particularly strong: in the largest firms on the stock exchange (the CAC 40), collective negotiations have become marginal in importance to top deciders, and largely

the responsibility of specialized legal counsel and human resources personnel whose influence on, and involvement in, strategy and key decisions has never been substantial. Secondly, in small to medium-sized firms there is a triple problem—negotiation processes seem too long for effective decision-making, the law surrounding negotiation is too dense and complex, and thirdly, agreements signed are unstable in law and open to litigation. As for very small firms, their experience of the previous problems is even worse because of the lack of any legitimate employee representation and negotiation beyond the direct one-to-one relations between managers and employees that exist in any small concern.

The second issue concerns the mutual perceptions of employers and unions of each other's *skills* (and thus of their respective pertinence and utility as a negotiation partner) and the third, the crucial issue of mutual *trust*. We can argue that only when skill and trust perceptions of the principal actors improve will dialogue (and by implication negotiation practices) become more constructive (Euwema et al., 2015). Evidence regarding France in this work suggests that HR and line managers perceive employee and union representatives as relatively poor in the types of skills that they would wish to see in a viable and credible negotiating partner, one able to bring constructive and innovative problem-solving capabilities to the table and negotiate agreements that help the firm compete as well as benefit its employees (Colson, Elgoibar, & Marchi, 2015). Employee representatives are also seen as overly partisan and ideological in perspective, leading to predictable and rigid negotiating positions that exclude the kind of flexibility, openness and perceived integrity needed to *build a vital minimum of trust* at the negotiating table, a pre-condition for cooperation and joint value creation.

On the other side, unions and their representatives often accuse managers of authoritarian and high-handed practices, of being unwilling to share company and strategic information, of hypocrisy and deception, along with having "strategic incompetence" in areas vital for the survival of the firm and for the guaranteeing of stable employment for workers.

The result is negotiation processes and practices which are weak when they could be strong, inertial instead of dynamic. Negotiation in the IR system in France is, in this view, often seen as a rather empty, formal and ritualistic obligation.

6.2 Mediation in France: From the Legal Framework to the Emergence of a Mediation Market

The legal framework concerning the role of third parties in labor disputes

The French Labor Code refers to three legal mechanisms (in Laws L.2522-1, L.2523-1 and L.2524-1): conciliation, mediation and arbitration (Clark, Contrepois, & Jefferys, 2012).

- The *conciliation* procedure can be freely chosen by the parties in conflict. It is initiated and led by the Work inspector in whose jurisdiction the company operates.

It can also be proposed by a joint commission (sectorial, regional or national) composed of representatives of employers, employees, and the state, in equal numbers. The *mediation pr*ocedure can be initiated either by the Chair of the conciliation commission, who encourages the parties to appoint a mediator, or (as is often the case) by the administrative authorities (at national, regional or county level, as the situation demands) following a written request from the parties, stating their reasons.

- *An arbitrator* is chosen by the parties involved in the dispute, or under the terms agreed by the parties. Arbitral awards should be explained and should not be subject to any other appeal except one before the *Supreme Court of Arbitration*.

Conciliation was first enshrined in law on the 27th December 1892; it established the opportunity for opposed parties to refer to a local conciliating magistrate within three days. The goal was to "anticipate or attenuate conflicts between capital and labor and, above all, to avoid and shorten strikes". However, the procedure was in fact little used.

The frequent parliamentary debates surrounding these laws come back time and again to the fact that, over a very long period (1892–1982), conciliation commissions were rarely used (despite a legal obligation) and few conflicts went into mediation. What are the reasons for that? Firstly, some conflicting parties seem to have been afraid of the implications of resolution in the presence of a third party (magistrate or prefect); and employers were concerned about making concessions to strikers during conciliation that they had resolutely rejected during the entire strike period. Further, while conciliation/mediation might have been seen as appropriate for resolving conflicts of interest, conflicts of rights (as in the interpretation of conventional, legal or normative clauses) were seen as ill-suited to such intervention. The relevant parliamentary debates reveal concern that mediation/conciliation rulings would become jurisprudence and thus compete with the legal interpretations and judgements of tribunals. Added to this was the fear that mediators would become the real architects of collective agreements at the level of sector or firm, thus diminishing the "private co-legislator" powers of the parties in conflict.

A growing mediation market

Many indicators of the rise in use of mediation *in the workplace* (since around 1990) are available. Firstly, the growing number of practitioners, of mediation networks and associations, and of training programs (public/university or private); secondly, the development of debate and controversy in this mediation milieu often dealing with issues of professional competence and qualification; thirdly, the gradual structuring of these mediator networks, on the slow path to institutionalization and professionalization.

This rise has been pushed by three intertwined ideological, institutional and socio-economic vectors: firstly a humanist ethos, promoting an ethic of empathy, non-violence and social harmony, of cooperation rather than competition (the "empowerment" of individuals and groups is a key theme here (Faget, 2010)). The second factor is an institutional drive, articulated by the state, judicial and local authorities,

who have seen in mediation a practical solution to the increasing costs and delays of litigation and the habitual recourse to tribunals for the management of conflicts (Vert, 2014). Finally there is a private service/market response from consultancy and mediation professionals, making themselves available to handle, for a price, the complexities of inter-group tension in pluralistic societies. This third phenomenon will be addressed now.

Why should we speak of a "market" for mediation in the area of collective conflict regulation in France? Because a supply and demand for mediation services, and their "sale and consumption", clearly exists in this country and this space for exchange needs to be understood using the usual socio-economic tools. This is important given the high level of rhetoric and ideology surrounding the promotion and use of mediation in France.

Three shifts lay behind the expansion of mediation *in the workplace and in organizations*: a search for alternatives to litigation, a need for professionalization and a quest for appropriate methodology. Back in the 1990s, the first mediators in France were essentially legal personnel, lawyers above all, just as the first *theoreticians* of the practice were university law academics with both an interdisciplinary orientation and a strong motivation to give greater voice and power to the parties involved in conflicts. Hence the promotion of a certain "justice douce", to use the term of Jean-Pierre Bonafé-Schmitt (1992), one of the pioneers of mediation in France, giving priority not to abstract rules and norms, but to a negotiated resolution of conflict starting from a recognition of the needs of the parties, and to a rebuilding of their relationship on a solid basis. This was understood as not just "alternative dispute resolution" (ADR), avoiding the courts, but more ambitiously as social reconstruction, changing socialization processes and the "spaces" of social cooperation and collaboration.

Conflict *in the workplace* was one of the later domains to be impacted by the trend, as Le Flanchec and Rojot note in 2009: "Despite the existence of certain procedures allowing the use of mediation and arbitration for work conflicts, not only is its use in France weak judicially, but it is poorly developed in companies". As these authors document, some of the first processes for "internal mediation" were experimented with in the SFR-Cégétel Group starting in 2002, the fruit of a company collective agreement. Other firms and administrations would follow. Today most of the big public companies in France (La Poste, EDF, SNCF, etc.) have an internal mediator and an ad hoc mediation service.

A market which is segmented and scattered

The mediation market is split between sectors and sub-sectors of activity with skills built in one area of specialization often difficult to transmit to another. When the actors and conceptual frameworks involved in conflicts change then mediation practices can be difficult to transfer in any meaningful and effective manner. The scattered nature of the market (similar to that for "organizational consultancy" in areas like change management) is also evident: in France there is a myriad of mediation firms, networks and structures, often built around founding figures or a favored mediation training method and "philosophy". Their size and approach are highly variable

and differentiated, and interaction between them has no clear discernible pattern, nationally. However, in one or two geographical areas (notably the cities of Lyon and Grenoble) some cooperation and mutual learning across firms and networks has developed, although it seems fragile and uncertain.

In fact there seem to be two "sub-markets" here—firstly a *market with a supply of independent producers* usually working in small networks and structures[4] (grouping a few mediators but all concerned to conserve their autonomy) and secondly a *market of associations or small organizations*, many run according to the French governance law of "Loi 1901". Some structures are hybrids, like the ANM (*Association nationale des médiateurs*) which sees itself as "a place for exchanges, training and professional development" providing its members with professional and technical support but also as a "platform able to supply to any given client a mediator with recognized skills and professional independence".

Conflicts between individuals at work, between groups there, and between management, labor and their representatives are all situations for which mediator help may be sought, but the dominant role of the third party in each of these will be different.

For the first type of conflict the mediator will usually be a member of an organizational hierarchy, such as a department head or an employee representative, charged with managing the dispute because of their status, experience and personal qualities. They mediate for many different reasons, from their belief in a role of independent problem solver, to their hope of benefits in some form, for themselves (or their group) or the organization as a whole.

The second type of conflict, involving a number of individuals, usually entails (after internal failure) a top manager or HR director calling in an external private mediator, found through a social network or recommended by a professional association they know. The choice of this third party depends on the proposed methodology, the personal aura, the reputation of the network s/he belongs to, etc. That market is expanding, even though techniques of collective mediation are under-developed—all of our interviewees stressed that a collective mediation clearly cannot be the sum of individual ones and that, faced with groups and group emotionality, special methods are required (such as co-mediation).

The resolution of the final type of conflict (of which the strike is the "archetype") is in France often dominated by the *conciliation* work of the work inspector covering the organization and its sector. Much of this social regulation thus escapes the domain of private mediators. There are two reasons here. One is the institutional role of the Inspecteurs, enshrined in labor law; and the other is the highly significant fact that this intervention/conciliation is *free* to the company and without formal time limit, unless another actor with appropriate formal authority (such as a local *Prefet*) intervenes to require an external mediator to help resolve the dispute.

[4]For example the RME (*Réseau des médiateurs d'entreprise*) sees itself as a "network for analysis and development of practices for the promotion of mediation in companies, as well as for the development of its members" https://www.mediateurs.fr/.

6.3 Three Types of Mediator Role

The "occasional mediators": artisans of day-to-day conflict management

This type of mediator is largely unknown, but actually an important figure in maintaining everyday cooperation and calm in the firm. Whether s/he is a union representative, a department head or a respected senior employee, such individuals play a mediating role. Their action is part and parcel of the fabric of social relationships in the organization, unlike the "classical" mediator whose effectiveness depends on neutrality and distance from them. The former, thanks to assets like status, charisma and experience can promote reconciliation and bring to light convergences beneath differences of opinion.

The private sector mediators/consultants

Here we can distinguish three types of private sector mediations, if we look at them from the point of view of the client and his/her demands.

- "Transaction mediation", called in French texts *"médiation conventionnelle"*, where the parties to a conflict turn to a freely chosen third party to obtain a mutually acceptable agreement. This will be an expert, academic or consultant whose task is to help the parties negotiate together and end litigation.
- "Resolution mediation", called in France *"médiation judiciaire"* (or *"médiation contrainte"* by many of our interviewees). This is demanded by the state, locally or nationally, and the goal here is not to "accompany" the parties but to resolve the conflict "hic et nunc", without further legal proceedings.
- "Regulation mediation", deployed over the long term, a kind of mix between collective coaching and change management. The goal here is to maintain the momentum of an organizational change process.

Mediator-conciliators: work inspectors between control and "wait-and-see" conciliation

The intervention of work inspectors in collective conflicts in France is paradoxical—it is both widespread and negligible in overall impact. It is *widespread* because the inspectors have a quite intimate knowledge of the firms under their jurisdiction (*"When you practice mediation in a company the process is broadly the same as for other settings; however, I think it is necessary to have quite detailed knowledge of the organization itself"*, Interview) and so certain conflicts are managed in the offices of the work inspection.

The report of the DGT on the activities of inspectors in 2015[5] suggests that their conciliation role is important but not really fully reflected in the statistics compiled. Such acts of conciliation are said to be "numerous, effective and very beneficial for

[5] *L'inspection du travail en France en 2015*, DGT, Ministère du Travail. Paris: La Documentation française, 2016.

the functioning of the companies concerned". Conciliation is "ad hoc and unplanned very often, case-by-case work in which inspectors adapt to local conditions" (p. 146).

Yet at the same time we can say that conciliation is rather *negligible* when counted within the other responsibilities of the inspectors. The DGT report admits that each year since 2010 only 1% of the time of work inspectors is devoted to that activity while 51% is devoted to company visits and 43% to documentary analysis. In 2015 900 conciliations were carried out by Inspectors, but that represents only 3 interventions per working day during a given year, for the whole of France.

Work inspectors seem to intervene, usually, only after being solicited by the parties, this making impossible important preparatory work in conflict *prevention*. The DGT report also adds a sociologically interesting point—when a collective conflict is threatening, or actually breaks out, inspectors usually allow the power struggle between the actors to unfold. In the case of intense or publicly visible conflicts they may operate as a small group. They are said to intervene rarely of their own initiative but wait to be called upon to help with negotiation or to find a solution. Discretion is one of their major obligations: they operate "behind the scenes".

Overall, the DGT report sends a *contradictory* message about the Inspectors' work of conciliation—on the one hand it is called "important and substantial" while being unknown to the public, but on the other hand no examples or analyses at all of such work are provided in the document.

6.4 Debate in the French Mediation Community

Building on the data from our interviews, we must raise the issue of rift and disagreement, of *dispute*, within the French community of mediators. These are at times *controversies*, debates whose arguments and counter-arguments can be traced, but at others simple *differences*, either of point of view regarding method and/or practice. Identifying and analyzing these disputes is useful because, beyond the calm, neutral and conventional mediator discourse of self-promotion one finds in France, they reveal in part the state and structure of the field of mediation. This is also, of course, *a struggle over the legitimacy of mediation* in a specific institutional context which is already occupied by other actors with claims to do mediation or conciliation (organizational and industrial relations consultants, work inspectors, etc.). As one interviewed mediator said: *"Many combine and confuse coaching and mediation, the roles of coach and of mediator. That is a mistake… In addition, beware the confusion between the mediator and the organizational consultant!"*.

The French mediator community's disputes feature three major tensions and debates. Firstly, differences regarding *central goals* structure the mediator community very significantly. While mediators are generally in agreement on a certain minimum definition of what mediation actually is, that is not the case when further detail and deeper questions are brought into the picture (ROM, Rassemblement des organisatuions de la médiation, 2009).

A reading of the homepages of the main mediation web sites in France reveals a broad spectrum of views about the social functions of mediation; if for some, mediation is confined to "easing tensions in the workplace through joint problem-solving accepted by the parties" (website of the CNPM), in others much more ambitious goals are highlighted (e.g.: the rebuilding of social relations and the pursuit of projects shared between the parties). The French Ministry for Territorial Integration defines mediation as a process of "recreation and rebuilding of the social fabric", and an author like Faget (2010) sees mediation practices as "new ways of giving life to democracy, discreetly and silently".

On the other hand, the well-established network RME "Réseau des médiateurs d'entreprise" insists on the *operational* value of mediation in an organization—-foreseeing psychological and health risks, raising collective performance, reducing absenteeism and the loss of skills, managing both individual and collective conflicts and developing learning capacity for future conflict regulation.

Raise collective performance or build a harmonious community? The difference between the two is considerable, expressing two different views of mediation's central goals: mediation as tool/technique or mediation as shared project. The second view is widely held in France, with many books and articles exalting an almost metaphysical goal for the practice.

A second important controversy within the mediation community concerns *the scope and scale* of mediation interventions themselves. Here what we might call the "depth" of intervention is an issue. It stems from a practical difficulty: how can we get the disputing parties to a solid agreement without examining the deeper organizational, motivational and socio-psychological causes of their conflict? Should the mediator simply try to repair a broken relationship or go further and build a better form of coordination relation for the future? Again, can and should the mediator be a coach or organizational consultant such that his/her mission goes beyond getting agreement between two parties and forging significant organizational change?

After all, many collective conflicts are those which the given organization, with its specific resources, has failed to resolve and a third party can—with an appropriate diagnosis and with available time—bring to light what is systemic (and perhaps chronic) about them. In such a complex situation of change, simply gathering the disputing parties around a table hardly allows the mediator to understand properly and in depth what is systemic to their conflict, as Kressel (2007) notes in his discussion of the importance of what he calls "strategic mediation". Should the mediator then undertake an in-depth sociological study, or simply confront the stories of the parties, knowing that this latter reduces the likelihood of bringing valuable *new knowledge* (of themselves, the organization, etc.) to them?

Opinions on this within the French mediator community vary of course, between flat refusal and open acceptance of joint regulation and assistance. The refusals are usually founded on the idea of strict respect of a mediation mission, whose scope is agreed and formalized with the client, or on a reading of conflict as an asymmetry of interests which can be overcome through empowering the parties. At the other end of the scale, some mediators offer mediation as but one element of a broader set which

often looks like organizational consultancy and may include coaching techniques (the RME in France calls this "multi-element engineering").

As one of our interviewees insisted, *"Mediation must be seen in a general sense, with a diversity of meanings. There is "pure" mediation, but there is also assisted negotiation, conciliation, coaching and arbitration,* etc. *These tools need to be carefully combined. Conciliation is favored by HR Directors but the unions prefer mediation, so we need a range of tools. We must not remain locked into mediation as the only technique. In addition, we need to be ready to go further in helping our clients deal with change, post-mediation, if they need that help"*.

Another debate across the mediator community concerns the economics of mediation production. Should mediation be delivered according to a standardized method, reducing the risks of subjectivity and distortion, and helping experiential learning, or on the contrary should "made for measure" and customization always prevail?

Some of our mediators say they use both of these contrasting approaches but, inevitably, this opens up the issue of the quality assurance of mediation delivery. One French network, the EPMN, has tried to differentiate itself from others by a sharp criticism of their methodological approach; for the EPMN, truly professional mediation is far from the "therapies" that others propose to clients. The former is structured and rational whereas the latter is moralistic, pseudo-psychological and quasi-philosophical in basis. In contrast, other mediators interviewed insist on the need for flexibility in the use of different methods; *"to know clearly where you are going, but not always requiring fixed steps or phases to get there"*.

6.5 Conclusion: The Role of Mediation in Rendering French Conflict Resolution More Effective

To conclude, we need to consider the possibilities of the development of mediation in three distinct conflict phases.

The *Pre-conflict phase* includes those key moments when differences of points of view can become disputes, which can then mutate into conflict. When the analyst reviews the chronology of a collective conflict s/he is often intrigued by the existence of many "warning signs" that all the actors involved failed to see or to understand. To deal with this important problem there is significant "capacity building" to be done, helping all the parties to better see those danger signs and thus reduce the risk of conflict breaking out and becoming destructive. Here one thinks immediately of generalizing the kind of industrial relations early warning system that has existed in the Parisian metro organization (the RATP) since 2001. Such a system ties the parties (by a contractual obligation) to regular joint examination of "danger signals" in the social climates of different departments. Also stipulated is the right of the parties to call on a local joint commission, or on work inspectors, to set up a *preventative mediation*. Another element is the provision to the social partners of a detailed guide to "trouble shooting" disputes, designed to help them improve dialogue and to better

compare their points of view and underlying assumptions (similar in spirit to those developed by ACAS/TUC (2016) in the UK).

The *conflict itself*, if sometimes necessary, should not drag on for too long; that is a dynamic which "creates victims" and new complex psychological conditions. So, after a short period (of perhaps one week) recourse to the labor administration could be initiated, either by the parties themselves or by work inspectors. Work inspectors would not wait to be called, but react more quickly and be pro-active in proposing conciliation or mediation. This would require the in-depth training of work inspectors in specialized mediation methods, something which is at the moment sorely lacking.

One could also imagine the French labor code authorizing the parties during a conflict to appeal freely to a mediator of their own choice, and this at any time and independently of the local labor administration, so long as the mediator concerned is recognized by the state as fully qualified (and thus listed as such by the local Prefecture) (Durand, 1999). In order to reduce the likelihood of refusal from one or other of the parties, pairs of mediators (with different orientations—an ex-HR Director along with a seasoned union representative, for example) could be proposed.[6]

The techniques used by mediators of collective conflicts could also be improved—through the provision of detailed written guidelines, handbooks and texts on methodology, for example—in order to raise aggregate skill levels (Colson, Lempereur, & Salzer, 2008). Local and regional fora of exchange on cases and best practices, and examination of the statistics on conflict collated by labor administrations, could also be organized.

The effectiveness of such mediation would also probably be improved if mediators themselves went beyond "dialogue facilitation" to embrace the more technical role of *providing detailed scenarios of resolution*. While re-establishing constructive communication is important, the crucial role of helping with forms of joint regulation and cooperation in day-to-day decision-making should not be neglected.[7]

Finally, the *post-conflict* phase requires, in addition to the changes mentioned previously, a system that supports and maintains cooperative social dialogue between the social partners. This could be part of a clinical follow-up approach to the parties in conflict undertaken jointly by work inspectors and the private sector mediators involved. If this lasted an appropriate length of time it could help the parties to both heal their wounds and to reconstruct their relationship and rebuild trust (when appropriate) with the active help of third-party expertise.

What this means overall is that in our perspective, for collective conflicts in the French workplace, it will be important to think in terms of broad missions of mediation where different professionals (coaches, organizational consultants, mediators, etc.) might help the parties in different ways and at different points in their conflict trajectories. That in turn, clearly, needs to be part of a better, broader process of

[6]The system has been used with success in both Martinique and Guadelope since 2012.

[7]The ILO definition is as follows: "Mediation can be considered as a special method for conflict resolution in which (even if the conflict continues to be 'governed' by an agreement between the parties) a third party who intervenes is more deeply involved than in conciliation and can have the authority (and even the obligation) *to make formal proposals for the resolution of the conflict*". (Our emphasis) http://www.ilo.org/legacy/french/dialogue/ifpdial/llg/noframes/ch4.htm.

socialization and acculturation of employers and employees—in problem-solving dialogue, in negotiation and in mediation processes. France is at the moment, in its industrial relations reforms, moving slowly in this direction.

References

ACAS/TUC. (2016). *Mediation: A guide for trade union representatives.* London: ACAS.
Bonafé-Schmitt, J.-P. (1992). *La médiation: une justice douce*. Paris: Syros.
Clark, N., Contrepois, S., & Jefferys, S. (2012). Collective and individual alternative dispute resolution in France and Britain. *The International Journal of Human Resource Management, 23*(3), 550–566.
Colson, A., Lempereur, A., & Salzer, J. (2008). *Méthode de médiation*. Paris: Dunod.
Colson, A. Elgoibar, P., & Marchi, F. (2015). "Employee representatives in France: Employers perceptions and expectations towards improved industrial relations". In Euwema et al (Eds), 2015.
Combrexelle, J. D. (2015). *La négociation collective, le travail et l'emploi: Rapport au Premier Ministre*. Paris: France Stratégie.
Direction générale du travail, DGT/DARES. (2013 & 2016). *Bilan annuel de la négociation collective, 2012 et 2015*. Paris: La Documentation française.
Durand, T. (1999). "Histoire d'une médiation dans un conflit social: quelques implications pour le management stratégique". In Ingham, M. & Koenig, G. (Eds.), *Perspectives en management stratégique. Management*.
Euwema, M., et al. (Eds.). (2015). *Promoting Social Dialogue in European Organizations*. Heidelberg: Springer Open.
Faget, J. (2010). *Médiations: les ateliers silencieux de la démocratie.* Paris: Erès.
Inspection du travail. (2014, 2016). *L'Inspection du travail en France en 2013 et 2015*. Paris: DGT.
Moore, C. W. (1996). *The mediation process*. San Francisco: Jossey Bass.
ROM, Rassemblement des organisations de la médiation. (2009*). Code national de déontologie des médiateurs, Press Book.* Paris: ROM.
Sainsaulieu, Y. (2017). *Conflits et résistances au travail*. Paris: Presses de Sciences Po.
Teissier C. (2014). *La place des représentants élus du personnel, des pratiques référendaires et des formes de médiation dans la négociation collective d'entreprise.* Paris: Commissariat général à la stratégie et à la prospective (ASTREES/CGSP).
Tilly, C. (1986). *The Contentious French*. Harvard: Harvard University Press.
Vert, F. (2014). Médiation: mode d'emploi. *La Gazette du palais*. 14–15 November.

Chapter 7
Mediation and Conciliation of Collective Labor Conflicts in Germany

Klaus Harnack

7.1 Introduction

On December 23, 2016, the union of the German train drivers (GDL) declared, after six rounds of negotiations, the failure of the collective bargaining process and called for an arbitration. Subsequently both sides appointed one of two impartial chairpersons. The union GDL appointed the prime minister of Thüringen, Bodo Ramelow and the employers' association (Agv-MoVe), appointed the former prime minister of Brandenburg, Matthias Platzeck. Based on the basic collective agreement, which was signed by both sides in 2015, after their last negotiations, the arbitration committee needed to find an agreement within three weeks after the beginning, with the option of extra time, if both parties agree. The result of this procedure was either a wage settlement and a joined agreement, or a strike. During the arbitration, there was an obligation for peace. Formal beginning of the arbitration was the 11th January 2017 and ended on March 9, 2017, after several extensions with a binding agreement between GDL and Agv-MoVe in Berlin. The arbitration was thus successfully completed and the disputes settled. Both impartial chairpersons were neither mediators nor arbitrators in a strict sense (neither certified nor especially trained), but public people with a high public reputation that guaranteed their neutral position and their potential to reach integrative negotiation results. Although this example represents a third party supported negotiation in the field of large-scale labor conflict, this sample case remains a rare exception in Germany.

The following chapter will depict the current situation in Germany with regard to third party intervention in labor conflict. Referring to the introductory sample case, it is not obligatory in Germany to conduct a mediation or seek help of a third neutral party, if both sides cannot find a common solution and a threat of strike rises. The reason why it is not mandatory to have a third-party intervention in such situations,

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is due to the culture of collective conflict in Germany, which is shaped by the principle of collective bargaining autonomy. This autonomy is deeply anchored in the constitution and is expressed via two different mechanisms. First the Convention Collectives [Tarifverträge]—a contract between the social partners (usually unions and employers) that functions as a regulator on the higher level and second the German Works Constitution Act [Betriebsverfassungsgesetzes] that functions as a regulator within companies (the main procedures are based on article §76 Works Constitution Act ('BetrVG', 1972). Both mechanisms considerably shaped the industrial relations tradition in Germany after World War 2 and both are still the basic fundament of all collective labor actions, culture and habits.

Unions have a strong position in Germany, compared to many other countries. This is both based in labor laws, guaranteeing the position of unions and works councils, and due to the long tradition of the autonomy of partners in collective bargaining processes (Whittal, 2015). Due to this, both employees as well as employers feel empowered in negotiations, and are not used to have a third party involved in their disputes and negotiations, hence any third party, even a neutral mediator, is not very common. Some key figures from the employee side in the industry and service sector have a privileged position in their threat potential; for instance air traffic controllers, hence they do not see the necessity to seek help of a mediator.

Nevertheless, third party interventions or mediations are sometimes utilised to solve collective conflicts. The main prerequisite in order to start a third party supported negotiation process is that both parties wish to do so, which is rarely the case and there is no regulation on this issue. In principle, it could take place at any stage of the conflict process, but in practice, it is only applied, if bilateral negotiations fail and if it was part of prior agreements or consultation. In cases of third party intervention, the question who typically acts as mediator has no clear-cut answer and differs between conflicts in the public and private sector. In the private sector, these third parties (or mediators) remain largely unknown and work in the background. For instance, the German Lufthansa and the union of the pilots (Vereinigung Cockpit) have been seeking support of a mediator in 2014 after their negotiations were deadlocked, but the public was only informed several weeks later and the name of the mediator as well as the applied procedure and style remained unknown. This does not hold true for the public domain. In the past, famous people or former politicians conducted several public third party conflict interventions. For instance, Heiner Geißler (former Federal Minister) acted as an arbitrator in the case of "Stuttgart 21" and Bodo Ramelow (State Premier of Thüringen) together with Matthias Platzeck (former State Premier of Brandenburg) mediated in the case between the Deutsche Bahn and the union of the German train drivers (GDL) in 2015. These persons are not mediators in a strict sense (certified or trained), but people with a high public reputation that guarantees their neutral position and their potential to reach integrative negotiation results. Both parties organize the selection of supporting third parties. Each side has the right to make recommendations without any limitations. During the process, which is not clearly defined as an arbitration or a mediation, the recommended persons take alternating turns in supporting the parties in conflict.

Table 7.1 Development of mediation procedures and culture in Germany

Year	Events and milestones
1960–1990	Beginning of theoretical development of first extrajudicial conciliation procedures
	Broader and public discussions on alternative conflict/"Import hit from America" Mediation procedures are developed and tested (Besemer, 2001)
1992	Founding year of the Federal German Association Mediation (Bundesverband Mediation e.V.)
1998	Founding year of the German Society for Mediation[a] (Deutsche Gesellschaft für Mediation: DGM), German Society for Business-Mediation (Deutsche Gesellschaft für Mediation in der Wirtschaft), Mediation consortium of the German Lawyer's Society (Arbeitsgemeinschaft Mediation—Deutscher Anwaltsverein)
2009	Founding year of the first umbrella organisation for mediation—Deutsches Forum für Mediation DFfM e.V
2012	Mediation Act
2016	Regulation on the education and training of certified mediators
2017	First evaluation of the German Mediation Law by the German Research Institute for public administration in Speyer. This evaluation did not include mediation or arbitration for collective labor conflicts

[a]Deutsche Gesellschaft für Mediation: DGM; German Society for Business-Mediation (Deutsche Gesellschaft für Mediation in der Wirtschaft), Mediation consortium of the German Lawyer's Society (Arbeitsgemeinschaft Mediation—Deutscher Anwaltsverein)

These examples illustrate that mediation or third party support remains an exceptional instance to ease collective conflict in Germany. This holds particular true for escalation prevention. The reason for this sealed off and closed behavior is mainly due to the deeply rooted culture of two exclusive sides as well as the rather short history of mediation as a recognized professional activity in Germany (compare Table 7.1).

7.2 The Role of Strikes in Germany

Compared to other European countries, strike is not a very pronounced topic of national debates and unions do not use it extensively (see Fig. 7.1). In order to characterize the German industrial relations tradition, the term "orientated towards consensus" is probably the best way to describe the main tradition (Whittal, 2015). Most strikes are "warning strikes", with just a fraction of the total employees and with a limited duration (mostly just a single day). Concerning the distribution of strikes over the working sectors, there is tendency that the production industry reduced their strike activities and that most strikes were conducted by the service sector. Some of the interviewed experts stated: "People with customer contact are more likely to

Fig. 7.1 People in strike and strike days in Germany from 2006 to 2015 (WSI—2018)

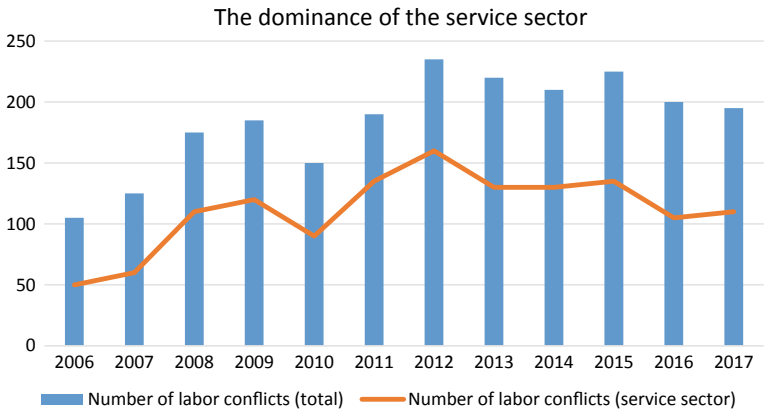

Fig. 7.2 Number of labor conflicts and the proportion of the service sector from 2006 to 2017 (WSI—2018)

seek strike"—the graphic below supports this idea (see Fig. 7.2). Due to the shielded nature of labor conflicts, it is important to notice is, that no systematic records are available on third party interventions in these conflicts.

7.3 Characteristics of the System

There are usually only two active sides in labor conflicts (employers' associations and unions). This due to the autonomy in wage bargaining, which is based on the Basic Law of the Federal Republic of Germany [Grundgesetz] Art. 9. Abs. 3:

> The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

Article 9 explicitly underlines and explains the bilateral tradition concerning the handling of conflicts—free of all interventions by governmental and state organizations, especially for the labor agreements, wages, and strikes. It is all about the tradition of free labor agreements.

Although being free of all interventions, this does not mean that support of a third party is prohibited. Depending on the conflict and parties involved, the mechanism how mediators might get involved differs. In collective labor conflicts (tariff negotiation, including issues like payment, work security and work conditions), a third party might be invited into the conflict resolution procedures, if one of the parties calls the negotiation failed (see the sample case). If the parties chose mediation as a potential way to solve their conflict, a dead-end situation in their negotiation is most often the case and the contestants have a strong interest in their future relationship. In addition, a high case complexity is one major motivator to opt for a mediation, as well as conflicts that are concerned with values rather than jurisdictional matters. Figure 7.3 illustrates the reasons for choosing a mediation or similar ADR procedures (although the survey is based on in-house conflicts, according to some interviewed experts, the underlying reasoning can be applied to collective conflicts as well). The recommendation of external persons and the initiation of the proceedings of the opposing party have increased particularly in the last ten years (PwC/EUV, 2016).

Independent of the area of application, mediation remains a voluntary process in Germany. According to the German Mediation Law (MediationsG, 2012), mediation cannot be ordered by law nor by the courts at any point before or during a court proceeding. Judges may recommend mediation, but both parties must agree in order to start a mediation process. Furthermore, there are voluntary self-commitments, like the RTMKM (Förderverein Round Table Mediation & Konfliktmanagement der Deutschen Wirtschaft e.V. 2016) in which the signing companies commit themselves in the event of a conflict with another signatory, to follow preferably alternative dispute resolution proceedings. Similar procedures are sometimes applied in collective conflicts. As described in the introductory example, the parties might sign a basic collective agreement, which allows and plans arbitration committees in case of negotiation deadlocks.

If parties agree to use the support of a third party, several databases are available in order to find a suitable third neutral party. Besides privately organised internet portals, mediation organizations provide registers and indices as an additional value to their membership services. There are several directories, categorized by region and expertise (e.g. economy, patent, families, etc.). The contact information of suitable qualified mediators can be either obtained through the indices of major mediator associations, such as the DGM, the BMWA, or the BM sometimes at the Chambers

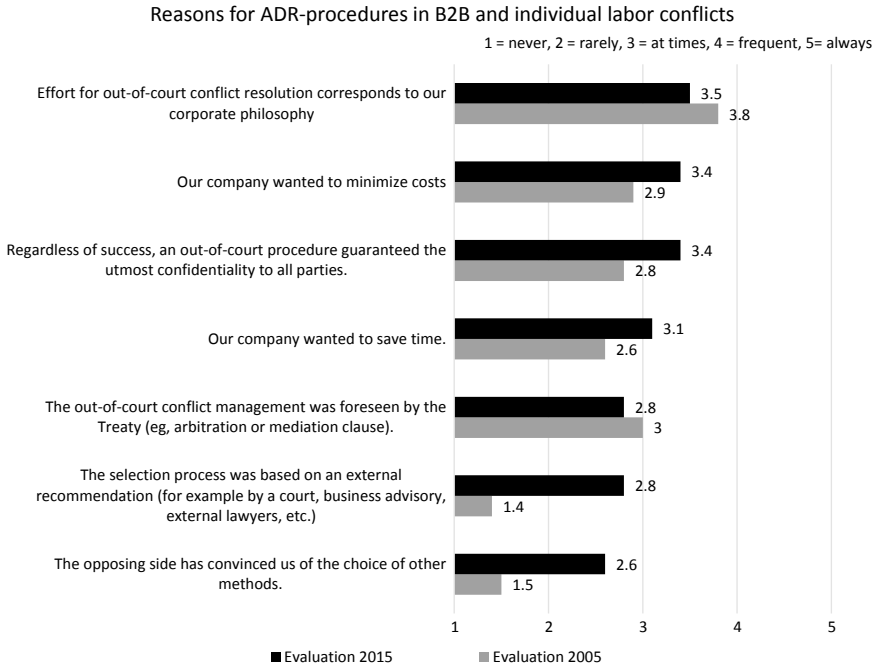

Fig. 7.3 Survey based on in-house mediations (150 companies with at least 50 employees and 32 members of RTMKM) (PwC—2016)

of Industry and Commerce, or simply by recommendations (Koschany-Rohbeck, 2015). In collective conflicts, the parties usually have a set of trusted individuals and these people become appointed, when one of the parties call the negotiation as failed. Due to the lack of research in the field of collective labor conflicts and the missing transparency of these processes, there is no clear evidence what kind of procedures are applied when third parties get involved. Also, there is a lack of data on the amount of collective conflicts in which third parties were invited, whom these were and what results were obtained. The interviews with the experts revealed that the pointed people are almost exclusively part of their personal and professional network.

7.4 Evaluation of Stakeholders on the System

Even though third-party intervention is not commonly used in collective conflicts, the basic approach—the spirit of mediation—is present behind the scenes. Several experts pointed out that the legal supporters and advisors on both sides are usually well trained in integrative negotiation. Hence, the tools of mediation are simply

used by these advisors instead of a "real mediator"—a separate and independent person. As part of the prior composition of the negotiation teams, some have the explicit role as an integrative element. These persons search for common interests and have a strict focus on the interests and resources of both sides. Even if both sides present themselves in public as very contradicting with a distributive mind-set, on the negotiation table there are integrative elements present as well. One expert said, "*They like to play the game—especially the unions—in order to justify their position and legitimize their existence*".

Concerning the legal structure, almost all experts called for improvements. For collective conflicts, several experts pointed out that there are no efforts to improve and strengthen preventive actions, because it could contradict the above-mentioned "game". Most comments were directed towards the field beyond labor conflicts. Here the use of third parties is still not yet exhausted. This is mostly due to the predominance of lawyers who seem to be not interested in a process without them and the problem was not tackled with the German mediation law nor in other pieces of legislature. When it comes to works councils, third parties could offer assistance preventing conflict escalation. There is no documented research on this third-party role, however.

Another issue that was addressed by the experts is the financial support for collective problems on the local level, like conflicts between civic association and the local governments. Here the parties cannot financially afford the support of a mediator, although it could prevent costly legal proceedings in the end.

7.5 How Many Mediators Are There in Germany?

Since a standard definition of the mediator's job-profile is difficult, a precise answer of the question is not possible, bearing in mind that until August 2016 the training of a certified mediator was not regulated by law. Nevertheless, one parameter might be suitable to establish a rough estimation: It is the number of memberships in German mediation organizations. Table 7.2 depicts all major German mediation organizations together, with an estimated number of memberships. In total, between 7000 and 9000 mediators in Germany are organized in mediation associations. The interviewed experts estimated the number of mediators that could function in collective conflicts by approx. 100.

7.6 Who Act as a Mediator in Germany?

The German Mediation Law states: A mediator is an independent and neutral person who guides the parties through the mediation without any authority to decide. The general job title is not protected, but the title "certified mediator" is protected by paragraph §5 and §6 of the German Mediation Law (MediationsG, 2012). Hence,

Table 7.2 Membership of German mediation organizations (November 2016)

Organization	Number of memberships
BMEV	More than 2500 members/mediators (BMEV, 2016)
BAFM	800 members/mediators (BAFM, 2016)
DGMW	119 members/mediators (DGMW, 2016)
BMWA	350 members/mediators (BMWA, 2016)
DFfM	Umbrella organization, including 12 organizations with in total more than 2700 members/mediators[a]
IM	350 members/mediators (IM, 2016)
DGM	600 members/mediators

[a]Berufsverband Deutscher Diplom-Pädagogen und Diplom-Pädagoginnen BDDP
Deutsche Gesellschaft für Mediation in der Wirtschaft DGMW
Deutsche Gesellschaft für Transaktionsanalyse DGTA
Europäisches Institut für Conflict Management EUCON
Contarini-Institut für Mediation an der FernUniversität in Hagen
Fördergemeinschaft Mediation DACH; Förderverein Mediation im öffentlichen Bereich FMÖB
Integrierte Mediation IM
Steinbeis-Hochschule-Berlin, Akademie für Mediation, Soziales und Recht
Steinbeis-Mediationsforum e. V. StMf (220 mediators)
Verband der Bau- und Immobilienmediatoren e. V
Verein Deutscher Patentanwälte zur Förderung der Mediation

anyone can act as a mediator and this is especially true for collective conflicts. The access requirements for the training as a certified mediator differs depending on the training institutes: Some institutes train only academics with a legal or psychological, pedagogical or social basic profession background, others are open to all occupations, but usually all require a completed professional education.

The training regulations, covered by the German Mediation Law, comprise 120 h of attendance in which different fields of knowledge and skills are trained. Federal associations offer training courses that require at least 200 h. Depending on the institution, it can be between 50 and 300 h. The ordinance on the education and training of certified mediators, issued by the Federal Ministry of Justice and Consumer Protection, also prescribes the mediators to develop steadily. Within four years (after issuing the certificate), 40 h of further training are required (Bundesministerium der Justiz für Verbraucherschutz, 2017). Even though mediation is steadily growing and developing as a professional activity in many societal fields, we notice that collective labor conflicts are hardly connected to this development and does not (yet) use the potential of qualified mediators.

7.7 Evaluation by Stakeholders of the Facilitators/Mediators and Third Party Procedures

The underlying structure and procedure in mediation in Germany clearly is different for collective labor conflicts, compared to other contexts. If a third party joins the collective labor negotiations, they try to incorporate and integrate the stance of both sides into possible solutions. The general approach of mediation that the clients need to find their own solution is not applied.

A formal agreement in the case of a mediation success is not required by law (§2. MediationsG), but it is part of the mediation culture. Many companies that have used an in-house mediation are issued a joint statement, of course only in the case of non-judicial cases. In such a case, which usually occurs between two companies, a legally binding contract is established (Diez, 2005). For collective conflicts, there are only two possible outcomes, a collective agreement, or a strike and no common document.

7.8 Is There Any Documentation on Satisfaction with the Mediation?

The Roland law report [Roland Rechtsreport] documents that roughly 50% of the general population believes that mediation is a useful tool and that about 60% of people that know about mediation, states that mediation is a potential tool to solve conflict (Institut für Demoskopie Allensbach, 2014). The "Kieler Studie" (Kaiser & Gabler, 2014) investigated the topic directly: Namely direct after the mediation procedure and one year later (See Fig. 7.4 for results).

7.9 Is There Change in the Use of Mediation?

In Germany, an increasing trend towards mediation is recognizable. A study conducted by PricewaterhouseCoopers AG and the European University Viadrina Frankfurt in 2016 compared results from a survey conducted in 2005 (182 companies) and one from 2015. Although both surveys differed slightly, a significant increase in the use of mediation procedures was observed. Figure 5 shows how the process of mediation and conciliation has increased over the past ten years (PwC/EUV, 2016).

7.10 The Use of Third Party Intervention in Work Councils

The Work Council Constitution Act [Betriebsverfassungsgesetz] rules the relationship between the employer and its employees in Germany. In addition, the act determines the basic rights of employees concerning staff-related as well as economic issues. Depending on the size of the company, a certain number of members can be send to the council, starting with one member for five permanently employed employees up to 35 members for companies between 7001 and 9000 employees with 2 additional members for each 3000 employees. It is important to notice that it is not mandatory to establish work councils. However, employees have the right to do so, and it is best practice. Generally, relations in the works council between employer and employee representatives are good, and trust in this relation is often high (Whittal, 2015), resulting in a valued cooperation at company level.

The expert interviews revealed that an increasing number of work council members are currently trained in mediation and other ADR-techniques in order to professionalize and smoothen the procedure within work councils as well as with their interacting partners. As the experts pointed out, this training is not systematic nor mandatory for either side. Similar to prior described labor related contexts, an implicit use of mediation is developing. In addition, mediators as well as other professionals are occasionally invited to structure and support the work of the work councils in order to foster collective problem solving, before these cases are taken to the labor court or rather to the "Güterichter". The employers usually initiate these procedures, because they fear that the strong propositions by the "Güterichter" might not be in favor of the company.

A unique feature of the German jurisdiction system are the so-called "Güterichter". The responsible judge can, in order to favour amicable settlements of the disputes, refer the parties for a negotiation or mediation to another judge

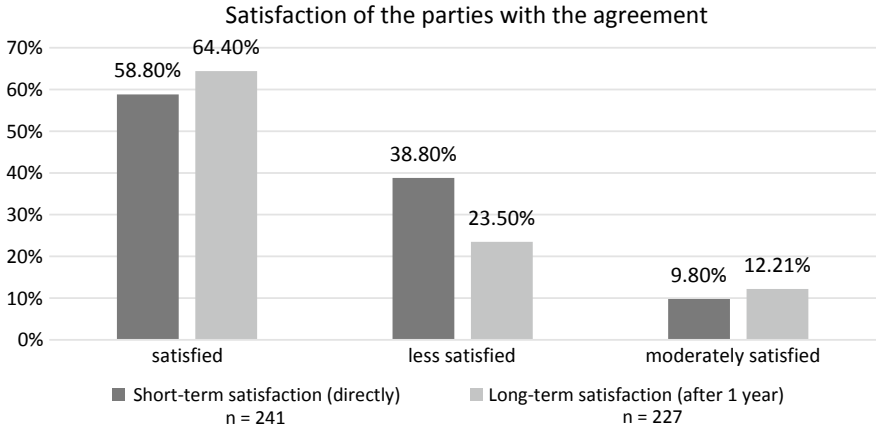

Fig. 7.4 Satisfaction of the parties with the agreement (Kaiser—2014)

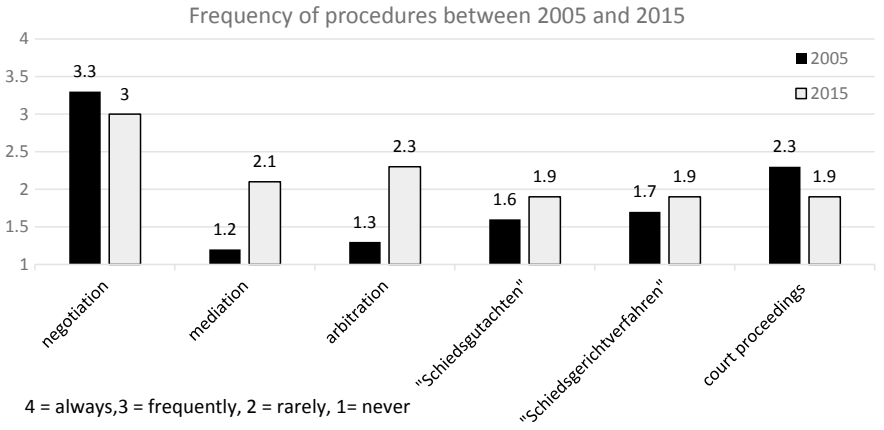

Fig. 7.5 Alternative conflict resolution procedure in 2005 and in 2015 (PwC—2016)

appointed for this purpose and not authorized to make decisions (§278 Abs. 1 ZPO). The appointed judge is not bound to a certain technique to tackle the problem, but has instead, the free procedural choice and can utilize the complete range of ADR-techniques. Analogue to the procedures in the civil justice system is the procedural approach, concerning labor conflicts. If a labor conflict escalates and the case is brought to the court, the labor courts may appoint "Güterichter" in a similar manner (compare §278(5) ZPO, §54(6) ArbGG). It is important to notice that these judges do not have to be a certified mediator.

The court may also propose to the parties a mediation or other out-of-court settlement procedure (§54a(1) ArbGG). If the parties decide to conduct a mediation or other out-of-court settlement procedure, the court orders the proceedings to be suspended. Otherwise, the court resumed the proceedings after three months, unless the parties agree that mediation or out-of-court settlement of conflicts is still ongoing (§278a ZPO, §54a ArbGG). Insofar as mediation is required to resolve conflicts in order to ensure proper and trouble-free works council work, the employer has to bear the costs (§40 Abs.1 BetrVG). Nevertheless, there are no specialized national institutions or databases that support this process. Mediators or supporting third parties can be freely chosen by the parties and are usually part of either sides' professional network.

7.11 Is There Indication of Trust or Distrust in the System and in the Quality of Mediations (Process) and Mediators?

In 2013 the Academicon ADR-Report was released, containing survey results from 589 middle to large German companies about alternative conflict resolution procedures (Academicon, 2013). It revealed that the certification of a mediator is not important for companies, but rather the perception of competence and the recommendation of others function as signal of trust. In addition, the authors state that German companies are increasingly recognizing out-of-court conflict resolution procedures as an effective method in order to save of litigation costs, to limitation of legal risks as well as a possibility for a speedy conflict resolution.

7.12 Is There at Systems Level an Evaluation of the Costs and Benefits of the Mediation System?

To the authors as well as the expert's knowledge there is no direct evaluation of the costs and benefits of the mediation system in Germany. There is a debate about the cost of conflict, but not about the positive aspects of mediation per se. There is no link between mediation and reduced strike activity. Although the trend towards alternative dispute resolution methods is increasing in Germany, this does not reflect less competition. There is hardly debate about introducing more "professional" mediators in the arena of collective labor conflicts.

Generally, the prior mentioned study in Kiel recommended better education, training and psychological counselling of mediators and lawyers. Heiko Maas, Federal Minister of Justice and Consumer Protection, said after the release of this report: „The study shows that mediation is applied in different settings throughout Germany, but it also shows that the potential still far from being fully realized." (BMJV-19.07.2017). This could be extended to collective labor conflicts certainly.

7.13 Conclusion and Suggested Improvements

In conclusion, there are several suggestions made by the experts to foster and support mediation for workplace conflicts as well as for collective conflicts. One suggestion by several experts regards the issue of strict voluntariness. In their opinion, the issue of voluntariness seems overrated and is more an obstacle, than a support for the process, and with less voluntariness more people would make use of mediation (Harnack, 2016, 2017). This accounts for all kinds of mediations.

Concerning collective conflicts, same experts stated, "Germany is trapped in its culture of bilateral negotiation" or "They want to play the game – Both sides need

to establish and strengthen their position through that game". Another emphasized the importance of more information on third party interventions and mediation in collective conflicts: "The benefits of mediation or alternative procedures are usually only seen if participants experienced at least once themselves and experienced the advantages of mediation. All experts agreed that a wider debate would foster mediation, that mediation has the potential to strengthen the social peace, but they do not recognize that such a debate is currently going on.

References

ArbGG. (2018). Retrieved 05 December 2018, from http://www.gesetze-im-internet.de/arbgg/index.html.

Academicon (Ed.). (2013). *ADR-Report 2013 zur außergerichtlichen Streitbeilegung in Unternehmen*. Norderstedt. Retrieved from http://www.academicon.net/adr-report-2013-zur-aussergerichtlichen-streitbeilegung-deutschen-unternehmen/.

Besemer, C. (2001). *Mediation: Vermittlung in Konflikten* (1.). Königsfeld: Stiftung Gewaltfreies Leben.

Betr, V. G. (1972). Retrieved 30 January 2017, from http://www.gesetze-im-internet.de/betrvg/index.html.

Bundesministerium der Justiz für Verbraucherschutz. (2017). Verordnung über die Aus-und Fortbildung von zertifizierten Mediatoren (Zertifizierte-Mediatoren-Ausbildungsverordnung-ZMediatAusbV) (2017).

Diez, H. (2005). *Werkstattbuch Mediation* (1st ed.). Köln: Centrale für Mediation: Schmidt, Otto.

Förderverein Round Table Mediation & Konfliktmanagement der Deutschen Wirtschaft e.V. (2016). Round Table Mediation und Konfliktmanagement der deutschen Wirtschaft. Retrieved 3 October 2016, from http://www.rtmkm.de/.

Harnack, K. (2016). A psychological toolbox for mediators: From theory and research to best practices. In K. Bollen, M. Euwema, & L. Munduate (Eds.), *Advancing workplace mediation through integration of theory and practice* (pp. 55–66). Springer International Publishing. https://doi.org/10.1007/978-3-319-42842-0_4.

Harnack, K. (2017). Der Mediator als Katalysator. In Kracht, A. Niedostadek, & Sendburg (Eds.), *Praxishandbuch Professionelle Mediation*. Berlin: SpringerVS.

Institut für Demoskopie Allensbach. (2014). *Roland Rechtsreport 2014—Einstellung der Bevölkerung zum deutschen Rechtssystem, zur Chancengleichheit und zur Mediation*. Köln.

Kaiser, P., & Gabler, A. M. (2014). Prozessqualität und Langzeiteffekte in der Mediation—Ergebnisse aus der Kieler Longitudinalstudie. *ZKM—Zeitschrift Für Konfliktmanagement*, 180–184.

Koschany- Rohbeck, M. (2015). *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte*. Wiesbaden: SpringerGabler.

MediationsG (2012). Retrieved from https://www.gesetze-im-internet.de/mediationsg/.

Montada, L., & Kals, E. (2001). *Mediation* (1st ed.). Weinheim: BeltzPVU.

Orca-Institut. (2012). Wann ist Mediation sinnvoll? Retrieved 27 October 2016, from http://www.orca-institut.de/mediation/wann.htm.

PwC/EUV (Ed.). (2016). *Konfliktmanagement in der deutschen Wirtschaft - Entwicklung eines Jahrzehnts*. Frankfurt am Main.

Whittal, M. (2015). Management perceptions of social dialogue at the company level in Germany. In Euwema et al (eds). Promoting social dialogue in European Organizations. pp. 79–92.

WSI—Wirtschafts-und Sozialwissenschaftliches Institut. (2016). *WSI- Arbeitskampfbilanz 2015*. Hans-Böckler-Stiftung.

ZPO. (2018). Retrieved 05 December 2018, from http://www.gesetze-im-internet.de/zpo/index.html.

Chapter 8
Mediation and Conciliation in Collective Labor Conflicts in Italy

Andrea Caputo and Giuseppe Valenza

The case

"*On Tuesday, the 31st of May 2017 at Atac, a strike was proclaimed from labor unions Faisa Confsal, Orsa Tpl, Sul Ct, Usb e Utl of 24 h for the public transportation, from 8:30 to 17:00 and from 20 to the end of the service time. It was the agitation expected initially on the 20th of May and then deferred. The protest would put at risk the bus, filobus, tram, metro and Roma-Lido, Termini-Centocelle and Roma-Nord train services. Possible repercussions would also have occurred on the night lines between May 31st and June 1st. The protest also involved personnel for parking and ticket offices and staff from the internal services. The danger of a total paralysis was averted thanks to the intervention of the neo Prefect Paola Basilone, which reduced the duration of the strike of the employees of Atac spa, with its order 'adopted pursuant to Law n. 146 of 1990,', proclaimed by different trade unions for the entire day of 31st May. The new measure limits work absence to the hours between 8:30 and 12:30. From a note of the Prefecture, we learn that it was adopted "after the unsuccessful attempt of conciliation between the parties took place in the prefecture yesterday, based on the knowledge of some critical elements for the urban public transport resulting from multiple circumstances such as the simultaneous development, in the same day, of other strikes actions, also up*

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to 24 h, in the field of peripheral local public transport—partially affecting on the same catchment area—and, again, the performance of certain events included in the jubilee calendar. These factors, along with 'the foreseeable increase of the number of visitors linked to the bank holiday on June 2nd and inconvenience to vehicular traffic associated with the traditional parade planned for the Republic Day—continues the statement—cause to fear that the conduct of protest actions planned can cause a serious and imminent harm to freedom of movement. The reduction of the duration of the abstention from work allows to reach a fair balance between the exercise of the right to collective abstention from work and the right, also guaranteed by the Constitution, the mobility of citizens and other users of the Capital".[1]

The case just above presents an emblematic example of the Italian situation in the mediation process regarding collective conflicts. A strike in public transport services for a 24 h period had been proclaimed by the unions, which would cause a paralysis of the Italian capital in terms of mobility.

The two parties involved were Atac, the company that manages the urban public transport services in Rome, and the workers trade unions employed in this fundamental public service. To avoid the strike, a third party intervened: the Prefect of Rome, who acted as a mediator and tried to find a conciliation between the parties involved. This attempt, however, was not successful. To avert the risk of total paralysis, the Prefect has resorted to the law n. 146/1990, which regulates the strike in essential public services, allowing an absence from work only in the morning hours, effectively reducing the strike from 24 to 4 h.

8.1 Introduction

The characteristics and modalities by which most of the collective conflicts take place in Italy can find their explanation in some historical factors with social and political connotations, for which it is necessary to provide an adequate overview before entering the main theme of this chapter.

After World War II (WWII), Italy witnessed an unprecedented economic boost, which became known as the "Italian miracle." In little more than a decade, the Italian industry saw the rise of many new factories. In this context, the working class acquired its own identity and its own awareness of their role in society.

Since the early 1960s, the relations between workers and employers began to show the first forms of tension. A series of class conflicts reached their peak of conflict between 1969 and 1971 (Meriggi, 1996). For decades, complaints, claims, protests,

[1] Source: *Il Tempo.it—«The prefect reduces the 24 h strike of transport» (May 29, 2016)*—http://www.iltempo.it/roma-capitale/2016/05/29/gallery/il-prefetto-riduce-lo-sciopero-di-24-ore-dei-trasporti-1011336/. Accessed on 11th November 2016.

strikes, and demonstrations represented the "DNA" of collective conflicts in Italy. Considering this "tradition," it seems that even today, labor unrests in Italy tend to adopt approaches that aim at confrontation rather than problem-solving.

These kinds of conflict can be seen even in the characteristics of the Italian industrial relations. Since 1968, for example, the considerable shocks in the political and social context led to a precarious balance in industrial relations (with open challenges from unions in the political and entrepreneurial class power) that would only partially stabilize in the early 1990s with the signing of the Maastricht Treaty. The signing of the Treaty, in fact, forced the political system, the entrepreneurial system, and the system of industrial relations to collaborate together to find a balance between the parties involved to ensure the entry in the Single European Market (Bianchi, 2003). Further, it was emphasized that in the 90 s, the collective conflicts characters were partially "cooled" due to a decrease of the importance of workers employed in the Italian industry and the consequent growth in the services sector (Farro, 2000).

Traditionally, Italy was the protagonist of strong social conflicts between the parties involved, in which the mediation processes have often not been easy to implement. Although tensions reached in the "hottest" historical periods have now ceased, it seems that some remain salient features of that conflict. In fact, even today in Italy, there are often numerous strikes in various sectors and, as showed in this chapter, the institutionalization of mediation as a preventive solution of the conflict is more exceptional than typical; moreover, it is often left to the voluntariness of the parties and with an informal organization.

Based on the content of the annual report 2016 of the *Commissione Garanzia Sciopero*, the Italian watchdog on industrial actions, in the year 2015, labor union conflicts in Italy were more concentrated in the areas of essential public services, whether provided by public, private, or semi-public organizations. In these areas, the strike action remained at very high levels, noting an increase from 2014. In 2015, there were 2261 proclamations of strikes, which was an increase of approximately 10 percent compared to the previous year (Commissione Garanzia Sciopero, 2016) (Tables 8.1 and 8.2).

8.2 Characteristics of the System

The aim of this section is to study the characteristics of the Italian system of collective conflicts, particularly how disputes take place between employers and workers. From the introduction above, it can be ascertained based on traditional Italian history, politics, society, and culture that a strike is the main tool used, throughout history to modern day, to lead a collective conflict.

This tool is in itself an "unfriendly tool." In some ways, it is "hostile" as it remains a mean to obtain rights or concessions of the workers through a collision or through the mere threat of conflict, despite knowing the impacts on society in recent years. It is also a tool that—precisely because it is based on confrontation- avoids involving any third party that could act as a mediator for as long as possible. As Bruno Leoni

Table 8.1 Collective industrial actions in Italy by geographical relevance (2004–2016)

Relevance/year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Individual firm	339	415	432	431	553	841	793	1347	1328	1506	1171	1409	1343	11,908
Inter-regional	23	80	54			4	2	2	10	7	18	8	18	226
Local		302	330	572	161	425	328	257	276	206	206	182	131	3376
National	466	480	329	299	283	297	335	269	266	351	351	288	298	4212
Provincial							93	82	119	86	86	94	37	603
Regional	365	195	120	166	100	238	248	293	340	206	206	203	288	3032
Territorial	241	367	262	259	393	156	254	57	61	42	42	73	65	2261
Not identified	479	49	148	304	736	19	27	8	3	11	11	13	8	1814
Total	1913	1888	1675	2031	2226	1980	2080	2315	2403	2091	2091	2270	2188	27,432
Total Mediation intervention (conciliation attempt)	553	642	540	634	595	553	639	666	504	382	382	334	435	6844
% of mediation	29	34	32	31	27	28	31	29	21	18	18	15	20	25

Table 8.2 Top 10 sectors for collective industrial actions in Italy (2004–2016)

Sector/Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total	%
Local public transport	325	317	270	343	412	372	333	496	357	394	328	378	339	4664	17
Waste management	126	141	139	147	181	161	270	359	355	503	312	408	321	3423	12
Air transport	224	353	258	243	326	211	241	124	161	166	181	153	206	2847	10
Public administration (Region and local)	72	93	89	165	152	145	163	204	188	162	162	202	166	1963	7
Rail transport	179	82	131	180	212	178	139	166	176	116	141	113	137	1950	7
Facility management	24	35	88	85	128	153	167	193	245	181	184	243	221	1947	7
Mail services	140	141	76	136	98	102	43	73	92	40	89	55	85	1170	4
Telecommunications	96	99	54	74	81	78	65	71	75	82	59	59	109	1002	4
National health services	56	33	67	107	79	43	91	62	68	87	63	64	108	928	3
Private health services	40	41	50	37	41	65	55	73	68	44	45	53	81	693	3

said, "the strike is indeed, by nature, a manifestation of the will to take the law into one's own hands" (Leoni, 2004, p. 161).

Even today in Italy, the collective conflict between workers and employers consists mainly of strikes or at least with its threat, and in general, there seems to be some reluctance to accept mediation by involving third parties.

The Italian legal system seems to reflect the characteristics of this tradition in the system of collective conflicts. In fact, the Italian legal system lacks a general framework to govern all the complexities in collective labor conflicts.

In Italy, individual disputes between workers and employers are governed by the provisions contained in Chap. 1, Title IV of Book II of the Code of Civil Procedure. This means that the dynamics of individual labor disputes, such as conciliation, judicial proceedings, and appeals, are all regulated by a general organic regulation.

Regarding conflicts and collective disputes, there is a discipline based on a normative system of general application, however not an organic regulation. In case of collective conflicts, different solutions can arise to reach a resolution of disputes. In some cases, there are special laws governing the individual cases. Sometimes cases may lack a specific law, and therefore, the conflict is generally resolved based on power relations between the parties from time to time involved.

In Italy, regarding the collective conflicts, the mediation is not provided at the institutional level, leaving mediation to occur on a voluntary basis, as it is not mandatory. In case of collective labor, disputes are a "system based on voluntarism," per which any mediation/conciliation is voluntary between the parties. If there are "rules" that can guide the procedures for any mediation, these often depend on "praxis," and these are not binding formal laws or systems.

As seen above, the strike in essential public services represents a case of collective conflicts that are particularly widespread in Italy. In these cases, there is a requirement for mediation/conciliation; the law requires that the two parties involved in the collective dispute (typically the public entity and the specific categories of workers) attempt compulsorily to initiate a conciliation process or "cooling off" for the dispute before the strike. The ultimate goal in these cases is to prevent harm to the citizens by ensuring that these "essential" services remain available.

The Law no. 146/1990 is the law governing strikes in essential public services. It was later amended by Law no. 83/2000, which only restricts the freedom to strike and not the right to strike in essential public services. This law attempts to balance the right to strike with the constitutionally protected rights found in Art. 2 of the Italian Constitution.

The Law no. 146/1990 provides for the establishment of "injunction" (*precettazione* in Italian language), by which it is possible to issue an order whereby the parties—in order to avoid injury to citizens users of the public services—reach a conciliation in order to avoid the strike. In these cases, this can be configured by a third party acting—in essence—as a mediator/conciliator (usually a Prefect or a Minister). In its general features, it is an extraordinary administrative measure that the authorities use to adjust to strikes (typically this is the Prime Minister, Delegate Minister, or Prefect in case of a limited geographical relevance of the action). In particular, the injunction is foreseen in the cases where "there are reasonable grounds of

risk for a serious and imminent prejudice to the rights of the citizens, constitutionally protected by Article 1, Paragraph 1, which could be occasioned by the interruption or alteration of the functioning of the public services in Art. 1, following the exercise of the strike or collective abstention." When conciliation between the parties is not successful, the Prefect may use the injunction to enforce a specific "address" required for the specific strike dynamic; for example, convening at the Prefecture for a new attempt of mediation, strike postponement or reduction of its duration, or imposition of guaranteed minimum levels of essential service delivery.

In essential public services and in cases of collective conflict, the law requires that there are attempts of mediation to avoid the strike, but it is well evident that there is no official figure of mediator acting in a professional capacity during the processes of mediation. The mediator de facto is the Prefect, as representative of the Government, however, the Prefect's work is essentially regulated either by their own discretion or by the will of the Government, not by a regulation that formally institutionalizes the mediation process.

When a dispute is over ordinary labor relations (that are not essential public services), in which there are claimed rights or specific working conditions, the relations between the parties are generally legally regulated by national collective agreements (CCNL). Such agreements are collective framework contracts signed by a group of labor unions and companies in a given specific sectors, which regulates the working conditions within the specific sector.

Given the relatively loose material which constitutes collective bargaining, it is quite evident that the modes to solve collective conflicts (and the possible requirements needed for mediation) between employees and employers are set freely by the CCNL. As a result, it becomes impossible to describe the contents of all CCNL,[2] however, what emerges is that mediation—just like any other content of the contract—is not mandatory and can be regulated on the basis of those voluntary agreements established between parties. Therefore, mediators may also be involved, if contractually provided.

Another special case where there may be a form of mediation in collective conflicts is in those of dismissal for collective redundancies. The Law no. 223/1991 provides that in the case of collective dismissal, the parties involved are trying to mediate to find a common solution through institutional confrontation. Also, in this case, there is no official figure that acts as a mediator If there is, their actions are influenced by parameters of the case, including the workers involved, territorial reference, and scale of the social impact resulting from the conflict.

[2] According to data gathered by the labour union CISL (Confederazione Italiana Sindacati Lavoratori—Italian Confederation of Workers Union) by using the National Archive of Contracts from CNEL (Consiglio Nazionale Economia e Lavoro—National Council of Economy and Labour), in 2015 the total number of national collective agreements in place across different sectors was 706; specifically 42 in Agriculture and Fishing, 147 in Industrial Sectors, 32 in Building and Real Estate, 461 in Service Industries and 24 in other sectors.

8.3 Characteristics of the Mediators or Facilitators and the Third-Party Procedures

The mediation is a legal institution concerning disputes between parties and the intervention of a third party acting as an official mediator. The European Union issued Directive 2008/52/EC, which has been implemented in various ways by different Member States. This directive raised specific provisions on mediation in civil and commercial matters. The European objective was to encourage Member States to adopt specific measures to promote conflict resolution between the parties, while avoiding recourse to the judgment of the courts.

Italy firstly transposed the directive with Legislative Decree no. 28/2010, showing their interest in this legal institution. Then, with a new Decree D.L. no. 69/2013, it was established that the mediation is mandatory in certain conflicts. After the Legislative Decree no. 28/2010, the Italian Constitutional Court had declared the mandatory aspect of the decree unconstitutional, but with the D.L. no. 69/2013 mediation returned as compulsory limited to the following areas of conflict (Art. 5):

- condominium;
- hereditary succession, heredity;
- property law (e.g. property, usufruct, easements);
- divisions (e.g. co-ownership, community of property);
- family pacts;
- insurance contracts, banking, financial;
- lease;
- free loan;
- business lease;
- damages from medical and health responsibilities or defamation.

The Ministerial Decree D.M. 180/2010 officially regulated the role of the "mediator," who must possess an education not lower than a three-year university degree or, alternatively, must be enrolled in a professional association and have at least 50 h of specific training on subjects concerning the scope of mediation (on mediation rules, techniques and procedures of negotiation, conflict management between the parties, and interaction and communication techniques).

This, in synthesis, is the situation that characterizes the civil and commercial mediation system in Italy. As it can be deduced, mediation is a compulsory institution that does not address matters regarding workplace conflict. An organic framework that manages the conflicts at work (both individual and collective) does not exist, and there is no official figure for mediation in such cases.

Initially, there was a proposal to include mediation for workplace disputes, however, this proposal was abandoned due to pressure from the lobby of labor lawyers, who viewed this proposal as a means of subtracting from their profession. It also seems that in the event of collective conflicts in the workplace, the unions have been reluctant to accept the possibility of recourse to a mediator. This is due to the fact that if this were required, the unions would see a substantial part of their activity and

contribution be taken off them. Further, as the conflict is seen as an instrument that, under a cultural and conservative profile, is possible to be resolved by itself, unions have adopted the mindset that the role mediator is unnecessary (the principle asks, "If there are workers' unions, why do we need a mediator?").

Therefore, in disputes relating to labor matters, there is no formal and institutional body that officially acts as mediator. Mediators do exist, but they are informal and may be different depending on the circumstances (e.g. mayors, prefects, ministers, or political actors are used when there is evidence of collective conflict).

It appears that what is missing is a formal discipline that institutionalizes mediation in the workplace and the ombudsman. This can certainly be considered a gap, as a mediator is required to have professional training and comply with pre-established protocols. Currently, a figure of professional mediator in the context of collective conflicts is lacking, and the mediation processes are likely to discount a potential lack of adequate skills in conflict resolution.

In case of conflict between the parties in the labor sector, there may be processes of "cooling" of the conflict, yet the arrangements for a resolution are on a voluntary basis. In addition, the formal provisions on mediation can be found in collective labor agreements, which may provide union discussions on topics chosen by the parties; for example, a discussion topic may be in relation to dispute resolution or interpretation of the collective agreement. Collective agreements, therefore, may engage generally of non-confrontational dispute resolution mechanisms that are "inspired" by mediation principles.

As previously stated, although there may be individuals acting as mediators, it is not in a strictly official capacity. Moreover, since the collective conflicts are mainly regulated on a voluntary basis, third party can vary in different cases. In the most important cases, social partners and institutions such as ministries (sometimes regions and prefectures) can be involved.

The most advanced form of mediation found, in the context of the strike, is in essential public services. By L. 146/90, there is an obligation to establish cooling procedures and conciliation of disputes in collective agreements, which are to be completed before a strike is called. In this situation, the institutions act as mediators and are represented, in most cases, by the Prefect or a collaborator of the prefecture.

8.4 Description of the Mediation Process

In Italy, a discipline of collective mediation in the workplace does not exist. Mediation is, therefore, almost always voluntary and, often, on bilateral basis. Mediation is used at the will of the involved parties or in cases of legal requirements when mediation is required by special laws.

The panorama that emerges tends to be "uneven" from the point-of-view of the legal system, which can be summarized in the following key points:

Table 8.3 Main types of collective conflicts in Italy

Typology	Regimentation	Attempt of conciliation between the parties	Attempt of conciliation with third parties	Mediator
Essential public services	Law no. 14/1990	Compulsory	Compulsory	Generally, the Prefect or the Ministry of Work
Collective redundancies	Law no. 223/1991	Compulsory	Optional	Institutions, Local governments, or competent Ministers
Collective conflicts in general	Identified by the parts in the national collective agreements	Optional, established in collective agreements	Optional	Institutions, Local governments, or competent Ministers

– There may be specific cases of labor conflicts in which there is a possibility to use mediation: regarding these cases, the circumstances and the manner of mediation are freely regulated between the parties within the collective labor agreements.
– In important cases of conflicts at work (such as collective redundancies), intervene for praxis third parties; depending on the case, there may be prefects, ministers, political organizations, or institutions of various kinds (in cases in the labor sector, there is not a figure similar to a "professional" mediator, and in general, there is no general organic regulation).
– The only case that imposes a mandatory collective mediation before a strike occurs is in cases that involve essential public services; in these cases, to avoid damage to the community, the parties must try to find a conciliation to avoid the strike, under the order of the Prefect, and must respond to invitations to undertake mediation in the presence of the mediator.

The following table allows to compare the three above mentioned cases (Table 8.3).

The table shows that there is only one case where there is a mediating figure systematically acting as a third party to resolve collective conflicts, i.e. conflicts that arise from strikes in essential public services. Because it is the most representative and evolved case of mediation, in the Italian context, it was decided to take it as "case study" about the Italian system of conflict resolution. A model of this developed mediation has been outlined below (Fig. 8.1).

As seen in the model above, the procedure relative to the strike in essential public services begins with the strike notice. The trade unions, through this prior notification, are obliged to communicate the intention of striking before acting on it. At this stage, the two conflicting parties are obliged to try to reach reconciliation, in order to "cool

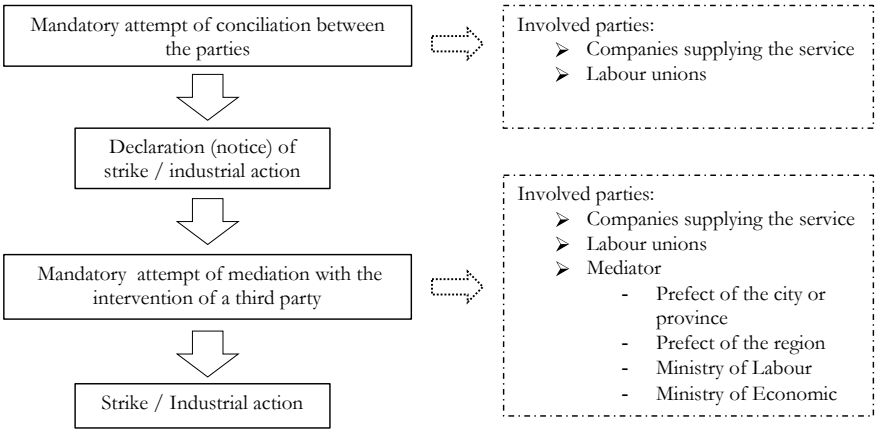

Fig. 8.1 Conciliation and Mediation in the strike in essential public services

off" the conflict and avoid the strike. However, at this point, the presence of a mediator is not required; typically, when the parties meet to attempt reconciliation, the workers union take on the mediation role. It should be noted that registered Italian mediators cannot work on labor disputes, according to the law (D.L. no. 69/2013, Art. 5).

If the conciliation procedure between the parties is not successful, the strike is called. After the proclamation, the two sides are convened by a third party acting as a mediator, whose objective is to ensure that an agreement will be reached, resulting in the end of the strike. The Ombudsman is usually represented by the Government, typically by a Prefect or a Ministry, depending on the geographical relevance of the conflict. For conflicts of provincial level, local, of individual company, organization, or administration, usually the Prefect of the province is involved. When the conflict pertains the regional level, the Prefect of the regional capital is involved. When the conflict pertains the national relevance, either the "Ministry of Labour" or the "Ministry of Economic Development and Industrial Activity" is involved.

In such cases, the mediator may either act to withdraw the strike or to reach an agreement with the unions in order to provide adequate levels of essential public service delivery during the strike.

As can be deduced, the conciliation and mediation processes are mandatory, however, there are some critical issues found in this system. The parties involved in the conflict do not have the ability to choose the mediator. The Prefect generally carries out the task of mediation alone or with the help of collaborators who assume certain roles in mediation, but it is not possible create a mediation team. In terms of procedures, there are no established protocols or laws, therefore mediation procedures are generally subject to praxis that may vary depending on the circumstances.

In essence, the mediation process takes place informally; here, the task of the Prefect is to ensure agreement between the conflicting parties involved in the collective labor dispute and avoid the strike. At least, their job is to reduce the number of strikes to ensure adequate delivery of essential public service. At the end of the medi-

ation process, a formal agreement between the parties that establishes the outcome of mediation does not seem to exist, rather the agreement is upheld by the union (e.g. by proclaiming the withdrawal of the strike), following the concessions or promises of concessions.

If the Prefect is not able to ensure that the parties reach an agreement, the union will then carry out the strike. However, the Prefect can, with an ordinance, impose that the strike follow a specific set of directives (e.g. that the strike takes place during a certain hours, thus ensuring services in the non-strike hours or require that a set number of workers to perform the essential public service while other workers strike).

8.4.1 Evaluation by Stakeholders

Out of the 30 interviewed users, only 16 agreed to fill a satisfaction questionnaire (on a scale from 1 to 5) on the mediation system in Italy. The table below shows the results of this questionnaire. From Table 8.4, it can be understood how some users view the Italian mediation system.

From the interviews, we investigated the main challenges that the users faced. A few themes emerged, converging towards general disappointment in the system and the hope for the improvements in its use. In particular, the main challenges faced were:

- The inexistence of a procedural framework for mediation
- Lack of knowledge and awareness of mediation
- Conflicting perception of the problem at the source of the conflict
- Lack of collaborative culture

Table 8.4 Satisfaction of users and mediators

Satisfaction with	Users	Mediators
1. The way mediations are conducted	3.44	4.14
2. The professional qualities of the mediator/s	3.38	4.14
3. The teamwork of the mediators (in case of team of mediators)	3.5	4.14
4. Consultation with other mediators (not directly involved in the case)	–	3.71
5. The quality of agreement reached through mediations	3.13	3.86
6. The outcomes of mediations	3.50	4.00
7. The level of compliance with the agreement by parties	3.56	4.14
8. The improvement of the relation between the parties	3.75	3.71
9. The organization of the mediation system (in terms of selection, training, etc.)	3.06	3.43
10. The trust in the system by employers, unions, employee representatives	3.00	4.29

- Low level of mediation training in the workers unions.

Regarding the mediators, which in Italy are mainly members of the prefecture, hence government officials, gathering data was more difficult. In fact, out of the 21 participants, only seven agreed to take part in a questionnaire on the satisfaction with the system. Table 8.4 also shows that these mediators were actually more satisfied with the mediation process and outcomes than the users and are generally more positive.

In terms of the results obtained during the interviews, four main themes emerged, in particular:

- The absence of a training path on mediation, which are left mostly to the individual skills of the individual involved in the process and tend to be built by experience
- The scarce impact of the mediations on the future relationship amongst the parties, in particular agreements are seen to be very fragile, holding up until the next conflict arises
- The lack of interest from certain parties in the success of the mediation due to the fact that the mediation is required by law rather than the will of the parties
- The lack of resources to effectively support the system.

8.5 Effectiveness of the System

At present, instruments do not exist that allow for an evaluation of the mediation system's efficacy. If the processes of mediation are considered in the context of essential public services, one realizes that there are no laws or protocols that require effective measurement of mediation. As there are no documents that assess the satisfaction of the conflicting parties, there are no systematic documents that measure the success rate of mediations (agreement rate). Further, there are no documents that include indicators able to express an opinion on the quality of the mediation and mediator, as there are no specific forms used by the parties that allow them to express their opinion. It is not possible to use these documents, even if they were systematically drawn up, despite knowing it would help to determine costs and benefits of the mediation.

The mediation system does not require that sufficient documentation able to determine the effectiveness of the mediation system be supplied or produced. From this perspective, the Italian context presents significant delays, and unfortunately, at the moment, there lacks an adequate debate on the topic.

From the interviews, it can be understood how the system of mediation of labor conflicts depend mainly on the practices and experience of the involved mediators. The effectiveness of mediation depends largely on the ability of the mediators to communicate with the parties. This highlights the need to increase the mediation training courses to make sure that mediators develop high-level, professional skills that do not depend only on field experience. In fact, it is noted that these training courses occur infrequently; this is a weakness of the system due to its organization

as a public service provided by the prefecture, which has a large number of other duties that are not related to labor conflicts.

Another important aspect related to the effectiveness of the mediation system is that the success of a mediation often depends on the knowledge that the mediator has of the territory in which it operates. The trust that the parties place in the mediator is essential, and this depends on the number of years the mediator has operated in said territory. However, the Ministry of the Interior often shifts the location of the Prefects and their collaborators every 2–3 years, and this does not allow mediators to develop sufficient knowledge of the territory, which undermines the effectiveness of the mediation system. In general, among the suggestions to increase the effectiveness of mediation, it would be important to create an office within the prefectures that deals with the mediation of labor conflicts; in such an office, there would be professions with diversified skills able to work in teams.

As such, the vast majority of the interviewees expressed the need to institutionalize the role of the mediator and give it greater, more defined powers. At present, it seems that mediation is unattractive and inconvenient for the parties involved, who see it as a formal step when taken.

The study conducted reveals the presence of a "regulatory vacuum;" if the cases where strikes in essential public services are excluded, all other cases are not regulated by law, therefore the mediator uses tools and procedures that depend on their experience, varying from case to case. The suggestion is, therefore, to promote legislative action to cover regulatory gaps and increase the effectiveness of the mediation system.

8.6 Conclusions

Currently, Italy provides mediation only in civil and commercial matters. Such legislation regulates the civil and commercial mediation in all its forms and aspects, appointing a professional mediator with a suitable background to fulfill these functions; similarly, specific areas of intervention are expressively reserved for the use of a mediator.

There has been an attempt, from the legislature, to extend mediation into labor laws, specifically for the conflicts between workers and employers. However, there has been resistance from lobbyists and trade unions against such legislation. The lawyers would lose the part of their business that arose from the recourse to the "Labour Court," while the unions would lose parts of their "identity," since culturally the Italian labor union handle conflicts to achieve certain rights or concessions.

The interviewed experts have confirmed that there is currently no legislation regulating mediation on collective labor disputes. According to these experts, it would be necessary to extend the mediation beyond the field of civil and commercial matters, meaning labor.

In the Italian context, the case of a strike in essential public services represents the scope of collective dispute in which mediation is more evolved; however, it seems that

the intervention of the Prefect, as it may help to add value to the process of mediation, still does not fully work, even with a completely professional background. Therefore, added value could be derived from the introduction of an official mediator.

In light of the above considerations, we have summarized the future developments and improvements desired to be seen in the current collective mediation system, listed are the following points:

- Enactment of a general framework that regulates, in all aspects, the institute of mediation in collective labor conflicts (like civil and commercial mediation) with specific provisions and protocols to be followed;
- Creation of an official figure capable of acting professionally and systematically as mediator in cases of collective labor dispute;
- Definition of an effectiveness evaluation and measurement system of the brokerage system, through the obligation to draw up documents and reports with indicators that express the quality of the mediation, the level of satisfaction resulting from mediation system, and the achievement rate of conciliation agreements reached.

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References

Bianchi, G. (2003). *Le relazioni industriali tra cooperazione e conflitto*. Milano, Italy: FrancoAngeli.

Commissione Garanzia Sciopero. (2016). *Relazione annuale 2016 sull'attività svolta nell'anno 2015*. Rome: Italy.

Farro, A. (2000). *Il conflitto dopo la lotta di classe. Azione collettiva e cultura dei lavoratori nella società dei lavoratori*. Milano, Italy: FrancoAngeli.

Leoni, B. (2004). *La libertà del lavoro. Scritti su concorrenza, sciopero e serrata, Rubbettino, Soveria Mannelli*. Soveria Mannelli, Italy: Rubbettino.

Meriggi, M. (1996). *Breve storia dell'Italia settentrionale dall'Ottocento a oggi*. Rome, Italy: Donzelli.

Chapter 9
Mediation and Conciliation in Collective Labor Conflicts in the Netherlands

Katalien Bollen

The Case[1]

In organization Van der Zande, new pension plans need to be negotiated since the current arrangements cannot be prolonged on the same terms. The Works Council (WC) has withheld its consent to implement new arrangements since it is—according to them—a worsening of the existing regulation. In addition, the WC feels that it has been involved and informed too late, leading to some mistrust towards the employer. Parties decide and agree to go to the mediation office located at the Social Economic council, called the Joint Sectoral Committee.[2]

In order to prepare the mediation session at the Joint Sectoral Committee that will take place face-to-face, both the employer and the Works Council send their version of the facts to the Joint Sectoral Committee. During the face-to-face session, parties are asked to tell their side of the story. Special attention is paid to how parties communicate about and with each other. Clarifying questions are asked to explore underlying issues. In order to solve this matter, first the issues both parties agree on are identified, then communication

[1] This case is inspired by and adapted from a case submitted to the Joint Sectoral Committee for mediation.

[2] The Joint Sectoral Committees (JSC) are installed by the Social Economic Council (SER) at broad sectorial level and can be turned to in order to mediate a conflict or disagreement specifically between employer and the Works Council. Committee members are experts in employee participation rights and are familiar with the different sectors.

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on the non-agreed parts is facilitated. Constant attention is paid to the way parties communicate and how they take decisions together, and members of the Committee intervene when this does not take place constructively.

After one long session of 5.5 h,[3] *both the employer and Works Council agree on the conditions for a new pension scheme, and have discussed the role of the WC in the organization and how to collaborate in the future. After the session, emails are exchanged to come to a correct wording of the agreement, after which the agreement is implemented in practice.*

9.1 Introduction

Collective conflicts may lead to high costs for organizations, employees and society at large. In the Netherlands, employers' and employees' organizations (the social partners) as well as government work together to shape national socio-economic policies at national, sectorial, and organizational levels (Nauta, 2015). The ***Dutch consultative economy*** represents *a modus operandi* whereby key stakeholder groups (unions, employer organizations, government, and other stakeholders), further their common interests through cooperation and negotiation. Together they seek for integrative agreements to maximize outcomes for all. This is also known as the Polder Model (a polder being an area of reclaimed land from the sea, typically found in the Netherlands), and has a long tradition.

The Netherlands is a country of great social peace with relative few collective labor conflicts (Van den Berg & Van Rij, 2007). This is reflected in the low number of strikes,[4] and days lost in strike (See Fig. 9.1), compared to the EU-25 average (Van der Velden, Dribbush, Lyddon, & Vandaele, 2014). For example, on an annual basis barely 5.7 working days per year per 1000 employees are lost to collective actions in the Netherlands (period 2005–2009) compared to an average of 30.6 days in the EU-25. These figures are in line with the statistics of the Dutch Central Office of Statistics (CBS). Mostly, strikes are declared by the unions (>80%). In 70% of the cases, the unions were also involved in the negotiation that led to the end of the strike. One in three strikes relates to a Collective Labor Agreement (CLA) conflict, only 15% deals uniquely with a salary issue.

In sum, Dutch labor relations are perceived as rather harmonious. Dialogue and the interchange of ideas are preferred above strikes and confrontations. In this climate, social partners do not feel the need (yet) to introduce a permanent agency for settling collective employment disputes.

[3] On average parties have one face-to-face session of 2 hours by the JSC.

[4] See also more detailed information on https://www.etui.org/Services/Strikes-Map-of-Europe/Netherlands.

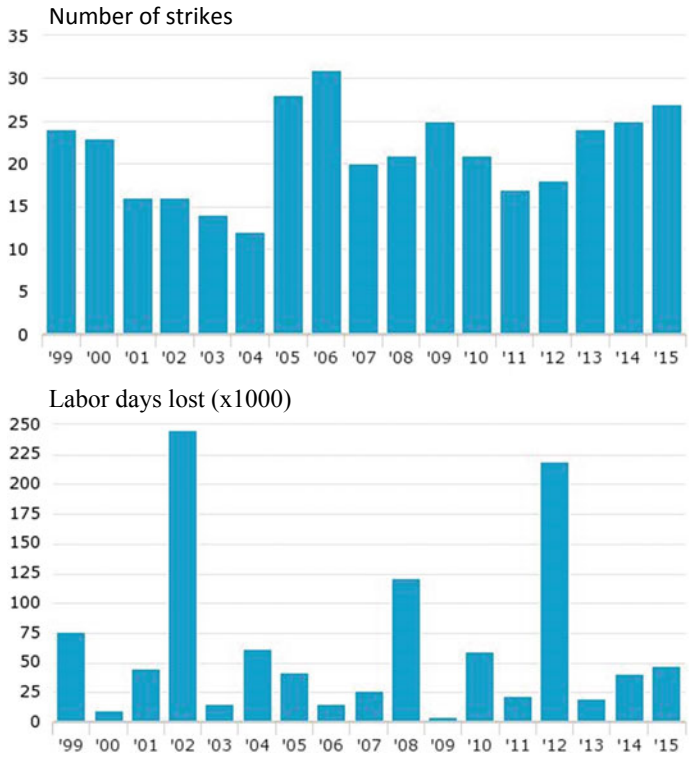

Fig. 9.1 The amount of strikes and lost labor days in the Netherlands (1999–2015)

In the Netherlands there has been a strong decline in union membership over the past 30 years as well as reduction of strikes and social actions (Brown, 2014). Looking at union membership, we see until 1980 a percentage of 38, to currently 20 (Ter Steege, van Groeningen, Kuijpers, & van Cruchten, 2012). This overall decline is in line with the global trend where the role of unions shifts (Euwema, Munduate, Elgoibar, Pender, & García, 2015).

The three most important union federations are the Federation of Netherlands Trade Unions (FNV), the National Federation of Christian Trade Unions in the Netherlands (CNV) and the Trade Union Federation for Professionals (VCP). Although relatively few employees belong to a union, more than 80% of employees are covered by one of the 1100 Collective Labour Agreements (CLA's) in force (www.ser.nl). Agreements reached between an employers' organization and a union automatically apply to all employees working in the particular organization under this CLA. Organizations also have the right to negotiate a CLA directly with their

own employees, without unions as intermediate. Typically this is done with the works council, being the local elected employee representation.[5]

Most Dutch employers (about 80%) belong to a sector-based organization that represents their interests. This percentage is far above the EU average of 55%. About 150 sector organizations affiliate to the federation VNO-NCW, the Confederation of Netherlands Industry and Employers, representing mostly larger companies. The general employers' association (AWVN) is a partner of VNO-NCW and is involved in the making of over 450 Collective Labor Agreements, mostly at midsize level. MKB-Nederland (the Royal Dutch Association of Small and Medium-sized Enterprises) represents small and medium-sized enterprises (employing up to 250 people).

9.2 Characteristics of the Dutch System for Collective Conflict Management

To understand the regulation of collective labor conflicts in the Netherlands, it is important to recognize the crucial role of social dialogue at an organizational level. Elected employee representatives in Works Councils (WCs) have a key legal position when it comes to organizational decision making. These representatives often are, but do not have to be unionized. Works Councils in the private sector and co-determination Councils in the public sector regularly face conflictive issues with top management. We differentiate in this chapter therefore between two types of collective conflicts involving a group of workers each with its own regulations and legal frameworks: conflicts between management and unions on the one hand and, management and C or co-determination councils on the other hand.

At the national level, there are two structures of consultation between social partners (employer organizations, trade unions, government). The Social and Economic council (SER)[6] advises the Dutch government independently on a broad social-economic spectrum. The Labour Foundation (STAR)[7] makes recommendations to trade unions and employer organizations with regard to the working conditions within companies and sectors.

At sector level, professional negotiators representing respectively employees and employers in a sector or organization negotiate CLA's (Huiskamp, 2003). Occasionally, the intervention by mediators is included in dispute settlement clauses in CLA's. It is estimated that 25% of the CLA's provide for dispute resolution clauses (de Roo, 2002).

[5]The role of the works council in CLA agreements is still under debate, however it is legal in the Netherlands for employers to directly make agreements with the works council. http://metamorfase.nl/uploads/Mag-een-OR-cao-afspraken-maken-2.pdf.

[6]SER, Sociaal-Economische Raad.

[7]STAR, STichting van de ARbeid.

9.2.1 Conflict Between Employer and Unions

Employers' organizations and trade unions are inclined to adopt a strategy of conflict avoidance. This may also explain the absence of permanent dispute settlement machinery (Jagtenberg & de Roo, 2002). Different to countries such as Belgium and the United Kingdom, the Netherlands have no central institute, statutory organization, or group of people appointed to mediate in collective conflicts between unions and employer(s). Informally, people often turn to a selected group of third parties, mostly experts such as academics or political and societal leaders to intervene as counsellor, scout, mediator or informer. Often these people are experts in the field of economics, finance, law or sociology. Usually these third parties are involved in a relatively late stage of the conflict.

Although the right to strike is positively confirmed by the courts in the Netherlands, there is no specific law regulating strikes. Instead it follows the European Social Charter (ESH, article 6 (4)) on this matter. According to this article, collective actions (including strikes) are allowed in case of conflicts of interest referring to disputes that are subject of collective negotiations and bargaining between employers and employees (e.g., wage increases, new CLA, social plan). There are three rules that need to be taken into account here (a) the timely announcement of a strike, (b) interests of employer and third parties need to be taken into account weighted, and (c) a strike must be the last resort. An employer who is informed, can take measures to prevent the strike or to limit its consequences. A strike is not justified when it goes against legal rules, endangers public order, national security or public health, when a solution can be reached through legal proceedings or manifest disproportion exists between the aim and social consequences of the action.

In the public sector, the Advisory and Arbitration Committee for the National Office (AAC, www.caop.nl) was established to assist the government authorities and civil servant unions in their role as negotiators (Akkermans, 1994). AAC advises or engages in arbitration or mediation to solve disputes that arise from the consultations between employers and employees.

Local entities like municipalities can turn to LAAC (Local Advisory and Arbitration Committee) when they have a conflict. These procedures are only used as last resort and rarely relied upon. Third parties active both in the public and private field, indicate that conflicts in the public sector are often more difficult to solve than the ones in the private sector, since the focus in the public sector is more on power and rights, and less on the underlying interests.

9.2.2 Conflict Between Employer and WC

At the level of the organization, we look at conflicts between the employer (CEO and/or HR director) and the Works Council (WC) or co-determination council (Euwema et al., 2015; Nauta, 2015). The *WC* represents the interests of the staff

in a company. It consults with management and the employer on the general organizational strategy, employment conditions and matters that have not been settled in the CLA (yet) and impact employee matters. In addition to advisory rights, the Works Council has also the right of consent. The latter implies that the employer may not implement a decision as long as the Works Council has not given its approval or the subdistrict court has given substitute approval to a proposed decision (Hofstee, 2018). The Works Councils Act[8] stipulates that employees in organizations with 50 or more employees have a right to form a WC. Works Council members are paid by the employer and are often a union member. Around 70% of the companies in the Netherlands are obliged to have a WC and of those obliged, 67% has a WC in reality (Wajon & Vlug, 2017). Small companies with less than 50 employees may set up a staff representative committee.

On request, WC's can hire expertise on various levels such as legal expertise, communication skills or mediation. In case of (a potential) conflict between WC and top management, parties may turn to the *Joint Sectoral Committees* as installed by the Social Economic Counsil (SER). In 2010, 23 joint sectoral committees in the market sector were restructured and reduced to 2 committees, Market I (commercial market sector) and Market II (non-profit sector referring to the former committees of healthcare, as well as the social and cultural sector). These two committees consist of 12 members and 12 substitute members and are located at the SER. The committee members are experts in employee participation rights and are familiar with the different sectors. A third joint sectoral committee is dedicated to government institutions and located at the CAOP, Centre for Labor Relations for Civil Servants.[9] CAOP is the largest knowledge and service centre with regard to labour relations within the public domain. It advises and supports various sectors, including the Dutch government, as well as education and health care sector. CAOP is an independent foundation under the supervision of the social partners, and also offers mediation services for individual labor conflicts. The Works Councils Act (WOR) stipulates that the tasks of these committees are (a) to settle disputes between WC (also other employee participation bodies) and top management; (b) to register the agreements of WCs; (c) to answer questions from WCs and top management about employee participation; (d) to give information about the Works Councils Act and to encourage employee participation in general.

In 2013, The Works Council Act has been revised. Till then, parties were obliged to consult Joint Sectoral Committees when they planned to go to the Enterprise Chamber (of the Amsterdam Court of Appeal). This is no longer required. Currently, parties can opt to consult voluntarily and without any cost the Joint Sectoral Committees. While earlier the committees focused primarily on giving legal advice, since 2013 the Committees in the market sectors focus on mediation and conciliation. Legal advice can still be given on request of the conflict parties. Parties may also turn immediately to the subdistrict court judge or the Enterprise Chamber. Often, these committees

[8]Referred to in the Netherlands as WOR, Wet op Ondernemingsraden.

[9]Referred to in the Netherlands as Centrum Arbeidsverhoudingen Overheidspersoneel (CAOP).

advise or mediate in the event of disagreements between employer and the WC about compliance with the provisions of the WOR. This often concerns issues related to the right of advise and consent, but it can also concerns conflicts in which a breach of trust plays a role, or when a party has the impression of not being listened to. For example in case of a reorganization: while the WC wants to be informed on the concrete next steps in the reorganization and the employee consequences, the employer prefers to wait and to decide later on whether to involve and consult the WC. This may give rise to feelings of distrust and not being listened to and the suspicion that the reorganization will be executed without consultation from the WC.

The joint sectoral committees are rarely consulted. Until 2013, the Committees handled 50–60 cases per year. Specifically, in 2011, 2012 and 2013, the committees of Market I and Market II receives 60, 67 and 49 mediation requests respectively. In 2014, 2015, 2016 and 2017 this fell to 22, 16, 24 and 14 mediation requests respectively, with an average number of 20 cases per year. Research by the SER (2016)[10] among Works Councils shows that when confronted with conflict, only 11% opts to consult the Joint Sectoral Committees. In the vast majority of the cases, WCs seek for external advice (outside the organization) from lawyers, consultants specialized in social dialogue, trainers or educational institutions, when the conflict has reached a high level of escalation, while unions are turned to less.

9.3 Characteristics of the Mediators or Facilitators and the Third Party Procedures

In 1923, the Dutch government introduced the Rijksbemiddelaar (Governmental Mediator) to mediate in collective conflicts. As mediators they operated alone and often took the initiative to intervene in a collective conflict. This type of mediator disappeared quickly once employers and unions developed regular consultation schemes, and a more constructive negotiation climate appeared.

Apart from the joint sectoral committees mentioned earlier, there are no formal institutions that mediate in collective conflicts, nor specific regulations for mediation in collective conflicts. No civil servants are appointed by the government working as conciliator or mediator. This implies that potentially everyone can act in such a capacity. Consequently, a large variety of potential third parties are active which makes it difficult to describe third parties characteristics intervening in collective conflict or to trace back the amount of mediations in collective conflicts.

In case of *conflicts between employer and unions*, parties can freely choose a mediator. The only prerequisite is that both parties agree upon the mediator. Particularly in the event of strikes with a major impact, ad hoc mediators are appointed by the parties. Often these mediations take place against the background of court injunctions. The ad hoc mediators are mostly well known public figures and are turned to because of their reputation, status, position (usually politicians or labor law univer-

[10] https://www.bedrijfscommissie.nl/publicaties/jaarverslagen.aspx.

sity professors), their previous experience with similar cases, or their personality. Common denominators of these people are that they are perceived as experts, have a lot of experience and are respected by both parties. These conciliators or mediators are typically not affiliated with professional mediation associations. In fact, a limited number of people are asked to mediate regularly. An extra challenge for the this type of mediators is how to deal with the outside pressure of media.

In *conflicts where employees are represented by the Works Council*, various people with a different background are involved as third party, depending on the stage of the conflict (see Chap. 1 of this handbook). In Phase 1 (latent conflict) coaches, advisors and trainers for social dialogue offer training and advice. In Phase 2 (early stage conflict) legal counsellors, and trainers are asked to give primarily legal advice or to intervene informally. Third parties active in Phase 1 and 2 often engage in some way of preventive mediation in the sense that they promote constructive dialogue among the social partners. But they do not call themselves mediators or conciliators, nor are they perceived in this way by the parties. In Phase 3 (confrontation and escalation) parties generally turn to legal counsellors or union specialists. In Phase 4 (hot conflict), parties turn to judges, arbitration or court (e.g., Enterprise Chamber). Mediations by the Joint Sectoral Committees usually take place between Phase 3 and 4. Phase 5 refers to the restoration of the relationship and how to rebuild trust in each other. Interventions on this level are hardly seen. Consultant: *"Parties just contact us with an* ad hoc *question to intervene. As such we help to extinguish or limit the fire. I do not know what happens next … It would be a good idea to contact parties afterwards also to double check the effectiveness of the intervention.*"

Only a very few people acting as a mediator in collective conflicts have followed a course to become a mediator and most are not registered in the national register of the MfN.[11] Judge: "*When acting as a mediator in collective conflicts, you do not need a specific mediation training. You need experience in the field, possess a great deal of creativity, the ability to think out-of-the-box and possess a healthy portion of curiosity.*"

9.4 Description of the Facilitation and/or Mediation Process by the Joint Sectoral Committee

When a politician, judge or university professor is involved as a third party in a collective conflict, parties often expect a more evaluative approach (Who is right; What is the advice?). This will typically include a period of investigation, to understand the broader story behind the legal question. When a consultant in social dialogue, trainer or coach is asked, a more transformative or facilitative approach is expected (with

[11] In the Netherlands, the MfN register (Mediators Federation Netherlands) acts as the independent quality dome for mediation in the Netherlands. MfN registered mediators have completed a MfN accredited mediation training and keep their knowledge and skills continuously up to date (lifelong learning and permanent education) to keep their registration.

focus to restore or improve the relationship). Many of these third parties indicate that they engage in separate conversations with parties before the joint face-to-face session(s).

When external third parties are hired by the WC, the fees are usually paid by the employer. Mediation by the Joint Sectoral Committee is free of charge. The only prerequisite for the mediation to take place is that both parties agree to mediate. A substantial part of cases presented to the Joint Sectoral Committees are withdrawn since parties engage again in conversations and negotiations before the joint session takes place.

The mediation style of the Joint Sectoral Committees representing the Market is facilitative. This is different from the 20th century where mediation was more evaluative and took the form of hearing parties and giving them a non-binding legal advice. This advice is necessary to go to the Enterprise Chamber (of the Amsterdam Court of Appeal). In Joint Sectoral Committees of the public sector, the primary focus is still on legal advice. Here parties are asked to present their case while the committee will ask questions. Parties only get an advice once they are back at work, not immediately in the session itself.

A typical mediation procedure at the Joint Sectoral Committees in the market sector consists of following steps: Before the face-to-face session in The Hague, parties are asked to provide the Committee and the other party with a description of the problem and the question(s) they have. The Committee represents the social partners and consists of 1 employer representative, 1 employee representative and 1 neutral member. In order to prepare the meeting, committee members read the documents, discuss the case with each other, look for interdependencies and formulate questions for the face-to-face session. In case something is unclear, parties are asked for additional information. The typical time lag between a request for mediation and the face-to-face meeting is 2 months. The face-to-face meeting in The Hague usually takes one hour and a half to 2 hours. Although parties regularly are accompanied by legal counsellors, the conflict parties themselves are asked to describe the problem and to formulate their questions. Member Joint Sectoral Committee: "*We try to banish legal advisors. From the moment they step into the room, the atmosphere changes completely, with little room to communicate constructively. Our main focus is on the underlying problems and needs. And often, these cannot be found in legal documents. You can only discover the root of the problem by talking to people involved in and impacted by the conflict*."

At the start of a session a member of the Committee explains the procedure in order to manage the expectations. Typical interventions are active listening, asking questions to identify underlying issues and problems, describing what they see (meta-communication) and trying to empower people. Committee Member: '*Describing what you see as third party is very important. It helps parties to identify what is often too difficult for them to say. Specific (technical) knowledge is not that important. A re-occurring theme is how to deal with mistrust. This is often the bottleneck in collective conflicts between WC and top management*.' A caucus (one to one meeting between the parties and the committee) may be an option when emotions run high or parties do not seem to be willing to tell the full story to the conflict. The sector committees

of the Market only rarely make use of caucus. The main aim of the Joint Sectoral Committee is to stimulate parties to find a solution together. Member Joint Sectoral Committee: "*It is our intention to empower people to find their own power again. When involved in conflict they have drifted away, not only from each other, but also from their selves*".

If the Joint Sectoral Committee fails in facilitating the conflict at hand, the committee issues an advisory opinion that is not binding, neither for the parties, nor for the courts. Typically, there is only 1 face-to-face session. As such this can be seen as a very speedy procedure that offers to both parties the opportunity to clarify their side of the story. When the committee assumes that the question presented is part of a bigger issue which cannot be sufficiently solved in the session, they may refer to further mediation by a mediator, consultant or coach. There is no formal list however for potential mediators or coaches parties can turn too. After the session took place, parties are send a form to evaluate the intervention.

In urgent cases, parties can ask for an emergency procedure in order to limit the time between the request for mediation and the face-to-face session. This procedure is only rarely used.

If the dispute concerns matters as listed in Article 26 of the WOR, one can decide to go directly to the Enterprise Chamber in Amsterdam. In this case, it concerns a decision by an employer whereby (a) the employer wrongly did not request advice from the WC, (b) the employer asked advice from the WC at such a late time that the advice has no influence on the decision, (c) the decision of the employer is not in accordance with the advice of the WC or, (d) the advice of the WC has been followed but some new facts have become known and that if the WC had known them this would have led to a different opnion. If one goes to the Enterprise Chamber, the focus is on the legal aspect of the case. Nevertheless, members of the Enterprise Chamber indicate that WCs regularly consult the Enterprise Chamber not solely for judicial reasons. "*In general, WCs engage in these legal actions because of other reasons than only the judicial ones. By going to the Enterprise Chamber they want to show* "*I do not accept this treatment any longer. Now it is over.*" *So the underlying topic is:* "*I want to be listened to and treated in a respectful way." This is an important aspect to work on since we deal with continuous relationships.*" Sessions at the Enterprise Chamber take usually between 2 and 5 hours. When issues appear that relate to interpersonal relations, judges of the Enterprise Chamber may refer to mediation. The judge can also refer to, or appoint, a specific mediator when asked for by the conflicting parties.

In general, there are very few rules that guide conciliation or mediation in collective labor conflicts. A common denominator is that third parties stress the great importance of **tailor-made interventions**, active listening and questioning to identify underlying problems and empathy. Member of Joint Sectoral Committee: "*It is crucial to design tailor-made interventions and to show empathy. You need to make sure that parties can walk out the room with their heads up high. Only this will make some room for long term solutions of the conflict.*"

9.5 Effectiveness the Dutch System for Collective Conflicts and Suggestions for Improvement

Different stakeholders indicate that the system for collective conflict management works quite well. At the same time, they all agree that conflicts too often stay 'hidden' until they explode or escalate. An explanation for this could be that the Netherlands is known for its '*polderen*' which puts emphasis on the idea of interchange, compromise and cooperation. To admit that you have a conflict, is often seen as a blame. Trainer: '*We see that many people think they should be able to solve the conflict themselves. And they try to do so as long as possible. Asking advise or turning to third parties is often seen as a loss of face and this is why parties usually wait a long time to turn to a third party.*' Another reason could be that parties are afraid of the costs and time related to a legal procedure. Consequently, people muddle through often resulting in deadlock situations. In these cases, the (initial) conflict on the content has usually transformed into a relational conflict. Employee representative: "*Now the word conflict is often synonym for war and thus stays unspoken. We need to learn how to disagree constructively.*" A third reason refers to the fact that the primary parties do not know that they can invite a mediator and/or where to find a third party.

Different parties involved in the research (employers, employees, WCs, unions, members Joint Sectoral Committees, Enterprise Chamber, etc.) suggest points for improvement which may address the difficulties parties encounter when confronted with collective conflicts.

1. Clarify the role of mediation, mediators and where to find them

Although the Dutch government is in favour of mediation, no special agreements have been reached by the social partners on the use of Alternative Dispute Resolution in collective labor conflicts. Often conflicting parties are not familiar with mediation, and are not well informed about the use of mediation. Member WC: "*To be honest, it is not clear to me (and I guess also to other stakeholders) how mediation can contribute to my particular case. I did not know we can hire mediators … I assumed we could only hire legal advice*". This is remarkable since the WOR stipulates that the WC can invite an external consultant to give training or advise on several topics including social processes, such as communication and conflict. If people are willing to turn to a mediator, they often do not know where to find a good, qualified mediator that can be trusted, and is knowledgeable about the WOR. Consequently parties do not engage in this "risky" business. In the field there is a high need for more information. As an employer representative formulates it: "*There should be a trusted source that helps us to find the right people at the right moment, including mediation. A flow chart explaining who could be contacted when, with some exemplary questions would be very helpful.*" The most natural party to take up this role might be the SER. Some unions already invest in mediation (behind de scenes), but indicate it is difficult to integrate the mediator role and the need for showing muscles when representing people which makes it difficult to make some compromises. Third parties in the field

that are confronted with (potential) conflict need to be trained on how to analyse the problem and to see whether mediation could be of added value to get to a solution.

2. Clarify the role of the Joint Sectoral Committees

Currently, perceptions and expectations on the joint sectoral commissions are diffuse. Many stakeholders still assume that Joint Sectoral Committees give legal advice and engage in arbitration, which is currently not the case. The Committees should be more clear on what they offer and the SER could strengthen its role in the field. Employer representative: "*The SER should profile itself as an expertise center in collective conflicts both in theory and practice. This implies strengthening and broadening its current role*." For instance, the fact that the secretary of the SER gives advice on how to deal with a difficult situation or conflict is unknown to most parties. Now, works councils regularly hesitate to turn to the Joint Sectoral Committees as they are afraid how their employer will react when finding out employees turned to a Joint Sectoral Committee, or they believe the employer will ignore the agreements made during the session. Another suggestion is to make a mediation session obligatory when a mediation request is made by one of the parties. Member WC: "*Currently, parties still have the option to decline participation in mediation. This is a pity. For a WC it might be really difficult to get hold of the employer or the top management. If there is no other way to push them to the table, the only option is to go to court. In my opinion, parties lose in this way many opportunities to have a decent talk*" (Here you can find a short movie that illustrates the mediation process as it takes place in the Committees for the Market Sector https://www.bedrijfscommissue.nl/).

3. More attention for preventive measures and care after the intervention

The law on WCs in the Netherlands made provisions for the investment in training for WCs. Every year the SER draws up targets amounts for the training of the WC. Members of the WC are entitled to training. The employer is obliged to offer members of the WC the opportunity to receive training of sufficient quality for a number of days per year during working hours while keeping pay as they deem necessary for the fulfillment of their duties. Since the reform of this law in 2013, WCs have to claim budget from the employer. One of the consequences is that people tend to follow less courses or training. This is especially the case in smaller organizations. Union representative: "*Before the reform of the WOR law, we provided three full days of training. Now we provide a half day training with a focus on the legal aspects. All training on the level of social skills has been removed.*" Currently, there is a need for more training on social skills both on the level of how to communicate constructively with each other, but also the employer, and how to function as a group (Works Council). This can be seen as preventive mediation. If one knows well his role, as well as how to communicate constructively, this may prevent future problems and conflicts. In these trainings, it would be good to involve on a very regular base the employer or top management. Member Joint Sectoral Committee: "*In many cases, a re-occurring theme is the lack of trust and respect which affects communication in a very negative way. There is much room for preventive measures. People need to learn*

how to communicate, how to negotiate and how to reach out to each other in case of problems. They need time to exercise this on the work floor when things are not going wrong yet." Also, parties see room for improvement for the period after a conflict and direct intervention. Third parties are rarely asked to facilitate trust rebuilding, nor do they offer their service for this.

4. Invest time and money in participatory bodies like the Works Council

Both top management and employees need to understand the importance of a strong WC with a high level of knowledge and expertise (Nauta, 2015). In some cases top management tends to perceive the WC as a loss of time and money. More time needs to be invested in education to inform people (top management and HRM) on the role and benefits of a good, knowledgeable WC (management courses, HRM courses). Employers could also get coaching on this level. Currently, employers confronted with insecurities or uncertainties, tend to go to a lawyer. At the same time, Works Councils need to be trained in how to be constructive and critical towards their management. They also need to realize what position they can and want to have. The current decrease in training is a potential threat to the knowledge level and know-how of the WC.

5. Control mechanisms

Although the law provides in participatory bodies, there is no controlling institute that checks compliance with the rules regarding participatory bodies or what the effects are of going to the Joint Sectoral Committee or Enterprise Chamber on the working relationshipe between the employer and the WC. A good option would be to invest in an internal coordinator who controls this.

6. Potential threats

The law on WCs in the Netherlands (WOR) aims to offer a framework to improve constructive dialogue. In theory there is a strict division between 2 types of collective conflicts related to the parties involved: unions on the one hand, or the works council, representing the employees on the other hand. Each has its own responsibilities and legal position. In practice, this distinction is becoming less clear. Not only are many members of the WC trade union members, but there is also an increasing trend that issues that would be dealt with by the unions, end up at the level of the WC (e.g. CLA's closed with the works council). This is especially the case in companies with a low level of unionization. This puts a lot of pressure on the WC to solve complex issues, which they are possibly not up to.

9.6 Conclusion

The system for collective conflict management in the Netherlands including the crucial role of Works Councils, is unique. When investigating the role of mediation in

collective labor conflicts, our results show that a formal system for mediating collective conflicts where the trade unions are involved (CLA related conflicts) is lacking. Parties tend to search in their own networks for mediators, or turn to well-known public figures because of their reputation, expertise, or position (usually politicians or labor law university professors). Although there are some provisions for mediation for the collective conflicts related to the Works Council (Joint Sectoral Committees), the role of mediation in collective conflicts is currently limited and should be increased next to more legal provisions.

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References

Akkermans, M. J. W. M. (1994). *Gelijk hebben en gelijk krijgen*. AAC: Den Haag.

Brown, W. (2014). Third party processes in employment disputes. In: *The Oxford handbook of conflict management in organizations* (pp. 135–149).

de Roo, A. J. (2002). The settlement of collective labour disputes in the Netherlands. In Valdes Dal-Re (Ed.), *Labour conciliation, mediation and arbitration in European Union countries*. Madrid: Ministero de Trabajo y Asuntos Sociales.

Euwema, M., Munduate, L., Elgoibar, P., Pender, E., & García, A. B. (Eds.). (2015). *Promoting social dialogue in European organizations: Human resources management and constructive conflict management*. Cham: Springer. https://doi.org/10.1007/978-3-319-08605-7_8.

Hofstee, L. I. (2018). *WOR, Wet op de Ondernemingsraden 2018*. Vakmedianet.

Huiskamp, R. (2003). *Arbeidsrelaties en onderneming: Vernieuwing in theorie, empirie en praktijk.* [*Employment relations and enterprises: Renewal of theory, empirical results, and practice*.] Utrecht: Lemma.

Jagtenberg, R. W., & de Roo, A. J. (2002). *Mediation in the Netherlands, National Report for the XVIth Congress of the International Academy of Comparative Law*, Brisbane, July/August.

Nauta, A. (2015). Industrial relations and works councils in the Netherlands—Results from interviews and a survey among HR managers. In M. Euwema et al. (Eds.) *Promoting social dialogue in European organizations* (pp. 105–121), Industrial Relations & Conflict Management 1. Cham: Springer. https://doi.org/10.1007/978-3-319-08605-7_8.

SER. (2016). Rapportage enquête omgaan met conflicten over medezeggenschap. https://www.ser.nl/nl/~/media/files/internet/publicaties/overige/2010_2019/2016/omgaan-conflicten-medezeggenschap.ashx.

Ter Steege, D., van Groeningen, E., Kuijpers, R., & van Cruchten, J. (2012). *Vakbeweging en organisatiegraad van werknemers.* [*Trade union and union membership of employees*.] Centraal Bureau van de Statistiek, Sociaal-Economische Trends, 4e kwartaal 2012. https://www.cbs.nl/NR/rdonlyres/B93BC030-43CE-47A9-B819-DB88CBC9AF01/0/2012k4v4p9art.pdf.

Van den Berg, N., & Van Rij, C. (2007). *Ervaringen van werkgevers met de cao en avv*. [*Experiences of employers with the CLA and the Statement of General Applicability*.] (publicatie nr. 1529). Amsterdam: Regioplan.

Van der Velden, S., Dribbush, H., Lyddon, D., & Vandaele, K. (2014). *Strikes around the world, 1968–2005: Case studies of 15 countries*. Aksant Academic Publishers.

Visee, H., Saalbrink, S., & Mevissen, J. (2012). *Naleving van de wet op de ondernemingsraden*. [*Compliance to the law on works councils*]. Amsterdam.

Wajon, I., & Vlug, P. (2017). *Naleving van de Wet op de Ondernemingsraden: Stand van zaken begin 2017*. Rotterdam: Numansdorp.

Chapter 10
Mediation and Conciliation in Collective Labor Conflicts in Poland

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Case 1—Collective conflict in the Polish unit of an international company

In the Polish subsidiary of the company, the trade union has been rejecting management's decisions for years. In this particular conflict, the union demanded a higher share in bonuses for line workers and a different meal plan. The management sought a mediator to help resolve the dispute since there was an imminent threat of a strike. At first, the mediator had a meeting with the management, an HR department employee and a lawyer, with the aim of collecting information about their negotiating position. Then, the mediator met the trade union representatives also in order to gather information regarding their negotiating position. Both parties' positions and their individual expectations were very divergent. Negotiators were chosen, and legal, economic and HR arguments were prepared. The parties were trained for multi-stage negotiations. After this process, the strike alert was cancelled, a settlement was reached and a collective agreement was signed.

Case 2—The bus drivers' strike

Mediation can be undertaken by various persons, and a bus drivers' strike in the Municipal Transportation Company in Kielce in August 2007 may serve as an interesting example. As a result of the failure to reach an agreement with the City Mayor, the crew of the Municipal Transportation Company went on to strike

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under the motto of "Stop privatization at the workers' expense". Having the prospect of a takeover of the company by an international organization (Veolia Transport Polska), the workers demanded to be guaranteed a package of social services, including employment security, decent pay and the modernization of the bus fleet. On the eighteenth day they reached an agreement, the municipal transport company was converted into an employee-owned company and was guaranteed the monopoly of Kielce's public transportation. The mediation was undertaken by a local bishop who got engaged in solving the conflict in the face of previous failures (*Sieczkowski; Sukces biskupiej mediacji, strajk MPK zakończony;* Wach, 2007).

10.1 Introduction

The specific characteristics of collective labor conflicts in Poland are related to the ownership structure of Polish companies. Frequently the company management is not a direct party in a conflict, rather it is the company owner, e.g. State Treasury (education, health care system), a parent company based overseas, or territorial self-governmental authorities (transport, water supply). This context often leads to stagnation and prevents conflict resolution. Apart from the structural problem, also the perception of the role of mediators is noteworthy. Parties may come to an agreement when choosing one, but afterwards it may result in applying for a mediator to be appointed by the Minister (to prevent either of the parties getting the feeling that "their own mediator" has been chosen). There are also collective conflicts which are mediated by a local authority or someone considered as impartial.

The Central Statistical Office of Poland[1] published another edition of the Yearbook of Labor Statistics in March 2016. Additionally, recent reports of the Ministry of Family, Labor and Social Policy show the data on mediation in collective conflicts. Reports indicate that the National Labor Inspectorate registered 1698 collective conflicts between the years 2014 and 2016. Most cases were registered in Mazowieckie and Śląskie Voivodships, in such branches as industrial processing, health care, social assistance, production of energy, mining and exploration, and the transport industry (Statistical Yearbook of Labor, 2015). Of these 1998 cases of collective conflicts, only 211 used mediations and/or facilitated negotiations.

On the other hand, during this period only 23 cases collective conflicts were finished after the negotiation stage and the parties signed an agreement after negotiations (that is, before mediation). This means that ca. 1, 5% of the collective conflicts ended in agreement after negotiations. At the same time, in a high percentage of cases (188

[1]The data illustrating collective conflicts in Poland come from statistical yearbooks of the Central Statistical Office (2016) and reports published by respective ministries responsible for labor and social policy (2014–2016), as well as interviews conducted with mediation parties (2016–2018).

cases, 11%) the parties didn't agree and strived for a strike, so they were forced to try mediation. The disparity in between the registered collective conflicts and those which ended after negotiations may suggest that the majority of conflicts remain in suspension (2014—187; 2015—1096; 2016—181), despite not going to strike or reaching an agreement. This situation, considering the persistent lack of agreements between conflicting sides, poses the threat of recurrent collective conflicts in the future, as issues seem to have not been fully solved.

Social dialogue in Poland is closely related to its history, the period of social and economic transformation, the post-socialist legacy and the structure of the system of trade unions (Kożusznik & Polak, 2015, 2016). The unions are the second biggest community of the non-profit sector in Poland (after the Roman Catholic Church). Currently, there are approximately 20,000 trade union organizations registered in Poland, of which about 60% are active. Meanwhile, the level of unionization according to recent data is at 5–11%,[2] which is one of the lowest in the EU (Feliksiak, 2017; Goś-Wójcicka & Sekuła, 2015).

The system for managing collective conflicts in Poland was established May 23, 1991 with the Act on Resolution of Collective Disputes.[3] Under this Act, a collective dispute between workers and an employer may refer to (1) working conditions, (2) pay, (3) social benefits, (4) trade union rights, or (5) freedoms of workers. Thus, the Act includes a number of specifications of general topics falling within the legal definition of a collective conflict. It is not permitted to manage an individual workers' demand as a collective dispute if it's feasible to process it through a body for resolving workers' claims (a labor tribunal). It also means that all industrial actions regarding the reorganization of a company, its development, policy, ownership changes, management structure, the election of authorities, to name a few, cannot be the subject of a collective conflict in the eyes of the Act.

Here is an example of a real conflict which was not considered currently applicable to the statutory regulations as it didn't fall within the legal regulations.

Case 3—The reorganization of a big Polish company

A collective conflict occurred in one department of a big company. The workers were deeply displeased with a decision about the reorganization of their department, a decision made by the previous management and executed by the current management. This decision entailed the transfer of the unit to another city. Even though it meant a significant change in the working conditions, following the Act on Resolution of Collective Disputes, the situation was not qualified as a collective conflict. This meant that the statutory regulation

[2]The unions report higher level of unionisation, but recent survey on a representative sample of adults indicate that only 5% respondents declare affiliation to trade union (Feliksiak, 2017).

[3]Journal of Laws of 2015, entry 295. The provisions of labor law in Poland are divided into collective and individual. Collective conflicts regulate the so-called collective labor law as opposed to individual conflicts regulated by the labor code.

mechanisms were not applied in this case. The employees were transferred but remained deeply regretful, lost their trust in the management and were left with the conflict which remains unsolved…

At the same time, if the conflict issue results from a collective labor agreement or any other agreement in which a trade union has participated, then such an agreement should be previously terminated by a dismissal notice. The wording of these provisions causes a number of issues to not be covered by the statutory definition which in fact constitute causes of collective conflicts are, and consequently they are excluded from the scope of this legal regulation.

In the Polish studies conducted within the project covered in this handbook, most respondents indicated the limitations of the Act's provisions while they simultaneously emphasized the need to implement changes to existing regulations in Poland so as to include the actual diversity of collective conflicts (e.g. in a situation of a company's restructuring, ownership changes, providing an employment guarantee or redundancy packages for employees).

Parties in a collective conflict are workers—represented by a trade union- and an employer or employers who are represented by an employers' organization (Kurzynska, 2008). Within the meaning of the Act, as referred to in article 3 of the Labor Code, an employer can be an entity, i.e. an organizational unit (also an entity without legal personality), or a physical person if they employ other workers. In organizations where there is more than one trade union organization, each trade union is entitled to represent their interests in collective conflicts. In the event of a lack of unions in a company, the Act provides that "on behalf of workers in a workplace where a trade union is not acting, a collective dispute may be dealt by a trade union organization as requested by the workers to represent their collective interests."

Under the Act on Resolution of Collective Disputes, mediation proceedings are obligatory, that is, they must be conducted following a negotiation deadlock if employees' are calling a strike. This means that the mediation proceedings must always precede the announcement of a strike decision. The obligatory nature of mediation is perceived by most of the research participants as a weakness of the Polish system. Experts emphasize that a number of disputes are subject to mediation without the aim of reaching a real agreement, rather to avoid being accused of breaking the law in case of employers, and in case of the trade unions, to create an opportunity to undertake industrial actions such as strikes. One of the interviewed mediators said: "*Mediations on the basis of the law are pretended, because mediations should be voluntary. Now, mediations are only the other element of the dispute; employers approve them because they want to obey the law and Labor unions because they want to strike*".

In accordance to the provisions of the Act, collective conflicts are managed through negotiations, mediations and arbitration proceedings. Negotiations, mediations and arbitration proceedings constitute separate stages of resolving collective disputes at work. A strike is considered a final attempt at settling a collective con-

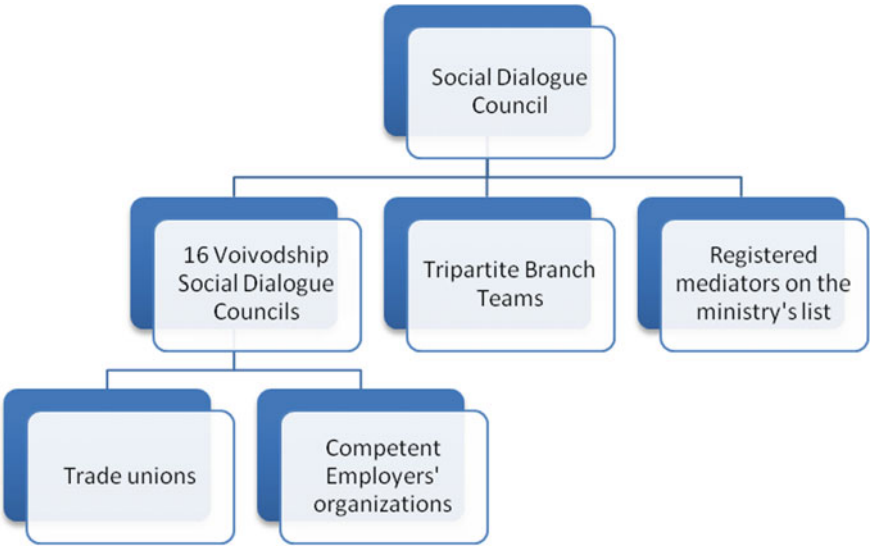

Fig. 10.1 System of Social Dialogue in Poland

flict in case of a lack of agreement between parties, as a tactic of employees to gain a better negotiation position. An alternative to strikes in the event of a mediation failure, is voluntary submission to the proceedings before social arbitration boards, which occurs very rarely in Poland. Recent data from 2014 confirms that proceedings before social arbitration boards in courts practically haven't existed during the last decade.

10.2 Characteristics of the System

The Social Dialogue System in Poland in accordance with the spirit of multi-level governance system consists of the Social Dialogue Council as a national forum for tripartite dialogue. "The tripartite dialogue engages employee representatives, employers and the government in the discussion about public issues, projects of legal solutions and other decisions made concerning the interests of the employers and employees" (Social dialogue) (https://www.mpips.gov.pl/en/social-dialogue/). At the regional level are the Voivodship Social Dialogue Councils. Sectorial dialogue also presents the tripartite formula. Employees are represented by trade unions and councils of employees; employers are represented by an employers' organization (Fig. 10.1).

Moreover, organizations associating mediators and social arbitration should be also indicated, though there's a relatively low development level in Poland. On the other hand, at the level of social partners, there's considerable fragmentation

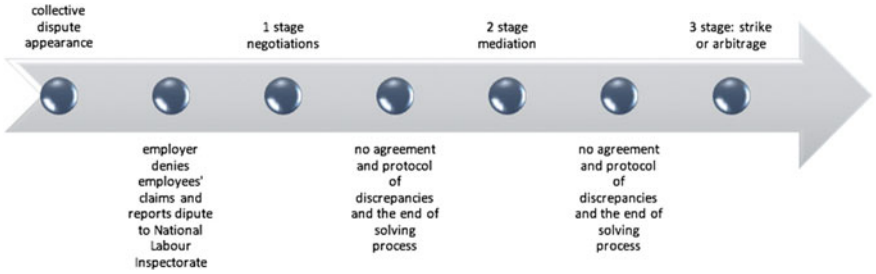

Fig. 10.2 Collective conflicts and mediation process in Poland

and political involvement of trade union organizations. Further, the system of the employers' organizations is quite stable and there's a relatively poorly developed system of mediators' organizations for solving collective conflicts. The differentiation between court mediators and mediators in collective conflicts also contributes to citizens' confusions about the system.

Our research confirmed that mediation is considered a mandatory stage of conflict which allows the workers' side to proceed with a strike call. Strikes have been registered and monitored during the past years in Poland (Krajewska, 2018). Furthermore, also the number of conflicts has been reported, specifying those conflicts which, thanks to negotiations and mediation, were settled, or for which a report of divergences was signed and the case was brought before social arbitration (Lukawska, 2008). The statistics and publications prepared for social reporting and accounting are supplementary to scientific research, which presents a wider context of collective conflict resolution in Poland.

The interviews and studies conducted for the NEIRE III project present a more individualized approach for the parties in collective conflicts, as well as mediators and policy makers.

Figure 10.2 presents the process for collective conflicts from the start till the stage of strike or arbitration. A collective conflict ends after an agreement or a court settlement is signed, or it remains suspended. There is no time limit for these conflicts, that's why many conflicts remain unsolved and/or suspended.

The Act on Resolution of Collective Disputes determines that a conflict is collective when requirements are met with regards to a larger community, a clash and its relation to work (Żołyński, 2013). Following such definition, a dispute is an example of a real conflict existing between employees and an employer. It is formed along with the aim of gaining improved conditions for workers (all workers or part of the workforce) and an employer who refuses to meet their demands. An employee representative stated: "*The current system reinforces "artificial" local disputes. In fact the problem concerns all of the country—(e.g. the system of healthcare and education). The dispute at local level doesn't solve the general problems*".

10.3 Characteristics of the Mediators and Third Party Procedures

Under the Act, formal mediation starts if a stage of negotiations has been completed and the party initiating a dispute maintains the claimed demand. The conflict is managed by a person who guarantees impartiality, who is referred to as a mediator. Polish legislators prescribes the so called Multi-Steps-ADR, a path from less formalized towards more formal conflict resolution procedures. The Act does not specify the participation of any independent/informal institutions as third parties, such as consultants.

10.3.1 Choosing a Mediator

The parties can establish the possibility of allowing the consultant to solve a conflict. If a mediator claims that the resolution of a collective conflict requires a detailed or additional fact relevant to the subject of a dispute, he notifies the parties of that. Moreover, if it is necessary to establish the economic and financial situation of a workplace in relation to the demands in a dispute, a mediator may propose an assessment to be made in such cases. The author of the assessment actually does not participate in the mediation process but provides relevant documents for it. The system also allows combining mediation with other alternative ways of solving collective conflicts. When a mediation is not successful and the party initiating the conflict will not use its right to strike, then that party can request a solution from the Board of Social Arbitration. The Board of Social Arbitration is composed of the chairman—a judge—and 3 members appointed by the parties. The industrial conflict is recognized by the board at a regional court dealing with cases in the scope of labor law and social insurance, and in the case of multi-employer industrial disputes, they are arbitrated by the Board of Social Arbitration at the Supreme Court.

The role of mediator may be taken by a person or a group of people. Some argue that it is better not to engage a single mediator who also for example conducts consulting activities, and prefer a collective body, such as a conciliation committee. However, in most cases of collective conflicts, the parties appoint one mediator. During the mediation period, mediators are entitled to take a leave off work (up to 30 days a year).

10.3.2 Remuneration

Remuneration cannot be lower than the amount specified in a regulation of a competent minister responsible for labor matters. A mediator is also entitled to have transport and accommodation costs reimbursed as per an agreement with parties

to a collective conflict. It is to be noted, however, that the amounts prescribed as minimal are quite low in comparison to the hourly rate which may be obtained by lawyers, psychologists and other specialists. As our experts stressed, these amounts have not been indexed for over 10 years so the professional mediator position is not an attractive one.

The Act provides that only a mediator who is trusted by the parties may be the third party. The mediation concludes with an agreement signed by all parties (including the mediator), and finally, a mediator appointed by the minister (in case the parties cannot appoint one) may not be cancelled by the parties. They have to submit an application to the minister for doing so, while in other cases parties may cancel a mediator if he loses their trust. In the event of mediations which don't end in agreement or only a partial agreement and a report of divergences, these actions are also accompanied by a mediator. Apart from that, there are no other protection mechanisms for a mediation process. Mediators acting as third parties should provide the mediation process in accordance with the so-called Working Standards for Mediators (Kawalec, 2009).

Since February the 5th, 2018, there are 206 mediators on the list of the Ministry of Family, Labor and Social Policy, broken down into individual voivodships.[4] The names of mediators associated in professional mediators' associations are also available (there is no obligatory professional self-government of mediators in Poland). There is also a possibility to use the list of mediators accredited by employers' organizations. The difference is that in general they act in disputes with business partners, and not only in collective disputes. The list of mediators is established by the minister competent for labor issues in consultation with trade union organizations and employers' organizations. From the interviews we understand that this list is however not checked by parties or updated.

The above figures do not reflect a complete picture since every person who safeguards impartiality in the opinion of conflicting parties may become a mediator and such a person does not have to be on the list of registered mediators. The research participants, in particular from a group of policy makers, stressed the need to professionalize the position of a mediator in the near future. Up to date, the people acting as mediators did their work without the need to demonstrate their additional qualifications or experience.

A mediator is appointed by the parties in a particular case. If the parties do not reach an agreement regarding the choice of a mediator within 5 days, further proceedings are conducted with the participation of the indicated mediator, upon request of either party, from the minister's list of mediators. No information is given as to how frequently this list is updated. Interviews with the mediators confirm that the list is out of date.

[4]The respondents complained that the list is rarely updated. In 2018, there were 206 mediators in the list in February, but at the end of May only 80 remained.

10.3.3 Appointment of Mediators

The act does not determine any specific requirements for a mediator. Thus, a mediator doesn't have to possess particular professional qualifications, e.g. to be a lawyer or to complete a course or training in the area of mediation, although, undoubtedly, legal or economic knowledge or practical skills as to how to conduct mediation should be taken into account when selecting a mediator. The most important aspect is impartiality and the likelihood to be accepted by the parties. This person cannot be related to either of the parties nor to the people representing them, in such a manner that it could result in challenging this person's impartiality.

Some mediators are partly associated to the chamber of mediators or arbitrators and to other professional associations. According to the current working standards set for mediators, they are required to raise their qualifications, but it should be treated not as a statutory requirement but only as a recommendation. Mediators have access to training, for example courses or post-diploma studies, which are organized by different organizations (universities, associations, foundations, ministry, etc.).

Our studies confirm that, as a general rule, mediators are people with legal, psychological, sociological or industry-specific education (medical, mining, technical etc.). The interviewed mediators had 20-years professional experience on average and 10-years' experience conducting mediations. Mediators often hold managerial positions in trade union organizations or work in HR units of companies, and they can be employed by both private and public companies. When they act as mediators they get time off work and they carry out the mediation process according to the act or the contractual agreement. The observations supported the assumption that Polish mediators' strength is based on their professional competences and expertise. However, the statutory authority of mediation is quite weak and therefore, sometimes conflicting parties do not take mediation and mediators seriously. Thus, in the respondents' opinion, the professionalization of the role of the mediator in social conflicts should be provided in the near future.

10.4 Description of the Facilitation or Mediation Process

The findings confirm that every mediator uses his or her own strategy. Some of them start with meeting each party separately, then they organize a joint meeting during which they outline the causes and dynamics of the conflict, and then, they help parties reach a consensus. Other mediators stated that if they did not observe real willingness to reach an agreement by the parties, they would terminate the mediation process. Some mediators (especially with psychological background) pay special attention to the sources of the conflicts (e.g. a dispute over values, a dispute of interests, etc.) and attempt to transform their differences into perception issues since parties are more likely to find an agreement in these cases.

During every step of the mediation, including meetings, presentation of positions and exchanging of expectations, agreements and minutes should registered. This is done to document all evidential reasons in the event of being used in possible further legal proceedings. A mediator who works under an employment contract is entitled to be off work throughout the duration of the mediation process. During that period, a mediator is not entitled to receive his regular remuneration for his regular employment contract.

A remuneration condition for a mediator from the ministry's list is laid down by the relevant regulation. On the other hand, mediators who are selected outside of the ministry's list have their remuneration and reimbursement of travel and accommodation expenses regulated by an agreement between the parties. The regulations apply the principle that the mediation proceeding costs—which are composed of remuneration for a mediator and his travel and accommodation costs—are to be incurred by both parties in equal parts, unless a different division of costs is agreed. Additionally, there is the Workplace Card and the Collective Dispute Card for statistical purposes (for the Ministry of Family, Labor and Social Policy). An interviewed employer said: "*the mediation system is very rarely used. The mediations don't bring profit to the law offices, that's why lawyers do not develop these forms of coping with collective conflicts. On the mediators list we find names of people who do not work as mediators*".

The parties may also withdraw the power of the selected mediator and choose another one at any time during the mediation process. This decision is at their own discretion. The Act regulates that in case of mediations conducted by a mediator from the ministry's list, the parties cannot cancel him. Our study shows that it's a common practice that one party indicates three candidates and the other one also puts forward three candidatures, and it occurs that the names of mediators are the same on both lists. Each party may refuse mediators proposed by the other party, ask for another mediator, or propose their own. Our findings confirmed that parties are more likely to request help from local authorities, rather than from a list of mediators. The mediator usually works individually. It is a matter of a mediator's experience and depends on the nature of a dispute itself. There are also mediators working in pairs or in groups of three (e.g. bringing in a psychologist or a lawyer creates a possibility of invoking content-related specialists). However, in most cases there is one mediator, but if he fails to meet the expectations, then there is a change (e.g. if he was not suitable for solving conflicts in a given field—there is no information available in this respect).

10.4.1 Starting the Mediation

Mediation proceedings may be conducted according to the rules applicable at the negotiation phase. Thus, it is important that all actions are taken in good faith, respecting the interests of the parties in conflict, as well as respecting the interests of these workers who are not directly involved in the collective conflict. Mediators act under a general formula of mediations which includes the essence of mediation (impartiality

and neutrality of a mediator, confidentiality, voluntary participation, monitoring of the content of an agreement by parties). There are individual rules for contacting parties to provide information about a meeting—by post, by phone, responding to additional enquiries. As a general rule, there is an individual kick-off meeting with each party and then, they have a joint meeting. Explanations are given about the mediation process (the so-called mediator's monologue), and a favorable atmosphere is created.

10.4.2 The Mediation

The Act does not include specific solutions in respect of a mediator's rights, however, as it results from the essence of mediation and existing residual regulations, such rights may be divided into three types: organizational, analytic and research, and postulated ones. A mediator is granted the right to control the course of proceedings by establishing a schedule for meetings and monitoring their course. Initially, a mediator may establish the course of the mediation procedure with parties, and determine jointly with them when and meetings take place, including separate meetings (caucus). This also includes arrangements regarding the recording of the mediation meetings, and how to inform workers of a course of negotiations by parties. Then, there are rights for mediators to have access to all relevant documents, to analyze the claims and positions of the parties, the genesis of the conflict, and the course of negotiations. In some cases, the mediator may request or ask an additional expert to develop opinions and test the mediation process.

The postulated rights consist in a possibility to attract parties' attention to the need to make detailed and additional arrangements regarding the subject of a dispute or to make use of experts' opinions, e.g. economists or lawyers. Mediation can go on from a few hours to a week, with no legal time limitations.

10.4.3 Ending the Mediation

Mediation proceedings are finished by concluding an agreement or signing a report of divergences. Both the signing of an agreement and the report of divergences in the event of failure to reach an agreement, are executed with the participation of a mediator. The legal regulations in force do not contain any guidelines regarding the content of an agreement. The agreement binds parties and constitutes a source of labor law, within the meaning of article 9 of the Labor Code. In the event of failure to reach an agreement through the mediation procedure, the Act imposes an obligation to draw up a report of divergences with the participation of a mediator. A report of divergences should contain clearly formulated positions of the employer and the trade unions and it should also include information related to the course of

the mediation and a difference of positions that prevented parties from reaching an agreement.

If a mediator fails to involve the parties in actual negotiations, he may, and should, finish his mission. It is to be noted that the legislator does not determine a time period for the mediation proceedings. Their duration depends on the parties' will and a mediator's assessment. The mediation should be conducted as long as there's still likelihood to reach an agreement, from the perspective of its participants. A report of divergences is drawn up if the mediation fails. A report of divergences may exclude some matters, and leave the remaining ones to be reconsidered at a negotiation level. It is possible to suspend a collective dispute (if it's is not covered by the employment law), which enables unions to save face, and it is also convenient for the management board which must excuse themselves before the supervisory board. Another option is to stop the mediation, referring back to the negotiation phase when a mediator is in a way. Another technique that mediators can use is to disagree to sign a report of divergences—giving some time for parties to discuss how to avoid a strike.

10.5 Effectiveness of the System

The interviewees are not in accord whether there is any documentation of success. As mentioned earlier, only few collective conflicts are subject to mediation, and there is no clear record of the agreement level. The respondents confirm that it is hard to assess in an unambiguous way whether mediation ended in success or failure. When mediation is only a formal condition to declare a strike, it may mean a short-term success of workers. Nevertheless, the evaluation of the situation may change in the long run. Success should be measured by a final outcome including profits and losses seen from the perspective of both parties to the conflict. Courts and mediation centers were indicated as being in possession of such documentation. Nevertheless, all the respondents unanimously expressed that the satisfaction level of mediation and the level of trust are not documented, although in the case of the latter, it can be dealt with at an individual level (collecting opinions about particular mediators) and at a group level (reported lack of confidence of employers towards active trade union members). It appears that there is no actual form of evaluating the mediation and mediator/mediators.

Certainly, it is possible to indicate numerous cases of collective conflicts in which the mediator's work turned out to be a key player for reaching beneficial solutions. We can also find a number of professional mediators and persons advocating for mediation and understanding the idea of dialogue—both among employees and employers. There are still specific drawbacks and shortcomings of the mediation system in collective conflicts, which has a considerable impact on its effectiveness. According to the research subjects, the mediation procedure should be introduced at an earlier stage, not after negotiations are over. In this context, it appears that mediation today is too formal, as specified by the Act. The biggest weakness is the fact that mediation is activated at a specific stage because the Act provides so. This causes that

in the current situation strikes do not occur, but disputes between employees and an employer remain in suspension for years and may trigger consecutive conflicts in the future. In the view of our respondents, mediation should be introduced (also) at the initial stage of a dispute. Another weakness is the limited number of situations which are formally considered collective conflicts. In such situations, mediation—if it is introduced—plays a role of a promotor of the dialogue culture and is not subject to the statutory regulation. Moreover, conflicting parties and mediators focus their attention on making the mediation procedure more flexible so that it could be possible to work with a co-mediator depending on actual needs.

Some corrective measures have been taken. In September 2016, the Labor Law Codification Commission preparing changes to existing regulations regarding both individual disputes (regulated by the Labor Code), as well as collective conflicts (regulated by the Act of Resolution of Collective Deputes) was established at the ministry level. The Commission's task is to recodify the norms of individual labor law and to codify collective labor law according to the requirements of a changing labor market.

10.6 Conclusions

From the total of 1700 registered collective conflicts (2014–2016) (Krajewska, 2018), negotiations and mediations were provided in only 11% of cases and then in only 23 cases the parties reached an agreement after negotiations. Thus, there is a strong need to improve particular elements of the system and the dialogue culture. Mediation costs money and as long as the parties have to pay the mediator's labor costs, they won't hire them. Currently, there are no legal regulations regarding the compulsory fund created by employers to cover mediation costs.

On the other hand, the court in legal proceedings encourages parties to reach an agreement, which is an incentive for parties to show their efforts to reach an agreement, and also encourages the use of mediation.

An important question would be how to get parties interested in mediation. It might be helpful to know how long it will take to finalize the case. What is needed is a wider knowledge about mediators' professional competences. Even among specialists, there is no conviction about the legitimacy of using mediation. Some of them treat mediation rather as a hobby and not as a profession that could be a permanent job. Mediators operating outside the area of collective disputes are sometimes considered as those who are taking clients away from lawyer's offices. This suggests there is a lack of mutual understanding of parties' needs. Mediation implements one of the functions of employment law—the irenic function. However, if the obligation of mediation is imposed from above, to some extent the idea of mediation is contradicted. A good idea could be to introduce a direct regulation regarding mediation in the Labor Code (for example, extending a catalogue of methods indicating how to enforce claims by workers).

The applicable Act in Poland comes from 1991, from the onset of the transformation period of Polish economy and is no longer adequate to current conditions, which contributes to the ineffectiveness of the mediation system. In a number of industries, conflicts are handled with indirect decision-makers, e.g. the minister of health or education, and not with direct decision makers, as for example the company director. This poses an obstacle for reaching an agreement, regardless of using mediation or not.

Collective disputes are most often of financial nature, as seen in the conflict involving the Polish Teachers' Association regarding middle schools, which has a wider context. Some disputes are of formal nature—for example the teachers in conflict with the government must first handle the conflict at local level, which is affected when, for example, the city mayor supports their activities and postulates towards the government. Our study shows that on the list of registered mediators, information about their profession and experiences is lacking, i.e. specializing in health care system (it is unnecessary to clarify the operating rules in this individual discipline).

The subjects are aware that there's a value-creating aspect to mediation in such that no one loses or wins—both parties are equally 'winners' and 'losers'. It is value added in the working environment, since these persons may still work together and it is beneficial for the working environment. Mediation emphasizes the educational aspect—there is no time for that in court proceedings. On the other hand, the legal fees in court mediation might exceed the costs of conventional ADR's. It might be appropriate to increase the number of trainings for both parties in conflict, focusing on more modern approaches to social issues and employment law, since one of the sources of conflict is the lack of knowledge. As for mediations not regarding collective disputes, it is necessary to align the legal environment and the issue of pay for mediators. It would be also important to promote mediation not only for collective disputes, but also as a method for resolving other types of conflicts. There is a need for institutional improvement, a change in the law, such as defining what a mediator can or cannot not.

There is no monitoring of how the conflict between the parties develops. Strikes are a form of indirect information about failed mediation. Some issues have been elaborated through practical operation, but they are not standardized; there is no definition for mediators and their legal powers. The competence level of mediators is not equal and the lists of mediators are not updated (for example, some of them are inactive but still appear on the list). One respondent would like mediators to have a bigger impact on the outcome of the mediation, and to have some possible sanctions to be imposed by the Minister of Labor on employers who are not cooperative in mediation.

Employers are sometimes unprepared for mediation and in some cases appear as arrogant, as expressed in the interviews. A mediator should have the possibility to report about such cases. Problems and conflicts may be similar for different employers, but at the moment there's no option to negotiate regulations that affect them all, which means that mediation must be conducted separately for each work establishment, even if there is the same management body/owner (e.g. Governor of

Voivodeship/city mayor). Wouldn't it be easier to negotiate such discrepancies with the government in order to resolve them at national level, for the benefit of the whole country?

An additional issue which might appear, is the gender bias, regularly perceived towards female employee representatives. These are not always respected, and take serious, despite their better preparation and knowledge than other parties at the table. It is also worth considering the functioning of alternative methods for settling disputes in workplaces where trade unions don't operate. How could workers be represented in places where there are no trade unions? The respondents also pay attention to the fact that there are psychological barriers in the Polish society regarding mediation, for example a lack of openness in communication and a low level of trust. To be able to apply mediation with a broader perspective, a change in the society is also needed.

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References

Act on Resolution of Collective Disputes (Journal of Laws of 2015, entry 295). Retrieved from http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19910550236/U/D19910236Lj.pdf.

Feliksiak, M. (2017). Działalność związków zawodowych w Polsce. *Komunikat z badań.* NR87/2, s. 1–11. Retrieved from http://www.cbos.pl/SPISKOM.POL/2017/K_087_17.PDF.

Goś-Wójcicka, K., & Sekuła, T. (2015, July 13). Związki zawodowe w Polsce w 2014 r. (Trade unions in Poland in 2014). Retrieved from https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5490/10/1/1/notatka_zz_1007_ost.pdf.

Kawalec, G. (2009). Standardy pracy mediatora. Retrieved from http://www.dialog.gov.pl/dialog-krajowy/spory-zbiorowe/standardy-pracy-mediatora/.

Kożusznik, B., & Polak, J. (2015). Employee representatives in Poland. How are they perceived and what are the expectations by employers in Poland? In M. Euwema, L. Munduate, P. Elgoibar, E. Pender, & García, A. (Eds.), *Promoting social dialogue in European organizations* (pp. 123–134). New York: Springer.

Kożusznik, B., & Polak, J. (2016). Regulation of influence. An ethical perspective on how to stimulate cooperation and trust in innovative social dialogue. In M. Euwema, L. Munduate, & P. Elgoibar (Eds.), *Building trust and constructive conflict management in industrial relations* (pp. 169–184). New York: Springer.

Krajewska, S. (2018). Monitoring konfliktów społecznych. Retrieved from http://www.dialog.gov.pl/monitoring-konfliktow-spolecznych/.

Kurzynska, K. (2008). Spory zbiorowe i mediacja (Collective disputes and mediation). Retrieved from http://www.dialog.gov.pl/dialog-krajowy/spory-zbiorowe/spory-zbiorowe-i-mediacja/.

Lukawska, I. (2008). Biuletyny/książki/broszury. Retrieved from http://www.dialog.gov.pl/promocja-dialogu/publikacje-dialogu/biuletyny-ksiazki-broszury/.

Rozporządzenie Ministra Gospodarki i Pracy z dnia 8 grudnia 2004 r. w sprawie warunków wynagradzania mediatorów z listy ustalonej przez ministra właściwego do spraw pracy. Dz.U. 2004 nr 269 poz. 2673. Retrieved from http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20042692673/O/D20042673.pdf.

Sieczkowski, M. Kielecki case kryzysowy (Kielce crisis case). Retrieved from http://www.proto.pl/PR/Pdf/art_sieczkowski.pdf.

Social dialogue. Retrieved from https://www.mpips.gov.pl/en/social-dialogue/.

Statistical Yearbook of Labor. (2015). *Rocznik Statystyczny Pracy (2015)*. Warszawa: Główny Urząd Statystyczny.

Sukces biskupiej mediacji, strajk MPK zakończony. (2007, August 30) The success of episcopal mediation, the MPK strike ended. Retrieved from https://www.wprost.pl/kraj/112991/Sukces-biskupiej-mediacji-strajk-MPK-zakonczony.html.

Wach, K. (2007). 18 dni strajku w MPK (18 days of strike at MPK). Retrieved from http://infobus.pl/18-dni-strajku-w-mpk_more_67156.html.

Żołyński, J. (2013). *Strajk i inne rodzaje akcji protestacyjnych jako metody rozwiązywania sporów zbiorowych*. Warszawa: Lex a Wolters Kluwer business.

Chapter 11
Mediation and Conciliation in Collective Labor Conflicts in Portugal

Andreia Pinheiro, Ana Margarida Passos and Alan Stoleroff

The Case

In 2016, a trade union made a request to DGERT for conciliation in a dispute. The reported conflict involved a union and an employers' association, and was based on a review of a collective agreement that had not been revised since 2008. The request was motivated by the fact that a set of practical changes had already been implemented but had not been previously formalized within the collective agreement.

When the parties started to negotiate, the employers' association revealed that it wanted a more flexible organisation of working time and was willing to concede wage increases in return. These became the focal points of the negotiation. Although at the beginning of the process the parties were both reluctant and the employers' association presented a very rigid position, after three meetings they decided to move on to direct negotiations. When they came back for another conciliation meeting they were ready to close the procedure and sign the revised collective agreement.

In this case, the role of the conciliator was crucial in pointing out the importance of having a collective convention rather than the mere application of the Labor Code, which would be unquestionably further apart from the sector's reality. Eventually, the parties recognized the added value of reaching an agreement and found out the way to agree on the controversial terms.

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11.1 Introduction

Over the last four decades, since the acquisition of basic democratic rights in labor relations, the Portuguese industrial relations system has evolved steadily (Barreto & Naumann, 1998; Stoleroff, 2000). In fact, the success of its institutionalisation, after a revolutionary upheaval and in the context of the consolidation of a constitutional democratic political regime and gradual recuperation of civil society, can, to some degree, be deducted from the pattern and evolution of labor conflict and the role of third party intervention.

In the very early stages of Portuguese democratisation, following the revolutionary period of 1974–75, labor conflict was endemic to the emerging pattern of labor relations. However, since the deep economic crisis of 1983–85 and the organisational restructuring of the late 1980s and 1990s, the level of conflict has continuously decreased. Even with spikes of strike activity, most notably during the recent crisis years, the average level of open conflict has tended to fall. An explanation of this evolution would require looking at many factors and variables (Costa, Dias, & Soeiro, 2014) and it is within this context that third party intervention should be examined.

During the period between 1986–2016 (represented on Fig. 11.1), strikes reflected an average number of lost working days per worker of less than 2 days, being 1 day the most common duration of a strike. In most recent years this number has been increasing, reaching a value of 1, 8 days in 2016, equalling values from the early years of this century (source: Pordata).

Most recently, Portugal experienced another serious crisis, associated with the international financial crisis and the sovereign debt crisis of the Euro Zone, that had significant implications in all sectors of the economy. Between 2008 and 2014 GDP fell sharply and unemployment rose to record heights.

The country was forced to seek external assistance from the IMF, the European Commission and ECB in April 2011, submitting to an adjustment programme, defined in a "Memorandum of Understanding" with this Troika, that ended in June 2014. During the Economic and Financial Assistance Programme a set of "austerity

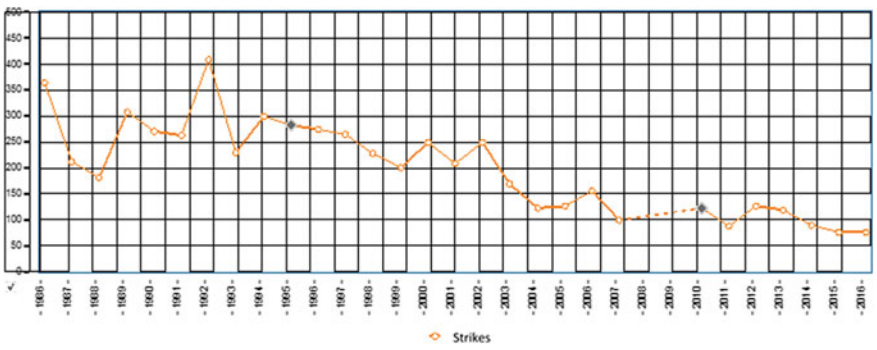

Fig. 11.1 Strike frequency—1986–2016

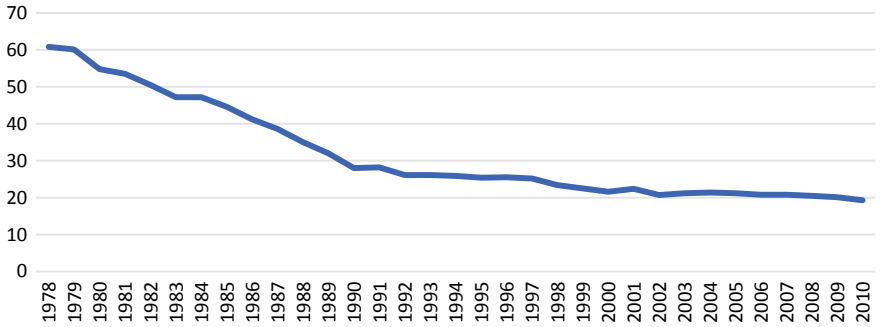

Fig. 11.2 Trade Union affiliation density. *Source* Costa, Dias, and Soeiro (2014)

measures" was implemented with the purported aim of reducing the deficit (from 11.2% at the end of 2010 to 4.4% at the end of 2015 and 3% in 2017; Source: Eurostat).

The budgetary constraints were felt most intensely in the public sector generally and in the public administration more specifically (Stoleroff, 2013). Amongst the measures applied to public employees were pay cuts, the suspension of the 13th month vacation pay, a freeze on hiring and career progression and the receipt of Christmas allowances in twelfths. However, the MoU contained other measures aimed very broadly at reducing workers' rights and led to revisions of the Labor Code to facilitate dismissals, reduce compensation for dismissal and limit the coverage of collective bargaining.

The labor movement responded with strike actions, including various general strikes (Campos Lima, & Martín Artiles, 2011; Costa et al., 2014). However, despite the increase in values registered during the crisis, especially between 2011 and 2014, it never came close to the values presented in the 80s and 90s. Most notably, strikes became endemic in the transport sector, which had a major impact on people trying to reach their daily workplace. The strikes with greater expression were probably those carried out by Metropolitano de Lisboa, but almost every transport company suffered strikes during the period of crisis.

Another aspect influencing the level of collective conflict is the significant and gradual reduction of union affiliation, as can be seen in Fig. 11.2. In conclusion, we can state that the number of strikes at company and workplace level, on the whole, continued its decline, while there has been a slight increase in sectoral disputes such as in transport and education sectors.

Currently, Portugal is undergoing a period of economic recovery, showing significant improvement in economic and financial indicators. As to be expected in a period of recovery, labor has been more assertive, particularly in the public sector, which has been marked by a series of strikes with significant participation, namely in Health and Education. It remains to be seen how recovery will affect the militancy and bargaining power of unions in private sector collective bargaining, which is where conciliation and mediation are most relevant since it is the source of most requests for intervention.

11.2 Characteristics of the System

Work-related conflicts can be addressed by both the Ministry of Justice, when these are individual, and the Ministry of Labor, when conflicts are collective. In this chapter we are only focusing on the procedures associated with collective conflict resolution, which includes conciliation, mediation, arbitration and prevention processes. A large part of the information presented here is based on legislation, the Labor Code (*Código do Trabalho*), the website and documents produced by DGERT (Directorate-General for Employment and Labor Relations), an interview conducted with DGERT's Chief Executive, the interviews conducted with the mediators and various users of the system and the CES (Economic and Social Council) website.

In order to clarify the concepts, collective conflicts of rights are based on the interpretation or enforcement of an existing contract, while collective conflicts of interests refer to *crisis situations in direct negotiation*, where the parties are not able or not willing to continue negotiating until they reach a balanced solution between the interests they both represent (Fernandes, 2012).

In Portugal, the legal system tends to promote intervention in collective labor conflicts (Fernandes, 2012) and their management is regulated by basic recognized parameters, such as the freedom of trade union organization and action; the recognition and guarantee of the right to strike; the freedom to choose between negotiation procedures; the existence of imperative boundaries on the content and timing and sequence of formal negotiation procedures; and the provision of optional or voluntary methods for conflict resolution.

Collective conflicts stem from disagreements regarding the updating, revision or enforcement of an existing contract and its clauses or the negotiation of a new contract. In the case that a party to a collective conflict requests the intervention of a third party, the Labor Code stipulates three standard procedures: Conciliation (Artºs 523–525), Mediation (Artºs 526–528) and Arbitration (Artº 529). There also exist procedures for the prevention of collective conflicts which involve the DGERT as third party. This latter function does not appear in the Labor Code, but rather derives from the DGERT's Organic Law, approved by the Regulatory Decree nr. 40/2012 of April 12th (Artº 2, 4 c).

The competent public entity involved in conciliation, mediation and prevention processes for the public and private sectors is the DGERT, which is a division within the Ministry of Labor, Solidarity and Social Security. It operates through two delegations for professional relations, one for the south (Directorate of Services for Professional Relations of Lisbon and Vale do Tejo, Alentejo and Algarve—DSRPLAA) and one for the north (Directorate of Services for Professional Relations in Northern and Central Regions—DSRPNC).

The services provided by DGERT are free of charge to the parties involved, facilitating the access to this collective conflict resolution service and helping to promote collective bargaining.

The relevant responsibilities of the DGERT are in:

(a) Conciliation and mediation of collective labor disputes resulting from the conclusion or revision of collective agreements;
(b) Registry of information and participation in the negotiation process for Collective Dismissals[1];
(c) Prevention of Collective Conflicts through assistance and intervention in labour relations in order to prevent or to surpass eventual collective conflicts;
(d) Definition of Minimum Services following the convocation of a strike by a union.[2]

Arbitration, unlike the other three processes, involves issuing a binding decision/sentence by the arbitrator or arbitration committee. Decision takes place following examination of the opposing parties' claims and grounds for them, with or without hearing them directly. The key criterion of arbitration is equity, which means it is a question of defining the right solution to the conflict, within the lines set by the parties' final positions. As stipulated in the Labour Code, arbitration may take three distinct forms: mandatory arbitration, necessary arbitration and arbitration for the definition of minimum services.

The competent public body in the case of arbitration processes is the CES, the Economic and Social Council, which is the public organ for consultation and tripartite concertation in the economic and social field. In this context, the main roles of the CES are to organize and maintain the required lists for the purpose of appointing arbitrators (Presiding Arbitrators, Employer Arbitrators and Worker Arbitrators), to select the arbitrators when necessary, to guarantee the payment of arbitrators and experts and to provide the technical and administrative support to the functioning of the Arbitration Court.

There is a possibility for the conciliation and mediation procedures to be carried out by an entity other than the DGERT, that is, to be carried out by anyone to whom the parties assign this responsibility to, usually an external lawyer. In this case, the rules provided by the Labour Code become supplementary. The Ministry services must nevertheless be informed of the beginning and end of the process. In the specific case of mediation, there is also a possibility for parties to jointly request the minister responsible for labor to appoint a personality from the Presiding Arbitrators list (CES) to be a mediator in the conflict. If the minister agrees and the personality accepts the nomination as mediator, the costs are covered by the Ministry of Labour.

[1]The Labor Code requires employers to inform the DGERT, coincident with notification to the representative organizations of the employees, of an intention to dismiss. Collective dismissals involve situations where a company with less than 50 employees intends to dismiss 2 or more employees or where a company with 50 or more employees intends to dismiss 5 or more workers. Collective dismissals must be justified due to the closing of company units or economic, structural-organizational or technological changes.

[2]The Labor Code requires registration of prior notice in the case of a union's call to strike and the negotiation of agreements regarding minimum services to be provided in case of a strike in a company or facility (public or private) that may affect the provision of essential social needs as well as the necessary means to ensure them.

This study has focused on the conciliation, mediation and prevention procedures because the three involve negotiation between the parties. According to the Portuguese law, these are never compulsory, they always depend on the will and request of at least one party (see further explanation below).

11.2.1 Evaluation of Stakeholders on the System

Evidence from the interviews with the mediators showed that, in general, they are satisfied with the legal structure in which the system is established and believe that it is appropriate to the parties' needs and requests. They also believe that the system should be more widely disseminated to organizations, continuing the efforts to get closer to the business sector. A mediator said: "The social partners are increasingly aware of the importance of DGERT and they are seeking us (our services) more and more".

Regarding the parties, although they prefer to negotiate directly without the intervention of a third party, both the employers' and the workers' representatives appreciate the work and effort carried out by the DGERT, which they consider to be a reliable actor for the resolution of collective conflicts. The parties said to require DGERT's intervention, especially in two situations: (1) when direct negotiations reach an impasse, preventing them from moving forward on their own; (2) when companies are unwilling to receive trade unions to negotiate.

11.3 Characteristics of the Mediators and the Third-Party Procedures

In 2017 DGERT employed 11 mediators in total, divided between the two regional Directorates, 5 of them working in Lisbon and the other 6 in Porto. These professionals are called conciliators or mediators, according to the procedure they are carrying out (conciliation or mediation) and formally they are classified as senior technicians of the Public Administration, who work full-time in the Ministry and perform tasks exclusively related to the function of conciliator/mediator. Although the workload is not constant and there are differences over time, there is a common perception among all interviewed mediators that they perform a significant effort to fulfill their work and that the resources, mainly human resources are scarce given the number of processes.

All the members of the North's team are jurists, but in Lisbon's team only the Director has a background in law while the other mediators have a background in sociology. No specific training in negotiation or collective bargaining is required, and the mediators' initial training is on-the-job, attending meetings together with

Table 11.1 Requested conciliations (2010–2016)

Years	Conciliation processes			
	Requests	Concluded with conciliation agreement	Concluded without conciliation agreement	Concluded—total
2010	85	35	38	73
2011	77	29	51	80
2012	35	15	20	35
2013	52	19	33	52
2014	61	33	25	61
2015	63	20	22	42
2016	38	17	21	38*

Source DGERT *28 conciliation processes open and on going

more experienced conciliators. The conciliator is expected to take charge of his/her own processes only a few months afterwards.

During the year, there are occasional training sessions and seminars, mostly related to Labor Law and Legislation, not specifically addressing issues such as negotiation or collective conflict resolution procedures. Apart from those annual training activities, all of the staff with more than 1 year of experience had been given the opportunity to attend a Certification Course on Conciliation/Mediation of Labour Disputes in the International Training Centre of the ILO. The members from Lisbon have also been given the opportunity to attend a graduate program in Labor Law and Social Security.

In Portugal, on an annual basis, approximately 40 conciliations, 10 mediations and 90 prevention procedures take place, facilitated by the official mediators from DGERT (see Tables 11.1, 11.2 and 11.3). The processes can go from one year to the next if they are not concluded within the same year of the request and that is why it is possible to conclude more processes than those requested. It is not useful to calculate the number of meetings that took place within these processes nor the average, due to the great variation in processes. We were informed of a conciliation process that lasted only 3 meetings and another that took at least 15 meetings before the final agreement was achieved.

11.3.1 Evaluation by Stakeholders of the Mediators and Third-Party Procedures

All the mediators that we interviewed considered the Certification Course from the ILO to have been a very valuable and useful tool for the performance of their functions. They pointed out that the most important aspects were to set a common

Table 11.2 Requested mediations (2010–2016)

Years	Mediation processes			
	Requests	Concluded with mediation agreement	Concluded without mediation agreement	Concluded—total
2010	14	1	1	2
2011	15	0	10	10
2012	8	1	7	8
2013	7	1	6	7
2014	11	1	10	11
2015	11	2	5	7
2016	10	1	9	10*

Source DGERT *5 mediation processes open and on going

Table 11.3 Prevention processes (2010–2016)

Years	Prevention processes			
	Requests	Concluded with agreement	Concluded without agreement	Concluded—total
2010	63	39	18	57
2011	77	44	18	62
2012	78	57	21	78
2013	85	56	29	85
2014	65	49	16	65
2015	80	49	24	73
2016	90	59	29	88*

Source DGERT *15 prevention processes open and on going

basis for the way of working as a conciliator and to learn best practices from different countries and realities.

An aspect mentioned by most of the interviewees is related to the definition of the Statute of the Mediator. This raises some issues, namely, problems of confidentiality in the mediator's action. The mediators expressed concerns regarding the lack of confidentiality rules for proceedings, meetings and minutes, meaning that the parties may disclose what is said in negotiation meetings, which is often not beneficial to the negotiation process and can in certain situations even exacerbate the conflict.[3]

Evidence from the interviews with both employers' and employees' representatives show that there is a general feeling of trust towards the mediators' work.

[3]In the words of one mediator: "If the parties don't feel at ease to speak freely, the negotiation will not be as fruitful as it could be."

The parties believe in the neutrality of the conciliators/mediators and trust them to facilitate dialogue throughout the conflict in negotiations.[4]

11.4 Description of the Conciliation, Mediation and Prevention Processes

Conciliation and mediation are both intended to promote agreement on the conclusion or revision of a collective agreement, but there are some differences in the processes and procedures.

Conciliation, usually the first stage of the process, is "assisted negotiation" where a third party is involved in order to help the parties find agreement. This may be a representative of the state (from DGERT) or a figure chosen by the parties involved. This procedure may be initiated either by agreement of the parties or on the initiative of only one of them, in the absence of a response to a proposal to conclude/revise a collective agreement or following 8 days' written notice to the other party. The extent and form of this intervention are highly variable; it may involve only procedural support or go beyond to the formulation of proposals/suggestions to the parties.

Prevention of collective conflicts is a similar process to conciliation—an assisted conversation without proposals by the mediators. The difference is that conciliation arises from a collective bargaining process, while prevention arises from other conflicts between parties, for example an interpretation of the collective agreement—right conflict—or other conflict of interest between unions and company (https://www.dgert.gov.pt).

Mediation is where the third party—a mediator appointed by DGERT—draws up a recommendation or proposed solution after having researched the positions of the parties and the grounds for their positions. As in conciliation, the request may be based upon the application of both parties or only one, provided that a conciliation process has already taken place with the duration of at least one month. The main goal is to promote an agreement between the actors and the ultimate result of successful mediation would be the signing of a collective convention, in whole or part. The fundamental criterion of mediation is efficacy when looking for the best agreement possible, and the role of the mediator is not to point to the fairest solution, but rather to discover and present to the parties a proposal that represents the closest approximation between their opposing positions.

Concerning the procedure to arrange a third party, regardless of the process, every request starts with an e-mail sent by one or both parties, usually the trade union, to the DGERT's office. It must indicate the purpose for the intervention and its object. Then, the DGERT verifies the validity of the request, assigns a conciliator/mediator and convenes the parties to start the negotiation process within 10 days of the request. It

[4]One employer representative said, "I absolutely believe that the parties trust the mediators' intervention. We have very competent and dedicated professionals and I have the best perception about them."

not possible for the parties to refuse to participate in conciliation/mediation processes without prior notice and valid justification and there are fines for unjustified absences of the parties.

In conciliation, the meeting participants are the parties—employer and union—and the conciliator appointed by DGERT. When conciliation concerns the revision of a collective agreement, the DGERT's services should invite union or employers' associations involved in that agreement even if they have not requested conciliation. Conciliation may conclude in agreement or non-agreement on the negotiated subjects. The result of the process, even when there is an agreement, is a protocol signed by the parties and the conciliator, but it is not subject to registration or publication. This document may be substantiated by a collective agreement, if and to the extent that the parties so decide.

Regarding mediation, the participants are the parties—employer and union—and the mediator appointed by DGERT. Mediation begins with the definition of the object. The legal framework, which is supplementary, defines the following stages:

- If mediation has been required by only one of the parties, the mediator must request the other side to decide on the object and, if there is a disagreement, it is the mediator who decides regarding feasibility of the mediation;
- The mediator must send the proposal to the parties within 30 days of its appointment, after meeting separately with both parties (more than one meeting may occur);
- The parties have 10 days from the receipt of the proposal to notify the mediator of their acceptance;
- After receiving the replies or after 10 days, the mediator must notify the parties of the acceptance or rejection of the proposal within 2 days.

The parties may accept the mediator's proposal in whole or partially or reject it. The proposal, even if accepted by both parties, is not subject to registration or publication. It is up to the parties to transform the agreement into the formal text of the collective agreement for subsequent registration.

All the cases are distributed internally and the parties have no choice regarding the responsible mediator. For example, in Lisbon the mediators are organized by industrial branches, which means that a certain branch is generally going to be dealt with by the same mediator. In Porto, however, this is not the method and cases are distributed by the Director with the aim of rotating branches amongst the mediators.

11.4.1 Evaluation by Stakeholders of the Mediators and Mediation Processes

The requests for conciliation are mostly made, unilaterally, by trade unions. As a mediator stated, "Almost all of our work is due to union initiative; it is very rare for a company to ask for conciliation, mediation or prevention. Usually, dissatisfaction

comes from unions. Lately, we have started to have some requests from companies". This might happen because companies are currently getting to know better DGERT's service.

It is unanimous among all the interviewees that the most recurrent issues in collective conflicts, and those that raise the most disagreements, are wage scales, cash benefits and the organization of working time (supplementary work, flexible overtime accounts and adaptability).

As stated earlier, the extent and form of conciliation are very variable because they truly depend on the parties' will, as we can understand by this mediator's statement: "There are cases that go beyond this (facilitation of dialogue) to try to unlock the negotiation, but everything depends on the willingness, openness and the mandate with which the parties come to the meetings". Furthermore, the conciliators have the freedom to choose from separate or joint meetings, selecting what they think fits best the type of conflict and relationship between the parties.

In general, the action in the different procedures varies from mediator to mediator, because as one mediator says: "We all have the same basis, identical, but then each of us adopts his own style of action, which depends on the way of being and expressing of each mediator". The basis for mediators' work is given by what is described on the Labor Code, but in practice the decisions such as the number of meetings, being with both parties or only one, be more or less interventive, are the sole responsibility of the mediator. Within the procedure that is stipulated by law the mediator can try different approaches in order to reach a more favorable result and they usually find it helpful to adapt the approach according to the interlocutor they are dealing with and its negotiation style.

11.5 Effectiveness of the System

Firstly, conciliation is by far more frequently requested by the actors than mediation. The number of mediation processes is consistently significantly lower than conciliations. In 2015 there were 11 mediation requests against 63 for conciliation (see Table 11.2). On the other hand, it is difficult to establish a regular pattern in requests for conciliation and mediation. Between 2010 and 2016, the number of requests tended to decrease, both for mediation and conciliation. Regarding prevention processes the requests have been increasing, surpassing the number of conciliation requests since 2011 and representing a large part of mediators' workload, with 90 requested interventions in 2016.

One way of measuring the effectiveness of the system of third party intervention is obviously based upon its ability to produce agreements. Focusing only on the processes of conciliation and mediation carried out by DGERT, it is notable that the majority of processes do not produce agreements. Nevertheless, it be can observed that conciliation processes and prevention process tend to produce significantly more agreements than do mediations. With the exception of the outlying year of 2010, the percentage of conciliation processes producing agreement was much greater than for

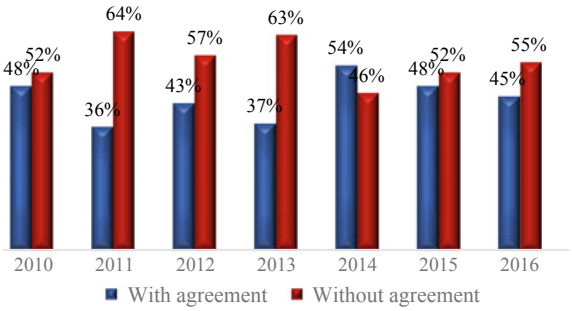

Fig. 11.3 Concluded conciliations (2010–2016)

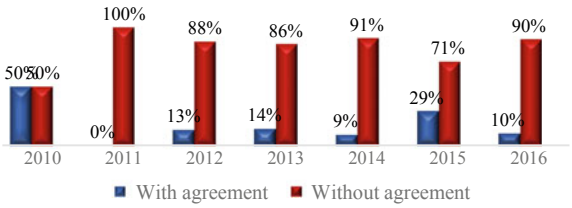

Fig. 11.4 Concluded mediations (2010–2016)

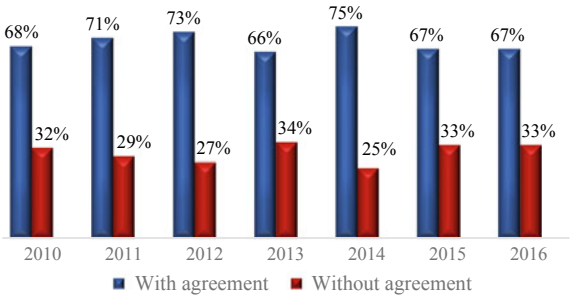

Fig. 11.5 Concluded preventions (2010–2016). *Source* DGERT

mediations, and prevention processes have higher agreement rates than conciliations. In 2016, for example, 67% of the prevention processes and 45% of the conciliations resulted in an agreement, against only 10% in mediation processes (see Figs. 11.3, 11.4 and 11.5). These data suggest that conciliation is more effective as a mechanism to manage escalated conflicts, rather than a conciliation used in a process of collective bargaining, requested for one of the parties.

However, as we understand from the information gathered in the interviews with DGERT's Chief Executive and mediators, this reduced rate of success in mediation may have to do with the fact that most mediation requests are related to a wage and salary issues, which is very challenging since the employers tend to demand concessions in exchange for adjustments that workers' representatives are not willing to accept, mostly regarding the organisation of working hours.

11.5.1 Evaluation by Stakeholders of the Effectiveness of the Mediation

In fact, there is no evaluation of the third-party intervention system in Portugal that goes beyond the registration of agreements and non-agreements of conciliation, mediation and prevention processes. That being said, evaluating effectiveness depends largely on the opinions gathered in the interviews as we believe in this case the statistics are a very limitative way to measure the effectiveness of the work carried out through these procedures.

Interviewed mediators told that although sometimes reaching an agreement is impossible, almost always they perceive an improvement in relationships between the parties that help them negotiate in future encounters. There is a shared idea that negotiating is never a loss because it opens the doors for conversation and exchange of ideas that can ultimately help the parties understand each other's grounds and compromise to a solution.

From the collected data we can see that feedback is needed in DGERT and would be very much appreciated by the mediators, even to improve their satisfaction at work when the results are not so visible. As one mediator stated: "We try to individually come up with different strategies. We don't share experiences with other colleagues, we just tell the Service Director about the cases, but we never receive feedback". Only with constructive feedback and shared experiences will it be possible to learn from each other and gather best practices from each mediator, in order to seek the higher rate of agreements.

11.6 Conclusion

Over the last two years, Portugal's economy seems to be recovering from the crisis. With the significant change in the government's orientation, significant efforts are being made, simultaneously involving concertation and struggle, to regenerate its industrial relations system and restore working conditions and standards in the context of the post-austerity era. While we have to acknowledge the importance of social dialogue in this process, industrial relations remain under significant constraints and there is significant tension amongst actors at all levels of the system, including its articulations with political actors and the political system.

However, it is predictable that conflict will increase with economic recovery and growth as employers require labour and the labour market becomes less elastic. Workers tend to sense opportunity for betterment of their negotiating positions and employers are still in need to recover their margins and make new investment. The context is thus ripe for conflict and the role of third party intervention may, as a result, become an ever more important resource for the resiliency of the industrial relations system.

References

Barreto, J., & Naumann, R. (1998). Portugal: Industrial relations under democracy. In A. Ferner & R. Hyman (Eds.), *Changing industrial relations in Europe* (pp. 395–425). Oxford: Blackwell.

Campos Lima, M., & Martín Artiles, A. (2011). Crisis and trade union challenges in Portugal and Spain: Between general strikes and social pacts. *European Review of Labor and Research, 17*(3), 387–402.

Costa, H. A., Dias, H., & Soeiro, J. (2014). As greves e a austeridade em Portugal: Olhares, expressões e recomposições. *Revista Crítica de Ciências Sociais, 103*(May), 173–202.

DGERT. (2017). *Relações Profissionais – Relatório anual (2010–2016)* [PDF]. Retrieved from www.dgert.gov.pt/relatorio-anual-das-relacoes-profissionais.

Fernandes, A. M. (2012). *Direito do Trabalho*. Lisbon: Almedina.

Stoleroff, A. (2000). Portugal: Union development within the changing contexts of political economy and industrial relations. In J. Waddington & R. Haffman (Eds.), *Trade unions in Europe: Facing challenges and searching for solutions* (pp. 451–497). Brussels: ETUI.

Stoleroff, A. (2013). Employment relations and unions in public administration in Portugal and Spain: From reform to austerity. *European Journal of Industrial Relations, 19*(4), 309–323.

Chapter 12
Mediation and Conciliation in Collective Labor Conflicts in Romania

Dragos Iliescu and Andreea Butucescu

The Case

In a non-unionized private company active in the banking industry, a collective labor conflict was notified by the employee representative for all its 800 employees, as a result of a refusal on behalf of the employer to accept a number of employee requests and the consequent impossibility to reach a consensus regarding the collective labor contract. The employee representative notified the territorial work inspectorate and requested the conciliation of the labor conflict, as a mandatory preliminary part in a possible escalation. Two meetings and one month were necessary for a satisfactory resolution of the conflict.

Conciliation was initiated, and was conducted by a representative appointed by the Ministry of Labor. Negotiation meetings took place at the company headquarters, with three representatives of the employees, three representatives of the employer (the HR director, a legal counsellor and a conformity officer), and the conciliator appointed by the Ministry of Labor. Among their various requests, employees mainly required higher salaries and benefit packages (e.g., medical insurance). The representatives of the employer rejected all these requests and required that the provisions of the previous contract are kept in the new one. Their main argument was an economic one: they showed that if these requests were granted, the company might become insolvable and layoffs would be a direct consequence. They also showed that job security was high and that there was a clear commitment from the management to keep all current employees. Building on the economic calculations provided as arguments

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by the employer, representatives of the employees proposed a scheme of extra performance-based payments for those employees that would show superior performance, a scheme that is also dependent on the general economic situation of the company. The employer accepted this proposal, and the conflict was declared solved during conciliation in the records of the Ministry of Labor.

12.1 Introduction

Mediation in labor disputes was introduced for the first time into the Romanian legal system through the Law no. 168/1999—a law specifically focusing on the settlement of labor disputes. A few years later, because of a stringent need to align Romanian practices with EU legislation, mediation as a profession was officially regulated in 2006 by the Law no. 192.

Individual labor conflicts are tackled and solved by the Mediation Council (an institution founded by the abovementioned Law no. 192), but not collective labor conflicts, which have a special character. The provisions of art. 73 of the Law no. 192/2006 on mediation and the profession of mediators are thus applicable for the mediation of individual labor conflicts, while collective labor conflicts are tackled by the employees of the Ministry of Labor, who are not necessarily accredited by the Mediation Council.

It should be noted that the various social partners still grapple with the issue of social dialogue, at least regarding the definitive answer regarding the responsible institution. Initially, the Ministry of Labor had this responsibility, but in 2017 the Ministry of Social Dialogue was established as a separate institution and took over the issue of social dialogue. Currently, the Ministry of Social Dialogue merged with the Ministry of Labor again—the decision to have a separate institution dedicated to social dialogue only lasted for a year. The position of the ministers involved was that from an organizational point of view it makes no sense for the two institutions to be separate Petrea (2018), the Government did not seem to be able to make up their minds where to put Social Dialogue. All these ongoing changes, that are a reflection of the unstable political background and of the continuous and never-ending reforms in Romania, contribute to the apparent confusion.

The number of collective labor conflicts is quite small in Romania, and this reflects also on the development of those institutions that have a mission towards the management of these collective conflicts. According to representatives of the Ministry of Labor, no more than 65 (and usually significantly less) collective labor conflicts are recorded every year. In 2017, for example, only 21 collective labor conflicts were registered with the Ministry. The Ministry of Labor has made several proposals for the creation of a government-run (and funded) Office of Mediators, with an organizational chart of 25 employees, but given the small number of reported labor

conflicts, the Ministry of Finance repeatedly refused to approve the needed budgetary resources for such an institution.

In absence of such an institution, social dialogue takes place in the legal framework given by labor law, more precisely Law no. 53/2003 (the Labor Code), and Law no. 62/2011 (the Law of Social Dialogue). The Law of Social Dialogue postulates the main regulations regarding collective labor relations, and has had a major impact on how these relations unfold. This law was however seriously criticized by a significant part of Romanian society. Since being recently approved, in 2011, this law has already faced a significant number of changes (Vasiliu, 2016), and still seems to demand acute amendments, at least accordingly to the representatives of Unions and Patronages. Besides the legal steps taken in this respect, a petition for amending the law has begun (https://campaniamea.de-clic.ro/petitions/vrem-o-lege-a-dialogului-social-mai-buna-pentru-angajati).

Changes are also needed to bring current labor and Law of Social Dialogue into compliance with the core Conventions of the International Labor Organization (ILO). The very adoption of this law was criticized: it was adopted by the government directly, circumventing the normal parliamentary procedure, a fact that was appealed by opposition parties in the Constitutional Court. Adoption of the Law of Social Dialogue in 2011 has been done without any impact study. Impact studies have not been made by legislators nor post-implementation (Guga & Constantin, 2015).

Social partners also appealed this law, by showing that several of its provisions (e.g., the conditions for a formal declaration of a strike) were not supported by impact studies, and that any and all comments and suggestions made by the Economic and Social Council and the International Labor Organization were ignored. A later section of this chapter will delve into these suggestions for change.

In conclusion, according to both trade unions and employer representatives, the current number of collective labor conflicts in Romania is quite small—an effect not so much of intensive and efficient social dialogue, but rather of a very restrictive legislation, that only defines a conflict as "action" (see below), and that makes any formal trigger of such a collective conflict a difficult and untenable endeavor.

The overwhelming feeling regarding the current state of affairs in the way collective labor conflicts are solved in Romania is one of discontent; this will be visible on the details below. However, it is not so much dissatisfaction with the conciliators or mediators, as it is with the general state of affairs, as governed by the current law: it enforces a legalistic view on collective labor disputes, and developed a context in which it is so difficult to meet in a specific case all the critical components of a collective labor conflict, that in the end we can easily say that Romania has no 'recognized' collective conflicts and no connected system of mediation for these conflicts.

12.2 Characteristics of the System

According to the Law of Social Dialogue, a collective labor conflict is defined as a labor conflict that occurs between employees and employer in connection with negotiations on either labor contracts or collective labor agreements. The commencement, development and conclusion of negotiations on these contracts and agreements are a responsibility of the employer, but require the participation of employees. The definition of collective labor conflicts also emphasizes their "collective" characteristic: they always concern a community of employees or civil servants (Law of Social Dialogue, 2011).

Collective labor conflicts are acknowledged as employee rights, and they may be legally started in the defense of the collective economic, professional or social interests of the employees. Collective labor conflicts are strongly related to the direct actions, i.e. to the right of employees to strike. The right of employees to start a conflict with the employer is considered to be a consequence of their fundamental rights, namely the right to work, the right to have a wage, the right to rest, the right to form trade unions, and the right to have social security. When these rights are considered to be at risk, they may be defended by triggering collective conflicts, including strikes.

The law on labor disputes (no. 168/1999) states that collective labor conflicts may be divided into conflicts of rights, that arise from the violation of an existing right of one or both of the parties involved, and conflicts of interest, that arise following a difference of opinion appeared in the collective bargaining phase between the parties (García, Pender, Elgoibar, Munduate & Euwema, 2015). Conflicts of rights are resolved in court, based on the rules of labor jurisdiction. Unlike conflicts of interest, conflicts of rights are not resolved through conciliation, mediation, arbitration or strike. However, the Law of Social Dialogue no longer recognizes the difference between "conflicts of interest" and "conflicts of rights", and only uses the notion of "collective labor conflict" (Paslaru, 2011).

According to, Art. 128 from the Law of Social Dialogue, collective labor agreements may be negotiated at the level of units, groups of units and sectors of activity.

Currently, Romania has no collective labor agreements at the national level and no sectorial agreements, because none could be concluded. There are however 14,343 collective labor agreements at the unit level, of which 12,327 were negotiated by work councils, and 2,016 by representative trade union organizations. The result is that less than 28% of Romanian workers are covered by a collective labor contract today, compared to 100% on 5 May 2011 (Hossu, 2015). An indirect result is the fact that, because there are no collective contracts at the sector level, there are also no collective labor conflicts at the sector level, as a collective labor conflict can only be triggered in connection with a collective labor contract at that same level.

According to Romanian law, collective labor conflicts may be prompted in the following situations:

– the employer organization refuses to start negotiating a collective contract or collective agreement;

– the employer organization does not accept the collective claims made by the employees;
– the parties do not reach an agreement on a contract or collective agreement until the date agreed for completing the negotiations.

During the term of a contract or collective agreement, employees may not trigger collective labor conflicts. Even if employee complaints may occur and accumulate while a collective labor contract is in place, the conflict itself cannot be triggered while the contract is in place but only after its expiration and only in the negotiation phase of the new contract (and as a result of lack of agreement on such a negotiation). From a legalistic point of view, this means that the law does not acknowledge collective labor conflicts for organizations where a collective labor contract is in place.

A significant issue lies in the fact that a collective contract can be adopted by an organization that has at least 21 employees. According to the National Institute of Statistics, in 2014, 88.6% of all Romanian companies were micro-enterprises (under 10 employees), and small enterprises (less than 50 employees) that had a weight of 9.4%. Within these premises, a collective agreement practice is almost null. At the level of the activity sectors, there is no collective labor agreement, according to the statistics of the Ministry of Labor and Social Justice (Frumosu, 2017). Strikes, that are considered parts of such collective labor conflicts, are also regulated: some categories of employees are not allowed to strike and others have only limited rights in this respect. The professional categories that may not declare a strike are clearly defined: prosecutors, judges, military personnel and staff with special status within the Ministry of National Defense, the Ministry of Administration, the Ministry of Justice and its various structures, including the National Penitentiary Administration, the Romanian Intelligence Service, the Foreign Intelligence Service, the Special Telecommunications Service, and the staff employed by foreign allied armed forces stationed on the territory of Romania. In order to not endanger human life and health, and to ensure continuous and safe operation of a number of facilities, a number of categories of employees may only strike with the condition that at least one third of the normal business activity is upheld. This is the case in the sanitary and social welfare systems, telecommunications, radio and television stations, rail transport, public transportation and public sanitation units, the supply of gas, electricity, heat and water. The same one-third rule is also imposed on employees working in units of the national energy system, operating units in the nuclear sector, in so-called "continuous fire" units (Beligradeanu, 1990).

12.2.1 Some Characteristics of the Current Law of Social Dialogue

Critique towards the Law of Social Dialogue (Law no. 62/2011) is explicit and very negative, both from labor unions and employer associations, and from international organizations (e.g., General Director of the International Labor Organization reacted

to this law; see Ryder, 2013). The critiques have emerged from both individual discussions and official documents. For example, a 60 pages document with suggestions for amendments was submitted by labor unions (Project of the confederation of employers and unions to amend the Law of Social Dialog, 2012), and a dedicated study was conducted in 2013 by the ILO (Hayter, Vargha, & Mihes, 2013). These organizations claim that with the adoption of the current law of social dialogue in 2011, a number of major and generalized dysfunctions in terms of collective bargaining and negotiations have appeared, as a direct consequence of the structural incompatibility (that is unfortunately prescribed by this very law), between labor unions and employer associations. The law also prescribes more difficult conditions for labor unions to form confederations and associations, and excludes from collective bargaining and negotiation almost 2 million employees from almost 450.000 companies (Hayter et al., 2013).

According to The European Trade Union (ETUI), an independent research and training center of the European Trade Union Confederation, the major changes of the legislation, involved the following (Clauwaert & Schömann, 2013):

- national-level agreements: dissolution of the national collective agreement (as a reference point for collective bargaining at all levels); collective agreements, previously negotiated for each branch of the national economy, have been replaced by sectoral collective agreements;
- timing: collective bargaining took place annually and the national agreement was made for 4 years, now there is no longer a compulsory agenda for negotiations, only the minimum and maximum duration of a collective agreement is fixed (12–24 months);
- representativeness criteria: the law sets out representativeness criteria for social partners at all levels (company, groups of companies, sectoral and national); previously 15 persons working in the same branch or profession were required to set up a trade union, now 15 workers in the same company are required;
- limitation of negotiation power: a trade union is considered representative and is allowed to negotiate in a company only if at least half plus one of the company's workers are affiliated to it (compared to one-third under the previous legislation), only one trade union can be representative in one company compared to up to three under the old legislation; if there are no representative unions in a company, because there are not enough members, negotiations can be carried out by the federation to which the existing union belongs and if there is no union at all, negotiations will be carried out by employee representatives only.

While possibly also generated by other variables, the number of unionized workers has dropped considerably since 2011, reflecting some discontent with the capacity of unions to meaningfully represent their members. For example, Dragoş Frumosu, President of the General Confederation of Labor-General Union of Trade Unions of Romania (CGM-UGSR), mentioned that the trade union movement has faded out in private businesses in recent years.

The Law of Social Dialogue is equally applicable to the private and the public sector. Unions are strongest in the public sector. While no proof of this has ever been

legally upheld, the general feeling (some stakeholders argue for "common knowledge") is that private companies actively take steps to discourage union participation, with very good success towards this goal: union participation is significantly weaker in private companies, especially in the service sector. The largest number of conflicts therefore appear in the public sector, or in large private companies, where unions are still active and strong.

A direct result of this situation in which unions disappear, especially in private companies, is however an increase in spontaneous labor conflicts: conflicts that are not mediated, but explode directly in a full-fledged confrontation, without the possibility of the various social partners to explore an agreement in advance.

Another visible effect of this new law was also immediately felt by employers—from the 13 employer confederations representative at a national level in 2010 (the largest number of employer confederations representative at the national level in the entire European Union, according to Guga & Constantin, 2015), only 3 remained representatives in 2015. A particular situation in the public sector, as opposed to the private one in the application of the Social Dialogue Law, refers to the subject of the negotiation. In the public sector, collective bargaining could really be seen as a simple communication exercise between the social partners if we take into account two aspects: the legal terms that do not allow the negotiation of salary rights (wages in the public sector are established by law) and the fact that the wage claims represent the highest weight in negotiations according to the statistics. Restricting wage bargaining in the public sector results in negotiations focusing on other areas (working conditions, work organization, working time, holidays, social rights) (Badoi, 2013).

12.2.2 Participants in Social Dialogue

Social dialogue is considered a direct way of exercising economic and social democracy. The three participants in social dialogue acknowledged by Romanian law are the employees, represented by trade unions, the employer organizations ("patronates") and the government. The first two are especially important in this regard. In those cases, when a trade union is not present in an organization, a Work Council (i.e., an elected body of employee representatives who deal with the management) has many of the rights of trade unions (except the right to strike), and may be consulted in cases that may escalate towards a collective labor conflict.

12.2.2.1 Unions

The main legal precepts regarding trade unions are contained in the Constitution, the Labor Code, the Union Law (Law no. 53/2003), and the law on collective labor contracts (Law no. 130/1996). According to the Labor Code, "unions are independent legal entities, without patrimonial purpose, established for the purpose of defense and promotion of collective and individual rights, as well as the professional, economic,

social, cultural and sports interests of their members" (art. 217, paragraph 1). Unions are independent of public authorities, political parties and employer organizations. Their role is explicitly non-political, i.e., they do not defend the political interests of their members. They are self-governed within the limits of the law.

An alternative, in case of organizations that don't meet the criteria of being constituted in unions, are the works councils. According to the Labor Code, in the units where exist more than 20 employees, the interests of the employees can be promoted and defended by their representatives, elected and mandated specially for this purpose. The election is made by voting at the general meeting of the employees, with the vote of at least half of the total number of employees. Employee representatives can't carry out activities that are recognized by law exclusively to trade unions. The number of elected representatives of the employees is established in agreement with the employer in relation to the number of employees. Work councils are important participants in social dialogue and give employees a common voice when unions are not present; they allow common bargaining and common promotion of workers' interests. However, work councils are not popular among unions, and are often seen as competitors: "In most cases, the management of the company is involved in the choice of work councils, even if the law has clear provisions in this respect" (Frumosu, 2017).

12.2.2.2 Employer Organizations ("Patronates")

The main legal regulations regarding employer organizations are contained in the Labor Code, the law of employer organizations (Law no. 356/2001), the law on collective labor contracts (Law no. 130/1996), and the Government Ordinance on associations and foundations (Law no. 26/2000).

According to the Labor Code, employer organizations are autonomous, non-political, organizations, set up as legal persons under private law, without a patrimonial purpose. They are also self-governed, within the limits of the law.[1]

12.2.3 Means of Resolving Labor Disputes

Romania currently acknowledges under the law three different ways to resolve collective labor conflicts: conciliation, mediation and arbitration (Fig. 12.1).

A brief description of these practices is given below.

An important note is however necessary here, before delving into details. We emphasize the fact that mediation and arbitration do not exist in Romanian practice at

[1] Employer organizations may be founded or joined by "patrons", i.e. employers who employ paid workers. Employer organizations are grouped by economic activities and are organized on sections, divisions, and branches at the national level. Employer organizations may further associate to form unions, federations, confederations or other associative structures.

Fig. 12.1 Succession of methods to solve collective labor disputes (Law of Social Dialog)

all, i.e., no cases of mediation or arbitration have been registered with the authorities. As the processes do not exist in practice, we will only describe them based on the way in which they are reflected in the law.

12.2.3.1 The Conciliation of Conflicts

Conciliation is regulated by the law no. 168/1999 (the special law on labor disputes) as a mandatory first step in resolving collective labor conflicts. If an attempt at a settlement of the conflict through conciliation is not made, the parties are not allowed to call for mediation or arbitration, and employees cannot trigger a strike. Initially, conciliation consisted of a direct dialogue between the management, and representatives of the employees (e.g., trade union delegates or works councils), aimed at resolving the conflict. However, in light of early experience with this provision, direct conciliation was considered inefficient; a formality that often prolonged the duration of the process unnecessarily. Direct conciliation between management and unions was therefore renounced and was instead replaced with the current approach of conciliation through the Ministry of Labor (e.g., civil servants).

Currently, if a conflict is triggered, the union or, where applicable, the representatives of the employees, of the employer or both, notify the Ministry of Labor through the geographically corresponding Territorial Directorate for Work, in order to begin the conciliation process. The Ministry of Labor will designate a delegate to attend the conciliation of the conflict. The union or, where appropriate, the employees, choose a delegation of 2–5 people to participate in the conciliation process. The manager of the company will advocate the employer's point of view, but the management may also designate a delegation of 2–5 representatives to participate in the negotiations (Law of Social Dialog, 2011).

The role of the Ministry of Labor during the conciliation process is limited to the facilitation and guidance of the other parties, and the conciliator has no legal competence to decide the cessation of the conflict. Conciliation is therefore a direct negotiation between the main parties (employees and employer), assisted by a third party (the Ministry delegate). The following results are possible at the end of the conciliation process:

– in the case of a complete agreement on the settlement of claims, the parties will finalize their collective work agreement and, thus, the conflict will be settled;

– in the case of a partial agreement, the employees are the only ones who may decide if the reasons for the conflict persist; as a result, they may accept the outcome of the conciliation, and the conflict will thus end even if the agreement is not complete, but they may also refuse to accept the partial agreement as an adequate settlement and in this case the conflict will continue;
– in case no agreement is reached, the conflict continues, passing to the subsequent stages of possible settlement (i.e., mediation or arbitration, see below).

The law prohibits successfully concealed claims to resume and be the subject of a new conflict.

12.2.3.2 The Mediation of Conflicts

Conflict mediation is a comparatively new legal institution, introduced in Romanian practice less than 20 years ago (Law no. 168/1999). Among other forms of mediation, the mediation of labor conflicts is specifically regulated. In this case, conflict mediation is introduced to prevent the triggering of strikes unless and until efforts have been made to solve the conflict in other, more cooperative ways.

If the conflict has not been settled following the conciliation organized by the Ministry of Labor, the parties may decide by consensus to initiate the mediation process. Mediation is a voluntary process in which the parties may enlist if they seek the termination of conflicts. The essential role in the mediation procedure belongs to the mediator (i.e., the person selected by the two parties to conduct the process).

Conciliation and mediation share some similarities, but also some striking differences. Conciliation is a mandatory step to resolving conflicts, while mediation is optional, and depends on an agreement between the parties regarding the appointment of a mediator. In the case of mediation, the parties select the mediator from a list provided by the Ministry of Labor, while the conciliator is a civil servant, a delegate of the Ministry and cannot be chosen by the parties. Conciliation is free of charge, while mediation requires that the mediator is paid.

In the case of conciliation, the parties are the ones who develop the solution. The conciliator does not propose solutions but facilitates the necessary discussion for conflict settlement. The main difference between the role of conciliator and that of mediator is in fact their degree of involvement in finding solutions for the conflict. The mediator is called to intervene more actively with proposals, recommendations and points of view, while the conciliator will only encourage the parties to seek their own solutions. In fact, mediators have an obligation to state their opinions on any claims made by the parties: after confronting both parties, the mediator is required to draft a report on the situation of the conflict, stating his/her opinion on any outstanding claims. The report will be sent to each of the parties and to the Ministry of Labor, and will propose a way of settlement. If the proposed settlement reaches a consensus and is acceptable for both sides, the outcome of a mediation process is usually sustainable, and the conflict ceases. Otherwise, if the mediation results in a failure, the conflict continues with one of the next stages prescribed by the law. Also,

if the parties fail to agree on a mediator, the mediation procedure is terminated, and the parties may move forward and reach arbitration.

12.2.3.3 The Arbitration of Conflicts

During a collective labor conflict, the conflicting parties may decide by consensus to submit their demands to an arbitration committee. Arbitration cannot occur before conciliation, which is a compulsory phase. Arbitration may only be initiated after the failure of conciliation, and is optional.

The arbitration panel is composed of three arbitrators appointed as follows: (a) an arbitrator appointed by the management, (b) an arbitrator appointed by the trade unions or, where appropriate, by the representatives of the employees, and (c) an arbitrator appointed by the Ministry of Labor.[2]

Although the law provides three different ways to resolve labor disputes (conciliation, mediation and arbitration), and although from an analytical perspective their usefulness and differences are clear, interviews with social partners, such as unions, patronates etc., have shown that in practice social partners, largely ignore mediation and arbitration. In fact, once a collective labor conflict is registered with the Ministry of Labor, a civil servant is officially appointed to handle the conflict, to act as a conciliator, and to also coach the parties through the process. This appointment should only be typical for the conciliation phase, which is a preliminary phase, but in most cases this is where third party involvement stops: mediation and arbitration are hardly ever requested, and a failure of the conciliation leaves the conflict open to escalation.

[2] A list of representatives of the Ministry of Labor who may be appointed as arbitrators in such cases is determined by the Ministry in consultation with trade unions and employer associations. These individuals must have a higher education degree and at least five years of experience in arbitration. The arbitration panel may only be formally constituted after the conflicting parties notify their request for arbitration in writing and register this request with the Ministry of Labor. Where several parties have common interests (e.g., several trade unions or several employer representatives), they may choose (if they so agree) a single arbitrator. If an arbitration panel is appointed, the chair of the panel is also formally appointed. In order to solve the conflict, the arbitration panel may request written explanations on the subject of the conflict and may order the parties to further submit any required evidence that the panel would need to reach a conclusion. For their work in solving the conflict, members of the arbitration panel receive an honorarium of arbitration which is paid in equal split by the parties to the conflict. If an agreement on the fees is not reached by the parties, the honorarium is determined by the Ministry of Labor, based on the proposals of the various parties. After the arbitrators decide how to resolve the dispute between the parties, this solution is formal and enforceable by law—the parties are *obliged* to abide by this solution. The board is led by a Chair who is either appointed when the board is constituted, or, if not appointed, elected by the members. The board makes decisions by the absolute majority of its constituent members; consensus on the solution is not needed.

12.2.4 Evaluation of Stakeholders on the System

The general opinion of the various stakeholders regarding the current system, its legal structure and practices, is that these are largely dysfunctional. In fact, not only are there no funds and no human resources specifically allotted for these activities, but responsibilities to this effect are unclear.

Mediators and officials in the Ministry of Labor who act as conciliators and legal auditors in collective labor conflicts decry the lack of consistent and continuous training (although an important training program that may solve this issue for the time being was recently launched; see below).

Labor unions also condemn the fact (and employer associations accept this position as correct) that the law is so restrictive that few if any collective labor conflicts have ever been accepted as legal. Ministry of Labor representatives mentioned that more than 70% of conflicts are solved after the conciliation—but this may of course mean that they are only solved through restriction, i.e., the conflict is declared illegal and thus "solved" artificially by refusing the right to escalate.

12.3 Characteristics of the Conciliators or Mediators and the Third Party Procedures

Requests for conciliation, mediation or arbitration of labor disputes are solved through the involvement of officials from the Ministry of Labor. These are public servants, who, however, have other primary day-to-day responsibilities besides the occasional mediation process, and who are only appointed in such disputes as an exception and extension to their usual scope of work.

We note that these employees of the Ministry of Labor who act as mediators in collective labor disputes are not necessarily accredited by the Mediation Council. Some of them did go through mediator's training and are accredited by the Council, but this is not a mandatory requirement, and for those who are trained as mediators, accreditation courses were not financially supported by the Ministry of Labor but by themselves. It should also be noted that the role played by the ministry representative in a conflict is not geared towards facilitation and conflict resolution, but is rather a formal legal role, with the aim of ascertaining whether the legal conditions of the conflict are met. If these legal conditions are not met, as it appears to be in most cases, the conflict is declared solved ex officio. One could therefore argue that mediator training is not required for these public servants, as they formally act as legal auditors and not as conciliators or mediators.

Currently, the Ministry employs 40 civil servants who may act as conciliators/mediators, and who have been trained during the past 15 years in various financed projects, usually international projects in which the Ministry has been a partner; these have usually been trained based on international practices by international trainers. The National Agency of Employment has also conducted a number of training pro-

grams on mediation; such training programs have been certified by the Mediation Council, and have been conducted by Romanian trainers. Notably, social partners (e.g., labor unions) were involved in these national trainings, which were considered effective, but unfortunately notably few.

The Ministry of Labor has lately launched another important program, funded through the EEA and Norwegian Assistance Grants, in order to train specialists in the mediation of collective labor disputes and collective bargaining. Trainings are delivered by the Directorate of Social Dialogue in collaboration with the National Norwegian Mediator Council, based on a partnership with trade unions and employer representatives.

12.3.1 Evaluation by Stakeholders of the Conciliators/Mediators and Third Party Procedures

It is difficult, if not impossible, to talk about the effectiveness in practice of an almost non-existent system. And, indeed, for all practical reasons, the mediation system is not functioning well in Romania.

The major problem mentioned by union representatives is that: "*In Romania, almost 95% of companies have less than 15 employees, so 1.2 million Romanians are not unionized and find it in principle impossible to do so, according to the Law of Social Dialogue. Almost 66% of employees are not protected by a collective labor contract. Almost 85% of collective labor agreements are signed not in trade union negotiations, but with the representatives of employees (works councils), who are most often directly appointed by the management. If there were 17 sector-level collective agreements before 2011, currently there are none.*"

Works councils are more sanguine on this topic. Exactly because of the current law actually interdicting unionization, work councils are the only real chance of workers to have a collective voice in interactions with the management. They seem to be efficient in doing this, and take the current status of conciliation in Romania more in stride, mentioning that: "*It would be bizarre to claim lack of satisfaction with the efficiency of a specialist (employee of the Ministry) in a process that he solves admirably, only because the logic of the process is faulty*."

Employer representatives consider that: "*In Romania, the main problems are the current provisions of the Law of Social Dialogue—this law has practically stopped social dialogue*".

12.3.2 Evaluation by Stakeholders of the Conciliation Process

The conciliation process in Romania is guided by the guidelines of best practice issued by the International Labor Organization (ILO). The ILO defines conciliation as "the practice by which the services of a neutral third party are used in a dispute, as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution" (Foley & Cronin, 2015). The neutral third party has a critical role under this definition: contributing to the conversion of a two-party confrontation into a three-party exploration of solutions.

Conciliators are perceived by the conflicting parties (unions and employer organizations) as being very diverse, especially in light of the fact that Romanian practice lacks a specific protocol or prescribed procedure they would have to follow. Conciliators have each their own preferred style, a reflection of their own personality, professional background and culture.

In order to be effective, conciliators need to understand their role, to develop the necessary skills to be effective, and to maintain good relationships. The development of those skills, including those that lead to the development and maintenance of good relationships with the mediated parties, is generally considered satisfactory by the interviewed representatives of union and employer organizations.

However, in terms of the desired attitudes, things are different. The labor union representatives interviewed in our study have repeatedly commented that the desired attitude (e.g., the expected attitude of impartiality and confidentiality) is still largely lacking. This is attributed to them being public servants employed by the Ministry of Labor. As such, they are not accountable to the stakeholders that they serve, but to the government that they represent, and are oftentimes perceived as not being impartial and as furthering an agenda. We present below some illustrative quotes: "*The competence of conciliators is only based on knowledge of the law and not on interaction with the parties; this is sometimes positive, because we have met social dialogue partners who did not know the law in detail*", "*How can we talk about the effectiveness of a conciliator if he just has to draft a set of minutes and has no other responsibility?*", "*We cannot say that the conciliators do not do their job, the problem is that their job is restricted—they are not allowed to actually have a say in the process*".

12.4 Effectiveness of the System

12.4.1 Evaluation by Stakeholders of the Effectiveness of the Mediation

The effectiveness of the system is assessed in widely divergent manners by the various partners. Officials of the Ministry of Labor consider that Romania has a highly efficient mediation system and, more general, highly efficient ongoing social dialogue, an efficiency that is illustrated by the very few registered collective conflicts. The Unions especially consider that the low number of registered collective conflicts is rather due to the badly structured Law of Social Dialogue (see above), which basically blocks the legal inception and formal declaration of any collective labor conflicts.

Specifically to conciliation and mediation, the Ministry of Labor considers that involvement in any cases so far has been extremely effective, and cites in support of this position the closure of over 70% of the notified collective labor conflicts as a direct result of conciliation/mediation. The social partners consider however that all that is done by the representatives of the Ministry of Labor in such situations, is not more than to decide on the legal status of the conflict and register the legality or illegality of the situation. The role of the conciliator in such cases is to bring the parties together and ensure a constructive dialogue between them: this is not the case in practice, because conciliators exclusively focus on the legal status of the conflict. If in a specific case the conflict is not formally acknowledged as such, unions will be discontent, and if it is, employers will be equally discontent. Facilitation between the two parties is, according to the representatives of the various social partners, not attempted by conciliators—instead they have an excessive legalistic focus, looking only at legal aspects.

12.5 Conclusions

Given the current legal prescriptions of the various Romanian laws governing collective labor conflicts, both the Ministry of Labor and the social partners are reasonably content with the conciliation process and the effectiveness of the conciliators. Conciliation seems to be reasonably well handled by the appointed conciliators, who after all only assess and register if the conflict is legal or not.

Relatively good personal relationships are visible both between the Ministry officials and labor unions and the Ministry officials and employer organizations—a number of common institutional projects have been initiated and efficiently conducted in time between these various partners (e.g., training of labor union workers by the Ministry). Indeed, as one of the leaders of a large labor union confederation remarked, it would be bizarre to claim lack of satisfaction with the efficiency of a specialist (employee of the Ministry) in a process that he resolves admirably, only

because the logic of the process is faulty. Dissatisfaction in any of these social partners is therefore not with specific persons who are involved in this process, but with the general rules by which the process is conducted. The main problem in this regard are perceived to consist in the current provisions of the Law of Social Dialogue, that has „practically stopped social dialogue in Romania".

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References

Badoi, I. (2013). *Negocierea colectiva in sectorul bugetar.* [Collective bargaining in the public sector]. Revista Transilvană de Ştiinţe Administrative, 33, pp. 3-17.

Beligradeanu, S. (1990). *Dreptul la grevă şi exercitarea lui*. [The right to strike and its exercise]. "Dreptul" nr.6.

Clauwaert, S., & Schömann, I. (2013). T*he crisis and national labour law reforms: a mapping exercise. Country report: Romania*. Retrieved from https://www.etui.org.

Foley, K., & Cronin, M. (2015). *Professional Conciliation in Collective Labour Disputes*. Retrieved from http://ilo.ch/wcmsp5/groups/public/—europe/—ro-geneva/—sro-budapest/documents/publication/wcms_486213.pdf.

Frumosu, J. (2017, February 27). *În mediul privat Codul Muncii a ajuns să se substituie Contractului Colectiv de Muncă.* [In the private sector, the labor code has come to replace the collective bargaining agreement.] (Adrian Stoica, Interviewer). Retrieved from http://m.jurnalul.ro/special-jurnalul/interviuri/dragos-frumosu-presedintele-cgm-ugsr-in-mediul-privat-codul-muncii-a-ajuns-sa-se-substituie-contractului-colectiv-de-munca-736856.html.

García, A. B., Pender, E., Elgoibar, P., Munduate, L. & Euwema, M. (2015). The tower of power: Building innovative organizations through social dialogue. In M. C., Euwema, L., Munduate, P., Elgoibar, E., Pender, A. B. García (Eds.), *Promoting Social Dialogue in European Organizations Human Resources Management and Constructive Conflict Management* (pp. 179–197).

Guga, Ş., & Constantin, C. (2015). *Analiza impactului noii legislaţii a dialogului social adoptate în 2011*. [Analysis of the impact of the new legislation on social dialogue adopted in 2011]. Retrieved from http://www.asociatiaconect.ro/upload_res/Cercetare_impactul_legislatiei_muncii.pdf.

Hayter, S., Vargha, C., & Mihes. C. (2013). *The impact of legislative reforms on industrial relations in Romania*; International Labour Office, Industrial and Employment Relations Department (DIALOGUE), Decent Work Technical Support Team and Country Office for Central and Eastern Europe. Budapest: ILO.

Hossu, J. (2015, October 21). *În România nu mai există contracte colective de muncă unice la nivel national.* [There are no collective labor agreements at national level in Romania.] (Agerpres, Inter-

viewer). Retrieved from https://www.agerpres.ro/social/2015/10/21/bogdan-hossu-cartel-alfa-in-romania-nu-mai-exista-contracte-colective-de-munca-unice-la-nivel-national-11-49-34.
Law no. 130/1996. Retrieved from https://lege5.ro/Gratuit/ge3denjz/legea-nr-130-1996-privind-contractul-colectiv-de-munca.
Law no. 168/1999. Retrieved from: http://www.mmuncii.ro/pub/imagemanager/images/file/Legislatie/LEGI/L168-1999.pdf.
Law no. 356/2001. Retrieved from http://www.dreptonline.ro/legislatie/legea_patronatelor.php.
Law no. 53/2003 (Social Dialogue). Retrieved from https://legeaz.net/legea-53-2003-codul-muncii/pagina-2.
Law no. 192/2006. Retrieved from https://legeaz.net/legea-medierii-192-2006/.
Paslaru, S. (2011). *Medierea în conflictele de muncă* [Mediation in labor conflicts]. Retrieved from https://www.cariereonline.ro/actual/legal/medierea-conflictele-de-munca.
Petrea, G. (2018, March 26). Gabriel Petrea dezleagă misterul dispariției Ministerului Dialogului Social: Am avut discuții cu Dragnea. [Gabriel Petrea unleashes the mystery of the disappearance of the Ministry of Social Dialogue: We had discussions with Dragnea.] (PS NEWS, Interviewer). Retrieved from https://psnews.ro/gabriel-petrea-dezleaga-misterul-disparitiei-ministerului-dialogului-social-am-avut-discutii-cu-dragnea-208974/.
Proiect de modificare a legii 62/2011. (2012) [Project of the confederation of employers and unions to amend the Law of Social Dialog]. Retrieved from http://www.prefecturasibiu.ro/resources/Dialog-Social/b1.pdf.
Ryder, G. (2013). Letter to Prime-Minister Victor Ponta. Retrieved from http://legislatiamuncii.manager.ro/a/8801/oim-legea-dialogului-social-trebuie-sa-respecte-conventiile-oim.html.
Vasiliu, D. (2016, January). *Legea dialogului social și iluzia modificării sale*. [The Law of Social Dialogue and the illusion of its amendment]. Retrieved from https://www.juridice.ro/420833/legea-dialogului-social-si-iluzia-modificarii-sale.html.

Chapter 13
Mediation and Conciliation in Collective Labor Conflicts in Spain

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The Case

A transport company in Andalusia, in the south of Spain, had acquired another company, including their fleet of buses and their routes. This acquisition, following the Spanish regulations, implied the subrogation of the debts of the company, which included the pending salaries of the workers. The agreement between the new buyers and the workforce was reached through mediation, in the system for labor mediation of Andalusia (Extrajudicial System of Labor Conflict Resolution—SERCLA) where the manager decided to pay off the debt in installments. However, after a long period of time, the manager stopped paying the pay checks, which created a collective conflict.

Another mediation session took place at SERCLA with a mediation team composed of four people, two appointed by the trade unions and two appointed by the employers' organization, following the formal procedure for mediation teams in this system. The workers and the manager were present for the session. The atmosphere was tense, since the workers had not been getting paid for more than two months. The manager explained that the delays were due to a payment he had to make to social security, and he tried to keep a conciliating tone, admitting to the debts he had been accused of. Nevertheless, this was not enough to calm down the atmosphere. The president of the mediation commission asked everyone to respect the intervention turns. The manager offered to pay a large part of the debts immediately, but part of these in installments during the following months.

The mediation team invited the parties to make a recess to consider the presented proposal and used the opportunity to carry out a caucus with each

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party. The mediation commission also met, and they had the shared opinion that the manager had shown his resistance point too fast, giving the workers the impression that he had solvency to actually pay all debts at once. Thus, they would not agree to his proposal. When they came back from the caucus, the workers threatened to go on strike and the atmosphere became even tenser. To bring tensions down and bring the mediation back on track, one of the mediators of the commission asked people to keep calm and started to write the proposals and alternatives on a flipchart, calling the attention of both parties. They also reassured both parties that they were doing it correctly, making proposals and making progress. The workers asked to intervene and a calmer dialogue took place, with an exchange of opinions and reaching a different proposal to the initial one they had in mind.

After the dialogue, the negotiation, and the last recess, the manager accepted the proposal and they reached an agreement, avoiding the strike and allowing the workers to receive the salaries they were owed.

13.1 Introduction

To understand the current agglomeration of mediation systems for collective conflicts in Spain, we need to recall some historical milestones. During the dictatorship era (1939–1975), the economic model combined growth with poor labor and social conditions, and high inequalities in terms of class and gender, as well as low trust between employers and employees (Miguélez & Prieto, 2009). The freedom of association and the right to carry out representative actions in organizations was forbidden, with the absence of Unions and collective bargaining as a consequence (Munduate, 1993; Munduate, Ganaza, Alcaide, & Peiró, 1994). Conflicts between workers and companies were dealt with violency and with great distrust between parties. In fact, employee representatives' (ERs) recognition in Spain is one of the youngest in Western Europe, and the tradition of adversarial and confrontational relations generated during the Franco era is still present in some aspects (Elgoibar, Munduate, Medina, & Euwema, 2012).

The Spanish transition towards democracy at a time of deep industrial restructuring (1975–1982) settled powerful reforms (Sánchez-Cuenca & Aguilar, 2009), regarding economic measures, freedom of association, and workers' rights. Social dialogue became a socioeconomic governance mechanism during the country's return to democracy with the introduction of some important laws, such as The Spanish Workers' Statute of 1980, which established the workers' rights and promoted a collective bargaining model.

Collective bargaining in Spain has some singular characteristics: (a) collective agreements have consequences for all workers regardless if they are a part of a

union or not; (b) collective agreements are laws, protected as any other law by the judicial system. These particular measures were adopted to strengthen the role of the unions, as representatives of the workers, and the role of collective bargaining, as a mechanism to guarantee labor rights. These measures were adopted consensually to strengthen the unions' side, which had become weak after the dictatorship.

Other mechanisms to balance power between the negotiating parties in Spanish labor relations were: *ultra-activity* and *extension*. Ultra-activity means that all collective bargaining agreements remained active unless both sides agreed to their renegotiation. If the period of an agreement finishes without a new contract, the old one remains in force. Extension means that sectorial agreements (education, tourism, health or others) automatically applied to all firms within this sector and geographical range. This characteristic also increased the relative power of unions in the collective bargaining processes.

The extension rule explains that, until 2012, although the majority of collective agreements were produced at a company level, the agreements negotiated at provincial or national sector level affected the majority of people. In summary, three key aspects are worth mentioning regarding this rule: (a) despite most of the collective agreements being carried out inside organizations, these affect a small number of workers, being sectorial agreements those with highest impact; (b) sector agreements are usually negotiated by provinces, therefore an organization with different locations has different collective agreements and different labor conditions (which is another source of conflict between parties); (c) the configuration of the agreements by provinces does not fit the configuration of the state as it currently is, by autonomous regions.

The legal intervention of the different governments during the last crisis period has produced changes in the structure of the collective bargaining in Spain. The socialist government (2008–2012) introduced a series of legal reforms to encourage companies introducing negotiated flexibility measures instead of recurring to downsizing. This reform allowed companies with economic difficulties to set limits to sectorial collective agreements through different flexibility measures, including temporary salary reductions. The subsequent reform of the conservative government (*Partido Popular*) in 2012 incremented the power of employers over unions through different actions: (a) it allowed employers to unilaterally leave the collective agreement; (b) it allowed permanent changes in working conditions (as salary or downsizing), not only for financial reasons but also for organizational, technical or productive reasons; (c) it erased ultra-activity, meaning that if two parties do not reach an agreement, the previous agreement is only valid for a year, and it eliminated the extension of the agreement, meaning that the company can currently negotiate its own agreements over or under the sector agreements; (d) collective negotiations were centralized, thus the topics to be negotiated at all levels can be decided at national level. Summarizing, this reform favored company-specific collective agreements.

Regarding social conflicts in Spain, during the past recent years there has been a decrease in the number of conflicts and strikes. In the reports of the Spanish economic and social council it is stated that the number of strikes has gone down to minimum

levels (CES, 2017). The controversial topics are still related mostly to salary, followed by working times, restructuring, and reclamations of union rights.

There are different mechanisms to manage collective conflicts in Spain. We must first differentiate between the systems regulated by the national government by law and those extrajudicial mechanisms of conflict resolution regulated by the collective bargaining (regional or autonomous origin). An example of the national system is the Center of Mediation and Arbitration (CMAC), with offices all around Spain. Although the word 'mediation' is present in the name, the CMAC does not provide conciliation or mediation. The CMAC is only an administrative step previous to court. The parties are attended by public staff that registers their presence as a requirement previous to court proceedings. Conflict parties can attend one system or another in function of the type of conflict. CMAC is especially active for individual conflicts, whereas autonomous systems manage collective conflicts. An example of an autonomous system is the Extrajudicial System of Labor Conflict (SERCLA), in Andalusia.

The Geometry of Mediation. The 3-R Model

For the analysis of the different mediation systems in Spain, we use the 3-R model, presented in Chap. 1, as a heuristic model considering the social, legal, and organizational context in which mediation takes place. We analyze the mediation systems in Spain from the perspective of these three dimensions. Explicit attention is paid to the constraints stemming from the context (*Regulations*) as well as the competitive versus cooperative nature of the relationship (*Relations*).

13.2 Regulations and Characteristics of the Systems

The legislative framework states that if a conflict is of national nature, because parties in conflict belong to different autonomous regions, this conflict should be managed at the SIMA Foundation (Servicio Interconfederal de Mediación y Arbitraje). This institution is a joint foundation composed of the most representative employers and union organizations of the state (CEOE, CEPYME, CCOO and UGT). It is a public national foundation controlled by the Ministry of Work and Social Security. In Andalusia, the equivalent system is the SERCLA, which manages conflicts where the parties in conflict belong to the Andalusia region.

Mediation in Spain is considered a full mandatory process, that means that it is a voluntary process to decide to not continue with the judicial systems, but it is mandatory as a prerequisite to go to the court. SERCLA can intervene to manage collective conflicts in Andalusia using either conciliation-mediation or mediation. There are several equivalents of SERCLA in other autonomous regions; however, we focus here on the Tribunal of Labor Conciliation, Mediation and Arbitration of Catalonia (TLC) given its relevance.

As with the other autonomous regions, the TLC was created following an agreement between parties in 2005, in this case between the unions UGT and CCOO,

Table 13.1 Systems for mediation in collective labor conflict in Spain

Autonomous region	Mediation system for collective conflict
Andalucía	Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía (SERCLA)
Aragón	Servicio Aragonés de Mediación y Arbitraje (SAMA)
Principado de Asturias	Servicio Asturiano de Solución Extrajudicial de Conflictos (SASEC)
Islas Baleares	Fundación Tribunal de Arbitraje y Mediación de las Islas Baleares (TAMIB)
Islas Canarias	Tribunal Laboral de Canarias (TLC)
Cantabria	Fundación para las Relaciones Laborales de Cantabria (ORECLA)
Castilla y León	Servicio Regional de Relaciones Laborales (SERLA)
Castilla La Mancha	Jurado Arbitral Laboral de Castilla La Mancha (JURADO ARBITRAL)
Cataluña	Tribunal Laboral de Cataluña
Euskadi	Consejo de Relaciones Laborales (CRL-LHK)-PRECO
Extremadura	Fundación de Relaciones Laborales de Extremadura (FRLEX)
Galicia	Acuerdo sobre Solución Extrajudicial de Conflictos Colectivos de Trabajo (AGA)
Comunidad de Madrid	Instituto Laboral de la Comunidad de Madrid (ILM)
Región de Murcia	Oficina de Resolución de Conflictos Laborales (ORCL)
Comunidad Foral de Navarra	Tribunal Laboral de Navarra (TLN)
La Rioja	Tribunal Laboral de La Rioja (TLR)
Comunidad Valenciana	Fundación Tribunal de Arbitraje Laboral de la Comunidad Valenciana (TAL)
Estatal	Servicio Interconfederal de Mediación y Arbitraje (SIMA)

and the employers' association. The parties freely decide if they take the conflict to conciliation or mediation with the TLC. The TLC can act for both collective and individual conflicts. Unlike the SERCLA, the TLC has three possibilities: (a) *Conciliation,* which in this system is considered facilitation without proposals by the mediators; (b) *Mediation,* where mediators can make proposals to the parties; and (c) *Arbitration,* where the third party makes a proposal that the parties must accept obligatorily.

A list with the collective mediation systems in Spain appears in Table 13.1.

The autonomous systems can intervene to manage collective conflicts using conciliation, mediation and arbitration for:

(a) *Right conflicts*: conflicts regarding the interpretation and application of judicial norms, collective agreements, practices, and organizational agreements or conflicts previous to legal proceedings, both perceptive and voluntary.
(b) *Interest conflicts*: conflicts that result from the collective negotiation processes or conflicts that cause threats of strike.

The use of arbitration is anecdotal, as it is used for less than 1% of all the collective conflicts.

13.3 Relationships. From Confrontational Relationships to the Promotion of Social Dialogue Between Social Partners

In the general introduction we have seen the major structural changes produced in collective bargaining in Spain. The dispute resolution instruments used when the collective bargaining fails are derived from agreements between the parties involved in the conflict. This is important because they are not systems that are legitimated by a law or a government decision, but an agreement between the parties in conflict. In this sense, since the 90s, different Employments and Collective Agreements have been signed by the national employer associations (the CEOE) and the two dominant national unions (CCOO and UGT). These agreements provided guidance rather than binding rules for negotiation of sectorial and firm-level agreements, and allow for different mediation systems to exist throughout the country.

In this sense, we find different mediation systems acting on collective conflicts, sustained by different agreements between business associations and union associations. Each of these agreements has its own characteristics regarding the composition of mediation teams, the professionalization of the role, and the intervention procedures. This chapter focuses, especially, on one of the Autonomous systems in Spain (the SERCLA), where there is a high number of companies and population. However, we will also show some data from the national system (SIMA), as well as the Catalonian system.

13.4 Roles. Characteristics of the Mediators' Role

In the previous section, we have concluded that there are different mediation institutions in Spain, and that they each have their own profile in mediation interventions. The mediation at the SIMA is carried out preferably by one person, though it can be a co-mediation if the parties ask for it. The SIMA facilitates a list of proposed mediators (about 200) agreed upon by the parties that signed the SIMA agreement. The mediators are senior professionals related with the labor's law, universities, or staff from the public administration. The party that applied for the mediation has to propose a mediator from the list in their initial application document. The other party can either agree to the proposed mediator or propose a different one from the list. If both parties agree with the proposed mediator, this person will be the only mediator in the sessions. If they do not, the mediation will be carried out by two

people. If none of the parties has assigned a mediator in the following three days after the application, these actions will be filed.

It is a free service. There is no established process for the mediation itself, thus, mediators can act with discretion. In 2016, 43% of the mediations were carried out individually, and the rest by a team. The duration of the mediation process was of 2 hours on average, and took between one and two meetings. Some complex mediation processes require weeks or even months, but others can be managed in less than an hour. Seventy seven mediators intervened in collective conflicts in 2017 (SIMA, 2017).

In SERCLA, the mediation service is provided by a mediation team that is usually composed of four mediators. A genuine characteristic of SERCLA's system is that trade unions and employers' associations design a list of eligible mediators each year. Therefore, in each mediation, two of the mediators are appointed by the main employers' association, and the other two by the two largest trade unions' lists, one appointed by each of them. The parties do not choose the mediators, they are proposed by the unions and employers' associations. Most of the people who were interviewed for this study were satisfied with this procedure of mediators appointed by the representing organizations. Both the parties and the mediators believe it is a useful solution to overcome the lack of trust between parties and the lack of mediation culture in Spain. As pointed out by a HR manager who had participated in several collective mediations:

> In my experience, it is rare to notice a bias from the mediators influenced by the organization that appoints them. Actually, I think the system mostly works well this way, we know that there's balance, so we don't have to worry about a mediator taking sides.

The presidency of the Conciliation-Mediation commission rotates annually between the unions' side and the employers' side. Additionally, every mediation is also assisted by a Secretary provided by the Andalusia Government. The role of this Secretary is registering the minutes and writing the reports that the parties need to start the judicial procedure. Although the role of the Secretary is only to register these issues and to provide support, research and active observation has shown that, in some cases, they use a more active approach, analyzing the legality of the agreements or even pushing parties to continue with the negotiation when an impasse exists. As a pilot project, the staff of the SERCLA has been supporting parties in complex collective bargaining through a process of preventive conciliation.

To start mediating at the SERCLA, new mediators must follow a basic training in mediation. The SERCLA offers compulsory mediation training throughout the year, differentiating between basic and expert training. The SERCLA also organizes a general meeting each year to improve competences and develop a reflexivity process with their mediations. The requirements to become a mediator are: to follow twelve-hour theoretical and practical mediation training, and to attend at least three real mediations as an observer. Once the mediators are included in the system, registered in this list, they shall take a re-training at least once every two years during their career as mediators. The SERCLA also has published a Guide for mediation as

Table 13.2 Global data from TLC (Catalonia) and SERCLA (Andalusia) in 2016

	TLC	SERCLA
Number of conciliation/mediation	579	670
Average time dedicated to mediation	2 h	1.76 h
Employees affected by mediation agreements	5,179,349	540,188
Agreement rate	40%	40%

a basic resource for the training of new mediators (Munduate, Butts, Medina & Martínez-Pecino, 2014).

The training for mediators is based on Ury, Brett, and Goldberg's model (1988) and the Slakieu (1996) approach for managing disputes. The SERCLA developed different workshops to train mediators in mediation tactics to reduce the level of conflict and understand the interest of the parties (e.g.: formulating open questions, re-framing, using words to reduce emotional levels, among others).

In the TLC, collective labor conflicts are also mediated with teams of four mediators appointed by the organizations of the foundation, in the case of conflicts in organizations with more than 30 employees. For organizations with less than 30 employees, mediations are carried out by two mediators. The percentage of collective mediations presented before the TLC which end in agreement between the parties is above 40%, and those previous to strike present slightly higher chances of reaching agreement. Table 13.2 presents some key aspects comparing SERCLA with TLC.

13.5 Description of the Mediation Process

In the SERCLA system, the mediation starts with the application of one person or institution. In conflicts previous to strike, mediation shall be requested by the Strike Committee. Once the application form is received at the SERCLA, they will notify the parties involved and will call them, usually within the following 7 working days from the reception of the submission or the rectification of it. In general, if no agreement is reached within 25 working days the proceedings will be classified finished without agreement. In mediations previous to judicial procedures and mediations of individual conflicts (which are also a mandatory step of the judicial individual procedure), limitation periods for filing the lawsuit before the employment tribunals are suspended. This is one of the requirements established by the European Directive on Civil and Commercial Matters (SERCLA, 2014).

SERCLA has developed a Reference Model for Mediation that we present in Fig. 13.1. The first stage (Mediation team pre-meeting to prepare the session), is oriented to the mediators' preparation as a team. In order to ensure cooperation within the team and that the parties perceive them as such, coordination is essential. Mediators are appointed by the parties (unions and employers associations). Mediation is based in a joint meeting although a caucus is possible in some circumstances (e.g.:

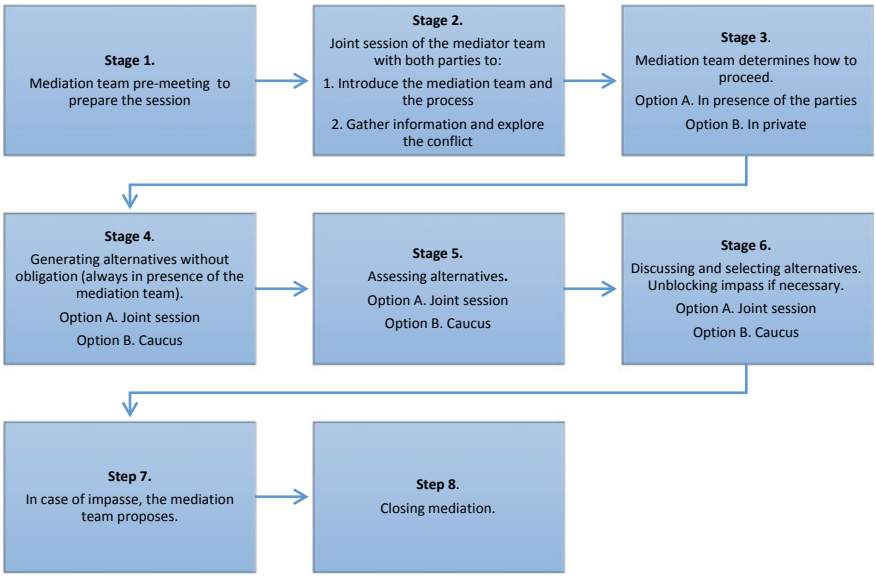

Fig. 13.1 Mediation model in SERCLA (Andalucia, Spain)

cases of violence). The Mediation committee coordinates, before each mediation, in order to maintain the impartiality and prepare the strategy of the team. They can also have private meetings during the mediation process to discuss the conflict at the table, the criteria or even to elaborate proposals for the parties.

As mentioned before, a challenge at the SERCLA is that Employers and Employees' associations decide what specific mediators will mediate, before each mediation. There are no stable mediation teams, which often hinders the coordination among mediators. A possible solution is a selection of the mediators based on competences, suggested both by the parties and the mediators. There is a debate around making teams stable, as some mediators in the system think this would be more effective. Following a statement by a mediator:

> I notice that when I've repeated in a same team, and especially if this team is configured in a balanced way in terms of experience and knowledge, everyone gets to know their role and the results are better. I think it would help to establish stable teams, if not fully stable, at least during a period of time or for certain conflicts.

However, this perception is not shared by everyone at the SERCLA and from the interviews, it was observed that there is a mixed opinion on this matter.

Data from observations show that mediators follow the mediation model that appears in Fig. 13.1, they employ caucus less than 10%, and prefer a joint session. They usually follow recommendation from training courses about the use of different mediation techniques. SERCLA does not formally distinguish between mediation and conciliation, observational data suggest that they follow a conciliation process.

Mediators also recognize the importance of the SERCLA's secretary role. They consider this role as a crucial for mediation for different reasons: the secretary can play a different role than mediators without losing neutrality and impartiality, for example, pushing parties to negotiate or advise parties about the legal consequences of their positions. The secretary also has the role of writing the agreement. In this sense, they recently changed between writing the agreement in a separate office to writing the agreement in the same session in presence of the parties. It has been proven that writing the agreement during the mediation process, and checking it with the parties, increases agreement rates. As pointed out by one of the mediators at SERCLA:

> We put quite some effort into writing out the minutes of the session and the agreement. Though the mediation team and the secretary here have the leading role, we like to keep the parties involved in the process, I feel that this helps them to keep to the agreement and reach a common understanding of what has happened during the session.

Another important point is that parties do not perceive loss of neutrality or impartiality in the mediators based on the belongingness to the professional association or to the unions. Moreover, parties in some cases defend this system configuration because they trust in one system where they actively participate.

It is interesting to note that these mediators know that they should not make proposals and have received training in that regard. However, they recognize that they are often making proposals.

Some heterogeneity in mediation's competences is founded between and within mediation teams. They ask for more training in complex competences and for more stable mediation teams. As stated by one of the providers of the system:

> Though we would like to provide more training to our mediators, both new and experienced, it is difficult. There are 450 mediators in our system, and also the responsibility for training the mediators actually lays in the organizations that appoint them. We are thinking of additional solutions, like increasing the number of observations for new mediators.

The more challenging part of the process is the coordination within mediation teams. They have a formal designation of the presidency, but the coordination of the different roles for the mediation is not clear. SERCLA recommend mediators to stay in the room about twenty minutes previous to the mediation. In our observation experience, mediators stay in the room waiting parties, but they usually do not discuss about the case or about the coordination roles.

SERCLA has some appropriate room for the joint sessions and also possibilities for caucus. They have a flipchart and encourage mediators to use this tool, but the use of flipchart in mediation is low.

SERCLA has an internal process of revision of the mediation process, making clearer the different stages and discussing with mediators the introduction of a process of mediation with proposals. The final outcome of this process is a new mediation model with a high consensus of the Andalusia mediators.

In the TLC system (Labor tribunal of Catalunya) the parties may find three possibilities: conciliation, mediation, and arbitration. The difference between conciliation and mediation is that the mediators can elaborate a proposal, which could be accepted

by parties. In case the conciliation process would not end up in an agreement, the parties can choose to start a mediation process, as long as this one starts in the following three days. Once the TLC's Mediation Commission is formed, the commission must have at least a mandatory joint meeting with both representations. After this joint meeting, the mediators can encounter each party separately (as long as neutrality is assured).

If the parties also cannot reach an agreement after the mediation, the Mediation Commission must then dictate a mandatory proposal that will be given to both parties so that they can study and reply on it, globally and without options of partial modification, after a recess or latest 24 h after the session. This proposal must be agreed upon and justified by the mediators, without any intervention from the parties. Once the proposal has been accepted by both parties, the mediation act can be considered as finalized with agreement. If, on the other hand, one or both parties would not accept the agreement, the mediation would finalize without agreement and the Commission would make sure the final positions of the parties are gathered. In both cases, the mediators' proposal is kept record of. This mediators' proposal can only be accepted integrally, not partially or with exceptions or modifications, unless both representations agree upon these, as a starting point of the agreement.

13.6 Effectiveness of the System. Evaluation by Stakeholders

The first fourteen years of the SERCLA have shown a significative effectiveness. Approximately 13,400 conflicts have been submitted, affecting more than 400,000 companies and more than 3000,000 employees (Medina, Vilches, Otero, & Munduate, 2014). It is noticeable that not all cases submitted to SERCLA have been finally processed; this can be for multiple reasons (SERCLA, 2014). Often the claimant desisted from the conflict, or the strike was cancelled, or the defendant did not show up in the mediation session (this is particularly the case in the public sector). The number of failures has shown to be higher for conflicts in the public sector than in the private sector. If we compare percentages of agreements between types of conflicts, a substantial difference is appreciated. Conflicts of rights get lower settlement rates than conflicts of interest, as seen in Fig. 13.2.

The level of agreements reached by interventions through TLC in the period between 1992 and 2015 was 60% in the case of mediations, and 52% in the case of conciliations. In this period, 1164 interventions of conciliations/mediations took place, 53, 10% of strikes were called off, and an estimated 25 million euros were saved through the recovered strike hours. The mediation process started in 2006 as a pilot experience.

In addition to a reached agreement, another performance indicator for conciliation and mediation is the satisfaction by the parties using the system (Bollen & Euwema, 2013). We analyzed systematically the satisfaction level during the period Decem-

ber 2017 to April 2018, based on 25 mediations. Parties and mediators reported a medium-high level of satisfaction of the mediation. Two interesting results are worth pointing out: (a) a significative high evaluation by the company representatives compared to the mediators and unions, (b) internal differences in unions in the level of satisfaction with SERCLA.

A deep analysis about the perception of mediators demonstrated a high satisfaction level in all the analyzed criteria. The most positive aspect is the quality of the system and cohesion between mediation teams. The less positive is the trust in the implementation of agreement by parties and the relationships between parties after mediation. Mediators showed their concern for various aspects: (a) Firstly, for mediation in the public sector, since agreements were reached through mediation in less than 10%. The main reason is that the negotiators from the public sector cannot have the possibility to reach agreements without the government's permission, due to the restrictions of the economy. (b) They consider that they need more training to manage parties when the negotiation range is low, or parties do not like to negotiate, what usually happens in the mediations with agents (e.g. lawyers), (c) They usually claim that mediation teams are permanent, (d) more promotion of SERCLA in society, and (e) more economical resources.

13.7 Challenges for the Spanish Systems. Qualitative Analysis of the Parties and Mediators' Perspective

There is a social debate over what would be the best approach to adopt by the different mediation systems in Spain. We will group the issues involved according to the three dimensions derived from the 3-R model referred to previously.

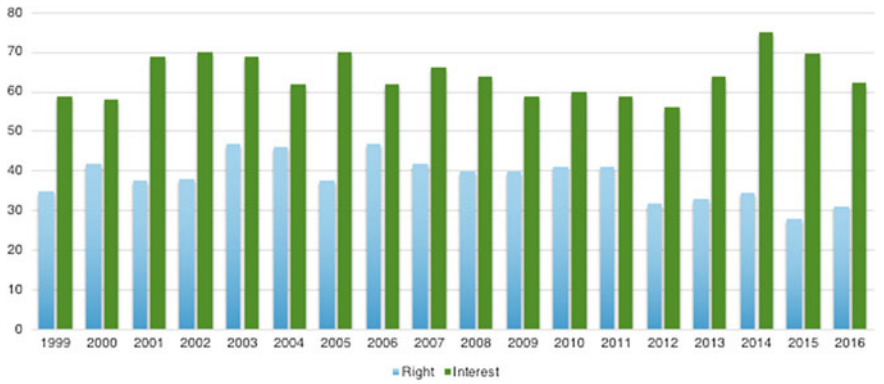

Fig. 13.2 Mediation effectiveness in conflicts of rights and of interests (SERCLA)

Regulations

- Some new laws related to mediation and promoted by the government in the past years are especially worrying the union organizations. As said before, some mediation systems in Spain are autonomous, which means that they are outside of the government's influence. However, the latest laws in this respect establish that public foundations must be controlled by governments, implying by this that many mediation systems that are foundations -such as SIMA- are currently under the Government's control.
- There is a great diversity in how the mediation processes are carried out. While some of them (e.g.: SERCLA & TLC) have systematized their mediation protocols with very detailed descriptions of the process, other systems do not give recommendations or hardly establish any procedure.
- A detailed analysis of mediations in conflicts of the public sector is deemed necessary, since the organizations are very constrained by the existing labor legislation and they attend the mediation process without any possibility to negotiate, or simply do not show up at the mediation meeting.

Relations

- There is an important debate going on about how to improve the mediation procedures to increase trust between the parties. The unions' side believes that often the employers' side attends the mediation with hardly any interest in negotiating or gives the lawyers that represent them very strict instructions, so they leave little room for reaching satisfying agreements for both parties.

Roles

- The autonomous systems and the mediators that were originally designed and appointed for collective conflicts are increasingly taking on more competencies and mediations in individual conflicts. For example, individual conflicts involving sanctions will be taken on by the SERCLA in the following months, while they used to be managed by the CMAC. These new issues will entail deliberations for the systems about the procedures and techniques of mediation used by the mediators, which will have to be adapted to the new types of conflict. It will also mean an increase in the activity of these systems and thus a need for more resources.
- There is also a debate regarding if mediators should make proposals to the parties or not. The differentiation between mediation and conciliation in the TLC has laid the cards on the table for new possibilities of distinguishing between mediation as a strict form and mediation as a procedure which can start as a mediation but if it reaches an impasse, a proposal can be made by the mediators, which could be accepted by the parties (or not). This mixed system of mediation and proposals of the mediators increases the effectiveness of the mediation, following the records of the TLC.
- There is a national debate about the training of mediators and arbitrators in the different mediation systems. In Spain, mediation in collective conflicts is still relatively an "amateur" process, where some of the mediators come from the

parties themselves and in other cases they are public service workers related to labor conflicts (e.g.: university staff, work inspectors, etc.). In the same line, training on integrative negotiation is required as important for parties and mediators.

- There is also a need for analyzing the records written by the mediators, in such that they also reflect the attempts to negotiate by the parties, the key points covered in the mediation, as well as the aspects observed by the mediators which have led to an impasse (if there were any). Records with more qualitative information could facilitate learning from the mediations, as well as systematizing good mediation practices and their promotion.
- It is important to increase institutional resources: better and more meeting rooms, larger time available for mediation, better trained mediators and deeper, and more specific taylor made training in general.
- In the same direction, it is important to disseminate the existence and effectiveness of the different available systems of Mediation in Collective Conflict. The achievements of the different systems described before are very high and, if the citizens knew about these, it would improve the credibility of the systems and society's trust in them, in addition to creating awareness of the need of better resources for their further development.
- There is an ongoing debate about the need for a greater professionalization of the mediation systems, though not necessarily of the mediators. The creation of stable mediation teams, the appointment of mediators to conflicts according to their specific competences, the incorporation of selection, training and evaluation systems based on competences, are all measures that are currently being analyzed by some of the Spanish mediation systems.

13.8 Conclusions

Spain is a clear example of how the mediation systems can be explained in relation to the *Regulation* of the political and normative system, as it has been expressed by some mediation models like the 3-R model (Bollen, Euwema, & Munduate, 2016). In this sense, the Spanish constitution establishes autonomy for collective negotiations, and thus also for the mechanisms of labor conflict resolution. These aspects explain why the government cannot directly regulate specific aspects of collective conflict mediations without risking this constitutional act. This also explains the existence of nearly twenty different systems throughout the country, with their own specific procedures.

Similarly, mediation is also influenced by legislative changes. We have previously seen how the new regulation for collective bargaining has changed the traditional balance between parties, in such that the relative power that once belonged to the unions now has shifted to the employers. In the following years this may mean that the collective agreements reached at organizational level will increase, while those at sectorial and regional level will decrease.

In the same way, the traditional lack of trust between unions and employers has motivated the existence of mediation systems in which the parties take part of (and act as mediators, as we have seen before), with an important supervision of the systems from both sides.

All the public systems of mediation for collective conflicts are financially supported by the public administrations. However the management and decision-making is in the hands of the employers' and unions' side, with the support of the labor administration. These relations explain this unique model of participative mediation. The *relations* between the parties also influence the mediation systems significantly, following the 3-R model once again (Bollen et al., 2016).

Finally, there is a crucial change that is taking place, worth mentioning, regarding the expectations of the parties about the role of the mediators, demanding a higher application of techniques and strategies of conflict resolution, more professionalized inside the mediation systems. This requires more appropriate selection, training and evaluation methods for mediators, as well as effective evaluations of the systems, to improve the systems' capacity to contribute to social dialogue, as suggested by the 3-R model in relation to the *roles'* dimension.

References

Bollen, K., & Euwema, M. (2013). Workplace mediation: An underdeveloped research area. *Negotiation Journal, 29*(3), 329–353.

Bollen, K., Euwema, M., & Munduate, L. (2016). *Advancing workplace mediation through integration of theory and practice*. London: Springer International Publishing.

CES. (2017). *Annual report*. Madrid: Consejo Económico y Social.

Elgoibar, P., Munduate, L., Medina, F. J., & Euwema, M. (2012). Why are industrial relations in Spain competitive? Trust in management, union support and conflict behaviour in worker representatives. *Revista Internacional de Organizaciones, 9,* 145–168.

Medina, F. J., Vilches, V., Otero, M., & Munduate, L. (2014). How negotiators are transformed into mediators. Labor conflict mediation in Andalusia. *Revista de Psicología del Trabajo y de las Organizaciones, 30,* 3–25.

Miguélez, F., & Prieto, C. (2009). Trasformaciones del empleo, flexibilidad y relaciones laborales en Europa/ Transformations of employment, flexibility and industrial relations in Europe. *Política y sociedad, 46*(1–2), 275.

Munduate, L. (1993). A psychosocial approach to the study of conflict and negotiation in Spain: A review. *Psicothema, 5,* 261–275.

Munduate, L., Butts, T., Medina, F., & Martínez-Pecino, R., (2014). *Manual para la mediación laboral.* Sevilla: Consejo Andaluz de Relaciones Laborales (CARL).

Munduate, L., Ganaza, J., Alcaide, M., & Peiró, J. M. (1994). Spain. In M. A. Rahim & A. A. Blum (Eds.), *Global perspectives on organizational conflict.* Connecticut: Praeger.

Sánchez-Cuenca, I., & Aguilar, P. (2009). Terrorist violence and popular mobilization: The case of the Spanish transition to democracy. *Politics & Society, 37*(3), 428–453.

SERCLA (2014). Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía. Carta de Compromisos de la Actuación Mediadora 2014 [*Extrajudicial system for labor conflict resolution in Andalusia. Report 2014*]. Sevilla: Consejo Andaluz de Relaciones Laborales.

SIMA. (2017). *Annual report*. Madrid: Servicio Interconfederal de Mediación y Arbitraje.

Slaikeu, K. A. (1996). *When push comes to shove. A Practical Guide to Mediating Disputes*. Boston, MA: Jossey-Bass.
Ury, W. L., Brett, J. M., & Goldberg, S. B. (1988). *Getting disputes resolved: Designing systems to cut the costs of conflict*. Boston, MA: Jossey-Bass.

Chapter 14
Mediation and Conciliation in Collective Labor Conflicts in the United Kingdom

Kristina Potočnik, Sara Chaudhry and Marta Bernal-Valencia

The Case

Employment Relations in Scottish Refinery—Background
In 2008, 1200 workers at one of the Scottish oil refineries held a 48-h strike. Employees, members of a large trade union, were seeking to protect their existing pension scheme. The company's majority shareholder came to terms with the trade union. In October 2013, he halted production (initially as a safety measure preceding strike action) and additionally initiated a lockout even after strike action had been called off. Furthermore, he bypassed the union by offering individual employees deals capitalizing on their fear of losing their jobs.
Position of Parties Involved—A Historical Overview
Two key disputes, involving the same stakeholders, emerged in this specific organizational context. In 2008, the trade union claimed that the company had already reduced its contributions to the pension scheme by introducing financial penalties for early retirement. The existence of a non-contributory pension scheme was due to the lower salaries—employees made £6000 a year less than workers in other refineries did. The changes proposed by the company would have further reduced members' payouts by an average £10,000 a year. In 2013, the union was caught off guard during a dispute involving a former union organizer. A third of the union members individually agreed to terms that included no strikes for three years, no further full-time union conveners, a one-time £15,000 payout and an enhanced employer contribution to the pension scheme in return for acceptance of worsening terms and conditions of employment in the coming years.

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Third Party Intervention in the Dispute
Acas was acting as a third party in the conciliation process for both disputes. Conciliation talks held at Acas offices over two days in 2008 prior to the strike taking place, involved discussion of issues of safety and integrity of the refinery site. However, the parties did not come to an agreement with respect to the underlying issue of the dispute—i.e., reduced employer contributions to the pension scheme and the strike took place four days after these talks Acas proactively offered assistance to both parties in pursuing an agreement. Eventually, the agreement was reached. Conversely, in 2013 the trade union formally asked the employer to involve Acas in the dispute resolution process. Despite their initial reluctance to do so, they were eventually persuaded to attend the talks at Acas. However, the employer attended these talks with no intention to resolve the conflict and in fact they walked out of these negotiations and also denied elected union representatives time-off to meet Westminster government ministers in London. Furthermore, the employer initiated a lockout, threatened permanent plant closure and capitalized on a trade union representative's suspension (based on an independent political scandal) to defeat trade union's organized action in the workplace.

In both disputes, Acas was involved prior to the strike and lockout taking place. In 2008, Acas helped parties reach an agreement on issues of safety and integrity, although the key issue underlying the collective conflict was not solved. In 2013, Acas did their best to help both parties reach an agreement but the conciliation talks fail ed because one of the parties was alleged to have entered the talks without any intention to solve the conflict.
The Scottish refinery case was derived from the following sources: Lyon (2017), *Arrowsmith* (2008), *Balakrishnan* (2008), *BBC* (2013, 2014), *McAlpine* (2013), *Peev and Allen* (2013) *and Seymour* (2013). We can contrast this case with our own recent experience of the UCU-UUK pensions dispute. The first and second authors of this chapter took part in the industrial action to defend a guaranteed pension. The industrial action started before Acas was involved. In this case the union was more proactive (compared to the UUK) in trying to use collective conciliation to solve the conflict. With the help of Acas, the UCU and UUK eventually reached an interim agreement and therefore a further round of industrial action that had been provisionally announced was instead cancelled.

14.1 Introduction

According to Acas, a state-founded mediation body with a mission to facilitate the resolution of employment conflicts in Great Britain, an organizational or workplace conflict is defined as 'discontent arising from a perceived clash of interests and may

be collective or individual, involving action such as a strike, raising a grievance or taking disciplinary measures' (Dix, Forth, & Sisson, 2008). According to Podro and Suff (2009), collective conciliation to settle such organizational conflicts has been a characteristic of British industrial relations for more than a century. Other forms of collective conflict management are collective mediation and arbitration, however our findings highlighted that collective conciliation is the dominant form of collective dispute resolution and the other two mechanisms are comparatively less used in the UK. For instance, our primary data collection from practitioners highlighted that mediation is seen by key stakeholders (i.e. organizations and trade unions) as a 'halfway house' and hence not a preferred option.

The overall pattern of organizational conflicts in the UK has changed over recent years showing a decline in collective disputes (see Fig. 14.1 for the number of stoppages and Fig. 14.2 for the number of working days lost, respectively). Our primary data suggests that Acas deals with 850 collective disputes on an annual basis in recent years. This relatively low number compared to previous years is not surprising since trade unions in the UK have been losing power since Margaret Thatcher came into power in 1979. Interestingly, the post-Thatcher governments have also been initiating legislative amendments that restrict the activities of trade unions in the UK. Several laws have been enacted to this end, such as allowing a union to be sued, introducing specific balloting rules prior to strike action (reducing balloting because of threshold requirements), and proscribing secondary and unofficial actions, all considered as making it more difficult to strike (Dix, Forth, & Sisson, 2008). For instance, the New Labour's first white paper on Fairness at Work also sought to weaken the trade unions (Dix et al., 2008).[1] Apart from these state-initiated changes other factors have also affected employment relations, including the cyclical pattern of economic activity, changes in the distribution of employment, weakened trade unions in terms of density and bargaining coverage, an increase in HR professionalism, trade liberalization and globalization (Dix et al., 2008; Dix & Barber, 2015). Comparing disputes among different industries, Heery and Nash (2011) reported that health, local government, education, manufacturing and central government to be the most dispute-prone sectors.

Furthermore, the number and strength of works councils, commonly referred to as joint consultative committees (JCC's) in Great Britain, has also been steadily declining; though at a slower rate (Adam, Purcell, & Hall, 2014). The most dramatic JCC declines were experienced in the finance, wholesale, retail, hotel and restaurant industries (Van Wanrooy, Bewley, Bryson, Forth, Freeth, Stokes, & Wood, 2013). More importantly, JCC's are criticized for not engaging in any meaningful consultation with employees. Instead, they are described as 'communicators of decisions that had already been taken by management, rather than as bodies engaged in active consultation' (Hall, Hutchinson, Purcell, Terry, & Parker, 2011) and even the ICE Regulations[2] have not enhanced the practice of active, joint consultation via works

[1]The level of unionisation has fallen from 12.6 million registered members in 1980 to 6.9 million in 2016 (Certification Officer, 2016).

[2]Information and Consultation of Employees Regulations—introduced in the UK in 2005.

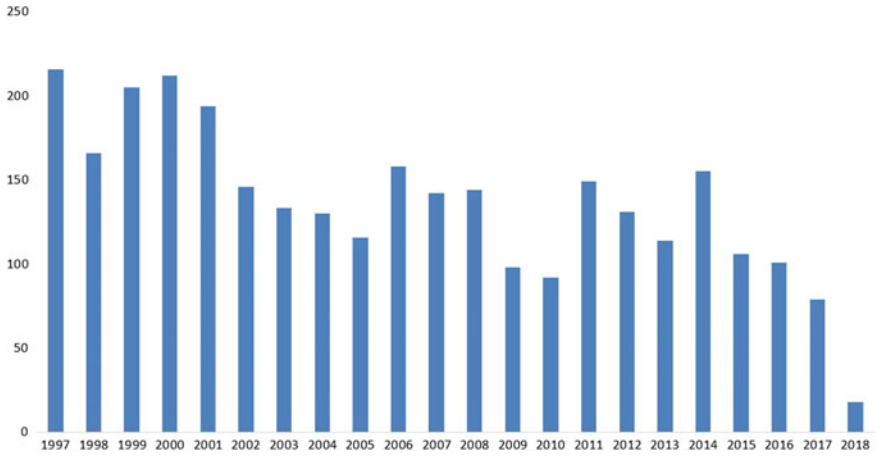

Fig. 14.1 Number of workplace stoppages per year in the UK (since 1997). Based on ONS (2018). The data for 2018 is up to the end of January

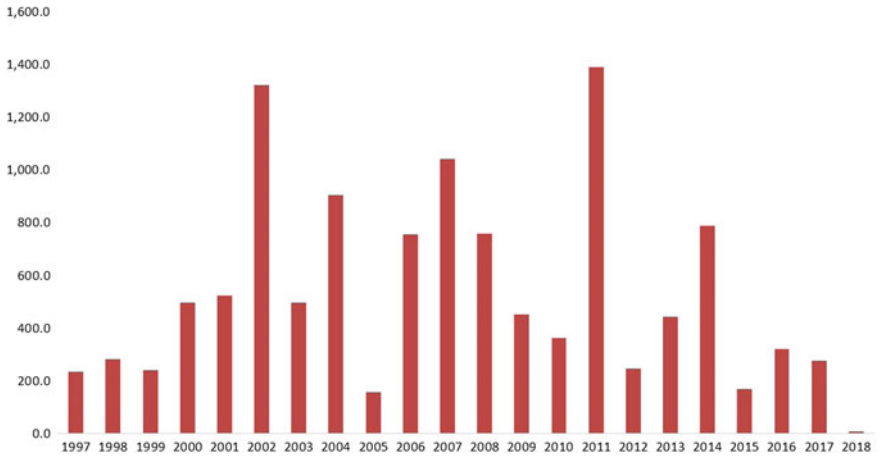

Fig. 14.2 Number of working days lost (in thousands) in the UK (since 1997). Based on ONS (2018). The data for 2018 is up to the end of January

councils (Van Wanrooy et al., 2013). Therefore, works councils/JCCs are unlikely to participate in collective dispute processes because of a significant narrowing of their agenda and role, in contrast to the important role played by works councils in other European countries like Germany, Sweden, and the Netherlands, amongst others.

Unsurprisingly, against this employment relations backdrop, statistics for official strikes show very low averages when compared with historical data (see Fig. 14.1) whereas individual employment claims to Employment Tribunals (ETs) have increased (apart from a minor decrease—see below).

This pattern of an increasingly individualized employment relationship may indicate on the one hand an 'individualization phenomenon' (Dix et al., 2008) whilst on the other hand, it reflects unions' decline of power and their new strategy to *enforce* and *protect* existing rights established by legislation (Dix et al., 2008). Nevertheless, the recent growth in multiple ET cases involving a single issue (or a set of issues) affecting a number of people in the same workplace or organization suggests the continuing importance of collective issues (Dix & Barber, 2015). The rise of multiple ET cases is heavily influenced by large scale disputes, primarily as a union-led tactic to change or maintain control in negotiations. There was a short-term decline in ET claims by individuals when tribunal fees were introduced in 2013 (Dix & Barber, 2015). However, these fees were abolished in July 2017 given a Supreme Court ruling (Renaudon, 2017) and in the proceeding month's tribunal claims for individual cases showed a 100% increase.

In this chapter, we discuss the collective conciliation and mediation practices in the UK. It is worth pointing out that the same employment law applies to private and public sectors in the UK and hence the same collective conciliation and mediation system is used in both sectors.

14.2 Characteristics of the System

The existing mediation model in the UK was decided in 2002, when new employment legislation was enacted (principally the Employment Act of 2002 and Dispute Resolution Regulations of 2004). Against the theoretical backdrop of the 3R model of workplace mediation (Bollen, Euwema, & Munduate, 2016), the British dispute resolution system can be characterized as a predominantly voluntarist approach to collective conciliation and mediation (Latreille, 2011; Saundry, Bennett, & Wibberley, 2013). The employment law in the UK does not impose either conciliation or mediation on disputing parties and the trade union can call for strike action if its members support it without going through collective conciliation or mediation first. If disputing parties do decide to take advantage of third party dispute resolution the most frequent port of call would be Acas. This is state-supported organization almost entirely funded by the government and acts impartially in providing a range of best practices and dispute resolution services (Dix & Oxenbridge, 2004). The Labour Relations Agency (LRA) is the equivalent body in Northern Ireland. Specifically, the Trade Union and Labour Relations (Consolidation) Act TULRCA 1992s 210 establishes the following: "*where a trade dispute exists or is apprehended* Acas *may, at the request of one or more parties to the dispute or otherwise, offer the parties to the dispute its assistance with a view to bringing about a settlement*". Therefore, Acas may be part of the mediation process depending on the will of the parties involved and Acas involvement is not compulsory in collective disputes (Podro & Suff, 2009). Any of the disputing parties can request help from Acas or they can also jointly approach Acas in seeking help to resolve the dispute (Bond, 2011). In Acas' 2016 collective conciliation evaluation survey 89% of the total surveyed participants reported that

their organizations had a formal procedure for dealing with collective conflicts in place. Of this, 69% indicated that in case of failure to agree, their formal procedure included a referral to Acas (Booth, Clemence, & Gariban, 2016).

Acas distinguishes between collective conciliation, mediation and arbitration mechanisms. Collective conciliation is defined as "talks aimed at resolving disputes between representative groups (most typically trade unions) and employers—facilitated by an independent third party" (Podro & Suff, 2009) and Acas emphasizes that the parties themselves decide the outcome and it primarily helps them find common ground and move forward. Collective mediation according to Acas refers to "making recommendations to attempt to resolve the dispute" (Podro & Suff, 2009) which parties have to consider. Collective mediation is pursued if collective conciliation has not been successful and the parties are still committed to settle the conflict without the use of coercive action (i.e., work stoppages, strikes or lockouts). Our primary data highlights that issues that escalate to collective mediation include procedural deficiencies, misuse of the law, dismissal of trade unions representatives etc. In terms of role expectations of conflicting parties (Bollen et al., 2016), they will agree on the terms of reference before mediation begins. The role of Acas is focused on offering recommendations aimed at settling the dispute, and parties are encouraged to accept these recommendations. Finally, Acas defines collective arbitration as a process whereby the parties are given a written decision, which they accepted to implement in advance, and the dispute formally concludes when both parties agree on the final terms of reference.

In terms of relations between the disputing parties and a neutral third party (Bollen et al., 2016) like Acas—it is considered that conciliation and mediation are appropriate means of collective conflict resolution only after the involved parties have exhausted all possibilities of solving the conflict by themselves or if the circumstances are so adverse that the parties agree they are in need of assistance from a third party to solve their conflict. Externally-provided alternative dispute resolution, such as by Acas, is expected to help solve most disputes, although it might not be suitable in all cases (Gibbons, 2007). For instance, large organizations usually rely on extensive internal dispute resolution procedures involving internal or bought-in mediation expertise. This approach to dispute resolution by larger organizations is primarily relevant because in heavily unionized workplaces, conflict is likely to occur and be resolved via direct negotiation with unions. Furthermore, our interview with Acas' chief conciliator revealed that organizations often deal with disputes internally because they '…are relationship-based rather than terms and conditions of employment…' Therefore, they would be very unlikely to resolve conflicts by immediately resorting to Acas procedures because trade unions use balloting process or ballot results as a key negotiation tactic to threaten action. This increases their bargaining power without actually initiating action (Van Wanrooy et al., 2013). This negotiation advantage would be lost if third parties like Acas were involved at the outset because both organizational and trade union policy prohibits industrial action if a dispute is to be referred to an outside body for collective conciliation or mediation (Bond, 2011; Molloy, Legard, & Lewis, 2003; Van Wanrooy et al., 2013). For instance, users of the Acas services reported relying on bargaining processes (81%) and escalating

disputes to more senior personnel members (68%) prior to Acas involvement. In fact, in more recent times an increase was reported in the use of the threat of industrial action (an increase to 42% in 2016 from 26% in 2012) *before* ACAS was involved in the dispute resolution process (Booth et al., 2016).

Nevertheless, the latest WERS (Workplace Employment Relations Study) data highlights that the proportion of workplaces with internal collective dispute procedures fell from 40% in 2004 to 35% in 2011 and only two-thirds (66%) of workplaces with a collective dispute procedure actually used it (Van Wanrooy et al., 2013)—this is attributed primarily to falling unionization levels. Two thirds of organizations (68%) have provisions for referral to external bodies in their internal collective dispute policies (ibid) and Acas remains the most popular external body referred to in collective disputes (in comparison to independent mediators, employer associations etc.). Furthermore, the most common use of Acas in collective dispute resolution is for conciliation (37%) followed by arbitration (25%)—while only 9% of the referrals were for collective mediation (ibid). In 2014–15 there were 1371 cases of collective conciliation but only 19 arbitrations (Corby, 2015).

Apart from Acas, the disputing parties can turn to a wide range of other organizations, including advisory bodies such as Citizens Advice Bureau and members of the Civil Mediation Council. There are also private organizations ranging from lawyers and consultants, to dedicated ADR and mediation organizations such as the ADR Group, CEDR (Centre for Effective Dispute Resolution) and Mediation UK (Podro & Suff, 2005). Practitioners in our sample noted that lack of negotiation experience of key stakeholders in the dispute places the onus of explaining the basics of the process on third party conciliators.

In terms of public vs private sector organizations, Acas research suggests that the public sector has involved ACAS in their dispute resolution to a lesser extent than the private sector (Dawe & Neathey, 2008; Podro & Suff, 2009; Ruhemann, 2010). The less frequent use of collective conciliation and mediation by public service organizations is puzzling given that up to 83% of the public sector workplaces have collective bargaining compared to only around 14% in the private sector (Podro & Suff, 2009). With over two-thirds of industrial actions, the public sector is also considerably more strike prone than the private sector (Heery & Nash, 2011). Nevertheless, Acas has provided their conciliation services in the railways, London Underground, colleges and universities, the NHS and fire brigade, to name a few examples. Overall, lower involvement of Acas in public sector collective disputes can be attributed to the fact that conciliation may sometimes be seen as a willingness to compromise by typically strong public sector unions. Unsurprisingly, the recent 2016 evaluation survey highlighted that the majority of organizations using collective conciliation are from the private sector (65%), whereas organizations from public sector comprised a total of 26% of disputes and voluntary/not-for-profit organizations accounted for 9% of disputes (Booth et al., 2016).

Acas involvement varies across individual versus collective disputes. Acas provides free conciliation for both collective and individual disputes (the latter is free only in relation to alleged infringement of employment rights) (Corby, 2015). In contrast, Acas provision of mediation for individual conflicts is for a fee. Acas can also

offer mediation for collective disputes and this service is provided by an independent panel of mediators.

In terms of the extent of the use of the conflict resolution system in the UK, employers are increasingly choosing conciliation to resolve workplace conflict. Dix and Oxenbridge (2004) have summarized the volume of collective conciliation requests in the 1974–2003 period. They observed a peak in conciliation requests between 1976 and 1978 at more than 3000. The request for collective conciliation fell substantially in the 1980s, most likely due to sectoral and legislation changes to union powers. However, despite this the demand for collective conciliation remained steady between 1990 and 2002 at approximately 1300 requests. The most recent data shows that the demand for collective conciliation slightly decreased to 1054 requests in 2010/2011, but it increased again to 1372 requests in 2014/2015 (Booth et al., 2016). Most frequently, these recent disputes were about pay (an issue on 46% of disputes), followed by other terms of employment, such as pensions, annual leave, etc. (26% of disputes), recognition of a trade union (18%), changes in working practices (9%), and redundancy (5%). In terms of the parties involved, the recent survey about the conciliation of collective disputes reports only cases that involve employers (management) and trade union representatives (Booth et al., 2016).

Evaluation of Stakeholders on the System

An attitudinal study on trade union officers highlighted that trade union officials were somewhat ambivalent about the differences between collective mediation and conciliation (Bond, 2011). This suggests a lack of awareness of how these respective Acas services are distinctive from a stakeholder perspective, a point we also observed in our primary data. More importantly, the current system was evaluated as effective because it not only has the potential to bring the parties back to the negotiating table but additionally the use of a neutral third party can help better manage the emotional undercurrents of the dispute. Trade union officials suggested that they would turn to the third party for help either when they wanted to make their position stronger or when they felt their position was weak with respect to the employers. In these circumstances they would turn to third parties so as to put more pressure on management to move towards their proposed solution.

Interestingly, all our participants, including trade union representatives, strongly agreed that the voluntarist approach to dispute resolution in the UK worked given the overall industrial relations climate. Finally, our primary data also suggests that due to the recent Trade Union Act of 2016 trade unions were engaging in more consultative balloting (due to increased ballot threshold requirements) and therefore approaching ACAS at earlier stages of collective disputes as compared to the past.

14.3 Characteristics of the Mediators or Facilitators and the Third Party Procedures

The collective conciliation and mediation processes will be characterized by the particular style of conciliation and mediation involved. There are different models of conciliation and mediation, mainly based on facilitative, evaluative, transformative, transactional and directive approaches (Acas, 2013). Facilitative mediation, operationalized in almost identical terms as conciliation, is the process in which the mediator is in charge of the process, asks questions but does not give advice or provide solutions, and it is the most common approach among the UK-based mediators (Saundry et al., 2013). The mediators we interviewed follow the Scottish Mediation Code of Practice, which does not dictate a form of mediation, though they suggested the facilitative approach as the most common approach in most workplaces. However, our participants also highlighted that in reality most mediators tend to draw on a range of approaches during different stages of the dispute resolution process in order to facilitate a resolution.

The users of Acas collective conciliation function have also identified different conciliation styles, ranging from the "go-between" to "proactive" style. The "go-between" conciliators were characterized as those who were mainly conveying messages but did not explain the underlying factors that influenced each party's position. In contrast, the "proactive" conciliators were perceived to not only be conveying the messages but also using tactics to make the involved parties think of solutions by presenting options or pointing towards areas of agreement in order to facilitate a settlement (Dix & Oxenbridge, 2004; Molloy et al., 2003). Needless to say, the vast majority of parties preferred the proactive conciliation style. There is also evidence that some conciliators tend to adapt their style to different people or stages of the conciliation process, which was classified as an "adaptive" conciliation style (ibid). We discuss about how the conciliation and mediation work in more detail later on in this chapter.

Collective conciliators are led by the chief conciliator and are based in offices across England, Wales, and Scotland. They help parties settle conflicts in both local and national disputes (Podro & Suff, 2009). There are several organizations that are positioning themselves as the register for mediators. Our specialist mediator interviewees, who were all working independent from Acas, were registered with Scottish Mediation, but across the UK there is also CEDR, UK Mediation and others, though CEDR is likely the biggest and best established. Importantly, all these organizations deal with all forms of mediation, and a large proportion of individuals who are registered with them do not actually practice or do so rarely. Therefore, it is difficult to establish how many mediators there are in the UK.

In terms of collective conciliation in particular, the conciliators have on average of eight years of experience, with almost one third having more than 10 years of experience as of March 2007. Approximately one in ten work exclusively on collective conciliation. Podro and Suff (2009) report that conciliator behaviors and techniques used are more important in determining the success of conciliation than

the characteristics of the dispute at hand (e.g., a threat of strike, type of conflict etc.). Particularly effective behaviors for successful collective conciliation outcomes are proactivity in seeking agreement (e.g., making a judgement about what is appropriate in a given situation), availability when needed outside the meeting and beyond established working hours, the establishment of conciliation rules and boundaries, and trustworthiness (Booth et al., 2016; Dix & Oxenbridge, 2004; Podro & Suff, 2009).

Another important characteristic of mediators and conciliators is the one of independence and impartiality conceptualized in terms of conciliators showing they did not have a vested interest in the terms of the agreement and clarifying they were not negotiating on behalf of any of the parties involved (Bond, 2011; Dix & Oxenbridge, 2004; Molloy et al., 2003). Both mediators and policy makers from our sample highlighted very strongly the importance of impartiality and how this is the key determining characteristic of the success of collective conciliation and mediation in the UK.

Our primary data also highlighted that the impartiality of mediators was guaranteed further by the fact that the mediators are not specifically affiliated to any trade union or employer which our participants saw as being fundamental to their role.

There is no formal/state regulation of the mediation profession at present and individuals can practice as mediators without any specific training. However, this might change in the future since organizations such as CEDR and Scottish Mediation are working to change these practices. Organizations with internal mediation schemes most frequently resort to their HR team for internal mediation who are formally trained by external providers, oftentimes by Acas (Latrielle, 2011). Our findings highlighted that Acas provides comprehensive training to its own conciliation staff, and on occasion also offers advice and support to other countries' conciliation services.

Independent mediators whom we interviewed suggested that when they were asked to mediate in a workplace, they were usually paid by the employer. Charges for Acas' services, with respect to both collective conciliation and mediation, was addressed in the earlier section (see the 'Characteristics of the system').

Evaluation by Stakeholders of the Facilitators/Mediators and Third Party Procedures

A key finding of this project was the degree of trust placed in the competence of Acas as a viable and reliable third party for dispute resolution purposes. Second, our trade union participants highlighted that long-standing relationships with local mediators and regional Acas offices facilitated trust during conflict resolution processes. In fact, Acas sees this as part of their stakeholder engagement policy—i.e. 'maintaining contact with the trade union representatives…and also the companies' human resource directors…' (Interview with Acas' chief conciliator). These relationships were further facilitated by organizations and unions involving Acas in setting up recognition agreements as well as involving Acas in analyzing the overall employment relations climate in the organization through a 'diagnostics workshop' that also helped highlight any ancillary issues that might have cropped up during the conciliation process (ibid). Interestingly both management and trade union officials felt that Acas

representatives were 'on their side' despite Acas openly and 'jealously guard(ing) (their) impartiality… because if we bias towards one side or the other our value goes out of the window' (Interview with Acas' chief conciliator). This suggests an open and trusting relationship (above and beyond specific trade disputes) that facilitates conversations between Acas representatives and respective managerial and union reps. All our mediator participants came across as very passionate, enthusiastic and socially integrated in the local employment relations context.

14.4 Description of the Facilitation and/or Mediation Process

Given the voluntarist arrangements predominant in the UK, Acas has no power to force parties to cooperate or impose a solution for disputes. Our interview with Acas' chief conciliator highlighted that disputing parties 'bring in Acas on a voluntary basis… we encourage the parties to exhaust their internal procedures on disputes before getting us involved…'.Therefore, the collective conciliation process usually starts with the "failure to agree" at the end of internal bargaining suggesting an ongoing conflictual relationship between both parties. The recent collective conciliation survey suggests that in 31% of the surveyed cases, Acas got involved after the parties had negotiated for 1–3 months and in 28% of the cases from 4–6 months. Only in 8% of the cases had Acas became involved after the parties had negotiated on their own for more than a year (Booth et al., 2016). Most frequently, Acas is likely to get involved after the disputing parties have made several attempts to solve a dispute, followed by situations in which the parties have stopped communicating or have reached a deadlock or a complete impasse (Booth et al., 2016; Ruhemann, 2010). Importantly, the majority of conciliation users on both sides of the collective dispute felt that involving Acas earlier in their negotiation process would not have been beneficial to reaching an eventual agreement because they felt it was important to utilize their mutually agreed conflict resolution procedures first. This once again underscores the importance, and stakeholder buy-in, of voluntarist arrangements in the UK.

Conciliation talks may take place on neutral territory such as Acas offices and involve different types of meetings (as explained below). According to Dix and Oxenbridge (2004), the only mandatory requirement imposed on both parties in the collective conciliation process is that they are willing to talk to each other. These authors found that the conciliation process is most frequently initiated jointly by both management and trade union (47%), by trade union alone (28%), by employer alone (14%), and by Acas (11%). An overall impression of both parties seems to be that showing willingness to use conciliation conveys a positive message to the other party (Molloy et al., 2003). Our participants also highlighted that the success of the collective conciliation process depended on disputing parties' willingness to engage in third party dispute resolution in the first place.

A typical conciliation meeting will start with a pre-conciliation stage in which the conciliator's terms of reference are agreed by all disputing parties beforehand to ensure everyone has clear expectations of what the conciliator is asked to do. The conciliator will then meet each party in a separate meeting to hear both sides of the story, to establish what the factors underpinning the dispute are, and find out what each party hopes to achieve from the conciliation process. A joint meeting (or a series of joint meetings) with all disputing parties will follow in which the conciliator will ask the parties to share their evidence with each other without interruptions in order to explore possible solutions to the dispute (Saundry et al., 2013). At the end of this meeting, the conciliator will also summarize and record in writing the main areas of agreement and disagreement in order to plan the next stages of the conciliation process.

Based on the collected information, the conciliator will start encouraging communication between the parties, shifting the focus from the past to the future and looking for constructive solutions. The conciliator will encourage joint problem-solving by the parties and building and writing an agreement. Upon reaching an agreement, the conciliator will bring a copy of the agreed statement that both parties will need to sign. In case of no agreement, anything that has been said during the conciliation cannot be used in future proceedings (Acas, 2013). In the case of no resolution our participants also highlighted that all material revealed during the collective conciliation process is confidential. If the conflict cannot be solved through either collective conciliation or mediation, the disputing parties can opt for collective arbitration, which will lead to an outcome both parties must, in most cases, adhere to. This last option is very rarely utilized in the UK and our participants confirmed that collective arbitration implied a complete loss of negotiation power and signaled conceding their position in the dispute. Interestingly, they also highlighted that collective arbitration undercuts the potential of building long-standing, trust-based relationships between management and trade unions.

Another option is the cooling down period whereby the parties would go back to their constituent members for consultation and work on any future plan of action. For the trade union representatives, this might include a possibility of strike or industrial action.

In the case of collective arbitration, the collective conciliator draws up the key terms of reference. The next stage involves the appointment of the arbitrator by Acas from a panel of outside experts, so that Acas can preserve its neutrality and not become involved in actual adjudication. The arbitrator then consults all relevant documents regarding the case after which a hearing is held for all parties to present the key points of their case as well as answering any questions raised by the opposing party. After questioning from the arbitrator, the parties present their closing statements. The arbitrator then deliberates on the evidence and statements presented and sends a written award statement to the Acas, that after due scrutiny is forwarded to the concerned parties (Corby, 2015).

Evaluation by Stakeholders of the Mediators and Mediation Process

Our findings suggest that the trade union representatives are happy with how the current mediation process allows them flexibility and stakeholder autonomy. Trade union participants as well as professional mediators in our focus group, despite coming from different parts of Scotland, already knew each other and stressed how these longstanding, informal relationships facilitated formal dispute resolution process. Our findings suggested that trade unions are more knowledgeable in regards to collective conflict resolution than the employers are, mainly because trade unions are organized and train their representatives when they recognize a knowledge gap to deal with the conflict resolution appropriately, whereas the employers are not. It was further added that many times HR advisors in charge of managing the employers' role in a trade dispute resolution process would not have any experience of dispute resolution or had not had to deal with one in years. Therefore, it was argued that conciliators find it easier to deal with trade union representatives than the employers' representatives. It was overall suggested that 'organized workplaces (i.e., unionized) are much more effective than unorganized workplaces'. In relation to the process, one trade union representative suggested that there is 'a misconception… a long-held sort of myth that the trade unions are out there somehow to wreck industry… nothing could be further from the truth… if the industries are wrecked, then it is our members who are losing their jobs… what is our biggest role is trying to stop management self-destroying their own industries to a certain degree'. In the discussion, this was interpreted as trade unions having a positive overall attitude towards using collective conciliation as means to help resolve a collective conflict in the workplace. As mentioned above, in case of no agreement as a result of conciliation process, the collective arbitration was not the preferred route to resolving disputes in largely voluntarist industrial relations context.

14.5 Effectiveness of the System

The ACAS survey data suggests that the overall satisfaction with the Acas' conciliation service has been high over time, both from the management and employee representatives' points of view (Booth et al., 2016; Dawe & Neathey, 2008; Dix & Oxenbridge, 2004; Molloy et al., 2003). According to the recent collective conciliation survey, a total of 76% of Acas users reported a successful outcome compared to 81% as reported in 2012. Across the smaller sub-set of users who did not report a resolution of their dispute, 91% of them acknowledged that their appointed conciliator could not have done more to bring about a successful settlement (Booth et al, 2016). A total of 91% of agreements reached during the conciliation were implemented fully and in 76% of successful cases it was perceived that the implemented agreement resolved the conflict. Our primary findings also suggest that the trade union representatives, mediators and policy makers all agree that the current system is effective and importantly, should remain voluntary.

When the users of collective conciliation were surveyed about their experience in 2007, a total of 89% of employee representatives and 82% of managers were satisfied with the collective conciliation service received. Customers have also noted that Acas either solved or made progress towards a settlement in 90% of the cases. A total of 87% of customers would recommend the service or use it again and. The recent Acas evidence shows that both employers and trade unions rated conciliators the highest (a score of 5 out of 5) on how well they listened to them, remained impartial, established rapport with them and presented issues in neutral language. Furthermore, a total of 84% of the employers and 90% of the trade union participants in the recent survey strongly agreed that their conciliator was trustworthy (Booth et al., 2016).

The economic arguments underlying collective conciliation and mediation schemes provided by Acas are quite strong. Research suggests that collective conciliation has net economic benefits of £147.8 million with only £1.8 million of net cost. As such, collective conciliation is the second most effective Acas service in terms of benefit/cost ratio, only preceded by E-learning (Urwin & Gould, 2016). The recent data also suggests that Acas' intervention in collective conflicts in relation to 14 key collective disputes across 2013–2014 and 2014–2015, respectively, led to a net economic impact in terms of loss avoided of £255.3 million (Urwin & Gould, 2016).

Overall, the conciliation service was suggested to have sped up the dispute resolution, it managed to bring both sides closer together and helped avoid industrial action. Nevertheless, organizations, particularly SMEs where the uptake of collective conciliation is lower, may need more evidence of the benefits of collective conciliation and mediation in order to use it more frequently for collective conflict resolution.

Evaluation by Stakeholders of the Effectiveness of the Mediation

In line with previous research, our findings suggest that Acas has been achieving a high level of success in settling collective conflicts. These findings were corroborated in our interviews whereby our trade union participants suggested that Acas was a trustworthy and impartial "partner" in helping them negotiate and solve collective conflicts with employers. Furthermore, policy makers also reported an extremely high value of Acas' service for the economy. Specifically, according to Acas' chief conciliator, 'the value of our service is phenomenal… research suggests that for every pound Acas spends on the service the economy saves £80'.

14.6 Conclusions

Our recommendations from the experts' point of view can best be summarized as follows:

1. Collective conciliation by Acas is widely valued. This relative decline in demand reflects changes to the institutional environment in which it operates, most notably the decline in trade union membership levels. Acas as an institution continues to

draw on the expertise of its senior advisors as they offer both collective dispute resolution and dispute prevention services via in-depth work inside organizations and through the provision of training.
2. It is important that Acas continue with the internal monitoring and evaluation of its performance in terms of collective conciliation. It is important that Acas maximizes its service provision with respect to collective dispute resolution, so that it continues to operate as the premier conciliation service in Great Britain. For example, for Acas it is key to increase its penetration rates in intervening in collective conflicts and proactively looking to get involved in collective disputes.
3. It is key that Acas continues to work with parties on recognition agreements. This would facilitate early involvement of Acas in workplaces and enable relationship building at regional levels.
4. Policy makers and providers could do more work if mediation is something that is seen useful for building effective workplaces. In this respect, it would be important to explore more what sort of interventions for collective conflict resolution could be done.
5. In relation to the previous point, it has been noted that we need a greater understanding of what we mean by different kinds of interventions. Our findings suggested there was a lack of clarity in terms of how information, consultation, negotiation and problem solving differ, particularly from the employers' perspective. Acas and other service providers could offer training to employers' and employees' representatives to help understand the key terms and possible interventions better.
6. Finally, it has been suggested that hardly any practicing mediator in the UK would accept the Acas' definition of conciliation and mediation in collective bargaining process. Most people practice facilitative mediation and see conciliation as such. As one mediator reflected 'this issue of terminology relates to the lack of understanding about what the role of mediator in the facilitative approach can actually mean…mediation is often seen as a last resort, but it should not be viewed as such… it is not a last resort, it is something that you look at earlier in the process.'

Giving the legislative changes in the balloting process in the trade Union Act of 2016, there will be more demand in trade disputes for collective conciliation. Therefore, it is important that it remains a free service in order to maintain harmony in employment relations and efficient dispute resolution.

Even though Britain's voluntarist approach to employment relations is somewhat atypical compared to its European counterparts—given the preferences of key stakeholders, as well as the impartiality of Acas, the current dispute resolution procedures are working well. Therefore, a more regulated approach to dispute resolution is, in the current employment relations climate, not called for.

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References

ACAS. (2013). *Mediation: An approach to resolving workplace issues*. London: ACAS.

Adam, D., Purcell, J., & Hall, M. (2014). *Joint consultative committees under the information and consultation regulations: WERS analysis*. London: ACAS.

Arrowsmith, J. (2008). Strike over pensions hits oil and gas production. *European Observatory of Working Life*. Retrieved from https://www.eurofound.europa.eu/observatories/eurwork/articles/strike-over-pensions-hits-oil-and-gas-production.

Balakrishnan, A. (2008, April 25). Q&A: The Grangemouth dispute. *The Guardian*. Retrieved from https://www.theguardian.com/business/2008/apr/25/oil.energy.

BBC (2013, October 21). Grangemouth dispute: Union members reject Ineos offer. *BBC*. http://www.bbc.co.uk/news/uk-scotland-24603346.

BBC (2014, February 4). Grangemouth Unite convener Mark Lyon sacked. *BBC*. Retrieved from http://www.bbc.co.uk/news/uk-scotland-tayside-central-26039630.

Bollen, K., Euwema, M., & Munduate, L. (2016). *Advancing workplace mediation through integration of theory and practice*. London: Springer International Publishing.

Bond, C. (2011). *Trade union officers' preferences and attitudes towards dispute resolution: A qualitative follow-up study with non-users of Acas collective conciliation*. London: ACAS.

Booth, C., Clemence, M., & Gariban, S. (2016). *ACAS collective conciliation evaluation 2016*. London: ACAS.

Certification Officer (2016). *Annual report of the certification officer: 2015–2016*. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537915/CO_Report_15-16.pdf.

Corby, S. (2015). *Arbitration in collective disputes: A useful tool in the toolbox*. London: ACAS.

Dawe, A., & Neathey, F. (2008). *Acas conciliation in collective employment disputes*. London: ACAS.

Dix, G., & Oxenbridge, S. (2004). *Coming to the table: The role of ACAS in collective disputes and improving workplace relationships*. London: ACAS.

Dix, G., Forth, J. A., & Sisson, K. (2008). *Conflict at work: The pattern of disputes in Britain since 1980*. London: ACAS.

Dix, G., & Barber, S. B. (2015). The changing face of work: Insights from Acas. *Employee Relations, 37,* 670–682.

Gibbons, M. (2007). *A review of employment dispute resolution in Great Britain*. London: DTI.

Hall, M., Hutchinson, S., Purcell, J., Terry, M., & Parker, J. (2011). Promoting effective consultation? Assessing the impact of the ICE regulations. *British Journal of Industrial Relations, 51*(2), 355–381.

Heery, E., & Nash, D. (2011). *Trade union officers and collective conciliation: A secondary analysis*. London: ACAS.

Latrielle, P. (2011). *Mediation: A thematic review of the Acas/CIPD evidence*. London: ACAS.

Lyon, H. M. (2017). *The battle of Grangemouth: A worker's story*. Chadwell Heath: Lawrence & Wishart Ltd.

McAlpine, R. (2013) *What's really happening at Grangemouth and what it tells us*. https://www.opendemocracy.net/ourkingdom/robin-mcalpine/whats-really-happening-at-grangemouth-and-what-it-tells-us (retrieved March 2018).

Molloy, D., Legard, R., & Lewis, J. (2003). *Resolving collective disputes at work: User perspectives of Acas collective conciliation services*. London: ACAS.

Office of National Statistics (ONS). (2018). *UK labour market: March 2018*. Retrieved from https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/march2018.

Peev, G. & Allen, V. (2013, October 28). Unite boss whose labour activities triggered shock closure of rangemouth QUITS just days after plant was saved when union caved in. *Daily Mail*. Retrieved from http://www.dailymail.co.uk/news/article-2478460/Unite-boss-Stevie-Deans-quits-Labour-activities-triggered-shock-closure-Grangemouth.html#ixzz5B4Izzvpm.

Podro, S., & Suff, R. (2005). *Making more of alternative dispute resolution*. London: ACAS.
Podro, S., & Suff, R. (2009). *The alchemy of dispute resolution—The role of collective conciliation*. ACAS.
Renaudon, C. (2017, September 21). Abolition of tribunal fees: Next steps for employers. *Personnel Today.* Retrieved from https://www.personneltoday.com/hr/abolition-tribunal-fees-next-steps-employers/.
Ruhemann, C. (2010). *Trade union negotiating officials' use and non-use of Acas conciliation in industrial disputes*. London: ACAS.
Saundry, R., Bennett, A. J. W., & Wibberley, G. (2013). *Workplace mediation: The participant experience*. London: ACAS.
Seymour, R. (2013, November 2013) How Ineos humiliated Unite in Grangemouth. *The Guardian.* Retrieved from https://www.theguardian.com/commentisfree/2013/nov/09/ineos-unite-union-grangemouth-oil-refinery.
Urwin, P., & Gould, M. (2016). *Estimating the economic impact of ACAS services*. London: ACAS.
Van Wanrooy, B., Bewley, H., Bryson, A., Forth, J., Freeth, S., Stokes, L., et al. (2013). *Employment relations in the shadow of recession: Findings from the 2011 workplace employment relations survey*. Hampshire: Palgrave Macmillan.

Chapter 15
Mediation and Conciliation in Collective Labor Conflicts in Europe: A Cross Cultural Analysis

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15.1 Commonalities and Differences Among Member States

Mediation and conciliation appear to be effective tools, both for the prevention and regulation of collective labor conflicts. Along this handbook the systems and the perceptions of users and mediators from 12 European countries (all EC member states) are presented. In this chapter we aim at a cross cultural analysis through the comparison of these various systems.

As discussed in Chap. 1, article 3 of the Directive 2008/52/EC of the European Parliament and the Council of the 21st of May of 2008 (European Union Directive on mediation) states: "Mediation means 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 or suggested or ordered by a court or prescribed by the law of a Member State". This mediation directive has as objective the facilitation of access to ADR and the promotion of the amicable settlement of disputes, by the promotion of the use of mediation as well as of a balanced relationship between mediation and judicial proceedings (European Commission, 2016). The EC recognizes member states have different traditions and systems, and implementation therefore takes different forms in the countries (Garriga, 2018). Given these, variety it will not come as a surprise that also mediation for collective labor conflicts is showing highly idiosyncratic practices and outcomes.

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With well-established practices and effective outcomes in some, and with clear challenges in other countries, many of whom having a short tradition in mediation in general, and in collective labor conflicts specifically. Despite the differences, there are fundamental rights that must be taken into account in all member states. These are established in the European Social Charter (1996). In its article 6 about the right to bargain collectively, the charter indicates: "*With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake (…) the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes*" (Council of Europe, 1996, p. 5). The EU Charter may have an impact on different normative systems of the member states (Eurofound, 2010).

This chapter first presents commonalities and differences in the legal and structural arrangements of the national systems when it comes to mediation in collective labor conflicts. Next, the perceptions of users and mediators are analyzed, and lastly the main challenges and recommendations for further developments in Europe are explored. Each country's system is considered as a unique case. We followed methods of qualitative multi-case analyses (Yin, 2009).

15.2 Diversity in Regulations and Systems for Conciliation and Mediation in the EC

This section explores the main commonalities and differences in regulations for and organization of mediation. These are presented in Table 15.1. Here we discuss some key features: (a) the obligation to use mediation; (b) providers of conciliation and mediation services and costs; (c) who act as mediators; (d) conflict parties or representatives at the table; (e) mediating different types of conflict; (f) phase in which the system is activated; (g) how to mediate: from evaluative to transformative mediation; (h) measuring effectiveness.

(a) *Obligation to conciliation or mediation*

To what extent is mediation mandatory to conflicting parties? For collective conflicts, this is particularly under ongoing debate in many countries in relation to the right for social actions, such as strikes. Do parties first have to try to solve their dispute through mediation, or at least a formal attempt to do so, before going to action? Plurality is the dominant trend in the EC in this respect (Valdes Dal-Re, 2003). In the application of the EC mediation directive, four different models of mediation are presented:

Model 1—Full Voluntary Mediation: the parties can engage a mediator to facilitate the resolution of any dispute that they have not been able to settle for themselves. In this case, a legal framework for mediation is not even required.

Table 15.1 Characteristics of the mediation system in EC member states[a]

	BL	DK	ES	FR	GR	IT	NL	PL	PT	RO	SP	UK
Is mediation mandatory before strike?	+	+	−	−/+	−	+	+	+	−	−/+	+	−
Is mediation free of costs?	+	+/−	0	+/−	−	+/−	+/−	−	+	−/+	+	+
Is the Ministry or a public institution organizing the process?	+	−	−/+	+/−	−	+/−	+/−	+	+	+	+	+
Is the Ministry or a public institution selecting the mediator?	+	−	−/+	+/−	−	+/−	−	+	+	+	+	+
Are the mediators civil servants?	+	−	?	+/−	−	+	−	−	+	+	−	+
Do agents represent the conflictive parties?	+	+	+	+/−	+/−	+	+/−	+	+/−	+	+/−	+/−
What type of conflicts are dealt with?[b]	1	1,2,3	1,2,3	1,2,3	0	3	1,2,3	1,2,3	1,2,3	2	1,2	1,2,3
At what stage is the system activated?[c]	2,3	1,2,3	3	2,3,4	3	3	3,4	3	2,3	3,4	3,4	1,2,3,4

[a] +: yes; −: no; +/−: depends on different factors; 0: missing data

[b] 1. Interpretation of previous agreements (rights); 2. Establishment of terms and conditions (interests); 3. Other escalated conflicts

[c] 1. Latent conflict; 2. Early stage; 3. Confrontation; 4. Hot conflict; 5. Rebuilding working relations

Model 2—Voluntary Mediation with Incentives and Sanctions: the parties are encouraged to have recourse to mediation, thus fostering the practice. This model requires a mediation law in place.
Model 3—Required Initial Mediation Session: the parties are required to attend an initial meeting with a mediator, free or at a moderate fee, to establish the suitability of mediation. This model, too, requires a legal framework regarding mediation.
Model 4—Full Mandatory Mediation: the parties must go through a full mediation procedure as a prerequisite to going to court, or to take actions such as strikes. The mandatory aspect applies only to attending the full procedure, while the decision to reach a settlement is always voluntary.

These four models have been applied differently throughout the EU for many different areas of mediation. Analysis of the four models in these other areas for mediation, shows that Model 3, the Required Initial Mediation Session, combines the most effective elements of both the voluntary and the mandatory models (De Palo & Trevor, 2016). The question remains to what extent this conclusion also holds for collective labor conflicts. That is, for example, the requirement to do an attempt for mediation, before a strike or lock-out is legitimate.

Table 15.1 indeed offers a spectrum of levels in which mediation (or conciliation) is mandatory. Please note, that in many countries a first step is defined as conciliation, followed by mediation. Conciliation is often more informal, and corresponding with Model 1 (voluntary). However, also the second step of mediation can still be voluntary. For example ACAS in the UK offers its conciliation and mediation services on a completely voluntary basis. As does the SER in the Netherlands. In both countries, employees can go on strike without further notice or attempt to previously mediate.

These practices differ largely from others with a more regulating framework. For example, Belgium, where conciliation (in fact mediation) is essentially mandatory, though not by law, however as an agreement among the social partners. And in the case of Spain, it is a full mandatory mediation. Or countries in which this process is voluntary but highly requested, such as Portugal where more and more parties are requesting conciliation and mediation to the competent public entity (DGERT).

In other countries the use of mediation is voluntary and mostly an exception (i.e. France, Germany). In some of these countries, mediation becomes mandatory only for certain sectors such as in case of a public transport strike (i.e. Italy). In these countries it has been found that mediation is culturally not internalized, and therefore, not a system that parties choose in cases of conflict. In Romania, conciliation is mandatory, however mediation is not. And while conciliation is relatively frequently used, in case this fails, few parties decide to go into mediation.

The issue of the mandatory mediation for collective labor issues continues being a debate in many countries. Parties recognize that ideally, the conciliation or mediation process starts with an authentic request of (one of) the parties, and the intention to negotiate an agreement, and not primarily because it is compulsory. This way, the parties show their engagement in the process and commitment to resolve the dispute using dialogue and cooperation (Foley & Cronin, 2015). And in countries where mediation is—either by law or social agreement—mandatory,

Table 15.2 Institutions organizing the collective mediation process in EC member states

Country	Institution
Belgium	Ministry of Labor—Belgian Federal Public Service Employment, Labor and Social Dialogue
Denmark	Statens Forligsinstitution
Estonia	National Conciliator Institution
France	–
Germany	–
Italy	Prefecture
Netherlands	Joint Sectoral Committees (from the Social and Economic council), only for conflict between Works Councils and employer.
Poland	Ministry of Family, Labor and Social Policy. Social Dialogue Council
Portugal	Ministry of Work, Solidarity and Social Security. Directorate-General for Employment and Labor Relations DGERT
Romania	Ministry of Labor
Spain	SIMA for Spain, SERCLA for the region of Andalucia
United Kingdom	ACAS

parties do not always come to the table in good faith, however just to 'follow the ritual'. Nevertheless, for example the experiences in Spain show that mandatory mediation in this context resulted in a substantial reduction of social conflicts, and improvement of social relations (Martinez-Pecino, Munduate, Medina, & Euwema, 2008). Finding a balance between mandatory and voluntary systems, such as the Model 3 (De Palo & Trevor, 2016), might indeed also be relevant for many EC member states when regulating collective labor conflicts.

(b) *Providers of conciliation and mediation services and costs*

Table 15.2 shows the institutions providing conciliation and mediation services in each participating country. Most countries have a public institution for these services, who doesn't charge fees for the services related to collective labor conflicts. This can be either a special unit within the ministry of labor (e.g. Belgium, Portugal), or an independent organization funded by the government, such as the ACAS in the UK, or funded by regional governments in the case of Spain. Mediation service providers might also be funded by the social partners (unions and employer organizations), such as in the Netherlands (Joint Sectoral committees within the Social Economic council), or through collective memberships, as in Denmark (cooperative consultants). In some countries such as France and Italy, the government or corresponding prefecture manages the process of the collective conflicts that are mandatory for mediation (I.e. public transport sector). In Poland and Romania, the government provides the list of mediators for the parties to agree on the mediator. In Poland, both parties pay the mediation process equally. In Romania, while conciliation is free of charge, in mediation parties need to pay the mediator. In Germany there are no special pub-

lic providers for conciliation or mediation services, as this is part of the collective negotiation process where social partners bring in higher levels to the conflict. In addition to these public provisions, which are mostly without costs for parties, there is a wide variety of private providers of consultation, conciliation and mediation. In some countries, for example the Netherlands, the market is more dominated by such private actors. These typically do charge fees to the parties. In several countries (Denmark, France, Germany, Italy, and the Netherlands) there is a growth of such private mediators in the market of collective labor conflicts. Also the markets for preventive actions (training, team development), and for rebuilding relations typically are open and free markets, where private consultants and mediators are active.

Looking at the costs of conciliation and mediation services, we see that in most participating countries there is some form of public or collective funding, which promotes access and use of the services. These are regulated for specific phases in the conflict, and in some countries also to specific sectors.

(c) *Who act as mediators*

In the countries where the ministry or another public institution manages the process, these institutions either employ directly the mediators, or work with a list of selected mediators. Being employed at such public institutes adds to the independent position of the mediator. Being a conciliator or a mediator is a full time function in some countries. We see this in the UK, where ACAS employs conciliators.[1] And in Portugal, where a team of 11 mediators works dedicated to conflict resolution. These have specific qualifications, training, and coaching on the job. In Belgium we also see this dedicated role: civil servants who are part of the mediation unit combine different roles. These mediators, employed at the ministry full time, act as chairs of collective negotiations, however also in conciliation and in mediation procedures. Another example is Estonia, where the chairman of the labor dispute committee, an inspectorate official, and acts as a conciliator. Mediators here are public conciliators appointed also by the government. In Poland mediators are also public servants, however they also have their daily functions and on top of that they work as mediators when and where required.

The role of a conciliator or a mediator can also be integrated in other public functions. For example in France, where the labor inspector does the conciliation work, even if this takes only 1% of the workload. And in Italy, the regional prefects often act in the capacity of mediator. In Romania, mediators are also civil servants, however not necessarily trained or specially qualified in that capacity.

The second model for the use of mediators is working with a list of potential qualified mediators, who act on a case by case base, and typically do this as a side job. This for example is the situation in Spain (region of Andalucia), where both social partners, unions and employer organizations, provide a list of their "own" mediators. Here, mediation teams are always composed of mediators from these both sides, while a public official offers administrative support. The allocation of mediators to

[1] ACAS also provides an independent panel of well qualified mediators, and these services than are paid.

specific cases is decided between the employer association and the main trade unions, not by the conflicting parties.

In Denmark the cooperation consulting units in charge of the mediation process also consist of a co-mediation team including members coming from the trade unions and of the employer associations.

Finally, another model is the free market model (the previous Model 1), where a variety of actors provide mediation services. In most countries this market is present, and conflicting parties can always hire such a mediator, if they agree to do so. In such cases, parties are free to select their mediator(s), and work as they prefer, also in preventive stages. Such practices are quite present in Germany and the Netherlands. In France there is a growing number of practitioners in the private sector, also offering training and coaching programs. In these countries, there is a very limited form of institutionalization.

In conclusion, in EC member states we can differentiate *four basic profiles of mediators* in collective conflicts. The *first* and most common profile is a public servant, who has part-time mediation functions, and is not specially trained in the conciliatory role. The *second* profile is the professional expert, who (almost) works full-time as conciliator and mediator, based in a national or regional mediation center. The *third* profile is the mediator who is representing employers' associations or trade unions, who acts incidentally, however is officially registered. The *fourth* profile is the independent expert, who is hired directly by the conflicting parties, outside any regulatory system. These people can be experts in labor law, negotiations, industrial relations, retired judges, or university professors, and acting at different phases and in different third party roles.

(d) *Conflict parties or representatives at the table*

In most countries parties act with agents in the mediation. For example, in an official conciliation process in Belgium, the mediator facilitates negotiations by representatives (typically sectoral professionals from employer organizations and unions. The conflicting parties are in separate rooms, and are consulted by the professional negotiators.

The advantages are evident, as professional negotiators are less personal and emotionally involved, and have a broader overview of options, and specific expertise and knowledge, for example on labor law. There is also a possible downside to this model. The parties are less engaged directly, and issues such as distrust, lack of communication and respect, which are often the root causes (see Chap. 2), are sometimes not dealt with in this format. Also, there is a potential agency problem, with the representatives having their own interests and agenda. Finally, representatives might experience strong pressures from their constituencies, who can literally 'stay in their room' (Munduate, Euwema, & Elgoibar, 2012).

Another complexity, is that in many conflicts, employees are represented by different unions, not necessarily with the same interests at the mediation/negotiation table, and also even different employers, as occurs in joint-venture organizations or in organizations where some activities are externalized by temporary employment

organizations. Such conglomerates of parties and interests generate a multi-party mediation which sets high demands for the coordination of the process and reaching an agreement. Such complex situations and systems require more training and mediators with a high level of competences in orchestrating the process.

An additional issue noticed in several countries is that not all relevant stakeholders are present. Particularly when the conflict is initiated at other levels, for example in the case of multinational companies, national governments or headquarters, or shareholders, who are not at the table. This can be illustrated by the challenges in Poland, where the conflicting parties appear at first to be the management and employees, however the manager in fact represents the interests of the (foreign) owner.

In many countries there is a tendency to promote direct communication between the main parties in an open dialogue. In that sense, mediation moves towards more informal conciliation processes. And only when these informal processes are not resulting in an agreement, further steps are taken, and representatives come more into play.

(e) *Mediating different types of conflict*

As discussed in Chap. 1, a classic distinction is made for two types of disputes—over interest or over rights. Indeed (see Table 15.1) in most EC countries, mediation is used for both types of conflict. Some countries, also outside the EC, limit formal mediation services to conflicts of interest. This might be due to the nature of the process, with conflicts of interest becoming evident when negotiations on collective labor agreements heat up.

From a technical point of view, disputes about interests have a greater potential to obtain integrative results, since the parties can create value in the negotiation and reach agreements that benefit both parties. Rights disputes are easier perceived by parties as a win-lose situation, and is about who is right and who is wrong. Parties have restrictions, given the fact that certain parameters are already agreed to in advance (Foley & Cronin, 2015). The judicial system also exerts a detrimental effect on the mediation agreement to be understood by the parties as a feasible alternative (or BATNA). Based on the limited data on types of conflict in relation to agreements, we conclude that the agreement rate for rights conflicts is lower if compared to conflicts of interest. This is in line with previous research (Martinez-Pecino et al., 2008). It is important for mediators to recognize the different dynamics in these conflicts, and act upon these (Foley & Cronin, 2015).

Disputes over rights and over interests are a very limited framing of the complex conflicts typically taking place. Throughout the studies in 12 countries, it is evident that when conflicts escalate, there are typically multiple issues at stake, and the underlying issues are usually driving the conflict. Issues over trust, communication, respect, insecurities, both in the relation between employees and the organization, and the employee representatives and (top) management, usually are more determinant for the conflict dynamics than the issue of ‘rights’ or ‘interests’ itself. Mediators therefore need the ability to address these underlying issues.

(f) *Phase in which the system is activated*

Table 15.1 shows the phase in which the mediation system is activated. All participating countries describe that at the confrontation phase the system is already activated. During this phase competitive tactics are used by the parties and they are usually stuck in the conflict or using threats. Some of the countries, such as Belgium, Denmark or the United Kingdom activate the system already at an earlier stage, where tensions between parties are visible and there is a strong debate around the issues at the table. In Belgium, the mediator always facilitates the sectorial CLA negotiations, therefore monitoring conflictive issues also at early stages.

In Denmark and the United Kingdom, the system can be activated when the conflict of interests is still latent. The UK and Denmark have a fairly elaborated early conciliation system, aiming at direct support for parties in such early stages, working directly within the organizations. For example, such services are provided by SBI in the Netherlands (the expertise center for social dialogue), and by the Social Economic Counsel. Also, many private companies offer services for training and team development as preventive measures, however these are not part of a national public system.

(g) *How to mediate: from evaluative to transformative mediation*

The benefits of mediation as a problem-solving process is well demonstrated by the academic literature. In this process the mediator acts as facilitator for open dialogue and promotes interest based bargaining (Bollen, Euwema, & Munduate, 2016; Carnevale & Pruitt, 1992). Transformative mediation aims to develop the competences of the conflicting parties, and to contribute to a better mutual understanding and constructive relation.

Evaluative mediation, in which the mediator gives opinions and recommendations, is not congruent with the problem solving approach (Foley & Cronin, 2015), and certainly not with the transformative approach (Folger & Bush, 1996). The studies in each country presented in this volume suggest that mediators in quite some countries do use such an evaluative method of mediation. Here opinions and judgments on the positions and interests of the parties appear throughout the mediation. In some systems, evaluation by the mediators is considered a bias, and not recommended. Other systems have included proposals by the mediator team, generating a process similar to a non-binding mediation-arbitration procedure (MED-ARB). Here, the mediator offers a proposal to the parties, after a period of conciliation. A problem of evaluative mediation is that some of the parties may perceive that the impartiality has been lost, as in the case of Portugal, for example. In this sense, it would be interesting, as some systems do, (a) to regulate how and when it is appropriate to make recommendations, (b) how these recommendations should be, and (c) inform previously to the parties that they are participating in a process of mediation where the mediator might offer proposals, so that parties can give their consent to this.

Based on the evaluation of the systems, the recommendation is to use a problem-solving mediation for a medium-high intensity conflict level, whereas a more transformative mediation, based on improving communication, relations and understanding

between the parties, could be more appropriate in the reconciliation phase. Evaluative mediation might be suitable when the conflict is at high-intensity level, with breakdown of communication and actions.

(h) *Measuring effectiveness*

It appears difficult to find reliable data in most countries on effectiveness. Registration of cases, including key characteristics, and outcomes of conciliation or mediation are often lacking. If these data are available, the measures are difficult to compare, and to interpret. Furthermore, effectiveness of mediation is not only to be measured by an agreement reached (Bollen et al., 2016). Satisfaction of parties with the agreement, likelihood of compliance with the agreement, and satisfaction with procedures and mediators, are also important indicators. These are mostly lacking. ACAS offers data, and also the different mediation providers in Spain present data on effectiveness. Generally, there is a strong need for more measures and more transparency on the outcomes of the efforts.

15.3 How Is Mediation in Collective Labor Conflict Perceived by the Users?

Here we have to differentiate between the evaluation of the mediation system, how the formal rules are arranged, the mediation procedures, and the mediators.

(a) *Evaluation of the system*

Users perceive that mediation is useful in producing new insights or common ground which in turn serve as a base for future negotiations. As an employee representative from Belgium mentioned: "*The reconciliation committee is an essential stepping stone in the larger process of continuous social dialogue*". In Belgium this has been explained by the active involvement of the mediator. This positive view is also shared by the employer representative: "*…allows us to enter in a mechanism that renews the dialogue*".

Also in Denmark, users perceive that the mediation helps to change the approach: "*It was certainly not high flying, but it was just a boost for us to realize how to do things differently*" (employer representative, Denmark). As the mediators were involved in early stage, the objective of the intervention aims to promote understanding of different interests and recreate trust. In that, users have a high degree of satisfaction. In the UK, trade union users believe that mediation allows them flexibility and autonomy.

In other countries with a low tradition of collective bargaining and mediation, as Estonia, users consider that the system needs to improve. Main reasons given are the lack of training, poor organization and lack of trust in outsiders. A user expressed: "*As far as I understand it is hardly organized and structured. Many of the mediators do not have any kind of formal training*". There exists also a lack of

consolidated ADR culture and this process is mainly used in conflicts related to large sized organizations. In Poland, parties show ambivalence, in the sense that they see the potential as a value-creation activity, however question the current structures and quality. Also, users believe that mediation should be introduced at an earlier stage.

In Romania, users perceive that the system is dysfunctional and that the responsibilities are not clear, plus they consider that there is a lack of training in mediation—some recent training programs established aim to solve this view. However, they also share a general satisfaction with the conciliators—which is the mandatory step here—and with mediators—voluntary step. An employee representatives illustrates it the following way: "*In Romania, trust and satisfaction with the conciliator and mediator exists when they are impartial and keep confidentiality*". However, social partners critic the system. "*It would be bizarre to claim lack of satisfaction with the efficiency of a specialist (employee of the Ministry) in a process that he solves admirably, only because the logic of the process is faulty*".

The resistance towards the involvement of third parties is observed in many countries, such as France, Germany, Italy and the Netherlands. Larger organizations prefer to work often with an internal mediator, for example within the HR department. In Portugal users also prefer to negotiate directly without the intervention of third parties, however here parties appreciate the work and effort developed by DGERT. They also show a feeling of trust, given their neutrality.

(b) *Trust in the mediators by parties*

Overall a general climate of trust can be perceived from the parties towards the mediators. In several countries, as just mentioned, there are however serious questions about the competences of the conciliators or mediators. This is related to perceived lack of training, specialized expertise and status. Trustworthiness is generally strongly based in perceived competence, and this is an important condition for parties to engage in open information exchange and problem solving behaviors (Elgoibar, Euwema, & Munduate, 2016; Foley & Cronin, 2015). In countries with a more developed system, and high qualified mediators, this is reflected in trust in the mediators. A Portuguese employer concluded: "*We have very competent and dedicated professionals and I have the best perception about them*". Belgian social actors also believe that mediators are neutral and competent. In Spain (Andalusia) the cooperative model between employers and employees in the composition of the mediation teams, facilitates trust of the parties in the mediators' team. Also the users mention the importance of trust: "*Trust in the mediators is key for successful mediations, experienced mediators who know the parties well achieve better results*" (Employer representative, Spain).

ACAS in the UK is highly valued by its users for the integrity and professionalism of conciliators. In that, the long term relationship of the stakeholders with ACAS facilitates trust. ACAS follows an engagement policy and maintains contact with the parties during and after the conflict. When parties are voluntary searching for a mediator, trust is key, and based mostly on the mediators' reputation of competence, experience, benevolence and integrity, in line with literature (Elgoibar et al., 2016).

(c) *Effectiveness of mediations*

Parties in most countries see a great potential for mediation in collective labor conflicts, though this is less the situation in France, Germany and Italy. However, in many countries, parties are critical on the current design features of the systems. This particularly is the case in countries where mediation is mandatory. Parties see here regularly the mediation as legally necessary, however not always useful, step. With parties following a ritual dance.

In the UK users perceive the system as effective, not only because it brings the parties back to the table, however also the process helps to manage the emotions of the parties involved. Managers and trade unions agree that the voluntarist approach is working and that this can be seen in the overall industrial relations climate. Apparently, organized (unionized) companies are perceived as more effective in terms of mediation process than the unorganized ones.

15.4 How Is Mediation in Collective Labor Conflicts Perceived by Mediators?

As we explain below the perception of the system changes considerably between mediators working (a) in cultures where the system is established and a tradition of mediation already exists and (b) in cultures where parties have difficulties to trust the system or where the benefits of using mediation is unknown by them. We focus on the satisfaction of the mediators with the system; the relation they build with the parties and their beliefs about effective behavior as mediators.

(a) *Satisfaction with the system*

Mediators in Belgium are satisfied with promotion and general familiarity with the system. This familiarity is linked to trust in the system, respect to the mediators and a higher understanding and respect to the agreement by the parties. However, they consider there is little follow up. Also, they consider the procedure is experienced as tiring and long and mediators fear that the budgetary restraints will bring more workload in the future. Also they believe that in the public sector the process is not effectively implemented and that media and politics have a strong influence.

In Portugal mediators are also satisfied with the legal structure and the fact that mediation is widely disseminated: “social partners are increasingly aware of the importance of DGERT and seeking our services more and more”. These requests are mostly coming from trade unions, given that is this party the one who is dissatisfied with the conditions. In the UK mediators show high level of satisfaction with the system and with their work: “The value of our service is phenomenal…research suggests that for every pound ACAS spends on the service the economy saves £80.” Acas Chief Conciliator UK.

This view differs in countries where the tradition of mediation is not existing. That is the case in France where there is no structured mediation system, and mediation

is growing in the private sector but not as an institutionalize procedure. Also in Romania, even if the conflict resolution procedures available (conciliation, mediation and arbitration) are clearly defined and distinguished, mediators observe that parties confuse between them. Foley and Cronin (2015, p. 17) conclude that: "where there is no tradition (…) such a requirement may create, over time, an environment where parties come to understand the process and, in due course, to value it as a means to resolve disputes".

(b) *Relation with the parties*

In Belgium mediators shared that the fact that parties experience the process and are taken seriously by third parties is helping to reduce emotions and the intensity of the conflict. One important concern mentioned by Portuguese mediators is the confidentiality: "If parties don't feel at ease to speak freely, the negotiation won't be as fruitful". French mediators focus on the post-conflict service: "We need to be ready to go further in helping our clients deal with change and post-mediation if they need that help". In many countries such as Belgium, Romania and Poland, mediators share that they follow their own style. Some keep constant contact with the parties, while other keep distant.

Therefore, mediators differ in their approach to the relation with the parties, with some keeping distance and others having a closer relations, this can also depend on the type of mediation that each mediators follow (more transformative or more evaluative).

(c) *Effective behavior*

Proactivity, availability, trustworthiness, independence and impartiality are considered factors that contribute too the success of collective mediation. In the case of Belgium, mediators believe that empathy, active listening and paraphrasing are key. Mediators facilitate discussion and guard the process. The suggestions given should be minimal. This differs with Romania, where mediators are expected to share their opinion and suggestions.

Impartiality is seen as key to get trust "We jealously guard impartiality…because if we bias towards one side or the other our value goes out of the window" (Mediator, UK). Overall mediators as well as policy makers in the UK consider impartiality as the key for success. Also in Poland impartiality is relevant to be chosen by the parties to lead the mediation.

15.5 Challenges for Conciliation and Mediation in Collective Labor Conflicts in Europe

This paragraph explores the main challenges for conciliation and mediation that users and mediators have shared during the development of the project.

1. *Lack of professionalization*

In several EC member states, conciliation and mediation is for many a part-time activity, with limited social and professional recognition. A deep analysis of the mediators and systems recommended a minimal regulation about the requirement that guarantees quality in mediation as occur in other professions (engineers or medicine among others), and a consolidated formative path. Mediators in many countries are requesting more training. A general way of getting trained is by joining mediations and learn from observation, before mediators lead their own process. The introduction of human resources practices in all the mediation systems is necessary, mainly in selection, training, and assigning of mediation cases, as well as systematic. The ACAS initiative to elaborate a mediation competence dictionary with instruments to measure the competence level could be a good practice for other systems.

2. *Institutionalization is needed*

This becomes an issue in countries as Italy where there are no institutions managing the process. Even in countries where the government leads the process there are critics on the way that this is established. The current situation is a consequence of the regulatory framework and the ways in which systems have been generating trust between the parties. In this sense, some countries have decided to generate systems where mediators belong to the parties, others prefer highly qualified professionals and others for assigning mediation tasks to their own civil servants. All of these systems may have a comparable effectiveness because they generate trust between the parties. In this sense, countries have to think about how to increase trust between parties and the mediation system.

Another challenge appears in those countries, such as Poland, where only a small part of the existing conflicts go to the mediation systems, which can generate enormous costs to the country's economy.

Making a comparative analysis, those more developed, and those that have still a low level of development, it is certainly worrying that countries with more than 20 million of inhabitants have less than thirty non-professional mediators. There is a high potential of evolution in the majority of the existing systems.

In some countries in which mediation is culturally not highly accepted, parties generally don't trust the system and therefore the promotion of mediation becomes really challenging.

3. *Restriction of time*

Mediation requires time, parties and mediators need to have enough space to explain their needs and generate integrative solutions. It is advisable not to have temporal control for mediation and that the time depends on the complexity of mediation.

4. *Measuring and evaluating effectiveness*

Poor social and administrative control of effectiveness has been concluded in most countries. Most systems have only agreement's indicators, and other satisfaction

questionnaires that the parties voluntarily fulfill (with some methodological gaps). In this sense, a more systematic evaluation of the effectiveness of mediation according to the type of conflict would be necessary, even separating interest and right conflicts in more specific subtypes, as the ACAS does. It could also be interesting to analyze the effectiveness of mediation according to the type of organization (public vs. private; national vs. multinational). In the same way, these data should be analyzing to generate good practices in specific mediation situations or where there is little experience (e.g. mediation in the public sector, in multinational organizations, with lawyers, etc.). Discussions and workshops between mediators should help mediators to increase their effectiveness in all the systems.

5. *Flexibility in methods*

Mediation is not only a method of managing conflicts, but also where the parties negotiate in a less complex environment. For this reason, it is possible that the agreement could occur hours or weeks after the mediation session. In the same way, these spaces of sharing are very important to facilitate the social dialogue.

6. *Mandatory nature of the system*

Even if some countries share that the promotion of mediation is needed, in countries in which mediation is mandatory, experts emphasize that a number of disputes is subject to mediation not in order to aim for real agreement, but, in case of employers, to avoid being accused of breaking the law. In the case of the trade union side, to create an opportunity to undertake industrial and strike actions. Mediation, like negotiation, requires a minimum willingness of the parties to reach an agreement, which cannot be coerced or stimulated by any law.

7. *Use of representatives*

The fact that representatives act on behalf of the conflicting parties has the upside of de-escalating the conflict, but also the possible downside of reducing ownership, and commitment by the conflicting parties afterwards.

15.6 Suggestions for a More Effective Collective Mediation System. What Can We Do?

1. *Establishing a formal way of evaluating the procedures*

Mediators would like to get constructive feedback and shared experiences with the colleagues to learn from each other and gather the best practices.

2. *More time for each mediation*

Having more time available would allow the mediators as well as the parties to share more information and to use direct mediation in order to analyze the underlying conflict.

3. *More mediators*

Some mediators have a very busy schedule, particularly in countries where mediation is compulsory. In that, a bigger team will help to divide the cases. In countries where mediation is not compulsory, mediators ask for more financial security and higher promotion of mediation.

4. *Formal and in-depth training*

Mediators in the participating countries suggest to program formal training of mediation and that this training is of quality and in depth. This also will increase the quality of the mediation process which can be linked to an increase of the social peace.

5. *Conflict prevention system*

Establishing a conflict prevention obligation by regular joint examination of danger signals in the social climate of the organizations.

6. *Extend the use of mediation in different phases*

As discussed in Chap. 1 the use of mediation should be extended to the first levels of intensity of conflicts and to the reconciliation phase (see Chap. 1). The challenge here is that even if a mediator could help when the conflict is still moderate, parties have a resistance to ask for third parties assistance and try to control the conflict themselves. In the same way, the restoration phase is considered as relevant to reconstruct the relationship between the parties with the active help of third-party expertise, engaging in post-reconciliation activities.

7. *Taylor-made interventions and more flexibility in the system*

Social partners require the ability of the process to respond to market changes. Some of the institutions are conservative and respond slowly to new demands or new types of organizations. The suggestion is a contingent model of mediation that allows mediators to decide about strategies and tactics they would use, based on scientific evidence.

8. *Promotion of the system*

Overall, mediators and users as well as policy makers recommend more promotion of the mediation system and its usefulness. Many companies and trade unions are still not aware or don't realize about the possible benefits of this alternative conflict resolution procedure. This is also linked to a lack of culture in ADR. The introduction of direct regulation on this issue is also suggested. Citing the authors of Chap. 10: "In Poland, to have the mediation wider applied a change in society is needed". We consider that this message can be extended to other participating countries.

15.7 Conclusion

The mediation in collective conflict in Europe has generated heterogeneous systems explained by the regulatory framework of each country and by its social and political tradition in collective bargaining. The European Directive of mediation didn't include the labor setting, because it is a sector protected in some EU members by National States constitutional laws. As a consequence, systems are beginners, with a few professionalized processes.

The Member States have been guaranteeing the existence of mediation systems and supporting them economically and technically, understanding them as completely necessary for the country's economy and social peace. However, in order for the systems to fulfil their role in a more efficient way, the mediators must be further trained and professionalized, systems must be evaluated in order to learn and improve. An increase of the number of mediators is necessary. In the same way, greater emphasis is required on preventive mediation and on the reconstruction of relations between the parties when the conflict is over.

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References

Bollen, K., Euwema, M., & Munduate, L. (Eds.). (2016). *Advancing workplace mediation through integration of theory and practice*. Springer International Publishing.

Carnevale, P. J., & Pruitt, D. G. (1992). Negotiation and mediation. *Annual Review of Psychology, 43*(1), 531–582.

Council of Europe. (1996). European Social Charter. Retrieved by https://www.coe.int/en/web/european-social-charter.

De Palo, G., & Trevor, M. B. (2016). *EU mediation law and practice*. Oxford University Press.

Elgoibar, P., Euwema, M., & Munduate, L. (2016). *Building trust and constructive conflict management in organizations*. Springer International.

Eurofound. (2010). *Right of collective bargaining*. Brussels: European Union

European Commission. (2016). *The implementation of the mediation directive.* Directorate General for Internal Policies. Workshop 29th November 2016.

Foley, K., & Cronin, M. (2015). *Professional conciliation in collective labour disputes. A practical guide*. International Labour Organization.

Folger, J. P., & Bush, R. A. B. (1996). Transformative mediation and third-party intervention: Ten hallmarks of a transformative approach to practice. *Conflict Resolution Quarterly, 13*(4), 263–278.

Garriga, M. (2018). *An European approach to mediation in collective conflict*. Barcelona: University of Barcelona.

Martinez-Pecino, R., Munduate, L., Medina, F. J., & Euwema, M. C. (2008). Effectiveness of mediation strategies in collective bargaining. *Industrial Relations: A Journal of Economy and Society, 47*(3), 480–495.

Medina, F. J., Vilches, V., & Otero, M. (2014). How negotiators are transformed into mediators. Labor conflict mediation in Andalusia. *Revista de Psicología del Trabajo y de las Organizaciones*, *30*(3), 95–100.

Munduate, L., Euwema, M., & Elgoibar, P. (Eds.). (2012). *Ten steps for empowering employee representatives in the New European industrial relations: New European industrial relations NEIRE handbook*. McGraw Hill.

Valdes Dal-Re, F. (2003). Informe de síntesis sobre conciliación, mediación y arbitraje en los países de la Unión Europea. *Conciliación, mediación y arbitraje laboral en los países de la Unión Europea, Ministerio de Trabajo y Asuntos Sociales, Madrid*.

Yin, R. (2009). *Case study research. Design and methods* (4th ed.). California: Sage.

Part III
Regulations and Practices of Mediation and Conciliation Around the Globe

Chapter 16
Mediation and Conciliation in Collective Labor Conflicts in Australia

Mark Bray and Johanna Macneil

16.1 Case Study: New South Wales (NSW) Trains

In January 2018, Australia's national industrial relations tribunal, the Fair Work Commission ("the Commission"), mediated a high profile dispute between railway workers and management in New South Wales (NSW), the most populous of Australia's states.

Most of the rail workers were represented by two unions, Professionals Australia (covering professionals and managers), and the Rail, Tram and Bus Union (RTBU). These unions, with some smaller unions and supported by the union peak body, bargained as a single group, the Combined Rail Unions (CRU). The employers, Sydney Trains and NSW Trains, were both government owned and also bargained together.

The dispute formally began in July 2017 when, in the collective bargaining process, the CRU presented to employers an initial list of demands for improved wages and working conditions. Management responded with their own demands. Subsequent negotiations were conducted almost weekly.

A failure to agree on a number of central issues (including pay increases, redundancy and redeployment provisions, and rosters) led the parties to seek the intervention of the Fair Work Commission. This came through four separate actions, involving three different tribunal members on the panel responsible for the transport industry.

First, in mid-November, the CRU made an application for a 'good faith bargaining' (GFB) order. In other words, the unions sought an order to require the employers to bargain as required in the legislation, including disclosing relevant information

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in a timely manner. The CRU argued that the employers were withholding information about past productivity changes and future restructuring, both of which would inform the amount of the wage increase they could seek. The first step in the formal application was heard before the Commission in early December, with a subsequent hearing scheduled for 30–31 January.

Second, just days after the GFB application, the unions applied to the Commission for permission to undertake protected industrial action. Permission was granted and subsequent ballots amongst members gained support in 2 of the 7 unions, including the RTBU. On the basis of this support, the RTBU announced its intention to impose an overtime ban commencing on 25 January, with an all-out strike planned for 29 January.

Third, the employers made a counter GFB application, claiming the unions were not themselves negotiating in good faith, and seeking assistance from the Commission in the form of conciliation. This application led to a series of conciliation conferences. Some, but not sufficient, progress was made.

In mid-January, the dispute came to a head. Public pressure on government had been building because of failures on the Sydney train network. Extreme temperatures, lightning strikes during storms, the introduction of a new timetable and staff shortages left thousands of commuters stranded when trains were cancelled. The threat of further disruption due to the planned industrial action gained huge media attention. The employers made further concessions, which the union leadership put to its members, along with a recommendation to call off the planned strike. Union delegates rejected both the employers' offer and the proposal to end industrial action. The planned ban on overtime started on 25 January.

This led to the fourth intervention by the Commission. Following an application by the employers, along with the responsible government minister, an order to terminate or suspend the strike was made, the tribunal member being satisfied that the industrial action represented, amongst other things, "a threat to life, safety, health or welfare of people, significant damage to the Australian economy, or a significant part of it". On 28 January, the industrial action was ordered suspended until March. The strike did not take place.

Negotiations continued along with further conciliation conferences in early February, with the employers making an amended offer, including several improvements in pay and conditions. Both sides agreed to take the new proposal to employees/members. It was subsequently accepted and approved by the Commission in April 2018, resulting in two legally-binding collective agreements, one for Sydney Trains and one for NSW Trains.

16.2 Introduction

Industrial relations in Australia have seen dramatic change over recent decades, but (as can be seen in the NSW trains case), the mediation of collective labor conflict continues to be dominated by the state and its agencies. There has been modest

involvement of private mediators. This means there is considerable institutional continuity, making both history and the law especially important in understanding the nature of mediation in Australia.

The story of mediation of collective labor conflict presented in this chapter comes in two parts. Before the 1990s, mediation came almost totally through a system of compulsory conciliation and arbitration, in which industrial tribunals worked to manage the conflict between employers and unions, in both disputes of interests and disputes of rights. Tribunals also assumed a pervasive regulatory role within a broader system of industrial relations, which was heavily collectivised and increasingly centralised. This broader industrial relations system, and the role of tribunals within it, was widely considered exceptional in international terms.

From the 1990s onwards, however, the old system was jettisoned in favor of greatly expanded individual employment rights and decentralised collective bargaining. This brought Australian industrial relations much closer to its Anglo-American counterparts. The mediation of collective conflict by industrial tribunals remained important and the tribunals retained much of their institutional form and even individual membership. However, the functions of these tribunals changed dramatically. They lost much of their regulatory role and their mediation role narrowed to a more conventional pattern, focusing on procedural aspects of disputes of interests and the performance of voluntary mediation and/or arbitration of disputes of rights.

Before embarking on the details of this story, however, there are some key definitional issues to address.

First, consistent with the 'phases' model set out in this book's appendix, we assume that conflict inevitably underlies the employment relationship, remaining latent or at least low-level most of the time. This conflict sometimes emerges more actively, manifesting in specific forms over specific issues at different places and times. Particularly important is the distinction between individual and collective manifestations of conflict, the latter being the main focus of this book. We therefore see 'conflict' as a general term, while in this chapter we prefer to refer to specific manifestations as 'disputes'. This latter term, however, is socially constructed and its meaning varies according to circumstances. In Australia, 'dispute' has both a specific legal and a statistical definition, further explained below, as well as a more general, 'common sense' meaning.

Second, we recognise a distinction between disputes of interests and disputes of rights. The former involves disagreements between the parties over the creation of rules to the employment relationship, while the latter are disagreements over the application or interpretation of existing rights.

Third, the term 'mediation' is rarely used in Australian industrial relations. The term only appeared in legislation for the first time in 1996 (Spencer & Altobelli, 2005: 5), to identify the new opportunity for disputing parties to use private dispute resolution providers, but was left undefined. The more common term is conciliation (Foenander, 1959: 89–91; Spencer & Altobelli, 2005: 5). The Commonwealth Conciliation and Arbitration Act 1904 governed the prevention and settlement of industrial disputes until its repeal in 1988. Section 20 of the Act did not define 'conciliation' but instead described the role of the Commission as including the

encouragement of settlement of disputes, requiring (in Section 26) that "where an industrial dispute has been referred for conciliation by a member of the Commission, the member *shall do all such things as appear to him to be right and proper* to assist the parties to reach an agreement on terms for the prevention or settlement of the dispute" [authors' italics]. Where conciliation was not effective, the dispute was referred (to a different member) for compulsory arbitration.

Despite the lack of definitions, the way in which conciliation is understood in Australian industrial relations is consistent with the broad meaning given to 'mediation' in this book, so that is the definition we use; that is, any third party assistance to help parties prevent escalation of conflict, end their conflict, and find negotiated solutions to their conflict.

16.3 How Is Mediation Organised and Conducted?

The mediation of collective labor conflict in Australia has long been the preserve of the state. Even in more recent times, when the broader industrial relations system has become more market-based, the long history of state intervention (only briefly outlined in this section) continues to exert a strong influence. This is evident not only in the legal and other formal aspects of industrial relations, but also in the attitudes and behaviors of the parties.

16.3.1 Historical and Legal Context

After many thousands of years of occupation by the indigenous aboriginal peoples, white Europeans settled permanently on the continent now called Australia in 1788, establishing a British colony where the city of Sydney now stands. Other British colonies were subsequently established elsewhere, before they federated to create the modern nation of Australia in 1901. The terms of this federation were embodied in a formal Constitution determining the respective powers of the new federal and State parliaments. In 1901, the population of Australia was around 4 million, growing to around 24.5 million in 2017. The Australian economy was historically reliant on agriculture and mining, although manufacturing grew significantly during the 20th century to peak in the 1960s, largely as the result of protection from international competition afforded by tariffs on imported goods. The virtual elimination of tariff barriers was one part of a broader 'deregulation' of the Australian economy in the 1980s onwards, as neoliberal ideas gained popularity.

Consistent with the British tradition, employee representation in Australian industrial relations has always focused on one channel—namely, trade unions. There have been few laws promoting non-union channels and no history of works councils as is common in Europe (Bray, Waring, Cooper, & Macneil, 2018: Chap. 7). Moreover, relations between employers and unions have generally been adversarial, despite

many attempts to promote cooperation, via government policy and law as well as private initiative (Bray et al., 2017: Chap. 3).

Compulsory conciliation and arbitration

From around the turn of the 20th century, corresponding roughly with the beginning of the federation, the state intervened extensively in collective labor conflict through a system of compulsory conciliation and arbitration (see generally Macintyre & Mitchell, 1989). The emergence of this system was usually explained as a political response to highly disruptive industrial disputes (a combination of strikes and lockouts) during the 1890s, in the context of a small and geographically isolated nation struggling to develop economically. The continued survival—indeed, the robust operation—of the system over subsequent decades until the 1990s was variously attributed to its ability to meet the interests of most sectoral stakeholders, the 'flexibility' of the tribunal as an organization, and the capacity of individual tribunal members to adjust to suit the times (see generally Isaac & Macintyre, 2004). Few other developed countries have witnessed such deep and persistent intervention in industrial relations by the state, while only New Zealand has seen similar intervention undertaken by industrial tribunals (Walker, 1984).

In general terms, the compulsory conciliation and arbitration system meant that wherever collective labor conflict (in the form of disputes, over either interests or rights) occurred, statutory bodies (originally in the form of courts, but subsequently industrial tribunals) were obliged by law to intervene. To begin, the tribunals convened meetings (or 'conferences') of the parties involved, attendance at which was compulsory. At these conferences, the tribunals tried to conciliate a resolution of the dispute. Failure to achieve resolution resulted in the tribunals convening compulsory arbitration hearings with the parties, potentially leading to determinations by the tribunals which were imposed upon the parties, thereby 'settling' the dispute.

Within these simple parameters, there was great complexity in the practice of compulsory conciliation and arbitration for at least four reasons.

First, despite the system continuing in broadly similar terms for around 80 years until the early 1990s, there were many changes in legal provisions and practical operation. Second, while it is easy to consider it as a single system, it was in fact highly fragmented because of Australia's federal system of government. Industrial tribunals were established and operated not only within the federal jurisdiction but also within the six State jurisdictions, each with its own legal and institutional idiosyncrasies. Third, there were significant shifts over time in the relative importance of the various jurisdictions, with the systems in the six States initially being most important but gradually giving way to the federal system.

Fourth, the practice of compulsory conciliation and arbitration in each jurisdiction was complicated. For example, the functions of the industrial tribunals became much broader than the system's architects anticipated. In particular, the tribunals came to perform a regulatory function rather than simply mediating conflict, determining significant components of most workers' wages and working conditions. The significance of this regulatory role grew as the system became more centralised, especially

from the 1960s to the 1980s. The processes of conciliation and arbitration also became intertwined with collective bargaining and the exercise of market power by employers and unions (Niland, 1978; Isaac, 1989). Buoyant economic times, for example, allowed workers and unions to make gains through bargaining outside the arbitration system, while a weaker economy often saw employers using the arbitration system to make gains. Finally, the operation of the system varied substantially from industry to industry, with the form and extent of mediation differing considerably (Perlman, 1954, Walker, 1970).

Complexities aside, the compulsory conciliation and arbitration system administered by industrial tribunals was broadly accepted by all major stakeholders. As a result, the many political controversies surrounding it, and the many legislative changes that followed, focused mostly on how the system operated rather than whether the system should be abandoned (see Bennett, 1994: Chaps. 2 and 4).

Changes in recent decades

This acceptance changed in the second half of the 1980s when employer groups —especially in the export and small business sectors—began to challenge the system (HR Nicholls Society, 1986, Dabscheck, 1995). A consensus amongst employers demanding major reform emerged in the early 1990s (Sheldon & Thornthwaite, 1997). Around the same time, trade unions, which had traditionally been pragmatic supporters of the system, also turned against it (Briggs, 2001). Political parties representing these interests fell into line and a new legislative regime followed.

In broad summary, the system that replaced compulsory conciliation and arbitration from the early 1990s onwards was essentially one of enterprise-level collective bargaining, underwritten by a suite of minimum standards. This arguably ended the exceptionalism of Australian industrial relations and brought the system much closer to its counterparts in Anglo-American countries, like the UK, USA, Canada and New Zealand (Colvin & Darbishire, 2013).

At the same time, a number of peculiarities in the Australian system—including the status and role of industrial tribunals—remain unusual compared to other countries.

The industrial tribunals continued after the 1990s in broadly similar institutional form in the new system, including many of the same individuals retaining their positions. However, the functions of the tribunals changed dramatically (Stewart, 2016). Their role in determining substantive rules of the employment relationship was confined to the setting of minimum standards. The loss of this regulatory role and the new decentralisation of the system meant that the tribunals' dispute resolution function focused almost solely on the workplace level. The main focus of the tribunals became individual disputes rather than collective disputes. With respect to collective disputes, the tribunals no longer enjoyed the power to conciliate and ultimately arbitrate compulsorily. Rather, their involvement focused on procedural aspects of collective bargaining and—except in exceptional circumstances—a voluntary role in conciliating and arbitrating collective disputes at the invitation of the parties.

Move to voluntary mediation

The role of the tribunals—evident in the NSW trains case at the beginning of the chapter—deserve further attention. Under the Fair Work Act 2009, the federal tribunal is charged with regulating several procedural aspects of collective bargaining. This amounts to the resolution of disputes over how the **process** of collective bargaining is conducted rather than disputes over the **outcomes** of bargaining. There are three main examples.

First, as in several other Anglo-American countries, there is a legislative obligation on the parties to bargain 'in good faith' with each other. The Commission can define the boundaries of bargaining (via 'scope' orders) and hear complaints about behavior to the contrary and may make orders obliging the parties to change their behavior and/or declare majority representation status where trade unions are challenged (Bukarica & Dallas, 2012). Such applications have become part of the tactics in collective bargaining (Pekarek, Landau, Gahan, Forsyth & Howe, 2017), especially in highly adversarial situations like the NSW trains case.

Second, industrial action by either unions or employers is not permitted during the operation of a collective agreement. Action is only 'protected' from legal sanction during the period between the end of one agreement and the commencement of another. It is the role of the Commission, as occurred in the NSW trains case, to determine when 'protected action' is permitted. It is also the role of the Commission, in rare situations, to order the suspension or termination of industrial action (McCrystal, 2009). The NSW trains case is one such rare example.

Third, collective agreements can only become legally enforceable if approved by the Commission, which must ensure they meet procedural requirements set out in the Fair Work Act. Once a final agreement is reached, including a successful ballot of employees, it must be lodged with the Commission and formally approved (Stewart, Forsyth, Irving, Johnstone, & McCrystal, 2016: Chap. 14). It then becomes a publicly available document.

The role of the Fair Work Commission in other aspects of collective dispute resolution is (with very few exceptions) voluntary, granted to it by one or more of the parties. In interest disputes, one of the parties engaged in negotiating a collective agreement may seek conciliation by the tribunal if bargaining reaches an impasse, as occurred in the NSW trains case, although the consent of both is needed for voluntary arbitration of such disputes (see Stewart et al., 2016: 913–914).

In rights disputes, the Act makes it mandatory for every collective agreement to include a disputes procedure. The regulations issued under the Act also provide a standard dispute resolution clause, which will be inserted if the parties do not agree on their own. The choice of 'dispute resolution provider' is therefore left to the parties. The parties could nominate a private provider, but the vast majority of agreements nominate the Fair Work Commission (see Stewart et al., 2016: 166, 374–376).

16.3.2 Who Can Act as Mediator?

Members of industrial tribunals

Given the long-term dominance of mediation by industrial tribunals in Australia, the most important mediators by far have always been members of these tribunals. What does this mean? What are 'tribunals' and who can become a member of a tribunal in Australia?

Answers to these questions changed over time and varied between jurisdictions. In the early years of the compulsory conciliation and arbitration system, the tribunals were courts, whose members were therefore judges or held the same status as judges, despite performing a wider range of conciliation and arbitration functions. Individual members of the Fair Work Commission are appointed under the Act by the Governor-General (Section 626). This means that each member has considerable autonomy because he/she holds a statutory position and is essentially responsible to the Governor-General rather than the President of the Commission. While this leaves much freedom for tribunal members to develop their own approaches towards dispute resolution, there are also many mechanisms (formal and informal) used to coordinate and review the actions of individual members and ensure a degree of consistency between them.

At 30 June 2017, there were 44 members of the Fair Work Commission, at five levels of appointment: President (1), Vice-President (2), Deputy President (14), Commissioner (22) and Minimum Wage Panel Member (5). There were also 5 members of State tribunals holding joint appointments with the Fair Work Commission (Fair Work Commission, 2017). The qualifications required of appointees vary according to the level of appointment, but the first three (more senior) categories can be judges (or former judges) of a court. Only the President's position holds the same status as a federal court judge. All categories, however, are required to have 'knowledge of, or experience in, one or more of the following fields: (a) workplace relations; (b) law; or (c) business, industry or commerce' (Section 623). Tribunal members have invariably been highly experienced practitioners before taking up their appointments, familiar with the processes of conciliation, mediation and arbitration. Beyond their personal experience, however, there is no systematic or mandatory training for tribunal members, although they can seek to advance their own professional development.

Both consistency and expertise are reinforced by the tradition of the 'panel' system, whereby a small group of tribunal members is allocated to work on all matters related to specific industries. In the NSW trains case, members of the Transport Panel were responsible for hearing the various applications and dealing with them. This also allows tribunal members to get to know the parties, (individuals as well as the organisations), and their specific interests and concerns, providing a better grounding on which to conciliate or mediate.

There was once a convention that nominations by the government of the day for appointment to the tribunals were alternately from employer, union, and government backgrounds. However, recent years have seen a politicisation of the appointments, with conservative governments nominating candidates with employer backgrounds

and Labor government giving preference to union officials (see Stewart et al., 2016: 149). Despite this, there is a strong tradition—broken by a few—that past allegiances are put aside once individuals assume their appointments. This tradition—along with a number of substantive legal protections (Acton, 2011: 589)—is consistent with the tribunal's reputation for independence and reinforces its legitimacy.

The processes of the tribunal are often quite formal and very public, especially when engaged in arbitration. There are public hearings, transcripts of submissions, and published decisions which provide reasons for the decisions. These published decisions provide some grounds for consistency between the various tribunal members through a loose system of 'precedence', similar to the decision-making processes of a common law court. As well as published decisions, detailed annual reports by the tribunals are presented to parliament. This combination of sources means that many aspects of the tribunals' activities have been well researched.

Conciliation is more private. The processes by which tribunal members deal with the parties are more informal and they remain 'behind closed doors'. The outcomes are only made public if they produce formal orders or recommendations by the Commission or they lead to an agreement between the parties that requires formal approval. The NSW trains case could only be written using publicly available information and talking to informed observers. This feature of conciliation makes research more difficult and there are few Australian studies of how conciliation works.

Other kinds of mediator

Private mediators of collective labour conflict operate in Australia, although they are relatively new, and rare.

Since the 1970s and 1980s, supported by legislation, conciliation has spread from use primarily in the industrial relations context into diverse areas such as family law, commercial law and discrimination, and expanded to encompass other 'alternative dispute resolution' processes (Spencer & Altobelli, 2005: pp. 3, 107). A recent industry study of 'Alternative Dispute Resolution Services in Australia' argued that the provision of such services was dominated by lawyers and single-person consulting firms, estimating 3610 enterprises employing 6316 individuals in 2017–2018 (IBISWORLD, 2018: 26). A reading of this report, however, suggests that the activities of these Alternative Dispute Resolution (ADR) providers lie mostly in areas such as family law and commercial disputes, rather than industrial relations. To the extent that they operate within industrial relations, they seem to have been confined mostly to the resolution of individual disputes, for example in relations to discrimination, rather than collective disputes.

Employment law firms acting as mediators in collective disputes face a tough road to establish and maintain an appearance of independence, because they are almost always paid by one party only. ADR consultants may have expertise in other domains, but without experience in the highly specialised domain of industrial relations, would struggle to gain credibility.

There are some exceptions—consultants with both mediation and industrial relations expertise, who are able to build trust with all parties. For example, in

1996 a joint venture was established between Restructuring Associates Inc., the US consulting firm central to the transformative interest-based bargaining process between the significant healthcare organisation Kaiser Permanente and its unions, and the Australian law firm Corrs Chambers Westgarth. A key part of the joint venture's practice was to support interest-based collective bargaining, and to assist unions and management in the design of more collaborative processes and governance arrangements. CoSolve is another exception: a small firm of principals with the mediation and negotiation expertise to work with unionised firms to settle and prevent disputes, and improve relationships (for cases, see Macneil & Bray, 2013; Bray & Macneil, 2015; Macneil & Bray, 2015). There are a few other studies which mention private mediators (see Van Gramberg, 2006; Forbes-Mewett, G. Griffin, J. Griffin, & McKenzie, 2005; Riley, 2009; Forsyth, 2012).

However, despite these exceptions, industrial tribunals dominate collective dispute resolution in Australia.

16.3.3 How Common Is the Mediation of Collective Conflict?

Mediation of collective conflict was very common during the operation of the old system of compulsory conciliation and arbitration. Unions were generally strong, enjoying high levels of membership and considerable capacity to exercise both industrial and political power. Employers were reactive, with all but the largest generally relying on employer associations to deal with unions through the tribunals rather than developing professionalism amongst managers and effective workplace strategies. The system was therefore highly adversarial, with many disputes, which ranged from large highly damaging disputes at an industry or even national level to a myriad of small disputes at a workplace level reflecting poor institutional arrangements.

Despite the institutionalised adversarialism, there was a perception that these arrangements had at least the comfort of the known. The union officials, industrial relations (IR) managers, employer association representatives and tribunal members who worked within this system were part of the "IR Club" (Henderson, 1983). While the term was coined as a criticism, for many members of the club there were advantages in familiar rules of engagement: only major disputes had the potential to generate real shocks. For the most part, the tribunal was able to manage the conflict to an accepted, if not always highly satisfactory, conclusion.

From the 1990s onwards, these traditional elements of Australia's system changed significantly, in a context of increasingly neoliberal public policies and more intensely competitive product markets. The decline of the union movement was precipitous. Aggregate union membership fell from around 50% for much of the 20th century to 30% in 1997 and then to 15% by 2016. The industrial and political power of unions declined correspondingly, although this was uneven across the workforce and unions remained influential in some industries/enterprises. Many employers became openly anti-union, whilst also becoming more professional and learning to deal more effectively with their own workforces. All political parties became less sympathetic

towards unions and collectivism in industrial relations and labour laws became more restrictive.

In this context, the number, volume and impact of industrial disputes declined dramatically and mediation was therefore far less common (Harley, 2004). For example, the average annual number of working days lost through industrial disputes per one thousand employees across all industries in Australia fell from 56.4 in the five-year period 1985–89 to 22.2 in the 1995–99 period and 4.1 in 2010–14 (see Bray et al., 2018: 428). It continued at these very low levels thereafter. Again, there were variations between industries, but the opportunities for tribunals to become involved in mediating collective disputes were reduced correspondingly. The explanation may be that, in some organisations, industrial relations have improved: it is more likely that opportunities for expressing collective voice have declined.

Statistics on the activities undertaken by industrial tribunals are available through their annual reports. They reveal major shifts in the workload of tribunal members over the years, most conspicuously from the resolution of collective disputes to individual disputes and non-dispute matters (see Acton, 2011: 586–589). The Commission's President characterised this trend in these terms:

> [There were] … 34,152 applications lodged in 2014–2015… Twenty years ago, about two-thirds of the applications lodged with the Commission were collective in nature. The remaining one-third were comprised of applications lodged by individuals… By 2014–2015 this situation had largely been inverted, with 67% of applications lodged by individuals and 33% lodged in relation to collective matters. (Ross, 2016: 406)

Of those activities that do relate to collective arrangements, a large proportion relate only to approval of collective agreements and few actually involve the mediation of disputes.

16.3.4 At What Stage Does Mediation Take Place?

The question of when industrial tribunals become involved in the mediation of collective labour conflicts is largely determined by the statutes under which they operate and, in most Australian situations, involvement has been confined to reactive intervention after a dispute has commenced. The NSW trains case study is typical, in that the tribunal members only became involved when the parties could not complete negotiations by themselves. Correspondingly, more proactive intervention by tribunals to prevent conflict and promote cooperative relationships is relatively rare. Also rare is subsequent intervention aimed at reconciliation and/or the re-building of trust after disputes. This is ironic because legislation (especially in the federal jurisdiction) has always defined the tribunals' role in terms of the 'prevention and settlement' of industrial disputes, and the promotion of cooperation has often been a stated object of federal law (see Bray et al., 2017: Chap. 4).

There have been some devices created either by the federal parliament or by the tribunals themselves in an attempt to encourage more proactive/early intervention.

One was the creation of 'paper disputes' under the old compulsory conciliation and arbitration system (Bray et al., 2017: 59). This involved unions serving exaggerated demands on employers and then using employers' inevitable refusal as a basis for notifying a dispute to the federal tribunal; the gap between the union demands and the employer's offer was called the 'ambit' of the dispute. This established the legal jurisdiction necessary for the tribunal to intervene—technically until the 'dispute' was settled—even though there was no actual industrial action or even serious hostility between the parties. This meant that the parties could gain the ongoing assistance from the tribunal until the ambit was extinguished, potentially preventing actual disruptions to work from emerging. Another example was the 'panel system' for allocating disputes amongst tribunal members, introduced in the early 1970s but continuing under the Fair Work Act (Bray et al., 2017: 60), and described above. Again, this potentially contributed to a longer-term and more proactive approach to the prevention of disputes and the promotion of cooperation. Such devices, however, were modest initiatives in the broader scheme of things, while their impact on the prevention of disputes and the promotion of cooperation were never systematically assessed.

Some of the State laws were less restrictive of the tribunal's activities, allowing them to operate more proactively, if they so choose, and to become involved in relations between employers and unions before disputes became serious. A leading example comes from the Hunter region of New South Wales, where a number of region-specific contingencies came together to support a system in which local tribunal members worked in an on-going way with employers and unions to build cooperative relationships (Bray et al., 2017: Chap. 6). The most long-running case was large construction projects in the region, where from the 1980s onwards tribunal members became involved in each project before it began and almost supervised industrial relations until its completion, meeting regularly with the parties, hearing reports on progress and mediating any disputes that occurred (ibid.: Chap. 7). The outcomes for clients, contractors and employees were excellent. Other cases during the 2000s involved Hunter-based tribunal members intervening in individual enterprises to facilitate the negotiation of collective agreements or working with the parties to introduce workplace change and/or or improve relationships, to the benefit of all participants (ibid.: Chaps. 8 and 9). These (highly successful) interventions, however, were driven mainly by the personal styles of the tribunal members involved rather than by legislative fiat or tribunal policy.

A more systematic approach came later at federal level through legislative amendment in mid-2013, taking effect at the beginning of 2014, which led to the federal industrial tribunal (the Fair Work Commission) going beyond its more traditional reactive approach to develop a new jurisdiction focused on more proactively 'promoting cooperative and productive workplace relations and preventing disputes' (Stewart et al., 2014). Referred to as 'New Approaches', this program is completely voluntary. It began with just two tribunal members undertaking pilot cases in which they were invited by employers and unions wishing to adopt a more cooperative approach, to work with them in on-going projects (Bray and Macneil, 2015). In one state-owned water utility, this involved the tribunal member holding relation-

ship workshops to review past hostilities and plan the introduction of new more cooperative arrangements, training the parties in the skills they required and providing periodic advice on how to implement the new arrangements (Bray et al., 2017: Chap. 11). Another pilot case took place at a manufacturing organisation in danger of closure. The tribunal member provided behind-the-scenes advice to both senior managers and union leaders and oversaw a framework in which the parties worked together, although the day-to-day training and mediation of minor disputes was undertaken by private consultants (Macneil & Bray, 2015).

The success of the pilot cases demonstrated the value of the New Approaches program and the President of the Commission gradually expanded the capacity of the tribunal to deliver this type of mediation (through training programs for tribunal members and the provision of administrative support) and publicised its considerable achievements. By September 2017, 44 New Approaches cases had been initiated, involving 16 different tribunal members (Bray et al., 2017: 180–181). This new program is therefore growing, but remains new and confined to a small number of unionised workplaces. Whether it can be applied in non-union workplaces or individual disputes remains to be seen.

16.4 Evaluating the Effectiveness of Mediation

The effectiveness of mediation in Australia is assessed less by private mechanisms on a case-by-case basis than by broader political judgment of the system as a whole. Indeed, the dominant role of the state in mediation in Australia and the public nature of the mediation arrangements makes it a focus of public policy debate, much of which has been highly partisan (Bennett, 1994: Chap. 2). As already mentioned, for most of the 20th century, this debate focused on the details of how the compulsory conciliation and arbitration system operated rather than any questioning of its legitimacy. This changed to some degree from the late 1980s, when some employers in particular saw tribunals as illegitimate 'third parties' to the employment relationship that prevented direct engagement between employers and individual employees (Cooper & Ellem, 2008; Mitchell, Taft, Forsyth, Gahan, & Sutherland, 2010). This sentiment found expression in some elements of the conservative, neoliberal agenda of the Coalition government led by Prime Minister Howard between 1996 and 2007. However, both the broad support of 'public opinion' as well as the uncertainties of parliamentary politics allowed the tribunals to survive and the Fair Work regime from 2009 onwards saw the tribunals regain an important role in the industrial relations system (Stewart, 2016).

The most recent period has also seen the emergence of new methods by which the tribunals attempt to retain the support of stakeholders and the public more generally. The current President of the Fair Work Commission—appointed in 2012—formalised and made public the tribunal's strategic plan, which was called 'Future Directions'. Central to this initiative were the concepts of accountability and 'public value':

> My starting proposition is that the Commission serves the community through the provision of an accessible, fair and efficient dispute resolution service and that in delivering that service, we are accountable to the community. Part of that accountability involves regularly reporting on the Commission's performance. At its core, reporting is about identifying the public value of the institution and communicating to stakeholders and the public that their expectations are being met. (Ross, 2016: 403; see also Ross, 2012)

There were four component parts of the Commission's strategy:

- promoting fairness and improving access to the tribunal by interested parties;
- efficiency and innovation in the way the tribunal operated;
- increasing the accountability of the tribunal, especially by making its operation more transparent; and
- promoting productivity and engaging with industry.

Overall, the various innovations within these four areas—most of which focus on the tribunal's newer jurisdictions involving individual rather than collective disputes (see also Van Gramberg, Teicher, & Bamber, 2016)—were focused on demonstrating the effectiveness of the tribunal to the general public as well as major stakeholders, like politicians, employers and employer associations, and trade unions. The success of these efforts remains to be seen, but there is no doubt they indicate a different approach to that of the FWC's predecessors. As New Approaches becomes a more established stream of tribunal activity, it will be interesting to see how the Fair Work Commission seeks to measure, in more detail and over time, the public value that this form of mediation creates.

16.5 Conclusions

Despite changes in the last three decades which have brought it more into line with its Anglo-American counterparts, the Australian industrial relations system retains some of its exceptionalism. Part of this involves the central role of industrial tribunals in the system, sustained by the respect and legitimacy they have gained through their long history and perceived independence. Other types of mediators have not been seen in Australia as genuine alternatives to the tribunals.

Despite their continuing prominence, the role of Australia's tribunals is changing. The decline of unions and rise of individual employment rights mean that tribunals are increasingly focused on the resolution of individual disputes and the determination of minimum standards. The corresponding reduction in collective conflict means that mediation of collective labor disputes is less important than it once was. In this sense, the tribunal's role in the dramatic NSW trains dispute, discussed at the beginning of the chapter, is now atypical.

Perhaps the most interesting recent development is the move towards more proactive intervention by tribunals and the use of interest-based bargaining techniques to promote cooperation and improved productivity within unionised workplaces. The early success of the Fair Work Commission's New Approaches program is promising,

and there is reason to be believe that Australia's industrial tribunals are especially well-placed to perform such a role, even compared to their counterparts in other countries. The expansion of this program, however, will require determination and specialist resources given the dominance of adversarialism in Australian industrial relations and politics.

Along with their traditional conciliation activities, the federal tribunals New Approaches initiative and similar State-based programs have provided further opportunities for members to mediate collective labour disputes. For as long as legislation in Australia provides a role for unions in collective bargaining, and in sectors where unions still have sway, the tribunal's expertise and perceived independence is likely to ensure its continued role in this type of mediation.

References

Acton, J. (2011). Fair work Australia: An accessible, independent umpire for employment matters. *Journal of Industrial Relations, 53*(5), 578–595.

Bennett, L. (1994). *Making labour law in Australia*. Sydney: Law Book Company.

Bray, M., & Macneil, J. (2015). *Facilitating productive workplace cooperation: A case study of Sydney Water and the ASU Water Division*, Fair Work Commission, Melbourne, p. 6. https://www.fwc.gov.au/documents/documents/engagement/case-studies/syd-water-case-study-2015.pdf.

Bray, M., Macneil, J., & Stewart, A. (2017). *Cooperation at work: How tribunals can help transform workplaces*. Sydney: Federation Press.

Bray, M., Waring, P., Cooper, R., & Macneil, J. (2018). *Employment relations: Theory and practice* (4th ed.). Sydney: McGraw Hill.

Briggs, C. (2001). Australian exceptionalism: The role of trade unions in the emergence of enterprise bargaining. *Journal of Industrial Relations, 43*(1), 27–43.

Bukarica, A., & Dallas, A. (2012). *Good faith bargaining under the Fair Work Act 2009*. Sydney: Federation Press.

Colvin, A., & Darbishire, O. (2013). Convergence in industrial relations institutions: The emerging Anglo-American model? *Industrial and Labor Relations Review, 66*(5), 1047–1477.

Cooper, R., & Ellem, B. (2008). The neoliberal state, trade unions and collective bargaining in Australia. *British Journal of Industrial Relations, 46*(3), 532–554.

Dabscheck, B. (1995). *The struggle for Australian industrial relations*. Melbourne: Oxford University Press.

Fair Work Commission. (2017). *Annual report 2016–17: New approaches to workplace relations*. Melbourne: Fair Work Commission.

Foenander, O. (1959). *Industrial conciliation and arbitration in Australia*. Sydney: Law Book Co.

Forbes-Mewett, H., Griffin, G., Griffin, J., & McKenzie, D. (2005). The role and usage of conciliation and mediation inn dispute resolution in the Australian industrial relations commission. *Australian Bulletin of Labour, 31*(2), 171–189.

Forsyth, A. (2012). Workplace conflict resolution in Australia: The dominance of the public dispute resolution framework and the limited role of ADR. *International Journal of Human Resource Management, 23*(3), 476–494.

Harley, B. (2004). Managing industrial conflict. In J. Isaac & S. Macintyre (Eds.), *The new province for law and order: 100 years of Australian industrial conciliation and arbitration* (pp. 316–354). Melbourne: Cambridge University Press.

Henderson, G. (1983). The industrial relations club. *Quadrant, 27*(9), 21–29.

HR Nicholls Society. (1986). *Arbitration in contempt*. Melbourne: HR Nicholls Society.

IBISWORLD. (2018). *Alternative dispute resolution services in Australia: IBISWORLD industry report OD4116* (privately commissioned by the University of Newcastle).
Isaac, J. (1989, September). The Arbitration Commission: Prime Mover or Facilitator. *Journal of Industrial Relations, 31*(3), 407–427.
Isaac, J., & Macintyre, S. (Eds.). (2004). *The new province for law and order: 100 years of Australian industrial conciliation and arbitration*. Melbourne: Cambridge University Press.
Isaac, J. E., & McCallum, R. C. (1992). The neutral and public interests in resolving disputes in Australia. *Comparative Labor Law Journal, 13*(4), 380–409.
Macintyre, S., & Mitchell, R. (Eds.). (1989). *Foundations of arbitration: The origins and effects of state compulsory arbitration, 1890–1914*. Melbourne: Oxford University Press.
Macneil, J., & Bray, M. (2013). Third party facilitators in interest-based negotiation: An Australian case study. *Journal of Industrial Relations, 55*(5), 699–722.
Macneil, J., & Bray, M. (2015). *Aiming for collaborative transformation: A case study of Orora Fibre Packaging and the AMWU Printing Division*, Fair Work Commission, Melbourne. https://www.fwc.gov.au/documents/documents/engagement/case-studies/orora-case-study-2015.pdf.
McCrystal, S. (2009). A new consensus: The coalition, the ALP and the regulation of industrial action. In A. Forsyth & A. Stewart (Eds.), *Fair work: The new workplace laws and the work choices legacy* (pp. 141–163). Sydney: The Federation Press.
Mitchell, R., Taft, D., Forsyth, A., Gahan, P., & Sutherland, C. (2010). Assessing the impact of employment legislation: The Coalition's Labour Law Program, 1996–2007. *Australian Journal of Labour Law, 23*(3), 274–301.
Niland, J. (1978). *Collective bargaining and compulsory arbitration in Australia*. Sydney: NSW University Press.
Pekarek, A., Landau, I., Gahan, P., Forsyth, A., & Howe, J. (2017). Old game, new rules? The dynamics of enterprise bargaining under the Fair Work Act. *Journal of Industrial Relations, 59*(1), 44–64.
Perlman, M. (1954). *Judges in industry*. Melbourne: Melbourne University Press.
Riley, J. (2009). Workplace dispute resolution under the Fair Work Act: Is there a role for private alternative dispute resolution providers? *Australian Dispute Resolution Journal, 20*(4), 236–243.
Ross, I. Justice. (2012). Promoting tribunal excellence. *Journal of Judicial Administration, 21*(3), 135–145.
Ross, I. Justice. (2016). Future directions: Enhancing the public value of the Fair Work Commission. *Journal of Industrial Relations, 58*(3), 402–418.
Sheldon, P., & Thornthwaite, L. (Eds.). (1997). *Employer associations and industrial relations change*. Sydney: Allen & Unwin.
Spencer, D., & Altobelli, T. (2005). *Dispute resolution in Australia: Cases, commentary and materials*. Pyrmont: Law Book Co.
Stewart, A. (2016). Continuity and change in Australian Labour Regulation: Work choices, fair work and the role of the "Independent Umpire". In K. Hancock & R. D. Lansbury (Eds.), *Industrial relations reform: Looking to the future* (pp. 40–65). Sydney: Federation Press.
Stewart, A., Bray, M., Macneil, J., & Oxenbridge, S. (2014). "Promoting cooperative and productive workplace relations": Exploring the Fair Work Commission's new role. *Australian Journal of Labour Law, 27*(3), 258–280.
Stewart, A., Forsyth, A., Irving, M., Johnstone, R., & McCrystal, S. (2016). *Creighton & Stewart's Labour Law*. Sydney: Federation Press.
Van Gramberg, B. (2006). *Managing workplace conflict*. Sydney: Federation Press.
Van Gramberg, B., Teicher, J., & Bamber, G. (2016). Reshaping the role of the tribunal as third party in Australian workplace conflict resolution. In R. Saundry, P. Latrielle, & I. Ashman (Eds.), *Reframing resolution* (pp. 237–263). Palgrave Macmillan, London.
Walker, K. (1970). *Australian industrial relations systems*. Melbourne: OUP.
Walker, K. (1984). The development of Australian industrial relations in international perspective. In W. Howard (Ed.), *Perspectives on Australian industrial relations* (pp. 1–19). Melbourne: Longman Cheshire.

Sources for NSW Trains case

Anonymous. (2018a, January 25). Rail strike off as FWC issues suspension order. *Workplace Express*. https://www.workplaceexpress.com.au/nl06_news_selected.php?R=2&act=2&stream=2&selkey=56417&hlc=2&hlw=, sourced February 15, 2018.

Anonymous. (2018b, February 8). Sydney train workers offered 3pc pay rise as part of new offer to rail union. *ABC News*. http://www.abc.net.au/news/2018-02-08/nsw-rail-workers-get-new-pay-offer/9407290, sourced February 16, 2018.

Fair Work Ombudsman. (2017). *Industrial action*. Last updated July 2017. https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/industrial-action#termination, pp. 1–4.

O'Sullivan, M., & Visentin, L. (2018, January 25). Sydney escapes commuter chaos after rail workers forced to abandon strike. *Sydney Morning Herald.* http://www.smh.com.au/nsw/sydney-escapes-commuter-chaos-after-rail-workers-forced-to-abandon-strike-20180125-h0obpq.html, sourced February 15, 2018.

RBTU. (2018, January 12). Sydney & NSW Trains results—prepare for action! *Loco Express.* http://locoexpress.com.au/sydney-nsw-trains-results-prepare-action/.

Sydney Trains, NSW Trains and the Australian Rail, Tram and Bus Industry Union, The Association of Professional Engineers, Scientists and Managers, Australia. (2017). *Decision by Commissioner Cambridge*, Matter nos. B2017/1116-1127, Fair Work Commission, 23 November. http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FWC/2017/6158.html?stem=0&synonyms=0&query=sydney%20trains%20and%20protected%20action, sourced February 15, 2018.

Sydney Trains, NSW Trains and the Australian Rail, Tram and Bus Industry Union, The Association of Professional Engineers, Scientists and Managers, Australia. (2018). *Transcript of proceedings before SDP Hamberger*, Matter no. B2018/50, Fair Work Commission, 25 January. https://www.fwc.gov.au/documents/documents/transcripts/20180125_b201850.htm, sourced February 15, 2018.

Chapter 17
Mediation and Conciliation in Collective Labor Conflicts in China

Wei Chi, Yueting Ji and Wei Huang

17.1 Introduction

On February 28, 2014, the Walmart Changde Store reported to the Changde City Federation of Trade Unions that the store will close down due to poor management. On March 5th, the company unilaterally posted the "Closed Business Announcement" and "Notice of Staff Settlement Agreement". The company announced that it had ceased operations since March 19 and provided staff with settlement plans for relocation and N+1 economic compensation plans for termination of the labor contract. Employees of the store under the leadership of the chairman of the trade union took actions to safeguard their rights and believed that the company's procedures for dismissal were illegal and required payment of double compensation. In the following two weeks, Changde City Federation of Trade Unions, the Municipal Bureau for Letters and Calls (*Xinfang*), and the district government each hosted four mediation meetings, attempting to settle this collective labor dispute, but none of them were able to help Walmart and the employees reach an agreement. At the mediation meetings chaired by Changde City Federation of Trade Unions on March 7th and the meeting chaired by the Municipal Bureau for Letters and Calls on March 12th, only the store union and workers' representatives showed up. At the mediation meetings chaired by the district government on March 14th and 18th, all parties were present, and the district government concluded that the Walmart's settlement plan was legal and also that Walmart denied all employees' demands based on the investigation results provided by the labor supervision department. The failure of mediation embarked on the road to arbitration. On April 25th, 69 employees and the trade union of Walmart Changde Store respectively initiated arbitration to Changde City Labor Arbitration

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Committee. Fifty-one employees accepted the mediation-arbitration result, while the rest 18 employees and the union did not accept the mediation outcome and proceeded to the arbitration. The arbitral award issued by the Labor Arbitration Committee on June 25th rejected all the claims of the labor party. The trade union of Walmart Changde Store disagreed to this arbitral award and continued to bring an action in the people's court of Wuling District, Changde City. On July 22th, the court rejected all claims of the labor party.

This is a typical collective labor dispute case in China with Chinese characteristics. First, mediation is an important mechanism that is commonly used in settling collective labor disputes. This is because compared to arbitration and litigation, mediation saves judicial resources, increases judicial efficiency, and the method is more thrift, simple, flexible, and secret. Emphases on mediation in China also reflect traditional cultural preferences for non-confrontation, which is rooted in Confucian and Maoist principles. Second, mediation is important but not perfectly regulated in China. As can be seen from the Walmart case, Changde City Federation of Trade Unions, the Municipal Bureau for Letters and Calls, and the district government all hosted the mediation meetings, but none of them were specialized mediatory agencies. Due to the lack of specific collective labor disputes mediation laws and regulations, all kinds of agencies can mediate collective labor disputes, such as enterprise mediation committees, community and village agencies, township authorities, county and district authorities, etc. China's labor dispute mediation system is still in an early stage of development, thus many of the collective labor dispute cases continue to be brought to a labor dispute arbitration committee after mediation, until that finally the case is settled by arbitration, just like the Walmart case. Third, the government has a strong influence in the mediation process and outcome. As is widely known, China has its unique political system. The Chinese Communist Party and Chinese government play decisive roles in China's political, economic, cultural and social life. As collective labor disputes may have great social impacts, the mounting pressure on local government to maintain social stability has made mediating collective labor disputes a top priority, so that conflicts can be quickly brought under control and defused.

The Walmart case is just one of the many collective labor disputes happening every year in China. Since the beginning of China's reform and opening up in 1979, the labor relations in China have undergone a series of major reforms, and profound changes have taken place. The impact of events such as the international financial crisis and the implementation of the Labor Contract Law further heightened the tension in labor relations. Under the combined impact of historical accumulation, economic system reforms, and responses to economic difficulties, these tensions reflected in labor relations in such a way that the total number of labor dispute cases runs at a high level, the collective labor disputes increase, and the content of appeals is complex. Figure 17.1 shows the number of collective labor disputes in China from 1996 to 2015. It can be seen that in 2008, which is the year when the Labor Contract Law enacted, the number of collective labor disputes and the number of laborers involved in collective labor disputes reached a peak. Then with a three-year decline, it has risen again since 2011.

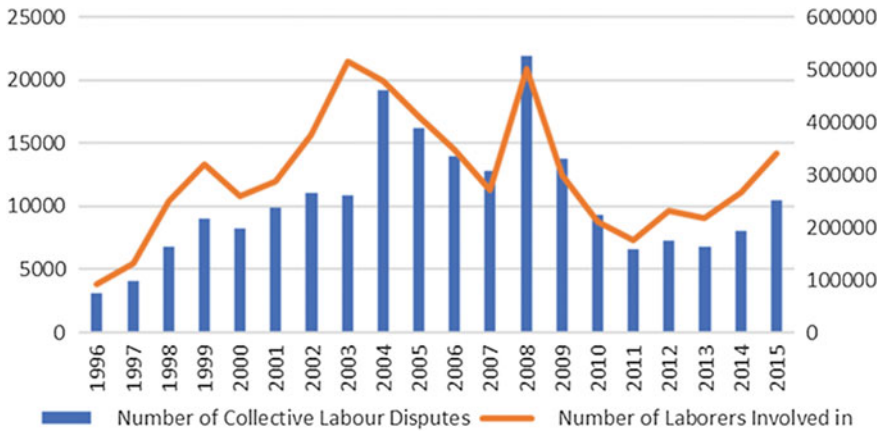

Fig. 17.1 Number of collective labor disputes in China. *Data source* China Labor Statistical Year Book 1997–2016

Faced with increasing collective labor disputes, China developed unique systems to settle collective labor disputes. China's current labor dispute handling system mainly focuses on individual disputes. There is no clear and unified regulation for the concept definition, type division and processing mechanism of collective labor disputes. Based on the current status and existing regulations of collective labor disputes in China, collective labor disputes can be divided into three categories: collective labor disputes in a narrow sense, collective contract disputes, and collective action disputes (Kai & Feng, 2014).

Collective labor disputes in a narrow sense are defined by the "Labor Dispute Mediation and Arbitration Law", in which Article 7 stipulates that "Where a labor dispute involves more than ten employees and the employees have a same claim, they may recommend their representatives to participate in the mediation, arbitration, or litigation." (Labor Dispute Mediation and Arbitration Law of the People's Republic of China, 2008). The essence of such collective disputes is that multiple workers have common claims for rights, so this kind of collective disputes are resolved according to the procedures for individual disputes (Cheng, Xie, & Wang, 2015).

Collective contract disputes include disputes over the termination of collective contracts and disputes over the implementation of collective contracts. Article 84 of the "Labor Law" stipulates that "Cases of disputes resulted from the termination of collective contracts shall be handled through consultation by all the parties concerned brought together by the labor administrative department of a local people's government if these cases cannot be handled through consultation between the parties involved. Cases of disputes resulted from the implementation of collective contracts shall be brought to a labor dispute arbitration committee for arbitration if these cases cannot be solved through consultation between the parties involved. (Labor Law of the People's Republic of China, 1995)." The disputes arising from the termination of collective contracts are handled through negotiation and coordination, which are

similar to the Western developed countries. However, there are no clear provisions on who in the labor administrative department will negotiate and how to negotiate. The disputes arising from the implementation of collective contracts are disputes related to the rights already provided in the existing collective contracts. Thus, this kind of collective labor disputes can be handled directly through the individual labor disputes settlement system. However, there are very few disputes in the implementation of collective contracts in China so far, and there is also lack of public data.

Collective action disputes are actually closely related to the termination of collective contracts. During the collective bargaining process, laborers take some collective actions, such as work stoppage to exert pressure on the employer. Thus, collective action disputes are handled through communication and negotiation instead of mediation.

Due to the unique characteristics and present settlement system of China's collective labor disputes, this paper mainly discusses the mediation of collective labor disputes in a narrow sense and disputes over the implementation of collective contracts (hereinafter referred to as collective labor disputes). Thus, the handling of collective labor disputes in China involves four processes of negotiation, mediation, arbitration and litigation. Negotiation and mediation are voluntary choices for employees and employers. Arbitration is a mandatory procedure before litigation, and litigation is the last remedy. Unlike western countries, parties can still go to court after arbitration. This is a unique character of China's labor dispute settlement system. Among them, the mediation of collective labor disputes has the advantages of low cost and high efficiency, and it has certain value recognition in the social culture because it fits the tradition of "harmony" in China. Thus, In China's collective labor dispute settlement system, mediation is an important form that is commonly used.

17.2 Collective Labor Dispute Mediation System in China

17.2.1 The Evolution of Collective Labor Dispute Mediation System in China

At present, there is no special legal regulation on the handling of collective labor disputes in China. The mediation system is the same as the individual mediation system. The "Interim Provisions on the Handling of Labor Disputes of State-Owned Enterprises" implemented by the State Council in 1987 required for the first time the establishment of a multi-level mediation committee and made provisions for mediation procedures.

In 1993, the "Regulations on the Handling of Labor Disputes of Enterprises" issued by the State Council established the labor dispute mediation system for the first time and expanded the scope of labor disputes from state-owned enterprises to various types of enterprises. The organizational form and mediation rules of the enterprise labor dispute mediation committee are stipulated.

The "Labor Law" implemented in 1995 raised the labor dispute mediation system from the administrative regulations to the level of the national basic law and extended the principle of mediation to labor dispute arbitration and litigation procedures.

The "Labor Dispute Mediation and Arbitration Law" implemented in 2008 reformed the labor dispute mediation system. The composition of the mediation committee was changed from the company's representatives, union representatives, workers' representatives to employee representatives and company representatives. The scope of the mediation organization has been expanded. It has been clarified that "Where a labor dispute arises, a party may apply to any of the following mediation organizations for mediation: (1) Labor dispute mediation committee of an enterprise; (2) Grassroots people's mediation organization legally established; and (3) Organizations with the labor dispute mediation function established in a township or neighborhood community. In China, all the mediation organizations are rather local. For example, the Walmart case was handled at the district and city level.

Moreover, the laws have given the mediation agreement some legal binding force, "where a mediation agreement is reached on a matter of delayed payment of labor remunerations, medical expenses for a work-related injury, economic indemnity, or compensation, and the employer fails to execute it within the period of time prescribed in the agreement, the employee may apply to the people's court for a payment order based on the mediation agreement and the people's court shall issue a payment order according to law."

The evolution of mediation in collective labor dispute settlements reflects a change in the government's strategy for handling collective labor relations. In the face of mounting labor conflicts as well as other kinds of social unrest, the government requires more flexible and effective means and more discretionary powers to maintain stability and even bypass the law and legal procedures.

17.2.2 China's Collective Labor Dispute Mediation System at Present

(1) **Mediation Organization**

At present, there is no written system for the mediation of collective labor disputes. China is still developing the mediation system, searching and implementing it through different means, including grassroots mediation, people's mediation, administrative mediation, joint mediation and mediation-arbitration. Under these mediation mechanisms, the participants are very diverse. In China, organizations that can conduct mediation of collective labor disputes mainly include: Enterprise Labor Dispute Mediation Committee, Six-Party Joint Labor Dispute Mediation Center, Township Labor and Personnel Disputes Mediation Organization, Grassroots People's Mediation Organization, etc.

These mediation mechanisms are led by different local authorities, and their development level and abilities to settle collective labor disputes vary across regions. Some

regions have a long history of constructing administrative mediation mechanisms, then in these regions administrative mediation mechanism should play a more important role in settling collective labor disputes.

There are various participants involved in grassroots mediation. There are labor dispute mediation organizations established at the enterprise, in township, neighborhood community and regional industries. At the same time, local industrial and commercial associations have also begun to participate in, or establish regional and industry labor dispute mediation organizations to mediate the collective labor disputes.

People's mediation organization is the grassroots people's mediation committee. It is a grassroots mass organization that resolves civil disputes. At first, they are not designed to settle labor disputes. After December 2007, the Labor Dispute Mediation and Arbitration Law was enacted, people's mediation organizations were given the statutory power to mediate labor disputes.

Administrative mediation is a mechanism with China's characteristics. Due to collective labor disputes' great social impact and governments' important role in coordinating labor relations, labor administrative authorities and its affiliated institutions also have the right to mediate collective labor disputes.

Joint mediation is a new labor disputes mediation mechanism developed in some big cities like Beijing and Guangzhou where there are great numbers of labor disputes. Joint mediation is an institutional mediation network by integrating trade unions, government agencies (for example, Bureau for Letters and Calls), labor arbitration commissions, judicial administration department, the courts and enterprise confederation. The mediation organization is the Labor Disputes Mediation Center in every district of the city.

Mediation-arbitration is a mediation process conducted by arbitrators before or during arbitration. The Article 42 of Labor Dispute Mediation and Arbitration Law stipulates that "Before rendering an award, an arbitral tribunal shall conduct mediation first. Where an agreement is reached through mediation, an arbitral tribunal shall make a mediation record." Therefore, mediation-arbitration is also an important part of the collective labor dispute mediation in China.

In summary, China's collective labor dispute mediation system consists of five mechanisms. Before the arbitration process, collective labor disputes can be mediated through grassroots mediation, people's mediation, administrative mediation, and joint mediation. If these mediations are not successful, and the collective labor disputes enter the arbitration process, they can still be mediated through mediation-arbitration. Each mediation is performed by the corresponding mediation organizations, as shown in Fig. 17.2.

(2) **Mediation Procedures**

Though the mediation mechanisms and organizations are various in China, the mediation procedures are almost the same, described as follows (Fig. 17.3):

① The parties (employees or employers) apply to the mediation organization for mediating a collective labor dispute, and may submit the application orally or in writing. Both parties have to agree to using mediation. If one of the parties

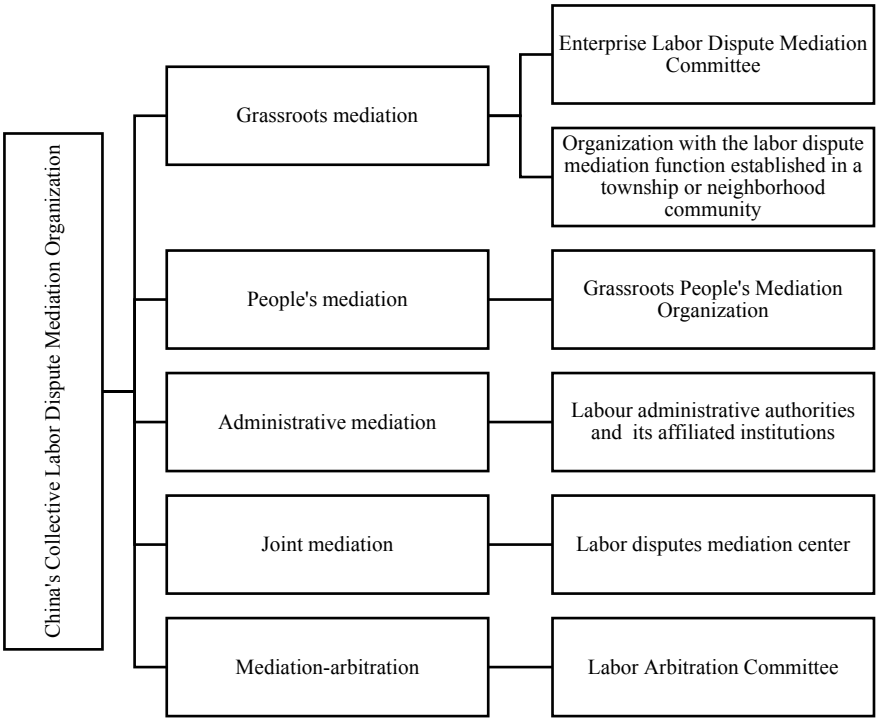

Fig. 17.2 Multi-level Mediation Organizations

deny the mediation request, other methods are used to resolve the dispute, such as arbitration.

② Once the mediation organization receives the mediation application from the applicant, it shall promptly complete the mediation registration form and the mediation work account and conduct preliminary communication with the applicant.

③ The mediation organization reviews the applicant's mediation application, makes a decision on whether to accept this case within 3 working days, and notifies the parties.

④ The mediation organization arranges the relevant mediators in charge of the mediation case and records the mediation process. If the mediation succeeds, a mediation agreement will be issued. If the mediation fails, a mediation statement of termination is issued. The mediation applicant can be informed that they can go to the labor dispute arbitration committee and other related departments to continue to exercise the right to appeal.

⑤ The mediation of labor disputes ends within 15 working days from the date the parties apply for mediation. Mediation and arbitration are free for both parties in China. Only litigation has cost.

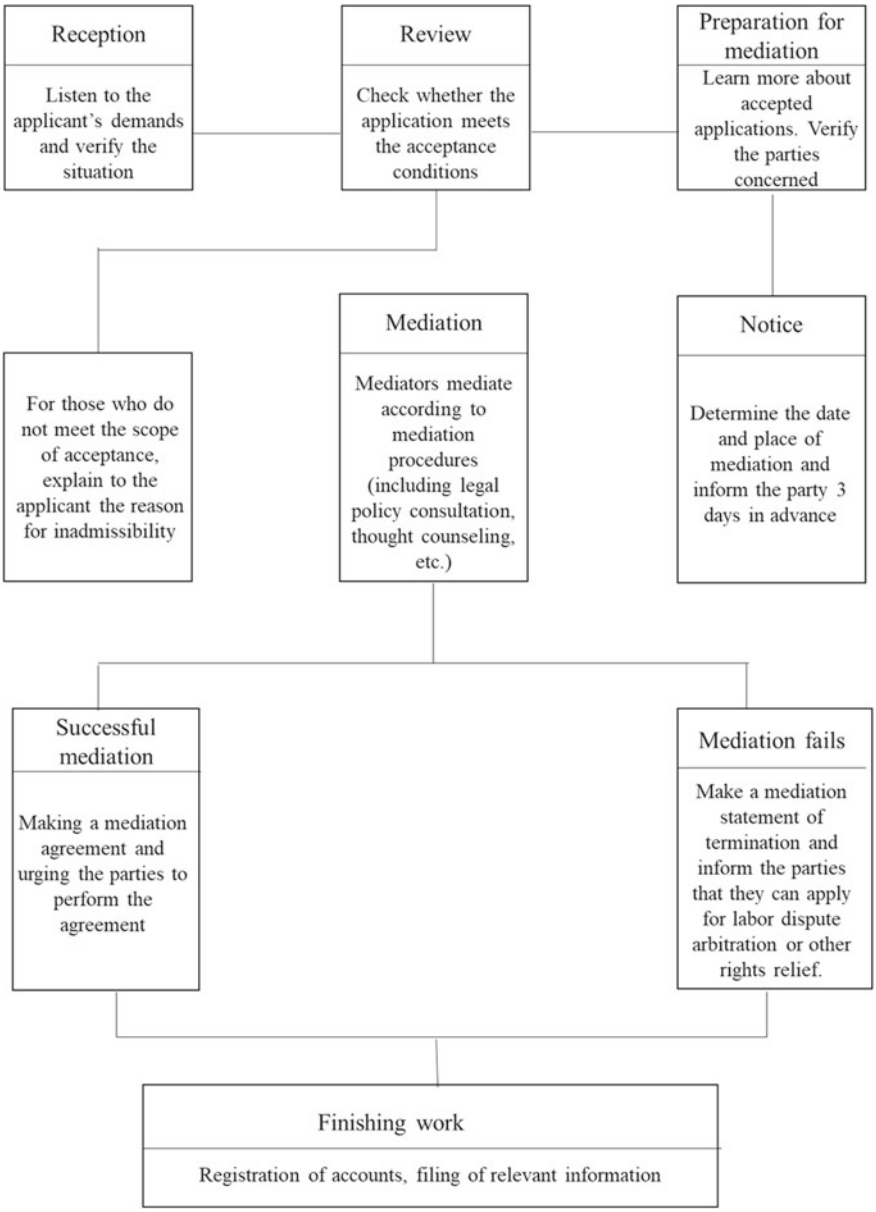

Fig. 17.3 Mediation process

(3) **Mediator**

In China, there are full-time and part-time mediators. Both of them must meet certain requirements. Article 9 of the "Labor Dispute Mediation Organization Work System" stipulates that mediators shall be appointed by mediation organizations and shall have certain knowledge of labor laws, policies, and relevant job skills. Full-time mediators need to have a labor dispute mediator certificate. The labor dispute mediator certificate is regulated by Article 11 of the Labor Dispute Mediation and Arbitration Law, "A mediator of a labor dispute mediation organization shall be an adult citizen who is fair, decent, and enthusiastic for the mediation work and has a certain level of knowledge of law, policy and culture. Adult citizens engaged in mediation work in the labor dispute mediation organization may obtain a labor dispute mediator certificate." The labor dispute mediation certification is regulated by the Ministry of Human Resources and Social Security (MHRSS) of each province, autonomous region, and municipality directly under the Central Government. To obtain the certificate, a person needs to acquire required training and also pass the certification exam administered by the Ministry of HRSS.

At present, most mediators are part-time. Take people's mediator for example, at the end of 2017, there are 3,172,000 part-time people's mediators in the country, accounting for 86.5% of the total number of mediators, and 49,7000 full-time people's mediators, accounting for 13.5%.[1] Part-time mediators lack the necessary professional training, making collective labor dispute mediation less effective. In practice, the mediator of collective labor disputes must have a strong ability to negotiate to seek a compromise that can be accepted by both parties. The ability of the mediator determines to a large extent whether the mediation can reach an agreement, and also affects the two sides' confidence in mediation. The lack of professional and qualified labor dispute mediators in China restricts the effectiveness of collective labor dispute mediation.

17.3 Trends in Mediation

In this section, we present data to show the trends in mediation in the recent years since 2010.

17.3.1 Trends in Mediation-Arbitration

As mentioned previously, mediation-arbitration is one of the key mediation mechanisms. Many collective labor dispute cases entered quasi-judicial procedures, that is, labor dispute arbitration. In the arbitral proceedings, mediation also exists because

[1] www.sohu.com/a/229686670_161795.

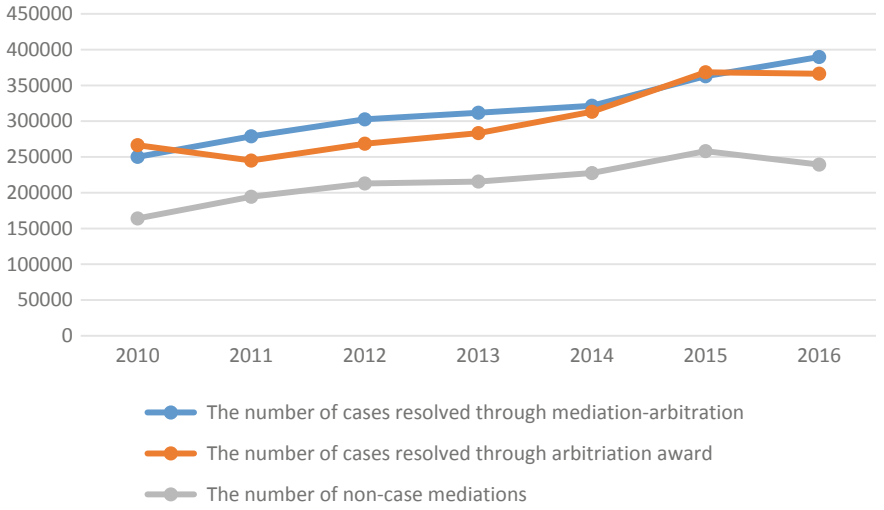

Fig. 17.4 Number of mediations since 2010 in China. *Source* National Bureau of Statistics of China, Yearbooks of Labor Relations

of Article 42 of the Law of the People's Republic of China on Labor Dispute Mediation and Arbitration. Therefore, in China, mediation in arbitration is mandatory, and mediation must be conducted by an arbitrator prior to arbitration. If the mediation is successful, the labor arbitration tribunal will directly end. If the mediation fails, the employer and the employee will continue to enter the arbitral proceedings.

Mediation in arbitration has two main characteristics: First, the mediator and the arbitrator are the same person. That is to say, the arbitrator first acts as a mediator. Thus, the arbitrator serves two functions: mediation and arbitration. Secondly, arbitration in mediation combines mediation procedures and arbitral proceedings together, which increases the success rate of collective labor dispute mediation, as employees and employers know better about what the results would be if they enter arbitration procedures.

Figure 17.4 shows the number of labor dispute cases settled through mediation-arbitration from 2010 to 2016. It can be used to handle both individual and collective labor disputes. The number in Fig. 17.4 is the total number of individual and collective labor disputes settled through mediation-arbitration. For comparison, the number of cases settled through arbitration that ends up with litigation was also reported for the same period. As can been seen, the two data series are highly correlated, suggesting that the mediation-arbitration and arbitration award follow the same trends. Moreover, for all these years, the number of cases settled through mediation during arbitration is greater than the number of cases settled through arbitration award.

17.3.2 Trends in Other Types of Mediation

As explained in the previous section, China adopted a multi-level mediation process. In addition to the formal Labor Arbitration Committee that accepted the labor dispute cases and conduct mediations prior to arbitration, various other organizations are involved in mediations, such as mediations conducted by enterprise labor dispute resolution committees, and community dispute resolution committees.

Figure 17.4 also shows the total number of mediations conducted by these other mediation organizations. It is labelled as "non-case mediations" because in this scenario, no formal labor dispute case was filed in the Labor Arbitration Committee. Altogether, Fig. 17.4 shows that the flexible and cost-efficient mediation mechanisms (mediation-arbitration and no-case mediations) are prevalent in China.

17.4 Conclusion

Mediation is an important procedure in China's collective labor dispute settlement system, as in the face of mounting collective labor conflicts as well as other kinds of social unrest, the government requires more flexible and effective means and more discretionary powers to maintain stability and even bypass the law and legal procedures.

Based on the current status and existing regulations of collective labor disputes in China, collective labor disputes can be divided into collective labor disputes in a narrow sense, collective contract disputes, and collective action disputes. As the disputes arising from the conclusion of collective contracts and collective action disputes are handled through negotiation and coordination, this paper mainly discusses collective labor disputes in a narrow sense and disputes over the implementation of collective contracts.

Due to the lack of specific regulations on collective labor dispute settlement system, China's collective labor dispute mediation has the same process as individual citizen labor dispute mediation. The essence of most collective disputes is that multiple workers have common claims for rights, so this kind of collective disputes can be mediated according to the procedures for individual disputes.

At present, there is no written system for the mediation of collective labor disputes. China is still in the early stage of development, featuring several mediation mechanisms, including grassroots mediation, people's mediation, administrative mediation, joint mediation and mediation-arbitration. Under these mediation mechanisms, the participants are very diverse. These mediation mechanisms are led by different local authorities, and their development level and abilities to settle collective labor disputes vary across regions due to different past experience accumulated.

There is no best mediation mechanism, and each of them has its own advantages and disadvantages. Grassroots mediation and people's mediation have a wide range of organizations and reach almost every corner of the society. Thus, they can intervene

in and mediate collective labor disputes in time and in place. Administrative mediation and joint mediation are more authoritative, as Chinese people always believe that the government can finally resolve their various disputes, and they have professional and expert advantages, as the mediators often have relevant qualifications, as well as extensive experience in collective dispute resolution. Mediation-arbitration is mandatory in arbitration, and mediation must be conducted by an arbitrator prior to arbitration. To form a formal and integrating collective labor disputes mediation system, China still has a long way to go.

References

Cheng, Y. Y., Xie, P., & Wang, P. (2015). Woguo jiti zhengyi chuli zhidu: Tedian, wenti yu jizhi chuangxin (China's collective dispute settlement system: Characteristics, problems and mechanism innovation). *Journal of Renmin University of China, 29*(4), 27–33.

Chinese Academy of Labor and Social Security. (2012). Jiceng laodong Zhengyi tiaojie zuzhi yanjiu. (Research on the grassroots labor dispute mediation organizations). Internal document.

Kai, C., & Feng, S. (2014). The collective transformation of labor relations and improvement of the government's labor policy. *Social Sciences in China, 35*(3), 82–99.

Ministry of Human Resources and Social Security. (2013). Notice of the General Office of the Ministry of Human Resources and Social Security and the General Office of the All-China Federation of Industry and Commerce on launching the demonstrative work on labor dispute prevention and mediation in non-public enterprises and chambers of commerce (Associations). http://www.mohrss.gov.cn/SYrlzyhshbzb/laodongguanxi/zcwj/201607/t20160720_243938.html. Accessed May 27, 2018.

Ministry of Human Resources and Social Security. (2014). Notice of the general office of the ministry of human resources and social security on the issuance and printing of the work standards for grassroots labor and personnel disputes mediation. http://www.mohrss.gov.cn/SYrlzyhshbzb/laodongguanxi/zcwj/diaojiezhongcai/201403/t20140313_126124.html. Accessed May 27, 2018.

Ministry of Human Resources and Social Security. (2017). Opinions of the Ministry of Human Resources and Social Security, the Office of the Comprehensive Administration of Public Security Commission under the Central Committee, the Supreme People's Court and other departments on further strengthening the mediation and arbitration of the labor and personnel disputes and improving the diversified handling mechanism. http://www.moj.gov.cn/index/content/2017-04/10/content_7100667.htm. Accessed May 27, 2018.

National Bureau of Statistics, and Ministry of Human Resources and Social Security. (1997–2016). *China labor statistics yearbooks.* Beijing: China Statistics Press.

The Standing Committee of the National People's Congress of China, Labor Law of the People's Republic of China (1995).

The Standing Committee of the National People's Congress of China, Labor Dispute Mediation and Arbitration Law (2008).

Chapter 18
Mediation and Conciliation in Collective Labor Conflicts in India

Ernesto Noronha and Premilla D'Cruz

In December 2015, the Tata Motors Sanand facility, suspended 26 workers on charges of 'misconduct' accusing them of damaging about 50 vehicles at the plant. This triggered a flash sit-in strike by 422 workers on February 22, demanding the reinstatement of the workmen suspended (pending enquiry) for serious misconduct. Simultaneously, workers at the Sanand plant also demanded a revision in salary. The initial intervention by the Labor Commissioner did not yield results as the company's management and protesting employees remained adamant on their stand. The workers demanded that suspension of all the employees be immediately revoked while the management argued that the decision on the matter would be taken only after the completion of the inquiry. However, the strike was finally called off on 23 March, 2016. The decision was arrived at after an eight-hour meeting between the workers' representatives, the top management of Tata Motors and the Labor Commissioner's office. The management stated that it would revoke the suspension of 13 out of 26 workers and take a decision about the rest following the completion of the enquiry within a reasonable time of four–six months. The company also agreed to recognize the union and begin negotiations on wages and charter of demands that the workers would give them in the next four–six months. Besides this, the company also agreed not to initiate any action against the strike while the decision on the legality of suspension and wages for the period of the strike would be taken by the court.

18.1 Introduction

The state has come to play a major role in guiding industrial relations in India. The government, in order to protect labor and to ensure uninterrupted production, has enacted a number of labor legislations. These laws have covered rights and

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privileges and also guaranteed certain levels of income and conditions of working environment (Noronha, 1996a). However, since 1991, there has been a clear departure from the state-led political economy following the adoption of neo-liberalist reforms (Noronha & Beale, 2011). Several states in India have relaxed the labor laws and issued directives to prevent routine and periodic inspections, leading to flexible practices (Sharma, 2006). For instance, companies are allowed to self-certify[1] in respect to several laws (Noronha & D'Cruz, 2016). Further, firms have increasingly dispensed with permanent employees in the non-core[2] activities and have hired temporary or contractual employees (Sharma, 2006). The broader liberalization environment has posed tough challenges for trade unions, and created a distinctive and difficult context in which ongoing battles over pay, benefits, conditions, casualization and job security are being debated (Beale & Noronha, 2014; Noronha, 1996b). This has been exacerbated by the disillusionment with third party intervention in the form of conciliation, arbitration or adjudication (Ramaswamy, 1985; Saini, 1991; Noronha, 1996a).

In this article, we focus on conciliation, which in the Indian context, basically means an effort to mediate between employers and employees (Lansing & Kuruvilla, 1987). Based on a review of earlier available research and on interviews with conciliation officers (CO, 4), employer representatives (ER, 6) and trade union leaders (TUL, 3) in Ahmedabad, Gujarat, India, we first outline the process of conciliation as per the Industrial Dispute Act 1947, we then capture the complexities that advantage employers over employees, and finally we discuss the challenges that confront conciliation and suggest a way forward.

18.2 The Conciliation Process

The state domination of industrial relations is deeply rooted in India's colonial past. Its origins can be traced to the promulgation of 81-A of the Defence of India Rules by the British Government in 1942 to control industrial unrest during the Second World War. This rule was converted into a full-fledged Industrial Disputes Act in 1947 (commonly known as ID Act, 1947) (Saini, 2014). In essence, it provided for the intervention of the state as a third party between labor and management at every stage of their relationship. This meant that the state would play a crucial role in settling an industrial dispute by monitoring the processes of conciliation, arbitration or adjudication under the ID Act, 1947 (Noronha, 1996a).

Accordingly, the Central or State Government is authorized to appoint Conciliation officers (Cos) or when the situation demands, a Board of Conciliation. The CO

[1] 'Under the self-certification scheme, employers employing up to 40 persons are required to provide only a self-certificate regarding compliance of labor laws, while those employing 40 or more persons are required to submit a self-certificate duly certified by a chartered accountant' (ILO, 2014).

[2] Work like security, canteen, loading and unloading which are not the central activity of the organization (see Noronha et al., 2018).

is normally the Assistant Commissioner of Labor (ACL) or the Labor Commissioner of the state. In addition, Government Labor Officers (GLOs) are promoted to ACLs, both of whom are recruited through the state public service commission. The GLOs are graduates while ACLs are post-graduates with a Master of Social Work (MSW) or Master of Labor Welfare (MLW) and have a minimum of 5 years of industrial experience. The main work of a GLO is inspections and monitoring of the implementation of labor laws. GLOs only conciliate in organizations having less than 30 employees while ACLs intervene in industries having more than 30 employees. Henceforth, we use the term CO to refer to ACLs. It is argued that the COs do not require any training as most of them have industrial experience and have interacted with the Labor Commissioner's office on a regular basis prior to being recruited. Consequently, all the training is on the job.

An industrial dispute can come into existence when one party has made a demand on the other and the other party has rejected the same. These may relate to a genuine mismatch between the expectations of the employees and unions and their employer. A typical list of individual disputes that are covered by the ID Act, 1947, include discharge or dismissal of employees, minimum wages deprivation, gratuity, bonus, wrongful termination, interpretation of standing orders, wages, bonus, conditions of work, rationalization, lay-offs and retrenchments, while collective disputes are related to terms of employment, service conditions, leave with wages and holidays, withdrawal of customary concession or privilege, new rules of discipline and long term charter of demands. Invariably, after the failure of bilateral negotiations, conciliation is the first attempt to reconcile views of disputants (individual or collective) with the help of a third party and the most frequently used method of dispute settlement both in the public and private enterprises (Lansing & Kuruvilla, 1987; Malhotra & Rao, 2015; Moorthy, 2005; Venugopalan, 2011).

Although it is the duty of the government to refer the dispute to conciliation, conventional practice allows either party to submit a request in writing to the CO to start the process (Lansing & Kuruvilla, 1987). The CO can also take up the matter for conciliation not only when there is an 'existing' dispute but also when such dispute is 'apprehended' (Malhotra & Rao, 2015). When the CO receives the complaint through the union, they verify the authenticity of the documents submitted with the originals. This is followed by the employer submitting the statement of justification in reply to the employee's complaint. In our fieldwork, some private sector employers involved lawyers to draft replies or even appear before the CO. This, according to Saini (1992), has professionalized the disputes. While trade unions avail of outside leadership, the management takes the help of consultants even at the conciliation stage, in the process promoting personal pecuniary interests and hampering conciliation. COs have become party to this by allowing such professionals to appear at the conciliation, even though this is prohibited by the ID Act, 1947. However, in keeping with Saini's (2014) argument that the ID Act, 1947, bans the presence of lawyers in conciliation proceedings to ensure that the settlement of an industrial dispute does not become legalistic, public sector representatives did not employ lawyers in conciliation proceedings, with the company officer representing the organization.

Nonetheless, once the employers filed their reply, the COs without delay brings the employer and the representatives of the employees together and investigates the dispute, with a view to inducing the parties to arrive at a fair settlement (Malhotra & Rao, 2015). In normal circumstances, the CO issues a notice to both the parties to ascertain the facts and tries to understand the merits of the case. On the basis of this investigation, the CO can reject the complaint or proceed with the conciliation. If the COs decide to proceed with the conciliation process, they may enter establishments involved in disputes, call for any relevant documents and resort to processes they think fit for the purpose of inducing the parties to come to a fair and amicable settlement (Van Kennedy, 1958; Kumar, 1966; Lansing & Kuruvilla, 1987; Malhotra & Rao, 2015). Where direct action by employees is expected, the CO tries to arrange meetings in rapid succession with a view to avert any prolonged strike or lockout (Lansing & Kuruvilla, 1987). On such occasions, the conciliation meetings could last a whole day. The strategy is to try to ascertain each party's bargaining and actual positions and to suggest suitable compromises in order to reach a settlement (Sapkal, 2015).

It should be noted that in the course of promoting "a fair and amicable settlement", the CO does not discharge any adjudicatory functions, but can only goad, induce, encourage or cajole the disputants to persist in or continue with negotiations to arrive at a settlement (Rao, 1987). The role of the CO is that of a guide, advisor and mediator who counsels the parties to reach an amicable solution. A conciliator may act as a "go-between" for the parties, preside over and guide their joint discussion or may play an active role in clarifying misunderstandings, exploring grounds for compromise, enabling the parties to see the reasonableness of the other party's point of view and suggesting settlements. Since the conciliator has no powers of coercion over labor and management, they can only persuade the parties to climb down and meet each other (Ramaswamy, 1985). The strategy is to try to ascertain each party's bargaining and actual positions, find out the greatest common measure of agreement and suggest suitable compromises in order to settle a dispute (Lansing & Kuruvilla 1987; Malhotra & Rao, 2015). In other words, their duties are only administrative and incidental to industrial adjudication (Malhotra & Rao, 2015). The main characteristics of conciliation are flexibility, informality and simplicity. The conciliator must be patient and persistent, infuse confidence in the parties and impress upon them that their problems are thoroughly understood (Kumar, 1966; Rao, 1987). For this, the CO does a benchmarking of the employer's working conditions and capacity to pay the wage level and increments within the industry and compares it with the demands of the employees. COs tries to persuade both the sides by highlighting the advantages of a settlement, the legality of the decisions and their vulnerabilities. Further, the perils of adjudication are highlighted as being time-consuming, futile and with a highly uncertain end result. In short, a conciliator adjusts his approach to the circumstances of each case (Kumar, 1966).

Further, the CO allows adjournments so that parties can soften their stance and do a rethink. Adjournments also provide opportunities to respective parties to submit documents and build arguments for their case. However, if the parties raising the dispute are not interested in getting a settlement, it is not the duty of the CO to try to

resolve the dispute. In fact, it is the duty of the persons raising the dispute to assist the CO about the facts of the dispute and how the same can be possibly resolved. Clearly, if the employee who raised the dispute fails to appear, there is no duty cast upon the CO to go ahead with the matter (Malhotra & Rao, 2015).

The conciliator's solutions need not be accepted by the parties (Kumar, 1966; Lansing & Kuruvilla, 1987; Sahoo & Pani, 2007), but if a settlement is reached in the course of conciliation proceedings, it is a binding settlement (Lansing & Kuruvilla, 1987). Such settlements are popularly known as 12 (3) settlements (Saini, 1999), at par with the award of a labor court, industrial or national tribunal. However, if it is achieved "otherwise than in the course of conciliation proceedings", it binds only the parties to the agreement (Rao, 1987). Thus, a settlement arrived at in the course of conciliation proceedings assisted and aided by the CO is on a higher pedestal because it is presumed to be just and fair (Malhotra & Rao, 2015). Clearly, the intention of the government has been to motivate employers and employees to avail of the conciliation facility (Noronha, 1996a).

Once the settlement is reached, the CO has to send a report to the government, together with a memorandum of the settlement signed by the parties to the dispute. If no settlement is arrived at, the CO has to send to the government a full report setting forth the steps taken by them for ascertaining the facts and circumstances, the efforts towards settlement and the reasons for not being able to arrive at a settlement (Lansing & Kuruvilla, 1987). On receipt of this report, the government may refer the dispute for adjudication to a labor court or industrial tribunal, depending upon the nature and type of the dispute. Such a reference, however, is not binding. If the government does not make a reference, it records the fact and communicates to the parties concerned its reasons (Kumar, 1966; Saini, 2014).

18.3 Advantage Employers

In the case of collective disputes, both the employer and employees would like the dispute to be settled at the conciliation stage and avoid litigation that seems to be long drawn and unending, and finally only benefits lawyers (Rao, 1987). However, it is clear from earlier research that employers had an edge in the conciliation process and used it to their advantage as and when convenient to them. For instance, Patil (1982) states that conciliation is used by the employer and union to simply register bipartite agreements, as if these were arrived at during the course of conciliation proceedings. This makes the agreement binding on all the parties and stems endemic conflicts. Patil (1982) terms this as 'convertive' bargaining. Further, employers also tend to use conciliation to ban strikes or their continuation during the pendency of conciliation proceedings. The implications of this are that the continuation of such a strike is then deemed illegal and demand for payment of wages for the strike period can be denied by employers (Lansing & Kuruvilla, 1987). However, with the decline in union militancy indicated in the proportion of strikes falling quite dramatically in

the last three decades (Noronha & Beale, 2011), a labor commissioner argued that cases of collective disputes coming for conciliation had declined:

> In seven months, not even seventeen major cases have come to me. Conciliation will be relevant only if we get 50 cases a day but nobody comes for conciliation in spite of this being the worst region in terms of industrial relations. If I have alternatives, why fight dismissal? I will fight for 5–6 months with the employer, another 5–6 years at the labor court, if the employer has money he will go to the high court, this is an endless process. Industries have increased three-fold but cases coming to conciliation have decreased. (Labor Commissioner)

Clearly, the average number of disputes settled through the mediation of COs has reduced substantially (Bhangoo, 2008; Jyoti & Sidhu, 2003; Moorthy, 2005) in spite of the fact that the number of industries have increased.

In recent times, collective disputes relate to contract employees approaching the CO to regularize their employment. They claim to be directly employed by the principal employer who supervises their work, grants them their leave and pays them their wages, maintaining that outsourcing is used to disguise their relationship with the principal employer. Employers try extricating themselves from these cases by arguing that contract labor is employed for non-core activities and that the employer-employee relationship does not exist, as the work order is given to a contractor with a valid labor license who supervises and controls non-core work. In these cases, the CO appealed to the employers' magnanimity by persuading them to help employees to find alternative jobs when the former refuses to employ those workers who raised a dispute any further. The employer may accede to the request of the CO by pressurizing the contractor to place the 'trouble makers' in another organization while ensuring that these employees do not return to their organization. In this situation, employers may also pressurize the contractor through colleagues, respected elders and opinion leaders from the same community to settle issues such as loss of pay, non-payment of wages, gratuity or bonus. Thus, employers only complied when they thought it was prudent to do so, their financial liability was limited, or the CO's suggestions did not lead to a precedence.

In the case of individual disputes, employers delayed matters through frequent adjournments to meet their interests. Delaying the process often meant that employers were keen that the matter be referred to adjudication especially in cases of dismissal. Consequently, although the prescribed time limit for the conclusion of conciliation proceedings was fourteen days, it often exceeded 6 months. Frequent adjournments (4–6 per case) demanded by employers were intended to harass employees both psychologically and economically. Employees approaching the CO was seen by employers as a personal affront and an attempt to blemish their reputation for which the employee was required to be 'taught a lesson'. Besides this, employees were put through great hardship and huge expenses if they wished to pursue the dispute. They had to take leave, suffer loss of wages and travel several times to appear for the dispute in person, eventually tiring them out so that they relented and agreed to a settlement or withdrawal of the dispute (Bhangoo, 2008; Jyoti & Sidhu, 2003; Moorthy, 2005) while private employers did not have to appear in person. The latter appointed lawyers to handle complex and long drawn disputes or sent representatives who did not have the power to take decisions or make commitments (Lansing &

Kuruvilla, 1987; Murty, Giri, & Rath, 1986). Thus, the delay in the conciliation process enabled employers to exploit the vulnerability of employees. According to unionists, this attitude was reinforced by recent judgements that did not grant back wages[3] to employees, with the presumption that they would have been working for the period pending conciliation proceedings. This made employers more belligerent and they were ready to accept the CO's ex-parte reference to adjudication, instead wasting their time to appear before them. One employer's representative also endorsed this view.

> Employers delay the process when there are monetary implications or it could cause a serious industrial relations issue. The employees would like the dispute to be sorted out as soon as possible and it would be the employers who would like to delay the process. (Employer Representative, Public Sector)

Moreover, previously, the employer had to prove that the worker was not their employee, but now the onus is on the worker to prove that they are employees of the employer against whom they had approached the CO.

Even when settlements were reached, there was an overt coercion by the management. This resulted in a lack of trust between parties and inequitable relations (Saini, 1992). This attitude of employers was reinforced by unscrupulous lawyers and union leaders (who also were often lawyers) who misguided the parties against resolving the dispute through mediation to further their own interests.

18.4 Challenges Facing Conciliation

Obviously, these attitudes impacted the conciliation process. The COs stated that the rigid stance taken by the parties at the negotiation table and the lack of commitment by the employer and employees to conciliation did not leave them with any options but to refer the dispute to adjudication. This is because both employers and employees believed that the adjudicator would rule in their favour.

In contrast, employer representatives argued that the heavy workload of COs delayed proceedings. In addition to the job of conciliation, COs doubled up as inspectors under various labor laws and so had to supervise the working of the multi-purpose Labor Welfare Centres, verify trade union membership, dispose of different types of complaints and discharge other miscellaneous duties. The COs were therefore not in a position to thoroughly study the disputes and offer innovative solutions or left with little time for continuous sittings on each dispute (Kumar, 1966; Lansing & Kuruvilla, 1987; Murty, Giri, & Rath, 1986). Both parties in a dispute wait to get adjournments and their interaction in the presence of the CO is minimal. Conciliation unfolds as a very mechanical process carried out in accordance with the law. This is exacerbated by restrictions placed by the government in filling vacancies of ACLs. Other impediments to be effective include lack of quality training, infrastructure and

[3]Wages due to the employee from the date of suspension/termination till the date of decision to reinstate.

legal and administrative support (Lansing & Kuruvilla, 1987). Though some studies point out that COs did not have adequate knowledge of the industry and latest developments in labor law (Lansing & Kuruvilla, 1987), our participants had no concern about their knowledge of law. According to them, the COs had a good understanding of the industry and were also well-trained in law. However, there were concerns about their art of conciliation and grounding in conciliation procedures (Murty, Giri, & Rath, 1986). They lacked the skills to convince and listen, making their communication ineffective and superficial. This was partially the result of the absence of a well-organized infrastructure.

> The ACLs are supposed to see that the labor laws are complied with in their respective regions. Ninety per cent of the time of ACLs goes into monitoring compliance of labor laws in their respective regions. So conciliation has a low priority. In terms of infrastructure, they do not have a proper room. In small rooms of 7 * 7 or 10 * 10, they have to deal with both the parties and there is a long que outside their offices. Have you been there? It is like a fish market. They also have to deal at least 100 cases a day because of the number of adjournments. This does not give them more than 2 min per case. There are no full-fledged ACLs working for 8 h only on conciliation. A lot of ACL posts lie vacant. Moreover, they are not trained in communication skills. They know the ID Act but don't know how to implement it in the conciliation process. For them, this job is a curse. (Employer Representative, Private Sector)

Further, employers argued there was no formal linkage between performance and promotion. The performance of the CO was not linked to the number of conciliation cases settled or to the reduction in the references made to adjudication and therefore there was no effort to settle the issue or persuade the parties. In fact, being part of a large bureaucracy, with guaranteed job security and promotions based on length of service, provided little incentive for COs to take interest in their job. This was concluded already 30 years ago, however still is confirmed in our interviews (Lansing & Kuruvilla, 1987).

Not surprisingly, conciliation was seen as a "waiting room" or a "hurdle to cross over" before the dispute was referred to adjudication. Not surprisingly, our participants stated that only 10% of the disputes were resolved at the conciliation stage. COs saw themselves as "door mats" or "rubber stamps" or "postmen" who simply forwarded the case to the industrial tribunal or the labor court for adjudication. This image got reinforced, given that the COs did not have the power to implement the settlements of the disputes mediated by them, nor did they have the power to take stringent action in case the parties violated the settlements. Employers (especially in the public sector) argued that COs should apply their minds, examine the merits of the case and prevail on the parties to reach a settlement, act swiftly and judiciously or use their power to reject cases that have no substance. COs' lack of initiative resulted in the employer and employee having to fight it out in court until the judgement was delivered. Some employer representatives argued that the CO's mentality was to send a failure report to the government and recommend adjudication. For instance, some employee representatives argued that the COs entertained disputes pertaining to supervisors, managers or even sons of employees who were not workmen under

the ID Act 1947.[4] Similarly, by referring cases of contract work for adjudication, employees are given a false hope. This mentality of COs got perpetuated as fresh recruits were socialized to maintain the status quo rather than 'act extra smart'.[5]

> The Contract Labor Act says that the employer should have a valid work order, a valid license, the employer should be registered. If these three requirements are met, anybody can employ contract labor. If these records are there, why are they referring the matter to courts? They can see that these documents are necessary and they can examine the same and they have time to do it. It takes several months in the conciliation procedure. Even if all the documents are submitted, it goes to the court—and in court, the same history is repeated. It takes years and years, it is a futile exercise. (Employer Representative, Public Sector)

At the same time, employers also understood that the COs' power was strictly circumscribed and scrutinized by the High Court. The CO could not go into the merits of the case and drawing the line between adjudication and administration sometimes seemed to be difficult. It was therefore easier to refer the case to the labor court or industrial tribunal. Similarly, for non-reference to adjudication, the CO had to give reasons in writing which once again made them susceptible to reprimands from the High Court. The decision not to make reference had to be exercised in a manner that it would not enter into the territory of adjudication since the COs power was merely administrative. For instance, the refusal by the CO to refer a dispute to adjudication, on the grounds that they were the employees of contractors and not of the principal employer, amounted to adjudication of the matter. However, the CO was required to state its reasons for refusing to make a reference so that it could stand public scrutiny. The reasons should be germane to the dispute under consideration and should not be irrelevant or extraneous to the dispute (Malhotra & Rao, 2015). In short, the risk averse Labor Commissioner's office argued that theirs was a toothless organization where conciliators had no powers to direct, adjudicate or force a settlement between employers or employees.

However, the difference between earlier research and our field work was in the area of political influence on the conciliation process. There were several instances in the earlier literature which stated that conciliation was increasingly the result of political intervention and, in this sense, had failed substantially. Political leaders who operated in the garb of conciliators coerce rather than persuade the disputants. The partners to the relationship contribute little to the outcome and both may view the settlement as an imposition about which they can do little (Lansing & Kuruvilla, 1987; Ramaswamy, 1985). Thus, both the partners harbored a sense of having been wronged (Ramaswamy, 1985). However, our field work revealed that the situation may be different today. None of the employers or labor commissioners stated that

[4]Under sec 2 (s) of the Industrial Disputes Act, a workman means any person (including an apprentice) employed in any industry to do any (1) skilled or unskilled (2) manual (3) supervisory (4) technical (5) clerical or operational.

[5]Means going beyond working norms.

they faced political pressure. The reason for this could be that there was a decline of militant trade unions alluded to earlier in the article. Further, there were no complaints about the COs being a partial third party as has often been claimed in the earlier literature.

18.5 The Way Forward

Some Labor Commissioners and employers argued that conciliation is ineffective and should be done away with or made optional. Instead, bipartitism may be encouraged, or since the matter ultimately goes for adjudication, both the parties should be given the liberty to approach the court directly. Accordingly, in 2010, section 2(A) of the Industrial Dispute Act of 1947 was amended to allow individuals to directly approach the labor courts instead of bringing it before conciliation proceedings. This change minimizes the role of conciliator in handling individual labor disputes. While the employers' associations have appreciated this change, unions argue that this would reduce the role of conciliation in resolving labor conflicts making it more costly for workers (Sapkal, 2015). Nonetheless, some persistently argue that the CO is not taken seriously while a judge is taken seriously because parties fear that the judgement would go against them if their approach was casual and therefore parties should be allowed to approach the court directly even in the case of collective disputes.

In spite of these debilitating factors, most employer representatives argued that conciliation was the only medium of getting the two warring parties together to find an amicable solution. Conciliation provided a window to correct disputes because, many times, decisions are taken hastily or due to some miscommunication. Further, conciliation provides a chance to the parties to gauge the strength of their case and offers an opportunity to withdraw unworthy cases. This was the only forum where a one-on-one dialogue was possible with employer and employee, unhindered by the formality of court proceedings. Employer representatives argued that only the CO could explain to labor that there was no substance in the case and no relief was possible and hence proceeding to adjudication would only be a waste of time and money. Conciliation is therefore a very important stage in the dispute resolution machinery and should not be dismantled. The conciliation process was indeed more efficient and effective method of resolving labor conflicts as compared to adjudication (Sapkal, 2015). The CO was just like a friend trying to mediate between the two parties, while the judge could never be a friend.

> There should always be a window to get out of a dispute. Even a judge in the family court always says that I will give you one more month to discuss and decide, only then I will endorse your divorce. Very often rash decisions are taken in haste. Conciliation provides a chance of undoing mistakes or correcting the miscommunication. This enables a compromise. Therefore, it is not a good idea to do away with conciliation. It's like going to a friend rather than going to an elder who dictates the decision. The CO guides us and also gives us a chance to provide the right documents to protect the company's interest. Bogus cases can also be reduced at this stage. (Employer Representative, Private Sector)

Moreover, conciliation was a cheap and quick process of sorting out differences where no cost was incurred by the parties, and if used appropriately, it could become the best option to resolve disputes. For this, the parties to a dispute should not regard the conciliation process to be a hurdle to be crossed in order to have a dispute adjudicated. All the parties should approach the proceedings with desire to settle differences, in the right spirit of co-operation and understanding. Therefore, the parties involved should approach the conciliation process with a determination to resolve their differences amicably (Rao, 1987). Conciliation would also reduce the number of cases being referred to adjudication. This could also be supported by the government resisting the urge to make references to adjudication and banning the representation of the parties by lawyers during the conciliation proceedings (Saini, 2014).

Lawyers should only be allowed if necessary, where the articulation of a legal point might be in question (Saini, 2014). The employer representatives we spoke to confirmed that when managers represented their company at the conciliation proceedings, the chance of reaching a settlement was higher.

Further, earlier research argued that both management and labor generally did not favor adjudication, because it robbed them of the opportunity to obtain their own objectives through the use of force or direct action. Besides this, having a third party would decide the dispute was not acceptable (Lansing & Kuruvilla, 1987). This was so because it was believed that the adjudicator or arbitrator cannot understand and appreciate the differences of the parties as well as they themselves could (Rao, 1987). Moreover, adjudication involved considerable time, and waiting for a decision would only worsen the industrial relations situation in the organization. As a result, both parties tended to rely more on conciliation efforts (Lansing & Kuruvilla, 1987).

In these circumstances, the choice of conciliators should be mutually chosen by the parties who should conduct the process in a professional way. In this regard, Rao (1987) suggests that a tripartite body consisting of representatives of employers, unions and the government can draw up a list of names of persons who can act as conciliators in respect of an industrial dispute so that they could command the co-operation of all parties in promoting a settlement. Besides this, given that the role of the conciliator is delicate and extremely crucial, only an impartial body set up on these lines can instil confidence in the disputants. The government should examine the setting up of an "autonomous conciliation agency" to insulate the service from political pressures while creating a specialized professional service.

The effectiveness of conciliation also depends on the amount of faith the parties have in the CO's skills, integrity and involvement to reduce the gap between the union and management and settle the matter (Murty, Giri, & Rath, 1986; Sahoo & Pani, 2007). To this end, proper selection of personnel, adequate pre-job training and periodic in-service training might help in making the system of conciliation effective (Rao, 1987). The number of COs should be increased so that they could spend more time on task of conciliation. The performance of the CO has to be monitored based on targets and number of settlements. They should be provided with incentives to convince the employer or employees to settle before conciliation rather than adjudication. In addition, too many adjournments should be taken to mean

below par performance since it was an indicator of the CO's inability or drive to get the dispute settled.

Overall, the crux of the matter lies in understanding the thin line between administration and adjudication. This has made the COs risk averse. Therefore, some employer representatives argued that the COs should be given liberty within limits to decide and settle some cases and the boundaries to their authority should be well defined.

18.6 Conclusion

In India, the state dominates industrial relations machinery which is often denoted by conciliation, arbitration and adjudication. In this chapter, we have examined the process of conciliation (which in practice means mediation) and its dynamics. There has been considerable disillusionment with the system of conciliation, with fewer cases being mediated over the years. Indeed, conciliation has not been used for the purpose it was created. Nonetheless, given the importance conciliation is bequeathed with, the parties involved have used the process in the most pragmatic manner to make bilateral agreements binding and to curb the initiation or continuation of strikes.

With the decline in militant trade unionism, employers use delaying tactics to tire and ultimately force employees who raise individual disputes to settle or withdraw. Obviously, employers prefer to see the process as a waiting room before the case moves on to adjudication. At times, the CO's intervention did help, but it was solely based on the employer's expedience which was largely guided by financial interests to consider the same. Overall, employers seem to have an upper hand in the conciliation process. Given these impediments some suggested that the entire process be abandoned in favor of adjudication. Further, the blurring of lines between administration and adjudication reduces COs to postmen/postwomen and the conciliation process as an adjunct to adjudication. In addition, the workload and skills of COs and the absence of a formal link between their performance and promotion also debilitated the process.

However, others argued that conciliation is a cheap and quick process if used appropriately. Therefore, one, the parties should approach conciliation with a commitment to resolve the dispute. Two, the COs' require to curb their urge to refer disputes to conciliation. Three, the government required to increase the number of COs. Four, COs' performance was required to be linked to the number of cases settled. Five, an independent body of conciliators was required to be established for parties to choose from those who were skillful. Finally, and most importantly, the boundary between administration and adjudication should be clarified so that the conciliation process becomes more fruitful.

References

Beale, D., & Noronha, E. (2014). Indian public-sector trade unionism in an autocratic political climate: The distinctive case of Gujarat. *Capital & Class, 38*(3), 517–539.

Bhangoo, K. S. (2008). Regional pattern of industrial disputes in India: A study of re-organized Punjab (1967–2003). *Indian Journal of Industrial relations, 43*(4), 603–632.

ILO. (2014). Observation (CEACR)—adopted 2014, published 104th ILC session (2015). Retreived from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3190722,102691,India,2014 on March 7 2019

Jyoti, & Sidhu, A. S. (2003). Industrial disputes in Punjab: Emerging trends. *Indian Journal of Industrial Relations*, *39*(1), 58–83.

Kumar, P. (1966). The working of the conciliation machinery in Rajasthan. *Indian Journal of Industrial Relation, 2*(1), 34–49.

Lansing, P., & Kuruvilla, S. (1987). Industrial dispute resolution in India in theory and practice. *International and Comparative Law Review, 9*(2), 345–376.

Malhotra, O. P., & Rao, E. M. (2015).The law of industrial disputes (7th ed., Vol. 2). Gurgaon: Lexis Nexis.

Moorthy, N. K. (2005). Industrial Relations scenario in textile industry in Tamil Nadu. *Indian Journal of Industrial Relations, 40*(4), 470–481.

Murty, B. S., Giri, D. V., & Rath, B. P. (1986). Conciliation machinery in Orissa: A study. *Indian Journal of Industrial Relations, 21*(4), 428–447.

Noronha, E. (1996a). *Changing industrial relations in India* (Unpublished MPhil paper).Tata Institute of Social Science, Mumbai, India.

Noronha, E. (1996b). Liberalisation and industrial relations. *Economic and Political Weekly, 31*(8), L14–L20.

Noronha, E., & Beale, D. (2011). India, neo-liberalism and trade union responses—Unfinished business and protracted struggles. In G. Gall, R. Hurd, & A. Wilkinson (Eds.), *International handbook on labor unions: Responses to Neo-Liberalism*. Cheltenham: Edward Elgar.

Noronha, E., Chakraborty, S., & D'Cruz, P. (2018). Doing dignity work: Indian security guards' interface with precariousness. *Journal of Business Ethics*, https://doi.org/10.1007/s10551-018-3996-x.

Noronha, E., & D'Cruz, P. (2016).Creating space: The role of the state in the Indian IT-related offshoring sector. In *Space, place and global digital work* (pp. 151–168). London: Palgrave Macmillan.

Patil, B. R. (1982). Coalition and convertive bargaining in Indian industries. *Indian Journal of Industrial Relations, 18*(2), 241–262.

Ramaswamy, E. A. (1985). Trade unions, rule making and industrial relations. *Economic and Political Weekly, 20*(12), 517–524.

Rao, V. S. S. (1987). "Conciliation" under the industrial disputes act 1947: Should it necessarily remain "a fifth wheel to the coach"? *Journal of the Indian Law Institute, 29*(2), 236–247.

Sahoo, C. K., & Pani, D. (2007). Management of industrial disputes in Orissa: Emerging scenario. *Management and Labor Studies, 32*(2), 225–239.

Saini, D. S. (1991). Compulsory adjudication of industrial disputes: Juridification of industrial relations. *Indian Journal of Industrial Relations*, 1–18.

Saini, D. S. (1992). Failure of conciliation: Perceptions and realities. *Indian Journal of Industrial Relations*, 105–122.

Saini, D. S. (1999). Labour legislation and social justice: Rhetoric and reality. *Economic and political weekly*, 34(39), L32–L40.

Saini, D. S. (2014). Indian industrial relations law: Case for reform. *Indian Journal of Industrial Relations, 50*(1), 119–132.

Sapkal, R. S. (2015). *To conciliate or not to conciliate: Empirical Evidence from Labor Disputes in India*. Retrieved from http://laborlawresearch.net/sites/default/files/papers/Sapkal_adr-2%20copy.pdf.

Sharma, A. N. (2006). Flexibility, employment and labor market reforms in India. *Economic and Political Weekly*, 2078–2085.

Van Kennedy, D. (1958). The conceptual and legislative framework of labor relations in India. *ILR Review, 11*(4), 487–505.

Venugopalan, K. V. (2011). Settlement machinery in public & private enterprises in Kerala. *Indian Journal of Industrial Relations, 47*(2), 380–386.

Chapter 19
Mediation and Conciliation in Collective Labor Conflicts in South Africa

Barney Jordaan

19.1 Introduction

In South Africa, strikes resulting from failed collective bargaining processes are often protracted and regularly involve recourse by striking workers to unlawful means in pursuit of their objectives (including non-compliance with agreed or statutory strike procedures, damage to property and/or physical violence against so-called 'scabs', i.e., workers who continuing working during the strike).[1] During the latter half of 2018, for example, a strike by bus drivers in the public transport sector was accompanied by various incidents of violence against people and property. The strike also left millions of commuters stranded and caused large scale traffic chaos as well as millions in lost wages. Mediation efforts eventually resulted in a settlement.[2]

It stands to reason that the impact of industrial action of such an aggravated nature and scale goes beyond the mere wage-work bargain and in fact strikes at the very heart of the relationship between union and management. It undoubtedly also affects the relationship between strikers and their non-striking colleagues who may have been prevented from working during the strike.

[1] 'In fact, some union leaders are of the belief that violence is the only method of winning justice for the working man'. Department of Labor (2016). *Industrial Action Report*. Available at http://www.labor.gov.za/DOL/downloads/documents/annual-reports/departmental-annual-reports/2017/annualreport_2017.pdf. (Retrieved 14.02.2018) at 5.

[2] https://www.fin24.com/Economy/Labor/News/new-wage-offer-put-on-the-table-for-bus-drivers-20180506-2. (Retrieved 7 May 2018).

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In South Africa, this context has led to the development of a relatively unique process (at least from a European perspective) aimed at helping the parties to such acrimonious encounters to try to rebuild their relationship ex post facto. Unless this is attended to, the conflict potential between the parties involved will probably remain at an acute level and relations on the work floor will continue to be strained and conflictual. These Relationship-by-Objectives (RBO) interventions took hold in South Africa in the mid-1990s and were pioneered in South Africa by the now defunct Independent Mediation Services of South Africa.[3] They are built around the development by the parties of consensus-based objectives and action plans directed towards addressing relationship deficits and improving the quality of their engagement, particularly when their relationship has reached a breaking point, e.g., after a protracted or violent strike. The process, an example of which is provided further below, is independently facilitated by a team mediators.

The RBO programme has become an abiding feature of South African labor relations in certain industries.[4]

Another possibly unique feature of the South Africa collective dispute resolution landscape is the focus of late by the country's premier statutory labou dispute resolution body, the Commission for Conciliation, Mediation and Arbitration ('CCMA'), on dispute prevention processes to try to deal with the high incidence of strike action.[5] Despite these innovations, low trust and a high level of antagonism in labor relations remain a feature of the landscape.

19.2 The Low Trust Character of Labor Relations in South Africa

More than two decades after the dawn of democracy and the establishment of an entirely new and progressive labor relations framework through the Labor Relations Act, no. 66 of 1995 (the 'LRA'), adversarial bargaining—all too often accompanied by violent strike action—remains the dominant feature of labor-management relations in both private and public sector organizations in South Africa. This despite the Act's laudable aim to 'advance economic development, social justice, labor peace and the democratization of the workplace'.[6]

The state of workplace relations is partly born out by the most recent statistics from the country's premier labor dispute resolution institution, the Commission for Conciliation Mediation and Arbitration ('CCMA'). During its 2016–2017 financial year, the CCMA dealt with 188 449 dispute referrals, or 745 new referrals per working day—an increase of roughly 5% on the previous year.[7] According to the CCMA's

[3] For a brief history of IMSSA, see below and also Nupen (2013).

[4] Nupen, above, Footnote 3.

[5] See the text accompanying Footnote 21.

[6] Section 1.

[7] See CCMA Annual Report (2016–2017).

2017 Annual Report, just over 5000 of these concerned disputes arising from collective bargaining. The bulk were disputes involving complaints about individual and collective dismissals, alleged unfair discrimination and alleged unfair labor practices. This number excludes disputes that are dealt with by bargaining councils[8] or disputes that are channeled by disputants through private mediation service providers.

Further evidence of the sorry state of labor relations comes from the 2016 Industrial Action Report of the Department of Labor[9] where the following statement appears:

> The burden of industrial action remains a heavy one on South Africa's labor relations. Recent years have witnessed a few strikes of long duration as well as strikes marked by violence, intimidation of non-striking workers, damage to property and deaths. The [department's] annual Industrial Action Report shows an increase in the number of strike activity [per year] from 100 strikes in 2015 to 122 strikes in 2016 as well as an increase in the number of workdays lost from 903.921 in 2015 to 946.323 in 2016'.

According to the Report, most of the strikes were 'unprotected', i.e., did not comply with statutorily prescribed strike procedures. The number of strikes for 2016 was 4.7% more than in 2015 and resulted in 946 323 work days lost. This translates into 7.6 m work hours or 59 work days per 1000 employees. An estimated ZAR 161 million in wages was lost to secure an average increase of 8% p.a. Several factors could have contributed to the high incidence of strike action, including low levels of trust,[10] the lingering after effects of the country's apartheid history, continued economic disparities, political uncertainty and low levels of economic growth, rather than the regulatory framework itself.[11]

[8] Bargaining councils exist in both the private, municipal and public sectors. In the private sector a total of 38 such councils have been established by agreement between organized labor and employers for particular industries, e.g., road transport, motor industry and metal and engineering. For the public sector, the LRA establishes a coordinating council for the entire public sector below which several sectoral councils are established for specific sectors within the public sector. Municipalities are represented by one national council for the local government sector. The number of disputes dealt with by the various councils and private providers is not known.

[9] Available at http://www.labor.gov.za/DOL/downloads/documents/annual-reports/departmental-annual-reports/2017/annualreport_2017.pdf. (Retrieved 14.02.2018).

[10] See, e.g., 'Anglo boss calls for end to hostile labor relations'—https://www.fin24.com/Companies/Mining/Anglo-boss-calls-for-end-to-hostile-labor-relations-20150731. (Retrieved 14/02/2018) and 'Business meets Jacob Zuma on trust deficit'—https://www.businesslive.co.za/bd/national/2017-04-28-business-meets-jacob-zuma-on-trust-deficit/. (Retrieved 14/02/2018). And, further, Benjamin (2013).

[11] See Jordaan and Cillié (2016), at 153–4.

19.3 The South African Dispute Resolution System

19.3.1 The Statutory System: The Commission for Conciliation, Mediation and Arbitration

The cornerstone of the country's labor relations system is the LRA, part of a 'package' of laws regulating employment that were put in place after the country's first democratic elections in 1994. The Act provides for the creation and protection of certain fundamental employer and employee rights and also for the resolution of individual and collective disputes arising between employers, employees and trade unions (Bendix, 2010). While certain disputes *must* be heard by the Labor Court ('rights' disputes, e.g., involving alleged unfair discrimination, dismissal of strikers or large scale retrenchments) the key statutory organ responsible for dispute resolution is the Commission for Conciliation Mediation and Arbitration (CCMA).

The CCMA, whose establishment, functions and powers are governed by the LRA, has a tripartite structure. Its governing body consists of three representatives each from the State, organized labor and employers, plus an independent, non-executive chairperson. Each representative is nominated by the National Economic Development and Labor Council ('NEDLAC') and appointed by the Minister of Labor to hold office for a period of three years. The governing body appoints the Director of the CCMA, who manages and directs the activities of the CCMA, appoints, supervises the CCMA's staff and performs a number of other functions conferred by the LRA. The governing body also appoints commissioners[12] on either a full-time or a part-time basis and either as a commissioner or a senior commissioner, to perform the functions of the CCMA. Their remuneration, allowances and all terms and conditions of appointment of the commissioners are also determined by that body. The governing body furthermore determines rules of conduct for commissioners, who may be removed a from office for serious misconduct, incapacity, or a material violation of the code of conduct. The CCMA operates from 15 regional offices across the country and is headquartered in Johannesburg.[13] The CCMA is funded from by government and its services are in most cases offered free of charge.[14]

The LRA provides for two primary dispute resolution processes, i.e. conciliation and arbitration. Conciliation is an evaluative process in which the third party's role is to actively direct the parties to resolution of their dispute. He or she may also advise the parties on, e.g., their legal rights, perceived chances of success in arbitration and make non-binding proposals for settlement. In practice, CCMA commissioners typically provide a non-binding opinion about the perceived merits of each party's case in the light of legal norms to try and procure a quick settlement.

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[12] See below under 'Characteristics of the mediators and the mediation process' for more detail on the qualifications and appointment of commissioners.

[13] See Kwakwala (2010).

[14] For a history and assessment of the work of the CCMA, see Benjamin (2013).

In mediation, by contrast, the mediator at all times maintains his or her impartiality, does not express a view about the merits of a parties' case and does not assume sole responsibility for generating solutions but instead works together with the parties to assist them in finding the best solution to further their interests.[15]

The Act defines 'conciliation' very broadly to include mediation:[16]

> *The commissioner must determine a process to attempt to resolve the dispute, which may include*:
>
> (a) *mediating the dispute;*
>
> (b) *conducting a fact-finding exercise; and*
>
> (c) *making a recommendation to the parties, which may be in the form of an advisory arbitration award.*

It is therefore up to the commissioner to determine which process to follow in a particular dispute, i.e., to conciliate a dispute or mediate it in the more traditional sense of the term. As a rough rule of thumb, disputes of right—e.g., alleged unfair dismissals—where the jurisprudence is quite clear on what is permissible for an employer and what isn't—lend themselves to resolution through conciliation. Collective disputes and disputes for which no clear legal remedies exist (e.g., a complaint about promotion or some work-related grievance) are more suited for mediation.

A commissioner has the power to issue subpoenas compelling persons to appear at the proceedings or to disclose documents, and may even enter and inspect premises and seize any book, document or object that is relevant to the dispute.

The LRA does not express any preference for any particular mediation 'style'. As is evident from the definition of 'conciliation', it provides broad powers to commissioners to determine not only what process to follow but also to engage with the merits of a dispute in a highly evaluative but non-binding way.

Benjamin (2013: 46) notes that the CCMA has been playing an increasingly assertive role in conciliating mutual interest disputes:

> [T]he initial vision was for the CCMA to conciliate unresolved disputes arising from negotiations, once referred by a party to the dispute. In this regard, the original CCMA model reflected the conventional wisdom about the autonomy of collective bargaining and dispute resolution. Increasingly, however, the need to intervene at an earlier stage in key disputes that could have disruptive consequences for the labor market has been identified as a significant priority. This reflects the emergence of a more 'active' approach to conciliation, pursuant to which the CCMA offers to facilitate collective bargaining at an early stage and seeks to prevent disputes spiraling into disruption and violence. However, criteria have been developed to ensure that an appropriate balance is struck between the public interest in dispute prevention and the autonomy of collective bargaining.

Before employers or employees may participate in any form of industrial action, it is compulsory that an attempt at amicable resolution of the dispute must first be made. Here the parties to the dispute have a choice: if there is a collective agreement

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[15] For a useful summary of the differences between mediation and conciliation, see Sgubini et al. (2004).

[16] Section 135(3).

in place that provides for private mediation of the dispute before industrial action may be embarked upon, parties are bound to follow that process. Failing that, the industrial action would be unlawful and may result in legal sanctions, e.g., an injunction to stop the industrial action or claims for compensation for any damages suffered as a result of the unlawful action. If such a procedure exists, there is no need for the dispute to also be referred for conciliation by the CCMA.

However, absent an agreed dispute resolution procedure, the CCMA must first attempt to conciliate otherwise subsequent industrial action will be rendered unlawful. If parties fall under the jurisdiction of a bargaining council, the dispute must be dealt with in terms of the council's own dispute resolution procedure. While conciliation (and mediation in the case of private arrangements) is compulsory before industrial action can be embarked upon, there is no compulsion on the non-referring party to attend or actively participate in the conciliation process. In that case the commissioner will simply issue a certificate that the dispute is unresolved, leaving *either party* to the dispute free to embark on industrial action.

19.3.2 The Statutory System: Bargaining Councils

The CCMA is, however, not the only body that deals with labor disputes as the Act also provides for the establishment of so-called bargaining councils by employers and trade unions in particular sectors or industries. Bargaining councils are discussed below.

A number of bargaining councils have been established in both the private and public sectors. Once established, they provide for a limited form of 'self government' in the sectors or industries falling within their scope. Their primary functions include negotiation of collective agreements for, and the resolution of disputes arising in their sectors or industries. The latter is taken care of by commissioners (mediators and arbitrators) chosen by the employer and trade union parties to a council to serve on its dispute resolution panel for a renewable period. Bargaining council commissioners must be admitted as CCMA commissioners in order to serve on the conciliation or arbitration panels of a bargaining council: all bargaining council commissioners are therefore also CCMA commissioners, but the reverse is not true. They also have the same powers as CCMA commissioners. The key difference is that they are elected by the employer and trade union parties in the relevant industry to serve on a panel for an agreed period.

19.3.3 Private Dispute Resolution

Unless a party wants access to the arbitration services of the CCMA, or seeks access to the Labor Court to enforce certain statutory employment rights, there is no obligation on parties to a dispute to use the formal dispute resolution processes of the

CCMA to solve employment-related disputes. They may, instead, opt by agreement to use private mediation or private arbitration by an external neutral. This person may either be an independent mediator, or someone assigned by a private sector dispute resolution agency at the request of the disputing parties. Many of these private mediators also serve as CCMA commissioners or on the dispute resolution panels of bargaining councils.

Privatised dispute resolution in the employment field first developed in South Africa in the early 1980s, when Black (mainly African) workers were only beginning to be included in the protective framework of employment legislation. The statutory dispute resolution institution available at the time—the Industrial Court—lacked credibility among the emergent Black trade union movement (Bendix, 2010). The establishment of the privately sponsored and managed Independent Mediation Services of SA (IMSSA) served to fill that void by providing mediation and arbitration services at relatively modest fees. IMSSA subsequently transformed into a new organisation, Tokiso Dispute Settlement.[17]

Today, private dispute resolution continues to fill a void in individual and collective disputes yet its main disadvantage is cost: the fact that the services of the CCMA are generally free, limits the number of instances where private mediation (through external neutrals) is being used in individual disputes. Yet many collective agreements concluded both in bargaining councils and outside of them[18] provide for mediation by Tokiso or other private providers of dispute resolution services. Reasons why parties might opt for private mediation or arbitration vary. Initially there were concerns about the quality of CCMA commissioners so many parties opted for a 'better-the-devil-we-know' option and stuck with private mediators and arbitrators who were familiar to them. However, what quality concerns there may have been have addressed through the years of the organization's existence to the extent that the writer does not believe that quality is any longer a major concern. Still, private processes provide parties with choices they don't have with the CCMA or a bargaining council, even if they have to pay for that luxury. This includes freedom (by agreement) to choose the mediator or arbitrator; freedom (by agreement) to determine his/her terms of reference; and the ability to determine, again by agreement, the amount of time the parties would like to set aside for the resolution of the dispute.

[17]Before taking up an academic position in Belgium in 2014, the writer served on the mediation and arbitration panels of Tokiso and its predecessor, IMSSA.

[18]The mining industry, for example, has never been part of a bargaining council system. Instead, there is a long-standing practice in terms of which collective bargaining for the industry takes place at a centralised or industry level in terms of framework collective agreement entered directly between employers and trade unions active in the industry.

19.3.4 Initiating the CCMA Conciliation Process in Collective Disputes

Access to the conciliation services of the CCMA for any dispute is by way of application on a prescribed form. While time limits exist for referral of rights disputes, referral of collective disputes are not subject to the same constraints. However, once a dispute has been referred for conciliation, the CCMA has 30 days in which to attempt to resolve it. This period may be extended by agreement between the disputing parties.

Failing resolution of a collective dispute (referred to in the Act as a dispute over 'a matter of mutual interest') within the prescribed or agreed timeframe, either the employer or trade union (or a group of employees acting collectively if they are not unionized) may embark on industrial action. For employers this means they may implement a lockout whereas employees may embark on a range of actions, from picketing, to a work-to-rule to a full-blown strike. The exception is disputes in so-called essential services where strikes and lockouts are prohibited. In that case the unresolved dispute has to be resolved through arbitration.

During the 2016–2017 reporting period, the CCMA conciliated 5013 'mutual interest' disputes (i.e., arising from collective bargaining or industrial action) of which 3224 (64%) were settled.[19]

The LRA in Section 150 allows for the CCMA to offer, at its own initiative, its conciliation services to disputing parties if it is aware of a dispute that has not been referred to it, and if resolution of the dispute would be 'in the public interest'. The disputing parties are not compelled to accept the offer. For the reporting period 2016–2017 the CCMA successfully resolved 143 (out of 173) such disputes, giving a success rate of 83%. These interventions involved disputes in both the private and public sectors, and included both situations where strikes were in progress[20] and ones where imminent strikes were prevented as a result of the intervention.[21]

According to the director of the CCMA,[22] dispute prevention is now a strategic focus of the organization. Apart from using access to disputes via Section 150, the CCMA's more recent efforts include capacity building interventions (e.g., joint training in collaborative negotiation techniques) and piloting of a workplace mediation model in the Western Cape Fruit Sector.

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[19] CCMA Annual Report (2016–2017).

[20] See, e.g., https://www.enca.com/south-africa/petrol-strikes-continues-as-ccma-intervenes; http://www.4-traders.com/COMAIR-LIMITED-6492574/news/Comair-UASA-approaches-CCMA-for-urgent-Section-150-intervention-22190975/ and https://mg.co.za/article/2012-02-06-minister-supports-ccma-intervention-at-implats. (Retrieved 15.02.2018).

[21] CCMA Annual Report (2016–2017).

[22] Presentation to Annual SASLAW Conference, 2017—available at https://www.saslaw.org.za/index.php/conference-2017/2017-papers?download=627:8-sep-cameron-morajane-lra-dispute-resolution. (Retrieved 15.02.2018).

19.3.5 Initiating Private Mediation Processes in Collective Disputes

In a number of industries, e.g., mining, employers and trade unions have over more than three decades used private mediation preventatively (in case of deadlocks during collective bargaining and prior to industrial action) as well as reactively during instances of industrial action. Typically, their dispute resolution agreements (often included in a so-called framework or 'trade union recognition' agreement) will spell out which individuals or agencies the parties will use in the event of a dispute. Despite the existence of such an agreement, initiating the mediation process still requires the consent of all parties to the dispute, or their representatives (typically trade union officials). This consent will normally be given in a written agreement to mediate in which the following will, among others, typically appear:

1. The identity of the mediator.
2. The mediator's 'terms of reference'.[23]
3. Responsibility for the mediator's costs.[24]
4. Logistical arrangements.

In the absence of an agreed dispute resolution process as described above, in both individual and collective disputes employers and employees, or trade unions on their behalf, may by agreement with the counter party enlist the services of a practicing mediator directly, or work through an agency such as Tokiso. Organizations like Tokiso also provide joint negotiation training to employers and trade unions as well as relationship-building interventions.

From the writer's own experience, these latter initiatives are particularly useful in cases where a strike or lockout has caused substantial harm to the relationship between an employer and trade union.[25]

One of the earliest most famous examples in the South African context of a successful RBO involved Mercedes Benz (South Africa) and its majority trade union, the National Union of Metalworkers of SA ('NUMSA'). Nupen[26] recounts the story in these terms:

> The relationship between Mercedes Benz and NUMSA had been very strained and difficult for a number of years. In 1989, IMSSA became involved with the parties when it mediated a dispute over the termination of the employment of certain union members who were found to have participated in acts of misconduct during a demonstration in the plant. The dispute was settled through mediation and in terms of the settlement agreement the parties committed

[23] I.e., what the dispute is about and what powers the mediator has.

[24] Typically shared equally.

[25] For a personal account of his involvement in relationship-building processes and in mediation generally, see the reflections of Charles Nupen, one of South Africa's foremost and most experienced mediators: http://www.accord.org.za/ajcr-issues/%EF%BF%BCmediation-and-conflict-resolution-in-south-and-southern-africa/. (Retrieved 15.02.2018).

[26] Above, Footnote 25 at 90–93.

themselves to a Relationship by Objectives (RBO) exercise to set their relationship on a new footing.

A team of five IMSSA mediators ran the process.

At an initial site visit at a Mercedes Benz plant they found workers with wooden AK47s on their backs. At lunch time there were mock bayonet charges on effigies of management. White supervisors were carrying real weapons and the atmosphere on the shop floor was one of deep antagonism and hostility. This was the late eighties, and the political climate was still highly oppressive.

The RBO took place at a neutral country hotel venue, over four days. The company was represented by its chairman, numerous board members and 40 other managers from various levels in the company. The union was represented by two senior full-time union officials and 30 shop stewards from various plants around the country.

The team of mediators constructed a mini-parliament and the parties engaged each other on a range of matters of concern to them including compliance with the recognition agreement, racial discrimination, political issues, the development of a sound basis for future negotiations between the parties, selection, training and development of employees, the quality and nature of supervision, social responsibility of the company, consultation and participation by employees in decision-making within the company, timekeeping, job security, carrying of weapons in plant, and the management of political demonstrations in plant.

The mediators guided the debate along constructive lines and the parties were given a full opportunity to voice their opinions and were encouraged to set objectives to overcome the problems in their relationship. Consensus was reached on a series of 30 objectives to do this, and action plans were developed to give effect to the objectives. Responsibility was assigned to specific individuals and groups within each party to execute the action plans. Time limits were placed on this process.

In the course of the process, a change in attitude was perceptible on the part of individuals within each party towards one another and an atmosphere developed that was far more conducive to sound industrial relations. Workers and management spoke to each other in a way that was cathartic and moving, both sides speaking of the humiliation they had suffered at the hands of the other, and showing the hurt this had caused them. Mtutuzeli Tom, one of the union representatives who was to become President of NUMSA, said: 'It was the first time in our lives as a labor movement to sit and open our hearts to management and management to labor. IMSSA made it possible for the real issues to be looked at and we are still feeling the positive effects.' Ian Russell of Mercedes Benz agreed with this positive assessment: 'The IMSSA third party intervention at Mercedes Benz in … was a watershed in the Company's Industrial Relations history. Despite a history of emotionally explosive and uncontrollable industrial relations which had paralyzed the manufacturing plant for years, the parties were able to craft their own ground breaking constitution … the boundaries of the practices institutionalizing the relationship have been severely tested since then on many occasions but it has been the commitment to the structures from both sides coupled with the spirit of the RBO process that has enabled Mercedes Benz to enter the "new South Africa" with confidence and commitment to a long-term future in this magnificent country.'

The RBO program has become an abiding feature of our labor relations system with literally hundreds of interventions having taken place in the 24 years since the seminal experience at Mercedes-Benz.

19.4 The Use of Hybrid Processes

The LRA specifically allows for the use of hybrid conciliation and arbitration processes in so-called disputes of right, which includes the option of an arb-med process. The Act states in Section 138(3) that, provided all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation. In the case of 'mutual interest' disputes, the CCMA has no power to arbitrate—a commissioner may, at most, issue a non-binding 'advisory' award. Hybrid processes are generally used in so-called disputes of right involving, e.g., alleged unfair dismissal.

There are no limits to the ability of mediators acting in a private capacity to use hybrid processes in either rights or 'mutual interest' disputes, apart from the limitations provided for in the mediator's terms of reference or the collective agreement governing private mediation. Parties are thus free to include an option for mediators to make advisory awards or even make binding rulings on specific aspects when requested to do so by the parties. The author has personal experience of applying an arb-med process in wage disputes. The process works as follows:

> During the first (arbitration) phase, the parties present documentary and verbal evidence giving a background to the dispute, the motivations for their respective demands, as well as what they regard as a 'fair' wage. Sometimes experts are called to testify about this aspect. The matter is then adjourned for the arbitrator to consider the evidence and make a ruling. This is *not* disclosed to the parties. On the day the proceedings resume, the arbitrator 'swops hats' and assumes the mantel of a mediator and attempts to assist the parties to arrive at a settlement. Failing settlement, the award is disclosed.

Typically, in such cases, because the parties are unaware of the arbitration ruling, they will be under some pressure to compromise on their demands during the mediation to avoid the win-lose result that disclosure of the award would entail (Drummond, 2006).

19.5 Characteristics of the Mediators and the Mediation Process

19.5.1 Appointment of Mediators

CCMA commissioners are appointed on a full-time or part-time basis. Many of those employed part-time also practice as lawyers, independent HRM practitioners, labor relations consultants or ex-trade union officials. Some also serve on the panels of bargaining councils. Commissioners of the CCMA and bargaining councils undergo extensive compulsory training in employment law as well as mediation and arbi-

tration skills. Before admission as commissioner, they are also required to take a number of examinations.[27]

Commissioners may be disqualified on one of the following grounds: serious misconduct; incapacity (for reasons of health or performance); or a material violation of the Commission's code of conduct.[28]

Generally, parties are not able to choose their commissioner except in the case of disputes of mutual interest disputes in essential services.[29] As a quid pro quo for not being permitted to strike or lock out, disputing parties in such a service are permitted by Section 135(6)) of the LRA to agree to the appointment of a specific commissioner to attempt to resolve the dispute through conciliation and determine by agreement the commissioner's terms of reference. Failure to do so within the prescribed time frame will result in the CCMA making the appointment and determining terms of reference.

As a rule, only senior commissioners are used to mediate disputes of 'mutual interest'.

There are no prescribed requirements to act as a mediator in private practice, although a number of organisations provide training and certification for persons interested in acting as mediators. Generally speaking, however, access to the panels of providers like Tokiso is subject to some quality control (training and experience) to ensure that those serving on a panel are suitably qualified in terms of training and experience to act as mediators. There are no binding national standards that individuals must comply with to qualify and act as mediators.

The norm in private mediations is that disputing parties choose their mediator by agreement. Sometimes collective agreements provide for a default option if the parties to a dispute are not able to agree on the identity of the mediator by deferring to the private agency to appoint a suitable mediator.

In some industries, for instance the mining sector, a panel of mediators is agreed on by trade unions and employers from whose midst mediators are chosen on the basis of their availability.

19.5.2 Registration and Certification of Mediators

As stated earlier, commissioners of the CCMA must undergo a training program and pass a number of examinations before they can be appointed as such. According to information available on its website, the CCMA will not admit someone as a commissioner unless that person has, in addition and amongst others at least four

[27] See https://www.ccma.org.za/portals/0/downloads/Commissioner%20Appointment%20and%20Recruitment%20Process.pdf. (Retrieved 15.02.2018).

[28] Section 117.

[29] This is defined in Section 213 as 'a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population' or involves the parliamentary service or the South African Police Services.

years' experience in labor relations, labor law or in mediation-related processes (such as conciliation and facilitation); a relevant tertiary qualification: analytical and problem solving skills and good knowledge of the labor market. The person must also possess sound ethics.

For admissions to their 'employment' panel Tokiso, requires a minimum of a recognized mediation or arbitration training course (depending on which panel the applicant would like to serve); some experience in ADR; computer literacy and a good reputation. Applicants must also be independent in their profession or position (i.e., not linked to a particular employer or trade union, for example) and must meet vetting process for criminal and credit checks.[30]

A private sector initiative, the Dispute Settlement Accreditation Council ('DiSAC'),[31] was established in 2012 to promote voluntary (opt-in) quality standards and certification of mediators and arbitrators in commercial, employment and family matters.

19.5.3 Conducting the Process

Conciliation and arbitration processes are always conducted in the presence of the parties to the dispute and normally conducted by a single commissioner, although the CCMA has allocated teams of mediators in some instances given the complexity of a dispute. Formal intake sessions are not the norm in either the CCMA or in mediations conducted via private agencies. Other than the usual norms of party self-determination, voluntariness and confidentiality, there are no prescriptions in terms of how the mediation process should be conducted in either the CCMA or in private proceedings. In practice, however, outside of mediations in family disputes where joint session are mostly used, mediators tend to use a mixture of joint and side sessions. The writer has also been involved—in both private and CCMA processes—in mediations where the entire process was conducted and concluded in a joint session and others where, because of the level of animosity between the parties, the entire process was conducted in side session until the end when the parties were brought together if and when a settlement agreement had to be concluded.

Settlement agreements are, as a rule, reduced to writing and signed by the parties, where after they become enforceable as contracts. Private mediation agreements can be enforced through the civil courts, whereas arbitration by the CCMA is the prescribed process to resolve disputes about the interpretation or breach of a collective agreement.[32]

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[30] Information supplied by Tanya Venter, CEO of Tokiso in email correspondence dated 18/02/2018.

[31] http://disac.co.za. (Retrieved 15.02.2018).

[32] If entered into between an employer and registered trade union, the settlement agreement acquires the status of a collective agreement under the LRA.

19.5.4 Process in the Event of Deadlock

If conciliation by the CCMA fails, either party to a mutual interest dispute may give written notice to the other and embark on industrial action after 48 h have expired from the date and time of the notice. The same applies to unresolved disputes that have been submitted to private mediation. In essential services, however, industrial action is not permitted but either party may refer their dispute to compulsory arbitration by the CCMA.

19.6 Effectiveness of the System

19.6.1 The CCMA Conciliation Process

The CCMA has maintained a fairly respectable settlement rate of 64% in mutual interest conciliations.[33] In a report to the ILO on the effectiveness of the CCMA, the author Paul Benjamin (2013: 46) quotes an earlier report of the OECD[34]:

> As one of the great post-apartheid institutions set up in the early phase of building a national system of regulated flexibility, the commission acts as a social safety valve, dealing with numerous individual disputes between employers and employees as well as 'interest' cases, and acting as a conciliator and eventually arbitrator between employer bodies and unions. Despite its budgetary limitations, it has played a very positive role in limiting social tensions and in creating and preserving a deliberative labor policy. It now performs functions that go well beyond the terms of reference one would expect from its name.

Benjamin's own assessment of the institution's effectiveness in collective disputes reads as follows (2013: 46):

> The CCMA plays a diverse range of roles in the South African labor market and has repeatedly reshaped its capacities in response to changing labor market realities. Its credibility and legitimacy as an institution charged with dispute prevention and dispute resolution have enabled the CCMA to respond to the fallout of high levels of inequality and unemployment by playing an increasingly active role in facilitating consensus-seeking processes, both in the collective bargaining arena and in situations where there are potential job losses. In part, this flows from the active tripartite participation of the social partners in its governance. This has enabled the CCMA to offer its services to parties to facilitate complex negotiations and increasingly improve the calibre of collective bargaining. Its development of an integrated job saving strategy has resulted in the CCMA playing an innovative role in coordinating the responses of a wide range of public institutions with the capacity to assist to enterprises in distress and their employers. These initiatives point to the further contribution it will make in the years to come.

As far as the author is aware, there is no public data available about the level of satisfaction of users with the services of the CCMA. The same appears to be true of private agencies such as Tokiso.

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[33] CCMA Annual Report (2016–2017).

[34] Leibbrandt (2010).

19.7 Overall Assessment

Mediation in labor disputes—in both its private and statutory forms—has a relatively long history in South Africa and is firmly embedded in the employment context. Some of those involved as mediators early on in IMSSA, the predecessor to Tokiso, have also made their mark in the development of the country's constitutional democracy.[35]

Despite the excellent work done by private mediators and organizations like IMSSA, Tokiso and the CCMA, however, the South African labor environment remains volatile. As the Marikana tragedy showed,[36] strikes can quickly turn violent and even deadly. In this environment characterized by low trust, hostility and adversarialism, the need for early dispute resolution ('EDR') systems and processes is acute. While the CCMA has made early intervention one of its strategic priorities, there is little evidence of EDR being promoted by the relevant stakeholders, including private mediation providers, on a larger scale.

This is a key challenge for trade unions, employers, service providers and mediators. While fostering sound labor relations is, ultimately, the responsibility of trade unions and employers, mediators are ideally placed to assist parties not only in resolving their current dispute, but also help them deal with the underlying conflict that might have caused the dispute in the first place. One way of doing this, is to help the parties craft agreements that would promote early intervention when the next dispute is threatening to erupt.[37]

References

Bendix, S. (2010). *Industrial relations in South Africa* (5th ed.). Cape Town: Juta.

Benjamin, P. (2013). Assessing South Africa's Commission for Conciliation, Mediation and Arbitration. Available at http://www.ilo.org/legacy/english/inwork/cb-policy-guide/southafricaccmaassessment.pdf. (Retrieved 16.02.2018).

CCMA Annual Report. (2016–2017). (available at https://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports. Retrieved 14/02/2018).

Department of Labor Annual Report. (2016) (available at http://www.labor.gov.za/DOL/downloads/documents/annual-reports/departmental-annual-reports/2017/annualreport_2017.pdf. Retrieved 14.02.2018.

Drummond, R. (2006). A case for arb-med: Why consider it and how to draft an arb-med clause. Available at SSRN: https://ssrn.com/abstract=951194; http://dx.doi.org/10.2139/ssrn.951194. (Retrieved 14.02.2018).

[35] See Nupen, above n14 and also Van der Merwe, H.W. (Publication date unknown). 'Facilitation and mediation in South Africa: Three case studies', available at http://www.gmu.edu/programs/icar/pcs/vander~1.htm. (Retrieved 23/02/2018).

[36] See Elgoibar et al. (2016).

[37] For some thoughts on the roles mediators can play prior to, during and beyond the mediation process, see Jordaan and Cillié (2016). 'A multi-faceted role for mediators in civil and commercial disputes: implications for practice and mediator training'. Unpublished paper presented at the 6th International Biennial on Negotiation. Paris, 16–18 November 2016. Copies available from the author on request: barney.jordaan@vlerick.com.

Elgoibar, P., Munduate, L., & Euwema, M. (2016). *Building Trust and Constructive Conflict Management in Organizations.* Springer International Publishing.

Jordaan, B. & Cillié, G. (2016). Building a collaborative workplace culture: A South African Perspective. In Elgoibar et al. *Building trust and constructive conflict management in organizations*. Switzerland: Springer International Publishing.

Kwakwala, B. O. K. (2010). A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA). Available at https://scholar.sun.ac.za/bitstream/handle/10019.1/4241/kwakwala_critical_2010.pdf;sequence=1. (Retrieved 7 May 2018).

Leibbrandt, M., et al. (2010). 'Trends in South African income distribution and poverty since the fall of apartheid'. OECD Working Paper. Available via http://www.oecd-ilibrary.org/social-issues-migration-health/trends-in-south-african-income-distribution-and-poverty-since-the-fall-of-apartheid_5kmms0t7p1ms-en. (Retrieved 23/02/2018).

Morajane, C. S. (2017). Presentation to Annual SASLAW Conference, available at https://www.saslaw.org.za/index.php/conference-2017/2017-papers?download=627:8-sep-cameron-morajane-lra-dispute-resolution. (Retrieved 15.02.2018).

Nupen, C. (2013). Mediation and conflict resolution in South and Southern Africa—available at http://www.accord.org.za/ajcr-issues/%EF%BF%BCmediation-and-conflict-resolution-in-south-and-southern-africa/. (Retrieved 15.02.2018).

Van der Merwe, H. W. (Publication date unknown). Facilitation and mediation in South Africa: Three case studies. Available at http://www.gmu.edu/programs/icar/pcs/vander~1.htm. (Retrieved 23/02/2018).

Sgubini et al. (2004). Mediation and conciliation: Differences and similarities from an international and Italian business perspective. Available at https://www.mediate.com/articles/sgubinia2.cfm. (Retrieved 7 May 2018).

Chapter 20
Mediation and Conciliation in Collective Labor Conflicts in the USA

Arnold M. Zack and Thomas A. Kochan

20.1 Introduction

Mediation is widely used to help resolve collective disputes in the United States.[1] In many instances it is required by statute, but it is relied upon even when not mandated. Mediation takes on a crucial role in the absence of any governmental facility imposing wages, hours or working conditions on unionized employees. When comparing the place of mediation in United States with its use in other nations one must recognize that federal legislation applies to those in federal employment as well as those employed by private sector enterprises engaged in interstate commerce, while each of the fifty states have jurisdiction over those in state and municipal employment within their jurisdictions and those in enterprises NOT engaged in interstate commerce. That understanding is important when evaluating the overall role of mediation in collective dispute resolution in the United States where in 2017, 6.4% of the private sector and 34.4% of the public sector was unionized.[2] Thus, collective dispute resolution in the private sector is largely guided by the laws and role of the federal government, while within states such issues are handled by the widely varying laws and roles of the respective states, with differing authorization of collective bargaining, and the use of mediation.

[1] For more background on mediation see: John T. Dunlop and Arnold M. Zack, *Mediation and Arbitration of Employment Disputes*. Jossey-Bass Publishers, 1997, Zack (1985).

[2] The Bureau of Labor Statistics in January 2018 reported a new low in union membership for 2017 of 10.7%. cpsinfo@bls.gov, www.bls.gov/cps. 1 Although about a quarter of federal government employees are unionized, wages and hours are largely determined by Congressional statute and are thus not subject to negotiation or mediation. www.bls.gov/news.release/union2.nr0.htm.

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Mediation is a voluntary tool often used for resolving disputes even if not statutorily mandated as a required step toward settlement (Dunlop and Zack, 1997). In addition, if mediation initially fails, it is often returned to again later in negotiations, formally or informally perhaps even to help end a strike. In the United States the federal and state governments employ full time career mediators on a salaried basis. Private mediators selected by the parties charge for their services on an hourly or daily basis and usually combine that role with work as labor management arbitrators, academics or on occasion as lawyers or members of the clergy.

20.2 Characteristics of the System

20.2.1 Statutory Authority

In the interstate private sector, the parties are required by the National Labor Management Relations Act (LMRA) of 1947 to notify the Federal Mediation and Conciliation Service (FMCS) an independent Federal agency, when they commence bargaining over new or renewed collective bargaining agreements.

Although disputing parties have the option of finding and employing their own private mediators, most interest mediation in the US is provided by the FMCS which has a roster of approximately 240 mediators stationed in 10 District Offices and more than 60 Field Offices throughout the United States. In 2016 the FMCS monitored approximately 11,734 negotiations and actually mediated 3540 cases of collective bargaining contract negotiations (10,678 in the private sector, 1056 in the public sector), with a settlement rate of 85.5% (up from 84% in 2012 and 2013). State provided and party initiated mediation is not as pervasive, but presumably has the same settlement rate. Privately initiated mediation may have an even higher rate of settlement inasmuch as the disputants pay for their mediator, and may have a higher expectation of settlement. In addition to its primary function of mediating labor management collective bargaining disputes, the FMCS also provides mediators for rights or grievance disputes. In 2016, it mediated 1670 grievance mediation cases securing agreement in 1264 cases, a 76% success rate.

Aside from mediation, the FMCS maintains a roster of 5400 private rights arbitrators and pursuant to 12,000 joint requests from management and unions in 2016 appointed single arbitrators in 5400 grievance arbitrations.

The FMCS also ran 1941 training programs for labor and management teams in firms on negotiations and problem solving methods in 2016.

20.2.1.1 The Process

The FMCS assigns a mediator from its roster of full time mediators, to monitor contract negotiations and, if requested by both parties, to provide mediation services to

help narrow the differences between them on procedural as well as substantive issues. These mediators continue to be available to the parties throughout their relationship, and may, if requested, also mediate individual rights disputes often as a component of the negotiation of the parties' collective bargaining contract. As mentioned, in 2016 the FMCS mediated 3540 disputes.[3] The FMCS may also be asked to provide training, to facilitate labor management committees dealing with particular workplace issues and to mediate individual employee grievances. In recent years, the FMCS has also undertaken assistance to parties in using "interest based" negotiations techniques that will be discussed below. Most states have comparable agencies to serve enterprises that do not meet the federal standard of interstate commerce and to help resolve disputes with unions of state and local government employees. For those states without such facilities, arrangements are often made for FMCS mediators to provide help to disputants.

Another statute, The Railway Labor Act (RLA) was enacted in 1926 to provide dispute resolution services for railways and the thirteen unions representing their employees. Through subsequent amendments that jurisdiction now serves parties in the airline industry. The 1934 amendments to the RLA created a government agency, the National Mediation Board (NMB), which provides mediation services for the transportation industry equivalent to those provided to the rest of the private sector by the FMCS. In addition, when the President of the United States declares that a potential strike of railway or airline employees threatens the national health and/or safety, he appoints a Presidential Emergency Board of 3–7 neutrals who enter the dispute after strenuous and often prolonged staff mediation, triggering a mandatory 30 day "cooling off period" during which it conducts hearings and may further mediate before issuing recommendations to the parties for the resolution of their impasse. There have been approximately 220 such Emergency Boards created since 1934. The Boards meet with the parties and write a report with recommendations for settlement that then may be submitted to the U.S. Congress. Normally, the parties resolve their dispute by using the recommendations as a basis for further negotiations, sometimes with further mediation assistance with either a federal mediator or one of the neutrals who served on the Emergency Board.

To handle disputes involving the federal government and its own employees, The Civil Service Reform Act was passed in 1978, establishing the Federal Labor Relations Authority (FLRA) to provide two million federal employees with rights comparable to those provided to the private sector in 1935 by the National Labor Relations Act. The Authority provides assistance to federal agencies in developing dispute resolution services including mediation, and through the office of the Federal Service Impasse Panel may seek the assistance of FMCS mediators to help resolve collective bargaining disputes between federal agencies and the unions of their employees.

[3] https://www.fmcs.gov/wp-content/uploads/2017/01/AnnualReport2017Jan13.pdf; 2435 of those cases were in the private sector, 508 involved state and municipal governments, 318 were in the federal sector.

20.2.1.2 Non-statutory Use of Mediation

Mediation is widely recognized as the most effective device for achieving resolution of collective disputes when the parties fail to achieve agreement in their direct negotiations. Thus, in states where there may be no dispute resolution agency, or where the state's provision of a mediator might be unacceptable, it is not uncommon for the disputants to invoke mediation by non-government, not full time, neutrals. At the outset of public sector collective bargaining in the 1960s, many unions in the public sector, wary of using mediators on the payrolls of their government employers, turned to private arbitrators or others with labor management experience to mediate their contract negotiations. In addition to such ad hoc mediation roles, these private sector neutrals were routinely enlisted to serve as fact finders, in the next statutory step following unsuccessful mediation. Their fact finding reports were envisioned as texts that both summarized the issues and provided recommendations that would hopefully help the parties move toward resolution of their disputes. Although on its face fact finding suggests a formal hearing and issuance of recommendations for settlement based thereon, the expectation that such recommendations would result in their acceptance by the disputants necessitates the crafting of recommendations having the highest prospect of acceptance. This dynamic in turn, focuses the role of the fact finder on determining which elements of a package most likely acceptable to end the dispute. The fact finder usually resorts to mediation as the most effective means of eliciting such information from the parties that would best enable the crafting of acceptable recommendations, all without wearing the formal title of mediator.

20.3 Characteristics of the Mediators and Traditional Mediation

Although the term mediator would suggest a neutral who meets with disputants to bring them to an agreed upon resolution of their conflict, such a dictionary use of the term minimizes the unique demands placed on such an individual to be effective in communicating and persuading opponents that compromise of often fiercely held positions should be reevaluated focusing on settlement as their preferred course of action. The labor-management mediator not only seeks to reduce the difference between the parties by nudging them closer together, an effort that on its face might require little substantive expertise. The mediator more importantly routinely offers suggestions for recasting the issues, offering new or revised approaches to lessening the differences. That requires a level of substantive expertise that usually requires years of experience dealing with those same issues. To best capture that experience the state and federal agencies have largely drawn their mediators from the ranks of advocates with years or even decades of negotiating experience. While those recruited into the ranks of full time mediators have usually had experience on only one side representing solely unions or management, their continued relationship with their

counterparts on the other side has given them experience on the issues shared with their adversaries. In addition to those with extensive experience as advocates, the agencies are increasingly hiring younger candidates with academic backgrounds, pairing them with the former advocates to bring newer cadres up to an experience level where they can mediate such disputes on their own. This approach has been helpful in building a contemporary roster of professional mediators that is becoming more diverse as to gender, race, and age.

As noted above, in addition to full time government employed mediators, such work is also performed in ad hoc fashion for disputants or government agencies which call upon labor management neutrals to mediate their disputes. The frequency of their use is restricted by the fact that unlike government employed mediators whose services are provided free of charge to the parties private mediators routinely charge the parties or a designating government agency for their time.

The most successful labor management mediators also need abundant "people skills". Mediators are often characterized as being patient, sensitive, tolerant, innovative, analytical, impartial and even humble with a good sense of humor. Such attributes are not universally found in all mediators, but it is clear that those who are most effective, considering they may be dispatched by either side if deemed persona non-grata, are those whom the opposing parties consider informed and personable, nonpartisan and innovative as they seek to push the parties ever closer together.[4] There is no formal training, certification or registration of mediators; anyone jointly acceptable to disputants to bring them to settlement can embrace that title. The efforts of all engaged in the mediation are universally considered private and confidential.

20.4 Description of the Process

There is no prescribed formula for mediators to follow in doing their work. Each case is usually handled by a single mediator, unless training another. If unacceptable he or she may be replaced. Given the requirement of continual tolerance by the disputing parties, the mediator must build up confidence in his or her skill and impartiality while developing knowledge of the parties' dispute and providing prescriptions for joint resolution. We describe below, first, the process as it has traditionally functioned. Thereafter we describe "interest based bargaining" (IBB), a newer and increasingly popular innovation.

[4]For a study of the determinants of mediation effectiveness, including measures of mediator characteristics, see Kochan and Jick (1978).

20.4.1 Mediation of Traditional Positional Negotiations

20.4.1.1 Initial Joint Session

In typical negotiations the mediator enters the negotiations after the parties have already formulated their lists of demands or issues to be considered and have presumably deadlocked in direct negotiations (Walton and McKersie, 1965). Moreover, even if the parties may know their mediator, it is quite likely that at least some of the negotiating team members are new to the process and to the mediator. Thus, the mediator must initially explain the process, the mediator's role and expectation of the parties, providing assurance that each team will retain the right to determine the final terms of any agreement. Such opening sessions also provide an opportunity for the mediator to get to know the teams and particularly their spokespersons. (Union negotiating teams normally consist a small number of union members who serve on a negotiating committee along with a lawyer or union officer who serves as the spokesperson; employers are normally represented by a lawyer or staff labor relations professional and several other managers from the organization). This is the point at which the mediator would set forth expectations for the process, that the proceedings be private between the two teams with the press excluded, that each team have a single spokesperson (who could delegate to other team members as desired) and that the participants pledge to refrain from talking to outsiders about what is transpiring (with the mediator sometimes reserving the right to make occasional statements to the press).

To avoid any charges of favoritism by initially talking to the "other" side, mediators usually commence their role in a joint session to meet the teams, to diffuse any suspicions of bias and to begin building trust of both sides. If the mediator feels sufficiently comfortable in her or his initial role, he or she may ask each side to identify the issues in dispute. Often such presentation with opponents in the same room may become volatile, a timely excuse for the mediator to separate the parties and begin meeting with one side at a time. If the initial joint session is not stormy, it informs as to what is in conflict, and indeed, with sufficient back and forth will help the mediator gain a sense of the parties' priorities among the issues, and within the teams. Sometimes, if lucky, that session might even last long enough to enable the disputants, feeling sufficiently comfortable, to provide some indication of how they might adjust their positions to narrow the dispute. At the end of such joint session, whether volatile or peaceful, the mediator will usually meet with each team for a more candid assessment of positions. Even the selection of which team to meet separately with first may trigger protest from the parties, so the mediator may explain his or her choice is dictated by choosing the moving party, the party seeking change in the status quo or the party with the more suitable venue for meeting, or by just saying that the initial party meeting will be with the team using the room in which they are then meeting.

20.4.1.2 Caucus with One Team

In meeting each side, the mediator has the opportunity of inquiring as to the perceived priorities of proposals on both sides, and with critical questions probe the seriousness of the proposals of the two teams. The goal of the mediator is always trying to cast doubts as to the convictions of the proponents of a proposal, to point out the risks of a team continuing to adhere to a position, and to propose innovative alternatives to encourage the team to move to alternative positions that might be more acceptable to the other side. Such single team meetings enable the mediator to assess the team dynamic and assess whether the official spokesperson is indeed the person with the power to alter positions. Often the spokesperson is NOT that person, with someone else vetoing proposals that come up in the session or proposing new positions, even instructing the spokesperson as to how to represent the team. The mediator has to be careful to respect both but identifying the real possessor of power enables the mediator to accommodate to the real leaders' initiatives. Not to be confused with the power center is the spoiler or naysayer, who may be even more outspoken, but whom the mediator must evaluate in terms of the receptivity of the rest of the team to his or her interventions to avoid being misled as to the true thinking of the team. Such individual may be championing a specific issue and presence in the team caucus enables the mediator to assess whether the championed issue is just personal and suitable to being shelved or ignored, or something that rest of the crew seriously considers. Determining the answer to that question will enable the mediator to nudge the team's position along lines that give appropriate weight to that person's idea, constituency, respect and role in the team, and impact on any final team position.

After the initial joint meeting, and sessions with separate teams, the mediator will have a sense of how to proceed. If the separate team meetings have moved the process forward with recast positions, if there are procedural questions or factual questions from both sides, the mediator might reconvene a joint session to allow the spokespersons to make revised presentations or use the session to ask questions on issues if confused or uninformed. More likely, if the separate meetings raise questions for clarification, the mediator will more likely seek answers by moving directly to the other team for a quick answer.

The mediator may find it most convenient going back and forth between the teams, asking questions, carrying proposals, and proposing adjustments of positions. Such shuttle mediation may be more efficient, but the mediator has to be careful not to spend too much time with either team for fear of conveying the impression that he is more comfortable with one team than the other. Coming into the room of the seemingly neglected team, the mediator might make some comment about how difficult that last meeting with the other team had been, how long it had taken, or how difficult it had been to get them to move.

Caucus with spokespersons

After the teams have had some exposure to the mediator and hopefully begun to have a sense of confidence in the mediator's role in the developing process, the mediator might pull the spokespersons away from their teams to enlist them in his

strategy for bringing the parties together. Asking their advice on how to proceed or eliciting their view on their positions, tends to enhance the spokes persons sense that the mediator values their role. Mediators always face the dilemma as to whether to deal first with the big "strike" issues like wages or the small issues such as parking space allocation, personal leave, etc. If the big issue such as wages is first resolved it usually brings a sense of relief, and satisfaction, hopefully making it easier to dispose of the other "non-strike" issues. Other mediators feel that reaching agreement on the small "non-strike" issues develops a sense of accomplishment and initiates a sense of momentum that may lead to fruitful consideration of major issues. The caucuses with spokespersons is a valuable tool for the mediator, not only in developing the agenda, but perhaps more importantly as a tool for assessment of progress, for floating new ideas, or for privately resolving the inevitable tensions that arise when a team member says something inappropriate or leaks a position, or when the mediator has erred in transmitting a message. Such conferences are often the most efficient and most productive way to proceed. To be fruitful such sessions require that the spokespersons have the confidence of their teams that their independence is trusted, respected and credible, that the teams recognize that their agenda is in safe hands and that their spokesperson may make proposals and counter offers that while departing from that agenda would be helpful in narrowing differences. For example when confronting the inevitable "boulder in the road" an insistence by one side that it will not discuss any other items until their boulder issue is resolved, it is often crucial to the mediator to be able to assess the priorities of the team leaders, and to hear their candid prescription for being able to move forward. Assuming both spokespersons share the goal of settlement, such candid hallway discussions may be the key to restoring movement in the process.

Such hallway sessions provide a safe format for putting forth "supposals", not formal proposals but feelers to gauge what would be the response if a formal proposal were made on a topic at issue. In some very secure relationships where the mediator has long experience with the spokespersons, it is not unknown for them to meet with the mediator even before the commencement of the formal mediation to jointly develop a scenario which all three will follow in the mediation itself, not only for some mutually identified issues the spokesmen anticipate are readily solvable, but to lay out the parameters of the bigger issues creating an atmosphere making them more likely of expedited resolution. After such a caucus, it is usual for the spokespersons to return to their teams to report on what transpired in the caucus and then, apart from the mediator adjust their formal positions for transmission to the mediator, or across the table in a joint session.

Sometimes when an issue is very complicated, or if there is need for specialized information, the mediator may create a joint committee with team members experienced in that subject, to try to achieve agreement on data, on figures such as the components of budget item, or the projected cost of the proposals from both sides, or the consequences of a change in contract language impacting on disputed numbers of employees, on timing, etc. Through the combined format the mediation continues, perhaps over many days until the issues are resolved by agreement on the disposition of all initial issues, or until there is joint recognition that settlement is beyond reach.

One of the uncomfortable tasks of the mediator is to assure the teams stay at the bargaining table, and do not invoke premature termination of the mediation. Often sessions run late into the night, taxing all involved. It is usually up to the mediator to cajole the teams to keep at it, promising perhaps early resolution, but always stressing that this is their best chance of getting resolution, and that a premature break in the proceedings at this time, will only encourage back sliding, and external pressure, making it impossible to get back in the future to the better spot in which they currently find themselves, uncomfortable and tiring though it may be.

20.4.2 Reconvening Joint Sessions

The mediator must be sensitive to the perceptions of both teams at all times, to make sure they feel involved in the process, and that they have had the opportunity to contribute their ideas. This is particularly true if the mediator spends what the team participants claim is too much time meeting privately with the spokespersons, or even while meeting with the other team. A report back from the spokesperson to his or her team that all is going well, may not overcome their feelings of neglect. Accordingly, the perceptive mediator will try to head off such concerns by calling occasional joint sessions if only to assure the members of both teams that they are involved. Reconvening to report on the status of the negotiations, or perhaps even to apologize for a mediator's misstep in misreporting a message, helps to improve that sense of participation. Many mediators, focusing on the issues from an outsider's perspective tend to forget that the members of the two teams, while adversaries in this drama, are really daily workmates, probably uncomfortable at being thrust into their adversarial role. Bringing the two teams together provides them the opportunity to reconnect with their workmates even though in opposing teams. Arranging for joint sessions for coffee breaks or catered/takeout meals tends to reduce inter-team tensions, reinforce or preserve personal relationships and encourage the view that the dispute is a shared problem that all need to help resolve. Additionally, a joint session is often called by the mediator when there is a breakdown or failure of movement, when the mediator needs to impress upon the members of both teams the imperative of adjusting positions for the process to move forward. While mediators often invoke the "chamber of horrors" prospect to each side to induce them to revise their deadlocked positions, that technique is also helpful when addressed to the convened both sides to alarm them to the prospects of failure of the mediation, the adverse results that both teams might confront if their dispute is not resolved. Hopefully that dismal forecast will be enough to redirect the team efforts, or at least encourage one or more members of the two teams to advise their spokesperson of the imperative to adjust their demands in order to get the mediation back on track.

The mediation continues with individual team and joint sessions, as well as caucuses until the "final" session. That meeting will announce the success or failure of the mediation.

If successful, the parties will convene with the list of issues they had raised discussed, resolved and then jointly noted as "tentatively agreed to" (TAs). It is then left to a scrivener, from either party or perhaps the mediator, to write up a final document reflecting all those TAs for signature. The document may be written out in full, but more likely, since most settlements are revisions to terms in the parties existing collective bargaining agreement, it will be left to the principals themselves to prepare the final agreement integrating the agreed upon alterations. Usually, for an agreement to become legally binding requires ratification by the union membership, and perhaps if it a public sector employer, by a state or local legislature. In such cases, the parties, usually pleased with or relieved by, having reached their agreement, recognize that they may be forced back to the negotiating table, and perhaps even to a continuation of the mediation, if their agreement is rejected in that process.

If the final meeting is to announce the collapse of mediation, the mood will presumably be dour, since the dispute remains unresolved and a strike or lockout may be in the offing. But that breakdown is inevitably temporary since the parties at some point have to resume negotiations. Whether that breakdown is short or long term, the mediator will usually refrain from declaring the negotiations are finished to avoid the problem of trying to reinitiate them when one or both parties feel compelled to return to the bargaining table. Additionally, it is not unusual for one of the parties to suddenly come up with a new idea after the negotiators have decamped. Accordingly, mediators will usually declare that the mediation is adjourned until one of the participants asks the mediator to reconvene the teams; even the mediator might come up with a new, perhaps even a settlement-clinching idea during the trip home, leaving a door open to reconvening the parties.

20.4.3 Interest-Based Mediation and Facilitation

In recent decades there has been growing endorsement of a variation of the above process in what has become known as "interest-based bargaining." (IBB). It is increasingly embraced by the younger and more diversified negotiators and neutrals because it emphasizes innovative problem solving techniques seeking agreements that reflect and emphasize the shared interests of the parties. Some have referred to this as "integrative or mutual gains bargaining".[5]

Typically, IBB processes begin well before negotiations, with the mediator(s) (often called facilitators) training the union and management teams in problem solving techniques.[6] This typically involves training in ways to encourage information sharing, conducting joint research on possible root causes of issues or pending problems that are of concern to one or both parties, brainstorming of ideas in open dis-

[5]Richard E. Walton and Robert B. McKersie, *A Behavioral Theory of Labor Negotiations*. New York: McGraw Hill, 1965.

[6]For a detailed case study of a large IBB training and facilitation process see McKersie et al. (2008).

cussions among all participants, generating multiple options for addressing issues, creating committees to generate and analyze options, and discussing ground rules for the actual bargaining process.

The actual bargaining process typically involves two groups, sometimes with overlapping membership. One group serves as the "main table" negotiators, i.e., the highest level representatives on the union and management teams who are responsible for reaching tentative agreements subject to final approval by the top management or ratification by the union membership. The second group involves worker and employer leaders with knowledge and experience in dealing with specific issues or that reflect different demographic or other interested participants in the employment relationship. They may be called on to participate in subject-specific subcommittees.

In the initial stages of an IBB-facilitated negotiations the participants review the ground rules for conducting the negotiations committing everyone to following the problem-solving protocols discussed in the pre-negotiations training. The parties then identify their basic interests in the negotiations. The goal at this stage is to avoid the more traditional "positional" approach to bargaining when the spokespersons state (or perhaps overstate) their list of "demands". Early in the IBB process the parties may agree to create one or more subcommittee to explore options on specific issues reflecting their top priorities. The mediators/facilitators often help these subcommittees invoking the problem-solving training that preceded negotiations. They often remind subcommittee members that they needn't reach final agreement on the issues assigned them. Instead, they should try to agree on one or more options to bring back to the main bargaining table for further or final consideration. On occasion of course, they might agree on a best way of resolving "their" issue. Success at this level requires full confidence in the data provided by the participants; if one or both parties is found to have been less than honest to score a later "win" it will obviously reduce trust and effectiveness of utilizing IBB in future negotiations.

Once the various subcommittees report their recommendations, the mediator/facilitator helps the representatives at the main table consider reported issues as well as other issues that had earlier been reserved for the representatives at the main table for their consideration. This is usually the most intense part of an IBB process involving some mixture of the more traditional mediation/negotiations processes described in the prior section and more creative exploration of ways to combine the various recommendations into a settlement package that best addresses the parties shared and often diverse interests carrying the spirt of cooperation into the day to day employment relationship. Unlike traditional mediation, this approach may involve multiple mediators/facilitators among the sub tables and even at the main table.

Interest-based mediation/facilitation has increasingly been used in both public and private sector settings. While no national data on the frequency of its use are available, in Massachusetts, for example, neutral facilitators have trained and facilitated negotiations for over forty school districts and teacher unions. Follow-up studies have shown IBB users to be more highly satisfied with their bargaining relationships

and results than those that have continued to use more traditional approaches.[7] Perhaps the best known use of IBB in the private sector has been by the large health organization Kaiser Permanente and the Coalition of Kaiser Permanente Unions.[8]

IBB is not a panacea for all labor relations problems nor is it likely to be effective in all settings or for all issues. It is, however, a promising option for dealing with the increasingly complex issues confronting labor and management, or when parties protest frustration over their traditional bargaining. But success with IBB requires consent and support of both parties to the negotiations as well as the executives and workers who must ratify (vote to accept) the agreement and live under its terms. It is most effective in settings where the parties already have cooperative relationships in their day-to-day labor management relationship, have received training in IBB, and/or are determined to significantly change from a more arms-length relationship going forward.

20.5 Effectiveness of the System

While few reliable statistics are available to track the effectiveness of mediation, FMCS and state government data indicate it has helped the parties reach agreements in most of the cases in which it is used.[9] For 2016 the FMCS reported a settlement rate of 85.5%.[10] This likely understates the full contributions made by mediation since it misses those "preventive" mediations and/or trainings that help the parties prepare for and carry out successful direct negotiations on their own. Yet, the public has little appreciation of the role of mediation in preventing labor management strikes and their economic and societal impact. Indeed, the number of strikes during negotiation of new contracts involving 1000 or more workers has declined by more than the proportionate decline in union membership. In 2016 there were only 15 such strikes or lockouts involving more than 1000 workers, compared to 470 in 1952.[11] Whether this is simply a reflection of declining union power to strike or increased effectiveness of negotiation and mediation cannot be determined. Clearly, however, both are part of the reason for the decline in strike activity in the U.S. It should be noted that strikes during the life of a collective bargaining agreement in the United States are very rare. Provision of final and binding arbitration is universally negotiated into collective bargaining agreements in exchange for the unions' surrender of the right to strike over issues of discipline, as well as contract interpretation and application.

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[7] Barry Bluestone, Thomas Kochan, and Nancy Peace, "Getting Along: A better approach to public sector collective bargaining can improve labor relations and schools." *Commonwealth Magazine.* Spring, 2016. https://commonwealthmagazine.org/education/getting-along/.

[8] Robert McKersie, et al, 2008.

[9] Joel Cutcher-Gershenfeld, Thomas Kochan, and John Calhoun Wells, "In Whose Interest? A First Look at National Survey Data on Interest-Based Bargaining in Labor Relations." *Industrial Relations.* Vol. 40, January 2001, 1–21.

[10] https://www.fmcs.gov/wp-content/uploads/2017/01/AnnualReport2017Jan13.pdf.

[11] Bureau of Labor Statistics, https://www.bls.gov/news.release/wkstp.nr0.htm.

20.6 Conclusions

The low rate of unionization in the United States limits the number of potential labor management conflicts and strikes in the country. Except in the rare circumstances where workers may engage in a protest on their own without formal union representation, it is only in the unionized sector where there is collective bargaining and the prospect of breakdowns which would trigger mediation or facilitation. The evidence of the continuing drop in workplace strikes suggests that the system of mediation has been effective over the decades and has proven to be a flexible process for adapting to the changing issues and needs of the parties and to new approaches to labor management relations.

It is difficult to make predictions about the future of mediation. On the one hand, if unions continue to decline in number and membership, so too will the use of mediation. On the other hand, pressures for increased wages and improved conditions and better funding of education and other public services appear to be producing increased militancy among teachers and other government workers. If this continues and spreads, strikes may begin to grow in number again and use of mediation may likewise increase. Thus, while the future is uncertain, the track record of successful use of mediation will stand the test of time and, if called on to do so, is a process that can once again help the parties shape effective union-management relations in the years ahead.

References

Dunlop, J. T., & Zack, A. M. (1997). *Mediation and arbitration of employment disputes*. Jossey-Bass Publishers.

Kochan, T., & Jick, T. (1978). The public sector mediation process: A theory and empirical examination. *Journal of Conflict Resolution, 22,* 209–240.

McKersie, R. B., Kochan, T., Sharpe, T., Eaton, A., Strauss, G., & Morgenstern, M. (2008). Bargaining theory meets interest based negotiations: A case study. *Industrial Relations, 48,* 66–91.

Walton, R. E., & McKersie, R. B. (1965). *A behavioral theory of labor negotiations*. New York: McGraw Hill.

Zack, A. M. (1985). *Public Sector Mediation.* Bureau of National Affairs.

Part IV
Taking Stock: From Intervention to Prevention in Collective Labor Conflicts

Chapter 21
From Intervention to Prevention in Collective Labor Conflicts

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21.1 Conciliation and Mediation in Collective Labor Conflict Around the World

This volume presents studies on the practices of third party intervention in many parts of the world. Firstly, twelve European union member states are investigated, and this is followed by contributions on Australia, China, India, USA and South Africa. Together, these chapters cover large parts of the industrialized economies. In this chapter we take stock, analyze some global tendencies and present suggestions for further development of the field. Developments both at the level of societies and regulations, mediation practices, as well as research.

Collective labor conflicts are an inevitable part of organizational life, and also of industrial relations. The recognition of different interests between employers and employees has been a cornerstone of the development of these industrial relations, including the development of third party support in the management of collective conflicts (Katz, Kochan, & Colvin, 2000; Kochan, Katz, & McKersie, 1994; Roche, Teague, & Colvin, 2014). The chapters in this book show a great variety of such systems. A first important remark is about terminology. The title of this book refers to mediation only. However, in the field of collective labor disputes, the term conciliation has a long tradition and conciliation and mediation are differentiated in many societies (Foley & Cronin, 2015). Therefore, in this chapter both terms are used, conciliation and mediation. The topic of terminology is discussed later in this chapter more extensively.

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21.2 Global Promotion for New Forms of Third Party Interventions and the Role of the EC

According to Brown (2014), there is a global trend towards more Alternative Dispute Resolution (ADR) in collective labor conflicts, where parties are assisted to come to an agreement, as alternative to judicial ruling with one party winning and the other loosing.

Brown argues that governments—inside and outside of the European Union—have promoted the creation of quasi-judicial processes, third-party institutions which facilitate the resolution of these collective conflict outside of politics. The most notable differences refer to the extent to which these institutions are formalized and can be considered judiciary as opposed to carried out by non-legal specialists.

This volume is the result of a project promoted by the European Union. This expresses the importance given by the EC to promote initiatives for constructive conflict management in industrial relations. Such promotion is done along two lines; social dialogue and ADR. This combination is typical for the European tradition, and differs for example from the traditions in China, India and the USA.

The EC has a long tradition of institutionalized social dialogue, also at organizational level (European Commission, 2016; Euwema, Munduate, Elgoibar, Garcia, & Pender, 2015; Martinez-Lucio, 2013; Weltz, 2008). Legal frameworks foster structures which offer a systemic, continuous and constructive dialogue at different levels between employers and employees. A major aim of these, being the prevention and regulation of collective conflicts. This is for example reflected in a strong position of works councils in relation to organizational decision making (particularly in Germany, Denmark and the Netherlands; this volume). Such structures, if existing, have much less impact in the USA, India or South Africa.

The second line of promoting constructive conflict management is through ADR, and particularly mediation. The European Union issued Directive 2008/52/EC (see Chaps. 1 and 14 this volume) *The mediation directive has as its objective the facilitation of access to alternative dispute resolution and the promotion of the amicable settlement of disputes, by the promotion of the use of mediation as well as of a balanced relationship between mediation and judicial proceedings* (European Commission, 2016).

This EC directive is implemented in various ways by different member states. Also when it comes to collective labor conflicts, the development of this directive differs between member states with very successful outcomes in some, and with clear challenges in other, many of them with a short tradition in conciliation and mediation. Industrial relations worldwide are changing (Elgoibar, this volume). For this reason experimenting and international comparison might be the best way of developing good practices for different contexts.

Let a hundred flowers blossom. (Mao Zhe Dong, 1957)

Practices globally, and within the EU, differ largely, as is demonstrated in this volume. Not surprising, given the large differences between countries, and the relative early stage of development of these practices in many countries involved. In this sense, a parallel development can be observed between ADR in Europe, with the labor mediation practices in China. Wei and Wei (this volume), explain the large variety of mediation practices in China due to the relative early stage of mediation in a dramatic changed economic environment. China faces a growth of labor conflicts, and a growing demand for mediation services. These develop differently, also related to the specific sectors and regions. India on the other hand relies on relative old systems, which—according to Noronha and DCruz (this volume), are suffering a lack of government support, and even deteriorate. Here, a strong need is signaled for revitalization.

Despite the different economic and political backgrounds of each country, there are some important commonalities, (Valdés Dal-Ré, 2003). For example, countries which were at some point in time very judicial, such as Spain, are becoming less so. Likewise, systems which relied more on voluntary approaches such as Britain, are increasing the regulation of collective disputes (Dix & Barber, 2015). A notable trend in European countries is the preference for voluntary approaches, as encouraged also by the European Commission in the year 2000. A spread of voluntary conciliation, mediation and arbitration procedures for dispute resolution can be noticed. This is due in part to the lower costs and fast resolution that these practices often achieve, and of course the building, restoration and maintenance of relations between the parties on the long run (Bollen, Euwema, & Munduate, 2016; Budd & Colvin, 2008). The design of these systems also shifts from a more formal model with a hearing and advice, to informal support to the dialogue of the parties. A good illustration of this is given by Bray and MacNeil (this volume), picturing the developments in Australia. Where traditionally 'labor tribunals' gave content advice, which would best be followed, now a clear trend is visible towards preventive actions and non-evaluative forms of conciliation (Della Noce, 2009; Prein, 1984, 1987). Such trends are in line with the reflection and recommendation by the ILO (see below).

> Experience from many countries shows that the center of gravity of a State dispute settlement system should be conciliation/mediation procedures aimed at assisting the parties to reach a negotiated settlement under conditions that are as close as possible to those of the normal bargaining process. ILO

21.3 Collective (Labor) Conflicts in Organizations

This volume focuses on collective labor conflicts. These are usually differentiated in conflicts of interests and conflicts of rights. Disputes over interests are those in which parties attempt the modification or substitution of existing agreement terms, for instance, the negotiation of a collective agreement. Disputes over rights are those which deal with the interpretation and application of existent rules such as laws or collective agreements.[1] Third party interventions differ in strategies used, as well as in effectiveness (Martinez-Pecino, Munduate, Medina, & Euwema, 2008). Surprisingly, the scarce studies investigating these conflicts, focus mainly on conflicts of interest. This is understandable from a perspective of negotiation, and also as these negotiations typically are stronger related to strikes (Macneil & Bray, 2013).

The studies presented in this volume point out that this approach of labor conflict and differentiation between conflicts of rights and of interests is rather limited. Three aspects are discussed here: (a) classification of conflict; (b) not limiting to labor conflict; (c) conflicting parties.

Classification. First, conflicts over interests and over rights describe at best the overt content of the conflict. Conflicts are typically multi-issue, and in fact escalation is more related to psychological processes as the break down of trust and communication, perceived incompetence's (Foley & Cronin, 2015). Bollen (this volume), shows that conflicts between works councils and management typically are about lack of trust, and perceived lack of respect, and problems in information management. Given these more covert causes of conflict, another approach by third parties is needed. Not only focused on the overt content, however on the root-causes (Elgoibar, Euwema, & Munduate, 2016; García, Pender, & Elgoibar, 2016). Therefore, the classification of collective labor conflict deserves extension, towards 'soft' factors, as trust, communication, competences.

Labor conflict only? The literature on collective labor conflict is mostly rooted in the tradition of labor relations. Our studies show, this limits the types of conflict which are addressed through the formal systems. In several European countries, the formal mediation system is only accessible for conflicts of interest, or for unions, who have an institutional place at the table. To what extent are there third party provisions for other collective conflicts in organizations? For example conflict between two departments, or faculties, or between production and marketing, are common practice (De Dreu & Van de Vliert, 1997; Rahim, 2017). Such conflicts often have a detrimental impact, also for employees, however are left to management to deal with. A works council could play a signaling role in this. Conciliation and mediation services could be of

[1] According to the ILO, "a rights dispute is a dispute concerning the violation of or interpretation of an existing right (or obligation) embodied in a law, collective agreement or individual contract of employment. At its core is an allegation that a worker, or group of workers, have not been afforded their proper entitlement(s). An interests dispute is one which arises from differences over the determination of future rights and obligations, and is usually the result of a failure of collective bargaining." http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch4.htm#3.

great benefit also in these conflicts, and organizing such services would match with the changing dynamics in industrial relations.

Conflicting parties. Another issue which came visible in this investigation is the question whom the conflicting parties currently are in mediation. Particularly among employees in organizations, substantial differences might exist, with important groups not necessarily represented (Garcia, Munduate, Elgoibar, Wendt, & Euwema, 2017). Conflicts of interest often exist between groups of employees, for example between professionals (doctors and nurses), older and younger employees, and particularly permanent staff and non-permanent staff. These issues rarely become subject of formal mediation, or conciliation. Particularly the interests of relative vulnerable groups are lacking attention.

The development of the field benefits from new and broader access to conciliation and mediation, than the relative limited approach now.

21.4 Employee Representatives in Conflict

In most countries presented in this volume, collective labor conflicts are between employers, and their representatives inside or outside the organization, and employee representatives. In most countries these are unions. Within Europe there are two basic institutional actors on the side of employees: inside the organization we find works councils and health and safety committees, and outside the organization we find unions representing the interests of workers. These bodies are related to different types of conflict. Most literature and legal regulations focus on one of these two, works councils or unions. Including third party interventions such as conciliation and mediation. In different countries, we see mostly different provisions for both.

Unions, strikes and mediation. Within the EU, usually unions are the only party with a right to call for a strike (Warneck, 2007). Before going into social action there will be in many countries an attempt to solve the conflict through conciliation or mediation. Such is for example the case in Spain, Portugal, and Belgium.
Works councils, deadlock in decision making and mediation. Works councils are the formal bodies of dialogue between management and elected employee representatives. Organizations in most EC member states have to inform, consult and even need the approval of the works council when it comes to decisions impacting the employees, such as restructuring. For example a Dutch health care organization facing financial losses proposed to restructure. The works council did not approve, which made progress impossible. Third party assistance to unfreeze these conflicts are offered for example in the Netherlands and Denmark.

In some countries, e.g. the UK, employees are able to directly ask for conciliation or mediation. This also is the case in China and India. With growing education of employees, larger variety, and a decreasing membership of unions worldwide, an important question is, who can have access to mediation services. Particularly, when such services are provided or funded by governments. The ILO also promotes access to services for (groups) of employees, who do not necessarily work with previously elected representatives.

21.5 Conciliation and Mediation: What's in a Name?

Mediation can be broadly defined as 'any third party assistance to help parties preventing escalation of conflicts, helping to end their conflict, and find negotiated solutions to their conflict.' (Elgoibar, Euwema, & Munduate, 2017). For collective labor conflicts, the international terminology differs from other domains. Internationally, conciliation and mediation are often used as synonymous in scientific literature (Foley & Cronin, 2015; Wall & Dunne, 2012). In the collective conflict's systems and regulations, significant differences exist between both concepts. Conciliation is defined as "the practice by which the services of a neutral third party are used in a dispute, as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution" (Foley & Cronin, 2015). The way this conciliation process is organized differs largely between countries, however is mostly a relative informal process, where the primary conflicting parties are engaging in a facilitated dialogue. The contributions in the volume from the USA, UK and Denmark give good examples of the use of such informal facilitation in early and preventive stages (Cutcher-Gershenfeld, Kochan, & Calhoun Wells, 2001; Dix & Oxenbridge, 2004). Here, the facilitation aims at the development of cooperative relations and competencies for problem solving negotiations. The goals and way of working shows resemblance with transformative mediation (Folger & Bush, 1996). The facilitator is focusing on the process (Schein, 1999), asking questions to parties to stimulate the learning process, and not giving own opinions (Foley & Cronin, 2015; Schein, 2013). If such conciliation does not end the conflict, a second step can be mediation. This is in many countries a more formal process, with mediators taking up an evaluative role, and give recommendations to the parties how to proceed. When parties accept these recommendations, the conflict can be ended with an agreement. There are systems, for example in Spain, in which parties can choose between mediation with and without recommendations. In the first case, a specific protocol how to give these recommendations by mediators exists. This form of evaluative mediation comes close to arbitration (Bush, 2002). In chapter two, developing the five phases model for collective labor conflict, conciliation is defined as an informal process of supported negotiation between parties. Mediation is defined as a process of more formal third party support, typically used when conflicts are more escalated and previous attempts to facilitate were unsuccessful. This approach is consistent with also individual work place conflicts, where often first a more informal conciliation effort is made (by different actors), followed by a formal mediation procedure (Bollen et al., 2016; Brinkert, 2016). These third party interventions offer substantial benefits, compared to collective actions or legal procedures (Budd & Colvin, 2008; Costantino & Merchant, 1996).

Third parties can have different roles and positions, related to the society, culture as well as level of escalation and specific parties involved (unions vs. works councils for example). Also, we notice there is a wide array of terminologies used, which often contributes to confusion. In several countries we observe that what is officially called 'mediation', has most characteristics of arbitration, and often is a very formal process

where representatives of the conflicting parties are negotiating for solutions, and the third party often acts in an evaluative way. For example in China, the same 'mediation' team can first try to facilitate the conflict, however also can act as arbitrator (Wei & Wei, this volume).

The development of the field benefits from more clarity and consistency in terminology. The presented definitions here might offer a way forward.

21.6 Understanding Different Mediation Practices with the 3-R Model

The 3-R model (Garcia et al., this volume) refers to three different dimensions that are important to consider when deciding for mediating and what form mediation takes: Regulations, Roles and Relations (Fig. 21.1). The three dimensions together create a pyramid that is built upon different layers, going from the broader context at the bottom, to specific third party tactics at the top.

The 3-R model has been used to classify the different systems presented in this volume. Evidently, the interplay of regulations, roles and relations result in highly different systems. The evident conclusion has to be, that certainly not one model for conciliation or mediation can be promoted or implemented. The fit within the context determines the effectiveness. However, these contexts develop, and often rapidly. As is shown in China, India and for example Estonia and Poland.

Alignment of components is a fundamental requirement for good functioning systems (Cummings & Worley, 2014). In the different systems we see examples of good alignment, such as ACAS in the UK, and the Belgium system with a team of

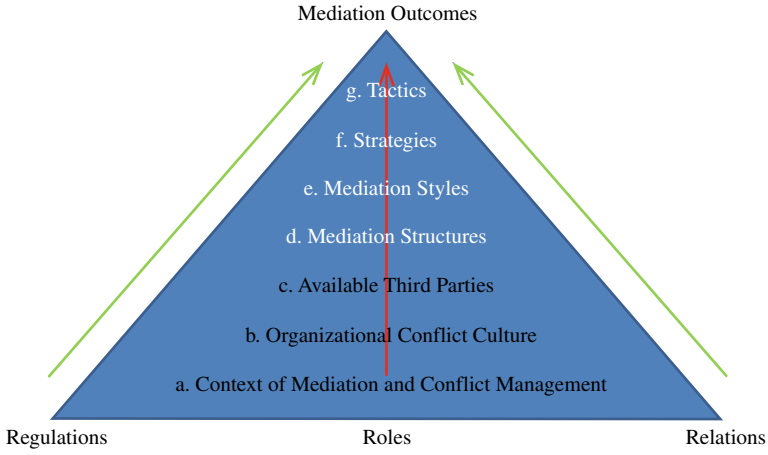

Fig. 21.1 The 3-R model of mediation in collective labor conflict

mediators at the ministry of labor acting also in preventive roles, or South-Africa. We also see poor alignment, for example in Italy, Poland and Estonia. Within each country, learning from other systems can help to further align the own national system.

The 3-R model helps to analyze conciliation and mediation in its context. First, it helps to understand the extent to which mediation is used, for what conflicts and how the process of entering the mediation is organized and functioning. Secondly, the model offers a framework to understand the choice for certain mediation styles, strategies and tactics based on the interplay of regulations, roles and relations. Finally, the 3-R model offers a tool to understand and explain specific outcomes of mediation, given the characteristics of the Regulation, Roles and Relations and their interplay.

21.7 Collective Conflicts: Interventions Through Five Phases

Collective labor conflicts develop, and this can be through five phases. Interventions differ for each (Pender et al., this volume) (Fig. 21.2).

Fig. 21.2 Five phases of conflict development

Five phases of collective labor conflict development

Win—Win

1. **Latent conflict**: no visible conflict, however conflicts of interest are latent, problems about misinterpretation or other's behaviors or small discrepancies could appear in this phase.
2. **Early stage**: rise of tensions between parties, debate replaces dialogue, issues at the table, open discrepancies, pressures inside the parties for an open conflict.

Win—Loose

3. **Confrontation**: negotiations are blocked, confronting tactics, forming of alliances, threats, competitive approaches by both parties.

Loose—Loose

4. **Hot conflict**: parties aim to hurt the other, through strikes, unilateral actions, lay-offs etc. Communication bridges are blocked. Parties increase competitive and aggressive actions.

Ending and Restoration

5. **Rebuilding working relations**: ending of conflict episode, searching new ground to work together, if the organization continues to exist. Dealing with damage done, restore relations, replace key actors (fire, prosecute, or change for political reasons).

While we see in many countries (legal and structural) arrangements for third party intervention in specific escalation phases (particularly around a threat of strike, or of other collective actions), much less is arranged in other stages of conflict in the relation between management and employee collectives. In several countries we see initiatives for intervention in an early stage of conflict. For example where facilitators help the collective bargaining process with setting the agenda, coordinating meetings and using caucus in order to facilitate negotiation and break the impasse.

Worldwide, we notice a trend to more preventive actions and early stage interventions. Zach and Kochan (this volume) present important evidence for the positive results of training in integrative bargaining, in one of the few academic studies in this field. They signal a trend towards more early stage support and education in collective bargaining and related conflicts. Same trends are mentioned by Jordaan

(this volume) in South Africa, by MacNeil in Australia. In Europe, Acas (UK), Belgium, Denmark and the Netherlands, all offer different forms of preventive actions and early intervention. However, a consistent message in all chapters is, the recognition of more early interventions, with high potential for improvement of industrial relations, and prevention of conflict escalation. Further investment in these type of interventions is highly recommended.

The phase of rebuilding after a conflict episode is apparently weakest developed in most countries. Our studies consistently show stakeholders all recognize the need, and address the lack of such support. This is left to the organizations, and usually parties move on, however with low trust and with increased risk for new escalations. If not properly addressed, the aftermath of one conflict will be fueling the next cycle, reinforcing a conflict culture. Therefore, investing in preventive interventions as well as measures for trust rebuilding are important steps to take, and should not just be left to the organizational dynamics. Surprisingly few initiatives address this topic in any of the 12 EC member states, nor in the other countries studied here.

21.8 More Methods and Research Needed

This volume presents empirical studies in a substantial amount of countries. Investigating the academic empirical literature, the conclusion is, there is a very limited amount of studies investigating the effectiveness of conciliation and mediation in collective labor conflicts. Given its relevance, this is surprising, and hindering the development of good practices.

There are several of such good practices though. Often a good research practice goes hand in hand with a well-developed national or regional mediation system, mature enough to invest in training and evaluation. Acas in this respect might be considered a benchmark organization, doing systematic qualitative evaluations of their interventions, keeping record of agreements and other outcomes, and investigating this in academic ways.

Both in the EC, as well through international cooperation, setting standards for the measurement of conciliation and mediation outcomes, as well as for methods used, would help this field to develop towards more mature practices, greater recognition by conflicting parties, and acceptance in each society. Cooperation internationally in developing and evaluation of interventions will add to our understanding of the conditions under which specific conciliation and mediation efforts are contributing to conflict prevention, resolution, and rebuilding of relations.

21.9 State of the Art in Conciliation and Mediation

Comparing the regulations and practices in described in this volume reveals large differences on all levels of third party interventions. It is difficult to compare these

systems and practices, given the different traditions, and labor relations systems. Here, we summarize the findings in 13 conclusions and propositions.

1. *Terminologies* differ between countries. Terminologies also differ from other areas of mediation, such as in family, commercial or individual workplace conflict. Most countries differentiate conciliation (informal process, aiming at problem solving guided by a third party), and mediation in collective labor conflict. Mediation in many countries is a more formal process, in which the mediator is fact finder, and usually gives recommendations. This is a form of *evaluative mediation*, particularly suitable in highly escalated conflicts.
2. *Conciliation* is used considerably more in most countries, compared to mediation.
3. *Mediation* appears mostly in highly escalated conflicts, often with threat of strike or during strike.
4. The *role of government* differs. This should not come as a surprise, given the large differences in political and societal models and ideologies between societies, such as China, USA, and India. However, these differences also are substantial within the EC. Most EC member states provide an organized public service. This can be either through public servants employed by the ministry of Labor (Belgium, Portugal, Estonia), or through an independent or autonomous service provider, funded by public means (SERCLA-Andalusia; ACAS, UK), or through organization founded by social partners (SER, Netherlands; Cooperation Consultants, Denmark). Several countries however lack such a public office (Germany, Italy, France).
5. *Third parties* are quite different when it comes to whom are available, and to what extent conflicting parties have freedom to choose a mediator. Also the level of professionalism differs substantially.
6. There is no international or European standard for conciliators and mediators in collective conflicts. Each organization uses own criteria. These are mostly based in general education (law), and experience. Less so in specific training in facilitation and mediation techniques.
7. Mediators acting in collective labor conflicts are typically not registered in national registers for mediators, and don't follow the guidelines of such professional bodies.
8. Mediation styles are shifting towards more facilitative mediation, and less evaluative mediation, however the approach in many countries still is rather formalized, acting with a mediation team (composed typically of third parties representing employers and employees). This shows still resemblance with the 'traditional' forms of tribunals, where a group of relative outsiders is investigating the facts, and comes with recommendations.
9. There is a growing tendency, particularly in conciliation, to introduce one single third party, working directly with conflicting parties in a explorative, problem solving, way.
10. Human resources practices are needed in all aspects of the mediation systems: selection of mediators, training, evaluation, competence-based systems.

11. Mediators see a large potential for their contributions which is still majorly under used. Main reasons are the lack of knowledge among primary actors, and the resistance to accept third parties.
12. The greatest potential for contribution is seen in the prevention of escalation, and in the post-conflict period. There are few initiatives to systemically offer third party services (Acas, UK; and Cooperation Consultants, DK). Furthermore, this is in most countries a free market where different providers are active.
13. Systematic evaluation and quality control is lacking and needed, with equivalent indicators for the evaluation of the mediation systems to compare effectiveness and learn of best practices in each country.

21.10 Ways Forward to Promote Third Party Support in Collective Labor Conflict

1. *Promote one provider at regional and/or national level for third parties services, at least to provide information for access to high quality facilitation and mediation.*
2. *Promote early signaling and facilitation programs, to develop competences among primary parties and to develop a more cooperative climate for social dialogue in organizations.*
3. *Promote exchange of good practices both within and between countries in relation to conflict conciliation and mediation.*
4. *Promote an international, or at least a European idiom, overcoming the Babylonic language issues.*
5. *Develop a European knowledge center, servicing EC member state offices and other third party providers. Exchange internatially expertise in conciliation and mediation.*
6. *Develop a strong HR policy recognizing the need for well trained, professional mediators in collective labor conflicts. Both at national, and international level.*
7. *Promote understanding of the specific requirements for conciliation and mediation in collective conflict through systematic evaluation, and further academic investigation as well as theory development.*

References

Bollen, K., Euwema, M., & Munduate, L. (2016). *Advancing workplace mediation through integration of theory and practice*. Springer International Publishing.

Brinkert, R. (2016). An appreciative approach to conflict: Mediation and conflict coaching. In *Advancing Workplace mediation through integration of theory and practice* (pp. 173–187). Cham: Springer.

Brown, W. (2014). Third party processes in employment disputes. *The Oxford Handbook of Conflict Management in Organizations*, 135–149.

Budd, J. W., & Colvin, A. J. (2008). Improved metrics for workplace dispute resolution procedures: Efficiency, equity, and voice. *Industrial Relations: A Journal of Economy and Society, 47*(3), 460–479.

Bush, R. A. B. (2002). Substituting mediation for arbitration: The growing market for evaluative mediation, and what it means for the ADR field. *Pepp. Disp. Resol. LJ, 3,* 111.

Costantino, C. A., & Merchant, C. S. (1996). *Designing conflict management systems: A guide to creating productive and healthy organizations.*

Cummings, T. G., & Worley, C. G. (2014). *Organization development and change*. Cengage Learning.

Cutcher-Gershenfeld, J., Kochan, T., & Calhoun Wells, J. (2001). In whose interest? A first look at national survey data on interest-based bargaining in labor relations. *Industrial Relations: A Journal of Economy and Society, 40*(1), 1–21.

De Dreu, C. K., & Van de Vliert, E. (Eds.). (1997). *Using conflict in organizations*. Sage.

Della Noce, D. J. (2009). Evaluative mediation: In search of practice competencies. *Conflict Resolution Quarterly, 27*(2), 193–214.

Dix, G., & Barber, S. B. (2015). The changing face of work: insights from Acas. *Employee Relations, 37,* 670–682.

Dix, G., & Oxenbridge, S. (2004). Coming to the table with Acas: From conflict to co-operation. *Employee Relations, 26*(5), 510–530.

Elgoibar, P., Euwema, M., & Munduate, L. (2016). *Building trust and constructive conflict management in organizations*. The Netherlands: Springer International.

Elgoibar, P., Euwema, M., & Munduate, L. (2017). Conflict management. In: *Oxford research encyclopedia of psychology* (pp. 1–28). Oxford University Press.

European Commission. (2016). *The implementation of the mediation directive*. Directorate General 588 for Internal Policies. Workshop 29th November 2016.

Euwema, M., Munduate, L., Elgoibar, P., Garcia, A., & Pender, E. (2015). *Promoting social dialogue in European organizations. Human Resources management and constructive conflict behaviour*. The Netherlands: Springer.

Foley, K., & Cronin, M. (2015). *Professional conciliation in collective labour disputes.* Retrieved from: http://ilo.ch/wcmsp5/groups/public/—europe/—ro-geneva/—sro-budapest/documents/publication/wcms_486213.pdf.

Folger, J. P., & Bush, R. A. B. (1996). Transformative mediation and third-party intervention: Ten hallmarks of a transformative approach to practice. *Conflict Resolution Quarterly, 13*(4), 263–278.

García, A. B., Pender, E., & Elgoibar, P. (2016). The state of art: Trust and conflict management in organizational industrial relations. In *Building trust and constructive conflict management in organizations* (pp. 29–51). Cham: Springer.

Garcia, A., Munduate, L., Elgoibar, P., Wendt, H., & Euwema, M. (2017). Competent or competitive? How employee representatives gain influence in organizational decision-making. *Negotiation and Conflict Management Research Journal, 10*(2), 107–125.

Katz, H. C., Kochan, T. A., & Colvin, A. J. (2000). *An introduction to collective bargaining and industrial relations*. IRWIN/McGraw-Hill.

Kochan, T. A., Katz, H. C., & McKersie, R. B. (1994). *The transformation of American industrial relations*. Cornell University Press.

Macneil, J., & Bray, M. (2013). Third party facilitators in interest-based negotiation: An Australian case study. *Journal of Industrial Relations, 55*(5), 699–722.

Martinez-Lucio, M.M. (Ed.). (2013). *International human resource management: An employment relations perspective.* Sage.

Martinez-Pecino, R., Munduate, L., Medina, F. J., & Euwema, M. (2008). Effectiveness of mediation strategies in collective bargaining. *Industrial Relations: A Journal of Economy and Society, 47*(3), 480–495.

Munduate, L., Euwema, M., & Elgoibar, P. (2012). *Ten steps for empowering employee representatives in the new European industrial relations*. Madrid: McGraw Hill.

Pel, M. (2008). *Referral to mediation: A practical guide for an effective mediation proposal*. Sdu Uitgevers.
Prein, H. (1984). A contingency approach for conflict intervention. *Group & Organization Studies, 9*(1), 81–102.
Prein, H. (1987). Strategies for third party intervention. *Human Relations, 40*(11), 699–719.
Rahim, M. A. (2017). *Managing conflict in organizations*. Routledge.
Roche, W. K., Teague, P., & Colvin, A. J. (Eds.). (2014). *The Oxford handbook of conflict management in organizations.* Oxford University Press.
Schein, E. H. (1999). *Process consultation revisited: Building the helping relationship*. Reading, MA: Addison-Wesley.
Schein, E. H. (2013). *Humble inquiry: The gentle art of asking instead of telling.* Berrett-Koehler Publishers.
Valdés Dal-Ré, F. (2003). Synthesis report on labour conciliation, mediation and arbitration in the European Union countries. In: *Labour Conciliation, Mediation and Arbitration in European Union Countries*. Ministerio de Trabajo y Asuntos Sociales.
Wall, J., & Dunne, T. (2012). Mediation research: A current review. *Negotiation Journal, 28,* 217–244.
Warneck, W. (2007). *Strike rules in the EU27 and beyond: A comparative overview*. Brussels: European Trade Union Institute.
Weltz, C. (2008). *The European social dialogue under Articles 138 and 139 of the EC treaty*. Amsterdam: Kluwer Law International.

Appendix
Investigating Interventions in Collective Labor Conflicts

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NEIRE project

With the support of the EC (DG Employment, Social Affairs and Inclusion) a project was conducted to examine and promote third party intervention in collective labor conflicts in 12 European countries. Three studies were conducted.

Study 1 was mainly a documental study offering a socio-political, institutional and legal analysis of each mediation system, including interviews with experts on the current status.

Study 2 was a comparative analysis of the effectiveness of mediation systems from the users' perspective. Interviews and focus groups were conducted in order to assess employers' and employees' motives to use or not use third party services for conciliation or mediation, and the satisfaction with and expectations towards these services.

Study 3 was also a comparative analysis, this time from the providers perspective. Exploring their perception of the system in their home country, experiences, ideas for improving the use and quality of the mediation process.

The studies have been discussed at symposia in each country and an international conference in Brussels.

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