CONCILIATION, MEDIATION AND ARBITRATION IN INDUSTRIAL DISPUTES IN THE COUNTRIES OF WESTERN EUROPE

Part I

A synopsis of national rules and practices in the countries of Western Europe

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GENERAL INTRODUCTION

This report is about the role of conciliation, mediation, inquiry and arbitration in industrial relations in European countries.

Conciliation refers to a voluntary, informal process of dispute resolution, whereby an independent third party assists the parties to a dispute to clarify the points of disagreement and attempts to promote a settlement. No binding award is made and any agreement reached is the responsibility of the parties.

Mediation is used to describe a more positive form of conciliation in which the third party recommends solutions, which the parties are free to accept or reject. In practice the line between this and conciliation may be difficult to draw.

Arbitration differs from both of these, because the parties hand over the determination of their dispute to a third party. When arbitration is utterly voluntary the procedure is embarked upon with the consent of both parties and with the understanding that they will abide by the outcome.

But it is also possible that the legislator has made the recourse to arbitration in one or more aspects compulsory.

Peaceful industrial relations can be disturbed by a variety of industrial conflicts

- individual conflicts, which concern a single employment relationship between an employer and an employee;
- collective conflicts, which concern a multitude of employment relationships.

Industrial conflicts can also be divided in

- disputes of rights, which arise from the application or interpretation of an existing rule in a collective agreement, works agreement, legislation or individual contract of employment
- disputes of interests, which arise out of the making of new agreements or the renewal of agreements which have already expired or are about to expire.

In some European countries these distinctions are of almost no importance. In these countries the mechanisms of settling industrial disputes are often available irrespective the character of the dispute.

But in most European countries these distinctions are crucial for the choice of the mechanism of settlement of the dispute.

Often the conflicts of rights are handled by specialised labour courts or by the ordinary civil courts.

Part I of this study contains a synopsis of the existing systems of conciliation, mediation and arbitration in the countries of Western Europe.

Its text is to a large extent based on information drawn from the International Encyclopedia for Labour Law and Industrial Relations (Ed. R. Blanpain, Kluwer, Deventer), on The Regulation of Industrial Conflict in Europe, EIRR Report Nr. 2, London, 1989 and on comments nicely presented to the author by various national experts. However, only the author is responsible for the final text.

Part II - will give some personal observations of the author of this study.

GERMANY

a) Introduction

In Germany the Labour Courts are the dominant mechanism for resolving industrial conflicts, in individual as well as in collective disputes.

Only if there is a conflict of interests Labour Courts cannot give a decision and the use of the strike weapon is allowed. But then there is also a certain role to play for conciliation, mediation and arbitration. These devices are also used in the area of industrial democracy, where the strike weapon should not be deployed.

b) Settlement of individual labour disputes

In Germany individual labour disputes are almost exclusively dealt with by the Labour Court system - a special branch of the court system, administered by the State. The initial stage of the procedures before the Labour Courts is one of conciliation.

In addition the law provides for a grievance procedure within the orbit of industrial democracy. If the employer and the works council do not agree over the justification of the complaint, the works council may appeal to the Arbitration Committee.

In a grievance involving a conflict of interests, the decision of the Arbitration Committee supersedes any agreement between employer and works council with appeal to the Labour Court.

If the grievance involves a conflict of rights, the decision of the arbitration committee can only serve as a recommendation.

However, there are indications, that this grievance procedure is a dead letter.

c) Settlement of collective labour disputes

c.1. Disputes on rights

German Labour Courts are in principle competent for resolving conflicts of rights. Yet, if a dispute arises over the interpretation of clauses in a collective agreement, the parties to the collective agreement normally try to solve the question in negotiations. Alternatively many collective agreement have established joint committees for the interpretation of the collective agreement.

Another suitable procedure to deal with such a dispute is: to submit an individual wage claim to the Labour Court. The decision by the Labour Court would then normally be applied to all analogous cases. In fact, the great majority of the cases in which the Labour Courts have to give an interpretation of the collective agreement are cases brought by individual parties.

A second group of those cases are created by the law on strikes, as employers use to have resort to the Labour Courts in case of strike in order to obtain an injunction.

c.2. Disputes on interests

Industrial disputes on interests, what mainly means: on the elaboration of a new collective agreement, will never go to Labour Courts. Yet, the Labour Courts are confronted with these disputes if they are called upon to give decisions on strikes or lockouts.

Shortly after the Second World War the allied powers installed a mechanism for voluntary conciliation and inquiry (Kontrollratsgesetz nr. 35 of 1946), which is still on the statute book, but which is considered as "dead wood".

Therefore the use of state mediation only plays a very marginal role in comparison to the mediation established by agreement between the social partners themselves. The actual legal order in Germany is indeed dominated by the idea of autonomous mechanisms of voluntary mediation. This means that it is up to the parties of the collective agreement, whether they establish a mediation procedure and it is also up to the parties to decide on the effect of mediation.

Meanwhile mediation agreements (Schlichtungsabkommen) are concluded for practically all areas of the private and the public sector. Although there is no homogeneous pattern to such agreements - they differ from industry to industry - a model was agreed between the umbrella-organisations BDA, DGB and DAG as early as 1954. If no such agreement exists, the bargaining parties may decide on an ad-hoc basis. The usual pattern is, that representatives from the bargaining parties form a conciliation board with or without an independent chairman. In the first case the parties either agree in advance on an independent personality sharing the confidence of both sides or a chairman is appointed ad-hoc and asked to act as conciliator. After consultations of union and employers' representatives, the chairman may suggest a balanced proposal to end the dispute. The relevant decision-making bodies of both sides are asked whether the proposal is acceptable. Generally the union concerned has to put it before all of its members for adoption in a ballot procedure. Only if it acquired the approval of the minimal percentage of the members, required in the rule books of the union, the compromise proposal is accepted. It is then subsequently shaped into a collective agreement.

While compulsory arbitration in collective bargaining was a significant feature of the pre-nazi period (1923-1933), this mechanism does no longer exists and is even understood to be incompatible with the freedom of association, guaranteed by the German constitution (Art. 9, sub 3).

d) Relation to the right to strike

In the legal order of Germany conflicts of rights cannot be subject of legal strikes. Conflicts of interests can be subject of a legal strike, but in German case law - not in statutory law, which is silent on the issue of strikes! - various prerequisites for a legal strike have been established. One of the most important of them is the requirement that a strike may only be carried out as a last resort. This so-called principle of ultima ratio implies that all means of negotiation must be exhausted and mediation must be attempted before a strike[1] can be called.

e) Conciliation, mediation and arbitration in the orbit of industrial democracy

Arbitration returned in the legal order of Germany in the framework of the "Betriebsverfassung" (industrial democracy in the enterprise). As strikes and lockouts are expressly prohibited as means of resolving conflicts between works council and employer, a special dispute resolving body, called Arbitration Committee, is provided for in the Betriebsverfassungsgesetz (Works Councils Act).

If the employer and the works council cannot agree on a matter being subject to co-determination by the works council, both parties can refer the matter to the Arbitration Committee. The Committee's decision is binding on the parties and has the same status as an agreement between the employer and the works' council (the "Betriebsvereinbarung"). However the committee's decision may still be subject to review by the Labour Courts of Germany. The Labour Courts power of review in sofar is however rather limited and consequently the Arbitration Committee's decision in actual practice is most of the times the final word.

Arbitration Committees in practice are always ad hoc committees for each case required. They consist of a certain number of members appointed by the employer, an equal number appointed by the works council and a neutral president who chairs the committee.

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[1] Warning strikes are precluded from this criterium.

AUSTRIA

a) Introduction

In Austrian law the "classic" differentiations between disputes concerning individual employment relationships and collective disputes and between disputes of rights and disputes of interests are relevant, because different authorities are responsible for their settlement and also the procedures for settling the disputes are different.

b) Settlement of individual labour disputes

Legal disputes concerning individual employment relationships in Austria are predominantly settled by state authorities, in particular by special labour courts.

In dismissal cases an important role is played by the Conciliation Authority. Employees and works councils can lodge an appeal to the Conciliation Authority against notice of termination, considered as "socially unjustifiable".

Private arbitration tribunals have little significance in the settlement of individual labour disputes. One of the reasons is the easy accessability of the labour courts. Another reason might be, that the validity of arbitration clauses is restricted by statute so far as labour law matters are concerned: any clause agreed by employer and employee to submit a future dispute between them is void, in sofar as the dispute concerns the labour relationship. So disputes related to the individual labour contract may only be submitted to arbitration by the parties after the dispute has occurred.

c) Settlement of collective labour disputes

c.1. Disputes on rights

All collective labour disputes on rights, notably those concerning the collective agreement may be heard by the Labour Courts.

However the parties to the collective labour agreement are not inclined to have resort to the ordinary civil courts on disputes about the interpretation of collective agreements. They prefer to solve these questions in negotiations. Alternatively many collective agreement have established joint committees for the interpretation of the collective agreement.

So the great majority of the cases in which the Labour Courts have to give an interpretation of the collective agreement are cases brought by individual parties.

c.2. Disputes of interests

Disputes of interests are traditionally solved by mutual agreement rather than by recourse to outside bodies, and there is no provision either in law or collective agreements that when collective bargaining breaks down, a conciliator or conciliation service must be called in. Where negotiations become deadlocked, however, either side may call in the Federal Conciliation Service to try to conciliate, although the Federal Conciliation Service is restricted simply to making available its "good offices" in the search for a resolution of the dispute.

The two sides may, in theory, agree in advance to be bound by the Conciliation Service's decision, but since this too requires the agreement of both sides, it rarely happens.

Collective agreements based on compulsory arbitration are unknown in Austrian law. In theory it is possible, that the two parties to a collective dispute together request the competent conciliation authority to make an arbitration award which is then valid as a collective agreement, but this procedure has no practical significance.

d) Relation to the right to strike

In the legal order of Austria conflicts of rights cannot be subject of legal strikes. Conflicts of interests can be subject of a legal strike, but in Austrian case law various prerequisites for a legal strike have been established. One of the most important of them is the requirement that a strike should not be contra bonos mores. This principle may imply that all means of negotiation must be exhausted and mediation must be attempted before a strike can be called.

e) Disputes in the orbit of industrial democracy

There is only one set of circumstances in which mandatory arbitration may be used in a dispute of interest. This relates to the conclusion of a works agreement (Betriebsvereinbarung). These are distinguished from collective agreements in that they may only deal with matters specified in the Work Constitution Act, and industrial action cannot be resorted to in case of deadlock.

Matters, which may, be subject to a works agreement, include: the fixing of work schedules and selecting ways to prevent, eliminate or alleviate the social consequences of measures such as rationalisation.

If in these cases no works agreement is reached between an employer and his works council, a mediation board mediates between them at the request of one of the parties to the dispute, making suggestions, striving for agreement, and where necessary making a ruling. The ruling is then valid as a works agreement.

This mediation board is not a permanent board. It is established after an application is made by one of the parties to the dispute to the chairman of the competent labour court. It consists of a chairman and four other members.

Moreover, a conciliation committee can be created to mediate in the event of disputes between an employer and the works council about certain economic measures.

The labour courts already mentioned are responsible for deciding legal disputes arising out of works representation law. These include: disputes concerning a workers' council's right of co-participation; disputes concerning the election of staff bodies; etc.

Any agreement to submit a dispute between employer and a staff representation body (especially works council) to arbitration is void.

SWITZERLAND

a) Introduction

Switzerland is virtually a "strike-free" country. The absence of industrial conflict owes much to the presence of institutional mechanisms, based on the compulsory referral of disputes of right to arbitration during the life of agreement (the absolute peace clause). At the same time conciliation, mediation and arbitration are important procedures in cases of disputes of interests on the occasion of renewing collective agreements.

b) Settlement of individual disputes

Individual labour disputes are in principle submitted to the courts; in 12 cantons these courts are the ordinary civil courts; in the other cantons either all or part of the individual labour cases are heard by special labour courts.

Apart from one canton the appeal case is always heard by an ordinary civil court of appeal with further appeal to the Federal Court.

In most of the cantons special attention is given to conciliation.

Few collective agreements provide that individual disputes between employers and employees shall be brought before arbitration panels.

A stipulation in a collective agreement providing for an arbitration clause may not be extended by public authority to employers and employees who are not personally bound by the agreement.

c) Settlement of collective disputes

The procedure of conciliation lies in the search for an amiable solution to an industrial dispute, either by the organs of the contracting parties themselves or with the help of an external body.

The conciliation of industrial disputes may be organized through different channels:

a. through bodies created by collective agreements,

b. through Cantonal Boards of Conciliation,

c. through the Federal Board of Conciliation.

Collective agreements which have been concluded between associations of employers and trade unions generally provide for the formation of bodies or mechanisms entrusted with the conciliation of disputes. Such mechanisms may be provided either for disputes which have arisen within a particular enterprise and which cannot be settled in the enterprise, or for disputes between the contracting parties. The conciliation body is very often the joint committee created for the implementation of the agreement.

According to the Federal Act respecting Work in Factories of 18 June 1914, each canton has to maintain a permanent Conciliation Board whose job is to try to conciliate labour disputes in industrial enterprises: in most cantons cantonal law gives these Boards the competence to deal with other enterprises too.

All the boards are composed of a neutral president and an equal number of employers' and workers representatives. Their task is to conciliate collective disputes between employers and workers about labour conditions, as well as about the interpretation and implementation of collective agreements or standard labour contracts. Thus, disputes of rights as well as disputes of interest may be brought before the Cantonal Conciliation Board, although certain cantonal provisions, despite the terms of the federal law, exclude disputes of rights from their competence.

The Board may act, ex officio as soon as it hears that a dispute has arisen; it is not bound to wait for a request from the interested parties. Attendance before the Board is obligatory and the procedure is free of charge.

According to some cantonal provisions, the parties to the dispute may not take any coercive action while the matter is before the Board, but it must be said that these provisions have fallen somewhat into abeyance.

The Board may act only if the employers and workers involved in the dispute are not bound by an agreement which institutes private conciliation or arbitration machinery, in which case this private body alone is competent to act.

Where the procedure of conciliation before the Cantonal board has failed the parties may, in some cantons, ask for the intervention of another authority, such as the cantonal government.

While at cantonal level the Boards will meet at the request of any party to a dispute - and even ex officio - at the federal level, very curiously, the situation is quite different. According to the Federal Act respecting the Federal Conciliation Board in collective industrial disputes, a Federal Board may be constituted, in a given case, only by the decision of the Federal Department of Public Economy. It shall be constituted, at the request of interested persons, if attempts to bring about conciliation between the parties by direct negotiations have failed, if no joint conciliation or arbitration board exists and if the dispute goes beyond the limits of any one canton.

According to the instructions of the Federal Department of Public Economy, the Federal Board may act only in cases of disputes of interest; that is essentially, disputes arising out of the making of new agreements or the renewal of agreements which have already expired or are about to expire.

The Federal Board of Conciliation, when constituted, is composed of a neutral president and two assessors, representing respectively the employers and the workers, who are chosen by the Department from a list of members established by the Federal Council.

The procedure is rapid and free of charge. Every person summoned by the board must appear, assist in the oral proceedings, supply information and produce the documents required. The Board endeavours to obtain agreement between the parties by direct means. If it fails to do so, it proposes a compromise to the parties. When an attempt at conciliation fails and the parties are not prepared to accept arbitration, the board informs the public generally of the state of affairs in any manner which it deems fit.

Mediation as such is not provided for by the law. But it may be organized by collective agreements. The mediator has more power than the conciliator; a mediator may not only recommend specific measures - as does the conciliator -but has also some powers of arbitration.

In the case of a dispute of interests, which bears not on existing rules but on the establishment of new rules, the ordinary courts are not competent and arbitration may only settle the dispute if the parties themselves cannot solve it through direct understanding, possibly after an attempt at conciliation. Although the parties are not compelled by law to submit their dispute to arbitration, they can undertake in a collective agreement to do so.

The main collective agreements provide for the establishment of trade arbitration tribunals. These tribunals are generally competent to deal with conflicts of rights. But many of them are also competent in cases of disputes if interests.

The president of such a Arbitration Tribunal is always a jurist (usually a judge), who is assisted by two or more members who, in equal number, are nominated by the employers and by the workers.

Often what happens is that the Arbitration Tribunal is entrusted with an attempt at conciliation and takes up arbitration if it does not succeed in conciliating the parties.

It is also possible that the parties may entrust the Cantonal Board of Conciliation with the arbitration of a dispute. In practice this method is provided for by many collective agreements.

Also where an attempt at conciliation before the Federal Board of Conciliation has failed, this Board will, if the parties agree, make a compulsory arbitration award. But the social partners, do not, in practice, make use of this option.

d) Relation to the right to strike

In the legal order of Switzerland conflicts of rights cannot be subject of legal strikes. Conflicts of interests can be subject of a legal strike, but in Switzerland case law various prerequisites for a legal strike have been established. These prerequisites may imply that all means of negotiation must be exhausted and mediation must be attempted before a strike can be called.

THE NETHERLANDS

a) Introduction

In the Netherlands a rather elaborate Act on the Settlement of industrial disputes, modelled after the Danish legislation, was adopted in 1923 and functioned well until the Second World War. After 1945 the act became a dead letter, although it never officially has been repealed.

Actually The Netherlands only have a statutory procedure on conciliation, mediation and arbitration as far as the public service is concerned. The Netherlands do not have any statutory rule on conciliation, mediation and arbitration in industrial disputes in private industry. In the eyes of the trade unions, the employers associations and the political parties the prevailing climate of industrial peace makes a formal machinery to promote the settlements of industrial disputes unnecessary.

Whenever an industrial dispute arises it is normally resolved either by the parties themselves or with the help of an ad hoc conciliator.

b) Settlement of individual labour disputes

All individual disputes between employees and employer concerning the contract of employment may be heard by ordinary civil courts - there are no specialised Labour Courts in The Netherlands.

Moreover various collective agreements have established grievances procedures, conciliation and mediation by joint committees or arbitration by arbitration boards. A stipulation in a collective agreement providing for an arbitration clause may not be extended by public authority to employers and employees who are not personally bound by the agreement.

Because of the system of dismissal permits more than half of the potential cases of individual labour disputes never reach the courts, as they are ending in the procedure to grant or refuse a dismissal permit before the Regional Director of the Employment Service.

c) Settlement of collective labour disputes

c.1. Disputes on rights

All collective labour disputes on rights, notably those concerning the collective agreement may be heard by ordinary civil courts.

However the parties to the collective labour agreement are not inclined to have resort to the ordinary civil courts on disputes about the interpretation of collective agreements. They prefer to solve these questions in negotiations. Alternatively many collective agreement have established joint committees for the interpretation of the collective agreement.

So the great majority of the cases in which the ordinary civil courts have to give an interpretation of the collective agreement are cases brought by individual parties.

A second group of those cases are created by the law on strikes, as employers use to have resort to the civil courts in case of strike in order to obtain an injunction.

c.2. Disputes on interests

The ordinary civil courts are not competent to solve collective labour disputes on interests.

Only a limited number of collective agreements contain provisions as to conciliation in case of industrial disputes of interests.

The Dutch Foundation of Labour (a platform of representatives of the umbrella organisations of employers and trade unions) keeps a register of persons who are able and eventually prepared to serve as conciliator, mediator or arbitrator in industrial disputes.

The social partners may use the general provisions of the Dutch Code of Civil Procedure on arbitration, which provides for voluntary arbitration. However, this possibility is seldom used.

d) Relation to the right to strike

Although - according to the majority of academic writing - in principle conflicts of rights cannot be subject of a legal strike, the Dutch courts are not very strict in this respect and many times have condoned strikes in conflicts of rights.

In the very few court cases, touched by a clause in the collective agreement on third party intervention in industrial disputes of interests, such a clause was considered an argument not to have untimely resort to the strike.

e) Conciliation, mediation and arbitration in the orbit of industrial democracy

Mediation has become a key issue in the Dutch system of industrial democracy, which requires all enterprises with at least 35 workers to establish a works council. Employers are under a legal obligation to obtain the consent of the works council on all matters relating to the fixing of work schedules, pension insurance, employee training policy, industrial welfare work, etc.

If the required consent of the works council is not obtained, the employer may apply to the Industrial Commission - a permanent bipartite body at industry level - for mediation. The same applies to other disputes between employer and works council on the application of the Works' Councils Act.

If the mediation of the Industrial Commission has failed, the employer may apply to the ordinary civil law judge for approval of his proposals.

BELGIUM

a) Introduction

The Belgian legislator has made ample provisions to incite both sides of industry to seek peaceful solutions for industrial conflicts. This has resulted in a system of conciliation, mediation and inquiry in collective labour disputes, which is a remarkable model of intertwining autonomous and heteronomous procedures. In this machinery the joint committees play a crucial role.

Immediately after the Second World War on the basis of an Act of 1945, joint committees, composed of representatives of the most representative unions and employers' associations, have been set up in every branch of industry. These committees are the platforms at which collective agreements are negotiated and concluded. At the same time these committees were charged by the legislator with the task to prevent and settle labour disputes. The Act on collective agreements and joint committees of 1968 consolidated this system.

b) Settlement of individual disputes

Individual disputes are settled through the intervention of the union and the Labour Courts. More than 80% of the cases the Labour Courts are dealing with concerns the individual grievances of employees whose employment contracts have already been terminated.

Grievances arising in the course of the individual labour contract will usually be handled by the union delegation. Ultimately the grievance may be brought before the joint committee of the industry, where the case will be jointly dealt with by representatives of the employers' association and the trade unions. Although the joint committee only has the power to conciliate and recommend a solution to the parties, its authority is such in quite a number of industries (textiles and petroleum for example) that the parties usually accept its recommendations. In some sectors grievances are rarely brought before the Labour Courts and are in fact settled by the joint committee.

Arbitration is of no importance as a means of settling disputes in Belgium, where there is a deep distrust of arbitration.

An arbitration clause - be it included in the individual employment contract or in the collective agreement - stating that grievances which arise in relation to the individual agreement will be submitted to arbitration is null, save in the case of employees with management responsibilities, earning more than 1,3 million Belgian francs yearly. In all other cases it is only when the grievance has actually arisen that the parties can agree to submit the dispute to arbitration.

c) The settlement of collective labour conflicts

In Belgium the judiciary has no power to intervene in collective labour disputes, save for those in the orbit of industrial democracy.

The majority of the collective labour disputes - whether they are about conflicts of rights or about conflicts of interests - are handled within the framework of joint committees.

These joint committees have i.a. the task "of preventing or settling conflicts between employers and employees". To do this the joint committees have set up conciliation committees. These committees may be regional or national. In most cases conciliation is provided for at different levels: company, regional and national.

These joint committees are chaired by an independent person, nominated by the King. In practise the most important joint committees are chaired by a "social conciliator".

A corps of "social conciliators" has been set up under a Royal Decree of 1964 and the Royal Decree of 23 July 1969. Under these provisions the government has appointed a corps of persons charged with the task of conciliating in collective labour disputes.

The conciliation committees are composed of the chairperson of the joint committee and members appointed on an equal basis between management and the trade unions. Only the most elementary rules are laid down in a Royal Decree of 6 November 1969 about the working of the joint committees: in the case of conflict or imminent conflict any party who wishes to do so can put the dispute before the chairman.

In harmony with this system, collective agreements usually refer industrial disputes to the appropriate conciliation committee.

The conciliation committee meets on the initiative of the chairperson or at the demand of an organisation represented on the committee. In the absence of a specific provision in the standing orders, the chairperson must call the conciliation committee together within seven days of such a demand.

The services of the conciliation committee are utterly voluntary. The committee has no decision-making power as regards the outcome of the conflict. The parties retain total control over their rights and interests. Although the conciliation committee normally works out a proposal, this proposal does not bind the disputing parties in any way.

Where there is a failure in the conciliation process, the parties regain full liberty of action.

However, if the conflict is not settled in the conciliation committee, the official conciliators will continue to work to bring the parties to an agreement.

Moreover, if a potential or actual labour dispute might have far reaching national consequences, the Secretary for Employment and Labour or even the Prime Minister himself may try to reconcile the parties.

In Belgium there is no specific arbitration procedure for collective labour disputes; arbitration carried out on the basis of the rules of the civil code of procedure is possible but unusual in labour disputes.

d) Relation with the right to strike

In Belgium conciliation has its origins and juridical basis in the obligatory part of the collective bargain which allows the parties to lay down their mutual relations, rights and duties.

With the aim of preventing the premature calling of a strike or lock-out, Collective Agreement No. 5 between the confederations of employers' and trade unions lays down, that agreements concluded at sectorial level by the joint committee should contain stipulations providing for conciliation machinery and a term of notice to be given before a strike or lock out. Very frequently this is effectuated. Although such clauses are not legally enforceable against the trade unions (as they in Belgium enjoin immunity in the courts), their effectiveness is brought about by the fact that in many collective agreements the payment of benefits to trade union members is linked with the observance of these clauses.

e) Settlement of disputes in the orbit of industrial democracy

Belgian Labour Courts are competent to consider disputes in the orbit of industrial democracy, for example those relating to the elections for works councils.

LUXEMBOURG

a) Introduction

Luxembourg is the EC country with presumably the most effective procedures in the area of conciliation, mediation and arbitration.

These procedures are frequently used and are relatively successful in avoiding industrial conflict.

The law of Luxembourg makes a distinction between individual and collective legal cases. Conflicts arising at the time of conclusion, revision of renewal of a collective agreement constitute collective cases, when it is not a matter of interpreting existing law but of creating a new rule.

The law provides for peaceful procedures to settle collective employment conflicts. In practice the National Conciliation Office has the power to intervene if the employer refuses to negotiate or if there is failure to agree on the basis of the collective agreement.

b) Settlement of individual labour disputes

The law allows staff delegates to present any complaint to the employer. Staff delegates have the function to prevent and smoothen any differences arising between the employer and his personnel concerning individual or collective litigations.

Labour tribunals are the competent tribunal in cases concerning the application of a collective agreement in the individual relation between the employer and the worker.

c) Settlement of collective labour disputes

c.1. Disputes on rights

In collective labour disputes on rights the rule is that special procedures of conciliation and arbitration are attempted before resorting to the labour jurisdiction.

c.2. Disputes of interests

By law all disputes between employers and unions over the conclusion or renewal of collective agreements must be referred to the National Conciliation Office, set up by a Grand-Ducal Decree of 6 October 1945.

It is composed of permanent members and special members and is presided over by the Minister for Employment or his deputy.

The permanent members are three employers' representatives appointed by the employers' organisations and three employees' representatives appointed by the unions which are representative at national level.

For each case the National Conciliation Office is complemented by special members appointed by the employers' organisations and by the workers' unions.

The task of the National Conciliation Office is to bring together the parties concerned to settle collective disputes when collective agreements are concluded or renewed.

Thus the Grand-Ducal decree of 6 October 1945 gave the "interested parties" the right to bring before the National Conciliation Office a "collective disagreement relating to working conditions in one or several enterprises".

The law of 12 June 1965 on collective agreements permits referral to the National Conciliation Office in the event of an employer refusing to begin negotiations with a view to concluding a collective agreement or if during the negotiations the parties are unable to reach agreement on one or several fundamental points within the collective agreement.

If the initiative is not taken by the interested parties, the law authorises the National Conciliation Office to "deal with any collective disagreement brought to its attention."

The conciliation procedure before the National Conciliation Office is obligatory.

Settlement of disputes placed before the National Conciliation Office results from the agreement of the employers' and employees' groups.

The settlement made within the National Conciliation Office may be declared to be generally binding.

If the president of the National Conciliation Office considers that means of conciliation have been exhausted, he draws up a statement of non-conciliation which indicates the disputed points.

If the conciliation attempts fails, one or both parties may ask the Government to put the case before an arbitration council. The arbitration council comprises a representative who is appointed by the Government, an employer, appointed by the employers' organisations and an employees' representative appointed by the unions.

The disputing parties may refuse to accept the arbitration decision. This may be published if it is believed to be in the common interest or with the aim of resolving the conflict.

Acceptance of the arbitration decision by the disputing parties is equivalent to a collective agreement. The arbitration decision may also be subject of a declaration to the effect that it is generally binding.

It should be noted that the law of 12 June 1965 on collective agreements expressly specifies that the disputing parties may at any time ask one or several arbiters to resolve their dispute after or even prior to an attempt at conciliation. In this event arbitration is carried out on the basis of the rules of the civil code of procedure (Articles 1033 and following).

d) Relation to the right to strike

The law makes it an offence to cause a stoppage of work without the prior intervention of the National Conciliation Office.

During conciliation all industrial action is prohibited, but if the conciliation attempts fails, both parties are free to take action.

The legitimacy of strikes in the public service is conditional on the failure of a compulsory conciliation procedure before a conciliation commission.

e) Relation to industrial democracy

Disputes arising from a disagreement between the group of employers' representatives and that of staff representatives forming the mixed works council on the subject of one of the measures falling under the decision-making scope of the mixed works council may lead to the conciliation or arbitrating procedure before the National Conciliation Office (art. 16, para. 2 of the law of 6 May 1974 instituting mixed councils in private sector companies and organising employee representation in limited companies).

FRANCE

a) Introduction

France has a system of Labour Courts (Conseil des Prud'hommes) which are specifically competent in labour disputes. Nevertheless jurisdiction in labour dispute in France is characterised by excessive dispersal. As a matter of fact, any French court may have to examine a dispute regarding social and labour law - courts of the administrative hierarchy have jurisdiction, and so do penal courts and courts of the judicial hierarchy.

In France the collective agreements sometimes contain provisions as regards conciliation, mediation and arbitration.

Moreover the State in the 1950s has provided three procedures for conciliation, mediation and arbitration of industrial conflicts. These procedures were predominantly optional for the parties, but they contained a few obligatory features.

In the French realities of the 1950s-1970s these legally provided procedures have not met with any success. Statistics show that they failed almost completely to have any impact on the level of industrial conflict in France, which is rather high.

Most industrial disputes in France are settled through conflict and negotiation. This has not been different since the legislator of 1982 - taking stock of that failure - overhauled the legal procedures, purifying them from all obligatory aspects.

The new rules are now contained in sections L 522-1 et seq. of the Labour Code.

b) Settlement of individual labour disputes

The Labour Courts have jurisdiction only over individual disputes arising from labour contracts.

The Labour Courts have a dual mission: to try as far as possible to bring about the reconciliation of the parties with their own "Board of Conciliation"; then if this fails, to pass judgment in their Boards of Judgments.

Any provision which would give jurisdiction to another court, any agreement to arbitrate, any provision of a collective agreement substituting the competence of a conciliation organ for that of a Labour Court would be automatically void, for reason of public order.

c) Settlement of collective labour disputes

c.1. Disputes on rights

The regular civil court (Tribunal de Grande Instance) has jurisdiction over the meaning of the provisions of a collective agreement.

c.2. Disputes on interests

Many industry-level collective agreements provide for a permanent conciliation commission.

In cases where collective agreements do not contain a provision for conciliation or if the provisions relating to it have not been applied by the parties, on request of one of the parties, the Minister, the Prefect or other official will convene the parties for conciliation before a conciliation commission. There are national, regional and departmental conciliation commissions. Under the Act of 1950 the parties were obliged to appear, but there was no obligation to reach an agreement or even to try in good faith to reach one. So the procedure was only theoretically compulsory. It could not legally prevent the occurrence of a strike. But since the Amendment Act of 1982 even this obligation to appear has been dropped and the participation in this procedure has become utterly voluntary.

After the failure of the conciliation procedure the parties may voluntarily decide to have resort to mediation. The mediator is proposed by agreement of the parties or if that is impossible, he is appointed by the president of the (regional) conciliation commission. If the conflict takes place at national level or is of national importance, he is chosen by the Minister from a list of 30 names of persons established by agreement between the Minister and the representative organisations of workers and employers.

The mediator proceeds to a fact-finding inquiry with very large investigative powers. He then convenes a meeting of the parties and issues a set of proposals in the form of a recommendation.

This recommendation is not compulsory. Either of the parties may freely decide not to comply with it within eight days. In that case the Minister publishes the recommendation within three months in order to try to apply public pressure for settlement.

After the failure of conciliation, or if provided for in the collective agreement, the parties may agree to arbitration. The arbitrator's decision may be appealed to a Superior Court of Arbitration provided for by the law. Arbitrators' awards can always be subject to later review by the courts.

The procedure for arbitration, which again is always voluntary, has been seldom used.

d) Relation with the right to strike

In France the existence of institutions as regards conciliation, mediation and arbitration has no incidence on exercising the right to strike as the freedom for unions or groups of employees to engage in industrial action at any time is considered paramount. This applies both on conflict of rights and conflicts of interests.

ITALY

a) Introduction

In Italy all labour disputes fall under the jurisdiction of civil courts. Special courts, and implicitly labour courts, are prohibited by Art. 102 of the Constitution. There is a vague provision of Act No. 520 of 1955, giving the Ministry of Labour and provincial and regional labour offices a general task of conciliation in industrial disputes. Notably innovations effected by Act No. 533 of 1973 have given great force to both conciliation before the labour office and inter-union conciliation, which are now by far the most frequent means of settling labour disputes, notably those on rights.

b) Settlement of individual labour disputes

The pretore, comprising a single professional judge, has general first instance jurisdiction in all labour law disputes. Appeals to the decisions of the pretore to the Tribunale. The decision of the Tribunale is, in turn, subject to appeal before the Corte di Cassazione, which reviews only questions of law.

A commission of conciliation may be called upon for conciliation of an individual dispute of rights by any individual employee, or employer, also through a labour organisation of his own choosing.

Permanent commissions of conciliation exist before the labour office in each province. The commissions are tripartite.

If the conciliation is successful, the record, authenticated by the president of the commission, can be granted executive effects by a decree of the pretore, i.e. it can be immediately enforced. The same executive effects may be attributed to the record of a conciliation agreement reached directly between the social partners (unions and employers), without the intervention of the commission, after it has been filed at the labour office in order to be authenticated and ratified by a decree of the pretore.

There are also conciliation procedures in national collective agreements, which can be effective in settling individual disputes. According to these procedures individual grievances are dealt with in the first instance by representatives of management together with shop delegates and then factory councils. In the second instance an unsettling grievance is referred for conciliation to officers' provincial unions and of the corresponding territorial employers' associations.

Italian law allows individual labour disputes to be decided through arbitration only if provided for by law or by collective agreements. The law (Act No. 533 of 1973), however, maintains rather strict limits on arbitration. One of them is, that the right of the parties to resort to the judiciary is preserved.

On the whole, arbitration has never been - and is still not - viewed with much favour in Italian law and practice. The sole case of (informal) arbitration in frequent use is provided for by art. 7 of Act No. 300 of 1970 concerning disciplinary sanctions.

c) Settlement of collective labour disputes

c.1. Conflicts of rights

Collective disputes concerning rights, whether to do with the interpretation of a collective agreement or to do with a statute, are unknown as such to civil procedure: i.e. although a dispute may in fact involve a collectivity of employees or employers, it can be brought to court only when divided up into many individual claims.

c.2. Conflicts of interests

Both autonomous and heteronomous procedures of conciliation, mediation and arbitration in collective labour disputes of interests are poorly developed.

As regards autonomous procedures: most national collective agreements provide for conciliation procedures. They follow a more or less standardised pattern. Collective disputes may be settled at the shop level, particularly if they concern the application of a company agreement; otherwise they are dealt with by the organisation at the provincial level and, in the case of failure, at the national level. Joint interpretation boards, authorised to attempt the settlement of disputes, rather frequent in the sixties, are now found only in a few sectors (chemical, electrical, telephone), but they are seldom active.

From time to time experiments are made to make these provisions more effective. One particularly significant example in this respect is the procedure laid down by the IRI protocol, which has been adopted in several national collective agreements.

As far as heteronomous procedures are concerned: mediation and conciliation may also occur by prefects and members of regional government, but this lacks any legal basis and rest on the sheer political or personal authority of the mediator.

Proposals made up by public mediators have no binding power on the parties but refusing the proposals may be very unpopular for the parties concerned and thus sometimes the proposals may amount to a sort of informal, politically binding arbitration.

d) Relation to the right to strike

Although experts and politicians have recognised the need for an efficient mediatory apparatus in order to modernize the Italian industrial relations system, so far none of these proposals has been taken up.

Under Italian law accepting public conciliation does not imply any duty on the part of the parties involved to refrain from industrial conflict and does not always actually interrupt strike action. This is the case both on conflicts of rights and on conflicts of interests.

GREECE

a) Introduction

Greece was the only E.C. country to know a system of compulsory arbitration until March 1990. This system dated back to 1955 (Act 3239/1955), and was highly controversial. The unions complained that the compulsory arbitration process and the associated restrictions on industrial action provided employers with the means to override the collective bargaining process (in practice, employers were quick to refer disputes to arbitration).

Finally, in 1990 a new statute (Act 1876/1990) came into effect which watered down the compulsory aspects of arbitration in collective labour disputes, putting more emphasis on voluntary third-party intervention, and providing other legal props for the encouragement of free collective bargaining. The new Act has only been fully in force since 1 January 1992.

b) Settlement of individual labour disputes

In Greece individual labour disputes are settled in the ordinary civil courts, notably the First Instance Court or the Magistrate's Court.

c) Settlement of collective labour disputes

Under the 1955-Act in the event of deadlock, collective labour disputes had to be referred to conciliation. The submission of a dispute to conciliation did not require any procedure of direct negotiations to be exhausted. The timing of the referral was left to the discretion of either party involved and often occurred after the most perfunctory negotiations.

Under the 1990-Act conciliation may be requested by common agreement between management and unions. It is defined as an informal process, whereby the conciliator endeavours to reconcile the views of the parties concerned, in order to assist them in reaching a negotiated settlement.

Conciliators are appointed by the Ministry of Labour.

Where, however, negotiations break down the parties concerned may have recourse to mediation or arbitration. These services are under the authority of the Mediation or Arbitration Board (OMED), a quasi-autonomous body set up under the provisions of the 1990-Act.

This body is governed by an executive committee of 11 members, comprising two academics, three representatives from the confederations of trade unions and employers' associations, a representative of the Ministry of Labour and a recognised authority in the field of industrial relations, who is appointed by a majority of the other members.

The Board is responsible for recruiting mediators and arbitrators. These are entrusted with complete independence in the performance of their functions, which they are bound to fulfil "with due impartiality".

The intervention of a mediator may be requested by either party. The mediator is selected by mutual consent of the parties, from a special list. Should the parties fail to agree, the mediator is appointed by drawing lots.

In the first instance the mediator will discuss the matters of issue, hear the opinions of the parties concerned and gather information. However, where no agreement is reached within 20 days of the mediator's appointment, he or she may submit proposals for the settlement of the dispute, which, if accepted by the parties, has the same standing as a collective agreement.

Should the parties fail to indicate their acceptance within five days, the mediation proposal is considered rejected.

Under the 1955-Act, if the conciliator decided that the dispute could not be ended peacefully, the compulsory arbitration procedure would come to play.

Under the 1990-Act arbitration can only be initiated, either

- by mutual consent of the parties at any stage of the bargaining process, or
- unilaterally, by either party, if the other side has rejected mediation
- unilaterally by the union, if it accepts a mediation proposal which has been rejected by the employer; or
- unilaterally, on the initiative of the party accepting a mediation proposal rejected by the other party, where the dispute relates to a collective agreement applicable to public sector utilities, corporations or authorities.

The arbitrator is selected by the parties to a dispute in the same way as a mediator. Once appointed, the arbitrator must take up his or her duties within five days. The arbitrator must issue a decision within 30 days or 10 days where a recourse to arbitration has been preceded by mediation. This decision has the legal status of a collective agreement.

d) Relation to the right to strike

The most controversial aspect of the 1955 legislation (art. 18, para. 2) was that it prohibited industrial action once a dispute had been referred to compulsory arbitration. The ban on industrial action remained in force for 45 days (60 days in the event of an appeal).

In contrast to the situation under the 1955-Act under the 1990-Act the restrictions on strike action during third-party intervention are minimal. Thus the trade union may continue to exercise the right to strike during collective bargaining and during mediation and arbitration. The only exception to this is if a union unilaterally invokes arbitration, where it accepts a mediation proposal which has been rejected by the employer, in which case the right to strike must be suspended for a period of 10 days as from the date of the application.

PORTUGAL

a) Introduction

Portuguese law on industrial relations was amended dramatically in october, 1992, which has also changed the role of conciliation, mediation and arbitration in collective industrial disputes. In fact one of the most important innovations, the new law has brought, is a procedure of compulsory arbitration. The procedure of compulsory arbitration existed already in the portuguese law before 1992, although restricted only to the public companies and to the companies with state-capital exclusively.

b) Settlement of individual disputes

In Portugal the jurisdictional settlement of disputes between parties bound by employment contracts rests with a system of Labour Courts. The possibility of appeal to appellate courts and the Supreme Court depends on the value and nature of the dispute. The entire system is part and parcel of the judicial order of the State. It rests with the judge to try a conciliation.

No conciliation committees has been set up by the law.

c) Settlement of collective labour disputes

c.1. Disputes of rights

Settlement of collective labour disputes of rights rests also with the system of Labour Courts (with appeal to appellate courts and the Supreme Court).

However, according to Portuguese law, collective agreements must provide for the creation of commissions composed of an equal number of representatives of the signatories empowered to interpret the respective agreements. Decisions taken unanimously are adopted as regulations for respective agreements; they are binding and will be formally registered with the Employment Ministry.

c.2. Disputes of interests

The Portuguese State has provided a procedure and mechanism for conciliation, mediation and arbitration of industrial conflicts: the services of the Ministry of Employment can make interventions in matter of conciliation, but not in matter of mediation or arbitration.

The parties may also agree at any time to resort to mediation. The mediator will be appointed by the parties.

Until 1992 arbitration could only take place with the consent of both parties. In practice, arbitration was seldom used in Portugal.

Only public companies and companies with state-capital exclusively arbitration could be made compulsory by a decision taken by the employment minister and the supervising minister.

But under the new legislation in disputes arising from the signing of a collective agreement (1992), compulsory arbitration may also be imposed when conciliation and mediation has proved unfruitful. The imposition of compulsory arbitration where conciliation and mediation has proved unfruitful, only takes place when the parts fail, in the delay of two month, to agree in submitting the dispute to voluntary arbitration.

Should any of the parties to a dispute fail to nominate an arbitrator when a situation of compulsory arbitration applies, the arbitrators shall be appointed by the secretary-general of the Economic and Social Council, who will also designate a third arbitrator in the event of a disagreement between the parties; this shall be done by drawing lots among the arbitrators on a list agreed by the worker and employer representatives on the Council.

Compulsory arbitration may also be decided by order of the Ministry of Labour at the request of either party or upon recommendation of the Economic and Social Council.

d) Relation to the right to strike

It is a general principle, that industrial action is temporarily prohibited once a dispute had been referred to compulsory arbitration. This principle, however doesn't have an explicit legal base and is without any legal sanction.

SPAIN

a) Introduction

Voluntary systems are not widely developed in Spain. Although collective agreements can provide any reasonable system of conciliation and/or mediation, clauses with such content have been most infrequent in the past.

Statutory law provides for certain public procedures, which are valid both for conflicts of interests and for conflicts of rights.

b) Settlement of individual labour disputes

The main characteristic of the Spanish system for the settlement of individual disputes is a highly developed and popular system of Labour Courts. It has jurisdiction over every controversy between employer and employee.

Mandatory previous conciliation is a necessary previous proceeding to almost every claim before the Labour Courts. The conciliation proceeding follows before the labour administration. Moreover, there is conciliation before the Labour Court itself.

Arbitration for individual labour complaints is almost unknown in Spain. Although the law in 1979 opened the possibility of the establishment of Arbitration Courts to decide in individual and collective disputes; these Courts have, up to this moment, not begun to actuate.

c) Settlement of collective disputes

c.1. Disputes of right

Although the Labour Courts have also jurisdiction over collective disputes, provided they are legal or juridical disputes, much more important are the autonomous procedures.

In collective bargaining agreements it is mandatory to include a clause setting up a mixed employer-employee committee to deal with all matters it may be called upon. It is mainly thought of in the context of collective disputes although the general clause also refers to individual disputes.

c.2. Disputes of interests

Labour inspectors have among their legal functions the duties of "mediation in collective labour conflicts". The Labour Inspector may mediate in a trade dispute from the moment at which the strike is notified to the Provincial Labour Director. The Labour Inspector may do that of his own accord or if called in by the parties.

In practice this type of conciliation and/or mediation is very frequent; and in practice too the Labour Inspector may and does meet the parties, or their representatives, jointly or separately, and offer his proposals for the solution of the dispute.

Labour administration of autonomous regions can have faculties in the settlement of industrial disputes and several of them actually have. In this case conciliation is made by their own organs; conciliation by organs with unions' and employers' representation is also established in several of them.

The mediator so nominated can convoke the parties in the dispute in order to obtain the necessary information about it. In a short space of time he must submit his proposals to the parties.

Any agreement reached through conciliation or mediation has the same effects as a collective bargained agreement.

Spanish statutory law (RDL) establishes a type of public arbitration conferred on the Provincial Labour Director (or on the Director General of Labour) if the dispute affected enterprises or work sites in more than one province). As far as this machinery contained some compulsory aspects these aspects where declared unconstitutional in a decision of the Constitutional Court of June 1981, assuming that they were against the collective bargaining right guaranteed by the Constitution. The Constitutional Court made an exception for cases of strikes whose duration and consequences have grievous effects on the national economy.

When the decision to submit the dispute to public arbitration is made by the parties, no defect of unconstitutionality exists.

Spanish laws opens the possibility that the parties can nominate one or several arbitrators. The arbitrator has a very short period (5 days) in which to make his decision, which - if accepted - has the same effect as a collective bargaining agreement.

This possibility of voluntary arbitration has been little used in Spain up to now.

d) Relation with the right to strike

In Spanish law, resorting to the right to strike most of the times remains safeguarded, even if the procedures to settle disputes, established by the legislator are used.

If however these procedures are used at the initiative of the workers the strike is prohibited.

GREAT BRITAIN

a) Introduction

Over already almost a century Britain has had experience with various types of statutory machinery as regards conciliation, mediation and arbitration.

The present institutions are dating back to the mid-1970s when they came to replace older ones.

In studying these institutions and procedures it is important to keep in mind, that in Britain both the distinction between "collective" and "individual" disputes and the distinction between disputes of rights and disputes of interests is of little practical relevance.

b) Settlement of individual disputes

Most individual disputes are not processed through machinery provided by the state, but are settled informally through workplace procedures and joint industrial bodies.

In Britain there exists an awkward separation of jurisdiction between the ordinary civil courts and the industrial courts. Jurisdiction for claims arising out of breach of contract, including the contract of employment, remains with the ordinary civil courts, as do actions for damages in tort, particularly for personal injury or death. A specialised system of labour courts, known as Industrial Tribunals, deals with almost all the statutory individual employment rights.

Conciliation officers designated by ACAS are required to promote a settlement of any complaint which has been or could be presented to an industrial tribunal in respect of statutory employment rights (60.000 cases in 1991).

c) Settlement of collective disputes

Collective disputes, in sofar as they give rise to civil action, are dealt with by the ordinary civil courts.

As collective agreements in Britain are generally not regarded as contracts between the parties to the collective agreement, disputes about the interpretation of collective agreements are seldom heard by the ordinary civil courts.

The most important involvement of the ordinary civil courts in collective labour disputes is about actions for injunctions and damages in connection with industrial action.

In Britain there is a wide variety of voluntary procedures. Most involve a series of stages, each with time limits, and if they fail to resolve a dispute the matter is then transferred to an outside body or individual for conciliation, mediation or arbitration. A recent development - mainly in the "greenfield" workplaces of some foreign-owned companies, is the provision for "pendulum" arbitration in which arbitrators are obliged to choose between the position of one or the other of the parties.

The most important service in this area, provided by the State, is the Advisory, Conciliation and Arbitration Service (ACAS), actually regulated by the Trade Union and Labour Relations Consolidation Act 1992 (pt IV, Ch. IV).

It is charged with the general duty of promoting the improvement of industrial relations. In this framework it also performs the functions of conciliation, mediation and arbitration.

In recognition of the priority of autonomous institutions, the service must have regard to the desirability of using voluntary procedures before intervening in disputes. Moreover ACAS has no powers of compulsion - it seeks to discharge its responsibilities through the voluntary co-operation of the parties concerned.

A central characteristic of ACAS is its impartiality and independence from Government. ACAS is directed by a tripartite Council consisting of a full-time independent Chairman and 9 members: three nominated by the Confederation of British Industry (CBI), three by the Trades Union Congress (TUC) and three independent members (usually academics).

ACAS provides facilities for settling disputes by conciliation, either at the request of one or more of the parties or on its own initiative where an industrial dispute exists or is apprehended (1200 cases in 1991). This conciliation is given by officers of ACAS.

Occasionally the Government may set up a special Court of Inquiry, now under TULRCA 1992 (ss 215-216) to inform Parliament and the public about the causes of an industrial dispute.

Voluntary agreements for arbitration usually envisage a joint rather than unilateral reference.

Where a trade dispute exists or is apprehended, when agreed procedures have been exhausted and conciliation has failed ACAS may appoint one or more persons (who are not officers of ACAS) to arbitrate or mediate on an ad hoc basis, provided at least one party request such a reference and both parties consent.

In the public sector (railways, police, post etc.) there is a number of standing boards of arbitration, serviced by ACAS.

(cases referred to ACAS-arbitration: 157 in 1991).

Moreover, on the request of one or more parties to a trade dispute and with the consent of both parties, ACAS may also refer a dispute to arbitration by the Central Arbitration Committee (133 cases in 1987, no references in 1989).

This a permanent arbitration committee (now based on ss 259-265 TULRCA 1992), maintained at state expense, consisting of a chairman and members with experience as employers' and workers' representatives respectively. It is independent to ACAS and is not subject to governmental directions of any kind.

The CAC can issue awards which then become a binding minimum term of individual contracts of employment.

Finally there is an almost unused provision relation to disclosure of information to the parties to collective negotiations, which provides for unilateral arbitration.

d) Relation with the right to strike

In Britain the freedom to strike, although in certain respects limited under recent legislation, is in no way limited by the very existence of machinery for conciliation, mediation and arbitration.

In some of the workplaces with "pendulum"-arbitration there are also so called no strike agreements. That is to say, the parties agree to forego resort to industrial action in the event of a dispute. There is nothing in law to stop them from doing so.

IRELAND

a) Introduction

Ireland has a long tradition of activities of a prestigious service, provided by the State, the Labour Court - a tripartite body for the settlement of industrial disputes, created in 1946. Its successes in securing a resolution of disputes have been quite impressive. In 1991 the former Conciliation Service of this Labour Court was made independent under the name Labour Relations Commission (LRC).

In studying these institutions and procedures it is important to keep in mind, that in Ireland like in Britain both the distinction between "collective" and "individual" disputes and the distinction between disputes of rights and disputes of interests is of little practical relevance.

Notably the Labour Relations Commission is charged with the solution not only of collective conflicts, but also of disputes which may arise in individual employment relationships.

b) Settlement of individual labour disputes

Trade disputes concerning individual grievances other than disputes over rates of pay, hours of work or annual holidays of a body of workers and other than over equality in employment, are dealt with by Rights Commissioners - a service of the Labour Relations Commission, albeit that they are independent in the performance of their functions.

A party to a dispute on which a Commissioner has made a recommendation may appeal against the recommendation to the Labour Court. The decision of the Labour Court will then be binding.

However, recommendations made by a Rights Commissioner under the Unfair Dismissals Act, the Minimum Notice Legislation and the Maternity Protection of Employees Act may be appealed to the Employment Appeals Tribunal which will then issue a determination on the matter. Appeal from it is possible.

Trade disputes concerning equality in employment legislation are dealt with by Equality Officers of the LRC. The investigate claims and make recommendations. The Equality Officers' recommendations may be appealed to the Labour Court. The decision of the Labour Court will be binding.

Categories of staff with access to public service conciliation and arbitration machinery do not have access to the Rights Commissioner service, neither are their grievance arbitrable.

c) Settlement of collective labour disputes

In Ireland trade disputes may be referred first to the Labour Relations Commission or its appropriate services. This Commission is directed by a tripartite board, whose members are nominated by the Minister of Labour. It offers a voluntary informal service to employers and workers when they find they are unable to reconcile their different viewpoints by direct discussion.

The Labour Relations Commission is empowered under the Industrial Relations Act 1990 to appoint members of its staff to act as industrial relations officers. These officers "shall perform any duties assigned to them" by the LRC through its chairman or chief executive and "in particular they shall assist in the prevention and settlement of trade disputes."

The LRC and its predecessor, the Conciliation Service of the Labour Court, enjoys a high degree of respect and many disputes ended in settlement.

The services of the LRC will not be invoked in cases where there is a specific provision for the direct reference of trade disputes to the Labour Court.

Disputes affecting the public interest may be referred to the Commission or to the Court by the Minister.

The Labour Court shall not investigate a dispute unless it receives a report from the Labour Relations Commission stating that it is satisfied that no further efforts on its part will advance the resolution of the dispute, and the parties to the dispute have requested the Court to investigate the dispute.

It may also investigate a dispute if the Chairman of the Labour Relations Commission or other authorised member or officer, notifies the Court that in the circumstances specified in the notice the LRC waives its function of conciliation in the dispute and, once more, the parties involved have requested the court to investigate the dispute.

Finally the Labour court may investigate a dispute, notwithstanding what is said above, where after consultation with the LRC, the Labour Court is of opinion that there are exceptional circumstances which warrant it so doing.

Moreover where he is of opinion that a trade dispute is of special importance the Minister may request the LRC, the Labour Court or another person or body to conduct an inquiry into the dispute and to furnish a report to him on the findings.

First at the request of one or more parties to a trade dispute or on its own initiative, the Labour Court may offer the parties its appropriate services with a view to bring about a settlement.

d) Relation with the right to strike

In Ireland the freedom to strike, although in certain respects limited, is in no way limited by the very existence of machinery for conciliation, mediation and arbitration. But according to a Code of Practice on Disputes Procedures of 1992 industrial action should only take place after all dispute procedures have been fully utilised.

It is the policy of the LRC not to intervene in disputes involving unofficial action until normal working has been resumed.

SWEDEN

a) Introduction

In Swedish law the distinction made with reference to union involvement is of greater importance than the distinction between individual and collective disputes. Many individual disputes are "collective" in the sense that they turn on the application of a collective agreement, in the interpretation of which the organisations on both sides may have an interest of their own.

Also it is a paramount principle of Swedish labour law, that judicable disputes should be resolved without recourse to industrial action.

The traditional attitude of non-intervention of the State in industrial relations did not prevent the State from establishing a Conciliation Service with the task of promoting industrial peace, particularly to promote peaceful settlements in disputes over new wage settlements.

Swedish Labour Law is characterised by the distinction between disputes of interests and disputes of rights.

Disputes of rights can be settled by the Labour Courts.

b) Settlement of disputes of rights involving a union

Labour disputes, viz. disputes that concern the relation between employer and employee or their organisations are referred to the Labour Court.

The Labour Court, which serves the whole country, should be used only in cases of major importance, namely in cases with "a collective interest" involved. Only "collective parties", employers bound by a collective agreement or unions, have immediate access to it.

There is no appeal against a decision of the Labour Court.

Before a dispute is referred to settlement by the Labour Court, two stages of disputes negotiations must take place, so cases are rather well sifted and prepared before they reach the Labour Court.

Negotiations are pursued first at local level between the parties involved in the dispute with the participation of local organisations wherever such exist: local negotiations. If the local parties do not come to a settlement and one of the parties wishes to pursue the issue, that party must call for negotiations at national branch level: central negotiations. Most disputes are settled this way.

If the dispute has not been settled by central negotiations, the party who wishes to continue may bring a suit to the Labour Court. But the parties are also free to choose arbitration.

Sometimes collective agreements prescribe arbitration for the final settlement of disputes. Sometimes permanent boards of arbitration are set up.

c) Settlement of disputes of rights not involving a union

Individual disputes, not involving a union may be referred to the ordinary districts courts. In labour disputes decided by the district courts the Labour Court serves as court of appeal.

No negotiation procedure is prescribed before an action is brought before the district court.

d) Settlement of disputes of interests

No legislation refers directly to disputes arising from wage negotiations. The provisions on conciliation in the Co-determination Act (ss 46-53), however aim particularly at promoting peaceful resolutions of this type of dispute, although no formal limitations to such disputes apply.

The normal procedure for third party intervention in Sweden takes the form of what is called mediation but could also be termed conciliation.

Sweden's mediation system is organised at both national and regional level. The National Conciliators' Office monitors events in the labour market and appoints mediators if the threat of industrial action looms.

The parties to a dispute must present the authority with notice of industrial action, which then makes an independent decision as to its involvement. Where the parties cannot reach agreement by themselves, and there is a risk of a major dispute arising, the government may decide to appoint one or more special mediators or a mediation commission, though in practice it will usually do so at the request of one of the parties involved.

The powers of the mediators are very limited and in practice they only have their own personal authority and the goodwill of the parties concerned to fall back on. The only obligation imposed on the parties to mediation is that they appear when asked to do so.

In the event of deadlock over a dispute, the parties may attempt to resolve the dispute to arbitration. Provisions for arbitration are not laid down by statute, but they may be laid down in an agreement concluded between the parties. In practice however, few disputes are actually referred to arbitration, safe for the daily newspaper industry.

e) Relation to the right to strike

Industrial action is banned in all disputes of rights.

In disputes of interests parties are under punitive sanctions statutorily obliged to notify the Conciliation Office of a conflict action at least seven days in advance (s. 47 Co-determination Act).

Although formally mediators do not have the power to postpone industrial action, they can appeal to the parties to postpone industrial action whilst mediation is in process. Such appeals have not always been abided by and in some instances mediation has had to take place whilst industrial action was already in progress.

DENMARK

a) Introduction

In Denmark the central organisations of trade unions and employers' associations already early in this century agreed on "Standard Rules of the Settlement of Trade Disputes". It is stated in the Standard Rules, that all trade disputes shall be negotiated by mediation and negotiations between the organisations involved. Later Parliament stepped in to extend the principles of the Standard Rules to all collective agreements (s. 22 ARL).

If the bargaining between the parties does not result in the conclusion of a collective agreement, the dispute is dealt with according to the rules of the LMA, popularly known as the Conciliation Act of 1910 (as amended later).

b) Settlement of individual labour disputes

A distinction must be made between disputes which concerns the individual labour contract without any relation to the collective agreement and disputes with a relation to the collective agreement.

Disputes, which only concerns the content of the individual labour contract without any relation to the collective agreement, must be decided by the ordinary courts. They cannot be solved by arbitration unless the parties agree to such decision.

This rule is also applicable in individual disputes, where no collective agreement is binding because none or only one of the parties to the individual contract of employment is member of an organisation. In those cases neither the Labour Court nor the trade arbitration courts are competent.

Disputes which have a relation with the collective agreement cannot be decided upon by the ordinary courts. Such disputes are to be decided by the institutions of the system of trade jurisdiction, to which, however, only the parties to the collective agreement have access.

Such disputes cannot be decided by the ordinary courts, even if the organisation of the employee refuses to initiate the proceedings according to the system of trade jurisdiction. Thus an employee, who believes he has a rightful claim towards the employer according to the stipulations of the collective agreement, has no possibilities of suing the employer if his organisation does not consent. The employee in such cases can only sue the organisation for damages at the ordinary courts, when the behaviour of the organisation can be considered as unjust and unreasonable in relation to the member.

The only exception concerns the payment of wages. An employee is always entitled to sue individually in the ordinary court in cases where the employer has not paid his wage in due time, provided the reason for non-payment does not arise from a conflict over the interpretation of a collective agreement.

Disputes about dismissals are decided by the Boards of Dismissal. This Board, consisting of representatives of the trade union and employers confederations under a neutral president is in reality an arbitration board.

A dispute cannot be brought before the Board of Dismissal, until it has been negotiated between the organisations involved in order to try to obtain an agreement on a solution to the dispute.

The Board of Dismissal only has competence to decide the question of whether or not a dismissal has been reasonably caused by the conditions of the enterprise or the conditions of behaviour of the employee. Other questions in connection with the termination of the employment must be decided by the trade arbitration courts or the Labour Court.

c) The settlement of collective labour disputes

c.1. Conflicts of rights

Usually an individual dispute involving the collective agreement or a collective dispute is first negotiated at enterprise level between the employer and the shop stewards, before the initiation of formal proceedings according to the Standard Rules.

According to these Standard Rules in nearly every dispute of rights between an employer and employees a solution has to be attempted through mediation.

Mediation is established by those organisations which are the parties to the collective agreement and is carried out by representatives of these organisations. The Standard Rules do not contain any stipulations relating to the composition of the mediation committee but they contain some stipulations of a formal character.

If the decision of the mediation committee cannot be considered as invalid by reason of such infringement of the formal rules and principles, the decision is a final one, against which there can be no appeal to the Courts. The decision is binding upon the local parties of the dispute as well as upon the parties of the collective agreement.

The last phrases indicate, that the mediation committee can decide the issue whether the local parties can agree upon such decision or not. However, the members of the mediation committees very seldom take the opportunity of making a decision which does not correspond with the wishes of their members.

If the dispute is not solved by mediation each party to the collective agreement has the right to claim that the dispute shall be negotiated between the parties to the collective agreement.

The aim is, just as it was the aim of the initial mediation, primarily to obtain an agreement between the local parties. If however such agreement cannot be obtained, the representatives of the organisations are entitled to decide in the dispute, even if the parties at the local level do not agree with the decision. At this stage this right of the organisation is a very important one, because the organisations, by agreement, make decisions in most of those disputes which cannot be considered as principal ones. Such agreements are binding upon the organisations as well as upon their members.

If the dispute cannot be solved by mediation or by negotiation between the parties of the collective agreement, each of the parties is entitled to have the dispute decided by an arbitration court for a final decision. The award from the trade arbitration court is the final decision on the dispute and there can be no appeal to a higher court or the Labour Court, save for cases in which the arbitration court has exceeded essential formal rules.

There are no stipulations in the Standard Rules of the composition of the arbitration court.

Finally there is the Labour Court. However the individual employee or employer cannot bring a case before the Labour Court. Only employers' associations and trade unions have a right to sue in the Labour Court over disputes, which concerns the breach of a collective agreement. Also a wrong interpretation of the collective agreement made in good faith, and subsequently effected, must be considered as a breach of the collective agreement.

So there might be an overlap in the competence of the Labour Court and of the trade arbitration courts.

Legal usage for the Labour Court shows that the Court does make a decision over the preliminary questions of interpretation, when the Court considers such questions to be of reasonable importance to one of the parties, whereas questions of a very technical nature and those which are only of importance to the local parties are dismissed to be decided upon by the trade arbitration courts.

Moreover the competence of the Labour Court can be circumvented by an agreement between the parties according to which such disputes shall be decided upon by the trade arbitration courts.

c.2. Conflicts of interests

It is normally stated in the Rules of Bargaining regulating the process of Collective bargaining in Denmark, that if the negotiations are not terminated within a certain period, the bargaining is to be continued in the Conciliation Service with the assistance of a conciliator and in accordance with the rules of the Conciliation Act. The parties, if they so wish, have the possibility of already having a mediator appointed from the Conciliation Service for the bargaining which is carried out before the case is brought before the Conciliation Service.

According to the Conciliation Act there is a Public Conciliation Service which consists of three conciliators and one substitute for the conciliators.

Moreover the Conciliation Service consists of a number of mediators and a number of substitute mediators who may assist the conciliators in their task.

The conciliators, mediators and the substitutes are appointed by the Minister of Labour on the proposals of the Labour Court and - in reality - also based on the proposals of the central organisations of trade unions and employers' associations. The Conciliation Service has the competence to conciliate in all disputes of interest in the labour market and also those disputes where the employer is the Public Service.

The Conciliation Service has no competence whatsoever to decide arbitrarily upon the content of the collective agreements between the parties, in order to create the possibility of concluding a collective agreement. But the conciliators have the right to have their proposals for a solution to the dispute decided upon by a vote amongst the members of the organisations involved in the dispute. On the trade unions side a proposed solution from the conciliator can only be rejected if a majority of the actual voters are against the proposal and if this majority consists of at least 35% of the total members of the organisation.

When the proposal for a solution from the conciliator has been approved, it is binding upon the organisations involved and their members as a collective agreement.

If the conciliator feels, that the conciliation has no possibility of resulting in agreement on a proposed solution, which could be approved by the members of both parties, he will normally declare the conciliation terminated. If however a threatened stoppage of work would affect the vital functions of society, or if the conciliator considers that the stoppage would have far reaching effects upon the society, he has an obligation to confer with the two other conciliators before stating that the conciliation is finally terminated.

Disputes of interest cannot be solved by arbitration unless the parties agree to such decision. Nothing prohibits the parties of the collective agreement from agreeing to arbitration as a method of settling a dispute, in the same manner as arbitration is used to resolve disputes over interpretation of a collective agreement. However, agreements to use arbitration must be expressly stated.

The Danish legislation offers no possibility of industrial disputes of interest being terminated by compulsory arbitration. This general state of affairs has however not prevented Parliament and the Government from time and again passing ad hoc legislation, which in fact has meant, that the new agreements have been created by compulsory ad hoc arbitration.

d) Relation with the right to strike

In Denmark disputes of rights must not lead to stoppages of work by any of the parties.

As regards disputes of interests: when the conciliator has intervened in the bargaining process, he has the right to demand, that those stoppages of work of which notice has been given and which have not been started, shall be suspended for a maximum period of fourteen days. If a conciliation has failed in vital sectors and functions of the society a second period of suspension of stoppages may be declared.

Finally the right to strike was suspended each time Parliament and Government imposed, by way of ad hoc legislation, settlements on the parties of the labour market.

FINLAND

a) Introduction

In Finland, where there is a dispute of interests, that is, when the parties have failed to negotiate a new collective agreement, the dispute must be referred to conciliation and mediation. Detailed regulations on conciliation and mediation procedure are contained in the Mediation in Labour Disputes Act.

b) Settlement of individual disputes

Most collective agreements provide for a grievance procedure for the settlement of disputes concerning the application of the agreement in question.

All disputes concerning the rights in individual contracts of employment are heard and tried by the regular courts, save for cases about matters connected with collective agreements.

Arbitration may be substituted for civil proceedings at regular courts, but this almost exclusively happens as regards managerial and comparable employees.

c) Settlement of collective disputes

c.1. Disputes of rights

A dispute concerning an existing collective agreement falls within the competence of the Labour Court.

The Labour Court is a single specialised court for matters connected with collective agreements. This regards the interpretation of collective agreements and breaches against duties based on the contents or existence of collective agreements.

Apart from a few exceptions the rule is that only parties to collective agreements may appear as parties to lawsuits at the Labour Court.

Disputes which would otherwise belong to the jurisdiction of the Labour Court may be referred to arbitration, but this possibility is not often used.

c.2. Settlement of collective disputes of interests

A party intending to initiate a strike or lock-out must notify the opposing party and the National Conciliator's Office (or in the case of a local strike the district conciliator) at least 14 days in advance.

The National Conciliator's Office was established under the Mediation in Labour Disputes Act with the role of preventing strikes and lock-outs in advance where possible. At present the Office consists of one national conciliator, appointed by the President of the Republic for four years at a time and five part-time district conciliators.

As soon as the competent conciliator has received notice of intended industrial action, he or she is charged with taking such measures he or she deems appropriate to settle the dispute. Conciliators may also act at their own initiative, whenever they become aware of a dispute likely to endanger industrial peace.

The Mediation in Labour Disputes Act contains detailed instructions for the mediation procedure.

The parties are obliged to attend negotiations convened by the conciliator and shall supply such information as the conciliator deems necessary. Having become familiar with all the matters relating to the dispute, the conciliator will endeavour to induce the parties to determine the matters in dispute and restrict them to as few as possible. Thereafter the conciliator will attempt to mediate, that is, seek to bring about a compromise solution, based mainly on the parties' own demands and proposals, suggesting such concessions and adjustments as appear fair and appropriate. If he or she fails to settle the dispute in this way, the conciliator may - but need not - present a draft proposal, recommending them to accept it within a short and specified time limit.

If the proposal is not accepted, the conciliator shall consider whether and in which manner the proceedings should be continued. In practice new discussions may be conducted immediately to modify the proposed settlement, or industrial action may be initiated, in which case the conciliator will follow the situation and call upon the parties to enter renewed negotiations after some time has elapsed.

The service of the conciliators are subsidiary in the sense that the parties may agree upon another body adjudicating or settling a labour dispute. In such a case the parties should notify the National Conciliators' Office, whose officials may not take any steps to mediate in the dispute unless it appears the other body has failed to settle the case, or the circumstances indicate it will not be able to handle its task successfully.

d) Relation to industrial action

A party intending to commence a strike or lock-out has to give notice to the opposite party and also to the office of the National Conciliation Service (or as regards local conflict, to the competent district conciliator) at least fourteen days beforehand. The Mediation in Labour Disputes Act allows a proclaimed stoppage of work to be deferred for a further fortnight in case where the stoppage is deemed to affect essential functions of the society or to prejudice the general interest to a considerable extent.[2]

2 Solidarity action and strikes initiated as part of a political demonstration may not be deferred by the Ministry.

NORWAY

a) Introduction

The dispute settlement procedures embodied in the legislation of Norway are based on the distinction - classic in Norway - between "disputes of rights" and "disputes of interests". This is coupled with the regulations, in legislation and supplemented by collective agreement, on a peace obligation which, simply put, entails a ban on industrial action. The dispute resolution system in its practical function must be viewed in the context of the centralization of the Norwegian labour market organisations and of collective bargaining structures.

Notably mediation in cases of collective disputes of interests is an important part of the Norwegian dispute resolution system. Voluntary arbitration in those disputes is rather rare, but compulsory arbitration is a feature of considerable factual importance in the Norwegian industrial relations system with significant bearing on the process of bargaining and mediation as a whole as well.

b) Settlement of individual disputes

Legal proceedings concerning the rights in individual contracts of employment must be instituted before the ordinary courts (which handle civil law as well as administrative and criminal law matters). Litigation in civil law matters within the jurisdiction of the ordinary courts must, in most cases, be started by filing a complaint with the Conciliation Council, a tribunal organised in each municipality and composed of three lay members. The task of the Conciliation Council is to mediate and seek a reconciliation of the parties to a voluntary settlement.

Concerning labour law matters, however, preliminary conciliation is not required for termination of employment (dismissal) disputes, in maritime cases and in actions against public bodies.

The decisions of the ordinary court in first instance may be appealed to the Appellate Courts and eventually to the Supreme Court.

c) Settlement of collective disputes

c.1. Disputes of rights

Any dispute concerning the interpretation, application, scope or validity of a collective agreement, or claims based on the agreement, e.g., for compensation in case of breach, is considered a "dispute on rights".

Any dispute of rights must be resolved through bargaining and eventually by the Labour Court, but not by industrial action. In this respect the peace obligation should he characterised as absolute.

The Labour Court is a specialised national court of law, established in 1915 by the first Labour Disputes Act, having exclusive jurisdiction over collective disputes of rights, including disputes concerning the lawfulness of industrial action. Predominantly the Labour Court is and has been called upon to consider whether industrial action is lawful in relation to the scope in substance of the peace obligation.

The number of cases brought before the Labour Court amounts to an average of 30 a year.

c.2. Disputes of interests

The settlements of demands concerning matters not covered by a collective agreement - including, and in practice most important, demands for regulation where no previous collective agreement is in force - and demands for alteration or renewal of an existing collective agreement, are on the other hand "disputes of interests".

As the Norwegian labour disputes legislation is based on the principle of freedom of collective bargaining, disputes of interests must be settled voluntarily, through bargaining. If the parties themselves fail to reach a voluntary settlement, mediation is however available and applicable, pursuant to fairly detailed provisions of the Labour Disputes Act, 1927 and the Public Service Labour Disputes Act, 1958. The Labour Court has no jurisdiction in disputes of interest.

One State Mediator and a number of district mediators are appointed by the King (Cabinet in Council) for a period of three years at a time. Special deputies are appointed by the Ministry for Local Government and Labour, upon nomination by the state mediator.

All mediators are independent of the Government and may not be instructed by the Government or a Minister with regard to their functions on the performance of their tasks.

Mediation may be instituted on the state mediator's own volition or following notification, eventually also a request, by the parties pursuant to the formal rules on notifications. The former is very rarely done; the latter is the all-prevailing rule. In either case, the competence to decide whether to institute mediation procedures rests solely with the state mediator. This applies also to the disputes that are of a limited and local nature and thus may be referred to a district mediator for subsequent conduction.

The purpose and aim of mediation is to have the parties reach a "reasonable" voluntary settlement without taking resort to industrial action.

During mediation, mediators have access to all documents of the parties and have fairly unlimited powers of investigation. In practice, however, their work is predominantly based not on documentary evidence but on talks with the parties, mostly separately, but in plenary meetings at the beginning and at the end of the procedure.

In all cases mediation is compulsory: once it is decided to institute mediation, the parties are obliged to convene and participate in good faith - for a limited period of time.

However, mediators have no formal competence to dictate the parties and cannot compel them to conclude an agreement or to accept a proposal.

The mediator may, in the concluding stages of the procedure, elect to present a formal proposal for a settlement. The common practice is then, that the parties concerned call a referendum on the mediator's proposal or submit it to a competent body of the organisation for final decision.

According to the Labour Disputes Act (and thus in private business) the submission of a proposal for subsequent decision is not a statutory requirement nor can it be imposed on the parties by the mediator. The Public Service Labour Disputes Act however authorises the state mediator to require a referendum.

Mediation is in fact resorted to quite extensively, in major disputes as well as in smaller ones. The number of cases subjected to mediation centrally, i.e. in major agreement disputes, may vary considerably - ranging from 20 in one year to 125 in another; in addition, some 100 up to more than 200 smaller disputes, mainly concerning the conclusion of standard collective agreements with single, non affiliated employers, are handled each year by the district mediators. Mediation in practice also quite often is successful. Exact figures are not available, but on the average actual failure occurs in no more than 5 to 10 percent of all cases.

If no settlement is reached by way of mediation, the parties to the dispute may at the outset take recourse to industrial action. But they may also opt for voluntary arbitration to the National Wages Board, set up by an Act of 1952. This Board is a permanent body available, at the outset, for voluntary arbitration of disputes of interests. It is composed of 5 permanent members: three neutrals and two representatives of the major organisations of trade unions and employers. The Board is empowered to deal with any dispute arising in the process of negotiating collective agreements, provided that both parties so request. It has full powers of investigation and use of files, but in practice mainly considers the arguments presented to the parties and, not less important, rely heavily on technical materials prepared by experts.

Requests for voluntary arbitration by the National Wages Board have been rather rare, scarcely more than one per year.

Occasionally applied in pre-war years, compulsory arbitration was introduced as a general instrument in 1945 and then gradually scaled down during the following years. Those statutory provisions were finally abolished in 1952.

The present labour disputes legislation makes no general provision for compulsory arbitration if mediation is unsuccessful.

However, since 1952, compulsory arbitration has been imposed rather frequently by special legislation to settle specific disputes. A special Act by Parliament -or, between sessions, a special Cabinet Decree in accordance with powers conferred by the Constitution - is required.

In practice, the actual number of disputes submitted to compulsory arbitration totals in excess of 120 since 1952, so approximately 3 per year on the average. Such cases have not been limited to essential services. Compulsory arbitration has also been used - and quite frequently so - to compel minority confederations and unions to follow the main wage policy guidelines adopted by the government in agreement with the major confederations of trade unions and employer's associations. Recognised, more or less tacitly as a matter of fact, the use of compulsory arbitration is however a matter of consistent controversy and frequent criticism, and of occasional conflict, at times involving illegal industrial action.

Compulsory arbitration is also foreseen for certain groups which do not have a right to strike: police, military personnel and senior civil servants appointed according to specific Constitutional procedures. The general rules on bargaining and mediation, as embodied in the PSLDA, apply to these categories of employees as well. However, if bargaining and subsequently mediation is unsuccessful, the dispute is subject to compulsory arbitration by the National Wages Board.

d) Relation to industrial action

In order to lawfully undertake industrial action in a dispute of interests written notice from one party to the other is required. The notice period is in most cases 14 days. When an "action notice" is given, the party giving that notice is required also to immediately notify the State Mediator's Office. Industrial action is in all cases prohibited during the four days following the notification to the State Mediator. This is to allow the State Mediator to assess the dispute and to decide on whether to order a temporary suspension of the right to start industrial action pending completion of the mediation procedure. The State Mediator may issue a ban to that effect within two days of having received a relevant notification from a party. Whether to do so is in principle largely left to the discretion of the National Mediator.

The Act states, that the State Mediator has the competence to ban industrial action if he considers that the dispute at hand appears likely to threaten the general interest either because of its scale or because of the type of enterprise concerned. In practise, suspension orders are issued in all national and other major collective agreement relationships, but more rarely in smaller disputes involving only a few or one employer with a limited workforce.

Ten days after the ban on industrial action either party may require the mediation to be terminated within four days. Thus at the outset, a suspension order is effective and mediation may be carried out for a minimum of 14 days. The usual practise is however to apply deadlines in a highly flexible manner, in order to give the mediation procedure every chance of success. It rests with the parties to decide when they should require the termination of the mediation procedure; they are not compelled to do so after ten days and may freely prolong the mediation procedure by waiting. Doing so is the prevalent practice.

All the aforementioned is based on the provisions of the Labour Disputes Act.

In the public service the Public Service Labour disputes Act stipulates a mandatory "cooling off" period (14 days, at the outset).

Industrial action is in neither case banned beyond the formal completion of the mediation procedure by virtue of statutory provisions. It is however established by case law that if it is accepted to submit a mediator's proposal for subsequent decision, this also implies an agreed postponement of any industrial action pending the expiry of the deadline fixed.

CONCILIATION, MEDIATION AND ARBITRATION IN INDUSTRIAL DISPUTES IN THE COUNTRIES OF WESTERN EUROPE

Part II

Synthesis report

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1. Introduction

In Part I of this study brief descriptions have been given of the actual situation on conciliation, mediation and arbitration in the countries of Europe. This description, however, is of limited value as it is poor on factual comparative data on the functioning of conciliation, mediation and arbitration in the various countries. One would have liked to have to hand some overall comparative research from the point of view of legal sociology. One also would have liked to have been informed by overall comparative research on the relation between the frequency of strikes and the occurrence of machinery for conciliation, mediation and arbitration in the various countries. Yet, it was impossible to undertake such overall comparative research within the scope of this study and we have to refer to the more isolated research in this field, which is abundant.

Part II offers a synthesis of the situation in the countries of Europe. It is written so as to contrast as much as possible similarities and contradictions between the countries in Europe in this respect.

At the same time I will try - for the sake of the discussion - to formulate some questions and present some personal views.

2. The role of conciliation, mediation and arbitration in individual labour disputes.

If we assess the preceding reports systematically, the first issue where conciliation, mediation and arbitration in Europe shows up is in the area of individual labour disputes.

In a number of European countries - Germany, Austria, Switzerland, France, Italy, Spain - conciliation is the initial stage of the procedure before the courts which are called to settle legal disputes concerning individual employment relationships. This is notably so in dismissal cases.[1]

In some European countries - Belgium, The Netherlands, Italy, Denmark -conciliation and mediation in individual labour disputes is sometimes provided for by procedures laid down in collective agreements as an alternative to proceedings before the court.

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1 In Norway it is just the contrary: litigation in civil law matters is normally started by preliminary conciliation by a Conciliation Board, which exists in every municipality. But this is not required for dismissal cases! In some countries dismissals are dealt with in special procedures, which have some features in common with conciliation and meditation: in the Netherlands the system of dismissal licenses is used; in Denmark the system of Boards of Dismissal applies.

And in two European countries conciliation in individual labour disputes is provided for by a prestigious state funded service, viz. ACAS in Great-Britain an the Labour Relations Commission in Ireland.

In most European countries private arbitration has little significance in the settlement of individual labour disputes. One of the reasons might be the easy accessibility of the courts in these disputes. Another reason might be, that the validity of arbitration clauses in many countries - Austria, Switzerland, The Netherlands, France, Italy - is restricted by statute or case law as far as these matters are concerned.

Only in Sweden and Denmark the role for arbitration in individual labour disputes is not negligible. In these countries sometimes collective agreements prescribe arbitration for the final settlement of these disputes and not infrequently permanent bodies of arbitration are set up as an alternative for referring these cases to the Labour Court.

All in all the role of conciliation and mediation in individual labour disputes in Europe seems to be considerable, whilst that of arbitration is only marginal.

This conclusion raises questions like:

- is conciliation and mediation in these cases successful?
- does it have a preventative function? One is tempted to make a comparison with conciliation in divorce procedures!
- does it diminish the workload of the ordinary courts?
- is it more to the satisfaction of claimants and defendants than procedures before the ordinary courts?
- is the marginal function for arbitration in individual cases justified? Why should there not be a larger role for arbitration? Are the legal obstacles to arbitration in individual cases necessary and desirable?

3. The role of conciliation, mediation and arbitration in collective disputes on rights.

In the majority of the countries in Europe in matters of collective labour disputes a distinction is made between disputes on rights and disputes of interests.

In a number of European countries - Germany, Austria, The Netherlands, France, Portugal, Spain - the ordinary civil courts or the specialised labour courts feel perfectly competent to hear collective labour disputes on rights, notably those concerning the interpretation or the breach of collective agreements. In the Scandinavian countries the legislator has established a special court solely competent to hear these cases.

By consequence in all these countries - and they are the large majority in Europe - conciliation, mediation and arbitration do not have a large role to play in this type of industrial disputes.

But this is not to say that they have no role to play in this type of disputes. The parties to the collective agreement are sometimes reluctant to have resort to the competent courts on disputes about the interpretation of collective agreements. They might prefer to solve these questions in negotiations. And - as an alternative - in these countries often collective agreements have established joint committees for the interpretation of the collective agreement. In Portugal and Spain the law prescribes collective agreements to provide for the creation of joint committees to interpret the respective agreements.

In Switzerland in many cantons the Cantonal Conciliation Boards also deal with collective disputes of rights.

So, in the majority of the European countries, where courts have an important role to play in the solution of collective disputes on rights, conciliation, mediation and arbitration is only a secondary road although it is a road not to be overlooked.

Alongside this majority of European countries, there is a minority of countries, where the courts have a much more limited role in collective disputes - disputes on rights as well as disputes of interests, a distinction that is not material in these countries.

This concerns in the first place Great-Britain and Ireland, where collective agreements are generally considered not to be legally binding contracts. And it concerns Belgium where the courts have no power to intervene in collective labour disputes, whether they are about conflicts on rights or conflicts of interests.

It is clear that in these countries, where there is no alternative way to have conflicts on rights peacefully settled, all emphasis is laid on procedures of conciliation, mediation and arbitration, which has prompted the legislator to provide for important institutions in this field - ACAS in Britain, the Labour Court an dthe Labour Relations Commission in Ireland and the Joint Committees and Social Conciliators in Belgium.

This synthesis leads us to a number of questions.

- What is the experience with the involvement of the courts with collective disputes on rights as compared to the activities of conciliation and mediation in this field? Are courts better equipped to handle these cases than machinery of conciliation and mediation? Is there not the chance that courts may confuse the contents of collective agreements more easily than conciliation and mediation machinery? "The power to interpret is the power to destroy", O. Kahn-Freund used to say.

Is that the reason why Scandinavian countries and Ireland opted for specialised Labour Courts with a large influence of the social partners? Can these Courts be seen as a compromise-model between - on the one hand - the jurisdiction of the courts and - on the other hand - conciliation and mediation in collective labour disputes on rights?

- Is the distinction between disputes on rights and disputes of interests still a useful distinction in the present industrial relations?

4. The role of conciliation and mediation in collective disputes about interests.

In virtually all countries of Europe the state has provided machinery for the settlement of collective disputes about interests, the most noticeable exceptions being Germany, the Netherlands and Italy.[2]

But although most countries possess public machinery for conciliation and mediation - sometimes also for inquiry and arbitration - the functioning and the role of these machineries is in some aspects similar, but in other aspects rather diverse.

A large similarity prevails as regards the outcome of public conciliation and mediation. In all the countries concerned the public conciliation and mediation procedures cannot result in solutions imposed on the parties. The public mechanism is restricted simply to make available its "good offices" in the search for a resolution of the dispute. The two sides may, in theory, agree in advance to be bound by the solution proposed by the public conciliation and mediation service, but this too requires the agreement of both sides and it rarely happens.

In Denmark the conciliator in an industrial dispute has the right to have his proposals for a solution to the dispute decided upon by a vote amongst the members of the organisation.

In Norway this is only so in the public service.

Another aspect in which the various public machineries do not much differ from each other is the idea of subsidiarity. It is standing practice that public services of conciliation and mediation should act only if the employers and workers involved in the dispute are not bound by an agreement which institutes private conciliation or mediation machinery, in which case this private body alone is competent.

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[2] Provided the "dead letter" statutes in Germany (Kontrollratsgesetz), The Netherlands (Act of 1923) and Italy (Act of 1955) are neglected.

The public service should respect the priority of autonomous institutions and have regard to the desirability of using voluntary procedures before intervening in disputes. One finds this rule notably emphasized in those countries in which there is a wide variety of voluntary procedures, such as in Switzerland, Britain and Finland.

The Belgian system offers a remarkable example of how the autonomous and the public mechanisms of conciliation and mediation can be intertwined: in all branches of industry there exist joint committees to prevent and settle conflicts between employers and employees, whether they are about conflicts on rights or about conflicts of interest. However, their status is regulated in an Act of Parliament and they are normally presided over by a "social conciliator" who is an independent person appointed by the King.

In all countries, the services of conciliation and mediation provided by the State have no compulsory powers - they seek to discharge their responsibilities through voluntary cooperation of the parties concerned. But the degree of non-interference varies, for example on the point as to whether the public machinery is acting only on request of the social partners or whether it is also acting on its own initiative.

In a number of countries - Austria, Switzerland (as regards the Federal Board of Conciliation), Greece, Spain, Great-Britain and Ireland - the parties to deadlocked negotiations are left completely free to make use of or to hold in abeyance the public machinery. This machinery acts only at the request of the interested parties.

The alternative is that the state provided machinery may act ex officio as soon as it hears that a dispute has arisen; it is not bound to wait for a request from the interested parties. Notably in Spain, Switzerland (only as far as cantonal conciliation boards are concerned), Luxembourg and the Scandinavian countries, the procedure before a state provided machinery of conciliation or mediation in conflicts of interests is obligatory.

In close connection to the last mentioned aspect there is the question of attendance before and cooperation with the state provided machineries.

In Switzerland, Finland and Norway attendance before the mediators, assistance in the oral proceedings, supplying information and documents is obligatory.

In Sweden the parties are only under punitive sanctions obliged to notify in advance the Conciliation Office of a collective action.

In France the public procedures on conciliation, mediation and arbitration, brought in the statute book in the 1950s were predominantly optional for the parties, but they contained a few obligatory features. It has been the legislation of 1982 - taking stock of the failure of these procedures to have any impact on the level of industrial conflict in France - which overhauled these provisions and purified them from all obligatory aspects.

In Britain the emphasis was not so much on the question whether the public service may act on its own initiative. But for the British the essential thing has been that the service is impartial, independent from government and being administered in such a way that it has the confidence of the social partners.

In Great-Britain and Ireland the idea of inquiry was especially developed by the legislator - in Britain Courts of Inquiry may be set up to inform Parliament and the public about the causes of an industrial dispute; in Ireland the Labour Court may investigate a dispute.

The information of the public as a means to put pressure on the social partners concerned is also known in France: if parties decide not to comply with the recommendations of the State mediator the Minister publishes the recommendation within three months in order to try to generate public pressure for settlement.

Let us now turn to the few countries in Europe where public machinery for conciliation and mediation in collective labour disputes is lacking - Germany, The Netherlands and Italy.

Again the situation in these countries differs from one country to the other.

On the one hand there is Germany, where autonomous mechanisms for voluntary conciliation and mediation - procedures set up by the parties to the collective agreement - are widespread and well-used.

On the other hand there is The Netherlands, where not only public machinery for conciliation and mediation is absent, but where also autonomous procedures are poorly developed.

Finally we must examine the incidence of the existence of machinery for conciliation and mediation on the right to strike.

On this very fundamental issue the situation in Europe is totally split in two.

On the one hand in quite a number of countries - Germany, Austria, Switzerland, Luxembourg, Greece (since 1992) - case law often implies that all means of negotiation must be exhausted and mediation must be attempted before a strike can be called. The idea is that one of the most important prerequisites for a legal strike is the requirement that a strike may only carried out as a last resort. This so-called principle of *ultima ratio* implies that all means of negotiation must be exhausted and mediation must be attempted before a strike can be called.

In Belgium this rule is not enforced by the courts but self-imposed by the parties to the collective agreement.

In Ireland, according to a Code of Practice on Disputes Procedures, industrial action should only take place after all dispute procedures have been fully utilised. And conciliators will not intervene in disputes involving unofficial action until normal working has been resumed.

In Finland industrial action may not be started before the dispute has been referred to conciliation and mediation.

In Denmark the conciliator that intervened in the bargaining process has the right to demand that those stoppages of work of which notice has been given and which have not been started, shall be suspended temporarily.

On the other hand there is Sweden, where the mediators formally do not have the power to postpone industrial action.

In Great-Britain the freedom to strike, although in certain respects limited, is in no way limited by the very existence of machinery for conciliation, mediation and arbitration.

In France and Italy the existence of institutions as regards conciliation and mediation has no incidence on exercising the right to strike. And also in Spain resorting to the right to strike most of the times remained safeguarded.

After the tour d'horizon of this paragraph the scholar is left with many questions.

- Is there a relationship between state provided machinery for conciliation and mediation and the frequency of industrial disputes - the higher the number of days lost by strikes the more and intensive the attempts of the legislator to tackle this phenomenon by introducing public machinery?

- Is it wise to divide the tasks between voluntarily established procedures of conciliation and mediation and state provided machinery along the lines of the subsidiarity principle? Or is the Belgian approach of intertwining the two more promising?

- Is it desirable that procedures of conciliation and mediation contain obligatory aspects, such as

- Also acting ex officio (without request of the parties)

- Obligatory meetings with and information of conciliators/mediators by the parties

- Publication of results of inquiry and of proposals made by the conciliators/mediators

- Obligatory consultation of the members on proposals of the conciliators/ mediators?

- Can and should the right or freedom to strike be limited by the requirement that possibilities of conciliation and mediation should be exhausted before a strike is called?

5. The role of arbitration in collective disputes.

We have seen that the role of arbitration in individual disputes is a marginal one and that one of the reasons for it might have been that the law in various European countries is not very friendly to that mechanism in individual disputes.

Things seems to be exactly the other way round as regards the role of arbitration in collective disputes.

Let us talk first on voluntary arbitration, which usually requires a joint rather than unilateral reference.

Only in a few European countries - Britain, France, Spain and Norway -, has the legislator provided special machinery for arbitration in collective labour disputes.

In most European countries there exists no specific arbitration procedure for collective labour disputes; if there is voluntary arbitration it is carried out on the base of the rules of the civil code of procedure. On that base in theory it is possible, that the parties to a collective dispute agree on arbitration, that they request arbitrators to make an arbitration award which is then binding.

In the majority of European countries voluntary arbitration has little significance in the settlement of collective disputes, be they about rights or about interests.

In Switzerland, Luxembourg, Britain and Denmark arbitration is not unusual.

In Britain there are some experiments with pendulum arbitration in which the arbitrators are obliged to choose between the position of one or the other of the parties.

Also, in Britain and in The Netherlands, in public sector arbitration on the basis of consent of both parties by standing boards of arbitration is popular.

In Europe compulsory arbitration has never played such a dominant role in the settlement of industrial disputes as it has done in other parts of the world, like in Australia. But it has known its major examples in Germany between 1923 and 1933 and in France between 1936 and 1939.

After the Second World War compulsory arbitration has disappeared and among many scholars it is considered to be incompatible with the freedom of association, guaranteed by the Constitution in Germany and by international treaties, or with the right to strike, guaranteed by the Constitution in France and Italy and also by some international treaties.

In Spain the Constitutional Court in 1981 declared unconstitutional some compulsory aspects of the public machinery for arbitration in industrial conflicts, considering that they were against the right on free collective bargaining, guaranteed by the Spanish Constitution.

Only in Greece compulsory arbitration was maintained and practised until 1990 when it was abolished.

Things went just the other way round in Portugal where in 1992 the procedure of compulsory arbitration - already in existence in the public/State-owned companies, was extended to all business.

In Denmark and Norway officially the legislation offers no possibility of industrial disputes being terminated by compulsory arbitration. But this has not prevented Parliament and the Government in these countries from time and again imposing, by way of ad hoc legislation, settlements on the parties of the labour market.

In some countries, such as Greece (since 1990), compulsory arbitration still has a role to play in the settlement of disputes of those workers (notably in the public sector) who do not have the right to strike.

In cases of voluntary arbitration it is up to the parties to regulate the relation to the right or freedom to strike, but it might be considered as a general principle that the right or freedom to take industrial action is temporarily suspended as long as arbitration is in course. And that it is prohibited to take industrial action against the outcome of arbitration to which both parties have bound themselves voluntarily or which is imposed to them by legislation.

Such principles, however seldom, have an explicit legal base and in some countries it is even without legal sanctions. In Spain for example this principle has only been accepted for cases of strikes whose duration and consequences have grievous effects on the national economy.

The aforementioned observations raise questions such as :

- Is not it remarkable that voluntary arbitration is so much underdeveloped in Europe as compared to for instance the US? Why so few experiments with devices like pendulum-arbitration/final-offer arbitration?

- Is compulsory arbitration utterly incompatible with the right to associate/to free collective bargaining/to strike? Or is there a role for compulsory arbitration in those cases in which no freedom to strike can be allowed (certain public servants, vital sectors of the economy, etc).

6. Conciliation, mediation and arbitration in industrial democracy

In recent years a new role for the devices of conciliation, mediation and arbitration seems to have been born, viz. in relation to industrial democracy in the enterprise. Major examples of it can be found in Germany, Austria, The Netherlands and Luxembourg.

In these countries the use of the strike weapon to solve conflicts of interests in the orbit of democracy in the enterprise is not allowed. For that reason other means of conflict resolution had to be found.

In Germany and Austria the law has established arbitration committees for the settlement of such disputes. The decisions of these bodies are binding on the parties. In the Netherlands the law has established mediation committees for the settlement of such disputes, whose proposals are not binding on the parties.

In Luxembourg similar bodies perform such tasks either as conciliation/mediation or as arbitration.

The EC Commission twice proposed in vain to introduce arbitration as a conflict resolution mechanism in the Directives on Collective Dismissals and on Transfer of Undertakings.

Which leads me to a final question:

- Should conciliation, mediation and arbitration be further developed as proper means of conflict solution in the orbit of democracy in the enterprise?

7. Conclusions

The right to take industrial action has been recognised in our modern European societies as a fundamental right. At the same time this right is to be considered as a "necessary evil". As the EC Commission once wrote in its Green Paper on Industrial Democracy (1976, p. 24): "Industrial confrontation is also wasteful and if it occurs too often in a society, every member of that society is the poorer, including those who are employees".

So it is not without reason that responsible persons time and again consider the fundamental dilemma: how to reconcile free collective bargaining with a low number of industrial disputes?

For the answer on this dilemma the classic methods of conciliation, mediation and arbitration may not have lost any appeal.