CONCILIATION, MEDIATION AND ARBITRATION IN (COLLECTIVE) LABOUR DISPUTES

REPORT FOR FRANCE

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I/ THE INDUSTRIAL RELATIONS SYSTEM

2. Rules

1.1. The primary source for French employment law is *legislation*. Provisions from laws and regulations are brought together in the *code du travail* (the labour code, the current version of which dates from 1973), an example of the "consolidation" of texts already in force. Legislative reforms are implemented in principle through amendments to this code and happen very frequently. However, in this context of "legislative inflation", the *quantity of case law being produced* seems to have never been greater. Moreover, the *droit commun des contrats et des obligations* (common law of contracts and obligations — comprising the civil code and some unwritten "general principles") continues to hold an important place in the organisation of industrial relations.

For a long time, *collective bargaining* played only a secondary role and took place essentially at sectoral level. However, it took off following the major reforms introduced after the first electoral victory of the Left in 1981. The reforms sought to organise and encourage negotiation, in particular company-level bargaining. The vitality of the *negotiated production of labour rules* is now evident (in particular in the area of working time). In this context, new forms of "adaptation" or "flexiblisation" negotiation have appeared alongside the traditional form of "acquisitive negotiation" (i.e. the acquisition of new rights, benefits or guarantees for workers).

Whilst company-level bargaining has seen spectacular development (in the areas of working time, pay, employment, trade union law), national intersectoral negotiation, in particular the negotiation of the *lex ferenda* ("negotiated law"), has not fulfilled the expectations of the 1980s and does not play the role that it does in other countries. The major reforms of recent years (reduction of working time in 1998-2000, "social modernisation" in 2001-2002) have resulted from legislation rather than national intersectoral negotiation. For a quarter of a century, the State has rarely legislated so intensely whilst consulting so little with the professional organisations and trade unions. Employers, the political Right and certain trade union groups are starting to call into question the current balance between legislation and negotiation.

1.2. Looking at the *content of state law*, the *industrial relations* system is based on the following principles:

1.2.1. *Trade union freedom*, in its broadest definition, is enshrined in and protected by the Constitution and the labour code: the *collective freedom* to form and associate trade unions and the *individual freedom* to belong to the union of one's choice, to not join a union or to withdraw from a union at any time.

This concept of trade union freedom has naturally encouraged *trade union pluralism*, which the law moderates by reserving the exercise of certain recognised prerogatives (concerning staff representation in enterprises, the exercise of union law in enterprises, collective bargaining, etc.) to "representative unions". However, the conditions for recognising a union as *representative* (laid down by a text in 1950, liberally interpreted in the case law) remain very modest: a few members, a certain longevity, a minimum of activity, real independence from the employer and employers' organisations, and a decent showing at elections (5 %, 10 %?). This fairly undemanding "selection of actors" means that five employees' confederations enjoy this status at national and intersectoral level (*see below*) and that, in a sector or enterprise, several equally representative unions often coexist (although some may represent only a minority or be very weak). Furthermore, any union affiliated to one of the five representative confederations is considered to be representative itself (an irrefutable assumption, ensuring *assumed representativeness*) for the exercise of certain prerogatives in the enterprise (in the area of union law, the elective representation of staff, collective bargaining, etc.). Nevertheless, other unions (at enterprise or sectoral level) also exist and are fairly often able to establish their *own representativeness* (including through the courts if it is contested).

1.2.2. The interests of employees are represented first of all by the *elected representative institutions*: *staff representatives* and *works councils* (works councils and the central works council in companies comprising several establishments; group councils, since 1982, with the management of the dominant company in a group; European works councils, following transposition of the 1994 Community Directive). The employer must inform and consult the works council before making any important decision; the labour code endows it with a particularly important role (certainly following the recent social modernisation law of 17 January 2002) in the case of projects likely to have an impact on staff and which could lead to collective redundancies on economic grounds.

The representative trade union organisations in a company (‘own’ or ‘assumed’ representativeness) have an important role in the effective setting up of these institutions: negotiating with the employer the agreement organising the elections, monopoly of candidates in the first round of the election (a second round, where candidacy is open to all, is organised if there is insufficient participation in the first round). Moreover, each representative organisation in the company (or establishment) can nominate a union representative to the council; he or she participates in the meeting of this body with right of discussion only.

A change in the law in 1968 means that *any representative union* may also set up a *company union branch* with various legal means of action (bill posting, distribution of documents, members' meetings, etc.), and may also, if the company’s or establishment’s workforce numbers at least 50, appoint one or more *union representatives* (between one and four, depending on the size of the workforce), who are the real initiators of union action at the workplace.

1.2.3. In the absence of an exceptional legal dispensation, only the representative unions (‘own’ or ‘assumed’ representativeness) are authorised to negotiate and sign *collective labour conventions and agreements* (at company level, at sectoral level - local or national - or at national and intersectoral level) on behalf of employees. Elected staff representatives do not have the authority to sign agreements of this kind.

Signature by just one representative organisation is enough to validate the agreement or convention and ensure its applicability to all relations between an employer personally bound by this document (as signatory, member of a signatory employers' organisation, or through signing up to an agreement already in force or membership of a signatory organisation). We talk of the *erga omnes* effect of the convention or the agreement, meaning that the rules laid down by this instrument also apply to employees who do not belong to any signatory or member union (which is the case for the vast majority of employees). Moreover, the convention or agreement can be *extended* to all companies in a particular sector by ministerial order.

Since the major reforms of 1982-1983, the law provides for a negotiation system alongside the agreement system: in particular, it lays down various *negotiation obligations*, either for the employer (e.g. annual obligation to open a company negotiation procedure on working time and organisation and on real wages) or for all the partners. Provisions of this kind - fairly common nowadays - implement the *"right of workers to collectively negotiate their employment and working conditions and their social guarantees"*, laid down in the law of 1971.

This system, which encourages agreements signed by very small unions to become commonplace, has been subject to several exceptions since 1982. In particular, certain provisions of the code allow, in pre-defined cases (mainly in the event of a so-called exceptional agreement relating to working time), a non-signatory union which has obtained a majority of the workforce's votes in the most recent staff elections (or a coalition of non-signatory unions if, together, they have obtained a majority) to oppose the entry into force of a "minority" agreement.

This collective bargaining system is being openly challenged today. The two main employees' confederations, the CFDT and the CGT, are proposing that the signature of the majority union(s) should be obligatory for any collective agreement to be valid. They are also calling for a redefinition - i.e. toughening up - of the conditions for representativeness.

1.2.4. According to the preamble to the 1946 Constitution, to which that of the current Constitution refers, "The right to strike shall be exercised within the framework of the laws governing it". The peculiarity of French law is without doubt that this constitutional right is understood as an *individual right* to which every employed person (in the private or public sectors) is personally entitled. The case law in this area, which has developed in the almost total absence of laws 'regulating' strikes, has derived certain important consequences from this individual entitlement: strikes are lawful even in the absence of union go-ahead ("wildcat striking"); as long as several workers stop working (i.e. the action is collective), the strike is lawful even if it is a minority action; clauses in a collective agreement making it compulsory for unions to give advance notice of a strike or making cessation of work dependent on the prior failure of a conciliation (or mediation) procedure are binding on the signatory unions but not on employees (according to the Court of Cassation, a union does not have the same "individual right to strike" as every individual worker).

French law does not recognise the "balance of bargaining power": employers and their organisations have no right to suspend work in the context of an industrial dispute or in order to force the acceptance of their demands (the French use the English term "lock-out" because the French language does not even have a word to express it).

This universal right to strike is subject to certain exceptions, most of which result from a law of 1963 on strikes in the public sector (central government, local authorities, public hospitals,

schools and universities, etc.) and certain types industrial or commercial public company (e.g. those in a monopoly position or those performing state contracts). The main restrictions are the following: obligation to give advance notice (of five clear days) submitted by one of more representative unions, ban on open-ended strikes and "rotating strikes", the interested parties' obligation to negotiate during the advance notice period. However, this regime does not include the "minimum service" system (which only exists in the law on strikes in the public broadcasting sector) or the "maintenance of essential services".

1.2.5. This public service strike regime and that of the formation of trade associations (which have also found their way into the labour code) are the only bodies of rules common to "private" employees (i.e. those employed in the private sector or the industrial and commercial public sector) and public employees. In fact, the employment and labour regime for the latter - civil servants and contractual agents employed by a public-law corporation in a public administration ("public-law employment contract") - is specific to this group and is still seen as coming under administrative law.

The public employment regime is subject to constitutional standards (guarantee of trade union freedom and the right to strike "within the framework of the laws governing it", except for certain high-level officials). It comprises specific laws - the "statutes" of the three public-sector employers (the State, local authorities, public hospitals) - and, for public employees working under contract, a mass of scattered regulations. According to the case law of the Council of State, the labour code does not apply to these public employees working under contract, although they can take advantage of various "general labour law principles" inferred from certain provisions of this code.

Labour relations in the public sector in the broad sense of the word (civil servants and public employees working under contract) are dominated by the principle of trade union freedom (pluralism is commonplace) but are also giving way to the introduction of representativeness for the selection of actors. Officially at least, they do not use a system of collective bargaining — collective bargaining is practised *de facto*, but there is no provision for valid and legally binding collective agreements or conventions. Staff representation is organised individually in public bodies or their departments (often in the form of equal representation between the administration and staff representatives). The strike regime is the one mentioned above, set out in the labour code, but the procedures for collective disputes governed by the code do not apply and no general text setting out procedures of this kind for these public bodies exists.

It should also be noted that many public servants under French law (under contract and even civil servants) do not qualify as "public administration workers" in the sense of Article 39(4) of the amended Treaty of Rome.

3. Actors

2.1. Three confederations represent and speak on behalf of employers. The largest, the *Mouvement des entreprises de France* (*Medef*), came into being in 1998 as the successor to the *Conseil national du patronat français (CNPF).* Its current management espouses a resolutely liberal ideology, is hostile to legislative intervention and is in favour of extending the scope of the "contract" as opposed to the law. The *Confédération générale des petites et moyennes*

entreprises (CGPME) is an organisation for SMEs linked to Medef and shows little autonomy in industrial relations. The *Union professionnelle artisanale (UPA)* is an association of three "confederations" (construction, retail, etc.) to which some small traders with the status of artisans (employing, on average, four workers, with the owner directly engaged in productive activity) are affiliated. The UPA negotiates alongside Medef and the CGPME with the trade union confederations, but sometimes demonstrates real independence from Medef (which has the reputation of being more representative of large companies and business interests) by being more concerned about real dialogue with the unions.

2.2. It is generally agreed that trade unionism is in a permanent state of crisis, as illustrated by two indisputable facts: their division and the small number of members.

On the employee side, five confederations are recognised as representative at national and intersectoral level: the *Confédération générale du travail (CGT),* the *Confédération française démocratique du travail (CFDT),* the *CGT- Force ouvrière (FO),* the *Confédération française des travailleurs chrétiens (CFTC)* and the *Confédération générale des cadres-Confédération française de l'encadrement (CGC-CFE).*

These confederations include unions from both the public and private sectors, as well as civil servants and other government agents. But the unionisation rate is low: less than 10% of employed workers, even less in the private sector alone. Moreover, these workers are distributed very unevenly: the CGT and CFDT are "big confederations"; fewer belong to the FO; the CGC-CFE, a category organisation, has not managed to make its mark on management staff; the CFTC has few members and owes its representativeness at national level primarily to the fact that it embodies a tradition of the union movement (trade unionism inspired by the social doctrine of the Catholic Church). But representativeness is assumed mainly on the basis of results obtained at elections for works councils, staff committees and other staff representation bodies. So the lists of candidates put forward by the unions affiliated to these confederations garner the majority of votes. The CGT and the CFDT compete against each other, and each receives about 25 % of these votes, outstripping the FO (almost 20%).

The French trade union movement, it is said, has always been dominated by "ideologies": the CGT associated closely, for many years, with the Communist Party; the CFDT in the 1960s and 70s nailing its anti-capitalist and self-managing socialist colours to the mast, with many militants having revolutionary beliefs. It then decided to “reunionise”, placing the defence of workers’ demands in the forefront and pushing its aspirations to transform society to the background. In the early 1990s, a kind of alliance of the “reformist organisations” (CFDT, FO, CGC, CFTC) isolated the CGT. Then the policy of *syndicalisme d'accompagnement* (on-the-job trade unionism) cultivated by the majority of the CFDT made it the employers’ favoured partner. Internal developments in the CGT, related to the ongoing decline of the Communist Party, appeared to favour a rapprochement with the CFDT. However, this was compromised by the development of the negotiations on "social reconstruction" launched in 2000 at the initiative of Medef: the CFDT would appear to be primarily interested in agreements with employers to promote employment, whilst the CGT is more concerned about defending workers’ entitlements.

The scattered nature of the union movement has been accentuated by the arrival of two new players (which do not benefit from representativeness at national and intersectoral levels, granted to the five longest established confederations):

- the *Union nationale des syndicats autonomes (UNSA)*, to which mainly civil servants' organisations (in particular the *Fédération de l'Education nationale*) are affiliated;

- the *SUD* (*Solidaires, unitaires, démocratiques* - solidarity, unity, democracy) unions, initially created in public corporations (SNCF, France Télécom, La Poste) by CFDT militants hostile to the direction their confederation was taking; these SUD unions, around which a *Groupe des Dix* (Group of Ten) has grown, are an example of "radical trade unionism".

4. Conflicts

The level of conflict in industrial relations can only be evaluated quantitatively by looking at its most visible symptom: strikes. The government uses "individual days not worked" as its unit of measurement. Measured in this way, conflict has dropped over the last twenty years, to reach a low in 1998 (353 000 days not worked, compared to 5 000 000 in 1976), with a fairly low level of strike participation (28% of the total workforce involved *a priori* in the action) and conflicts which tend to be localised rather than generalised (national strikes in a sector, profession or at intersectoral level). An upsurge has been seen over the last three years, associated with difficulties in the reduction of working time entered into in 1998 (transition to the 35-hour week) and establishment closures and lay-offs. The main "overt" areas of conflict are jobs, working time and wages.

More generally, strikes are now fewer and less 'widespread' (as measured by the number of days lost and the participation rate) in the private sector than in the public sector (public companies, public administration) and the civil service.

II/ LABOUR DISPUTES AND HOW TO RESOLVE THEM

1. Types of dispute

1.1. Individual/collective disputes. Book V of the labour code, entitled "Labour disputes", governs the treatment of these disputes by drawing a distinction between *"individual"* and *"collective"* disputes, but without defining these terms.

The provisions relating to *"individual disputes"* are limited to the organisation of and procedures for industrial tribunals (tribunals where both parties are on an equal footing, instituted at the first level of the civil justice system). These tribunals do not constitute *the* jurisdiction in industrial disputes, with general powers in industrial relations (*à la* Spanish or German industrial tribunals, for example). A large proportion of disputes come under other civil jurisdictions - the *tribunal de grande instance* or high court (civil jurisdiction of general law) and the court of first instance - by virtue of specific provisions in the labour code or application of the general rules of *ratione materiae* jurisdiction (without forgetting the role of the criminal courts ruling on criminal offences, even those criminalised in the labour code, or that of the administrative courts, the sole competent jurisdiction for ruling on the legality of many administrative decisions made in the context of industrial relations). The high court and the court

of first instance are therefore authorised to resolve disputes which reflect a collective dispute or have occurred against the background of a more or less sensitive collective dispute (action by a union organisation against an employers' organisation or against an employer to implement undertakings in a collective agreement; action regarding the interpretation of a collective agreement; application for the expulsion of strikers occupying work premises; demand for a particular union representative to be removed from that position, etc.), or to resolve disputes relating to the operation of staff representation bodies (cancellation of elections; cancellation of a decision of a works council; works council's or union's request to obtain the suspension or cancellation of a consultation procedure prior to a mass lay-off, etc.). A ("collective") dispute between workers and their employer, or between a union and an employer, *may give rise to different types of legal action and submission to different courts*, depending on the circumstances, choices or strategic or tactical options of the protagonists.

The French experience is that it is useful to distinguish between two major categories of cases associated with collective labour disputes: those relating to the *actions* which reflect or accompany the dispute (strikes, sit-ins, disciplinary actions, dismissals, pay withheld), and those relating to the *claims* at the origin or heart of the dispute (workers' claims, refusals or counter-proposals from employers). It can be seen then that procedural initiatives (a litigation or dispute procedure as provided for and governed by the law) generally arise from or concern certain aspects or consequences of the action (a sit-in, disciplinary measures, dismissals, pay withheld, etc.) rather than the actual claims forming the subject of the dispute. Specific procedures for the "settlement of collective disputes" relate only to the claims (*see below*) and give rise to the following distinction.

1.2. Conflicts of law/conflicts of interest. This distinction was at the origin of the first specific procedure for settling collective labour disputes (1892). Since then, traditionally, a distinction has been made between "legal disputes" and "economic disputes", or between disputes subject to the courts and disputes subject to negotiation. The current labour code retains this distinction but refers to each of these terms with a long periphrasis in one of its articles concerning arbitration: it distinguishes between *"disputes relating to the interpretation and execution of prevailing laws, regulations, collective labour conventions or agreements"*, on which the arbitrator gives a ruling based on the law, and *"other disputes, in particular those relating to wages or working conditions which are not laid down by laws, regulations, collective labour conventions or agreements, and (…) disputes concerning the negotiation and revision of clauses in such collective conventions or agreements"*, on which the arbitrator gives a ruling based on fairness.

2. What constitutes a "collective dispute"?

One of the chapters in Book V of the labour code (Articles L. 522-1 ff.) sets out specific procedures for the settlement of *"collective labour disputes"*. These therefore constitute a *specific category of French law*, which, however, the law does not define. But this is a high-stake issue: any situation constituting a collective dispute of this kind can be subject to these procedures, and cases of opposition to claims cannot be brought before a civil court (high court or industrial tribunal) in order to be settled by a judgement imposed by the application of the rules of law in force; conversely, only a situation meeting these criteria can lead to the implementation of one of these specific procedures.

Various rulings (although now rather old) of the Higher Court of Arbitration (see below) and the Court of Cassation throw some light on the matter. This case law points to a *narrow and comparative interpretation*. So, a dispute is considered to be collective if a collective interest is at stake (disagreement with regard to wage rates or the exercise of staff representatives' prerogatives), even if all the employees objectively involved are not engaged in the confrontation (e.g. a disagreement between a union and an employer). But the appearance of a relationship calling for this definition of a "collective dispute" - and the exclusion of any procedure other than those in Articles L. 522-1 ff. - may depend on the legal choices made by those involved (see comment in 1.1. above). If several employees, all in dispute with the same employer, present similar claims to the industrial tribunal at the same time, these claims give rise to the same number of individual cases coming under the same jurisdiction, even though these cases all arise from a collective dispute which would itself be subject to different procedures.

3. Types of resolution procedure

It is not customary to divide the processes and procedures in Articles L. 522-1 ff. of the labour code into "judicial", "administrative" and "contractual" means. According to these texts, *"collective disputes between workers and employers"* may be submitted to *"negotiations"*, a *"conciliation"* or *"mediation"* procedure, or lead to *"arbitration"*. It should just be noted that:

- arbitration works by engaging a third party to settle the dispute with a ruling, following an adversarial procedure: it is therefore a *jurisdictional* procedure in the broad sense (the ruling must be based on law in the case of a "legal dispute", but on fairness in the case of a "conflict of interests"), but not "judicial" under French law (as neither industrial arbitrators nor higher industrial tribunals count as judicial jurisdictions);

- a conciliation or mediation procedure can be started at the Minister's initiative, but *this is not exactly an "administrative" procedure*, as the third party called upon to encourage the search for an agreement between the parties is not the Minister him- or herself (subject to the specific rules for disputes in a public company), an official from the labour administration or a specialist administrative body;

- direct negotiation, as mentioned in the labour code, and conciliation or mediation procedures are basically *"contractual procedures"*, because, under the code, they are governed by the collective agreements and, even when initiated by the Minister or his or her department, they remain searches for an agreement with the assistance or intermediation of a third party, generally a body, such as a joint committee, or a private individual.

III/ EXTRA-JUDICIAL PROCEDURES FOR RESOLVING INDUSTRIAL DISPUTES

1. The role of the State and social players

The State apparently plays a fundamental role in that *the law lays down "procedures governing the settlement of collective labour disputes"*, to which a chapter in the labour code is devoted. This chapter is the longest under the heading of "collective disputes".

One text, with the status of a regulation, states that "any collective labour dispute must be notified immediately by the party with the greater interest to the prefect (representative of the State for each *département*, with authority over all State services), who, in conjunction with the competent labour inspector, will intervene in order to search for an amicable solution" (Article R. 523-1). The obligation to inform the prefect, which would appear to be instituted by this text, is not, however, subject to any particular penalties, and the prefect's and labour inspector's duties are described in very vague terms: "search for an amicable solution" means, above all, suggesting that the protagonists implement the procedures provided for in the labour code.

The latter gives *priority to direct negotiation* between the parties: "collective disputes (…) shall be the subject of negotiations, either where the collective labour conventions or agreements in question contain provisions to that effect or where the interested parties take the initiative to do this" (Article L. 522-2). This would appear to be self-evident, but the fact that the law is expressed in that way suggests a preference for a negotiated solution rather than resorting to government intervention. Moreover, the code refers, in the absence of direct negotiation between the protagonists, to any conciliation procedures provided for in the applicable collective agreement or other agreement. In order to be extended by ministerial decree, a national sectoral agreement must, furthermore, contain provisions setting out a conciliation procedure for disputes likely to break out in the sector. Only in the absence of a conciliation procedure in the agreement do the arrangements laid down by law kick in (Article L. 523-1). This suppletory conciliation regime provides for a conciliation committee (at national or regional level) which includes "representatives of the public authorities" (the number of which must not exceed one third of all the members of the committee); only in public establishments and certain public companies is the conciliation committee chaired by "the minister responsible for the establishment or company (…) or his or her representative".

According to the code, the mediation procedure can be initiated either by the chairman of the conciliation committee if the latter does not reach an agreement, or by the Labour Minister at the request of one of the parties or on his or her own initiative. In any case, the parties are called on to jointly appoint a mediator, and the Minister will not appoint one unless the parties have failed to appoint a mutually acceptable one themselves. Recourse to an arbitration procedure, whether governed by the collective agreement or in accordance with the suppletory rules in the code, is left entirely up to the agreement between the parties (Articles L. 525-1 and L. 525-2).

It can therefore be seen that, overall, *the legal rules governing these special procedures always give priority to provisions or agreements between the parties, rather than intervention by a public authority*. The latter will only participate in the procedure in exceptional cases.

Above all, the *contrast between the density of legal and regulatory provisions providing for and governing conciliation, mediation and arbitration for collective labour disputes and the use of these provisions in practice is huge: these procedures are very rarely implemented*. Before 1982, it was compulsory to initiate a conciliation procedure and then, if it failed, a mediation procedure (from the invention of this method in 1953-1955) in the event of collective disputes. However, in practice

it became increasingly rare, and the Law of 13 November 1982 to reform collective bargaining drew the consequences from the "ineffectiveness" of this obligation by making these procedures *optional*. In practice, collective disputes that are not resolved fairly quickly by direct negotiation between the employer and the unions (or another type of worker representation) - or do not subside as a result of unilateral concessions or the dropping by the workers of their demands or action - sometimes lead to *mediation other than that provided for by law* (without being in any way "illegal"), the initiation of which always assumes the assent of both parties (see below, IV).

Overall, the "official" procedures (provided for and governed by the labour code) and social practices *do not give a decisive role to the public authorities* - the role of the social partners seems to be a little greater - nor do they provide any real power to impose the implementation of a settlement-seeking procedure.

2. General form of the extra-judicial procedures

2.1. Types

The labour code sets out four procedures for settling collective disputes which can be described as “extra-judicial". The types set out by the code are not affected by *other types used in practice*, which all come under mediation.

- (Direct) *negotiation* between the protagonists is the first procedure mentioned in the code; such negotiations are *optional* (Article L. 522-2), *except in the public services*: the special strike regime in this sector (public administration and industrial and commercial public services, whether they are managed by a public establishment, a publicly owned company or a private contractor) means that notice must be given by one or more representative trade unions at least five clear days before the stoppage is due to start and states that "the interested parties must conduct negotiations during this period" (multilateral obligation to start negotiations: for the employer or the management of the service, on the one hand, and the union(s) that signed the advance notice on the other).

- *Conciliation* (Article L. 523-1 ff.), the process of *searching for an agreed settlement before a conciliation committee*, the arrangements for which are set out in the collective agreement (*see above*, III/1) or, as a suppletory provision, by the code itself but which is always optional (even for public establishments or public companies subject to specific provisions under Article L. 523-7 ff.).

- *Mediation* (Article L. 524-1 ff.) is a procedure for seeking an agreement through the intervention of a physical person, the mediator, responsible for researching the foundations of the agreement, but with greater powers of investigation and initiative; this procedure is always optional. However, the mediation of collective disputes as generally practised (and referred to as such) *is not the same as is set out in the labour code*: there are, however, varieties of mediation (in the generic sense (*see below*, IV)).

- *Arbitration* (Article L. 525-1 ff.) is a jurisdictional procedure with full hearing of both sides, the initiation of which assumes the agreement of the parties, allowing a private arbitrator, chosen by common accord, to settle the dispute by making a decision - known as a "*sentence*" - which is binding on them, subject to the right of appeal, on limited grounds, to a higher court of arbitration, as set out in the labour code.

2.2. Funding

The fees for the operation of the conciliation committees, the lump-sum payments made to the mediators, and the costs of arbitration are, in the case of procedures provided for in the labour code, borne entirely by the Ministry of Labour (or the Ministry of Agriculture for disputes in that area).

3. Conciliation and mediation

3.1. Definitions and features

See above, III/ 2.1

3.2. Field of application

"Any labour dispute" can be put to a conciliation procedure governed by the collective agreement or, as a suppletory provision, the labour code - and at any time in its development. The procedure is never compulsory, either for the parties or for the civil service (including public establishments or companies). The composition of the conciliation committee and the procedure are different in the agricultural sector and certain public establishments or companies.

Mediation can also be initiated for any type of dispute, and the parties to any kind of collective dispute may agree to submit their dispute to arbitration.

3.3. Procedure

3.3.1. Conciliation

A conciliation procedure provided for in a collective agreement proceeds in accordance with the rules laid down therein.

A dispute which has not been submitted to a *contractual procedure* of this kind (because no collective agreement is applicable, because the agreement does not provide for such a procedure, or for any other reason) may be brought before a *national conciliation committee* or a *regional conciliation committee*, either by one of the parties (the employer, an employers' organisation, a trade union), or by the Minister of Labour, or, in the case of a dispute restricted geographically to a single *département* or region, by the prefect or the regional labour and employment director. However, if the dispute occurs on the occasion of the establishment, revision or renewal of a sectoral collective agreement or convention or an intersectoral agreement, the Minister of Labour may initiate directly a mediation procedure.

The national committees (in fact, there is only one) and the regional committees comprise representatives from the most representative employers' and employees' organisations (five from each category), and representatives from the public authorities. For the national committee, these are the minister him- or herself or his/her representative, the chairman ex officio of the committee, and a representative of the Minister for Economic Affairs; for each regional committee, there is the regional labour and employment director or his/her representative, the chairman and an adviser from the administrative tribunal. Representatives of other ministries take the place of the Ministry of Labour if the dispute comes under a sector where the latter’s role is exercised by a different ministry (e.g. industry, public works, transport), and the composition of conciliation committees for collective disputes in the agricultural occupations is governed by special rules.

When the procedure is initiated on the agreement of the parties, the party with the greater interest submits a request to the committee chairman listing the points at issue. When a matter is referred to the committee at its own initiative or by a public authority (minister, regional employment director, prefect), it is up to the referrer to specify these points. The parties are obliged to appear “in person” (on pain of a fine) or to send a representative empowered to negotiate and conclude a conciliation agreement on their behalf.

At the end of the committee meetings, the chairman draws up a report recording the agreement reached or indeed the absence of agreement between the parties (specifying the points of agreement and disagreement). *A conciliation agreement has the same effect as a collective labour agreement* (*erga omnes* effect in the sector and geographical area) and therefore counts, for example, as an amendment to the collective agreement or convention in force in the field where the dispute broke out.

3.3.2. Mediation

The mediation procedure can be initiated by:

- the chairman of the conciliation committee, who then invites the parties to appoint a *mediator*, within a deadline (s)he sets;

- the Minister of Labour or the regional employment director (depending on the "scope of the dispute", i.e. whether or not it affects more than one region), at the request of one or all of the parties, or at his or her own initiative (following the failure of conciliation; or directly if the dispute occurs on the occasion of the establishment, revision or renewal of a sectoral convention or agreement or a national intersectoral agreement); in such cases, the *mediator* is appointed in agreement between the parties or chosen by the administrative authorities from a list of mediators (national or regional list, drawn up and revised every three years by the ministry or the regional director of labour).

  The law grants mediators "extensive powers to investigate" the economic situation of the company or companies concerned and the situation of the workers involved in the dispute. They can conduct extensive investigations of the companies and unions involved, and ask the interested parties for any document or information required for the success of their task, and turn to any expert or other person who can throw light on the matter. Each party submits to the mediator its observations, which must also be communicated to the other parties. The mediator can summon the parties and try to bring them to an agreement.

  At the end of this inquisitorial procedure involving a full hearing, and within one month of his or her nomination, the mediator sends the parties, in the form of a *reasoned recommendation*, "proposals for settling the points at issue". The parties then have the option of notifying the mediator within eight days of their rejection of the proposals. This rejection must be reasoned. At the end of this eight-day period, the mediator records the agreement (or absence of an expression of disagreement) or the disagreement of the parties. If this attempt at mediation fails, the mediator's recommendation and the parties' rejections can be made public by the Minister of Labour.

  The mediator's recommendation, in the absence of its rejection by the parties, is equivalent to a collective labour convention or agreement (like the conciliation agreement).

4. Arbitration

A collective labour agreement or convention can always provide for and organise a procedure known as "contractual" arbitration and establish a list of arbitrators. In the absence of such a procedure, the parties to a collective dispute may decide by mutual agreement, following the failure of the conciliation or mediation procedure, to submit their dispute to an arbitrator, again chosen mutually.

The arbitrator may rule only on those issues set out in the record of non-conciliation or at the suggestion of the mediator. If the dispute relates to the interpretation and implementation of contractual or legal provisions, the arbitrator's ruling must be *grounded in law*. If the dispute is of

another kind - conflict of interests, or “economic” - the mediator rules *on the basis of fairness*. In all cases, the ruling must be reasoned.

Appeals against arbitrator’s rulings are allowed only in cases of excess of power or contravention of the law. Such appeals are heard before the *Cour supérieure d'arbitrage* (Higher Arbitration Tribunal), set up to this effect, which is presided over by the Vice-President of the Council of State and comprises four Councillors of State and four judges of the Court of Cassation. It must issue a ruling within eight days of the appeal. If the ruling is overturned, the case is returned to the parties, who may agree to designate another arbitrator. An appeal may be lodged against this new ruling; if the Court overturns this ruling, too, it must itself issue a definitive ruling.

The arbitrator’s ruling has the same effect as a conciliation agreement or an agreement on the recommendation of the mediator, i.e. the same as a *collective labour agreement.*

IV/ EVALUATION OF THE EXTRA-JUDICIAL CONFLICT RESOLUTION PROCEDURES

1. The procedures laid down in the labour code are falling into disuse

The specific procedures provided for and governed in such detail by the labour code are *notoriously underused*. It could be said that, today, they are falling into disuse. But as, since 1982, the rules for initiating them no longer make them compulsory, it cannot be said that the rules themselves are "ineffective".

2. The practice of "mediation" not governed by the labour code

As already mentioned, some collective labour disputes, in the absence of direct negotiations between the protagonists or in the event of the failure or blocking of these negotiations, give rise to the intervention of a third party called upon to promote or recommence these negotiations and reach an agreement. It is usual practice nowadays to refer to these interventions as *"mediations"*, even though they do not meet the conditions set out in Articles L. 524-1 ff. of the labour code, and to refer to the person in charge as a *"mediator"*. In fact, some of them hold this title by virtue of other legal provisions, e.g. mediation order by a judge pursuant to the new code of civil procedure. Above all, and more generally, it is anything resembling *this type of intervention of a third party charged not with resolving a difference but rather with encouraging the reaching of an agreement or proposing the terms of an agreement between the parties to a conflict (dispute, difference or litigation),* that can reasonably be called, in legal language and theory, *"mediation"*. Mediation as the resolution of collective disputes, as provided for in Book V of the labour code, but also the conciliation process before the industrial tribunal, conciliation and mediation in the new code of civil procedure — in contemporary French law, they are all examples of this generic type of mediation.

No global records of these procedures for settling collective labour disputes are kept, so it is impossible to measure them quantitatively. The most one can say is that they arise "in a not insignificant number" of disputes. Qualitatively, however, three types can be distinguished:

2.1. "Mediation" is sometimes practised by *the labour inspector* (or the departmental director of labour and employment, responsible for the Inspectorate at *département* level), who agree to intervene actively in a dispute to look for the foundations of an agreement, on condition that all the parties so request or agree. Entirely dependent on the agreement of the protagonists, this procedure is perfectly legal. The intervention of the labour inspectorate may also be decided upon, without the agreement of the parties or with the agreement of just one of them, by the prefect where a dispute is notified to him or her, pursuant to Article R. 523-1 of the labour code, which authorises the prefect to intervene "in liaison with the competent labour inspector (…) in order to look for an amicable solution."

2.2. Where a labour dispute takes on symbolic (because of the size of the company concerned, the nature of the demands, the political circumstances, etc.) or dramatic (e.g. caused by a company closure which compromises the economic future of a region) proportions, or where it concerns a public contractor or has a strategic nature, the Minister of Labour (or Transport, Industry, etc.) appoints a *high-ranking official* (labour director (active or honorary) within an external department or the ministry) or a *respected figure* (a former director-general of the ILO, as was the case with F. Blanchard a few years ago; a law or industrial sociology professor, etc.), to "bring together the threads of the dialogue" between management and unions. This "mediator" is not chosen in accordance with the conditions and arrangements set out in the labour code (he or she is not necessarily on the list of mediators provided for in the labour code and is not called upon to formulate a "recommendation" within the meaning of the code, etc.). However, there is nothing illegal about this, as long as the parties accept this external intervention.

But, in this case as in the previous one, any agreement obtained as a result of "mediation" of this kind which does not come under Articles L. 524-1 ff. of the code does not enjoy *de plano* the same effect that the code confers on an agreement resulting from a procedure it governs. It has the status of a collective labour agreement under general law, within the meaning of the code (with *erga omnes* effect) only inasmuch as it fulfils the conditions of Articles L. 131-1 ff. (*see above*, I, 1.2.3): signature by one or more representative unions in the company. If it is concluded between the employer and a works council or staff committee, a strike committee (form of organisation unknown in French law) or ad hoc employee representatives, it will have an analogous effect to that of a collective convention or agreement if a *unilateral commitment on the part of the employer* can be attributed to it (the Court of Cassation, for some ten years now and in the absence of guidelines in the civil code or the labour code, has established this source of commitment on the part of the employer or via the rules of the company).

2.3. A *mediator authorised by the president of the court of first instance* (TGI) may also intervene "as an interim measure". This is an emergency procedure before the president of the court sitting as the sole judge, called upon by one party to issue an "order", a judicial decision which does not have the force of *res judicata*, laying down a measure that can be amended at any time and which is "not to the detriment of the principal"). It is most often introduced by an employer (against a union and union representatives: it therefore does not come under the competence *ratione materiæ* of an industrial tribunal) for an order to expel strikers occupying the work premises, where the judge chooses not to issue a definitive ruling before proper negotiations have been attempted. The judge postpones making a ruling, deferring the issue of an expulsion order, as requested by the employer, until negotiations have been opened, in the hope that an agreement will be found, thus rendering this measure redundant (in some cases, the employer's request has been refused when the appointed mediator found that the former refused

to negotiate or did not negotiate in good faith). On a number of occasions, a union, involved in an open collective dispute, has brought the employer, under this interim procedure, before the president of the court of first instance, requesting that the latter appoint a mediator.

In the past, this kind of mediation had a doubtful legal grounding; when it was introduced in the 1970s, it was referred to by the judges as the nomination of a "*mandataire de justice*" (judicial proxy), then of a "conciliator", before the term “mediator” came into favour. It is now provided for in the revised code of civil procedure (dating from 1995-1996), which states in Article L. 131-1 that "Where a dispute is referred to a judge, the latter may, with the agreement of the parties, appoint a third party to hear the parties and compare their points of view in order to help them to find a solution to their dispute. *Juges des référés* (judges sitting to deal with urgent matters) in tribunals also have this power". However, these provisions make the appointment of such a third party conditional on the agreement of the parties ("the decision ordering the mediation shall mention the agreement of the parties"), i.e. mediation cannot be ordered if the employer refuses. This limitation did not exist before the provisions were drawn up.

At the end of his or her assignment, "the mediator informs the judge in writing whether or not the parties have been able to find a solution to their dispute". If necessary, the judge "approves, at the request of the parties, an agreement which they submit to him". This judicial act makes the ruling enforceable. In the event of an agreement obtained between protagonists in a collective labour dispute, the most important thing is to determine the scope within which it produces its obligatory and normative effect: it can be seen as equivalent to a collective labour agreement under general law within the meaning of the labour code if it meets the conditions of Articles L. 131-1 ff. (signature by one or more representative unions in the company); failing that, it can be seen as a unilateral commitment on the part of the employer towards all the employees concerned by the demands or claims forming the subject of this agreement.

The costs of judicial mediation (mediator’s fees and remuneration) are borne, in accordance with the standard system for legal costs, by the parties (50/50 or in a different proportion, as the judge thinks fit).

3. Outlook

A few years ago, more or less specific proposals for reforms or new legislation were put forward (the idea was to link the introduction of a "minimum service" in public-sector companies and the imposition of a new mediation procedure). They appear to have been put on the back burner for the time being.

The current vogue for mediation (in the more specific generic sense) as a procedure for dealing with and settling collective labour disputes in French law and judicial practice should be noted — to be more precise, for mediation performed by an individual rather than a group, in order to reach a solution accepted freely by all parties. This preference would appear to be confirmed by the very recent creation by law of a new form of mediation in industrial relations. In fact, the social modernisation Law of 17 January 2002 introduced into the labour code some very original provisions concerning the operation and powers of works councils: in the event of a "serious disagreement" between a proposal to suspend the activity of a company presented by the employer and alternative proposals presented by the works council, "either party may refer the matter to a mediator" chosen from a list drawn up by the Labour Minister responsible for bringing the

viewpoints of the parties together and making a recommendation which, if accepted by them, would have the status of a collective agreement within the meaning of the code. One hesitates to describe it as a new procedure - a special procedure - for solving collective labour disputes because it is unclear whether the hypothesis (“a serious disagreement” between an employer’s "proposals" and an employee representative’s “proposals”) really constitutes a collective dispute, especially given the uncertainty about this term (*see above*, II, 2). Nevertheless, this very recent legislative innovation testifies further to the *vogue for mediation in French law*.

V/ EXTRA-JUDICIAL CONFLICT RESOLUTION PROCEDURES AND THE COMMUNITY AREA

We are unaware of any plans to implement the procedures described above "as a way of settling conflicts arising from the application of Community law".

The controversial episode (in France) of the closure of the Renault group’s Vilvorde plant, announced in February 1997 by the CEO of Renault, could be mentioned. In fact, all the European works council of Renault (created in 1995 by an "advance agreement" of the national texts as a response to the Directive of 2 September 1994) did was to bring Renault (the parent company) before the court of first instance in Nanterre in order to stop the closure of this factory on the grounds that it had not been consulted by management in advance, and this court and the court of appeal in Versailles were called on to rule only on this question of the operation of this staff representation body (the court’s ruling of 7 May 1997 forbade the Société Renault Industrie Belgique from implementing the announcement of the plant’s closure made by the CEO of the parent company on 22 February of the same year, before the group works council had been consulted). It was therefore a "dispute relating to actions" (the action leading to the collective dispute, in this case), which we distinguished from "disputes relating to claims" (*see above*, II, 1.1) that procedures must be able to deal with in order to warrant the status of "procedures for the settlement of collective labour disputes".