

OUT-OF-COURT METHODS FOR RESOLVING CONFLICTS IN THE SPANISH SYSTEM OF EMPLOYMENT RELATIONSHIPS

I. The system of employment relationships

These few lines of introduction are merely intended to provide an outline of the configuration of the Spanish system of employment relationships, an outline which should provide the backdrop for the methods for resolving conflict used therein and which should also throw some light on the structure of Spain's system of employment relationships.

Recognition of the right to freedom in trade union matters, enshrined in Article 28(1) of the 1978 Constitution prompted the formation of numerous trade union organisations and thus trade union pluralism which has, however, tailed off over the years. At this point in time, although several trade union organisations are still regularly active in the Spanish system of employment relationships, two are clearly predominant: firstly, the Trade Union Confederation of Workers' Committees (*Confederación Sindical de Comisiones Obreras*, CC.OO) and secondly the Trade Union Confederation of the General Workers' Union (*Confederación Sindical de la Unión General de Trabajadores*, UGT). These are the two most representative trade union organisations in the Spain by virtue of votes cast by workers in the elections held at the workplace all over the country every four years. They are also, generally speaking, the most representative trade unions in the various geographical areas and sectors in which the various employment relationships in Spain are played out, making them, without challenge, key players in shaping industrial relations in Spain.

The CC.OO and the UGT have had and still do have differences of opinion concerning the interpretation of certain issues or aspects of industrial relations and how to deal with these. Nonetheless, since 1990 both Trade Unions have coordinated their activities, agreeing on policies and strategies when dealing with the Government and in the area of collective bargaining and conflicts.

There are also two major organisations on the employers' side. Firstly, the Spanish Confederation of Employers' Organisations (*Confederación Española de Organizaciones Empresariales*, CEOE) and secondly the Spanish Confederation of Small and Medium-sized Businesses (*Confederación Española de la Pequeña y Mediana Empresa*, CEPYME). The only difference between them is the size of the companies associated with each one; large companies with the CEOE and, as the name indicates, small and medium-sized businesses with the CEPYME. In the area of policy and strategy when dealing with the Government and in the area of collective bargaining and dispute very few disagreements between both Confederations have been reported, as they are firmly committed to concerted action.

As far as sources of legislation on employment relationships are concerned, it should be made clear that, following official recognition of the right to collective bargaining pursuant to Article 37(1) of the 1978 Constitution, the role of State legislation has been just as important as that of the legislation arising out of collective bargaining. The Constitution recognises both of these as sources of legislation for employment relationships on an equal footing, although collective bargaining cannot be considered as a subordinate or secondary source under the law. Although this is the case, the Constitution itself recognises that the law has an essential role in legislating over certain areas and in turn it is the law which, in some measure, determines its own role in relation to collective bargaining. In this way, rather than a strict hierarchical relationship between both sources, the relationship is based on the division of responsibilities, regulated in any case (and this must be stressed) by the law itself.

This relationship between legislation and collective bargaining has, moreover, been evolving over time. At the start, and as a general rule, legislation set the minimum conditions and the basic standards or principles to be respected in collective bargaining, limited, consequently, to the improvement of legal minima or the development of the basic standards defined by law. Currently, the relationship between both sources has become more complicated. The areas in which the law determines the minimum regulations liable to improvement by collective bargaining have gradually been reduced and, nevertheless, there has been an increase in the number of areas where the law places responsibility for its regulation with collective negotiation without making its own provisions for this in cases where collective bargaining has not covered this regulation. In other cases, the law regulates one area but provision is made for further regulations in order to prevent loopholes when collective bargaining does not provide for the regulation of this area. There are, finally, times the area in question is regulated through collective bargaining, although the law sets the limits within which the regulation must be situated.

In the light of the above, it can be said that action by the legislator is making it increasingly possible for employment relationships to be regulated by collective bargaining. This is a truly paradoxical situation, as – at the same time – the rules governing collective bargaining itself are more frequently the subject of legislative activity. In fact, there is a noticeable trend in Spanish legislation whereby the more leeway is left for the regulation of working conditions by collective bargaining, the more it intervenes in regulating it. The latest employment legislation reforms – specifically that of 1994 (and which was intended to come into effect in 2001) are, effectively, interventionist as far as collective bargaining is concerned, in other words the law governs certain basic aspects of its implementation including the level which certain issues should be negotiated and thus regulated. The law thus determines levels for negotiation and issues that should be covered as well as regulating the structure of collective bargaining, which superimposes itself on and takes priority over the structure devised by the parties involved in the negotiations.

Finally it must be stressed that in the Spanish legal system, collective agreements, if negotiated in accordance with the rules laid down in the Workers' Statute (*Ley del Estatuto de los Trabajadores*, ET¹), are general and mandatory. In other words, they must be applied to employment relationships as if they were laws, and this is the case for all workers and employers included within their scope, whether or not they are affiliated with the organisations which concluded the agreements. It is true to say that there are no shortage of cases in which collective bargaining takes place at the fringes of the regulations contained in the ET, in which case the collective agreement applies directly to and is binding on employment relationships although here this only applies to the workers and employers affiliated to the organisations which concluded the agreement. However, “statutory” collective bargaining – in other words that carried out in accordance with the ET – is clearly predominant, and cases of “extra-statutory” negotiation, i.e. on the fringes of ET rules, are few and far between, almost anecdotal.

Finally, in the area of dispute it should be noted that the 1978 Constitution recognises, and makes a clear distinction between, the right to strike and the right to adopt measures concerning industrial disputes. The fact that they are at separate locations in the constitutional text – the first at Article 28(1) and the second at Article 37(2), reflects the different consideration given to both rights and, thus, the different

¹ The version currently in force is Royal Legislative Decree 1/1995 of 24 March 1995.

protection accorded to each one, thus breaking the parity between strikes and industrial dispute mechanisms (including lock-outs).

A second trait of the regulation covering conflicts in the Spanish legal system is that the legislation governing it is pre-constitutional, in other words, developed at a time when strikes and industrial dispute mechanisms were not recognised as fundamental rights. This means that this is a regulation which is, broadly speaking, somewhat restrictive, as it continues to reflect a negative and to some extent pathological view of strikes and industrial dispute mechanisms. The truth is that this regulation, contained in Royal Decree-Law 17/1977 of 4 March 1977 was later watered down by the Constitutional Tribunal Ruling 11/1981, of 8 April 1981, which declared some of its paragraphs to be unconstitutional and determined how others should be interpreted in accordance with the Constitution. Having said this, the solutions provided by this Ruling remain conservative, at least in some respects: the restrictive concept of the strike remains, depriving modern expressions of conflict or dispute from being defined as such and thus considering it to be means of defending professional interests; the concept of strike action as abusive and strongly focussed on the workplace is still widespread; and, to cite just a few examples, far too little room is left for the social players, particularly trade unions, to actively regulate strike action.

To the above we must add that the section of Royal Decree 17/1977 of 4 March 1977 concerning what are known as “collective labour conflicts” remains in force, which means that Spanish law still contains the possibility of action by the public administration in the settlement of collective conflicts between workers and employers. Furthermore, it falls to the social courts to settle collective disputes stemming from the interpretation and/or application of regulations of state or conventional origin, as stated in the Law on Labour Proceedings (*Ley de Procedimiento Laboral*, LPL²).

This prolific activity by the government and, above all, that of the social judges and courts in settling disputes between workers and employers is, without a doubt, another of the distinctive traits of the Spanish system of employment relationships. In fact, the one feature unique to industrial disputes in Spain is that uninterested third parties are called upon to settle them. This is, moreover, particularly the case for disputes stemming from the interpretation and/or application of regulations derived from collective agreements, which are left almost entirely in the hands of the courts, so that they – and not the social players – take a prominent role in the administration of conventional covering negotiations.

It is, in fact, the social players’ reaction to this situation that has led to the establishment of procedures for the out-of-court settlement of disputes in Spain.

II. Industrial disputes and methods of settling them

1. Legal typology of industrial disputes

In Spanish law, there is no actual regulation that lists the types of dispute between workers and employers covered. However, certain of the concepts mentioned do make or presuppose a distinction between *individual* and *collective* disputes, and the traditional separation between *legal* conflicts and conflicts of *interest*, although most doctrine reiterates that this last distinction is artificial and in spite of the difficulty of separating legal requirements from simple demands in nearly all collective disputes.

Thus, Article 1 of the LPL gives social judges and courts competency to hear “both *individual* and *collective*” industrial disputes, thus explicitly recognising the existence of both types of dispute as separate realities, even where both of them claim to be appropriate for the social courts.

² The version currently in force is Royal Legislative Decree 2/1995 of 7 April.

Individual disputes are also separated from collective disputes in Article 91 of the ET. This is the precept that provides for the possibility of negotiating or starting proceedings such as mediation and arbitration to resolve disputes arising out of the interpretation and/or application of collective agreements. Such proceedings may be used to settle “collective disagreements” and “individual disagreements” although in the latter case it is made clear that all parties must give express consent to such proceedings. Thus it comes back to distinguishing collective disputes from individual disputes, even if both stem from the interpretation and/or application of regulations resulting from collective bargaining.

Moreover, the Spanish legal system also makes the distinction, to some extent, between *legal* conflicts and conflicts of *interests*. Proof of this is Article 25 a) of Royal Decree-Law 17/1977 of 4 March 1977, which devises the procedure to be followed in cases where government intervention in a collective dispute proves unsuccessful. According to this precept, if the dispute has its origin in discrepancies in “the interpretation of a pre-existing regulation, be this a state regulation or one resulting from collective agreement”, the government must place the matter in the hands of the social courts; a provision which does not extend to other “situations of dispute affecting workers’ general interests” (Article 17(1) of Royal Decree-Law 17/1977 of 4 March 1977) in which the public administration may also intervene in order to find a solution.

This difference is also present – albeit implied – in the provisions of Article 151(1) of the LPL concerning the administration of the procedural method for industrial disputes in cases where the disagreement centres on the “application or interpretation of a state regulation [or] collective agreement” or in Article 91 of the ET where it provides for the establishment of proceedings such as mediation and arbitration in order to settle disagreements “arising out of the application and interpretation of collective agreements”. It can be seen here that neither case makes general reference to collective disputes, but to those disputes which arise out of the interpretation and/or application of existing regulations, in other words what are now traditionally defined as *legal* disputes.

However, the separation between *individual* and *collective* disputes and, above all, the separation between *legal* conflicts and conflicts of *interest* is basically hinges on the ways or methods used to settle disputes in either case. In fact, as will be demonstrated further on, one or more procedures may be used to settle a dispute depending on the kind of dispute in which the parties are involved. This is, therefore, a purely instrumental typology, in that it is only useful as a pointer, in one way or another, towards the settlement of the dispute.

2. Existence of a concept of collective dispute

From the above one can already surmise that there is, in fact, a concept of *collective dispute* in the Spanish legal system, expressly referred to by its own employment legislation; better still, that there are two concepts of collective dispute expressly referred to by the employment legislation. The first, more general, is contained in Article 17(1) of Royal Decree-Law 17/1977 of 4 March 1977 referring to “situations of dispute affecting workers’ general interests”. The second definition is found in Article 151(1) of the LPL, which considers that collective dispute exists where it affects “general interests of a generic group of workers” and centres around “the application and interpretation of a State regulation, collective agreement, irrespective of its scope, or a company decision or practice”.

It can be seen that this second concept is much narrower than the previous one, in that it refers only to disputes arising out of the interpretation and/or application of existing company regulations or decisions, while the other includes any situation of dispute affecting workers’ general interests, irrespective of the cause. We therefore have

two definitions, which are not mutually exclusive, of collective disputes. On the other hand, the definition of collective disputes contained in Royal Decree-Law 17/1977 of 4 March 1977 encompasses the one later provided by the LPL, so that collective disputes as defined by the latter can be considered as a simple “species” of the “genus” collective dispute covered by Royal Decree-Law 17/1977 of 4 March 1977.

Moreover, both definitions are solely intended to identify that may be subject to proceedings regulated by each of the regulations in which they are contained. In fact, the concept of collective dispute provided for in Article 17(1) of Royal Decree-Law 17/1977 of 4 March 1977 is only intended to identify the disputes which may be subject to the settlement proceedings established by this same regulation and in which the public administration can intervene. For its part, the sole *raison d’être* of the concept of collective dispute provided in Article 151(1) of the LPL is to identify conflicts which may be dealt with by the social courts and thus settled in the courts.

This same function of identification of disputes subject to one or another settlement procedure, also leads to both definitions alluding to the necessary criterion that the dispute affect “workers’ general interests” (in the version of Article 17(1) of Royal Decree-Law 17/1977 of 4 March 1977) or the “general interests of a generic group of workers” (in the version of Article 151(1) of the LPL). The criterion that the interests affected must be “general” is intended to make the distinction between collective disputes and what are known as *plural* disputes, where only the purely personal interests of individual workers are affected, even though several workers may be involved.

In practice, it is difficult to draw the dividing line between collective disputes and *plural* disputes, since in many cases this depends only on how the dispute arose. However, in theory, if general interests are affected (in which case this is a collective dispute) it is not the same as if individual or personal interests are affected (in which case it is a plural dispute) even though in both cases several workers are involved in the dispute. *Plural* disputes, in so far as they affect the interests of each individual worker, remain individual disputes taken together with other equally individual disputes. Therefore, the methods for settling such disputes are the same as applied to individual disputes and not those applied to collective disputes. Therefore, both Article 17(1) of Royal Decree-Law 17/1977 of 4 March 1977 and Article 151(1) of the LPL insist that disputes dealt with in one way or another must affect general interests. The reason for this is simply the exclusion of proceedings covering disputes that are not “conceptually” collective, although they involve a group of workers; the issue here is not one of numbers but of the interest affected by the dispute.

3. Typology of methods of settling disputes

As has just been explained, in the Spanish legal system, the use of certain proceedings to settle disputes between workers and employers depends on the type of dispute involved. In short, the division of responsibilities is as follows.

Firstly, there is the possibility of taking disputes to court, in other words having judiciary bodies specialising in employment issues resolve the disagreement between workers and employers. This procedure, regulated by the LPL, is available – as stated in Article 1 of said Law – for both individual and collective disputes; however these must be *legal* disputes, namely, disputes where the interpretation and/or application of state regulations or regulations resulting from collective agreements is in question. This is particularly clear in cases of collective disputes where, as will be remembered, submission for proceedings in the judiciary courts (known as the procedural method for collective disputes) requires that the dispute centre around the “application or

interpretation of a state regulation, collective agreement [or] company decision or practice” (Article 151(1) of the LPL).

Secondly, there is the possibility of subjecting disputes between workers and employers to a procedure known as the *collective industrial dispute procedure* and played out before the authorities responsible for employment-related matters³. This procedure, regulated by Royal Decree-Law 17/1977 of 4 March 1977, is presented as an alternative method, incompatible with workers’ exercise of their right to strike (Article 17(2)) and, in short, consists of the employment authorities encouraging the parties to reach an agreement to put an end to their dispute or to voluntarily go to arbitration to definitively settle the dispute. This procedure in the administrative courts is available for any dispute “affecting workers’ general interests” (Article 17(1)), in other words all types of collective disputes, whether they centre on the interpretation and/or application of a pre-existing state regulation or regulation resulting from collective agreement, or on any other issue or motive⁴. This procedure is not, however, available for individual disputes.

A third type of procedure, midway between the administrative procedure and the conventional procedure, is *conciliation before taking the case to court*. In most disputes, Spanish law makes it obligatory for an attempt at conciliation to be made before the case is taken to the judiciary authorities. General provision – that is, for both individual and collective disputes – is made for this in Article 63 of the LPL, reiterated in relation to collective disputes in Article 154(1) of this same Law. Clearly, in so far as this conciliation procedure is perceived as a step to be taken before going to court, this option is only open to conflicts centring on the interpretation and/or application of state or agreement-based regulations since, as will be remembered, these are the conflicts which may be settled in a court of law. Furthermore, this procedure may be administrative or agreement-based as it may involve either government conciliation bodies or conciliation bodies created through agreement between the most representative trade union and employers’ organisations. This is possible under Articles 63 and 154(1) of the LPL.

Finally, there are dispute settlement procedures originating out of agreements. These will be studied in more detail later on, but one point must be emphasised. In Spain, since the late 1980s, there have been sectors of activity where *autonomous* dispute settlement measures have been devised⁵. This is the case, to cite just the most

³ The field of administrative intervention in the settlement of industrial disputes also encompasses labour inspection activities. General provision is made for these activities in Article 3(3) of Law 42/1997 of 14 November, the Labour and Social Security Inspectorate Regulation, according to which the inspector’s duties will include tasks of “arbitration, conciliation and mediation” in disputes and strikes. Similarly, mediation once a strike has been called is governed by Article 9 of Royal Decree-Law 17/1977 of 4 March 1977.

⁴ The only difference between the types of dispute subject to this procedure is the path to be taken should they not be settled through said procedure. Therefore, if the dispute centres around the interpretation and/or implementation of a pre-existing State or conventional regulation, the administration itself will hand the reins over to the competent judiciary body so that this last can settle the dispute in accordance with the LPL (Article 25 a) of Royal Decree-Law 17/1977 of 4 March 1977). For other disputes, once the handing down of mandatory sentences by the administration was ruled unconstitutional (Articles 25 b) and 26 of Royal Decree-Law 17/1977 of 4 March 1977 were, in fact, declared to be unconstitutional in the Constitutional Court ruling 11/1981 of 8 April 1981) the methods used to settle the dispute remain entirely in the hands of the parties.

⁵ Although the term extrajudicial dispute settlement is normal when referring to procedures other than court proceedings, some Spanish writers prefer to use the term autonomous procedures. The reason for this preference is that the qualification extrajudicial is an over-simplification in relation to the nature of these procedures, since it only takes into account the fact that these procedures take place outside the scope of the judiciary and thus in relation to disputes that could be settled in the courts, namely legal

illustrative examples, of the national metal industry or the chemical industry sector. Similarly, since the early 1990s procedures for settling disputes have been negotiated within the Autonomous Communities, firstly in the “historical” communities of the Basque Country, Catalonia and Galicia, and then in the others (currently, only the Autonomous Community of the Principality of Asturias does not have an agreement on the autonomous settlement of disputes, although negotiations are nearing completion.) For their part, on 25 January 1996 CC.OO and the UGT, on the workers’ side, and CEOE and CEPYME, on the employers’ side, signed the Agreement on the Out-of-court Settlement of Industrial Disputes (*Acuerdo sobre Solución Extrajudicial de Conflictos Laborales*, ASEC), establishing, at state level, autonomous procedures for settling disputes. This Agreement was renewed on 31 January 2001 for another four years and will thus expire on 31 December 2004.

To keep matters simple, however, we must concentrate on explaining just one out of this proliferation of procedures of conventional origin. The chosen example is, naturally, the autonomous settlement procedures in Spain as negotiated and implemented at state level through the ASEC. And this because most of the autonomous dispute settlement mechanisms negotiated at sectoral level have been absorbed into or replaced by those devised by this Agreement and most of the procedures negotiated within the Autonomous Communities have great similarities to those negotiated before or afterwards at State level. This does not, of course, prevent reference being made to dispute settlement mechanisms negotiated in the operational or territorial areas involved, when such reference is considered necessary to explain the autonomous procedures in Spain.

III. Out-of-court methods for settling industrial disputes

1. The role of the State and of the social players

As far as the Spanish system of employment relationships is concerned, emphasis must be placed on the fact that the development of autonomous methods for settling disputes has fundamentally been driven by the trade union and employers’ organisations themselves. Proof of this is that the establishment of such procedures has taken place in all cases following agreement between the trade union and employers’ organisations most representative in their respective areas, and is not the result of legislative intervention.

It is significant that the implementation of autonomous dispute-settling mechanisms by the social players has received considerable support. Firstly, there was (and still is) a certain consensus in employment law doctrine on the need to create a system for dispute settlement where the social players return to centre stage, to the detriment of the leading role taken by employment administration and, above all, judiciary bodies⁶. This consensus of doctrine has to some extent provided a stimulus to the trade union and employers’ organisations as it created an environment suited or favourable to their establishment of such procedures.

Secondly, the establishment of autonomous procedures has also had the support of the public authorities. It should be stressed that both at state level and in the different

disputes. However, using the term autonomous reflects that these are procedures where the main part is played by the social players and not third parties removed from the dispute, so that the parties in dispute are themselves the ones who settle it without calling on judiciary or government authorities.

⁶ In my view, notable proof of this is in the Report on Autonomous Industrial Dispute Settlement procedures, adopted by the Spanish Economic and Social Council on 19 October 1994, which clearly expresses the need for such procedures to be established as a sign of the maturity of the Spanish system of employment relations and which provides guidelines for the regulation of such procedures; guidelines which then passed into the ASEC and other agreements reached in the Autonomous Communities concerning the settlement of disputes.

Autonomous Communities the public authorities are the ones who finance the bodies responsible for handling procedures, which makes it possible, among other things, for the parties in dispute to use their services for free and, consequently, for such procedures to run normally.

Moreover, provisions intended to reinforce autonomous procedures for settling disputes have been added to State legislation. It is true that this legislation is still incomplete, obscure in some cases and, generally speaking, deficient and, for this reason, the need is felt to reform it in some aspects. Nonetheless, it cannot be ignored that some of the precepts – including those contained in the LPL as reformed in 1990 – were in fact intended to encourage trade union and employers' organisations to set up and use conciliatory bodies other than government bodies or even the social courts (and here I am of course referring to Articles 63 and 154(1) of the LPL, which allows prior conciliation to be carried out within organisations created pursuant to agreements on specific issues reached between the trade union and employers' organisations most representative at state or autonomous Community level).

The 1994 reform of the employment legislation also added similar provisions to the ET and the LPL. It is not necessary to examine these provisions in detail, but it should be noted that Article 91 of the ET details the possibility of reaching agreements setting up mediation and arbitration procedures to settle disputes arising out of the interpretation and/or application of regulations resulting from agreements and implements – to a minimal extent – the regime applicable to these. It should also be noted, to cite but two examples, that the Seventh Additional Provision of the LPL regulates the implementation of the rulings handed down in arbitration proceedings in the same way as are implemented rulings of social courts. There is no doubt, then, that with all of their faults, these State regulations serve to support the implementation of autonomous proceedings in that they clarify their structure and support compliance with the solutions that they help to obtain.

Moreover, in some Autonomous Communities (although still not at State level) employment administration limits recognition of the collective disputes that can be subject to the autonomous procedures it establishes. This is an unofficial measure, in that it is not contained in the legislation, but there is some manner of agreement between the social players and the employment authorities of some Autonomous Communities to channel settlement of collective disputes to organisations responsible to dealing with autonomous proceedings, without the corresponding employment administration intervening in them although it is legally able to do so. Much the same applies to agreements – also unofficial – between the social partners and bodies responsible for administering unemployment benefits (INEM) or for the payment of salaries and compensation in case of company insolvency (FOGASA) to the effect that they will pay workers the appropriate benefits. These *praeter legem* agreements ensure that the use of autonomous procedures does not adversely affect any workers, and thus encourages the workers to use them.

Neither should we disguise the fact that, at the same time as the above, there is some conduct that may have a negative influence on the running of autonomous procedures. Perhaps the most obvious is the delay in reforming the ET and the LPL to definitively clarify some aspects of the relationship between autonomous proceedings and court proceedings. The lack of clarity surrounding these aspects produces uncertainty among the social players when autonomous procedures are to be used, and it can mean that they are not used as planned since, faced with these uncertainties, they may choose to use another, more secure type of procedure. This is also possible because autonomous procedures have to “compete” with other procedures for settling disputes.

This means that the public authorities' support for autonomous procedures for settling disputes has not reached the point of cancelling out the rest of the procedures, particularly the procedure followed before the employment authorities and regulated by Royal Decree-Law 17/1977 of 4 March. This means that autonomous procedures, relatively recent, must – as already said – compete with other already consolidated procedures, with which the social players are fully conversant and comfortable. All of which goes against them, at least for the moment.

2. General structure of out-of-court methods for settling disputes

A. Typology

a) By nature

If by out-of-court methods for settling disputes we mean those played out outside the judicial sphere, in other words those where judiciary bodies are not involved, the response to the question of which procedures are used also includes those played out in administrative circles. Thus, among administrative procedures we find, firstly, prior *conciliation* before initiation of court proceedings in cases where, in accordance with Articles 63 and 154(1) of the LPL, this is carried out by administrative bodies, and, secondly, procedures regulated by Royal Decree-Law 17/1977, of 4 March 1977⁷. In relation to these, it is not clear from Article 24 of Royal Decree-Law 17/1977 of 4 March 1977 whether the employment authority performs *conciliation* or *mediation* duties, since it only refers to “trying to reach a compromise between the parties”, which may be achieved by means of both functions. What is clear is that, in addition to this, the parties in dispute may appoint one or more arbitrators and thus enter a procedure of *arbitration*.

Regarding out-of-court procedures resulting from agreements, which I prefer to call autonomous procedures, the following must be pointed out. ASEC and some of the agreements on autonomous settlement of disputes within the Autonomous Communities have established *mediation* and *arbitration* as standard procedures, but make no provision for the possibility of the parties entering into a simple *conciliation* procedure. This may have been because, although conciliation and mediation are different procedures in theory, in practice there are very few differences, since it is rare for the average conciliatory body to resist making any suggestions to the parties. Furthermore, we cannot lose sight of the fact that Article 91 of the ET only mentions the procedures of mediation and arbitration, but not conciliation, and that it is this very article which has served to a major extent as the basis for the later development of autonomous dispute settlement procedures. All in all, there is no lack of agreements at Autonomous Community level covering the possibility of recourse to *conciliation*, *mediation* and *arbitration* procedures⁸.

b) Based on its origins

From the above, the origin of the various dispute settlement procedures existing in the Spanish system of employment relationships is easily discernible. However we should remember, firstly, that the out-of-court methods developed by the public administration all, naturally, have their origins in the law. This is, in fact, the case regarding conciliation prior to the initiation of court proceedings when this is done by government bodies. It will be remembered that Article 63 of the LPL makes general

⁷ It should, furthermore, be remembered that, as stated before, the labour Inspectorate may perform conciliation, mediation and arbitration work in disputes and strikes.

⁸ In most Autonomous Communities the respective dispute settlement agreements refer to the conciliation-mediation procedure as one single procedure (this is the case in Catalonia, Galicia or Cantabria to name but three). However, in other Autonomous Communities (the Basque Country, the Canary Islands) the agreement includes the possibility of going to conciliation, mediation or arbitration.

provision for this procedure, and Article 154(1) of this same Law makes provision regarding the procedural method for settling collective disputes. This is also the case with regard to procedures in which the employment authorities intervene, which are regulated, as I have previously stated, by Royal Decree-Law 17/1977, of 4 March 1977, which obviously has its origins in the law⁹.

Autonomous procedures, that is those administered by the social players themselves, always – as stated above – have their origins in agreements. In fact in Spain, both at State and at Autonomous Community level, the implementation of mediation, arbitration, and – where appropriate – conciliation procedures has taken place on the basis of agreements reached by the trade union and employers' organisations most representative at the relevant level. The particularity of the Spanish system of employment relationships is, therefore, that the dispute settlement procedures commonly referred to as out-of-court have their origins in collective bargaining.

c) Based on their use

As a general rule, in Spanish law out-of-court dispute settlement procedures are *voluntary*. In other words the parties in dispute use them only in so far as they are willing to do so. This is, moreover, the rule as far as the *arbitration* procedure is concerned¹⁰. In fact, arbitration as made possible by Article 24 of Royal Decree-Law 17/1977 of 4 March 1977 is purely voluntary, since this provision expressly states that parties in dispute “may” appoint one or more arbitrators, which means that they have the possibility of entering into an arbitration procedure and not that they must do so.

The same goes for the arbitration procedure, provided for in the ASEC and which is therefore agreement-based. The voluntary nature of its use is made clear in Article 11(1) of the Agreement, which expressly states that arbitration consists of “the parties *voluntarily* agreeing to ask a third party” to settle their dispute. This voluntary nature is reiterated once again in Article 11(2) of the ASEC, where it is emphatically stated that “the arbitration procedure will only be possible if both parties call for it”.

However, the *mediation* procedure, albeit equally *voluntary*, does not require consent of both parties to come into play. It is true that the parties are free to decide whether to use, or not to use, this out-of-court dispute settlement procedure, in that it is not imposed on them: however, when one of the parties in dispute asks for a mediation procedure to be initiated, the other party is, in some respect, obliged to enter into it. This appears to be the case for administrative procedures, where, according to Article 23 of Royal Decree-Law 17/1977 of 4 March 1977, the employment authorities send a copy of the letter opening the procedure to the party to which the dispute is addressed, and then calls both parties to appear before it.

⁹ The Law is also the origin of the regulations providing for the performance of conciliation, mediation and arbitration work by the labour Inspectorate.

¹⁰ Although Articles 25 b) and 26 of Royal Decree-Law 17/1977 of 4 March 1977, which imposed upon parties in dispute to comply with a mandatory ruling handed down by the labour authority in cases where they were unable to reach their own agreement were declared in violation of the right to collective bargaining and thus unconstitutional, under Spanish law it is still possible for the labour authorities to oblige the parties to go to arbitration in extreme cases. In fact, the Constitutional Court ruling 11/1981 of 8 April, in its Legal Basis 19, makes clear that the provision contained in Article 10 of Royal Decree-Law 17/1977 of 4 March 1977 – namely the obligation on the parties to submit to an arbitration procedure in cases defined in this article and which are, generally speaking, clearly exceptional situations concerning “the duration or consequences of the strike, the positions of the parties and the serious damage to the national economy” – is not incompatible with recognition of the right to strike. The aforementioned case is the only instance in Spanish law where arbitration is considered compulsory; however, situations where it may be ordered are so exceptional that this barely contradicts the general rule whereby any decision by the parties to go to arbitration must remain voluntary.

This is also the case as regards the agreement-based mediation procedure. Article 10(3) of the ASEC does not, in fact, leave any doubts here, since it clearly states that “the mediation procedure will be obligatory when one of the parties requests it”¹¹. Therefore, the use of mediation, in place of other dispute settlement procedures, is, in principle, optional¹²; however, it becomes obligatory where one of the parties involved in the dispute calls for it. However, one of the problems raised by this system is that there are times where the party to which the mediation procedure is addressed does not attend appearances even though these are compulsory, thus preventing mediation from taking place. For this reason, although in theory mediation is obligatory when one of the parties in dispute calls for it, in practice it only runs more or less normally when the other party also agrees that it should take place, an agreement that manifests itself in the act of attending the scheduled appearances¹³.

Finally, it must be stressed that *conciliation* prior to a social court case, is, in fact, *obligatory*. This is not just because this procedure is defined in Articles 63 and 154(1) of the LPL as a compulsory step before the initiation of judiciary proceedings in the majority of individual and collective disputes, so that the failure to do so means that the request will be archived and the procedure discontinued (Article 81(2) of the LPL), but because, furthermore, Article 66(1) of this Law states expressly that “presence at conciliatory proceedings is obligatory for the litigants”, and a party that is summoned to conciliation but fails to appear may be fined for contempt or bad faith should the final ruling find completely in favour of the summoning party (Article 66(3) of the LPL).

B. Financing

In Spain, out-of-court methods of settling disputes are always financed from public funds, or in other words the government itself subsidises all bodies responsible for handling such procedures. This is the case, logically, for procedures as defined in Royal Decree-Law 17/1977 of 4 March 1977 and carried out by the employment authorities in the exercise of duties considered to be part of its responsibilities as a public authority, or for conciliation by a public body prior to the initiation of court

¹¹ There are only two cases in which mediation must be requested by both parties in order to go ahead. Firstly, situations where collective bargaining is “blocked” in other words paralysed by the disagreement between the parties on one point or aspect and the mediation procedure begins in order to lead the parties out of this *impasse*. However, if there is no desire to wait for five months to pass after the constitution of the bargaining committee before starting mediation, this must be requested by both parties, in accordance with the provisions of Article 5.1.b) of ASEC’s Implementing Regulation. Secondly, the request for mediation must also come from both parties in cases where the joint committee of the agreement or collective agreement in question is the one submitting to the mediation procedure, a possibility provided for in Article 4(1)e) ASEC.

¹² In spite of the fact that in general terms the use of the mediation procedure is in fact purely optional, ASEC has attempted to encourage its use by imposing this procedure in certain types of dispute. Thus, should one of the parties attempt to take the other to social court in order to settle a dispute arising out of the interpretation and/or implementation of State or agreement-based regulations or decisions by the employer, said party will have to go through a prior mediation process (Article 10(3) ASEC); similarly, workers’ representatives who intend to call a strike will have to go through mediation before the call can be made (Article 10(3) ASEC). In other disputes, the use or non-use of the mediation procedure is, as has been said, for the parties to decide.

¹³ Although Article 15(2) of ASEC’s Implementing Regulation establishes the obligation on both parties to attend appearances in the course of the mediation procedure, as this is a consequence of their duty to negotiate in good faith, the truth is that this provision is somewhat toothless. Firstly because it only concerns mediation prior to a strike call and not the other instances of mediation; and secondly because if the party to which the dispute is addressed fails to comply with said provision, all this means is that said party will be called to a later appearance, which it may, once again, fail to attend (Article 20 of the Operating Regulations of the Interconfederal Mediation and Arbitration Service).

proceedings. But this is also the case for dispute settlement procedures created by collective bargaining and which are handled by bodies led by the social players.

For this reason, there are differences in the structure of these bodies and in their relationship to the government. In some cases, the body responsible for handling autonomous procedures is a government department¹⁴. This happens in some Autonomous Communities where, although the creation of autonomous dispute settlement procedures has been the work of an agreement between the trade union and employers' organisations most representative within that Community, responsibility for handling these procedures falls to a specific department or section within the government of the Autonomous Community in question. Therefore, in these cases, public financing is direct, in that the department or section responsible for handling the autonomous procedures is financed as is any other government department or section.

Other Autonomous Communities have chosen to create private *foundations* which are, nonetheless, completely financed by the government of the Autonomous Community itself and out of its budget¹⁵. In exchange, the government takes some responsibility – generally the chairmanship – in the leadership of the foundation; this responsibility generally brings with it institutional duties and duties of representing the corresponding body, rather than administrative duties or intervention in dispute settlement procedures, which are usually the exclusive responsibility of the social players.

Finally, at State level, a private foundation has also been created, although its resources are entirely public, in this case provided out of the State general budget, and it comes under the auspices of the Ministry of Labour and Social Affairs (Article 11(1) of the ASEC Implementing Regulation (*Reglamento de Aplicación del ASEC*, RASEC¹⁶). This foundation administers the Interconfederal Mediation and Arbitration Service (*Servicio Interconfederal de Mediación y Arbitraje*, SIMA), which is the body responsible for handling mediation and arbitration procedures related to disputes at State level. Among the leaders of this foundation we find representatives of the trade union and employers' organisations which were signatories to the ASEC, and agreement which served as a basis for its constitution, namely CC.OO, UGT, CEOE and CEPYME, although there is no representative of the Ministry of Labour and Social Affairs. Which means that although it is entirely financed out of public funds it is administered by solely the social players, with no intervention from the official body that finances it.

This is, moreover, and to close this point, of vital importance for the running of autonomous procedures. It should be borne in mind that, as stated above, autonomous dispute settlement procedures “cohabit” with administrative and judiciary dispute settlement procedures. The latter are, generally speaking, free of charge for the parties in dispute and, as also stated above, are well established among the social players. Therefore, if users were made to pay for autonomous procedures, which are something of a novelty, the development of such procedures would be severely hampered, since on

¹⁴ This is the case, for example, in Andalucía, where the autonomous dispute settlement body is attached to the Andalusian Employment Relations Council. (*Consejo Andaluz de Relaciones Laborales*)

¹⁵ This happens, for example, in Catalonia, where the Labour Court is a private foundation supported by the Generalitat. I should also point out that this is the most common arrangement in the Autonomous Communities.

¹⁶ Although reference has already been made to ASEC's Implementing Regulation, I should clarify now that this is an Agreement tied to the ASEC, signed on the same date and by the same organisations and those that signed the ASEC, and that it is intended to complement the latter Agreement in that it develops or puts into effect many of its provisions; hence the title “Regulation” although strictly speaking it is not.

top of the novelty factor and the uncertainty of use would come the increased cost relative to the other procedures.

It is therefore vitally important that parties in dispute be able to enter into autonomous procedures *at no cost*, as is the case with administrative and, as a rule, judiciary procedures. However it is clear, at least in Spain, that trade union and employers' organisations do not have sufficient resources to finance the bodies responsible for handling mediation and arbitration procedures, meaning that public financing is essential for these. In other words, if the government were not financing autonomous dispute settlement procedures, these procedures would almost certainly remain in the letter of the agreements establishing them, and not be implemented in practice.

3. Conciliation and mediation in collective industrial disputes

Before I go on I must clarify that, from this point on, references to out-of-court procedures must be taken to mean only agreement-based procedures, and not administrative procedures or conciliation prior to the initiation of proceedings in the social court (out-of-court in that they also take place outside the judiciary sphere). The reason for this choice is the relative originality of the Spanish dispute settlement system at this point, in that administrative intervention in this area is a more traditional and, thus, much more widespread solution. For this reason, as a lesson in a possible system of dispute settlement at Community level, the experience of dispute settlement procedures developed and managed by the social partners themselves may be of greater interest.

A. Definition and characteristics

As explained above, the agreements concerning autonomous dispute settlement procedures in Spain are not unanimous on the procedure to be followed; specifically, there is no consensus on how conciliation and mediation procedures are to be considered. It will be recalled that in some autonomous agreements both procedures are merged into one, known as a conciliation-mediation procedure, and in others a clear distinction is made between conciliation and mediation. Finally, at State level, ASEC only entertains the possibility of entering into a mediation procedure and not, therefore, into a conciliation procedure.

Moreover, agreements on dispute settlement do not contain a clear definition of what is to be understood by conciliation procedure or mediation procedure and what are the differences between them (to the extent that, as stated above, most of the agreements provide for both of them as if they were one procedure, which means that they cannot be told apart). Nonetheless, those agreements which do make the distinction between the procedures demonstrate that conciliation is meant to be a procedure where the intervention of a third party is more passive, whereas in mediation the intervention is more active.

In fact, in those autonomous agreements that make provision for conciliation and mediation as two separate procedures, the advantage of mediation over conciliation is that the mediator or mediators have to make a more or less official proposal to settle the dispute. In other words, conciliation tries to have the parties reach an agreement on their own initiative while mediation has the parties reach an agreement by proposing a possible solution – which they are free to accept or reject – for their dispute. In conciliation parties are helped to discuss between themselves; in mediation on the other hand they are offered a potential solution to help them reach an agreement to put an end to their dispute.

This can also be observed in the ASEC. As already stated, this Agreement does not make provision for the parties entering into a conciliation procedure, meaning that it

is not possible to determine what the State considers this term to mean. However, when the ASEC does refer to the mediation procedure, it always hints at active participation by mediators in settling the dispute. This is demonstrated by Article 10(1), which expressly states that the work of a mediation body is to *actively* seek a solution to the differences giving rise to the dispute; this, according to Article 10(7) of the ASEC, entails “making proposals for settling the dispute” which the parties may then accept or reject. Thus, the idea that mediation requires more active intervention by the mediators, who may not limit themselves to encouraging discussion between the parties in dispute but must also propose solutions to help them overcome the deadlock in their own negotiations, also seems to be accepted at State level.

Nonetheless, in practice it is unusual for conciliation to take place without minimal intervention from a third party, given that this last is thus only a “silent guest” who, generally speaking, brings little or nothing to the negotiating table apart from his or her own presence. It is logical that in the attempt to bring the parties closer together, the conciliatory body should contribute ideas for a possible intermediate or less extreme position relative to the object of the dispute; in other words that they should, albeit unofficially, make proposals that the parties should consider in order to move forward with their own negotiations. In turn, on many occasions the proposals made by the mediating body are the fruit of prior work to bring the position of the parties closer together, work that has been carried out by the mediation body itself; in some cases, the proposals made in mediation serve only as a catalyst for negotiations between the parties. In these cases, conciliation and mediation are so similar that it cannot be said with any certainty where one ends and where the other begins¹⁷.

B. Scope

a) Based on the object of the dispute

The mediation procedure established by the ASEC may be used to resolve both collective disputes focussing on the interpretation and/or implementation of State or agreement-based regulations (known as *legal* disputes), and collective disputes with no links to the interpretation and/or implementation of the law (known as conflicts of *interest*). It must be pointed out that the ASEC does not contain a broad definition of the collective dispute that encompasses legal disputes and conflicts of interests and allows any dispute fitting into this concept to be resolved through a mediation process. The opposite is nearer the truth. The ASEC lists a series of disputes which the parties may take to the mediation procedure provided for in this same Agreement. We may well sometimes find legal disputes and conflicts of interests on the list of disputes drawn up by the ASEC; however it should be made clear that the ASEC makes no distinction between one type of dispute and the other but merely lists them as possible subjects of a mediation procedure.

In particular, and in accordance with Article 4 of the ASEC, the disputes that may be taken to a mediation procedure are the following: a) disputes arising out of the interpretation of State or agreement-based regulations¹⁸; b) disputes that may arise during collective bargaining and which may bring it to deadlock; c) disputes that may lead to a strike being called or concern the security and maintenance arrangements

¹⁷ Although ASEC contains a concept of mediation requiring the mediators to take an active role and make proposal, it also says – and I quote – that the mediating body “will attempt to bring the parties to an agreement, moderating the debate and allowing each party to speak as many times as it needs” (Article 15(3) RASEC). This sounds like help or assistance to the negotiation between the parties, closer to conciliation than to mediation.

¹⁸ The latter is also the case in which the joint committee of the agreement or collective agreement in question may take the initiative to request the start of the mediation procedure; it is not, therefore, considered to be a specific type of dispute.

during the period of the strike; and d) disputes arising out of discrepancies during the period of consultation before the adoption by the employer of decisions with collective impact, such as changes to working conditions, the transfer of workers, the suspension of employment relationships or dismissals.

b) Based on the nature of the employer

In spite of the fact that in some Autonomous Communities it is possible to take disputes in which one of the parties is a government body to a mediation (or, where appropriate, conciliation) process, this is an experiment which is still at a very early stage in Spain. Where it is being performed it normally involves local government bodies acting as private employer, and thus centres on employment relationships and not the public service¹⁹.

All in all, as a general rule autonomous dispute settlement procedures, and thus the mediation procedure, are only used in relation to private companies and do not, therefore, relate to government bodies. Moreover, ASEC's provisions are clear in this respect. In fact, Article 1 of this Agreement expressly rules out its application and, thus, the application of the mediation procedure to "disputes where one of the parties is the State, [the] Autonomous Communities, [the] local authorities [or] autonomous organisations responsible to the same". Similarly, any government body or administration related to any type of judiciary relationship, even when acting as a private employer, remains excluded from the mediation procedure.

c) Because of the area or other reason

The fact that Spain has autonomous dispute settlement systems agreed at Autonomous Community level and one system agreed on at State level means that there is a need to determine the responsibilities which either system can assume in the area of settling disputes. In most cases, the criterion used has been the territorial scope of the dispute.

In this way, the mediation procedure defined in the ASEC may only be applied to disputes with a State dimension. This is made clear in Article 4(2) of said Agreement, which provides for a mediation procedure to come into play in only two cases: a) when the dispute affects a sector or subsector of activity outside the scope of one Autonomous Community; and b) when the dispute affects one company's centres of work located in two or more Autonomous Communities. In short, the mediation procedure defined in ASEC may be applied to sectoral or company disputes, provided that the dispute in either case goes beyond the territory of one Autonomous Community. This is so as to not encroach upon the competencies of the dispute settlement bodies created within the Autonomous Communities and which, generally speaking, can intervene in sectoral or company disputes limited to the Autonomous Community in question²⁰.

Finally, it remains for me to mention the disputes that may be taken to a mediation procedure from the point of view of the subjects involved. In principle, all agreements on autonomous dispute settlement state that the mediation procedure may be used for collective disputes, namely those affecting a group of workers (it is not usually

¹⁹ This happens, for example, in Cantabria, a Community where it is possible for municipal authorities to sign an "agreement" whereby they submit to Orecla (*Organo de Resolución Extrajudicial de Conflictos Laborales de Cantabria*, Cantabrian Organisation for the Extrajudicial Resolution of Industrial Disputes) procedures for any disputes between them and their employees.

²⁰ In some Autonomous Communities it is possible for disputes that are not limited to the territory of the Autonomous Community in question to go to mediation, provided that the parties agree to submit to said Community's dispute settlement body. This is the case in the Balearic Islands, for example, where the Tamib (*Tribunal de Arbitraje y Mediación de las Islas Baleares*, Balearic Islands Court of Arbitration and Mediation) can, in fact, handle instances of mediation related to disputes at a level higher than that of the Balearic autonomous community should the parties submit to this body.

specified that this must be generic, which means that in theory they may also be used in cases of *plural* disputes). This is also the case with regard to the ASEC. Furthermore, this Agreement may only be applied to collective disputes and not to individual disputes, as this eventuality is expressly ruled out in Article 4.3, which clearly states that “this Agreement does not encompass the settlement of individual disputes”. In the State dispute settlement system it is not, therefore, possible to use the mediation procedure to settle individual disputes, as it is exclusively geared towards collective disputes.

However, the same is not the case with the Autonomous Communities. In many of these²¹ the autonomous dispute settlement procedures contained in the respective agreements have been applied to *individual* conflicts for some time now; this means that in some Autonomous Communities, the mediation procedure comes into play irrespective of whether the disputes are collective or individual. It must be stressed that when this is the case, the mediation procedures are only used for certain types of individual disputes, as the bodies responsible for autonomous procedures have not yet taken on all individual disputes but only a very restricted selection of individual disputes.

C. Procedure

a) Intervening bodies

ASEC makes provision for mediation duties to be performed, firstly, by the *joint committee* of the agreement or collective agreement of which the interpretation and/or implementation gave rise to the dispute. This possibility is contained in Article 8(2) of RASEC and requires two conditions to be met in order to come into effect: the first that it be a dispute arising out of the interpretation and/or implementation of an agreement or collective agreement, and secondly that the agreement in question place responsibility for mediation duties in the hand of its joint committee.

However, as a general rule mediation is performed by *mediators*. Relative to these last I should point out that:

* a *list of mediators* is available to the parties in dispute; this list is approved by the management of SIMA (Article 10(5) ASEC) and includes mediators proposed by the organisations that signed this Agreement (Article 11(2) of RASEC). Normally, these mediators are dedicated professionals with expertise in areas related to employment relationships (professors of employment law, labour inspectors, lawyers or economists); sometimes, however, the list also includes people engaged in trade union activity or activity in defence of employers’ interests²².

* Most commonly, mediators intervening in disputes appear on SIMA’s list of mediators (Article 10(5) ASEC); however, in exceptional cases parties may be permitted to appoint, by common accord, a mediator not included in the list (Article 11(2) RASEC). In any case it is SIMA that pays the mediators, even if they do not appear on its list, and not the parties in dispute.

* In principle the parties in dispute appoint the mediator, although it is also possible for SIMA to appoint the mediator if the parties do not do so. Normally, each of the parties in dispute appoints a mediator, so that two mediators are involved in the

²¹ Reference is always made to Navarre, which was a pioneer in this area; however La Rioja, the Autonomous Community of Madrid and the Autonomous Community of Castille-La Mancha are also taking steps along this path for individual disputes.

²² The standard practice at Autonomous Community is this latter, i.e. that mediators are persons belonging to trade union or employers’ organisations, since mediation is perceived as an attempt at conciliation by the parties in dispute, rather than the intervention of a third party completely outside the dispute.

procedure; however, it is also possible for the parties to agree to appoint, or to agree that SIMA appoint, a single mediator (Article 10(4) ASEC).

* Mediators are subject to causes of incompatibility that may prevent them becoming involved in a specific procedure. In general these causes are intended to ensure that the mediator or mediators remain at all times “external to the specific dispute where they perform their services without any direct personal or professional interests which may affect or influence their mediating activity” (Article 11(7) RASEC).

b) Start of the mediation

ASEC does not contain any general provision concerning *who may request the mediation procedure*. The rule is quite the opposite; in other words, that one party or the other may request mediation, depending on the type of dispute in question. This is demonstrated in Article 13 of RASEC, which lists the disputes which may be subject to mediation and determines who may request that the procedure be started for each type of dispute.

Generally speaking, then, it may be said that the persons who may request mediation are the same as those directly involved in the dispute. Thus, if the dispute centres around the interpretation and/or implementation of an existing regulation, the persons competent to request mediation are those who may initiate collective dispute proceedings in a court of law; if the dispute arises out of deadlock in a process of collective bargaining the persons competent to request mediation are those who, in turn, would be competent to intervene in said bargaining process; in cases where the dispute leads to a strike call, the persons competent to request mediation are, indeed, those who could call a strike; and so on.

Regarding the time limits applicable to a mediation procedure, two points must be made. The first relates to the time limit within which mediation must be requested. In principle there is no time limit for requesting the start of this procedure and the parties may do so whenever they see fit. However, in certain disputes, the ASEC has laid down certain requirements concerning the *periods where the start of mediation may be requested*. Thus, should the dispute arise from a deadlock in collective bargaining, at least five months must have passed since the constitution of the bargaining “table” or committee (Article 5(1)b) RASEC) although, as you will recall, there is no need to wait this long should both parties agree to go to mediation. If the dispute will lead to a strike being called, the mediation procedure must begin at least 72 hours before the strike is called; similarly, should the dispute centre on the security and maintenance arrangements during a strike mediation must begin within 24 hours of the strike being called (Article 15(2) RASEC).

ASEC does, however, make provision for the *length of the mediation procedure*. Generally, this is 10 days (Article 15(1) RASEC), although I should clarify this. Firstly, the mediation procedure may take place over a shorter period for certain types of dispute: this is the case for disputes leading to a strike being called or centring on the security and maintenance arrangements, where mediation does not, in principle, last longer than 72 hours (Article 15(2) RASEC). This is necessary in the case of the last type of dispute given the imminent nature of the strike and the need for such arrangements to be made by the time the strike starts. However, in the case of disputes leading to a strike being called, the generally established period of 72 hours may be extended if the parties agree to this (Article 15(2) RASEC). This is, moreover, normal practice with regard to the standard period of 10 days which, although ASEC makes no

comment about this, may also be extended if the parties prefer to continue with the mediation although the time for mediation is up²³.

Concerning the *formalities* to be completed in order to start the mediation procedure, Article 14 of RASEC requires a letter to this end to be presented to SIMA. This letter must contain information allowing the dispute to be clearly identified. Details should also be provided of the parties involved in and/or affected by the dispute, the functional and/or territorial area covered and the reasons for the dispute. Additionally, a mediator may be appointed or SIMA may be asked to nominate one.

c) The mediation procedure

Once mediation has been requested, SIMA must verify whether or not the *joint committee* of the agreement or collective agreement in question has *previously intervened*. This applies only if the dispute centres around the interpretation and/or implementation of agreement-based regulations, but it should be borne in mind that should this requirement not be complied with, mediation for such disputes cannot go ahead (Article 8 ASEC). This clearly demonstrates that the trade union and employers' organisations that signed the ASEC understand that the person best placed to interpret an agreement is the person who subscribed to it at the time, meaning that any other procedure attempting to perform the same task – including the mediation procedure – takes second place or a back seat.

Once it has been established that the joint committee has intervened, where necessary, mediation proper can begin. Before continuing I must stress that this is a procedure which, in accordance with Article 10(2) ASEC, “shall not be subject to any pre-established order” and will thus take place “according to the order the mediating body sees fit” (Article 15(3) RASEC). Even where this is the case, the parties are usually called to one or more *appearances*, where the mediator or mediators will attempt to bring the parties to an agreement, moderating their debates and allowing each party to speak as many times as they need (Article 15(3) RASEC). Then (although there is nothing to prevent this taking place unofficially during the appearance) the mediator or mediators must make *proposals* to resolve the dispute, which the parties are entirely free to accept or reject, in which case they will be considered as not done (Article 17(1) and (2) RASEC). The mediator may also propose that the dispute be presented to an arbitrator in order, in fact, to encourage the use of this procedure.

To assist them in the performance of their duties, mediators can, finally, gather as much *information* as they consider necessary, while guaranteeing its confidentiality (Article 15(3) RASEC)²⁴.

For their part, the parties involved in mediation must *refrain from adopting any other methods intended to settle the dispute* (Article 10(6) ASEC). In particular, and as detailed in Article 16(1) RASEC, the start of the mediation procedure will prevent, in relation to the matter giving rise to the dispute, “calls to strike and the adoption of lock-out measures, as well as the initiation of judiciary or administrative proceedings or any other proceedings intended to settle the dispute”. However, this ban on adopting dispute measures during the course of the procedure is widely considered as affecting only those parties involved in the procedure and not those persons who, for whatever reason,

²³ In my opinion, there is no change in the duration of the mediation procedure in disputes focussing on discrepancies arising during the consultation period, even where Article 10(3) ASEC states that mediation does not in such cases mean an extension of the time allotted for the consultation period. It should be remembered that, in accordance with Article 51(4) of the ET, these periods are minimum periods, which means that they can extend to cover the entire period allotted for the mediation procedure.

²⁴ In some Autonomous Communities, including Catalonia, the mediating body may request advice from experts in the matter at the heart of the dispute in some procedures, with his fees to be paid by the TLC (*Tribunal Laboral de Catalunya*, Catalonia Employment Tribunal).

have decided not to take part in it, and who – even though they may later be affected by the agreement reached in mediation – are therefore free to adopt any dispute measures they see fit while mediation runs its course.

d) End of mediation

Mediation may conclude *with no effect* should the party to whom the procedure is addressed not attend the appearances, or may be *closed* if, for whatever reason, the party who requested the procedure is the one who fails to appear²⁵. However, the general rule is that mediation concludes when the parties reach an agreement or, conversely, when the parties cannot reach an agreement through the procedure. Starting with this last, I should point out that, in case of *disagreement*, the mediator or mediators will draw up a record in which they will detail, in addition to the fact of disagreement between the parties, their own proposals to settle the dispute and the parties' stated reasons for rejecting them (Article 17(4) RASEC). From this point on, they are entirely free to adopt dispute measures including, naturally, strikes.

Should the mediation procedure end successfully, the *agreement* between the parties will be made official in writing in a report drawn up to this effect (Article 17.3 RASEC) and will have the same effectiveness as a collective agreement signed by them (Articles 91 ET, 9 and 10(7) ASEC and 17(3) RASEC). This means the following. Should the parties signatory to the agreement adopted in the mediation procedure be those competent to negotiate a collective agreement, in accordance with the provisions of the ET, the agreement they sign in the course of the mediation procedure will carry the same weight as a “statutory” collective agreement, in other words it will be *mandatory and general in scope*. As you will recall, this means that the agreement will be applied to all workers and employers included in its scope of application, whether or not they are affiliated to the signatory organisations, and that this will be of direct and mandatory application as if it were a State regulation.

On the other hand, should the agreement reached in the mediation procedure have been signed by persons who, in accordance with the provisions of the ET, do not have sufficient authority, it will carry the same weight as an “extra-statutory” collective agreement, in other words it will be mandatory and limited in scope. This means that the agreement reached in mediation will be applied only to workers and employers belonging to the organisations which signed the agreement, although it will also be of direct and mandatory application.

Since agreements adopted in mediation are treated as if they were collective agreements (as indeed they actually are) they are then *processed* exactly as collective agreements are (Article 91 ET). Thus, if the agreement was adopted by persons competent to negotiate under ET regulations, it is then officially deposited, registered and published by the employment authority (Article 17(3) RASEC)²⁶. However, this does not happen when the agreement reached in mediation was signed by persons not

²⁵ Neither way of bringing the mediation procedure to an end is mentioned in the ASEC or in the RASEC; although they do appear in Article 20 of the SIMA Operating Regulations. These other ways of ending the mediation procedure were provided to cope with situations that occur in practice and are not covered by said Agreements. This has been the case, above all, where mediation ends with no result, required so that there may be a possibility of taking the collective dispute to court, which cannot happen unless this way of handling the mediation is accounted for, albeit in an unorthodox manner.

²⁶ There are times when the content of the agreement adopted in mediation may not be published officially as it is not, strictly speaking, a regulation. In such cases it has become acceptable for agreements not to be published, even when they are signed by parties competent to negotiate in accordance with the ET rules, and even though they are still **deposited and registered by the employment authority**. Publication or non-publication of an agreement therefore depends on its content.

meeting the requirements of legitimacy for negotiating as set out in the ET, in which case it remains in the hands of the parties.

One consequence of the consideration of agreements reached in mediation as if they were collective agreements is also the manner in which they may be *challenged*. In this connection, Article 91 ET states that these agreements must be challenged in the same way as are collective agreements and which is, then, the procedural method for challenging collective agreements established in Articles 161-164 of the LPL²⁷. There is no need to go into detail on the various steps in the procedural method, but I should highlight, firstly, that only a group may challenge (Article 163(1) LPL) and, secondly, that the reasons for challenging a collective agreement and, thus, an agreement reached in mediation are its illegality or its prejudice to the interests of a third party (Article 161(1) LPL).

Finally, it may not be overstating the case to stress that the weight of agreements reached in mediation is in some way increased by Article 10(7) ASEC, which stresses that the agreements reached in mediation will carry identical weight to that of agreements reached during conciliation prior to the initiation of court proceedings. These latter enjoy, in accordance with the provisions of Article 68 LPL, *executive force* among the parties and can, therefore, be implemented in the same way as court rulings. This is, as was said, a means of increasing the effectiveness of agreements reached in the mediation process, which nonetheless is completely justified by the fact that, in some disputes, mediation replaces conciliation prior to the initiation of court proceedings (Article 6 ASEC and 16(2) RASEC). However, for this very reason, this weight can only be accorded to agreements adopted in mediation procedures concerning disputes which may be taken to court, since it is only with respect to such cases that mediation replaces the step of conciliation prior to the initiation of court proceedings.

4. Arbitration procedure

A. Definition and characteristics

As stated earlier, the arbitration procedure established in the ASEC is strictly *voluntary*. This means that, firstly, it is not imposed under any circumstances and, secondly, that for it to come into play the agreement of *both* parties is necessary; in other words, neither party can oblige the other to go to arbitration without its consent (Article 11(2) ASEC). This is reflected, furthermore, in the *definition of arbitration* given by the ASEC. Thus, according to Article 11(1) of this Agreement, arbitration consists of “calling on a third party and agreeing to accept the solution they offer to the dispute” provided that this is voluntarily done, or by voluntary agreement between the parties. Something similar appears in Article 18(1) RASEC, which states that “the arbitration procedure will require the parties in dispute to clearly manifest their willingness to submit to the impartial decision of an arbitrator or arbitrators, a decision with which compliance will be obligatory.”

I should stress, moreover, that in the ASEC, the arbitration procedure is not thought of as part of a sequence involving the mediation procedure. In fact, the ASEC *does not impose any order between the mediation and arbitration procedures*, but allows the parties to decide what path to follow to settle their dispute. Thus, the parties can initiate mediation and, once this is complete, the arbitration procedure, but may also request arbitration while mediation is still going on or may go directly to an arbitration

²⁷ I should point out here that this is clearly dysfunctional in the case of agreements adopted in mediation concerning disputes focussing on discrepancies arising during the consultation period and which, in accordance with Article 85(1) ET, can also be challenged via the procedural channel for challenging collective agreements. A different solution is needed here; in fact, it should be possible to challenge such agreements in the same way as agreements adopted during the consultation period are challenged.

procedure without first completing a mediation procedure (Article 18(2) RASEC). All in all, the most common practice is, first of all, to request mediation which, once complete, gives way to arbitration proposed by the mediators themselves, since, as you will recall, one of the proposals the mediators may make to the parties is precisely, that they take their dispute to arbitration (Article 17(1) RASEC).

B. Scope

For ASEC, mediation and arbitration are clearly different procedures but may both be used to settle the same *disputes*. This means that the arbitration procedure is also subject to the criteria previously mentioned concerning disputes that may go to mediation, as follows: a) arbitration may not be used in all cases, but only for disputes as mentioned in Article 4(1) ASEC, namely those centring on the interpretation and/or implementation of State or agreement-based regulations, those arising out of deadlock in a collective bargaining process, those leading to a strike or centring on the security and maintenance arrangements during a strike and, finally, those arising during periods of consultation prior to the adoption of certain decisions by employers; b) sectoral or company disputes may go to arbitration but only provided that in either case the dispute goes beyond the territory of one Autonomous Community (Article 4(1) ASEC); only collective disputes may be the subject of arbitration and not, therefore, individual disputes (Article 4(3) ASEC); and d) disputes must in all cases involve private companies, as disputes where one of the parties involved is a public administration cannot go to arbitration (Article 1(2) ASEC).

C. Procedure

As is the case with disputes, the *persons competent* to initiate arbitration are the same as those competent to request mediation (Article 19 RASEC). For this reason, this area is also subject to the criteria listed above concerning the mediation procedure; however, I should highlight, once again, the fact that competence to initiate the arbitration procedure (as with the mediation procedure) is determined by the type of dispute in question (article 13 RASEC) as there are no general rules governing who may request the procedure established in the ASEC.

The initiation of arbitration must be requested, as with mediation, by a *letter* to SIMA; this letter must contain information allowing the dispute in question to be clearly and precisely identified. Similarly, and in accordance with Article 20 RASEC, it should also contain details of the parties going to arbitration and of the matter concerning which the decision of the arbitrator is to be made. It should also contain a very clear “undertaking to accept the arbitrator’s decision”, or what is commonly known as an *arbitration bond*, which is simply the parties stating in advance that they will accept and comply with the provisions of the ruling handed down by the arbitrator or arbitrators settling the dispute. The parties may also give a time for the ruling to be handed down and name their arbitrator or arbitrators, or note their decision that SIMA should appoint an arbitrator or arbitrators to intervene in the procedure. This should, finally, be signed by the parties, so that the arbitration bond can be considered to have been signed.

Should the parties not be in agreement on the arbitrator or arbitrators to whom their dispute should be presented and nonetheless do not delegate appointment of an arbitrator to SIMA, Article 20(3) RASEC establishes the procedure to be followed by SIMA. Firstly, SIMA must propose an arbitrator body to the parties, who may or may not accept it. Should the arbitrator body proposed by SIMA not be accepted, SIMA must draw up a list with an odd number of arbitrators, so that each party can eliminate, alternately and in succession, arbitrators as it sees fit until only one is left, with the last one on the list being appointed to settle the dispute.

The *appointment of the arbitrator or arbitrators*, whether this is done by the parties themselves, following the procedure described above, or by SIMA, must be based on SIMA's list of arbitrators (Article 11(2) RASEC). This list, like the list of mediators, is made up of arbitrators proposed by the organisations that signed the ASEC (Article 11(2) RASEC); however, while SIMA's list of mediators contains mediators proposed by each individual organisation (thus making it obvious which mediator proposed each organisation), the list of arbitrators contains arbitrators proposed by organisations in no particular order, since they were all previously agreed upon and are included in the list as if they had been proposed by all of the organisations together.

In general, arbitrators are professionals in the area of Employment Law and Economics (labour inspectors, lawyers, economists and, above all, university professors) of some renown; the list of arbitrators therefore seldom contains persons from trade unions or employers' organisations. Unlike mediators, arbitrators are not subject to any cause of incompatibility, although there is a kind of unwritten law according to which anyone with an interest in the conflict he has been asked to settle may not participate in the arbitration procedure. Finally, arbitrators are paid by SIMA, since all of the procedures administered by this body are, in accordance with Article 7 ASEC, *free of charge*.

Once the arbitrator or arbitrators have been appointed the *arbitration procedure* proper may begin. In principle there is no pre-established order to be followed by the arbitrator or arbitrators; on the contrary, as Article 21(1) of RASEC states, "the arbitration procedure will take place according to the order which the arbitration body sees fit". However, all arbitration procedures must respect the general principles laid down in Article 7 of the ASEC²⁸. Specifically, Article 11(5) ASEC mandates that the principles of *contradiction* and *equality of the parties* must be observed; these are reiterated in Article 21(1) RASEC, which also orders respect for the principles of the adversarial system and equality of the parties, in addition to the *right of hearing of those present* and the guarantee that none of them *shall be left defenceless*.

In accordance with these principles, the arbitrator or arbitrators may call the parties to an *appearance* and request such *information* as they consider necessary to assist them in the performance of their duties (Article 21(1) RASEC). The arbitration body is also competent to request *help from experts* on the matter at hand (Articles 11(5) ASEC and 21(1) RASEC). Finally, the arbitration body must *keep a record* of each of the sessions making up the arbitration procedure and must sign this record (Article 21(1) RASEC).

Moreover, neither ASEC or its implementing regulation say anything about the *type of arbitration* that can take place in the context of this Agreement, in other words whether this must be *legal or equitable arbitration* or whether it may be both, depending on the decision of the parties. However, in spite of this silence, it is understood that the parties in dispute do in fact decide what type of intervention they require from the arbitration body. This is because, although ASEC says nothing on this point, it seems clear that some of the types of dispute which, according to this Agreement, may go to arbitration cannot normally be settled in accordance with the rules concerning the interpretation and/or application of the law but must be settled equitably. Moreover, even some disputes which may appear to be legal disputes often have a significant non-judiciary element and are therefore both – to use the traditional

²⁸ According to this Article, both the arbitration procedure and the mediation procedure must respect certain principles, i.e. be free of charge, swift, procedurally fair, ensure hearing of the parties, and be adversarial and impartial. They must also, and in accordance with the same text, respect the legislation in force and the constitutional principles, which would appear absolutely obvious.

terminology – both legal disputes and conflicts of interests. Such disputes may, then, be settled through legal arbitration, but there is nothing to prevent equitable arbitration also being used, so that the dispute is settled more by those evaluating the “fairness” of the situation than by the application of rules of juridical hermeneutics. This therefore means that it is for the parties in dispute to decide what type of ruling they request from the arbitration body in each case.

Regarding the *duration of the procedure* there are two possibilities. The first is that the parties determine in the arbitration bond the time allowed to the arbitrator or arbitrators to hand down the appropriate ruling, in which case the arbitration body may not extend this period and is obliged to issue its decision within this time. The second possibility is that the parties make no mention in the arbitration bond of the time limit to be observed by the arbitrator or arbitrators. In this case, Article 11(6) ASEC states that the arbitration body has a maximum of *ten working days* from the date of appointment as arbitrator to make its ruling (Article 22(1) makes similar provision). However, this general period may be extended. In fact, in accordance with Articles 11(6) ASEC and 22(1) RASEC, should the parties in dispute not have set a time for the arbitration body’s decision, it must respect the period of ten days as described above, although it may, in exceptional cases, extend this to a maximum of *25 working days* counting from the date of appointment of the arbitrator or arbitrators. However, this extension must be justified by the particular difficulty or importance of the dispute, to be expressed by the arbitrator in a decision drawn up to this effect.

Finally, I should point out that, once the parties in dispute sign the arbitration bond thus submitting to the arbitration procedure and the solution found therein, they must *refrain from any activity intended to resolve their differences*. Specifically, Article 11(4) of the ASEC orders the parties to refrain from initiating “other procedures on any issue or issues subject to arbitration or from resorting to strikes or lock-outs”. However, as happens with the mediation procedure, it is to be understood that this duty is limited only to the parties signatory to the arbitration bond and who therefore have decided to submit to the arbitration procedure but it does not affect other persons who may be affected by or involved in the dispute but have not subscribed to the arbitration bond. And this is the case even if the resulting ruling is has general scope and is therefore binding upon them too.

D. The arbitrator’s ruling

First of all, a note that the arbitration procedure established in ASEC ends, effectively, with the issue of a *ruling*, since this is the name given in this Agreement to the decision made by the arbitration body. According to the provisions of Article 22(2) RASEC, the ruling must be justified and immediately brought to the attention of the parties. It does not, however, say that it must be in writing although rulings are normally put in writing in practice. Following this the ruling is forwarded to SIMA (in fact, it is actually SIMA which, in practice, notifies the parties in dispute of the ruling²⁹) so that it is deposited with this body which, in turn, forwards it to the employment authority³⁰ so

²⁹ In accordance with Article 24 of the SIMA Operating Regulations it would in fact be SIMA, and not the arbitrating body, that would have to notify the parties of the ruling handed down during the arbitration procedure.

³⁰ It should be borne in mind that, in accordance with the provisions of Article 11(2) ASEC, it should already have informed the employment authority of the signature of the arbitration bond for the purposes of – according to the Article – “the confirmation and later publication of the ruling”.

that, where appropriate, it can be officially deposited, registered and published (Article 22(4) RASEC)³¹.

Regarding the *weight* of the ruling, it should be emphasised that ASEC treats these rulings in exactly the same way as it treats agreements reached in mediation. This means that, like such agreements, rulings are considered to carry the same weight as collective agreements. This is in accordance, moreover, with Article 91 of the ET which, as you will recall, serves as a basis for the mediation and arbitration procedures established by ASEC. The only difference of note between the rulings and agreements reached in mediation is that, in the former, the *weight depends on the persons who subscribed to the arbitration bond that initiated the arbitration procedure*.

Thus, and in accordance with the provisions of Articles 9 and 11(7) of the ASEC, the arbitrator's ruling will be treated as a “statutory” collective agreement, provided that the parties who signed the arbitration bond are competent to negotiate at that level pursuant to the provisions of the ET. This means that it will be mandatory and general in scope, in other words it will be applied to all workers and employers included in its scope of application, whether or not they are affiliated to the signatory organisations, and that this will be of direct and mandatory application, as if it were a law.

On the other hand, should the parties who subscribed to the arbitration bond not be competent to negotiate at the corresponding level pursuant to the provisions of the ET, the arbitrator's ruling will have the weight of an “extrastatutory” collective agreement. Consequently it will have limited personal scope, while still being mandatory. In other words, the ruling will apply only to workers and employers belonging to the organisations which signed the arbitration bond, although it will also be of direct and mandatory application.

As far as *later processing* is concerned, the same applies as for agreements adopted in mediation. Therefore, I will merely repeat that this processing is the same as for collective agreements, which carry the same weight as rulings. They are thus officially deposited, registered and published – when they are considered as equivalent to statutory collective agreements (and when their content needs to be published) – but remain in the hands of the parties if they are considered equivalent to “extrastatutory” collective agreements.

The process of *challenging* is also similar. In fact, in so far as arbitrators' rulings are considered equivalent to collective agreements, it is logical that the manner in which the former are challenged should be the same as that used to challenge the latter. This is, moreover, laid down in Article 91 ET, which states that rulings may be challenged following the same procedure as is used to challenge collective agreements.

However, you will certainly recall that agreements adopted in mediation are also challenged in the same way and that I have already said in respect of these that there is a specific procedural method for this and that such agreements may be challenged on the grounds that they are illegal or prejudicial to the interests of third parties. This is also the case for rulings handed down in arbitration³². In fact, rulings may be challenged in accordance with the *procedural method for challenging collective agreements*

³¹ Article 25 of the SIMA Operating Regulations provides for the possibility of the parties being able to ask for the ruling to be *clarified* by the arbitration body that handed it down. In this case, the arbitration body will proceed as it sees fit.

³² With rulings handed down in arbitration, one should not overlook the dysfunction – already referred to – affecting challenges against agreements adopted in mediation, in cases involving disputes during the consultation period. Remember that I then said that Article 85(1) of the ET makes the mistake of not treating such agreements and rulings handed down in arbitration procedures as agreements adopted during the consultation period for the purposes of challenging them.

established in Articles 161-164 of the LPL³³. Thus, rulings may be challenged if they are *illegal or prejudicial to the interests of a third party* or, at least, this appears to be the case according to Article 91 ET³⁴. In addition to these reasons, however, Article 91 ET sets out other possible reasons to challenge rulings handed down in arbitration, reasons that must be clearly demonstrated during the procedure to challenge collective agreements³⁵. These reasons are, firstly, the failure to observe “duly established requirements and formalities” during the arbitration procedure and, secondly, the settlement by the arbitration body of issues not submitted for its consideration.

Article 11(8) ASEC, for its part, limits itself to specifying the reasons mentioned above. Thus, this article lists the following as possible reasons to challenge a ruling: a) the arbitrator body having overstepped its boundaries by resolving aspects or issues not covered by the arbitration bond; b) a noticeable break with the principles governing the arbitration procedure; c) exceeding the time limit established for the arbitration body to make its ruling (all issues that could be covered by the general reason of failure of observe the requirements and formalities of the arbitration procedure); and d) the contradiction by the ruling of constitutional or legal regulations (a reason which could be covered by the general reason of illegality of the ruling).

Finally, I must stress that the LPL itself accords *executive force* to rulings handed down in arbitration procedures established by agreements reached in accordance with Article 83(3) ET and that, since the ASEC is one of these agreements, rulings made pursuant to this Agreement enjoy such executive force. Specifically, the Seventh Additional Provision of the LPL states that *firm* rulings may be enforced – where they are not complied with voluntarily – in the same way as firm sentences are enforced, in other words subject to the rules to this effect as laid down in the LPL.

This, then, raises a problem. There is no time limit for challenging collective agreements, which means that collective agreements may be challenged at any time during their period of validity. However, remember that arbitrators’ rulings must be challenged in the same way as are collective agreements so that rulings are subject to

³³ Article 22(5) RASEC states that the ruling may be challenged in accordance with the use of an appeal to *cancel a ruling* as provided for in Article 65(3) of the LPL. However, this provision is slightly artificial or hollow since Article 65(3) of the LPL actually refers to a supposed appeal to cancel a ruling that is not regulated in this Article or in any other Article of the LPL; it is therefore an appeal to cancel a non-existent ruling.

³⁴ However, some argue that challenging the ruling could lead to a revision of the law applied in said ruling, since it is considered that judiciary bodies can only revise whether the arbitration procedure has been completed or not or whether the arbiter has gone beyond his remit or not by settling issues not brought to him for a decision, in other words merely formalities. Naturally, this would appear to be the case if arbitration has been performed with impartiality and the ruling is thus based on this, since it is not up to judiciary bodies to make rulings of this nature (this has, moreover, been made clear in the Constitutional Court Judgement 43/1988 of 16 March 1988). On the other hand, for rulings handed down in arbitration procedures carried out in law, the answer is not so simple. The very meaning of the arbitration procedure (and the initiation of this procedure) seems to call for it to be made impossible to revise the law applied to the ruling by the judiciary bodies; however, it cannot be ignored that there are certain employment law regulations that cannot under any circumstances be broken. Therefore an intermediate position, which I believe is the most appropriate, is to reject the possibility of revising the law applied to the ruling by the judiciary bodies, except in cases where it is alleged that a fundamental right or mandatory regulation has been violated.

³⁵ It should be borne in mind that the LPL does not include a specific procedural method for challenging rulings made in arbitration (except in the provisions of Articles 127 - 132 of said Law in relation to rulings handed down concerning *trade union* elections, the specific nature thereof preventing them being transferred to other types of ruling) and that it is therefore commonly believed that the procedure where these other causes for challenging may be alleged should be the same as used to challenge rulings because of their presumed illegality or harmful nature and not, therefore, the *ordinary* procedure.

the same provisions as are collective agreements, including – and this is the problem – the provision that they may be challenged at any time or, to put it another way, that there is no time limit for challenging them. This means that rulings cannot become *firm*, since they may always be challenged. And if they do not become firm they cannot be enforced since, as I have just explained, the Seventh Additional Provision of the LPL states that rulings may only be considered as sentences for the purposes of the application of its rules provided that they are firm – one element that could seriously jeopardise the possibility of enforcing rulings.

ASEC has tried to remedy this by establishing, in Article 11(8) a time limit of 30 days for challenging rulings. However, it will be difficult for this time limit to work in practice, since it is established in an agreement-based regulation, and it is certainly doubtful that a regulation covering the employment process can arise out of a collective agreement as such matters are normally considered to be public responsibility and are therefore to be regulated by the law. And this is all the more important when, as in this case, LPL does not establish any time limit whatsoever for challenging it³⁶.

IV. Evaluation of out-of-court methods of settling industrial disputes

1. Practical evaluation: a few statistical indicators

Before I begin, I should make it clear that I only use figures relating to procedures dealt with by SIMA pursuant to ASEC. There are two reasons for this. The first is the excessive complexity of a survey taking into account all of the autonomous dispute settlement bodies in view of their number (a total of 17) and their territorial dispersion. The second is the possible lack of homogeneity of the figures. In fact, a few pages ago I noted that bodies responsible for handling autonomous dispute settling procedures at Autonomous Community level had started to handle individual disputes, which means that these are also reflected in their statistics. This, in view of the fact that individual disputes are counted together with collective disputes, may distort the perception of the use of autonomous procedures, since there are certainly many more instances of individual disputes than of collective disputes. This is one reason for the impression that autonomous procedures are being used much more than they really are for collective disputes. Therefore, I felt it best to concentrate in my analysis on the system that only deals with such disputes.

Over the last three years of SIMA's operation, the results, therefore, are as follows³⁷:

1999	
TOTAL NUMBER OF PROCEDURES.....	97
NUMBER OF INSTANCES OF MEDIATION.....	94
NUMBER OF INSTANCES OF ARBITRATION.....	3
NUMBER OF AGREEMENTS REACHED.....	30
2000 ³⁸	
TOTAL NUMBER OF PROCEDURES.....	113
NUMBER OF INSTANCES OF MEDIATION.....	108
NUMBER OF INSTANCES OF ARBITRATION.....	5
NUMBER OF AGREEMENTS REACHED.....	24

³⁶ Furthermore, a Spanish Supreme Court ruling of 14 December 1998 has already applied the period of 30 days as established in Article 11(8) ASEC and, consequently, declared that the challenge to the ruling that was being completed was invalidated as the period had already passed.

³⁷ Figures provided by SIMA.

³⁸ Figures as at 30 November 2000.

2001

TOTAL NUMBER OF PROCEDURES.....	125
NUMBER OF INSTANCES OF MEDIATION.....	125
NUMBER OF INSTANCES OF ARBITRATION.....	0
NUMBER OF AGREEMENTS REACHED.....	29

In light of these results, I think the following comments can be made. Firstly, we note a *slight increase in the number of procedures handled by SIMA* each year, which may indicate that, as time goes by, the use of autonomous dispute settlement procedures has started to take hold among the social players, although this is very gradual, since the increase in the number of procedures is not spectacular. In fact, the year-on-year increase is a little over 16% between 1999 and 2000 and a little under 11% between 2000 and 2001. Nevertheless, I believe that this increase in the number of procedures should be highlighted as it indicates that use of these procedures is gaining ground and not the opposite.

A second point of note is the *absolute predominance of the mediation procedure over the arbitration procedure*; or to put it another way the scant use of the arbitration procedure compared to the mediation procedure. In this connection the figures are very telling. In 1999, almost 97% of procedures handled by SIMA were mediation procedures and only just over 3% were of arbitration. Similar figures can be observed for the year 2000. During this year, just over 95% of the procedures handled by SIMA were mediation procedures and just under 5% were arbitration procedures. Finally, for the year 2001, the figures speak for themselves: 100% of the procedures handled by SIMA were mediation procedures, and there was not even one single arbitration procedure.

The third conclusion to be drawn is the *low level of agreements reached in the mediation procedure*. Almost 32% of the procedures handled by SIMA in 1999 were completed successfully, which means that 68% of the mediation procedures concluded with no positive results, in other words more than two-thirds of the procedures were unsuccessful. But the results are even worse for the years 2000 and 2001. In the first year, only 23% of the procedures handled by SIMA concluded with an agreement between the parties; in the second, the figure is similar, since just over 23% of the mediation procedures ended with an agreement between the parties. In other words, in the last two years fewer than 25% of mediation procedures ended with an agreement being reached.

2. Critical evaluation (problems of implementation and development)

The points made above *should not, however, lead to the conclusion that the implementation of autonomous dispute settlement procedures is having a negative outcome in Spain*. It is true that the statistics do not throw up any results that could be considered excellent, or even good, but we must not lose sight of the following. The establishment of autonomous procedures in Spain did not start from zero but, one could say, from minus ten. This means that for a long time the settlement of disputes between workers and employers has been in the hands of third parties, the government and the judiciary and that, logically enough, these methods have taken firm root in the culture of the social players. For this reason, the establishment of self-administered dispute settlement procedures must begin by overcoming the culture of third-party involvement in disputes and only then can it begin to gain ground as a formula suited to settling industrial disputes. This is a path that clearly needs time to make a mark; a path that cannot be completed overnight or merely because the trade union and employers' organisations have signed an agreement in this connection.

By taking the above into account we can better understand how, in spite of the statistics, I can consider that the establishment of autonomous procedures in Spain can produce a positive result. The fact that their use is becoming *commonplace* is undoubtedly a major achievement in light of what I have just said and, on top of this, the lack of knowledge, in principle, on recently devised dispute settlement procedures and the uncertainty arising out of their because of this very novelty. Nonetheless, the statistics show how the number of procedures handled by SIMA over the past three years has remained steady and has even begun to increase, which is a sign that their use in the settlement of employment disputes is being considered *normal*.

However, the evidence relating to the system's two weak points cannot be ignored: firstly, the low number of instances of arbitration, and secondly, the low number of agreements reached in mediation.

A. The low level of growth of the arbitration procedure

In principle, there is no cause for alarm or astonishment that mediation is the preferred procedure and that, conversely, arbitration is not very popular among the social players. And not merely for the obvious reason, i.e. that mediation allows the parties to control the course and outcome of the dispute while in arbitration all control is lost and it is left to a third party to settle the dispute. Apart from this I must stress that one of the main reasons for the establishment of autonomous dispute settlement procedures – at least as far as Spain is concerned – is the emphasis on dialogue between the parties as a means of settling disputes and, consequently, the development of a dispute settling method very close to collective bargaining. If this, then, is the focal point, it would be most logical to use the dispute settlement procedure that leaves more room for dialogue between the opposing parties and which bears more resemblance to collective bargaining. In other words, the mediation procedure where, in spite of the active intervention by a third party, it is the parties themselves who, in the final analysis, have to reach an agreement to put an end to their dispute. In this way, the scant use of arbitration only serves to demonstrate that the aim of putting autonomous dispute settlement procedures into effect is, in fact, what has just been expressed, given that the social players rarely make use of a procedure where, in principle, there is no room for dialogue or negotiation between them.

All in all, growth of the arbitration procedure is still very slow, in so far as this could also provide support to negotiation between the parties, particularly in cases where it has reached “deadlock”. There is therefore a need for serious discussion of the reasons for the scant use of this procedure. The first of these may be the generally negative opinion of arbitration in Spain. It should be borne in mind that many of those involved in the current development of employment relationships in Spain still recall the methods used to settle disputes during the last years of the Franco dictatorship and during the period of transition to democracy including, as some will remember, submission to a compulsory ruling handed down by the employment authority concerning the obligation to enter into arbitration to settle disputes between workers and employers. This means that arbitration is often perceived as a method used to resolve disputes typical of a past that was no better; or, to put it another way, as a method typical a period where there was no autonomy to settle disputes and where this was done through authoritarian intervention.

However, there is no doubt that *historical memory works against the development of the arbitration procedure*, since given these precedents it is logical that proposing arbitration to settle a dispute, albeit on the basis of an agreement between trade union and employers' organisations, will be received with suspicion, at the very least, by the parties.

A second factor to take into consideration is the *type of disputes making up the majority of SIMA's statistics*. In 1999 over 79% of the disputes leading to procedures handled by this body resulted from the interpretation and/or implementation of a State or agreement-based regulation. In the year 2000 almost 70% of the disputes that came to SIMA had the same cause. Finally, in 2001, over 75% of the disputes resulted, once again, from the interpretation and/or implementation of pre-existing regulations. Which means, in short, that the vast majority of the disputes subject to ASEC procedures are, to use the classic terminology, *legal disputes*. However, on the legal stage the judiciary bodies still have a leading role. We may come back to this later, but perhaps the point should be made now that social courts in Spain are, generally speaking, positively received by their users. With a few exceptions, the general belief is that the decisions are fair and of a high standard, that access to justice is not overly expensive and that the justice itself is not too slow. There is therefore no reason to change the "plan" when the dispute is legal, and the parties continue to place their trust in the judiciary.

The third element to be taken into consideration is the *balance of power between the parties in dispute*. The choice of a dispute settlement method based on dialogue and negotiation between the parties means that the solution of the dispute will often be determined by the balance of power between the parties, much as happens in any *pure* collective bargaining process. This means that when the parties themselves attempt to settle their dispute it is very probable that the party which, for whatever reason, has greater bargaining power than the other will ultimately impose its solution for their dispute. Conversely, arbitration may be a way to balance out power between the parties in dispute, precisely because an impartial third party has the final say on the solution to the dispute, meaning that the outcome bears no relation to the power that one party may wield over the other.

In view of the above, it would seem clear that no party believing itself to have more power over the other in a specific dispute would want to relinquish the possibility, granted by its power, to win the dispute. The reverse would be more likely, in other words, it would try to make the best use of its greater bargaining power to settle the dispute in a way most favourable to its own interests. This does not, of course, sit well with the arbitration process since a dispute that goes to arbitration will be settled in accordance with a third party's interpretation of the law or sense of fairness and not by any coercion by the more powerful party of its adversary. This means that the party with greater bargaining power in a dispute will rarely want to go to arbitration even if the other party requests it. This also means that this procedure is very rare, since the balance of power between the parties in dispute is almost always unequal and sometimes extremely so.

B. The low number of agreements in the mediation procedure

As far as the lack of agreements in the mediation procedures is concerned I should clarify before going any further that the reasons listed below come from my three years of experience as Head of SIMA's Legal Department: you should also be aware that as pure abstractions they are subject to a certain margin of error, due fundamentally to the fact that my views of the events of the time were and continue to be somewhat subjective.

Having said that, I will start by giving some *reasons related to the work of the mediators for the lack of agreement in mediation procedures*. In SIMA, there have in fact been times where the mediator has felt "obliged" in some way to defend the interests of the party that appointed him as mediator in return for this appointment. In these situations the mediator feels that by appointing him the party has placed trust in him, trust which he may betray if he does not defend said party's interests during

mediation. This means that instead of trying to settle the dispute by bringing the parties' positions closer together the mediator sides with the position defended by the party that appointed him, so that he does not "work" to find a solution to the dispute but to argue that the case of the party that appointed him – "his" party – is the correct one and that it therefore should not move an inch.

A second notable behavioural trait is that of the mediator who was placed on the list of mediators by the corresponding trade union or employers' organisation and mediates a dispute in a company where the workers' representatives or the employer belongs to said (trade union or employers', respectively) organisation. In these cases it is quite common to see that the mediator feels "obliged" to defend the interests of this party – be this the workers' representation or the employer – so that said party thus feels in some way "protected" by "its" organisation. These are situations where the mediator (usually a member of the organisation that placed him on the list of mediators) thinks that if he moves away from the position defended by the party belonging to his organisation, this could be perceived as a kind of "betrayal" in that instead of defending the interests of fellow members of his organisation he protects the interests of its adversaries. For this reason, such mediators tend not to make proposals but limit themselves to stressing that the position defended by the members of their organisations is correct and that, consequently, there can be no agreement if it is not on the basis of this position. This does not, of course, settle the dispute, but the party in dispute perceives the mediator as the defender of said party through his representation of the organisation to which they both belong, which serves to strengthen the organisation itself.

To this I must add the lack of experience of some mediators, who are undoubtedly experts in their day to day work but have little knowledge of what is required of a mediator in a dispute. There is no doubt that the mediator's work entails, in addition to a certain disposition, a "professional" ability that is not always present. And we must not forget that some of the mediators on SIMA's list are highly qualified professionals who have not worked as mediators before, which means that they do not know – because they have never used it – what technique to use to bring the parties to settle their dispute. There are, thus, occasions where the mediation procedure fails because the mediator does not know how to deal with the parties' refusal to even consider the possibility of being able to try to settle their dispute through mediation.

Finally there have been times – albeit very few – where the lack of agreement in the mediation procedure may have been due to the fact that the mediator preferred to put off settling the dispute so that the parties could continue negotiating outside SIMA though with the same mediator's "help". These are the – rare – occasions where the mediator has literally taken the settlement of the dispute outside SIMA, attempting to have the negotiation continue within the company or the sector in question and with his own cooperation.

Another reason to take into account when assessing the factors in the lack of agreement in mediation procedures is the *prior process of familiarisation by the joint committee*. There is no doubt that nobody is better placed to interpret a regulation than the person who negotiated it and, thus, that nobody is better placed to interpret a clause in an agreement, a collective agreement or a pact than its own joint committee, as it represents the parties that negotiated it. But this entirely positive "upside" of prior intervention by the joint committee in disputes arising out of the interpretation and/or implementation of an agreement-based regulation, has a negative "downside". In the prior process of familiarisation with and discussion of the dispute by the joint committee the positions of the parties have already been made clear and an attempt has

already been made to reach an agreement. However, if the parties could not reach an agreement after these joint committee negotiations it is unlikely that they will do so during mediation. Events normally run as follows: since the discussions within the joint committee have made the parties' positions so very clear, mediation is merely a step to be taken (where the case for the lack of agreement already made in the joint committee is restated) before application is made to take the collective dispute to a court of law.

It should also be borne in mind that statistically, as stated above, the majority of the disputes for which a settlement is attempted by means of procedures handled by SIMA are those arising out of the interpretation and/or implementation of collective agreements, agreements or pacts and, therefore, those where prior intervention by the joint committee is required. This means that the factor being examined here has a multiplier effect on the number of mediation procedures within this organisation that end without agreement, which is, in fact, related to the fact that in many cases the outcome is already "marked" by the lack of agreement in the joint committee.

The third reason or factor in the lack of agreements in the mediation procedure is the *attitude or conduct of the parties in dispute*. I have already mentioned the relative novelty of the industrial dispute settlement procedures contained in ASEC and dealt with by SIMA and, thus, the social players' lack of familiarity with the use of these procedures. It is true that this novelty and lack of familiarity will gradually disappear as the autonomous dispute settlement procedures become more consolidated and deeper entrenched in the system of employment relationships. However, in the meantime, some SIMA "users" have displayed an attitude towards mediation procedures that could be deemed a clear manifestation of their lack of familiarity. In fact there are many who, faced with a request for mediation, react by denying the existence of a dispute or stressing that "their" dispute needs to be settled within the company or sector and that there is no need to "take it" anywhere else. Nor is it unusual to find situations in which the parties distrust the mediators, do not give them sufficient information to understand the background to the dispute or are "too lazy" to repeat the background because they already know it and repeating it to the mediators seems like a tedious task; not to mention asking openly who this (wo)man is and what on earth he/she has to do with the dispute (and excuse my expressing it in this way the better to reflect the real situation).

It is clear that the above comments are often part of a strategy consisting of refusal to submit to mediation and attempts to settle the dispute at hand; consequently, the only thing that becomes clear is the guilty party's unwillingness to negotiate. However, there are also times where these are not a "pretext" but merely an expression of unfamiliarity with mediation as a dispute settlement method. Thus, as they are not familiar with the procedure they do not trust it, the mediators or SIMA's role, thus making it difficult to reach an agreement since not only the dispute between the parties itself but also the mistrust in the method used to settle the dispute must, first and foremost, be overcome first.

Another factor related to the attitude or conduct of the parties is one which could be termed "strategic" in that the lack of agreement in the procedure is a result of the strategy being used by the parties in the dispute. Thus, when a strike is called to publicly complain about a particular situation, it seems clear that no agreement can be reached in the mediation procedure since the objective is, in fact, to call a strike to make the complaint. To give another example, something similar happens in cases where, if workers go on strike, the human resource managers "load up on" reasons to explain to the multi-national management of the company why they have reached certain agreements with the staff. In these cases, an agreement cannot be reached during mediation because the managers "need" the staff to go on strike so they can "hide

behind” this when dealing with their superiors. Something similar happens when one trade union is in competition with another and “uses” the lack of agreement in mediation to appear – in the workers’ eyes – more radical or less willing to bow to the employer. These are, in short, well known and absolutely legitimate dispute tactics or strategies which lead to mediation ending without agreement because the very lack of such an agreement is best suited to the position of either party.

Among these tactics or strategies we find one which is worthy of separate mention because of its noticeable repercussions on the lack of agreements in mediation procedures handled by SIMA. I have already stated that most of the disputes that come to this organisation are those resulting from the interpretation and/or implementation of State or agreement-based regulations or company decisions (including challenges to substantial modifications to working conditions and collective transfers). However, this type of dispute is noticeable in that it arises when the employer has already made his/her decision: it is when the latter has interpreted and/or implemented the State or collective regulation in a particular way or has taken the relevant decision that the dispute arises, provided, of course, that the workers’ representative considers that the employers’ interpretation and/or implementation is not the correct one or that his decision is flawed. As you may recall, the fact that the dispute arises once the employer has already decided and acted and the workers’ representative has reacted (a fact that is, moreover, completely obvious) is because this has a negative influence on the mediation process.

Once the two parties have taken sides, one deciding and the other reacting to the decisions, it is very difficult for the mediation procedure to make them go back on their positions. The employers’ party, which decided on the interpretation and/or implementation of the regulation or took the decision in question, tends to have the impression that if the mediation procedure reaches an agreement this could be interpreted by the workers as a capitulation in its position; this could have negative repercussions for its image of authority and could also set a “dangerous” precedent for later decisions, which could be challenged or countered on the grounds that this was already done once before through mediation. Something similar happens with the workers’ representatives themselves. The fact that they have already made clear their opposition to the employers’ decision and are therefore going to initiate the corresponding proceedings to invalidate the employers’ action could go against a possible agreement in mediation – because an agreement during this procedure could be perceived as the workers as a capitulation by their representatives before the employers and could thus cause them to lose credibility in the eyes of the people they represent and their potential electorate. In short, neither the employers’ nor the workers’ representatives feel it is appropriate to back down from the position that has brought them into dispute because they both feel that this could have negative repercussions on their power.

If, moreover, you take into account that, as has repeatedly been pointed out, the majority of the disputes of which a settlement is channelled through SIMA centre around the interpretation and/or implementation of company decisions, it does not seem too much of a stretch to conclude that the above is one of the main factors in the volume of disagreements in the procedures handled by this body³⁹.

To the above I may add a factor to which I have alluded before: *the excessive “weight” still given to judiciary solutions* in disputes as referred to above. Excessive

³⁹ This point should lead to debate on the wisdom of “anticipating” the mediation procedure. In fact, should a Community-level dispute settlement system finally be set up, thought should be given to the appropriateness of mediation taking place before the dispute begins; in other words, thought should be given to the suitability of mediation more as a way of *preventing* disputes than as a way of settling them.

weight which could stem from the following. Firstly, and not unrelated to the above factor, there is no doubt that judiciary settlement of disputes allows parties to relieve themselves of responsibility in settling their dispute. Whatever may happen, whether the judge finds in favour of one or the other, they can always say that they only had to back down from their previous decision because the ruling said they had to. This means that the one party is not giving way to the other party and does not, therefore, appear to be capitulating, but is simply complying with the orders contained in the ruling handed down by a third party. Therefore, the third party assumes responsibility for one of the parties backing down from the position that gave rise to the dispute.

And you should also take into consideration that, in this type of dispute, it is difficult not to appear as the victor or the vanquished in the corresponding procedure, including mediation. In fact, as far as mediation procedures centring around the interpretation and/or implementation of company regulations or decisions are concerned, one of the reasons for the near absence of mediating activity and for the overall preference for the judiciary solution is that the object of the dispute is too restricted: it is either the company's decision or the workers' representatives' reaction to it. This being the case, mediation activity becomes, as I have said, very difficult, as it can offer no alternative choice to either of the parties backing down from their previous position. Moreover, it is sometimes the case that the positions are clearly defined in strictly legal terms, since each party believes its position to be the only legally acceptable one. This means that their "plan" does not provide for a solution negotiated in mediation, since, if you think that you have the law on your side, you do not understand how you could give way and thus run the risk of breaking the law.

However, there are even more "advantages" of the judicial solution that may form barriers to the satisfactory outcome of the mediation procedure. The security offered by courtroom proceedings, against the relative uncertainty awaiting users of a novel dispute settlement procedures (there are still many people who believe that they may run into legal problems if they go to mediation within SIMA instead of opting for conciliation); or the security of having a favourable sentence with which compliance may be imposed against the uncertainty of compliance, or non-compliance, with an agreement adopted in mediation. Although sometimes, it must be admitted, this is less to do with security than with familiarity with the use of the judiciary procedure. It is standard practice for disputes concerning the interpretation and/or implementation of regulations or company decisions to be placed in the hands of lawyers because the controversy, as I have already stated, appears to be based on legal terms. This means that each party also defends its respective position in legal terms, beginning with the declaration of pleas to the defence and continuing into the heart of the matter concerning the law applicable to it.

However, when such disputes are settled not by the corresponding jurisdictional body but through a mediation procedure, lawyers tend to follow the path taken by a court case. They do not, then, take account of the fact that mediation is closer to a collective bargaining process than a court case and thus declare pleas to the defence or legal arguments supporting the position defended by each party during the mediation procedure itself. This position, more suited to a courtroom, naturally tends to discourage mediation and any agreements therein, since all it does is entrench each party in the position each defends on the grounds that the law is on their side and that, consequently, they have nothing to negotiate.

Having said this, I need only repeat that these are, in any case, my own perceptions, subject to a certain margin of subjectivity and, naturally, lay no claim to being exhaustive; they are simply some of the possible reasons for the low number of

agreements reached in mediation procedures handled by SIMA and, thus, are only of use in so far that they may help in the discussion on what might be the best autonomous dispute settlement method to use in the Community sphere.

V. Out-of-court methods for settling industrial disputes and the Community sphere⁴⁰

In view of the possible development of a dispute settlement procedure at European level, I think the following comments are of interest. The first refers, clearly, to the suitability of such a development and the second to how such a system might be structured, at least in some aspects.

To start with the suitability or not of developing such a system: the response must clearly be in the affirmative. There is one primary basic reason for this: any moves forward in the construction of a European social space will need the trade union and employers' organisations to take a more active role at European Union level, which means more activity at Community level and more participation in decision-making at this same level. There is at present a paradox that should not be ignored, namely that while many of the decisions affecting workers' and employers' interests are taken at European Union level, most of their action (or reaction) – or rather that of the trade union and employers' organisations representing them – still takes place at national level. One way to correct this dysfunction is, as I have stated, for the social players to be given a more active role in the Community sphere, so that their action (or reaction) takes place here and not just at national level.

There are many – and they are well known – ways by which the social players can intervene at any given level or in any particular system. Institutional participation and collective bargaining are, perhaps, the most telling in this respect; but they also include the handling of disputes between workers and employers. In fact, the fact that trade union and employers' organisations take on responsibility for resolving disputes between them increases – logically – their presence and active participation in the management of the employment relationships within the system in question. It is at this point that all of the activities derived from the productive system are placed in their hands: the representation of workers' and employers' interests, the drafting of regulations governing their relationships and the settlement of disputes that can arise in the course of the same. This makes the social players into the true agents or catalysts of the system of employment relationships which is, in fact, created when this happens.

⁴⁰ The document I used as a guide when preparing this report emphasises that it is best to clarify whether autonomous dispute settlement procedures used in Spain have been used in disputes arising out of the implementation of Community law. However, this question is difficult to answer given the lack of official information on the specific content of these procedures. Nevertheless I can say that during my three years as Manager of SIMA's Judicial department only one of the mediation procedures I attended focussed on the implementation of Community law, specifically Directives 77/187 and 98/59, on, as you know, workers' rights in case of transfer of undertakings. The dispute arose following a merger between several companies which had previously belonged to the same group and was motivated by the unilateral decision by the new company to change the agreement-based regime that had been applied to the workers in each of the previously existing companies. The request for mediation, which came from the workers' representative, centred around the implementation of the abovementioned Directives (and Article 44 of the ET) and, consistent with them (at least this was the position adopted by the workers' representative) keeping the previous agreement-based regimes in place until such time as a new collective agreement including all of the employees of the new company was negotiated. The mediation ended unsuccessfully and the dispute went to court where the **Spanish** Supreme Court ruled that it considered that the new company had neglected its duty to negotiate and this was contrary to the right to collective bargaining enshrined in Article 37(1) of the Constitution (however, the issue of keeping the pre-merger agreement-based regime in place was not resolved).

However institutional participation and collective bargaining systems already exist at European Union level, but not systems for settling industrial disputes by the social players themselves. The establishment of procedures to settle disputes other than in the courts would therefore mean that the trade union and employers' organisations operating at Community level would become responsible for the missing element so that all of the elements of the administration of employment relationships would be placed in their hands. Taking on this final element and consequently beginning to manage disputes with a European dimension would be *a step along the way to developing a European system of employment relationships*, a system completely overseen by trade union and employers' organisations at the same level. Only in this way would we be able to correct the dysfunction of the European Union being a system only as far as economy is concerned and not in the area of employment relationships.

In addition to the above I should like to highlight the existence of two areas to which autonomous settlement of disputes is especially well suited. The first of these is the area of *collective bargaining with a European dimension*. It is well known that in accordance with Article 139 of the Treaty Establishing the European Communities, the social players may maintain social relations and conclude agreements between themselves. Provision is also made for collective bargaining specifically related to the constitution of European works councils (Directive 94/45) and to the ways of involving workers in European companies (Directive 2001/86). However, during the course of these collective bargaining procedures, the parties may reach a point where negotiation comes to a standstill and prevents them reaching an agreement. This seriously jeopardises the development of collective bargaining at European level and the constitution of European works committees and the implementation (when the time is right) of the methods to involve workers in European companies. And do not forget that the growth of the first is, as I have just stated, a prerequisite for the consolidation of a true European system of employment relationships and that these last are, in my opinion, essential to increase worker participation in the company environment.

However, there are no methods at Community level that can overcome a stalemate as described above. It would therefore be appropriate to implement procedures with a Community dimension, the same dimension as the deadlocked collective bargaining, to unblock the negotiation procedure. Mediation and even arbitration could serve this purpose and thus allow agreements to be reached between the social interlocutors. I stress here that both mediation and arbitration should have a Community dimension; this because collective bargaining also has a Community dimension, so perhaps it would be best not to "fragment" or, as the case may be, "nationalise" the activities carried out to overcome the moments of *impasse* though the use of mechanisms provided to this end at national level.

The second area where the establishment of autonomous dispute settlement procedures would bear fruit is, in my opinion, the area of *company restructuring processes*. And there are two reasons for this. Firstly, there is currently a major shortfall in trade union control over decisions taken by companies, decisions which often have a dramatic and intense effect on workers' interests. This shortfall exists because there is, generally speaking, no coordination between the level where company decisions are taken and the level at which trade union activity takes place. In fact, while it is increasingly common for companies to take their decisions at multi-national level, trade union activity mostly tends to remain at national level. This lack of coordination produces a lack of control over decisions taken by the company and which have direct and negative repercussions for workers' interests; but it also completely cancels out the possibilities for trade union activity at national level since the decisions on the

employment consequences fall outside the decision-making capacities of the national directors of the company and, thus, rarely can negotiate on them. Thus, there is no trade union control at the decision-making level, and scarcely any at national level.

However, the possibility to use autonomous dispute settlement procedures at Community level (specifically, mediation procedure) to settle disputes arising out of company restructuring exercises would allow the discussion on the measures to be adopted by the companies to take place at the same level as that at which they will be adopted. Faced with a company's communication of measures to be adopted in companies situated in various European Union countries, mediation at Community level in disputes resulting from the adoption of such measures would, in fact, mean that discussion with workers' representatives would also take place at European level. This is, it seems, the way towards greater and better trade union control on company decisions and towards progress in the democratisation of employment relationships. Mediation at European level, in that it permits confrontation between the positions of the company and those of the workers' representatives concerning the measures to be adopted by the former, introduces an element of dialogue and participation in the company decision-making process and in the same way – as already stated – a higher level of democracy in the exercise of employers' powers.

But there is a second aspect which should not be ignored. The announcement of company restructuring measures to take place in several European Union territories can lead to a sort of "trade union patriotism" in that the national trade unions in each country call for workers in other countries to bear the brunt of said measures. Apart from the clear break with class solidarity this produces, the push to not be the country to suffer at the hands of company measures with negative repercussions for workers may lead to concessions being made with regard to working conditions, concessions which would not have been made under different circumstances; and this because the pressure exerted by the possibility of "de-localisation" of employment relationships considerably increases bargaining power on the employer's side. For this reason, raising to European levels the procedures to settle disputes occasioned by the announcement of such measures by companies could prevent this wrangling between national trade unions and thus the need to make concessions on working conditions merely to "placate" workers in that country. Moreover, mediation encompassing all of the companies that could be affected by company measures and where representatives of all of the workers affected are present would mean that the solution to the dispute could be more far-reaching and have more regard for solidarity, as the repercussions of such measures in all of the countries could be discussed and attempts could be made to share them equally depending on the company's actual needs.

However, there is an awareness that a model for dispute settlement similar to the one suggested may run into major difficulties as far as its *compatibility with state mechanisms* is concerned. It is true that in some cases there will be no particular difficulty. In fact, the implementation of autonomous procedures in order to unblock collective bargaining at European level pursuant to Articles 138 and 139 of the Treaty establishing the European Community would not have any special problems with the weight of the agreements that could be adopted in mediation and even of the rulings that could be handed down in a hypothetical arbitration procedure. In accordance with these Articles, the weight would be the same as that of the agreements adopted in the collective bargaining procedure in question, since mediation and arbitration would only serve to bring the parties to an agreement or, where necessary, provide a substitute for one. In other words, the agreement reached in a mediation procedure or the ruling handed down in an arbitration procedure has the same value as the agreement between

the parties involved in the collective bargaining process and thus, logically, has the same weight.

There is a greater problem with collective bargaining that sets up European works committees or that establishes (or rather, will establish) methods of involving workers in European public liability companies. And this is because, as is well known, negotiation between either party is governed by the laws of the State in which the management of the company or European group of companies is based or, if workers in a European public liability company are involved, by the laws of the State in which said company will locate its headquarters. This means that deadlocked collective bargaining may submit to dispute settlement mechanisms established for this purpose in said States. Therefore, before a Community-wide system to settle such disputes can be established, the potential relationship between national procedures and the system for settling disputes at European level has to be clarified.

One first possibility could be as follows: once the negotiations on the setting up of the European works committee or on the ways of involving workers in European public liability companies have reached deadlock, European-level mediation could be initiated should one of the parties (the negotiating committee or the company representative) request that the European dispute settlement procedure be opened, which would result in the closure of the dispute settlement procedure at national level, providing this had previously been opened. A second, less extreme possibility, could be the opening of Community-level dispute settlement procedures only in cases where the two parties in dispute agree to request this. This agreement could also be reached in dispute settlement procedures at national level, meaning that these would be brought to a close as soon as the Community-level procedures began.

The latter is a "safer" solution than the former, since the fact that European-level procedures need to be requested on agreement between the parties avoids the problem of a possible disagreement between them concerning the level at which the procedure is to take place. A problem which could well arise if a request from only one party were required for the European-level procedure to begin, while the other party, on the other hand, could wish to use national-level procedures. However, it is a much more "operative" solution than the first mentioned, since if the parties are required to agree on the use of European procedures they will undoubtedly be much less frequently used. And this is because in order to have access to them the parties in dispute will need to be able to reach an agreement on the way of settling the dispute, which is not always easy in a context of confrontation. Therefore one could believe that the first solution would be a better way of encouraging the use of dispute settlement procedures at Community level, since their use – or non-use – would depend only on one party's willingness to accept them.

Secondly, as regards the weight of the agreements that could be adopted in Community-level dispute settlement procedures in relation to these disputes, there is no problem whatsoever. The weight of said agreements would be the same as agreements reached between the relevant negotiating committee and the employers' representation currently have (or will have in future). This is because, despite using a Community-level mediation procedure, the parties in the procedure would be the same as would be negotiating the agreement setting up the European works committee or the method of involving workers in the European public liability company. The only change would be to the place or level where the mediation is carried out and there is no reason for this to affect the legal system applicable to agreements reached in the abovementioned areas.

Finally, there is no doubt that the greatest difficulty in the method of structuring autonomous Community-level procedures relates to company restructuring processes.

Such processes tend to involve changes to working conditions and, worse still, mass redundancies, when they do not involve a restructuring of the company itself. This means that most company restructuring **processes (programmes - global replace)** involve the implementation of Community directives (specifically Directive 98/59, on collective redundancies, or Directives 77/187 and 98/50, on transfers of undertakings) and, in turn, of the national legislation transposing them. Which means that each country that could be affected by a multi-national company restructuring measure may have different procedures for putting this into practice and that it is, consequently, very difficult to be able to structure a Community-wide dispute settlement procedure that could take this diversity into account.

Moreover, we cannot forget that one of the duties inherent to trade union activity is the decision on where to place the dispute and thus its settlement. The level of the dispute and the level at which it is settled are, in fact, important strategic factors in trade union activity: it therefore does not appear possible to impose these without losing some measure of autonomy. Therefore, it is believed that it would not be appropriate to impose Community-wide dispute settlement procedures in areas such as company restructuring, but that the decision should be left to the trade unions that would intervene in such procedures at national level.

A possible solution would be that once company restructuring measures had been announced in companies situated in different European Union countries, one of the trade unions involved in the national procedures initiated for this purpose would ask for a dispute settlement procedure to be initiated at Community level. This request could be made through the ETUC, which would call the other trade union representations involved in the national procedures to discuss the feasibility of following the Community-level dispute settlement procedure or, on the contrary, continue with the national procedures. Although the opposite could also happen, in other words once the Community-wide company restructuring process had been announced it would be for the ETUC to call the trade union representations that could be involved in each of the countries potentially affected by said process. This would be in order to coordinate the trade union position, and particularly to determine whether the dispute settlement procedure to be used is the one at Community or national level.

Naturally, there would be the need for some type of intervention so that, once the European-level dispute settlement procedure had begun, any national procedures that might have started at national level would be placed on hold. And this up until the European-level dispute settlement procedure concludes in an agreement or, on the other hand, in failure. In this latter case, the national procedures would have to continue; in the former, it appears that the solution might lie in “fragmenting” the agreement reached in the European-level dispute settlement procedure with regard to the company restructuring measures to be adopted in each of the countries affected. Once this was done, the “fragment” of the agreement corresponding to each country would then be taken to the national procedure.

Finally, during the course of this procedure, the ETUC could work to coordinate the positions of the national trade unions involved.

All of the above is, of course, subject to a better solution.

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