SYNTHESIS REPORT ON CONCILIATION, MEDIATION AND ARBITRATION IN THE EUROPEAN UNION COUNTRIES

Fernando Valdés Dal-Ré
Professor of Labour Law
Universidad Complutense de Madrid

March 2002
1. Introduction

1. The purpose of this report\(^1\) is not to give an account—albeit superficial and brief—of all the procedures through which industrial disputes can be addressed in European industrial relations systems. Its scope and intent are much less ambitious than that. This paper simply aims to examine a number of specific resolution procedures for settling certain industrial disputes, namely those that are solely and exclusively collective in nature. Such collective disputes are deemed to be all those concerning the interests of a generic group of workers or employers defined with reference to a variety of different criteria (locative, personal or professional, to cite just three significant examples). The procedures themselves are also restricted in scope by means of a negative criterion used to define them thus: they are procedures in whose resolution there is no intervention by any public authority with jurisdictional powers.

However, nor does this paper set out to give a synthetic or summarised description of the most noteworthy organisational or procedural aspects that shape and regulate the out-of-court or extrajudicial solutions to collective disputes in each and every European Union country. It actually goes further than that by attempting to compare and contrast the legal arrangements for those solutions in European legal systems to detect the points on which they converge and on which they diverge.

Essentially, this report aims to analyse the extrajudicial methods for settling collective industrial disputes and does so with the help of a very concrete methodological tool: a comparative study.

The bare statement of fact above explaining the goal of this report and the analytical tool it uses to achieve it is enough to highlight the constraints and difficulties of the task in hand. First and foremost, with regard to the subject matter itself, neither "collective dispute" is a notion with conceptual substantiation and autonomy in all European legal systems, nor does the adjective "extrajudicial", which is used to describe the resolution methods for that particular type of conflict, have a hard and fast definition. It is certainly useful initially to use this particular adjective, however, because the term itself is a way of tracing out the dividing line that separates these methods from any others implemented through bodies endowed with the authority in each legal system.

\(^1\) The report has been drafted on the basis of the national reports prepared by the members of the group of experts given the task of preparing a study, sponsored by the European Commission Directorate General of Employment and Social Affairs, on "comparative analysis and proposal of a possible voluntary European system of conciliation, mediation and arbitration". An earlier version of this paper was discussed and debated by the experts at a seminar held on 1\(^{st}\)-2\(^{nd}\) March 2002. I would like to thank all of them for their remarks and suggestions, which have enriched the content of the presentation. Nevertheless, the production of this paper is obviously my own responsibility.
to irrevocably issue rulings *ius dicere*. But the use of such a term is also open to serious objections including the two highlighted as follows.

On the one hand, it may shift the focus of, or even move, the debate on the advisability or not of implementing or fostering conciliation, mediation and arbitration procedures to the undesirable terrain of rivalry with the judicial model of resolution of industrial disputes. On the other hand, it skirts around or runs along the edges of the function that these procedures perform in most European industrial relations systems which is not, or not so much, the fact that they offer more effective or efficient ways of putting an end to industrial disputes that are different from those made possible by judicial protection. Their true function is simply that of facilitating new possibilities for workers’ representatives and employers or their associations to renew a bilateral and autonomous or voluntarist dialogue that has been temporarily and fleetingly interrupted by the emergence of the collective dispute.

It is on the methodological front, however, that the difficulties start to build up. Extrajudicial collective dispute resolution systems (ECDRS) are just one single element - not even the most noteworthy or significant one - in the whole picture drawn up by each of the European industrial relations systems; they are nothing but cogs in the machinery. As elements in a bigger picture, they have an influence on the other pieces in the same puzzle - just as they too are influenced by them - through a complex relationship of cross-over interdependence, which is far from easy to translate into legal language with reference to mechanical or pre-established variables.

The intense permeability of the ECDRS to their own environment, to their historical, institutional, economic, social or cultural surroundings, is an unavoidable fact when using the proposed comparative method. It means that any conclusions drawn from the similarities or differences noted must be proffered with all due prudence. There is a risk that any generalisations may turn into banal or erratic oversimplifications that are incapable of providing the answer to why there are points on which the autonomous resolution procedures for industrial conflicts noticeably coincide or differ.

The idea just described can be illustrated with a few straightforward examples. When reading the national reports, it becomes clear that in countries with such different employment or industrial cultures as Greece and UK, the bodies that manage the aforementioned procedures and the procedures themselves are held in high regard by society. It is also obvious from reading the reports that in other countries with cultures that can certainly not be claimed to be homogeneous, such as Germany and Portugal, institutional methods of extrajudicial dispute resolution have long been in the doldrums, languishing on the sidelines of each country’s respective system of industrial relations.
Some clues can certainly be given by explaining away such coincidences on internal grounds, such as how well-organised the service is or how highly professional the public officials or experts performing the conciliation or mediation functions are, but these are unsatisfactory. To be able to justify with a reasonable margin of certainty the points of convergence and divergence it would be necessary to go further than the extrajudicial dispute resolution systems themselves and judge the differences and the similarities pinpointed from an overall perspective. That task, however, lies outside the most generous bounds of this study.

2. This paper is split into two parts. The first and possibly more constructive part because it is pitched at a medium to high level of legal abstraction, aims to bring out the factors in both diachronic and synchronic terms that may have played a role in shaping the ECDRS. Useful points of comparative law may be made by this analysis within the constraints already stated above. For example, it may identify some of the reasons that have cooperated in consolidating or not consolidating conciliation and mediation procedures in the social fabric. A further example along similar lines is the possible detection in the study of the existence of a platform of common functional or teleological links in all or most of the European systems.

The second part of the paper, however, is more analytical in content. Its goal is to try to group into relatively homogeneous categories or parameters the notable diversity of legal arrangements that regulate the extrajudicial resolution methods for collective disputes in each system. This is done by drawing up models as a basis for identifying the features that are most common to the European industrial dispute resolution systems.

It should be unnecessary to add, moreover, that this task of seeking out the points where the different systems coincide is not an end in itself but rather a purely instrumental function. Even though it is not actually developed or specified here, the ultimate goal sought is to lay the foundations for the definition, or perhaps the simple outline of, a prototype European-wide extrajudicial resolution system for collective disputes.

2. The institutional environment of collective dispute resolution procedures: pointers for debate

A. Collective bargaining and collective dispute resolution procedures

3. Collective bargaining is definitely the reference institution for ECDRS. It defines the first and closest level of the institutional environment in which those systems are developed and function. Regardless of the most typical, chronic
differences that can be discerned between the different European legal systems, the link between collective bargaining and ECDRS can be expressed through a triad or trio of forms of expression; through all of them simultaneously or, in more limited fashion, through any one of them.

For a start, there are a great many legal systems where the resolution methods for collective disputes are established and regulated by typically bargaining-based instruments such as inter-professional agreements and collective agreements. ECDRS do not tend to be or are not normally created through collective bargaining, however, as an end in themselves. On the contrary, they are an instrument to invigorate the collective bargaining process by increasing the odds of reaching an agreement and improving the quality and effectiveness both of the negotiating process and its outcome. Autonomous procedures for the resolution of collective industrial disputes thus enjoy a two-fold fertile relationship with collective bargaining: one that is genetic and one that is instrumental or functional. Expressed another way, on the one hand, collective bargaining lies at the origin or source of ECDRS but, on the other hand, by opening up new scenarios for dialogue to be prolonged, conciliation and mediation processes, together with arbitration to a lesser degree, help to strengthen the social legitimacy of collective bargaining as a method of governing and managing the industrial relations systems.

This reciprocal interaction explains the second of the forms of expression through which the link between ECDRS and an autonomous or voluntarist system takes concrete shape. Although this aspect will be have to be further qualified at a later point in this paper, the experience of European systems bears witness to the special suitability of conciliation and mediation methods for solving any disputes that may arise in the two major phases involving social dialogue: the production of the collective agreement and its administration phase. In other words, the ECDRS can be used to tackle any controversies over the contents of a rule that has still not been perfected or that is to be amended or replaced. But they also can be used to resolve any other controversies that arise when enforcing the rules that have been worked out and agreed on previously.

It has already been pointed out that in a great many European legal systems, collective bargaining constitutes the source of the ECDRS. Inter-professional agreements or collective agreements not only regulate conciliation and mediation procedures but also can - and usually do - set up the body to manage these procedures, laying down the rules on the way it is to work. Spain is quite a paradigmatic case in this regard because a 1996 inter-professional agreement ("Acuerdo para la solución extrajudicial de conflictos", ASEC), signed by the most representative trade union organisations and employers’ associations at State level, went on to establish both the procedures (their objective, subjective and territorial scopes) and the institution given the mandate to organise them (Servicio Interconfederal de Mediación y Arbitraje, SIMA). In other countries, however, the procedures are regulated and the body managing them is set up by an act of
political sovereignty (by law). The UK experience with the Arbitration and Conciliation Advisory Service (ACAS) and the Greek example with the Greek Conciliation and Mediation Service (OMED) slot into this second legal model.

But aside from the marked differences in their origin, conciliation, mediation and arbitration institutions or commissions often tend to be managed jointly and with equal participation by workers’ and employers’ representatives or, at the very least, those representatives play a major role in their management bodies. This executive function is not strictly speaking an expression of collective bargaining but it does offer new opportunities for social dialogue, which is the basis, or pre-requisite for codes of good negotiating practice to take firm hold. Thus, equal and joint management or the institutional participation of trade union organisations and employers’ associations in the ECDRS also helps, albeit collaterally or indirectly, to strengthen the collective bargaining method.

4. The positioning of ECDRS within the field of collective bargaining is rather more than a simple statement of the way things work in legal practice. In other words, it is rather more than a compulsory functional reference point. It is also an experience for which a series of conclusions applicable to all European countries can very probably not be drawn but where certain equivalents can be deduced, although this must be done with all due prudence. Two complementary trends are worth highlighting here.

Practice in European systems reveals first of all a close dependence link between social acceptance of conciliation and mediation formulas and the relevance of collective bargaining and social dialogue, where these concepts are understood not so much as a means of regulating working conditions but more as a way of governing the industrial relations system itself. The existence of an institutional and cultural environment that is favourable to collective bargaining and where the social partners are pivotal to the industrial relations system acts as an incentive and stimulus for practices involving autonomous or voluntarist solutions to industrial disputes. Such practices offer the parties who are negotiating or administrating the agreement new possibilities for them to continue to meet and, therefore, gives them further opportunities to reach agreements. Collective bargaining processes and procedures to resolve any disputes arising out of the practice of such activities are not perceived, configured or regulated as separate actions either in material or temporal terms. Indeed, they form a continuum in which the point where the bargaining phase moves into the procedure phase or the other way round is not easy to discern as the two moments blend or merge together.

The second link to be found in the European panorama is complementary and not at all contrary to the one mentioned above. It is the link that exists between the degree of institutional development and consolidation of the organisation managing the autonomous collective dispute resolution methods
and the relevance of collective bargaining. The institutional weight or extent of the organisational structure of extrajudicial dispute resolution procedures is not so great in those countries where a stable, smooth bargaining channel is open between the trade unions and the employers' associations and where they have lengthy, consolidated and definite experience in collective bargaining. Looking at the same idea from another perspective, these procedures enjoy a greater level of institutional development in those very legal systems where legislation has historically played or currently plays a preferential role in the way industrial relations are regulated.

There is no paradox at all posed by such a link. In fact, quite to the contrary, it is actually the consequence of the bargaining rationale. In countries where there is a strong tradition of collective bargaining and social dialogue such as Denmark, Sweden, Holland and Finland, the resolution procedures for collective disputes are not only created, organised and administered on the basis of and by means of contractual instruments that are agreed on collectively, as those procedures in actual fact resolve most of the collective industrial disputes, they allow very little room for institutional or administrative conciliation or mediation bodies to act. The function of such bodies is, therefore, reduced to a mere stamp of authority supplementing the solution methods agreed on for industrial disputes. In other words, the existence of major conciliation or mediation institutions or bodies is normally due to the weakness of bargaining processes, which are to be strengthened precisely by fostering formulas that support and uphold collective bargaining itself. The Spanish and Greek experiences illustrate this second link. As the Greek report states, the goal of the OMED, the reason why it was set up, is not simply to make available to the social partners mechanisms that will put an end to their disputes; rather more ambitiously, it was set up "to support collective bargaining by providing independent mediation and arbitration services".2

This link, however, has no universal value in the panorama of European countries; it defines trends but does not lay down any principles of causality. In this regard, the UK, Austrian, French and Portuguese experiences follow a different rationale to the one above, albeit for different reasons.

In UK, negotiated resolution procedures for collective disputes historically have been, and still are today, undeniably central to the industrial relations system. Despite that, there has been a notable development of institutional bodies to solve industrial disputes (ACAS and the Central Arbitration Committee <CAC>), which intervene as an optional supplement to the traditional commissions and procedures. In Austria, the scanty implementation of ECDRS stems not so much from solely weak collective bargaining but more from the

2 Cfr. YANNAKOURO, M., "Conciliation, mediation and arbitration in Greece", Athens 2002, pg. 6 (photocopy of the original)
components of the structure of its industrial relations system themselves. Corporate chambers replace the typical collective scenarios and provide a channel to deal with industrial disputes by solving them or absorbing them. The French and Portuguese experiences, however, are still firmly rooted in the most typical, traditional situation of countries with a marked interventionist tradition and with a strong tendency to use the legal system to deal with and solve industrial problems. This situation is characterised by the absence of political, public or private policies promoting ECDRS as an indirect formula for stimulating collective bargaining and its outcomes.

B. Judicial systems and non-jurisdictional collective dispute resolution systems

5. Judicial systems for the settlement of disputes provide a second, essential reference element when attempting to describe and understand the institutional framework in which the systems described with an adjective with the opposite meaning - the non-jurisdictional systems - operate.

A whole host of rather tricky problems arise when studying the relations between these two systems, between "formal justice" and "private jurisdiction". Most of these questions do not have any one straightforward answer but rather they require a response that goes into more subtle detail. The type of judicial organisation chosen, the effective functioning of the bodies given the task of administrating justice, the opinion that the social agents may hold about the way such institutions work and the rules that govern the procedure and industrial process make up a limited but concrete inventory or shortlist of factors that have an unquestionable impact on how the prevailing model for industrial dispute settlement is shaped and consolidated. In other words, behind the relationship between judicial systems and non-jurisdictional solutions lies a whole background of facts and ideas that have created the natural environment in which that relationship has developed and matured. In essence, it is the logical corollary of the interaction between the structural elements that make up the industrial relations system itself. Hence, the special care that must be taken when drawing up working assumptions and when asserting conclusions if applicable. This is especially true when, as is the case of this study, it is not possible to put this relationship in the context of its natural environment.

By examining the experience in Europe, it is possible to group the relations between a judicial system and non-jurisdictional methods used to settle legal collective disputes into two broad theoretical models or ideal types. The element that differentiates the two models cannot be traced to, nor does it depend on the greater or lesser institutional pivotal role played by the judicial systems which are actually the prevailing method used to settle legal industrial disputes. This is definitely the case of individual disputes but it also applies to collective ones. These models are actually drawn up on the basis of the functional linkage between non-
jurisdictional methods and judicial protection.

In the first model, the relationship between non-jurisdictional solutions and the judicial system is one of functional dependence. Non-jurisdictional and jurisdictional are not governed by a principle of functional equivalence. They are not structured as interchangeable and reciprocally autonomous remedies to restore the legal peace. The way conciliation or mediation are dealt with in legislative terms or, where applicable, under a framework of collective agreements, follows an instrumental subordination rationale. The ways and means of settling industrial disputes amicably, through agreement, are designed almost as auxiliary techniques falling under jurisdictional activity, as "simple appendices to judicial protection". Their purpose is normally to relieve some of the excessive workload of judges or courts whose mandate is to issue the applicable ruling in each legal system.

In the second model, on the contrary, the relationship between the judicial system and the non-jurisdictional system is not one of dependence but rather of functional autonomy. Both systems share a common goal; they collaborate to deflate industrial disputes without actually being designed as procedures to be used in sequence or side by side. Whenever they conclude without agreement being reached, neither conciliation nor mediation is a compulsory point of interface leading into the judicial intervention phase. The submission of the dispute to the decision of a judicial body does not necessarily mean that the conciliation or mediation phase has been fully concluded either. In essence, the relationship between industrial process and non-jurisdictional procedures builds up an open-ended scenario that allows the parties in dispute the possibility of choosing between a number of options as the next move to take instead of being forced to choose only one.

6. As stated above, these models have been drawn up on the basis of the type of functional connection that has been observed to exist between non-jurisdictional means of dispute resolution and the judicial system. That is the source or matrix used, on the one hand, to define the models proposed and, on the other hand, to assign or affiliate the different systems by trend to one or the other. However, apart from the constructive value of the source and as a consequence of that source, each one of the models has gradually segregated a series of secondary aspect of differentiation, some of which are worth highlighting here too.

The first one concerns the identification of the non-jurisdictional methods suitable for industrial dispute resolution. In the functional subordination model, conciliation tends to be the exclusive or at least preferential procedure.
since conciliatory formulas take up all or most of the space left open for an amicable settlement of the controversy. The functional autonomy model, on the contrary, is more plural. Legislation or collective bargaining can certainly establish stimuli or incentives to favour one settlement method over another or others, but all of them are available to the parties in dispute who, at the end of the day, will be the ones taking the most suitable decision for themselves when choosing the instrument or instruments to be used to resolve the dispute.

The second differentiation is one that is not nearly so perceptible as the first one although it is more significant in political terms. It concerns the way the non-jurisdictional means of solving industrial disputes are actually viewed. In a functional dependence model, the real or ideological perception of non-jurisdictional procedures revolves around two fairly extreme positions: rivalry or alternation with the judicial system. If the judicial system is held in high esteem socially because it works fast and efficiently, conciliation, mediation and, above all, arbitration, will tend to be viewed as rival instruments in the industrial process. By the same token, policies for rule-making, legislation or agreement processes, together with the decisions of the judicial bodies themselves, may remove any incentive for parties to try them or not make them an easy option to choose, thus curtailing their social use. If the opposite is true and the judicial system works inefficiently, is slow or costly, or, more simply, if workers and employers and the social partners have lost confidence in it, non-jurisdictional instruments tend to be more highly valued. They cease to be regarded as rival instruments of that system and become alternatives to it, capable of remedying the judicial organisation crisis and of collaborating effectively to eliminate industrial disputes and to bring legal peace back to the industrial relations sphere.

In a functional autonomy model, the idea driving and underpinning non-jurisdictional procedures for dispute settlement is very different and much more straightforward. These procedures do not rival the judicial system nor do they aim to replace it; their prime and essential function is to seek out ways and means of cooperating with it in either a complementary or distributive way.

7. As has been mentioned already and is repeated here, there are numerous, complex factors determining whether in a specific set of industrial relations the dominant model of relations between non-jurisdictional procedures and the judicial system is based on a functional dependence principle or one of functional autonomy. I do not intend to review those factors here, nor is there the opportunity to do so. Many are factors referring to domestic situations, very much tied in with the cultural background of the country.

Nevertheless, it would not seem too bold a proposal to put forward a number of hypotheses although they should be backed by the necessary provisos. The intention here is certainly not to offer a complete or closed explanation of how each one of
the different European industrial relations systems belong to or can be placed within the scope of either the functional subordination model or the functional autonomy model. These two hypotheses stated immediately below have a less ambitious aim in mind, which is solely to bring out any elements of convergence that may help to gain a better understanding when assigning the European systems to one or other of the theoretical models. At the end of the day, the hypotheses drawn up may provide a useful tool to transform the ideal types described above into analytical models. In all other respects, the two judicial protection hypotheses have a common denominator: the organisation of judicial protection.

a) A comparative examination of the rules that govern the processes through which industrial claims are aired in a fair number of countries in the European Union would very probably bring to the fore a considerable number of differences. Questions like those concerning the content and the form of the demand, the succession of actions taken, the eventual correction or not of flaws in the processes, the systems for hearing and assessing the evidence, the acceptance or not of double authority and, lastly, to cut the list short, the existence or not of special industrial processes that are not dealt with uniformly by law. This assertion can be verified with the help of rudimentary empiricisms. A look at the procedural laws in France, Germany or Spain (to give examples from a small group of countries that have industrial jurisdiction that is solidly rooted in the social fabric) would be enough to be able to assert with reasonable grounds that diversity prevails over homogeneity.

However, if the slant of the comparison shifts from the sphere of concrete procedural solutions, from “procedural DIY”, to the sphere of the principles that underpin the administration of justice, a group of underlying common elements can once again be detected that would allow the different forms of judicial protection to be grouped again into two broad categories. The first one covers all those legal systems that have specialised the judicial resolution of industrial disputes either in an organic sense, by setting up a separate industrial jurisdiction, split off from civil jurisdiction (Germany or Spain, for instance), or with a functional scope (Italy for example). In any event, regardless of the specialisation formula chosen, the legislations have very often endowed industrial litigation with a set of principles (oral capacity, immediacy, concentration, speed, freedom to express proposals or absence of cost, to cite the most significant ones). These have not really varied substantially over time and they all work towards a common goal: to facilitate access to jurisdictional services4 for those seeking justice, above all, the workers and their representative organisations. In other systems, however,

judicial protection of industrial rights and interests falls within the remit of the ordinary courts without, moreover, the processes for those rights and interests to be aired having being given any special prerogatives or benefits of a technical/procedural nature or of a social nature (absence of cost).

The remarks made above lay the foundations for the first hypothesis to be drawn up. Conciliation, mediation and arbitration procedures have been given a special legislative or agreement-based impetus in those legal systems that do not give industrial disputes any special procedural advantages. In other words, the neutral use of procedural techniques has worked in favour of the maturing of the functional equivalence model. Inversely, the existence of a specialised industrial jurisdiction in either organic or functional terms as had the effect of halting, or at least curtailing, any incentivisation of non-jurisdictional methods. The UK, Irish or Dutch cases, on the one hand, and the Mediterranean countries, on the other hand, provide conclusive evidence to support this hypothesis which, in fact, is a conclusion that is already sufficiently well documented.

b) Industrial jurisdiction in the form of a specialised jurisdiction is very probably the prevailing judicial model in European countries including Germany, Austria, Belgium, Denmark, Spain or Finland. This is, however, a coincidence based on the nomen iuris defining the industrial jurisdiction itself. Under this heading, the specialised jurisdiction through which protection of industrial rights is implemented is organised in line with a variety of very different formulas.

Depending on the body responsible for resolving the legal actions, the different ways industrial jurisdiction can be organised can be grouped into three broad types:

a) Firstly, courts or tribunals made up solely and exclusively of non-professional judges designated equally by the trade union organisations and the employers’ association;

b) Secondly, courts or tribunals with a mixed structure, formed by professional judges and non-professional judges, wingmen, appointed or put forward by the organisations representing socio-professional interests; and,

c) Lastly, judicial bodies made up of just one person or individuals working as a collegiate body with professional magistrates.

The French institution of prud’hommes boards and German courts in their three jurisdictional tiers (court of the first instance, Arbeitsgericht, the appeal court, Ländersarbeitsgericht, and the federal court, Bundesarbeitsgericht), match up respectively with the first and second model whereas the Spanish judicial system corresponds to the last one.

---

The structure of the judicial bodies may also have an influence on the development of the non-jurisdictional dispute resolution methods and, in fact, this is the second hypothesis put forward here. In legal systems that incorporate workers and employers in the justice administration function, there is a risk that those procedures may get confused or mixed up with the judicial system itself, thus forming a symbiosis – real or symbolic, it really does not matter which – that may not be easy to break. The limited development of conciliation, mediation and arbitration formulas in Germany or France cannot be explained away, of course, by the traditional association of trade union and employers' organisations with jurisdictional activity. But it is possible that the composition of their industrial tribunals may have indirectly removed the incentive for any solutions other than the judicial one to have been developed as an alternative to it. The fact that the prime reason for or "the justification par excellence\(^6\)" of the French prud'hommes institution is the conciliation function supports this hypothesis.

C. State policies to promote dispute resolution procedures

8. A third and equally unavoidable element defines the institutional environment of the non-jurisdictional procedures to settle collective industrial disputes. That element is, of course, the State, or, perhaps it would be better to say, the role of the State in industrial relations systems. This role is or can be seen through two broad functions: the creation of laws and their enforcement.

This paper cannot cover all the complex problems posed by the role of the State in European Union countries. That role, moreover, has been undergoing major changes over the course of recent decades as a result of the extent of the multifaceted transformation (political, economic, social and cultural) that has swept through our societies. It is enough to say that, although it is true that "il n’ya pas deux pays en Europe où le rôle de l’État en matière de relations de travail soit conçu de la même manière"\(^7\), it is equally true that the traditional differentiation that has divided European systems of industrial relations in the past into two huge, unyielding categories ("interventionist", on the one hand, and "abstentionist or voluntarist", on the other hand) has been toned down gradually since the 1970s. Firstly, this has been due to the notable development of statutory regulation in countries located in the area of "industrial democracy". Quoting Kilpatrick, the elements that historically shaped England "as a collective laissez-faire system have been subject to dramatic transformations\(^8\)". And secondly, it has been due to the growing

\(^6\) Cfr. SUPIOT, A., Les juridictions du travail, Paris (Dalloz) 1987, pg. 73


\(^8\) Cfr. KILPATRICK, C., "Conciliation, mediation and arbitration in United
shift in traditionally interventionist countries (France, Portugal, Greece or Spain, to name but four significant examples) of the centre of gravity of the industrial relations systems from the law to collective bargaining, which is often empowered to repeal statutory regulation.

These reform moves described in such brief terms above, which to a certain extent were fostered and encouraged by the European integration process itself, have certainly not led to a unitary conception of the role of the State in the field of industrial relations. However, despite the fact that differences still persist, European industrial relations today are more hybrid.

9. These remarks aside, the interesting point to focus on here is the question of State policies as regards the non-jurisdictional procedures for the resolution of collective industrial disputes. The most recent trends in this field that can be detected in most European countries point to promotion and incentive.

At a later point, there will be the opportunity to investigate further, albeit from a more general perspective, the determining factors of the growing favourable treatment being dispensed to these procedures. The interesting question to address now is which are the broad fields in which these State incentivisation policies are being put into practice.

The first field in which these public measures are being implemented is the strictly material terrain. Many European States guarantee the orderly, stable functioning of the institutions that manage the conciliation, mediation and arbitration procedures or the services that perform these functions. This happens, obviously, when it is the State itself that creates diverse types of bodies for the non-jurisdictional resolution of industrial disputes. It chooses either to incorporate them into its internal administrative machinery (as happens in Belgium, Finland or Denmark) or to keep them in a sphere outside this machinery or apparatus, but supplying them with the corresponding organisational, economic, technical and human resources required. The National Mediation Office in Sweden, the Labour Relations Commission in Ireland, ACAS in UK, and the Greek OMED, are all institutions whose remit is to start up conciliation, mediation or arbitration procedures in dispute situations and which are both independent and publicly funded. But this also happens in those other cases where despite having been created independently and privately (under inter-professional agreements) the institution is still subsidised through public funds. The Servicio Interconfederal de Mediación y Arbitraje (SIMA) is a paradigmatic example of this second trend.

Public policies to provide material support for the bodies that perform conciliation, mediation and arbitration functions
do not constitute by themselves a guarantee of any real and effective development of the non-jurisdictional resolution procedures for industrial disputes. But the absence of these policies, the passive attitude taken by the State towards them, tends to act as a disincentive for workers’ organisations and employers and their associations to try out these procedures. The experience in Europe reveals the link that exists between the degree of social consolidation of these industrial dispute resolution methods and the degree of involvement of the State. They tend to be more consolidated (Sweden, Finland, Denmark or UK, to name a few major examples) in countries with solid, traditional promotion policies. The degree of consolidation is the lowest in those that lack such policies (France, Portugal and Italy).

The public measures described above are general in scope. In other words, they can - and in fact are - implemented, regardless of the kind of judicial organisation that exists or of the relationship that exists between the two major methods of industrial dispute settlement. This is not a conclusion that can be advocated, however, for the second, still incipient field of public intervention to be discussed as follows. The scope this time is more limited because of the measures implemented in certain legal systems, specifically those that give the industrial procedure a series of technical advantages.

It has already been stated in this paper that the neutral use of procedural techniques has played a major role in the consolidation of the type or model of relationship that exists between non-jurisdictional procedures and judicial procedures in a given system of industrial relations. Even though this may not be the only element appraised or rated socially, the decision by the parties in dispute to resort to the non-jurisdictional channels or to the jurisdictional channel is determined by the calculation of the respective advantages that can be gained by each one. This idea can be illustrated by the following banal example. When the legislation acknowledges the nature of an enforceable right for an agreement reached through agreement *apud iudicem* but denies it or does not grant it for an agreement obtained administratively it is indirectly incentivising the judicial method as a way of settling the rights and interests in dispute.

The legal regulation of non-jurisdictional procedures is, therefore, the ideal terrain to implement legislative actions of a promotional nature. The immediate purpose of this kind of actions is to extend the set of legal guarantees that have historically been granted to the judicial solution to non-jurisdictional procedures. But this equalisation, putting the two on an equal footing, works or can work towards a more ambitious objective. The restoration of a principle of neutrality in the methods for settlement of industrial disputes is, in many countries, a necessary condition or pre-requisite - although it may not be the only one - for the implementation of an autonomous or voluntarist and unsubordinated extrajudicial resolution system for settling industrial disputes.
D. Towards a re-appraisal of non-jurisdictional labour dispute resolution procedures?

10. Over the course of recent years, non-jurisdictional labour dispute resolution procedures have been the subject of growing interest in Europe. This phenomenon, however, has not made its presence felt with the same intensity in all the countries of the European Union. Besides, it converges with some experiences reflecting a clearly opposite trend, where the role of judges is being reinforced. In Belgium, for example, new channels of access to the référe judge have been introduced for collective disputes. In France too, some recent laws (the law on collective redundancies, called the "Aubry" Act) increase the possibility of judicial control over collective bargaining processes taking place in the company sphere9. Nevertheless, it does seem that social partners and public authorities are now paying greater attention to these methods of dispute settlement. That is certainly the case if we compare the situation today with previous trends. The promotion policies implemented in countries with such diverse legal backgrounds and different trade union traditions as Spain and Denmark or Greece and UK suggest, moreover, that we are dealing with a fairly widespread phenomenon. It is a phenomenon, furthermore, that even goes beyond the scope of industrial relations as it is now moving into other spheres such as commercial or family relations.

There is really no single, straightforward answer to the question of what might be the determining factors of this favourable - possibly unprecedented treatment in some countries (Greece or Spain) - of conciliation, mediation and arbitration procedures in the industrial relations field. The causes vary from country to country and even in the same country they may change in line with law policy options that may come up in the near future. Notwithstanding this and regardless of the typical differences in each legal system, it does not seem too bold an assertion to link up this trend with the changes that the industrial relations systems have undergone over recent years.

More specifically, although my intention is not to review these changes, the re-appraisal of non-jurisdictional dispute resolution procedures is largely the result of the progressive assertion and consolidation of an industrial culture that reinforces the social dialogue, concertation and cooperation trends to the detriment of conflict, opposition and rivalry. It is a culture that, likewise, broadens and multiplies both the scenarios for the development of bargaining practices and the

---

9 The most recent social modernisation legislation, passed on 17th January 2003, however, seems to be more inclined towards boosting mediation. Vid. JEAMMAUD, A., "Conciliation, mediation et arbitrage des conflits (collectifs) du travail en France", Lyon 2002, pg. 27 (of the photocopy of the original)
methods through which agreements can be sought. In such a context, which, on top of that, coincides with far-reaching changes in the organisation of work and with a growing participation of the trade union in company strategic decision-making processes, the comparison of the respective benefits of each one of the two major ways of settling labour conflicts comes up with a net result, on balance, in favour of autonomous or voluntarist procedures. The slowness and rigour of court procedural forms is countered by the swiftness and flexibility of those other procedures; the need for strict enforcement of the law by the judges is opposed by the wide leeway that conciliators and, above all, mediators and arbitrators enjoy in order to weigh up the interests at stake more effectively. Compared with the winner-loser outcome that a legal ruling always produces, the capacity of conciliation and mediation formulas to generate or renew agreements and to create a stable negotiating channel and synergies for continuing negotiation is quite laudable.

This undeniable interest now being taken in non-jurisdictional procedures and that has taken the form - at least in some countries - of the adoption by social agents or public authorities of concrete promotion measures in no way pushes the judicial method of dispute settlement into crisis nor does it aim to do so. The crisis that this system may be undergoing in certain but not all European countries can be traced to complex internal reasons and not to reasons of rival competences or areas of authority. That being said, the main advantage stemming from the revaluation or re-appraisal of the autonomous or voluntarist methods of solving industrial disputes is already visible in some European industrial relations systems. That aspect has been dealt with thoroughly in this paper already. The advantage, stated very summarily, is currently the promotion of collective bargaining and, in the more distant future, will be the conversion of the collective bargaining system itself into the method governing the industrial relations system.

3. Non-jurisdictional solutions to industrial disputes: some topics

11. As stated earlier, the purpose of this second section of the report is not to repeat what the experts have explained in their national reports but rather to take a more analytical look at the way industrial disputes have been resolved without taking recourse to the courts, to get a better understanding of these procedures, and to identify the common points and differences in the way these procedures are regulated in the different European Union countries so as to highlight the prevailing trends.

12. Most industrial relations systems in Europe handle two main categories of industrial disputes: "individual"/"collective" and "legal" disputes or disputes "concerning rights"/"economic" or concerning "interests". Nonetheless,
these types of dispute are not explicitly defined in law in many systems but are based on dogma (Italy) or reflect the practice of the social partners. Even in those cases in which this definition is encompassed in legislation (France, Portugal, or Ireland, in keeping with certain statutory regulations), the law, substantive or procedural, does not attempt to provide a notion although case law has tried out a definition, with a greater or lesser degree of success, whose conception, as in the French case, is "peu extensive et relative". Art. 151 of the Spanish Procedural Law (Ley de Procedimiento Laboral) supplies a conceptual definition of a collective legal dispute as one that "affects the general interests of a generic group of workers and that deals with the enforcement or the interpretation of a statutory regulation, collective bargaining agreement or a corporate decision or practice". The function of a legal notion however, is not to provide a closed description of the disputes but rather to "identify the procedure" to which some such disputes may be submitted. In Denmark, however, collective disputes are deemed to be those arising out of the enforcement of a collective agreement or from the negotiation process. Sweden, whose legislation is based on the principle that industrial disputes "are to be settled at the bargaining table", has no experience of this type.

The distinction between individual dispute and collective dispute is hazy, characterised by "fluiditá e di incertezze". Legislation and practice in the field of industrial relations in Europe seem to follow two lines of thought. The first trend, in the minority, defines collective disputes as those which deal with a collective interest affecting a generic group of workers or employers (Italy or Spain). In the second case, probably the majority, a collective dispute is not defined as such on the basis of the collective nature of the interests at stake but is rather based on how the parties involved choose to deal with it.

From a conceptual standpoint, there is less discussion about the distinction between legal disputes or conflicts and conflicts concerning interests, the differentiating criterion being "the functional structure of the conflict itself". A

---

10 Cfr. JEAMMAUD, A., "Conciliation, médiation, ..." pg. 11 (photocopy)


14 Cfr. VIDA SORIA, J., "La distinción entre conflictos sobre derechos y conflictos sobre intereses en la problemática general de los conflictos colectivos de trabajo", in AA.VV., "Quince lecciones sobre conflictos colectivos de trabajo", Madrid (Faculty of Law) 1968, pg. 38
dispute regarding rights has to do with the meaning and scope of already existing norms or rules (for example a clause in a collective agreement or a corporate agreement), and is addressed by applying the established objective criteria encompassed in said regulation. A dispute over interests aims, directly or indirectly, to change or replace the already existing regulation or, where applicable, at the time when the dispute is resolved, to create a new or different norm. Portuguese legislation defines a dispute over interests as that which affects the "conclusion or revision" of a collective agreement (art. 30, Decree-Law 519/C-1/79, dated 29th December).

This is, in all other respects, a classification, which in some European legal systems defines how the collective dispute is to be settled. Legal disputes are resolved by finding the right interpretation for the objective criterion set out in the applicable regulation. That is why this type of dispute is best resolved by means of a legal decision, whether this be a court ruling or arbitration award. On the other hand, for economic disputes there is no previous rule which can be interpreted or applied on an objective basis; that is to say such an issue may not be decided in law but rather must be settled by creating or restoring new regulations.

In these legal systems, the immediate outcome of this classification of disputes is derived from the fact that whilst the competence of the judiciary is limited to resolving disputes over rights, the autonomous procedures, based upon negotiation, can settle both legal and economic disputes. In Austria, however, legal conflicts (Rechtsstreitigkeiten) are settled, solely and exclusively under industrial jurisdiction; the same applies in the Netherlands, where in fact there is no specialised industrial tribunal structure. In Spain, legislation provides for a special procedure, the so-called collective disputes procedure, which is concluded with a "collective ruling", with erga omnes implications, for the settlement of collective disputes on the basis of an interpretation or enforcement of the law, although they can also be settled by autonomous means. In France, Greece, Portugal, Denmark or the Netherlands, legal conflicts can also be settled before the courts. This is not so in Italy, according to whose legal system all types of collective dispute, both legal and of interests, with the exception of some legal disputes defined as rationae materiae, must be resolved by non-jurisdictional settlement means. In Finland, there is a specialised Labour Court to deal with legal conflicts, both individual and collective, to settle disputes regarding the interpretation of collective agreements or disputes ensuing from non-fulfilment of obligations "based on the contents or existence of collective agreements".15

14. It is no easy task to identify the prevailing model

15 Cfr SALONIUS, J., "Conciliation, mediation and arbitration in Finland", Helsinki 2002, pg. 7 (photocopy)
regarding the establishment or the regulation of non-jurisdictional procedures. This is because in most countries these procedures originate from and are governed either by heteronomous or external pressures (law) or by autonomous or voluntarist (collective agreement) means. Normally however, the settlement instruments of a legal origin and those originating from collective agreement processes are not interrelated on the basis of the principle of functional equivalence. Recourse to the former is usually subsidiary or supplementary; the parties in dispute will go to the institutional or public conciliators or mediators in the event that conciliation or mediation held before the commission or body agreed upon in the collective agreement has failed.

According to some legal systems in which the resolution of disputes is largely based through law, the most commonly used procedures, paradoxically, are not the formal ones but rather the so-called "extralegal" or informal procedures. In Italy, for example, the parties in conflict tend to entrust conciliation or mediation to the public authorities, Labour Inspectors or experts designated by the Government. It is not uncommon to see political leaders also involved. In France, collective disputes which do not reach a negotiated settlement within a reasonable period of time through direct negotiation then take recourse to a "médiation ne correspondant pas aux prévisions légales"\(^{16}\) which is usually accepted by the sides involved. In Austria, conciliation boards are rarely convened to carry out the function for which they were created.

But this tendency to opt for more informal procedures is not exclusive to those legal systems with a wealth of norms on settlement of collective disputes. In the Netherlands, the mediation or arbitration clauses contained in the collective agreements "are not very active in practice"\(^{17}\), and the interested parties normally resort to designating ad hoc mediators, who very often are well-known politicians.

15. Regardless of the conciliation institutions provided for in the collective agreements, in which both sides are usually equally represented, there are many European countries in which there are legally constituted conciliation institutions, mediation or arbitration services which more often than have independent status. That is the case in UK (ACAS), Ireland (Labour Relation Commission and Labour Court), Greece (OMED), Austria (Federal Court of Conciliation), in Finland (National Conciliators Office), Sweden (National Mediation Office), Denmark (Statens Forligsinstitution), in Portugal (Instituto de Desenvolvimento e Inspeção das Condições de Trabalho, IDICT) and in the Netherlands, for the public sector (Advies-en Arbitrage Commissie). Belgium has organised a complex and very hierarchical system of nation wide

\(^{16}\) Cfr. JEAMMAUD, "Conciliation, mediation,...", pg. 15

\(^{17}\) Cfr. RE ROO, A., "The settlement of (Collective) Labour Disputes in the Netherlands", Rotterdam 2002, pg. 9 (photocopy)
inter-professional committees of equal representation, decreed by a law dated 5th December 1968, called the Conseil National du Travail, a national professional Commission paritaire and a sub-professional national sous-commission paritaire which are given the two-fold task of negotiation of collective agreements and conciliation of collective industrial disputes.

From an organisational point of view, there is no standard across-the-board model. Public management formulas converge with private management systems, which may or may not receive public funds. The Greek OMED and Spanish SIMA experiences are original: these are private institutions, the first of which is financed by contributions from employers and workers, and the second by public funding.

16. In almost all European systems, non-jurisdictional settlement of disputes is undertaken by means of the classical triad: conciliation, mediation and arbitration. Distinguishing each one of these formulas from both the preceding and following solutions present in the ranking of available possibilities is, however, a complex task.

Conciliation and mediation have something in common: it is not the third party who decides. They are also different as to whether the third party is empowered to either propose or not propose solutions. If the function of the third party is merely to guarantee the flow of information between the parties, to contribute to the clarification of respective arguments, and to bring about a rapprochement between the two positions or to highlight the advantages of a negotiated settlement, the activity falls within the scope of conciliation. If said third party, on the other hand, as well as the aforementioned activities, is to propose solutions to the parties, then this activity could be defined as mediation. In practice, however, there is a very fine and easily shifting line between conciliation and mediation; so much so that in some systems (Germany, UK or Belgium), conciliation and mediation tend to blend and are used as functionally synonymous activities.

The distinction between mediation and arbitration is based on the fact that, instead of offering solutions, the arbitrator decides; that is to say, he chooses one solution out of a number of possibilities. But in practice, once again there are also possible intermediate situations, such as arbitration which announces the adopting of the last offer or proposal made by the interested parties or arbitration which opts for the previous agreed settlements (med/arbitration).

In most European legal orders, the institutions responsible for resolving contractual disputes normally play a role either of conciliation or conciliation and mediation. Very rarely and in the exceptional case of the Netherlands do they take on the function of arbitration. However, the responsibility of these institutions is broader, although a large number of legal systems tend to emphasise mediation in the belief that it is more active. In UK, ACAS public officials are only involved in conciliation, whilst mediation is the
responsibility of outside experts. In Finland and Portugal, conciliation/mediation administrative officials do both; and in Denmark they are only responsible for mediation with an express exclusion of arbitration. In Spain, the SIMA is normally only involved in mediation and arbitration, therefore excluding conciliation. The same criterion applies in Greece regarding procedures covered by legislation. The OMED only performs mediation and arbitration functions.

17. Plurality is once again the dominant trend in the optional or compulsory nature of non-jurisdictional formulas for the settlement of disputes as defined in each national legal system. In Denmark, conciliation is compulsory both in collective disputes concerning rights and collective disputes concerning interests. However, in UK and Belgium, conciliation is absolutely optional and in Spain mediation by SIMA is compulsory if either of the parties in conflict initiates said procedure. In some countries, the optional or compulsory nature of this procedure may depend on the nature of the dispute. For example, in Sweden, conciliation is compulsory if there is a risk of "industrial action".

As a general rule, arbitration is always optional and is very seldom used in industrial relations in Europe. In fact, some countries, such as Italy, expressly prohibit compulsory arbitration. Austrian legislation expressly prohibits arbitration agreements in collective disputes. Greek and Danish legislation have a requirement for compulsory arbitration in certain cases. And in Portugal there continues to be, a corporativist legacy18, awarding the Ministry of Labour the possibility to issue a portaria de regulamentaçao do trabalho in those cases where there has been a systematic refusal to negotiate a collective agreement or as a result of the use of delaying tactics in the normal process of collective bargaining.

On the other hand, the means building up non-jurisdictional systems of dispute settlement are not usually interrelated from a functional point of view. Conciliation, over and above its voluntary or compulsory nature is not necessarily a prior requirement for mediation, nor does arbitration necessarily require a previous breakdown or failure of conciliation or mediation.

18. Generally speaking, and with the exception of SIMA-managed procedures in Spain, and Belgium, non-jurisdictional dispute settlement methods are normally not standardised, and thus leave significant leeway for self-regulation by parties in conflict and by the conciliating/mediating institution. This procedure is quite straightforward and not subject to special requirements. The Irish Labour Court describes this fact in terms that may easily be applied to other institutions:

"Formalities are reduced to a minimum. Written submissions are made by both parties before the court investigation commences (..). The more fully facts and arguments are given in the written and oral submissions the less need there will be for members of the Court to put questions"\textsuperscript{19}.

Nonetheless, in some national systems, institutional or administrative conciliators/mediators may (Spain) or must (Belgium or Ireland) draft a written recommendation to be provided to the parties in conflict. In Denmark, the conciliation agency is obliged to issue a proposal, but as demonstrated by "a long standing practice"\textsuperscript{20}, such a proposal is not made if one or both parties are in opposition. It is striking to note that Portuguese legislation expressly prohibits any joint meetings between the mediator and both parties; meetings with each party must be held separately.

Conciliation or mediation can be conducted by an individual or by a collegiate body, usually with equal representation in bargaining proceedings. In administrative proceedings the conciliator or mediator agency may be a public official (ACAS UK, National Conciliators Office in Finland or the IDICT in Portugal), a person independent of the institutional agency chosen by the parties from a list of recognised experts (OMED and SIMA), the conciliation agency - a collegiate body - itself (the Irish Labour Relations Commission and Labour Court or the Austrian Federal Conciliation Board) or, a specialised court in this agency (the Bureau of conciliation commission of equal representation) or its chairperson, typically an official from the conciliation agency. In France, the judicial authorities may designate a conciliator, charged with "faciliter, en dehors de toute procédure judiciaire, le règlement amiable des différends portant sur les droits dont les intéressés ont la libre disposition". This conciliator is empowered to draft a "constat d’accord", which is then registered with the secretariat of the Lower Court and which may be enforced by the judge if the two parties so agree.

Proposals drafted by mediators are not usually binding for the parties concerned; acceptance or rejection are subject to a joint decision. Recommendations, however, particularly those issued by collegiate institutions or experts appointed by common consent usually have significant moral authority and influence in society. Parties, therefore, frequently accept their role willingly in most disputes (Ireland, Belgium), especially when their decisions can be made public, as is the case in several countries. In Denmark, a proposal must be accepted by the workers’ council affected by the dispute.

Agreements reached in the conciliation or mediation phase

\textsuperscript{19} Cfr. KERR, A., "Conciliation, mediation and arbitration in Ireland", Dublin 2002, pg. 11 (of the photocopy)

\textsuperscript{20} Cfr. KRISTIANSEN, J., "Conciliation, mediation and arbitration in Denmark", Copenhagen 2002, pg. 12 (photocopy)
are accepted as collective agreements with the resulting implications established in each national legislation. However, in Austria, according to the functions awarded to the administrative conciliation agency, "it would be false and incomplete to define the result of the conciliation board’s decision in case of enforceable participation simply as a works agreement; instead, the decision is regarded as decree (Bescheid) for the parties", while such a decision may also be modified by a higher agency 21. In Portugal, conciliation agreements do not hold the same rank as collective agreements, but rather are defined to be as effective as any other agreement.

Arbitration awards are of the same nature as collective agreements and may only be contested before a jurisdictional agency on the basis of abuse of power or if the law has been breached.

19. European legal systems do not usually establish separate or different procedures for conciliation and mediation on the basis of the subject matter of the dispute. The nature of the right or interest under discussion may be relevant in determining, as mentioned above, whether the procedure is optional or compulsory, but not the subject matter. In Spain, however, SIMA-managed procedures are limited rationae materiae. In Austria, the agency responsible for settlement of conflicts of collective interest varies according to the nature of the dispute. If the basis for the dispute is related to the conclusion, modification, or termination of a collective agreement, settlement is the responsibility of an administrative commission of equal representation. If the dispute affects the conclusion or substitution of a collective agreement the competent agency is the Federal Conciliation Board.

Fernando Valdés Dal-Ré
Professor of Labour Law
Universidad Complutense de Madrid

21 Cfr. MARHOLD, F., "Conciliation, mediation and arbitration on collective conflicts in Austria", Graz 2002, pg. 9 (photocopy)