

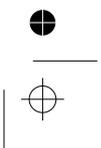
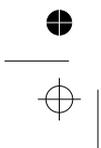


# Manual on collective bargaining and dispute resolution in the Public Service

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SECTORAL ACTIVITIES DEPARTMENT

International Labour Office - Geneva





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## Preface

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Social dialogue, including collective bargaining, is one of the core principles of the ILO. It should form part and parcel of the regulation of labour relations in the public sector. Dialogue and bargaining can and should be key contributors to public sector efficiency, performance and equity. However, because competing interests are involved, neither is conflict-free. If governments and public sector unions are to be encouraged to bring these dynamics into public sector work, where industrial peace carries a special premium in the public mind, then considerations of conflict management must be uppermost. This is more relevant than ever in times of fiscal consolidation and austerity measures.

In 2005, the ILO's Sectoral Activities Department published the *Practical guide for strengthening social dialogue in public service reform*,<sup>1</sup> which proposed mechanisms for participatory decision-making, and formed the basis of the Action Programme approved in March 2005 by the ILO's Governing Body. The Action Programme is directed at improving the capacity of public services stakeholders to engage in meaningful social dialogue and establish appropriate and sustainable social dialogue mechanisms for national development and poverty alleviation. This manual was commissioned by the Sectoral Activities and Industrial and Employment Relations Departments as one of the follow-up activities to this Action Programme, and incorporates practical examples as well as the input from the constituents and experts.

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<sup>1</sup> V.Ratnam and S.Tomoda: *Practical guide for strengthening social dialogue in public service reform* (Geneva, ILO, 2005).



In August 2008, the ILO's Social Dialogue, Labour Law and Labour Administration Department published Paper No. 17, *Public service labour relations: A comparative overview*, which described the procedures for determining the terms and conditions of employment and dispute resolution mechanisms in several countries. The report further underscored the need to develop effective systems for the avoidance of industrial strife and conflict resolution as contemplated by Article 8 of the Labour Relations (Public Service) Convention, 1978 (No. 151):

“

The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties, or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

In November 2010, the ILO's Sectoral Activities Department published Working Paper No. 277, *Dispute prevention and resolution in public services labour relations: Good policy and practice*, which described diverse mechanisms used around the world to address the issues raised in Paper No. 17.

This manual seeks to build on the work done in these publications by offering a compilation of good practices in dispute prevention and dispute resolution in public services. The intention is to showcase an array of mechanisms, mostly interconnected, that governments and social partners around the world have developed to minimize and resolve disputes – and especially interest disputes in collective bargaining – in the public services. Specifically, the manual aims to identify approaches and practices around the world which have enabled unions and public sector employers to engage in negotiations regarding wages and conditions of work on a fair footing and with minimal disruption to public services.

At the same time, this manual represents one of the outputs developed under a global product on “Supporting Collective Bargaining and Sound Industrial and Employment Relations”, under which the Office has concentrated its efforts across different departments, to produce global tools that assist in the prevention and resolution of labour disputes. The Sectoral Activities Department and the Industrial and Employment Relations Department wish to thank Mr Clive Thompson for contributing to shed light on this important aspect of the work of the ILO. We also wish to thank the coordinators of this research, Carlos R. Carrión-Crespo and Susan Hayter, for contributing their experience and technical inputs. Finally, we recognize the research and support provided by Roosa Mäkipää in the elaboration of this Manual. In addition, we would like to thank the ILO officials who contributed to the finalization of the Manual and the participants of the validation workshop that was held in Turin, Italy on 27-29 July 2011; in particular, we thank Fernando Fonseca from the International Training Center and Minawa Ebisui from the Industrial and Employment Relations Department for their extensive substantive contributions.

Alette van Leur  
Director  
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## Foreword

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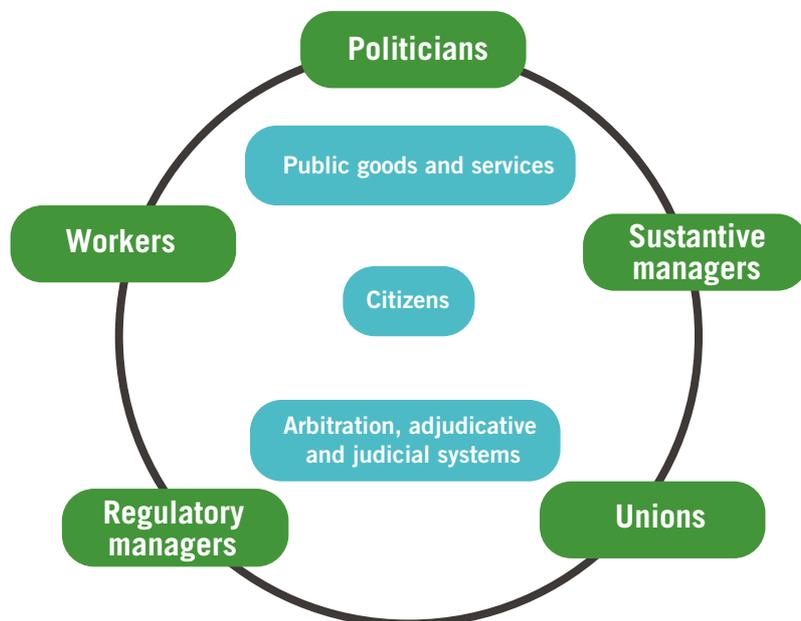
The *Practical guide for strengthening social dialogue in public service reform* defined public services as follows: “Whether they are delivered publicly or privately, services such as health, education, utilities, posts, telecommunications, transport, the police and fire-fighting are considered to be public services because they are provided to sustain the wellbeing of each citizen and help the development of society as a whole.”<sup>2</sup> The concept of “public worker” may vary considerably under the various national legal systems. According to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA), a distinction must be made between public workers who by their functions are directly engaged in the administration of the State, as well as officials who act as supporting elements in these activities and workers who are employed by the government, by public undertakings or by autonomous public institutions.<sup>3</sup>

Public sector labour relations are a key component of a comprehensive network of social relationships and institutions, which have been widely studied. A study co-sponsored by the Inter-American Development Bank and the Latin American Centre for Administration and Development suggested the following diagram to represent the relationships between the actors within the public sector labour relations subsystem:

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2 V. Ratnam and S. Tomoda: *Practical guide for strengthening social dialogue in public service reform* (Geneva, ILO, 2005), p. 1.

3 ILO: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition (Geneva, 2006), Paragraph 887.



Source: Bonifacio and Favilene, p. 14.

This diagram is not intended to include other subsystems, such as the political, legal or economic systems. It shows the separation between political and administrative arenas. The political arena defines the rules and priorities, quality standards and resource distribution, while the administrative arena is responsible for implementing policy objectives. Politicians represent the authority of the State and managers are the conduits through which this authority is exercised. The latter are divided into substantive managers, who implement public policy, and “regulatory” managers who administer industrial relations.

Public sector decision-makers often seek to maximize social welfare both efficiently and equitably. As a result, they may choose employment policies that minimize the costs of providing public services, or to resolve labour market imperfections elsewhere in the economy. In doing so, policy-makers have inevitably taken decisions which affect employment conditions and the interests of workers. The ILO encourages policy-makers to take into account the interests of workers in order to minimize conflicts. For that purpose, ILO constituents adopted the Labour Relations (Public Service) Convention, 1978 (No. 151)



and the Labour Relations (Public Service) Recommendation, 1978 (No. 159), which provide minimum standards and guidance for government employers to follow.

As the constituents did in 1978, this manual has been based on the premise that public administration labour relations respond to dynamics that differ from other sectors. The ILO has defined the particularities of public sector labour relations as follows:

“ The method of establishing the relationship between the parties is not always contractual, but very often an administrative relationship and, even if some aspects of terms and conditions of work are similar for all categories of workers regardless of the sector in which they are located, at least the commencement and the termination of the relationship usually have different features.

...

“ The generalization of public sector reform started in the 1980s is inducing a change in the legal regime governing many branches of the State and to some extent what has now come to be regarded as a trend toward bringing the civil service under the general labour regime. One writer has pointed out that the reform or restructuring processes in the public sector have led to a violent shake-up in the way in which the public administration was managed and to the imposition of private sector management styles and structures.

...

“ Furthermore, institutions until recently non-existent within the public administration, such as workers' representation bodies, have now been created along the lines of the labour regime. The same has occurred with regulations creating forums for worker participation ... thanks to trade union representation and freedom of association, there is growing participation in the setting of terms and conditions of work, collective bargaining and increasingly even the right to strike.<sup>4</sup>

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4 J.L. Daza: *Social dialogue in the public service* (Geneva, ILO, 2002).

Labour relations in public administration continue this transition nowadays, and more countries are adopting consensual mechanisms to determine working conditions. For example, since 2008 Mozambique, Botswana and Uruguay have adopted statutes to enable collective bargaining in public administration. Four of the 48 countries that have ratified Convention No. 151, have done so since October 2009: Gabon in October 2009, Slovakia in February 2010, Brazil in June 2010 and Slovenia in September 2010. The Decent Work Country Programmes (DWCP) for Benin, Madagascar, Macedonia and Namibia have identified ratification of Convention No. 151 as a priority for the tripartite partners, and the ILO has programmed activities to promote the application of Convention No. 151 in El Salvador, which ratified it in 2006. The DWCPs of Kiribati, Tuvalu and the Marshall Islands also include a commitment to implement legislation along its lines.

As the OECD has noted, “Compared with the private sector, employment relations in the public sector are deeply rooted in country-specific legal, normative and institutional traditions, which make comparisons difficult.”<sup>5</sup> History, culture and legal frameworks are all relevant to this observation. This manual provides examples of institutions that have been used to prevent and resolve disputes in this context, and intends to encourage discussion leading to the development of mechanisms that respect national characteristics while complying with applicable ILO standards.

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5 European Foundation for the Improvement of Living and Working Conditions: *Industrial relations in the public sector* (Dublin, 2007), p. 2, citing OECD: *Management in government: Feasibility report on the development of comparative data* (Paris, 2005), p. 7, <http://www.eurofound.europa.eu/docs/eiro/tn0611028s/tn0611028s.pdf> (accessed 27 Oct. 2011).



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## List of acronyms

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<b>ACAS</b>	Advisory, Conciliation and Arbitration Service (United Kingdom)
<b>ADR</b>	alternative dispute resolution system
<b>BATNA</b>	best alternative to a negotiated agreement
<b>CCMA</b>	Commission for Conciliation, Mediation and Arbitration (South Africa)
<b>DyADS</b>	dynamic adaptive dispute systems
<b>ECN</b>	enhanced cooperative negotiation
<b>FMCS</b>	Federal Mediation and Conciliation Service (United States)
<b>ILO</b>	International Labour Organization
<b>Med–arb</b>	mediation–arbitration
<b>MTB</b>	modified traditional bargaining
<b>Nedlac</b>	National Economic Development and Labour Council (South Africa)
<b>NCPP</b>	National Centre for Partnership & Performance (Ireland)
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>PSLRB</b>	Public Service Labour Relations Board (Canada)
<b>REP</b>	relationship enhancement programme
<b>SER</b>	Sociaal-Economische Raad (the Netherlands)

## Introduction

### Promoting effective dispute avoidance and resolution in a key sector of employment

The public sector accounts for a very significant proportion of employment in all countries around the globe. It is unsurprising, then, that the ILO has a keen interest in promoting international norms on good labour relations in this key sector of the world of work. However, it is also true that very special public interest factors come into play here, informed principally by the need for uninterrupted essential services. The International Labour Conference adopted the Labour Relations (Public Service) Convention, 1978 (No. 151) with the singular features of the public sector in mind. The Convention applies to all persons employed by public authorities.<sup>6</sup> Articles 7 and 8 deal with the pivotal areas of the setting of terms and conditions of employment and dispute settlement respectively:

“Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organizations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters. (Article 7)

“The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved. (Article 8)

6 Convention 151 defines the term “public employee” as any person employed by public authorities. Only high-level employees whose functions are normally considered as policy-making or managerial, or employees whose functions are of a highly confidential nature can be excluded from the guarantees provided by the Convention – see S. Olney and M. Rueda: *Convention No. 154: Promoting collective bargaining* (Geneva, ILO, 2005), p. 14.



The two areas are intimately linked: the success of negotiating arrangements can depend on their underlying dispute resolution measures. With a view to advancing the objectives set out in Article 7, this manual seeks to give guidance to governments and unions on ways to promote the dispute settlement objectives seen in Article 8.

The different political systems around the world have developed diverse labour relations processes in the public service.<sup>7</sup> Nonetheless, an examination of the approaches and mechanisms seen in a variety of national systems provides persuasive indicators on better ways of doing things. The manual provides suggestions: within a scheme consistent with ILO norms, it invites governments and unions to consider a range of options, some relatively integrated, others perhaps alternative to one another.

The ILO has steadily promoted a common platform of standards for both the private and public sectors, which in practice has meant the closing of a historical gap. The Collective Bargaining Convention, 1981 (No. 154), and its Recommendation (No. 163) broadened the concept of collective bargaining first articulated in the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), while at the same time extending it to all branches of activity, that is, both the private and the public sectors, except for the armed forces and the police. The Committee of Experts and the Committee on Freedom of Association recommend that states not exclude large categories of workers employed by the government from the terms of Convention No. 98 merely on the basis that these workers are formally placed on the same footing as public officials engaged in the administration of the State.<sup>8</sup> Convention No. 151, in turn, states that national laws or regulations shall determine the extent to which the Convention applies to high-level workers whose functions are considered to be policy-making, managerial, or highly confidential. The Convention includes a similar

7 G. Casale and J. Tenkorang: *Public service labour relations: A comparative overview*, Paper No. 17, ILO Social Dialogue, Labour Law and Labour Administration Branch (Geneva, ILO, 2008), p. 2.

8 ILO: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition (Geneva, 2006), Paragraphs 886 and 887.

type of provision concerning armed forces and the police. During discussions leading to the adoption of Convention No. 151, the Committee on the Public Service confirmed that “members of parliament, the judiciary and other elected or appointed members of public authorities themselves do not come within the meaning of the term persons employed by public authorities” and would therefore be excluded from the application of the Convention. It has been understood that this interpretation applies also to Convention No. 154.<sup>9</sup>

By 2009 an ILO report found that:

“ [a]ll over the world, although the form and extent of this trend varies widely from country to country, there seems to be a general move away from the unilateral fixing of terms of employment by the State as an employer . . . Nowadays it is a more or less accepted fact that the underlying trend in labour relations in the public and semi-public sectors is towards a system of collective bargaining akin to that applied in the private sector.<sup>10</sup>

The common platform extends to dispute prevention and resolution as well.

This manual does not advocate any particular country’s system, although some systems are referenced more often than others. Nor, when drawing on a country as an example, is the focus on whether a particular approach or mechanism is still in force there or whether it has been replaced. The manual seeks to package and represent the idea of dispute prevention and resolution to those considering redesigning their own systems. Dispute resolution endeavours are never complete, never perfect and not all changes represent progress. But some approaches are better able to reconcile policy objectives

9 International Labour Conference: *Record of Proceedings* (1978), p. 25/4, and B. Gernigon, A. Otero and H. Guido: *Collective Bargaining: ILO standards and the principles of the supervisory bodies* (Geneva, ILO, 2000), p. 21.

10 See B. Gernigon: *Collective bargaining: Sixty years after its international recognition* (Geneva, ILO, 2009), pp. 2 and 8–9.



of social justice, social inclusion, economic progress and effective service delivery, and this manual points to these.<sup>11</sup>

However, a system that works well cannot simply be transferred to another context. The elements behind a system are of the utmost importance and should be taken into account.<sup>12</sup> Institutions, policies and practices are truly products of their homes and histories, and are seldom – if ever – open to ready replication elsewhere. For example, functioning of special labour relations institutes can be understood only if they are put in the context of a specific country.<sup>13</sup> And because of the political context of the public service, collective bargaining is sensitive to government policy.<sup>14</sup> But before adopting any mechanisms of their own, national reformers can find and extract workable designs and ideas from other systems, particularly when they are agreed upon through inclusive consultative processes. This manual is intended to provide such examples of good practices.

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11 The ILO encourages the use of negotiation, conciliation and mediation methods, as well as arbitration conducted by an impartial body, but concerning judicial mechanisms, the ILO standards do not prescribe a specific model for the organization of systems and procedures of labour dispute prevention and settlement. International labour standards define general principles and provide guidance to member states which are useful for the enactment of legislation and the formulation of practical measures. It is up to each country to design the systems and procedures for the settlement of labour disputes which best fit the country's judicial traditions and industrial relations practices. (ILO: *Improving judicial mechanisms for settling labour disputes in Bulgaria*, Report on the High-Level Tripartite Conference, Sofia, 5 May 2006 (Budapest, 2006), pp. 6–7 and 34–35.)

12 ILO: *Improving judicial mechanisms for settling labour disputes in Bulgaria*, Report on the High-Level Tripartite Conference, Sofia, 5 May 2006 (Budapest, 2006), pp. 34–35.

13 *Ibid.*, p. 32.

14 G. Casale and J. Tenkorang: *Public service labour relations: A comparative overview*, Paper No. 17, ILO Social Dialogue, Labour Law and Labour Administration Branch (Geneva, ILO, 2008), p. 1–2.

There is scope for legislative and institutional reform when systems fall short of benchmark international labour standards.<sup>15</sup> These standards can be seen to be the culmination of extensive and considered deliberation by the tripartite parties at international level, and eminently worthy of reflection in all domestic regimes.

#### Possible indicators of good practices:

1. Affinity of the country's bargaining and dispute resolution systems with the objectives and requirements of Articles 7 and 8 of Convention 151;
2. Systems characterized by a high level of social dialogue between the parties, displaying in particular an inclusive collective bargaining regime where representatives of all or most key stakeholders are involved;
3. Systems in which the collective bargaining process itself (as opposed to external forces, agencies and processes) regularly produces agreements;
4. Systems displaying supportive institutions and measures for the bargaining process such as facilitation, mediation and, selectively and where appropriate, arbitration;
5. Systems that show a high degree of success in resolving collective bargaining disputes with a minimum of disruption to services;
6. Systems that deliver agreements that are generally acceptable to the parties and sustainable over the agreements' intended lifespan, and that strengthen the relationship between the parties;
7. Systems that deliver agreements that contribute to public sector performance.

15 See, for instance, several of the country reports appearing in G. Casale and J. Tenkorang: *Public service labour relations: A comparative overview*, Paper No. 17, ILO Social Dialogue, Labour Law and Labour Administration Branch (Geneva, ILO, 2008), and the roll call of countries cited, p. 9 in B. Gernigon: *Collective bargaining: Sixty years after its international recognition* (Geneva, ILO, 2009) that have been the subject of complaints concerning collective bargaining violations brought before the Committee on Freedom of Association. See also Y. Yoon: *A comparative study on industrial relations and collective bargaining in East Asian countries*, Working paper No. 8, ILO Industrial and Employment Relations Department (Geneva, ILO, 2009), p. 23: "Collective bargaining in the public sector is seriously underdeveloped in all East Asian countries, mostly due to legal restrictions imposed on employees in the public sector."



This manual intends to provide encouragement and assistance. For governments and human resources professionals in particular, it is important that the expression of international labour standards in their domestic public sector labour relations systems will not bring social unrest, particularly in the form of strike action. If change is needed, the focus should be on finding the best practice in conflict settlement principles and mechanisms. Since workplace relations inevitably attract controversy, the social partners need to be assured that legal regulations are goal-oriented, resilient and adaptable.

The manual is aimed at members of workers' organizations and governments, including staff of ministries of labour and other ministries. It may also be used by parliamentarians, community leaders or other stakeholders in society who wish to learn more on issues related to collective bargaining and dispute resolution.

### **The arrangement of the manual**

The manual is presented in two parts. It opens with a set of framing propositions for the material that follows. Social dialogue between the key parties on the very foundations of the relationship features as the main point of departure. Then, moving from the more general to the more specific, the manual deals with autonomy in the bargaining process, other features of the bargaining process, approaches and formulas for dispute prevention and finally, in the second part, approaches and formulas for dispute resolution.

## Best practice dispute prevention and resolution in public services labour relations: Elements and sequences

### Foundations

- Social dialogue
- Stakeholder recognition
- Engagement framework

### Dispute prevention

- Joint training
- Joint research
- Productive bargaining
- Facilitated negotiations
- Promoting model workplaces
- Joint problem solving
- Effective change management
- Duty to bargain in good faith
- Maintaining agreements

### Dispute resolution

- Effective dispute resolution agencies
- Good dispute system design
- Enlisting assistance
- Facilitated discussion
- Fact-finding
- Joint problem solving
- Conciliation & mediation
- Arbitration
- Industrial action
- Integrated dispute resolution
- Review & renewal



## Best practice in public sector dispute prevention and resolution: Approaches and propositions

### The goals and the context

Quality public services need the support of good labour relations systems, embodying effective dispute resolution approaches and mechanisms. The aim of this manual is to contribute to the achievement of services that:

- provide access for all to safe, reliable and affordable services to meet basic human needs;
- facilitate sustainable local economic and social development to promote the goals of full employment and the alleviation of poverty;
- provide a safe and healthy environment for citizens;
- improve and enhance democracy; and
- secure human rights.<sup>16</sup>

Within the broader sphere of public sector workplace relations, this manual addresses interest disputes that may lead to industrial action and to associated effects of disruption to public services. In this context, an interest dispute is one which arises from differences over the determination of future rights and obligations. It usually results from a failure to reach a meeting of the minds during collective bargaining. It does not originate from an existing right, but from the interest of one of the parties in creating such a right through its embodiment in a collective agreement, and the opposition of the other party to doing so.<sup>17</sup>

The manual commences with the upstream bargaining process and approaches to the regulation of economic disputes. Disputes over rights may also cause conflict, and some information to assist in resolving them is also included in the manual. A rights dispute is a dispute concerning the violation or interpretation of an existing right or obligation embodied in a law, col-

16 See the preface to V. Ratnam and S. Tomoda: *Practical guide for strengthening social dialogue in public service reform* (Geneva, ILO, 2005).

17 F. Steadman: *Handbook on alternative labour dispute resolution* (Turin, International Training Centre of the ILO, 2011), p. 13.

lective agreement or individual contract of employment. At its core is an allegation that a worker, or group of workers, has not been afforded his/her/their proper entitlements.<sup>18</sup>

### Guiding propositions

Some general observations may be made at the outset. International experience coupled with international standards generates the following guiding propositions:

1. Social dialogue between the key parties should be a principal feature of the public sector regulatory system, both in its formation and its operation. Comprehensive and structured collective bargaining and consultation fortified by high levels of information-sharing should be constitutive elements of this dialogue. Successful social dialogue structures and procedures have the potential to resolve economic and social matters, encourage good governance, advance social and industrial peace and stability and boost economic progress. The success of social dialogue depends on several issues such as respect for the fundamental rights of freedom of association and collective bargaining; strong, independent workers' and employers' organizations with the technical capacity and knowledge required to participate in social dialogue; political will and commitment to engage in social dialogue on the part of all parties; and appropriate institutional support.<sup>19</sup>
2. If effective institutionalisation of conflict is the goal, all the key parties should participate in the formative social dialogue, the ensuing regulatory system and the ongoing adaptation of that system. These would include the full range of public sector employers, workers and their representatives (typically trade unions), and possibly also representatives of civil society. Governments have an important role to play in advancing and sustaining national social dialogue, and promoting and enforcing the legal framework

18 Ibid.

19 See "What is Social Dialogue?", <http://www.ilo.org/public/english/dialogue/ifpdial/areas/social.htm> (accessed 27 Oct. 2011).



by ensuring social partners' independence and fundamental rights.

3. *An overarching system of labour relations projecting a common core of principles and objectives for both the public and private sectors* is most likely to achieve coherence of purpose and outcome. Convention No. 151 was adopted to fill the gap between the rights of private and public sector workers, as Convention No. 98 excluded from its scope all public servants engaged in the administration of the State. Even though the right to organize is protected by Convention No. 151 in similar but not identical terms to those of Convention No. 98, Convention No. 151 can be seen to eliminate discrimination which may be unfavourable to civil servants in relation to workers in the private sector as regards the essential principles of trade union rights.<sup>20</sup> Good labour relations policies and practices stand above any public–private sector divide and apply with equal logic to both; all the more so as the private sector contribution continues to expand into services previously provided exclusively by the state.
4. Nonetheless, *special considerations come into play in the public sector*. The public interest demands that essential services be maintained and spared from labour disruption, and that key state functions continue at all stages of labour–management engagement.
5. On the same topic, *the role of industrial action should be carefully considered*. The dynamics and effectiveness of collective bargaining are underpinned in important ways by the ability and right of governments and unions to use economic leverage to advance their respective interests. Ideally, recourse to industrial action may be regulated and restricted in targeted ways that preserve the integrity of the bargaining process rather than prohibited outright.
6. *Bargaining, consultation and dispute resolution processes should enjoy maximum autonomy*. Governments, and state treasuries and finance ministries in particular, have a legitimate interest in the impact that public sector wage-setting

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20 ILC, 64th Session, 1978: *Provisional Record*, pp. 28/12, 28/13 and 28/28.

has on budgets, and hence there must be some discourse and relations between political and labour relations processes. And, of course, if a breakdown in public sector bargaining precipitates a major disruption in the delivery of services to the public, the government will be an interested party. Nonetheless, if the labour relations system is to make its desired contribution to public sector efficiency, equity and industrial peace, then it must be given space to do its work. Undue interference or untimely intervention can impair the integrity of the collective bargaining and supporting dispute resolution processes.

7. *Public sector bargaining and consultation should promote best practice features.* There are contrasting traditions, styles and formulas of labour–management relations on display in the world, and some offer better experiences and outcomes than others, as suggested in the box in the introduction. A public sector system engaged in reform should consciously seek to identify, adopt and adapt, as needed, the features of more constructive models.
8. *Dispute prevention and resolution should encompass a flexible but integrated suite of measures, to be drawn on according to need.* Conflict assumes many guises, and particular measures may be better suited to dealing with particular issues. The challenge for any dispute management system is to provide a range of remedies within an integrated framework.
9. *Dispute prevention and resolution agencies should operate primarily as loop-backs to the backbone processes of collective bargaining and consultation.* This means that dispute prevention should be centred on education and facilitation, and that dispute resolution should be centred on the promotion and, if need be, restoration of the negotiation process. Substitutes for bargaining and consultation, such as adjudication and arbitration, should be positioned as reserve measures. Voluntary adjudication and arbitration should be preferred to compulsory variants.
10. *Systems need regular review to ensure ongoing relevance and to combat over-elaboration and ossification.* Labour relations have been pioneering territory for Alternative



Dispute Resolution (ADR). A prime concern has always been to provide for processes that are informal, accessible, speedy and cost-effective. However, even the alternatives have shown a strong tendency to become obsolete and duplicate the faults of the formal administrative and judicial processes. Systems need to be constantly and rigorously reviewed to maintain their efficacy.

11. There should be provision in the regulatory system for *independent, skilled, properly resourced and credible dispute prevention and dispute resolution agencies*.
12. *Attitudes are as important as machinery*. A sound formal system of labour relations integrating appropriate dispute resolution mechanisms is a necessary but insufficient condition for good public sector outcomes. It is more important to cultivate an environment of cooperative workplace relations geared towards social delivery and workplace equity.



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### Framing remarks: fair and robust collective bargaining as a foil to avoidable conflict

While the focus of this manual is on avoiding and resolving disputes, collective bargaining is seen as a primary reference point within any idealised dispute resolution array. As early as the late nineteenth century, Sidney and Beatrice Webb were already documenting the “method of collective bargaining” as an avenue for dispute resolution in industrializing countries<sup>21</sup> and perceptive readers of the labour market have been sharpening the analysis ever since:

“ In Western societies there have been two approved arrangements over the past two hundred years for resolving conflicting interests among groups and organizations, and among their constituent members: the give-and-take of the marketplace and government regulatory mechanisms established by the political process...

As a means for resolution of conflict between organizations, negotiations and agreement-making have a variety of advantages compared with litigation, governmental fiat, or warfare to extinction.... The significant feature of an agreement is that both parties are committed to live by it rather than to continue conflict and warfare after a decision unacceptable to one side.... There is an important sense in which no decision among groups can genuinely resolve the controversy unless the parties agreed to accept it. The likelihood of parties enforcing their own agreement is far greater than accepting a decision adverse to one party.<sup>22</sup>

And in an earlier introductory paper to labour dispute resolution, the ILO put the proposition in very straightforward terms:

“ [T]he effective resolution of labour disputes is a high priority. Of even greater importance is the need to prevent disputes of all types arising in the first place.... Collective bargaining prevents disputes by sharing power in the workplace.<sup>23</sup>

21 S. and B. Webb: *Industrial democracy* (London, Longmans, Green, and Co., 1897), Vol. II, Ch. II.

22 J. Dunlop: *Dispute resolution: Negotiation and consensus building* (Westport, CT, Greenwood Publishing, 1984), pp. 3 and 25.

23 R. Heron and C. Vandenabeele: *Labour dispute resolution: An introductory guide* (Geneva, ILO, 1999) pp. (iii) and 17.



The dispute resolution nodes and pathways set out below have links back to dispute prevention options, and they in turn are largely anchored in a model that recognizes the primary role of self-regulation, especially in the form of collective bargaining. Good dispute prevention and resolution systems can then be described as those that direct the parties back into the collective bargaining process as the prime bearer of relationships and results. This is because the quality and makeup of the relationship between the parties largely determine the fortunes of their linked economic fates and the impact of their joint endeavours – good, bad or indifferent – on the economy and society.<sup>24</sup>

But if industrial peace and other beneficial social outcomes are the goal, then not just any variant of collective bargaining will do. As a minimum, the system must be inclusive, equitable and robust, capable of integrating resources and distributing rewards in a functional way. But beyond that, certain systems may be better than others at promoting mutual gain for the parties and society. Healthy workplaces are characterized by relations of trust, respect and quality communications. The support measures advocated here take their bearing from the more promising bargaining models.

This manual does not seek to reproduce or advocate particular country dispute resolution systems in their entirety. Instead, instructive principles, formulas and practices have been collected eclectically and presented thematically, moving from broad relationship issues through the bargaining process to dispute resolution. This manual extends an invitation to very differently located public sector policy-makers to look for approaches and mechanisms that can be considered and, if thought promising, adopted and adapted for domestic purposes. The real challenge lies in reinterpreting a proposition or formula to serve local needs and aspirations.

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24 “Stronger democracy and freedom of association and collective bargaining rights may result in greater economic and social stability that enhances global competitiveness and economic performance”. (ILO: *Freedom of association in practice: Lessons learned*, International Labour Conference, 97th Session, 2008, para. 67).

### Summary of ILO principles on the right to collective bargaining

The standards and principles emerging from the ILO Conventions, Recommendations and other instruments on the right to collective bargaining, and the principles set forth by the Committee of Experts and the Governing Body Committee on Freedom of Association on the basis of these instruments, may be summarized as follows:

1. The right to collective bargaining is a fundamental right which States, on account of their membership of ILO, have an obligation to respect, promote and realize, in good faith (ILO Declaration of Fundamental Principles and Rights at Work and its Follow-up).
2. Collective bargaining is a right of employers and their organizations, on the one hand, and organizations of workers on the other (first-level trade unions, federations and confederations). Only in the absence of these latter organizations may [other types of] representatives of workers concerned conclude collective agreements.
3. The right to collective bargaining should be recognized by all private and public sectors, and only the armed forces, the police and public servants engaged in the administration of the State may be excluded from the exercise thereof (Convention No. 98).
4. When a State ratifies the Collective Bargaining Convention, 1981 (No. 154), the right to collective bargaining is also applicable in the context of public administration, for which special modalities of application may be fixed in accordance with the provisions. The Labour Relations (Public Service) Convention, 1978 (No. 151) provides a lower level of international protection for collective bargaining, since it permits, in the context of public administration, the possibility of opting between collective bargaining and other methods of determining the terms and conditions of employment.
5. The purpose of collective bargaining is the regulation of the terms and conditions of employment, in a broad sense, and the relations between the parties.



6. Collective agreements should be binding. It must be possible to determine terms and conditions of employment that are more favourable than those established by law. Preference must not be given to individual contracts over collective agreements, except where more favourable provisions are contained in individual contracts.
7. To be effective, the exercise of the right to collective bargaining requires that workers' organizations are independent and not "under the control of employers or employers' organizations", and that the process of collective bargaining can proceed without interference by the authorities.
8. A trade union that represents the majority, or a high percentage, of the workers in a bargaining unit may enjoy preferential or exclusive bargaining rights. However, in cases in which no trade union fulfils these conditions, or such exclusive rights are not recognized, workers' organizations should, nevertheless, be able to conclude a collective agreement on behalf of their own members.
9. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into.
10. Collective bargaining is voluntary in nature and it must be possible for bargaining to take place at any level.
11. The imposition of compulsory arbitration in cases in which the parties do not reach an agreement is generally contrary to the principle of voluntary collective bargaining and is admissible only: (1) in essential services in the strict sense of the term (those whose interruption would endanger the life, personal safety or health of all, or part, of the population); (2) with regard to public servants engaged in the administration of the State; (3) when, after prolonged and inconclusive negotiations, it is clear that the deadlock will not be overcome without an initiative by the authorities, and (4) in the event of an acute national crisis. Arbitration accepted by both parties is always preferable.

12. Interventions by the legislative or administrative authorities that have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. Restrictions on the content of future collective agreements, particularly in relation to wages, which are imposed by the authorities as part of economic stabilisation or structural adjustment policies on account of major economic and social policy consideration are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and meet the following conditions: they are applied as an exceptional measure, and only to the extent necessary; they do not exceed a reasonable period, and they are accompanied by adequate guarantees designed to effectively protect the standards of living of the workers concerned, particularly of those likely to be most affected.

*Source: B. Gernigon, A. Odero and A. Guido: Collective bargaining: ILO standards and principles of the supervisory bodies (Geneva, ILO, 2000), 75–77. [As reproduced in V. Ratnam and S. Tomoda: Practical guide for strengthening social dialogue in public service reform (Geneva, ILO, 2005).]*



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## Part I: Dispute prevention<sup>25</sup>

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A consensus-based labour relations system is the best prevention tool against industrial discord, and it can take a variety of forms.<sup>26</sup> The goal should be to design and put in place effective processes and institutions that recognize, address and reconcile the legitimate interests of the workplace parties and society at large.

Much of the discussion that follows immediately below concerns the bargaining process. For the present purposes, we consider the dispute prevention and resolution dimensions of that complex phenomenon.

### 1. Social dialogue as the starting point

The ILO has already produced dedicated publications on social dialogue in the context of the public service, and this manual assumes and builds on its lessons.<sup>27</sup> The reader is encouraged to refer to those sources, but we incorporate here some of their observations and conclusions:

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25 For a pioneering discussion on the subject, see Chapter 12 “Preventative conciliation”, in *Conciliation in industrial disputes: A practical guide* (Geneva, ILO, 1973).

26 According to the Global Report under the follow-up to the ILO Declaration of Fundamental Principles and Rights at Work (ILO: *Freedom of association in practice: Lessons learned*, International Labour Conference, 97th Session, 2008), “successful collective bargaining and other methods of dialogue between workers and employers can prevent conflicts. ... For example, effective collective bargaining mechanisms helped to prevent any work stoppages from 1998 to 2005 in South Africa’s education sector.” See more on this subject: Republic of South Africa, Department of Education: *Teachers for the future: Meeting teacher shortages to achieve Education for All*. In addition, ILO Social Dialogue survey 2006 suggested that industrial conflicts are being resolved more quickly and effectively than before. The Global Report suggests that “collective bargaining has contributed to this positive record. A collective agreement creates an atmosphere of mutual trust and establishes social peace. But it is also an important normative source for dispute resolution (e.g. by establishing mutually acceptable rules for resolving a dispute through, for instance, conciliation, mediation or arbitration).”

27 V. Ratnam and S. Tomoda: *Practical guide for strengthening social dialogue in public service reform* (Geneva, ILO, 2005) and J. Ishikawa: *Key features of national social dialogue: A social dialogue resource book* (Geneva, ILO, 2003).

“ Social dialogue is a powerful tool for finding concrete ways of establishing and maintaining social cohesion and improving governance. It contributes to the creation of quality public services, both for employees and citizens.<sup>28</sup>

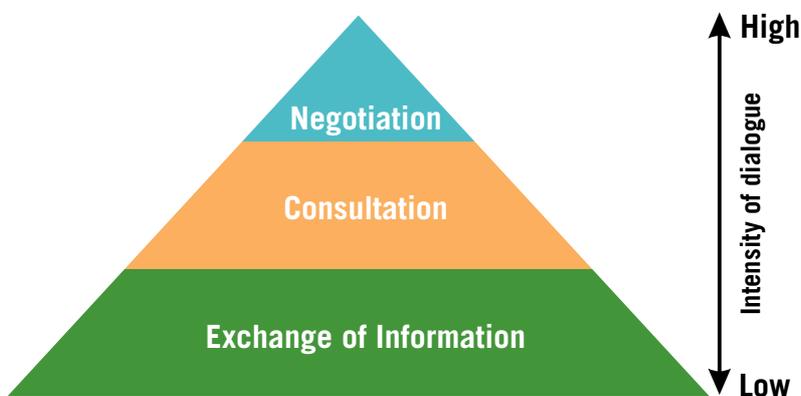
...

A major lesson is that reforms can be successful only if they are designed and implemented with the cooperation of, and in consultation with, all the stakeholders who will be affected.<sup>29</sup>

Social dialogue includes the sharing of all relevant information, consultation and negotiation between, or among, representatives of governments, employers and workers on issues of common interest relating to economic and social policies. Social dialogue has broad and varied meanings worldwide: it should take place at all appropriate stages of the decision-making process; it should not be overly prescriptive; it should be adapted to circumstances, and it should include particularly those affected by the changes/decisions.<sup>30</sup>

...

### Social dialogue triangle



Source: J. Ishikawa: *Key features of national social dialogue: A social dialogue resource book* (Geneva, ILO, 2003) p. 3.

28 V. Ratnam and S. Tomoda: *Practical guide for strengthening social dialogue in public service reform* (Geneva, ILO, 2005), p. 4.

29 Ibid., p. iii. See also paragraph (2) of the Labour Relations (Public Service) Recommendation 159 of 1978, in the Appendix.

30 V. Ratnam and S. Tomoda: *Practical guide for strengthening social dialogue in public service reform* (Geneva, ILO, 2005), p. 3.



“

Exchange of information is the most basic process of social dialogue. It implies no real discussion or action on the issues concerned, but it is an essential starting point towards more substantive social dialogue. Consultation is a means by which the social partners not only share information, but also engage in more in-depth dialogue about issues raised.... Collective bargaining and policy concertation can be interpreted as the two dominant types of negotiation. Collective bargaining is one of the most widespread forms of social dialogue and is institutionalised in many countries. It consists of negotiations between an employer, a group of employers or employers' representatives and workers' representatives to determine the issues related to wages and conditions of employment.<sup>31</sup>

The ILO recognises that the definition and concept of social dialogue vary over time and from one country to another. Social dialogue can be informal and ad hoc or institutionalised and formal – or even a mixture of these. The informal processes can be as important as the formal ones.<sup>32</sup> For example, in Brazil, a large number of social dialogue conferences have been organized in past years to address labour relations issues.<sup>33</sup> In Namibia, trade unions work in close collaboration with the government, and before any new legislation related to labour issues can be imposed, the unions receive a draft of the new act.<sup>34</sup>

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31 J. Ishikawa: *Key Features of National Social Dialogue: a Social Dialogue Resource Book* (ILO, 2003), p. 3.

32 Ibid.

33 J. Drummond and D. Paiva Ferreira: *Report on public sector labour relations in Brazil*, presented at the validation workshop of this manual, Turin, Italy, 28 July 2011.

34 H. Hangula and M. Iinane: *Report on public sector labour relations in Namibia*, presented at the validation workshop of this manual, Turin, Italy, 27 July 2011.

## Advising government and parliament

### **The role of the Social and Economic Council (Sociaal-Economische Raad, SER) of the Netherlands**

“The SER’s primary function is to advise the Dutch government and the parliament on social and economic issues, with the aim of promoting:

- balanced economic growth and sustainable development;
- the highest possible level of employment;
- a fair distribution of income.

Upon request or at its own initiative, the SER advises the government on the main outlines of policy. The arguments put forward by the SER are also used by parliament in its debates with the government.

Issues covered include:

- medium-term social and economic developments
- regulatory issues
- social security
- labour and industrial law
- employee participation
- the relationship between the labour market and education
- European policy
- environmental planning and traffic accessibility
- sustainable development
- consumer affairs.”

*Source: see <http://www.ser.nl> (accessed 1 Nov. 2011).*





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### **The role of the National Economic Development and Labour Council of South Africa**

“At Nedlac, Government comes together with organised business, organised labour and organised community groupings on a national level to discuss and try to reach consensus on issues of social and economic policy. This is called “social dialogue”. The National Economic Development and Labour Council Act 35 of 1994, section 5(1) reads as follows:

The Council shall-

- (a) strive to promote the goals of economic growth, participation in economic decision-making and social equity;
- (b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
- (c) consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament;
- (d) consider all significant changes to social and economic policy before it is implemented or introduced in Parliament;
- (e) encourage and promote the formulation of coordinated policy on social and economic matters.

Under the terms of Section 77 of the Labour Relations Act, Nedlac has a dispute resolution function between trade unions and government and/or business on issues of socio-economic policy.

*Source: see <http://www.nedlac.org.za/home.aspx> (accessed 1 Nov. 2011).*

### ILO support: example from the Philippines

The representation of trade unions in the Philippines is limited, and the unions do not have voting power during deliberation of policies that affect the civil service. The Decent Work Common Agenda 2008-2010 aimed to strengthen the genuine representation of public sector unions in the Public Sector Labor Management Council. The Council oversees the implementation of the Executive Order's provisions, and is composed of heads of the Civil Service Commission, Department of Labour and Employment, Department of Finance, Department of Justice and Department of Budget and Management. The Executive Order provides the guidelines on exercising the right of government employees to organize, and mechanisms for social dialogue in the public sector are promoted through the promulgation of the law.

The Decent Work Common Agenda sought to institute amendments in Executive Order 180 to ensure trade union representation in formulating policies in the public sector.

*Source: Narrowing decent work deficits: The Philippine common agenda 2008-10.*

## 2. Allowing a well-crafted bargaining system to operate: self-government and adequate intervention

Public authorities should give collective bargaining enough space to deliver its social dividends. As part of this process, governments need the necessary administrative and technical capacity to uphold the principle of freedom of association in order to create an enabling environment for collective bargaining. In some countries, labour administrations are not able to influence economic and social policies that can have a direct impact on collective bargaining frameworks. Well-built and efficient labour administrations are important for that purpose.<sup>35</sup> For example, the Nordic countries have produced well-functioning public sector bargaining regimes character-

<sup>35</sup> ILO: *Freedom of association in practice: Lessons learned*, International Labour Conference, 97th Session, 2008, para. 58.



ised by self-regulation between employers and unions.<sup>36</sup> In Argentina, too, the establishment of self-regulation mechanisms is considered one of the initial subjects of bargaining.<sup>37</sup>

However, this does not mean that public sector bargaining in those and similar jurisdictions is totally free. The political process is always in the background, but government is inclined to intervene only when it appears that autonomous bargaining is at a definite impasse and the dimensions are such that the public interest is at risk. The general confidence in the resilience of public sector bargaining is generally well-founded, and that it itself creates a virtuous circle. Government intervention, when it comes, is generally graduated: first facilitative, then directive and, only as a last resort, prescriptive. Third party resources such as statutory or non-statutory mediation are in many cases built into the autonomous bargaining processes themselves. The very spectre of government intercession spurs the bargaining parties to redouble their self-regulatory efforts. In situations where impasses are ended by fiat – in the form, for instance, of legislation or a directive to submit to compulsory arbitration – the measures are self-evidently exceptional and because of that not, in the long run, subversive of the institution of collective bargaining.

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36 T. Treu: "Comparative report", in T. Treu (ed.): *Employees' collective rights in the public sector* (The Hague, Kluwer, 1997), pp. 3–24.

37 Act No. 24,185 of 16 Dec. 1992, Article 18.

### Intervening to keep the peace while still supporting the bargaining process

#### Sweden

In Sweden, only once – in 1971 – has a strike been staved off by legal enactment. The effect of the particular piece of legislation was to extend the life of existing collective agreements and hence the associated peace obligations. The breathing space – and pressure – was used by the parties to resolve their differences. The legislation effectively shored up the bargaining process.<sup>1</sup>

#### Finland

In 2007 the Union of Health and Social Care Professionals threatened to use mass resignation as industrial action in order to put pressure on the negotiations for pay increases. In practice, this would have meant that around 70 to 100 per cent of all nurses working in critical care departments in university hospitals would have resigned. In order to sustain adequate levels of care, the government interfered in the situation and imposed an unparalleled law which would have, in practice, forced the nurses back to work. The law was problematic also because it would have forced even those nurses to work who had already retired, changed career or were working in the private sector. The negotiating parties reached an agreement before any legal actions needed to be taken, but the situation triggered a question about fundamental rights such as a worker's right to take part in industrial action and a person's right to get decent care. The Labour Court ruled, among other things, that the resignation of nurses who were civil servants had been illegal.<sup>2</sup>

<sup>1</sup> T. Stokke and A. Seip: "Collective dispute resolution in the public sector: The Nordic countries compared", in *Journal of Industrial Relations (Australian Labour and Employment Relations Association, 2008)*, Vol. 60, No. 4, p. 569, citing A. Adlercreutz: *Svensk arbetsrätt (Stockholm, Norsdtedts Juridik, 2003)*, p.106.

<sup>2</sup> *The Finnish Labour Court R 83 and 84/07, 7.11.2007. Expert opinion for the Social Affairs and Health Committee concerning a bill on ensuring patient safety during industrial actions, 9 Nov. 2007.*

In Latin America, there is an increasing tendency to allow public sector workers to participate in the determination of their working conditions. Uruguay recently adopted an enabling statute for collective bargaining. The enabling statute of the Panama Canal Authority also includes collective bargaining, and mandates that all collective agreements include dispute



resolution mechanisms.<sup>38</sup> Costa Rica has adopted collective bargaining by regulation, thereby facilitating a longstanding practice without recourse to legislative sanction. The ILO assisted in the development of the corresponding regulations.<sup>39</sup>

### 3. Structuring the bargaining: bargaining representatives

Effective collective bargaining requires that the parties involved recognize one another for that purpose. This recognition may be voluntary, as is the case in some countries where it is based on agreements or a well-established practice. Some countries have adopted legislation obliging government employers to recognize trade unions for collective bargaining purposes, subject to certain conditions. On the other hand, the enabling legislation might assist trade unions to identify who represents the government in negotiations. Simple legal provisions can spell out who is responsible for carrying out collective bargaining, thereby assisting the parties involved to recognize one another.<sup>40</sup>

It generally helps if the bargaining rules or arrangements discourage union proliferation as suggested in paragraph 1 of the Labour Relations (Public Service) Recommendation, 1978 (No. 159), because this facilitates more orderly, moderated and internally mediated bargaining.<sup>41</sup> Sectoral regulation in Nordic

38 Act No. 19 of 11 June 1997, Article 104.

39 Executive Decree No. 29576-MTSS, 15 June 2001.

40 "Substantive provisions of labour legislation: Effective recognition of the right to collective bargaining", in ILO: *Labour Legislation Guidelines*, Chapter III, <http://www2.ilo.org/public/english/dialogue/ifpdial/llg/index.htm> (accessed 27 Oct. 2011). For further consideration of the issues involved see, for example, G. Bamber et al.: "Collective bargaining", in R. Blanpain (ed.): *Comparative labour law and industrial relations in industrialised market economies*, 6th and revised edition (The Hague, Kluwer, 1998), p. 414; G. Casale: *Union representativeness in a comparative perspective*, ILO-CEET Working paper No. 18, (Budapest, ILO, 1996).

41 These paragraphs read:  
"(1) In countries in which procedures for recognition of public employees' organizations apply with a view to determining the organizations to be granted, on a preferential or exclusive basis, the rights provided for under Parts III, IV or V of the Labour Relations (Public Service) Convention, 1978, such determination

countries has promoted the realization of this outcome<sup>42</sup> and many countries work with rules that afford recognition to the most representative unions only. A Canadian account reveals the policy considerations at work:

“ We made a conscious, sustained effort... under the [British Columbia] Labour Code to avoid fragmentation in new bargaining relationships, and to seize any opportunities to put together single, all-employee units in existing relationships...

When a new Crown Corporation was created to operate the extensive ferry service between Vancouver Island and the Lower Mainland, the Labour Board was required for the first time to determine the appropriate bargaining units on the ferry system under the Labour Code. The trade unions proposed to divide up the employees into two units: a general “unlicensed” unit to be represented by the Marine and Ferry Workers, and the licensed officers – master, mates, engineers, et al – who probably would be represented by the Canadian Merchants Services Guild. They were persuasive reasons for holding that the officers did have a separate community of interest: the special training in skills which they had to establish to obtain their licenses, the authority they exercised over the vessel and its crew, and a lengthy history of separate craft representation in the larger maritime industry. Undoubtedly, licensed officers had prospered greatly with their own trade union, and they were determined to retain that on the B.C. Ferry Authority.

Notwithstanding that powerful case, we rejected the claim for a separate unit. The ferry system was a vital transportation link upon

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should be based on objective and pre-established criteria with regard to the organizations' representative character.”

“(2) The procedures referred to in subparagraph (1) of this Paragraph should be such as not to encourage the proliferation of organizations covering the same categories of employees.”

- 42 “Regulating the bargaining structure also means influencing who gets to bargain over what. In the Nordic countries, such regulations have especially applied to the state sector. Without exception, the state has forced the union side to form coalitions or bargaining cartels. These cartels are either given exclusive bargaining rights, or priority rights in bargaining over the most important collective agreements. The outcome of these measures is the uniform regulation of wages and working conditions within a highly centralized bargaining system. Unions are forced to compromise internally before they meet their opponent, and a majority coalition of union cartels and the state will usually stand very strong against outsiders. Independent unions may exist, but will have severe problems in altering a majority deal.” T. Stokke and A. Seip: “Collective dispute resolution in the public sector: The Nordic countries compared”, in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 60, No. 4, p. 565.



which the British Columbia public had to rely. The policy of minimizing industrial conflict which fragmentation might produce on a sensitive public utility such as this simply had to outweigh the values of self-determination for one particular occupational group of employees.

Licensed officers would not be forced to engage in collective bargaining. But if that was their preferred method for dealing with their employer, then we felt they had to accept the larger logic of that process. The licensed officers did not have an inalienable right to go off and “do their own thing” in their own interests. Instead, the officers had to pool their bargaining resources into a single structure which would negotiate a collective agreement for the crew as well.<sup>43</sup>

It can be inferred that exchanges may occur in a more orderly manner when public sector authorities deal with a limited number of union counterparts.<sup>44</sup> The inter-union rivalry factor with its disruptive potential may be addressed before the bargaining process gets underway.<sup>45</sup> With a limited number of unions, the scope for leapfrogging in bargaining demands from a multiplicity of unions is kept firmly in check and the structure of negotiations itself obliges the unions to aggregate and then mediate internally the claims of all segments or at least a wide cross-section of the workforce. However, if only the most representative union enjoys preferential or exclusive bargaining

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43 P. Weiler: *Reconcilable differences: New directions in Canadian labour law* (Toronto, Carswell, 1980), pp. 159–60. The author is recounting his experiences as Chairman of the British Columbia Labour Board during the mid-1970s.

44 It must be noted that some governments have supported unions in order to strengthen collective representation, even when it may encourage such proliferation. For example, some Baltic governments supported the expansion of trade union membership, which requires resources that trade unions with low membership rates may not have. (European Foundation for the Improvement of Living and Working Conditions: *Trade union strategies to recruit new groups of people* (Dublin, 2010), p. 28).

45 It must be noted that unions do not just compete with each other, but also cooperate both at national and international level. For example, trade unions in Malta addressed the issue of migrant workers with the help of the Italian CGIL confederation. (European Foundation for the Improvement of Living and Working Conditions: *Trade union strategies to recruit new groups of people* (Dublin, 2010), p. 28). At European level, the European Federation of Public Service Unions and the European Confederation of Independent Trade Unions (CESI) signed a Cooperation Agreement which came into force on 1 January 2005. In the agreement the unions established a joint delegation to represent central administration workers in the national administration social dialogue, which was formalized in December 2010 with the sectoral social dialogue committee. See M. Albertijn: “New sectoral social dialogue committee for central government administrations,” in EIROOnline, March 2011, <http://www.eurofound.europa.eu/eiro/2011/02/articles/eu1102011i.htm> (accessed 27 Oct. 2011).

rights, decisions to determine the most representative organization should be made on the grounds of objective and pre-established criteria in order to avoid any opportunities for abuse or partiality. And even though public authorities have the right to decide whether they will negotiate at regional or national level, the workers should be entitled to choose the organization which represents them in the negotiations.<sup>46</sup>

Another alternative is “single-table” bargaining, in which several unions representing all employees in a single bargaining unit converge in a single bargaining process.<sup>47</sup> This became commonplace in the public sector in the UK during the 1990s.<sup>48</sup> Another example can be found in the bargaining for employees of the State of Washington in the United States, where all unions representing less than 500 workers each bargain with the state government at a single, multi-union table.<sup>49</sup> This will be discussed below, under the heading Mediating conflicts of interest within parties.



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- 46 ILO: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition (Geneva, 2006), Paragraphs 962 and 963.
- 47 For a detailed discussion of single-table bargaining, see J. Gennard and G. Judge: *Employee relations* (London, Chartered Institute of Personnel and Development, 2005).
- 48 A. Bryson and D. Wilkinson: *Collective bargaining and workplace performance* (London, Department of Trade and Industry, 2000), p. 3.
- 49 Revised Code of Washington (RCW) Sec. 41.80.010. Unions that represent more than 500 workers negotiate with the government at separate tables.



Traxler and Brandl have drawn a model of three main categories of bargaining. According to the model, the three categories differ in their breadth and relationship to sector-specific interests:

“Peak-level coordination is most encompassing. It is performed by the cross-sectoral confederations which carry out their coordination activities either directly or orchestrating the bargaining policies of their affiliates or directly by negotiating centralized accords on behalf of them. In either case this means that sector-specific interests must be unified, such that joint strategies can be pursued. The pattern bargaining represents intermediate encompassment. Coordination is based on the leading role of one certain sector in pay setting, while the other sector follows. The uncoordinated bargaining means that the distinct bargaining units set their wages independently of each other. Therefore, not any kind of intentional coordination across sectors takes place.”<sup>50</sup>

#### 4. Structuring the bargaining: levels of bargaining and coordination between levels

The ILO’s Collective Bargaining Recommendation, 1981 (No. 163), states that member states should endeavour to make collective bargaining possible at all levels, “including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels”. In those states that establish several levels of bargaining, “the parties to negotiations should seek to ensure that there is coordination among these levels”.

There is no universal prescription regarding the levels of bargaining. Country circumstances and dynamics are so diverse as to allow wide latitude. The appropriate level or levels for bargaining will depend on the strength, interests, objectives and priorities of the parties covered, as well as the structure of the

50 F. Taxler, and B. Brandl: “Collective bargaining, Macroeconomic performance, and the sectoral composition of trade unions”, in *Industrial Relations*, (Oakland, CA, University of California, 2010), Vol. 49, No. 1, Jan., p. 100.

trade union movement, the representatives of the government and traditional patterns of industrial relations.<sup>51</sup> Whether negotiations take place at national, sectoral or regional level, each level may have different jurisdiction, authority over personnel matters, revenue sources and fiscal autonomy.

Some systems adopt a central or sectoral framework, supplemented with negotiations in decentralised settings, to provide orderliness to bargaining and promoted self-regulation. For example, a two-tier bargaining model has been developed in Sweden, Denmark, Norway and Finland with the sectoral level defining procedural rules and an economic framework (sometimes including pay parameters) for local bargaining. Some of the substantive bargaining – for instance, actual wages – has then been devolved to lower levels.<sup>52</sup>

South Africa has also adopted this approach to public sector collective bargaining by establishing a nationwide Public Service Coordinating Bargaining Council with bargaining responsibilities covering all matters that:

- (i) “are regulated by uniform rules, norms and standards that apply across the public service; or
- (ii) apply to terms and conditions of service that apply to two or more public sectors; or
- (iii) are assigned to the State as employer in respect of the public service that are not assigned to the State as employer in any other sector”.<sup>53</sup>

The bipartite Bargaining Council was assigned the task of establishing a second layer of sectoral bargaining councils within the country. As a general rule, these second-tier bargaining forums – for instance, the Education Labour Relations Council – conclude agreements on substantive issues in the relevant sector

51 ILO, “Substantive provisions of labour legislation: Effective recognition of the right to collective bargaining”, in ILO: *Labour Legislation Guidelines*, Chapter III, <http://www2.ilo.org/public/english/dialogue/ifpdial/llg/index.htm> (accessed 27 Oct. 2011).

52 T. Stokke and A. Seip: “Collective dispute resolution in the public sector: The Nordic countries compared”, in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 60, No. 4, p. 562.

53 Section 36 of the Labour Relations Act 1995.



such as wages and conditions of service, but then allow further devolved provincial chambers of the Council to assume responsibility for both implementation and local variation.

Centrally agreed dispute resolution procedures typically regulate lower level disagreements in both South Africa and the Nordic countries. This structure allows for issues at a local level to progress up the system and be dealt with by ever more senior personnel should they remain unresolved – a feature that boosts the self-regulating nature of the entire system.

Argentina ratified the Labour Relations (Public Services) Convention, 1978 (No. 151) in 1987. To implement it, the 1992 Law on Labour Collective Agreements (Act No. 24.185) established the standards for collective bargaining in public administration at national level. Under the Act, unions are represented in the bargaining process in proportion to their number of members. In practice, this means that more than one union can represent the same constituency.<sup>54</sup>

The Argentinean labour relations system recognizes two kinds of workers' associations: the registered unions (*inscripta*) and those that have trade union status (*personería gremial*). "While the *personería* is the State's recognition of the most representative union (that with the most members in a particular constituency), in theory, a second organization may arise that will eventually be granted the *personería* if it represents a 'considerably higher' number of workers than the first. Until that time, however, the second organization will not be permitted to take

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54 A. Cardoso and J. Gindin: *Industrial relations and collective bargaining: Argentina, Brazil and Mexico compared*, Working paper No. 5, ILO Industrial and Employment Relations Department (Geneva, ILO, 2009); J. Bonifacio and G. Falivene: *Análisis comparado de las relaciones laborales en la administración pública latinoamericana. Argentina, Costa Rica, México, y Perú* (Caracas, Banco Interamericano de Desarrollo, Centro Latinoamericano de Administración para el Desarrollo, 2002); M. Wegman: *Aportes a la profesionalización del servicio civil en el gobierno federal de la República Argentina a través de al negociación colectiva*, XV Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Santo Domingo, Dominican Republic, 9–12 Nov. 2010.

part in collective bargaining, nor will it have access to union quotas from its affiliates.”<sup>55</sup>

Under Act No. 24.185, separate negotiating commissions carry out general and sectoral negotiations in the public services. They consist of state and worker representatives, coordinated by the Ministry of Labour. Some sectoral agreements currently in place cover National Lottery, Teaching, Food Safety, Park Security, and National Arts workers.<sup>56</sup>

Uruguay also adopted such a structure in 2005. The Superior Council of Public Sector Collective Bargaining has representation from four central government agencies and an equal number of union representatives, meets upon request of any of its members and makes decisions by consensus. Sectoral (second-tier) and agency (third-tier) level bargaining is conducted separately and deals with the same subjects, within the limits established by agreements reached at a higher level. The Ministry of Labour, which chairs the Superior Council, is charged with coordinating the levels.<sup>57</sup>

In Italy, the Agency for the representation of public administrations in collective bargaining (ARAN) was introduced with the decentralization of public administration in 1993 and is responsible for representing the government in collective bargaining with the public sector trade unions. Bargaining is conducted through designated bargaining units, both nationwide and in each decentralised public agency.

Representation by ARAN is compulsory for various individual

55 A. Cardoso and J. Gindin: *Industrial relations and collective bargaining: Argentina, Brazil and Mexico compared*, Working paper No. 5, ILO Industrial and Employment Relations Department (Geneva, ILO, 2009), p. 15.

56 A. Cardoso and J. Gindin: *Industrial relations and collective bargaining: Argentina, Brazil and Mexico compared*, Working paper No. 5, ILO Industrial and Employment Relations Department (Geneva, ILO, 2009); J. Bonifacio and G. Falivene: *Análisis comparado de las relaciones laborales en la administración pública latinoamericana. Argentina, Costa Rica, México, y Perú* (Caracas, Banco Interamericano de Desarrollo, Centro Latinoamericano de Administración para el Desarrollo, 2002); M. Wegman: *Aportes a la profesionalización del servicio civil en el gobierno federal de la República Argentina a través de la negociación colectiva*, XV Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Santo Domingo, Dominican Republic, 9–12 Nov. 2010.

57 Act No. 18508, 26 June 2009, articles 10–14.



administrations such as ministries, schools, health and social security bodies.<sup>58</sup>

“ Aran operates as a service structure for [these administrators.]... [T]he various administrations... exercise a “power of direction” over Aran as regards national collective bargaining, setting up sector committees for this purpose. A sector committee will be created for each sector of collective bargaining - health, local authorities, research, universities and non-economic public bodies (ie social security). However, as regards the ministries, schools and some public utilities (the fire service and a few others), it is the President of the Council of Ministers, through the Civil Service Ministry, who will act as the “sector committee”.

Each committee, and the President of the Council of Ministers for the central state administrations, will set guidelines and objectives for collective bargaining as each agreement comes up for renewal, while Aran must keep them constantly informed on the progress of negotiations. Once a provisional agreement has been reached, the Agency must obtain the committees’ approval of the draft before it is definitively signed. The law therefore provides that the sector committees must be expressly involved in the ratification of collective agreements, thus establishing a relationship with Aran which to a certain extent resembles the relationship between base/membership and bargaining agents in the private sector.<sup>59</sup>

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58 European Federation of Public Service Unions: *Collective bargaining, country profiles: Italy*, <http://www.epsu.org/r/471>; “Decentralised bargaining in the public sector examined”, in EIROOnline, Mar. 2003, <http://www.eurofound.europa.eu/eiro/2002/12/feature/it0212209f.htm>; and “Reform of public sector bargaining agency approved”, in EIROOnline, Nov. 1997, <http://www.eurofound.europa.eu/eiro/1997/11/feature/IT9711217F.htm> (all URLs accessed 27 Oct. 2011).

59 “Decentralised bargaining in the public sector examined,” op. cit.

## 5. Bargaining approaches and models

### The positional model

Since collective bargaining as an institution emerged in conditions of hostility, it is surrounded by an adversarial culture.<sup>60</sup> Some countries have forged historic pacts, turning social antagonists into social partners, but generally speaking – and perhaps particularly in societies under the sway of an Anglo-Saxon worldview – positional bargaining is fractious.<sup>61</sup> In fact, analysts of the art of negotiation have been able to compile a list of positional bargaining behaviours:

- Develop target and resistance positions in advance
- Overstate opening positions
- Commit to these positions early and publicly
- Channel communications through a spokesperson
- Give as little as possible for what you get
- Never “bargain against yourself”
- Always keep the other side off balance
- Use coercive forms of power
- Mobilize support from constituents
- Divide and conquer the other side; protect against the same on your side
- An agreement reluctantly accepted is a sign of success<sup>62</sup>

60 Researching the situation in Europe from medieval times through to the nineteenth century, Jacobs records that “public authorities everywhere were very suspicious of workers’ organizations. One reason they had for repressing those combinations was the concern for public order since combinations were very often associated with unrest or violence.” A. Jacobs: “Collective self-regulation”, in B. Hepple: *The Making of Labour Law in Europe* (London, Mansell, 1986), p. 197. The progression has been from repression through toleration to (ambivalent) recognition.

61 “The system has [been], and continues to be adversarial because, when collective bargaining was created, it was believed that capital and labour would be eternal enemies or eternally in conflict. Thus, a system of law and regulations, and federal agencies like the FMCS, were created to take that conflict out of the streets and channel it into collective bargaining and lawful strikes, walkouts or economic pressure.” P. Hurtgen (Director, United States Federal Mediation and Conciliation Service): *Collective bargaining and individual rights: The changing dynamics of workplace dispute resolution*, The Henry Kaiser memorial lecture, The Georgetown University Law Center, November 13, 2003, edited excerpts, [http://fmcs.gov/assets/files/Articles/Kaiser\\_Lecture.htm](http://fmcs.gov/assets/files/Articles/Kaiser_Lecture.htm) (accessed 27 Oct. 2011).

62 J. Cutcher-Gershenfeld: “How process matters”, in T. Kochan and D. Lipsky: *Negotiations and change* (Ithaca, NY, Cornell University Press, 2003), p.143.



While the positional mode may be understandable in its historical context and is widely functional, its limitations are easy to identify as well. Modern-day workplaces are at least as much about shared as conflicting interests. Wide-ranging research and experience show that great workplaces – productive, high-performance organizations where people want to work – are characterized by relationships of trust and respect amongst all stakeholders.<sup>63</sup> Positional bargaining may discourage joint creativity and fails to exploit the considerable scope on offer for mutual gain.

Significantly, the style of negotiation in some rapidly modernizing countries is replicating in key senses the historical experience of now post-industrial societies. Positional bargaining – discussed further below – is emerging as the default mode. This publication hopes to encourage the parties in such countries to explore different pathways at an early point in their bargaining development.

#### *The mutual gains model*<sup>64</sup>

The development of alternative models of negotiation has emerged during past years, variously described as mutual gains, interest-based, win-win, integrative and principled bargaining. The approach seeks to promote productive bargaining through the following principles:

- a careful appreciation of one's own and the other parties' interests and needs, rather than the dogged advancement of pre-set negotiating positions;

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63 See, among many sources, J. Rogers and W. Streeck (eds.): *Works councils: Consultation, representation, and cooperation in industrial relations* (Chicago, University of Chicago Press, 1995); G. Leminsky: "Everything you always wanted to know about Mitbestimmung", in *Die Mitbestimmung* (Düsseldorf, Hans Böckler Foundation, 1999), pp. 46–50; D. Hull and V. Reid: *Simply the best workplaces in Australia*, ACIRRT Working paper No. 88 (Sydney, University of New South Wales, 2003); T. Kochan and P. Osterman: *The mutual gains enterprise* (Boston, Harvard Business School Press, 1994); J. Gittel: *The Southwest Airlines way* (New York, McGraw-Hill, 2003); D. Weiss: *Beyond the walls of conflict* (Toronto, Irwin, 1996); and the Great Place to Work Institute, <http://www.greatplacetowork.com> (accessed 27 Oct. 2011).

64 For a discussion focused squarely on the public sector (in a Canadian context), see N. Caverly, B. Cunningham and L. Mitchell: "Reflections on public sector-based integrative collective bargaining: Conditions affecting cooperation within the negotiation process" in *Employee Relations* (Glasgow, University of Strathclyde, 2006), Vol. 28, No. 1, p. 62.

- a high level of information exchange;
- attempts to “grow the pie” over the next bargaining cycle before cutting it;
- creatively generating options that promote shared interests and reconcile different or conflicting interests;
- problem solving; and
- the realization that process matters.

The mutual gains model turns on an empowered bargaining process as an alternative to relying on economic power, whether exercised by the employer, workers or their representatives. The theory is that:

- there is power in developing a good working relationship: where parties grow trusting and respectful relationships, they can negotiate with one another more safely and can influence one another more creatively and to reciprocal degrees;
- there is power in understanding interests: the more one understands the other side’s concerns, and the more faithfully one conveys one’s own, the more the prospects for an agreement that meets both sides’ interests are enhanced;
- there is power in inventing an elegant solution: information sharing and real engagement help to produce options and then solutions that would otherwise never have been uncovered;
- there is power in commitments: if the one side is prepared to commit and trust that the other will as well, much more can be achieved in the agreement-making process.<sup>65</sup>

65 See R. Fisher, W. Ury and B. Patton: “Negotiation power: Ingredients in an ability to influence the other side”, in L. Hall (ed.): *Negotiation strategies for mutual gain* (Thousand Oaks, CA, Sage Publications, 1993), p. 6 and following, partially reproduced here.



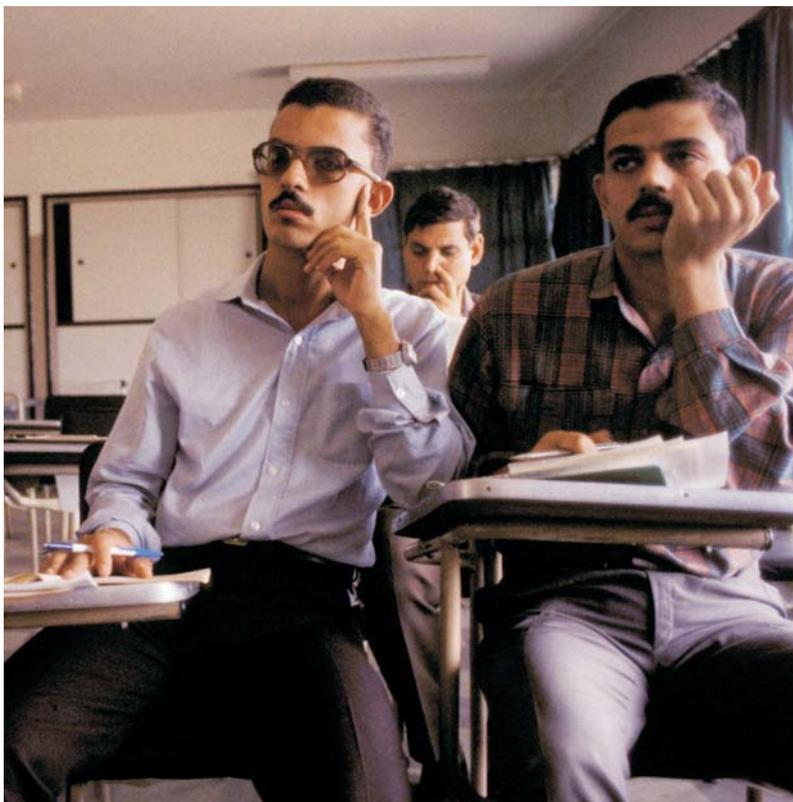
The differences between positional and mutual gains bargaining have been instructively summarized as follows:

**Table 1**

	<b>Interest-based bargaining<sup>1</sup></b>
The main focus is to give as little and to get as much as possible	The main focus is to ensure that the interests of each side are addressed
The parties prepare separately by drafting opening positions as targets	The parties prepare together by agreeing on ground rules and ways of working
These positions take the form of “wish lists”. The parties frequently table “unreal” positions that they can subsequently “concede”	The parties prepare separately by discussing interests with constituents.
They also prepare resistance points above or below which they are not prepared to go	If constituents present positions the negotiators convert these into interests
The negotiations take the form of two sides bargaining across a table with breaks for caucus meetings; options are explored in private sessions	They approach bargaining with open minds as to what the final agreement might be
If the parties undergo negotiation training it is done separately	The negotiations take the form of one group with occasional breaks for caucus or side meetings; options are openly explored in joint sessions
The negotiations open with positional statements and follow a sequence of offers and counteroffers with frequent deferrals and breakdowns	If using IBB for the first time, the parties undergo joint training
Information is kept “tight” and only disclosed under pressure or to extract a concession	The negotiations open with discussions around an issue and each party’s interests underlying that issue followed by a problem-solving sequence

Decisions are made by compromise or under pressure	Information is openly shared and research is usually conducted jointly
Mainly involves industrial relations managers and union officials	Decisions are made by consensus after an agreed objective evaluation of options
Spokespersons present key positions and moves	Involvement is extended to others with expertise around relevant topics
Each side attempts to keep the other under pressure through power tactics	Spokespersons outline key interests but all members participate
The parties use a facilitator when they reach an impasse	The parties agree not to use pressure as a negotiation lever

<sup>1</sup> Source: Barrett J. and O'Dowd J. *Interest-based bargaining – A users' guide* (Trafford, 2005), p.39.



Another way of delivering these results has been framed as “mutual gains negotiation,” explained in the following box.

### A guide to mutual gains negotiation

#### 1. Pre-negotiation meeting

- agree an overall goal for the negotiation
- agree to negotiate as far as possible in a needs-based way
- share your own needs, interests, fears, concerns and expectations
- seek to understand the needs, interests, fears, concerns and expectations of the other party
- clarify the issues to be negotiated, including outstanding matters
- settle any issues capable of easy settlement to promote a culture of agreement
- agree a date, time and place for the first negotiation

#### 2. After the pre-negotiation meeting but before negotiations commence

- determine the composition of your negotiating team and agree ground rules for the conduct of the team
- share with your constituency the needs, interests, fears, concerns and expectations of the other party
- be aware of the value of an early moderation of your constituency's expectations
- generate creative options for meeting the needs, interests, fears, concerns and expectations of the other party
- seek to obtain flexible mandates from your constituency, ones which will assist you satisfy the other party and which will not create obstacles to needs-based bargaining
- resist making positional demands, instead make needs-based proposals
- obtain as much information as possible to substantiate your needs and to give you insight into the needs of the other side
- determine your and their best alternative to a negotiated agreement (BATNA)<sup>1</sup> and strengthen yours if possible

### 3. At the commencement of the negotiation process

- welcome the other party to the negotiation
- introduce your team
- settle the housekeeping matters, including:
  - start and end times
  - tea and lunch arrangements
  - smoking regulations
  - casual dress code
  - setting limits to interruptions, including turning cell-phones off
- agree to meeting ground rules including that participants:
  - will as far as possible follow the process as agreed
  - will seek first to understand and then to be understood
  - will listen carefully
  - will speak in turn and not interrupt one another
  - may be assertive but polite and respectful of one another
- agree to caucus ground rules including that:
  - parties may request caucuses at any time
  - caucusing will take place only once parties have fully explored the issues raised by the other party
  - the party requesting the caucus will leave the room
  - the party requesting the caucus will indicate realistically how long they require to caucus
  - if it appears that a caucus will take longer than anticipated then the caucusing party will inform the other party and indicate a new time
  - reaffirm your commitment to your agreed goal for the negotiation and to needs-based negotiation
  - agree that all that is said in the negotiation will be off the record unless agreed otherwise
  - confirm that summary minutes will be kept i.e. minutes reflecting the attendance, matters of record including issues addressed and agreements reached, and the way forward after each meeting
  - confirm that minutes will be circulated to all participants in the meeting within a reasonable period of time of the meeting.



#### **4. Clarifying and developing an understanding of the issues for both parties**

- first party to present their needs, interests, fears, concerns, expectations and proposals
- frame issues in collaborative and solvable ways
- second party to present their needs, interests, fears, concerns, expectations and proposals
- frame issues in collaborative and solvable ways
- needs, interests, fears, concerns, expectations and proposals of both parties to be fully explored
- list and agree all the issues for negotiation
- agree on order of issues to be dealt with (consider starting with easier issues, urgent issues or issues that will help clarify others)
- if appropriate, parties to provide one another with information to promote an understanding of issues
- continue to clarify issues with particular regard to needs, interests, fears, concerns and expectations
- track and focus the discussions
- identify areas of common concern and competing interest

#### **5. Developing and selecting options for agreement**

- taking each issue one at a time, generate as many possible ways of meeting the needs of each party and “making the pie bigger”
- invent options without committing
- use criteria and standards as a basis to evaluating and choosing options
- analyse options to see which ones both parties can accept
- seek to influence and be open to be influenced
- separate and integrate issues as necessary
- consider linking and trading issues
- try hypotheticals i.e. ‘what if..?’
- consider creating sub-groups/task teams/commissions to develop proposals
- consider using a single text document to reach consensus
- keep options tentative and conditional until all issues have been agreed
- identify areas of agreement
- package acceptable options into an overall agreement
- minimize formality and record-keeping until final agreement is reached

## 6. Reaching agreement

- draft an agreement
- ensure mutual understanding of the terms of the agreement
- specify who, what, where, when and how agreement will be implemented
- set out evaluation, implementation and follow-up details
- consider report back procedures including the idea of a joint statement to constituencies
- include procedures in the event of deadlock
- if a final agreement is difficult to arrive at, consider agreements in principle, tentative agreements, interim agreements, partial agreements, agreement on goals, agreement on process
- resist positional bargaining as far as possible
- if a final agreement is not possible then reality test, compromise, take a break, discuss alternative ways of reaching agreement such as the involvement of a third party, capture what has been agreed and narrow down what is in dispute

*Source: International Training Centre of the ILO: Joint union–management negotiation skills training for social partners on conflict prevention and negotiation skills, Training package, June 2005, pp. 53–56.*

<sup>1</sup> “BATNA” refers to a party’s fall-back if negotiations fail – the other options available. It is often the key to understanding the trade-offs facing each side. Determining BATNAs involves a careful exploration of each party’s power- and rights-based alternatives to reaching agreement. BATNAs are the starting point to all negotiation. A realistic understanding of one’s own and the other parties’ BATNAs is vital to determining the negotiating power in any negotiation.

### *The blended model*

Not all parties who find the positional model limiting or dysfunctional are prepared to embrace the full mutual gains alternative. There can be several reasons for this, such as if requisite levels of trust are not in place to allow, for instance, extensive information-sharing; principals or constituencies do not know enough about the alternative model to support it; or it may be that a more arms-length relationship between the parties is necessary to avoid co-option; and so on.

Despite these sorts of reservations, the parties may prefer to adopt elements of mutual gains bargaining in a selective way. So, for instance, interest-based problem-solving methods have



been used to deal with bargaining matters which are more integrative in character such as training, work-life balance, occupational health and safety and the workplace environment while accepting that positional bargaining methods will still feature as the principal determinant of distributive matters such as wages and benefits.

Sheer support for pragmatism has sometimes moved parties to adopt a more hybrid approach. “Modified traditional bargaining” or “blended bargaining” is now offered by the Federal Mediation and Conciliation Service (FMCS) in the United States and is also used by independent facilitators in countries such as Australia and South Africa, to mention a few.

With the aim of offering parties as many options and as much flexibility as possible, FMCS mediators have in recent years developed a mixed model of “traditional” (positional) and modified traditional bargaining, known as “Enhanced Cooperative Negotiation” (ECN):

ECN was placed squarely between traditional bargaining and [Modified Traditional Bargaining] MTB on the bargaining process continuum, thus creating a full spectrum of dispute resolution process options for the mediator to utilize. ECN was clear about its goals. It had to be simple; not require extensive training; not interfere with the parties’ normal bargaining committee structures; promote communication and an understanding of interests that lie underneath the issues; and utilize the traditional bargaining process...

ECN can roughly be described as a three-part process: (1) mediator-facilitated issue preparation and exchange; (2) proposal preparation and exchange; and (3) traditional collective bargaining.”<sup>66</sup>

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66 C. Brommer, G. Buckingham and S. Loeffler: *Cooperative bargaining styles at FMCS: A movement toward choices* (Washington, DC, Federal Mediation and Conciliation Service, 2002), p.32, <http://admin.fmcs.gov/assets/files/Articles/Pepperdine/CBStylesatFMCS.pdf> (accessed 27 Oct. 2011).

### *Consultation and bargaining*

Through consultation, the social partners not only share information, but also engage in more in-depth dialogue about issues raised. While consultation itself does not carry with it decision-making power, it can take place as part of such a process.<sup>67</sup> Consultation requires an engagement by the parties through an exchange of views which can lead to more in-depth dialogue. While many institutions make use of consultation and information-sharing, some are empowered to reach agreements that can be binding. Those social dialogue institutions which do not have such a mandate often provide advisory services to ministries, legislators and other policy-makers and decision-makers.<sup>68</sup>

The Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113) establishes that measures should be taken in order to promote effective consultation and cooperation between public authorities and employers' and workers' organizations without discrimination of any kind against these organizations. Consultations should aim at ensuring that the public authorities seek the views, advice and assistance of these organizations, particularly in the preparation and implementation of laws and regulations affecting their interests.<sup>69</sup> In addition, the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations have stated that when a government seeks to alter bargaining structures in which it acts directly or indirectly as employer, it is particularly important to follow an adequate consultation process, so that all objectives can be discussed by all parties concerned. Such consultations imply that they have been undertaken in good faith and the parties have all necessary information to make an informed decision.<sup>70</sup>

67 J. Ishikawa: *Key features of national social dialogue: A social dialogue resource book* (Geneva, ILO, 2003).

68 See more: <http://www.ilo.org/public/english/dialogue/ifpdial/sd/index.htm> (accessed 27 Oct. 2011).

69 Para. 1 and Para. 3.

70 ILO: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition (Geneva, 2006), Paragraphs 1068 and 1086.



## Consultation over changes in terms and conditions of employment

It has been seen in the past that unilateral management decision-making that impacts on worker interests kindles worker reaction, including industrial action. In fact, some of the very first pieces of industrial legislation in the early twentieth century included “status quo” provisions designed to check and even reverse unilateral action.<sup>1</sup>

Australia’s Fair Work Act 2009, again, provides for model consultation terms to be included in the awards and collective agreements that regulate most of the labour market. The Higher Education Award’s expression of the obligation is typical:

### Consultation regarding major workplace change

#### Employer to notify

- (a) Where an employer has made a definite decision to introduce major changes in production, programme, organization, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.
- (b) Significant effects include termination of employment, major changes in composition, operation or size of the employer’s workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.



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### Employer to discuss change

- (a) The employer must discuss with the employees affected and their representative, if any, the introduction of the changes referred to in clause 8.1, effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.
- (b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes.
- (c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.<sup>4</sup>

<sup>1</sup> See, for instance, the *Canadian Industrial Disputes Investigation Act of 1907* and the *Transvaal Industrial Disputes Act 1909*.

<sup>2</sup> *Directive 2002/14/EC*.

<sup>3</sup> *The Information and Consultation of Employees' Regulations 2004 – DTI Guidance 2006*, accessible at [www.berr.gov.uk/files/file25934.pdf](http://www.berr.gov.uk/files/file25934.pdf).

<sup>4</sup> *Clause 8 of the Higher Education Industry – General Staff – Award 2010*.

### Changing mindsets

For employers and unions in the public sector to reap the benefits of dispute-minimizing models of collective bargaining, two matching changes in thinking must occur:

- governments should fully recognize trade unions for collective bargaining and related engagement purposes; the representative role of trade unions flowing from the principles of freedom of association must be fully respected.

In some countries, the right of freedom of association has been secured by constitutional law, giving it higher



legal status than regular laws have, and making it a fundamental right. Other countries have regulated in detail the position of trade unions and their right to take part in collective bargaining, as part of regular laws. In addition, some countries have implemented international labour standards such as C 151, which binds them to respect these rights because of constitutional or legal mandate.<sup>71</sup>

For example in Argentina, Brazil and Mexico, labour law is enshrined in the constitution, establishing: formal standards for collective bargaining including the representation of interests and conflict mediation, substantive rights related to working terms and conditions (including remuneration and health standards) and the role of the state as guardian recognizing the weak position of workers, actions and reach of the trade union representation. Although the precise content and wording of the regulations within these three countries vary, regulations in all three cover the following: working hours, the prohibition of night work for women and youth, a minimum working age, entitlement to one day off each week, special rights for women during and after pregnancy, the definition of a minimum salary based on the basic needs of a worker who is the head of a family, equal pay for equal work, salary protection, limits on overtime, the right to housing and schooling, employer responsibility for work-related accidents and diseases, minimum occupational safety and health standards, the right of association for workers and employers, the right to strike, tripartite bodies for conflict resolution, labour courts, compensation for unjust dismissal and the non-renounceable character of labour rights.<sup>72</sup>

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71 Some model provisions on freedom of association can be found in <http://www.ilo.org/public/english/dialogue/ifpdial/llg/index.htm> (accessed 27 Oct. 2011).

72 A. Cardoso and J. Gindin: *Industrial relations and collective bargaining: Argentina, Brazil and Mexico compared*, Working paper No. 5, ILO Industrial and Employment Relations Department (Geneva, ILO, 2009).

- Government worker unions must move beyond their traditional “defender” role to incorporate also a “contributor to the organization” role, and then be able to manage the dualism successfully.<sup>73</sup> This requires, among other things, that leaders and negotiators are exposed to new possibilities in collective bargaining.

### *Lessons for public sector bargaining*

Conflict prevention should be a prime consideration when designing measures to introduce or strengthen collective bargaining in public sector labour relations. Certain models of collective bargaining can prevent conflict better than others. However, measures geared towards mutual gains are more likely to render work satisfaction along with efficient and reliable service delivery for the public. This process requires careful decision-making by the government and trade unions when presented with opportunities to establish or reset their approaches to bargaining.



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73 See T. Huzzard, D. Gregory, and R. Scott (eds.): *Strategic unionism and partnership: Boxing or dancing?* (Houndmills, Hampshire, UK, Palgrave Macmillan, 2004) and EPMU, DWU and M. Ogden: *Building high performance workplaces: The union approach* (New Zealand, Centre for High Performance Work, 2010).



## Convention No. 154 and the public service<sup>74</sup>

The Convention acknowledges that collective bargaining in the public service may need to be addressed differently from other branches of economic activity. This is because its conditions of service are usually designed to achieve uniformity. These conditions are usually approved by parliament and apply to all public servants. They often contain exhaustive regulations covering rights, duties and conditions of service that leave little room for negotiation, and may require laws on conditions of service to be amended. Negotiations are, therefore, often centralized.

The unique situation of the public service in collective bargaining also results from its financing. Wages and other employment conditions of public servants have financial implications that must be reflected in public budgets. The budgets are approved by bodies such as parliaments, not always the direct employers of public servants. Negotiations with financial implications regarding the public service are, therefore, frequently centralized and subject to directives or the control of external bodies, such as the finance ministries or inter-ministerial committees.

These aspects are compounded by other issues such as the determination of the subjects that can be negotiated, the jurisdiction of the various state structures, as well as the determination of negotiating parties at different levels.

### Special modalities

Based on these issues, Article 1(3) of the Convention allows for “special modalities” of application that might be fixed by national laws or regulations, or by national practice for the public service. Special modalities could include:

- parliament or the competent budgetary authority setting upper or lower limits for wage negotiations, or establishing an overall budgetary package within which parties may negotiate monetary or standard-setting clauses;
- legislative provisions giving the financial authorities the right to participate in collective bargaining alongside the direct employer;
- harmonization of an agreed bargaining system with a statutory framework, as is found in many countries;
- the initial determination by the legislative authority of directives regarding the subjects that can be negotiated, at what levels collective bargaining should take place or who the negotiating parties may be. The determination of directives should be preceded by consultations with the organizations of public servants.

<sup>74</sup> Reproduced from S. Olney and M. Rueda: *Convention No. 154: Promoting collective bargaining* (Geneva, ILO, 2005), p. 14.

### *Positional bargaining: a public sector Achilles heel*

Public sector bargaining sometimes falls short. Predetermined monetary positions, established by ministers of finance and treasury officials who have set numbers according to a different cycle and a different dynamic, might be presented at the table. It aggravates matters when positions are declared publically; in other words entrenched to be defended. It encourages unions to respond in kind, with mass-mandated and inflated demands that must then be bargained down aggressively to be affordable.

It also does not help if the negotiating process itself is bypassed through recourse to the political and financial figures who are taking decisions on the strength of pressures not necessarily functional to optimum collective bargaining and, by that token, social outcomes. In this setting, information is imparted sparingly and tactically, not comprehensively or transparently. Bargaining in good faith and bargaining for mutual gain can become very difficult.

The parties, however, must recognize that collective bargaining reflects the workings and judgement of the wider democratic process. Rather, that decision-making in the political and budget-setting spheres is enhanced if an optimum model of workplace negotiation, mediation and, if need be, arbitration is allowed to run a less trammelled course. This can be seen to be largely a matter of sequencing and coordination, flowing from an understanding of how the institution of bargaining can make its best social contribution.

Mutual gains bargaining requires each party to consider carefully its and the other parties' interests or needs before proposing any solution to the issues, because pre-empting engagement with early answers can be seen as presumptuous. It negates shared ownership of not only the solution, but of the problem itself. It might even provoke a dismissive reaction.

The distinctive and most beneficial feature of mutual gains bargaining involves the joint exploration of issues, where options



can be generated and weighed up in a creative and protected environment, and qualitatively superior outcomes achieved.

Therefore, the parties should ideally arrive at the negotiations without positions, but with clearly articulated interests and issues, and with flexible mandates.

In order to eventually come up with optimal and rational solutions, these should be based on all the relevant information. Therefore, maximum disclosure of information, which is a matter of trust and good faith communication, is essential too.

A more supple alternative to the positional sequence might look something like this, following Convention No. 154:

- (i) Treasury or finance ministry officials provide “suggestive parameters” on wage outcomes for their negotiators in a pending bargaining process, consistent with overall budgetary planning and modelling.<sup>75</sup> These parameters may consist of flexible ranges of increases in the wage bill or total cost of the agreement.
- (ii) Bargaining ensues, with the parties having access to the key background analyses and data. A problem-solving, mutual gains-maximising approach is adopted in negotiations.
- (iii) The provisional bargaining outcome may be within or outside the scope of the previously supplied parameters. In the latter case, then the negotiators would jointly make a case to the purse string holders on why the earlier target figures should yield. If the argument succeeds, the provisional bargain is endorsed. If not, the parties either abandon or modify their earlier tentative deal or one or more of the parties

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<sup>75</sup> See ILO: *Freedom of association and collective bargaining* (Geneva, 1994), para. 263: “In the view of the Committee [of Experts on the Application of Conventions and Recommendations], legislative provisions which allow parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall ‘budgetary package’ within which the parties may negotiate monetary or standard-setting clauses . . . or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer are compatible with the Convention [98], provided they leave a significant role for collective bargaining.” And see also the extract from S. Olney and M. Rueda: *Convention No. 154: Promoting collective bargaining* (Geneva, ILO, 2005), reproduced in Box 1.

persevere with it through lawful means, including agreed dispute resolution mechanisms such as mediation, arbitration or the exercise of labour market power (see below).

Even if positional bargaining over money is unavoidable, the parties may approach the non-monetary aspects of the bargaining agenda in a more problem-solving way. Where the state employers cannot be weaned off their set ways, there is often still considerable scope for flexibly-minded negotiators to tackle other topics such as work-life balance, the organization of work and, indeed, even the distribution of the aggregate pay allocation in creative ways that best serve or reconcile the parties' respective interests.<sup>76</sup>

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76 In fact, issues covered by collective bargaining change over time and they mirror shifts in the labour market. Nowadays bargaining can cover topics such as telework, employment relationships, protection of personal data and alternative dispute settlement mechanisms. Also, in some countries bargaining can include issues in the areas of career development, leisure time, compensation, evaluation systems, bonuses/performance pay, family leave, pension schemes and further education; e.g. in Canada increasing attention is being focused on provisions such as medical coverage and pension security. In addition, an expanding topic has been compromise packages involving trade-offs agreed by the unions in exchange for commitments by employers to retain production and jobs in existing sites. In such packages concessions may be agreed as regards wage increases, working hours and certain other benefits in exchange for job security. Closely related to this type of agreement are so-called flexibility agreements to avoid redundancies, and employment and competitiveness pacts. Such agreements may include a range of issues relating to cost containment as well as working time, work organization and skill flexibility. However, there are conflicting views on the desirability and impact of such agreements (ILO: *Freedom of association in practice: Lessons learned*, International Labour Conference, 97th Session, 2008, pp. 23–25). The Wage Bargaining Report 2008 published by the Labour Resource and Research Institute (LaRRI) suggests that the trade unions should move away from the tradition of negotiating only for wages and include other benefits such as housing, transport, medical aid contribution and so on, which will eventually enhance the overall well-being of workers and their families. The Report also encourages workers and their trade unions not only to focus on better wage agreements but to also seriously consider alternative economic and social policies if the challenges of mass unemployment and poverty are to be overcome. (*Wage Gap Increases in Namibia: Wage Bargaining Report 2008*. Labour Resource and Research Institute (LaRRI), September 2009, p. 27-28).



## 6. Preparing for bargaining

Whatever the formal forms of any established bargaining framework are, the way in which parties set about bargaining may affect to the outcomes of the process.

Public sector bargaining, for understandable reasons, has a distinct political character to it.<sup>77</sup> Also, high expectations and disputant optimism might be nowhere more prevailing than in public sector bargaining. This may cause anger and disappointment later on, if expectations cannot be realized at the bargaining table.

Professionalism in negotiations demands, namely:

“ Acting to ensure that the right parties have been involved, in the right sequence, to deal with the right issues that engage the right set of interests, at the right table or tables, at the right time, under the right expectations, and facing the right consequences of walking away if there is no deal.<sup>78</sup>

This entails ensuring that the bargaining sessions are attended by unions and government officials with standing to represent the interests of those affected by the agreement. Also, that all the matters that affect the government and the workers, within legally established parameters, are discussed thoroughly. It entails as well that the bargaining representatives face each other in good faith, and that the timing is ripe to renew the relationship.

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77 Public service labour relations are characterized by excessive external political control of resources and activities (G. Casale and J. Tenkorang: *Public service labour relations: A comparative overview*, Paper No. 17, ILO Social Dialogue, Labour Law and Labour Administration Branch, (Geneva, ILO, 2008), p. 1–2).

78 D. Lax and J. Sebenius: *3-D negotiation* (Boston, Harvard Business School Press, 2006), p. 12.

### *Constituency education*

If bargaining is essentially seen as a contest, then the expectations over the process and over appropriate strategies and behaviours for negotiators will be coloured accordingly. If the negotiators wish to adopt alternative and perhaps more expansive approaches, then they would need to engage with their constituencies in an exploration, education and consent-gaining process well before the onset of any actual bargaining.

### *Flexible bargaining process*

With positional bargaining, the negotiators are typically constrained by relatively tight bargaining instructions. In a more expansive process, the negotiators will, in the first instance, look for guidance on interests rather than positions when interacting with their constituencies. At the outset of bargaining, their quest would be to secure flexible mandates from their constituents.



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### Tackling the crisis – Irish example

In Ireland, the government began negotiations with unions and employers in December 2008 on how to deal with the country's financial crisis. In January 2009 the parties agreed on a general framework but further talks on concrete implementation collapsed without an agreement. In March, the negotiations reopened but an agreement was not reached. In December, the unions gave their own proposition on how to tackle the crisis, but the government rejected it and gave its own proposition which included salary cuts: this was implemented through legislation and came into force on 1 January 2010. The measures were strongly opposed by the unions and industrial actions started at the beginning of 2010. In March 2010, however, the negotiations reopened once again and finally, at the end of March, the parties reached an agreement. According to the agreement there would be no further pay reductions from 2010 to 2014 and pay would be reviewed in the spring of 2011 and every year thereafter to see whether the savings made through public service moderation might allow salary increases. In addition, the 2010 salary reductions would be disregarded for the purposes of calculating pensions for those retiring in 2010 and 2011. The unions agreed to cooperate fully in redeployment within the public services as part of the modernisation of the public services allowing staff numbers to be reduced. It can be interpreted that without this kind of rather complex and abstract agreement it might have been very difficult for the parties to reopen negotiations and reach a solution.

*Source: The wrong target – how governments are making public sector workers pay for the crisis. Report compiled by Labour Research Department, commissioned by EPSU and financed by the European Commission 2010.*

### Mediating conflicts of interest within parties

Public sector bargaining is often conducted by multiple unions which represent different sectors engaged in the process. Thus, differences may occur between the unions, including over the substantive claims to be made in the negotiations. Inter-union discord can complicate the bargaining process, with the employer having to transact with various wishes and demands. Usually, the public resources for dispute prevention and resolution are available only in relation to bargaining proper – the interaction between employers and unions. However, the cause of bargaining might benefit if the services of independent facilitators and medi-

ators were on hand to manage inter-union dealings in the pre-bargaining phase. The assistance could extend to help with the design of the internal negotiation system, the facilitation of inter-union negotiations and then the mediation of any inter-union disputes.

## Research

With a view to a more informed bargaining process, it is essential that the parties are able to access quality research, in particular on relevant labour market economics.<sup>79</sup> While the bargaining process clearly involves much more than economic modelling, sound information and analyses serve not only as a reality check for negotiators but also as a resource for innovative solutions. It is also important that *all* parties have access to research of equivalent quality, better still the same research. Inequality in the resourcing of the bargaining process may itself figure as a source of mistrust and misperceptions. The Report of the International Labour Conference 97<sup>th</sup> Session (2008) suggests that information services such as public databases on all the collective agreements concluded can be helpful. For example, the website of the Central Organization of Finnish Trade Unions<sup>80</sup> offers information on collective agreements, situations of ongoing negotiations, industrial co-operation procedures, statistics concerning salaries, and links to pages which offer knowledge on the market situation. The general collective agreements in their entirety are available through another government-supported website, which can be accessed by any-

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79 “Public and private employers should, at the request of workers’ organizations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole as is necessary for meaningful negotiations . . . the public authorities should make available such information as is necessary on the overall economic and social situation of the country and the branch of activity concerned to the extent to which the disclosure of this information is not prejudicial to the national interest”. The Collective Bargaining Recommendation 1981, No. 163, Paragraph 7.

80 Specific information about the collective agreements, on-going negotiations and so on are available in Finnish at the web site of the Central Organization of Finnish Trade Unions, <http://www.sak.fi/english/whatsnew.jsp?location1=1&sl2=1&lang=en> (accessed 27 Oct. 2011).



one, free of charge.<sup>81</sup> The subject of research is returned to again below, under the heading *Joint investigation/research*.

### Country example: Canada

#### Supporting the bargaining process through research

The Public Service Labour Relations Board (PSLRB) in Canada is an independent body that administers the collective bargaining and grievance adjudication systems in the federal public service. While mediation and adjudication feature prominently in the work of the PSLRB, it also plays the role of resourcing the collective bargaining process through analysis and research. More specifically, it conducts compensation comparability studies and provides information that can be used by the parties in the negotiation and settlement of collective agreements.<sup>1</sup>

The Ontario Collective Bargaining Information Services unit provides a related service to a broader audience. It collects, analyses and distributes information on approximately 10,400 collective bargaining relationships in Ontario.

The service provides research and analytical support to a variety of clients including government, labour and management, school boards, law firms, negotiators and academics.

The service compiles and analyses labour relations trends, collective bargaining outcomes, wages and benefits, and prepares a number of related reports.

In addition to a labour relations/collective bargaining information database, an up-to-date collective agreements and arbitration decisions (awards) repository is maintained and made available to clients.<sup>2</sup>

<sup>1</sup> See <http://www.tbs-sct.gc.ca/rpp/2010-2011/inst/rlt/rlt01-eng.asp>.

<sup>2</sup> See [www.labour.gov.on.ca/english/lr/cbis.php](http://www.labour.gov.on.ca/english/lr/cbis.php).

### Risk analysis

In recent years there has been an increase in the body of literature in the area of risk analysis as an integral part of mediation

81 Finlex, <http://www.finlex.fi/en/> (English translations are available for some laws). Collective agreements are available in Finnish. However, the General Collective Agreement for Government (the latest: 28 Mar. 2010) is available in English (unofficial translation) on this web page of the Finnish Ministry of Finance: [http://www.vm.fi/vm/en/04\\_publications\\_and\\_documents/02\\_documents\\_on\\_personnel\\_management/02\\_sopimukset/20100301Genera/General\\_collective\\_agreement\\_with\\_annexes\\_final.pdf](http://www.vm.fi/vm/en/04_publications_and_documents/02_documents_on_personnel_management/02_sopimukset/20100301Genera/General_collective_agreement_with_annexes_final.pdf) (accessed 27 Oct. 2011).

and litigation. Risk analysis is an implied part of bargaining, too, as the concepts of “best and worst alternatives to negotiated agreements” (BATNAs and WATNAs) show.<sup>82</sup> However, it is never safe to assume that everyone is fully aware of the risks. Consequently, some facilitators and mediators advocate that negotiators should explicitly map out, in detailed written terms, the risks they confront.<sup>83</sup>

## 7. Promoting model workplaces

Independent statutory organizations such as the Advisory, Conciliation and Arbitration Service (ACAS) in the United Kingdom deploy extensive advisory services to assist employers, workers and unions to build workplaces with strong and respectful relationships, which might be the best way to prevent conflicts. The strategy is to encourage parties to think about a model workplace and then extrapolate its features. This has been illustrated in a supporting publication.<sup>84</sup> These agency services are available to the public sector also.

The Federal Mediation and Conciliation Service in the United States works similarly on a conflict prevention basis, providing

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82 See further, R. Fisher, W. Ury and B. Patton: *Getting to yes: Negotiating agreement without giving in*, second edition (New York, Penguin Group USA, 2010), Ch. 6; and S. Goldberg, F. Sander and N. Rogers: *Dispute resolution: Negotiation, mediation and other processes*, third edition (New York, Aspen, 1999), p. 39: “Know your best alternative to a negotiated agreement (BATNA). The reason you negotiate with someone is to produce better results than you could obtain without negotiating with that person. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of entering into an agreement that you would be better off rejecting or rejecting an agreement that you would be better off entering into.”

83 See J. Wade: *Systematic risk analysis for negotiators and litigators: How to help clients make better decisions* (Robina, QLD, Australia, Bond University Dispute Resolution Centre, 2004), available at <http://epublications.bond.edu.au> (accessed 27 Oct. 2011).

84 *The Acas model workplace*, available online at <http://www.acas.org.uk> (accessed 27 Oct. 2011). “The aim of Acas (Advisory, Conciliation and Arbitration Service) is to improve organizations and working life through better employment relations. Our belief is that prevention is better than cure. We promote best practice in the workplace through easily accessible advice and services.”



advice to public and private sector workplace stakeholders in dispute system design.<sup>85</sup>

The Irish Labour Relations Commission also plays an active role in this area through its Advisory Service:

### *What is the Advisory Service?*

The Advisory Services Division works with employers, employees and trade unions in non-dispute situations to develop effective industrial relations practices, procedures and structures that best meet their needs. The Division is independent, impartial and experienced in industrial relations practice and theory.

In discussion with the parties, the staff of the Division will tailor assistance to individual union/management requirements. This assistance is confidential to the parties and free of charge.

The Division assists employers and employees to build and maintain positive working relationships and works with them to develop and implement ongoing effective problem-solving mechanisms. With these in place, the organization (management and employees) is free to concentrate on core objectives, meet competitive challenges, implement organizational change and positively address employee expectations and concerns.

Also, the Labour Relations Board of British Columbia in Canada places a strong focus on pre-emptive work, developing what it has defined in its Relationship Enhancement Program to be the following:

“ The Relationship Enhancement Program (REP) is intended for employers and unions who are experiencing difficulties in their ongoing relationship and who are interested in establishing and maintaining a more productive and positive relationship. The programme focuses on the specific issues and concerns associated with the parties’ current relationship and on establishing mutually agreeable and achievable steps for improvement.

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85 See FMCS: *Best practices in system design*, <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=130&itemID=15882> (accessed 27 Oct. 2011).

At the joint written request of an employer and a union, a mediator will be appointed to meet with the parties to design a programme that is specifically tailored to the parties' needs. The mediator (or a team of mediators) will facilitate a one to three day working session of representatives of the employer and the union.

Participants at the working session normally range from executive management to first line supervisors on the employer side and from senior full-time officials to shop stewards on the union side.

The programme will only succeed if both the employer and the union acknowledge that their relationship needs improvement. In addition, they both must be prepared to commit the time and resources required. It must be strongly emphasized that support for the programme by the key personnel from both the employer and the union is essential.

The initial working session is normally conducted away from the workplace, so that the participants are better able to give their full attention to the task at hand.

Generally the REP proceeds as follows:

“ Initial sessions include skill development in communication and interest based problem solving. The union and employer representatives then meet separately with the mediator(s) to discuss specific suggestions on how to improve the relationship. Each party is asked what it “could” do to improve the relationship and what the other party “should” do to improve the relationship.

Subsequently, union and employer representatives meet together to review the suggestions for improvement. Common objectives are established based on the “should” and “could” lists developed in Step 1.

The final step in the process involves the development of mutually agreed specific action steps to be taken to achieve each objective. Each action step includes a description of the required action, identification of the individuals responsible for implementing the action step, and a time frame for the commencement and/or completion of the action step...



## 8. Gender and collective bargaining

### *Why are gender issues important in the public services?*

A recent ILO paper summarized the gender dimension of collective bargaining as follows:

“ Collective bargaining can be an important way to promote gender equality ... Equal pay, overtime, hours of work, leave, maternity and family responsibilities, health and the working environment, and dignity at the workplace are all examples of issues for collective bargaining that could promote gender equality in the workplace. The issues for negotiation depend on the social and legal context, and on what women themselves choose as priorities. For collective bargaining to be truly effective and equitable, the concerns of women must be understood and be given credence. Consultation with women workers and ensuring that women are represented on negotiation teams are good ways to do this.<sup>86</sup>

Public administration is a highly gendered sector, in which the majority of workers are often women. This is largely due to the fact that governments have entered spheres of activity that have been associated with women since the early twentieth century, such as education, care work and administrative support duties, and because women are increasingly entering disciplines that supply the needs of the sector, such as law and social sciences. Consequently, collective bargaining outcomes in the sector should also reflect the specific needs of the female labour force. The attention to issues such as pay differentials, equal opportunities for promotion, work–family integration, continuing education and employment security will, in the long run, prevent conflict by providing a sense of ownership to a greater proportion of workers.

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<sup>86</sup> S. Olney and M. Rueda: *Convention No. 154: Promoting collective bargaining* (Geneva, ILO, 2005), p. 16.

### *What are the issues?*

Inequality in access to employment and in the workplace is prevalent in societies across the world:

“Population surveys show that subjective perceptions of happiness depend more on how an individual’s income compares with those of other people than on the absolute level of their income. There are also many economic costs associated with higher inequality, such as higher crime rates, higher expenditures on private and public security, worse public health outcomes and lower average educational achievements. A growing body of studies also highlights the importance of reducing inequality to achieve poverty reduction.<sup>87</sup>”

Gender inequality is particularly tenacious, and wage differentials are one readily quantifiable expression of its extent. In most countries, women’s wages are around 70 to 90 per cent of men’s, but much higher ratios are encountered in certain parts of the world such as Asia.<sup>88</sup>

In those countries for which data is available, there has been only a small narrowing of differentials,<sup>89</sup> so much work remains to be done. The challenge extends not only to ensuring that men and women doing work that is different but of equal value are remunerated equally (“equal pay for work of equal value”), but even to combat the more visible discriminatory practice of unequal pay for the same work.

The ability to combine work and family life is important equally to men and women. Especially in the industrialized countries, trade unions are putting work-family reconciliation high on their agenda, regarding it as an effective device to increase membership. In some countries, for example in Latin America, collective agreements have included benefits beyond what is required by law. In some, however, family care provisions are still absent from the agreements.<sup>90</sup>

87 ILO: *Global Wage Report 2008/09 – Minimum wages and collective bargaining: Towards policy coherence* (Geneva, 2008), p. 23.

88 *Ibid.*, p. 29.

89 *Ibid.*, p. 29.

90 Report of the Director-General: *Equality at work: Tackling the challenges*, Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 96th Session, 2007, Report I (B) (Geneva, 2007), p. 88.



The structure of collective bargaining has an impact on gender equality in the workplace. Research suggests that there is a strong relationship between centralized or coordinated bargaining and lower wage disparities, including a narrower gender pay gap. It is also the case that:

“... minimum wages can help to curb gender wage differentials at the bottom of the wage distribution. Women are over-represented among low-paid workers and their mobility into higher paid jobs is much lower than men’s. Women are therefore concentrated in jobs and sectors where collective bargaining is more limited. By establishing comparable wages across dissimilar and often sex-segregated workplaces, minimum wages can help address gender biases in wage fixing.<sup>91</sup>”

Although gender wage gaps are smaller in the public sector than in the private sector in OECD countries, women are much less likely than men to work as legislators, senior officials or managers.<sup>92</sup>

Key ways to promote gender equality to increase the representation and participation of women in social dialogue and collective bargaining structures, including those pertaining to the public sector, as well as having the gender dimension mainstreamed in the forums that matter. The ILO’s 2009 Conference report *Gender equality at the heart of decent work* states:

“394. The challenges of promoting gender equality through social dialogue are twofold. First, there is the matter of increasing the participation and status of women in the process. Second, there is the challenge of introducing a gender perspective into the content so as to reflect the changing nature of labour markets and patterns in the world of work. In a year that marks the 60th anniversary of Convention No. 98, it is important to recognize the centrality of collective bargaining to these challenges.”

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91 ILO: *Global Wage Report 2008/09 – Minimum wages and collective bargaining: Towards policy coherence* (Geneva, 2008), pp. 41 and 59.

92 B. Anghel, S. de la Rica and J. Dolado: *The effect of public sector employment on women’s labour market outcomes*, Discussion paper No. 5825 (Bonn, Institute for the Study of Labor, 2011), pp. 37, 22–25, <http://www.ilo.org/public/libdoc/igo/2011/465429.pdf> (accessed 27 Oct. 2011).

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395. The equitable participation of women in the institutions of social dialogue is itself key to promoting gender equality through tripartism and social dialogue. Low participation rates of women in workers' and employers' organizations and in the relevant tripartite institutions have been well documented. In some regions, as women have increased their participation in the paid workforce, whether as employers or workers, they have also increased their participation in the relevant institutions of tripartism and social dialogue. Women have also been shown to place gender issues on the agenda more than men do. So an increased involvement of women in social dialogue has also resulted in greater attention to gender issues, for example with the emergence of national tripartite machineries for women in the 1990s in Latin America.<sup>93</sup>

### *How can these issues be addressed?*

The constraints on women and men in collective bargaining may be different. A gender analysis would help ensure that both women's and men's perspectives are included, and would perhaps investigate the reasons why women's participation at the bargaining table is often less than men's.<sup>94</sup> The ILO has published tools to address gender issues<sup>95</sup>: how to assist and enhance women's participation in union structures and activities and promote equality and solidarity among union members.

93 International Labour Conference, 98th Session, 2009, Report VI.

94 In several countries unions have launched programmes in order to extend the membership and representation of women. In Austria, the Austrian Trade Union Federation carried out a gender mainstreaming plan and in 2006 the Federation committed to proportional representation of women in all of its bodies. In 2002 in Belgium the three national confederations signed a charter for equality of women and men in trade unions. In Cyprus the Cyprus Workers' Confederation launched an information campaign in 2006 that focused on women. (European Foundation for the Improvement of Living and Working Conditions: *Trade union strategies to recruit new groups of workers* (Dublin, 2010), pp. 22 and 38). In addition, it must be taken into consideration, that in some trade unions the number of female members is relatively high compared to men because the sector itself is female dominated. For example, in Bulgaria male staff prevail in employers' member organizations but in trade unions women make up an equal, or even higher, percentage (European Foundation for the Improvement of Living and Working Conditions: *Capacity building for social dialogue at sectoral and company level – Bulgaria* (Dublin, 2007), p. 8).

95 See e.g.: ILO: *A resource kit for trade unions: Promoting gender equality*, Booklets 1-6 (Geneva, 2002).



When trade unions are preparing for bargaining, they can do the following to address gender equality in bargaining:

- ensure the active participation of women, seek their views and make sure their voices are heard;
- promote awareness and appreciation of gender issues among the union membership and also among employers;
- select the negotiating team;
- develop the gender equality bargaining agenda;
- be well prepared for negotiations; gather all relevant facts, draft the agenda for bargaining, develop a clear strategy.<sup>96</sup>

First and foremost, when preparing to bargain, the unions should recruit women members and promote their active participation in all union structures. Unions have found that they have been more successful in recruiting women when they have carried out multiple activities and not focussed just on one. The measures can include the following, for example:

- raising awareness of the benefits of unionization;
- improving the public image of unions, including publicizing success stories;
- soliciting the views of women workers, understanding and giving credence to their concerns and needs;
- making women more visible in unions;
- providing services to specifically meet women's needs; and
- carrying out special campaigns to encourage women to organize.<sup>97</sup>

Besides recruiting, the unions should also ensure that all workers – both men and women – understand and are able to address their concerns to the union representatives. Unions should educate their members in order for them to recognize different forms of discrimination, and conduct research which would catalogue sexual discrimination cases, and so on. Specific op-

96 ILO: *A resource kit for trade unions: Promoting gender equality through collective bargaining*, Booklet 2 (Geneva, 2002), p. 13.

97 ILO: *A resource kit for trade unions: Promoting gender equality within unions*, Booklet 1 (Geneva, 2002), p. 11.

opportunities may also be offered to enable women to make their voices heard.<sup>98</sup>

If a union wishes to make sure that their policies and programmes are gender-sensitive, unions can conduct gender analysis by:

1. identifying the issues: how is diversity taken into account?
2. defining desired outcomes: what does the union want to achieve with the policy and who will be affected?
3. gathering information: what type of data is available? How will the research address the differential experiences of diversity?
4. developing and analysing options: do the options have different effects on women and men? Do the options provide advantages for others?
5. making recommendations: how can the policy be implemented in an equitable manner?
6. communicating the policy: is the language used gender-aware? What strategies need to be developed to ensure the data is available for both men and women?
7. evaluating the results: what indicators does the union use to measure the effects of a policy? How will gender equality concerns be incorporated in the criteria the union uses to evaluate its effectiveness?<sup>99</sup>

The ILO Gender Analysis Framework requires the identification of:

1. the division of labour between men and women;
2. access to and control over resources and benefits;
3. the practical and strategic needs of women and men;
4. constraints and opportunities to achieve equality; and
5. the capacity of social partners to promote gender equality.<sup>100</sup>

98 ILO: A resource kit for trade unions: Promoting gender equality through collective bargaining, Booklet 2 (Geneva, 2002), p. 13.

99 ILO: A resource kit for trade unions: The issues and guidelines for gender equality bargaining, Booklet 3 (Geneva, 2002), p. 59.

100 ILO: "Briefing Note 1.6", in *Gender issues in the world of work: Briefing kit*, INT/93/MO9/NET, Gender Training for ILO Staff and Constituents for the Promotion of Equality for Women Workers (Geneva, 1995).



## Country examples: Canada, Australia

### Promoting gender equality in the public service

#### Canada

The Public Sector Equitable Compensation Act of 2009 obliges employers (and in unionized settings, bargaining agents) to take measures to provide workers with equitable compensation in accordance with the Act. At the same time, it provides for the Public Service Labour Relations Board to require employers to conduct, or to undertake itself, “equitable compensation assessments” with specific gender dimensions. Many of the Act’s obligations are directly tied to the collective bargaining process.

#### Australia

The Fair Work Act of 2009, which covers public and private sector workers, empowers the federal tribunal “to make orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value”. Applications for such orders may be made by interested workers, unions and the Sex Discrimination Commissioner. The statute also effectively prohibits the inclusion of any discriminatory term in a collective agreement. The concept of discrimination extends to sex, sexual preference, age, marital status, family or carer’s responsibilities and pregnancy.

### References on model legislative provisions addressing gender audits and model clauses

“Bargaining Equality: A workplace For All” from CUPE (2004) discusses widely on equality issues and includes tools for self-auditing and samples collective bargaining language: <http://www.cupe.ca/www/bargeq> (accessed 27 Oct. 2011).

“Promoting Gender Equality: A resource Kit for Unions” from the ILO offers explanations, checklists, and examples from many countries on gender issues. The toolkit consists of 6 booklets, which are available at: [http://www.il.workinfo.com/free/links/gender/cha\\_1.htm](http://www.il.workinfo.com/free/links/gender/cha_1.htm) (accessed 27 Oct. 2011).

The Labour Legislation Guidelines provided by the ILO (available at: <http://www2.ilo.org/public/english/dialogue/ifpdial/lilg/> (accessed 27 Oct. 2011)) provide model provisions on, for example, elimination of discrimination in respect of employment and occupation. The website offers examples of provisions, including, for example, those relating to: equality of remuneration; elimination of discrimination based on race, colour, national extraction, social origin, disability, political opinion, religion, age or sex; and sexual harassment.

## 9. Vulnerable groups

Besides gender issues, collective bargaining can be used as a means to address issues concerning vulnerable groups of workers, such as ethnic and migrant workers and workers with disabilities. The elimination of discrimination can be a subject for collective agreements. The ILO's Discrimination (employment and occupation) Convention, 1958 (No. 111) refers in section 1.1(a) to seven prohibited grounds of discrimination: race, colour, sex, religion, political opinion, national extraction and social origin. Very often, discrimination on the basis of race, colour, national extraction and social origin is linked to the existence of different ethnic groups within a country.<sup>101</sup>



101 ILO, "Substantive provisions of labour legislation: The elimination of discrimination in respect of employment and occupation", in ILO: *Labour Legislation Guidelines*, Chapter VII, <http://www2.ilo.org/public/english/dialogue/ifpdial/llg/index.htm> (accessed 27 Oct. 2011).



The Trades Union Congress (TUC) of the UK conducted an Equality Audit in 2005, which showed that steps are taken in agreements to address ethnic minority and migrant worker issues. Matters such as ensuring equal access to promotion, training and career progression and tackling racism in the workplace were reported on in the survey. However, reorganizing leave and provisions on language were less often covered by the agreements.<sup>102</sup>

Discrimination based on age has become an issue in many countries. The Older Workers Recommendation, 1980 (No. 162) applies to all workers who may encounter difficulties in employment and occupation because of age. On the other hand, younger workers and women can face discrimination on the basis of marital status and family responsibilities. As previously noted, some collective agreements, for example in Latin American countries, have included provisions on pregnancy, maternity leave, breastfeeding, childcare, paternity leave, adoption and care-giving leave.<sup>103</sup>

In some countries and especially in the public sector, collective agreements include clauses that refer to disability. For example, in Norway, some agreements have included provisions on the adaptation of work for older employees and those with impaired health. In Netherlands, agreements have included clauses on issues related to reintegration and selection of people with disabilities.<sup>104</sup>

## 10. Training and capacity building

Negotiation is a skill that requires insight, structure and a great deal of practice if it is to be undertaken to good effect. Negotia-

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102 Trades Union Congress: *TUC Equality Audit 2005* (London, 2005), <http://www.tuc.org.uk/extras/auditfinal.pdf> (accessed 27 Oct. 2011).

103 Report of the Director-General, *"Equality at work: Tackling the challenges"*, Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 96th Session, 2007, Report I (B) (ILO, 2007), p. 89.

104 "Workers with disabilities: Law, bargaining and the social partners", in EIROOnline, Feb. 2001, <http://www.eurofound.europa.eu/eiro/2001/02/study/tn0102201s.htm> (accessed 27 Oct. 2011).

tors tend to arrive at the bargaining table with preset worldviews and bargaining models, but if bargaining is to be at its most productive, then it is essential that negotiators benefit not only from prior training in negotiation skills but also education in underlying bargaining perspectives. Only with knowledge of the choices available can the negotiators make informed decisions on the best bargaining approaches to adopt.

In order to combat the unhelpful sense of defensiveness that may come when one party believes the other has superior bargaining skills and preparedness, it is important that all parties' negotiators have the benefit of adequate training. A strong case can also be made for the *joint* training and education of the parties' negotiators. This is especially true if the potential of mutual gains bargaining is to be realized. But even if the parties are working within a more positional bargaining frame, a common understanding and skills set can improve the prospects of productive bargaining and assist with the sensible management of conflict if matters go that far. In addition, the very process of training together in a non-threatening environment often produces an emerging rapport, which is a valuable asset in real-world negotiations.<sup>105</sup>

## 11. Active facilitation of negotiations

Some systems have seen the introduction of support measures aimed at improving the parties' prospects of achieving agreed (and qualitatively better) outcomes in negotiations, thus also preventing the emergence of disputes. The emphasis is on positive dispute prevention rather than reactive dispute resolution.

An example of this is the facilitative provisions introduced in the 2002 amendments to the South African *Labour Relations Act 1995*. The social circumstances were charged: in an attempt to obtain more leverage in the face of the ongoing restructuring of

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<sup>105</sup> And see also paragraph of the Collective Bargaining Recommendation, 1981 (No. 163): "Measures should be taken by the parties to collective bargaining so that their negotiators, at all levels, have the opportunity to obtain appropriate training".



workplaces in response to globalization, the labour movement succeeded in winning the legal right to strike in opposition to downsizing. However, the lawmaker simultaneously made provision for a dispute-preventing offset. The right to strike could only be pursued if, as an alternative to the otherwise obligatory statutory conciliation process at the point of breakdown, either party was given the right to enlist the services of a facilitator to preside over the restructuring negotiations (technically, consultations). The provisions apply to both the private and public sectors.

The parties are entitled to agree on a facilitator, failing which the state dispute prevention and resolution agency (the Commission for Conciliation, Mediation and Arbitration) provides an experienced panellist. The facilitator has powers appropriate to the task. At the first meeting he/she assists the parties in agreeing a protocol for engagement, encompassing also statutorily prescribed aspects of information disclosure. Thereafter, the facilitator chairs the meetings and maintains control of the process, with his/her statutory mandate open to either expansion or contraction by agreement between the parties. The parties may agree that the proceedings are confidential and to be conducted on the premise that it will not prejudice the results of any eventual adjudication, and the facilitator may not be summoned to give evidence on any aspect of the facilitation in judicial proceedings.<sup>106</sup>

Experience with this innovation has been very encouraging. Facilitated negotiations regularly produce agreements in respect of inherently divisive subject matter, reducing the incidence of litigation and, especially, industrial action.

In the United Kingdom, ACAS generally plays a very cautious role in relation to collective bargaining given that the process is strongly supported by the longstanding tradition of voluntarism. Nonetheless, it offers what it calls “assisted bargaining” services:

Notwithstanding the importance that the statute, and ACAS, places on the parties’ ability to resolve their own differences

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<sup>106</sup> See section 189A of the Labour Relations Act 1995 and the associated Facilitation Regulations 2002.

through established procedures, there are occasions where ACAS does get involved in some capacity much earlier; for example in an “assisted bargaining” role. This is because ACAS is not confined to dealing with formal, collective disputes but can provide a different sort of assistance to handle collective employment relations issues and prevent a dispute arising. Assisted bargaining involves outcomes remaining in the hands of the local parties with the role of ACAS being to facilitate the parties in arriving at mutually acceptable solutions. This is not the same as collective conciliation because collective conciliation can happen only where there is a trade dispute.

This type of intervention typically happens where there is a history of disputes. For example, following several years of disputes and instances of multiple conciliations in the same pay round at a major retail group, it was suggested that the ACAS conciliator chair a meeting before negotiations had even started. At this informal meeting between several senior HR directors and the two trade union full-time officers, the company presented the financial situation and would then hear the union’s aspirations and topical bargaining issues from their national conference. The aim was to achieve a more realistic union claim and a more reasonable company response. The parties also agreed that ACAS would facilitate the first round of negotiations in an advisory capacity. The outcome was the submission of a lower claim; following some conciliation-type work on the part of ACAS between the two parties, a revised offer was agreed and put to ballot. It was accepted by a reasonable majority and this model became the format for future negotiations. There have been no pay disputes or the need for ACAS’ traditional conciliation services since.<sup>107</sup>

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107 Advisory, Conciliation and Arbitration Service: *The alchemy of dispute resolution: The role of collective conciliation*, Acas policy discussion paper (London, 2009), p. 4. While Acas’s collective conciliation services have, for a range of historical reasons, been sparingly used in the public sector, “[e]vidence shows that those who use the service value it, use it again and recommend it to others”. See the same publication, p. 6.



ACAS has recently made public its commitment to assist public sector parties during the financial crisis that began in 2008.<sup>108</sup>

The United States was an early and comprehensive forerunner in this area of preemptive assistance to negotiators, with the Federal Mediation and Conciliation Service (FMCS) using its good offices under the *Negotiated Rulemaking Act* of 1990 to improve government operations. As a neutral third party, the FMCS is empowered to convene and facilitate a wide range of complex, multi-party processes, including public policy dialogues and regulatory negotiations, helping all parties to improve their communications and relationships and to reach consensus on issues.

Negotiated rule-making under the auspices of independent agencies can provide a useful model for those countries wanting to craft bargaining and dispute resolution systems in receptive areas of the public service.

## 12. Joint investigation/research

When management and labour are looking for solutions to issues, it may be unhelpful for them to commission their own studies or investigations into the matter. Even when independent expertise is recruited for this purpose, the product of such an initiative can be considered to be selective, whether or not this is objectively the case. The commissioned work might not be treated as a solution or perhaps even as an option, but rather as self-serving ballast for the initiating party's negotiating position, which can be countered by a competing expert opinion or piece of research.

However, there is a great deal of merit in the parties' jointly retaining the services of an expert to produce a single report to contribute to subsequent deliberations or negotiations. The parties may then be better placed to evaluate the output on merit, and not dismiss it as tendentious material.

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<sup>108</sup> *Acas support for public sector organizations undergoing change*, <http://www.acas.org.uk/index.aspx?articleid=3121> (accessed 27 Oct. 2011).

### 13. Codes on good practice

Many national consultative bodies and dispute resolution agencies develop and make available codes of good practice on a range of topics, including collective bargaining and dispute resolution.<sup>109</sup> A well-honed code can play a significant educational function and be an important dispute prevention aid.

It is also not rare for statutory arbitration tribunals and labour courts to be instructed by legislation to take into account the content of codes of good practice when deciding on cases that come before them.<sup>110</sup>

### 14. Joint problem solving

Joint problem solving is a process applicable to areas other than labour. However, it can also be seen as an alternative to conventional bargaining or as a dimension of interest-based bargaining. The essential difference is that problem-solvers tackle the issue in a collaborative way whereas positional negotiators may be more focused on advancing their respective positions. In other words, negotiators tend to be ranged against one another, whereas problem-solvers work together.

Positional bargainers have as their objective the maximization of gains for their side. For problem-solvers, on the other hand, the goal is to secure the optimum collective agreement for all stakeholders. Their prize is the same as that of the omniscient independent arbi-

109 For examples of such codes, see the websites of the Irish Labour Relations Commission (<http://www.lrc.ie>), the South African Commission for Conciliation, Mediation and Arbitration (<http://www.ccma.org.za>) and Acas in the United Kingdom (<http://www.acas.org.uk>) (all URLs accessed 27 Oct. 2011).

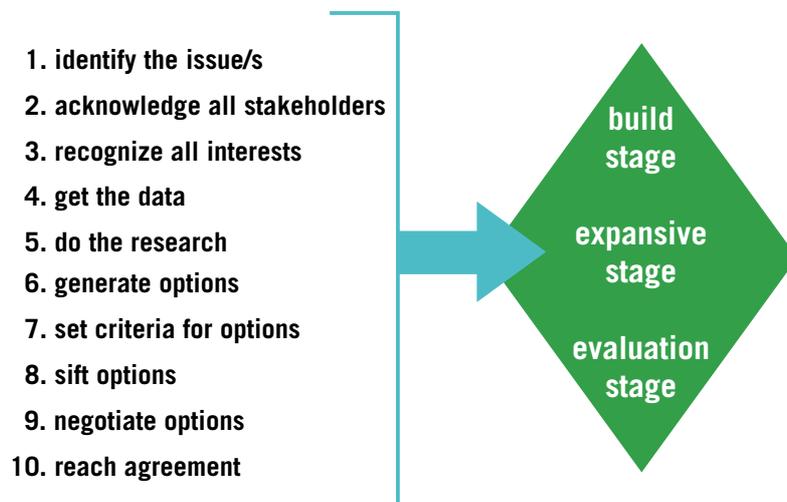
110 The conduct of mediators and arbitrators and of court officials is often regulated by codes of conduct, whether they work through statutory dispute resolution services or private agencies. These codes regulate the standards of performance and the conduct of third parties, limiting the possibility of corruption and moderating vested interests. In addition, many labour laws include codes of good practice for employers, employees and their representatives in their handling of conflict and disputes. Departments of labour are increasingly providing parties with these codes and guidelines, model agreements and relevant precedents to assist parties in managing conflict more effectively. (F. Steadman: *Handbook on alternative labour dispute resolution* (Turin, International Training Centre of the ILO, 2011), p. 54.)



trator: the achievement of a deal that best reconciles the different interests of the stakeholders and best promotes their common ones.

Problem-solving may include brainstorming, the generation of options and the selection of the best outcome according to criteria that are as objective as possible.

**Figure 1. Interest-based problem-solving: working jointly to –**



Certain negotiation subjects such as health and safety, work–life integration and grading systems may lend themselves more readily to joint problem-solving than, for instance, monetary subjects. They can then be separated from the rest of the negotiations and negotiated through problem-solving techniques.

## 15. Duty to bargain in good faith

In the preparatory work for Convention No. 154, the Committee of Collective Bargaining stated that “collective bargaining could only function effectively if it was conducted in good faith by both parties” and “emphasised the fact that good faith could not be imposed by law, but could only be achieved as a

result of the voluntary and persistent efforts of both parties.”<sup>111</sup> The ILO Committee on Freedom of Association has also emphasized the importance of the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement, particularly in situations, such as essential services, where trade unions are not allowed to engage in strikes.<sup>112</sup>

Effective collective bargaining involves encouraging dialogue and promoting consensus. A number of countries have endeavoured to do this by setting forth a statutory duty in the legislation intended to oblige the parties at the bargaining table to engage in fully informed negotiations. The purpose of this duty is to ensure that the parties have every possible opportunity to reach agreement. In some instances, this duty is limited to a duty to negotiate, while in others it is expressed as *a duty to bargain in good faith*.<sup>113</sup>

## 16. Duration of agreements

Collective bargaining is an activity that consumes resources and carries risks. That being the case, negotiated agreements would benefit from a longer duration. Underlying recognition and framework agreements may often be for an indefinite period, and can be terminated on reasonable notice in the event of changed circumstances. However, a limited lifespan of the agreement may allow the parties to track, predict and perhaps even influence developments in the labour market and wider economy when it comes to substantive matters, most notably pay.

For an agreement on substantive matters to make its stabilising contribution to workplace affairs, a term of around two to three

111 International Labour Conference: *Record of Proceedings* (1981), p. 22/11.

112 ILO: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition (Geneva, 2006), Paragraphs 934–943.

113 ILO, “Substantive provisions of labour legislation: Effective recognition of the right to collective bargaining”, in ILO: *Labour Legislation Guidelines*, Chapter III, <http://www2.ilo.org/public/english/dialogue/ifpdial/llg/index.htm> (accessed 27 Oct. 2011).



years is often seen as appropriate. Longer agreements may be tenable if they build in dynamic elements regulating mid-term negotiations regarding individual issues, “extraordinary events” reviews and adjustments, or automatic adjustments such as cost of living adjustments (COLAs).

Unless there are special factors justifying this, it would normally be sub-optimal to have agreements of merely one year’s duration. The costs of such a limited bargaining cycle will normally outweigh the benefits, particularly if the one-year deal is not a one-off phenomenon but a repetitive feature.

Extended duration of agreements can also be used to promote settlements. For example, in the state of Washington in the United States, for most public sector employees, a collective agreement remains in effect for one year after it has expired in order to allow time for negotiations. At the end of the year in question, the employer has the right to implement its last offer in terms of hours, wages and employment conditions, as well as the grievance procedure. This does not include other subjects of negotiation. For example, the employer loses the management rights clause, which usually allows the employer to make changes that the law otherwise requires it to negotiate. In addition, the employer must continue to negotiate in good faith with the union until they reach an agreement and cannot make additional changes without negotiating with the union. The impact of this one-year “freeze” has been that unions can delay negotiations if the employer’s offer is more onerous than the existing agreement. This has happened often when employers have asked employees to assume part of the cost of health insurance, which reduces net income. Thus, the union may trade off the employer’s desire to lower costs for higher benefits in other areas. Occasionally, manoeuvre is counterproductive, but usually the mediation is successful by offering both sides an incentive to agree. Sometimes the parties have negotiated for several years without the employer even suggesting the

possibility of taking any action, although the relationship became very hostile.<sup>114</sup>

## 17. Clarity and structure of agreements

Clarity in agreement-writing is an important partial antidote to later disagreement. The agreement should be easy to read and clearly express the intent of the parties, and not cause any conflicts. Convention No. 154 (art. 2) defines that collective bargaining covers all negotiations determining working conditions and terms of employment. These terms should be placed in writing.<sup>115</sup>

A collective agreement can be structured using the following general sections, for example:

1. General rulings under which the coverage of the agreement is explained: what is the sector in question and who are the parties that are bound by the agreement. There can also be rules on which other agreements are obeyed and applied alongside the agreement in question.
2. Definition of working time. In other words, what is the regular length of working time and what are the rules for short time and overtime, as well as holidays.
3. Salary. The level of pay can be based, for example, on grouping: a beginner, a worker with some experience, a junior specialist, specialist, experienced specialist and highly experienced specialist belong to different salary categories. The descriptions of these types of workers are included in the agreement.
4. Benefits such as extra compensation for work done abroad.

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114 Revised Code of Washington (RCW) 41.56.123; C. Carrión-Crespo and A. Santos Bayrón: *The impact of mediation on the use of labour arbitration in the public services: Comparison between the State of Washington and Puerto Rico*, Presentation made before the 2nd International Congress on Alternative Dispute Resolution Mechanisms, San Juan, Puerto Rico (2006) (in Spanish).

115 Convention No. 154 does not refer to the determination of terms and conditions of employment by means of "collective agreements". B. Gernigon, A. Otero and A. Guido: *Collective bargaining: ILO standards and principles of the supervisory bodies* (Geneva, ILO, 2000), p. 50.



5. Social provisions. What kind of guidance an employer should give (orientation to work), what kind of policy should be followed in case an employee is sick and absent from work, what kind of maternity/paternity leave a person can take.
6. The policy in case of disagreement over the provisions of the agreement, a dispute resolution policy and the term of the agreement.<sup>116</sup>

The subjects presented are examples, and collective agreements can include various other issues from training to work-family reconciliation measures. Within these general areas, the parties may draft specific sections to address their special needs. It must be noted, however, that national regulations such as labour codes can impose compulsory provisions on collective bargaining subjects, e.g. salary (minimum wage) or working time, which have to be taken into consideration when deciding on collective agreements (if the provisions are compelling). If a regulation is optional and can be displaced with a collective agreement, there can be an explicit expression of this matter.

It might be useful for the negotiators to test the readability of a draft with “ordinary” users of the agreement who have no knowledge of the background exchanges in the bargaining processes. If they have difficulty with a provision, it probably warrants a redraft.<sup>117</sup>

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116 See for example the Finnish General collective agreement for government 28 March 2010, [http://www.vm.fi/vm/en/04\\_publications\\_and\\_documents/02\\_documents\\_on\\_personnel\\_management/02\\_sopimukset/20100301\\_Genera/General\\_collective\\_agreement\\_with\\_annexes\\_final.pdf](http://www.vm.fi/vm/en/04_publications_and_documents/02_documents_on_personnel_management/02_sopimukset/20100301_Genera/General_collective_agreement_with_annexes_final.pdf) (unofficial translation).

117 Helpful literature in this area is growing. See, for instance, D. Elliott: *Writing collective agreements in plain language*, Paper presented at the 8th Annual Labour Arbitration Conference, 1990, revised 1998, <http://www.davidelliott.ca/plainlanguage.htm> (accessed 21 Nov. 2011); and the further sources found at sites such as <http://home.comcast.net/~garbl/writing/plaineng.htm> (accessed 27 Oct. 2011).

As a general rule, the text of a collective agreement will be better understood if it:

- uses simple language;
- is well organized, with informative headings and appropriate chapters and paragraphs;
- is broken up into shorter sentences; and
- uses worked examples (illustrations of, for instance, pay rates in concrete cases).

For example, the Subregional Tripartite Conference in Montenegro in 2009 highlighted that the terms used and the stated conditions in collective agreements should be expressed clearly, written simply and use everyday language and they should be relevant to the practical requirements of the sector.

## 18. Maintaining agreements

Agreements operate in dynamic environments, and therefore should themselves have dynamic features. This is particularly so if they have life spans of longer than a year.

Several areas of contention arise almost inevitably during the life of any collective agreement. These include:

- disagreements over the interpretation of provisions;
- the fallout from unanticipated developments (a burst in inflation rates, a change in government policy, new and surprising legislation, amongst other things);
- disagreements over how provisions are being implemented in practice (for instance, over rewards for achieving agreed key performance indicators);
- the failure by one or other party to live up to their agreements. Certain undertakings might not be self-executing and have to be taken on trust during agreement-making. Again, the temptation often arises during rocky negotiations to postpone difficult issues until future processes. So, for instance, towards the end of taxing negotiations but with a long-outstanding



concern still unresolved, one party may persuade the other to parcel the unfinished business into a future commitment. The other party may, with varying degrees of good faith, go along with the proposal. Breakdowns, should they occur, often fall into one of two categories:

“ *Failures to go along with undertakings to modify behaviours (or to collaborate with processes intended to modify behaviours).* Certain matters require other parties to take steps or to change their behaviours. Examples here include things such as redressing high levels of absenteeism, agreeing to submit to new drug and alcohol testing policies, agreeing to undergo training to be able to operate new work systems, and so on.

“ *Failures to carry out projects.* An employer may have agreed to develop and introduce a new grading system, or to review certain work patterns seen as onerous, or to improve environmental conditions, and so on.

Success in implementing and maintaining agreements depends greatly on whether the parties negotiate in good faith and then take on obligations in good faith. The mutual expectation, of course, is that parties mean what they say and have the resolve and capacity to make good on their declared intent.

Thus, it is recommended that agreements contain provisions dealing with and resourcing implementation issues. Individuals and perhaps steering committees should be charged with delivering on commitments, with review intervals built in.

However, disagreements do arise even if pre-emptive steps are taken. In that event, parties should first engage in problem-solving, not dispute declaration. Changed circumstances which are beyond a party's control may warrant the renegotiation of what may become an unworkable clause. Remediating unforeseen developments is undoubtedly best done through discussion and not complaints.

Should it be evident to all parties that certain undertakings originally given in good faith simply cannot be made good, it might be better that they be explicitly withdrawn in the course of remedial negotiations.

Agreements may also contain formal dispute resolution procedures that can be invoked if and when issues cannot be resolved through discussions or negotiations. Disagreements over the interpretation and application of agreement provisions are classed as rights disputes, meaning that if they remain unresolved they should be settled by speedy and inexpensive arbitration or adjudication.

#### Country Example: Canada, South Africa

##### Section 57(1) of the Canada Labour Code

Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or workers bound by the collective agreement, concerning its interpretation, application, administration, or alleged contravention.

##### Section 23(1) of the South African Labour Relations Act:

Every collective agreement . . . must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

The Irish Labour Relations Commission's *Code of practice: Dispute procedures including procedures in essential services* (1992) provides more detailed guidance on content:

#### Dispute procedures – General

22. The disputes procedures set out below should be incorporated in employer/trade union agreements for the purpose of peacefully resolving disputes arising between employers and trade unions. Such agreements should provide:



- (a) that the parties will refrain from any action which might impede the effective functioning of these procedures;
  - (b) for cooperation between trade unions and employers on appropriate arrangements and facilities for trade union representatives to take part in agreed dispute procedures;
  - (c) for appropriate arrangements to facilitate employees to consider any proposals emanating from the operation of the procedures.
23. Trade union claims on collective and individual matters and other issues which could give rise to disputes should be the subject of discussion and negotiation at the appropriate level by the parties concerned with a view to securing a mutually acceptable resolution of them within a reasonable period of time. Every effort should be made by the parties to secure a settlement without recourse to outside agencies.
24. In the event of direct discussions between the parties not resolving the issue(s), they should be referred to the appropriate service of the Labour Relations Commission. The parties should cooperate with the appropriate service in arranging a meeting as soon as practicable to consider the dispute.

## 19. Dealing with change in negotiated outcomes

The Committee on Freedom of Association has disavowed suspensions, interruptions, annulment or forced renegotiation of existing agreements by law or by decree, without the consent of the parties involved. In addition, extensions in the validity of collective agreements by law should only be imposed in cases of emergency and for brief periods of time.

Nevertheless, new technologies, new social needs, old unmet needs and evolving public expectations – to name just a few factors – mean that the organization of work in all public ser-

vices is a continuing endeavour. Terms and conditions of employment and indeed employment relations may constantly change. Consequently, the parties' needs have to be pursued and safeguarded through appropriately crafted processes rather than fixed settings. This means that collective bargaining agreements should be dynamic and reconcile an organization's need for change with the worker's need for security. In other words, it may be useful to include in the agreement some type of mechanism – “a window for change” – to provide guidance on how to deal with the changed circumstances.

Contemporary directives on this issue were anticipated by the ILO's Recommendation concerning communications between management and workers within the undertaking, 1967 (129), which applies to public service workplaces:

- (1) Employers and their organizations as well as workers and their organizations should, in their common interest, recognize the importance of a climate of mutual understanding and confidence within undertakings that is favourable both to the efficiency of the undertaking and to the aspirations of the workers.
- (2) This climate should be promoted by the rapid dissemination and exchange of information, as complete and objective as possible, relating to the various aspects of the life of the undertaking and to the social conditions of the workers.
- (3) With a view to the development of such a climate management should, after consultation with workers' representatives, adopt appropriate measures to apply an effective policy of communication with the workers and their representatives.
- (4) An effective policy of communication should ensure that information is given and that consultation takes place between the parties concerned before decisions on matters of major interest are taken by management, in so far as disclosure of the information will not cause damage to either party.



## Consultation over changes in terms and conditions of employment

It has been seen in the past that unilateral management decision-making that impacts on worker interests kindles worker reaction, including industrial action. In fact, some of the very first pieces of industrial legislation in the early twentieth century included “status quo” provisions designed to check and even reverse unilateral action.<sup>1</sup>

Australia’s Fair Work Act 2009, again, provides for model consultation terms to be included in the awards and collective agreements that regulate most of the labour market. The Higher Education Award’s expression of the obligation is typical:

### Consultation regarding major workplace change

Employer to notify

- (a) Where an employer has made a definite decision to introduce major changes in production, programme, organization, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.
- (b) Significant effects include termination of employment, major changes in composition, operation or size of the employer’s workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

### Employer to discuss change

- (a) The employer must discuss with the employees affected and their representative, if any, the introduction of the changes referred to in clause 8.1, effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

- (b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes.
- (c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.<sup>4</sup>

<sup>1</sup> See, for instance, the *Canadian Industrial Disputes Investigation Act of 1907* and the *Transvaal Industrial Disputes Act 1909*.

<sup>2</sup> *Directive 2002/14/EC*.

<sup>3</sup> *The Information and Consultation of Employees Regulations 2004: DTI Guidance (Jan. 2006)*, available at <http://www.berr.gov.uk/files/file25934.pdf> (accessed 27 Oct. 2011).

<sup>4</sup> *Clause 8 of the Higher Education Industry – General Staff – Award 2010*.

The sorts of provisions set out above are strongly process-oriented. However, given their purpose and location, they are also cast in general terms. Applied situations require more applied measures, and an example of such is seen in the labour–management partnership arrangements of the Irish health service. Here the employer and unions have published a handbook for managing workplace dynamics entitled *Tools for change through partnership – Alternative processes for handling change, conflict resolution and problem solving* (2004).

The parties' information and consultation agreement includes the need:

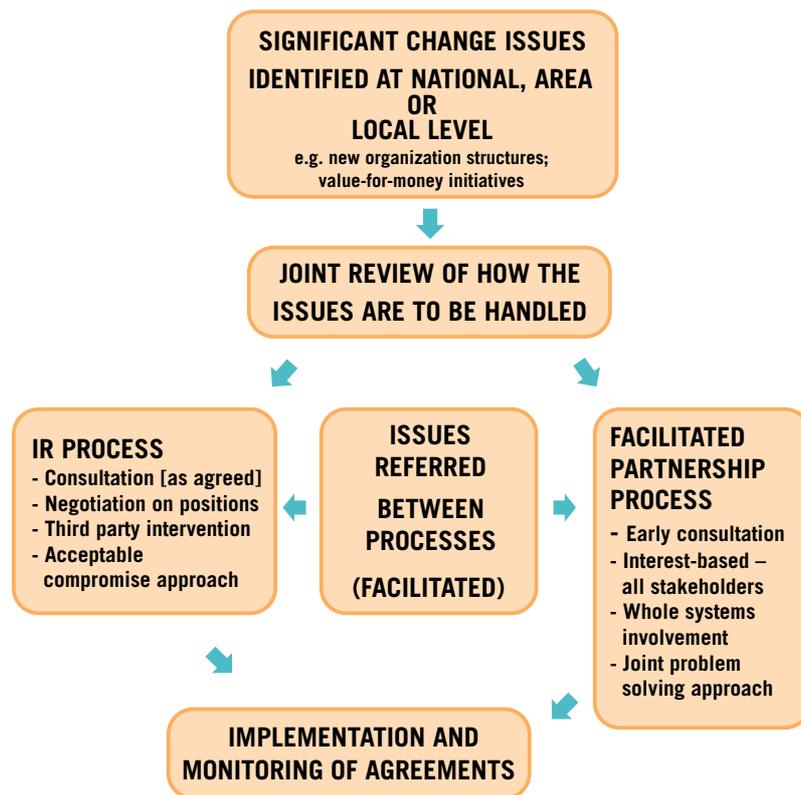
- to identify the parties likely to be affected by proposed change;
- to provide information about the proposed change to those likely to be affected;
- to consult with the parties likely to be affected by proposed change;
- to carry out a change impact analysis where appropriate, with the purpose of identifying the effects (both positive and negative) of introducing the proposed change;



- to take due account of the possible impact of the proposed operational and/or strategic changes on established workplace practices and terms of employment, and the (associated) need to consult with workers' representatives;
- for the parties and/or their representatives to fully engage with the preparation for and implementation of change;

to provide opportunities for staff and their representatives to contribute ideas, views and solutions within the change management process, adding value, improving the quality of decision-making and outcomes.

**Figure 2. Protocol flowchart**<sup>118</sup>



118 The flowchart needs to be considered in the full context of the partnership arrangements under study.

The processes available to carry out change are various and include information-sharing, consultation, negotiation and joint problem-solving, as well as combinations of these. The common guiding factor, though, is a *joint* consideration of how particular subject matter should best be treated. That lends legitimacy to whatever path is chosen, and maximizes the prospects of acceptable outcomes. Independent facilitation, too, may be a useful way to deal with change.

Not all change management arrangements produce agreement every time, however, and they too need to be underwritten by appropriate dispute resolution mechanisms.

In situations in which the changes result from the outsourcing of public sector work, the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) applies. Under Article 2 of Convention No. 94, ratifying states commit to uphold industry standards regarding conditions of work, as follows:

“ Contracts to which this Convention applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on—

- (a) by collective agreement or other recognised machinery of negotiation between organizations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; or
- (b) by arbitration award; or
- (c) by national laws or regulations.

The Municipal Systems Act (MSA) of South Africa states that local governments must consult with trade unions and other stakeholders before contracting an external agency to provide municipal services. Also, Clause 7 of the 2008 agreement between the South African Local Government Association (SALGA) and the South African Municipal Workers Union (SAMWU) and the Independent Municipal Workers Union



(IMATWU) states that in case of outsourcing government services, workers will enjoy the same benefits under the private provider as provided in the South African Local Government Bargaining Council agreement.<sup>119</sup>

### Checklist for Dispute Prevention

**The following steps may assist decision-makers in reviewing existing or proposed dispute prevention mechanisms through the legislative process:**

- Identify the structure, framework, principles, mechanisms and principal characteristics of dispute prevention in your country.
- Identify the stakeholders involved in dispute prevention.
- Locate the place and role of trade union organizations supporting dispute prevention.
- Identify the main problems involved in dispute prevention: problems in the area of freedom of association, industrial relations, collective bargaining mechanisms, and so on.
- Analyze the causes of the problems.
- Explore the needs of the parties involved and prioritize those needs.
- Generalize all possible solutions to the problems without evaluating them.
- Identify objective criteria to evaluate each possible solution (e.g. in relation to cost/benefits, consequences, practicality, meeting of needs, addressing causes, disadvantages/advantages, eliminating symptoms).
- Evaluate possible solutions using the objective criteria and narrow the range of solutions.

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119 J. Theron: *Non-standard workers, collective bargaining and social dialogue: The case of South Africa*, Working paper No. 28, ILO Industrial and Employment Relations Department (Geneva, ILO, 2011), p. 21.

- Produce action plans for implementing the solutions/good policies at national, sectoral and local level:
  - visualize what dispute prevention requires and could look like;
  - understand the gender perspective and visualize a system that takes it into account;
  - identify what changes are required in the legal and regulatory framework;
  - identify the resources, including both human and financial, needed and how they will be obtained; and
  - identify the role and contribution of the stakeholders in the process.
- Develop means to disseminate and provide an awareness of national dispute prevention mechanisms.
- Develop means to monitor and review the process, and enact changes if necessary from the national level to the local levels.
- Design a strategy for follow-up.



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## Part II. Dispute resolution

While there may be many shared and perhaps simply different interests in the workplace, there are also conflicting ones. And although certain engagement pathways may produce mutual gains outcomes, others lead to differential wins and losses. Negotiations cannot always steer conflicting interests to agreed solutions. This is particularly true with subjects such as wages, benefits and work obligations. Workers tend to want higher wages and employers greater workplace efficiencies and flexibilities. As a result, deadlocks might occur in negotiations. Without further measures or actions, those deadlocks are hard to break. What are the goals and where are the avenues for resolution in the event of impasses?

The first goal of deadlock-breaking measures is to recharge the negotiating process, because negotiated solutions are the most favoured. Fresh resources or fresh perspectives – through mediation, for instance – may be able to get the negotiators back on track. However, if the parties are not to be persuaded into shared conclusions, then perhaps an agreement on process – such as arbitration – may produce a substantive resolution. But if even that option is not agreed or obliged, then power may be needed. Power may be exercised through the political process or through autonomous levers such as strikes, lockouts and the unilateral implementation of new terms and conditions of employment.

Recourse to power – or at least the existence of the power option – may not only be legitimate but even necessary for the functioning of the whole labour relations system. However, the first call should always be for more persuasive and less drastic means.

Dispute resolution nearly always entails the enlistment of extra resources, including external resources. This manual now turns to consider the features of the agencies, public and private, that provide these services. Then follow some observations on dispute system design. The bulk of this Part deals with the varied



forms of conflict resolution on offer, starting with the least interventionist and ending with the most coercive.

The Industrial and Employment Relations Department (DIALOGUE) of the ILO, in collaboration with the Social Dialogue Programme of the International Training Centre of the ILO (ITC-TURIN), will publish during 2012 a Practitioners' Guide on effective dispute prevention and resolution, which will provide ILO constituents and the practitioners of dispute resolution systems with practical information and guidance concerning how to formulate labour relations policy and regulations; how to set up the institutional machinery; and how to ensure the effectiveness of dispute resolution services.

#### Country example

##### **Seven steps in the design of the dispute resolution system: British Columbia, Canada**

###### **Step 1: The design process**

Select a diverse group of key constituents and stakeholders to be on the design team.

Empower the design team to develop a comprehensive mandate and workplan for the design process.

###### **Step 2: Organizational assessment**

Prior to designing the actual dispute resolution system, the team should conduct a detailed organizational assessment.

The assessment process should examine the organization's mission, structure, dispute history, disputants involved, current system flaws and potential barriers to change.

###### **Step 3: Guiding principles and project objectives**

The first major task of the design team is to establish guiding principles for the dispute resolution process.

These principles should support the fulfilment of both substantive and procedural objectives in line with the organization's policy values (collaborative problem-solving, managing resolution and dispute prevention under an integrated/comprehensive policy umbrella).

#### **Step 4: Examine key design issues**

The design team should evaluate carefully major design issues, including Dispute Resolution Processes, Rights-Based or Interest-Based Approach to Mediation, Selecting the Right Dispute Resolution Processes, Selecting Cases for Dispute Resolution, Confidentiality, Dispute Resolution Provider, The role of the Dispute Resolution Provider, Power Imbalance and Outcomes/Enforcement.

#### **Step 5: Training and qualifications**

The design team should ensure that the mediators selected are well qualified and trained in alternative dispute resolution (ADR) techniques, including advanced procedural and awareness training.

#### **Step 6: Implementation**

The design team has the options of implementing the newly designed dispute resolution process via a pilot test, an implementation team or a staged approach.

Testing the new system through a gradual rollout plan can help the team work out the difficulties of the new system and modify it accordingly.

#### **Step 7: Evaluation and performance measures**

It is important for the design team to identify evaluation goals, performance measures, evaluation tools, data collection sources and system modification steps for the future in order for the newly designed system to evolve and improve over time.

*Source: British Columbia Ministry of Attorney General, Reaching Resolution: A Guide to Designing Public Sector Dispute Systems, <http://www.ag.gov.bc.ca/dro/publications/guides/design.pdf> (accessed 19 November 2011).*



## 20. Dispute resolution mechanisms

Recognizing the special context and needs of public service labour relations, many countries have developed dedicated agencies with wide-ranging roles in dispute resolution. This is a change from the legal tradition of dealing with labour disputes under the formal court system, which is still available as an appellate recourse under the newer systems.<sup>119</sup> Consider, for example, the brief of the Irish Labour Relations Commission:

“ [Our mission is] to promote the development and improvement of Irish industrial relations policies, procedures and practices through the provision of appropriate, timely and effective services to employers, trade unions and employees.

The Commission carries out this mission by providing the following specific services:

- an industrial relations Conciliation Service
- industrial relations Advisory and Research Services
- a Rights Commissioner Service
- a Workplace Mediation Service
- assistance to Joint Labour Committees and Joint Industrial Councils in the exercise of their functions.

The Commission undertakes other activities of a developmental nature relating to the improvement of industrial relations practices including:

- the review and monitoring of developments in the area of industrial relations;
- the preparation, in consultation with the social partners, of codes of practice relevant to industrial relations;
- industrial relations research and publications;
- organization of seminars/conferences on industrial relations/human resource management issues.

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<sup>119</sup> For initial comments, the reader is referred to the discussion on self-government and adequate intervention at the beginning of this manual.

In order for state and non-statutory labour agencies to be able to operate effectively, especially in the critical area of dispute resolution, it is essential that they display certain key procedural and substantive qualities:

- *Legitimacy.* The system within which the agency operates must be the product of the consent of the parties whose interests are at stake, and the substantive standards to be applied should satisfy public interest norms and standards.
- *Scope.* The system must be able to cover the full range of interests of rightful concern to the parties, and the attendant issues that give rise to conflict in the workplace.
- *Powers.* The system should ideally be able to bring the full portfolio of alternative dispute resolution (ADR) processes to bear, from mediation to arbitration and the intermediate mechanisms described in this manual, as appropriate to the resolution of the issue at hand.
- *Independence.* The facilitators, mediators and arbitrators of any conflict resolution scheme and any organization executing such schemes must be seen to be manifestly independent and without any conflicts of interest in relation to the parties or subject matter. The appointment of a neutral party must be the product of either general or specific consent. It may, for example, stem from a national provision or procedures to resolve particular disputes in specific public sector activities as the need arises.
- *Professionalism.* While dispute resolution styles may vary according to personalities and individual strengths, the users of services are entitled to know that the providers work under an ethically sound governance structure, have the appropriate experience, and are qualified and competent in their field.
- *Coordination and integration.* Any non-statutory or sectoral dispute resolution process should be compatible with the wider system of workplace regulation and agreement-making applicable to or adopted by the parties. The statutory and non-statutory



dispute resolution systems should ideally complement, but in any event not undermine, one another.<sup>120</sup>

- *Adequate funding and staffing.* These are essential to effective functioning of any labour agency and could be described as prerequisites to other requirements.
- *Monitoring and evaluation of effectiveness.* Agencies should create tools to assess their activities and develop their operations according to the needs of parties.

To enhance their acceptability and credibility, the top officials of these agencies may be appointed through a bipartite or tripartite consultative process involving the State, employer organizations and trade unions. They may also be nominated by the bargaining parties and confirmed by the government through the normal nominations process.

The South African *Labour Relations Act* sets up a Commission for Conciliation, Mediation and Arbitration (CCMA). It is required by statute to be “independent of the State, any political party, trade union, employer, employers’ organization, federation of trade unions or federation of employers’ organizations”.<sup>121</sup> The governing body of the Commission is constituted on a tripartite basis, and the panels of professionals charged with carrying out the Commission’s work must be “independent and competent and representative in respect of race and gender”. They are also required to operate under an exacting code of conduct. The governing body accredits, subsidises and oversees generally the dispute resolution activities of the CCMA itself, bargaining councils and non-statutory agencies.<sup>122</sup>

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120 See C. Thompson, “Dispute resolution in the workplace: public issues, private troubles”, in *ADR Bulletin* (Robina, QLD, Australia, Bond University Dispute Resolution Centre, 2007), Vol. 9, No. 8, p. 141.

121 Section 113 of the Labour Relations Act 66 of 1995.

122 Section 127(1) of the Labour Relations Act 66 of 1995: “Any council or private agency may apply to the governing body . . . for accreditation to perform any of the following functions – (a) resolving disputes through conciliation; and (b) arbitrating disputes that remained unresolved after conciliation, if this Act requires arbitration.” Section 132 (1)(b): “Any accredited agency, or a private agency that has applied for accreditation, may apply to the governing body . . . for a subsidy for performing any dispute resolution functions for which it is accredited or has applied for accreditation, and for training persons to perform those functions.”

The CCMA facilitates sector-level dispute resolution through bilateral bargaining councils. These councils, once created, discharge dispute prevention and resolution functions under the relevant council's constitution in relation to both interest disputes (bargaining disputes) and rights disputes (covering matters such as collective agreement interpretations and unfair dismissals). Public sector bargaining councils with their own dispute resolution services have been set up.<sup>123</sup>

Many of these agencies, like ACAS in the UK, the LRC in Ireland, the CCMA in South Africa or the FMCS in the United States, try to offer their services as a “one-stop shop” to promote their utility and cost-effectiveness. The aspirational language seen in Australia in relation to the introduction of a new labour commission (*Fair Work Australia*) in its federal statute on workplace relations, the *Fair Work Act 28* of 2009, is representative of the intent evident across countries:

*Fair Work Australia institutions—A one-stop shop*

“ Under [earlier law] employers and employees had to navigate seven agencies. The Australian Government made a commitment to creating a new independent umpire, Fair Work Australia, to oversee the new workplace relations system.

Fair Work Australia will provide the public with an accessible ‘one-stop-shop’ to provide practical information, advice and assistance on workplace issues and ensure compliance with workplace laws. It will be independent of unions, business and government and focused on providing fast and effective assistance for employers and employees.

Fair Work Australia will oversee the new, fair, simple and modern workplace relations system. It is based around a user-friendly culture that moves away from the adversarial and often legalistic processes of the past in favour of less formal processes. The focus will be on providing fairness and efficiency, and excellent levels of service to users of the system.<sup>124</sup>

123 See the Public Service Collective Bargaining Council and Commission for Conciliation, Mediation and Arbitration web pages, <http://www.pscbc.org.za> and <http://www.ccma.org.za> (both accessed 27 Oct. 2011).

124 *Fair Work Australia institutions: A one-stop shop*, Fact sheet issued by the Australian Government (2009).



These statutory agencies often direct special attention to the public sector, appointing panels with expertise in the area – as in Australia<sup>125</sup> – and devising processes of special relevance for the sector, as is the case in Ireland.<sup>126</sup>

Non-statutory systems may play a supplementary role in dispute resolution. They have the potential to offer adaptive and attuned formulas for parties, particularly at the more local level. They can bring with them some other benefits as well: privacy, informality, speed and a focus on substance rather than form. These can make them cost-effective even where not publicly subsidized, for example in the United States, Canada and South Africa.<sup>127</sup> Non-statutory systems may figure as an option of particular relevance for larger and more sophisticated actors in the workplace scene, who may have the resources to plan, negotiate (on an equal footing), develop and sustain them.

The Dunlop Commission Report of 1994 summarized general principles that should be in operation in the context of non-statutory dispute resolution:

“Practitioners of ADR suggest that these procedures work best when integrated into a system that begins with effective organizational policies and practices that limit the occurrence of problems before they arise, provides informal processes for individual and group problem solving of issues or conflicts that do arise, and includes formal appeal and dispute resolution procedures. In turn, for these internal procedures to be used to full advantage, they need to have the necessary due process features. Moreover, neutrals who resolve claims within these systems need to have sufficient substantive expertise to warrant deference to the decisions by the public agencies and courts responsible for the laws involved. Finally, most experts in

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125 Fair Work Australia: *The panel system*, <http://www.fwa.gov.au/index.cfm?pagename=aboutpanels> (accessed 27 Oct. 2011).

126 See, for instance, the *Code of practice: Dispute procedures including procedures in essential services* of the Irish Labour Relations Commission.

127 Some countries, such as the USA and Canada, have a tradition of using private arbitration whereas mediation by an official mediator is a well known and very important feature of industrial relations in the Nordic countries. (ILO: *Improving judicial mechanisms for settling labour disputes in Bulgaria*, Report on the High-Level Tripartite Conference, Sofia, 5 May 2006 (Budapest, 2006), p. 5)

dispute resolution stress the importance of involving the parties covered by the system in its design and oversight.<sup>128</sup>

Tokiso is the largest non-statutory dispute resolution provider in South Africa, and over 10,000 disputes are solved every year by its panellists. Tokiso provides mediation/conciliation, arbitration, fact-finding and facilitation services. It has also established its own rules for mediation and arbitration, and a code of conduct for its panellists. In practice, both state-funded and non-subsidized dispute resolution agencies are very active in South Africa, and the non-statutory bodies perform a valuable supplementary and perhaps even complementary function in the national scheme of things. The FMCS in the USA provides a similar service through arbitrator panels, which the parties may access. Private arbitrators are paid by the parties, which encourages negotiated or mediated solutions.<sup>129</sup>

The mainstay dispute resolver under the Australian *Fair Work Act* of 2009 is a statutory body, Fair Work Australia, but the Act also provides for disputes to be resolved by private persons.<sup>130</sup> In the United Kingdom, the largely state-funded but independent ACAS<sup>131</sup> is the lead organization in providing a range of dispute resolution and dispute system design services, but its work is supplemented by private bodies such as the Centre for Effective Dispute Resolution.<sup>132</sup> Non-statutory dispute resolution will generally involve additional cost to the parties, making it an unlikely facility for developing countries. In these countries, a national mediation and arbitration service, available to all sectors, should be established to promote fair labour practices and standards.<sup>133</sup>

128 The Dunlop Commission: *Fact-finding report of the Commission on the Future of Worker-Management Relations* (Washington, DC, Departments of Commerce and Labor, 1994), p. 113.

129 See more on Tokiso at its web site, <http://www.tokiso.com> (accessed 27 Oct. 2011).

130 See section 740.

131 See the Acas web site, <http://www.acas.org.uk> (accessed 27 Oct. 2011).

132 See the Centre for Effective Dispute Resolution web site, <http://www.cedr.com> (accessed 27 Oct. 2011).

133 See A. Zack: *Achieving ILO Convention aspirations through independent monitoring* (Jan. 2007, accessible at <http://www.law.harvard.edu/programs/lwp/people/staffPapers/zack/2007JanILO.pdf>) and A. Zack: *Conciliation of labor standards disputes: a potential for the ILO*, Paper presented to the International Institute for Labour Studies and the ILO Section of the International Society for Labour and Social Security Law, Apr. 10, 2006.



## 21. Dispute system design

Just like the broader collective bargaining system of which it is a part, the effectiveness of a dispute resolution system turns substantially on its legitimacy. That legitimacy flows from the participation of the interested parties in its creation:

“ When the system’s stakeholders are involved collaboratively in the design process, they become true partners in identifying, understanding, and managing their disputes – and have a more vested responsibility for the successful operation of the conflict management system.<sup>134</sup>

When a system is statutory, participation may be achieved through the political process. However, it assists greatly if the parties have had a more direct involvement in the making of the relevant governing legislation. Some countries have created bodies for this and related purposes. Examples here are the Social and Economic Council of the Netherlands<sup>135</sup> and the National Economic, Development and Labour Council of South Africa (NEDLAC).<sup>136</sup>

These high-level bodies have important roles to play not only in legitimizing the legislative scaffolding but also in making valuable substantive contributions to the content of the laws.

Major social accord initiatives very often extend beyond legislative inputs. An example here could be the partnership approach adopted by the social partners in Ireland from 1987 onwards, leading to the establishment of the National Centre for Partnership and Performance (NCPP) in 2001. In 2010, it was integrated into the National Economic and Social Council. Its original web page read as follows:

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134 C. Constantino and C. Sickles Merchant: *Designing conflict management systems* (San Francisco, Jossey-Bass, 1996), p. 54.

135 See the Social and Economic Council of the Netherlands web site, <http://www.ser.nl> (accessed 27 Oct. 2011).

136 See NEDLAC web site, <http://www.nedlac.org.za> (accessed 27 Oct. 2011).

“The National Centre for Partnership & Performance (NCP) was established by Government in 2001 to promote and facilitate partnership-led change and innovation in Ireland’s workplaces.

By building and supporting the case for workplace change and innovation through increased levels of employee involvement and engagement, the NCP’s objective is to contribute to national competitiveness, enhanced public services and a better quality of working life for employers and employees alike.

At the heart of the Centre’s mission is workplace innovation – new ways of working based on new ideas, practices and behaviours that can significantly benefit organizations and their employees in terms of improved productivity, performance, flexibility, commitment and job satisfaction...<sup>137</sup>

Public sector labour relations reform programmes should provide for or encourage the establishment of high-level fora to contribute to the change process. Beneath the broader legislative framework, there may be a need to develop and modify applied dispute resolution mechanisms. These may range from local remedies to deal with contract interpretation disputes through to personal grievances. These mechanisms are especially effective when they have been agreed and customized by the immediate stakeholders to meet their particular needs and circumstances. Because of this, they may be more responsive and adaptable than their legislated counterparts:

“The first principle is that if you are really serious about developing consensus, you have to include from the beginning all the stakeholders who have the power to make decisions, are responsible for implementing them, are affected by them, and have the power to block them... The truth is that if groups are cut out of the process, they may do more harm than if they are included.<sup>138</sup>

137 The National Centre for Partnership & Performance web page, <http://www.ncpp.ie>, is no longer accessible. The information regarding the NCP is now available in the National Economic and Social Council web page, <http://www.nesc.ie/en/our-organization/nescdo/ncpp/> (accessed 27 Oct. 2011).

138 D. Strauss: “Facilitated collaborative problem solving and process management”, in L. Hall (ed.): *Negotiation strategies for mutual gain* (Thousand Oaks, CA, Sage Publications, 1993), p. 35.



The Federal Mediation and Conciliation Service in the United States has reached down into the workplace to encourage local parties to build their own appropriate dispute resolution mechanisms. It has developed for consideration a flexible suite of measures that the parties may adapt (“*Dynamic Adaptive Dispute Systems*”) to deal primarily with non-economic issues, but the formula could be more generally deployed:

“ [T]here are numerous workplace complaints, ranging from statutory claims of discrimination to personality conflicts, not typically resolved in the collective bargaining arena. Those matters can turn into protracted disputes, costly time-consuming lawsuits and poisoned relationships, with a devastating impact on employee morale. New alternative processes are called for to resolve individual employment disputes that threaten competitiveness, efficiency, productivity and morale....

FMCS has responded to the need for mechanisms to resolve such disputes by introducing [in 2004] a new program – Dynamic Adaptive Dispute Systems, or DyADS. Over the past 18 months, a team of dispute system design experts helped FMCS develop a model for organizations to build their own conflict resolution systems....

The word “dyad” signifies two components working together as a team. In this case, a DyADS project includes representatives of management and labor, collaborating to design and maintain a system for resolution of conflicts arising in their workplace. These conflicts can range from complex equal employment opportunity claims to morale and workplace relationship problems that are damaging to the working environment.

A DyADS process begins with discussions between front-line managers and union representatives whose member employees would be directly affected by any new system. The parties themselves build the program from its inception, designing different processes to efficiently handle, and hopefully resolve, workplace disputes. To be a success, any system should be very flexible, open to change, and have many different avenues for disputants to bring their concerns. With the DyADS approach, the parties can jointly develop an internal “neutral function” — performed by either an individual or a committee — to coordinate and implement the program and help disputants reach solutions to their workplace problems. During this process, an FMCS team facilitates internal dialogue between the parties, and helps them collaborate to design a flexible DyADS program that has multiple tracks for conflict resolution. The key to a

successful DyADS program lies with the parties' readiness to create a unique system that suits the needs of their workplace.

DyADS is... an inclusive process that encourages parties to develop a proprietary system with multiple options available for resolution of various types of employment disputes. Any such system must be dynamic, constantly evolving, and must not interfere with collective bargaining rights or the rights of individuals to seek redress in any statutory scheme.<sup>139</sup>

The FMCS also offers services on “negotiated rule-making” which, although mainly intended to help parties with substantive outcomes, could readily be used for assistance with dispute system design as well.<sup>140</sup>



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139 See <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=281&itemID=18120> and <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=42&itemID=18115> and the extract reproduced under *Resources* below (URLs accessed 27 Oct. 2011).

140 See further the observations under *Active facilitation of negotiations* at p. 31, above.



## 22. Enlisting higher-tier figures

It is a general principle of grievance resolution systems that issues should be dealt with as close to their source as possible. Not only does this oblige the immediate antagonists to take responsibility for their actions and their consequences, but it also means that if a matter remains unresolved, there are more senior layers of personnel to be called in for assistance.

Public sector collective bargaining over key matters such as wages and working conditions or major change management initiatives would usually commence at a senior level. Nonetheless, if the primary negotiators find themselves at a deadlock, the same general rule should apply: before calling on third-party resources, the parties could consider drawing on more senior figures within their respective organizations to bring fresh eyes and perhaps greater authority to bear on the impasse.

Many bargaining arrangements do indeed work with this approach in practice. In the wake of the relatively recent and fairly extensive decentralisation of bargaining in the Nordic countries, for instance, it is quite common to see the government and unions intervening in a mediating capacity should bargaining at municipal level reach a deadlock.<sup>141</sup>

## 23. Facilitated discussions

When an issue first emerges but before it hardens into a clear dispute, the parties may decide to work it over in discussions that are independently facilitated:

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A facilitated discussion is an informal process allowing the efficient resolution of “low level” disputes that are relatively new and have

<sup>141</sup> T. Stokke and A. Seip: “Collective dispute resolution in the public sector: The Nordic countries compared”, in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 60, No. 4, pp. 571–2.

not yet escalated to significant divisions between the people involved. The facilitator will assist the parties to talk about their issues in a “safe environment” that is totally confidential. The facilitator will not offer advice or suggest solutions. The aim of the process is to provide a space in which both parties can listen to each other, gain a deeper understanding of the other and try to come to a mutually agreeable resolution.<sup>142</sup>

Facilitation makes its contribution in several ways:

- The workplace parties bring a mix of shared, different and competing interests with them into the room. That being the case, it nearly always helps to have a neutral chair whatever the nature of the interactions.
- While the parties are usually intent on substantive outcomes, the facilitator’s primary focus is on process as a means to an end. The facilitator’s mandate is to set and keep the parties on the most productive pathways to maximize mutual as opposed to partisan gains.
- A credible facilitator can steer the parties into looking at wider interests, more perspectives and longer time horizons.
- A dispassionate facilitator can smooth small group dynamics, manage personalities and operate as a shock absorber. When trust between the parties is in short supply, the case for an independent facilitator is particularly compelling.
- The facilitator can act as off-line sounding board for concerns and propositions; and, with permission, as a reality-tester.
- The facilitator may, with consent, ease into the more activist role of proto-mediator when positions start to become fixed.
- Good facilitation does not displace consultations, negotiations or other interactions, but supports them.

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142 Health Services National Partnership Forum, *Tools for change through partnership: Alternative processes for handling change, conflict resolution and problem solving*, p. 27.



## 24. Joint problem solving

Joint problem solving can feature both as dispute prevention (see above, p. 37) and dispute resolving technique. Once a dispute has actually arisen, the parties may decide to break out of combat mode and instead place the issue into a problem solving process, very often facilitated. The Argentinean general collective agreement, for example, sets up a Permanent Commission of Application and Labour Relations (Comisión Permanente de Aplicación y Relaciones Laborales, CoPAR), which may intervene upon request of either party and may suggest solutions of its own design during fifteen days, after which the parties may agree to submit the issue to mediation.<sup>143</sup> It is composed of three representatives each of the workers and the employer, and has the authority to verify that sectoral collective agreements are consistent with the general collective agreement. In Mexico, the Federal Tribunal of Conciliation and Arbitration is similarly composed of equal representation by each party but are divided in chambers, each of which has a president selected by the partisan members.<sup>144</sup> In Uruguay, conflicts must by law be resolved at the lowest level possible, overseen by the Ministry of Labour.<sup>145</sup>

## 25. Conciliation and mediation

The Voluntary Conciliation and Arbitration Recommendation, 1951 (R92) sets out the basis for voluntary labour dispute mechanisms. The Recommendation encourages to establish mechanisms that are appropriate to national conditions. Furthermore, Convention No. 154 states that bodies and procedures for the settlement of labour disputes should be so

143 N. Rial: *La negociación colectiva y el conflicto: formas alternativas de solución* (Caracas, Banco Interamericano de Desarrollo, Centro Latinoamericano de Administración para el Desarrollo, 2008).

144 J. Bonifacio and G. Falivene: *Análisis comparado de las relaciones laborales en la administración pública latinoamericana. Argentina, Costa Rica, México, y Perú* (Caracas, Banco Interamericano de Desarrollo, Centro Latinoamericano de Administración para el Desarrollo, 2002), pp. 50, 125.

145 Act No. 18508, 26 June 2009, Article 15.

conceived as to contribute to the promotion of collective bargaining.

Mediation<sup>146</sup> is a deadlock-addressing process where the parties to a dispute, either voluntarily or under legal obligation, use the services of an independent third person to clarify issues, develop and consider settlement options, or steer them towards an agreement of their own making. The mediator has no determinative role in regard to the outcome of the dispute but may offer process guidance and, on occasion and by consent, content suggestions to assist the parties. Process, not substance, is the mediator's responsibility. If the parties remain unpersuaded, the impasse persists.<sup>147</sup>

If one accepts that the best agreements and solutions are those negotiated by the parties by themselves, then mediation easily represents the alternative dispute resolution option of choice. A good mediator tries to get the parties back on track by providing fresh structure and direction to their efforts, moderating inter-personal tensions and encouraging rational deliberation. Being essentially without decision-making powers, the mediator's challenge is to help bring the parties to new and, better still, shared insights through careful chairing and, by invitation, judicious reality-testing, whether in joint or separate meetings.

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146 Used here synonymously with "conciliation". Different countries are inclined to use the terms in different ways. "Conciliation" is sometimes used to denote statutory as opposed to private dispute resolvers.

147 See the Voluntary Conciliation and Arbitration Recommendation 92 of 1951, and in particular subparagraph 3(2): "Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority".



### Definitions of conciliation/mediation

The Participant's workbook for Conciliation/Mediation Training Course organized by the International Training Centre presents different definition for conciliation/mediation:

*"Friendly or diplomatic intervention, usually by consent or invitation, for settling differences between persons, nations, etc."* (Webster's New World Dictionary)

*"The act of a third person in intermediating between two contending parties with a view to persuading them to adjust to settle their dispute."* (Black's Law Dictionary)

*"Mediation is a method of resolving disputes and conflicts. It is a voluntary process involving a complainant, the person who brings the complaint, and a respondent, who has done something the complainant is upset about. Mediation requires the participation of a mediator who operates from an impartial base and whose primary role is to promote agreement. The mediator has no authority to impose a settlement on the parties, nor can the parties be forced to enter mediation or to reach an agreement."* (The Mediation Project — University of Massachusetts/Amherst)

*"[The p]urpose of conciliation is to convert a two dimensional fight into a three dimensional exploration leading to the design of an outcome." Edward De Bono "Conciliation may be described as the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of rational and orderly discussion of differences between the parties to a dispute under the guidance of the conciliator."* (ILO)

Source: Conciliation/Mediation Training Course – Participants workbook (ILO, 2002), pp. 16-17.

## Shades of mediation<sup>1</sup>

### Facilitative mediation

In a facilitative mediation, the mediator works with a light hand. The role is firmly process-orientated, and substantive suggestions to the parties on how to sort out their differences would not be volunteered. The mediator structures a process to assist the parties reach a mutually agreeable resolution. So the mediator may ask questions, test (perhaps in private session) the parties' respective points of view and try to draw out the parties' underlying interests so that alternative solutions become evident.

### Evaluative mediation

In an evaluative mediation, the mediator plays a more active role, though usually in a calibrated way. The mediator may begin proceedings in a facilitative mode but, if the impasse remains, switch to a more interrogating stance, encouraging the parties to reality-test their respective positions, perhaps by putting before them challenging counter-evidence. If a breakthrough still eludes the parties, the mediator may propose and even actively recommend particular solutions. Even here, though, the parties are not bound to accept them.

### Transformative mediation

Transformative mediation turns on extensive recognition by each party of the other's needs, interests, values and points of view, coupled with mutual empowerment. The object is a transformation of the underlying relationships between the parties in consequence of the mediation process. Transformative mediators meet with parties together, since only they can empower and effect the necessary change. In transformative mediation, the parties structure both the process and the outcome of mediation, with the mediator as facilitator.<sup>2</sup>

<sup>1</sup>A useful resource for materials on mediation is the web site <http://www.mediate.com> (accessed 27 Oct. 2011). Readers looking for a comprehensive glossary of mediation and related terms are referred to the website of the National Alternative Dispute Resolution Advisory Council in Australia: see <http://www.nadrac.gov.au> (accessed 27 Oct. 2011). The practitioners' guide (forthcoming) on effective dispute prevention and resolution will provide with practical information and guidance regarding steps to establish a mediation procedure.

<sup>2</sup> See R. Baruch Bush and J. Folger: *The promise of mediation: Responding to conflict through empowerment and recognition* (San Francisco, Jossey-Bass Publishers, 1994).



The ways in which mediation may be used to strengthen both the bargaining processes and the prospects of settlement are legion. However, mediation is coupled with other remedies and features such as peace obligations, cooling-off periods, references to voluntary arbitration and loop-backs into the bargaining process itself. The Nordic countries offer some good examples of the technique in practice.

In Sweden, Denmark, Norway and Finland, industrial action is integral to collective bargaining in the public sector.<sup>148</sup> However, no strike action can be taken until compulsory mediation has run its course. Parties are under an obligation to notify the mediator or mediating agency about any threatened industrial action, they are bound to participate in the mediation process, they must defer any industrial action in respect of the process and they must consider the mediator's proposals.

While mediation in all four countries is state-financed and regulated, in Sweden the parties have also carved out the latitude to shape their own negotiation and dispute resolution procedures. In one case, the parties made provision for the appointment of a neutral chairman with powers to mediate, to postpone industrial action for a maximum of 14 days and to propose arbitration over specific topics.<sup>149</sup>

In Denmark, in a further endeavour to lower temperatures and oblige additional reflection, parties must wait a further five days after the conclusion of mediation before being entitled to take any industrial action. Public sector mediators in Denmark also have the power to demand a union ballot over a mediation proposal. The governing legislation provides furthermore that for a mediator's proposal to be rejected, a majority of voters must vote against it and that this majority must represent at least 25 per cent of union members eligible to vote.

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148 The summary here draws extensively on T. Stokke and A. Seip: "Collective dispute resolution in the public sector: The Nordic countries compared", in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 60, No. 4.

149 Op. cit., p. 566.

All of these measures have the indirect effect of encouraging the parties to stay with, or perhaps return to, the bargaining process.

### Suggested conciliation mediation process steps

1. *Introduction: create a climate conducive to the resolution of the dispute and to ensure that the parties have a basic understanding of the process.*
2. *Diagnosis: develop an understanding of and to analyse the conflict and the dispute.*
3. *Solutions: generate options for settlement and to develop consensus on preferred options.*
4. *Agreement: reach an agreement and confirm it in writing.*

*Source: Source: Conciliation/Mediation Training Course – Participants workbook (ILO, 2002), pp. 115-120.*

### Mediation as a continuing resource

In difficult cases, and especially where the stakes are high, mediation at the point of impasse in negotiations may not deliver a settlement. If the issue in dispute is not then abandoned, the parties concerned may decide to keep pursuing their opposing interests through either industrial action or arbitration. The pressure of attrition associated with both industrial and legal battles often gives the late-stage mediator more compelling leverage to close off a dispute that would otherwise drag on.

### A negotiation–conciliation–arbitration model

For close on 100 years after federation in 1901, the Commonwealth of Australia worked with a negotiation–conciliation–arbitration model of workplace regulation. The fact that in principle almost any genre of workplace dispute, whether in the public or private sector, could be placed before a tribunal equipped with compulsory conciliation and arbitration powers carried a number of special consequences. It meant that the distinction between disputes of interest and of right was largely academic, that all industrial action was regarded as irregular



and that an almost unique system of conciliation/arbitration-supported negotiation evolved.

While the Australian Conciliation and Arbitration Commission's<sup>150</sup> arbitration function might have attracted most of the public's attention, in fact the majority of disputes brought to it were settled by conciliation. Even this feature disguised what was probably the most telling impact of the Commission, namely, its promotion of the underlying employer–union negotiation process:

“ Under... the original Act, it is clear that the primary function of the legislation, and the court which it established, was to encourage employees and employers to reach agreement by negotiation. If agreement was not forthcoming the court could exercise its function as a conciliator to assist the parties to agree amicably. If this failed to result in an agreement the court could then exercise its function as arbitrator to decide on any remaining dispute terms in the form of an award. The [intention] of the founders is clear. Direct negotiation between the parties was to be encouraged even if it meant that a conciliator had to be called in to help the process along toward agreement. Arbitration was to be the last resort if all else failed.<sup>151</sup>

Conciliation has on occasion included providing recommendations under circumstances where the parties have effectively agreed to be bound by the recommendations.<sup>152</sup>

The Australian example truly demonstrates how conciliation and arbitration can be used to advance bargaining processes.

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150 Initially called the *Commonwealth Court of Conciliation and Arbitration*, then after 1956 the *Commonwealth Conciliation and Arbitration Commission*, then the *Australian Conciliation and Arbitration Commission*, then the *Australian Industrial Relations Commission* and currently (with less prescriptive powers) *Fair Work Australia*.

151 R. McLelland: “Towards collective bargaining: A critical analysis of trends”, in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 1976) Vol. 18, No. 4, p. 391, cited and discussed further by W. Creighton, W. Ford, and R. Mitchell: *Labour law*, second edition (Sydney, The Law Book Company, 1994), p. 579–610.

152 See for instance the decision of the state (as opposed to federal) tribunal in *Minister of Industrial Relations v. BHP Steel Limited 7 others*, (NSWIRC 8095) 13 May 2002.

## Mediation in rights disputes

While the primary emphasis in this manual is on mediation in the context of interest disputes, it is an option that can be used to good effect in rights disputes as well, both individual and collective.<sup>153</sup>

In the case of interest disputes it is usually the spectre of industrial action that gives the mediator some persuasive leverage. In rights disputes, the adjudication before a court of law or arbitration looming is the final solvent. In these cases the prospects of a loss of control, a dictated decision and the significant matter of legal costs gives mediation an added leverage.<sup>154</sup> The underlying mediation rationale is that negotiated outcomes trump all others, and it is the mediator who can often help refocus the parties on the formula for productive discussions.

Several countries now oblige mediation as a precursor to any rights determination by an arbitrator or court of law, and it is perhaps in the area of unfair dismissal that the technique has produced its best results.

153 See A. Zack: "Conciliation of labor court disputes", in *Comparative Labor Law and Policy Journal* (Champaign, IL, University of Illinois College of Law and the United States Branch of the International Society for Labor Law and Social Security, 2005) Vol. 26, No. 3, and A. Gladstone, "Settlement of disputes over rights", in R. Blanpain, (ed.): *Comparative labour law and industrial relations in industrialized market economies* (The Hague, Kluwer, 2007), p. 692.

154 The following goals of alternative labour dispute resolution systems have been mentioned in the literature: relieving court congestion and reducing undue cost and delay; enhancing community involvement in the dispute resolution process; facilitating access to justice and providing more effective dispute resolution. S. Goldberg, E. Green and F. Sander: *Dispute Resolution* (New York, Little, Brown and Co., 1985). "Processes like mediation and arbitration have been used increasingly over the last three decades to deal with a variety of disputes in countries around the world, because they have helped relieve pressure on the overburdened court system and because they provide a more credible forum for dispute resolution. ADR has gained widespread acceptance among both the general public and the legal profession in recent years and many legal systems require the courts to both encourage and facilitate the use of civil mediation. In fact, some courts now require the parties to resort to ADR of some type, conciliation or mediation, before permitting their cases to be heard. In some countries pre-trial conciliation in court is compulsory before adjudication. ADR has found a sympathetic audience among litigators and litigation users in many common law countries, and increasingly in civil law systems worldwide. In the USA ADR processes are now widely regarded as being on the same footing as court processes and being part of the civil justice system." F. Steadman: *Handbook on Alternative Labour Dispute Resolution*, (Turin, International Training Centre of the ILO, 2011), pp. 11–12.



Collective bargaining statutes in many countries impose compulsory settlement mechanisms whenever an impasse occurs, as illustrated by the following table of European Public Service Dispute Resolution Systems:

**Table 2. Compulsory dispute resolution**

<b>Bulgaria</b>	Only in the public sector
<b>Cyprus</b>	Mediation after social partner dialogue has collapsed
<b>Denmark</b>	Both conciliation and arbitration are compulsory if there is a dispute
<b>Estonia</b>	If a dispute cannot be settled, it must defer to the public conciliator, the trade union and the courts
<b>Finland</b>	Duty to engage in mediation, not to come to an agreement
<b>Greece</b>	Certain public sectors
<b>Latvia</b>	Not specifically grounded in law, but conciliation is a norm
<b>Lithuania</b>	Must submit unsettled disputes to the Conciliation Commission
<b>Malta</b>	If a negotiating deadlock occurs
<b>Netherlands</b>	Only in certain sectors of the public workforce
<b>Romania</b>	Conciliation, mediation and arbitration
<b>Slovakia</b>	Mediation
<b>Spain</b>	In cases of public services
<b>Sweden</b>	Mediation can be compulsory or voluntary

## 26. Fact-finding

Greater levels of rationality are always desirable in the collective bargaining process, particularly at the point of breakdown. When parties are struggling to reach an agreement and part of the problem is sourced in conflicts over data or perspectives on fairness and affordability, one way of injecting greater objectivity is to request a neutral third party to undertake a fact-find-

ing exercise and then to present recommendations to the negotiators.

While the fact finder has no determinative role, the intention is that the independence, expertise and – ideally – weight that comes with the title will be highly persuasive, putting the parties under considerable moral pressure to respect or, better still, adopt the relevant recommendations. At the very least, the introduction of recommendations is intended to clarify matters for the parties, thereby reducing the extent of any data conflict. Public opinion may come into play as well if one party is allowed to publish the fact finder’s recommendation if the other refuses to accept it.

Fact-finding is an approach seen in public sector areas such as education in several states of the United States. To be successful, it is necessary that the fact finder has ready access to relevant comparative data, which means in turn that pertinent public records needs to be available.

The method also has its weaknesses. A standard criticism is that parties may become conditioned to relying on the input of a neutral, abrogating some of their own responsibilities for concerted bargaining. Again, recommendations themselves bring no finality and the rejection of a neutral’s recommendations may attract allegations of bad faith.<sup>155</sup> Nonetheless, fact-finding can play a constructive part in dispute resolution and at the very least it could be available as a voluntary option.

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155 See further T. Kochan: *Collective bargaining and industrial relations* (Toronto, Irwin, 1980) and E. Ries: *The effects of fact finding and final-offer issue-by-issue interest to arbitration on teachers’ wages, fringe benefits and language provisions* (monograph, 1992).



### Early neutral evaluation — an alternative to fact-finding

- Early neutral evaluation (ENE) is a *preliminary assessment of facts, evidence or legal merits*. This process is designed to serve as a basis for further and fuller negotiations, or, at the very least, help parties avoid further unnecessary stages in litigation.
- The parties appoint an *independent person who expresses an opinion on the merits of the issues* specified by them. It is a *non-binding opinion* but provides an unbiased evaluation on relative positions and guidance as to the likely outcome should the case be heard in court.
- Early neutral evaluation is intended to encourage each party to understand better its own position vis a vis the benchmarks used to resolve disputes by providing a forum in which the parties present their respective cases and receive an independent, neutral assessment of the likely outcome.

Source: P. Teague: *Dispute resolution, employment relations and public policy in the Republic of Ireland, Presentation made for the ILO, 2008.*

## 27. Arbitration

Arbitration can be seen to represent the “next step” from mediation in the dispute resolution chain. In voluntary arbitration the parties to the dispute, appreciating that their own efforts will not deliver a breakthrough, voluntarily agree to place the issues dividing them before an independent third party. The arbitrator is empowered either by contract (the deed of submission to arbitration, which may be captured in a broader collective agreement) or by statute to consider evidence and argument and then make a final and binding determination on the matters in dispute.<sup>156</sup>

In interest (economic) disputes, two modes of arbitration can be identified. The standard mode sees the arbitrator with a free hand in determining, for instance, the wage outcome, provided only that the award is rational, justified by the evidence and

<sup>156</sup> See paragraph 6 of the Voluntary Conciliation and Arbitration Recommendation, 92 of 1951: “If a dispute has been submitted to arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the arbitration is in progress and to accept the arbitration award.”

within the arbitrator's terms of reference. Often, the award represents a compromise between the claim advanced by the union and the offer presented by the employer. Where parties begin to believe that the arbitrator is likely to split the difference, they can be tempted to exaggerate their respective positions, both in negotiations and in the arbitration process itself. Both developments hinder the reaching of voluntary settlements.

To counter this tendency, the alternative "final offer" mode of arbitration was conceived. Here the arbitrator is instructed not to split any difference but to adopt either the union's claim or the employer's offer. If one party presses an extreme case and the other a modest one, the likelihood is that the arbitrator will go with the latter. Both parties are aware of this, and therefore pressured by the process itself to moderate their positions, so closing the distance between them. Moderated positions makes the arbitrator's task a little easier and sometimes even induce the parties to return to their own direct negotiating process to close the deal.

Final offer arbitration may take one of two formats. In the first, the arbitrator is directed by the terms of reference to select the *entire* package proposed by one or other of the parties. In the second, the arbitrator is asked to make determinations on an item-by-item basis, possibly selecting the proposition put forward by the union on one item and then the proposition put forward by the employer on another, and so on.<sup>157</sup>

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157 Some states in the United States have adopted the standard model of arbitration and others the final offer variant. So, for instance, Connecticut school teacher interest disputes are subject to final-offer arbitration on the entire package, while Iowa uses final-offer arbitration on an item-by-item basis. See J. Fossum: *Labor relations: Development, structure, process*, 8th edition (New York, McGraw-Hill, 2002). For some discussion on the merits of the two approaches, see E. Edelman and D. Mitchell: *Dealing with public sector labor disputes: An alternative approach for California*, <http://www.spa.ucla.edu/calpolicy/files05/CPO-MTAp.pdf> (accessed 27 Oct. 2011). Their conclusion (at 157): "Suffice it to say that a model of arbitrators who mechanically split the difference without any reference to norms of what would be a reasonable settlement seems naïve. Nor does the evidence suggest that arbitration has a substantial independent effect on actual outcomes – although unionization itself does tend to raise pay. The important point for public policy is that there is more than one model of interest arbitration available. Whether mandated by law or chosen voluntarily by the parties, policy-makers or the parties can pick the version with which they are most comfortable."



While final offer arbitration represents a later development of conventional arbitration, it is best regarded as a permutation of the mainstream, to be used only by way of deliberate exception. Practitioners familiar with both systems generally regard the mainstream as more judicious.

As a general rule, an arbitrator's award is not subject to an appeal to the formal legal system.<sup>158</sup> While the merits of the award may not be challenged in the ordinary courts, it would normally be possible to review the arbitration process or outcome on the basis of some manifest irregularity<sup>159</sup> or illegality.<sup>160</sup>

Arbitration stands as an alternative to the exercise of power as a method of breaking otherwise intractable bargaining stalemates, and is very often seen by all parties as a preferable and rational alternative.<sup>161</sup>

While voluntary arbitration may be used to dispose of an entire dispute, it often works very well when the parties deploy it more selectively, for instance to resolve just certain elements of a larger matter.

The legitimacy of a voluntary arbitration process and, relatedly, the acceptability of its outcome will generally not be in question precisely because the option has been jointly agreed. Its voluntary character means that, unlike in the case of compulsory arbitration (see below), the hazard of a chilling effect on the underlying bargaining process should not readily arise.

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158 Although the parties themselves sometimes provide for an internal appeal process.

159 Such as the arbitrator failing to give a party a proper opportunity to be heard.

160 Such as the arbitrator making an award that exceeds the powers set out in the relevant terms of reference or that offends against public policy.

161 In the celebrated words of Henry Bournes Higgins, second president of the federal labour court in Australia (from 1907 to 1921): "[T]he process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public."

Voluntary arbitration is a method of dispute resolution that satisfies the objectives and concerns of Article 8 of Convention 151.<sup>162</sup>

## 28. Med-arb

A fused or directly connected two-stage process of mediation followed by arbitration (med-arb) is seen in many systems across the private and public sectors. The proximity of the two processes produces both economy and settlement efficacy, and both practitioners and users have generally supported the innovation. There are, though, some professional misgivings over models which provide for the same individual to exercise both mediation and arbitration roles. The charge is that optimum mediation requires frank disclosures, and that parties will feel constrained before a mediator who may, if the dispute remains unresolved, figure as the later arbitrator. In practice, however, where systems provide for the dual role, the coupling does not appear to compromise the dispute settlement objectives.<sup>163</sup>

A med-arb process may assign different professionals to discharge each role, allowing full sway to each process. Depending on the nature of the issue, the volume of matters and the resources available, countries may also design the process in multi-door way so that in the event of mediation failing, the matter can proceed immediately to arbitration.

Med-arb (or con-arb) has been used with marked success in South Africa in respect of both collective agreement interpretation and dismissal disputes.<sup>164</sup> It is used in Australia in several employment settings, public and private sector.

<sup>162</sup> See ILO: *Freedom of association and collective bargaining* (Geneva, 1994), para. 256. Also, according to the position of the ILO as defined by the supervisory bodies, arbitration should be voluntary and performed by an impartial body such as a court or other independent body (ILO: *Improving judicial mechanisms for settling labour disputes in Bulgaria*, Report on the High-Level Tripartite Conference, Sofia, 5 May 2006 (Budapest, 2006).)

<sup>163</sup> For a critique of the fused role, see A. Zack: "Conciliation of labor court disputes", in *Comparative Labor Law and Policy Journal* (Champaign, IL, University of Illinois College of Law and the United States Branch of the International Society for Labor Law and Social Security, 2005), Vol. 26, No. 3, pp. 408–10.

<sup>164</sup> See section 191 of the Labour Relations Act 1995.



In the State of New South Wales, workers compensation disputes proceed first to conciliation, usually in a telephone conference environment and then, if matters remain unresolved, to arbitration. A similar procedure has been adopted by the Fair Work Act in Australia in relation to unfair dismissal cases. The relevant New South Wales statutory worker compensation provisions illustrate the general intent to promote informality, flexibility and expedition in dispute settlement:

*Procedure before Commission*

- (1) Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.
- (2) The Commission is not bound by the rules of evidence but may inform itself on any matter in such manner as the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits.
- (3) The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
- (4) Proceedings need not be conducted by formal hearing and may be conducted by way of a conference between the parties, including a conference at which the parties (or some of them) participate by telephone, closed-circuit television or other means.
- (5) Subject to any general directions of the President, the Commission may hold a conference with all relevant parties in attendance and with relevant experts in attendance, or a separate conference in private with any of them.
- (6) If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing.

*355 Arbitrator to attempt conciliation*

- (1) The Commission constituted by an Arbitrator is not to make an award or otherwise determine a dispute referred to the Commission for determination without first using the Arbitrator's best endeavours to bring the parties to the dispute to a settlement acceptable to all of them.
- (2) No objection may be taken to the making of an award or the determination of a dispute by an Arbitrator on the ground that the Arbitrator had previously used the Arbitrator's best endeavours to bring the parties to the dispute to a settlement.<sup>165</sup>

The principal collective agreement covering tens of thousands of public sector workers in the province of Ontario, Canada, has a particularly concise med-arb formulation covering all disputes arising out of the interpretation and application of the agreement, as well as other grievances. By consent, the procedure can also be extended to dismissal, sexual harassment and human rights cases. The relevant provisions read:

*Mediation/Arbitration procedure*

“ 22.16.1 [A]ll grievances shall proceed through the [Grievance Settlement Board] to a single mediator/arbitrator for the purpose of resolving the grievance in an expeditious and informal manner.

“ 22.16.2 The mediator/arbitrator shall endeavour to assist the parties to settle the grievance by mediation. If the parties are unable to settle the grievance by mediation, the mediator/arbitrator shall determine the grievance by arbitration. When determining the grievance by arbitration, the mediator/arbitrator may limit the nature and extent of the evidence and may impose such conditions as he or she considers appropriate. The mediator/arbitrator shall give a succinct decision within five (5) days after completing proceedings, unless the parties agree otherwise.

165 See Sections 354–5 of the Workplace Injury Management and Workers Compensation Act 1998.



## 29. Compulsory arbitration

Because compulsory arbitration can rob the bargaining process of its vitality and equity, it is an option that must be approached with caution. It is more commonly imposed under the law or through administrative decision when it is evident that the parties cannot break their impasse without intervention from the authorities, or when a strike has surpassed a pre-established time frame.<sup>166</sup> In relation to arbitration imposed by the authorities, the Committee of Experts on the Application of Conventions and Recommendations has stated that such interventions are not easily reconcilable with the principle of voluntary negotiation established in Article 4 of Convention No. 98.<sup>167</sup> For example, Peru has removed compulsory arbitration and repealed provisions that effectively prohibited strikes in the “essential public services”.<sup>168</sup>

The ILO’s supervisory bodies have declared that mandatory arbitration imposed on the parties to a dispute by a third party, e.g. by a public authority, in the case of a collective dispute will constitute a breach of international labour standards. However, the ILO supervisory bodies have recognized the use of compulsory arbitration, particularly where the model is the product of consent between the parties. This can be seen in the case of strike action occurring in essential services, which are defined under the sub-heading *Prohibitions and restrictions on industrial action in the case of key personnel and essential services*.<sup>169</sup> Also, it can be imposed when there is a national emergency or when it involves government workers who exercise

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166 B. Gernigon, A. Odero and H. Guido: *ILO principles concerning collective bargaining*, International Labour Review (Geneva, ILO, 2000), Vol. 139, No. 1, p. 44.

167 See ILO: *Freedom of association and collective bargaining* (Geneva, 1994), para. 258.

168 ILO: *Freedom of association in practice: Lessons learned*, International Labour Conference, 97th Session, 2008, p. 16

169 ILO: *Improving judicial mechanisms for settling labour disputes in Bulgaria*, Report on the High-Level Tripartite Conference, Sofia, 5 May 2006 (Budapest, 2006), pp. 5-6.

authority in the name of the state.<sup>170</sup> An important caveat in this connection is that arbitration should be discharged by impartial bodies and the parties permitted to participate at all stages of the arbitration procedure.<sup>171</sup>

An example of this can be found in Norway, where senior civil servants have no legal right to engage in industrial action. They do have bargaining rights through the same unions representing the rest of state workers, but their particular collective terms of employment are decided by compulsory arbitration as a last resort if negotiations do not succeed.<sup>172</sup>



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- 170 B. Gernigon, A. Odero and H. Guido, *ILO principles concerning collective bargaining*, International Labour Review (Geneva, ILO, 2000), Vol. 139, No. 1, p. 44.
- 171 ILO: *Improving judicial mechanisms for settling labour disputes in Bulgaria*, Report on the High-Level Tripartite Conference, Sofia, 5 May 2006 (Budapest, 2006), pp. 5-6
- 172 See T. Stokke and A. Seip: "Collective dispute resolution in the public sector: The Nordic countries compared", in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 60, No. 4, p. 564.



Because the costs associated with industrial action may be too high to bear, legislators may decide to restrict or prohibit such action in critical areas of the public service. In the state of Washington of the USA, the binding arbitration covers police, fire fighters and employees of public transportation provided to large population groups. These three groups provide, in the opinion of the state, the most essential services, and binding arbitration is perceived as the greatest incentive to not declare strikes. Under the law, the arbitrator must compare the offers of the parties to collective agreements in similar jurisdictions. By ordering that employees must be kept at the level of their colleagues in similar geographical areas, the law tends to protect employees against proposals involving a standard of living lower than they have already achieved. Binding arbitration has proved so popular that it was recently granted to employees who care for patients in the latter's homes and to the operating and maintenance employees of joint operating agencies who are employed at a commercial nuclear power plant.<sup>173</sup>

But reducing bargaining to no more than the making of appeals would greatly prejudice workers, and so compulsory arbitration is often substituted as the final deadlock-breaker in such cases. Compulsory arbitration means arbitration imposed by law or by the government authorities at their own initiative or in reaction to a request by one party – and not all parties – to the dispute.<sup>174</sup>

A good example of the policy considerations at stake is captured in section 1 of the *Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act 312 of 1969* of the State of Michigan in the United States:

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173 C. Carrión-Crespo and A. Santos Bayrón: *The impact of mediation on the use of labour arbitration in the public services: Comparison between the State of Washington and Puerto Rico*, Presentation made before the 2nd International Congress on Alternative Dispute Resolution Mechanisms, San Juan, Puerto Rico (2006) (in Spanish).

174 See ILO: *Freedom of association and collective bargaining* (Geneva, 1994), para. 256.

“ It is the public policy of this State that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

In systems characterised by participant involvement and consent, arbitration does not appear to blunt bargaining but rather closes off the process in acceptable ways. In the Nordic countries arbitration in forms ranging from voluntary through “pressurized” to compulsory figure as sparingly used expedients to finalize outstanding issues. And so in the state sectors of Norway and Sweden, only around two per cent of disputes are typically settled in arbitration. Largely because of the oversight role of the sectoral parties – who may oblige the local parties to engage in intensive mediation – the use of arbitration at the municipal level is close to zero.<sup>175</sup>

One potential benefit of compulsory arbitration is that it allows parties and mediators to review previous awards in order to establish realistic parameters within which the parties can set their Best alternatives to a negotiated agreement (BATNAs) and worst alternatives to a negotiated agreement (WATNAs).

For that purpose, clear parameters in the law are helpful. If the system is predictable, this will discourage frivolous or outlandish proposals, and may in fact promote the negotiated settlement of disputes.

The evidence out of Canada and the United States suggests that compulsory arbitration produces outcomes similar to comparable non-arbitrable, collectively bargained agreements. In Ontario, the base wage rate average annual increases for collective agreements covering 200 or more workers over the period 1998 to June 2009 in the public sector was 2.5 per cent in arbitrated

175 See T. Stokke and A. Seip: “Collective dispute resolution in the public sector: The Nordic countries compared”, in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 60, No. 4, p. 572.



cases and 2.7 per cent in non-arbitrated cases. (The average number of agreements involved was 407 in the former and 2,842 in the latter). The base wage rate average achieved for the private sector in arbitrated processes was the same: 2.5 per cent.<sup>176</sup>

The conclusions of a study comparing the use of interest arbitration for police and fire fighters in New York State from 1974 to 2007 are in similar vein, again indicating that a system founded in involvement and consent can deliver acceptable results. According to the publication abstract:

“ [The authors] find that no strikes have occurred under arbitration, rates of dependence on arbitration declined considerably, the effectiveness of mediation prior to and during arbitration remained high, the tripartite arbitration structure continued to foster discussion of options for resolution among members of the arbitration panels, and wage increases awarded under arbitration matched those negotiated voluntarily by the parties. Econometric estimates of the effects of interest arbitration on wage changes in a national sample suggest wage increases between 1990 and 2000 in states with arbitration did not differ significantly from those in states with non-binding mediation and factfinding or states without a collective bargaining statute.<sup>177</sup>

Any well-calibrated arbitration statute also keeps open the option of the extension or resumption of bargaining, a feature seen in sections 137(2) and 144(2) of the Canadian *Public Service Labour Relations Act 2003*:

“ **Delay**  
The Chairperson [of the Public Service Labour Relations Board] may delay establishing an arbitration board until he or she is satisfied that the party making the request has bargained sufficiently and seriously with respect to the matters in dispute.

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176 Ontario Ministry of Labour, Collective Bargaining Information Services.

177 T. Kochan et al.: *The long-haul effects of interest arbitration: The case of New York State's Taylor Law*, Working paper No. 90 (Ithaca, NY, Cornell University ILR School, 2009).

“**Subsequent agreement**

If, before an arbitral award is made, the parties reach agreement on any matter in dispute that is referred to arbitration and enter into a collective agreement in respect of that matter, that matter is deemed not to have been referred to the arbitration board and no arbitral award may be made in respect of it.

Section 7a of the *Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act 312 1969* of the State of Michigan speaks to the same policy intent:

“ At any time before the rendering of an award, the chairman of the arbitration panel, if he is of the opinion that it would be useful or beneficial to do so, may remand the dispute to the parties for further collective bargaining for a period not to exceed three weeks.

In another comparison of public and private sector arbitration processes in the United States, the study’s authors noted that “the basic issues brought to arbitration in both sectors appear to be quite similar”, with management “winning” most of the cases: about 63 per cent in the public sector and about 70 per cent in the private sector.<sup>178</sup> Amongst the disciplinary-type cases, almost twice as many termination cases were brought in the private sector when compared to the public (30 per cent v 18 per cent). One explanation offered for this discrepancy is that more unconventional methods of dispute resolution are implemented in the public sector.<sup>179</sup>

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178 D. Mesch and O. Shamayeva: “Arbitration in practice: A profile of public sector arbitration cases”, in *Public Personnel Management* (Alexandria, VA, International Public Management Association for Human Resources, 1996), Vol. 25, No. 1, p. 119.

179 Mesch and Shamayeva, op. cit., p. 130.



Because of its possible adverse impact on budgetary policies and sensibilities, some labour relations systems subject the award of the independent arbitrator to an element of political review. The relevant South African legislation, for instance, provides as follows:

“ Any arbitration award ... made in respect of the State and that has financial implications for the State becomes binding:

- (a) 14 days after the date of the award, unless a Minister has tabled the award in Parliament within that period; or
- (b) 14 days after the date of tabling the award, unless Parliament has passed a resolution that the award is not binding.

If Parliament passes a resolution that the award is not binding, the dispute must be referred back to the Commission for further conciliation between the parties to the dispute and if that fails, any party to the dispute may request the Commission to arbitrate.<sup>180</sup>

Canadian public sector legislation, while leaving open the money quantum, obliges any arbitration award to leave untouched any legislated terms or conditions of employment and the organization of the service. Section 150 of the *Public Service Labour Relations Act 2003* provides:

“ Award not to require legislative implementation

- (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if:
  - (a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;
  - (b) ...;
  - (c) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;

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180 Section 74 of the Labour Relations Act 66 of 1995.

- (d) ...; or
- (e) doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.

In the State of Washington in the United States, the state government is required to resume bargaining if it decides not to submit an arbitration award to the legislature for funding. This is because the duty to bargain remains as long as there is no agreement.

#### Employment ADR: Islamic precedents and parallels

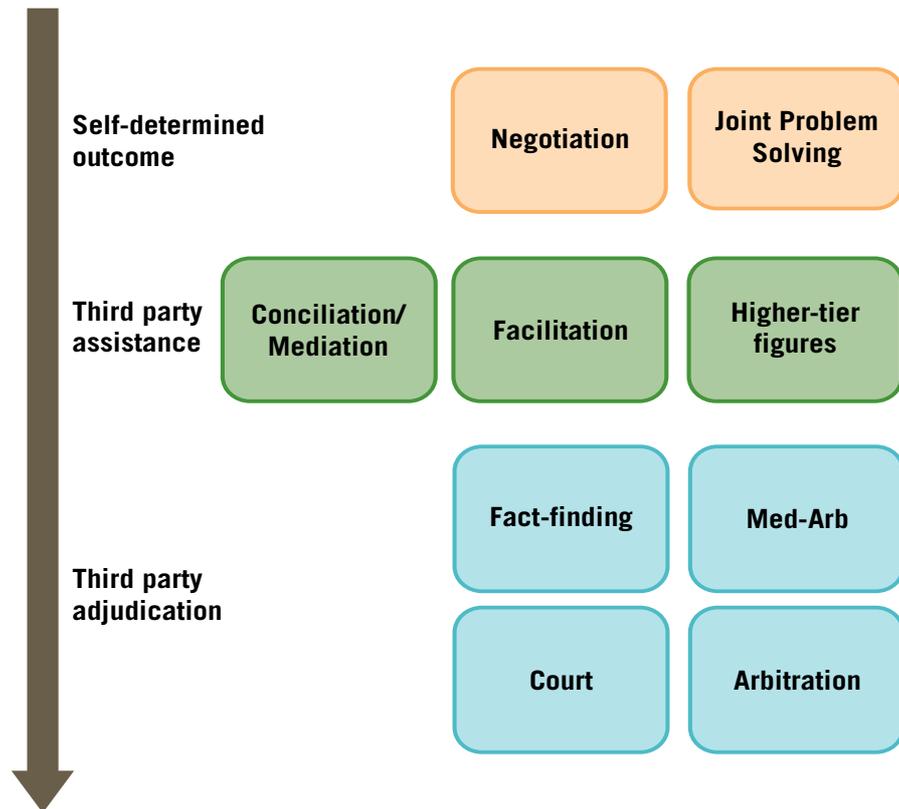
“ADR is not a western concept, nor a creation that has come into being during the last few decades. In fact, the basic notion of amicable settlement was known in every civilization in the past, including Islam.

“... Islam reveals the presence of at least five ADR processes: 9(i) Sulh, which can be roughly translated as Negotiation, Mediation/Conciliation, or Compromise of Action; Tahkim, roughly translated as arbitration; a combination of Sulh and Tahkim we can call Med-Arb; (iv) Muhtasib, which in modern terms is known as Ombudsman; and (v) Fatawa of Muftis or Expert determination.”<sup>1</sup>

<sup>1</sup> K. H. Hassam: “Employment Dispute Resolution Mechanism from the Islamic Perspective”, *Arab Law Quarterly* (Leiden, Netherlands, Brill, 2006), Vol. 20, No. 2, pp. 181–182.



**From consensus-based processes to third party based problem solving mechanisms: a continuum**



### 30. Industrial action

Industrial action (meaning all forms of work stoppages, slow-downs and lockouts including, in the case of employers, the unilateral implementation of changes to terms and conditions of employment) is normally regarded as an integral part of collective bargaining systems, and as a general statement this holds true for public sector labour relations as well. Ultimately, prices set in the labour market are substantially based on the political, social and market power that the stakeholders are able to bring to bear. The expression of power is mediated by many societal factors such as community norms, economic constraints and legislation.

Industrial action, or the threat of industrial action, plays a key part in an effective bargaining process. Where conflicting interests need to be reconciled, knowing that the other party has the capacity and the right to exercise power helps focus the negotiators. This obliges them to take the other party seriously and reach a compromise settlement. In this important sense, industrial action is functional to collective bargaining. Recent studies have highlighted that wages and job security continue to be the main causes of industrial conflicts. The so-called “political” strikes are motivated by government policies such as social security, labour law reform and so on.<sup>181</sup>

However, industrial action comes at a price, both to the immediate parties and others as well. This is particularly true in the public sector, where disruptions to social services will nearly always impact on the wider community. In the case of essential public services, the disruption may simply be considered unacceptable.

These considerations have not stopped many countries with an excellent record of dispute resolution – such as Norway, Sweden, Denmark and Finland – from maintaining the right to strike even in relation to the public sector.

<sup>181</sup> ILO: *Freedom of association in practice: Lessons learned*, International Labour Conference, 97th Session, 2008, p. 14.



A steady theme throughout this manual is that an inclusive and well-structured collective bargaining system is not only a worthy asset in its own right but also the best protection against avoidable industrial conflict. The workers' group at the 64th Session of the International Labour Conference (1978) indicated that "our ultimate goal should be to establish machinery designed to make strikes unnecessary as a means of securing just solutions to our problems...".<sup>182</sup> A range of design features can be built into negotiating systems to minimize the likelihood of industrial action episodes. But even in the best systems, conflicts will occur and must be managed as intelligently as possible. Restrictions and even prohibitions on the right to strike may be justified in appropriate contexts and would not then offend against the relevant International Labour Standards.<sup>183</sup> These regulatory approaches and mechanisms will now be considered.

### Industrial action as a last resort

Many contemporary labour relations systems require the parties to bargain seriously and exhaustively before any recourse to industrial action will be regarded as legitimate and lawful. For the most part a well-functioning bargaining system with multiple loop-back mechanisms will cause minimal industrial dislocation.

In addition, it is a common requirement that any industrial action be deferred until any agreed or obligatory mediation has been given an opportunity to address matters as well. For example, the paragraph 4 of the Voluntary Conciliation and Arbitration Recommendation, 92 of 1951 states the following: "If a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress."

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182 ILC, 64th Session, 1978: *Provisional Record*, p. 28/13.

183 See generally, ILO: *Freedom of association and collective bargaining* (Geneva, International Labour Office, 1994), Ch. V, "The right to strike".

Where parties take industrial action in breach of their legal duties (whether statutory or contractual) to bargain to impasse first, most systems provide for legal injunctions to be issued against the offender. In others, such actions may be considered a breach of the duty to bargain in good faith. In both cases, the courts or tribunals are typically empowered to restrain the action and order a resumption of bargaining.

### Notice of strike action

Even at the point that all negotiations and settlement efforts have run their course, many systems require not only that notice of actual strike action be given but that, in the case of the public sector, *additional* notice. For instance, in South Africa, 48 hours' notice of industrial action is required in respect of private sector industrial disputes but seven days' notice where the state is the employer.<sup>184</sup>

The Nordic countries, too, have special notice rules in relation strike activity to the public sector. Partly to allow a proper opportunity for mediation to work even while giving public authorities due warning, in Norway signalled work stoppages can be postponed for up to 21 days in the case of state and municipal workers. In Finland, the Ministry of Employment and the Economy can postpone the planned strike for maximum of two weeks at the request of the conciliator or conciliation board involved, if the strike would have an effect to the essential services and would cause unreasonable harm. An additional seven days' postponement applies in the case of disputes covering public servants.<sup>185</sup> These postponements allow the parties to explore avenues of agreement, either on their own or with the assistance of third parties.

184 See section 64 of the Labour Relations Act 66 of 1995.

185 See T. Stokke and A. Seip: "Collective dispute resolution in the public sector: The Nordic countries compared", in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 60, No. 4, p. 567; Act on Mediation in Labour Disputes (420/1962), <http://www.finlex.fi/en/laki/kaannokset/1962/en19620420.pdf> (accessed 27 Oct. 2011).



## Peace obligation

One of the key conditions that states may impose to allow terms and conditions of employment to be determined by collective bargaining in the public sector is the peace obligation, which includes an interest that bargaining would continue without a forceful action. Peace obligation, obligating both of the negotiating parties, arises in two contexts:

- (i) In the agreement-making process, where disputes of interest (economic disputes) regularly arise.
- (ii) After the agreement has been signed, if the parties may either have disagreements over the interpretation and application of the concluded agreement (disputes of right), or if a party wishes to press additional economic claims because of changed circumstances notwithstanding the existence of a collective agreement (disputes of interest).



### Peace obligation during negotiations

Structured dialogue may be the best method of appropriately and fairly maximising the shared interests and reconciling the conflicting interests of the primary workplace stakeholders. And even though power relations ultimately shape and sometimes simply determine outcomes, the recourse to power – and particularly premature recourse – carries short and long-term costs. One of these is damage to the negotiating process, not to mention relationships generally. Thus, power should not be exercised while reasoned dialogue is underway.

Consequently, several legal systems provide in respect of both private and public sector bargaining that neither side may resort to industrial action to advance its claim at least until the negotiation process has been exhausted. Even then, and especially in the public sector, the peace obligation may be extended to two further stages:

First, many statutory dispute resolution procedures integrate the requirement that in the event of a negotiating deadlock, the parties hold off any industrial action until conciliation or mediation steps have run their course. The rationale, often realised in practice, is that the opportunity to resource the bargaining process with independent expertise will assist in agreement-reaching.

Second, some systems provide additional options for public authorities to bar industrial action until some other dispute resolution mechanism such as fact-finding or recommendation-making has occurred. Exceptionally, the governing rules may afford a public authority the discretion in certain circumstances to prohibit industrial action altogether and to direct that the underlying issue be determined through arbitration (as in the case of essential services – see below).



### *Peace obligation after an agreement has been signed*

Once a collective agreement on workplace matters (including terms and conditions of employment) has been achieved, many systems provide that either a relative or an absolute peace obligation comes into effect. Two examples are Germany and Denmark. In the former case, this means that for the lifespan of the agreement no industrial action will be permitted or protected on any subject that has been dealt with in the applicable collective agreement. However, disputes over matters not so covered may be pursued. In the latter case, the conclusion of a binding agreement means that no further economic claims may be advanced on any front, and especially that no claims may be pursued through industrial action.

Where disputes arise over the interpretation or application of an agreement (rights disputes), the peace obligation may hold and all these disputes could then be referred to binding arbitration or adjudication in the courts. In more graduated systems, the parties could attempt to conciliate their differences or explore problem solving ways of arriving at an agreement over any disputed provisions, and arbitrate the dispute only when these fail. Examples of this can be seen in the legislation of Venezuela and the State of Washington in the United States.

### **Prohibitions against industrial action in the case of rights disputes**

By definition, an arbitrator or a court can resolve rights disputes. In law at least, an authoritative person can supply a definitive ruling in the event of a dispute. In principle, then, it is possible to remove a whole range of disputes from the sphere of potential industrial action. The labour systems of many countries incorporate this principle, effectively outlawing strikes and obliging parties to turn to arbitral and adjudicative authorities in the event of disputes over, amongst other things:

- the recognition of trade unions;<sup>186</sup>
- the determination of bargaining units;<sup>187</sup>

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186 As is the case in the United States and Canada.

187 United States, Canada and Australia, among others.

- the interpretation and application of collective and other agreements;<sup>188</sup> and
- the fairness of dismissals.<sup>189</sup>

Legal injunctions should be available to protect innocent parties in the event of breaches of statutory or contractual duties.

### Prohibitions and restrictions on industrial action in the case of key personnel and essential services

Because of the fundamental importance of the right to strike, limitations on its exercise need to be justified. The Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR) advocates that the right should only be restricted in relation to first, public servants exercising authority in the name of the state and, second, genuinely essential services, namely: “those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.”<sup>190</sup>

While many countries have restricted the right to strike of public sector workers, the justification is often tenuous. While a case can be made for treating certain core personnel responsible for key services as special, most public sector workers would not fall into this category. The withdrawal of their services is no more or less disruptive than the same action taken by private sector workers. The Committee of Experts has proposed that, instead of imposing a total ban on strikes, the governments and unions might consider negotiating a minimum service where a total and prolonged stoppage might result in serious consequences for the public.<sup>191</sup> In this event, those operations strictly necessary to meet the basic needs of the popu-

188 A near-universal feature of labour law regimes.

189 Another near-universal feature. An exception is the case of operational requirements dismissals in South Africa, where employee parties are given the option of defending their interests through either adjudicative or industrial action avenues: see section 189A of the Labour Relations Act.

190 ILO: *General Survey* (Geneva, 1983), paras. 213–4. And see also ILO: *Freedom of association and collective bargaining* (Geneva, 1994), paras. 158–9.

191 ILO: *Freedom of association and collective bargaining* (Geneva, 1994), para. 158.



lation or the minimum requirements of the service would be identified and quarantined from industrial action.

The parties may demarcate essential or minimum services, and allow matters take their course in the event of wider industrial disputation. Also, they may recognize the importance of such services in the larger scheme of things and actively cooperate to develop contingency plans accordingly. The Committee of Freedom of Association has defined that the right to strike can be restricted if a worker is engaged in the following activities: services in the hospital sector, electricity services, water supply services, telephone services, police and armed forces, air traffic control, fire-fighting services, public or private prison services, nutrition to pupils and cleaning services of schools.<sup>192</sup>

In Sweden and Norway, the government and unions have concluded Basic Agreements that have achieved two related outcomes in the context of public sector disputes: (1) key personnel in leading functions have been excluded from industrial action; (2) rules on the maintenance of essential work during wider industrial conflict have been agreed upon.

The process of determining which services should count as essential or minimum should ideally involve all the social partners, alternatively an independent body, and not be the prerogative of the authorities alone. In the event that a service is declared or agreed to be essential or minimum, then fairness and the maintenance of industrial peace require that the laws incorporate guarantees to foster trust in the process. The measures taken may include settlement of working terms and conditions if negotiations come to a deadlock through a mutually acceptable adjudication process like neutral compulsory arbitration, or another previously agreed procedure.

In South Africa, a dedicated Essential Services Commission has been established to investigate and then determine which services or parts of services should be designated as essential.

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<sup>192</sup> ILO: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition (Geneva, 2006), para. 585.

The definition of what is essential conforms to the requirements of the Committee of Experts, as described above. The Commission members are appointed by the Minister only after consulting with the employers and unions, and the investigation process allows for submissions by all interested parties. Industrial action is not permitted in relation to interest disputes that arise in essential services. Instead they must be directed towards statutory conciliation and arbitration by the Conciliation, Mediation and Arbitration Commission, which is subject to tripartite governance.<sup>193</sup>

The South African legislation tries to keep the bargaining dynamic alive even in this sensitive area. It does this by giving the parties concerned space to negotiate “minimum services” agreements in respect of services designated as essential. Where the parties can so agree, and where their agreement has been ratified by the Essential Services Committee:

- the minimum services then become the only strike-free zone and
- the broader prohibition on strike action in the balance of the services previously designated as essential and the obligatory reference to arbitration of unresolved disputes then fall away.<sup>194</sup>

The relevant act also provides for services to be declared as “maintenance services” – a service which if interrupted would have “the effect of material physical destruction to any working area, plant or machinery”. Disputes in such services must generally be directed towards arbitration, and industrial action is not permitted in such cases.<sup>195</sup>

At federal level, the equivalent Canadian legislation works with a more expansive definition of essential service, namely “a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public”. The statute then encour-

193 See sections 70–74 and 116 of the Labour Relations Act 1995.

194 Section 72 of the Labour Relations Act 1995.

195 Section 75 of the Labour Relations Act 1995.



ages employers and unions to conclude essential services agreements, i.e., those identifying:

- (a) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;
- (b) the number of those positions that are necessary for that purpose; and
- (c) the specific positions that are necessary for that purpose.<sup>196</sup>

Should an employer and its counterpart unions be unable to reach such an agreement, either of them may apply to the Public Service Labour Relations Board “to determine any unresolved matter that may be included in an essential services agreement”.<sup>197</sup> No strikes are permitted in respect of “any employee who occupies a position that is necessary under an essential services agreement for the employer to provide essential services, and no officer or representative of an employee organization shall counsel or procure the participation of such employees in a strike”.<sup>198</sup>

### **Vote on the employer’s offer to prevent recourse to strike action**

When an employer offer has been turned down by the union negotiators, an impasse has developed and a strike is imminent or even underway, there may be cause to believe that the offer would be acceptable to the rank and file. To test this proposition and to act as a counterweight to possible negotiating intransigence and avoidable industrial action, some statutes make provision for a ballot of worker opinion on the em-

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<sup>196</sup> See section 4 of the Public Service Labour Relations Act 2003. However, see also in this regard section 120: “The employer has the exclusive right to determine the level at which an essential service is to be provided to the public, or a segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided.”

<sup>197</sup> Section 123(1).

<sup>198</sup> Section 194(2) of the Public Service Labour Relations Act 2003. In addition, “No person shall impede or prevent or attempt to impede or prevent an employee from entering or leaving the employee’s place of work if the employee occupies a position that is necessary under an essential services agreement for the employer to provide essential services” – section 199.

ployer's offer. The Canadian *Public Service Labour Relations Act 2003* is an example:

“ *Vote on employer's offer*

*Minister may order vote to be held*

**183.**

1. If the Minister is of the opinion that it is in the public interest that the employees in a bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the bargaining agent in respect of all matters remaining in dispute between the parties, the Minister may:
  - (a) on any terms and conditions that the Minister considers appropriate, direct that a vote to accept or reject the offer be held by secret ballot as soon as possible among all of the employees in the bargaining unit; and
  - (b) designate the Board, or any other person or body, to be in charge of conducting that vote.

“ *Vote does not delay right*

2. The direction that a vote be held, or the holding of that vote, does not prevent the declaration or authorization of a strike if the employee organization that is certified as the bargaining agent is not otherwise prohibited from making the declaration or authorization, nor does it prevent the participation in a strike by an employee if the employee is not otherwise prohibited from participating in the strike.





*Consequences of favourable vote*

3. If a majority of the employees participating in the vote accept the employer's last offer:
  - (a) the parties are bound by that offer and must, without delay, enter into a collective agreement that incorporates the terms of that offer; and
  - (b) any strike that is in progress when the Board or other person or body in charge of conducting the vote notifies the parties in writing of the employees' acceptance must cease immediately, and the employees must return to work as soon as the employer determines that it is practicable for them to do so.

### 31. Gender and dispute resolution

If the gender dimension is to be adequately addressed in dispute resolution, then at a minimum:

- the representation and participation of women in dispute resolution agencies at all levels needs to be properly facilitated;
- presiding officers need appropriate training in issues pertaining to the promotion of gender equality;
- quality research on point must be available to assist dispute resolution bodies in their deliberations;
- the dispute resolution process must be geared to treating discrimination and abuse cases with the necessary sensitivity to ensure fairness to both complainants and defendants.

The objective must be to allow a dispute resolution system to take into account both the practical and strategic needs of women, replicating the virtues of collective bargaining with gender-balanced worker participation.

### Checklist for dispute resolution process design

The following steps may assist decision-makers in reviewing existing or proposed dispute resolution mechanisms through the legislative process:

- Analyze the functioning of dispute resolution mechanisms in your country by identifying its current framework and principal characteristics:
  - legal framework;
  - arbitration;
  - mediation;
  - conciliation;
  - integrated conflict management systems;
  - labour inspectorates;
  - judicial protection (courts);
  - institutions for alternative dispute resolution system; and
  - requirements regarding mediators/arbitrators/conciliators.
- Study the role of social partners.
- Identify the main problems that dispute resolution is facing (e.g. if the system for amicable resolution of disputes is incomplete).
- Analyse the causes of these problems.
- Explore the needs of the parties involved and prioritise those needs.
- Generalise all possible solutions to the problems without evaluating them.
- Identify objective criteria to evaluate each possible solution (e.g. in relation to cost/benefits, consequences, practicality, meeting of needs, addressing causes, disadvantages/advantages, eliminating symptoms).
- Evaluate possible solutions using the objective criteria and narrow the range of solutions.
- Produce action plans for implementing the solutions/good policies at national level:
  - visualise what dispute resolution requires and could look like;
  - understand the gender perspective and visualise a system that takes it into account;
  - identify what changes are required in the legal and regulatory framework;
  - identify the resources, including both human and financial, needed and how they will be obtained; and
  - identify the role and contribution of the stakeholders in the process.
  - Think of means to create awareness of existing national dispute resolution mechanisms.
  - Think of means to monitor and review the dispute resolution process and identify indicators for measuring the achievements.
  - Design a strategy for follow-up.



## 32. Integrated conflict management systems

To some extent, dispute resolution systems have moved from a narrow rights-based foundation to a more encompassing rights-and-interests approach. Still, the appreciation has grown that the analyses and remedies remain too narrow. Societies and organizations require more comprehensive systems that recognize the full complexity of social and interpersonal relationships, that feature earlier and in more ways.

This insight had led to the notion of “integrated conflict management systems”:

“ These systems include both grievance processes and mediation, but go beyond them, introducing a systematic approach to preventing, managing, and resolving conflict. An integrated conflict management system introduces and focuses on other tools of conflict management – referring, listening, anonymous problem identification and consultation, coaching, mentoring, informal problem solving, direct negotiation, informal shuttle diplomacy, generic solutions, and systems change. These are the processes most employees are willing to use and are the processes most likely to prevent unnecessary disputes and to resolve conflict early and constructively.

... [W]hile the more formal dispute resolution processes such as grievance procedures and mediation are necessary, they are insufficient because they usually address only the symptoms, not the sources of conflict. An effective integrated conflict management system addresses the sources of conflict and provides a pervasive method for promoting competence in dealing with conflict throughout the organization.<sup>199</sup>

Public sector employment statutes, amongst others, are taking the lessons to heart. A good example here is Canada’s *Public Service Labour Relations Act 2003*. The consultation committees are designed to have a wide reach throughout the organiza-

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199 See SPIDR’s ADR in the Workplace Track/Committee: *Guidelines for the design of integrated conflict management systems within organizations: Executive summary* as reproduced at <http://www.mediate.com/articles/spidrtrack1.cfm> (accessed 27 Oct. 2011). SPIDR has now merged with other organizations to form the Association for Conflict Resolution: see <http://www.acrnet.org> (accessed 27 Oct. 2011).

tion as well as a pre-emptive function; the initiative in respect of co-development places an emphasis on inclusive problem solving; the ADR provision in respect of bargaining is meant to be as open-ended as the parties' imagination; and the conflict management provisions are inclusive, informal and pre-emptive in their design. Set out immediately below are a number of provisions that reflect elements of an integrated approach.

### Consultation committees and co-development



#### *Consultation committee*

8. Each deputy head must, in consultation with the bargaining agents representing employees in the portion of the federal public administration for which he or she is deputy head, establish a consultation committee consisting of representatives of the deputy head and the bargaining agents for the purpose of exchanging information and obtaining views and advice on issues relating to the workplace that affect those employees, which issues may include, among other things,
  - (a) harassment in the workplace; and
  - (b) the disclosure of information concerning wrongdoing in the public service and the protection from reprisal of employees who disclose such information.



#### *Meaning of “co-development of workplace improvements”*

9. For the purpose of this Division, “co-development of workplace improvements” means the consultation between the parties on workplace issues and their participation in the identification of workplace problems and the development and analysis of solutions to those problems with a view to adopting mutually agreed to solutions.



#### *Co-development of workplace improvements*

10. The employer and a bargaining agent, or a deputy head and a bargaining agent, may engage in co-development of workplace improvements.



“  
*National Joint Council*

11. Co-development of workplace improvements by the employer and a bargaining agent may take place under the auspices of the National Joint Council or any other body they may agree on.

### *Alternate dispute resolution process*

“  
*Alternate dispute resolution process*

**182.**

(1) Despite any other provision of this Part, the employer and a bargaining agent for a bargaining unit may, at any time in the negotiation of a collective agreement, agree to refer any term or condition of employment of employees in the bargaining unit that may be included in a collective agreement to any eligible person for final and binding determination by whatever process the employer and the bargaining agent agree to.

### *Conflict management*

“  
*Informal conflict management system*

207. Subject to any policies established by the employer or any directives issued by it, every deputy head in the core public administration must, in consultation with bargaining agents representing employees in the portion of the core public administration for which he or she is deputy head, establish an informal conflict management system and inform the employees in that portion of its availability.

### 33. Putting it all together

Some statutes regulating dispute resolution are especially illustrative of the principles at stake as well as the sheer range of options that can be integrated and sequenced in a single bundle of provisions. Canada's Public Service Labour Relations Act 2003 provides an example of this:

#### *Canada's Public Service Labour Relations Act 2003*

The Act's Preamble could serve as a universal charter for public sector labour relations and dispute resolution:

Recognizing that –

- the public service labour–management regime must operate in a context where protection of the public interest is paramount;
- effective labour–management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;
- collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment; the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;
- the Government of Canada recognizes that public service bargaining agents represent the interests of workers in collective bargaining and participate in the resolution of workplace issues and rights disputes;
- commitment from the employer and bargaining agents to mutual respect and harmonious labour–management relations is essential to a productive and effective public service;



## 34. Maintaining the responsiveness of dispute resolution systems: the need for ongoing review and revitalization

Over many years now both private and public sector labour relations have produced pioneering initiatives in regard to methods of negotiation and dispute resolution. The quest has always been for purpose-driven, effective and efficient systems and practices. But once institutionalised, good ideas can become over-elaborate, unwieldy and generally burdensome. Alternative Dispute Resolution systems were meant to be the antidote for the rigidities and cost associated with formal legal systems, but they too have proved susceptible to ossification with the passage of time. The following censure levelled at the core institutions of American collective bargaining could just have well been ranged against any established system of labour–management relations anywhere:

“ [T]here are widespread criticisms amongst scholarly observers (see, for instance, virtually any collective bargaining textbook) that the system’s much-vaunted benefits – speed, informality, flexibility, openness, low-cost – have eroded over time. More disturbing perhaps is the suggestion that the system is too positional, increasingly sclerotic, and ineffective at resolving conflict. Critics portray the once problem solving system as ensnared by procedures that have institutionalised hostility and failed to provide adequate solutions, remedies, or deterrence.<sup>200</sup>

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200 A. Eaton and J. Keefe: *Employment dispute resolution and worker rights in the changing workplace* (Champaign, IL, Industrial Relations Research Association, 1999), p. 1.

The lesson is that, even recognizing a need for stability and predictability, systems of bargaining, dispute prevention and dispute resolution must be open to constant re-examination and re-invention. Review must itself be a design feature, and as ever it should be the stakeholders – and new classes of stakeholders – who are the rights-holders in this regard.<sup>201</sup>



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201 “The role of government does not stop at the formulation of legislation, although this will continue to be a major preoccupation as legal frameworks also tend to change in time... Governments can further provide for a conducive environment by adopting promotional measures as well as policies and structures facilitating and supporting collective bargaining. This should include effective machinery and mechanisms to prevent and resolve labour disputes.” (ILO: *Freedom of association in practice: Lessons learned*, International Labour Conference, 97th Session, 2008, p. 17.)



## Concluding remarks

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A recent article provides the perspective for the use of best practices in the design of dispute resolution mechanisms:

“ The growing importance of this topic is connected to the changes in industrial conflict that have occurred in most industrialized democracies over the last three decades. ...[T]he critical core of collective disputes has moved from the manufacturing and industrial sectors to the tertiary and public sectors. This is more than just a displacement of the locus of conflict from one sector to another. From a practical and public policy perspective, this kind of dispute often exerts the most disruption on the functioning of contemporary societies. Unlike traditional conflicts in the industrial and manufacturing sectors, these disputes can cause disruption even with the involvement of only few dozens of strikers for few hours: they do not need to be quantitatively massive episodes to have socially disruptive consequences, and even forms of action “short of strikes” can be highly damaging for users and citizens at large. ... The State is involved both as ultimate employer and as defender of societal/national interests as well as of citizens’ rights.

...

Comparative analysis can be of great value in this area, to examine common problems that arise from public service disputes and to explore and assess the variety of legal and institutional arrangements and processes to deal with them that have been adopted by different countries. Such analysis does not provide easy answers to the “problems” of public services dispute management, but it can enable more pertinent questions to be posed; provide a wider range of options for consideration, grounded within an understanding of the contextual factors that affect their outcomes, and suggest criteria for better assessing the viability and utility of different approaches.<sup>202</sup>

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202 L. Dickens and L. Bordogna: “Public service dispute management: Pertinence of comparative study”, in *Journal of Industrial Relations* (Sydney, Australian Labour and Employment Relations Association, 2008), Vol. 50. No. 4, p. 540.

This manual has concentrated on ideas, institutions and mechanisms, generally sourced in countries with good track records in public sector labour relations. But experience shows that the mere adoption of formally sound approaches and systems is an insufficient guarantor of success. Smart dispute resolution methods will not salvage a troubled state of relations between the social partners. The foundation for solid progress remains a basic accord between the key stakeholders and then the patient and unending cultivation of a cooperative ethos for workplace relations, geared towards the delivery of great public service outcomes.



## Convention No. 87: Excerpts

Convention concerning the Freedom of Association and Protection of the Right to Organise Convention, 1948:

### Part I: Freedom of association

#### **Article 1**

Each Member of the International Labour Organisation for which the Convention is in force undertakes to give effect to the following provisions.

#### **Article 2**

Employees and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.

#### **Article 3**

1. Employees' and employers' organisation shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

#### **Article 4**

Employees' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

#### **Article 5**

Employees' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of employees and employers.

### **Article 6**

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of employees' and employers' organisations.

### **Article 7**

The acquisition of legal personality by employees' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

### **Article 8**

1. In exercising the rights provided for in this Convention employees and employers and their respective organisations, like other persons or organised collectives, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

### **Article 9**

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 or article 19 of the Constitution of the International labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

### **Article 10**

In this Convention the term “organisation” means any organisation of employees or of employers for furthering and defending the interests of employees or of employers.



## **PART II Protection of the right to organize**

### ***Article 11***

Each Member of the International labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that employees and employers may exercise freely the right to organise.

## Convention No. 98: Excerpts

### Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June, 1949, and

Having decided upon the adoption of certain proposals concerning the application of the principles of the right to organise and to bargain collectively, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, adopts this first day of July of the year one thousand nine hundred and forty-nine the following Convention, which may be cited as the Right to organise and collective Bargaining Convention, 1949:

#### **Article 1**

1. Employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to —
  - (a) make the employment of an employee subject to the condition that he shall not join a union or shall relinquish trade union membership;
  - (b) cause the dismissal of or otherwise prejudice an employee by reason of union membership or because of participation in union activities outside working hours, or with the consent of the employer, within working hours.

#### **Article 2**

1. Employees' and employers' organisations shall enjoy adequate protection against any acts of interference by each



other or each other's agent or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of employees' organisations under the domination of employers or employers' organisations, or to support employees' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

### ***Article 3***

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

### ***Article 4***

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and employees' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

### ***Article 5***

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

### **Article 6**

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

## **Convention No. 151: Excerpts**

Labour Relations (Public Service) Convention, 1978 (Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service)

### **Part I. Scope and Definitions**

#### **Article 1**

1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.
2. The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.
3. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

#### **Article 2**

For the purpose of this Convention, the term *public employee* means any person covered by the Convention in accordance with Article 1 thereof.

#### **Article 3**

For the purpose of this Convention, the term *public employees' organisation* means any organisation, however composed, the



purpose of which is to further and defend the interests of public employees.

## **Part II. Protection of the right to organize**

### **Article 4**

1. Public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to:
  - (a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees' organisation;
  - (b) cause the dismissal of or otherwise prejudice a public employee by reason of membership of a public employees' organisation or because of participation in the normal activities of such an organisation.

### **Article 5**

1. Public employees' organisations shall enjoy complete independence from public authorities.
2. Public employees' organisations shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.
3. In particular, acts which are designed to promote the establishment of public employees' organisations under the domination of a public authority, or to support public employees' organisations by financial or other means, with the object of placing such organisations under the control of a public authority, shall be deemed to constitute acts of interference within the meaning of this Article.

## **Part III. Facilities to be afforded to public employees' organisations**

### **Article 6**

1. Such facilities shall be afforded to the representatives of recognized public employees' organisations as may be ap-

appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work.

2. The granting of such facilities shall not impair the efficient operation of the administration or service concerned.
3. The nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means.

#### **Part IV. Procedures for determining terms and conditions of employment**

##### ***Article 7***

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

#### **Part V. Settlement of disputes**

##### ***Article 8***

The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

#### **Part VI. Civil and political rights**

##### ***Article 9***

Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.



## Convention No. 154: Excerpts

Convention concerning the Promotion of Collective Bargaining

This General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-seventh Session on 3 June, 1981, and

Reaffirming the provision of the Declaration of Philadelphia recognising “the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve . . . the effective recognition of the right of collective bargaining”, and noting that this principle is “fully applicable to all people everywhere”, and

Having regard to the key importance of existing international standards contained in the Freedom of association and Protection of the Right to Organise Convention, 1948, the Right to organise and Collective Bargaining Convention, 1949, the Collective Agreement Recommendation, 1951, the Voluntary Conciliation and Arbitration Recommendation, 1951, the Labour Relations (Public Service) Convention and Recommendation, 1978, and the Labour Administration Convention and Recommendations, 1978, and

Considering that it is desirable to make greater efforts to achieve the objectives of these standards and, particularly, the general principles set out in Article 4 of the Right to Organise and Collective Bargaining Convention, 1949, and in Paragraph 1 of the Collective Agreement recommendation, 1951, and

Considering accordingly that these standards should be complemented by appropriate measures based on them and aimed at promoting free and voluntary collective bargaining, and

Having decided upon the adoption of certain proposals with regard to the promotion of collective bargaining, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, adopts this nineteenth day of June of the year one thousand nine hundred and eighty-one the following Convention, which may be cited as the Collective Bargaining Convention, 1981:

## **PART I: Scope and definitions**

### **Article 1**

1. This Convention applies to all branches of economic activity.
2. The extent to which the guarantees provided for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.
3. As regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice.

### **Article 2**

For the purpose of this Convention the term “collective bargaining” extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more employees' organisations, on the other, for

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and employees; and/or
- (c) regulating relations between employers or their organisations and a employees' organisation or employees' organisations.

### **Article 3**

1. Where national law or practice recognises the existence of employees' representatives as defined in Article 3, sub-paragraph (b) of the Employees' Representatives Convention, 1971, national law or practice may determine the
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1997 11 Conciliation/Mediation Training Course  
READING 1 extent to which the term “collective bargaining” shall also extend, for the purpose of this Convention, to negotiations with these representatives.

2. Where, in pursuance of paragraph 1 of this Article, the term “collective bargaining” also includes negotiations with the employees' representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the employees' organisations concerned.

## **PART II: Methods and application**

### **Article 4**

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

## **PART III: Promotion of collective bargaining**

### **Article 5**

1. Measures adopted to national conditions shall be taken to promote collective bargaining.
2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:
  - (a) collective bargaining should be made possible for all employers and all groups of employees in the branches of activity covered by this Convention;
  - (b) collective bargaining should be progressively extended to all matters covered by sub-paragraphs (a), (b) and (c) of Article 2 of this Convention;
  - (c) the establishment of rules of procedure agreed between employers' and employees' organisations should be encouraged;

- (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules
- (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

### **Article 6**

The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate.

### **Article 7**

Measure taken by public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and employees' organisations.

### **Article 8**

The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining.



## Recommendation No. 159: Excerpts

### Recommendation concerning Procedures for Determining Conditions of Employment in the Public Service

1.
  - (1) In countries in which procedures for recognition of public employees' organisations apply with a view to determining the organisations to be granted, on a preferential or exclusive basis, the rights provided for under Parts III, IV or V of the Labour Relations (Public Service) Convention, 1978, such determination should be based on objective and pre-established criteria with regard to the organisations' representative character.
  - (2) The procedures referred to in subparagraph (1) of this Paragraph should be such as not to encourage the proliferation of organisations covering the same categories of employees.
2.
  - (1) In the case of negotiation of terms and conditions of employment in accordance with Part IV of the Labour Relations (Public Service) Convention, 1978, the persons or bodies competent to negotiate on behalf of the public authority concerned and the procedure for giving effect to the agreed terms and conditions of employment should be determined by national laws or regulations or other appropriate means.
  - (2) Where methods other than negotiation are followed to allow representatives of public employees to participate in the determination of terms and conditions of employment, the procedure for such participation and for final determination of these matters should be determined by national laws or regulations or other appropriate mean.

## Recommendation No. 163: Excerpts

### Recommendation concerning the Promotion of Collective Bargaining

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-seventh Session on 3 June, 1981, and

Having decided upon the adoption of certain proposals with regard to the promotion of collective bargaining, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Collective Bargaining Convention, 1981, adopts this nineteenth day of June of the year one thousand nine hundred and eighty-one the following Recommendation, which may be cited as the Collective Bargaining Recommendation, 1981:

#### I. METHODS OF APPLICATION

1. The provision of this Recommendation may be applied by national laws or regulations, collective agreements, arbitration awards or in any other manner consistent with national practice.

#### II. MEANS OF PROMOTING COLLECTIVE BARGAINING

2. In so far as necessary, measures adopted in national conditions should be taken to facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and employees' organisations.
3. As appropriate and necessary, measures adapted to national conditions should be taken so that
  - (a) representative employers' and employees' organisations are recognised for the purposes of collective bargaining;
  - (b) in countries in which the competent authorities apply procedures for recognition with a view to determining



the organisations to be granted the right to bargain collectively, such determination is based on pre-established and objective criteria with regard to the organisations' representative character, established in consultation with representative employers' and employees' organisations.

4.
  - (1) Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.
  - (2) In countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is coordination among these levels.
5.
  - (1) Measures should be taken by the parties to collective bargaining so that their negotiators, at all levels, have the opportunity to obtain appropriate training.
  - (2) Public authorities may provide assistance to employees' and employers' organisations, at their request, for such training.
  - (3) The content and supervision of the programmes of such training should be determined by the appropriate employees' and employers' organisation concerned.
  - (4) Such training should be without prejudice to the right of employees' and employers' organisations to choose their own representatives for the purpose of collective bargaining.
6. Parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations within their respective organisations.
7.
  - (1) Measures adapted to national conditions would be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.
  - (2) For the purpose —

- (a) public and private employers should, at the request of employees' organisations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to be made available may be agreed upon between the parties to collective bargaining;
- (b) the public authorities should make available such information as is necessary on the overall economic and social situation of the country and the branch of activity concerned, to the extent to which the disclosure of this information is not prejudicial to the national interest.
8. Measures adapted to national conditions should be taken, if necessary, so that the procedures for the settlement of labour disputes assist the parties to find a solution to the dispute themselves, whether the dispute is one which arose during the negotiation of agreements, one which arose in connection with the interpretation and application of agreements or one covered by the Examination of Grievances Recommendation, 1967.

