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INDIVIDUAL AND COLLECTIVE LABOUR DISPUTE SETTLEMENT SYSTEMS – A COMPARATIVE REVIEW

PROJECT "SUPPORTING THE IMPLEMENTATION OF THE ROADMAP ON TACKLING UNDECLARED WORK IN GREECE"[1]

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Table of Acronyms

CFA	Committee on Freedom of Association
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFREU	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ESC	European Social Charter
EU	European Union
EWC	European Works Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization

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1. Introduction: Resolving individual and collective labour disputes

Context

Context

1. From 2016 to 2020, the International Labour Office (hereinafter "the Office") implemented a project in close collaboration with the Government and the social partners in Greece "Supporting the transition from informal to formal economy and addressing undeclared work in Greece". The project, carried out in three phases, was funded by, and implemented in cooperation with, the European Commission's Directorate-General for Structural Reform Support (DG REFORM, former SRSS). Following the national tripartite consensus reached about a national three-year roadmap, an Action plan on tackling undeclared work was prepared with the help of the project. The phase two project was then launched in 2018 to support the implementation of a number of actions described in the Action plan, while the third-phase project aimed at supporting the implementation of the Action plan until the end of the roadmap (December 2019). In 2019, the scope of the project was extended to review the framework on individual and collective dispute resolution and trade union rights and facilities for trade union representatives from a comparative European and international perspective.

2. This latest phase of the project has two main objectives. First, the project has provided technical support to the Ministry of Labour and Social Affairs (MoLSA) and to the Greek social partners in the areas of individual and collective dispute resolution and trade union facilities. Second, the project has also aimed at enhancing tripartite consultation and social dialogue on labour law reform processes in these areas.

3. The present report, namely "Individual and collective labour dispute settlement systems – A comparative review" by Dr Aristea Koukiadaki, was commissioned in the framework of the project.[2] Another report on the "Facilities for trade union officials and members to exercise their rights – A comparative review" has been authored by Professor Filip Dorssemont. Two background reports on Greece on the same topics had been drafted by Professor Costas Papadimitriou and relevant findings of those were incorporated into the international reports, as background information for the comparative analyses. The comparative report also draws on the outcomes of the inception mission by the ILO project team [3] that took place in Athens from 29-31 January 2020, two rounds of individual workshops with government and social partners on 10-11 June 2020 for the presentation and discussion of the two comparative studies, and on 8-9 July 2020 for the presentation and discussion of draft policy recommendations, as well as a tripartite technical workshop on 20 July 2020 for the presentation and discussion of the revised draft policy recommendations. All workshops were carried out through videoconferences .[4] The report also builds on the responses to the questionnaire that was shared with the Greek constituents in February 2020.

[2] *The author is very grateful for the support provided by the ILO project team and particularly for the helpful feedback by Valérie Van Goethem. She would also like to thank the Greek social partners and the officials from the Ministry of Labour, SEPE and OMED for the important and enlightening discussions concerning key issues in labour dispute resolution.*

[3] *The ILO project team comprises : Frédéric Lapeyre, Senior Coordinator on the Informal Economy, ILO, Verena Schmidt, Labour Relations and Collective Bargaining Specialist, ILO; Valérie van Goethem, Labour Law Specialist, ILO; Athina Malagardi, Senior National Consultant; Filip Dorssemont, Professor of Labour Law, Université Catholique de Louvain; Aristea Koukiadaki, Senior Lecturer in Labour Law, University of Manchester; Costas Papadimitrou, Professor of Labour Law, University of Athens (until his appointment to OMED on 17.02.2020) and Ioannis Koukiadis, Professor Emeritus, Aristotle University of Thessaloniki (July 2020).*

[4] *The EC-ILO project organized a tripartite technical meeting on 20 July 2020 via videoconference. During the meeting, the Ministry stated that the ILO technical assistance project on providing comparative practices in the fields of individual and collective disputes and trade union facilities will be the basis for a draft law on the above issues. The draft law is expected to be discussed at the Greek Parliament in the beginning of September 2020. The Ministry also stated that further technical assistance by the ILO would be sought on the reengineering of both SEPE and the "enlarged" OMED. The social partners called for social dialogue on the draft labour law. They also demanded various conditions for the transfer of conciliation services to OMED.*

1.2 Scope and structure of the report

4. Conflict and its management are permanent features of organizational life – ever-present with important implications for a wide range of employer- and worker-related issues. All organisations, regardless of their characteristics, face the need to address, deal with or manage the myriad manifestations of workplace conflict and all manage conflict in one way or another, whether they adopt a proactive stance or they are avoidant and reactive. [5] From a labour law perspective, the issue of conflict is, in principle, tackled under the concept of labour disputes. The latter have been traditionally defined as 'all disputes arising from the conclusion, existence or termination of individual employment contracts and/or collective labour agreements'.[6] However, attention needs to be paid to the fact that this definition may be incomplete, as it fails to include the case of disputes that involve those in unclear or disguised employment relationships.[7] Generally speaking, labour disputes are divided into two categories: **individual and collective disputes**. As the term implies, individual disputes are those involving a single worker, whereas collective disputes involve groups of workers – usually represented by a trade union; such a distinction between individual and collective disputes is characterised, as we shall see, by fluidity.

5. The present report will investigate specific individual and collective labour dispute resolution practices and institutions in a selected sample of countries. These include the following: **Australia, Belgium, France, Spain, Sweden and the United Kingdom (UK).** The countries were selected to reflect broadly different legal and industrial relations systems with diverse forms and traditions of dispute resolution, as well (see also Annex 1 for a summary of the countries' main characteristics). The analysis will set out the features of the individual and collective labour disputes resolution processes and shed light on these with a view to identifying good practices, where possible, and addressing some of the issues that stem from the evolving labour relations framework in Greece. In doing this, attention will be paid to the linkages between practices and institutions within each of these countries and the nature of complementarities, if any. Emphasis will be placed primarily on institutions that provide scope for labour disputes to be resolved before they enter the judicial domain, although reference will be made to judicial mechanisms, where there is a direct and prescribed link between the two.[8]

[5] *Avgar, A. C. Integrating conflict: A proposed framework for the interdisciplinary study of workplace conflict and its management [Electronic version], Paper presented at Conflict and its Resolution in the Changing World of Work: A Conference and Special Issue Honoring David B. Lipsky, Ithaca, NY. Retrieved [4 May 2020], from Cornell University, ILR School site: http://digitalcommons.ilr.cornell.edu/lipskycrconference/5*

[6] *De Roo, A.J. and Jagtenberg, R.W. Mediation in the Netherlands: past - present - future. In Ewoud Hondius and Carla Joustra (Eds.), Netherlands Reports to the Sixteenth International Congress of Comparative Law (pp. 127-146). Antwerpen/Oxford/New York: Intersentia, 2002 at 189).*

[7] *On this, see Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016).*

[8] *The analysis is not intended to examine substantive labour rights as such, although the interplay will be addressed where relevant (e.g. in respect of industrial action).*

6. For the purpose of comparing and evaluating the national-level dispute resolution systems, the analysis will draw on **international and European labour standards** concerning dispute resolution and the related guidance from the **ILO supervisory bodies,**[9] as well as relevant academic literature. The report is structured along the following lines. Section 2 outlines the main international and European labour standards in the area of individual and collective disputes. Section 3 then summarises existing research concerning the relationship between dispute resolution and legal/industrial relations systems and considers recent changes in the nature and extent of labour disputes. Section 4 discusses the main features of national systems of dispute resolution in respect of individual disputes, with a particular focus on alternative dispute settlement procedures, their operation and effectiveness, where such evidence is available. Section 5 then examines the resolution mechanisms in respect of collective labour disputes, with particular emphasis on conciliation, mediation and arbitration, with a view to ascertaining the operation of such mechanisms in their particular industrial relations contexts. Section 6 sets out the conclusions.

7. *In response to the CEACR observations, the Ministry has stated the following:*
- With respect to individual labour disputes, "the Ministry intends to separate the conciliation from labour disputes resolution as described in Article 23, para. 1, of Law 4144/2013, transferring all disputes to O.ME.D. (collective disputes to be settled by collective agreements and individual disputes to be settled with the consent of the parties). To this end the independence and experience of O.ME.D. in providing impartial mediation and arbitration services would be strengthened by also adding conciliation, while human resources, technical support and financing would be available. Training programmes for mediators, arbitrators and conciliators would be organized and extended also to the social partners and the Labour Inspectors, while certification procedures will be established for the new conciliators, mediators and arbitrators. Adequate transitional measures shall be taken to ensure the smooth addition of conciliation to O.ME.D. The inspection of labour law, as the core competence of S.EP.E., would be strengthened by improving individual disputes procedures, enhanced by the labour law background knowledge and labour market information to be made available as technical advice to employers and employees for the accurate implementation of labour law. Regular training of Labour Inspectors shall be provided."
- With respect to compulsory arbitration, the Ministry provides that "compulsory arbitration for collective disputes has been reformed by Law 4635/2019 and free collective bargaining is developing in Greece in line with international labour standards."
- With respect to the issue of trade union facilities, the Ministry provides that "Association of Persons is not a topic/thematic included in the deliverables requested in the framework of the technical assistance provided by the ILO. In any case, the Ministry always welcomes social dialogue."
Finally, the Ministry stated that "The discussion on all the above issues is expected to generate constructive social dialogue between the social partners, possibly extended to additional issues, and this would further the confidence in tripartite social dialogue on labour policies."

8. The present report is published as Volume II in a series of three reports which were developed in the framework of the EU /ILO project on "Supporting the implementation of the roadmap on tackling undeclared work in Greece". The series of reports read as follows:

- "Policy recommendations on "Individual and Collective Labour Dispute Settlement Systems" and on "Facilities for trade union officials and members to exercise their rights" (Volume I);
- "Individual and collective labour dispute settlement systems – A comparative review" (by Dr Aristea Koukiadaki) (Volume II);
- "Facilities for trade union officials and members to exercise their rights – A comparative review" (by Prof. Filip Dorssemont) (Volume III).

[9] *See section 2 of the report.*

2. International and European labour standards on labour dispute resolution

2.1 ILO standards on dispute resolution

ILO standards on dispute resolution

9. International Labour Standards do not provide definitions of the terms conciliation, mediation, arbitration and adjudication; similarly, no definition exists in terms of what qualifies as an individual or collective dispute. In addition, no single ILO instrument exists that deals comprehensively with the issues examined in the report; instead, as we shall see, different instruments and provisions address specific issues related to dispute resolution, but there is a clear lack of systematic categorisation. Still, it is possible to suggest that the legal/institutional framework in the context of the ILO system has been based on a set of three basic principles: a) preventing the emergence of labour disputes; b) in the case of the inevitability of a labour dispute – orientation to its internal resolution; c) in case of need – the involvement of a third party.[10] A number of broad benchmarks can be considered in respect of effective dispute management systems, including primarily the following: preventive emphasis ; range of services and interventions ; free services ; voluntarism ; informality ; innovation; professionalism; independence; resource support; and confidence and trust of users.[11]

10. In this context, certain instruments and provisions are more applicable to individual disputes in comparison to collective disputes, and vice versa. The section below discusses the most important of these benchmarks, as recognised in the ILO standards.

2.1.1 Individual labour disputes

Individual labour disputes

11. In the area of individual labour disputes, the V**oluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)** and the **Examination of Grievances Recommendation, 1967 (No. 130)** address certain aspects of the resolution of individual labour disputes that reflect some of the principles above. ILO Recommendation No. 92 emphasises, among others, the importance of **dispute prevention**. Paragraph 1 provides that voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers.[12] An emphasis on dispute prevention requires that resources be available to assist employers and employees to prevent disputes from arising, through the provision of advisory information and training services, including joint training in strengthening and improving arrangements and processes for dialogue, consultation, bargaining, and improved labour management relations at the enterprise level.

[10] *Heron, R. and Vandenabeele, C. Labour Dispute Resolution: An Introductory Guide (ILO, 1999).*

[11] *See ITC-ILO, Labour Disputes Systems: Guidelines for Improved Performance (ITC-ILO, 2013), 30, which refers also to informality, innovation, professionalism, resource support and confidence and trust of users.*

[12] *ITC-ILO, n 7 above at 1.*

Individual labour disputes

12. A second specific benchmark for effective dispute resolution systems is the range of services offered: services may cover the full range of disputes including individual, collective, rights, and interests, as well as those relating to organizational rights, recognition for bargaining, interpretation of collective agreements, discrimination, unfair labour practices, retrenchments, and dismissals.[13] To that end, paragraph 3(2) of Recommendation No. 92 provides that 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. In addition, simplicity of procedures and operations is also held as a key to the effective resolution of disputes: paragraph 3(1) of Recommendation No. 92 states that voluntary conciliation procedures should be free of **charge and expeditious**. Free service requires that conciliation and arbitration services be made available free of charge to the disputing parties, but it is possible that some costs related to conciliation and arbitration processes, including interpretation services, witnesses, and costs associated with a party's representatives, will be borne by the concerned party.[14]

13. Recommendation No. 92 also anticipates that the conciliation machinery established by the State shall be **voluntary** in principle.[15] The disputing parties are free to decide whether to have recourse to conciliation and arbitration proceedings and are not required by law to use the State-funded conciliation and arbitration services.[16] The principle of voluntarism is not seen to be compromised where the parties voluntarily make an agreement to submit to compulsory conciliation/mediation or arbitration as part of the bargaining process.[17] The Recommendation states explicitly that 'no provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike.[18] However, if a dispute is submitted to a conciliation or arbitration procedure with the consent of all the parties, the latter should be encouraged to abstain from strikes and lock-outs during such procedures.[19] **Independence** means that the system neither belongs to nor is controlled by any political parties, business interests, employers, or trade unions, and operates without interference from Government. Providing for the equal representation of employers and workers in the dispute resolution system, as contemplated by paragraph 2 of Recommendation No. 92, is an important element of ensuring the system's independence.[20] Participation can be either direct or through legitimate intermediate institutions or representatives. Notably, however, independence does not mean financial independence from the Government, as dispute management systems operating as statutory bodies will be dependent on State-funding.[21]

[13] *The Recommendation is mute on mediation.*

[14] *ITC-ILO, n 7 above, 31.*

[15] *See analysis below regarding the interplay with collective bargaining and industrial action.*

[16] *Parties can choose a private third party as conciliator or arbitrator instead of the conciliation or arbitration machinery established by the State. ITC-ILO, n 7 above, 32.*

[17] *Ibid.*

[18] *Paragraph 7.*

[19] *Paragraph 4.*

[20] *In mediation and arbitration proceedings it is essential that all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned (See the 1996 Digest, para. 549; 310th Report, Case No. 1928, para. 182, and Case No. 1943, para. 240; 318th Report, Case No. 1943, para. 117; 324th Report, Case No. 1943, para. 26; 327th Report, Case No. 2145, para. 306; 328th Report, Case No. 2114, para. 406; 333rd Report, Case No. 2288, para. 829; 335th Report, Case No. 2305, para. 507; and 336th Report, Case No. 2383, para. 773.)*

[21] *ITC-ILO, n 7 above.*

Individual labour disputes

14. In addition, the **Examination of Grievances Recommendation, 1967 (No. 130)** addresses dispute resolution at the enterprise level , including both individual and collective disputes.[22] Any worker who, acting individually or jointly with other workers, considers that they have grounds for a grievance should have the right: (a) to submit such grievance without suffering any prejudice whatsoever as a result; and (b) to have such grievance examined pursuant to an appropriate procedure.[23] Three basic parameters can be used to ensure this balance in the design of grievance procedures. First, procedures within the enterprise should offer **a real possibility of arriving at a settlement** at every stage. Second, if an acceptable solution cannot be found between workers and their first- or second-line supervisors, it should be possible to **take a grievance to a more senior level of management.** Third, if workers remain unsatisfied after internal procedures have been exhausted, there should have the **possibility of resolving unsettled grievances** via conciliation, arbitration, recourse to court or other judicial authority, or another procedure agreed by the relevant workers' and employers' organisations, including through collective agreement.[24]

15. Recommendation No. 130 sets out a number of provisions on the development and implementation of workplace dispute mechanisms, emphasizing the importance of minimising the number of grievances via the establishment and proper functioning of a sound personnel policy, which should take into account and respect the rights and interests of the workers. In order to achieve such a policy, management should, before taking a decision, co-operate with the workers' representatives.[25] In this respect, the **Workers' Representatives Convention, 1971 (No. 135),**[26] which supplements the provisions of Convention No. 98, requires the employer to afford to workers' representatives the necessary facilities to enable them to carry out their functions promptly and efficiently, and protects both union representatives and the workers' elected representatives in each undertaking against any act, which may be prejudicial to them, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

16. The need for effective mechanisms to address disputes, including **access to effective remedies,** is also explicitly recognised as an important element in any dispute resolution system. In the context of the ILO, it was reinforced recently as a result of the adoption of Violence and Harassment Convention, 2019 (No. 190). The Convention provides the most recent tripartite-approved pronouncement on the need for effective mechanisms to address disputes arising from alleged violation of work rights. Article 10 calls on Member States to ensure that victims have access to "safe, fair and effective reporting and dispute resolution mechanisms and procedures in cases of violence and harassment in the world of work." [27]

[22] *Recommendation No. 130 does not apply however to collective disputes regarding interests.*

[23] *Paragraph 2.*

[24] *See also Termination of Employment Recommendation, 1982 (No. 166), which states that in the event of an individual dispute for termination of employment, "a worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment" (paragraph 9).*

[25] *Paragraph 7.*

[26] *See also the analysis in F. Dorssemont "Individual and Collective Labour Dispute Settlement- A comparative review".*

[27] *See also HIV and AIDS Recommendation, 2010 (No. 200), which provides that "Members should have in place easily accessible dispute resolution procedures which ensure redress for workers if their rights set out above are violated" and Termination of Employment Convention, 1982 (No. 158) (Article 10).*

2.1.2 Collective labour disputes

Collective labour disputes

17. The issue of dispute resolution is addressed in the C**ollective Bargaining Convention, 1981 (No. 154).** While Convention No. 154 focuses on collective bargaining, it does not rule out the use of conciliation and/or arbitration as part of the bargaining process where such processes are voluntary.[28] It also provides that bodies and procedures for the settlement of labour disputes should be designed to contribute to the promotion of collective bargaining.[29] This means they should be framed so as to encourage the two parties to reach agreement between themselves. One objective of dispute resolution is indeed to promote the mutual resolution of differences between workers and employers and, consequently, to promote collective bargaining and the practice of bipartite negotiation.[30] As such, in the ILO's view, the effective resolution of labour disputes is closely linked to the promotion of the right to collective bargaining. In this context, the structure of dispute settlement systems is designed to promote collective bargaining, for example, by requiring the parties to exhaust all possibilities of reaching a negotiated solution or to exhaust the dispute settlement procedures provided for by their collective agreement before having access to state provided procedures.

18. In addition, Collective Bargaining Recommendation, 1981 (No. 163) specifies that 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 such dispute arose during the negotiation of agreements, or in connection with the interpretation and application of agreements, or is covered by the Examination of Grievances Recommendation, 1967 (No.130).[31]

[28] *Article 6.*
[29] *Article 5(2)(e).*
[30] *See also Article 8 of the Labour Relations (Public Service) Convention, 1978 (No. 151) concerning settlement of disputes in the public sector.*
[31] *Paragraph 8.*

Collective labour disputes

19. The interplay between collective bargaining, industrial action and dispute resolution has been considered in the jurisprudence of the ILO supervisory bodies and it has been deemed that a system of compulsory arbitration is problematic in relation to ILO standards.[32] In respect of the **Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),** it has been held that legislation, which provides for voluntary conciliation and arbitration in industrial disputes before a strike may be called, cannot be regarded as an infringement of freedom of association provided recourse to arbitration is not compulsory and does not, in practice, prevent the calling of the strike.[33] In general, a decision to suspend a strike for a reasonable period, so as to allow the parties to seek a negotiated solution through mediation or conciliation efforts, does not in itself constitute a violation of the principles of freedom of association.[34] While it is thus accepted that conciliation and arbitration procedures are not necessarily incompatible with the requirements of the Convention, they must, however, be designed to facilitate bargaining between the two sides. This in turn requires that it must be for the parties to decide, whether they wish to refer any matters in dispute to binding arbitration. The discretionary powers assumed by the Government to introduce legislation, which refers disputes to binding arbitration against the wishes of one or both of the parties, is not found to be consistent with this principle.[35] The ILO supervisory bodies have maintained that compulsory arbitration to end a collective labour dispute and a strike is only acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term that is, services, the interruption of which, would endanger the life, personal safety or health of the whole or part of the population.[36] The prime motivation behind this approach is that a system of compulsory arbitration through the labour authorities, unless a dispute is settled by other means, can result in a considerable restriction of the voluntary nature of collective bargaining.[37]

[32] *The term "compulsory arbitration" is used in the ILO jurisprudence. This itself gives rise to a certain confusion. If the term refers to the compulsory effects of an arbitration procedure resorted to voluntarily by the parties, this does not raise difficulties in the Committee's opinion, since the parties should normally be deemed to accept being bound by the decision of the arbitrator or arbitration board they have freely chosen. The real problem arises in the case of compulsory arbitration which the authorities may impose in an interest dispute at the request of one party, or on their own initiative, the effects of which are compulsory for the parties (General Survey 2012, para 246). In addition, it may be argued that the term best describing a case of 'compulsory arbitration', as defined by the ILO, would be that of 'unilateral' or 'not-agreed' arbitration, as it may reflect more accurately the situation where one party has the right (but may not exercise) to request arbitration or in other cases, it may be imposed by the government at the request of a party respectively.*
[33] *See Compilation of decisions of the Committee on Freedom of Association (Digest) 2018, paragraph 793.*
[34] *See 338th Report, Case No. 2329, para. 1274.*
[35] *Committee on Freedom of Association in Case No. 1389 (251st Report of the Committee, approved by the Governing Body at its 236th Session (May-June 1987)) and in Case No. 1448 (262nd Report of the Committee, approved by the Governing Body at its 242nd Session (February-March 1989) https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2078193*
[36] *See 2018 Digest, paras. 816-823 and references therein. With regard to the duration of prior conciliation and arbitration procedures, the Committee has considered, for example, that the imposition of a duration of over 60 working days as a prior condition for engaging in a lawful strike may make the exercise of the right to strike difficult, or even impossible. In other cases, it has proposed reducing the period fixed for mediation (United Republic of Tanzania (Zanzibar) – CEACR, observation, 2011). The situation is also problematic when legislation does not set any time limit for the exhaustion of prior procedures and confers full discretion on the authorities to extend such procedures (see, for example, Kiribati – CEACR, observation, 2011).*
[37] *Report in which the Committee requests to be kept informed of development - Report No. 367, March 2013. Case No 2894 (Canada) - Complaint date: 15-AUG-11*

Collective labour disputes

20. Similar considerations are at play in respect of the application of Convention No. 98 as well.[38] It is instead accepted that compulsory arbitration is allowed only in limited cases, including (i) in essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); [39] (ii) in the case of disputes in the public service involving public servants engaged in the administration of the State; (iii) when, after protracted and fruitless negotiations, it becomes obvious that the deadlock will not be broken without some initiative by the authorities; or (iv) in the event of an acute crisis.[40] The ILO position reflects predominantly a concern, as seen also above in the case of the interplay with the right to strike, about the use of compulsory arbitration as a measure of compulsion that is not consistent with the principle of the right to free and voluntary collective bargaining, as articulated in Convention No. 98.[41] In this respect, the scope for compulsory arbitration, as that of last resort in the case of (iii), seems to rest on a quantitative criterion concerning the duration of protracted negotiations without necessarily considering the existence or not of good-faith behaviour from the parties for the resolution of the dispute.[42] At the same time, it is important to add here that the CEACR has found that systems – which provide that, once the conciliation attempt between the parties to the dispute has failed, the dispute is transferred to a specific independent body, which is entrusted then with issuing a report or recommendations that, after a certain period, become enforceable unless the parties to the dispute have not challenged them – may be compatible with ILS, on condition that the period referred to above is reasonable. In addition, while the CEACR considers that arbitration imposed by the authorities at the request of one party is generally contrary to the principle of the voluntary negotiation of collective agreements, it can envisage an exception in the case of provisions allowing workers' organizations to initiate such a procedure for the conclusion of a first collective agreement.[43]

[38] *Article 4. See the 1996 Digest, para. 861; 332nd Report, Case No. 2261, para. 665; and 333rd Report, Case No. 2281, para. 631. See the 1996 Digest, paras. 518 and 862; and 338th Report, Case No. 2329, para. 1276.*

[39] *See the 1996 Digest, para. 860; 320th Report, Case No. 2025, para. 408; 327th Report, Case No. 2145, para. 305; 332nd Report, Case No. 2261, para. 665; and 335th Report, Case No. 2305, para. 506.*

[40] *In all cases, the Committee considers that, before imposing arbitration, it is highly advisable that the parties be given every opportunity to bargain collectively, during a sufficient period, with the help of independent mediation. ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR): Observation on the Application of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) by Greece (ratification: 1962), International Labour Conference, 108th Session, Report iii (Part A), June 2019. See also 2ILO 2012 General Survey on the fundamental Conventions, paragraph 247.*

[41] *See 2018 Digest, para. 1315.*

[42] *This was in broad terms the approach adopted by the previous legislation in Greece. Greek law 4549/2018 preserved the right of a party that has accepted mediation to unilaterally resort to binding arbitration when the other party had refused to do so. But it restricted the right of any party to unilaterally resort to binding arbitration after the submission of the mediator's proposal, by confining that right only to the party that has accepted the mediator's proposal.*

[43] *ILO 2012 General Survey on the fundamental Conventions, para. 250.*

2.1.3 The role of administrative authorities (including labour inspectorates) in dispute resolution

The role of administrative authorities (including labour inspectorates) in dispute resolution

21. From the perspective of the role of administrative authorities in dispute resolution, the most important instruments are **Labour Administration Convention, 1978 (No. 150)** and L**abour Inspection Convention, 1947 (No. 81)**. Article 6 of ILO Convention No. 150 outlines the scope of action of labour administration bodies, including making their services available to employers and workers, and their respective organisations "with a view to the promotion – at national, regional and local levels as well as at the level of the different sectors of economic activity – of effective consultation and co-operation between public authorities and bodies and employers' and workers' organisations, as well as between such organisations".[44] In this context, **Labour Administration Recommendation, 1978 (No. 158)** insists on the usefulness of involving the labour administration bodies in furthering labour relations and sets out the means that can be used to do so. Among others, it provides that "the competent bodies within the system of labour administration should be in a position to provide, in agreement with the employers' and workers' organisations concerned, conciliation and mediation facilities, appropriate to national conditions, in case of collective disputes."[45]

22. In terms of the ILO Convention No. 81, Article 3(1) states that "the functions of the system of labour inspection shall be: (a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors; (b) to supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions; (c) to bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions. Any further duties, which may be entrusted to labour inspectors, shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality, which are necessary to inspectors in their relations with employers and workers." [46]

[44] *Article 6(1)(c).*

[45] *Paragraph 10.*

[46] *Article 3(2).*

The role of administrative authorities (including labour inspectorates) in dispute resolution

23. In this context, among the duties occasionally assigned to labour inspectors, in addition to inspection related to conditions of work and protection of workers while engaged in their work, is the settlement of labour disputes. There are countries in which conciliation is regarded as a natural aspect of the function of labour inspectors because, as public officials closest to the social partners, and owing to their qualities of independence and impartiality foreseen in Article 6 of Convention No. 81, labour inspectors are considered to be in the best position to understand conflicts between workers and their employers.[47] ILO Recommendation No. 81, paragraph 8 states that "the functions of labour inspectors should not include that of acting as conciliator or arbitrator in proceedings concerning labour disputes". In this context, assigning conciliation and mediation in collective labour disputes to a specialized body or officials has been considered as enabling labour inspectors to carry out their supervisory function more consistently.[48] In the recent comments by the CEACR, the starting assumption can be interpreted as implying that it is possible in principle (though not always preferable) for states to allocate conciliation and mediation duties to labour inspectors, so long as they do not "interfere with the effective discharge of their primary duties."[49] One of the factors taken into account in this respect is "the proportion of staff assigned to labour dispute settlement as compared to the staff assigned to labour inspection", the rationale behind this being the need to ensure the effective operation of labour inspection services related to enforcement and compliance.[50] In other words, "the time and energy expended by inspectors in attempting to settle collective labour disputes should not be to the detriment of their primary duties."[51]

24. Similar considerations seem to be at play in respect of the observations of the CEACR in the case of **Greece**. Having emphasised the need for separating the functions of conciliation from those of inspection, it noted the government's indications on the redesign of the labour dispute resolution process within the context of the Labour Inspectorate (SEPE) and "that the conciliation procedure is preferred by workers in a number of cases over inspections visits (for example, in relation to delayed payment of wages)" and requested the Government "to provide detailed information on the consideration given, in the framework of the plan of the SEPE to modernize the labour dispute resolution process, to create a separate unit with officials specializing in dispute resolution."[52] In this context, other strategies (e.g. split of services provided under the Labour Inspectorate or the promotion of an effective use of voluntary conciliation machinery constituted on a joint basis, comprising equal representation of employers and workers for collective labour disputes as well as a greater use of internal grievance procedures to facilitate voluntary labour law compliance in line with the principles set out above) may be considered in order not to interfere with or undermine the labour inspection as such.[53]

[47] *Paragraph 72, General Survey of the reports concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, the Labour Inspection Recommendation, 1947 (No. 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133). International Labour Conference 95th Session, 2006.*
[48] *Ibid.*
[49] *See Observation (CEACR) - adopted 2010, published 100th ILC session (2011) Labour Inspection Convention, 1947 (No. 81) – Burundi and Direct Request (CEACR) - adopted 2017, published 107th ILC session (2018), Togo. Direct Request (CEACR) - adopted 2012, published 102nd ILC session (2013) Labour Inspection Convention, 1947 (No. 81) – Cameroon.*
[50] *Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012), Labour Inspection Convention, 1947 (No. 81) – Estonia.*
[51] *See for instance, Observation (CEACR) - adopted 2006, published 96th ILC session (2007) Labour Inspection Convention, 1947 (No. 81) – Burundi. These include the following ones: Burundi, Cameroon, China-Macau, Fiji, Republic of Korea, Estonia, French Polynesia, New Caledonia and Eswatini. In contrast, no such issues have arisen in the case of Australia, France and Spain, where labour inspectorates play an important role in conciliation and mediation of labour disputes (see analysis below).*
[52] *Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016) Labour Inspection Convention, 1947 (No. 81) – Greece.*
[53] *On these recommendations, see also Greece Labour Administration Needs Assessment Report, April 11, 2017. At the same time, attention needs to be paid to the CEACR's observations regarding concerns about the detrimental impact of the restructuring of labour inspectorates and a lack of material resources due to the budget cuts (https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3255320,102658,Greece,2015).*

The role of administrative authorities (including labour inspectorates) in dispute resolution

25. It is important to underline here, given the broad framework of the report in the context of the project's objective to support the transition from informal to formal economy and address undeclared work in Greece, the role of labour inspectorates in dealing with undeclared and illegal employment, including in relation to foreign workers.[54] In its 2006 General Survey on Labour inspection, the CEACR indicated that "the function of verifying the legality of employment should have as its corollary the reinstatement of the statutory rights of all the workers."[55] The CEACR also "recalled that neither Convention No. 81 nor Convention No. 129 contain any provision suggesting that any worker be excluded from the protection afforded by labour inspection on account of their irregular employment status."[56] At the same time, the control of undeclared work also contributes to establishing an employment relationship if it is associated with the protection of workers' rights. The most recent CEACR comments on Greece on this point do not address this positive side of the control of undeclared work in granting an employment contract,[57/58] but the CEACR has noted this protective function of the labour inspectorate with respect to a number of countries.[59]

26. In respect of the issues around the nature of the employment relationship and informal work, **Employment Relationship Recommendation, 2006 (No. 198)** calls on the competent authorities to adopt measures to ensure respect for and the implementation of laws and regulations regarding the employment relationship, including dispute settlement machinery. It also indicates that the national policy called for in the Recommendation should include measures to provide effective access to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship.[60] Recommendation No. 198 adds in Paragraph 14 that "the settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice". In a similar vein, **Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204)** also calls on Members to put in place mechanisms with a view to ensuring compliance with national laws and regulations ensuring the recognition and enforcement of employment relationships.[61] Importantly, this is not limited to the employment relationship but Members are required to put in place appropriate mechanisms or review existing mechanisms with a view to ensuring compliance with national laws and regulations to facilitate the transition to the formal economy.[62] Access to efficient and accessible complaint and appeal procedures for workers in the informal economy should also be ensured.[63]

[54] *Articles 3(1) and (2) of Convention No. 81 and Articles 6(1) and (3) of Convention No. 129. See paras 75-78 in General Survey of reports concerning Labour Inspection Conventions and Recommendations, ILC 95th Session, Report III (Part B) (ILO, 2006).*
[55] *Ibid, paragraph 77.*
[56] *Ibid. The Committee also observed in its 2017 General Survey on the occupational safety and health instruments, paragraph 452, that workers in a vulnerable situation may not be willing to cooperate with the labour inspection services if they fear negative consequences as a result of inspection activities, such as the loss of their job or expulsion from the country (https://www.ilo.org/ilc/ILCSessions/previous-sessions/106/reports/reports-to-the-conference/WCMS_543647/lang--en/index.htm).*
[57] *Observation (CEACR) - adopted 2015, published 105th ILC session (2016), Labour Inspection Convention, 1947 (No. 81) – Greece.*
[58] *Ibid.*
[59] *Recommendation No. 204 adds that Members should put in place efficient and accessible complaint and appeal procedures, and provide for preventive and appropriate corrective measures to facilitate the transition to the formal economy and ensure that the administrative, civil or penal sanctions provided for by national laws for non-compliance are adequate and strictly enforced (paragraphs 29 and 30). See Direct Request (CEACR) - adopted 2018, published 108th ILC session (2019), Slovenia Labour Inspection Convention, 1947 (No. 81) and Labour Inspection (Agriculture) Convention, 1969 (No. 129) para 962; Direct Request (CEACR) - adopted 2019, published 109th ILC session (2020) Latvia; and Direct Request (CEACR) - adopted 2019, published 109th ILC session (2020) Portugal.*
[60] *Paragraph 4(e).*
[61] *Paragraph 26.*
[62] *Direct Request (CEACR) - adopted 2018, published 108th ILC session (2019), Slovenia Labour Inspection Convention, 1947 (No. 81) and Labour Inspection (Agriculture) Convention, 1969 (No. 129) para 962.*
[63] *Paragraph 29.*

2.2 European labour standards on labour dispute resolution

European labour standards on labour dispute resolution

27. In the **EU context**, the terms 'conflict' or 'dispute' resolution are often used in various places, but not in a consistent manner.[64] Both the industrial relations and judicial channels offer well-developed mechanisms for the resolution of labour disputes. In the case of the former, the EU model has traditionally rested on the development of worker involvement in the decision-making process or conflict resolution through information, consultation, broad representation and other forms of employee voice. In line with the ILO view on dispute settlement, EU policy aims to contribute to the promotion of social dialogue through the recognition of the right to information and consultation (Article 27 of the Charter of Fundamental Rights of the European Union (CFREU) and the right to collective bargaining (Article 28, CFREU).[65] However, there is no explicit reference in the CFREU to a duty to promote the establishment and to the use of appropriate machinery for conciliation and voluntary arbitration.[66] Further, this support has been eroded in the context of the recent economic crisis.[67] In respect of the judicial channel, this involves the Court of Justice of the European Union (CJEU) in dealing with labour law enforcement issues. It is however less evident to see labour disputes (with no state actor involved) being resolved.[68] It is the administrative channel that has not been very much developed at EU level there is, among others, no real administrative remedy in the area of labour law, nor a European labour arbitration institution. The only exception here is the recently established European Labour Authority that deals, among others, with dispute resolution.[69] Another recent EU initiative, the European Pillar of Social Rights, included provisions on termination of employment and referred to procedural fairness in the form of a right to "effective and impartial dispute resolution".[70]

[64] *Hendrickx, F. Labour Dispute Resolution and Settlement in EU perspective, in Brenninkmeijer, A.F.M, Jagtenberg, R.W. de Roo, A.J. and Sprengers L.C.J., Effective Resolution of Collective Labour Disputes (Europe Law Publishing, 2006).*

[65] *Note, however, that the Community Charter of the Fundamental Social Rights of Workers 1989 provided that "in order to facilitate the settlement of industrial disputes the establishment and utilization at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice."*

[66] *However, Article 47 CFREU that recognises the right to an effective remedy and to a fair trial.*

[67] *For an overview of this, see Koukiadaki, A. Tavora, I., and Martinez-Lucio, M., Continuity and change in joint regulation in Europe: Structural reforms and collective bargaining in manufacturing, (2016) 22 European Journal of Industrial Relations, 189.*

[68] *Hendrickx, n 60 above.*

[69] *The Authority provides mediation exclusively in cases of disputes between national authorities regarding the application of Union law in the area of labour mobility and social security coordination. A dedicated Mediation Board is established for this purpose.*

[70] *Principle 7 (b) reads: "Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation."*

28. In terms of initiatives specifically targeting dispute resolution, the European Commission's social policy agenda for the 2000-5 period contained a commitment to consult the social partners on "the need to establish, at European level, a voluntary mechanism on mediation, arbitration and conciliation for conflict resolution".[71] In 2008, an EU Directive relating to certain aspects of mediation in civil and commercial matters was adopted.[72] The Directive applies to civil and commercial matters, but does not extend to "rights and obligations which are not at the parties' disposal under the relevant applicable law [73]. Such rights and obligations are particularly frequent in family law and employment law". The Directive defines mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator." [74] This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge, who is not responsible for any judicial proceedings concerning the dispute in question, and excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.[75] 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.[76] Under Article 5, "a court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available".

[71] *The case of EU institutions as employers can be considered here as well: at the level of the European Parliament, an Accord cadre (1990) contains a commitment on the part of all signatory parties to develop a conciliation procedure in case of a work stoppage (see Dorssemont, F. and Rocca, M. Right of Collective Bargaining and Action, in Dorssemont, F., Lörcher, K., Clauwaert, S. and Schmitt, M. (eds) The CFREU and the Employment Relation (Hart Bloomsbury, 2019).*

[72] *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136/3 of 24 May 2008. See also European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)).*

[73] *Preamble to the Directive, point 10.*

[74] *Article 3(a).*

[75] *Article 3(a).*

[76] *Article 3(b). The European Code of Conduct for Mediators sets out a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility (https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6)*

29. Although the Directive contains few compulsory rules and is in principle addressing issues related to cross-border disputes, many EU Member States took further actions to promote mediation and almost all applied the Directive to domestic disputes.[77] However, the national laws on mediation enacted in the Member States vary greatly in the use of different models, in legal provisions, and above all, in final results with respect to the number of mediations generated.[78] The limited impact of the implementation of the 2008 Directive was examined in a 2014 study commissioned by the European Parliament.[79] Despite implementation, the Directive has not arguably achieved its objective stated in its Article 1: "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings." One of the main recommendations has been to introduce a 'mitigated' form of mandatory mediation, i.e. some form of opt-out but with potential sanction for unjustified opt-out. In this respect, the CJEU has confirmed that mandatory mediation is not a breach of Art. 6(1) of the European Convention of Human Rights on the right to a fair trial,[80] because the mandatory mediation procedures cannot result in a binding decision ; cannot cause substantial delay in bringing proceedings ; cannot expend any time-bar period; and cannot give rise to more than minimal costs.[81]

30. At **Council of Europe** level, Article 6(3) of the European Social Charter (ESC) on the right to bargain collectively stipulates an obligation "to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes". The provision is confined to conflicts of interest and not of rights.[82] Insofar as consultation or negotiation fails to produce a consensual or contractual outcome, conciliation or voluntary arbitration could be helpful to avoid an 'open' conflict between both parties, having recourse to means of collective action protected under Article 6(4) ESC. The ESC does not provide definitions of conciliation and 'voluntary' arbitration. It is mute on mediation. However, the Digest of the case law of the European Committee of Social Rights adds 'mediation' to the procedures that should be instituted to facilitate the resolution of collective conflicts.[83] The European Committee of Social Rights (ECSR) is critical of compulsory processes of conciliation that take place prior to the exhaustion of proper means of social dialogue inter partes.[84]

[77] *The Directive was implemented in Greece in 2010 (3898/2010). Further amendments have been made since (see Law 4512/2018 and Law 4640/2019).*

[78] *Not all Member States have implemented the Directive in cross-border family and labour matters, even in cases where the rights are at the parties' disposal (for a review, see European Parliament, The Implementation of the Mediation Directive, Compilation of In-depth Analyses, PE 571.395 (European Parliament, 2016).*

[79] *Ibid.*

[80] *Paragraph 1 of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which is entitled 'Right to a fair trial', provides:*
"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[81] *Rosalba Alassini v. Telecom Italia SpA (C-317/08). See however in the context of the UK the decision in Halsey v. Milton Keynes General NHS Trust [2004] EWCA (Civ) 576, where it was held that courts cannot force parties to mediate because that would be a breach of Art 6(1) ECHR.*

[82] *The Digest states that 'conflicts of interest' are conflicts, which concern the conclusion of a collective agreement or the modification, through collective bargaining, of conditions of work contained in an existing collective agreement. It does not concern conflicts of rights, i.e. conflicts related to the application and implementation of a collective agreement or to political dispute.*

[83] *Digest 51, see Dorssemont, F. The Right to Bargain Collectively, in Bruun, N., Lörcher, K., Schömann, I. and Clauwaert S., The European Social Charter and the Employment Relation (Hart, 2017).*

[84] *Ibid at 256.*

Under the ESC, there is a role for voluntary arbitration, even though negotiation-based approaches are much more frequently used in such disputes. The rationale for this preference for direct negotiation or conciliation is obvious: unlike arbitration, these methods respect the autonomy of the social partners. The ECSR objects to the mandatory character of arbitration but not of conciliation or mediation.[85] In both cases, there is an impact on the recourse to strike action. Whereas mandatory arbitration tends to exclude recourse to strike, mandatory conciliation amounts to a kind of cooling-off period, suspending the ability to have recourse to strike action.[86] A system of compulsory arbitration can constitute a restriction of both Article 6(1) and Article 6(2) of ESC.[87] Compulsory arbitration can only be justified insofar as it is consistent with Article G.[88] Furthermore, arbitration systems must be "independent, and the outcome of arbitration may not be predetermined by pre-established criteria".[89]

31. In the context of the European Convention of Human Rights (ECHR), the mandatory arbitration system was scrutinized by the European Court of Human Rights (ECtHR) in a 2002 test case involving Norway, which was submitted by the Offshore Workers' Trade Union.[90] In the particular case at hand, the ECtHR saw no infringement of Art. 11 of ECHR. Rather than focusing on the compatibility of compulsory arbitration with international standards, the Court instead directed its attention to the balancing of interests, disregarding the non-judicial nature of the procedure under Norwegian law, which allowed administrative authorities to engage in such an exercise.[91] The ECtHR has dealt predominantly with the issue of resolution for individual labour disputes. In a 1962 decision, the then European Commission of Human Rights considered that such a clause had been signed voluntarily as the individual employee concerned "could have refused the employment".[92] In a 1999 judgment, the ECtHR held that the German courts had not violated two ESA employees' right of access to court contained in Art. 6 ECHR, by granting the ESA as an international organization immunity from jurisdiction, because an arbitration-like mechanism within ESA had been available to the complainants, while in addition they could have sued the firms that had hired them out in a court of law.[93] Together, these cases seemed to condone arbitration, although the first case is rather old now, and in the latter case arbitration was held acceptable as resort to the courts had been an additional option through a different litigation track.[94] In more recent case-law, the ECtHR reiterated that arbitral tribunals are in principle compatible with the "right to a court" under Article 6(1) ECHR. However, the ECtHR distinguished between compulsory ("arbitrage forcé") and voluntary arbitration, holding that in compulsory arbitration all guarantees provided for in Article 6(1) ECHR must be safeguarded under all circumstances. In contrast, if parties voluntarily consent to arbitration proceedings, those rights may be waived under the condition that this is being done freely, lawfully and in an unequivocal manner.[95]

[85] *See, for example: ECSR, Conclusions XV-1, 30 March 2000, Norway. The compulsory character of the mediation concerned did not give rise to an assessment of non-conformity.*

[86] *See Dorssemont, n 79 above at 255.*

[87] *Among others, the statutory legislation of Malta, allowing the relevant minister to refer a collective dispute to compulsory arbitration at the request of only one of the parties to the dispute, was considered not to be in conformity with Article 6(2) (ECSR, Conclusions, XV-1, 30 March 2000, Malta; ECRS, Conclusions XIV-1, 30 March 1998, Malta).*

[88] *See ECSR, Conclusions 2010, 22 October 2010, Albania; ECSR, Conclusions 2010, 22 October 2010, Moldova; ECSR, Conclusions 2010, 22 October 2010, Portugal; ECSR, 30 March 1998, Conclusions, XIV-1, Norway.*

[89] *ECSR, Conclusions 2010, 22 October 2010, Georgia.*

[90] *Appl. No. 38190/97, ECtHR decision of 27 June 2002.*

[91] *On this, see Dorssemont, F. The Right to Take Collective Action under Article 11 ECHR, in Dorssemont, F., Lörcher, K. and Schömann, I. (eds) The European Convention on Human Rights and the Employment Relation (Hart Publishing, 2013), 357.*

[92] *Decision of the Commission of 5 March 1962, X. v. the Federal Republic of Germany, Appl. No. 1197/61.*

[93] *Waite and Kennedy v. Germany, Appl. No. 26083/94, ECtHR judgment of 18 February 1999*

[94] *Jagtenberg, R. and de Roo, A. Employment Disputes and Arbitration: An Account of Irreconcilability with reference to the EU and the USA (2018) 68 Zbornik Pravnog Fakulteta u Zagrebu, 171.*

[95] *Mutu and Pechstein v. Switzerland, Decision of 2 October 2018, application no. 40575/10 and 67474/10.*

2.3 Concluding remarks

Concluding remarks

32. As this section illustrated, the main elements of an effective dispute resolution system in the ILO context include, but are not limited to, the following: preventive emphasis; range of services and interventions; free services; voluntarism and independence .[96] The analytical framework will be further supplemented by the concepts of **efficiency, equity and voice**.[97] It is certainly the case that there is no 'complete theory' of labour dispute resolution processes and any all embracing theory would be 'incomprehensible .[98] Research into this area is further complicated by the variety of forms that disputes and their resolution mechanisms can take and by a range of other factors, e.g. lack of good metrics for assessing the quality of such mechanisms. In respect of the latter, i.e. metrics used for assessing the quality of the systems, attention has been predominantly placed on speed of procedures and satisfaction by the parties .[99] However, these have been widely criticised for their incompleteness and inability to assess the effectiveness of the systems.[100] The need for a more complete framework enabling the assessment of dispute resolution systems is heightened as the issue of justice takes on increasing importance, especially in relation to non-traditional forms of dispute resolution .[101] An alternative approach focusing on efficiency, equity, and voice has been put forward by Budd and Colvin.[102] In this respect, an **efficient** dispute resolution system is one that conserves scarce resources, especially time and money. While efficiency may have been traditionally associated with a business case for labour standards, this may be different in the context of dispute resolution: for example, efficient workplace dispute resolution methods that yield timely and inexpensive settlements serve both employer and employee interests.[103] The second objective is equity. This incorporates concepts such as procedural fairness, equal opportunity, the existence of safeguards — including the ability to appeal decisions to a neutral party— and transparency to prevent arbitrary or capricious decision-making and enhance accountability. The interpretation of these elements has to take into account the nature of the employment relationship, which is traditionally characterised by lack of bargaining equality between the parties. An equitable dispute resolution system also has widespread coverage independent of resources or expertise and is equally accessible irrespective of gender, race, national origin, or other personal characteristics and contractual status (e.g. in the case of individuals in unclear or disguised employment relationships). Finally, voice emphasises the element of self-determination in the relationship between the parties. In dispute resolution systems, not only does it capture the extent to which individuals are able to participate in the operation of the dispute resolution system (e.g. in terms of due process), but it can also include the extent to which individuals have input into the construction of the dispute resolution system and into specific mechanisms.[104] Table 1 below brings together the main goals and principles of dispute resolution in a way that captures the elements in the ILO system as well.

[96] *ITC-ILO, n 7 above.*

[97] *Budd, J.W. and Colvin, A.J.S. Improved metrics for workplace dispute resolution procedures: efficiency, equity, and voice, (2008) 47 Industrial Relations, 460. This is based on the original formulation of the objectives of the employment relationship, as developed by Budd (Budd, John W. 2004. Employment with a Human Face: Balancing Efficiency, Equity, and Voice. Ithaca, NY: ILR Press). In this context, efficiency is a standard of economic or business performance; equity is a standard of treatment; voice is a standard of employee participation.*

[98] *Bemmels, B. and Foley, J.R. Grievance procedure research: a review and theoretical recommendations, (1996) 22 Journal of Management, 359.*

[99] *For a review of existing research, see Budd and Colvin, n 93 above, and Bemmels and Foley, n 94 above.*

[100] *For a review, see Bemmels and Foley, n 94 above.*

[101] *Walker, B. and Hamilton, R. T. Employee–Employer Grievances: A Review (2011). International Journal of Management Reviews, 13, 40.*

[102] *Budd and Colvin, n 93 above.*

[103] *Budd and Colvin, n 93 above.*

[104] *Budd and Colvin, n 93 above, 464.*

Table 1
The goals and key elements of effective dispute resolution systems[105]

Goals	Selected key elements
Efficiency (i.e. efficient use of scarce resources and complementarity between existing institutions)	· Eliminates barriers to performance · Does not interfere with productive deployment of resources · Cost effective · Speedy · Flexible · Preventive emphasis
Equity (i.e. fairness and justice)	· Flexible in terms of access to justice · Unbiased and independent decision-making · Reliant on evidence · Consistent · Effective remedies · Opportunities for appeal · Inclusive coverage · Range of services and interventions · Free services
Voice (i.e. participation in design and operation)	· Input into design and operation of a dispute resolution system · Protection of voluntarism · Hearings · Obtaining and presenting evidence · Representation by advocates and use of experts

[105] *This draws on Budd and Colvin as well as the elements of the ILO dispute resolution system.*

3. Comparative overview of legal/industrial relations systems and trends – Incidence and nature of labour disputes

3.1 Main characteristics of legal and industrial relations systems

Main characteristics of legal and industrial relations systems

33. Although all countries examined in the report have broadly similar levels of economic output and living standards, they are generally categorised as belonging to different types of legal systems and industrial relations. Existing literature suggests that there are associations between the broad characteristics of the legal/industrial relations system of a country and its labour dispute resolution framework.

34. When considering the area of **individual labour dispute resolution mechanisms**, different explanatory forces can be derived from distinct conceptual frameworks.[106] In one of the most recent analyses of individual rights adjudication, Corby et al. drew on some of the main ones, i.e. the 'legal origins hypothesis' (LOH)[107], national business systems, specifically 'varieties of capitalism' (VoC) and comparative industrial relations, to evaluate different systems from a comparative perspective.[108] Focusing on two key dimensions, i.e. existence of labour courts and presence and powers of Non-Legal Members (NLMs), including in relation to professional judges, the authors suggested some association between the models and the adjudicative institutions, but by no means a complete match.[109] Their analysis suggests that the typology of industrial relations systems and VoC offered a set of stronger associations with the main features of employment adjudication. This means that one should expect strong collective actors, and consequently NLMs in labour courts, in countries assigned to Continental European Social Partnership and Nordic Corporatism. The converse would apply in Anglo-Saxon pluralist IR systems.[110] Instead, the LOH, on its own, did not appear to offer a convincing approach to the key differentiating factors of employment adjudication.[111]

35. In terms of the VoC categorisation of the countries examined at present, **Australia** and the **UK**[112] represent examples of Liberal Market Economies (LMEs): these are distinguished by a tradition of adversarialism in industrial relations, lower incidence of organisation of workers and employers, company-level bargaining and low degree of government intervention in labour-market arrangements, including dispute resolution.[113] In contrast, B**elgium, France, Spain** and **Sweden** represent examples of Coordinated Market Economies (CMEs), i.e. these rely more heavily on non-market forms of interaction in the coordination of their relationships with other actors; in the specific field of industrial relations, this implies a higher level of membership in trade unions and employers organizations, and bargaining over wages occurring at the industry, sectoral, or national level.[114]

[106] *For a review, see Corby, S. and Burgess, P. Adjudicating Employment Rights (Palgrave, 2014), 21.*
[107] *According to LOH, national regulatory approaches are significantly influenced by whether a country belongs to one of the two 'principal legal families' (Deakin, S. Lele, P., Siems, M. The evolution of labour law calibrating and comparing regulatory regimes. International Labour Review, 146 (2007) 133): the civil law tradition (with French, German and Nordic variants) and the English common law tradition.*
[108] *Corby and Burgess, n 102 above.*
[109] *The authors examined the following countries: Germany, Sweden, the Netherlands, France, Italy, Ireland, UK, USA and New Zealand. It is important to note here that they focused primarily on judicial mechanisms and considered mediation and conciliation, only when it was provided as part of the judicial process.*
[110] *However, the 'Latin' model would not necessarily entail any particular pattern of labour jurisdiction, although a high degree of social polarisation might be expected to be prejudicial to tripartism or social partnership. This might lead to France being anomalous in the IR typology, especially as its labour courts at first instance are, in fact, bi-partite (Corby and Burgess, n 102 above).*
[111] *Ibid.*
[112] *See analysis below in sections 4 and 5.*
[113] *Hall, P., and Soskice, D. (2009) 'An Introduction to Varieties of Capitalism', in Hancké, B. (ed) Debating Varieties of Capitalism. Oxford: Oxford University Press.*
[114] *Ibid.*

At the same time, differences may exist within each of these models: this is, for instance, the case in respect of the extent of voluntarism and state intervention. In LME countries, government intervention is markedly different between the **UK**, on the one hand, and **Australia** on the other: Australia has long had an extensive degree of government intervention in labour-market arrangements, including, as we shall see, in the area of labour dispute resolution. These differences become obvious when considering the comparative industrial relations typology.[115] For instance, in CME countries, **Sweden** is an example of a Nordic corporatist system while **Belgium** falls within the 'Continental European Social Partnership' model. In contrast, **France** and **Spain** are 'Latin polarised', with a strong state-led sector, adversarial and politicised industrial relations and extensive statutory regulation.[116] The UK is a typical example of the 'Anglo-Saxon pluralism' model, based on workplace-level industrial relations and common law contractual principles. A similar argument could be made about **Australia**, albeit with some differentiation on the basis of the role of state institutions.

36. Some of these considerations are pertinent in the case **of collective labour disputes resolution mechanisms** as well. On the basis of a comparative analysis of collective labour dispute systems in Europe, Valdés Dal-Ré put forward the argument that the status of conciliation, mediation and arbitration (CMA) in collective labour disputes can be best examined by taking into account two other elements of any country's industrial and legal system.[117] The first is the confidence put in the judicial system, and the second is the presence or absence of a tradition of collective bargaining. In relation to the judicial system, according to Valdés Dal-Ré, we should expect strong CMA when no special priority is given to industrial courts or labour courts over normal civil or common law courts, and where social partners are not significantly involved in the labour court system. If there is a tradition of specialized industrial/labour courts with representation of social partners, then the legal tradition of strong intervention in collective bargaining processes should be weak.[118] In this respect, industrial jurisdiction in the form of a specialised jurisdiction is the prevailing judicial model in the countries included in the present report. However, as we shall see, a degree of divergence exists instead in respect of the involvement of social partners in the composition and operation of the specialised court system.[119]

[115] *See Ebbinghaus, B. and Visser, J. (1997) 'Der Wandel der Arbeitsbeziehungen im westeuropäischen Vergleich', in Hradil, S. and Immerfall, S. (eds) Die westeuropäischen Gesellschaften im Vergleich, Leske+Budrich: Opladen.*

[116] *Ibid.*

[117] *Valdes Dal-Re V. Labour conciliation, mediation and arbitration in European Union countries (Ministerio De Trabajo Y Asuntos Sociales, 2003).*

[118] *Underlying these hypotheses linked to the judicial system is the concept of voluntarism in industrial relations (see Crouch, C., Industrial Relations and European State Traditions, (Clarendon Press, 1993)).*

[119] *See the analysis in sections 4 and 5.*

37. In respect of collective bargaining, we should expect, according to Valdés Dal-Ré, that in countries where there is a strong tradition of collective bargaining and social dialogue, the resolution procedures for collective disputes are not only created, organised and administered on the basis and by means of contractual instruments that are agreed upon collectively, but they also allow very little room for institutional or administrative conciliation or mediation bodies to act.[120] In Sweden, for instance, the labour market parties have primary responsibility for regulating wages and other terms of employment.[121] In **Belgium**, social partners assume a major role in the process of dispute resolution in a wider context of bipartism in the industrial relations system. In contrast, the existence of major administrative conciliation or mediation institutions or bodies is, according to Valdés Dal-Ré again, normally due to the weakness of bargaining processes, which are to be strengthened precisely by fostering formulas that support and uphold collective bargaining itself.[122] This seems to be the case in **Australia and the UK**, which are characterised by weak collective bargaining institutions and relatively strong institutional bodies to solve industrial disputes (i.e. the Fair Work Commission in Australia (FWC) and the Advisory, Conciliation and Arbitration Service in the UK (ACAS)).[123] While Valdés Dal-Ré considers **Spain** in the same category, i.e. high level of state intervention and adversarial and politicized industrial relations system, it is important to note that the main dispute resolution mechanisms have been created and sustained through social dialogue.[124] The case of **France** is somewhat different, as it is a typical example of a system that is characterised by the absence of political, public or private policies promoting strong CMA as an indirect formula for stimulating collective bargaining.[125]

[120] *Valdés Dal-Ré, n 113 above.*

[121] *The right of association is protected by the Swedish Employment (Co-Determination in the Workplace) Act (1976:850).*

[122] *Greece is also considered to fall within this category: the goal of the mediation and arbitration service (OMED) is not simply to make available to the social partners mechanisms that will put an end to their disputes; rather more ambitiously, it was established "to support collective bargaining by providing independent mediation and arbitration services" (Yannakourou, M. Conciliation, Mediation and Arbitration in Greece (Athens, 2002) at 6.*

[123] *Colvin, A., and Darbishire, O. Convergence in industrial relations institutions: The emerging Anglo-American model? (2013) 66 Industrial and Labor Relations Review, 1047.*

[124] *See analysis in sections 4 and 5. This may be explained by the fact that Valdés Dal-Ré's analysis refers to the early period of the operation of the dispute resolution framework in Spain.*

[125] *Valdés Dal-Ré, n 107 above.*

Main characteristics of legal and industrial relations systems

38. More recent empirical research challenges the argument that strong CMA institutions reflect legal traditions that use civil courts rather than specialized labour courts (as Valdés Dal-Ré suggested) and further argues that strong CMA institutions are established to control collective bargaining when unions are powerful but fragmented.[126] According to Ibsen, low governance capacity is a sufficient condition for strong CMA but only in combination with strong unions and weak strike rules.[127] As such, the findings suggest that strong CMAs are found in the Nordic countries (i.e. Finland, **Sweden**, Denmark and Norway), all building on voluntarist self-regulation and a coordinated market economy[128] but with experience of serious economic crises accompanied by large-scale industrial unrest, and low governance capacity.[129] **Belgium** also belongs in the cluster of countries with strong CMA. Conversely, other countries have resisted strong CMA either because it was not necessary since unions were under control or weak, as in the **UK**, or because the preference for non-intervention was stronger than the threat of adversarial industrial relations, as in **France**.[130] **Greece** and **Spain** are examples of systems where stronger CMA rules were introduced recently with the intention of controlling collective bargaining and trade unions.[131]

39. In this respect, the role of the regulatory framework on industrial action is worth considering. The dominant view seems to be that the level of industrial action is a direct measure of the need for some kind of third-party intervention through CMA. In other words, if the access of social partners to industrial action is severely limited, then there is no need for strong CMA. Conversely, if there are few restrictions, strong third-party intervention to prevent conflicts of interest from developing into work stoppages should be expected (see Table 2 for the main elements of the regulatory framework on industrial action in the countries examined in the report).[132] However, the relationship between CMA institutions and level of industrial action can also be reversed, as strong CMA might have a calming effect on strike levels.[133] The latter is confirmed in the study by Ibsen.[134]

[126] *Ibsen, C. L. Conciliation, mediation and arbitration in collective bargaining in Western Europe: In search of control (2019) European Journal of Industrial Relations, https://doi.org/10.1177/0959680119853997. It is only in combination with strong unions that absence of normal courts is a condition for strong CMA.*

[127] *Ibid.*

[128] *Zachert U. Labour conciliation, mediation and arbitration in Germany. In: Valdés Dal-Ré F (ed.) Labour Conciliation, Mediation and Arbitration in European Countries (Ministerio de Trabajo y Asuntos Sociales, 2003).*

[129] *Ibsen, n 122 above.*

[130] *Ibsen, ibid.*

[131] *Ibid.*

[132] *Valdés Dal-Ré, n 113 above.*

[133] *Ibsen, n 122 above.*

[134] *Ibid.*

Table 2.
The regulation of industrial action

Countries	Right to industrial action	Waiting period prior to industrial action	Peace obligation	Compulsory conciliation or arbitration
Australia	There is no constitutional right to strike in Australia, and legislation providing limited immunity from 1994 did not confer an effective individual right to strike, being confined to strikes undertaken for the purpose of enterprise bargaining. Legislation also grants state arbitral bodies the right to stop protected industrial action under certain circumstances.	Before 1993, strikes were generally unlawful regardless of notice. A notice requirement was imposed in the 1993 legislation (effective from 1994) that granted a limited immunity for strike action and this requirement has been continued since in various forms. See WRA 1996 s. 170MO and FWA 209 s. 409.	Under the awards system, the award imposed a de facto peace obligation. WRA 1996 prohibited industrial action until expiry of the enterprise agreement. Article 412(6) FWA 2009 prohibits industrial action before the expiry of an enterprise agreement.	Under the awards system, conciliation and arbitration were in effect mandatory, as the quid pro quo for state enforcement of the minimum terms in awards. From 1993, a duty to negotiate prior to taking strike action has been provided for (see IRA 1988 s. 170PI; 64 WRA 1996, s. 444, FWA 2009 s. 413(3).
Belgium	The right to strike is not specifically referred to in the Constitution, but it can be derived from the right to collective bargaining in Art. 23 and by reference to ILO and ECHR standards which can be relied on in national law.	Legislation does not govern the procedures for calling a strike.	Collective agreements contain peace clauses, but the general view is that they are binding in honour only (Blanpain, 'Strikes' in Kluwer Bulletin of Comparative Labour Relations (1994).	Legislation does not impose arbitration or conciliation prior to a strike, but it is accepted that parties to a collective agreement should negotiate prior to any strike action.
France	The Constitution of 1946 protects the individual right to strike.	There is no waiting period or notice required for strikes, except in the public sector (Court of Cassation case law from the early 1950s onwards).	A strike is not unlawful merely on the grounds that a collective agreement is in force (Court of Cassation decision, 1959).	Law 1950-205 Ch. 2 Art. 5 made provision for compulsory conciliation. The element of compulsion was removed by the Auroux laws of 1982.
Spain	1978 Constitution, Art. 28(2).	Decree 1376/1970, Art. 11: 15 days' notice. Decree 5/1975: notice of 5 days following conciliation. Decree 17/1977: notification to employer and public authorities within 5 days of strike beginning	Decree 17/1977, Art. 11.	Decree 1376/1970: mandatory conciliation. Decree 17/1977: obligation to negotiate with encouragement of arbitration and mediation, but no compulsion.
Sweden	The Constitution recognised a right to strike from 1974 (see Constitution Act, 1974:152, Ch. 2, s. 14).	Notice periods and a duty to notify state conciliation and mediation bodies go back to the Act on Mediation in Work Disputes, 1920. See now Codetermination Act 1976, s. 45	A peace obligation must be observed (Codetermination Act, ss. 41-42; case law) although there is an excepting for solidarity action where the primary dispute is lawful.	Under the Codetermination Act, the National Mediation Office can decide on compulsory mediation, although this does not affect the parties' right to take industrial action
United Kingdom	The right to take part in industrial action is not explicitly protected in any constitutional text relevant to the UK.	Strike notice has been required in UK law since 1993 (Trade Union Reform and Employment Rights Act 1993).	Strikes were unlawful between 1972 and 1974, thanks to the Industrial Relations Act 1971; otherwise, the existence of a collective agreement has been largely irrelevant to the lawfulness of industrial action.	There is no requirement for conciliation or alternative disputes resolution before industrial action can be taken or in the course of such action.

Source: Adams, Z., Bishop, L. and Deakin, S. CBR Labour Regulation Index (Dataset of 117 Countries) (Centre for Business Research, 2016).

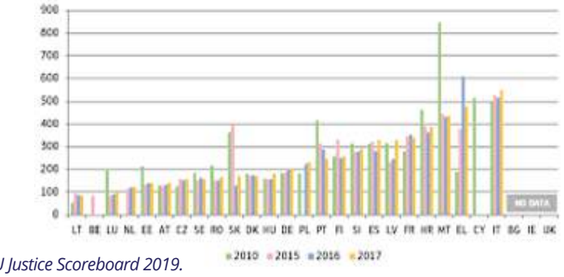
3.2 Trends in individual and collective labour disputes

40. This section outlines the major trends in individual and collective labour disputes in the countries that constitute the focus of the comparative analysis in the report, i.e. Australia, Belgium, France, Spain, Sweden and the UK.

41. In respect of **individual labour disputes**, there is relatively little knowledge from a comparative perspective. If one considers the wider notion of "conflict", this may take subtle forms of "organisational misbehaviour" such as sabotage, absenteeism, or low work morale, which might not even be identifiable as the expression of employee discontent.[135] In this context, recent analyses across a number of countries suggests that there has been a transformation of workplace disputes over time from large-scale, overt collective disputes, such as strikes, to smaller-scale, but possibly more frequent, individual disputes, and there is an increasing incidence of individual employment rights cases, absenteeism, illness, and covert uncooperative behaviours.[136] The forms of conflict may reflect the context that can vary in terms of the type of national regulation.[137] For example, it has been argued that where the regulatory framework for collective representation and industrial action is restrictive, workers may express discontent in various individual ways (e.g. by exiting or "working without enthusiasm").[138] The context also varies greatly between, on the one hand, large enterprises that may be unionized in the public, manufacturing, transport or mining sectors, and on the other hand, small and SMEs in services or the primary sector that are rarely unionized. Typically, the former category of enterprises has formal dispute resolution procedures for dealing with grievances, while most SMEs may have less formalized approaches to dealing with grievances.[139] In that respect, Saridakis, et al. find that SMEs in the UK are more likely to produce employment tribunal claims and explain this phenomenon by pointing to the informality of employment relations.[140]

42. A more obvious form of conflict resolution is through the enforcement of individual employment rights before tribunals or courts . In this respect, the only comprehensive comparative data that exists for EU Member States is provided by the EU Justice Scoreboard reports.[141] However, it is important to note that the Scoreboard does not provide a detailed breakdown of labour disputes. As Figure 1 indicates, a number of Member States, including Greece, can be identified as facing challenges with the length of proceedings in first instance courts.

Figure 1. Time needed to resolve litigious civil and commercial cases (1st instance courts)[142]

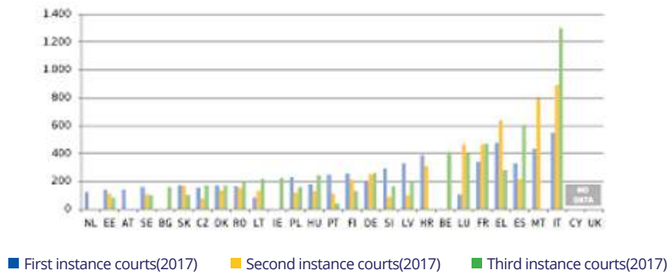


Source: EU Justice Scoreboard 2019.

[135] *Ackroyd, S., Thompson, P. Organisational Misbehaviour (Sage, 1999).*
[136] *For a comprehensive analysis across different national contexts, see Roche, P, W. K., Teague, P., Colvin, A. J. S. (eds) The Oxford Handbook of Conflict Management in Organisations (OUP, 2014). See also Goddard, J. What has happened to strikes? (2011) 49 British Journal of Industrial Relations 282.*
[137] *Bamber, G. J., Russell D. L., Wailes, N. and. Wright, C. F. International and Comparative Employment Relations: National Regulation, Global Changes (Sage, 2016).*
[138] *Van Gramberg, B., Teicher, J., Bamber, G. J., and Cooper, B. A changing world of workplace conflict resolution and employee voice: An Australian perspective [Electronic version]. Paper presented at Conflict and its Resolution in the Changing World of Work: A Conference and Special Issue Honoring David B. Lipsky, (Ithaca, NY 2017), http://digitalcommons.ilr.cornell.edu/lipskycrconference/17*
[139] *Ibid.*
[140] *Saridakis, G., Sen-Gupta, S., Edwards, P.K., Storey, D.J. The Impact of Enterprise Size on Employment Tribunal Incidence and Outcomes: Evidence from Britain (2008) 46 British Journal of Industrial Relations, 469. Since their methodology does not allow controlling of union presence, it remains unclear whether the size effect is not moderated by trade union presence, since the latter is significantly less likely in small workplaces.*

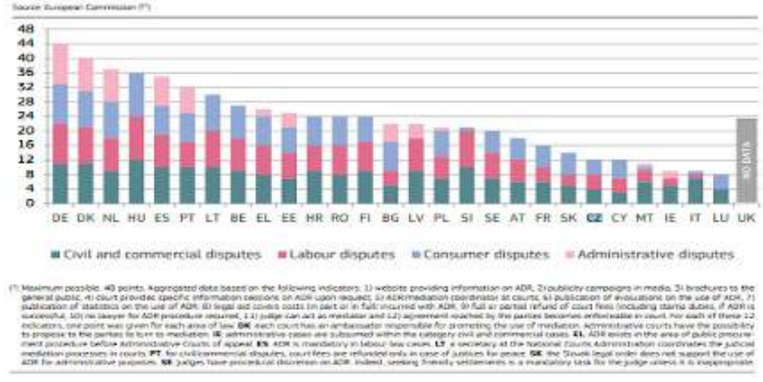
43. While higher instance courts tend to perform in a more efficient manner in some Member States (e.g. Sweden), in others (e.g. Greece and Italy) the average length of proceedings in higher instance courts is even longer than in first instance courts (see Figure 2).

Figure 2. Time needed to resolve litigious civil and commercial cases across court instances in 2017 (1st, 2nd and 3rd instance/in days)



44. The EU Justice Scoreboard provides a breakdown in terms of labour disputes only in respect of Alternative Dispute Resolution (ADR) mechanisms. Figure 3 provides a snapshot of ADR methods concerning labour disputes. These do not cover compulsory requirements to use ADR before going to court, as such requirements raise concerns about their compatibility with the right to an effective remedy before a tribunal enshrined in the EU Charter of Fundamental Rights.[143] As it can be seen, ADR methods are promoted across all EU Member States but the extent to which this is done is varied (cf. for instance Italy versus Slovenia).

Figure 3. Promotion of and incentives for using ADR methods

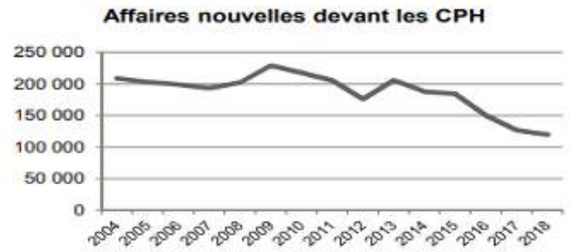


Source: EU Justice Scoreboard 2019.

[141] *European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2019) 198/2EU.*
[142] *Under the methodology used for the analysis, litigious civil/commercial cases concern disputes between parties, e.g. disputes regarding contracts. Non-litigious civil/commercial cases concern uncontested proceedings, e.g. uncontested payment orders (ibid).*
[143] *See Article 47 CFREU and ibid.*

45. At national level, two systems stand out in terms of recent developments in the extent of labour disputes. The first is that of **France**. Empirical evidence suggests a significant decline of claims involving the conseils de prud'hommes in the recent years (see Figure 4). Despite peaks in 2009 and 2013, the trend in claims is down. The decline has been attributed, among others, to changes in substantive labour standards including the possibility for "contractual termination" by mutual agreement between the employer and the employee and dismissal compensation. However, an additional consideration seems to be the changes in the process for adjudication of labour disputes, which were introduced in 2015, and led arguably to the increase in the complexity of the process.[144] It is worth noting that the rate of acceptability of the decisions rendered by the industrial tribunals is low: two thirds (66.7%) of the decisions are subject to an appeal (against 21.6% for the Tribunal de grande instance and 14.5% for the commercial courts).[145]

Figure 4. New claims to conseils de prud'hommes (CPH)



Source: https://www.senat.fr/rap/r18-653/r18-653-syn.pdf

46. The case of the **UK** also points to the significant effect of regulatory changes in the adjudication of labour disputes. As evident from Figure 5, the number of claims almost doubled in August 2017 and has remained at similar levels since then. The sharp increase was the direct consequence of the Supreme Court's decision, issued on 26 July 2017.[146] In its decision, the Court ruled that the legislation, which had introduced in 2013 employment tribunal fees [147], was unlawful. When the case reached the Supreme Court, a report from the Ministry itself acknowledged that about 14,000 individuals did not file claims each year because of the costs, of which 8,000 were due to the fact that they could not afford to pay them. It is important to stress here that as claims had dropped by about 77% in previous years due to the introduction of tribunal fees, the recent increase simply restored the system to between half and two-thirds of the number of claims before the introduction of the fees.

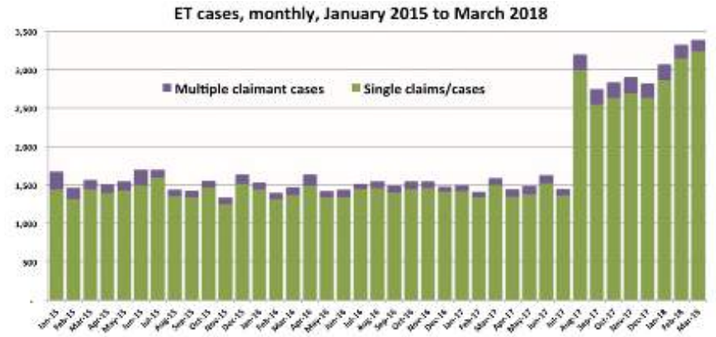
[144] *Bissue B., Les recours aux prud'hommes en chute libre depuis 2009, (2018) Le Monde, https://www.lemonde.fr/politique/article/2018/01/30/les-recours-aux-prud-hommes-en-chute-libre-depuis-2009_5249081_823448.html*

[145] *La justice prud'homale au milieu du gué, Rapport n° 653 (2018-2019) de Mmes Agnès Canayer, Nathalie Delattre, Corinne Féret et Pascale Gruny, https://www.senat.fr/rap/r18-653/r18-653-syn.pdf*

[146] *R (UNISON) v Lord Chancellor [2017] 3 WLR 409.*

[147] *Employment Tribunals and the Employment Appeal Tribunal (Fees) Order 2013.*

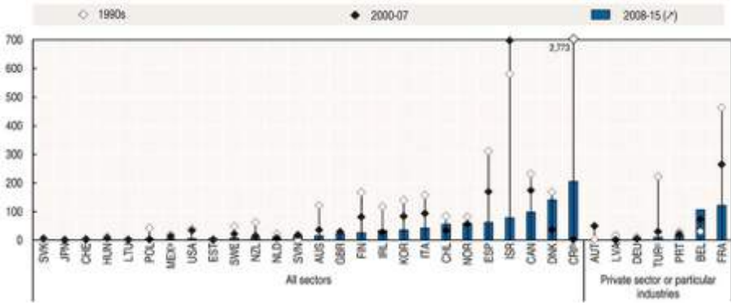
Figure 5. Employment Tribunal cases (2015-2018)



Source: Tribunal statistics.

47. In contrast to the case of individual labour disputes, where the issue of measurement proves challenging, the classic indicator in the case of **collective labour disputes** is the incidence of industrial action. The OECD Employment Outlook 2017 [148] shows the trends in industrial disputes (strikes and lock-outs) across OECD and accession countries.[149] As seen from Figure 6, industrial disputes as well as the degree of variation across countries have gone down considerably since the 1990s; a notable exception is Belgium where days lost because of strikes have steadily increased since the 1990s.

Figure 6: Industrial disputes 1990-2015



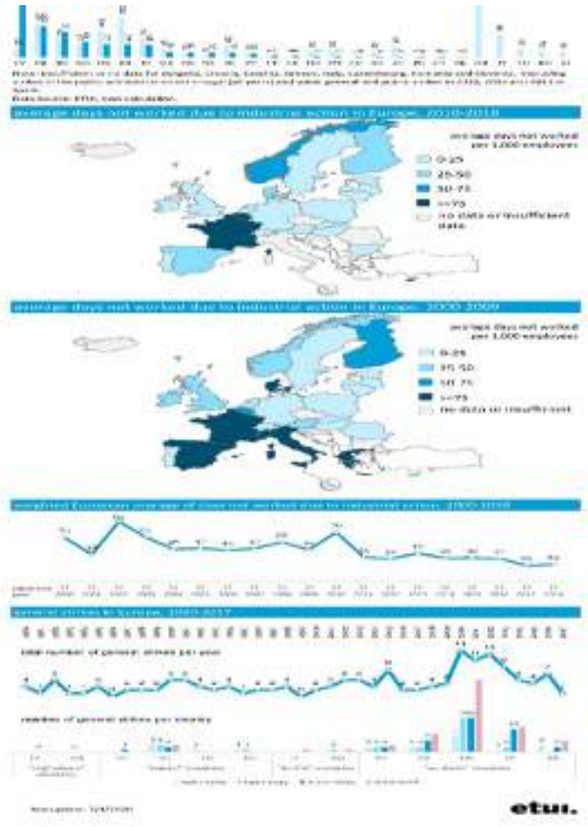
Source: OECD, Employment Outlook, 2017.

[148] *OECD, Employment Outlook (OECD, 2017), https://www.oecd-ilibrary.org/sites/empl_outlook-2017-8-en/index.html?itemId=/content/component/empl_outlook-2017-8-en*

[149] *Data should be interpreted however with caution as the number of strikes is likely to be affected by how they are regulated at national level and may thus not reflect the actual level of strife at the workplace. Furthermore, existing statistics are plagued by considerable differences in definitions and measurement which severely limit the comparability of the data.*

48. More updated information and a more detailed breakdown of the incidence of collective labour conflict is provided by the ETUI (see Figure 7). The data suggests sustained cross-national diversity across a number of dimensions, including in respect of the average days not worked due to industrial action. Significant differences are also observed in terms of the periods 2000-2009 and 2010-2018.[150]

Figure 7. Strikes map in Europe



Source: ETUI.

[150] *For an analysis, see Vandaele, K. Interpreting strike activity in Western Europe in the past 20 years: The labour repertoire under pressure, (2016) 22 Transfer, 277.*

[151] *See, among others, Hebdon, R. P., and Stern, R. N. Tradeoffs among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations (1998) 51 Industrial and Labor Relations Review, 204.*

[152] *See Saundry, R. and Dix, J. Conflict Resolution in the United Kingdom, in Roche, W. R., Teague, P. and Colvin A. J. S. (eds) The Oxford Handbook of Conflict Management in Organisations (OUP, 2014). Empirical evidence in the case of France suggests that the occurrence of collective disputes, including both strikes and non strike disputes, significantly and strongly reduce the likelihood of Employment Tribunal claims in French workplaces. In contrast, collective disputes are found to significantly increase the likelihood of disciplinary action in the form of written warnings. This may reflect the differences between the two countries in the way the employee "voice" is exercised (see Tanguy, J., Collective and Individual Conflicts in the Workplace: Evidence from France (2013) 52 Industrial Relations, 102).*

[153] *Ibid.*

49. An important issue here, raised in the literature and still under discussion, is that of the **substitutability between individual expressions of conflict and collective disputes, including strikes.** Empirical studies conducted on this issue have tended to show that legal or other restrictions on the strike have resulted in an increase in individual expressions of conflict, primarily in "covert" form such as absenteeism, indiscipline, or negligence, also called forms of "exit" or "temporary exit" in the recent literature.[151] At the same time, the decline in collective industrial disputes may not necessarily imply a rise in the number of individual employment rights claims. Survey evidence from the UK, for instance, suggests that there has been no significant increase in the level of individual-based conflict at the workplace.[152]

For Dix and Saundry, patterns of conflict, and the capacity to resolve these, are fundamentally influenced by the nature of the workplace and managerial relations, and here they point to a challenging development. In particular, they argue that a 'resolution gap' has emerged in many workplaces caused by the erosion of effective structures of employee representation on the one hand and the devolution of responsibility for conflict-handling from human resources practitioners to poorly trained operational line managers on the other hand.[153]

4. Comparative analysis – Individual labour dispute resolution

50. This section examines the availability of resolution mechanisms in the case of individual labour disputes. Informed by the thematic approach developed in Ebisui et al [154], this section will consider the following issues: non-state procedures; labour administration systems (including administrative agencies and labour inspectorates); and the interplay with judicial mechanisms and human rights/equality institutions. Where available, the analysis examines the extent to which such services/mechanisms deal with the following: proactive conflict prevention; promotion of voluntary compliance and settlement of disputes, especially in the context of Small and Medium Enterprises (SMEs); and access to justice for individuals in unclear or disguised employment.

51. The term 'individual labour disputes' may refer to a wide range of disputes that could arise in the context of employment. Before proceeding to examine the main mechanisms employed in the systems considered in the report, it is first important to outline how the term is defined in each system (see Table 3 for the definitions in the countries included in the report). It is important to underline here that generally workers in an employment relationship are able to access dispute resolution procedures and mechanisms to seek redress for violations of their rights. However, it is often more difficult to access protection when the labour is argued to take place outside of an employment relationship (e.g. in the case of workers in unclear or disguised employment) or concerns informal work.[155] Countries have responded to this in two main ways. The first and most prevalent response is for the courts to determine on a case-by-case basis whether or not an employment relationship exists in light of the legally established indicators or factors. All systems in the report operate on this basis and have responded differently to recent challenges, including, for instance, the employment status of gig workers.[156] The second, often used in combination, is engaging the competence of labour inspection authorities to gather information from workers and employers concerning the existence of the employment relationship, interact with other public agencies in relation to informal work or developing action plans to address undeclared work, fraudulent employment arrangements and false self-employment.[157]

[154] *See Ebisui et al., n 3 above.*

[155] *ILO: Non-standard employment around the world: Understanding challenges, shaping prospects (ILO, 2016) 12 and 13.*

[156] *For examples, see ibid.*

[157] *For a review, see ILO, Promoting employment and decent work in a changing landscape, International Labour Conference 109th Session, 2020 (ILO, 2020) paras 925-937.*

Table 3.
The definition of 'individual labour disputes'

Country	Subject matter
Australia[158]	These include grievances raised by an employee, and/or disputes between the parties, relating to: • the contract of employment (which is regulated by a combination of common law rules and various statutory minimum standards, rights and obligations); • issues arising under the terms of an applicable modern award or enterprise agreement; • disciplinary action against an employee; • termination of employment (unfair dismissal); • adverse treatment (e.g. reduced entitlements, discrimination, dismissal) on the basis of an employee's exercise of workplace rights or engagement in industrial activity (or non-participation in such activity); • discrimination on the basis of other protected attributes such as race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, social origin, etc.; • sexual harassment; • workplace bullying; • workplace health and safety; • enforcement of minimum employment conditions (under legislation, or an award or agreement).
Belgium[159]	Individual disputes that fall within the competence of the labour courts include the following: disputes relating to employment contracts, individual disputes regarding the application of collective bargaining agreements, disputes between employees during work time, civil disputes arising from infringements of criminal employment legislation (without prejudice to the competence of the criminal jurisdictions), disputes relating to transfers of undertakings, or to discrimination (including equality between women and men, racism and xenophobia) and psychosocial risks (e.g., violence or harassment), and disputes relating to medical examinations in the context of employment relationships.
France[160]	Any dispute regarding the legal classification, formation, implementation or termination of an employment contract.
Spain[161]	Every dispute taking place between an employer and a single employee working for that employer, or a group of workers with similar claims that can be individualized as a consequence of each one's employment contract. At the origin of the dispute there is a single employment contract, either still in force or terminated, that deals with the recognition of an individual right. Therefore, these types of disputes can affect an employee individually or as part of a group in which each member is affected individually.
Sweden[162]	The concept of individual labour disputes covers all disputes between employers and employees or previous employees. In certain cases, it also covers disputes between user undertakings and temporary agency workers, as well as disputes between employers and trainees or persons at various stages of a job-seeking process. The definition of labour disputes applies equally in private and public employment.
UK[163]	Individual labour disputes are referred to by a range of labels but are most commonly and formally referred to as "individual employment disputes" or "employee grievances". These signifiers can indicate, but are not restricted to, a range of formal causes of action in relation to actual or perceived breach of common law (including breach of the employment contract), failure to comply with statutory requirements or the applicable European Union (EU) law. The terms might also be used in relation to complaints arising from failures to comply with industry standards, public sector guidelines or other best practice requirements. Other substantive disagreements might also give rise to a grievance or individual employment dispute.

[158] *See Forsyth, A. Australia, in Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016).*
[159] *Simon, N. Belgium, The Labour and Employment Disputes Review – Edition 3, https://thelawreviews.co.uk/edition/the-labour-and-employment-disputes-review-%E2%80%93-edition-3/1215952/belgium.*
[160] *Daugareilh, I., Fiorentino, A., Merkhantar, J., Niquège, S., Poirier, M., Sautereau, N. and Tournaux, S. France, in Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016).*
[161] *Guamán Hernández, A. Spain, in Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016).*
[162] *Julén Votinius, J. Sweden, in Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016).*
[163] *Jones, B. and Prassl, J. United Kingdom, in Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016).*

4.1 Non-state procedures[164]

Non-state procedures

52. The section examines the role of non-state procedures in facilitating settlements of individual labour disputes. It has been suggested that such procedures can settle disputes early and informally, limiting the need for recourse to formal mechanisms and the associated costs, both private and public, for the actors involved.[165]
A distinction can be made here in terms of whether they are **bipartite** or **unilateral**. In the case of the former, this involves mechanisms jointly established with the participation of employers, unions and/or workers' representatives.[166] In the case of the latter, these are introduced by employers, with or without engaging collective voice mechanisms.[167]

53. A further distinction may be made in respect of the source for these mechanisms: these may derive from a **statutory mandate** or from **voluntary agreements**, collective or otherwise. In terms of their **coverage/level of operation,** these may operate at workplace or company level or outside the company level (e.g. at sectoral or local level), or both.[168]

54. Finally, in terms of their **subject matter**, these may include legal advisory services, bipartite procedures, 'one-stop' counselling services and workplace grievance procedures, among others.

55. Research suggests that it is the nature of the arrangements, i.e. whether they are **multi(bi)lateral** or **unilateral,** that helps explain to a considerable degree the greater legitimacy of certain mechanisms.[169]
Systems that are characterised by legal/institutional rules that empower various collective voice mechanisms, including primarily those organised by trade unions, may score high in terms of efficiency, equity and voice, as they offer a cheaper, faster and more informal route to settlement than litigation.

56. In **Belgium**, the importance of social dialogue in the industrial relations system is also reflected in the dispute resolution system. At workplace level, the trade union delegation (délégation syndicale/vakbondsafvaardiging)[170] has competence, among others, to monitor the employer's observance and application of labour regulations, collective agreements, and company work rules. In this respect, it has a crucial role to play in individual and collective labour conflict resolution and mediation between parties. With regard to individual labour disputes, the trade union delegation assists individuals in their disputes with the employer. If parties do not come to an agreement, the trade union delegation can bring the individual's case to the conciliation office. If that fails and the individual submits a lawsuit, they can be assisted by the union representatives in the court proceedings, if they are union members.

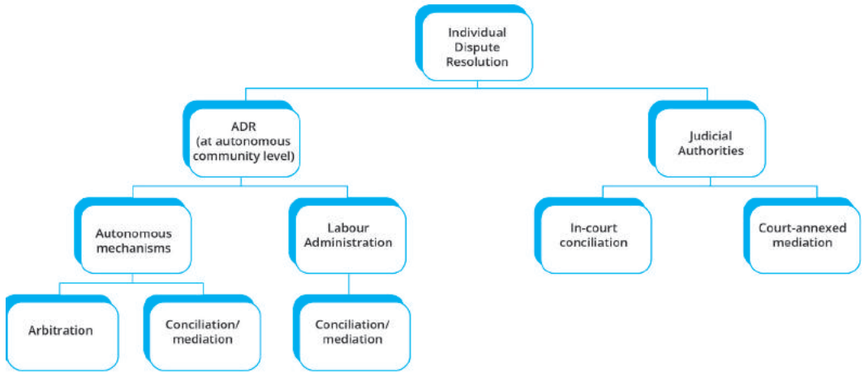
[164] *See table 3 for a comparison, including Greece.*
[165] *Ebisui et al. 5.*
[166] *Ibid, 5.*
[167] *Ibid, 5.*
[168] *Ibid, 6.*
[169] *Ibid 6.*
[170] *The delegation is exclusively composed of employees who have been designated by the union organizations represented within the company. The minimum number of workers employed in the company is defined by the sectoral collective agreement. The trade union delegation represents only unionised workers of the company and not the entire staff. The trade union delegation takes over some competencies of the works council if there is no works council (Art. 24 of Collective Bargaining Agreement No. 5).*

Non-state procedures

57. Similarly, in **France**, a company with 11 or more employees must have elected employee representatives. A company with 50 or more employees must also have union representatives, appointed by one or more representative unions. These representation mechanisms play a role in encouraging internal resolution of individual labour disputes. Both individual employees and employee representatives have the right to present employees' grievances directly to the employer. Employee representatives have the right to intervene in a range of areas during the grievance procedure. However, research suggests that in the absence of union representatives, the rights accorded to employee representatives are often poorly understood and implemented: the majority of individual disputes that come before the employment tribunals (ETs) are indeed referred from small companies lacking established union structures.[171]

58. The **Spanish** case represents an example where joint procedures are established through collective agreements; these can be inter-professional agreements at national level or at the autonomous community level between the most representative trade unions and employers' associations.[172] They generally deal with collective disputes [173] but may cover individual disputes (they do not concern though generally dismissals). Some joint mechanisms are integrated into the public administration of the autonomous communities or the labour relations councils, while others function as a substitute for administrative conciliation. These joint procedures have the potential to improve both efficiency and access to dispute resolution, given the delays associated with litigation. In autonomous communities where dismissals do fall within the purview of bipartite mechanisms, they play an important role, improving settlement rates even though the amounts of compensation obtained are smaller (Figure 8).

Figure 8. Channels for the resolution of individual labour disputes in Spain[174]



[171] *Daugareilh, n 156 above.*

[172] *The fifth agreement on autonomous labour dispute resolution (ASAC V) was approved on 7 February 2012.*

[173] *See section 5 below.*

[174] *Ibid, 206.*

Non-state procedures

59. In **Sweden**, when a labour dispute arises and if the worker(s) is a member of the union and covered by a collective agreement there are initially formal local negotiations between the most senior workplace manager and the local union representative.[175] The logic behind this is that disputes should be taken care of within the channels of dialogue and negotiations that exist and are regulated by Co-determination Act (Medbestämmandelagen, MBL) and parties' collective agreements.[176] MBL is compulsory, and provides the framework for how the individual disputes should be handled between parties. The trade unions have the first/exclusive right to negotiate on behalf of the worker both in MBL and the Discrimination Act. These negotiations may involve several meetings and most issues are settled locally, providing a significant filter.[177] If there is no resolution, however, the next stage is central negotiations between the trade union official and the employers' association official. These negotiations tend to be more formal, often with the parties' lawyers providing advice and most cases that reach this stage are settled, thus providing a further filter.[178] The privileged role of trade unions does not have uniform reach: while trade union density in Sweden is around 70 per cent overall, it is notably low in certain groups and sectors – young workers, fixed-term workers, those born outside the Nordic countries, and workers in the hospitality, retail, agriculture, forestry and fishing industries. Some unions are working to address the representational challenge; in the meantime unorganized workers are left to take their individual disputes to the ordinary district courts.[179]

60. **Unilateral mechanisms** exist in a number of companies operating in the countries examined in the report. Among others, in the **UK,** a recent survey of employers conducted by YouGov for the Chartered Institute of Personnel and Development[180] found that in-house mediation was used in 24 per cent of organisations.[181] As Latreille[182] has shown, the primary driving force behind the introduction of mediation is efficiency, being perceived as a cheaper and faster method of dispute resolution compared to conventional disciplinary and grievance procedures. Nonetheless, as mediation is not costless, Latreille and Saundry found that this was a significant barrier to its adoption, particularly in smaller organisations.[183] Another change in the UK concerns the increase of formal procedures for dealing with discipline and dismissals, with the large majority of organisations having now such a procedure in place.[184] This also represented a transition from the joint regulation of conflict towards unilateral managerial prerogative: according to data from WERS2011, disciplinary and grievance procedures were subject to negotiation in only 5% of workplaces, with five or more employees, and less than a quarter of workplaces in which unions were recognised.[185] In addition, the extent of equity and voice achieved by these mechanisms is sometimes disputed. Research in **France**, among others, suggests lack of employee confidence in their impartiality and a fear of potential repercussions for their own careers.[186]

[175] *Trade unions are granted formal powers by law to represent their members and those covered under collective agreements (90 per cent of employees) in the resolution of individual labour disputes, which must first be negotiated fully before the labour court.*

[176] *Lovén, K. Sweden: Individual disputes at the workplace – alternative disputes resolution (Eurofound, 2010).*

[177] *MBL 1976:580.*

[178] *Corby, S. Sweden, in Corby, S. and Burgess, P. Adjudicating Employment Rights (Palgrave, 2014).*

[179] *Julén Votinius, n 158 above.*

[180] *Chartered Institute of Personnel and Development, Getting Under the Skin of Workplace Conflict: Tracing the Experiences of Employees (Chartered Institute of Personnel and Development, 2015) 11.*

[181] *Ibid.*

[182] *Latreille, P. L. 'Workplace Mediation: A Thematic Review of the Acas/CIPD Evidence' (2011) Acas Research Papers, 13.*

[183] *Latreille, P. L. and R. Saundry, 'Mediation', in W. Roche, P. Teague and A. Colvin (eds), The Oxford Handbook on Conflict Management in Organizations (Oxford University Press, 2014), 190.*

[184] *Saundry, R. and Dix, G. Conflict Resolution in the United Kingdom, in W. Roche, P. Teague and A. Colvin (eds), The Oxford Handbook on Conflict Management in Organizations (Oxford University Press, 2014).*

[185] *Ibid, 482.*

[186] *Cited in Ebisui, n 3 above at 9.*

61. Some unilateral mechanisms may not necessarily be formal. For instance, in **Australia**, a range of **informal measures** exist in addition to formal dispute resolution procedures, including "open door" policies and "management by walking around," both of which encourage direct and often proactive communication of disputes to managers.[187] Another type of informal procedure, designed to manage discrimination and bullying complaints, is approaching a "contact officer". This person is usually a volunteer employee who has been trained to provide advice on the relevant human resources (HR) policy. Contact officers may serve as "sounding boards" for employees who want to be heard but who may not want to pursue their rights to a resolution . Contact officers also provide an alternative to the supervisor as a channel for complainants.[188]

62. A particular case here concerns the use of private arbitration through employment contracts. National laws tend to drastically limit the extent to which employment-related issues can be arbitrated.

63. In **Australia**, the Fair Work Commission (FWC) is tasked with providing accessible and effective procedures to resolve grievances and disputes of a specific nature (e.g. termination of employment, general protections of workplace rights, bullying). Apart from mediation and conciliation, the FWC can also arbitrate if the parties are not able to agree to a solution. While it is possible for disputes arising under awards and agreements to be resolved by recourse to private mediators and arbitrators (rather than FWC) [189], the strong reputation and efficient operation of public agencies/tribunals offering dispute resolution have meant, that Australia has not seen the development of a "private ADR [alternative dispute resolution] industry" for individual employment claims.[190]

64. In **Belgium**, disputes can be only referred to arbitration after they have arisen.[191] This limitation does not apply to disputes relating to employment contracts of employees, who are entrusted with the company's daily management and whose annual pay exceeds a substantial threshold, or who have significant management responsibilities.[192] Further, provisions in collective bargaining agreements that refer individual conflicts to arbitration are null and void. Finally, arbitration cannot be used for social security disputes.

[187] *McCabe, Douglas M., Lewin, David. Employee voice: A human resource management perspective. (1992) 34 California Management Review, 112.*

[188] *Rayner, C. and Lewis, D Managing workplace bullying: The role of policies. In Einarsen, S. Hoel, H., Zapf, D. and Cooper, C. L. (Eds.), Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice, CRC Press, 2011). pp. 327–40.*

[189] *FWA 2009, sec. 740.*

[190] *Forsyth, n 154 above at 41.*

[191] *Article 1676, §5, Judicial Code (JC) with Article 13 of the Belgian Employment Contracts Law of 3 July 1978.*

[192] *Article 69, Belgian Employment Contracts Law of 3 July 1978.*

65. Similar restrictions apply in **France**, where arbitration agreements are often found to be contrary to national public policy and, therefore, unenforceable.[193] As a result, parties bound by an employment contract are not entitled to call in an arbitrator if a dispute should arise between them, nor may they insert an arbitration clause into that contract. There are three exceptions where arbitration is possible: cases involving international employment contracts, journalists, and salaried lawyers.[194] In addition, workplace disputes may be arbitrated if the parties agree to resort to arbitration after the termination of the employment contract.

66. In **Spain**, the Spanish Arbitration Act excludes, under Article 1(4), arbitration related to labour matters. However, arbitration can be established in an inter-professional agreement and included in employment contracts; such clauses still require the explicit consent of the parties in a conflict.[195]

67. In **Sweden**, arbitration clauses are permitted in employment contracts; in practice, however, the occurrence of arbitration clauses is very limited (e.g. in the case of Chief Executive Officers (CEO).[196] There are also some collective agreements that contain arbitration clauses (e.g. in the banking sector and in respect of care assistants) as well as those regarding occupational insurance. Both in the banking sector and in care assistance, the parties have jointly established arbitration boards, where arbitration is free of charge for any employee who is a union member. Collectively agreed arbitration clauses are binding not only for the members of the trade union, who have signed the collective agreement, but normally also for the other employees at the workplace.[197] In most areas, arbitration is a permitted alternative to judicial proceedings in individual labour disputes: the only general exception is discrimination cases, where there is a prohibition on arbitration clauses that had been established prior to the dispute, and that deny the parties the possibility to appeal the arbitral award.[198] In other disputes, an arbitration clause is normally valid provided that it is not deemed unreasonable.[199]

68. Finally, in the **UK**, an arbitration clause would fall foul of the restrictions on contracting out of employment protection legislation, but parties can enter into a settlement agreement compliant with the statutory requirements once a dispute has arisen, whereby they agree that the employee's statutory claims be submitted to arbitration.[200] An employment arbitration scheme was created in 2001 specifically for work-related grievances.[201] However, research suggests that this custom-tailored procedural option handles fewer than ten cases per year.[202] Anecdotal evidence from employment lawyers indicates that the legal complexities have made such arbitration too risky.[203]

[193] *The Supreme Court (Cour de Cassation) has consistently taken the view that statutory employment rights concern public policy and thus lack arbitrability (see for example Cour de Cassation 30 novembre 2011, Arrêt no. 2512 (pourvoi 11-12.905 et 906). Further, article L. 1411-4 of the Labour Code stipulates that ETs have sole authority to hear disputes relating to matters of employment law, and that any convention to the contrary will be considered null.*

[194] *There is no arbitration in the French public sector.*

[195] *See n 157 above.*

[196] *See the analysis by Jenny Julén Votinius, n 158 above.*

[197] *Swedish Labour Court judgments, AD 1994 No. 28 and AD 2002 No. 137.*

[198] *Labour Disputes Act (1974:371), ch. 1, sec. 3.*

[199] *Swedish Labour Court judgments, AD 1991 no. 3, AD 1995 No. 135 and AD 2005 no. 79.*

[200] *Arbitration in the UK is governed by the Arbitration Act 1996.*

[201] *ACAS created a speedy, less-formal, yet binding means for parties to arbitrate a particular subset of labour disputes relating to unfair dismissals. See Sen, A. The Role of Acas in Dispute Resolution, IDS Pay Report, Aug. 2010, available at http://www.acas.org.Uk/media/pdf/8/p/The_role_of_Acas_in_dispute_resolution.pdf.*

[202] *Purcell, P. Eurofound, Individual Disputes at the Workplace: Alternative Disputes Resolution n. 9 (2010), available at http://www.eurofound.europa.eu/docs/eiro/tn09 10039s.pdf.*

[203] *Jagtenberg and de Roo, n 90 above.*

4.2 Labour administration systems[204]

Labour administration systems

69. Labour administration systems can play an important role in ensuring the effective organization and operation of individual labour dispute prevention and resolution systems.[205] In many countries, they are entrusted not only with operating mechanisms for prevention and resolution of disputes, but also with offering free-of-charge settlement services such as conciliation/mediation, as well as providing a range of preventive services through information, advice and education, which encourage voluntary settlement of disputes and voluntary compliance. In some countries, these also include adjudication.[206] The section here considers the role of administrative departments and agencies in promoting dispute resolution processes outside a formal court hearing. Acting as a third party, they may help the parties to settle the matter. These can range from facilitative, where the third party's role is to help the parties discuss the matter and resolve it themselves, through to determinative, where the third party's role is to evaluate the dispute and make a decision.

70. A recent comparative study on individual labour dispute resolution mechanisms found that in countries where collective voice mechanisms play a key role in the prevention and handling of disputes, extra-judicial administrative dispute resolution services are not offered. This is in contrast to the situation in systems where the extent and effectiveness of collective voice mechanisms has been reduced in the last decades, as in such cases labour administration and other resolution agencies play a major part in providing ADR.[207]

Dispute resolution through administrativeagencies

71. In **Spain**, pre-court administrative conciliation is mandatory for individual labour disputes in the private sector, with some exceptions for certain jurisdictions. The administrative claim shall include the main terms of the lawsuit that will be pursued in court and will result in a conciliation hearing, whereby both parties will be summoned to try to settle the case. Unjustifiable non-attendance on the part of either party incurs a fine.[208] If the conciliation ends without agreement having been reached, it will be deemed "concluded without settlement", and the way will be open for the parties to take the judicial route. In the course of the judicial process, they will not be able to use facts different from those presented during the conciliation proceedings. If an agreement is reached, this will be registered in the court records and will constitute an instrument for the purposes of initiating enforcement action.[209] In practice, conciliation does not take longer than 10–15 minutes; the process is used for the bureaucratic administrative registration of settlement agreements, or in order to provide access to unemployment benefits or recourse to the courts. The limited functioning of administrative conciliation in Spain has nevertheless provided an incentive for the social partners to promote bipartite voluntary settlement, which had long been limited owing to legal restrictions.[210]

[204] *See table 3 for a comparative table, including Greece.*

[205] *According to ILO Convention No. 150, a system of labour administration "covers all public administration bodies responsible for and/or engaged in labour administration – whether they are ministerial departments or public agencies, including parastatal and regional or local agencies or any other form of decentralised administration – and any institutional framework for the co-ordination of the activities of such bodies and for consultation with and participation by employers and workers and their organisations" (Art. 1(b)).*

[206] *See Ebisui et al., n 3 above.*

[207] *Ebisui et al., n 3 above at 11.*

[208] *LJS, art 80.1(c).*

[209] *LJS, art. 68.1.*

[210] *Julen Votinius, n 158 above.*

Labour administration systems

72. In the **UK**, the Advisory, Conciliation and Arbitration Service (ACAS) has a long-standing statutory duty to conciliate between employment tribunal claimants and respondents after a claim has been lodged (box 1 outlines the evolution of ACAS in the UK system of industrial relations). A scheme for 'early conciliation' was introduced by the 2013 Enterprise and Regulatory Reform Act. Under this, all prospective claimants will have to submit their details to ACAS and will be offered conciliation. Early conciliation was earmarked as a necessary tool in the pursuit of a reform agenda[211], as a pre-filing process that would avoid the 'far too costly, time-consuming, and complex[212] employment tribunal processes. ACAS provides free and telephone-based conciliation services: talks take place over the phone for up to one month. The period can be extended by 2 weeks if the parties are close to an agreement. Settlements reached through ACAS are legally binding and prevent future ET claims on the matter at hand.[213] Where this fails or is rejected by either party, the claimant will be able to submit an application to the employment tribunal. No tribunal claims will be accepted without the complaint first being referred to ACAS and a certificate issued.

Box 1. The increasing importance of ACAS in the UK system of labour dispute resolution

Established by the UK Government in 1976, ACAS (Advisory, Conciliation and Arbitration Service) is a state-funded public sector agency. It is independent of government and its impartial status is ensured by a governance arrangement that involves a tripartite council, comprising representatives of employers and employees, as well as independent experts. This independence and impartiality are viewed as allowing ACAS to address workplace matters in a manner that can support both sides of the workplace. It deals with collective disputes, including actual or threatened strike action, and also plays a significant role in responding to conflict of a more individual nature through its telephone hotline, mediation and conciliation services. Increasingly it also seeks to prevent conflict and promote best practice through a range of services. These include publications, a website offering guidance and toolkits, statutory Codes of Practice, a comprehensive training programme for managers and finally in-depth consultancy with organisations and employee representatives (Dix, Davey and Latreille, 2012).

[211] *Department for Business, Innovation and Skills Resolving Workplace Disputes: Government response to the Resolving Workplace Disputes consultation (2011). See also Department for Business, Innovation and Skills (2013) Consultation paper on implementation.*

[212] *Cable, V. Speech at Engineering Employers' Federation, 23 November 2011, at http://www.bis.gov.uk/news/speeches/vince-cable-reforming-employment-relations*

[213] *ACAS, Conciliation Explained, (ACAS, 2018) https://archive.acas.org.uk/media/3968/Conciliation-explained/pdf/Conciliation-Explained-Acas.pdf*

73. Empirical evidence suggests that the process does fulfil its 'gatekeeping' role, preventing direct access to the tribunal except in exceptional circumstances.[214] The ACAS 2018-19 annual report revealed there were around 132,000 notifications of early conciliation– equivalent to around 2,500 per week. The number of these relating to a tribunal claim increased to 39,000, up 40% since the Supreme Court's decision to abolish tribunal fees in July 2017.[215] 73% of notifications (92,000) handled by ACAS did not lead to a Tribunal claim being made (either because a formal or informal resolution was reached with the parties or because the claimant otherwise reconsidered their intention to proceed).[216]

74. Both legal theory and available data suggest pitfalls in terms of procedural and substantive justice. When it does not result in settlement, conciliation may lengthen the dispute resolution process in a way that imposes disproportionate burdens on workers. Whatever its outcomes, it also offers employers an opportunity to shape workers' expectations through the authoritative voice of conciliators, whose impartial position may be confused with that of a judge despite the fact that they have no mandate to interpret legal rights and standards. The ambiguity is compounded by ACAS' multiple roles, including a helpline on employment rights, which many employees contact prior to conciliation. High rates of satisfaction with ACAS services may thus conceal that conciliation can result in workers accepting unfair settlements in which their legal rights are compromised.[217]

75. ACAS also offers a mediation service to help resolve workplace conflict before it escalates. The ACAS Codes of Practice on mediation, produced in collaboration with representatives of employers and trade unions, define mediation as a process where "an impartial third party, the mediator, helps two or more people in dispute to attempt to reach an agreement. Any agreement comes from those in dispute, not from the mediator. The mediator is not there to judge, to say one person is right and the other wrong, or to tell those involved in the mediation what they should do. The mediator is in charge of the process of seeking to resolve the problem but not the outcome."[218] Mediation can be used in situations where work relationships have broken down, with adverse impacts on employee engagement, effectiveness and absence rates.[219] Data on the prevalence of mediation in British workplaces is scarce but suggests that uptake remains low.[220] Studies have found that mediation is seen as "being most suitable for dealing with issues where there may be little or no basis for an ET claim".[221] In this sense, it is far from evident that mediation can be cast as an 'alternative' to adjudication, particularly since workplaces where mediation is used also tend to have higher rates of ET applications.[222]

[214] *This scheme was accompanied by changes to the Employment Tribunal processes, rules and fee structures, with the latter raising particular concerns regarding access to the system. The Supreme Court ruled later that some of these changes, i.e. those related to fees, were unlawful (see analysis above in section 3.2).*

[215] *See above section 3 on dispute trends.*

[216] *ACAS, Annual Report 2018-2019, HC 2197 (ACAS, 2019).]*

[217] *For a review, see Dupont, P. L, Kirk, E. McDermont, M. and Anderson, B. (2018) Promoting Access to Injustice? Alternative Dispute Resolution and Employment Relations in the UK, Ethos project.*

[218] *TUC/ACAS (2010), Mediation: A guide for trade union representatives. Acas/CIPD (2013), Mediation: An approach to resolving workplace issues.*

[219] *Mediation is not advised in the following cases: where mediation is used as a first resort, or to bypass or undermine agreed dispute resolution procedures, or to avoid their managerial responsibilities; where a decision about right or wrong is needed; where the individual bringing a discrimination or harassment case wants it investigated; where the parties do not have the power to settle the issue; where one side is completely intransigent and using mediation will only raise unrealistic expectations of a positive outcome.*

[220] *For a review of the evidence, see Dupont et al. 211 above.*

[221] *Latreille, P. Mediation: A thematic review of the Acas/CIPD evidence, ACAS Research Paper 13/11, (ACAS, 2011), 15.*

[222] *Wood, S., Saundry, R. and Latreille, P. Analysis of the nature, extent and impact of grievance and disciplinary procedures and workplace mediation using WERS2011, Acas Research Paper 10/14 (ACAS, 2014).*

76. Finally, in addition to early conciliation and mediation, an additional service is the ACAS arbitration scheme. The service was launched in 2001 in England and Wales and was designed to serve as an alternative to employment tribunal hearings. The Scheme will only apply if parties have so agreed. Initially, it had a remit to deal with cases of unfair dismissal only; in April 2003, it was extended to handle cases concerning applications for flexible working. Unlike tribunals (see below), the hearing is chaired by one arbitrator, whose decision is binding. The hearing is not held in public and there is a very limited right of appeal. An arbitrator has the power to award the same remedies as a tribunal. Each party has to agree in writing to participate in the scheme. However, empirical evidence suggests that this procedure is rarely used and receives less than 10 applications a year. It may be indicative of a general view and experience that arbitration is too rigid a method of ADR, lacking the flexibility and exploration of alternatives that conciliation and mediation offer prior to the involvement of the courts.[223]

Relationship with labour enforcement/inspectorates

77. The functioning of individual labour dispute resolution systems is also directly affected by the operation of labour inspectorates and similar enforcement agencies that play a role in promoting compliance. In some countries, labour inspectors have a wide range of competences, including the adoption of proactive approaches, enabling them to target certain categories of vulnerable workers and/or sectors, workplaces or geographical areas where violations of labour protection legislation are prevalent, or where workers are often unaware of applicable protective laws and standards.[224] Different mechanisms may be in operation, including, for instance, the law specifically establishing the competence of labour inspectors to gather information from workers and employers concerning the existence of the employment relationship[225] and providing the right to all workers, irrespective of the nature of the arrangements, to resort to labour dispute resolution mechanisms provided through inspectorates.[226] As discussed in the work by Ebisui et al., in some countries, the adoption of approaches designed to encourage such voluntary compliance, including through conciliation/mediation, "may blur the demarcation between enforcement and dispute settlement.

[223] *Eurofound, Individual disputes at the workplace: Alternative disputes resolution, https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0910039s/tn0910039s.pdf*

[224] *Ebisui et al. n 3 above.*

[225] *For examples, see ILO, n 153 above.*

[226] *The example of the Greek SEPE, which provides the right to all workers, irrespective of the nature of the arrangements, to resort to labour dispute resolution mechanisms, is referred to in the ILO, n 153 above, 333.*

78. This is particularly the case where complex scenarios arise in which it is not easy to clearly determine violations, or the distinction between these and disputes." [227] In some countries, monetary and administrative complaints are distinguished from other types of complaints: in the case of former, mediation/conciliation are not formally offered.[228] In other systems (e.g. the UK), there are parallel systems of enforcement through administrative agencies and dispute resolution, involving in this case early conciliation.[229] Where enforcement and dispute resolution through conciliation/mediation is provided by a single agency (e.g. see below the cases of Australia and Spain), settlement options are built into the procedures of the labour inspectorates, as a major step before enforcement. Finally, in other systems (e.g. France), the involvement of inspectors in the context of enforcement seems to lead, in some cases, to the informal resolution of disputes.[230]

79. The most extensive involvement of the labour inspectorate is in the case of Australia [231]. The example of Australia illustrates how a comprehensive framework on dispute resolution mechanisms can be integrated into the system of labour enforcement. It is the Office of the Fair Work Ombudsman (FWO), established under Part 5-2 of the FW Act, that is, in ILO terms, Australia's labour inspectorate.[232] Its functions include: promoting cooperative and harmonious workplace relations , compliance with the FW Act and awards/agreements made under the legislation, including through provision of education, assistance and advice to employees/employers and their representative organizations; inquiring into and investigating acts or practices that are contrary to the FW Act or awards/agreements; bringing court or FWC proceedings to enforce the FW Act and awards/agreements.[233] Importantly, the FWO has broad jurisdiction extending to most parts of the FWA 2009. The FWO's operating model is based on a risk-based strategic education, advice and enforcement approach, which comprises both responsive and proactive interventions.[234]

[227] *Ebisui et al., n 3 above at 14.*

[228] *Ebisui et al., n 3 above at 14.*

[229] *For instance, in the context of the National Minimum Wage Regulations in the UK, if Her Majesty's Revenue and Customs (HMRC), which is responsible for enforcement, find out that the employer has not paid the correct wage rates, they will send them a notice for the arrears plus a fine for not paying the minimum wage. HMRC can take them to court on behalf of the worker if the employer still refuses to pay. Workers can also go directly to the employment tribunal themselves (in this case, the ACAS early conciliation scheme applies).*

[230] *See, for example, Bessiere, J. L'activité de l'inspection du travail dans un contexte de fortes évolutions (2011) 11 Droit Social, 1021. In such cases, empirical research is required to uncover how such informal dispute resolution mechanisms work and the extent to which they are effective. However, with the exception of examples such as the work by Bessiere, there is lack of such empirical evidence in the countries examined at present.*

[231] *See Annex 2 for a detailed analysis of the role of the FWO.*

[232] *It is important to note that the FWO only has responsibility in relation to the Fair Work Act. As such, its coverage is solely in respect of employers covered by the law, and does not include matters related to occupational health and safety. There remain States laws and systems for some employers and workers as well.*

[233] *FWA 2009, sec. 682.*

[234] *FWO, Assisted Dispute Resolution Services Annual Report 2017-2018, https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/02-fwo-performance-report/assisted-dispute-resolution-services*

80. The process in total, i.e. from registration and assessment to resolution, is expected to take 84 days (2 working days for the registration/assessment, 15 days for Assisted Voluntary Resolution (AVR), 25 days for mediation and 42 days for resolution. In 2018–19, the FWO finalised 96% of all disputes through the advice, education and assisted dispute resolution services.[235] Concerns have been raised that formality and an assessment of risks and benefits inform an employer's response to complaints: many employees, particularly at the early intervention or mediation stage, walk away with nothing or very little of what they are owed.[236] The case of Australia also points to the role of the labour inspectorate concerning workers in unclear employment relationships. The FWO can investigate disputes relating to the existence of an employment relationship or an alleged breach of false contracting provisions. In cases where the FWO believes that a worker has been misclassified, the Ombudsman may opt to mediate the dispute between the parties or to work cooperatively with the business.[237]

81. In the case of **France**, the main duties of labour inspectors are to monitor the application of labour law in all its aspects ; to advise and inform employers, employees and employee representatives on their rights and obligations ; and to facilitate amicable conciliation between the parties.[238] In this respect, it is advised that either the worker or the employer may contact the Labour Inspectorate in the case of a conflict; the worker cannot be penalized by their employer for having contacted the Labour Inspectorate.[239]

82. In **Spain**, the Labour and Social Security Inspectorate has a fundamental role as guarantor of compliance with labour regulations . Its duties include monitoring and control of these regulations while various functions have been added progressively, such as information and technical assistance to employers and workers, mediation, arbitration and conciliation.[240] These mechanisms are available in the general case of 'labour conflicts': even if traditionally the Inspectorate has intervened in collective conflicts, it cannot be ruled out that it may mediate individual conflicts if the parties agree to it. The articulation with those mechanisms established in collective agreements is not specified, apart from a reference that the work of the Inspectorate will be carried out "without prejudice" to these other channels.[241]

[235] *Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2018-2019, https://www.transparency.gov.au/annual-reports/fair-work-ombudsman-and-registered-organisations-commission-entity/reporting-year/2018-2019-10. In 2017-2018, the FWO finalised 96% of all disputes through our assisted dispute resolution services in an average of seven days. https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/02-fwo-performance-report/assisted-dispute-resolution-services. Cooperation between individual labour dispute settlement mechanisms and the labour inspectorate is also well established through consultation points, which are located not only in the main offices of the prefectural labour offices of the Ministry of Health, Labour and Welfare, but also at labour inspection offices. Depending on the jurisdiction, both refer requests and complaints to each other.*

[236] *Early intervention yielded, on average, $614 in recovered monies per dispute in 2017-18. 20,538 disputes (around 72% of total disputes and around 75% of disputes resolved without resort to compliance or enforcement powers) were dealt with in this manner. Mediation accounted for 5,125 disputes (around 18% of total disputes and around 19% of disputes resolved) and yielded around $1,268 per dispute. Small claims assistance involves the FWO assisting people to write a letter or demand, calculate their underpayment and prepare forms to commence a small claim proceeding (which carries with the waiver of any right to seek penalties2). Only 800 disputes were resolved in this way (less than 3% of total disputes), yielding around $1530 per dispute (ACTU, Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance: Response to Attorney General's Department Discussion Paper, ACTU Submission, 25 October 2019, ACTU D. No 45/2019, https://www.actu.org.au/media/1385754/d45-actu-submission-re-improving-protections-of-employees-wages-and-entitlements-strengthening-penalties-for-non-compliance-october-2019.pdf).*

[237] *The FWO may also opt to litigate suspected breaches of false contracting provisions in the courts to enforce workplace laws, impose penalties and deter employers from committing violations, see ILO n 153 above, para 963.*

[238] *Articles L. 1263-1 to L. 1263-7, L. 8112-1 and following, R. 8111-1 and following of the Labour Code.*

[239] *https://www.service-public.fr/particuliers/vosdroits/F107*

[240] *Article 1(2) of Law No. 23/2015, 21 July, Regulating Work and Social Security Inspection (Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social).*

[241] *Jesús R. Mercader Uguina, Relaciones Laborales y solucion extrajudicial de controversias, http://afduam.es/wp-content/uploads/pdf/11/Relacines%20laborales%20y%20solucion%20extrajudicial%20Jesus%20R%20Mercader.pdf*

Labour administration systems

83. In **Sweden**, the activities of the labour inspectorate lie outside the area of individual labour disputes. At workplace level, the social partners are closely involved in health and safety matters, both on safety committees and through the appointment of safety delegates. In the event of a disagreement about the application of statutory law on health and safety, the trade union may file a report to the labour inspectorate, but can never bring an action against the employer. The enforcement of the legal provisions on health and safety is the responsibility of the labour inspectorate alone, and all cases in this area are ruled upon by the administrative courts.[242]

84. Finally, the **UK** represents an example of a system, where recovery of unpaid wages is an enforceable matter through labour market inspection and enforcement in addition to the scope for an employment claim by the individual worker.[243] The mechanism under the legislation includes a power for enforcement officers to sue on behalf of workers in case of non-compliance.[244] However, concerns regarding the effectiveness of enforcement have been raised: a 2019 Low Pay Commission (LPC) report found that 23 % of all individuals were underpaid , signalling a two-percentage point rise in the share of workers entitled to the rate .[245]

[242] *Julen Votinius, n 158 above.*

[243] *National Minimum Wage Act 1998, secs 17ff.*

[244] *National Minimum Wage Act 1998, sec. 20.*

[245] *Low Pay Commission, Non-compliance and enforcement of the National Minimum Wage (Low Pay Commission, 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797675/Non-compliance_and_enforcement_of_the_National_Minimum_Wage_WEB.pdf*

Table 4.
Individual labour dispute resolution – comparative table (including Greece)

Country/ Subject	Australia	Belgium	France	Spain	Sweden	UK	Greece
Nature and extent of reliance on non-state mechanisms	Lack of significant bilateral mechanisms, existence of informal measures	Significant role of bilateral mechanisms (e.g. trade union delegation at workplace level) Extra-judicial dispute resolution services through social dialogue	Significant role of bilateral mechanisms at workplace level (through employee representative channels)	Considerable role of joint procedures through collective agreements (no dismissal)	Significant role of dialogue and negotiations in unionised workplaces	Emphasis on unilateral mechanisms and union representation where unions are recognised	No significant role of bilateral mechanisms in individual labour dispute resolution
Role of labour administration systems and labour inspectorates	Lack of extra-judicial administrative services (Fair Work Commission (FWC) part of the judicial system) Integration of dispute resolution processes in the system of labour inspection	Social conciliation integrated with social dialogue processes Competence of labour inspectorate across a wide range of labour disputes	Lack of extra-judicial administrative dispute resolution services Role of labour inspectors including facilitating amicable conciliation between the parties	Mandatory pre-court administrative conciliation in the private sector Function of labour inspectors includes CMA	Lack of extra-judicial administrative dispute resolution services Activities of the labour inspectorate lie outside the area of individual labour disputes	Compulsory early conciliation before claim to Employment Tribunal Mediation and arbitration services by ACAS Lack of labour inspectorate	Competence of labour inspectorates (SEPE) to provide conciliation

4.3 Relationship with other dispute resolution mechanisms[246]

Relationship with other dispute resolution mechanisms

85. This section examines the potential links between extra-judicial options and judicial mechanisms, as well as their interactions with alternative pathways, mainly non-discrimination/human rights agencies.[247]

Judicial or quasi-judicial mechanisms

86. In **Australia**, it is the FWC, a specialized tribunal that is charged with individual disputes, albeit largely restricted to dismissal protection. Other claims are submitted to the Federal Circuit Court or the Federal Court of Australia. While the FWC has an internal system of appeals, the parties may also seek legal review of FWC decisions in the federal courts. When adopting decisions, the Commission has to have regard to "equity, good conscience and the merits of the matter".[248]

87. In **Belgium**, the main institution for the resolution of labour disputes is the labour tribunal.[249] The labour court considers appeals against decisions of the labour tribunals. There are only a few rules that are specific to labour courts, namely the possibility for a trade union representative to represent the employee in court; the unlimited possibility of appeal (i.e. irrespective of the value of the claim); and the presence of a specific Public Prosecutor in certain matters. It is the Supreme Court that can annul appellate decisions.

[246] *See Table 5 for a comparative analysis, including Greece.*

[247] *For a detailed analysis on human rights agencies, see also the annex to the report.*

[248] *S 578(b) FWA 2009.*

[249] *In principle, the labour tribunal does not have jurisdiction over collective labour law conflicts. However, it can pass a ruling on disputes which have a collective nature and disputes over rights.*

88. Similarly, in **France**, the employment tribunals (Conseils de prud'hommes) have jurisdiction over individual labour disputes in the private sector. Appeals are heard in special labour chambers of the appeal courts, and further appeals go to the Court of Cassation.

89. The procedure is similar in **Spain**: the labour court has jurisdiction in the first instance, and appeals are heard before the labour chambers of the high courts of justice at autonomous community level.

90. **Sweden**'s system differs significantly from that of the other countries: the labour courts are given exclusive jurisdiction over all labour disputes in the unionized context, but non-unionized cases are handled first by the local district courts.[250] All appeals from the district courts go to the labour courts, which are the final instance in all cases.

91. Finally, in the **United Kingdom**, the ET has jurisdiction over unfair dismissal, discrimination, contractual breaches not exceeding £25,000, minimum wage claims, unlawful wage deductions, failure to provide proper documentation and disputes regarding payments arising out of insolvency. The civil courts hear claims involving breach of contract, including wrongful dismissal, tortious actions, and safety and health breaches. Civil courts also hear claims when the limitation period for the tribunal has expired.

Involvement of lay judges/members

92. Consistent with the voice element of the analytical framework used in the report to assess the effectiveness of dispute resolution,[251] third-party interventions in labour disputes are required to provide some degree of popular legitimacy and be ultimately accepted by all interested parties. This is usually provided through some form of joint employer and union/worker involvement, or participation of lay members in the judicial proceedings. Such composition rules also make court proceedings less legalistic and formal.[252]

93. In ***Australia***, the FWC is made up of labour relations, business and legal experts who are appointed by the government.[253]

94. In **Belgium**, the labour tribunal is presided over by a professional judge, assisted by two lay judges, one of whom is an employer representative and the other a union representative.[254] As with the labour tribunal, the sections of the labour court consist of a professional judge and two or four lay judges.

[250] *Swedish labour courts do not charge fees, although the district courts do. Further, in the unionized context, trade unions cover all the litigation costs: this acts as an incentive for them to seek settlement through grievance negotiations, and for claimants to join unions. For non-unionized workers, means-tested financial aid is available, but this can cover only part of the litigation costs (see Ebisui et al. n 3, 21).*

[251] *See analysis above.*

[252] *Ebisui et al. 21.*

[253] *FWA 2009, secs 626–627.*

[254] *There is also a labour prosecutor, who represents the public interest and intervenes specifically in social security matters or cases involving discrimination, harassment, or violence.*

95. Similarly in **France**, each employment tribunal is composed of employer and employees' representatives.[255] If the lay judges are equally divided, and the parties so request or is warranted by the nature of the dispute, a professional judge from the county court adopts the final decision.[256] Appeals are submitted to the labour chambers of the appeal courts, staffed by professional judges. The Law on growth, activity and equal economic opportunities of August 6, 2015 now provides for a union defender, who is responsible for assisting and representing employees, during a procedure before the Labour Court and the Court of Appeal.[257]

96. In **Spain**, the labour courts are composed of a single judge with a territorial competence spanning an entire Spanish province.

97. In **Sweden**, the Labour Court is a joint body in which the majority of members are representatives of the social partners. The Swedish Labour Court has a total of 25 members: eight professional judges, who serve as chairpersons (four) and vice-chairpersons (four); three neutral individuals with specialized knowledge of the labour market (these individuals, who normally have a background in Government or in another authority in the area of working life, do not have to be qualified judges); and 14 representatives of the social partners.[258]

98. Finally, in the **UK**, Employment Tribunals comprise a lawyer chairperson and one individual who used to be nominated by an employer association and another by the trade unions, but who now self-volunteer on the basis of having had 'employer-side' or 'employee-side' experience. While ETs themselves were created as a relatively informal and accessible 'alternative' to ordinary civil courts in labour law cases,[259] a series of reforms have made them increasingly similar to ordinary courts.[260] According to data from the Survey of Employment Tribunal Applications (SETA), employers are much more likely to be represented at tribunal hearings by a legal specialist compared to claimants; moreover, there is some evidence to suggest that where respondents are legally represented, claimants are less likely to be successful.[261] Dickens has highlighted the lack of awareness on the part of many workers (particularly the vulnerable and non-unionised) of their legal rights and how to enforce them, and difficulty in accessing legal advice or representation, resulting in ET cases not being initiated or pursued.[262]

[255] *C. trav., art. L. 1421-1.*

[256] *For details on the process, see https://www.designation-prudhommes.gouv.fr/PortailWebFO/Accueil.action;jsessionid=6D646113C94CF3AF7045E0DC3E02A113*

[257] *Law on growth, activity and equal economic opportunities of August 6, 2015; Article L.1453-4 of the Labour Code; Decree n ° 2016-975 dated 18 July 2016; Article 258 of law 2015-990 of August 6, 2015. The legislation provides access to facilities: e.g. in companies and establishments with at least 11 employees, the union defender, if an employee, benefits from 10 hours of leave of absence per month to perform the task whilst maintaining their remuneration for the hours of absence (the employer is reimbursed by the State).*

[258] *Labour Disputes Act (1974:371), ch. 3, secs 1–3.*

[259] *Dickens, L. The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past, (2014) 45 Industrial Relations Journal, 234 at 244.*

[260] *Corby, S. and Latreille, P. Employment Tribunals and the Civil Courts: Isomorphism exemplified', (2012) 41 Industrial Law Journal, 387.*

[261] *Saundry and Dix, n 148 above at 483.*

[262] *Dickens, L. 'Delivering Fairer Workplaces through Statutory Rights? Enforcing Employment Rights in Britain,' Paper Delivered at the 15th World Congress of the International Industrial Relations Association, Sydney, Australia, August 2009, 5.*

Promoting in-court settlement and empowering claimants

Relationship with other dispute resolution mechanisms

99. Conciliation and mediation are widely used to promote dispute resolution in individual labour disputes. Practices differ based on whether the process is mandatory or voluntary, free of charge or fee-charging, and who facilitates settlement.[263]

100. In the case of **Australia**, the FWC may offer free-of-charge telephone conciliation in the area of its competence (i.e. dismissal rights), conducted by specialist conciliators, that can be initiated voluntarily with the consent of the parties, for unfair dismissal claims, among others. A three-day cooling-off period applies after conciliation of unfair dismissal claims. This is applicable to unrepresented parties and can potentially reconcile the efficiency of speedy telephone conciliation with the fairness of settlement agreements by offering time to those who are unrepresented to seek advice before committing to a settlement agreement. Conciliation over the phone (rather than face-to-face meetings) was a controversial initiative, with practitioners representing both employers and employees initially arguing that the dynamics of face-to-face conciliation meetings (which are conducive to achieving a settlement) are lost over the telephone.[264] However, research evidence suggests that telephone conciliation has been generally prompt and effective, achieving a settlement in around four-fifths of unfair dismissal cases.[265]

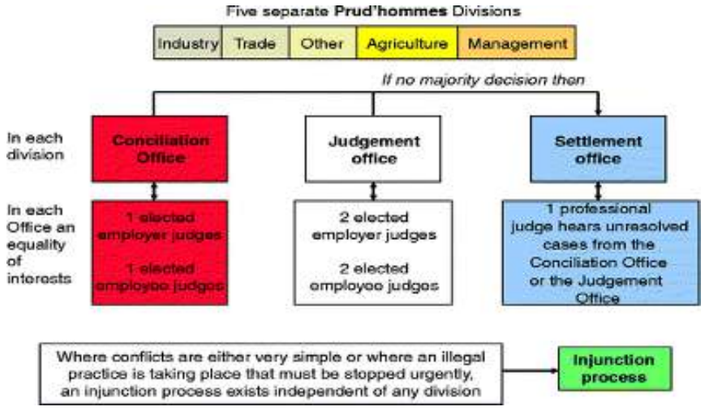
101. In **Belgium**, conciliation is organised by the court.[266] Either party can ask the court to start a conciliation procedure, whether before the court procedure has started or at any time during the court procedure or, at the latest, during the oral pleadings. The judge can also propose conciliation to the parties, rather than a trial, subject to the parties' agreement. Mediation can take place outside legal proceedings, but it can also be judicial (i.e. initiated by the court within the framework of existing legal proceedings, but only if the parties consent to this).[267] If the parties reach a settlement agreement, this will be binding on the parties but is not enforceable without obtaining ratification by the court. The documents and communications arising from the mediation are confidential and cannot be used in a judicial or similar procedure (i.e., administrative or arbitral). In the event of a violation of this duty of confidentiality, the judge can award damages.

[263] *Ebisui et al. n 3 above at 25.*
[264] *Cited in Forsyth, A. Workplace conflict resolution in Australia: the dominance of the public dispute resolution framework and the limited role of ADR, (2012) 23 The International Journal of Human Resource Management, 476.*
[265] *For a detailed discussion of the evidence, see Forsyth, n 154 above.*
[266] *Conciliation is free of charge.*
[267] *Articles 1724 to 1737 of the Judicial Code.*

Relationship with other dispute resolution mechanisms

102. In **France**, when workers file a case at one of the five occupational divisions of the ET, it goes initially to a conciliation department where two lay councillors having the authority of judges seek to achieve a mutual agreement (see Figure 9). The councillors fulfil the functions of conciliation and judgment: they alternate in holding the chair, and the chair takes no priority in conciliation. Conciliation is pursued on average for only ten minutes and its success rate is around 10 per cent.[268] If no agreement is reached, the case then goes to a judgment hearing consisting of four judges. The losing party in that judgment may then take the case to appeal where it is decided by a professional judge sitting alone. Despite criticism for its cost and the time involved by some employers, the first stage of conciliation by two lay judges representing the two different sides of industry is still seen as giving the aggrieved employee a real opportunity to voice their case using legal arguments before an impartial audience, and help enable a resolution.[269] However, conciliation succeeds only in one case out of ten on average.[270] In recent years, there have been growing numbers of cases in which both sides are represented by lawyers, and this situation both entrenches more firmly existing positions and is beginning to undermine the effectiveness of the *Prud'hommes conciliation* phase.[271] Reforms introduced in 2015 now enable more frequent recourse to a judge, who can deliver a casting vote when requested by the parties or when it is warranted by the complexity of the dispute.

Figure 9. Conciliation in individual conflicts in France[272]



[268] *See n 156 above.*

[269] *Grumbach, T., and Serverin, E. L'audience initiale: de sa phase de conciliation à sa phase juridictionnelle, (2009) 735 Droit Ouvrier, 735, 469.*

[270] *Ibid.*

[271] *Two other forms of conciliation can take place in relation to certain kinds of employment grievances: workers could use the Civil Code's conciliation or mediation procedures, or, if the issue concerns discrimination, the independent agency HALDE (High Authority for the Struggle Against Discrimination and for Equality) (see Contrepois, S. Changes in Conciliation, Arbitration and Mediation Services used in the Resolution of Labour Disputes in France (Working Lives Research Institute, 2010) 36).*

Relationship with other dispute resolution mechanisms

103. In addition to in-tribunal conciliation, non-judicial conciliation and mediation are also available. In terms of the former, there are very few studies on this form of dispute resolution.[273] In the case of mediation, the judge can propose mediation to the parties during the court hearing.[274] If both parties agree, the judge nominates a mediator, establishes the duration of the mediation, and sets a new date for the hearing. Mediation can be entrusted to an individual or to a team of mediators. An individual appointed as mediator must meet certain conditions as to his/her independence and moral standing.[275] In practice, those appointed tend to be former magistrates, lawyers or others who are familiar with the business world. The duration of mediation is limited to three months, with a possible extension for a further three-month period, upon the mediator's request.[276] The mediator is bound by an obligation of confidentiality, and declarations made to the mediator can neither be produced nor referred to later on in the procedure, or in any other context, without the consent of both parties.[277] After the mediation process, the mediator informs the judge in writing whether the parties have managed to find a solution to their dispute.[278] If the parties fail to reach an agreement, the judge will hear the arguments of both sides. If an agreement is reached, the parties must drop their claims and request that the judge validate the agreement,[279] so that it becomes legally enforceable. Empirical evidence suggests that mediation can provide an effective means to resolve an individual labour dispute to the satisfaction of all parties to a dispute.[280]

104. In **Spain**, in-court conciliation is pursued first by court secretaries, and if this fails, by judges.[281] If a conciliation agreement is reached before the court secretary, it will have the same legal force as a judicial conciliation. If the parties fail to reach an agreement through conciliation before the court secretary, they may do so through conciliation before the judge; in this case the agreement will need to be approved by the judge.[282] Another opportunity for conciliation is provided at the point where, having presented the evidence, the parties may receive suggestions and assistance from the judge.[283] In terms of mediation, a so-called "court-annexed mediation" has been introduced by which the writ of summons may allow the dispute to be handled according to mediation procedures established by collective agreements.

[272] *Clark , N. Contrepois, S. and Jefferys, S. Collective and individual alternative dispute resolution in France and Britain, (2012) 23 The International Journal of Human Resource Management, 550.*

[273] *This method is not state-regulated, and parties can contact non-state organisations. Where available, the data suggests that employees' perceptions about the use of mediation at company level are mixed, arising from a lack of trust in the impartiality of the mediator and a fear of potential repercussions for claimants' careers. Le Flanchec, A., et Rojot, J. La médiation dans les relations du travail, (2009) 2 Négociations, 155.*

[274] *Code de procédure civile (CPC), art. 131-6.*

[275] *CPC, art. 131-4, 131-5.*

[276] *CPC, art. 131-3.*

[277] *CPC, art. 131-14.*

[278] *CPC, art. 131-11.*

[279] *CPC, art. 131-12.*

[280] *See Chappe, N. and Doriat-Duban, M. La résolution des conflits individuels du travail. Conciliation versus médiation, (2003) 113 Revue d'économie politique, 549.*

[281] *There is no authoritative definition of either mediation or conciliation, either in the labour laws or in collective agreements.*

[282] *LJS, art. 84.3.*

[283] *LJS, art. 85.8.*

105. The judge may suggest it at any stage of proceedings, subject to both parties' acceptance. The judge does not perform any mediation function in person; the case is referred instead to a mediation professional.[284] Mediation can end with a total agreement, a partial agreement, or no agreement. If it ends with a total agreement, the parties may withdraw from the trial process, and either present the agreement before the court in order for it to be ratified and incorporated in written form, or have the terms of the agreement encompassed in a conciliation before the court secretary. If no agreement or only a partial agreement is reached, the parties will be summoned to trial. Mediation is now offered by several courts, including those in Bilbao, Barcelona, Burgos and Madrid.[285] Experience has been encouraging for users and is evaluated positively by judges, as it helps filtering the work of already overloaded judges while offering faster and more practical solutions to users. Parties can also choose to commit themselves to arbitration, by which they submit resolution of the conflict to a third party that will issue an award.[286] In contrast to conciliation and mediation, arbitration is not established in law as a means of avoiding a court process, and has only a voluntary character in individual disputes.[287]

106. In **Sweden**, judges attempt to conciliate disputes with the parties' consent during the pre-hearing stage in both labour courts and district courts.[288] The chair has a duty to explore the scope for a settlement at the pre-hearing: normally one side (e.g. the union's attorney accompanied by the union official and the worker(s) involved) has one room and the other side (e.g. the employers' association attorney and the chief executive of the company concerned) has the other room and the chair shuttles between the two rooms, seeking to conciliate.[289] If the discussions are not successful, the full hearing follows some six months after the pre-hearing. Some 400–425 claims per annum are made to the Labour Court and about half were settled before a full hearing in 2010–11, according to the then Chief Judge.[290] Conciliation can be replaced by mediation subject to the parties' agreement. In-court conciliation by judges is free of charge, but parties usually pay for mediators, who are appointed by the courts. According to the Government's 2012 report on an analysis of termination and dismissal cases between 2005 and 2010, only 10 per cent of the cases referred to the first-instance labour courts were settled through pre-hearing conciliation, and judgments were rendered in 90 per cent of cases. This suggests that only the cases that are difficult to resolve through grievance negotiation are coming to the labour courts. On the other hand, in the district courts about 70 per cent of the cases referred were settled amicably through judges' conciliation, and judgments were rendered in 30 per cent of cases .[291]

[284] *The judge will decide when examining the claim whether the case can be submitted to court-annexed mediation and will communicate this decision to the parties in writing. At this point the judge will also set a date for the trial in case the parties decide not to accept mediation.*

[285] *García, M.R. "Protocolo de mediación social", in Guía para la práctica de la mediación intrajudicial, (2013) Revista del Poder Judicial (Madrid, Consejo General del Poder Judicial), 121.*

[286] *LJS, art. 65.3.*

[287] *ET, art. 91.*

[288] *About 400-450 cases are reported to the Labour Court annually and the annual number of judgements passed is about 150 due to the high level of amicable settlements by arbitration at the court (see Loven, n 171 above).*

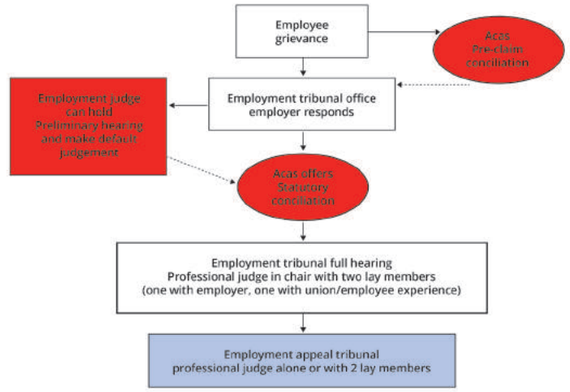
[289] *Corby, n 173 above, 179.*

[290] *Ibid at 179.*

[291] *Julen Votinius, n 158 above.*

107. In the **UK**, conciliation is still possible after employment tribunal proceedings have been commenced . In conjunction with the early conciliation scheme, ACAS officials continue to have a statutory duty to attempt conciliation once a formal claim has been notified to the Employment Tribunal (see Figure 10). This will take place if either both parties request it, or the conciliation officer thinks there is a reasonable prospect of success.[292] An ACAS conciliator usually attempts to do this initially by telephone. Where it is thought that a quick resolution of the issue is needed, a preliminary hearing may take place before a single judge. This preliminary hearing can provide an opportunity for conciliation and leads to a judgment .[293] If this is not accepted by both parties, or if the case is not withdrawn, the case is then referred to a full hearing. Of those that did proceed to tribunal, ACAS conciliation meant that 51% were settled and 18% were withdrawn by the claimant. Only 9,000 of all disputes ACAS dealt with over the period were decided by a tribunal. The work of ACAS has been described as a 'cost-effective filter' to reduce hearing days at tribunals and minimize the financial and non-financial costs to the parties.[294] However, empirical evidence has questioned the effectiveness of the scheme. Evidence from a survey of Employment Tribunal claimants suggests that one in four of those that settled privately remained dissatisfied (cf. with one in five of successful tribunal claims).[295] Further, a study on vulnerable employees engaged in the UK employment tribunal system found that they did not necessarily feel empowered by the ACAS conciliation process.[296] A mediated process premised on the notion of equality of bargaining and the neutrality of the conciliator can compound a complainant's lack of knowledge of employment rights.[297] As Dickens observes, "ACAS can act as a broker, but what some need is an advisor or advocate"[298]

Figure 10. Conciliation in individual conflicts in the UK [299]



[292] *Employment Tribunals Act 1996, s 18C.*

[293] *The ETs and ACAS are financed by the government, but the costs of any legal advice and representation taken by the complainant are at their charge – or that of the trade union which is supporting their case.*

[294] *Dickens, L. Employment Tribunals and Alternative dispute resolution in Dickens, L. (ed) Making Employment Rights Effective, (Hart Publishing, 2012), 36.*

[295] *40% commented they wanted a higher payment, but 20% wanted to receive an apology, and 19% wanted 'justice' and another 19% wanted reinstatement in their old job (Peters, M., Seeds, K., Harding, C., and Garnett, E., 'Findings from the Survey of Employment Tribunal Applications 2008,' Employment Relations Research Series, (BIS Department for Business Innovation & Skills, 2010) 87–88).*

[296] *See Busby, N. and McDermont, M. Workers, Marginalised voices, and the employment tribunal system: some preliminary findings, (2012) 16 Industrial Law Journal 169 at 179.*

[297] *Pollart, A. The unorganised worker; the decline in collectivism and the new hurdles to individual employment rights (2005) Industrial Law Journal 217 at 222.*

[298] *Dickens, L. The Role of conciliation in the employment tribunal system in N. Busby, M. McDermont, E. Rose & A. Sales (eds.) Access to justice in employment disputes: surveying the terrain (Institute of Employment Rights, 2013).*

Prevention in individual labour disputes

Relationship with other dispute resolution mechanisms

108. An important development in the context of dispute resolution has been the increasing emphasis on dispute prevention, especially by third parties. This reflects a wider shift towards the approach, evident particularly in labour administration agencies, that prevention is better than treatment,[300] that complaints represent an extremely small proportion of instances of employer non-compliance with the legislation and that complaint-driven enforcement puts the burden on the employee to ensure regulatory compliance.[301] An emphasis on dispute prevention is associated with finding voluntary solutions and settlements of disputes freely accepted by the worker and the employer. In this respect, the role of collective voice mechanisms may constitute an important mechanism for the promotion of dispute prevention.[302]

109. In **Australia**, the "Future Directions" engagement strategy implemented since 2012 has placed great emphasis on dispute prevention and the provision of information about how the FWC operates on its website. Further, a legislative amendment in 2013 clarified the FWC's role consists in "promoting cooperative and productive workplace relations and preventing disputes".[303] The FWO's dispute prevention focus now includes an Online Learning Centre, offering facilities such as programmes to assist employees and employers in holding difficult talks with each other; PayCheck Plus, an online tool for calculating award pay rates for employers and employees; and two telephone inquiry services, Small Business Helpline and Fair Work Infoline. In addition, the FWO produces best practice guides on a number of topics, including effective dispute resolution in the workplace.[304] The FWO has also combined traditional approaches to enforcement with a preventive compliance approach; this involves initiatives to provide information, education and advice to employees, employers, unions and other stakeholders with the aim of fostering voluntary compliance.[305]

110. **France** provides an example of a system that recognises the role of voice in preventing the emergence of individual labour disputes. This takes place through the recognition in French labour law of the "right to notify". Employee representatives[306] make use of this right in cases where there is deemed to be an unjustified infringement of employees' rights, physical or mental health, or individual freedoms within the company. If the employer is found to be at fault, or if there is a difference of opinion regarding the extent of the infringement, the matter may be referred to the adjudication panel of the ET, either by the employee concerned or by the employee's elected representative if the employee, notified in writing, does not object. The adjudication panel then issues an interim (emergency) ruling. The efficacy of these labour conflict prevention mechanisms derives from the motivation of those involved, the existence and quality of union representation, and the presence of a legal framework which provides for the training of all parties and enables intervention early enough to prevent conflicts from deteriorating.[307]

[299] *Clark et al, n 261 above.*
[300] *Brown, W. Third Party Intervention Reconsidered, (2004) 46 Journal of Industrial Relations, 448.*
[301] *Bernstein, S. Canada, in Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016), 79.*
[302] *See section 6 as well.*
[303] *FWA 2009, sec. 576(2)(aa).*
[304] *Forsyth, n 154 above, 39.*
[305] *Ibid.*
[306] *C. trav., art. L. 2313-2.*
[307] *See n 156 above.*

Relationship with other dispute resolution mechanisms

111. Against the context of reduced voice in other systems, alternative mechanisms have been introduced to help dispute prevention. The case of ACAS in the UK is instructive in this respect. ACAS is completing yearly a number of advisory projects with individual companies on subjects such as managing change, employee involvement, partnership, and bargaining arrangements. These may run over thousands of training events reaching a large number of particularly smaller employers. They disseminate, through booklets and their website, hundreds of thousands of copies of best-practice guides. In addition, one aspect of all this ACAS advisory activity of particular interest concerns the encouragement of so-called 'partnership' arrangements. ACAS conciliators have been playing a crucial facilitative role, combining their conciliation and advisory techniques, to enable managers and union representatives to establish and develop such arrangements.[308]

112. Finally, of importance here is the **information, advice and consultation services provided through administrative departments and agencies**. Dispute resolution agencies and/or labour inspectorates alike are both increasingly placing an emphasis on information, consultation, and advice in their services. The goal is to encourage voluntary compliance and voluntary settlement of disputes.[309] However, it is important to bear in mind the potential limits of 'self-help kits' that may be available in order to promote dispute prevention, e.g. in terms of awareness of rights and processes by employees and employers alike.[310]

[308] *This includes the case of the public sector (e.g. prisons, hospitals, fire, postal and even civil services, see Brown, n 289 above 445).*
[309] *Ebisui et al. n 3 above at 17.*
[310] *Bernstein, n 290 above at 95.*

Table 5.
Individual labour disputes – Comparative analysis (including Greece)

Country/ Subject	Australia	Belgium	France	Spain	Sweden	UK	Greece
Relationship with judicial mechanisms	Co-existence of the Fair Work Commission (FWC, composed by IR experts) and ordinary courts	Specialised labour courts (participation of lay judges)	Specialised labour courts (conseils de *prud'hommes*) (participation of lay judges)	Specialised labour courts (composed of a single judge)	Distinction on the basis of union membership or not (in Labour Court, majority of members are representatives of the social partners)	Existence of employment tribunals (two lay judges plus a judge) alongside country courts	Ordinary civil courts (procedural law applicable specific to labour disputes)
Promotion of in-court settlement	Free-of-charge telephone conciliation by the FWC (mostly focusing on dismissal rights)	Conciliation at the request of any of the parties or upon proposal by the judge Scope for mediation with parties' consent	In-tribunal conciliation service offered by two lay councillors Scope for mediation with parties' consent In-court conciliation pursued first by court secretaries; if it fails then by judges Provision of court-annexed mediation (performed by an out-of-court mediator)	In-court conciliation pursued first by court secretaries; if it fails then by judges Provision of court-annexed mediation (performed by an out-of-court mediator)	Judges conciliate with the parties' consent during the pre-hearing stage Conciliation can be replaced by mediation if parties agree	In-court mediation with both parties' consent	Provision of mediation conditional on parties' consent

Interplay with anti-discrimination and human rights bodies [311]

113. Human rights and discrimination bodies may handle individual labour disputes as part of their broader mandate. Services offered may be varied, ranging from monitoring the implementation of anti-discrimination legislation, conducting investigations, issuing recommendations/opinions awareness raising and training activities, advisory assistance, mediation, monitoring and inspection measures, and offering representation in court. In the EU Member States, these forums have typically been established through incorporation of the relevant EU instruments into domestic legislation.

[311] *See annex 3 for a detailed analysis of the mechanisms developed in the legal systems examined in the report.*

5. Comparative analysis – Collective labour dispute resolution

114. Collective labour disputes involve groups of workers – usually represented by a trade union. Irrespective of the nature of the industrial relations system, the 'public interest' in collective labour conflict resolution can be defined as an intention to reduce those manifestations of conflict over the employment contract, which become visible or have an external impact beyond the workplace.

115. Collective disputes have been traditionally divided into two sub-categories: **rights' disputes** and **interests' disputes.** A rights' dispute arises where there is disagreement over the implementation or interpretation of statutory rights, or the rights set out in an existing collective agreement. By contrast, an interest dispute concerns cases where there is disagreement over the determination of rights and obligations, or the modification of those already in existence. Interest disputes typically arise in the context of collective bargaining where a collective agreement does not exist or is being renegotiated. The kind of dispute often is important for determining the method for resolving it. In the case of a rights' dispute, where there is a valid collective agreement in force, this same agreement might include provisions setting out the mechanism the parties must implement in the event of a dispute. Depending on the national system, there may be legal provisions requiring certain collective disputes to proceed in a specified manner to arrive at a resolution.[312]

116. This section provides a comparative overview of the existing regulatory frameworks for dispute resolution covering collective disputes. The analysis will also consider the complementarity of these mechanisms with judicial processes, including labour courts and specialised tribunal procedures, on the one hand, and other procedures - established by law, or bipartite/tripartite coordination. Where possible, the extent to which such services/mechanisms in existence deal with proactive conflict prevention will also be examined.

117. It is useful here to consider how the term is differentiated from that of individual labour disputes and how it is defined, if at all, in the systems examined in the report. In relation to the **distinction between individual disputes** and collective disputes, this is not generally clear but is instead characterised by fluidity and uncertainty.[313] The function of a legal notion is not so much to provide a closed description of the disputes but rather to "identify the procedure" to which such disputes may be submitted.[314] Legislation and practice follow two approaches.

118. The first trend, in the minority, defines collective disputes as those, which deal with a collective interest affecting a generic group of workers or employers. In **Spain**, for example, Art. 151(1) of the Procedural Labour Law [315] supplies a conceptual definition of a collective legal dispute as one that "affects the general interests of a generic group of workers and that deals with the enforcement or the interpretation of a statutory regulation, collective bargaining agreement or a corporate decision or practice".

119. In the second case, probably the majority of systems (including, for instance, B**elgium** and **France**), a collective dispute is not defined as such on the basis of the collective nature of the interests at stake but is rather based on how the parties involved choose to deal with it.

[312] *For instance, a collective interest dispute involving an essential public service may be subject to compulsory arbitration.*

[313] *Grandi, M., La composizione stragiudiziale delle controversie collettive nell´esperieza italiana, Bologna 2002, pg. 9, quoted in Valdés Dal-Ré, n 113 above.*

[314] *Valdés Dal-Ré, n 113 above.*

[315] *Ley de Procedimiento Laboral states "Se tramitarán a través del presente proceso las demandas que afecten a intereses generales de un grupo genérico de trabajadores y que versen sobre la aplicación e interpretación de una norma estatal, convenio colectivo, cualquiera que sea su eficacia, o de una decisión o práctica de empresa".*

The role of social dialogue in collective labour disputes resolution systems

5.1 The role of social dialogue in collective labour disputes resolution systems [316]

120. Similar to the case of individual labour disputes, the mechanisms for the resolution of collective labour disputes may be established via collective agreements or other initiatives of the social partners. In a number of countries, social partners conclude collective agreements precluding government intervention by using private consultants to settle a dispute. There is wide variation in the use of inter-sectoral, sectoral, and company agreements, reflecting the prevalence of each in collective bargaining.

121. In **Australia**, the role of social dialogue in dispute resolution is intrinsically linked to the statutory framework for collective agreements. Under the FWA, the FWC must approve all enterprise agreements before they can become legally enforceable. A number of provisions are mandatory for all agreements including those related to dispute resolution.[317] The mandatory dispute resolution clauses in enterprise agreements can specify either the FWC or an ADR provider to assist the parties with the settlement of disputes.[318] With the FWC providing free dispute resolution, uptake of ADR has been though very limited.[319]

122. In **Belgium**, under the system of joint committees of equal representation, the committees are given the two-fold task of negotiation of collective agreements and conciliation of collective disputes. Conciliators from the Federal Public Service Employment, Labour and Social Dialogue Department, tend to chair the joint committees, while other officials from the Department are in charge of the secretariat for the committees.[320] Usually the joint committees set up a conciliation board for the purpose of dispute resolution.[321] In most sectors, labour and management have jointly developed such boards. Participation in the conciliation procedure is not compulsory. However, as a preventative measure to ensure social peace, a number of joint committees have stipulated that parties are expected to refer to conciliation before resorting to industrial action (e.g. strike or lock-out). The high ownership of the process by the social partners results in most cases into a satisfactory outcome for the conflicting parties or an alleviation of the conflict by providing a stepping-stone for further negotiations between the parties.[322]

123. **Spain** is also quite a paradigmatic case in respect of the role of social dialogue in collective dispute resolution. A range of inter-professional agreements – signed by the most representative trade union organisations and employers' associations at state level – have established both the procedures (in terms of their objective, subjective and territorial scopes) and the appropriate institution with the mandate to organise them. In a similar way to Belgium, these are not systems legitimated by a law or a government decision, but by an agreement between the parties in conflict. The first agreement (since renewed), the Acuerdo sobre Solución Extrajudicial de Conflictos Laborales, ASEC (Agreement on the extra-judicial resolution of labour conflicts), was concluded in 1996.[323] The agreement established a national body, the Servicio Interconfederal de Mediación y Arbitraje (SIMA), to enable intervention in the case of disputes covering more than one region.[324] At regional level, similar agreements have since been negotiated. Industrial relations actors, e.g. union federations, employers' associations and companies, sign up voluntarily to the agreements.[325]
Recourse to collective autonomy for the purpose of dispute resolution has been in some ways functional: the purpose of promoting alternative conflict resolution mechanisms was to alleviate the dysfunctionalities of the judicial system and promote collective bargaining as a mechanism for regulation.[326]

124. In **Sweden**, the resolution procedures for collective disputes are also created, organised and administered on the basis and by means of contractual instruments that are agreed upon collectively. As those procedures resolve in practice most of the collective industrial disputes, they have traditionally allowed little room for institutional or administrative conciliation or mediation bodies to act.[327]
The Agreement on Industrial Development and Wage Formation of March 1997 (usually known as the Industrial Agreement, IA)[328] established independent chairs, whose task is to monitor the first two months of bargaining and then mediate directly during the last month. Under the agreement, an independent chair is not neutral but has a clear mandate to ensure sound wage developments in manufacturing.[329] Similar agreements subsequently surfaced in other industries and in 2000, this model provided the basis for the establishment of a new National Mediation Office (NMO) – Medlingsinstitutet.[330]

[316] *See Table 6 for a comparative overview (including Greece).*

[317] *Approval is subject, among others, to an agreement leaving employees 'better off overall' ('BOOT') than the relevant 'modern award' (Behrens, M. Colvin, A. J. S., Dorigatti, L. and Pekarek, A. H. Systems for Conflict Resolution in Comparative Perspective (2020) 73 ILR Review, 312 at 334).*

[318] *Forsyth, n 253 above.*

[319] *Ibid.*

[320] *Rombouts, J. Settlement of collective labour conflicts in Belgium, in Brenninkmeijer, A.F.M, Jagtenberg, R.W. de Roo, A.J. and Sprengers L.C.J., Effective Resolution of Collective Labour Disputes (Europe Law Publishing, 2006) at 62.*

[321] *The legal basis for the functioning of Belgium's social conciliation system is the Act of 5 December 1968 on collective labour agreements and joint commissions, which defines collective labour agreements (Article 5), criteria for the representativeness of employers' and workers' organisations (Articles 3 and 42), the tasks of joint commissions (Article 38) and the hierarchy of sources of law and obligations between employers and workers (Article 51).*

[322] *Rombouts, n 308 above.*

[323] *Follow-up agreements have since been concluded. The one that is currently applicable is the 5th agreement on Independent Labour Dispute Resolution (ASAC-V), which was concluded on the 7th of February 2012. For a copy of the agreement, see http://fsima.es/wp-content/uploads/asac-v-version-web-ingles.pdf*

[324] *The inter-professional agreement provides guidance rather than binding rules for negotiation of sectoral and firm-level agreements, and allows for different mediation systems to exist throughout the country.*

[325] *In some cases, they have been interpreted as having an erga omnes effect on the basis of Article 83(3) of the Workers' Statute.*

[326] *See, among others, Cialti, P. H. Los mecanismos autónomos de resolución extrajudicial de conflictos colectivos laborales: el caso español y apuntes sobre la legislación colombiana (2016) 45 Revista de Derecho, 169.*

[327] *Valdés Dal-Ré, n 113 above.*

[328] *For a review, see Elvander, N. The New Swedish Regime for Collective Bargaining and Conflict Resolution, (2002) 8 European Journal of Industrial Relations, 197).*

[329] *See Ibsen, n 122 above.*

[330] *See analysis below.*

The role of social dialogue in collective labour disputes resolution systems

125. The **UK** dispute resolution system can be characterized as a voluntarist approach to collective conciliation and mediation. UK employment law does not impose conciliation or mediation on disputing parties and a trade union can call for strike action, if its members support it, without going through conciliation or mediation first. Against this context, negotiated (internal) resolution procedures for collective disputes have historically been central to the industrial relations system and conflict has tended to resolve via direct negotiation with unions.[331] Nevertheless, the latest WERS (Workplace Employment Relations Study) data highlights that the proportion of workplaces with internal collective dispute procedures fell from 40% in 2004 to 35% in 2011 and only two-thirds (66%) of workplaces with a collective dispute procedure actually used it - this is attributed primarily to declining unionization levels.[332]

[331] *Potočnik, K., Chaudhry, S. and Bernal-Valencia, M. Mediation and Conciliation in Collective Labor Conflicts in the United Kingdom, in Euwema, M. C., Medina, F. J., Belén García, A. and Romero Pender, E. Mediation in Collective Labor Conflicts (Springer, 2019) 214.*

[332] *VanWanrooy, B., Bewley, H., Bryson, A., Forth, J., Freeth, S., Stokes, L., et al. Employment relations in the shadow of recession: Findings from the 2011 workplace employment relations survey (Palgrave Macmillan, 2013).*

5.2 Collective labour dispute resolution institutions [333]

Collective labour dispute resolution institutions

126. The nature of the institutions tasked with collective labour dispute resolution provided in the countries concerned points to a range of possible combinations. Permanent agencies can be found in most countries (with the exception of France), but differences exist in the way these facilities are organised and funded, the way they are staffed, their coverage of the industrial relations landscape and the extent to which they are actually used. What is common across a number of countries is that conciliation, mediation and arbitration institutions often tend to be managed jointly and with equal participation by workers' and employers' representatives or, at the very least, those representatives play a major role in their management bodies. Similar to the case of individual labour dispute resolution mechanisms, this may satisfy the requirement for voice in dispute resolution systems. In addition, equal and joint management or the institutional participation of trade union organisations and employers' associations also helps, even indirectly, to strengthen the collective bargaining process.[334]

127. In some countries (e.g. **Belgium**), dispute resolution mechanisms have been integrated into the state administrative machinery. In other cases, they have been accommodated in separate entities (e.g. ACAS in the **UK** and the NMO in **Sweden**), but the state supplies them with the corresponding organisational, economic, technical and human resources required. This may also happen in those other systems, where despite having been created independently and privately (under inter-professional agreements, for instance, in the case of **Spain**) the institution is still subsidised through public funds.[335]

128. In **Australia**, it is the FWC that constitutes the main institution for the resolution of collective labour disputes. The main types of disputes that can be referred to the FWC are disputes under the terms of an award or a collective or enterprise agreement; bargaining disputes ; and disputes arising under the general protection provisions of the FWA 2009. Sections 739 and 740 FWA 2009 deal with the powers that can be exercised by the FWC (or other independent person, if appointed) under a dispute settlement procedure. These sections make clear that the FWC (or other person) can only exercise those powers provided for by the procedure. Moreover, the FWC cannot make a decision that is inconsistent with either the FWA or the enterprise agreement. Expert panel members must have knowledge of or experience in one or more fields specific to their panel (i.e. for annual wage reviews: workplace relations, economics, social policy, or business, industry, or commerce).[336]

[333] *See Table 6 for a comparative overview (including Greece).*

[334] *This was, for instance, one of the primary reasons behind the promotion of autonomous solutions on dispute resolution in Spain.*

[335] *Valdés Dal-Ré, n 113 above.*

[336] *Current Commission Members come from a diverse range of employment backgrounds including the legal profession unions and employer associations, human resources and management, and the public service (https://www.fwc.gov.au/about-us/members-case-allocations).*

Collective labour dispute resolution institutions

129. In **Belgium**, the Federal Public Service Employment, Labour and Social Dialogue Department offers conciliation and mediation services to the private and the public sectors. The Department, through a team of social conciliators and administrators, facilitates the conciliation process and provides administrative support. This takes place primarily through the appointment of conciliators as chairpersons of the joint committees and conciliation boards that are set up in different economic sectors.[337] These government officials are chosen for their specific knowledge of social and economic matters and perform their duties in their capacity as experts in social and economic affairs. Social conciliators are paid by the public authorities and are considered civil servants.[338] In practical terms, the conciliators chair nearly all joint commissions, and this accounts for their main activity, in terms of both quantity and quality. Social conciliators also have monitoring tasks,[339] but in practice, they leave these tasks to the inspectorate. The aim behind this was not to transform social conciliators into enforcement agents, but rather, in the event of serious disputes, to give them access to premises which would otherwise be inaccessible on the basis of their monitoring powers.[340] A specific case of intervention on the part of the Labour Inspectorate exists in respect of conflicts concerning the establishment or modification of workplace rules.[341] If no agreement is reached between the employer and the works council, the president of the works council can refer the matter to the labour inspectorate for conciliation. If conciliation fails, the matter is referred to the joint committee in the sector, which can also attempt to conciliate.[342]

130. In **France**, there is no national coordinating office to specifically provide or organize dispute resolution. In broad terms, collective dispute resolution can be organized by the state (via the national and local labour administrations, often labour inspectors)[343] or by the industrial relations actors themselves. The intervention of labour inspectors in the process of collective labour dispute resolution is seen in the context of ensuring the effective application of law[344] and is considered important, especially in periods of crisis where social issues intersect with concerns of security and public order.[345] A code of ethics of the public labour inspection service was introduced in 2017 and sets the rules that must be observed by inspectors, as well as their rights in respect of the prerogatives and guarantees granted to them for the exercise of their duties, defined in particular by ILO Convention No. 81 and by ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129) as well as the provisions of the Labour Code relating to labour inspection.[346]

131. In **Spain**, the main institution responsible for collective labour dispute resolution is SIMA. SIMA is an organisation composed of the most representative employers' and trade union organizations of the country.[347] It is financed by the state and protected by the Ministry of Employment and Social Security.[348] SIMA is strictly subject to the contents established by the inter-professional agreements and is normally only involved in mediation and arbitration.[349] In addition to SIMA, separate dispute resolution systems are organized at the autonomous community level (17 different systems in total).[350]

[337] *See Royal Decree of 23 July 1969.*

[338] *In accordance with the Royal Decree of 23 July 1969 setting up a Collective Labour Relations Service and establishing regulations covering its staff, social conciliators are subject to the general regulations covering State employees (Royal Decree of 2 August 1937 and all subsequent amendments). This means they are subject to disciplinary proceedings like all other civil servants and to normal channels of authority outside the scope of their tasks as conciliators/chairmen. Assistant social conciliators have recently been made subject to an assessment system in the same way as civil servants of the same rank, and senior social conciliators and social conciliators will also be placed under a similar system applicable throughout the public service in the near future.*

[339] *The legal basis is Articles 52 and 53 of the Act of 5 December 1968 as implemented by the Royal Decree of 21 October 1969.*

[340] *Delattre, E. The Social Conciliation and Mediation Procedure in Belgium, EMPL-2002-10528-00-00-EN-TRA-00 (FR)2 at 85.*

[341] *Law of November 16, 1972 on labour inspection (as amended on June 6, 2007). Labour inspectors' scope of competences is limited to private sector employers (see EPSU, A mapping report on Labour Inspection Services in 15 European countries: A SYNDEX report for the European Federation of Public Service Unions (EPSU, 2012).*

[342] *There is also a special provision for companies without union representation, which employ on average fewer than 50 workers.*

Collective labour dispute resolution institutions

132. The institutions in such cases are part of the autonomous public labour administration or of the councils of labour relations of the autonomous communities. There can also be specific bodies set up ad hoc for each conflict. In any case, the services provided by these institutions are free and subsidized by the respective administrations. In contrast to other systems, where such institutions only deal with conflicts of interest, SIMA and the autonomous systems can intervene to manage collective conflicts using mediation and arbitration in conflicts of both rights and interest.[351]

133. Similar to France, Spanish labour law also assigns intervention powers (for conflicts of interest only) to the Labour Inspectorate.[352] Labour inspectors have the right to intervene in a dispute as soon as the strike is notified to the administrative authority.[353] The Labour Inspector may do that of his/her own accord or upon request by the parties. The intervention of labour inspectors is complemented by certain safeguards in order to avoid the risk of blurring of boundaries. First, it is explicitly stipulated that the function of arbitration, when performed by the labour inspection service, may not be exercised by an individual who has concurrently an inspection function in respect of the company involved in the dispute.[354] Secondly, the 2015 legislation introduced a duty to maintain confidentiality regarding the information obtained during the dispute resolution process so that it does not affect the services of monitoring and enforcement.[355] Following the development of social dialogue on dispute resolution, parties to a dispute can decide whether to have recourse to the labour inspectorate or the process established in the collective agreement. Evidence suggests that dispute resolution through the labour inspectorate has suffered from the 'heritage' of compulsory intervention under the Franco dictatorship and has not been used much in recent years.[356]

[343] *When a third party is involved, they may be centrally coordinated from Paris when a conflict of "national importance" arises or persists.*

[344] *Szarlej-Ligner, M. (2016). Les résistances des agents de l'inspection du travail à la reddition de comptes (1980-2013) (2016) 160 Revue française d'administration publique, 1139.*

[345] *Bessiere, n 226 above. See also Decree of 24 November 1977 on the organization of external labour and employment services, codified in article R812-2 of the Labour Code. See also Article R. 2522-1 (any collective labour dispute is immediately communicated by the most diligent party to the prefect, who, in liaison with the competent labour inspector, intervenes to seek an amicable solution).*

[346] *Decree by the Council of State No. 2007–541 of April 12, 2017 incorporates into the Labour Code a new Code of ethics of the public labour inspection service. (cf. art. R8124-1 et seq.). The ILO Committee of Experts has not yet examined the decree. However, the ILO noted "with interest the adoption of this code of ethics, considering that this type of system could reinforce the consistency of the action of supervisors and limit the risks of arbitrariness" (Rapport d'information n° 743 (2018-2019) de M. Emmanuel CAPUS et Mme Sophie TAILLÉ-POLIAN, L'inspection du travail: un modèle à renforcer, available at http://www.senat.fr/rap/r18-743/r18-743_mono.html#fn23).*

[347] *The Spanish Confederation of Employers' Organizations (CEOE), the Spanish Confederation of Small and Medium-sized Enterprises, the Workers' Commission (CCOO) and the General Union of Workers.*

[348] *Article 5(1) of the ASAC-V.*

[349] *Valdes Dal-Re, n 113 above.*

[350] *In Andalusia, for instance, the equivalent system is the SERCLA, which manages conflicts where the disputing parties belong to the Andalusia region.*

[351] *See Article 4 of ASAC-V.*

[352] *Law No. 23/2015, 21 July, Regulating Work and Social Security inspection, art. 1.2 (Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social, art. 1.2).*

[353] *Article 12(3) (a) and (b) ibid.*

[354] *Article 12(3) (b).*

[355] *Article 12(3) (c). Cooperation between the labour inspectorate and the justice administration in individual disputes takes also place in terms of the exchanging reports on disputes over professional classification, geographical mobility controversies, substantial modifications of job conditions etc. See Guamán Hernández, n 157 above.*

[356] *Rigby, M., and Garcia Calavia, M. Á. The development of extra-judicial systems of collective conflict resolution in Southern Europe: Understanding the Spanish system (2014) 20 European Journal of Industrial Relations, 149.*

Collective labour dispute resolution institutions

134. In **Sweden**, the NMO is an institution whose remit is to start up conciliation, mediation or arbitration procedures in dispute situations and which is both independent and publicly funded. It was established in 2000 and is a government agency under the Ministry of Employment.[357] The purpose of NMO is, as explicitly stipulated by law, to 'ensure sound wage developments' by aligning them with manufacturing and the new IA-regime.[358] Its ten or so staff includes social scientists, lawyers and statisticians with extensive experience in labour market issues. Formally, the NMO has three principal tasks: to promote an efficient wage formation process;, to mediate in labour disputes; and to oversee the provision of public statistics on wages and salaries. In terms of mediation, it provides support for collective disputes between employers and employees, either at the request of the parties or on its own if the there is a risk of industrial action.[359]

135. In the **UK**, if disputing parties decide to turn to third parties for conflict resolution, the most frequent port of call would be ACAS.[360] A collective dispute can be referred to ACAS whether or not there is a written collective disputes procedure, and whether or not such a procedure makes reference to ACAS. Nevertheless, the existence of such procedures is perhaps a guide to the likelihood of ACAS being used. Evidence from the WERS suggests that two thirds of organizations (68%) have provisions for referral to external bodies in their internal collective dispute policies and ACAS is the most popular external body referred to in collective disputes (in comparison to independent mediators etc.).[361]
The collective conciliators are ACAS staff and spend about a third of their time on collective conciliation, handling about 10 to 20 collective disputes a year.[362]

[357] *Its duties are defined more explicitly in the Co-Determination Act and in a special ordinance.*

[358] *See analysis above.*

[359] *Its remit does not extend to individual rights.*

[360] *The CAC is empowered to carry out voluntary collective arbitration, but in practice does not do so. It last conducted a voluntary arbitration in 1989. It instead carries out arbitration, which is part of a statutory process, leaving voluntary arbitration to ACAS. The disputing parties can also turn to a wide range of other organizations, including advisory bodies such as Citizens Advice Bureau and members of the Civil Mediation Council, as well as private organizations.*

[361] *VanWanrooy, B., Bewley, H., Bryson, A., Forth, J., Freeth, S., Stokes, L., et al. Employment relations in the shadow of recession: Findings from the 2011 workplace employment relations survey (Palgrave Macmillan, 2013).*

[362] *Otherwise, they carry out training, for instance for employee forums, undertake advisory projects, facilitate joint workshops and occasionally carry out individual mediation.*

Table 6.
Collective labour disputes – Comparative overview (including Greece)

Country	Australia	Belgium	France	Spain	Sweden	UK	Greece
Role of social dialogue in dispute resolution systems	Dispute resolution clauses mandatory for enterprise-level agreements	Joint committees significantly involved in conciliation of collective disputes	Agreements to prevent strikes by establishing a preliminary negotiation, or to set up meetings for the purpose of negotiation during the conflict	Collective agreements establishing dispute resolution procedures and the institutions given the mandate to organise them	Dominance of collectively-agreed solutions to dispute resolution	Negotiated resolution procedures but decline in recent years due to decline of collectivism	Competence, under the law, of the parties to decide jointly on the resolution process but lack of such examples in practice
Dispute resolution institution	FWC or other independent person if appointed under a dispute settlement procedure	Social conciliator officers (public administrative agency in the Ministry of Labour) participating in joint sectoral committees and conciliation boards	Lack of national coordinating office Conflicts handled by labour inspectorate/Ministry of Labour or the departmental Prefect; Wide use of informal conciliation before a judge	SIMA Foundation established by inter-professional agreements and regional equivalents; Right of labour inspectorate to intervene in conflicts of interest (on their own accord or if called in by the parties)	National Mediation Office (NMO) operating under the Ministry of Employment Recourse to ACAS (non-departmental public body Department for Business, Energy and Industrial Strategy (BEIS))	Recourse to ACAS (non-departmental public body Department for Business, Energy and Industrial Strategy (BEIS))	Competence of Labour Inspectorate/ Ministry of Labour to provide conciliation; Competence of OMED for mediation and arbitration in collective labour disputes

5.3 Modes of collective labour dispute resolution[363]

Modes of collective labour dispute resolution

136. The main conflict resolution mechanisms for collective labour disputes consist of the classic triad: conciliation, mediation, arbitration. Common to all three is that a third party is asked to intervene in order to resolve a conflict between the two sides of industry; it is then the nature and degree of the intervention that distinguish the three different procedures.

137. The dividing line between conciliation and mediation is very thin. In some countries, they are treated as identical procedures, while elsewhere there is a definite albeit subtle difference between the two.[364] While both conciliation and mediation are processes involving the intervention of a neutral third party, the role of a conciliator is to help facilitate communication between the parties, without making any specific proposals for resolving the dispute.[365] On the other hand, in addition to keeping the lines of communication open, a mediator's role may also include proposing terms of settlement, which the parties are free to accept or reject. In terms of the types of mediation/conciliation, this can be 'evaluative' if the mediator/conciliator gives an expert opinion on the merits of the dispute ; 'facilitative' if the third party helps the parties in dispute identify and dovetail their interests,[366] or 'transformative' where the emphasis is on empowering the parties to control all aspects of the mediation.[367] These three models of conciliation/mediation can be considered as points on a spectrum from relatively 'interventionist' (evaluative) to relatively 'non-interventionist' (facilitative and transformative).

[363] *See Table 8 for a comparative overview, including Greece.*

[364] *Thaler, D. and Bernstein, A. Strengthening Governmental Conciliaton Institutions. A practitioner's handbook. Washington (Federal Mediation and Conciliation Service, 2003).*

[365] *Waldman, E. A. The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence, (1998) 82 Marquette Law Review, 155.*

[366] *Fisher, R., Ury, W., and Patton, B. Getting to Yes. (2nd ed.) (Penguin Books, 1991).*

[367] *Bush, R.A.B., and Folger, J. The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey-Bass, 1994).*

Conciliation and mediation

Conciliation and mediation

138. In **Australia**, the starting point for consideration is section 186 FWA, which requires that an enterprise agreement include a dispute resolution provision.[368] A condition, which provides only for conciliation or mediation or non-binding opinions (not necessarily arbitration), is sufficient to comply with s.186.[369] As indicated earlier in the discussion, the condition does not need to provide for dispute resolution by the FWC; any independent person may be authorised to settle disputes.[370] In addition, the condition must, as a minimum, provide for resolution of disputes about matters arising under the agreement and National Employment Standards (NES), but it can go further. Empirical evidence suggests that two thirds of agreements (union and non-union ones) conform to a fairly-standard model whereby disputes that cannot be resolved by discussion at the workplace level can be referred to FWC for conciliation, accompanied with arbitration by the FWC if conciliation is unsuccessful. The procedure is used in many cases in a variety of ways, for example, "any grievance, industrial dispute or matter likely to create a dispute which pertains to the relationship between the employer and any of the employees' or 'all grievances or disputes between the employee and the employer in respect to any industrial matter".[371] Assessments of the operation of the dispute resolution system under the FWA suggest that the FWC was rated highly on measures of accessibility/cost, informality, speed/efficiency, expertise, independence/impartiality, fairness and as an agent of 'social change'. FWC applies procedural fairness and, as a body operating in the public sphere, can act to redress injustice and promote harmony more broadly.[372]

139. In **Belgium**, the legislator has given priority to voluntary conciliation in the event of collective disputes, rather than arbitration or compulsory conciliation.[373] The process is free for the parties involved. Many joint commissions have included provisions in their rules of procedure for the parties to be asked to refer a matter to the conciliation panel at any time before the deadline stipulated in a strike notice is reached. The system still cannot be described as compulsory conciliation, as the chairperson of a joint commission's conciliation panel cannot force the parties to appear before a tribunal. The legal effects of the provision can be freely interpreted by a court and the non-appearance of a party before the conciliation panel may be evidence of bad faith.[374]

[368] *Section 186 states that when the FWC must approve an enterprise agreement—general requirements (6) "The FWC must be satisfied that the agreement includes a term: (a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes: (i) about any matters arising under the agreement; and (ii) in relation to the National Employment Standards; and (b) that allows for the representation of employees covered by the agreement for the purposes of that procedure."*

[369] *Woolworths Ltd trading as Produce v Recycling Distribution Centre [2010] FWAFB 1464; 192 IR 124*

[370] *Boral Resources (NSW) Pty Ltd v Transport Workers' Union of Australia [2010] FWAFB 8437; 202 IR 135.*

[371] *Hamberger, J. M., Workplace Dispute Resolution Procedures in Australia (PhD thesis, 2015).*

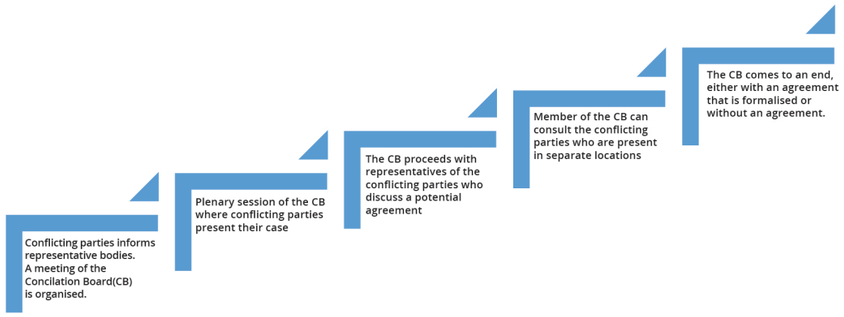
[372] *Forsyth, n 253 above.*

[373] *This does not apply to the delicate issue of rulings delivered by courts of first instance on the application of civil rights other than the right to strike (see below).*

[374] *For an in-depth analysis, see Delattre, n 327 above.*

140. As a first step, collective disputes are discussed at enterprise level between the management and the union delegation (Figure 11).[375] If such disputes cannot be resolved at all, the dispute will be transferred to the conciliation board of the joint committee. A meeting is then organized during which the parties to the dispute present their dispute to the members of the conciliation board. The session is afterwards suspended, and the conciliation office withdraws in order to reach a common point of view. In this phase, separate consultations may take place with the parties to the conflict. If the conciliation board reaches a unanimous opinion, this opinion is communicated to the parties in the form of a recommendation. Although the latter is not binding, it seems that in practice it is often followed by the parties to the conflict. About 500 conciliation meetings are held every year. If the conciliation board does not reach a unanimous opinion, the procedure ends with an inefficiency report.

Figure 11. Five-step process of the Conciliation Board in Belgium



Source: Mediation and Conciliation in Collective Labour Conflicts in Belgium

141. The conciliation board can also recommend continuing negotiations at company level and/or resorting to mediation.[376] This involves the joint committee's chairperson acting on their own and often takes place so as to avoid a damaging strike or the continuation of an existing strike likely to jeopardise the survival of the production unit. In such circumstances, the mediator will propose what is known as a survival plan, which under normal circumstances would be entirely unacceptable to the various parties concerned but which, given the imminent danger, is likely to gain their support.[377]

[375] *Besieux, T, Lenaerts, E., Van Loo, O. and Veldeman, V. Mediation and Conciliation in Collective Labour Conflicts in Belgium, in Euwema, M. C., Medina, F. J., Belén García, A. and Romero Pender, E. Mediation in Collective Labor Conflicts (Springer, 2019) at 31.*

[376] *For details on the process, see https://www.cgslb.be/fr/procedure-de-conciliation*

[377] *Delattre, E. n 327 above at 80.*

142. In **France**, it has been argued that there is no structured dispute resolution "system" [378] as such. In practice, out-of-court dispute resolution in France is not used frequently.[379] First, the prud'hommes system already includes conciliation procedures, making strong mediation processes redundant.[380] Second, French law prohibits any contractual clauses specifying use of alternative forms of dispute resolution that impede the individual right to strike. Third, state labour inspectors can advise and conciliate in collective disputes.[381] These are combined with a lack of solid, traditional policies promoting such resolution methods by the state.[382] Intervention for the resolution of collective disputes takes place in two main ways: through conciliation before a judge in chambers, where either party may be seeking a summary injunction,[383] and through administrative intervention. Under the Labour Code, all collective labour disputes may be submitted to conciliation procedures. Some legally binding collective agreements stipulate that the parties should go to conciliation.[384] Conflicts, which, for some reason, have not been subjected to a conventional conciliation procedure established by either the collective agreement or a special agreement, may be brought before a national or regional conciliation commission. National or regional conciliation commissions shall include representatives of the representative organizations of employers and workers in equal numbers as well as government officials whose number may not exceed one third of the members of the commission.[385] When a conflict occurs during the course of the establishment, revision or renewal of a sectoral/occupational or inter-occupational agreement, the Minister of Labour may, at the written reasoned request of one of the parties or on their own initiative, directly engage in the mediation process as provided for in Chapter III of the Labour Code.[386] If an agreement is reached, a conciliation report records the agreement in writing; the agreement reached will have the same effect as a collective agreement. In the event that conciliation fails, a detailed authenticated account (procès-verbal) is drawn up.[387] In the event of failure of the conciliation procedure, the conflict is subject either to the mediation procedure, or to the arbitration procedure, if both parties agree.

[378] *Jenkins, A. Thuderoz, C. and Colson, A. Mediation and Conciliation in Collective Labour Conflicts in France. Euwema, M. C., Medina, F. J., Belén García, A. and Romero Pender, E. Mediation in Collective Labor Conflicts (Springer, 2019) at 31.*

[379] *Rojot, J. R., Le Flanchec, A. and Kartochian, S. Mediation within the French Industrial Relations Context: The SFR Cegetel Case, (2005) 21 Negotiation Journal, 443.*

[380] *See also Valdés Dal-Ré, n 113 above.*

[381] *Ibsen, n 122 above.*

[382] *On this, see Valdés Dal-Ré, n 113 above.*

[383] *On this, see Annex 3. French law permits judges to intervene very widely in collective disputes where it can be shown there is 'manifestly illegal conduct' or the prospect of 'imminent damage'.*

[384] *ACAS, Social Dialogue and the changing role of Conciliation, Arbitration and Mediation Services in Europe (CAMS): Europe-CAMS): e (CAMS): A five country study of third party dispute resolution, Research Paper 09/10 (ACAS, 2010).*

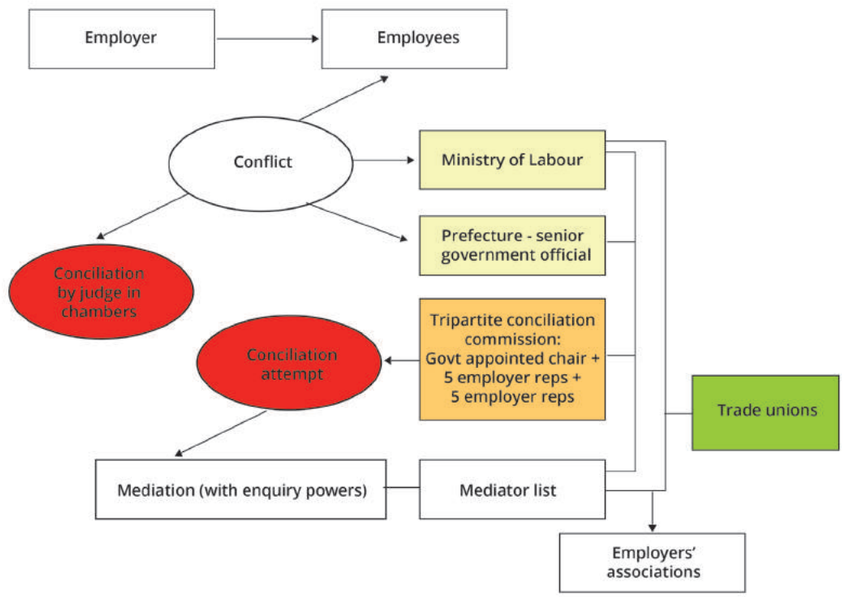
[385] *L2522-7 of the Labour Code.*

[386] *L2522-1 of the Labour Code.*

[387] *This type of conciliation process should not be confused with the initial attempt at conciliation before the courts, where the judges first try to obtain that the parties reach an out-of-court agreement to settle their dispute.*

143. Mediations in France are both uncommon and rarely successful.[388] The mediation procedure may be initiated by the chairperson of the conciliation commission, who, in this case, invites the parties to appoint a mediator within a specified period in order to promote the amicable settlement of the collective dispute. This procedure may also be initiated by the administrative authority at the written and reasoned request of one of the parties or on its own initiative.[389] When the parties do not agree to appoint a mediator, the latter is chosen by the administrative authority from a list of persons designated on the basis of their moral authority and their economic and social competence.[390] The mediator has extensive enquiry powers to probe the company's financial and administrative records but can only make recommendations. After having tried to reconcile the parties, the mediator submits to the parties, in the form of a reasoned recommendation, proposals for the settlement of the dispute, within one month of his/her appointment. This period may be extended with the agreement of the parties.[391] The parties will notify the mediator if they reject the proposal and justify their rejection.[392] In the event of failure of the mediation attempt and after the expiration of a period of 48 hours from the disagreement, the mediator communicates to the Minister of Labour the text of the reasoned and signed recommendation, accompanied by a report on the dispute, as well as the reasoned rejections sent by the parties to the mediator.[393] A model of the collective procedures implemented in France is shown in Figure 12.

Figure 12. Conciliation and mediation in collective French conflicts [394]



[388] *Severin, E. 'Le mediateur civil et le service public de la justice (2003) 2 Revue trimestrielle de droit civil, 229.*

[389] *Article L2523-1 of the Labour Code. The lists of mediators are drawn up after consultation and examination of the suggestions of the representative trade unions of employers and employees at national level, sitting on the national collective bargaining committee.*

[390] *Article L2523-2 of the Labour Code.*

[391] *When the mediator finds that the conflict concerns the interpretation or breach of legal provisions or contractual stipulations, he/she recommends that the parties submit the conflict either to the competent court or to the contractual arbitration procedure provided for in articles L. 2524-1 and L. 2524-2 of the Labour Code.*

[392] *Article L2523-6 of the Labour Code.*

[393] *Article L2523-7 of the Labour Code.*

144. In **Spain**, the dispute resolution system, established under the inter-professional agreement, applies to all collective conflicts at the enterprise or sectoral level[395] in the private sector. Within the scope of ASAC-V, the mediation procedure is obligatory when one of the parties requests it, except in those cases where the agreement of both parties is required. Notwithstanding this, mediation is a pre-procedural requirement in the event of industrial action by any of the parties.[396] The parties to a dispute must appoint a mediator or mediators and an arbitrator or arbitrators from those included on the list, as stipulated in the collective agreement.[397] Mediation will be carried out preferably by a single person, or if this is expressly chosen by the parties, by a joint body of two or three mediators.[398] Once established and throughout the duration of the mediation, notification of industrial action or lock-out measures is prohibited together with the exercise of judicial/administrative recourse and, more generally, any other action aimed at settling the conflict.[399] The mediator or mediators will formulate proposals for the resolution of the dispute, which may include the submission of the dispute to arbitration. The parties will expressly accept or reject the proposals formulated.[400] As in other systems, if accepted the mediation agreement has the same effects as of a collective agreement.[401] If no agreement is reached, the mediator will enter a record of this immediately, registering the lack of agreement and, if appropriate, the proposal or proposals formulated and the reasons raised by each of the parties for non-acceptance.[402] These arrangements have been characterised by flexibility and speed in terms of the resolution of the conflicts, which are not always available in the case of judicial procedures.[403] In contrast to other systems, ASAC-V also provides for compulsory mediation in the event of a dispute concerning a conflict of rights.[404]

145. In effect, the Spanish system has a hybrid character, with SIMA functioning as an agency independent of the judicial process in providing mediation when strikes have been called, but acting as an adjunct to the judicial system in the case of disputes of rights, providing a compulsory mediation stage before cases reach the court.[405] The successful operation of the system has been facilitated by the process of voluntary adherence to the system and social partners' involvement in its management, down to their nomination of mediators.[406] The Spanish system is interesting given the characteristics of its economic/labour market system. Similar to the case of Greece, there is a large number of SMEs, where most workers are employed, as well as sparse union organization and limited collective bargaining. At the same time, there are relatively stable collective bargaining relationships in bigger companies and at sectoral level. A strength of the intervention system is that it allows space for both patterns of employment relations to co-exist (see Box 2 for the implications of the Valencian scheme across these two dimensions).

[394] *Clark et al., n 261 above.*

[395] *The collective agreements may establish specific mediation or arbitration bodies. These bodies will become part of SIMA, once this has been agreed by the Follow-up Commission of ASAC-V. In addition, mediation through the SIMA replaces prior administrative conciliation to the effects anticipated in Articles 63 and 156 of the Law Regulating Business Jurisdiction (RDLRT).*

[396] *Likewise, formal notification of a call to industrial action requires that mediation has failed.*

[397] *Article 7(2) ASAC-V.*

[398] *Article 12(1) ASAC-V.*

[399] *The mediation procedure carried out in accordance with this Agreement replaces the compulsory step of conciliation anticipated in Article 156.1 of the Law Regulating Business Jurisdiction within its field of application and for the disputes to which it refers.*

[400] *Article 15 ASAC-V.*

[401] *Article 16(1) ASAC-V.*

[402] *The mediation agreement may be challenged under the terms and within the deadlines indicated in Article 67 of the Law Regulating Business Jurisdiction (Article 16(4) ASAC-V).*

[403] *Camas Roda, F. Les systèmes de règlement extrajudiciaire des conflits collectifs du travail en Espagne, in Rigaux, M. and Humblet (eds) Conciliation, médiation et arbitrage. Vers une régulation européenne des modes alternatifs du règlement des conflits (collectifs) du travail? (Bruylant, 2011) 107-116.*

[404] *Reforms in 2012 also introduced mediation in the case of disputes that may occur during the periods of the consultation of Articles 40, 41, 44.9, 47, 51, and 82.3 of the Workers' Statute. These articles relate to the different consultation periods due to a business decision regarding geographical mobility; substantial changes in working conditions; suspension of the contract of employment; or reduction of working hours for economic, technical, organizational or production reasons, or due to force majeure and collective dismissals, for their part. The legislation provides that "the employer and the workers' representatives may at any time agree to replace the consultation period with the mediation or arbitration procedure that is applicable within the company."*

[405] *https://journals.sagepub.com/doi/full/10.1177/0959680113505012*

[406] *https://journals.sagepub.com/doi/full/10.1177/0959680113505012*

Resolution of collective labour disputes in Valencia [407]

A high proportion of cases are initiated by the trade unions in respect of disputes in SMEs (in Valencia, 57% of cases relate to firms with fewer than 100 employees). A dispute can be referred to mediation either by the worker representatives at enterprise level or by the regional organization of one of the unions. The latter is most often the case, thus reducing the possibly of victimization of worker representatives. However, this does not mean that recourse to mediation is unlikely to transform union organization at SME level. From an employer perspective, the union recourse to mediation externalizes the conflict and does not necessarily provide a sustained threat to existing power relations. It would therefore be unwise to assume that intervention through the extra-judicial system would have a lasting impact on the culture of employment relations at company level. As well as providing a lever for intervention in SMEs, the Spanish system also reflects the needs of the more organized elements of collective employment relations, at sectoral level and in large companies. The location of interest disputes within the system, and in particular the obligation to submit strikes to mediation, made the new dispute resolution system relevant to the organized sector (where judicial issues such as the failure to implement collective agreements were less common).

146. In **Sweden**, the NMO may appoint mediators if there is a risk of industrial action or if the parties negotiating a collective agreement request this. The agency deals with disputes of interest concerning national level agreements.[408] The NMO appoints special mediators, with the consent of the parties, in disputes between employers and trade unions during their negotiations on wages and general employment conditions. The law also provides for mediators to be appointed without consent. This can take place if one of the parties has given notice of industrial action and the NMO considers that mediators may be able to achieve a good resolution to the dispute. This kind of compulsory mediation is highly unusual. In practice, the parties always agree to the mediation of their conflicts. If a negotiating procedure agreement between the parties has been registered with the NMO, mediators cannot be appointed against the will the parties. The mediators work on behalf of the NMO but are not its employees.[409] The NMO also has four permanent mediators affiliated to it. They are responsible for different geographical areas and are called in to assist in local disputes at company level.[410]

147. The task of the mediators is to ensure that the parties come to an agreement and that industrial action is avoided. This cannot be at any price, however, and the mediators must ideally strive for the parties to reach an agreement that is compatible with an efficient process of wage formation.[411] The mediators call the parties to negotiations. If a party fails to attend the meeting, or otherwise fails to fulfil its obligation to negotiate, the NMO, at the request of the mediators, may order the party to fulfil its negotiation obligation and impose a fine in case of non-compliance. The mediators can submit proposed solutions and must strive for the parties to postpone or call off industrial action. The mediators cannot, however, force any solution on the parties. At the request of the mediators, the NMO can also decide that a party must postpone notified industrial action by up to 14 days. This may only be done once per mediation assignment. The intention is to give the mediators more time to bring about a resolution. The NMO must, therefore, have made the assessment in this case that additional time for the mediation work would promote the resolution of the conflict.

148. A feature of the legislation is the scope given to the parties to organise their mediation activities themselves via agreements on negotiation arrangements, and thus avoid the need for compulsory mediation ordered by the NMO. The requirement is that such agreements must contain timetables for bargaining as well as rules for the appointment of mediators, the powers of mediators, and the termination of agreements. If these requirements are met, the parties can register the agreement with the NMO. Social partner agreements account for 60% of dispute resolutions, whereas the NNO takes on about 40% of the labour market disputes.[412] As such, the NMO acts in effect here as the default model of dispute resolution; however, this is seen as consistent with the deeply-rooted Swedish belief that collective agreements are preferable to legislation.[413] The establishment of the NMO and the advent of the agreements on negotiation arrangements have led to a situation where new collective agreements are concluded before the old ones expire. Empirical evidence suggests that mediation in Sweden is necessary for the purpose of coordination in the absence of centralised bargaining (see Figure 13).[414]

[407] *See Rigby and Garcia Calavia, n 343 above.*

[408] *Disputes of interest at company level, except in the case of union demands for collective agreements with non-organised employers, are not dealt with by the NMO. If the parties fail to reach a new collective agreement before the old one expires, bargaining takes place without any obligation to maintain peaceful industrial relations, which means that the parties are free to take industrial action in support of their demand.*

[409] *Many of them have previously been negotiators or held senior positions at some of the labour market parties.*

[410] *The permanent mediators are affiliated to the NMO for one year at a time and undertake this assignment as secondary employment. Often they are, or have been, court lawyers.*

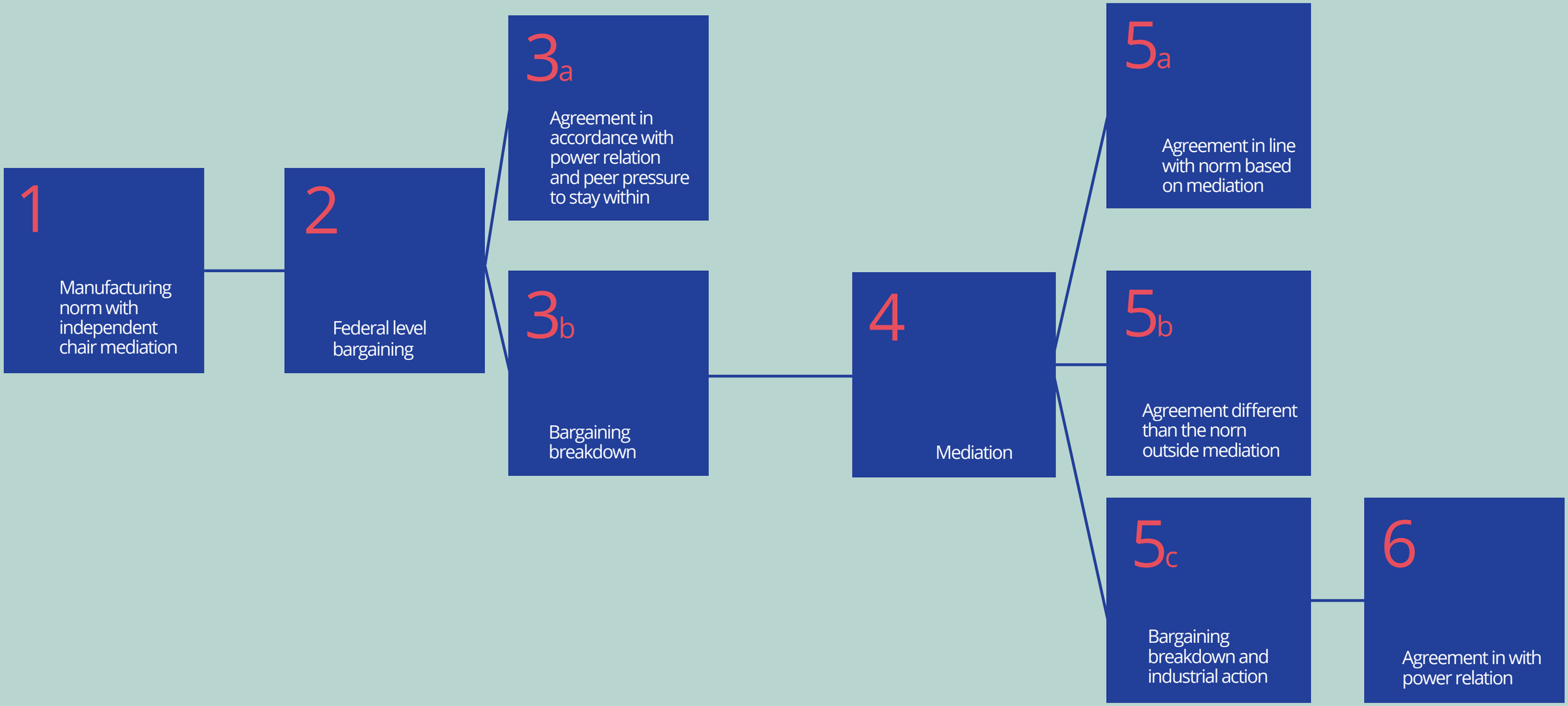
[411] *See Ibsen, C. L. The Role of Mediation Institutions in Sweden and Denmark after Centralized Bargaining, (2015) 54 British Journal of Industrial Relations, 285.*

[412] *Eurofound, Collective dispute resolution in an enlarged European Union (European Foundation for the Improvement of Living and Working Conditions, 2006).*

[413] *Eriksson, K. The Swedish Experience in Mediating Collective Labour Disputes, in Brenninkmeijer, A.F.M, Jagtenberg, R.W. de Roo, A.J. and Sprengers L.C.J., Effective Resolution of Collective Labour Disputes (Europe Law Publishing, 2006) at 137.*

[414] *See Ibsen, n. 403 above. However, in comparison to Denmark, the Swedish mediation has less power to force bargaining areas into agreement and rely much more on persuasion, naming and shaming and the role as scapegoat when attempting to bring potential defectors in line.*

Figure 13. Swedish bargaining and mediation process [415]



[415] *See Ibsen, n 403 above, 301.*

149. In the **UK**, as a result of a long history of voluntarism in industrial relations and with only a relatively recent increase in the volume of labour law detailing appropriate conduct of the employer-employee interface, there are virtually no legal requirements for parties in dispute to undergo conciliation or arbitration processes. Instead, the process is voluntary and may be initiated by the employer, the trade union or both. The Trade Union and Labour Relations (Consolidation) Act TULRCA 1992s 210 provides that "where a trade dispute exists or is apprehended ACAS may, at the request of one or more parties to the dispute or otherwise, offer the parties to the dispute its assistance with a view to bringing about a settlement." Evidence suggests that collective conciliation is the dominant form of collective dispute resolution and the other two mechanisms are comparatively less used. ACAS officials are only involved in conciliation. The conciliators are civil servants employed directly by the agency and the process will only begin once both parties have agreed to participate. Their prime aim is to facilitate an agreement. Survey data suggests that the overall satisfaction with the ACAS' conciliation service has been high over time, both from the management and employee representatives' points of view.[416]

150. If conciliation by its own officials has been unsuccessful, or not requested, but the parties then request mediation (or arbitration), ACAS will propose a choice from a panel of independent experts who have to be agreed by the parties.[417] The mediators are paid a fee by ACAS on a case by case basis. Mediation is reported to be seen by employers and trade unions as a 'halfway house' and hence not a preferred option.[418] Issues that escalate to collective mediation include procedural deficiencies, misuse of the law, dismissal of trade unions representatives, etc.[419] In the light of terms of reference drawn up by the parties, a mediator normally makes written recommendations, which the parties are not bound to accept. Nevertheless, they very often agree in advance to try to convince their union members/the other directors and board of the organisation and this is usually reflected in the terms of reference.[420] Any decision reached in mediation is binding in honour only. The 2018-2019 ACAS report noted that following ACAS involvement, 84% of cases either settled or made progress towards settlement.[421]

[416] *Booth, C., Clemence, M., and Gariban, S. ACAS collective conciliation evaluation 2016 (ACAS, 2016).*

[417] *ACAS's collective dispute mediation is distinguishable from ACAS's individual mediation. The former is free, directive and carried out by someone on the ACAS panel of arbitrators/mediators, not by an ACAS employee. In contrast, ACAS's individual mediation is a charged for service, carried out by a member of the ACAS staff, essentially in a facilitative style, where there is no ET claim and it normally concerns relationships between two individuals, colleagues or a supervisor and supervisee, who should work closely and cooperatively together, but are failing to do so.*

[418] *Potočnik et al., n 319 above at 211.*

[419] *Ibid.*

[420] *Lippiatt, T. The UK Perspective on the Provision of Alternative Dispute Resolution Processes, in Brenninkmeijer, A.F.M, Jagtenberg, R.W. de Roo, A.J. and Sprengers L.C.J., Effective Resolution of Collective Labour Disputes (Europe Law Publishing, 2006) at 137.*

[421] *ACAS, Annual Report 2018-2019 (ACAS, 2019). The economic arguments underlying collective conciliation and mediation schemes provided by ACAS are also quite strong. Research suggests that collective conciliation has net economic benefits of £147.8 million with only £1.8 million of net cost. Collective conciliation is the second most effective ACAS service in terms of benefit/cost ratio, only preceded by E-learning (Urwin, P., and Gould, M. Estimating the economic impact of ACAS services (ACAS, 2016).*

Arbitration in the context of collective labour disputes

151. Unlike conciliation and mediation, arbitration constitutes the most intense form of third-party involvement, as it is for the arbitrator to decide how to solve the conflict. The character of arbitration itself can vary, in terms of whether the parties are bound (by law or by prior agreement) to submit certain disputes to arbitration, and whether they are bound to accept the arbitrator's award. In its least binding forms, arbitration is little stronger than mediation. In its most binding form (i.e. compulsory recourse to arbitration), arbitration is considered compatible with international labour standards under specific circumstances.[422] The literature distinguishes two main forms of arbitration : conventional arbitration and pendulum (also called last offer or flip-flop) arbitration. Under conventional arbitration, "the arbitrator is free to construct what they regard as a satisfactory award....but may be restrained to within the range of parties' claims".[423] Under pendulum arbitration, the arbitrator has to choose between the final position of either the employer or of the trade union, so providing the parties with an all-or nothing outcome.

152. **Australia**[424] represents an example of a system with a long-standing tradition in providing scope for arbitration to resolve collective labour disputes.[425] At present, the requirement for a conditions allowing settlement of disputes under s186 FWA 2009[426] does not require arbitration as such.[427] In case of disputes over existing enterprise agreements, the obvious source regarding the procedure is the dispute condition itself. If the parties have agreed on a condition, which prescribes the arbitral procedure, then this is the procedure to be applied. If the dispute procedure does not descend to that level of detail, it is inferred that parties intended that the FWC would exercise all its powers under the statute.[428] The FWC is empowered to decide all questions of fact and law arising in the relevant dispute. As a corollary, the decision of the FWC cannot be set aside by a court on the basis that it had made an error of fact or law.[429]

[422] *See section 2 above.*

[423] *Gennard, J. 'Voluntary arbitration: the unsung hero', (2009) 40 Industrial Relations Journal, 309 at 314.*

[424] *Fagir, O. The FWC's powers of arbitration under enterprise agreements—an underestimated power, Greenway Chambers CPD series.*

[425] *The previous practice is often referred to as "industrial arbitration". Industrial arbitration was an exercise of administrative power by a public body, and was subject to judicial review. It involved the resolution of inter-state industrial disputes by the making of industrial awards.*

[426] *See analysis above.*

[427] *Forsyth, n 253 above, is critical of the lack of any obligation for dispute settlement procedures in enterprise agreements to provide for the final arbitration of disputes. This is on the grounds that effective dispute resolution must have an end point and agreement clauses that provide for arbitration as an option, or do not provide for it at all, may result in some disputes never being resolved. Nor, in his opinion, is the lack of a requirement to have arbitration as a final step consistent with one of the key overarching objectives of the FWA, namely, to provide 'accessible and effective procedures to resolve grievances and disputes' (section 3(e)).*

[428] *DP World Brisbane Pty Ltd v Maritime Union of Australia [2013] FWCFB 8557; (2013) 237 IR 180.*

153. The FWC's role is not confined to dealing with disputes referred to it under the provisions in the enterprise agreements. Its responsibilities extend to making and varying modern awards and regulating the process whereby enterprise agreements are negotiated. In respect of the latter, the expectation is that in the overwhelming majority of cases, bargaining will result in an enterprise agreement being submitted to the FWC for approval. However, if the bargaining representatives for a proposed enterprise agreement cannot agree, in special cases (after specific requirements are met) the FWA 2009 allows for a Full Bench of the Commission to determine terms and conditions of employment.[430] If the Commission makes such a determination, it is called a workplace determination. FWA 2009 provides for 3 types of workplace determinations: in relation to lower-paid workers where bargaining is unlikely to result in an agreement [431] where the FWC has issued bargaining orders to facilitate the making of an agreement and it has determined that a serious breach of those orders has taken place [432] or where the FWC has issued orders terminating protected industrial action and subsequent bargaining has not resolved the issues in dispute.[433] When deciding the content of a workplace determination, the Commission must take the following factors into account: the merits of the case; for a low-paid workplace determination , the interests of the employees and employers who will be covered by the determination, including ensuring that employers can remain competitive; for other workplace determinations, the interests of the employees and employers who will be covered by the determination; the public interest; how productivity might be improved in the enterprise or enterprises concerned; the extent to which the conduct of bargaining representatives was reasonable during bargaining; the extent to which the bargaining representatives have complied with the good faith bargaining requirements, and; incentives to continue to bargain at a later time.[434] Evidence suggests that few applications are submitted each year for workplace determination.[435]

154. As discussed in the previous section, the **Belgian** system is based on voluntary conciliation rather than arbitration. The Law on Collective Agreements and Joint Committees states under Article 9(2) that provisions which set out the settlement of individual disputes by arbitration are null and void – so in theory collective disputes may be subjected to arbitration, but, in in fact, such provisions for collective disputes do not occur.

[429] *For an analysis of arbitration under enterprise agreements, see Fagir, n 413 above.*

[430] *Explanatory Memorandum to Fair Work Bill 2008 at para. 1076.*

[431] *See FWA 2009 ss.260–265.* [432]*See FWA 2009 ss.269–271.*

[433] *See FWA 2009 ss.266–268. The latter provision was invoked in a major dispute concerning Qantas (the national airline) that threatened major disruption to its worldwide fleet. Further, the FWC can eventually arbitrate in response to a party failing to obey orders made by the Commission in relation to good faith bargaining. It was also invoked in Parks Victoria v Australian Workers' Union [2013] FWCFB 950 (Ross J, Hamilton DP, Hampton C, 11 February 2013), [(2013) 234 IR 242].*

[434] *Workplace determinations are treated in a similar way to enterprise agreements. Accordingly, if a workplace determination (of any kind) is made, it must: include a nominal expiry date; only include terms that would be about permitted matters; if the determination were an enterprise agreement, not include terms that would be unlawful ; if the determination were an enterprise agreement, not include any designated outworker terms; include terms such that the determination would, if it were an enterprise agreement, pass the better off overall test; not include any terms that would, if the determination were an enterprise agreement, mean that the Commission could not approve the agreement; include a term about settling disputes arising in relation to the NES, or about any matter arising under the determination; include the model flexibility term (unless the Commission is satisfied that an agreed term would be sufficient); and include the model consultation term (unless the Commission is satisfied that an agreed term would be sufficient). In addition, workplace determinations must include applicable coverage and agreed terms and terms dealing with matters at issue between the parties (see FWA 2009, ss.272–275).*

[435] *In 2018-2019, 4 were submitted in total: one in respect of low-paid workers, one in respect of collective bargaining and two regarding industrial action (FWC, Fair Work Commission Annual Report 2018-2019 (FWC, 2019). In 2017-2018, the figure stood at one for low-paid workers and one for industrial action (FWC, Fair Work Commission Annual Report 2017-2018 (FWC, 2018).*

155. In **France**, arbitration in collective conflicts is recommended as an optional clause in collective agreements by the Labour Code,[436] but the presence of such a clause is not required in order for the agreement to be extended to the sector or nationally. As a result, very few collective agreements include this requirement, and formal arbitration in collective conflicts is extremely rare. When the collective agreement does not provide for a contractual arbitration procedure, the parties concerned may decide by mutual agreement to submit to arbitration any disputes that remain after a conciliation or mediation procedure.[437] The arbitrator is chosen either by agreement between the parties, or according to the terms established by mutual agreement between them. The Labour Code also sets forth various procedural mechanisms for collective bargaining arbitration.[438] These include the following:

- Collective bargaining agreements may contain arbitration agreements and lists of arbitrators;
- Parties may agree to submit disputes to arbitration following unsuccessful mediation or conciliation procedures
- Arbitrators handle some issues, such as those concerning the application of laws and existing collective bargaining agreement rules and regulations, using a legal approach, and handle others, such as those regarding proposed changes to the collective bargaining agreement and issues involving wages and working conditions, using an equitable approach
- Arbitral decisions must be "motivated" and list the reasons for the decision
- A Supreme Court of Arbitration hears appeals of awards for excess of power or violation of a law
- Decisions can be appealed to the Supreme Court of Arbitration twice and, if annulled on the second appeal, are decided by an 'award' rendered by that court
- Final awards in this arena are effective immediately without the need to resort to an exequatur procedure.

[436] *The Labour Code explicitly allows for the existence of such voluntary contractual arbitration procedures in article L. 2524-1 and following.*

[437] *Article L2524-2 of the Labour Code.* [438] *See Chapter IV, Labour Code. For an analysis, see Tarasewicz, Y. and Borofsky, N. International Labor and Employment Arbitration: A French and European Perspective, (2013) 28 ABA Journal of Labor and Employment Law, 349.*

[438] *See Chapter IV, Labour Code. For an analysis, see Tarasewicz, Y. and Borofsky, N. International Labor and Employment Arbitration: A French and European Perspective, (2013) 28 ABA Journal of Labor and Employment Law, 349.*

156. In **Spain**, arbitration is regulated under the *Ley del Estatuto de los Trabajadores*,[439] the *Real Decreto Ley De Relaciones De Trabajo* (RDLRT) and the *Ley de Jurisdicción* social.[440] However, its actual functioning is regulated in the different collective agreements on dispute resolution.[441] The parties may agree to submit voluntarily to the arbitration procedure regulated by the ASAC-V agreement, without the need for resorting to mediation. Voluntary submission by mutual agreement of the parties to arbitration is also possible in the case of a strike.[442] The parties may empower, either from the beginning or during the mediation procedure, the mediator or mediators to arbitrate some or all of the matters subject to the dispute.[443] Under the arrangements by the social partners, there is scope for compulsory arbitration as well. Under Article 8(1)(b) of ASAC-V, when this has been expressly established in the collective agreement that has been denounced, arbitration will be compulsory for its renewal when the negotiation deadlines, established in Article 85(3)(f) of the Workers' Statute, or the collective agreement itself have lapsed without an agreement been reached. It will likewise be obligatory in the other cases anticipated in the collective agreement. In both cases, the collective agreement may contemplate mediation prior to compulsory arbitration by the arbitrator or a different third party. Importantly, arbitrators may resolve disputes of rights (those deriving from the administration of the collective agreement) but also disputes of interests.

157. Once the arbitration commitment has been formalised, the parties will refrain from instigating other procedures on any matter subject to the arbitration, as well as from having recourse to a strike or lockout.[444] The arbitrator must be appointed by mutual agreement by the parties promoting the procedure. However, in the event that there is no agreement by the parties, it is possible to delegate such designation to SIMA.[445] The arbitrator or arbitrators, who will always act jointly, will communicate to the parties the resolution adopted within the deadline set in the arbitration commitment, notifying equally the secretariat of SIMA and the competent labour authority.[446] The arbitration award must be explained and notified immediately to the parties and the arbitral resolution will be binding and immediately executive.[447]

[439] *Workers' Statute, 92. (2) Notwithstanding the provisions of the preceding paragraph, parties to collective bargaining may establish procedures, such as mediation and arbitration, for the settlement of collective disputes arising from the application and interpretation of the collective agreements. The agreement reached through mediation and the arbitration award shall have the legal effect of collective agreements regulated under the present law, provided that those who had adopted the agreement or signed the arbitration agreement would have the legitimacy that would allow them to agree on, in the subject matter of the dispute, a collective agreement as provided in articles 87, 88 and 89 of this Law.*

[440] *Law 36/2011, of 10 October, Regulating the Social Jurisdiction.*

[441] *ASAC at the national level, and other agreements at the autonomous community level, signed by the most representative trade unions and business associations. The inter-confederal agreements do not incorporate arbitration as a mechanism for the solution of conflicts related to negotiation, i.e. blocks in the negotiation of a new collective agreement, blocks in the procedures for substantial modification of agreements or in the processes of collective dismissals.*

[442] *Article 17(3) ASAC-V.*

[443] *Article 12(6) ASAC-V.*

[444] *Article 18(3) ASAC-V.*

[445] *Article 20(3) ASAC-V.*

[446] *Article 21(2) ASAC-V.*

[447] *Article 21(3) and (4) ASAC-V.*

158. Compulsory arbitration is also stipulated in statutory legislation.[448] Firstly, Article 10 RDLRT-77 establishes compulsory arbitration to end a strike with a strong economic and social impact. In such cases, the competent authority is authorised to impose arbitration for the resolution of the dispute, taking into account "the duration or consequences of the strike, the positions of the parties and the serious damage to the national economy".[449] Secondly, legislative reforms, introduced in 2012, provide now for compulsory arbitration to take place in the context of a special company agreement at company level whose purpose is to dis-apply a higher-level collective agreement. Under Article 82(3) of the Workers' Statute, either party, in case of disagreement, may submit the difference to the commission of the collective agreement. If an agreement is not reached or if the Commission does not intervene because it is not mandatory by the collective agreement, the parties must resort to the procedures that have been established in inter-professional agreements at the state or regional level. If these procedures have been applied or failed and after the consultation period has ended, any of the parties may request the intervention of the National Advisory Commission on Collective Agreements, when the non-application of the collective agreement affects the company's locations in the territory of more than one autonomous community, or the corresponding bodies of the autonomous communities in other cases, to carry out arbitration or appoint an arbitrator for this purpose. It is expected that it is the employer that would seek arbitration in such cases, as it is the one that has an interest in not applying the collective agreement.[450]

159. In **Sweden**, binding arbitration in collective bargaining disputes (for conflicts of interest) is not part of the dispute resolution model. It exists in few branches as part of a voluntary commitment of the parties to the collective agreement.[451] Where it exists, it can be either voluntary or compulsory, depending on the content of the agreement.[452] In this respect, there may be issues during negotiation that cannot be resolved through mediation. In such cases, the parties usually agree to remove the issue from the mediation agenda and refer it to a joint working group whose task is to develop proposals for solving the problem during the current contractual period. On occasion, mediators are appointed by the parties to chair such working groups.

[448] *In addition, arbitration can be carried out by the Labour Inspectorate. This includes strikes and other labour disputes when the parties expressly request it, as well as the cases established in the legislation (Article 3(b) Law 23/2015, of July 21, Organizing the Labour and Social Security Inspection System). The function of arbitration by the Labour Inspectorate, without prejudice to the technical functions of information and advice, if requested by any of the parties, will be incompatible with the simultaneous exercise of the inspection function by the same person, who has this function over the companies subject to their control and surveillance.*

[449] *This has been accepted by the Constitutional Court.*

[450] *Cialti, n. 314 above. The provision has been deemed constitutional (Tribunal Constitucional en la Sentencia 119/2014 de 16 July 2014).*

[451] *Arbitration is not permitted in discrimination disputes or disputes where one party seeks to declare that a collective bargaining agreement by which the parties are bound is no longer applicable, due to a gross breach of such an agreement.*

[452] *Fahlbeck, R., Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features, available at http://arbetsratt.juridicum.su.se/filer/pdf/reinhold/fahlbeck-sc%20studies.pdf*

160. In the **UK**, arbitration stems from the 1896 Conciliation Act, which repealed earlier arrangements for compulsory and binding arbitration[453] and provided for voluntary arbitration to settle industrial disputes with the Labour Department of the Board of Trade appointing a single arbitrator. In the case of collective arbitration, the collective conciliator draws up the key terms of reference. The next stage involves the appointment of the arbitrator by ACAS from a panel of outside experts, so that ACAS can preserve its neutrality and not become involved in actual adjudication. The arbitrator then consults all relevant documents regarding the case after which a hearing is held for all parties to present the key points of their case as well as answering any questions raised by the opposing party. After questioning from the arbitrator, the parties present their closing statements. The arbitrator then deliberates on the evidence and statements presented and sends a written award statement to the ACAS, which, after due scrutiny, is forwarded to the concerned parties.[454] Awards are not legally binding, but arbitration decisions have been invariably accepted.[455] In the last user satisfaction survey conducted in respect of collective arbitration, a high level of satisfaction was reported with the role played by the arbitrator and the majority felt that the arbitrator's award was 'fair'.[456] A more recent report that relies on qualitative interviews found no criticisms of the process of arbitration and almost no criticism of the speed of its delivery. However, in recent years the number of ACAS arbitrations has been significantly lower than the number of collective conciliations and the disparity has become more marked over time (see Table 7). Statistical analysis suggests a strong association between both trade union membership and the number of arbitrations, and a slightly lower, but still significant, association between trade union membership and the number of collective conciliation cases.[457]

Table 7. Cases referred to collective arbitration, dispute mediation and collective conciliation (2016-2019)

Case type	2018-19	2018-19	2016-2017
Single arbitration	8	13	12
Single mediation	8	7	5
Request for collective conciliation	607	715	744

Source: ACAS annual reports.

[453] *In wartime compulsory, binding arbitration was introduced and as noted in the main text, arbitration is required to resolve disputes where industrial action is outlawed as at Government Communications Headquarters (GCHQ).*

[454] *Corby, S. Arbitration in collective disputes: A useful tool in the toolbox (ACAS, 2015).*

[455] *Ibid, 26.*

[456] *Brown, W. 'Acas arbitration: a case of consumer satisfaction?' (1992) 23 Industrial Relations Journal, 224. Given the length of time that has elapsed since this survey was undertaken, its relevance today is questionable. Corby's report, which is more recent (2015) relies on users interviewed.*

[457] *See Corby, n. 443 above at 36. In this respect, the authors argue that the decline and fragmentation of collective bargaining and procedural machinery across most sectors of the economy, the culture of individualism and the decline in trade union membership, as collective arbitration only applies where workers are organised, may be factors explaining this trend.*

5.4 Collective labour disputes and preventive intervention

Collective labour disputes and preventive intervention

161. The literature differentiates between different forms of dispute prevention. One type is **prior conciliation**. The best example of this type of intervention is found in **Belgium**. "Prior conciliation" involves the parties asking for a conciliation panel meeting with a view to finding a solution to a tense situation, a latent conflict, or a dispute within an undertaking, sector or sub-sector. For example, the head of a company (who need not be a member of a representative employers' organisation), a trade union delegation or the chairman of a joint commission may, if he or she considers it useful, convene the conciliation panel before a dispute is declared, if a dispute is threatened, or even if there is a simple difference of opinion (e.g. in interpreting a clause in a collective labour agreement). The prevention of disputes is explicitly written into the charter of the Labour Ministry department tasked with mediation. This task of prevention is facilitated by the dense network of professional contacts of the service, inter alia with the Labour Inspectorate.

162. On the other hand, **preventive conciliation** tends to be based on an expert's report, rather than conciliation as such. ACAS in the **UK** offers preventive conciliation, by providing requesting companies with a report with the aim, for example, of making work organisation more harmonious so as to reduce potential tensions and improve workforce performance within the production unit. Such tasks may also be entrusted to private consultants. A comparative European survey into the practice of court- annexed mediation (though not exclusively in the area of labour disputes) found that mediation providers, who had become well rooted in society and had come to enjoy the confidence of large segments of potential users, also had the best prospects for deploying novel mediation techniques successfully.[458] The existence of the 'permanency-professionalism- prevention' potential link is broadly confirmed by the ACAS experience in the UK.[459]

[458] *Cited in de Roo, A. and Jagtenberg, R., Effective Resolution of Collective Labour Disputes in Brenninkmeijer, A.F.M, Jagtenberg, R.W. de Roo, A.J. and Sprengers L.C.J., Effective Resolution of Collective Labour Disputes (Europe Law Publishing, 2006).*
[459] *Ibid.*

Collective labour disputes and preventive intervention

163. Another mechanism deployed in the **Belgian** system, which has a positive effect on dispute prevention, is the appointment, as discussed earlier, of social conciliators as chairs of the joint committees at sectoral level. In their day-to-day business, the chair is acting as an independent and neutral expert. They can also collect important information at that stage, which can be very useful when, later on, a labour conflict arises.[460] In a rather similar way, the NMO in **Sweden** aims, among others, at working for 'a well-functioning wage formation'.[461] This constitutes a preventive function of the office, as it implies such things as acting at an early stage in the bargaining rounds by calling the parties to deliberations and collecting information in other ways. At the same time, the NMO is to identify potential areas of conflict between the parties and offer assistance in the form of negotiation managers or mediators. This is consistent with the permanent mediators under the IA, explained earlier, a function that is performed by the independent chairs.

164. A more systematic approach to preventing disputes has been also adopted in **Australia**. This followed legislative amendments in mid-2013, taking effect at the beginning of 2014, which prompted the FWC to go beyond its more traditional reactive approach to develop a new jurisdiction focused, more proactively, on 'promoting cooperative and productive workplace relations and preventing disputes'.[462] Referred to as 'New Approaches' (see Box 3), this program is completely voluntary and complements the Commission's dispute resolution and bargaining functions by providing a formal process to help parties to work together effectively and prevent disputes from occurring. The program supports parties in reaching agreement and establishing processes for future negotiations through training, workshops, discussion and facilitation.

The New Approaches programme of the FWC in Australia [463]

Problem-solving is a consensus-seeking approach that can be used in almost any situation. It is a way of working things out with practical implications for how decisions are made and how disputes may be prevented or resolved. The joint problem-solving approach steps through the following processes:

- *identifying the issues in dispute*
- *identifying stakeholders in the dispute, as well as their interests*
- *collecting information*
- *generating options*
- *developing criteria for assessing options*
- *selecting and trialling options*
- *implementing a solution and monitoring progress.*

By applying the principles of joint problem-solving, employers, employees and their representatives can:

- *uncover solutions that may not otherwise have been considered*
- *prevent future disputes from arising*
- *increase the acceptance of changes at work*
- *minimise the cost, inefficiency and damage often incurred through conventional dispute resolution processes*
- *reduce stress and frustration felt by those involved in a dispute*
- *deal with issues themselves more quickly and with a greater degree of control*
- *provide an opportunity for active engagement and for voices to be heard.*

A joint problem-solving process enables management, employees, unions and other stakeholders to generate solutions together. As a tool, it can be applied to a particular problem, or it can become an integral characteristic of the organisation's culture.

As of November 2019, there had been 68 New Approaches files since 2014, with 18 commencing in 2018. Many begin with the parties jointly requesting a member of the FWC to facilitate negotiations over the making of an enterprise agreement. The successful negotiation of a new enterprise agreement often – though by no means always – leads to deeper forms of cooperation either in the implementation of the agreement or new issues. Irrespective of the type of issue addressed, the programme files invariably involve training in interest-based bargaining processes – usually delivered by the tribunal member – because the skills required are so different from more traditional distributive or adversarial bargaining.

[460] *Rombouts, n 308 above at 67.*

[461] *An efficient wage formation process is based on the normative role of the international competitive sector in wage formation; combines increased real wages with a high level of employment; results in fewer labour market conflicts; enables relative wage changes; and contributes to the international competitiveness of Swedish trade and industry (see Swedish National Mediation Office, The Swedish model and the Swedish National Mediation Office, available at https://www.mi.se/app/uploads/Modellen_sve_new_engelska_web.pdf).*

[462] *Stewart, A., Bray, M.,Macneil, J., and Oxenbridge, S. Promoting cooperative and productive workplace relations": Exploring the Fair Work Commission's new role (2014) 27 Australian Journal of Labour Law, 258.*

[463] *Bray, M., Macneil, J., and Spiess, L. Unions and collective bargaining in Australia in 2018. (2019) 61 Journal of Industrial Relations, 357. For more details, see https://www.fwc.gov.au/disputes-at-work/new-approaches/new-approaches-case-studies*

Table 8.
Collective labour disputes – Comparative overview (including Greece)

Country	Modes of dispute resolution
Australia	Conciliation, mediation or non-binding opinions (not necessarily arbitration) in enterprise agreements sufficient to comply with legislation; Compulsory arbitration in specific cases (1. lower-paid workers 2. serious breach of bargaining orders; 3. linked to industrial action)
Belgium	Voluntary conciliation (involving the conciliation board of the joint committee) and mediation as a potential next step if conciliation fails Lack of use of arbitration
France	Limited use of out-of-court dispute resolution; Conciliation through national or regional conciliation commissions; Mediation in the event of failure of conciliation initiated by the administrative authority at the written and reasoned request of one of the parties or on its own initiative Arbitration subject to consent of both parties
Spain	Compulsory mediation (for interest and right disputes) when one of the parties requests it, except in those cases when the agreement of both parties is required Mediation also a pre-procedural requirement in the event of industrial action by any of the parties Voluntary submission by mutual agreement of the parties to arbitration Compulsory arbitration if expressly established in the collective agreement, to end a strike or non-application of company agreement
Sweden	Conciliation, mediation and arbitration procedures NMO services at the request of the parties or on its own if the there is a risk of industrial action; Collective agreements on negotiation arrangements avoid the need for compulsory mediation Voluntary/compulsory arbitration if included in collective agreement
UK	Voluntary dispute resolution be initiated by employer, trade union or both Greater use of conciliation than mediation/arbitration Voluntary recourse to arbitration
Greece	Voluntary conciliation at the request of either of the parties (by SEPE/Ministry of Labour) Provision of mediation by OMED (upon request by either of the parties) Compulsory arbitration in specific cases (1. essential services or public sector companies 2. general interest linked to the functioning of the national economy)

5.5. Interaction with judicial adjudication[464]

Interaction with judicial adjudication

165. As discussed earlier, collective disputes can be subdivided into conflicts of rights and conflicts of interest. The regulatory framework of most countries in the EU and elsewhere provides for judicial procedures tasked to resolve disputes of rights. In contrast, in the case of conflicts of interest, dispute resolution mechanisms normally involve extra-judicial procedures such as conciliation, mediation and arbitration. The distinction between conflicts of rights and interests is mainly the result of case-law rather than statutory regulation. It is the case that most countries in the report (e.g. **France** and **Swede**n) do not have integrated mechanisms for the resolution of both types of disputes; instead they maintain the separation and dominance of the judicial system in respect of disputes of rights.[465] One of the main reasons behind this approach is the requirement to ensure the effectiveness of the right to effective judicial protection, recognised in the systems, in respect of conflicts of rights. On the other hand, it has been argued that integration of rights and interest disputes in the same system opens up the possibility that success in resolving interest disputes can have a positive normative impact, establishing the credibility of the system, thus increasing the likelihood of having some impact on disputes of rights.[466] According to this view, the handling of conflicts of rights by the same institution, that may not be a judicial one, does not challenge the right to effective judicial protection if the recourse is voluntary or if access to judicial proceedings is ensured in the event of failure of dispute settlement [467]. Examples of systems where such integration of conflicts of rights and interests takes place include **Australia** and **Spain** (for further analysis, see Annex 4).

[464] *See annex 4 for more details.*
[465] *On this, see Rigby et al., n 343 above.*
[466] *Ibid.*
[467] *Valdés Dal-Ré, F. (1992). Tutela judicial y autotutela colectiva en la solución de los conflictos colectivos. Relaciones Laborales, 1, 26. Editorial La Ley.*

6. Conclusion

Conclusion

166. Conflict avoidance is invested with all the characteristics of a public good: no third person has an incentive to provide the good ; the service is public in nature; and its consumption cannot be controlled.[468] Bearing this in mind, the analytical framework for the assessment of both individual and collective labour dispute resolution systems in the report is broadly informed by the notions of efficiency, equity and voice.[469] An examination of ILO as well as European standards in this area illustrates how the legal/institutional framework at national level (i.e. in terms of actors, mechanisms and processes) should be consistent with these objectives. In this respect, efficiency has been associated with, among others, promoting simplified procedures and operations, and is served by requiring that mechanisms be free of charge and expeditious. Equity is reflected in the requirement, among others, for procedures to be independent, applied consistently and without bias and to be inclusive in terms of coverage. Finally, voice is primarily associated with the equal participation of employers and workers, directly or through legitimate intermediate institutions or representatives, in the design and operation of the dispute resolution mechanisms.

167. At the same time, it is important to bear in mind two main issues. The first is that effectiveness of dispute resolution mechanisms across all dimensions (i.e. efficiency, equity and voice) is far from straightforward. There is generally a lack of reliable data, especially at comparative level, which would enable us to assess this in a definite manner. Registration of cases, including key characteristics, and outcomes of conciliation or mediation are often not available. Furthermore, it would require additional quantitative and qualitative evidence, e.g. in terms of likelihood of compliance with the outcome, which is not available for the type of exercise on which this report is based. Secondly, even if such an exercise were possible in the present context, it may not be practicable or desirable, for industrial societies and their legal systems to aspire to incorporate within their peculiar domestic frameworks labour law solutions from different countries with no consideration for other realities, but should be seen as generally accepted principles of good labour relations.[470]

[468] *Welz, C. and Kauppinen, T. Industrial Action and Conflict Resolution in the New Member States (2005) 11 European Journal of Industrial Relations, 91 at 96.*

[469] *Budd and Colvin, n. 93 above.*

[470] *On a similar point, see Countouris, N. Deakin, S. Freedland, M., Koukiadaki, A. and Prassl, J. Report on collective dismissals: A comparative and contextual analysis of the law on collective redundancies in 13 European countries (ILO, 2016).*

168. Bearing these issues in mind, it is possible to draw a couple of broad conclusions. First of all, the analysis in sections 4 and 5 of the report suggests that all stakeholders involved in dispute resolution processes are now making more use of CMA processes – among other techniques – when navigating labour disputes. However, much as the general theoretical assumptions of the dynamics of conflict are seen to be universal, the degree of institutionalisation for the channelling of conflict, including through such mechanisms, seems to differ significantly between different systems.[471] In the context of individual labour disputes, common themes are found in each country's approach to resolving such disputes. Most systems seem to provide multiple avenues in seeking redress: common across all systems is the fact that mediation, occasionally conciliation (and arbitration in very limited cases), and litigation are offered and used.[472] On the other hand, differences largely pertain to the ways the dispute resolution mechanisms have been established and operate, their coverage as well as how they inter-relate to other institutions, including judicial mechanisms, human rights' institutions and labour inspectorates. In respect of the latter and similar to Greece, labour inspectorates are involved in dispute resolution in the majority of the systems (i.e. Australia, Belgium, France and Spain). Differences exist in terms of the nature of the institutionalisation of such intervention as well as the extent of their competences. The example of Australia illustrates how labour inspectorates can be integrated in the dispute resolution framework and also points to the role of the labour inspectorates in dispute resolution processes involving workers in unclear employment relationships.

169. The important role of voice, particularly collective, is evident in individual labour dispute resolution systems. In countries where collective voice mechanisms play a key role in the prevention and handling of disputes, extra-judicial administrative dispute resolution services tend not to be offered (e.g. in Sweden) or, where they do exist (e.g. Belgium and Spain), they are integrated successfully in the system. In contrast, in systems where the extent and effectiveness of collective voice mechanisms has been reduced in recent decades (e.g. the UK), labour administration institutions and other agencies play a major, if not the only, role in providing CMA services.[473] Marked differences are also evident regarding the extent to which CMA is fully established and used, with evidence suggesting that the interplay with judicial mechanisms is significant in this respect (e.g. in France). In terms of the effectiveness of dispute resolution mechanisms, research evidence, where available, also suggests that the nature of the arrangements, i.e. whether they are multi(bi)lateral or unilateral, helps explain to a considerable degree the greater legitimacy of certain mechanisms. More broadly, systems that are characterised by legal/institutional rules empowering various collective voice mechanisms across extra-judicial and judicial processes tend to perform better in terms of efficiency, equity and voice, as they offer a cheaper, faster and more informal route to settlement than other forms of dispute resolution.[474]

[471] *In this context, 'institutionalisation' refers to the process of making alternative forms of dispute resolution (i.e., alternative to the courts) part of a community's formal, public system of resolving disputes. It is recognized that institutionalisation occurs through private channels as well, such as when a private dispute resolution centre has survived long enough and functioned effectively enough to have become an institution within a community. However, use of the term in this comment refers exclusively to public institutionalisation: either in the form of public modes of alternative dispute resolution [hereinafter ADR] (e.g., court-annexed arbitration) or public funding/authorisation of private modes (Monroe, B., Institutionalization of Alternative Dispute Resolution by the State of California (1987) 14 Pepperdine Law Review, 943).*

[472] *The popularity of mediation rather than arbitration as a means to settle labour disputes has been explained in a threefold way: "(1) the increasing complexities of the law that hamper arbitration but not mediation, (2) the fact that confidentiality is equally protected in mediations, while mediation fits in better with the tendency to promote teamwork, and (3) the fact that overburdened judges can initiate referrals to mediation but not to arbitration" (A.J. de Roo and R.W. Jagtenberg, Mediation in the Netherlands: past - present - future. In Ewoud H. and Joustra, C. (Eds.), Netherlands Reports to the Sixteenth International Congress of Comparative Law. (Intersentia, 2002) (pp. 127-146) at 189.*

[473] *On this, see also Ebisui, M., Cooney, S. and Fenwick, C. Resolving Individual Labour Disputes: A Comparative Overview (ILO, 2016), 11.*

[474] *See also ibid, 6.*

170. Secondly, the institutionalisation of quasi-judicial processes via third-party institutions is now a characteristic of many collective dispute resolution systems inside and outside Europe. The comparative analysis in section 5 suggests that in a number of countries (e.g. Belgium, Spain, Sweden), social partners have relied on social dialogue and collective bargaining to preclude or limit government intervention in settling a dispute. In such cases, there is a wide variation in the nature of dispute resolution arrangements (e.g. in terms of the level at which the arrangements operate), which tend to reflect the main characteristics of the collective bargaining system. When it comes to the nature of the institutions tasked with collective labour dispute resolution, the report points to a range of possible combinations. Permanent agencies can be found in the majority of countries, but differences exist in terms of: the way the facilities are organised and funded; the professional status of the individuals providing such services ; the extent to which they cover different types of collective disputes; and their actual usage. In some countries (e.g. Belgium, Spain and Sweden), dispute resolution mechanisms are intrinsically designed and operate in a way so as to actively support collective bargaining processes. In terms of the nature of the mechanisms, some are integrated into the state administrative framework (e.g. in Belgium) while in other cases, they are accommodated in separate entities (e.g. the ACAS in the UK and the NMO in Sweden), with the state supplying them with the necessary organisational, economic, technical and human resources. What is common across a number of countries is that the dispute resolution institutions are jointly managed and with equal participation by workers' and employers' representatives or the latter play a major role in their management bodies.[475]

[475] *See also Valdes Dal-Re, n 113 above.*

171. The main conflict resolution mechanisms for collective labour disputes consist of the classic triad: conciliation, mediation and arbitration. Conciliation and mediation are most often used, albeit the boundaries between the two are sometimes blurred and differences exist in terms of the aspects of these mechanisms, if any, that are obligatory. Arbitration does not necessarily require a previous breakdown or failure of conciliation or mediation, but its usage is not wide in a number of systems. As a general rule, arbitration is optional, albeit with exceptions in the cases of Australia and Spain, where compulsory arbitration is stipulated in specific cases, e.g. in respect of lower paid workers in Australia. Other notable differences pertain to who the providers of the services are; the extent to which these mechanisms apply in conflicts of interests and conflicts of rights; and the phase in which the system is activated (e.g. when there is threat of industrial action). Evidence also suggests a growing emphasis on dispute prevention and forms of preventive intervention, with differences regarding the nature of intervention and the interplay with other processes, including collective bargaining. Overall, the evidence points to voice, both in terms of the design and actual operation of resolution mechanisms, as a crucial determinant for the legitimacy and, ultimately, effectiveness of collective dispute resolution systems.

172. The final point here concerns the implications from the institutionalisation of strong CMA mechanisms for dispute resolution itself. In the context of individual labour disputes, CMAs propose new models or the reconfiguration of old mechanisms and seek to reduce costs and adversarial impact. From the perspective of the claimants, employers and the state alike, it has been argued that such mechanisms may offer a "means of bringing workplace justice to more people, at lower cost and [...] it also helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively."[476] In a broadly similar manner, in respect of collective labour disputes, costly labour conflict can be averted without loss of bargaining autonomy, because collective bargaining is retained as the regulatory process. In addition, costly litigation can be avoided since CMA is typically not a legal process but an extension of negotiations. Third, by retaining bargaining autonomy, both procedural and substantive legitimacy of settlements may be increased.[477] The function of extra-judicial collective dispute resolution mechanisms, as Valdes Dal-Re puts it, is to facilitate "new possibilities for workers' representatives and employers or their associations to renew a bilateral and autonomous or voluntarist dialogue that has been temporarily and fleetingly interrupted by the emergence of the collective dispute." [478]

[476] *Bendeman, H. ADR in the Workplace: The South African Experience (2007) 1 African Journal on Conflict, 137.*
[477] *Ibsen, n 122 above.*
[478] *Valdes Dal-Re, n 113 above at 2.*

173. At the same time, attention needs to be paid to the potential risks associated with the growing emphasis on CMA mechanisms, regarding individual labour disputes in particular. Recent research points, among others, to the fact that legal representation is usually not compulsory as the parties are expected to reach a decision by themselves with the help of a third party. But if the parties are not familiar with procedures and not comfortable expressing themselves, informality may be translated into an authoritarian adjudication of the dispute. Empirical evidence has largely confirmed that if one party lacks relevant legal information, they may feel compelled to accept an uncomfortable settlement.[479] In the context of collective labour disputes, while CMA practices have been traditionally relied upon to resolve disputes, third-party intervention may be controversial if seen as an intrusion into collective bargaining. The comparative analysis in section 5 suggests that the mediation schemes discussed are in many cases essentially voluntary, albeit with some variety in terms of the strength of the incentives provided to persuade parties to have recourse to such mechanisms for dispute resolution.[480] For instance, in the case of Sweden, an incentive provided by the legislation is that parties calling for industrial action have to refer their dispute compulsorily to the NMO unless they have concluded an agreement on negotiation. This is complemented by the development of specific strategic approaches on the part of industrial relations actors that have been designed to deal with the challenge of bargaining coordination.

174. The above lead us to conclude that the institutionalization of CMA is often a matter of political choices and strategic approach by the industrial relations actors at specific times in specific contexts,[481] whilst taking into account legal and institutional norms defined at supranational and national level. The country examples in respect of compulsory arbitration in collective labour disputes provide an illustration of this. Against the context of the ILO jurisprudence on compulsory arbitration, different legal systems have addressed the issue in various ways, ranging from not providing recourse at all to allowing such resolution mechanisms to take place in specific circumstances (e.g. to end a strike with a strong economic and social impact in the case of Spain or in respect of lower-paid workers in the case of Australia). Developing an understanding of these functionalities of national dispute resolution systems alongside the dimensions of efficiency, equity and voice is important for policy-related developments in any context, including in the case of Greece. To that end, the comparative analysis in the report points to a range of possible mechanisms and combinations for resolving labour disputes, with a varying extent of effectiveness that is dependent on the characteristics of these mechanisms per se but also their interplay with other legal/institutional arrangements and industrial relations actors. Rather than identifying best practices outside of their context, these should be seen as generally accepted principles of good labour relations that are the result themselves of inclusive social dialogue.

[479] *Araujo, S. B. and Brito, L., Comparative Report on Labour Conflicts and Access to Justice: The Impact of Alternative Dispute Resolution (Ethos, 2019) at 59.*
[480] *de Roo, A and Jagtenberg, R., n 447 above at 22.*
[481] *Valdes Dal-Re, n 113.*

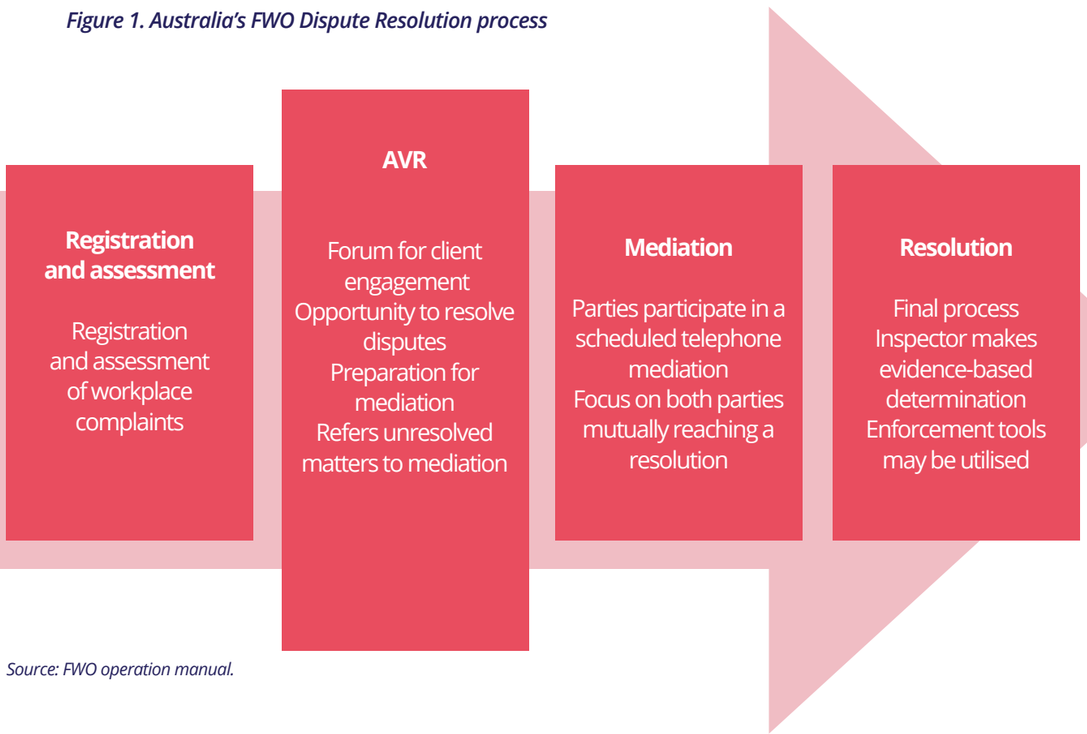
Annex to the Report
Annex 1.
The countries' main characteristics

Country	Type of legal system	Type of industrial relations system	Individual dispute resolution mechanisms	Collective dispute resolution mechanisms	Complementarity with other labour institutions (e.g. collectiv bargaining, social dialogue, judicial proceedings and enforcement authorities)
Australia	Common law	Voluntarist (but with elements of considerable state intervention)	High level of individual dispute resolution by tribunals and other public agencies: Fair Work Commission (FWC) performing a range of functions including dispute resolution; Fair Work Ombudsman (FWO) tasked with ensuring compliance with industrial legislation and dispute resolution Requirement that parties first attempt to resolve the dispute through discussions at the workplace, before they may refer it to the FWC for resolution through mediation, conciliation, or where agreed by the parties, arbitration.	Long history of conciliation and arbitration but move towards enterprise-level agreements, including mandatory dispute resolution clauses in enterprise agreements can specify either the FWC or an alternative dispute resolution (ADR) provider to assist the parties with the settlement of disputes Some scope, albeit limited, for the FWC to arbitrate	Clear delineation of responsibilities in individual dispute resolution mechanisms (albeit some overlap) Interaction between the systems of individual employment rights and collective bargaining in the management of workplace conflict
Belgium	Civil law	State-centred but with strong bipartism tradition	Three types of ADR: conciliation, mediation and arbitration 1. Conciliation: organised by the court; voluntary or judicial 2. Mediation: voluntary or judicial 3. Arbitration: for specific issues (i.e. not linked to public order provisions)	No jurisdiction of labour courts Collective disputes to be resolved by negotiation between the employer and the employees' representatives in special bodies created for this type of negotiation. Belgian Federal Public Service Employment, Labour and Social Dialogue: third party to mediate collective conflicts, primarily through the Conciliation Board Role assigned also to labour inspectorate in respect of certain collective disputes	Collective mediation and conciliation solidly adhered to by the social partners, who play a major role in the process
France	Civil law	State-centred	Conciliation offered by employment tribunals (conseil de prud'hommes): parties must bring their case before the ET's Conciliation and Guidance Board (CGB) Option of using mediation in specific circumstances (i.e. psychological harassment, apprenticeship contracts and cross-border employment contracts) (compulsory mediation in the case of employment contracts concerning a salaried notary or bailiff) Prohibition of arbitration	Lack of coordinated/centralised agency for dispute resolution Process of conciliation run by labour administration/local "Inspecteurs du travail" Limited evidence of early conciliation systems that are based on private regulation (e.g. the Parisian metro organization (the RATP)	Court system composed of equal number of employers' and employee' representatives and CGB composed of two counsellors, one each from the employers and the employees Complementary employee representative bodies in the workplace Important role of labour inspectors in promoting conciliation
Spain	Civil law	State-centred	Scope for reaching out-of-court settlements with or without the intervention of an administrative or judicial body	Establishment of conciliation and arbitration bodies by employers' associations and trade unions at national and regional level, which provides for conciliation, mediation and arbitration over disputes of interests and disputes of rights	Existence of different resolution systems acting on collective (and sometimes individual) conflicts, sustained by different agreements between business associations and union associations indicating considerable complementarity between dispute resolution and bargaining/social dialogue
Sweden	Civil law	Voluntarist	Significant role of dialogue and negotiations in unionised workplaces Swedish Labour Court as the court of first and last instance/district court in cases where the employee is not a union member/acting on his/her own/employee not bound by a CBA; arbitration clauses are permitted (albeit controlled by courts)	Conciliation, mediation and arbitration procedures NMO services at the request of the parties or on its own if the there is a risk of industrial action	Close interdependency between dispute resolution and negotiation. Disputes are resolved in the first instance through negotiation (i.e. co-determination negotiation, dispute negotiation and agreement negotiation). Judicial system (in individual disputes) takes over only where the parties are unable to settle a dispute Collective agreements on negotiation arrangements avoid the need for compulsory mediation
United Kingdom	Common law	Voluntarist	Mandatory early conciliation to provide the opportunity for disputes to be resolved without resorting to a tribunal Scope for private or judicial mediation ET composed of an employment judge and two lay members (from an employer background and an employee background) Arbitration allowed in limited instances (also the ACAS arbitration scheme)	No imposition of either conciliation or mediation on disputing parties ACAS statutory powers to offer conciliation, mediation and arbitration	ACAS linked to the ET system (as part of the mandatory early conciliation system) Growing collaboration between ACAS and trade unions and employers in respect of collective disputes

Annex 2.
The interplay between the FWO and dispute resolution in Australia

175. Infoline, Dispute Resolution and Compliance (IDRC) is the group within the FWO that is primarily responsible for monitoring and ensuring compliance with the FW Act. The Dispute Resolution and Compliance (DRC) operating model focuses on: resolving disputes in a timely manner and ensuring easier dispute resolution for workplace participants ensuring compliance – focusing on matters that align with the FWO's strategic enforcement priorities via complaint investigation and auditing services; promoting harmonious, productive and cooperative workplace relations educating workplace participants to effect behavioural change delivering enhanced customer service.[482] Dispute Resolution incorporates the work of four teams: *Registration and Assessment;*[483] Assisted Voluntary Resolution (AVR); *Mediation and Resolution* (see Figure 1). The aim is for Dispute Resolution to provide parties with sufficient information and advice to promote early resolution.

Figure 1. Australia's FWO Dispute Resolution process



Source: FWO operation manual.

[482] *FWO, Fair Work Ombudsman Operations Manual (August 2013), 11.*
[483] *The Registration and Assessment Team is a gatekeeper of incoming complaints, keeping tight control of where matters are allocated, and actioning those matters that have no or limited strategic significance.*

176. The Dispute Resolution pathway is chiefly a linear process, but the FWO has the discretion to refer a complaint to Compliance Branch for a comprehensive investigation at any stage. In this respect, *Assisted Voluntary Resolution (AVR)* provides a sophisticated client management forum wherein AVR staff will engage meaningfully with clients by: advising and assisting parties in relation to their workplace rights and obligations; providing a forum for parties (particularly small business) to "tell their story"; preparing parties for mediation as the "next step"; providing parties with the opportunity to resolve their dispute prior to mediation. Although AVR staff are Fair Work Inspectors, the AVR process is characterised by the non-use of coercive powers as contained in the FW Act. AVR will refer the majority of its unresolved matters to *Mediation* (the next stage of the Dispute Resolution pathway). On occasion, AVR may refer matters to *Resolution*. Examples include: where an employer cannot be located to participate in Mediation; where the employer is in administration; where a particular compliance or technical issue needs to be determined. AVR can send matters identified as having high impact and significant importance to Compliance.[484]

177. Mediation is a flexible and, generally, confidential dispute resolution process conducted by an FWO mediator. Mediation brings the parties to a workplace complaint together through telephone mediation process, typically lasting between ninety minutes and two hours. There is the option for face-to-face mediations in most metropolitan offices where both parties consent. In mediation, the focus is on reaching a mutually acceptable resolution of the complaint that will accommodate both parties' interests, rather than making a decision as to who is right or wrong. Mediation is a voluntary process and the expectation is that the parties will enter into mediation in good faith with the goal of reaching an agreement. The primary responsibility for the resolution of disputed workplace issues rests with the parties. The FWO mediator will support the parties to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent. The FWO mediator will suspend or terminate a mediation if parties seek to misuse the mediation or reach an agreement that the mediator believes is unconscionable or illegal.[485] FWO mediators are usually members of FWO's specialist Mediation unit which ensures the mediators are independent and separated from the FWO inspectorate in the performance of their duties. The role of FWO mediators is limited to the mediation process and FWO mediators do not conduct or have involvement in any subsequent treatment or investigation of the complaint in the event that no agreement is reached at mediation. Where agreement is reached at mediation it is generally recorded in a deed of settlement which is confidential, final and binding to the extent provided by law. Should either party fail to abide by the deed of settlement, the aggrieved party may choose to take their own legal action to enforce the deed of settlement. The FWO cannot enforce the deed of settlement.

[484] The Case Categorisation Model and associated triggers will assist AVR staff in identifying such cases. In the event that such matters are identified, the AVR Fair Work Inspector will discuss the case with the team leader or assistant director, to decide the appropriate action or referral for the matter. If a matter proceeds from AVR to another dispute resolution or compliance process, then the AVR Fair Work Inspector must (to the extent operationally possible) inform relevant parties of the change in status.
[485] FWO mediators are professionally trained and have extensive dispute resolution and workplace relations experience. FWO mediators are independent and serve as the neutral third party i.e. the FWO mediators do not take sides but instead help the parties to achieve agreed resolution of the complaint where possible. The FWO mediator does not act as a judge, provide legal advice, make a determination on who is right or wrong, or impose decisions on the parties.

178. The Mediation team refers matters where no agreement is reached to the Resolution team. Resolution is a condensed evidence-based process involving Fair Work Inspectors applying high level discernment and experience. Resolution is the "last step" or "end point" for completing complaints in the dispute resolution pathway. Most matters referred to *Resolution* occur where mediation was attempted, but no agreement was reached. The Resolution process involves Fair Work Inspectors gathering information from the parties and producing a findings report, typically including a set of recommendations to the parties, which will effect compliance with Commonwealth workplace laws.[486] In Resolution, Fair Work Inspectors do use the powers under the FW Act, including in particular the issuing of infringement notices (INs).[487] After the findings report is provided to both parties, they are given an opportunity to respond. Parties are given assistance to carry out the recommendations as appropriate (e.g. an employer might be advised how to calculate the amount owing to the complainant). If either the employer or complainant disagrees with the findings report, the parties are to be advised that it remains open for the complainant to take their own action to secure any outstanding entitlements. Such action may include small claims procedures under the FW Act (where the amount sought is less than $20,000). At this stage, the parties should also be offered the opportunity to participate in mediation (where appropriate) to resolve the matter. If a matter remains unresolved, and the parties choose not to participate in mediation, then the matter should be closed (providing there are no outstanding INs, NTPs or compliance notices that require action).

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[486] The findings report acts primarily as a solution-based mechanism to break any impasse between the parties.
[487] In limited circumstances (and with assistant director approval), notices to produce (NTPs) and compliance notices also may be issued.

Annex 3.
Labour dispute resolution and human rights' institutions

179. Anti-discrimination and human rights' bodies increasingly handle discrimination disputes arising from employment, although their overall jurisdiction is broader, covering discrimination on various grounds. In Australia, the Australian Human Rights Commission (AHRC) is the federal body responsible for dealing with complaints of unlawful discrimination[488] on the basis of race, sex, disability and age under the applicable federal legislation.[489] Once a discrimination complaint is lodged, the AHRC inquires into it and attempts to resolve the complaint by conciliation.[490] Where a discrimination complaint is not resolved through conciliation,[491] the complainant may pursue the allegation of unlawful discrimination in the FCC or FCA (within 60 days of termination of the complaint by the AHRC).[492] The AHRC may also inquire into complaints of employment discrimination, rather than those arising under the Racial Discrimination Act 1975 (RDA), Sex Discrimination Act 1984 (SDA), Disability Discrimination Act 1992 (DDA) or Age Discrimination Act 2004 (ADA), on the grounds of a worker's criminal record, trade union activity, political opinion or religion. However, these complaints can only be the subject of conciliation by the AHRC – there is no option to pursue unresolved complaints in the courts.[493]

180. In **Belgium**, the Institute for Equality of Women and Men, which was created by the Act of 16 December 2002, covers discrimination on the ground of gender (including gender reassignment). Other grounds fall within the respective competences of two other institutions, the Interfederal Centre for Equal Opportunities (now Unia) and the Federal Centre for Migration (now Myria). The Institute serves as an administrative body to implement federal policy on gender equality and is also in charge of promoting gender equality through all useful means, including research. In this capacity, it is bound to provide advice to victims of gender discrimination and is also entitled to take legal action to uphold gender equality. A significant development took place in 2019: in April of that year, the Belgian Parliament adopted a new law on the establishment of a National Human Rights Institution. The Institution is responsible, among others, for monitoring respect of the freedom of association or the freedom of expression, going hence beyond the remit of existing equality institutions.[494]

181. In **France**, the Ombudsman, created by the framework law of 29 March 2011, is an independent authority, one of whose responsibilities is to handle claims involving employment discrimination in the public and private sector. Among others, it also deals with individual claims, either by finding an amicable resolution (informal agreement, civil, administrative or penal settlement, formal mediation process or equitable agreement) or by presenting its observations to the relevant judicial authorities (these may take the form of findings, reports to the public prosecutor or observations). In addition to cases where the parties in dispute call upon the agency themselves, the Ombudsman may be called in directly and free of charge by any natural or legal person. Nobody has the right to ignore the Ombudsman's demands. The agency has all the standard legal means at its disposal (demanding explanations, documents etc.) along with a number of more official options (hearings or site inspections, where necessary in the presence of a judge).[495]

[488] *The Commission operates alongside similar state institutions introduced through state-specific legislation. See Forsyth, (Australia chapter). AHRC Act, sec. 46P. On the arrangements for resolution of discrimination and harassment complaints in all Australian jurisdictions, see Rees, Rice and Allen, 2014, ch. 12.*
[489] *Racial Discrimination Act 1975 (Cth) (RDA); Sex Discrimination Act 1984 (Cth) (SDA); Disability Discrimination Act 1992 (Cth) (DDA); Age Discrimination Act 2004 (Cth) (ADA).*
[490] *AHRC Act, secs 46PD and 46PF.*
[491] *Leading to termination of the complaint: AHRC Act, sec. 46PE.*
[492] *AHRC Act, sec. 46PO.*
[493] *See Forsyth, n 154 above at 41.*
[494] *The mandate of the new Belgian institution has though been limited to the federal level, and therefore limited to federal areas of competence.*
[495] *See chapter on France (ILO), at 122-123*

182. In **Spain**, the body designated for the promotion of equal treatment irrespective of racial or ethnic origin is the Council for the Elimination of Racial or Ethnic Discrimination *(Consejo para la eliminacion de la discriminación racial o étnica).*[496] Its competence includes providing independent assistance to victims.[497] Provided there are 'clear indications' of direct or indirect discrimination, recommendations may include 1) negotiation, 2) mediation, 3) legal support, 4) psychological support, or 5) complaint.[498] In addition to the council, a separate institution, the Institute for Women and Equal Opportunities, is responsible for other forms of equality in respect of a wider range of protected characteristics.[499] The Institute has the following competences: a) providing independent assistance to victims of discrimination in pursuing their complaints; b) conducting studies into discrimination; c) publishing reports and making recommendations regarding any issue relating to discrimination. However, reports suggest the limited effectiveness of the Institute, e.g. it has never exercised its competence of filing lawsuits in relation to certain discriminatory acts.[500] In 2019, a proposal for the establishment of an Authority for equal treatment and non-discrimination *(Autoridad para la igualdad de trato y no discriminación)* ('the Authority') was submitted. The Authority would be an independent body and would have jurisdiction on all grounds of discrimination.[501] Its functions would be those provided for by the directives but also others, such as mediation, investigation of cases of discrimination on its own initiative, intervention in litigation, training, etc.

183. In **Sweden**, it is the Equality Ombudsman – a national authority, which employs about 100 people – that is assigned to promote equal opportunities, inform about and work against discrimination, and represent individuals in discrimination cases. Its approach is dual: on the one hand, it has a proactive role (e.g. it informs and instructs employers in their obligations to conduct recurrent pay policy analysis and to establish mandatory action plans for equal wages in the workplace). On the other hand, it offers support to individuals in discrimination cases, where it provides information services and guidance, and also has the competence to represent individuals in settlement negotiations and before the court.[502]

184. Both unionized and non-unionized workers may seek the support of the Equality Ombudsman, which is free of charge. However, because trade unions always have the right to bring actions in labour disputes on behalf of their employees, for trade union members the Ombudsman can act only if the trade union has made clear that it will refrain from representing its member in the dispute.[503] When settlement negotiations fail, cases may be brought to the labour courts. Before the Labour Court, the Equality Ombudsman is the only supervisory authority that can act as the counterparty to the employer who is accused of discrimination.

[496] *See Law 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (Article 33) (as amended by Article 18 of Law 15/2014 of 16 September 2014) and Royal Decree 1262/2007 of 21 September 2007 (modified by Royal Decree 1044/2009 of 29 June 2009)103. The council is the only body that corresponds to the requirements of Article 13 of Directive 2000/43 (as is explicitly recognised in Law 15/2014).*

[497] *To fulfil this competence, the council has the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination, under the coordination of Fundación Secretariado Gitano (FSG) and involving seven NGOs (FSG, ACCEM, Cruz Roja Española, Fundación CEPAIM, Movimiento contra la Intolerancia, Movimiento por la Paz, el Desarme y la Libertad and Red Acoge). These NGOs work independently but follow a formal protocol established by the council, handling cases for possible victims of discrimination on request or dealing with situations that have been identified by the NGOs themselves.*

[498] *Cachón L. Non-discrimination Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 Spain, (Directorate-General for Justice and Consumers, 2019).*

[499] *Institute of Women and for Equal Opportunities (Instituto de la Mujer para la igualdad de oportunidades), www.inmujer.gob.es/.*

[500] *Ballester, A. Gender equality How are EU rules transposed into national law? Spain, (Directorate-General for Justice and Consumers, 2019) at 73.*

[501] *http://www.congreso.es/public_oficiales/L13/CONG/BOCG/B/BOCG-13-B-67-1.PDF This implies that the two existing bodies (regarding racial and gender discrimination, respectively) would disappear or change their functions.*

[502] *See Julen Votinius, n 158 above at 254.*

185. Finally in the **UK**, the non-departmental public body with an important remit in connection with labour disputes is the Equality and Human Rights Commission (EHRC), created under the Equality Act 2006.[504] Like ACAS, the EHRC has the power to produce guidance and codes of best practice for, among others, employers and employees (though breach of them does not attract a penalty). In addition to research and publication work to promote equality and raise awareness of human rights law, the EHRC also supports strategic litigation, advising on and funding cases which are not fundable under public legal aid schemes, such as ET claims, and intervening in cases such as the judicial review applications brought against the ET fee regime.[505] The emphasis on a comprehensive institution that has the capacity to deal with all aspects of employment has resulted in a jurisdictional separation of employment and non-employment discrimination cases in the UK, which continues under the current Equality Act 2010,[506] with non-employment cases dealt with by the County Courts.

186. While such forums seek to protect various individual rights, it is not clear how or indeed whether they are coordinated or interact with labour dispute resolution systems. Often the same dispute could be referred to one of several different forums, which can lead to confusion for users.[507] **In Australia**, there are some overlaps in the functions of various dispute resolution forums, including between the FWC and the FWO, and between the FWC and the Australian Human Rights Commission. Certain types of claims can be brought under different forums simultaneously, whereas others cannot. Employees are given the option to choose a forum, but it is sometimes not easy to decide between them.[508] Furthermore, Australian anti-discrimination agencies are precluded from the strategic use of litigation as a means of encouraging compliance, leaving the process of ADR implemented by these bodies operating under the weak shadow of the threat of litigation by an aggrieved individual, rather than the agency itself.[509]

187. In the case of **Belgium**, the uncertainty arises in respect of the vertical coordination of these adjudicating bodies. The Institute for Equality of Women and Men (unlike UNIA, the equality body for other discriminatory grounds) remains to this day a federal institution. It has signed protocols of collaboration with five federated entities (French Community, Walloon Region, French Community Commission, Brussels-Capital Region and German-speaking Community), which enables it to act against discrimination on the basis of gender in matters falling within the competence of these entities. It does not have a protocol with the Flemish Community, which has a service in charge of diversity issues, and where complaints should be addressed to the Vlaamse Ombudsman (Flemish Ombusdperson). As a result, in order to know which organisation to turn to, the victim of gender discrimination must first be able to identify whether the facts fall within a field of competence of the Flemish Region or of another entity, which requires a thorough knowledge of the system of division of powers and may, in some cases, impair action from a victim.[510]

188. In **Sweden**, the Ombudsman system is carefully designed so as not to undermine the role of trade unions in dispute resolution, but at the same time to provide full access for non-unionized employees. However, this requires complex procedural arrangements, and also creates a highly polarized dispute resolution system.[511]

[503] *Discrimination Act (2008:567), ch. 6, sec. 2.*

[504] *See Jones and Prassl, n 159 above. Northern Ireland has its own separate Equality Commission and a distinct Human Rights Commission, both created under the 1998 Good Friday Agreement.*

[505] *R (ex parte Unison) v. The Lord Chancellor [2015] EWCA Civ 395.*

[506] *Hepple, B. Equality: The New Legal Framework, 154 (Hart Publishing, 2011).*

[507] *On this, see Ebisui et al., n 3 above at 23.*

[508] *See Ebisui et al. n 3 above.*

[509] *MacDermott, T. The Role of Mandatory ADR and Agency Engagement in Resolving Employment Discrimination Complaints: An Australian Perspective, (2015) 31 International Journal of Comparative Labour Law and Industrial Relations, 27.*

[510] *On this see, Wuiame, N. Belgium Country report Gender equality How are EU rules transposed into national law? (Directorate-General for Justice and Consumers, 2019).*

[511] *On this see, Ebisui et al. n 3 above.*

Annex 4. Collective labour dispute resolution and judicial adjudication

189. In **France**, collective conciliation and forms of mediation and arbitration occur almost entirely within the justice system. This is because the issues in dispute in France are usually around the interpretation of the Labour Code or of a binding collective agreement.[512] In the public sector, conflicts are dealt with by Administrative Courts, while private sector conflicts are dealt with through ordinary courts. Private sector collective conflicts usually go to magistrates' courts and appeal courts, and occasionally to commercial courts.[513] By far, the most common form of French collective dispute resolution is through 'informal' conciliation before a judge in chambers where either party may be seeking a summary injunction. In chambers, the judge, knowing that any judgment made is only temporary and can be appealed, often makes real efforts to conciliate the parties and reach a settlement.[514] Some judges, particularly those in larger courts where they specialise in collective conflicts, often go so far as to draft the outline of agreements that are then accepted by both parties, becoming in effect mediators.[515] The two parties can also voluntarily agree not to appeal against the judge's decision in a formal hearing – effectively giving the judge power to arbitrate and to issue a judgment that carries the force of law.[516]

190. In a similar way, in **Sweden**, it is disputes of rights, i.e. disputes over the interpretation of a particular law or agreement, that can be resolved by the Labour Court. Recourse to the Labour Court takes place once negotiations for the resolution of the dispute are not successful. The court procedure can cover every subject that could be included in a collective agreement.[517] No industrial action is allowed in cases involving disputes of rights. Nor does the NMO appoint mediators in such cases. The Labour Court, however, is required to take active steps to help the parties arrive at a settlement, insofar as this is deemed appropriate, bearing in mind the nature of the case and other circumstances.[518] In the **UK**, "enforcement" of collective agreements is not usually through legal channels. As such, any remedy for its enforcement must be outside the law, by the use of the strike and lock-out weapon or persuasion.[519] Individual employees may bring proceedings against the employer to seek the enforcement of the agreement, if it is "incorporated" into the contract of employment.

191. On the other hand, examples of systems where such integration of conflicts of rights and interests takes place include **Australia** and Spain. In Australia, conflict resolution under the FWA encompasses both rights' disputes over the interpretation and application of existing entitlements and interest disputes over the creation of new rights through collective bargaining. The most prominent example of this integration is **Spain**. As explained above, the extra-judicial procedures for the resolution of disputes relate both to conflicts of interests and conflicts of rights. According to the established theory in Spain, the resolution of conflicts of rights through extrajudicial mechanisms established by collective agreements fits with the normative capacity of the social partners vis-à-vis collective bargaining, as recognised in Article 37 of the Spanish Constitution; autonomous conflict resolution mechanisms are seen as another manifestation of the right to collective bargaining.[520] ASAC-V stipulates that in disputes deriving from the interpretation and application of a collective agreement, the prior intervention of a Commission for the Administration of the Agreement will be necessary, as otherwise the procedure cannot be initiated.[521]

[512] *On this, see Clark et al., n 261 above, at 552.*
[513] *Trade unions or work councils have access to courts (ordinary civil courts) for interpretation or application of a collective agreement or other collective relations issues. Unions also have access to court, to protect the collective interest of the profession (intérêt collectif de la profession).*
[514] *Although French law stipulates once a collective conflict is underway that 'conciliation procedures… must be initiated' by one or the parties or by the Prefect or the Ministry of Labour, in practice this procedure is quite rare (Clark et al. n 261 above at 564).*
[515] *The basis for French judges taking the initiative in pushing for dispute resolution in a summary hearing lies in the 1987 Code of Civil Procedure, after which a leading employment judge argued publicly that the principles of 'manifestly illegal conduct' and of 'imminent damage' should be used against all forms of 'illegal practices'.*
[516] *Clarke et al. n 261 above.*
[517] *The normal sanction for breach of a collective agreement would be (punitive) damages. However, other sanctions, such as specific performance, may also be applied for.*
[518] *Eriksson, n 399 above at 134.*
[519] *See Trade Union and Labour Relations (Consolidation) Act 1992 (s 179).*
[520] *Granados Romera, Mª I. (2012, noviembre). La desjudicialización de las relaciones laborales: ¿una nueva dimensión del derecho a la tutela judicial efectiva? Relaciones Laborales, Año 28, 21, 1 Sección Doctrina. Editorial La Ley, at 9.*
[521] *Article 10 ASAC-V.*

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