

Thirteenth Meeting of European Labour Court Judges

**Conference Room, Palazzo Ratta,
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Bologna, Italy
19 September 2005**

Theme 2: The Use of Mediation/Conciliation by Labour Courts

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The Use of Mediation/Conciliation by Labour Courts

Questionnaire

**General Reporter: Mr. Arnold Zack
Judge, Administrative Tribunal of the Asian Development Bank
Faculty Member, Labour and Worklife Program, Harvard Law School
Boston, MA, USA**

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?
 - 1.1 Is there a statutory requirement for conciliation? If so, what does it require?
 - 1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?
 - 1.3 Is there a routine or occasional use of conciliation?
 - 1.4 Is the use of conciliation increasing or decreasing?
 - 1.5 Does resort to conciliation require agreement of the disputants?
 - 1.6 Are there issues which are barred from conciliation?
 - 1.7 Where does the conciliation fit into any appellate proceedings?
2. What is the timing of the conciliation; when does it occur?
 - 2.1 Is it done prior to the Court taking jurisdiction over the case?
 - 2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?
 - 2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?
 - 2.4 What is the role of the court if only a portion of the parties' dispute is settled?
 - 2.5 How often is conciliation used compared to straight litigation?
 - 2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?
 - 2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?
 - 2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

- 2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?
3. What are the qualifications of the conciliators?
- 3.1 How are conciliators selected?
- 3.2 Is the designation of the conciliator made by a court judge or by another agency?
- 3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?
- 3.4 What are the experience and/or training requirements for serving as a conciliator?
- 3.5 Are conciliators used on a full-time or part-time basis?
- 3.6 Are they compensated by the court or parties or government?
- 3.7 Are the compensation rates set by the court, parties, government, or conciliator?
- 3.8 Are there any procedures for evaluation of the conciliators or the sessions?
4. What subject matters may be submitted to conciliation?
- 4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?
- 4.2 What are examples of issues conciliated and the frequency of their submission?
- 4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?
- 4.4 Does the court monitor the progress of the conciliation? If so, how?
5. Do you consider use of conciliation to be a positive contribution to the work of the court?
- 5.1 What is the impact of conciliation on the volume of cases coming to the court?
- 5.2 What is the impact on the work and functioning of the court?
- 5.3 Does conciliation adversely impact on the court's making of case law?
- 5.4 Do the disputants prefer conciliation to litigation?
- 5.5 Have there been any changes in attitudes toward mediation since its introduction?
- 5.6 Should mediation be encouraged, discouraged, or ignored?

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Conciliation of Labor Court Disputes

General Report

**Arnold M. Zack
Tribunal Judge, Asian Development Bank**

It has been nine years since I spoke to this group at the meeting in The Hague in 1996 urging the use of conciliation/mediation to help resolve disputes within the jurisdiction of the European Labor Courts. At that time the approach was rather new to the participants. Although my proposal was viewed with skepticism by the group, I must admit that the hospitality and politeness of the reception has made me an appreciative participant in most of the sessions held since that date.

But now, I am back beating on the same drum. Not only because I think the cause is justified, but because I think there has been an astounding increase in interest and receptivity to the idea in the intervening years. The fact that 16 countries took the time to respond to my questionnaire is testament to the increasing interest in the topic, and the fact that thirteen of those considered mediation to be important and of increasing value and interest, underscores the validity of putting it on our agenda for the Bologna meeting. Perhaps most important in its recent growth, has been the increase in legislation mandating or recommending the use of mediation.¹

I wish to express my appreciation to Angelika Muller, and to Rita Natola of the ILO Geneva who have kindly arranged for the national responses to be made available to the attendants. I also want to thank the reporters who responded to my questionnaire for the 14 systems discussed.

Conciliation cf. Mediation

I also want to clarify, if I can, the use of the terms conciliation and mediation. They are indeed quite different terms with different meanings, and I was fascinated to learn the extent to which various nations handle the terms. In Belgium, according to the report, conciliation refers to the preliminary mandatory initiation of discussions by a judge, while mediation requires agreement of both parties.² In France, conciliation is governed by a decree of 23 March 1978, for rights disputes prior to litigation, while mediation is contemplated in cases of moral harassment.³ In Austria, mediation is defined as

¹ Christian Storck, Advisor, Cour de Cassation Belgium, reports that the Law of 21 February 2005 modifies the Judicial Code to endorse participation in mediation by public entities. Judge Pekka Orasmaa, President Labour Court of Finland reports that the Act on the Conciliation in Civil Cases in Regular Courts effective 2006 covers disputes falling within the jurisdiction of regular courts. Vice President Jon Gisle of the Labor Court of Norway reports that a new Act, no. 90, concerning mediation and legal procedures in civil cases was adopted on 17 June 2005. Prof. Dr. Janez Novak, Supreme Judge of the Supreme Court of the Republic of Slovenia reports that Article 205 of the Employment Act of 2002, and Articles 305-309 of the Civil Procedures Act of 2004 encourage conciliation, arbitration and settlement procedures. Judge Kuras of the Austrian Supreme Court reports that the statute regarding mediation came into force in 2004.

² Article 731 para 1 of the Judicial Code focuses on conciliation by a judge at the first trial, while Article 734 Para 1 of the same code makes preliminary conciliation mandatory before the labor court. See Storck *ibid*.

³ Michel Blatman, Conseiller a la Cour de Cassation, France, Article 21 of the New Code of Civil Procedure for individual disputes requires that "It shall be part of the duties of the judge to conciliate the parties. The Decree of 23 March 1978 was amended on 8 February 1995 and 22 July 1996 to establish an office for conciliation while Articles L 524 of the Code du Travail provides for conciliation before national or regional conciliation committees with mediation for collective redundancies under Article L 432-1-3 of the Code du Travail.

that done outside the court, while conciliation is defined as that done during the proceeding by the judge.⁴ At the Irish Equality Tribunal, conciliation is defined as “a process where the conciliator gets each party in private to identify their essential positions and uses this to push both parties to reach a compromise position”, while mediation is defined as “a process where both parties talk about the issues with the help of a professional mediator who helps them to reach a mutual agreement”.⁵

In the United States, the definitions used are similar to those at the Irish Equality Tribunal, with the conciliator as the facilitator relaying messages back and forth between the parties trying to narrow their differences, and the mediator as the more activist neutral interjecting new ideas and proposals beyond those offered by the parties themselves in an effort to bring closure. In reality most neutrals do both at different times, and the terms tend to be used interchangeably, in recognition that even the conciliator may introduce new concepts while the mediator may be limited to conveying messages between the parties. The legislative history of the U.S. Federal Mediation and Conciliation Service which provides this service in the labor field shows that the Senate bill for creation of the agency referred to it as a conciliation service while the House of Representatives bill called for the creation of a federal mediation agency. The agency name, incorporating both was a negotiated compromise. This paper will use the term conciliation, though the reader can sprinkle in the term mediation as desired.

The trend toward conciliation

The increasing resort to conciliation and its widespread endorsement as an alternative to labor court litigation underscores the value of discussing the process at the Bologna meeting. The change in attitude is due to recognition of the benefits of conciliation for the disputants as well as for the government’s judicial institutions. We all recognize the benefits of the parties resolving their disputes on their own by direct negotiations in order to avoid litigation. That is particularly true in the labor relations field where the ongoing relationship between disputants may be permanently disrupted when they surrender their control over the resolution of their conflict to judges and courts where the prime concern tends toward enforcement of statutory rights rather than the parties self interests. Judicial resolution of disputes certainly disposes of pending conflict, but may not go to the heart of the disputants’ problem and by adherence to the traditional role of parties winning or losing, may even intensify the conflict between parties in an ongoing employment relationship. A dispute before a labor court may focus on a simple matter of wage reimbursement masking much more volatile underlying problems between employer and employees. Deciding that a termination was for legal cause may leave unresolved deeper problems affecting that and other employees. Certainly the parties themselves can resolve their conflict on the courthouse steps by direct negotiations, and fortunately most parties do, but how much more conducive to such resolution could be the intervention of a facilitator to encourage communication between the disputants, or to provide them help in resolving not merely the issue that brought them to court, but the underlying problems of the parties interests and future relationship, issues that may well lie beyond the reach of the immediate litigation.

In commercial dealings one could rationalize that the disputants need never deal with one another again, but in the ongoing employment relationship, even a single termination may have implications for the rest of the work force that can not be addressed as easily in litigation as it can through direct or facilitated discussion between the parties in interest. Such discussions can do much more than litigation over a prior wrong to improve the posture and relationship of the parties for their future dealings.

Benefits for Court Administration

The reach of conciliation is not limited to the benefit of resolving issues prior to litigation. There is, I believe, a greater benefit of conciliation in helping to overcome many of the increasing problems

⁴ Judge Gerhard Kuras of the Austrian Supreme Court reports for the Austrian Labor Court.

⁵ Melanie Pine, Director, Irish Equality Tribunal.

facing administration of labor and other courts. We all recognize the increasing litigiousness that comes with an ever more highly educated and demanding electorate. Everyone wants their day in court, resulting in increased case filings, extended delays in pre trial depositions and discovery, more complex case processing, heavier burdens in scheduling ever crowded dockets, more and more time spent in writing decisions, and of course the increasing pressures of court appeals and interminable waiting for final closure of litigated disputes. The limited, if not strained financial resources of labor and other courts begs for an alternative to reduce the use or abuse of the process of litigation.

The experience of the majority of respondents is that availability of conciliation prior to the initiation of litigation, and indeed at any stage during the proceedings, is an asset in helping to avoid litigation, to shorten its ever lengthening duration, and to provide disputants with a more practical, immediate, efficient, cost saving process for overcoming their hostilities. Conciliation is faster, cheaper and brings more effective finality.

As an avowed proponent of the process, I would like to consider some attributes for a successful conciliation structure and process based on the experience of those of you who have responded to my survey, as well as from my own experience in designing effective dispute settlement systems for enterprises and governments.

Mandatory or Voluntary

Obviously one can not mandate an agreement by disputants or even an agreement to initiate negotiation of the pending dispute. Of the respondents, all systems other than the German have some form of systematized conciliation structure, and all provide some role for the Labor Court or the government to encourage the use of conciliation as an alternative, or at least a prelude, to proceeding to trial.⁶ Some systems do not have any formal conciliation procedure or relationship, making conciliation totally voluntary,⁷ and thus a matter left to the parties and beyond influence of legislation or the courts.⁸

However, a number of systems make the initial conciliation meeting mandatory.⁹ That at least provides the venue for persuading the disputants to voluntarily proceed with the process. In disputes where the parties are so hostile that they will not engage in direct negotiations, a directive ordering

⁶ Jeremy McMullen reports that the British Labor Court is required to send papers on incoming cases to the Advisory Conciliation and Arbitration Service(ACAS) a public body independent of government in most cases such as dismissal and discrimination.

⁷ Dr Mario Eylert of the German Labor Court reports that “an institutionalized system of mediation or conciliation is fairly unknown in Germany, yet 40% of all labor law disputes are settled by an agreement between the parties out of court, and 47% of cases settle at first hearings where judges evaluate cases with the parties. Judge Kuras of the Supreme Court of Austria reports that:

During the proceeding the court is obliged by procedural law to initiate conciliation...During the proceedings the Judge can recommend mediation....Conciliation by the court is used in almost all proceedings Mediation outside the court is used only occasionally.” Prof. Dr. Jamez Novak Supreme Judge of the Supreme Court of the Republic of Slovenia reports that conciliation is used for collective agreements, and that “the mediation proceedings/conciliation proceedings are not regulated by law. This method of amicable settlement of disputes is voluntary.

⁸ President Eggert Oskarsson of the Icelandic Labor Court reports that although there is no statutory requirement for conciliation “it can be initiated under all circumstances. Regularly the judge examines whether the parties think there might be grounds for conciliation” He does note that “... judges and attorneys regularly discuss the need for establishing by law a more formal conciliation mechanism”.

⁹ Dominica Whelan, Commissioner, Australian Industrial Relations Commission, reports that reference to conciliation is mandatory unless the commissioner “is satisfied that conciliation would not assist the prevention or settlement of the alleged dispute” or where “reasonable attempts to settle the matter by conciliation are likely to be unsuccessful”. Melanie Pine at the Irish Equality Tribunal reports that “mediation takes place in all cases where neither party objects to mediation ...”. Kevin Duffy of the Irish Labour Court reports that the initiation of conciliation is mandatory but that “the conciliation officer must certify that no further effort on his or her part will advance the resolution of the dispute before the Court can accept the case.” Antonio Martin Valverde of the Spanish Labor Court reports that “The activity by the Judge of trying the conciliation or agreement of the parties is mandatory in all cases”.

them to talk would accomplish little, but if the legislation requires a third party, either a government official or a professional conciliator, to meet with the parties, such a meeting may provide a valuable prod to help reduce the hostility between the disputants and inducing them to begin negotiations. Involvement of a skilled conciliator may provide the crucial link for establishing communication between the non-speaking disputants, even if it requires separating the parties to different rooms and shuttling between them with messages to reduce the intensity of their conflict.

Often such third party assistance is the necessary stimulus to overcome initial antipathy, with the disputants overcoming their resistance to direct discussions and negotiations thereafter. In some jurisdictions the presence of a judge as the third party provides even greater pressure on the disputants to talk, for fear of antagonizing the judge who may ultimately exercise control over the outcome of the case.¹⁰ Conciliation is an effective tool for resolving conflict between disputants because they are free to speak of their interests off the record, and before going to court to resolve questions of rights. The freedom of such wide ranging discussions might, however, be compromised if the third party is the judge to whom they will present their case for resolution.

Often things are said in confidence which at least one of the disputants would not be willing to admit if it were to be heard in court.¹¹ That is particularly true if the third party is also the person charged with making the final decision on matters of credibility. Thus, if an employee discharged for theft were to deny it on the record but to admit that theft to a conciliator with permission to resign in an effort to resolve the dispute, the admission to a conciliator would be confidential. Conciliators are generally given immunity from testimony for that very reason of encouraging disputants to speak freely, relying on their confidentiality.¹² However, if the conciliator is the same judge who might be called upon to make credibility finding when the employee at the trial denies theft, it would deter the admission and thus impose a chilling impact on the freedom of discussion which is so essential for effective conciliation. Judges obviously seek to rule on the basis of the most accurate information and facts, and an admission of theft in the conciliation, if learned by the judge as conciliator, would be hard to ignore when the judge became the decision maker. Judges, even those involved in encouraging the parties to early settlement prior to initiating their trials, are usually careful not to place themselves in a position where they would receive confidential information from one side which might impact on their objectivity in making rulings of fact or law.

Some systems use different judges for the two roles, with the judge who conducts a conciliation being a different individual than the judge who would be conducting the trial. Some countries using judges as conciliators follow the concept of “opt out”, i.e. that the judge conducting the conciliation will continue to serve as judge at the trial unless one or both of the parties exercise their option to opt out of that arrangement by requesting a different judge as decision maker. Some systems employ the alternative approach of “opt in”, where the assumption is that the judge who conducted the

¹⁰ Judge Tunde Hando. President of the Labor Court, Budapest Hungary reports that the conciliation is initially directed by the judge, and if unsuccessful, the case is scheduled for trial, with an initial “informal conversation without record conducted by the judge where the judge and the parties discuss the whole dispute”. When the parties first appear in the court for the trial “the judge must attempt the conciliation. It is an important obligation”. Judge Stefan Adler, President of the Israeli Court reports that although “mediation is generally done prior to the court hearing”, “the court attempts to convince the parties to mediate in almost all civil cases. In about a third of the cases the parties agree to mediate”. President Michael Koch of the Labor Court of Sweden reports that Swedish procedural law “states only that the court should work to promote a settlement between the parties, if this is deemed appropriate” but that it should be emphasized that the conciliation is performed by the court itself,” although it infrequently appoints a special mediator.

¹¹ Dominica Whelan, Commissioner of the Australian Industrial Relations Commission reports on the confidentiality of the conciliation process by noting there is no report of what occurred during the conciliation and added. “The general view is that the confidential nature of the process encourages the parties to make “without prejudice” offers and facilitates the finding of compromise outcomes”.

¹² Christian Storck in the Belgian report notes: “...the mediator is required to maintain professional secrecy and can not be called as a witness for any procedure in relation to the facts that the mediator learned during the mediation”. Judge Blatman reporting on France cites Article 131-14 protecting the privacy of the conciliation “The findings of the mediator and the declarations he has taken down may not be produced nor shall be relied upon in the course of the subsequent proceedings without the agreement of the parties, nor , in any case, be referred to in any other proceedings.”

conciliation will not conduct the trial, giving the parties the choice of jointly requesting that judge continue in the trial role by mutual agreement.¹³

If the priority is to encourage the parties to resolve their own disputes through direct negotiation or with the facilitative skills of the conciliator, the disputants must have sufficient faith in the integrity and confidentiality of the neutral to bare their souls in the hope that such open discussion will provide the tools for the conciliator to extract movement toward settlement from both sides. That is best done if the parties opt to select their own conciliator, although the cost and availability of such private neutrals may make their use infrequent or unattainable. Thus it is more practical and more economically feasible for the government to provide or to subsidize a separate conciliation service external to the court system, or even within the court system itself, as long as the neutrals therein have credibility and the reputation of respecting confidentiality. Certainly systems with a long history of encouraging conciliation even by judges are not to be automatically precluded from providing both conciliation and trial services. But their effectiveness in stimulating the disputants to frank discussion of underlying interests, depends upon their credibility and their ability to maintain a firewall between both functions and particularly between judges performing both functions.¹⁴

Conciliation Prior to or During Court Proceedings

All systems encouraging conciliation make a point of encouraging it prior to the intervention of the court, or as a first stop once inside the courthouse. But except in the UK where initiation of Labor Court jurisdiction precludes referral to conciliation,¹⁵ the failure to resolve a dispute in pre-litigation conciliation does not mean that all opportunities for settlement are lost.¹⁶ Indeed it could be argued that being put to the pressure of court preparation and impending trial, increases pressure on disputants to reconsider settlement, more than had been the case back before there was any fear of going to trial. In the case of the UK, that pressure is intensified by recognition that if the parties do not undertake to resolve their dispute with the assistance of ACAS conciliators, they may find the door to further conciliation locked and be forced to a judicial resolution. But in most countries, the tactful judge can also put pressure on the disputants at numerous stages during a trial suggesting that they might do better if they talk together out in the hall or avail themselves of the skills of an outside or a court appointed conciliator. Thus it is common practice for labor courts to encourage the parties to resort to conciliation even after a trial has commenced, holding the court proceedings in abeyance while the parties seek to conciliate their differences with an outside or court appointed conciliator. Such encouragement to conciliation might be a function of the court's recognition that the entire dispute could be resolved in conciliation eliminating the need for judgment while the parties reach agreement acceptable to both. It might also be recognition that even if only a portion of the dispute is resolved by the parties that is to their benefit while also benefiting the court by reducing the issues left within its jurisdiction. Once in litigation the parties themselves may recognize that their underlying

¹³ Dominica Whelan, Commissioner of the Australian Industrial Relations Commission reports on the procedures for cases filed with the Commission being assigned to commissioners as conciliators while the trial proceedings are held in abeyance to be conducted by a different commissioner. Judge Pekka Orasmaa, President of the Finnish Labor Court reports that "the judge who has failed in conciliating a case, is not allowed to hear the case as a judge." The Report from the Venezuelan Labor Court cites the use of two classifications: Judges of Mediation "who dealt with the case from the very beginning and during the phase of mediation" and judges of judgment "who intervene and have to decide the case if the conciliation or mediation fails once the phase of mediation is over."

¹⁴ Christian Storck, in the Belgian report notes "Under any type of mediation, the secrecy of mediation in regard to the judge is absolute. The obligation of secrecy may be lifted only with the agreements of the parties in order, namely, to allow the judge to approve the mediation agreement. Judge Blatman reporting on France cites Article 131-14 protecting the privacy of the conciliation "The findings of the mediator and the declarations he has taken down may not be produced nor shall be relied upon in the course of the subsequent proceedings without the agreement of the parties, nor, in any case, be referred to in any other proceedings."

¹⁵ Jeremy McMullen reports that the initial referral to ACAS gives them their opportunity for conciliation which is extinguished once the Court asserts jurisdiction.

¹⁶ President Oskarsson of the Icelandic Labor Court reports that "Once the case has been taken to the court, conciliation can be invoked at any moment." And that the Labor Court "can decide to suggest conciliation between the parties at any moment while the case is before the court. However the judges have to be very discreet in order not to disqualify themselves".

dispute can not be resolved by litigation of a narrow issue of rights, and that even a court decision will not resolve their bigger problems.

Restrictions on Issues

Some systems preclude conciliation of certain matters, such as constitutional protection, or even discipline.¹⁷ But most have no such restrictions,¹⁸ and indeed, if the disputants can resolve their disputes and withdraw them from the court on their own, why should they be barred from doing so with the assistance of a conciliator. For those matters that are unresolved, access to the courts remains with the courts holding in abeyance their exercise of jurisdiction for a fixed or indeterminate period of time.¹⁹

Qualifications of the Conciliator

Most of the responding systems indicated that the conciliator may be a private practitioner selected by the parties or designated by the court, or may be a judge of the court itself. Although in most countries there is no well established profession of full time conciliators, there is even less likelihood of having a developed cadre of professional conciliators with expertise in our labor relations field.²⁰ Nonetheless, conciliation has grown as a profession in several countries where disputants have turned to mutually accepted laymen to help resolve their conflicts. To the extent that the parties may be represented by attorneys, it is not unusual for adversary attorneys to agree upon mutually accepted colleagues to serve in the conciliation role. These individuals invariably conciliate on a part time basis. The litmus test for such selection is usually not necessarily expertise in the field of the dispute; rather it is acceptability, i.e. trust in the neutrality and integrity of the person selected with each party assuming the responsibility of educating the conciliator as to what is needed to be known to help the parties in reaching their settlement. Selected often enough, and effective in resolving the parties disputes, such individuals develop a reputation and often as well, a practice of service as a conciliator, perhaps in a variety of fields, not only in labor relations. In the United States there are numerous individuals who serve as private conciliators on a part time basis, usually with the parties sharing the payment of their fees. This cost figure, particularly in the labor relations field may be prohibitive for some disputants particularly employees.²¹ Conciliators may serve, on occasion, pro bono, but the need for professional conciliators outside the court system to help resolve disputes such as here under discussion, suggests the possibility of government provision of a subsidized corps of conciliators. Very few conciliators have the demand for services which enables²² them to conciliate on a full time basis. In some countries there have developed associations which maintain rosters of experienced and

¹⁷ Belgium precludes conciliation of social security issues such as industrial accidents. Hungary precludes conciliation of disciplinary matters. Venezuela precludes conciliation of issues of constitutional protections. Antonio Martin Valverde reports that in Spain issues such as constitutional rights and validity of clauses of collective agreements are not subject to mandatory conciliation.

¹⁸ In the UK for example, ACAS may conciliate on all topics.

¹⁹ Christian Storck of Belgium reports that the judge who orders mediation may suspend litigation proceedings for three months but intervene to shorten that period at any time. Michel Blatman reports a similar time frame in the case of France. In Hungary, according to Judge Hando, the parties may ask the judge to hold the court proceedings in abeyance for 6 months, although the practice is for conciliation to take" just a few days while the day appointed for the next hearing is 3 or 4 months away" Antonio Martin Valverde reports on Spain that the maximum duration of administrative professional conciliation is 15 days.

²⁰ Antonio Martin Valverde reports for Spain that, "In principle the conciliators are public officers. But the collective agreements can establish a different body of conciliators." In fact the conciliation of the disputes over collective controversies is often charged to conciliators who are not necessarily public officers.

²¹ President Hando of the Hungarian Labor Court reports that conciliators are compensated by the parties except "in special fields where the state operates the mediation service (consumer protection, public procurement procedures, health protection education and the labor interest disputes) some of the mediations are free and the mediators are compensated by the government".

²² The UK report submitted by Jeremy McMullen refers to the conciliation role of ACAS as the nations conciliation service in the employment law field.

acceptable conciliators,²³ while in other countries the government not only maintains rosters of conciliators, but also provides them with governmental registration or certification,²⁴ and may restrict the parties' selection to those on government lists.²⁵ In the United States, the Federal Mediation and Conciliation Service is a government funded agency employing conciliators who for the most part had spent their careers as partisans but who had sufficient acceptability to the other side to lead to their use as credible conciliators of labor disputes. FMCS Conciliators are full time government employees conciliating on a full time basis. Many state governments in the US also provide similar services for more localized disputes. In the UK the Advisory Conciliation and Arbitration Service (ACAS) is likewise staffed with fulltime professional conciliators.

Evaluative Approach

In court annexed structures, where the designated conciliator is likely to be a judge, there is less concern over issues of integrity and trustworthiness, or competence; those who decide such cases are presumed to be similarly neutral in their role conciliating such matters. Some systems assign the conciliation to judges dedicated to conciliation as their sole function, but for most it is a part time function in addition to their sitting on other cases as decision rendering judges. The role of the conciliator is quite different from the role of the case decider. There are those who say that judges have a tendency to bring to the dispute their legal knowledge and awareness of likely decisions in urging the disputants to settle their case with the potential decision as the benchmark. Experience developed in decision making may tend to influence the judge as conciliator to point out to the parties the potential of taking the court case to decision, and perhaps a warning of what might come as a decision, and suggestion of settlement that is more favorable to the disputants than the risk of a judge's decision. That evaluative approach to conflict resolution certainly has its place and advocates. In some respects the judge as conciliator is similar to the neutral case evaluator, forecasting the outcome of litigation, and urging the parties toward a more mutually acceptable result.

Facilitative or Transformational Approach

Yet, there are those who argue that the conciliator should focus more on trying to bridge the gap between the disputants' underlying concerns and interests rather than warning them of a potential consequence of their dispute going to decision. The term facilitative conciliation is applied to the effort to get the parties to overcome their prior differences and seek mutual accommodation, thus facilitating a resolution. The term transformative conciliation is applied to the more probing effort to get the parties to not merely accommodate for the resolution of the pending dispute, but rather to transform their relationship from the hostility or confrontation that led to the conflict to better understand each other and so transform their relationship to something more positive for their future together. One can scarcely deny the benefit of the last approach when dealing with disputants in labor relations where the relationship is destined to continue beyond the immediate dispute. But it is a far more difficult undertaking for a conciliator oriented to the problems of labor law and labor relations, to have the skills or to be willing to undertake the training to gain the skills to enable him or her to

²³ In the United States organizations such as the American Arbitration Association and JAMS maintain rosters of conciliators. The Alliance for Education in Dispute Resolution is an association of 20 universities and organizations which has trained several hundred mediators in a 40 hour training program with emphasis on employment law, offering the roster on its web page to interested users www.ilr.cornell.edu/alliance.

²⁴ Christian Storck reports that in Belgium "The mediators are approved by the federal commission of mediation which is composed of a general commission and three special commissions (with the latter specializing in family matters, civil and commercial matters and social matters) In order to be approved as a mediator, the applicant must have, namely though present or past activities, the required qualification with regard to the nature of the dispute, present academic training or experience related to the practice of mediation, as well as present guarantees of independence and impartiality required for the exercise of mediation". Judge Blatman reports that in France Conciliators of justice are listed on a roster held by the courts, while "Mediators are chosen on an ad hoc basis, but generally within a list of persons approved by the court." President Hando of the Hungarian Labor Court reported that the Ministry of Justice keeps a list of mediators.

²⁵ Judge Kuras reports from Austria that the Minister of Justice maintains a fixed roster of conciliators, and that "only members of these lists are entitled to act as mediator" and that the parties can select any member of the list.

bring the parties to a close and more productive relationship for their future after the conciliation. The emphasis on learning and trying to reconcile the disputants' interests involves more of a psychological approach than most judges or even attorneys are comfortable or familiar with. The conciliation may often turn to issues of personal and family relationships, far more "touchy feely" than a judge may deem appropriate in warning disputants of the risk of proceeding to court decision. Yet if the end goal is to help the parties resolve the dispute that has disrupted their relationship in the hope that it can lead to improved relations in the future, then understanding their base emotions and needs may be important, not merely to avoid a court decision, but to leave the parties better off than when they came into the process.

Conciliator Training

Unless conciliators are already experienced and knowledgeable in the substantive issues arising in the dispute, it is important that they gain the requisite information for them to be effective conveyors of messages and innovators of creative ideas for potential settlement. If the issue in dispute is a strictly legal matter and the conciliator a judge or attorney who has dealt with that issue in the past, that prior experience will enable the conciliator to better understand the parties' positions and interests, and inform them of the risks of continuing to litigation or failing to settle.²⁶ If the conciliator does not have that expertise, it is important that it be provided.²⁷ Unfortunately, that expertise might not be impartially or fully presented if only one of the disputants is providing the needed background and information to educate the conciliator. For that reason it is important that the parties select as conciliator not only one whom they trust, but one who has the requisite knowledge of the specialized issues in dispute. Conciliator training on substantive issues or issues of law can be provided by the courts, or the bar association or sought out by the conciliators in extra training to give them the information needed to assure both disputants are operating from a level playing field in dealing with such substantive matters²⁸. Training on social security law, statutes governing termination benefits, workers compensation and the like would enhance obviously the skill and effectiveness of conciliators.

If conciliators are to make the fullest and most effective use of the process, they would be helped by the provision of training in conciliation techniques, as well, to get beyond the threat that "You'd better settle at x because I know that if you went to decision the judge would order y" Increased sensitivity in dealing with the parties' needs and concerns, and learning how to gain their confidence to entice them into the settlement realm are not things taught in law schools or courts, and may be more the domain of family and interpersonal disputes. However those disputes are the daily fodder for the conciliator, and learning better how to deal with peoples personal problems is a helpful assist in becoming an effective and efficient conciliator. Most of the systems surveyed had provision for training, but only in the Israeli system was there mention of specialized substantive training for issues of mediation.²⁹

Evaluation

Although most of the systems responding to the survey indicated satisfaction with the development of their conciliation projects in the past few years and hope that the systems will be even more effective in the future there is little evidence of professional or comprehensive evaluation programs. Some systems consider the tabulation of settlements as a type of evaluation, but only the Irish Equality

²⁶ Dominica Whelan reports that in Australia "The general view is that the confidential nature of the process encourages the parties to make 'without prejudice' offers and facilitates the finding of compromise outcomes.

²⁷ Dominica Whelan reports that the AIRC "is organized into industry panels headed by a Vice President or Senior Deputy President who allocates files to panel members".

²⁸ Dominica Whelan reports that "...the Australian Industrial Relations Commission runs its own training for members on legislation and relevant case law."

²⁹ President Stefan Adler of the Israeli Labor Court pointed out the need for specialized training for conciliators working in particular industries as in the diamond cutting industry.

Tribunal responded that it has a program involving a confidential user survey.³⁰ Computation of cases settled does give a sense of the effectiveness of the process compared to completed litigation. However, an effective evaluation program is not merely to count “wins and losses”. Rather it is to examine the various components of the program including the efficiency and effectiveness of administration, the skills of the conciliators and the acceptability of outcome, by a comprehensive questioning of those who have used the system. Ideally such questionnaires should be provided to all users at the completion of the conciliation asking questions of how the process was conducted, the effectiveness and skill of the conciliator, and whether the participants had a sufficient involvement as well as their assessment of the outcome of the effort. Only through such ongoing routine and continuous evaluations over time can the administrators of the system learn from their mistakes and seek to overcome the objections, concerns and misgivings of the participants they are endeavoring to serve. A one time evaluation is better than none. However, each set of participants should be given the opportunity to comment on the process and the conciliator as a routine end of conciliation exercise, as a means of informing the administrators of opportunities for improvement.³¹

Impact of Conciliation on the Courts

According to the reports provided, there has been increasing endorsement of the conciliation effort as adopted through most of the responding countries. Viewed from the perspective of the responders, conciliation has proven successful in several respects.

First it has resulted in the reduction of litigation as more and more cases are settled in conciliation. This has of course reduced the judges’ case load.³² In Australia it is reported that 75% of termination cases are settled and only 6% proceed through to final adjudication.³³ In the UK an estimated one-third of cases are concluded in conciliation.³⁴ In Venezuela it is reported that 90% of cases are resolved in conciliation with only 10% going to trial.³⁵ In Spain it is reported that 24% of dismissal disputes are settled in judicial conciliation.³⁶ It has facilitated the litigation with the conciliated cases being taken off the docket to leave time for the more complicated cases to proceed to litigation.³⁷

Second, conciliation is speedier than litigation, with resolution achieved in a matter of hours or days, rather than through protracted litigation, filings, decision writing time and potential appeals.³⁸

Third, conciliation is cheaper for the parties and the courts permitting them to dispose of disputes in a resolution acceptable to the disputants while dedicating the courts resources to the litigation of the

³⁰ Melanie Pine reports that “Informal feedback from users is also a feature of the operation of the service.

³¹ President Adler of the Israeli Labor Court reported that the Ministry of Labor had conducted a comprehensive evaluation of mediation at the labor court with completion of questionnaires, which were processed by the Justice Ministry’s mediation institute. But since the Institute has been closed there have been no subsequent evaluations.

³² Chairman Kevin Duffy of the Irish Labor Court reports that “Approximately 70% of the cases submitted to conciliation are settled. This has a corresponding easement on the workload of the court”. President Michael Koch of the Swedish Labor Court reports that more than 40% of the cases in the labor court are resolved through conciliation. Vice President Gisle of the Norwegian Labor Court reports: “If mediation is conducted in cases where chances to come to an agreement are good, this may result in less work for the court and have a positive effect on the work situation of the court.”

³³ Report of Dominica Whelan.

³⁴ Jeremy McMullen report from UK on the role of ACAS.

³⁵ The Venezuelan report notes that conciliation has “a great impact in the work and operation of the court, since the judges have to decide the matters in which conciliation has been impossible, so less cases to decide and more time available for it”.

³⁶ Antonio Martin Valverde reports the statistics were for 2004.

³⁷ President Adler reports for Israel that “Mediation has reduced the judges’ workload. In particular mediation of small claims has allowed the judges to concentrate on more complicated cases.”

³⁸ Melanie Pine of the Irish Equality Tribunal reports “Mediation is quicker than conclusion of a case through formal hearing and is an important case management tool accordingly.” Dominic Whelan of the Australian Industrial Relations Commission reports “Most disputants appreciate the value of conciliation. It is a faster and lower cost option to litigation.”

more complicated and standard setting cases. The respondents acknowledged that provision of conciliation has not had an impact on the courts ability to make important case law.³⁹

Fourth, even if a dispute is not totally resolved in conciliation, the process refines the issues in those cases that proceed to litigation. As noted in the case of Norway, “Mediation may also save the parties work and expenses, as well as contribute to a good climate and a will to cooperate among the participants on other sides of working life.”⁴⁰

Fifth, beyond resolving disputes which otherwise might find their way to judgment in the labor courts, conciliation, once proven as an effective tool for resolving disputes otherwise headed for court, might find its usefulness in helping to resolve disputes in fields other than labor relations.⁴¹

Better Resolutions

It is difficult to assess whether the outcome of conciliation, while acceptable to the parties, is a better resolution than a labor court judgment setting a legal standard for the entire society. One view is that despite the availability of conciliation, the parties may “prefer a straight solution to their conflict than a soft settlement with the adversary”.⁴² Another view is that many disputants are not yet sufficiently aware of the availability of conciliation to make it an appreciated alternative to judgment, and that it is a process that requires more encouragement and publicity.⁴³ However the comments of most of the respondents indicate an endorsement of the parties’ conciliated settlement over the decisions of the court particularly because they can encompass matters that may be beyond the jurisdiction of the courts,⁴⁴ and because they can be of particular value in preserving or reestablishing goodwill in continuing relationships.⁴⁵

Conclusion

³⁹ President Koch of the Swedish Labor Court reports “Conciliation can not be said to impact adversely on the courts making of case law. Important issues are seldom settled by conciliation” Dominica Whelan of the Australian Industrial Relations Commission reports “There would appear to be cost and convenience advantages in the use of conciliation/mediation as an alternative to litigation”.

⁴⁰ Vice President Gisle of the Norwegian Labor Court. As noted by Chairman Kevin Duffy of the Irish Labor Court, “Even where a case is not settled, the conciliation process will refine the range of issues between the parties. This is of considerable benefit to the court”.

⁴¹ Melanie Price of the Irish Equality Tribunal pointed out: “Mediation has become increasingly acceptable as is reflected in the increasing number of cases resolved through mediation. In particular, it has become more acceptable to legal and trade union representative. Increasingly the successful record of mediation in the Equality Tribunal has encouraged the Irish Government to provide for mediation in other areas of litigation such as insurance claims”. On a personal note, I would add as Chairman of the Alliance for Education in Dispute Resolution I arranged for a pilot program at the US Department of Labor where cases scheduled for litigation by the Labor Solicitor were offered the opportunity for conciliation. Our final evaluation shows that 86% of the cases which went to conciliation were resolved. The full report is at www.ilr.cornell.edu/alliance

⁴² Michel Blatman of the French Labor Court added, “They usually feel to be acting by right and intend to get legal answer to their problem. The situation is different when the contract of employment is still current.”

⁴³ President Hando of the Hungarian Labor Court reports “... the clients don’t know the conciliation and how it is available. Therefore we initiated a cooperation between the court and the Association of Mediators with the intention to make the conciliation/mediation become well known”.

⁴⁴ President Koch of the Swedish Labor Court reports that “If a settlement is reached it saves a lot of work for the court and can be more advantageous for the parties than a ruling of the court.” Melanie Pine of the Irish Equality Tribunal reports that “feedback from the parties involved in mediation has indicated that mediation is seen as a very positive experience. In addition mediation can lead to solutions which meet both parties’ needs and which go beyond the redress which by law could be awarded by the Tribunal.”

⁴⁵ Judge Blatman reports that in France “Where disputes brought before the labor court imply dignity of the employee, psychological aspects, passionate or family relationships between parties, and when the employee still works for his/her employer mediation looks appropriate. But it is difficult to consider this means of settling disputes as a general solution to the increasing number of labor litigations.

The majority of reports indicate that there has been an increase in resort to conciliation in the past few years and that the parties are more attuned to its benefits and more comfortable with the process.⁴⁶ The same certainly holds true for the reporting courts who note that the ability to refer disputants to conciliation has helped them in their administration of the labor court systems.⁴⁷ The comments of the report from Slovenia may similarly be reflective of the future problems facing labor courts in other countries: “Considering the absolutely excessive number of new cases before all Slovenian Courts, there are strong tendencies present, particularly in the professional circles, that the disputes should be resolved in special proceedings of amicable substitute settlement procedures and not in court proceedings.”⁴⁸ President Adler of the Israeli Labor Court has underscored the obvious preferability of disputants resolving their own disputes as achieving the “most just solution”.⁴⁹ And finally, as one may gather by now, I share the view of Judge Duffy of the Irish Labor Court: Conciliation should be “most definitely encouraged”.

⁴⁶ Michel Blatman of the French Labor Court reports “Mediation is receiving a better welcome”.

⁴⁷ President Orasmaa of the Finnish Labor Court reported “Mediation has certain advantages. When appropriate, mediation should be encouraged”. President Hando of the Hungarian Labor Court reported “Mediation should be encouraged”.

⁴⁸ Report of Supreme Judge Novak.

⁴⁹ Many participants have acknowledged the importance of settling disputes by agreement and expressed the sentiment that an agreement is the “most just” solution to a dispute. The active mediation role of the labor courts in the past few years has convinced many in labor relations that an agreement is preferable to a court judgment or a strike.

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

by **Dominica Whelan,**
Commissioner,
Australian Industrial Relations Commission

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

In Australia industrial disputes and unfair dismissal claims are handled by industrial tribunals that are not courts of law. They practice conciliation in virtually all matters that come before them. Enforcement of entitlements under awards or orders of the industrial tribunals generally involve proceedings in a civil Court. The Court also deals with claims of unlawful termination of employment (generally failure to give notice or dismissal for discriminatory reasons). A Court may refer a matter to mediation by a Court registrar or may defer proceedings while conciliation by a member of the industrial tribunal occurs.

1.1 Is there a statutory requirement for conciliation? If so, what does it require?

Where an industrial dispute comes before the Australian Industrial Relations Commission (AIRC) the matter must be referred for conciliation unless the relevant member is satisfied that conciliation would not assist the prevention or settlement of the alleged dispute. Where a claim for unfair or unlawful dismissal is made the Commission must attempt to settle the matter by conciliation unless it is satisfied that all reasonable attempts to settle the matter by conciliation are likely to be unsuccessful.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

Where a matter is brought before a Court of law the referral of the matter to mediation is at the discretion of the presiding judge. Where the matter is before the AIRC 1.1 applies.

1.3 Is there a routine or occasional use of conciliation?

Conciliation by industrial tribunals is routine. It only occasionally occurs where matters are before a Court.

1.4 Is the use of conciliation increasing or decreasing?

Conciliation has been a feature of the Australian system for 100 years.

1.5 Does resort to conciliation require agreement of the disputants?

No.

1.6 Are there issues which are barred from conciliation?

No.

1.7 Where does the conciliation fit into any appellate proceedings?

Conciliation may occur at any stage in the proceedings.

2. What is the timing of the conciliation; when does it occur?

In the industrial tribunals conciliation usually occurs as soon as the Commission is notified of a dispute or an application is lodged.

2.1 Is it done prior to the Court taking jurisdiction over the case?

As the Court usually deals only with enforcement conciliation will usually have occurred at some stage in the Commission proceedings. In the case of unlawful dismissal claims conciliation by the AIRC occurs before the application is lodged with the Court.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

A matter may be the subject of conciliation after the Court has proceedings before it. A party may, for example, seek that the AIRC conciliate the dispute while at the same time enforcement proceedings are before the Court.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

A judge may at his/her own discretion adjourn an application while conciliation is occurring in the Commission.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

The Court is not usually involved in dispute resolution. This is generally the role of the industrial tribunals. The Court may deal with a matter where part of the dispute relates to the interpretation of an existing Commission award, or order, or an industrial agreement or where industrial action associated with the dispute is claimed to be in breach of the law.

2.5 How often is conciliation used compared to straight litigation?

Most matters are dealt with in conciliation although changes to the legislative provisions since 1996 have resulted in more litigation occurring, particularly in relation to industrial action associated with a dispute.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

Conciliation of a dispute continues until an agreement is reached, or the member of the Commission is satisfied that there is no reasonable likelihood that further conciliation will result in agreement, or the parties inform the member that there is no likelihood of agreement and the member does not have a substantial reason to refuse to regard the conciliation proceeding as completed.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

Generally the time during which conciliation may occur is a matter for the relevant member and the parties.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

By consent of the parties the matter may go back into conciliation at any time.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

Conciliation is a confidential process. The terms of agreement reached are usually made public but there is no report of what occurred during the conciliation. With the conciliation of unfair/unlawful dismissal claims, where settlement is not reached, the Commission must produce a certificate stating that conciliation is unlikely to lead to settlement and providing the parties with an assessment of the merits of the claim. The general view is that the confidential nature of the process encourages the parties to make 'without prejudice' offers and facilitates the finding of compromise outcomes.

3. What are the qualifications of the conciliators?

Members of the Australian Industrial Relation Commission may be lawyers or persons with experience at a high level in industry or commerce or otherwise have appropriate skills and experience in the field of industrial relations. Current members have completed training in mediation.

3.1 How are conciliators selected?

The AIRC is organised into industry panels headed by a Vice President or Senior Deputy President who allocates files to panel members.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

See 3.1

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

Members are full-time statutory appointees.

3.4 What are the experience and/or training requirements for serving as a conciliator?

The experience requirements are the same as for appointment. All members are required to keep acquainted with industrial affairs and conditions. The Commission undertakes its own professional development programs.

3.5 Are conciliators used on a full-time or part-time basis?

See 3.3.

3.6 Are they compensated by the court or parties or government?

Members are statutory appointees paid by government.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

Rates of remuneration are set by a Remuneration Tribunal established by the Government in the same way as judges' salaries are set.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

There are no formal evaluation processes.

4. What subject matters may be submitted to conciliation?

Subject matters within the jurisdiction of the Commission to conciliate are set by the relevant legislation. Generally speaking they include any matter concerning the relationship of employer and employee about which there is a dispute or a potential dispute. Matters concerning termination of employment, the facilitation of the negotiation of an industrial agreement between parties and disputes about the application of such agreements may also be dealt with in conciliation.

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

Any matters which the parties wish to pursue may be dealt with in the conciliation process even if they would otherwise be outside of the jurisdiction of the Commission or the Court.

4.2 What are examples of issues conciliated and the frequency of their submission?

In 2003-2004 the Commission dealt with 2121 dispute notifications, 480 applications to stop or prevent industrial action, 753 applications to settle disputes over the application of industrial agreements, 7044 applications relating to termination of employment and 83 applications for conciliation in the making of an agreement. All of these would generally be dealt with by conciliation as an initial step.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

No, although the AIRC runs its own training for members on legislation and relevant case law.

4.4 Does the court monitor the progress of the conciliation? If so, how?

No.

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

The use of conciliation assists in preventing matters from proceeding to Court hearings.

5.1 What is the impact of conciliation on the volume of cases coming to the court?

This is difficult to judge. However, 75% of matters relating to termination of employment are settled in conciliation and only some 6% eventually proceed to a hearing.

5.2 What is the impact on the work and functioning of the court?

This is also hard to judge because of the current divided jurisdiction between the industrial tribunals and the Courts.

5.3 Does conciliation adversely impact on the court's making of case law?

No.

5.4 Do the disputants prefer conciliation to litigation?

Most disputants appreciate the value of conciliation. It is a faster and lower cost option to litigation.

5.5 Have there been any changes in attitudes toward mediation since its introduction?

Because of the long history of the use of conciliation in Australia this would also be hard to judge. However, private mediation, as opposed to conciliation by Commission members is currently being trailed.

5.6 Should mediation be encouraged, discouraged, or ignored?

There would appear to be cost and convenience advantages in the use of conciliation/ mediation as an alternative to litigation.

AUSTRIA

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Dr. Gerhard Kuras,
Supreme Court of Austria,
Vienna**

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

1.1 Is there a statutory requirement for conciliation? If so what does it require?

I want to distinguish two kinds of conciliation –

- a. pre trial conciliation or conciliation done outside the court (mediation), and
- b. conciliation during the proceeding done by the judge (conciliation).

There is no statutory requirement for pre- trial mediation. There are only some collective agreements which require this. During the proceeding the court is obliged by procedural law to initiate conciliation..

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

Its up to the discretion of the court to initiate conciliation during the legal proceeding. Mediation (outside the court) is not mandatory. It has to be initiated by the parties. During the legal proceeding the judge can recommend mediation.

1.3 Is there a routine or occasional use of conciliation?

Conciliation by the court is used in almost all proceedings. Mediation outside the court is used only occasionally.

1.4 Is the use of conciliation increasing or decreasing?

Rather increasing.

1.5 Does resort to conciliation require agreement of the disputants?

Yes.

1.6 Are there issues which are barred from conciliation?

Not in labour law.

1.7 Where does the conciliation fit into any appellate proceedings?

Conciliation by the court fits only if there is an oral hearing. Mediation outside the court can be initiated by the parties at any time.

2. What is the timing of the conciliation; when does it occur?

Usually at the beginning of the proceeding.

2.1 Is it done prior to the Court taking jurisdiction over the case?

Mediation is usually done prior to the Court taking jurisdiction but it also can be recommended by the judge.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

The attempt for conciliation is part of the proceeding before the court. Mediation outside the court may be initiated by the parties or be recommended by the judge at any time.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

There is no special impact but the parties can agree to stop the proceeding for a period.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

The proceeding regarding the rest will continue.

2.5 How often is conciliation used compared to straight litigation?

Mediation is only used sometimes. Conciliation before the court is used very often.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

The duration Of mediation is decided by the parties, the duration of conciliation before the Court is prescribed by the judge.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

If both parties agree the proceeding also may be held in abeyance to continue outside conciliation.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

Each party can reactivate the process.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

If the proceeding continues usually there will be a report to the court

Conciliation is done by the judge during the proceeding.

Mediation is done by a mediator.

3.1 How are conciliators selected?

By the parties .

3.2 Is the designation of the conciliator made by a court judge or by another agency?

See Question 3.1.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

There is no fixed roster but there is a list (kept by the minister of justice). Only members of these lists are entitled to act as mediator. The Parties can select every member of this list.

3.4 What are the experience and/or training requirements for serving as a conciliator?

There are a lot of requirements for serving as mediator (300-500 training units). Only people who fulfil these requirement can become member of the list.

3.5 Are conciliators used on a full-time or part-time basis?

There are no provisions about this.

3.6 Are they compensated by the court or parties or government?

By the parties.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

By the parties.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

No.

4. What subject matters may be submitted to conciliation?

All kind of matters.

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

Mediation is not restricted.

4.2 What are examples of issues conciliated and the frequency of their submission?

At the court all kinds of disputes are conciliated. Outside the court mediation is used labour matters especially regarding dismissal disputes.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

Mediator must have a specific training for mediation.

4.4 Does the court monitor the progress of the conciliation? If so, how?

Conciliation is done by the court. Mediation is done outside the court. There are no specific provisions for monitoring the progress of mediation .

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

5.1 What is the impact of conciliation on the volume of cases coming to the court?

There are no statistics.

5.2 What is the impact on the work and functioning of the court?

In some cases mediation can help to achieve a peaceful settlement of a dispute.

5.3 Does conciliation adversely impact on the court's making of case law?

No.

5.4 Do the disputants prefer conciliation to litigation?

Sometimes.

5.5 Have there been any changes in attitudes toward mediation since its introduction?

The statute regarding mediation came into force 2004. So we have not a lot of experiences.

5.6 Should mediation be encouraged, discouraged, or ignored?

Mediation should be encouraged.

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

by Christian Storck
Adviser, Cour de cassation,
Belgium

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

According to Article 731, Paragraph 1 of the Judicial Code, each dispute claim addressed to the court may be submitted, before hearings and on the request of one party or of both parties, to *conciliation* by a judge competent at the first trial (provided that the litigant parties are competent¹ to bargain and the concerned dispute can be resolved through negotiation.)²

Under Article 734, Paragraph 1 of the same Code, insofar as the litigations concern work contracts, *preliminary conciliation* is mandatory before the labour court.

Mediation, which is different from conciliation, is not carried out by a judge but supposes the intervention of a third party – the *mediator*. Mediation has been regulated in Belgium so far by various legal acts which are scattered and without much coherence. It has not been expressly regulated in social matters. In a judgment of 27 April 2004, the Labour Court of Liège considered mediation as a measure of investigation which, even in the absence of legal text, can be ordered by a judge (and the judge cannot be reproached for having delegated his/her function to judge). This isolated ruling has been deemed audacious.

The law of 21 February 2005 *modifying the Judicial Code concerning mediation* introduced to this code Part Seven, entitled “Mediation”. This law is expected to come into force on 30 September 2005.

1.1 Is there a statutory requirement for conciliation? If so, what does it require?

Like conciliation, mediation supposes, as a rule, that the dispute can be resolved by negotiation³ (C. jud., art. 1724, Para. 1).

Also, public entities⁴ can be parties in a mediation in the cases listed by law or royal decree after deliberation by the Cabinet⁵ (C. jud., art. 1724, Para. 2).

However, the social security issues (in a broad sense) – including the industrial accidents – are of general public interest, for which bargaining is normally impossible and the claims related to these matters cannot be carried out through mediation.

Thus, in principle, mediation in labour courts is possible only in the field of labour legislation.

¹ Other possible translations: able, capable.

² Other possible translations: settlement, deal, transaction.

³ Other possible translations: settlement, deal, transaction.

⁴ Other possible translations: moral persons of public law.

⁵ Council of Ministers.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

The judge is entitled, on his/her own initiative, but with the agreement of the parties, to order mediation as long as the case is not yet under deliberation by the court (C. jud., art. 1734, §1, Para. 1).

1.3 Is there a routine or occasional use of conciliation?

Preliminary mandatory conciliation hardly produces any results. It is more of a formality – which is nevertheless prescribed under sanction of nullity. It is done as a matter of routine and not as a real mode of conflict resolution.

Mediation, which requires the agreement of the parties and supposes their common willingness to find a negotiated solution to their dispute under the aegis of a third competent party, appears by nature a more suitable alternative mode of dispute resolution.

1.4 Is the use of conciliation increasing or decreasing?

In cases where conciliation is not mandatory, it is not frequently used.

It remains to be seen whether mediation will be frequently used in the field of labour legislation.

1.5 Does resort to conciliation require agreement of the disputants?

Mediation, as previously stated, supposes agreement by the parties.

1.6 Are there issues which are barred from conciliation?

See above n° 1.1.

1.7 Where does conciliation fit into any appellate proceedings?

Preliminary conciliation occurs exclusively before a judge at the first trial.

By contrast, *mediation* may be ordered for the first time at the level of appeal (but not before the Cour de cassation⁶) (C. jud., art. 1734, § 1, al. 1).

The decision ordering mediation, like those which extend or stop it, cannot be appealed (C. jud., art. 1737).

2. What is the timing of the conciliation; when does it occur?

The law distinguishes:

- *voluntary mediation*, where the parties agree, without going to the judge, to try mediation; it does not matter whether or not they are already engaged in trial;
- *judicial mediation*, ordered by the judge, on the request of the parties or on his/her own initiative, but with the agreement of the parties.

⁶ i.e. the third (final) level.

The law also provides for cases where the contract contains a *clause of mediation* which obliges the parties to have recourse to mediation prior to any other mode of resolution of the disputes related to this contract.

2.1 Is it done prior to the Court taking jurisdiction over the case?

When there is a valid *clause of mediation*, the judge in charge of the case suspends the examination of the litigation if one party invokes it (C. jud., art. 1725, § 2). This kind of clause, however, is not an obstacle to requests for temporary and protective measures (C. jud., art. 1725, §3).

Voluntary mediation can occur prior to, during or after the judicial procedure (C. jud., art. 1730, § 1).

Judicial mediation is possible as long as the litigation is not yet in the stage of deliberation by the court (C. jud., art. 1734, §1, al. 1).

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

By ordering mediation, the judge determines the initial duration of the task of the mediator, which cannot exceed three months, and fixes the date of a new audience (C. jud., art. 1734, § 2), during which the parties inform the judge about the result of the mediation. If agreement is not reached, the parties can request a new period of mediation or the continuation of the procedure (C. jud., art. 1734, §3).

During mediation, the judge remains engaged and can, at any time, take any measure which seems relevant to him/her. He/she also can, on the request of the mediator or one of the parties, end the mediation before the initially fixed termination date (C. jud., art. 1735, §3).

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

Judicial mediation may deal with only a portion of the dispute (C. jud., art. 1735, § 2).

The judicial power remains intact concerning the part of the litigation which is not subject of mediation.

2.5 How often is conciliation used compared to straight litigation?

Without subject.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

See above, n° 2.3.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

See above, n° 2.3.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

The audience that the judge fixes after the expiration of the initial duration of the mediation must be the first useful audience (C. jud., art. 1734, §2 *in fine*).

The litigation can be brought to the judge before the planned date by a simple written declaration submitted or addressed to the clerk's office by the parties or by one of them. The decision on the litigation is taken within fifteen days following the request (C. jud., art. 1735, § 5, al. 1).

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

Under any type of mediation, the secrecy of mediation in regard to the judge is absolute. The obligation of secrecy may be lifted only with the agreements of the parties in order, namely, to allow the judge to approve the mediation agreement (C. jud., art. 1728, §1, Para. 1).

Otherwise, the mediator is obliged to maintain professional secrecy and cannot be called as a witness for any procedure in relation to the facts that the mediator learned during the mediation (C. Jud., art. 1728, §1, Para. 3).

3. What are the qualifications of the conciliators?

3.1 How are conciliators selected?

The mediators are approved by the federal commission of mediation, which is composed of a general commission and three special commissions in charge of assisting the general commission by giving opinions.

The general commission is composed of two lawyers,⁷ two notaries⁸ and two representatives of the mediators, which are neither professional lawyers nor notaries. These persons must have specialization in mediation.

The special commissions, of similar composition, have respective fields: family matters, civil and commercial matters, and social matters.

In order to be approved as a mediator, the applicant must have, namely, through present or past activities, the required qualifications with regard to the nature of the dispute, proven academic training or experience related to the practice of mediation, as well as present guarantees of independence and impartiality required for the exercise of mediation (C. jud., art.1726, §1).

The mediators must have ongoing training.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

In case of judicial mediation, the appointment of the mediator is made by the judge, with the agreement of the parties, among the approved mediators (C. jud., art. 1734, §1st, Para. 1).

⁷ Other possible translations (it depends on the country) : advocate, barrister, attorney-at-law.

⁸ Other possible translation: solicitor.

The parties may, jointly and in a motivated manner, request the appointment of a non-approved mediator. The judge is allowed to accept this request exclusively in the case whether it is demonstrated by the parties that any approved mediator with required competencies for the needs of the mediation is not available. In addition the judge checks if the proposed mediator meets the conditions required for the mediators.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

The general commission is allowed to withdraw the approval of a mediator who no longer meets the necessary requirements.

3.4 What are the experience and/or training requirements for serving as a conciliator?

The experience requirements are defined by the federal commission.

3.5 Are conciliators used on a full-time or part-time basis?

Normally the function of mediator is not used on a full-time basis.

3.6 Are they compensated by the court or parties or government?

and

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

The protocol of mediation must contain a provision on the mode of determination and the rate of fees of the mediator, as well as the modalities of the payment (C. jud., art. 1731, §2, 6).

The cost of the mediation is part of collectable expenses and consequently paid by the parties. The sharing of expenses is decided by the judge.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

The federal commission, which is in charge of elaborating the code of good practice, will also assess the mediators and can also discharge them.

4. What subject matters may be submitted to conciliation?

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

In the case of judicial mediation, it is in principle limited to the subject of the litigation or a part of it.

Taking into account the lack of experience in mediation in Belgium, it is premature to answer other questions.

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

by Judge Pekka Orasmaa
President, Labour Court
Finland

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

In Finland the competence of the Labour Court is confined to the sphere of collective labour law. An individual employee can file a case in the Labour Court only if he has the benefit of a collective agreement. If he does not, he has to go to the civil court to enforce his rights. Thus claims based on individual employment contracts and statutory labour law are heard and tried within the system of regular courts.

Most collective agreements provide for a grievance procedure for settlement of disputes concerning the application of the agreement in question. The typical industry-wide collective agreements in manufacturing provide that if a disagreement between an employee and his immediate supervisor cannot be settled between them, grievance negotiations shall be conducted first between the supervisor and the shop steward of the department and then between the management and the chief shop steward of the plant. If local negotiations fail, either party may ask for negotiations between the federations that are parties to the agreement. Should these negotiations fail, the dispute may be brought before the Labour Court.

Although all courts have a general duty to help the parties to reach a settlement in the case concerned, the Labour Court does not request the parties to go to mediation before a hearing.

The new legislation concerning the conciliation and the confirmation of settlements in civil cases handled by regular courts has been recently accepted in the Parliament and it enters into force in 2006. According to the new legislation conciliation would cover also labour law disputes meeting the general requirements explained above. Matters belonging to the jurisdiction of the Labour Court would not be covered.

This report is based on the new legislation mentioned above.

1.1 Is there a statutory requirement for conciliation? If so what does it require?

According to the Section 1 of the Act on the Conciliation in Civil Cases in Regular Courts, conciliation covers disputes that fall within the jurisdiction of regular courts. A prerequisite for conciliation is that the subject matter is by nature suitable for conciliation and that conciliation is also otherwise deemed appropriate having regard to the demands of the parties.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

Conciliation is intended to be an alternative to trial and voluntary for the parties. Therefore the invocation is up to the petition of the parties to the dispute concerned.

1.3 Is there a routine or occasional use of conciliation?

There is not yet any practice.

1.4 Is the use of conciliation increasing or decreasing?

Increasing, because there has not been any official in-court conciliation system before.

1.5 Does resort to conciliation require agreement of the disputants?

Yes.

1.6 Are there issues which are barred from conciliation?

No, as long as the issue meets the general requirements mentioned above.

1.7 Where does the conciliation fit into any appellate proceedings

As a main rule, conciliation is carried out in regular courts of first instance. However, conciliation is possible also in appellate proceedings.

2. What is the timing of the conciliation; when does it occur?

2.1 Is it done prior to the Court taking jurisdiction over the case?

Both matters already pending in court and cases not yet at that stage can be referred to conciliation.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

The dispute can be referred to conciliation before the preliminary hearing of the case has ended.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

The court procedure does not continue before conciliation has ended. In cases not pending in court, conciliation does not prohibit parties to bring an action.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

The court procedure concerning the part of the dispute outside the conciliation may continue.

2.5 How often is conciliation used compared to straight litigation?

There is no practice yet.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

The duration of the conciliation is up to the parties and the conciliator.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

The new Act covers only conciliation in court. In practice it is possible to postpone the case, for instance, due to negotiations between parties. The duration of the postponement is up to the judge.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

If the case is pending in court, the preparation of the case will continue ex officio, if conciliation is terminated.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

The objective of conciliation is to seek an amicable settlement of the dispute in a procedure, which is relatively free from formal requirements. Though conciliation takes place within the court system, they are two distinct systems. For instance the judge, who has failed in conciliating the case, is not allowed to hear the case as a judge.

3. What are the qualifications of the conciliators?

3.1 How are conciliators selected?

The judges of the court concerned are acting as conciliators.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

3.4 What are the experience and/or training requirements for serving as a conciliator?

3.5 Are conciliators used on a full-time or part-time basis?

3.6 Are they compensated by the court or parties or government?

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

4. What subject matters may be submitted to conciliation?

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

As mentioned in point 2.1 also matters not pending in court can be referred to conciliation. Thus conciliators are not restricted to issues covered in the litigation.

4.2 What are examples of issues conciliated and the frequency of their submission?

There is not yet any practice.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

There are no specific qualifications. The judges will be trained for conciliation before the Act enters into force.

4.4 Does the court monitor the progress of the conciliation? If so, how?

The conciliation takes place in court.

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

5.1 What is the impact of conciliation on the volume of cases coming to the court?

It is very hard to estimate the effects of the new Act in advance. However, due to the nature of the Finnish system, the impact on the volume of cases coming to the court will probably be fairly slight.

5.2 What is the impact on the work and functioning of the court?

See above.

5.3 Does conciliation adversely impact on the court's making of case law?

See above.

5.4 Do the disputants prefer conciliation to litigation?

Yes, it seems to be so in many cases.

5.5 Have there been any changes in attitudes toward mediation since its introduction?

Possible changes cannot yet be seen at this stage.

5.6 Should mediation be encouraged, discouraged, or ignored?

The mediation has certain advantages. When appropriate, mediation should be encouraged.

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

by Michel Blatman,
Conseiller à la Cour de cassation
France

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

Book I of the “nouveau Code de procédure civile” (new Code of civil procedure _ NCPC) is common to all courts and, as repeated by Article R. 516-0 of the Code du travail (Labour code) is applicable before first level labour courts (“conseils de prud’hommes”). This book includes, in a chapter called “guiding principles for trial”, an Article 21 laying out that *“It shall be part of the duties of the judge to conciliate the parties”*.

This provision is applicable as well to appellate courts.

Further, the NCPC distinguishes between “conciliation” submitted in title VI to Articles 127 to 131, and “mediation”, regulated in title VI *bis* by Articles 131-1 to 131-15.

But if preliminary compulsory conciliation instituted before some jurisdictions like “tribunal d’instance” (first level minor civil jurisdiction) may be delegated by the judge to “conciliators of justice”, such a provision does not exist for labour courts.

The “conseil de prud’hommes”, which is an elective and joint jurisdiction, comprising members of the two sides of the industry, has for first rule to settle the disputes by conciliating the parties. It is only if this preliminary stage failed that it must take jurisdiction.

1.1 Is there a statutory requirement for conciliation? If so, what does it require?

a) Individual labour disputes:

1° Conciliation

* A decree of 23 march 1978 institutes “conciliateurs of justice” (conciliators of justice) in order to settle benevolently and friendly any disputes before a court is seized. These conflicts, however, must be related to rights available to the parties.

A later law of 8 february 1995 extends the conciliators’ business to the preliminary attempts of conciliation.

But if a decree of 22 july 1996 (Article 831 NCPC) applies this extension before “tribunal d’instance”, it does not before “conseil de prud’hommes”.

*Once a claim has been filed before the “conseil de prud’hommes” – a special committee named “bureau de conciliation” (Office for conciliation) and composed of a lay judge representing the workers and another one representing the employers, must attempt to conciliate the parties.

This **preliminary** step is excluded, and henceforth the judgment panel called “bureau de jugement” (Trial office) is **directly** seized of the claim without preliminary conciliation, in some cases:

- when the claim aims at the requalification of short-term contract in a long-term contract (art. L.122-3-13 Code du travail);
- when the employee disagrees with the refusal of the wage guarantee institution (AGS) to guarantee his/her claims in case of insolvent employer;
- before the other panel of lay judges named “bureau de référé” (Summary interlocutory procedure panel) which has to state in chambers.

As the general text aforementioned (Article 127) does not exclude it, a conciliation may be ordered by the judge and put in the hands of a conciliator of justice after a claim has been lodged and preliminary conciliation attempt has failed.

2°) The «mediation »

Mediation is specially contemplated by Article L.122-54 of the « Code du travail » in case of moral harassment, in order to put an end to this behaviour (L.122-54).

Otherwise, the general text of Articles 131-1 and sq of NCPC applies

b) Collective labour disputes:

1° Optional conciliation boards:

Collective labour disputes are not brought before labour courts but before civil courts.

Often, collective agreements organize conciliation proceedings in order to settle friendly such conflicts.

Were these conflicts would not have been submitted to the collective agreements conciliation proceedings, it is provided by Articles L. 524-1 to L.524-5 and R.524-1 to R.524-14 of the « Code du travail » that they might be submitted to the procedures of conciliation, before a national or regional conciliation committee.

Where disputants should not reach to an agreement, the chairman of the committee might start a procedure of mediation (L.524-1 to L.524-5). The ministry of Labour is similarly empowered.

2° Optional mediation for collective redundancies:

Article L.432-1-3 of the “Code du travail” specified that in case of large divergence between the proposals of the works council and the employer about a draft of total or partial transfer of undertaking involving the redundancy of at least 100 employments, each party may seize a mediator on a list issued by the ministry of Labour.

This provision was lately repealed by Law n° 2005-32 of 18 janvier 2005 relating to social cohesion.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

After the compulsory preliminary conciliation has failed, the proceedings go on. And it is then up to the discretion of the court (“bureau de jugement”) to decide whether a new conciliation can be attempted before or during the hearings.

It must be noticed that “bureau de conciliation” and “bureau de jugement” may give a direction named “mission de conseillers rapporteurs” (reporters), asking two lay judges to investigate the case. The aforethought of this is not only to make things clear and understandable before judgment, but also often to conciliate parties.

The intermediate appellate court (“cour d’appel”) is equally empowered to attempt conciliations. It usually decides it during hearings. Such attempts by appellate judges are not seldom.

The decision depends on the appreciation of its convenience by the court.

1.3 Is there a routine or occasional use of conciliation?

Except preliminary conciliation, the use of conciliation is not a routine. Nor is “mediation”. But some courts practise a selection of the cases in which it appears possible or desirable to mediate.

1.4 Is the use of conciliation increasing or decreasing?

The use of conciliation and mediation increases before all courts, included appellate courts. The lawmaker, by organizing mediation proceedings, permitted this phenomenon. But some courts are more in advance than other, more reserved.

1.5 Does resort to conciliation require agreement of the disputants?

A) Individual litigations:

Conciliation, as a mandatory preliminary, does not require the agreement of the disputants. Moreover, these are required to appear before the “bureau de conciliation”. But later, it is up to the courts to appreciate if they will use or not such attempt.

One of the parties, or both, can also apply before the court for a conciliation.

Article 127 of New Code of civil procedure provides that parties may conciliate as between themselves or the same may be engineered by the judge at any time during the proceedings

As to mediation, Article 131-1 NCPC requires the agreement of the parties, and Article 131-6 requires in addition the mention of this agreement in the act ordering this measure.

B) Collective disputes:

If the collective agreement does not require a mediation between the two sides of industry, such a means of settling disputes is only optional.

1.6 Are there issues which are barred from conciliation?

Although some matters are not subjected to the preliminary conciliation, the court may resort to conciliation and/or mediation if it appears convenient.

But there are some impediments to this resort:

- matters of public order;
- workers' representatives cannot conciliate or mediate on rights linked to their statute, especially protected in the interest of the whole staff of the undertaking;
- in insolvency proceedings, where the employer is often not entitled to stand in for the undertaking;
- the conciliation implemented without the presence of the ASSEDIC (Associations for Employment in Industry and Commerce) - bodies managing the local unemployment insurance funds – is not opposable to these institution. Because the redundancy allowances paid by them to the employee must be reimbursed by the employer when the termination of the contract of employment is an unfair dismissal.

1.7 Where does the conciliation fit into any appellate proceedings?

As aforesaid, appellate proceedings are not a hurdle to conciliation and mediation.

The Cour de cassation (supreme court), which is not dealing with facts, is not likely to resort to conciliation or mediation. If parties conciliate by themselves, they will just have to put an end to their litigation and discontinue it.

2. What is the timing of the conciliation; when does it occur?

The timing of “conciliation” is up to the discretion of the court.

The timing of “mediation” is plainly regulated by the code of civil procedure.

2.1 Is it done prior to the Court taking jurisdiction over the case?

Conciliation is done prior to the court taking jurisdiction over the case (unless the court states over a point and intends to conciliate on others.

Mediation also involves that the court is seized of a dispute.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

Conciliation and mediation may be ordered by the court as long as it is seized of the litigation. Article 128 of NCPC provides: “*A attempt at conciliation may be undertaken, save where special provisions shall apply, at such venue and time as the judge shall deem proper*”

For instance, the court may discuss over the case, rule about some principle or claim, and in the same time decide that conciliation or mediation must be attempted on other questions.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

When the dispute is referred to conciliation or mediation, things are held in abeyance, unless the court otherwise decides.

Article 131-2 NCPC states that: *“Mediation shall relate to the whole or a part of the dispute. At any event it shall not bring the matter out of the cognisance of the judge who may at any time give all other directions which shall appear necessary to him.”*

But the parties are allowed to stay their case by having it willingly struck off the roll: *“The withdrawal from the roll shall be ordered where all the parties make an application to the same while giving the reasons thereof.”* (Article 382 of NCPC),

2.4 What is the role of the court if only a portion of the parties’ dispute is settled?

If only a part of the dispute is settled by conciliation or mediation, the court has to judge what remains debated.

2.5 How often is conciliation used compared to straight litigation?

Conciliations and mediations are much less used than straight litigation. It must not be forgotten that labour courts have already attempted to conciliate parties during the preliminary session.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

Under Article 131-3 NCPC: *“The initial time-limit for mediation shall not exceed three months. The assignment may be renewed once, for the similar duration, at the suit of the mediator.”*

And the order is to indicate *“the date at which the matter shall be called for a hearing.”* (Art131- 6 NCPC).

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

As aforesaid, the parties may be willing to mediate even though the duration of this measure exceeds the legal time-limit. They therefore are authorized to apply for the withdrawal of the case from the roll.

They will be able to re-establish it later.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

Under Article 131-11 NCPC: *“At the termination of his enterprise, the mediator shall inform in writing the judge that the parties have or not resolved the issues dividing them.*

On the day fixed, the matter shall be brought before the judge.”

But the termination of the mediation may also be decided by the judge on application of a party or *ex officio* (131-10):

“The judge may put an end, at any time, to the mediation on application by a party or on the initiative of the mediator to the same.

The judge may, further, ex proprio motu put an end thereof where the proper progress of the mediation shall seem to have been compromised.

At all events, the matter shall have to be called for a hearing to which the parties shall have to be convened at the suit of the registrar by recorded letter with the advice of delivery slip sought.

At such hearing, the judge, where he puts an end to the assignment of the mediator, may revive the proceedings. The mediator shall be informed of the decision.”

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

A) Learning:

No, the court must not learn what has been said or proposed during the mediation or outside conciliation.

But, it can be otherwise if it is on parties’ request that this transpired:

“The findings of the mediator and the declarations he has taken down may not be produced nor shall be relied upon in the course of the subsequent proceedings without the agreement of the parties, nor, in any case, be referred to in any other proceedings.”
(Art. 131-14)

B) Report:

1°) Conciliation:

The tenor of the agreement, even where partial, shall be recorded in a “procès-verbal” (record, minute, statement) signed by the judge and by the parties (Art. 130 NCPC)

Abstracts of the procès-verbal recording the agreement may be delivered; they shall be enforceable. (Art. 131)

2°) Mediation:

There is no report. This, in order to ensure confidentiality to the mediation: the mediator has just to inform the judge of the fulfilment of his assignment.

Under Article 131-11 NCPC: *“At the termination of his enterprise, the mediator shall inform in writing the judge that the parties have or not resolved the issues dividing them”.*

It is the only thing asked from the mediator on this point.

But the parties are free to apply for an approval of the agreement they reached.

“At the request of the parties the judge shall approve by way of homologation the agreement that they shall submit before him.” (Art.131-12)

3. What are the qualifications of the conciliators?

3.1 How are conciliators selected?

a) Individual labour conflicts:

*“**conciliators of justice**”: they are instituted by a decree of 20 march 1978, whose Article 2 mentions that they must be entitled to their civil and political rights. Article 3 of the same decree provides that they are designated for a first period of one year, by order of the first president of the appellate court, after advice of the “ministère public” (prosecution body) and on the proposal of the “juge d’instance” (first level minor civil court). At the end of this period, they can be reassigned for a renewable period of five years.

Conciliators of justice must, of course, also own a minimum of human qualities and enjoy judge’s and parties’ confidence.

* “**mediators**”: If the court may choose a conciliator with the consent of both parties (Article 21 of law n° 95-125 of 8 february 1995), it is up to the parties to make this choice as concerns the **mediator**. But the designation of this third person shall be made by the judge:

*“Judge seized of a dispute may, **after having received the agreement of the parties**, appoint a third person to hear the parties and to confront their points of view so as to allow them to resolve the issues dividing them.” (Art. 131-1 NCPC)*

The mediator can be a natural person or an association:

“Mediation may be assigned to a natural person or to an association.

Where the appointed mediator is an association, its legal representative shall submit to the approbation of the judge the surname or surnames of the natural person or persons who shall implement the measure on its behalf.” (Art. 131-4 NCPC)

Formerly, mediators appointed in moral harassment matters had to be chosen on a list of “conseillers du salarié” (worker’s counsels), who were assigned in order to assisting employees during the pre-dismissal meeting with the employer. This provision has been withdrawn. Now, it is only provided by Article L.122-54 of the “Code du travail” (Labour code) that the choice of the mediator results of the agreement of the parties. They thus choose the mediator themselves.

b) Collective labour conflicts

See answer to question 1.1 a) 1 about regional and national Conciliation Boards composed of representatives of workers’ and employers’ organizations.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

See answer to question 3.1: designation by the judge

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

Conciliators of justice (natural persons or associations) appear on a roster held by courts.

Mediators are chosen on an ad hoc basis, but generally within a list of persons approved by the court.

3.4 What are the experience and/or training requirements for serving as a conciliator?

* Conciliators of justice must justify of a 3-year experience in juridical field and have to be particularly qualified for the exercise of these functions with regard to their competence and activity.

* For all mediators the criteria of selection are provided by the NCPC.

Under Article 131-5 NCPC “A *natural person implementing mediation shall have to satisfy the following conditions:*

1° Not having been the subject of a criminal sentence, of an incapacity or a forfeiture as indicated in the N° 2 criminal record bulletin.

2° Not having been the originator of facts contrary to honour, probity and good virtue which gave rise to disciplinary or administrative sanctions of dismissal, removing off, revocation, or that of a withdrawal of consent or authorisation;

3° To hold, by actual and past occupation, the required qualifications with regard to the nature of the dispute;

4° To show cause of, as the case may be, a training or experience suitable for the practice of mediation;

5° To demonstrate sufficient guarantee of independence necessary to conduct mediation”

3.5 Are conciliators used on a full-time or part-time basis?

Conciliators and mediators are used according the needs of the court. They are independent.

3.6 Are they compensated by the court or parties or government?

Conciliators of justice are benevolent.

Mediators are compensated by the parties after the judge fixed the amount of the remuneration due to theses third persons.

But some parties (here employees) can receive legal aid from government.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

The compensation rates is set by the court.

It is proceeded to it in two steps.

* Initial deposit:

Under Article 131-6 NCPC:” *The decision which orders a mediation shall (...) **fix the amount of the deposit** for the remuneration of the mediator at a level which is the nearest possible to the foreseeable payment and shall designate the party or parties who shall deposit by consignation within the imparted time-limit; where several parties are designated, the decision shall indicate the contribution in relation to consignation of each party.*

In default of a deposit by consignation, the decision shall lapse and the proceedings shall be prosecuted.”

* Final fixing:

Under Article 131-13 NCPC: “At the termination of his enterprise, **the judge shall fix the remuneration** of the mediator. The burden of the cost of the mediation shall be borne as provided under Article 22 of the Act n° 95-125 of the 8 February 1995 relating to the organisation of courts and that of civil, criminal and administrative procedures.

The judge shall grant leave to the mediator to have the amount deposited to the registry to be released to him up to the due limit.

He shall order, where the same appears necessary, the payment of **additional sums** and shall indicate the party or parties who shall have to provide for it, or the return of the excess amount deposited.

An enforceable title shall be delivered to the mediator on his request.”

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

* Conciliators of justice must address each year a report of their activity to the first president of the appellate court and to the juge d’instance.

* Once the mediator’s assignment is over, the case returns to the judge, who can then appreciate its quality and decide later not to designate him/her any more.

4. What subject matters may be submitted to conciliation?

See answer 1.6

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

It seems that the conciliators should be restricted to the case submitted to the court. The judge, at any event, must be informed of the difficulties encountered in the implementation of the conciliator’s assignment.

As regards mediation, the same observation about existing difficulties should be made. But the aim of mediation being deeper than conciliation’s, the mediator could ask the judge to resolve the conflict in more general terms than the current dispute before the jurisdiction. This point needs to be discussed.

Once, a mediator seized of a labour dispute was authorized by several jurisdictions to extend his assignment to civil and commercial aspects of the litigation between the same parties.

4.2 What are examples of issues conciliated and the frequency of their submission?

More conciliated or mediated issues are those in which labour disputes interfere with family or passionate relationships. Mediation is more indicated when the contract of employment between the parties is not terminated.

Mediation in labour disputes before some appellate courts could rise up to 12-15% of the cases.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

Under Article 131-5 NCPC the mediator must *“hold, by actual and past occupation, the required qualifications with regard to the nature of the dispute”* and *“show cause of, as the case may be, a training or experience suitable for the practice of mediation”*;

Bars, who often institute mediation centers, organize special training for mediation in labour disputes’ field.

4.4 Does the court monitor the progress of the conciliation? If so, how?

The court monitors the progress of the conciliation and of the mediation. The concern of the law maker was to prevent these measures to delay proceedings.

A time-limit is given to the conciliator or mediator, and a hearing date already mentioned in the order of assignment.

The conciliator or the mediator must inform the judge of the difficulties encountered in the performance of the assignment.

In the case where the mediation would fail, the proceedings should be prosecuted immediately.

For this purpose, Article 131-10 NCPC provides that:

“The judge may put an end, at any time, to the mediation on application by a party or on the initiative of the mediator to the same.

The judge may, further, ex proprio motu put an end thereof where the proper progress of the mediation shall seem to have been compromised.

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5. Do you consider use of conciliation to be a positive contribution to the work of the court?

Yes, if these measures are appropriate to the nature of the dispute, are not too expensive and do not delay too much the proceedings

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Maybe about 15 % (in the courts who use it)

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The recourse to such measures seems too scarce to impact on the court's making of case-law.

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5.6 Should mediation be encouraged, discouraged, or ignored?

Where disputes brought before the labour court imply dignity of the employee, psychological aspects, passionate or family relationships between the parties, and when the employee still works for his/her employer, mediation looks appropriate.

But it is difficult to consider this means of settling disputes as a general solution to the increasing number of labour litigations.

FRANCE

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Michel Blatman,
Conseiller à la Cour de cassation**

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

Book I of the "nouveau Code de procédure civile" (new Code of civil procedure _ NCPC) is common to all courts and, as repeated by Article R. 516-0 of the Code du travail (Labour code) is applicable before first level labour courts ("conseils de prud'hommes). This book includes, in a chapter called "guiding principles for trial", an Article 21 laying out that "*It shall be part of the duties of the judge to conciliate the parties*".

This provision is applicable as well to appellate courts.

Further, the NCPC distinguishes between “conciliation” submitted in title VI to Articles 127 to 131, and “mediation”, regulated in title VI *bis* by Articles 131-1 to 131-15.

But if preliminary compulsory conciliation instituted before some jurisdictions like “tribunal d’instance” (first level minor civil jurisdiction) may be delegated by the judge to “conciliators of justice”, such a provision does not exist for labour courts.

The “conseil de prud’hommes”, which is an elective and joint jurisdiction, comprising members of the two sides of the industry, has for first rule to settle the disputes by conciliating the parties. It is only if this preliminary stage failed that it must take jurisdiction.

1.1 Is there a statutory requirement for conciliation? If so, what does it require?

a) Individual labour disputes:

1° Conciliation

* A decree of 23 march 1978 institutes “conciliateurs of justice” (conciliators of justice) in order to settle benevolently and friendly any disputes before a court is seized. These conflicts, however, must be related to rights available to the parties.

A later law of 8 february 1995 extends the conciliators’ business to the preliminary attempts of conciliation.

But if a decree of 22 july 1996 (Article 831 NCPC) applies this extension before “tribunal d’instance”, it does not before “conseil de prud’hommes”.

*Once a claim has been filed before the “conseil de prud’hommes” – a special committee named “bureau de conciliation” (Office for conciliation) and composed of a lay judge representing the workers and another one representing the employers, must attempt to conciliate the parties.

This **preliminary** step is excluded, and henceforth the judgment panel called “bureau de jugement” (Trial office) is **directly** seized of the claim without preliminary conciliation, in some cases:

- when the claim aims at the requalification of short-term contract in a long-term contract (art. L.122-3-13 Code du travail);
- when the employee disagrees with the refusal of the wage guarantee institution (AGS) to guarantee his/her claims in case of insolvent employer;
- before the other panel of lay judges named “bureau de référé” (Summary interlocutory procedure panel) which has to state in chambers.

As the general text aforementioned (Article 127) does not exclude it, a conciliation may be ordered by the judge and put in the hands of a conciliator of justice after a claim has been lodged and preliminary conciliation attempt has failed.

2°) The «mediation »

Mediation is specially contemplated by Article L.122-54 of the « Code du travail » in case of moral harassment, in order to put an end to this behaviour (L.122-54).

Otherwise, the general text of Articles 131-1 and sq of NCPC applies.

b) Collective labour disputes:

1° Optional conciliation boards:

Collective labour disputes are not brought before labour courts but before civil courts.

Often, collective agreements organize conciliation proceedings in order to settle friendly such conflicts.

Were these conflicts would not have been submitted to the collective agreements conciliation proceedings, it is provided by Articles L. 524-1 to L.524-5 and R.524-1 to R.524-14 of the « Code du travail » that they might be submitted to the procedures of conciliation, before a national or regional conciliation committee.

Where disputants should not reach to an agreement, the chairman of the committee might start a procedure of mediation (L.524-1 to L.524-5). The ministry of Labour is similarly empowered.

2° Optional mediation for collective redundancies:

Article L.432-1-3 of the “Code du travail” specified that in case of large divergence between the proposals of the works council and the employer about a draft of total or partial transfer of undertaking involving the redundancy of at least 100 employments, each party may seize a mediator on a list issued by the ministry of Labour.

This provision was lately repealed by Law n° 2005-32 of 18 janvier 2005 relating to social cohesion.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

After the compulsory preliminary conciliation has failed, the proceedings go on. And it is then up to the discretion of the court (“bureau de jugement”) to decide whether a new conciliation can be attempted before or during the hearings.

It must be noticed that “bureau de conciliation” and “bureau de jugement” may give a direction named “mission de conseillers rapporteurs” (reporters), asking two lay judges to investigate the case. The aforethought of this it not only to make things clear and understandable before judgment, but also often to conciliate parties.

The intermediate appellate court (“cour d’appel”) is equally empowered to attempt conciliations. It usually decides it during hearings. Such attempts by appellate judges are not seldom.

The decision depends on the appreciation of its convenience by the court.

1.3 Is there a routine or occasional use of conciliation?

Except preliminary conciliation, the use of conciliation is not a routine. Nor is “mediation”. But some courts practise a selection of the cases in which it appears possible or desirable to mediate.

1.4 Is the use of conciliation increasing or decreasing?

The use of conciliation and mediation increases before all courts, included appellate courts. The lawmaker, by organizing mediation proceedings, permitted this phenomenon. But some courts are more in advance than other, more reserved.

1.5 Does resort to conciliation require agreement of the disputants?

A) Individual litigations:

Conciliation, as a mandatory preliminary, does not require the agreement of the disputants. Moreover, these are required to appear before the “bureau de conciliation”. But later, it is up to the courts to appreciate if they will use or not such attempt.

One of the parties, or both, can also apply before the court for a conciliation.

Article 127 of New Code of civil procedure provides that parties may conciliate as between themselves or the same may be engineered by the judge at any time during the proceedings

As to mediation, Article 131-1 NCPC requires the agreement of the parties, and Article 131-6 requires in addition the mention of this agreement in the act ordering this measure.

B) Collective disputes:

If the collective agreement does not require a mediation between the two sides of industry, such a means of settling disputes is only optional.

1.6 Are there issues which are barred from conciliation?

Although some matters are not subjected to the preliminary conciliation, the court may resort to conciliation and/or mediation if it appears convenient.

But there are some impediments to this resort:

- matters of public order;
- workers’ representatives cannot conciliate or mediate on rights linked to their statute, especially protected in the interest of the whole staff of the undertaking;
- in insolvency proceedings, where the employer is often not entitled to stand in for the undertaking;
- the conciliation implemented without the presence of the ASSEDIC (Associations for Employment in Industry and Commerce) - bodies managing the local unemployment insurance funds – is not opposable to these institution. Because the redundancy allowances paid by them to the employee must be reimbursed by the employer when the termination of the contract of employment is an unfair dismissal.

1.7 Where does the conciliation fit into any appellate proceedings?

As aforesaid, appellate proceedings are not a hurdle to conciliation and mediation.

The Cour de cassation (supreme court), which is not dealing with facts, is not likely to resort to conciliation or mediation. If parties conciliate by themselves, they will just have to put an end to their litigation and discontinue it.

2. What is the timing of the conciliation; when does it occur?

The timing of “conciliation” is up to the discretion of the court.

The timing of “mediation” is plainly regulated by the code of civil procedure.

2.1 Is it done prior to the Court taking jurisdiction over the case?

Conciliation is done prior to the court taking jurisdiction over the case (unless the court states over a point and intends to conciliate on others.

Mediation also involves that the court is seized of a dispute.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

Conciliation and mediation may be ordered by the court as long as it is seized of the litigation. Article 128 of NCPC provides: *“A attempt at conciliation may be undertaken, save where special provisions shall apply, at such venue and time as the judge shall deem proper”*

For instance, the court may discuss over the case, rule about some principle or claim, and in the same time decide that conciliation or mediation must be attempted on other questions.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

When the dispute is referred to conciliation or mediation, things are held in abeyance, unless the court otherwise decides.

Article 131-2 NCPC states that: *“Mediation shall relate to the whole or a part of the dispute. At any event it shall not bring the matter out of the cognisance of the judge who may at any time give all other directions which shall appear necessary to him.”*

But the parties are allowed to stay their case by having it willingly struck off the roll: *“The withdrawal from the roll shall be ordered where all the parties make an application to the same while giving the reasons thereof.”* (Article 382 of NCPC),

2.4 What is the role of the court if only a portion of the parties’ dispute is settled?

If only a part of the dispute is settled by conciliation or mediation, the court has to judge what remains debated.

2.5 How often is conciliation used compared to straight litigation?

Conciliations and mediations are much less used than straight litigation. It must not be forgotten that labour courts have already attempted to conciliate parties during the preliminary session.

2.7 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

Under Article 131-3 NCPC: *“The initial time-limit for mediation shall not exceed three months. The assignment may be renewed once, for the similar duration, at the suit of the mediator.”*

And the order is to indicate *“the date at which the matter shall be called for a hearing.”* (Art131- 6 NCPC).

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

As aforesaid, the parties may be willing to mediate even though the duration of this measure exceeds the legal time-limit. They therefore are authorized to apply for the withdrawal of the case from the roll.

They will be able to re-establish it later.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

Under Article 131-11 NCPC: *“At the termination of his enterprise, the mediator shall inform in writing the judge that the parties have or not resolved the issues dividing them.*

On the day fixed, the matter shall be brought before the judge.”

But the termination of the mediation may also be decided by the judge on application of a party or *ex officio* (131-10):

“The judge may put an end, at any time, to the mediation on application by a party or on the initiative of the mediator to the same.

The judge may, further, ex proprio motu put an end thereof where the proper progress of the mediation shall seem to have been compromised.

At all events, the matter shall have to be called for a hearing to which the parties shall have to be convened at the suit of the registrar by recorded letter with the advice of delivery slip sought.

At such hearing, the judge, where he puts an end to the assignment of the mediator, may revive the proceedings. The mediator shall be informed of the decision.”

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

A) Learning:

No, the court must not learn what has been said or proposed during the mediation or outside conciliation.

But, it can be otherwise if it is on parties' request that this transpired:

“The findings of the mediator and the declarations he has taken down may not be produced nor shall be relied upon in the course of the subsequent proceedings without

the agreement of the parties, nor, in any case, be referred to in any other proceedings.”
(Art. 131-14)

B) Report:

1°) Conciliation:

The tenor of the agreement, even where partial, shall be recorded in a “procès-verbal” (record, minute, statement) signed by the judge and by the parties (Art. 130 NCPC)

Abstracts of the procès-verbal recording the agreement may be delivered; they shall be enforceable. (Art. 131)

2°) Mediation:

There is no report. This, in order to ensure confidentiality to the mediation: the mediator has just to inform the judge of the fulfilment of his assignment.

Under Article 131-11 NCPC: *“At the termination of his enterprise, the mediator shall inform in writing the judge that the parties have or not resolved the issues dividing them”.*

It is the only thing asked from the mediator on this point.

But the parties are free to apply for an approval of the agreement they reached.

“At the request of the parties the judge shall approve by way of homologation the agreement that they shall submit before him.” (Art.131-12)

3. What are the qualifications of the conciliators?

3.1 How are conciliators selected?

a) Individual labour conflicts:

***“conciliators of justice”**: they are instituted by a decree of 20 march 1978, whose Article 2 mentions that they must be entitled to their civil and political rights. Article 3 of the same decree provides that they are designated for a first period of one year, by order of the first president of the appellate court, after advice of the “ministère public” (prosecution body) and on the proposal of the “juge d’instance” (first level minor civil court). At the end of this period, they can be reassigned for a renewable period of five years.

Conciliators of justice must, of course, also own a minimum of human qualities and enjoy judge’s and parties’ confidence.

* **“mediators”**: If the court may choose a conciliator with the consent of both parties (Article 21 of law n° 95-125 of 8 february 1995), it is up to the parties to make this choice as concerns the **mediator**. But the designation of this third person shall be made by the judge:

*“Judge seized of a dispute may, **after having received the agreement of the parties**, appoint a third person to hear the parties and to confront their points of view so as to allow them to resolve the issues dividing them.”* (Art. 131-1 NCPC)

The mediator can be a natural person or an association:

“Mediation may be assigned to a natural person or to an association.

Where the appointed mediator is an association, its legal representative shall submit to the approbation of the judge the surname or surnames of the natural person or persons who shall implement the measure on its behalf.” (Art. 131-4 NCPC)

Formerly, mediators appointed in moral harassment matters had to be chosen on a list of “conseillers du salarié” (worker’s counsels), who were assigned in order to assisting employees during the pre-dismissal meeting with the employer. This provision has been withdrawn. Now, it is only provided by Article L.122-54 of the “Code du travail” (Labour code) that the choice of the mediator results of the agreement of the parties. They thus choose the mediator themselves.

b) Collective labour conflicts

See answer to question 1.1 a) 1 about regional and national Conciliation Boards composed of representatives of workers’ and employers’ organizations.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

See answer to question 3.1: designation by the judge

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

Conciliators of justice (natural persons or associations) appear on a roster held by courts.

Mediators are chosen on an ad hoc basis, but generally within a list of persons approved by the court.

3.4 What are the experience and/or training requirements for serving as a conciliator?

* Conciliators of justice must justify of a 3-year experience in juridical field and have to be particularly qualified for the exercise of these functions with regard to their competence and activity.

* For all mediators the criteria of selection are provided by the NCPC.

Under Article 131-5 NCPC “A natural person implementing mediation shall have to satisfy the following conditions:

1° Not having been the subject of a criminal sentence, of an incapacity or a forfeiture as indicated in the N° 2 criminal record bulletin.

2° Not having been the originator of facts contrary to honour, probity and good virtue which gave rise to disciplinary or administrative sanctions of dismissal, removing off, revocation, or that of a withdrawal of consent or authorisation;

3° To hold, by actual and past occupation, the required qualifications with regard to the nature of the dispute;

4° To show cause of, as the case may be, a training or experience suitable for the practice of mediation;

5° To demonstrate sufficient guarantee of independence necessary to conduct mediation”

3.5 Are conciliators used on a full-time or part-time basis?

Conciliators and mediators are used according the needs of the court. They are independent.

3.6 Are they compensated by the court or parties or government?

Conciliators of justice are benevolent.

Mediators are compensated by the parties after the judge fixed the amount of the remuneration due to theses third persons.

But some parties (here employees) can receive legal aid from government.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

The compensation rates is set by the court.

It is proceeded to it in two steps.

* Initial deposit:

Under Article 131-6 NCPC:” *The decision which orders a mediation shall (...) **fix the amount of the deposit** for the remuneration of the mediator at a level which is the nearest possible to the foreseeable payment and shall designate the party or parties who shall deposit by consignation within the imparted time-limit; where several parties are designated, the decision shall indicate the contribution in relation to consignation of each party.*

In default of a deposit by consignation, the decision shall lapse and the proceedings shall be prosecuted.”

* Final fixing:

Under Article 131-13 NCPC: “At the termination of his enterprise, **the judge shall fix the remuneration** of the mediator. The burden of the cost of the mediation shall be borne as provided under Article 22 of the Act n° 95-125 of the 8 February 1995 relating to the organisation of courts and that of civil, criminal and administrative procedures.

The judge shall grant leave to the mediator to have the amount deposited to the registry to be released to him up to the due limit.

He shall order, where the same appears necessary, the payment of **additional sums** and shall indicate the party or parties who shall have to provide for it, or the return of the excess amount deposited.

An enforceable title shall be delivered to the mediator on his request.”

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

* Conciliators of justice must address each year a report of their activity to the first president of the appellate court and to the juge d'instance.

* Once the mediator's assignment is over, the case returns to the judge, who can then appreciate its quality and decide later not to designate him/her any more.

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GERMANY

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Dr. Mario Eylert
Richter am Bundesarbeitsgericht
Germany**

A multitude of labour law conflicts in Germany are settled out of Court by the employer and the employee. In these cases, the parties of the employment relationship consult independent experts only in exceptions. Usually, they charge lawyer or trade-unionist/employer-unionist representatives to enforce their rights or to create a settlement. 40 % of all labour law disputes are thus settled by an agreement out of court.

An institutionalised system of mediation or conciliation is fairly unknown in Germany. Our legal system does not forbid these instruments, but unlike other countries, the German labour law, especially the German Law Court Act (Arbeitsgerichtsgesetz – ArbGG = LCA) does not know any legal regulation about mediation or conciliation. Therefore, a German law court can not initiate mediation or conciliation in, out or before court, especially by an external (not a court member) expert. Other forms of conciliation in German labour law exist or existed only in very few cases: for collective disputes (Tarifschlichtung), sometimes for particular groups of people (trainees, artists in theatres etc.) or in the past, in the eastern region of Germany (former: G.D.R.) during the years 1990-1994 (Schlichtungsstellen). But even in those cases, the „conciliator“ always maintained the right to decide the issue.

What are the main reasons for this particular situation in Germany? Unlike other countries (i.e. USA), there is no need for alternative-dispute-resolutions (ADR-procedure) in German labour law. One of the main reasons for this is based on the duration of labour law proceedings. The German labour law courts' first and second instance – working with a fully law trained professional judge and 2 layman/woman judges – are separate from the other courts and are especially not part of the civil court system with its own legal procedure (LCA). These labour courts deal with approximately 630.000 cases each year and settle most disputes quickly and at low cost. Of the annually processed 340.000 cases of termination, 73.000 (21%) are settled within one month (21 %), 146.000 cases within three months and only 8.000 cases (2%) take longer than one year to resolve.

Under the LCA (§ 57 Abs. 2 LCA) the labour courts are required to try a settlement in each case and in each phase of the procedure. Because of this general rule the labour court hearing starts with a conciliatory session (Gütetermin; comparable to the Conseil des prud'hommes in France). For the purpose of an amicable settlement the presiding professional judge discusses the whole matter in dispute with the parties under free evaluation of all circumstances involved. In this first hearing normally 47% of all cases are settled.

Before this background and the fact, that the costs of a labour court dispute are less expensive than in other countries and also less than in a normal civil case, the „out-sourcing“ of labour law cases to other persons or institutions is not common and popular.

Therefore, the answer to Question 1 of the questionnaire is: German law courts cannot initiate mediation or conciliation before or outside the court.

Our LCA does not provide any statutory requirements for conciliation or mediation. Therefore German labour courts' second or third instance can also not initiate such procedures. The procedure, which the questionnaire assumed, does not exist in German labour law.

Since the assumed procedure is not available in Germany, an opinion can only be submitted with regard to Question 5:

It is imaginable to establish mediation or conciliation procedures for special subjects of labour law. This procedure could be interesting in those cases, in which „win-win-solutions“ are possible („Mobbing-cases“). Particular in those cases, in which the reasons for the conflict are unclear, mediation/conciliation could be successful. But for most of these cases, especially in dismissal cases, ADR-procedures would not be appropriate. ADR-procedure is based on the „4 C“ (consensus, control, confidentiality and continuity) concept. Especially the last aspect is questionable in cases of dismissal for redundancy as this is desired result in a dismissal case. Two thirds of all cases of termination are issues of redundancy dismissal. In those cases the dismissed employee would normally not return to his job and continuity takes place in only a very few disputes. Therefore, these alternative procedures could have only little effect in exceptional cases.

HUNGARY

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

by Judge Tünde Handó,
President of the Labour Court,
Budapest, Hungary

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

1.1 Is there a statutory requirement for conciliation? If so what does it require?

A) The Act XII of 1992 On the Labour (hereinafter Labour Code) contains a possibility for legal disputes: a clause ordering the participation of a **conciliatory party** in employment-related legal disputes may be included in the collective bargaining agreement in the employment contract for the purpose of attempting to reach an agreement. In that case negotiations shall be initiated with the conciliatory party (Section 199/A).

B) The Act III of 1952 on the Code of Civil Procedure (hereinafter Code of Civil Procedure) orders that if the parties or their representatives appear in the court at the first trial, the procedure begins with a conciliation directed by the judge. If the conciliation remains unsuccessful, the case immediately comes on for trial. It is an individual, special provision for labour/employment disputes and it is mandatory (Section 355). This is an informal conversation without record conducted by the judge,

where the judge and the parties discuss the whole dispute. The Act does not regulate the subject-matter of the conversation at all, it is left to the judge's discretion. Usually the judges inform the parties about the law of evidence, the burden of proof, the difficulties of verification and the fees of the procedure during the session.

C) Code of Civil Procedure regulates a general provision for every kind of disputes: it says that the court (the judge) may attempt in any phase of a suit to achieve that the parties come to a settlement regarding the legal dispute or a part of the matters in dispute. It means also that the judge operates as a conciliator and helps the parties to reach an agreement. If the parties reach an agreement and the settlement is in conformity with the legal rules and the just interests of the parties, the court shall approve it by a judge's order, while in a contrary case it shall refuse approval and shall continue the proceedings. A settlement approved by court has the same effect as a judgement (Section 148.).

D) The Labour Code provides that the employment-related legal disputes shall be decided in court. It means that only the courts has competence to give judgement in any employment/labour legal dispute. However the courts have no competence for labour interest disputes. The Labour Code Act regulates the settlement of collective labour interest disputes. These kind of disputes are settled by the parties direct negotiation, mediation or arbitration. In a few cases an arbitrator must be employed. These cases are the followings: a) the trade unions' right to publish information and announcement, to use the employer's premises b) the necessary costs of election and operation of the workers' council c) the workers' council's right of codetermination with regard to the appropriation of welfare funds specified in the collective bargaining agreement and with regard to the utilization of institutions and real property of such nature (Section 197). A Labour Mediation and Arbitration Service established in 1996, gives services in such labour interest disputes.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

A) The parties can write a clause in their collective bargaining agreement or employment contract ordering mandatory conciliation. This conciliation clause is up to the parties' discretion. But if the collective bargaining agreement or the employment contract contains such a clause it is mandatory and the parties could not go to the court before they attempt the conciliation.

B) If the parties or their representatives appear in the court at the first trial, the judge must attempt the conciliation. It is an important obligation.

C) Besides these the judge may attempt in any phase of a suit to conciliate between the parties, if he/she considers that there is a chance for the agreement. This possibility is left to the judge's discretion.

1.3 Is there a routine or occasional use of conciliation?

A) The conciliation at the first trial is routine.

B) The conciliation on the other trials it's up to the discretion of the judge, it is occasional.

1.4 Is the use of conciliation increasing or decreasing?

A) A conciliation clause in the collective bargaining agreement/employment contract is rarely found. It is not a typical provision and its number is still very few.

B) There is a positive change that is more and more judges take the mandatory conciliation (at the first trial) seriously, and besides this they like to use this technique at the later period of the case too recognising that the parties' agreement is useful for both the parties and also the court.

1.5 Does resort to conciliation require agreement of the disputants?

A) The parties agreement for the conciliation is necessary if a conciliation clause is located in the collective bargaining agreement/employment contract.

B) But the parties agreement is needless for the conciliation conducted by the judge.

1.6 Are there issues which are barred from conciliation?

Yes, in disciplinary issues the conciliation is prohibited.

1.7 Where does the conciliation fit into any appellate proceedings?

According to the general provision of the Civil Procedure Act (Section 148) the appeal court also may attempt in any phase of a suit to achieve that the parties come to a settlement regarding the legal dispute or a part of the matters in dispute. Therefore the judge can initiate conciliation on the appeal trial too.

2. What is the timing of the conciliation; when does it occur?

2.1 Is it done prior to the Court taking jurisdiction over the case?

A) If the collective bargaining agreement or the employment contract contains a conciliation clause, the parties must conciliate before they bring the case before the court.

B) If the parties or their representatives appear in the court at the first trial, the procedure begins with a conciliation directed by the judge; The court also may initiate conciliation in any phase of a suit if there is a chance for the parties' agreement. In these cases the conciliation is done after the Court taking jurisdiction over the case.

There is a strict obligation in the Civil Procedure Act regulating what has to be indicated in the complaint. Besides the name, address of the plaintiff and defendant, the necessary data for deciding does the court have competence for the case etc. should be included. The plaintiff also has to make a declaration in the statement of claim about did the parties have conciliation prior the plaintiff brings the case to the court.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

A) As I mentioned above if the parties or their representatives appear in the court at the first trial, the procedure begins with a conciliation directed by the judge; The court also may initiate conciliation in any phase of a suit if there is a chance for the parties' agreement. Our experience is that typically and usually the conciliation is successful rather in the later period of the procedure than at the first trial. The reason of this that

after the taking of evidence, the parties have more realistic view about the case, therefore they are more interested to make a deal.

B) The parties also have the right to initiate conciliation in any phase of the suit.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

In practice there is no impact on the court proceedings when a dispute is referred to conciliation. However the parties can jointly ask the court to hold the proceedings in abeyance for 6 months (Proceedings shall be in intermission if the parties announce their mutual agreement on this before the first trial or at any time in the course of the proceedings of first instance. Section 137 of Civil Procedure Act) Usually the procedure goes on because the conciliation takes just a few days while the day appointed for the next hearing is 3 or 4 months away.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

The court discontinues the lawsuit in the settled part of the dispute. (Usually the plaintiff has abandoned the suit in this part of the complaint.)

2.5 How often is conciliation used compared to straight litigation?

We do not have statistics about this question, but straight litigation is much more frequently used than conciliation. Conciliation is insignificant.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

A) If the collective bargaining agreement/employment contract includes a conciliation clause, the agreement/contract itself determines the duration of the conciliation. However the parties have to take care of the time-limit of bringing an action prescribed by the Labour Code for some disputes (especially termination disputes). This deadline is 30 days.

B) When the judge conducts the conciliation on the trial, he/she decides the duration of the conciliation regarding the parties' purpose for cooperation.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

Proceedings shall be in intermission if the parties announce their mutual agreement on this before the first trial or at any time in the course of the proceedings of first instance. Proceedings shall be in intermission also if neither of the parties appear at any trial (Section 137 of the Civil Procedure Act). The court doesn't have to examine the reason of such an announcement.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

A) Any time **the parties** can reactivate the process.

B) The judge also has a right to attempt in any phase of a suit to conciliate between the parties, if he/she considers that there is a chance for the agreement.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

A) If the conciliation is carried by an outsider conciliator (not a judge) the court doesn't learn what transpired in conciliation. But there is an important aspect, namely the fees: if the parties reach an agreement, the fees is covered by them according to the result of the agreement (failure/victory).

B) If the judge conducts the conciliation he/she has to meet the requirements of both the procedural and substantial rules. The judge (court) shall approve the agreement only if the settlement is in conformity with the legal rules and the just interests of the parties. The reason for this is that a settlement approved by court has the same effect as a judgement.

3. What are the qualifications of the conciliators?

Hungary passed a bill on Mediation in 2002, Act LV of 2002 hereinafter Mediation Act. According to the Act the mediation is excluded in some legal disputes like administrative law disputes or affiliation cases. The Ministry of Justice keeps a list of mediators. The register contains names of individual mediators and corporations, incorporated companies that employ mediators.

There are special fields where the state set up mediation/conciliation service and regulates its operation by independent Acts. Such fields are consumer protection, public procurement procedure, health protection, education and the above mentioned labour interest disputes.

3.1 How are conciliators selected?

The parties select the mediator by mutual written agreement. The parties can ask more persons to operate as co-mediators in their dispute. The mediator has to answer for the parties' request in 8 days and has to declare in his/her answer that does he accept the parties' invitation or not to work as a mediator in their dispute.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

As I mentioned above the parties select the mediator by mutual agreement from the list of the Ministry of Justice. If the parties choose an incorporated company/corporation, the company/corporation designates one of his employees to function as a mediator in the parties' dispute.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

As I mentioned above the parties select the mediator by mutual agreement.

3.4 What are the experience and/or training requirements for serving as a conciliator?

A) The mediator must have a higher, university education, at least 5 years professional practice of his/her profession (not in the field of mediation), a clean record, and unlimited capacity.

B) Those mediators who operates in those special fields which are regulated by independent Acts (consumer protection, public procurement procedure, health protection, education and the labour interest disputes), the provisions of the law usually requires 5 or 8 years professional practice in this special field. They also have regular trainings.

3.5 Are conciliators used on a full-time or part-time basis?

The conciliators/mediators are used on a part-time basis.

3.6 Are they compensated by the court or parties or government?

They are compensated by the parties. In the special fields where the state operates the mediation service (consumer protection, public procurement procedure, health protection, education and the labour interest disputes) some of the mediations are free and the mediators are compensated by the government.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

The parties and the mediator have to make an arrangement about the fees. This arrangement about the fees is without restriction.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

The mediator has to keep a record of the mediations. It contains the starting time of the mediation, the name, address of the parties, the nature of the dispute, the fee of the mediator, participation of lawyers, the closing time of the mediation and if the parties reached an agreement, it also contains the date of the agreement. The mediator has to supply a record of the number and the nature of the mediations, and its successfulness as well as the cause of inefficiency, if the mediation was failure.

4. What subject matters may be submitted to conciliation?

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

Conciliators are not restricted to the case jurisdiction of the court, the parties' agreement remain outside of the court's view. However if the judge conducts the conciliation and functions as a conciliator he/she has to meet the requirements of both the procedural and substantial rules. The judge (court) shall approve the agreement only if the settlement is in conformity with the legal rules and the just interests of the parties. The reason for this is that a settlement approved by court has the same effect as a judgement.

4.2 What are examples of issues conciliated and the frequency of their submission?

In disciplinary issues the conciliation is prohibited. Besides this the conciliation is almost impossible in civil/public service related disputes, because the state and the local government can only give payment if there is a binding judgement. Any other issues are subject to conciliation especially the claim for damages and compensation and the termination. Any time the parties ask for conciliation and the judge also has a right to attempt in any phase of a suit to conciliate between the parties, if he/she considers that there is a chance for the agreement.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

Those mediators who operate in those special fields which are regulated by independent Acts (consumer protection, public procurement procedure, health protection, education and the labour interest disputes), the provisions of the law usually

requires 5 or 8 years professional practice in this special field. They also have regular trainings.

4.4 Does the court monitor the progress of the conciliation? If so, how?

If the conciliation is carried by an outsider conciliator (not a judge) the court doesn't monitor the progress of the conciliation. But there is an important aspect, namely the fees: if the parties reach an agreement, the fees is covered by them according to the result of the agreement (failure/victory).

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

5.1 What is the impact of conciliation on the volume of cases coming to the court?

We do not have statistics about the outsider conciliation but general opinion is that the change is not perceptible yet.

5.2 What is the impact on the work and functioning of the court?

The judges can also conduct conciliation in the above mentioned way. It has a positive impact on the work and functioning of the court. Some judges likes to initiate conciliation and they are very talented to help the parties toward settlement.

5.3 Does conciliation adversely impact on the court's making of case law?

No, especially because the parties agreement remain outside of the court's view.

5.4 Do the disputants prefer conciliation to litigation?

No, the clients don't know the conciliation and how it is available. Therefore we initiated a cooperation between the court and the Association of Mediators with the intention to make the conciliation/mediation become well known.

5.5 Have there been any changes in attitudes toward mediation since its introduction?

There is a positive change in attitudes of the judge conducted conciliation, in the case of outsider conciliation there is a cooperation between the court and the Association of Mediators with the intention to make the conciliation/mediation become well known.

5.6 Should mediation be encouraged, discouraged, or ignored?

Mediation should be encouraged.

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

by Judge Eggert Óskarsson
President, Labour Court

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

The same rules apply for conciliation before the Labour Court as in a regular trial court. The judges can decide to initiate conciliation, within the courtroom, or ask the parties whether they see some grounds for conciliation, either inside or outside the courtroom.

1.1 Is there a statutory requirement for conciliation? If so, what does it require?

No there is no statutory requirement. Conciliation can be initiated under all circumstances.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

It is entirely at the discretion of the court whether or not to initiate conciliation.

1.3 Is there a routine or occasional use of conciliation?

Regularly the judge examines whether the parties think there might be grounds for conciliation.

1.4 Is the use of conciliation increasing or decreasing?

It is hard to say. However, judges and attorneys regularly discuss the need for establishing by law a more formal conciliation mechanism.

1.5 Does resort to conciliation require agreement of the disputants?

Yes, the judge would never try conciliation without prior consent of the disputants.

1.6 Are there issues which are barred from conciliation?

No.

1.7 Where does the conciliation fit into any appellate proceedings?

The conciliation does not fit into any appellate proceedings. It is not mandatory to invoke conciliation

2. What is the timing of the conciliation; when does it occur?

2.1 Is it done prior to the Court taking jurisdiction over the case?

Under Icelandic law it is not mandatory to try conciliation before the case is taken to court. No conciliation mechanism, outside of the courtroom has been established as yet. Once the case has been taken to the court conciliation can be invoked at any moment.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

I refer to the answer under 2.1. Since no conciliation mechanism exists, the case is never referred to conciliation. However, the Labour Court, following the procedural rules of the regular courts, can decide to suggest conciliation between the parties at any moment while the case is before the court. However, the judges have to be very discreet in order not to disqualify themselves.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

See answer above. However, if the parties think it might be beneficial to adjourn the proceedings and to try conciliation outside the courtroom the court will adjourn until the conciliatory effort has come to a standstill.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

The court would then try the remaining portion of the dispute.

2.5 How often is conciliation used compared to straight litigation?

Conciliation by specially selected conciliators is never used because that mechanism has not yet been established by law.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

There is no prescribed time limit for how long judicial proceedings can be adjourned, while conciliation by the parties is attempted.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

As was mentioned earlier, there is no conciliation mechanism outside of the courtroom, prescribed by Icelandic law. Therefore, it is not possible to provide any pertinent answers to this or the following questions.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

[Replies end here.]

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Mr. Kevin Duffy,
Chairman, The Labour Court
Ireland**

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

In cases involving claims of discrimination a mediation service is provided by the Equality Tribunal, which is the Court of first instance for such claims in the Irish system. The Director of the Equality Tribunal has prepared a separate reply to this questioner dealing with the operation of the mediation service operated by her Tribunal. This reply deals with cases other than those involving the application of the principle of equal treatment.

In other disputes concerning individual employment rights there is no formal system of meditation or conciliation. There is, however, a well developed conciliation service operated by the Labour Relations Commission (LRC) which assists parties to reach agreement in collective disputes where the issues are ones of interest (i.e. where there is no prescribed legal right to what is claimed, such as a pay increase or improvements in working conditions) Subject to some exceptions in such cases the parties must engage in conciliation before the Labour Court can hear the case.

1.1 Is there a statutory requirement for conciliation? If so what does it require?

There is a statutory requirement in the type of case referred to at 1 above. It requires the parties to make a genuine effort to resolve the dispute by negotiation. The conciliation officer must certify that no further effort on his or her part will advance the resolution of the dispute before the Court can accept the case.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

It is not up to the Court. It is a statutory requirement in all industrial relations cases. There are exceptions to this rule where a trade union is not recognised by the employer for negotiating purposes. Here the dispute may be referred directly to the Court. Also, in cases involving individual issues a direct reference may be made.

1.3 Is there a routine or occasional use of conciliation?

It is routine.

1.4 Is the use of conciliation increasing or decreasing?

Remaining stable

1.5 Does resort to conciliation require agreement of the disputants?

Subject to the exceptions referred to above parties must engage in conciliation before their dispute can be adjudicated upon by the Court.

1.6 Are there issues which are barred from conciliation?

No. However it is not used in cases where statutory employment rights are in contention.

1.7 Where does the conciliation fit into any appellate proceedings?

In the case of conciliation a report of the conciliation officer is available to the Court at every stage in the procedure. It will be noted from the response of the Director of the Equality Tribunal that the position is different in the case of mediation provided by her office.

2. What is the timing of the conciliation; when does it occur?

After local negotiations have broken down

2.1 Is it done prior to the Court taking jurisdiction over the case?

Yes. Conciliation is undertaken by the Labour Relations Commission which is a specialist statutory body.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

See above.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

Conciliation takes place before the dispute is referred to the Court

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

The Court deals with the outstanding issues.

2.5 How often is conciliation used compared to straight litigation?

The majority of cases (approximately 80% are conciliated).

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

It is a matter for the parties and the conciliation officer.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

Where the Court is of the view that further conciliation may resolve the dispute it can be referred back to conciliation and the hearing stayed.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

Conciliation can be adjourned and can be reactivated at any stage up to the hearing before the Court.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

Yes. The Court obtains a report from the conciliation officer.

3. What are the qualifications of the conciliators?

They are civil servants who are trained for the post.

3.1 How are conciliators selected?

By competition amongst civil servants in the relevant government department.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

They are officers of the Labour Relations Commission and are assigned by that body.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

See above.

3.4 What are the experience and/or training requirements for serving as a conciliator?

See above.

3.5 Are conciliators used on a full-time or part-time basis?

Full-time

3.6 Are they compensated by the court or parties or government?

See above

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

They are full-time officers and civil servants and are paid accordingly.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

Yes. This is undertaken by the Labour Relations Commission.

4. What subject matters may be submitted to conciliation?

Generally, any matter that can be referred to the Labour Court may be dealt with through conciliation.

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

See above

4.2 What are examples of issues conciliated and the frequency of their submission?

As indicate above all issues of an industrial relations nature are referable to conciliation.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

No.

4.4 Does the court monitor the progress of the conciliation? If so, how?

No. It is conducted by a separate and independent agency.

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

Yes.

5.1 What is the impact of conciliation on the volume of cases coming to the court?

Approximately 70% of cases referred to conciliation are settled. This has a corresponding easement on the workload of the Court.

5.2 What is the impact on the work and functioning of the court?

See above. Even where a case is not settled the conciliation process will refine the range of issues between the parties. This is of considerable benefit to the Court

5.3 Does conciliation adversely impact on the court's making of case law?

No.

5.4 Do the disputants prefer conciliation to litigation?

Generally yes.

5.5 Have there been any changes in attitudes toward mediation since its introduction?

No.

5.6 Should mediation be encouraged, discouraged, or ignored?

Most definitely encouraged.

The Use of Mediation/Conciliation by Labour Courts

Reply of the Irish Equality Tribunal to the Questionnaire

**by Ms. Melanie Pine
Director, The Equality Tribunal
Ireland**

Note: The Irish Equality Tribunal has the specialised tribunal with first instance jurisdiction for discrimination claims in employment (including pensions) and in access to goods and services.

Please note: the equality tribunal in Ireland has a statutory role to mediate, not to conciliate.

For convenience the difference between mediation and conciliation can be summarised as follows:

- ❖ Mediation is a process where both parties talk about the issues with the help of a professional mediation who helps them to reach a mutual agreement. There is no pressure to reach agreement.
- ❖ Conciliation is a process where the conciliator gets each party in private to identify their essential positions and uses this to push both parties to reach a compromise position.

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

Mediation is available in all complaints of discrimination both in relation to employment (including pensions) and in relation to access to goods and the provision of services.

1.1 Is there a statutory requirement for conciliation? If so what does it require?

Mediation is provided for under statute as an option for resolution of a discrimination complaint. The legislation provides that mediation:

- ❖ Is held in private
- ❖ Cannot take place where either party objects
- ❖ Cannot take place outside the Tribunal's jurisdiction or where a claim has already been decided through investigation and hearing
- ❖ Agreements are legally binding on both parties and can be enforced through the civil courts

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

Mediation takes place in all cases where

- a) neither party objects to mediation and

- b) the Director of the Equality Tribunal considers the case is resolvable through mediation.

1.3 Is there a routine or occasional use of conciliation?

Mediation currently takes place in over 40% of cases referred to The Equality Tribunal.

1.4 Is the use of conciliation increasing or decreasing?

Mediation has increased from approximately 10% of cases in 2003 to 40% in 2005.

1.5 Does resort to conciliation require agreement of the disputants?

Mediation cannot take place where either party objects but explicit agreement is not required.

1.6 Are there issues which are barred from conciliation?

Any issues in discrimination cases can be referred to mediation.

1.7 Where does the conciliation fit into any appellate proceedings?

Mediation takes place only at first instance, before the Equality Tribunal. There is no provision for appeal as by definition mediated agreements involve both parties. However there is provision for enforcement of mediation agreements through the civil courts.

2. What is the timing of the conciliation; when does it occur?

Parties are generally asked whether they are agreeable to mediation as soon as a case has been lodged. However it is open to parties to opt for mediation at any stage before conclusion of the hearing of a case.

2.1 Is it done prior to the Court taking jurisdiction over the case?

No. The Tribunal cannot mediate unless it has jurisdiction.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

See above. Cases are usually referred for mediation within 2 months of lodgement.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

Formal Tribunal proceedings are stayed pending the conclusion of mediation. If mediation results in agreement the Tribunal has no further role and the case is concluded. If mediation does not result in agreement, the case can return, by application of the claimant, for formal hearing. However information gained by either party through mediation cannot be taken into account in the formal proceedings.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

On very rare occasions, matters not settled through mediation can be referred for hearing and investigation but matters already agreed through mediation may not be

raised again. In general mediation is taken as offering a comprehensive settlement of the dispute.

2.5 How often is conciliation used compared to straight litigation?

Approximately 40% of cases referred to the Tribunal go to mediation and about three-quarters are resolved at mediation. The remaining 60 % of claims go straight to hearing, with a further 10% falling to be heard after mediation has not led to agreement.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

The duration of the process is a matter for the parties and for the mediator. There is no legal or judicial prescription as to the duration of a mediation session or the number of sessions necessary to bring a matter to a conclusion. Most mediations do not last more than half a day and do not take more than 2 sessions. In general, mediation agreements are signed within 7 or 8 months of initial lodgement of a case.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

Tribunal litigation proceedings are held in abeyance for all cases for the duration of mediation by the Tribunal.

In relation to external mediation (e.g. by an employer's industrial relations processes), proceedings before the Tribunal (either at mediation or by way of hearing) may be held in abeyance at the request of the claimant.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

If mediation does not reach agreement, the parties may return to the formal proceedings. However at the request of either party with the consent of the other, mediation may re-commence at any time prior to the issue of a formal judgment in the case. There are no statutory provisions governing this.

2.9. Does the Court learn what transpired in conciliation? Should it? Is there a report?

The legislation provides that the Equality Tribunal retains a copy of the mediated agreement. However the Tribunal's code of practice provides that the mediation process is entirely confidential and the information gained may not be used in another forum, including a formal hearing before the Tribunal. The Tribunal adheres rigidly to this code of practice. There is no report to the Tribunal in the event of a formal hearing of the case. A judge who mediates unsuccessfully in a case will never be assigned that case for hearing.

3. What are the qualifications of the conciliators?

Mediators receive formal structured training leading to professional accreditation by the national body.

3.1 How are conciliators selected?

Almost all mediators also act quasi-judicially in the adjudication of cases before the Equality Tribunal. Under legislation mediators must normally be part of the staff of the Equality Tribunal and must be appointed mediators by the Director. Staff members who apply for appointment and who complete satisfactorily the requisite professional training will be appointed.

Statutory provision has also been made for the appointment of a panel of external mediators to work for the Tribunal, given the increasing number of cases going to mediation.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

Designation as a mediator in a particular case is made by the Director of the Equality Tribunal, or by the head of mediation acting on her behalf.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

Assignment of mediators by the Tribunal is made on a day-to-day basis.

3.4 What are the experience and/or training requirements for serving as a conciliator?

Comprehensive knowledge of the relevant legislation is essential for the mediator, combined with the completion of the requisite professional mediation training.

3.5 Are conciliators used on a full-time or part-time basis?

Currently all mediators in the Equality Tribunal are full time staff but carry out their mediation functions on a part-time basis, most also act quasi-judicially with the Tribunal. External mediators will work on a part-time basis.

3.6 Are they compensated by the court or parties or government?

Mediation is free. Equality Tribunal mediators are civil servants paid by government. External mediators will also be paid by the government on a part-time basis.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

Salaries are determined by the Government.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

A confidential users survey has been undertaken and analysed. Informal feedback from users is also a feature of the operation of the service.

4. What subject matters may be submitted to conciliation?

All matters which are covered by the provisions of Employment Equality Acts, Equal Status Acts and the equality provisions of the Pensions Acts may be submitted.

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

They are restricted to the case jurisdiction of the Equality Tribunal.

4.2 What are examples of issues conciliated and the frequency of their submission?

There are nine discriminatory grounds in respect of which protection is provided under Irish Law: gender, marital status, family status, religion, age, disability, sexual orientation, race and membership of the Irish Traveller community.

Mediation is provided in respect of all nine grounds, with the gender, race, disability and age grounds predominating overall. The Traveller community ground is also frequently cited in equal status cases.

Issues include:

Employment: discriminatory dismissal, equal pay, sexual and other harassment, direct or indirect discrimination in relation to recruitment or selection for promotion, general conditions of work.

Equal status: access to refreshment and entertainment, insurance, service in shops, access to general education

Pensions: refusal of access to schemes on gender, age and disability grounds

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

All of the mediators receive comprehensive training on discrimination law (most also adjudicate on cases) and must have professional mediation training.

4.4 Does the court monitor the progress of the conciliation? If so, how?

The Tribunal does not monitor the progress of conciliation.

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

Mediation is a highly satisfactory method of addressing complaints of alleged discrimination in the workplace and in the provision of goods facilities and services. It is informal and accessible. Feedback from parties involved in mediation has indicated that mediation is seen as a very positive experience. In addition mediation can lead to solutions which meet both parties' needs and which go beyond the redress which by law could be awarded by the Tribunal.

5.1 What is the impact of conciliation on the volume of cases coming to the court?

There is no evidence that the availability of mediation is a factor which has led to an increase in the numbers of cases referred to the Equality Tribunal.

5.2 What is the impact on the work and functioning of the court?

Mediation is quicker than conclusion of a case through formal hearing and is an important case management tool accordingly.

5.3 Does conciliation adversely impact on the court's making of case law?

On balance the Tribunal does not consider there is any adverse impact as the volume of complaints before the Tribunal which are not resolved through mediation gives ample opportunity for the development of case law.

5.4 Do the disputants prefer conciliation to litigation?

A predominantly positive attitude on the part of users of the mediation service is apparent from a users' survey which was undertaken by the Tribunal in 2004. Anecdotal evidence indicates that parties find mediation less confrontational and less intimidating than a formal hearing.

5.5 Have there been any changes in attitudes toward mediation since its introduction?

Mediation has become increasingly acceptable as is reflected in the increasing number of cases resolved through mediation. In particular it has become more acceptable to legal and trade union representatives. Interestingly the successful record of mediation in the Equality Tribunal has encouraged the Irish Government to provide for mediation in other areas of litigation such as insurance claims.

5.6 Should mediation be encouraged, discouraged, or ignored?

Mediation is extremely successful at resolving issues in a way in which the needs of both parties are met, and in dealing with situations (e.g. employment) where the parties need to maintain a continuing relationship. The Tribunal strongly promotes mediation in all appropriate cases.

ISRAEL

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Judge Stephen Adler,
President, National Labour Court
Israel**

[1] Conditions for use:

There is no statutory requirement requiring parties to mediate. However, there are laws and regulations governing mediation.¹

Labour Courts request that litigants mediate their dispute prior to their hearing. Sometimes, the court suggests during the hearing that the parties mediate their dispute. Some courts require litigants to attend a preliminary mediation session, at which the mediator or Registrar will explain how mediations works and attempts to reach a settlement.

¹"Courts Law 1984," Paragraphs 79 C and 79 D; "Court Regulations (Mediation) 1993."

The following types of mediation are used in labour courts:

[a] Court appointed and financed mediators mediate cases involving relatively moderate sums of money. The mediators are generally lay members, who will not sit on the case they mediate.

[b] Private mediators mediate cases involving substantial amounts of money. The court-financed mediations are generally brief, lasting between 30 – 120 minutes and do not always involve the mediator sitting separately with each party. The private mediations generally take longer and often involve the mediator sitting separately with each party.

[c] Registrars and lawyers who are judges' legal assistants or employed in the courts' Case Handling Department sometimes do mediation.

[d] Judges sometimes mediate major disputes.

Until last year the use of mediation was increasing in the Labour Courts. About 5,000 cases were settled by mediation. However, the Courts Administration and Treasury Ministry eliminated the budget for lay member mediators, which reduced the amount of cases being mediated. However, some of the dedicated lay members continue to do mediation on a volunteer basis.

Agreement of all litigants to a dispute is required for mediation to take place.

The government mediation agency is small and mediates a small number of court disputes without charge. The courts sometimes refer disputes to this agency for arbitration without charge.

No issues are formally barred from mediation. However, the mediator has the discretion to decide that a particular issue is not appropriate for the mediation process and may stop the proceedings.

Mediation is used at both the appellate level (one National Labour Court) and trial level (five Regional Labour Courts).

The President of the National Labour Court encourages mediation conventions between parties in the labour relations field. In 2004 a mediation convention was signed in the private sector, between the Histadrut General Labour Federation and the Chamber of Private Sector Employers Associations.

[2] **Timing of use:**

Mediation is generally done prior to the court hearing. Parties to a dispute are free to call in a mediator prior to the filing of a court petition, but this is infrequent.

Referral of disputes to mediation, as mentioned above, is done by the Case Handling Department, shortly after the petition is filed. This department reviews briefly every case filed and, in most instances, suggests in writing that the parties agree to mediation.

The general policy is that mediation does not delay the hearing date. The Case Handling Department set a date for mediation and a later date for the court hearing.

When part of a dispute is settled in mediation, the court may grant it judgment status and continue to hear the remaining issues in the case.

When litigants reach an agreement in a court appointed mediation they generally request the court to make the agreement a court judgment. In absence of such judgment a mediation agreement is regarded as a binding contract.

The court attempts to convince the parties to mediate in almost all civil cases. In about a third of the cases the parties agree to mediate.

Most court-financed mediation is completed in one hearing. The length of private mediation is generally longer but depends on the circumstances of each dispute.

Lengthy court-financed mediation is discouraged and infrequent because of its' high cost. Private mediation is generally not a lengthy process because of the cost. When judges mediate major collective disputes the process can be lengthy, especially when the judge monitors the progress of negotiations and the implementation of agreements.

Almost all court-financed mediation is done in court premises, at both trial and appellate levels. Where available, special mediation rooms are used. Notices of mediation dates are sent by the court administration.

[3] Qualifications of mediators:

Court-financed mediators are selected from among the lay members. The parties select private mediators from the known experts in labour relations and labour law. When the parties to a dispute cannot agree on a mediator they often petition the court to select the mediator. Sometimes the court selects the mediator from a list submitted by the parties and sometimes the court chooses expert mediators who it knows.

As explained above, some types of mediation involve fixed rosters and some, especially the private ones, are ad hoc. However, the mediators are generally experienced in labour relations or labour law. The custom of making an agreed mediator and arbitrator list when a collective agreement is signed is beginning.

All mediators are required to complete a mediation course, of a minimum of 60 hours. There are mediation-training courses, some of which are conducted at the labour courts. Experienced mediators conduct these. The mediation is done on court premises by the mediation teacher and his student and is, in effect, financed by the student.

There are few full time mediators. Many mediators are practicing lawyers or labour relations' practitioners, with mediation being a small part of their practice. In recent years, there are more mediators who spend most of their working time doing mediation.

Compensation was discussed above. The courts have set reasonable fees for private mediators to whom cases are referred. If the parties want a mediator who has not joined this arrangement, the fee is set by agreement between the parties and the mediator. In such instances, the mediator's fee is generally substantially higher than the court-set fees. Judges and other court employees do not receive special compensation when they are mediators.

The mediation institute of the Justice Ministry recently conducted a comprehensive evaluation of mediation at the labour courts. Parties filled out a questionnaire, which they gave to the court secretariat. The institute processed the results. Since then, no subsequent evaluations have been conducted and the Justice Ministry's mediation institute has been closed.

[4] Subject matter of mediation:

The parties may agree to mediate any dispute. Generally, mediation in the labour courts relates to labour disputes with issues of law and facts. However, it is possible for the parties to expand the subjects mediated to include economic disputes.

Mediation is particularly appropriate in labour relations cases. Collective disputes are particularly suitable for mediation; judges or private mediators do these. Mediation is often useful in cases with multiple parties or many sub-disputes within the larger conflict. At the appellate level litigants have been willing to mediate their dispute, despite the fact that one party has won in the trial court.

Sometimes mediators with knowledge of specific industries are used as mediators for disputes in that industry. This happens especially in economic branches like the diamond industry, which have many customs particular to that industry.

Court monitoring of mediation is particularly used in collective disputes. The judge requires the parties to submit written or oral reports regarding the mediation's progress. Sometimes the judge will use the report sessions to further the mediation process and suggest breakthroughs to structure the continuing mediation.

[5] **Value of Mediation:**

Mediation has not reduced the volume of cases filed with the labour courts. In recent years between 85,000 and 95,000 cases are filed annually in the five trial level (Regional) labour courts. The variation in volume appears to be determined by the state of the economy.

Court supported mediation settled about 5,000 cases a year for the last ten or more years. In the middle of last year the budget for mediation was reduced and, therefore, the number of cases settled was reduced to about 3,500. In the year 2005 the budget for mediation was eliminated and volunteers and young attorneys working for the court, generally in the Case Management Department did the mediations. According to the amount of cases settled in the first half of the year about 2,400 cases will be settled in mediation.

Mediation has reduced judges' workload. In particular, mediation of small claims had allowed the judges to concentrate on more complicated cases.

Mediation has had no effect on case law. However, there have been a number of cases related to mediation.²

Parties to mediation have generally expressed satisfaction with the process and feel that mediation lead to an equitable agreement.

Mediation has become more acceptable in the past 10 years. Mediation training centers and trained mediators has increased. However, the cost of mediation deters some litigants, especially when the sum in dispute is small.

It is hard to tell what the impact on justice has been. Many participants have acknowledged the importance of settling disputes by agreement and expressed the sentiment that an agreement is the most just solution to a dispute. The active mediation role of the labour courts in the past few years has convinced many in labour relations that an agreement is preferable to a court judgment or strike.

The State Attorneys and many government ministries have not been receptive to mediation.

² See e.g., Dr. Yitzhak Haleving v. Att. Yoram Elroi, PDA 32, 481, (the National Labour Court denied the appeal of an employee who refused to pay his mediator after two years of court-appointed mediation. The Court held, *inter alia*, that mediation is a proper avenue for settlement of disputes, and that mediation should be entirely separate from court proceedings); Zika Electrode Factories Co. v. Yehudit Yakobovitz, PDA 37, 796, (the National Labour Court granted an employer's appeal to recuse the Regional Court judge who accidentally received a copy of an unsuccessful settlement agreement drafted in mediation. The Court held, *inter alia*, that exposure to mediation documents without the approval of the parties is not automatic grounds for recusal; every case should be decided individually.)

In my opinion mediation should be encouraged, and more disputes should be submitted to mediation.

Another type of ADR used in the Labour Courts – Early Neutral Evaluation:

I note that there is another form of ADR used in the Labour Courts:

Early neutral evaluation has been very successful. It has been used in social welfare cases in a few Regional Courts and the National Labour Court. A special budget was allocated to support this pilot program. The people doing the evaluation are known experts in the field, generally retired judges. The results of ENE are: the plaintiff withdraws his case; the defendant (the National Insurance Institute) accepts the claim; a neutral medical evaluator is appointed to give his expert opinion; some issues in the case are agreed upon and where there are disagreements the case is transferred to a hearing.

MALTA

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Judge Abigail Lofaro
Magistrate, Courts of Justice
Malta**

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

1.1 Is there a statutory requirement for conciliation? If so what does it require?

The Law provides a mechanism where the parties involved in a trade dispute may refer the matter for conciliation.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

This is extraneous to the conciliation mechanism.

1.3 Is there a routine or occasional use of conciliation?

Routine.

1.4 Is the use of conciliation increasing or decreasing?

Increasing.

1.5 Does resort to conciliation require agreement of the disputants?

Yes.

1.6 Are there issues which are barred from conciliation?

No.

1.7 Where does the conciliation fit into any appellate proceedings?

Where conciliation fails, the Law contemplates various possible routes in order to try and reach a settlement. The ultimate solution is to refer the dispute to the industrial tribunal.

2. What is the timing of the conciliation; when does it occur?

2.1 Is it done prior to the Court taking jurisdiction over the case?

Yes.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

Yes, if the parties agree.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

They are suspended.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

It decides the unsettled part.

2.5 How often is conciliation used compared to straight litigation?

Quite often.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

It is up to the parties.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

The matter is left open for the parties and the Tribunal to decide.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

There is nothing to stop the parties from trying to solve the dispute at a later stage should they feel that a fresh attempt at conciliation may resolve the dispute.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

No.

3. What are the qualifications of the conciliators?

3.1 How are conciliators selected?

By the Minister responsible Employment and Industrial Relations.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

By the parties failing which by the Director responsible for employment and industrial relations.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

Fixed roster. The said Minister after consultation with the Malta Council for Economic and Social Development.

3.4 What are the experience and/or training requirements for serving as a conciliator?

The Law does not specify.

3.5 Are conciliators used on a full-time or part-time basis?

Part time.

3.6 Are they compensated by the court or parties or government?

Yes.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

Government.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

No.

4. What subject matters may be submitted to conciliation?

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

They may pursue issues beyond the issues covered in the litigation.

4.2 What are examples of issues conciliated and the frequency of their submission?

Matters arising from collective agreements quite frequent.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

No.

4.4 Does the court monitor the progress of the conciliation? If so, how?

No.

5. **Do you consider use of conciliation to be a positive contribution to the work of the court?**

5.1 **What is the impact of conciliation on the volume of cases coming to the court?**

Considerable.

5.2 **What is the impact on the work and functioning of the court?**

Considerable.

5.3 **Does conciliation adversely impact on the court's making of case law?**

No.

5.4 **Do the disputants prefer conciliation to litigation?**

Conciliation.

5.5 **Have there been any changes in attitudes toward mediation since its introduction?**

Yes.

5.6 **Should mediation be encouraged, discouraged, or ignored?**

Encouraged.

NORWAY

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Jon Gisle
Vice-president,
The Labour Court of Norway**

Introductory notes

I will start by observing that the Labour Court is a specialist court for cases concerning collective labour law. The court primarily decides in cases concerning the interpretation, validity, and existence of collective agreements between a union on one side and an employers' association or a single employer on the other. The court also decides disputes concerning breaches of collective agreements and claims for damages in connection with this, and actions (strikes, lockout, go-slow-actions, etc.) that are allegedly illegal or in conflict with a collective agreement. Disputes concerning individual contracts of employment and work conditions, however, do *not* fall under the Labour Court but are to be decided by the ordinary courts.

The legal procedure of the Labour Court is ruled by specific legislation, primarily the Labour Disputes Act of 5 May 1927 no. 1. The ordinary rules of legal procedure do not apply directly to the Labour Court. (Another aspect is that the Labour Court often makes use of the ordinary rules of legal procedure "as is fitting and as long as it is not incompatible with the Labour Disputes Act".) For civil

proceedings before the ordinary courts, however, the Act relating to the rules of legal procedure in civil cases of 13 August 1915 no. 6 applies. This act will be replaced by the Act concerning mediation and legal procedure in civil cases of 17 June 2005 no. 90, which has been adopted, but still not come into effect. These laws apply among many other things to individual labour law disputes before the ordinary courts.

This means that the provisions in these acts concerning mediation do not apply to cases before the Labour Court, but they do apply to disputes concerning individual contracts of employment before the ordinary courts. Mediation was introduced at the ordinary courts on a trial basis in 1997 warranted by the Act relating to the rules of legal procedure in civil cases § 99 a with regulations. Mediation was first restricted to a few courts, but has later had its geographical scope considerably extended. Pursuant to the new act chapter 8 mediation is no longer on a trial basis, but has become a permanent arrangement that applies to all the ordinary courts. There is a distinction between “conciliation” which happens when the court in session or by other contact with the parties seeks to establish a settlement, and “arbitration”, which is conducted out of session according to more detailed provisions by a judge or appointed arbitrator.

Since it explicitly is asked about use of mediation at the *Labour Court*, I will not discuss the use of mediation in cases concerning individual contracts of employment before the ordinary courts. I will therefore limit the answer to cover the informal conciliation procedure now used by the Labour Court, and which is used in collective cases concerning labour law.

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

1.1 Is there a statutory requirement for conciliation? If so what does it require?

There is no legislation that regulates conciliation in cases before the Labour Court. There is, however, a requirement that the parties must have attempted to find a solution to the conflict through negotiations (without the assistance of the court) before the plaintiff may deliver the petition, see 2.1. Once the petition is delivered conciliation is a possibility at every stage of the proceedings.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

Conciliation is not mandatory. It is up to the discretion of the President of the Court or the judge in charge of the preliminary proceedings whether conciliation is to be attempted. Conciliation may also be initiated by the parties. In practice conciliation is only attempted in a minority of the cases pending at any time, although the number of cases where conciliation is attempted has increased during the last couple of years. Arbitration before the Labour Court is conducted in an informal way without set procedures, giving considerable flexibility concerning the decisions of which cases that shall be mediated (see 2).

1.3 Is there a routine or occasional use of conciliation?

Occasional. See 1.2.

1.4 Is the use of conciliation increasing or decreasing?

In 2004-2005 the number of cases in which conciliation has been sought has increased. This is due to a deliberate effort on part of the Court in order to make the proceedings more efficient.

1.5 Does resort to conciliation require agreement of the disputants?

There is no legislation regulating this either, but since conciliation is voluntary, it only happens with the parties' consent. The parties almost never refuse when the Court proposes mediation. The judge in charge of the preliminary proceedings often confidentially asks the parties about the possibilities for reaching a settlement before proposing mediation.

1.6 Are there issues which are barred from conciliation?

No. All points of conflicts may be referred to conciliation.

1.7 Where does the conciliation fit into any appellate proceedings?

The question is of little practical importance because appellate proceedings almost never occur. In most cases the Labour Court is the first and the last court.

2. What is the timing of the conciliation; when does it occur?

2.1 Is it done prior to the Court taking jurisdiction over the case?

There is no *mediation* before the Labour Court receives the petition in the case. The Labour Disputes Act no. 18 no. 3, however, demands that before a case is brought before the Court there must have been negotiations between the parties, or negotiations must have been attempted in vain by the plaintiff.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

Since the conciliation procedure of the Labour Court is informal, conciliation may take place at any time during the preliminary proceedings. Sometimes conciliation happens in interaction with negotiations between the parties without the mediation of the Court. Conciliation may also occur in connection with the main hearing of the case.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

If the conciliation leads to a settlement the case is closed without a main hearing. If the conciliation fails it will have no effect on the court proceedings. On rare occasions a main hearing may be interrupted in order to try conciliation.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

This rarely happens, but it is conceivable. The proceedings will then continue in regard to the part of the conflict which has not been solved and there will be a main hearing.

2.5 How often is conciliation used compared to straight litigation?

This varies so much from one year to another, that it is hard to give a precise answer. In 2005 conciliation has so far (up to July 31) been tried in nine cases. Of these, conciliation was successful in six cases, failed in two, while the outcome still is uncertain in one case. As a basis for comparison, sentence has been passed in 12 cases so far in 2005, while nine cases have been withdrawn or settled by the parties without mediation. The numbers are small but inspiring. It is, however, impossible to say whether any of the cases that were solved through conciliation could have been solved by the parties through negotiations without mediation.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

The duration may vary from a meeting that lasts one to two hours to several longer meetings. This is up to the parties and the conciliator. There is no legislation concerning this.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

Sometimes the court office holds off the assignment for the main hearing because there is hope for a settlement in the case. This often happens when the parties communicate informally and the judge in charge of the preliminary proceedings later follows up with a conciliation meeting. Proceedings that are already assigned are rarely held in abeyance because of conciliation. In such cases, however, the awareness that the main hearing is approaching may have a positive effect on the parties' aspirations to make a settlement out of court.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

It will always be possible to resume conciliation even though it failed to begin with, but this does not often happen in practice. Reopening of conciliation may occur on the initiative of the parties, the presiding magistrate or the judge in charge of the preliminary proceedings.

More often the judge call for conciliation after the parties have failed in their negotiations.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

No report is written, but it is registered that a meeting has been held in order to discuss the case and attempt to reach a settlement. If conciliation fails, the judge conducting the mediation may be disqualified if s/he during mediation has suggested what s/he thinks the result of a trial will be. In such cases the mediating judge will naturally not tell the Court what happened during mediation. In other cases where there is no question of qualification, the mediating judge may tell the other members of the Court what emerged during mediation.

3. What are the qualifications of the conciliators?

3.1 How are conciliators selected?

There is no formal designation of mediators. Mediation has so far only been conducted by the two permanent judges of the Court. Alternatives have been debated informally but not been put into effect.

3.2 Is the designation of the conciliators made by a court judge or by another agency?

See 3.1.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

There is no roster and no system of ad hoc conciliators. See 3.1.

3.4 What are the experience and/or training requirements for serving as a conciliator?

As mentioned in 3.1, the conciliators are the permanent judges of the Court. There are no additional requirements to conciliators in cases before the Labour Court. The judges may attend a course in judicial conciliation but this is not mandatory.

3.5 Are conciliators used on a full-time or part-time basis?

Conciliation amounts to a comparatively small part of the work as a full-time judge.

3.6 Are they compensated by the court or parties or government?

The judges are paid by the government. No extra compensation is given for conciliation.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

See 3.6.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

There are no formal procedures for evaluation either, but in practice an internal evaluation of the entire conciliation system is conducted on a continuous basis.

4. What subject matters may be submitted to conciliation?

Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

When conciliation is conducted in a case before the Labour Court it is up to the parties and the mediating judge which issues to pursue. The conciliation is not restricted to the case jurisdiction of the court in that case. There are often financial issues underlying a more principled judicially formulated litigation. In some such cases the litigation may no longer apply if the conciliation leads to a solution of the underlying dispute.

4.1 What are examples of issues conciliated and the frequency of their submission?

As mentioned earlier, most cases are *not* mediated. It is not possible to give an adequate answer to this question because of the small number of cases. See however 4.1 and 5.4.

4.2 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

No. See 3.4.

4.4 Does the court monitor the progress of the conciliation? If so, how?

Monitoring is unnecessary because conciliation is conducted by the court's own judges.

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

What is the impact of conciliation on the volume of cases coming to the court?

Conciliation has no impact on the number of *incoming* cases, since the conciliation takes place after the writ is received at the court office.

5.1 What is the impact on the work and functioning of the court?

On the one hand do preparations for conciliation meetings and conducting these entail a considerable amount of work. On the other hand, work is saved when the conciliation leads to a settlement. Whether conciliation reduces the workload of the court as a whole is difficult to say, but our experiences with conciliation after we started to actively use it in several cases in 2004, have been positive. See 2.5.

5.2 Does conciliation adversely impact on the court's making of case law?

It is hard to see any impact from conciliation on case law.

5.3 Do the disputants prefer conciliation to litigation?

It varies. In some cases the parties may still prefer a court decision. This may seem natural when the questions of the case in reality are of a judicial quality. The parties may prefer conciliation in cases where there are underlying financial conflicts because they may feel more comfortable with the situation, and because they wish to avoid the element of risk a court trial entails. Norwegian collective labour law is to a large degree based on the principle that the parties shall try to find solutions among themselves with or without the help of a mediator. Conflicts of *interest* (bargaining and renegotiations of collective agreements) are often solved by conciliation. Most cases before the Labour Court wholly or partly concern the interpretation of collective agreements that the parties have negotiated. When a dispute like that occurs, the parties are required to go through an extra round of negotiations without the assistance of a mediator before the case may be brought before the Labour Court, see 2.1. The parties, therefore, are familiar with negotiating with or without the assistance of a mediator in various situations.

5.5 Have there been any changes in attitudes toward mediation since its introduction?

Mediation has been conducted occasionally for a long time in the Labour Court. Preliminary meetings have been usual in many of the cases for years, and these have occasionally turned into informal conciliation.

Mediation has increased since 2004. This is due to a conscious effort on part of the court. The judges initiate mediation more often, and the parties are more frequently encouraged to use it whenever they find it appropriate. The change is connected with an increased faith on part of the court (and probably also the parties) in mediation as a means to reach a settlement.

5.6 Should mediation be encouraged, discouraged, or ignored?

If mediation is conducted in cases where chances to come to an agreement are good, this may result in less work for the court and have a positive effect on the work situation of the court. Mediation may also save the parties work and expenses, as well as contribute to a good climate and a will to cooperate among the participants on both sides of working life. It is important, however, to make correct decisions as to which cases to mediate. If much effort is spent in vain in cases where the chances for settlement are bleak, the mediation might have the adverse of the intended effect. Similarly, there is little point in using resources on cases where the parties should be able to find a solution out of court on their own.

Translated by Gyri Ryen

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

by Prof. Dr. Janez Novak
Supreme Judge
Supreme Court of the Republic of Slovenia

1. The circumstances under which conciliation may be initiated in cases before the labour court:

GENERAL

The Slovenian legislation does not regulate the concept of mediation. This method of amicable settlement of disputes is in fact regulated in the institute of conciliation.

The following methods of amicable/friendly settlement of labour disputes are regulated by law:

- **conciliation proceedings**, dealt with by the general collective agreements (for trade sector, for services-to-trade sector), and dealt with also by sectoral collective agreements (currently effective are 42 of them);
- **arbitration proceedings**, regulated by the above listed general collective agreements and sectoral collective agreements, and also by Article 205 of the Employment Act (Official Gazette of RS, No. 42/2002), applicable to regulation of individual employment relationships;
- **settlement proceedings**, regulated by Articles 305 a to 309 of the Civil Procedure Act (Official Gazette of RS, No. 36/2004), and applied on the basis of Article 19 of the Labour and Social Courts Act (Official Gazette of RS, No. 2/2004) also in proceedings before the labour courts. Settlement proceedings are regulated also by some other regulations, for example Article 32 of the Act on the Rights of Industrial Property arising from Employment (Official Gazette of RS, No. 7/2003).

Conciliation proceedings, regulated in those parts of collective agreements that concern obligations, are used by the parties to these agreements for resolving collective labour disputes.

Individual labour disputes and collective labour disputes may be resolved in arbitration proceedings.

Settlement proceedings are used to resolve individual labour disputes and collective labour disputes before the labour courts, because the proceedings of resolving individual labour disputes and collective labour disputes are regulated by the Labour and Social Courts Act, while the Civil Procedure Act is applied for resolving both kinds of above mentioned disputes, if not stated otherwise in the Labour and Social Courts Act (Article 19 of the Labour and Social Courts Act).

Under the provisions of Article 305a and the subsequent Articles of the Civil Procedure Act (relating to Article 19 of the Labour and Social Courts Act), the labour court has to fix a settlement hearing prior to the main hearing after receiving answer to a complaint. Such settlement hearing is thus obligatory in principle. The labour court, however, is not obliged to fix a settlement hearing in the following cases:

- if the parties have already carried out preliminary proceedings of amicable dispute settlement without success (mediation, conciliation, arbitration), or

- if the court assesses that there is no possibility of a compromise in court or that it does not constitute a suitable method of resolving the dispute.

Some courts of general jurisdiction (particularly, for example, the District Court in Ljubljana) decided on the conciliation proceedings prior to the commencement of the main hearing (i.e. already in the course of litigation) in the past years. The cases where the judges fixed settlement hearings involving older cases, were also frequent. A certain degree of success was achieved in this field (conclusion of a compromise in court – court settlement, withdrawal of complaint, waiver of claim), but the number (percentage) of thus resolved disputes was below expectations.

The practice of the courts of general jurisdiction and labour courts indicates that the ways of amicable settlement of disputes should be encouraged and sought prior to initiating court disputes because of their several positive consequences.

It is encouraging that the number of amicably resolved labour disputes (particularly through compromises in court – court settlement) has been constantly increasing during the last years. Thus in 2001, the percentage of the total cases resolved by labour courts through settlement was 5.2 %, in 2002 it was 9 %, in 2003 14.9 % and in 2004 16 %. The situation is thus improving, but in the field of amicable settlement of disputes it is still not comparable with certain other states.

It should be mentioned that before the labour courts, if there is no answer to a certain question in the labour law, the provisions of the Obligations Act (Official Gazette of RS, No. 83/2001) are subordinately applied. The obligation of amicable settlement of disputes is regulated by Article 11 of the Obligations Act, and the obligation of settlement by Articles 1050 to 1059 thereof.

TO INDIVIDUAL QUESTIONS:

1.1., 1.2. As stated above, the mediation proceedings/conciliation proceedings are not regulated by law. This method of amicable settlement of disputes is voluntary. In fact, such proceedings are regulated only by collective agreements.

1.3. The use of mediation/conciliation proceedings could be characterized as occasional.

1.4. It is not possible to give an exact answer to this question. However, the fact is that the number of labour disputes, settled in amicable manner, is increasing.

1.5. Particularly in the case of collective labour disputes, the disputants have to resort to amicable settlement of disputes prior to initiating the court proceedings.

1.6. No.

1.7. Legal remedies are neither possible nor regulated in the conciliation proceedings.

2. What is the timing of the conciliation: when does it occur?

There are no special provisions concerning the time limits for these proceedings. However, the time limits are determined for settlement hearing before the labour courts. The settlement hearing before the labour courts is in fact obligatory. In some cases the Labour and Social Courts Act sets the time limits when the courts of first instance and the parties have to perform certain procedural acts. This applies particularly to disputes concerning the existence or termination of employment (Article 41 of the Labour and Social Courts Act). The time limit for answer to a complaint is 15 days. The court has to fix the first hearing not later than within two months from receiving the answer to a complaint or from the expiry of the time limit set for answer to a complaint.

3. What are the qualifications of the conciliators?

Mediation is performed by judges (of regular courts and labour courts).

It should be mentioned that several training courses for judges on the methods of amicable settlement of disputes were organized in the last years. Such consultations and training were organised by state institutions, courts, professional associations and similar, and included the participation of numerous experts from abroad.

4. Subject matter of disputes submitted to conciliation

The subject matter of conciliation proceedings may be every disputed issue, referring to individual or collective employments. With individual labour disputes, such issues are relationships between an employee and the employer (for example: termination of employment contract, right to the wage, etc.). With collective labour disputes, such issues involve the rights or interests of parties to these legal relationships, mainly regulated in those parts of collective agreements that concern obligations (for example, amendments to collective agreements, strike). Frequent subject matter of disputes between the parties to collective agreements or of their amicable settlement are above all the interests of contract parties (interest collective labour disputes).

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

The use of conciliation has a positive impact on the proceedings before labour courts, because it eliminates the need for initiating a labour dispute before the labour court by enabling the disputants to resolve the dispute by themselves through the mediation of a third party (conciliator).

There is no data on the number of disputes that are resolved in such manner before initiating a labour dispute (i.e. out-of-court proceedings), and consequently there are no data on the decreased share of labour disputes owing to such method of resolving disputes.

Considering the absolutely excessive number of new cases before all Slovenian courts (around 600.000 cases per year), there are strong tendencies present particularly in the professional circles that the disputes should be resolved in special proceedings of amicable (substitute) settlement of disputes and not in court proceedings.

SPAIN

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Judge Antonio Martín Valverde
Tribunal Supremo
Madrid, Spain**

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Courts?

There are two kinds of conciliation in cases before the Labour Courts: A) administrative/professional conciliation, prior to the claim ; B) judicial conciliation, at the beginning of the judicial proceeding.

1.1. A) y B) are both regulated in the Labour Court proceeding Law. What is required is trying the agreement of the litigants.

1.2. B) – the activity by the Judge of trying the conciliation or agreement of the parties – is mandatory in all cases.- A) – the activity by the administrative/professional officer of trying the conciliation or agreement of the parties – is mandatory except in several types of cases (i. e., over constitutional rights, or over the validity of clauses of collective agreements).

1.3. See 1.2.

1.4. The use of both kinds of conciliation is traditional in Spanish Law.

1.5. No.

1.6. The Labour Court cannot accept a conciliation that carries a grievance for one or another litigant.

1.7. The conciliation is only regulated in trial Labour Court, not in appellate proceedings.

2. What is the timing of conciliation; when does it occur?

2.1. Administrative/professional conciliation (A) is prior to the claim; judicial conciliation (B) occurs at the beginning of the judicial proceeding.

2.2. No.

2.3. See 2.2.

2.4. The non-settled portion of the dispute may be claimed before the Labour Court.

2.5. There are no accurate statistics of the agreements reached in conciliation.

2.6. The maximum duration of the administrative/professional conciliation (A) is 15 days. The trying of judicial conciliation (B) is at the beginning and in the course of the open court.

2.7. See 2.6.

2.8. If conciliation is terminated with agreement it is not possible to sustain another claim over the same dispute.

2.9. Not in what concerns A. Yes in what concerns B.

3. What are the qualifications of the conciliators?

In principle, the conciliators are public officers. But the collective agreements can establish a different body of conciliators. In fact the conciliation of the disputes over collective controversies are often charged to conciliators that are not necessarily public officers. The compensation of the conciliators is up to the government.

4. What subject matters may be submitted to conciliation ? Responses in 1.

5. Do you consider the use of conciliation to be a positive contribution to the work of the court?

The administrative/professional conciliation is not very useful except in collective controversies. The judicial conciliation in Labour Courts is, in opinion of the observers, a useful way of settling labour

disputes. According the judicial statistics (not specially accurate till the moment), in dismissal disputes 25% of the disputes in 2004 are settled in judicial conciliation.

SWEDEN

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by President Michaël Koch
Deputy Chairman Lars Johan Eklund
The Labour Court
Stockholm, Sweden**

- 1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?**
 - 1.1. Under Swedish procedural law, all courts have an obligation to mediate between the parties in a legal dispute, provided that the dispute is of such character that the parties have a right to settle the matter themselves. The requirement states only that the court should work to promote a settlement between the parties, if this is deemed appropriate considering the character of the dispute and other circumstances. It should be emphasized that the conciliation is performed by the court itself. The court has a possibility to appoint special mediator, but this does not occur very frequently. - These principles are applicable also for the Labour Court.
 - 1.2. See 1.1.
 - 1.3. There is in practice a routine use of mediation.
 - 1.4. The use is increasing rather than decreasing.
 - 1.5. The use of conciliation does not require agreement of the disputant, but such agreement is of course necessary for obtaining a successful outcome of the conciliation.
 - 1.6. No, not as far as legal labour law disputes are concerned. Hence, all disputes before the Labour Court may be settled by an agreement.
 - 1.7. In appellate proceedings, conciliation does in practice not occur as frequently as in other proceedings. If it does occur, this happens mostly just before the final hearings.
- 2. What is the timing of the conciliation; when does it occur?**
 - 2.1. As has been explained above, conciliation is performed by the court itself.
 - 2.2. The dispute may be referred to conciliation by request of the parties. However, this is very unusual.
 - 2.3. If the dispute should be referred to conciliation performed by a body outside the court, this would mean that the court proceedings would be held in abeyance.
 - 2.4. If only a portion of the dispute is settled, the court has to deal with the remaining issues in the normal way.
 - 2.5. As has already been explained, the court has a principal obligation to promote a settlement. In practice, this is in fact done in most cases. Of all cases filed in the Labour Court, more than 40 per cent are settled.

- 2.6. If the conciliator is appointed by the court – very unusual – the court would probably prescribe a duration for the conciliation.
- 2.7. The proceedings may always be held in abeyance if the parties agree to this.
- 2.8. If the court has not succeeded in settling the dispute at one stage in the proceedings, this does not prevent the court from trying again at a later stage.
- 2.9. This question presupposes that the conciliation is not performed by the court. It is in such a case possible that the court is informed by the content of the settlement. But it is also quite possible that the settlement is held secret by the parties; in such a case the plaintiff would simply declare that his claims are withdrawn.

3. What are the qualifications of the conciliators?

- 3.1. Mediation is usually conducted by a court judge and no special conciliator is selected. As mentioned before, it is however possible for the court to select a conciliator from outside the court. Most of the answers to question 3.2 – 4.4 applies to those very rare situations.
- 3.2. When a conciliator from outside the court will be used the designation is made by the court.
- 3.3. A conciliator would be selected on an ad hoc basis.
- 3.4. There are no special requirements for serving as a conciliator.
- 3.5. A conciliator would be used on part-time basis.
- 3.6. Under certain circumstances (within the framework of a legal assistance scheme) a conciliator can be compensated by the government.
- 3.7. If the compensation is paid by the government the rate will be set by the court.
- 3.8. There are no procedures for evaluation of the conciliators or the sessions.

4. What subject matters may be submitted to conciliation?

- 4.1. There are no formal restrictions for the conciliator to the case jurisdiction of the court in that case. Observe the answer under 1.1.
- 4.2. As mentioned before, more than 40 per cent of the cases in the Labour Court are settled. Most of them concerns questions related to dismissals.
- 4.3. No, there is no provision for specific qualification or training for conciliators on specialized issues being conciliated.
- 4.4. No, the Labour Court does not monitor the progress of the conciliation.

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

- 5.1. As mentioned before more than 40 per cent of the cases in the Labour Court are settled through conciliation.
- 5.2. The question of conciliation is almost always taken up during the due course of the proceedings. If a settlement is reached it saves a lot of work for the court and can be more advantageous for the parties than a ruling of the court.
- 5.3. No, conciliation can not be said to impact adversely on the courts making of case law. Important issues are seldom settled by conciliation.
- 5.4. In a lot of cases the parties prefer conciliation to avoid the strain of a complete litigation process.
- 5.5. The Labour Court is not aware of any changes in attitudes toward mediation.
- 5.6. In the view of the Labour Court mediation should be encouraged

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Judge Jeremy McMullen, QC
Employment Appeal Tribunal
London, UK**

1. What are the circumstances under which conciliation may be initiated in cases before the Labour Court?

There are 3 procedures at the first instance (Employment Tribunal).

- 1) A claim will not be accepted unless the Claimant has initiated a grievance or the employer has refused to go through a disciplinary procedure, which is regarded as a way of reducing the number of cases.
- 2) It is a requirement that papers be sent to ACAS (Advisory Conciliation and Arbitration Service) a public body independent of government in most cases e.g. dismissal, discrimination.
- 3) There is a voluntary ACAS arbitration scheme for unfair dismissal only.

1.1 Is there a statutory requirement for conciliation? If so, what does it require

Yes. But the parties are not obliged to enter into it.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

See above.

1.3 Is there a routine or occasional use of conciliation?

Routine.

1.4 Is the use of conciliation increasing or decreasing?

It is level but as to 1) above, the use is compulsory and increasing.

1.5 Does resort to conciliation require agreement of the disputants?

Yes.

1.6 Are there issues which are barred from conciliation?

No.

1.7 Where does the conciliation fit into any appellate proceedings?

It may be directed usually when a case has been given permission to appeal by the Employment Appeal Tribunal especially where there is a challenge to the fairness of the Employment Tribunal hearing, or where the case is likely to be remitted to the Employment Tribunal for a rehearing or where the sum involved is low.

2. What is the timing of the conciliation; when does it occur?

ACAS conciliation usually before the oral procedure.

2.1 Is it done prior to the Court taking jurisdiction over the case?

At the same time.

2.2 May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When are cases usually referred?

No.

2.3 What is the impact on the court proceedings when a dispute is referred to conciliation?

Employment Tribunal proceedings are concluded.

2.4 What is the role of the court if only a portion of the parties' dispute is settled?

The remaining portion is tried.

2.5 How often is conciliation used compared to straight litigation?

One third of cases is concluded in this way.

2.6 What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

There are limited time scales.

2.7 Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

At the discretion of the Employment Tribunal.

2.8 If conciliation is terminated early in the case, is there provision for reactivating the process at a later time? How is that done?

No.

2.9 Does the Court learn what transpired in conciliation? Should it? Is there a report?

No.

3. What are the qualifications of the conciliators?

ACAS officer.

3.1 How are conciliators selected?

By ACAS.

3.2 Is the designation of the conciliator made by a court judge or by another agency?

By ACAS.

3.3 Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

They are full time officers.

3.4 What are the experience and/or training requirements for serving as a conciliator?

As above.

3.5 Are conciliators used on a full-time or part-time basis?

As above.

3.6 Are they compensated by the court or parties or government?

As above.

3.7 Are the compensation rates set by the court, parties, government, or conciliator?

As above. The parties pay nil.

3.8 Are there any procedures for evaluation of the conciliators or the sessions?

Not known.

4. What subject matters may be submitted to conciliation?

All.

4.1 Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

All issues.

4.2 What are examples of issues conciliated and the frequency of their submission?

Unfair dismissal, unpaid wages, discrimination.

4.3 Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

No. All ACAS conciliators are appropriately trained.

4.4 Does the court monitor the progress of the conciliation? If so, how?

No.

5. **Do you consider use of conciliation to be a positive contribution to the work of the court?**

Yes.

5.1 **What is the impact of conciliation on the volume of cases coming to the court?**

Reduced by one third

5.2 **What is the impact on the work and functioning of the court?**

Reduced caseload

5.3 **Does conciliation adversely impact on the court's making of case law?**

No.

5.4 **Do the disputants prefer conciliation to litigation?**

Do not know.

5.5 **Have there been any changes in attitudes toward mediation since its introduction?**

We don't have mediation formally.

5.6 **Should mediation be encouraged, discouraged, or ignored?**

Yes.

VENEZUELA

The Use of Mediation/Conciliation by Labour Courts

Reply to Questionnaire

**by Magistrate Juan Rafael Perdomo
Vice Presidente, Sala de Casación Social
Tribunal Supremo de Justicia
Caracas, Venezuela**

1. **What are the circumstances under which conciliation may be initiated in cases before the Labour Court?**

In cases of legal labour and social security conflicts, including those related to collective or diffuse interests (clash actions).

1.1 **Is there a statutory requirement for conciliation? If so, what does it require?**

A) In the out-of-court conciliation there is not regulation, for that the general principles apply.

B) In the judicial conciliation there is indeed a regulation. It is required:

- b.1. A demand has to be presented
- b.2. And admitted
- b.3. The defendant must be notified.
- b.4. Obligatory aid of the parts or to name representative if they are several.
- b.5. Personal intervention of the “judge of mediation”. At the labour court there are in fact two labour judges: 1) The “judge of mediation” who dealt with the case from the very beginning and during the phase of mediation; 2) The “judge of judgement”, who intervenes and have to decide the case if the conciliation or mediation fails, once the phase of mediation is over.

1.2 Is the invocation up to the discretion of the court, or mandatory? Does the court require it in all or only in some cases?

The judicial conciliation is obligatory, by law. The court requires it in all the cases.

1.3 Is there a routine or occasional use or conciliation?

There is a routine, mandatory use of conciliation.

1.4 Is the use of conciliation increasing or decreasing?

Since it is mandatory, it always takes place, in all judicial cases.

1.5 Does resort to conciliation require agreement of the disputants?

- A) In the out-of-court conciliation the agreement of the disputants by general principle is required.
- B) In the judicial conciliation the agreement by regulation is not required (art. 133 of the Labour Procedure Law of 2002, Ley Orgánica Procesal del Trabajo).

1.6 Are there issues which are barred from conciliation?

Conciliation is not allowed on issues of constitutional protection and particularly on the violation or threatens of violation of the rights and constitutional guarantees.

1.7 Where does the conciliation fit into any appellate proceedings?

The judicial conciliation is acceptable in the appeal. It can be dealt with to request of the parts and of the upper judge if the parts accept it.

2. What is the timing of the conciliation: when does it occur?

- A) In the out-of-court conciliation there is not limit of time and it can be carried out at any moment.
- B) In the judicial procedure, conciliation is carried out after the notification of the defendant and before the answer of the demand takes place. The phase of conciliation or mediation cannot last more than four months.

2.1. Is it done prior to the Court taking jurisdiction over the case?

- A) In the out-of-court conciliation it is carried out before the court take jurisdiction.
- B) In the labour court conciliation is carried out after the court takes jurisdiction over the case (See question 1.1).

2.2. May the dispute be referred to conciliation once the Labour Court asserts jurisdiction? When cases are usually referred?

Voluntary conciliation can take place at any moment, even after the judicial phase of conciliation or mediation is over (See question 1.1)

2.3. What is the impact on the court proceedings when a dispute is referred to conciliation?

- A) In the out-of-court conciliation, during the judicial procedure, the judgment is suspended during the interim agreed by the parts or until these achieve the conciliation or they request the continuation of the judgment (art, 202 of the Code of Civil Procedure of 1987).
- B) During the judicial conciliation, there is no adjudication of the case. Therefore the judgment phase does not take place, for a maximum of four months or until the judge of mediation considers that the conciliation is impossible (arts. 134 and 136 of the Labour Procedure Law).

2.4. What is the role of the court if only a portion of the parties' dispute is settled?

The court decides that it is not resolved and ratifies in its decision that there is agreement among the parts on the remainder of the conflict, for the sake of the execution of the decision.

2.5. How often is conciliation used compared to straight litigation?

Conciliation has become a normal part of the straight litigation. It takes place in all judicial cases (see question 1.1).

2.6. What is the duration of the conciliation? Is duration prescribed by law or by a judge, or is it up to the parties and/or the conciliator?

- A) In the out-of-court conciliation there is not limit of time, it finishes when the parties and/or the conciliator realize that conciliation is impossible.
- B) In the judicial conciliation there is maximum limit of time of four months but it also prescribes earlier when the judge decides that conciliation is impossible.

2.7. Under what circumstances may proceedings be held in abeyance for continued or extended outside conciliation?

Proceedings may be held in abeyance indefinitely until the parties achieve the conciliation or they request the continuation of the judgment (article 202 of the Code of Civil Procedure).

2.8. If conciliation is terminated early in the case, is the provision for reactivating the process at a later time? How is that done?

Articles 133 to 135 dealt with the “preliminary hearing”, during which the parties are invited by the judge of mediation to arrive to an agreement. If the mediation / conciliation is successful, the proceedings is finished. If not, the same judge will take the necessary measures to complete the file which will then go the judge of judgement. This can happen at the four months, which is the limit for the conciliation / mediation phase, but this can also happen earlier.

2.9. Does the Court learn what transpired in conciliation? Should it? Is there a report?

A) In the out-of-court conciliation if has been carried out before a private conciliator or before the administrative authority and there is breach of the agreement, the court will be informed by the parties themselves.

B) In the judicial conciliation the court all the necessary information is in the file itself

3. What are the qualifications of the conciliators?

A) In the out-of-court individual conciliation in general there are not requirements; however conciliators would normally be lawyers.

B) In the judicial conciliation, the mediator / conciliator is in fact a labour judge.

3.1. How are conciliators selected?

A) In the out-of-court conciliation by the parties by common consent.

C) In the judicial conciliation there is no “selection” of the mediator / conciliator, because this role is that of the labour judge of mediation.

3.2. Is the designation of the conciliator made by a court judge or by another agency?

A) The out-of-court conciliators are designated by the parties by common consent.

B) In the judicial conciliation, judges are appointed by the Supreme tribunal of Justice.

3.3. Are they members of a fixed roster or selected on an ad hoc basis? Who maintains the roster, if there is one?

No.

3.4. What are the experience and/or training requirements for serving as a conciliator?

A) In the out-of-court conciliation, none.

B) In the judicial conciliation, the judge has to approve a course of conciliator.

3.5. Are conciliators used on a full-time or part-time basis?

A) In the out-of-court they are used on a full-time or part-time basis, depending on the parties.

B) In the judicial conciliation always on a full-time basis

3.6. Are they compensated by the court or parties or government?

A) In the out-of-court conciliation they are compensated by the parties.

B) In the judicial conciliation they receive their normal remuneration.

3.7. Are the compensation rates set by the court, parties, government, or conciliator?

A) In the out-of-court conciliation the rate is valued by the parties and the conciliator.

B) In the judicial conciliation the remuneration of judges is determined by the law.

3.8. Are there procedures for evaluation of the conciliators or the sessions?

A) In the out-of-court conciliation there are not procedures to evaluate the conciliators.

B) On the contrary, in the judiciary conciliators are evaluated taken into account the number of positive conciliations and the total in money involved in the agreements of the parties.

4. What subject matters may be submitted to conciliation?

See question 1.1.

4.1. Are conciliators restricted to the case jurisdiction of the court in that case or may they pursue issues beyond the issues covered in the litigation?

Yes.

4.2. What are examples of issues conciliated and the frequency of their submission?

A) In the out-of-court conciliation, very often the following questions are treated and with good results:

a.1. Qualification of dismissal.

a.2. Collection of social benefits.

a.3. Industrial accident derived from compensation for damages collection or professional illness.

B) In the judicial conciliation, all cases on:

b.1. Qualification of dismissal.

b.2. Collection of social benefits.

b.3. Industrial accident derived from compensation for damages collection or professional illness.

The rate of success is very high (see question 5).

4.3. Is there provision for specific qualification or training for conciliators on specialized issues being conciliated?

No.

4.4. Does the court monitor the progress of the conciliation? If so, how?

The conciliation is done in court.

5. Do you consider use of conciliation to be a positive contribution to the work of the court?

Yes indeed, a positive conciliation in more than ninety percent (90%) of the cases submitted to the labour courts is achieved.

5.1. What is the impact of conciliation on the volume of cases coming to the court?

It has a great impact since finally only ten percent (10%) of the cases go for a judgement.

5.2. What is the impact on the work and functioning of the court?

It has a great impact in the work and operation of the court, since the judges have to decide the matters in which it the conciliation has been impossible. So, less cases to decide, more time available for it.

5.3. Does conciliation adversely impact on the court's making of case law?

No.