

Mediation in Labour Relations: what can we learn from other countries?

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Alternative Dispute Resolution (ADR)



- Conciliation/mediation before the parties can access Judicial resolution growing in many countries – especially in common law countries; it can be judicial based or non-judicial based;
- Mediation is seen as fast, flexible & cheaper option compared to legal adjudication (high legal costs, over-burdened courts & delays in disputes resolution machinery);
- Mediation has high success rate in countries such as US, Canada, Australia, Korea, New Zealand, Singapore, Japan;
- There is however a need to improve quality and practice of Mediation to build confidence among the parties and increase its effectiveness as dispute resolution method;
- Balancing Mediation v/s Rights of workers and their organizations (settlement v/s social justice);

CONCILIATION/MEDIATION SERVICES



- **State provided Mediation Services** (usually through the Ministry of Labour) – Ex: Belgium, Denmark, New Zealand, India, Indonesia, etc.;
- **Agency independent of the State, but resourced by the State** – Ex: Australian Industrial Relations Commission (AIRC); the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa; Advisory Conciliation and Arbitration Services (ACAS) in the United Kingdom; Federal Mediation and Conciliation Services (FMCS) in the United States;
- **Private institutions** – Ex. American Arbitration Association (AAA), Tokiso in South Africa, the Centre for Effective Dispute Resolution (CEDR) in the UK;
- MoL appointed Mediators, Outside Mediators or Tripartite Mediation Panel;

Growth Mediation in US & Europe



- US: Railway labour disputes led to Erdman Act (1898) required compulsory mediation, failing which, arbitration; widely used since then for settling labour disputes; Companies now often include mediation in employment contracts for dispute resolution (from in-house processes to external mediation by external mediators – last step being external arbitration); Cos. pay for these as it is much cheaper than the litigation in courts;
- In continental Europe, mediation of labour disputes has not developed much but picking up; TUs have been strong & prefer collective representation of interests through collective bargaining, works councils and labour courts; ADR was often seen as a threat – to bypass or weaken union influence; But all this is changing slowly;

Mediation in Continental Europe



- Procedures & practices vary from State to State; Both Court based & private forms of Mediation are growing;
- **UK:** first country to have Conciliation Act – in 1896; Now, Employment Tribunal Judges offer judicial mediation to parties before a full hearing of the Tribunal – this often leads to settlement;
- **Germany:** where earlier labour disputes could not be arbitrated or mediated, now Legal system & procedural rules allow the Judges to have settlement seeking role; Case can be referred to a ‘settlement judge’ to settle the case using all appropriate means including mediation;
- **Portugal (for Individual Disputes):** through a tripartite protocol signed in 2006, social partners established Labour Mediation Service (Sistema de Mediação Laboral, **SML**) for individual disputes; SML pays the cost of the mediation, each party is required to pay a small fee (€50). Mediators receive a fixed honorarium; Companies include in individual worker contracts a clause that commits both parties to to make use of the SML, in case of conflict;

Collective Labour Disputes Mediation in Portugal (1)



- Collective Labour Disputes are mediated by DGERT - Directorate-General for Employment and Labor Relations; services provided by DGERT are free of charge to the parties involved;
- Mediators are appointed by DGERT; Parties have no choice regarding the Mediator; Practice regarding the assignment of the Mediator by DGERT:
 - in Lisbon the mediators are organized by industrial branches, which means that a certain branch is generally going to be dealt with by the same mediator.
 - In Porto, cases are distributed by the Director with the aim of rotating branches amongst the mediators.
- Once the DGERT accepts the request for Mediation, parties cannot refuse to participate in conciliation/mediation processes without prior notice and valid justification and there are fines for unjustified absences of the parties.

Collective Labour Disputes Mediation in Portugal (2)



- If mediation has been required by only one of the parties, the mediator must request the other side to decide on the object and, if there is a disagreement, it is the mediator who decides regarding feasibility of the mediation;
- The mediator must send the proposal to the parties within 30 days of its appointment, after meeting separately with both parties (more than one meeting may occur);
- The parties have 10 days from the receipt of the proposal to notify the mediator of their acceptance;
- After receiving the replies or after 10 days, the mediator must notify the parties of the acceptance or rejection of the proposal within 2 days;
- The parties may accept the mediator's proposal in whole or partially or reject it. The proposal, even if accepted by both parties, is not subject to registration or publication. It is up to the parties to transform the agreement into the formal text of the collective agreement for subsequent registration;

Korea: Dispute Mediation System



- **Labor Relations Commission(s)** – quasi-judicial body - adjudicates or arbitrates individual labor disputes and mediates collective labour disputes; (No labor court in Korea, but there are labor divisions of the general court);
- On CB failure – any or both parties can ask for mediation by LRC; **Mediation is legally required before TU can go on strike;**
- Mediation period: 10 days for general industries & 15 days for public utilities; if both parties agree, period may be extended;
- If mediation proposal accepted, it becomes equivalent to a CBA; If mediation fails, the union can go on strike (& employer can impose lockout);
- Success rate of LRC mediation is high; Even if both parties are not fully satisfied, they tend to accept or compromise based on the mediation proposal;

Korea: Mediation process for collective labor disputes



When CB fails

① File for Mediation with LRC (union or employer)

② Prior review (LRC inspector)

③ Mediation Committee is convened

Mediation COMMITTEE (general)

3 members: public interest commission (chairman),
employer commissioner, worker commissioner

Special Mediation Committee (public services)

3 public interest commissioners

④ Mediation meeting

- Interviews with both parties
- Coordinating differing views - Facilitate bargaining
- Mediation proposal – agreed? Rejected?

Mediation failure

Can go into a strike from the
moment mediation ends

Mediation successful

Agreed proposal is
equivalent to CBA

New Zealand - resolving employment relationship problems



Except for minimum conditions at work, for most employment issues, New Zealand labour law encourages Mediation both for individual & collective disputes; **Employment law requires Mediation Clause in every Collective Agreements;**

If employee–management talk or internal mechanism does not solve the problem, then - **Mediation by Employment Relations Service** - If no agreement, then either party can refer the problem to the Employment Relations Authority (ERA) for investigation.

ERA is an independent organization below the Employment Court; ERA's process is more formal than mediation but less formal than the Employment Court; **ERA can direct parties to mediation, or can investigate the problem and issue a determination.**

If not happy with ERA decision, any of the party can go to Employment Court (but the court can also send the party back for more mediation).

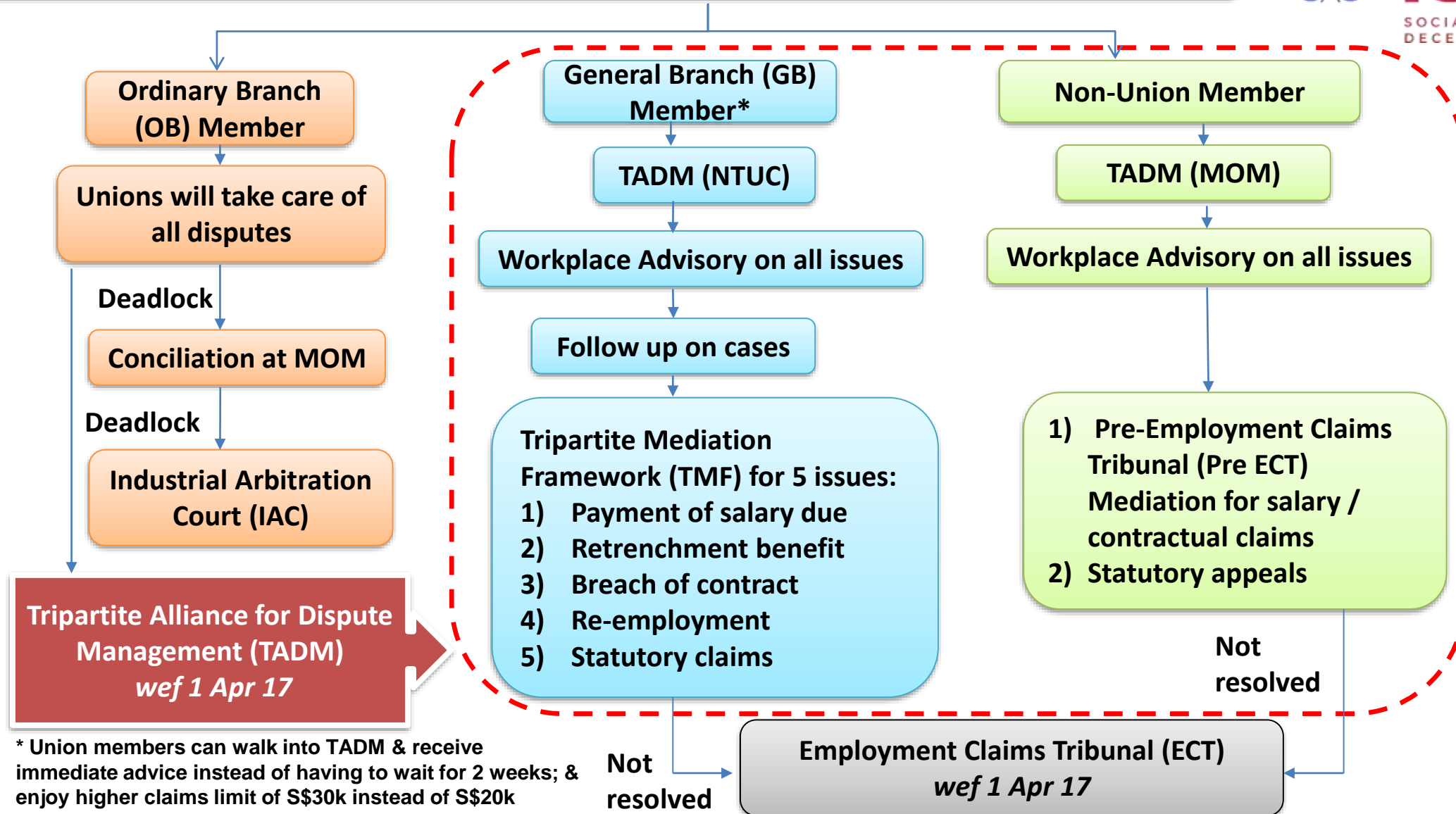
Right to appeal a decision of the Employment Court to the Court of Appeal & Supreme Court – **in very limited circumstances.**

Singapore: Tripartite Alliance for Dispute Management (TADM)



- Set up jointly by the Ministry of Manpower (MOM), National Trades Union Congress (NTUC) and Singapore National Employers Federation (SNEF);
- Provides employees & employers advisory & mediation services, including mediation before salary claims can be heard at the Employment Claims Tribunals (ECT);
- Claims that cannot be resolved through mediation will then be referred to the ECT.
- Maximum claim amount: up to \$20,000 [up to \$30,000 if you go through Tripartite Mediation Framework or mediation assisted by unions recognized by the Industrial Relations Act].

Singapore: Employment Dispute Resolution Mechanisms



* Union members can walk into TADM & receive immediate advice instead of having to wait for 2 weeks; & enjoy higher claims limit of S\$30k instead of S\$20k

Japan: Labour Relations Commission(s)



- On failure of CB to resolve dispute, parties report to LRC (LRCs exist at national & prefectural levels) - provide conciliation, mediation & arbitration services;
- Composition of LRCs: equal representation from employers, workers and persons representing the public interest;
- LRC attempts conciliation through its panel of conciliators; if conciliation fails, then LRC does mediation – mediation committee comprises of member(s) representing the employers, workers & public interest – equally represented but Chair is always from public interest side;
- During the pendency of dispute before mediation or when clarifications are being sought (within time deadline), neither of the parties concerned shall resort to acts of dispute;
- LRC can also carry out arbitration – when both parties agree; or when any of the parties apply based on the provision in CBA that stipulates arbitration by LRC;
- Arbitration by LRC leads to written agreement between the parties;

South Africa: Procedure for resolving disputes



- Every CBA, should provide for procedure for dispute resolution, including conciliation & arbitration in case of disputes related to the agreement;
- Collective disputes: any party to the dispute may refer the dispute in writing to -
 - Bargaining Council - joint body of Employers & TU(s) - if the parties to the dispute fall within the registered scope of that council; or
 - Commission for Conciliation, Mediation & Arbitration, if no council has jurisdiction.
- Copy of the complaint must be served on all the other parties to the dispute by the party making the complaint;
- The council or the Commission tries to resolve the dispute through conciliation/ mediation /arbitration (if all parties agree);
- If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication;

Challenges



- Not all disputes can be '*mediated*'. How to devise a system that *channels disputes to the best suited procedure* at the entry stage (when the parties realize that bilateral negotiation will not lead to a solution);
- Workers prefer Court based adjudication; Need to promote trust of workers in methods other than Court proceedings;
- **Enforceability of agreements resulting from mediation** - party often has to go to Court for enforcing, especially where compensation has to be given;
- ADRs of labour disputes need not only more publicity but also an investment in legislation and in the institutions, who provide such services but resources for this limited;
- Where Mediation services are provided by MoL, Training of Mediators and retaining of experienced mediators need to be ensured (Government officials get transferred);
- Outcome of mediation: Have these promoted justice? Reduced burden on the courts? Improved access to justice for litigants? Waiting time?

BUILDING BLOCKS FOR EFFECTIVE INDUSTRIAL RELATIONS



- Enabling legal framework - Rule of Law (ex. TU Act, IR Act, Employment Act, Social Protection);
- Independent, capable & accountable actors – that can make & implement the agreements;
- Mechanisms for representation – both for worker & employers – to voice, representation & participation; Requires respect for FoA.
- Effective dispute resolution & enforcement mechanisms – time bound, fair, accessible & affordable AND one that promotes prevention;
- Collective labor dispute resolution system requires also effective social dialogue arrangements:
 - ✓ Tripartism
 - ✓ Bi-partite social dialogue arrangements [Workplace cooperation arrangements & Collective Bargaining]

Labour Disputes Mediation in Portugal



Individual Disputes:

- Labour mediation for individual disputes available through Labour Mediation Service (Sistema de Mediação Laboral, SML) – established through a tripartite protocol signed in 2006; SML pays the cost of the mediation, each party is required to pay a small fee (€50). Mediators receive a fixed honorarium; Companies include in individual worker contracts a clause that commits both parties to make use of the SML, in case of conflict;
- Employers or employees can make a demand for mediation through the website, by phone, email or postal application. Then SML will seek the consent of both parties to join the mediation. If both accept, SML nominates a mediator from the region of the parties and defines a place. Mediation is conducted in a meeting room in facilities belonging to public (municipalities) and private entities. The time & date are scheduled by the parties & the mediator. The process is voluntary & parties can end mediation any time;
- Collective Labour Disputes are mediated by DGERT - Directorate-General for Employment and Labor Relations; services provided by DGERT are free of charge to the parties involved; Once the DGERT accepts the request for Mediation, parties cannot refuse to participate in conciliation/mediation processes without prior notice and valid justification and there are fines for unjustified absences of the parties.