

## CONCILIATION OF LABOR COURT DISPUTES

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The past decade in Europe has seen an increase in litigation before national labor courts leading to changed attitudes about the use of conciliation to resolve disputes more quickly at lower cost and perhaps even with results that are more appealing to the disputants. The more traditional view that the courts were the preferred venue for resolving issues of worker rights has fueled a growing recognition that the courts lack sufficient personnel and financial resources to handle demand for labor court litigation and that the provision of a neutral facilitator is likely to reduce recourse to the courts and permit the parties to resolve more basic issues in their relationship that would not be addressed as well though litigation. That is being seen as particularly true where the relationship, collective or individual, is continuous, to survive the resolution of the immediate dispute.

In 1996 I was asked to speak on ADR to the annual meeting of the Presidents of the European Labor Courts at The Hague. I urged the use of conciliation/mediation to help resolve disputes within the jurisdiction of the European Labor Courts. At that time there was relatively little interest in conciliation or procedures for its utilization by Labor Courts. The approach was rather new to the participants. My proposal was viewed with skepticism by most of the group, despite the fact that use of conciliation/mediation was expanding in many countries. In the United States it is available for resolving litigation disputes in federal and many state court systems.

Then, nine years later, I was invited to return to the topic for the 2005 meeting of the same group in Bologna in September 2005. I am still beating the same drum, not only because I continue to 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 eighteen national courts took the time to respond to my questionnaire is testament to the increasing interest in the topic, and the fact that seventeen of those considered mediation to be important

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and of increasing value and interest, underscored 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.<sup>1</sup>

I wish to express my appreciation to Angelika Muller and Rita Natola of the ILO Geneva who 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 eighteen systems discussed. I received responses from the following labor court judges

<i>Australia</i>	Australian Industrial Relations Commission	Dominica Whelan, Commissioner
<i>Austria</i>	Supreme Court of Austria	Dr. Gerhard Kuraz, Justice
<i>Belgium</i>	Cour de Cassation	Christian Storck
<i>Finland</i>	Labour Court of Finland	Judge Pekka Orasmaa
<i>France</i>	Cour de Cassation	Michel Blatman, Conseiller
<i>Germany</i>	Richter am Bundesarbeitsgericht	Dr. Mario Eylert
<i>Hungary</i>	Labour Court of Hungary	Judge Tunde Hando
<i>Iceland</i>	Labour Court of Iceland	Judge Eggert Oskarsson
<i>Ireland</i>	Labor Court of Ireland	Kevin Duffy, Chairman
	Equality Tribunal of Ireland	Ms. Melanie Pine, Director
<i>Israel</i>	National Labour Court	Judge Stephen Adler, President
<i>Malta</i>	Courts of Justice	Judge Abigail Lofaro, Magistrate
<i>Norway</i>	Labour Court of Norway	Jon Gisle, Vice President
<i>Slovenia</i>	Supreme Court of Slovenia	Prof. Janez Novak, Supreme Judge

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 Orasmann, 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 Kuraz of the Austrian Supreme Court reports that the statute regarding mediation came into force in 2004.

<i>Spain</i>	Tribunal Supremo	Judge Antonio Martin Valverde
<i>Sweden</i>	Labour Court of Sweden	President Michael Koch; Deputy Chair Lars Johan Eklund
<i>United Kingdom</i>	Employment Appeal Tribunal	Judge Jeremy McMullen, QC
<i>Venezuela</i>	Sala de Casacion Social, Tribunal Supremo	Vice Pres. Juan Rafael Perdomo

### I. CONCILIATION CF. MEDIATION

I also want to clarify, if I may, 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 is voluntary, requiring agreement of both parties.<sup>2</sup> In France, conciliation is governed by a decree of March 23, 1978, for rights disputes prior to litigation, while mediation is contemplated in cases of moral harassment.<sup>3</sup> In Austria, mediation is defined as that done outside the court, while conciliation is defined as that done during the proceeding by the judge.<sup>4</sup> 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.”<sup>5</sup>

In the United States, the definitions used are similar to those at the Irish Equality Tribunal with the conciliator as the facilitator

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 *id.*

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.

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

5. Melanie Pine, Director, Irish Equality Tribunal.

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 message conveying 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 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.

## II. THE TREND TOWARD CONCILIATION

The increasing resort to conciliation and its widespread endorsement as an alternative to labor court litigation underscored the value of discussing the process at the Bologna meeting of the Labor Court judges. The change in attitude is due to recognition of the benefits of conciliation for the disputants as well as for the benefit of 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 workforce that cannot 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.

### III. 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 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.

### IV. RISKS AND LIMITATIONS OF CONCILIATION

Despite my endorsement of the process of conciliation it is important to recognize its limits as well. The fact that it has taken so long to take hold points to the resistance it has historically

encountered. Aside from the traditional fears of any alternative approach to dispute resolution inherent in the "jealous mistress of the law" concept, there are legitimate concerns that widespread endorsement of conciliation will deprive the courts of their traditional control over litigation and detract from the courts as the institution where law is made, where decisions are proclaimed, and where jurisprudence is established to guide society in its future conduct. That is particularly true where the society has relied on the courts, even labor courts, to serve as arbiter of social behavior by establishing the norms by which the participants in the labor and employment field will function. Ready access to conciliation may deprive the courts, and thus society, of the opportunity for establishing future rules of conduct, if a dispute that might make important law is sidetracked into conciliation. Certainly it may be preferable for the two disputants to reach a mutually acceptable compromise, but that action might deprive the court of the opportunity to set important precedents to guide the larger labor and employment community in resolving similar disputes in the future. Legal decisions provide a much more wide-reaching impact than a private resolution between disputants in a single case. It is true of course that disputants might resolve any number of disputes on their own before litigation, but for the court to assume an official position in discouraging cases from being litigated by supporting or offering conciliation may keep the court from making important law on important issues. Thus too much reliance on conciliation may deprive the courts of their most important role, as setters of precedent for society as a whole. Carried to the extreme, a really successful conciliation program may eviscerate the role of the courts in developing broader codes of expected behavior.

It is perhaps inevitable that participation of judges in the process may taint their objectivity if they are later called to decide a case where they learned the true positions of disputants in a conciliation that fails and is then given to the court, either to that judge or a fellow judge for presumed objective examination and decision. Although there are proclaimed assurances of a firewall between conciliator and judge, it is not unheard of that the judge may know or learn of the parties' true positions, or case weaknesses.

Additionally, where the conciliation is unsuccessful there is always the risk that the parties may use conciliation as a probing exercise to learn weaknesses of the other side, which will then become part of the presentation in litigation. Since there is no assurance that conciliation will always lead to settlement, it is perhaps too common

that one of the parties to the conciliation, on learning the true strength of its position in that venue, may decline to settle when newly acquired facts lead it to believe it has a stronger case than it thought and opt instead for litigation using such newly acquired ammunition by insisting on litigation.

Finally, it should be recognized that pressure to rely on conciliation may deprive some parties of what might otherwise be a cost free process for resolving their conflicts. To the extent that the costs of conciliation are borne by the parties, it may impose a financial toll on the disputants in lieu of adjudication that would normally be of minimal cost. But it is also true that the lure of more expeditious conciliation and the persuasive powers of the conciliator might also exert pressure on the less financially secure party to settle rapidly to reduce costs instead of turning to the court for what might otherwise become more costly with the risk of appeals and long term escalating legal fees. Conciliation may be on its ascendancy, but as a societal tool it only has value when there continues to be availability of access to the court system as the failsafe alternative to the appeal of a “quick and dirty” solving of the parties’ immediate conflict.

#### V. MANDATORY OR VOLUNTARY

On balance however, I think that conciliation should be encouraged. As an avowed proponent of the process, I would like to consider some attributes for a successful conciliation structure and process based on the experiences of those who have responded to my survey, as well as from my own experience in designing dispute settlement systems for enterprises and governments.

Obviously one cannot 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 conciliation structure either inside or outside the judiciary for resolving workplace disputes, 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.<sup>6</sup> Some systems do not have any formal conciliation procedure or relationship, making

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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.

conciliation totally voluntary,<sup>7</sup> and thus a matter left to the parties and beyond influence of litigation or the courts.<sup>8</sup>

However, a number of systems make the initial conciliation meeting mandatory.<sup>9</sup> 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 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

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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 Kuran 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."



case.<sup>10</sup> 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 that at least one of the disputants would not be willing to admit if it were to be heard in court.<sup>11</sup> That is particularly true if the third party is also the person charged with making the final decision on matters of credibility. Therefore, 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, that of encouraging disputants to speak freely, relying on their confidentiality.<sup>12</sup> However, if the conciliator is the same judge who might be called upon to make a 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 that 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

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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."

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

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 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

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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."

both functions and particularly between judges performing both functions.<sup>14</sup>

#### VI. 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 United Kingdom, where initiation of Labor Court jurisdiction precludes referral to conciliation,<sup>15</sup> the failure to resolve a dispute in pre-litigation conciliation does not mean that all opportunities for settlement are lost.<sup>16</sup> 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 United Kingdom, that pressure is intensified by recognition that if the parties do not undertake to resolve their dispute with the assistance of the Advisory Conciliation and Arbitration Service (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 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 an agreement acceptable to both. It might also be recognized that even if only a portion of the dispute is resolved by the parties that is to their

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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 that 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."

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

#### VII. RESTRICTIONS ON ISSUES

Some systems preclude conciliation of certain matters, such as constitutional protection, or even discipline.<sup>17</sup> But most have no such restrictions,<sup>18</sup> 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.<sup>19</sup>

#### VIII. 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.<sup>20</sup> 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

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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 United Kingdom for example, ACAS may conciliate on all topics.

19. Christine 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 six 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 fifteen 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 are often charged to conciliators that are not necessarily public officers."

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 needs 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.<sup>21</sup> Conciliators may serve, on occasion, pro bono, but the need for professional conciliators outside the court system to help resolve disputes such as those here under discussion, suggests the possibility of government provision of a subsidized corps of conciliators. Very few conciliators have the demand for services that enables them to conciliate on a full-time basis.<sup>22</sup> In some countries there have developed associations that maintain rosters of experienced and acceptable conciliators,<sup>23</sup> while in other countries the government not only maintains rosters of conciliators, but also provides them with governmental registration or certification,<sup>24</sup> and

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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 U.K. report submitted by Jeremy McMullen refers to the conciliation role of ACAS as the nation's conciliation service in the employment law field.

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 twenty universities and organizations that has trained several hundred mediators in a forty-hour training program with emphasis on employment law, offering the roster on its Web site to interested users, *available at* <http://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.

may restrict the parties' selection to those on government lists.<sup>25</sup> 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 United States also provide similar services for more localized disputes. In the United Kingdom ACAS is likewise staffed with full-time professional conciliators.

#### IX. 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 suggest a settlement, which 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.

#### X. 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

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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.

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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 to 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 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 a 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.

#### XI. 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.<sup>26</sup> If the conciliator does not have that expertise, it is important that it be provided.<sup>27</sup> 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 matters.<sup>28</sup> Training on social security law, statutes governing termination benefits, workers compensation, and the like would obviously enhance 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 asset 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.<sup>29</sup>

## XII. EVALUATION

Although most of the systems responding to the survey indicated satisfaction with the development of their conciliation projects in the

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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.



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 Tribunal responded that it has a program involving a confidential user survey.<sup>30</sup> 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 regarding 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.<sup>31</sup>

#### XIV. 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.<sup>32</sup> In Australia it is reported that 75% of termination

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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

cases are settled and only 6% proceed through to final adjudication.<sup>33</sup> In the United Kingdom, an estimated one-third of cases are concluded in conciliation.<sup>34</sup> In Venezuela it is reported that 90% of cases are resolved in conciliation with only 10% going to trial.<sup>35</sup> In Spain it is reported that 24% of dismissal disputes are settled in judicial conciliation.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup>

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 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.<sup>39</sup>

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."<sup>40</sup>

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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 the United Kingdom 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."

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."

Fifth, beyond resolving disputes that 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.<sup>41</sup>

## XV. 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.”<sup>42</sup> 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.<sup>43</sup> 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,<sup>44</sup> and because they can be of particular value in preserving or reestablishing good will in continuing relationships.<sup>45</sup>

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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 U.S. 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 that went to conciliation were resolved. The full report is *available at* <http://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.

## XVI. CONCLUSION

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.<sup>46</sup> 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.<sup>47</sup> 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."<sup>48</sup> President Adler of the Israeli Labor Court has underscored the obvious preferability of disputants resolving their own disputes as achieving the "most just solution."<sup>49</sup> 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."

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

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

47. President Orasman 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."