

INTERMEDIARY IN A COLLECTIVE LABOR DISPUTE RESOLUTION

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Collective labor disputes based on the differences in economic interests between workers and employers can be effectively resolved exclusively through conciliation procedures. Contemporary alternative methods arose mostly due to the necessity to resolve collective labor disputes; mediation for this purpose is applied differently in various countries. National legislation equally provides various means for collective labor dispute resolutions and determines relevant intermediary procedures. An intermediation in a collective labor dispute resolution can be private and/or state-appointed and mandatory or alternative and remains a very perspective means of alternative dispute resolution. An analysis of different countries' legislation distinguishes several common features of intermediation in collective labor disputes, concerning mainly the goals, objectives and principles. For bodies and persons conducting intermediation, the degree of compulsion in their decisions varies greatly from country to country. However, the obtained experience reveals common and distinctive procedural features and provides the possibility to classify existing approaches, having combined them into groups. The analysis also follows general development trends of collective labor dispute intermediation in different countries and identifies several shortcomings that are characteristic to different systems of intermediation legal regulation. Further research on the most effective ways

of collective labor dispute conciliation is necessary for establishing new harmonious labor relations as the grounds for social progress.

Keywords: alternative dispute resolution (ADR); intermediation; collective labor dispute; conciliation procedure; state-private mediation system.

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Introduction

Traditional classification of labor disputes within the doctrine of labor law based on the division of the individual and collective, has a special focus on the rights and interests that the law does not formalize. The application of formal or informal procedures to resolve labor conflicts mostly concerns the possibility or lack of procedures to enforce positive law to settle the disputes. Debates on the protection of legitimate interests in particular of a group of workers in this regard represent a promising ground for applying intermediation as an alternative method of dispute resolution (hereinafter AMDR). The issues of intermediation legal regulation as an AMDR and its active implementation in legal practice remain topical and are widely discussed by scholars globally.¹

¹ Kazutoshi Koshiro, *Formal and Informal Aspects of Labor Dispute Resolution in Japan*, 22(3-4) Law & Policy 353 (2000); Francesca Ferrari, *The Judicial Attempt at Conciliation: The New Section 185-bis of the Italian Code of Civil Procedure*, 2(3) Russian Law Journal 80 (2014); Hiruy Wubie, *The Settlement of Individual and Collective Labor Disputes Under Ethiopian Labour Law*, 2(1) E-Journal of International and

The article focuses on the most promising method for the resolution of collective labor disputes to protect legitimate interests: a dispute with intermediary participation.

Many scholars have considered intermediation as a universal method for conflict resolution.² Intermediaries have neither decision-making authority nor any power over the parties. They provide the necessary conditions for the negotiation and adoption of a consensual, mutually beneficial solution by the parties.³ The legal doctrine considers the notions “conciliation” and “intermediation” jointly because only intermediation provides each disputing party for profitable settlement of disagreements.⁴

Since intermediation in collective labor dispute resolutions has been used in many countries, it makes it possible to distinguish common features of this AMDR and typical problems of its development, particularly within the context of industrial and post-industrial societies. Additionally, national traditions and peculiarities of legal regulations can influence the attitudes of legislators and law enforcement officials to intermediary participation in collective labor dispute resolutions. This creates specific, sometimes defective, provisions that slow down the effective reconciliation of collective labor disputes via intermediary.

This paper falls into several sections. First, “Definition of a Collective Labor Dispute and the Means for Its Resolution,” presents the concept of a collective labor dispute stated in Russian legislation, as well as that of several other countries, and an overview of collective labor dispute resolution (hereinafter CLDR) methods. The second section, “Historical Background of the Conciliation Procedure Application to Collective Labor Disputes in Russia,” focuses on Russia’s historical development of conciliation procedures for collective labor disputes. Section three, “International Experiences of Conciliation Procedures with Intermediary Participation for Collective Labor Dispute Resolutions,” reviews international experiences and empirical evidence. The section “Current Russian Legislation on the Intermediation Application in Collective Labor Dispute Resolutions” gives a critical analysis of Russia’s state policy on this issue. The last section, “State Intermediation in Collective Labor Dispute Resolutions,” evaluates the possibilities and prospects of state intermediation in collective labor dispute

Comparative Labour Studies 39 (2013); Krishna Agrawal, *Justice Dispensation Through the Alternative Dispute Resolution System in India*, 2(2) Russian Law Journal 63 (2014).

² Joseph Duss-von Werdt, *Homo mediator: Geschichte und Menschenbild der Mediation* 104 (Klett-Cotta 2005); Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 296 (3rd ed., San Francisco: Jossey-Bass, 2003).

³ Миримановф Ж.А. Универсальный характер медиации: Опыт и свидетельство Европы: триптих [Jean A. Mirimanoff, *The Universality of the Mediation: The Experience and Testimony of Europe: A Triptych*] (May 4, 2019), available at <http://www.mediationgeneve.com/docs/Details%2015.pdf>.

⁴ Paul H. Sanders, *Types of Labor Disputes and Approaches to Their Settlement*, 12(2) Law and Contemporary Problems 211 (1947).

resolutions. Finally, the conclusion presents the main outcomes of the study and highlights the prospects of a contemporary international practice of intermediary application for CLDR.

1. Definition of a Collective Labor Dispute and the Means for Its Resolution

Foreign legislation often lacks a legal definition for “collective labor dispute”⁵ as well as specialized legislation on this very private issue. However, as Jorge Sappia claims in the book, “Labour Justice and Alternative Dispute Resolution of Collective and Individual Labour Conflicts,” in most countries, individual and collective labor disputes are distinguished within the doctrine of labor justice and positive labor law.⁶

Russian labor legislation and those of former Soviet Union countries are characterized by a significant number of legal definitions of key concepts, with the notion of a “collective labor dispute” being among them. This is typical for countries of the Commonwealth of Independent States and the Baltic states. For example, there is a legal definition of “a collective labor dispute” in the Labor Dispute Law of the Republic of Latvia.⁷

The definition of a “collective labor dispute” in Article 398 of the Labor Code of the Russian Federation (2001) (hereinafter the RF Labor Code) states the subject of such a dispute as the disagreements on the establishment or modification of collective labor conditions (i.e. a collective agreement and local normative acts of the employer that contain labor law norms, the adoption of which may cause a collective labor dispute, also state regulatory terms that determine the working conditions of all or a number of certain people working for the employer). Therefore, collective labor disputes may be initiated:

- to establish or modify working conditions (including wages);
- in connection with concluding/modifying or executing collective bargaining agreements;
- in response to the refusal by an employer to take into account the opinion of the workers’ representative body concerning internal procedures and policies.⁸

⁵ Annie de Roo & Rob W. Jagtenberg, *Settling Labour Disputes in Europe* (Deventer; Boston: Kluwer Law and Taxation, 1994).

⁶ Jorge Sappia, *Labour Justice and Alternative Dispute Resolution of Collective and Individual Labour Conflicts* (Lima: International Labour Office, 2002) (May 4, 2019), available at <https://pdfs.semanticscholar.org/89e8/d29b21d732bf218a833cc24d4c6a8b48c3ef.pdf>.

⁷ Labour Dispute Law of 16 October 2002 (May 4, 2019), available at http://www.lm.gov.lv/upload/legislation/leg_er_2.pdf.

⁸ Elena Gerasimova, *Collective Labor Disputes and Strikes in Russia: The Impact of Judicial Precedents and Enforcement*, 5(2) Russian Law Journal 5 (2017).

Consequently, the majority of such disputes are interest-centered. An exception can be made for the debate on the performance of the collective agreement terms. However, this type of dispute depends on the chosen method of violated rights protection and may become a personal dispute if every employee whose individual rights have been violated, due to the failure to fulfill the collective agreement conditions, seeks protection and claim.

Similar approaches to the definition of “a collective labor dispute” via the definition of its subject matter (other than the indication of the collective of the participants) are characteristic for legislation of former USSR countries.

Many researchers have already noted and still mark that a conciliation procedure is the best means to protect violated legal interests.⁹ In particular, disputes within the scope of applicable justice and legal norms cannot be resolved regarding the merits of the disputes. Indeed, in the narrow legal sense, there are no innocent or guilty participants of a collective labor dispute. The divergent economic interests of workers and employers, rather than the labor violation, form the essence of a collective dispute.¹⁰ Therefore, Western scholars refer to the interest-centered dispute as an economic conflict and contrast it to legal disputes that can be resolved based on the enforcement of the law.¹¹

Conciliation procedures in their current form were used mostly to resolve collective labor disputes, which appeared to be mainly economic conflicts of interest.

Collective labor dispute resolutions have their own national specifications. However, having summarized a variety of approaches to the abovementioned dispute resolutions, we indicate the following highly applicable methods:

- Direct negotiations between representatives of the parties to the collective labor dispute (conciliation or reconciliation commissions);
- Administrative procedures used by state bodies on the grounds of procedures of varying obligation degrees and different levels of state interference in collective labor disputes;
- Choosing an independent intermediary (intermediaries) from among private individuals or private organizations and institutions, purposefully created or encouraged by the state to resolve a collective dispute;
- Arbitration;
- Court consideration of the dispute based on *ex aequo et bono* (ad hoc – equitable).

⁹ Sappia 2002; Войтинский И.С. Примирительное и третейское разбирательство. Трудовые споры и регулирование труда на Западе [Joseph S. Voytinskiy, *Conciliation and Arbitration. Labor Disputes and Labor Regulation in the West*] (Moscow: All-Union Central Council of Trade Unions, 1923).

¹⁰ An exception is made for collective labor disputes on the failure to fulfill the collective agreement conditions. However, such offenses, affecting collective interests, are based on economic contradictions between the employer and employees.

¹¹ Sappia 2002.

The dynamics of collective labor disputes occurring in the Russian Federation are subject to public accountability of the Federal Service for Labor and Employment. This institution provides public services with registrations and resolutions of collective labor dispute data. The following issues are subject to state supervision: the parties to collective labor disputes, which appeal to the Federal Service and territorial bodies for the dispute registration, and information concerning intermediaries or labor arbitrators available for employment in a dispute resolution.

Table 1 presents data on the dynamics of collective labor disputes in the Russian Federation. The report does not include relating data for 2017.

Table 1: Dynamics of Collective Labor Disputes in the Russian Federation

Year	Collective Labor Disputes		
	Total	The number of resolved collective labor disputes	The number of resolved collective labor disputes including those resolved with Rostrud participation
2008	17	16	13
2009	6	6	2
2010	9	9	7
2011	7	6	3
2012	10	9	*
2013	*	*	5
2014	4	3	1**
2015	2	1	–
2016	4	2***	2

Source: Federal Service for Labor and Employment (*Rostrud*) data,¹² 2008–2016

* There is no relevant data in the report of the Federal Service.

** According to Rostrud Activities Report of 2015, a state service was provided to facilitate one collective labor dispute that arose and was registered in 2014 (p. 38 of the Rostrud Activities Report of 2015 (May 4, 2019), available at <https://drive.google.com/file/d/0B3tYhO6hNJ2lbG9SdmFnaTFJNnc/view>).

*** According to Rostrud, the request to provide the state service to facilitate a collective labor dispute was refused (p. 72 of the Rostrud Activities Report of 2016 (May 4, 2019), available at https://www.rostrud.ru/upload/Doc/report_2016.pdf).

¹² According to Rostrud official progress reports (2014, 2016) and information published on its website (May 4, 2019), available at http://www.rostrud.ru/control/sotrudnichestvo-i-partnerstvo/?ID=236470&sphrase_id=423520.

Despite a comparatively small number of collective labor disputes in a country as big as Russia, which faces economic challenges and difficulties, the importance of collective labor dispute resolutions cannot be underestimated. Unresolved disputes and delays in reconciliation procedures can result in strikes, which are extreme measures of social tension and entail significant political and economic losses. Strikes in the Russian Federation are subject to state statistical supervision of the Federal State Statistics Service. According to its annual reports presented on the official website, strikes in the Russian Federation have the following dynamics (Table 2).

Table 2: Dynamics of Strikes in the Russian Federation

	2008	2009	2010	2011	2012	2013	2014	2015	2016
The number of organizations where the strikes took place	4	1	*	2	6	3	2	5	3
The number of workers involved in strikes:									
thousands of people	1.9	0.01	*	0.5	0.5	0.2	0.5	0,8	0,1
the average number of people in each organization	480	9	*	227	84	65	231	167	19
The amount of time wasted by the employees participating in the strike:									
thousands of man-days	29.1	0.11	*	0.4	2.4	0.2	5.0	10,2	0,1
The average number of wasted working days per participant for a strike	15.1	12.2	*	0.9	4.8	1.2	10.9	12,2	1,7

Source: Federal Service of State Statistics (*Rosstat*) data, 2016

* The data is not available.

Assessment of collective conflicts' relevance and their conciliation prospects in the Russian Federation should not be exclusively based on official statistics because of the formalization of collective disputes, which fall under the supervision of official state registration. A great number of labor conflicts are of latent nature for the Federal State Statistics Service due to the adopted accounting system. The informal data¹³ on the number of labor protests (Table 3) deserve special attention. They can precede formalized collective labor disputes and indicate the level of social and labor tensions in the society. Labor Rights Center (Moscow) has conducted public monitoring of labor protests in the Russian Federation for many years. The table below provides data on the number of labor protests in Russia from 2008 until 2017 (<http://trudprava.ru/expert/analytics/protestanalyt/1588>).

Table 3: The Number of Labor Protests in the Russian Federation

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Total number of protests	93	272	205	263	285	277	293	409	289*	73**

Source: Bizyukov 2016

* According to the Russian Independent Trade Unions Federation (RITUF) (May 4, 2019), available at <https://www.gmpr.ru/gallery/14866/>.

** For three quarters of 2017, according to data by the Economic and Political Reforms Center (May 4, 2019), available at <https://www.rbc.ru/politics/07/11/2017/59fc780e9a794772d40d85d1>.

Notably, this information should be treated critically, as it fails to provide a complete idea of the number of collective labor disputes among labor protests related to the protection of workers' collective rights and interests. In compliance with the Russian legislation, a simple set of one-type individual labor disputes does not create a collective labor dispute. Their resolutions will differ from those of collective labor disputes: via a labor dispute committee created in the organization or in the court. Additionally, an individual labor dispute can be resolved via an intermediary, but the practice has not become widespread in Russia since the worker can resolve a dispute in the court free of charge. The narrow legal definition of a "collective labor dispute" presented in the RF Labor Code does not consider the whole number of recorded social and labor protests, does not see them as potential or collective labor disputes.

A report of the abovementioned public organization presents the results of labor protests in Russia (Table 4). They persuasively suggest the possibility of labor

¹³ Public monitoring of labor protests in Russia has been carried out by the public organization Labor Rights Center (Moscow) for many years.

conflicts' escalation if the protests lead to the workers' pressure or prosecution of trade union members. Alternatively, a total or partial satisfaction of requirements and the negotiations' prolongation suggest the effectiveness of undertaking measures at a high level.

Table 4: The Results of Labor Protests in the Russian Federation

	2009	2010	2011	2012	2013	2014	2015	2016
No information	31	48	36	39	39	42	38	6
Requirements are not satisfied	17	13	26	21	20	18	21	–
Requirements are partially satisfied	8	7	12	15	18	16	16	66
Requirements are fully satisfied	10	10	9	7	5	7	11	28
Continuation of negotiations	22	18	12	20	31	31	34	–
Creation of a trade union	*	*	*	2	2	1	1	–
Transfer of cases to law enforcement bodies	9	1	5	2	4	4	1,5	–
Pressure on workers	10	6	8	6	8	5	9	–
Persecution of trade union members	9	5	5	6	5	1	3	–

Source: Bizyukov 2016. Note: data refers to all protests (% of a total number of protests)

* The data is not available.

*According to the Russian Independent Trade Unions Federation (RITUF) (May 4, 2019), available at <https://www.gmpr.ru/gallery/14866/>.

2. Historical Background of the Conciliation Procedure Application to Collective Labor Disputes in Russia

The Russian Empire Charter on Industrial Labor of 1913, among the duties of factory inspection, established “the measures to prevent disputes and misunderstandings between the employers and workers by an immediate examination of any displeasure and an amicable agreement between the parties.”¹⁴ Evidently enough, the state organized the factory inspection and it was, actually, the first specialized body of state control and pretrial proceedings, inducing the parties to reconcile (i.e. factory inspection carried out intermediation functions concerning both collective and individual disputes).

¹⁴ Устав о промышленном труде // Свод законов Российской империи. Т. 11. Ч. 2 [*The Charter of the Industrial Labor in The Code of Laws of the Russian Empire. Vol. 11. Part 2*] 1–228 & 541–597 (St. Petersburg: State typography, 1915).

Since 1917, conciliation chambers and arbitration tribunals have functioned as conciliatory institutions in Russia.

According to Soviet ideology, the Russian Federation Code of Laws on Labor, adopted in 1922, testified there was no reason for labor and capital discord, thus stating no grounds for collective labor disputes emergence. Labor disputes were tried by special sessions of the National Courts, by disputes and wage-rates committees in accordance with the conciliatory procedure, by conciliation chambers or arbitration courts. Conciliation consideration was therefore voluntary in nature.

However, conflicts in making and executing collective agreements remained as well as the cases that endangered the security of the proletarian state. Vasily Dogadov denounced the intervention of the bourgeois state in the resolution of labor disputes and simultaneously noted the benefits of an analogical intervention of the workers and peasants' state in such conflicts. He defined this intervention type as assistance.¹⁵ Consequently, Soviet scientists believed the state to act as an intermediary and facilitate the parties' reconciliation as well as ensuring enforcement of conciliation bodies' decisions. Furthermore, conciliation chambers and arbitration courts were compulsorily created with the People's Commissariat participation.¹⁶ Therefore, disputes at state enterprises concerning making or interpreting collective agreements or serious conflicts that threatened state security were subject to mandatory (required) arbitration. Regarding collective agreements, the People's Commissariat formed the Arbitration Court whereas the latter was subjected to the highest bodies of the state executive power. Conciliation chambers considered both individual and collective labor disputes.

According to the Decree of the Council of People's Commissars of the RSFSR (1923), the chambers were formed on a parity basis of the parties to the dispute's representatives. Its chairperson, appointed by the relevant authority of the People's Commissariat, did not enjoy a deciding vote but had to promote the development of conciliatory proposals. It was mandatory to achieve conciliation chamber agreement and receive signatures by the chairperson and both parties. Provided, the parties failed to agree in the conciliation chamber, the case was transferred, upon the agreement of both parties, to Arbitration Court.

Arbitration Court was established on the arbitration record, made by relevant authorities of the People's Commissariat and signed by the participating parties. The parties were bound to abide by the decision of the Arbitration Court. The chairperson of the Arbitration Court was elected upon the agreement of the parties or, in some cases, provided by the law; if there was no agreement between the parties, the

¹⁵ Догадов В.М. Очерки трудового права: Учебное пособие [Vasily M. Dogadov, *Essays on Labor Law*] (St. Petersburg: Priboy, 1927).

¹⁶ People's Commissariat of Labor is the sectoral state body of executive power in charge of labor regulation issues (the equivalent of a modern Labor Ministry).

chairperson was appointed by the authority of the People's Commissariat. The Arbitration Court consisted of the umpire (the chairperson) and an equal number of representatives from each party. Either all issues were resolved by the agreement of the parties' representatives or, if such an agreement was not reached, by one umpire.¹⁷

Later, in 1928, the rules on conciliation, arbitration and judicial review of labor disputes were adopted. Based on these rules, disputes and wage-rates committees could hardly be regarded as the bodies to resolve collective labor disputes, as they were "not entitled to make decisions that alter, amend or cancel the terms of collective agreement, unless the right was specifically stated in the collective agreement."¹⁸

Conciliation chambers were primarily created to resolve collective disputes and were always organized upon the agreement of relevant trade unions and employers, to resolve their labor disputes. Within the scope of competences, they considered conflicts relating to the conclusion, changes, additions and interpretations of collective agreements as well as issues on the establishment of new working conditions that had not been previously resolved in disputes and wage-rates committees.¹⁹ The Arbitration Court was formed similarly and tried disputes that the conciliation chamber failed to resolve.²⁰ The chairperson of the Arbitration Court (the umpire) could be partly seen as an independent intermediary appointed by the People's Commissariat authority or elected upon the parties' agreement. The chairperson was independent and impartial to the dispute's outcome. However, if the parties failed to agree, the chairperson of the Arbitration Court would make binding to the parties decisions, as they had previously agreed to.

Accordingly, we note that conciliation procedures of labor dispute resolutions have quite a long history. An intermediary, as an independent negotiator invited by the parties to the collective labor dispute, appeared shortly after the adoption of the Federal law "On the Procedure of Collective Labor Dispute Resolutions" in 1995.²¹

USSR laws on collective labor disputes (Law of the USSR of 1989, Law of the USSR of 1991) did not provide for the dispute resolution via an intermediary.

¹⁷ Декрет Совета Народных Комиссаров РСФСР от 23 марта 1923 г. «Положение о примирительных камерах и третейских судах» [Decree of the Council of People's Commissars of the RSFSR of 23 March 1923 "Provisions on Conciliation Chambers and Arbitration Courts"] (May 4, 2019), available at http://www.libussr.ru/doc_ussr/ussr_1584.htm.

¹⁸ Постановление Центрального исполнительного комитета СССР и Совета Народных Комиссаров СССР от 29 августа 1928 г. «Правила о примирительно-третейском и судебном рассмотрении трудовых конфликтов» [Resolution of the Central Executive Committee of the USSR and the Council of People's Commissars of the USSR of 29 August 1928 "Rules on Conciliation-Arbitration and Judicial Consideration of Labor Disputes Resolution"], Art. 1.

¹⁹ *Id.* Arts. 22–27.

²⁰ *Id.* Arts. 28–34.

²¹ Repealed.

3. International Experiences of Conciliation Procedures with Intermediary Participation for Collective Labor Dispute Resolutions

The main advantage of mediation is the possibility for the parties to resolve the conflict themselves,²² having come to a mutually beneficial agreement.²³

Extra-judicial settlements of labor disputes were first mentioned in the second half of the 19th century as “individual private initiatives.” By the end of that century, national governments were much concerned about the strikes and therefore initiated the creation of a system of bodies, aimed at bringing together the representatives of workers and employers. In the Netherlands, for instance, “a statutory system of joint committees, the *Kamers van Arbeid*,” was formed. Later, when the *Kamers* were found to be irresolute, civil servants, called *Rijksbemiddelaars* (government mediators) were introduced in 1923.²⁴ During the Second World War, the system was abolished and since then, there has not been any formal permanent mechanism for collective labor dispute resolutions in the Netherlands. However, since the 1970s, joint bilateral committees, empowered to participate in dispute resolutions in the workplace, have been formed at the sectoral level. Since 1990, these committees, called *Bedrijfscommissies*, must turn to mediation in all disputes between management and the company workers’ council.²⁵

Vasily Dogadov, in “Essays on Labor Law,” noted,

It was also typical for the foreign practice of the beginning of the twentieth century, to have a conciliatory-arbitration resolution of collective labor disputes.

For instance, beginning in 1806, the Boards of Trustees have worked in France and the commercial courts in Germany, which includes representatives of both employers and employees. Since 1919, industrial courts have operated under the same principles in England, and appellation, to them, was voluntary. Along with the abovementioned practice, many countries exercised the so-called system of compulsory Canadian arbitration (New Zealand, Canada, Australia, Romania and

²² Медиация – искусство разрешать конфликты. Знакомство с теорией, методами и профессиональными технологиями [*Mediation – the Art of Resolving Conflicts. Introduction to the Theory, Technique and Professional Technology*] (G. Meta & G. Pokhmelkina (eds.), Moscow: Verte, 2004).

²³ Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (4th ed., St. Paul: West, 2013); Laurence Boulle & Miryana Nestic, *Mediation: Principles, Process, Practice* 350 (London: Butterworths, 2001); Nadja Alexander, *Mediation and the Art of Regulation*, 8(1) QUT Law & Justice Journal 1 (2008).

²⁴ Annie de Roo, *The Settlement of (Collective) Labour Disputes in the Netherlands in Labour Conciliation, Mediation, and Arbitration in European Union Countries* 273 (F. Valdés Dal-Ré (ed.), Madrid: Ministerio de Trabajo y Asuntos Sociales, 2003).

²⁵ *Id.*

Italy). Obviously, Soviet scientists negatively viewed a forced reconciliation, which provided the possibility for the umpire to make a binding decision.²⁶

In some branches of U.S. law – for instance, in labor law – informal justice tools have been in practice for a long time.²⁷ The necessity to resolve collective labor disputes caused the emergence of mediation in the 20th century.²⁸ In 1947, a special federal agency, the Federal Mediation Conciliation Service of the United States (FMCS), was established and is functioning to date.²⁹ Within its jurisdiction are the settlement of issues relating to the legality, validity and content of collective agreements and contracts as well as the issues of their correct interpretation. The Court makes decisions on the fine amount for an illegal strike. The ruling of the Labor Court is final.

Presently, some countries prefer mandatory or preferential consideration of collective labor disputes with an intermediary participation. Mandatory intermediation for all labor disputes is typical in Canada and Argentina.³⁰

In Germany, there is the Federal Mediation Union in Economy and Labor (*Bundesverband Mediation in Wirtschaft und Arbeitswelt*) while the Advisory Conciliation and Arbitration Service (Acas Codes of Practice) exists in the United Kingdom.

In South Korea, mediation of labor disputes is provided as one of the possible alternative resolution procedures.³¹

Legislators of the Baltic countries, as well as most countries of the former USSR, follow a similar approach. For instance, Latvian legislation defines mediation as the means of a collective labor dispute resolution involving one mediator or a panel of mediators, both private and public (included in the official national list).³²

In the Philippines, the voluntary modes of labor dispute resolutions, including mediation, are most often used.³³

²⁶ Dogadov 1927.

²⁷ Carrie Menkel-Meadow, *The NLR's Legacy: Collective or Individual Dispute Resolution or Not?*, 26(2) ABA Journal of Labor & Employment Law 249 (2011).

²⁸ Jerome T. Barrett & Joseph Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement* 336 (San Francisco: Jossey-Bass, 2004).

²⁹ Носырева Е.И. Альтернативное разрешение споров в США [Elena I. Nosyрева, *Alternative Dispute Resolution in the USA*] (Moscow: Gorodets, 2005).

³⁰ Sappia 2002.

³¹ Деок К. Урегулирование коллективных трудовых споров по законодательству Южной Кореи // Трудовое право в России и за рубежом. 2010. № 2. С. 46–54 [Kim Deok, *Collective Labor Dispute Resolution in South Korea Legislation*, 2 Labor Law in Russia and Abroad 46 (2010)].

³² Labour Dispute Law, *supra* note 7.

³³ Jonathan P. Sale, *Labor Disputes, Trade Unions and Collective Bargaining: An Analysis from a Decision-Theoretic Perspective*, Working Paper, School of Labor and Industrial Relations, University of the Philippines (2009) (May 4, 2019), available at http://www.ilera-directory.org/15thworldcongress/files/papers/Track_4/Thur_W5_SALE.pdf.

Within the globalization context, the current labor market sets new challenges for states, especially for the members of powerful integrated economic and political unions. So far, the trade unions' work grounds on national associations and protects the workers' rights within one state. Nevertheless, many companies have economic interests in several countries. Therefore, in the process of a common system of social and labor standards creation or making collective agreements legible for several states, the emergence of collective labor disputes outside the legislation scope of one state is highly plausible. As Annie de Roo fairly noted, the issue of creating a European mediation agency in the European Union might soon become topical.³⁴

4. From State to Market Oriented Intermediation: Brazil as a Comparison

In order to integrate Brazil in this comparative study, this country long standing labor disputes intermediation will be presented in historical perspective based on the enactment of Brazilian founding legal code in 1943, the Labor Laws Consolidation (*Consolidação das Leis do Trabalho*, hereinafter CLT). Implemented through Law 5.452/1943,³⁵ CLT not only defined most dimensions of labor in society, but also inspired additional legislation after 1943. This is the starting point of this part of the article that analyzes the 2017 reform of Brazil legal system for labor.

Recapturing and organizing isolated labor laws enacted since early 20th century, CLT was a structured and encompassing labor code, but also had a couple of loopholes, as the lack of inclusion of rural, domestic, and self-employed workers from the very start. Additionally, CLT has always covered labor issues from the private sector; public employees from municipal, state, and federal levels have always had their own political and social labor legislation, not dealt with here.

Throughout the years, CLT and related legislation have approached labor disputes intermediation under the principle that labor was the weaker part of capital/labor relations, and that it-needed protection in order to turn its rights effective. In order to assure legislation effectiveness, a unique judicial institutional structure in charge of managing labor disputes, named Labor Justice (*Justiça do Trabalho*) was established in the country central administration as part of the Executive Power.³⁶ In any case, the Labor Justice had its own courts, judges, persecutors and other legal personnel, and

³⁴ De Roo 2003.

³⁵ Lei Complementar 150/15: principais novidades e possíveis efeitos sobre a sociedade e o Poder Judiciário [Supplementary Law 150/15: Main Developments and Possible Effects on Society and the Judiciary].

³⁶ Angela Maria de Castro Gomes, *Burguesia e trabalho: política e legislação social no Brasil [Bourgeoisie and Work: Politics and Social Legislation in Brazil]* (Rio de Janeiro: Campus, 1979).

it was the only intermediary channel to deal with labor disputes, either individually or collectively.³⁷

Last year however, this whole apparatus was challenged by a market-oriented reform that nonetheless kept basic labor rights. Different from CLT, current labor reform assumed a market metaphor and framed labor and capital as equivalent forces that can freely negotiate contracts on selected aspects of labor relations, under a cloud of private intermediation. This reform has however been challenged in upper courts, resulting in an uncertain path in labor disputes intermediation.

In order to analyze the impacts of this new legislation, CLT must be understood as part of the foundations of modern Brazil in the so-called Vargas Era (1930–1945). A dissident landowner from Southern Brazil, Vargas staged a coup in 1930 against a new elected president, and governed the country for fifteen years through authoritarian and dictatorial rule, in search of a full scale social, economic, and political modernization of the country. Backed by a coalition of fellow rural oligarchs, dissatisfied lieutenants and liberal middle classes, Vargas essentially opposed traditional clientele politics that characterized Brazilian society, supported the emerging manufacturing industry, and implemented various policies towards economic, social and political modernization.

Vargas also had an attentive eye to the working class, which had been striking in major cities with demands of new social and political and social rights under civil law since late 1910s. After various repressive moves against workers' movements, Vargas finally established a peculiar legislation along corporatist lines to deal with workers unrest, by forbidding any type of spontaneous union activity, and created a union structure of those that would meet political clearance.³⁸ Known as "official unions" they were actually a top down statist instrument to control labor.³⁹

In spite of the restricted room for workers⁴⁰ movements, in the end of Vargas Era they had been granted rights such as:

- Creation of Department of Labor in the Federal Government (*Ministério do Trabalho*), 1930;
- 8 working hours/day, 48 working hours/week paid weekly rest day, and paid vacations of 15 days/year (Varied origin, consolidated CLT, 1943);
- Workers monthly family-based minimum wage (Origin 1930, Law Decree 2163/1940);

³⁷ Luiz Werneck Vianna, *Liberalismo e sindicato no Brasil [Liberalism and Union in Brazil]* (Rio de Janeiro: Paze Terra, 1976).

³⁸ Mihail Manoilescu, *Le parti unique: institution politique des régimes nouveaux [The Unique Party: Political Institution of New Regimes]* (Paris: Les Oeuvres Françaises, 1937).

³⁹ Wanderley Guilherme dos Santos, *Cidadania e justiça: a política social na ordem brasileira [Citizenship and Justice: Social Policy in the Brazilian Order]* (Rio de Janeiro: Campus, 1979).

⁴⁰ "Workers" refers to employed people over 18 years that comprises those who work under contract based on whole existing labor legislation, and leaves out self-employed, rural and domestic laborers.

– A unique Labor Justice system attached to the Executive Power (1934 Constitution).⁴¹

Interestingly enough, workers' deprivation of their freedom of association and the mandatory organization in the State controlled corporatist unions was the channel for them to have access to health care, retirement, and pension benefits through corporatist defined sectorial social institutes. In spite of being an ordinary workers' right, these social benefits were originally provided in Brazil under discretionary basis and remained as such until mid-1960s.

Brazil successfully underwent a development process towards an urban-industrial society, but Vargas' era and administration came to a close in 1946, for various reasons. According to Skidmore,⁴² Brazil then began its first "experiment in [mass] democracy," that lasted until 1964, with four regular presidents whom faced disruptive moments in their elections, and/or administrations, and two vice-presidents who replaced incumbent president also under politically tense conditions.

In economic terms, the country did not face similar unstable times. After the first post II WW presidency, Vargas returned to power and resumed the same state-led development project that essentially continued until early 1960s. With respect to labor, new laws were created and enforced:

– Job tenure after ten years of employment (Origin 1925, consolidated 1946 Constitution);

– Labor Justice System moved to the Judiciary Power (1946 Constitution);⁴³

– A "thirteenth wage" practically replacing a traditional Christmas one voluntarily paid by employers was implemented by Vice-President-turned-President Goulart (Law 4.090/1962).⁴⁴

Since late 1950s, Brazil became immersed in a stagnant economy and with an extensive workers unrest both in urban and rural areas that unfolded into a broad politico-economic crisis.⁴⁵ A civil-military block that staged a coup in 1964 turning the country again into a dictatorship that emphasized economic growth and modernization. Along with these lines, new labor laws were also created:

– Replacement of ten-year job tenure by a workers' savings account from employers' contribution, useable at dismissals and retirement (Law 5.107/1966);

⁴¹ República Federativa de Brasil Constituição Política de 1934 [Constitution of the Federative Republic of Brazil of 1934].

⁴² Thomas Skidmore, *Politics in Brazil 1930–1964: An Experiment in Democracy* (Oxford: Oxford University Press, 2007).

⁴³ República Federativa de Brasil Constituição Política de 1946 [Constitution of the Federative Republic of Brazil of 1946].

⁴⁴ Lei do Décimo Terceiro Salário – Lei 4.090/1962 [Law of the Thirteenth Salary 4.090/1962].

⁴⁵ Juan Linz, *The Future of an Authoritarian Situation or the Institutionalization of an Authoritarian Regime: The Case of Brazil in Authoritarian Brazil: Origins, Policies, and Future* 233 (A. Stepan (ed.), New Haven: Yale University Press, 1973).

- Equalization, and universalization of health care provision and retirement benefits to workers (Complementary Law 72/1966);
- Extension of labor rights to self-employed (Law 5.889/1973) and to rural workers (Law 5.890/1973);
- Maternity leave adopted as new benefit from social assistance (1973).

Since the 1980s, this second authoritarian regime of Brazil's modern history faced a multi-class opposition movement that ended up in a presidential election of a civilian in 1985. Surprisingly enough, in times of economic crisis, an important new right was created – limited unemployment insurance.

This democratizing process ended with the promulgation of a new and important constitution in 1988 that came to be adequately known as “Citizen Constitution” because of its extensive concern with citizen's rights, particularly labor rights. In the Constitutional Assembly that wrote the Constitution, socially oriented political forces succeeded in “constitutionalizing” most of existing labor social and political rights, as a way to turn difficult to have them changed but new ones were also added to the list:

- Paternity leave (1988 Constitution);
- 44 working hours/week (1988 Constitution).

Last, but not the least, another relevant step was taken later on in the inclusion of left out groups:

- extension of labor basic rights to domestic workers (Complementary Law 150/2015).

In sum, from 1943 CLT, Brazil incrementally formed a universal, comprehensive, and egalitarian system of labor political and social rights. It continued to serve only to workers of the private sector, with a low-income ceiling for contribution and benefits, something also expressed into a poor quality of health care provision. Needless to say, this system was and is supported by a Labor Justice of national reach that deals and has dealt with uncountable individual and collective labor disputes.

By and large presented with goals of lowering production costs, stimulate economic growth, and overcome persistent high rates of unemployment, current President Temer passed a year ago two laws forming the so-called Law of Modernization of Labor Legislation (*Lei de Modernização Trabalhista*), in what became a major break with Brazil's labor legal system.

On the one hand, Law 13.429/2017 expanded, and diversified to the limit of the possibility of outsourced workers in the firms, and of working hours regimes, by allowing for outsourced labor to be admissible in any function in any firm, and not only in the general supporting activities of the companies' main business. In addition, it strengthened fixed term, temporary contracts, but went further in this respect.

This new legal document even established a new appealing interim format of working hours through which rendering services is not continuous, occurring in alternate of periods of time of “concrete work” and inactivity, determined in hours,

days or months, regardless of the type of activity performed. Employees have only to be notified of the timetable three days in advance through any means of communication, based on a written contract signed beforehand by both parties.

This legal provision may be suitable for some economic activities but once enforced (as it has been), it represents a break with the labor bond, as it existed until nowadays. Another critical change of CLT inspired system, implied in the above law, can be better seen in the second law.

Law 13.467/2017 modified 201 CLT points, and recognized the superiority of direct negotiation between labor and capital to legislation, as it defined a number of specific dimensions of labor that would be subject of direct negotiation of labor and capital as daily working hours; annual hours bank; scheduled intervals; employees participation in the firms career program; workers' representation in the workplaces; home office work; intermittent work schedule; productivity bonus; holiday day exchange; incentive premiums on goods or services, among others.

Different from CLT principles, these two laws explicitly or implicitly assumed that both parts had an equal power and could freely adjust one's to another's interests, as in a free market, without changing traditional basic labor rights earlier built, but make the jobs that are at the root of rights fewer and fewer.

The long term outcomes of these new laws are still hard to predict, both in qualitative legal aspects, but also in more quantitative ones, IPEA's vary recent assessment of current socio-economic conjuncture suggests that:

The fact that the real GDP is still 6% lower than the pre-crisis level and that the unemployment rate remains very high, around 12.5%, contributes to a widespread perception that the economy is stagnant. This fact is reinforced by the falling growth forecasts for 2018, which shrank from 2.7% as of the end of 2017 to 1.4% last September.⁴⁶

In conclusion, there seems to be an on-going transition in Brazil from State labor disputes intermediation to a market-oriented one through legal definition of a new labor bond without outlawing the long existing one. A somewhat focused reform may look like a revolution.

5. Current Russian Legislation on the Intermediation Application in Collective Labor Dispute Resolutions

The current Russian order of a collective labor dispute resolution presupposes an intermediary participation and appears to be an alternative (optional) stage of conciliation procedures that occurs after the party's failure to resolve disagreements by a conciliation committee.

⁴⁶ Alfred Stepan, *Democratizing Brazil: Problems of Transition and Consolidation* (New York: Oxford University Press, 1989).

The intermediary activities are regulated by Chapter 61 of the RF Labor Code, but they are not subjected to the provisions of the Federal law “On Alternative Procedure of Dispute Resolution with Participation of a Mediator (Mediation Procedure).”⁴⁷ Herewith the rule of p. 5, Article 1 of the Russian Law on Mediation (hereinafter the Law on Mediation) states the impossibility of a mediation procedure to be applied to collective labor disputes and disputes affecting the rights and legitimate interests of the third parties not involved in the mediation or public interest. This rule does not appear to be reasonable. Most likely, the focus should be on the inapplicability of legal provisions of the Law on Mediation to the intermediary in collective labor disputes because this procedure has been previously adjusted in the RF Labor Code as a special intermediation covering the specific and complex nature of collective labor conflicts.

The functions and powers of the intermediary in a collective labor dispute resolution, determined by Chapter 61 of the RF Labor Code, are quite specific, but like a mediator, he has no power of decision or of imposing his will over the parties to the conflict.

To comprehend the reasons for inapplicability of the Law on Mediation to collective labor dispute resolutions, it is essential to compare the legal status of a mediator stated in the aforementioned law and of an intermediary in a collective labor dispute.

As Svetlana Golovina⁴⁸ states:

Enunciated in Article 3 of the Law on Mediation principles of voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independence of a mediator are fixed to varying degrees for an intermediary in the Ministry of Labor Decree of 14 August 2002 No. 58 “On Approval of the Recommendations on the Organization of Work to Consider Collective Labor Dispute with Participation of an Intermediary.”⁴⁹

In compliance with a new edition of Article 403 of the RF Labor Code, the parties to the collective labor dispute, having drawn the Conciliation Commission

⁴⁷ Федеральный закон от 27 июля 2010 г. № 193-ФЗ «Об альтернативной процедуре урегулирования споров с участием посредника (процедуре медиации)» [Federal Law No. 193 of 27 July 2010. On Alternative Procedure of Dispute Resolution with Participation of a Mediator (Mediation Procedure)].

⁴⁸ Головина С.Ю. Проблемы применения медиации при разрешении трудовых споров // Российский юридический журнал. 2013. № 6. С. 119–126 [Svetlana Yu. Golovina, *Problems of Application of Mediation in the Resolution of Labor Disputes*, 6 Russian Juridical Journal 119 (2013)].

⁴⁹ Постановление Минтруда России от 14 августа 2002 г. № 58 «Об утверждении Рекомендаций об организации работы по рассмотрению коллективного трудового спора с участием посредника» [Resolution of the Ministry of Labor of the Russian Federation No. 58 of 14 August 2002. On Approval of the Recommendations on the Organization of Work for the Consideration of a Collective Labor Dispute with a Mediator’s Participation].

disagreements report, are bound to conduct negotiations on the review of the collective labor dispute with intermediary participation. If the parties fail to come to an agreement, the protocol for the conciliation procedure's refusal of both or one of the parties is made. Accordingly, a collective labor dispute consideration with intermediary participation remains the optional step of a conciliation procedure.

If the parties have agreed to arbitrate a dispute with intermediary participation, they shall make an appropriate agreement. Thereafter, within two days, the parties shall cooperatively determine an intermediary candidacy. They are recommended to apply to the appropriate state body in charge of the collective labor dispute settlements. If the parties disagree on an intermediary candidacy, the negotiations will not take place, and the parties will start the procedure in labor arbitration.

Due to the order of collective labor dispute consideration with intermediary participation, if agreed upon by the disputing parties, an intermediary may obtain all required documents and information concerning the dispute.

At the local social partnership level, the consideration of a collective labor dispute with intermediary participation should be carried out within three working days – at other levels, up to five working days from an intermediary invitation date – and should result in the adoption of the collective labor dispute parties' written negotiated solution or drawing up of a disagreements protocol.

Although the principles of a collective labor dispute consideration with a mediator or intermediary participation are much alike, they still differ:

1. The law defines mediation as an alternative to a court procedure, but collective labor disputes in the Russian Federation are not considered by courts at all.⁵⁰ However, we can argue that consideration of a collective labor dispute with intermediary participation is also an alternative procedure, which is non-obligatory but optional.

2. A state body may offer the candidate for an intermediary in a collective labor dispute resolution, but the company (not a state body) provides the candidacy of a mediator. The type of interaction between the parties to the dispute and the company or organization is described as an advisory role that is nonbinding. The state body has no power or public authority but aims to facilitate the organization of conciliation procedures and does so for free, in contrast to the company providing mediation.

3. Unlike a mediator, an intermediary for a collective labor dispute does not have to meet certain requirements except one: to suit both parties, especially in terms of public reputation.

4. Chapter 61 of the RF Labor Code establishes time limits for an appointment, and the participation period of an intermediary in a conciliation procedure is comparatively much shorter than that determined for a mediator by the Law on Mediation.

5. An intermediary is empowered to offer the disputing parties options for the conflict resolution while a mediator needs the parties' special permission to do this.

⁵⁰ Golovina 2013.

In this regard, we can refer to American mediation researchers who distinguish the “mediator’s weighted settlement of a dispute.” Under this procedure, a neutral collective labor dispute mediator decides or offers a solution to the conflicting parties, which is comparably more than the facilitation of the mediation process. Collective labor disputes are exactly the appropriate dispute type for such a resolution.⁵¹

6. If mediation fails, then, in compliance with the law, it should not be drawn up in the form of a document. In contrast, a collective labor dispute procedure with intermediary participation requires even a negative result to be drawn up in the protocol of the disputing parties’ disagreements.

7. There is a difference regarding the privacy matter of mediation in general and a collective labor dispute with an intermediary participation procedure. An intermediary in a collective labor dispute shall keep only the state, official, commercial or any other secret protected by law (Decree No. 58 of 2002). On the contrary, a mediator shall keep in secret any information obtained while resolving the dispute.

Nevertheless, we believe that inapplicability of the Russian law on mediation to collective labor dispute resolutions is explained by their public nature. The negotiations of collective labor dispute resolutions that include intermediary participation can hardly ensure the involvement of all stakeholders in the negotiation procedure or, consequently, in the development of an agreed solution. An intermediary in a collective labor dispute organizes the negotiations of the parties’ representatives but not the parties themselves, thus lacking procedural and real opportunities to take into account the opinion of each individual employee. The procedure of conducting individual labor dispute mediation, similar to any other case of classical mediation, tends to involve all stakeholders. During the procedure, a mediator is to ask the participants whether all the people whose opinions and decisions can influence the dispute resolution are involved in the negotiations. Consequently, we conclude that a relative prohibition to apply mediation in collective labor dispute resolutions stated in the Law on Mediation may violate the rights of the third party.

6. State Intermediation in Collective Labor Dispute Resolutions

When exploring the procedures of collective labor dispute resolutions, we must draw attention to the role of state authorities in assisting the resolution. Currently, the Federal Service provides state support for Labor and Employment (Rostrud) and its regional offices in the constituent entities of the Russian Federation.⁵² Among their

⁵¹ Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24(4) Florida State University Law Review 937 (1997).

⁵² Количество коллективных трудовых споров (КТС), зарегистрированных Рострудом за период с 2006 по 2012 годы // Федеральная служба по труду и занятости (Роструд) [The Number of Collective Labor Disputes Registered by Rostrud from 2008 to 2012, Federal Service for Labor and Employment (Rostrud)] (May 4, 2019), available at http://www.rostrud.ru/control/sotrudnichestvo-i-partnerstvo/?ID=236470&sphrase_id=423520.

functions is the provision of state services in collective labor dispute settlements (Resolution No. 324 of 2004). As the resolution of a collective labor dispute is carried out via conciliation procedures and an intermediary is considered a service to facilitate the reconciliation of an organization and its conduct, we can therefore define the state authorities' intermediary in collective labor dispute resolutions as a specific intermediary.

Among state services, which are of intermediary nature (i.e. aimed to establish the negotiating links between the parties) are the services within the powers of the Labor Agency, stated in Article 407 of the RF Labor Code:

- Assistance in the collective labor dispute resolution;
- Verification, in case of necessity, of the collective labor dispute party representatives' powers;
- Provision of methodical assistance to the collective labor dispute parties provided at all stages of its consideration and approval.

Rostrud authorities also:

- Recommend to collective labor dispute parties the candidates for intermediary and labor arbitrators (Arts. 403 and 404 of the RF Labor Code), carrying out their advance preparation and taking the appropriate records of potential intermediaries and labor arbitrators;
- Create temporary labor arbitration in cooperation with the parties to the dispute (Art. 404 of the RF Labor Code).

Other Rostrud powers as a state authority for the settlement of collective labor disputes are characterized by surveillance and monitoring, ensuring state public security functions.

We should note that, at the minimum, law formalizes the intermediary function of the Russian state authorities in collective labor disputes. State authorities of the Russian Federation and constituent entities, except Rostrud bodies, virtually possess a significant administrative reserve of informal influence on the collective labor dispute parties. The forms of such "hand-controlled" management of conflicts are likely to be unlawful in nature. For instance, there were a number of cases of collective labor dispute resolutions in separate Russian single-industry company towns, where the conflicts were resolved primarily due to the President's direct intervention.⁵³

We believe the lack of a clear regulatory framework of state intermediation in this field to be connected with the declared earlier liberal ideas of government and business interactions, where the state takes the position of nonintervention or minimal intervention. Nevertheless, neoliberal economic theories face the needs of an active socially oriented policy. Therefore, the lack of normative regulation of

⁵³ For instance, the conflict in Pikalevo, Leningradskaya oblast in 2008. *Дмитренко А. Трудовые конфликты в монопрофильных городах // Закон. 25 марта 2012 г. [Artyom Dmitrenko, Labor Conflicts in Single-Industry Cities, Law, 25 March 2012] (May 4, 2019), available at http://zakon.ru/Blogs/trudovye_konflikty_v_monoprofilnyx_gorodax/2553.*

this matter does not mislead anyone. State authorities and local governments must intervene actively in any large collective labor conflict to prevent its escalation and proliferation. Within this context, we can hardly call state authorities an impartial intermediary. They have a clearly defined political goal: to preserve social stability. However, the goal is still autonomous from specific interests of the disputing parties. The state, represented by the appropriate authority, is interested in the settlement, but the question of whose interests will predominantly prevail in such a settlement is almost the last to be discussed. Therefore, state authorities primarily stimulate the parties to start the negotiation, and they use administrative resources to explain (mostly to the employer and the owner) the need for social dialogue.

In some countries, especially those that do not have a history of the abrupt change of state ideology from the bourgeois to the communist and vice versa, the state intermediary regulation in the resolution of collective labor disputes is much more consistent and long term in nature.

An intermediary of this type is carried out in at least two ways:

- A certain state authority is empowered to conduct mediation for collective labor dispute resolutions;

- The state establishes a permanent mediation body for collective labor dispute settlements that does not belong to the state justice system but is often created on the principles of tripartism, which develops the existing social partnership system.

In Germany, for instance, in case, an employer and employee fail to come to an agreement on a social plan⁵⁴ any of the parties can apply to the Executive Office of the Federal Employment Agency for an intermediary procedure. If this does not result in an agreement, the case is referred to the Conciliation Committee.⁵⁵ Consequently, due to the rules of Article 373 of the RF Labor Code, the employer has the right to act on his or her own.

In Canada, as mentioned before, intermediary and conciliation procedures are mandatory in nature, thus relevant services are created purposefully. If the employees and employer fail to sign a collective agreement, they must apply to the Minister of Labor Relations for a conciliation procedure. The minister has the discretion to assign a procedure, reject its implementation and appoint a reconciliation official and Commissioner for Reconciliation Council as well as an intermediary. However, the parties to the dispute cannot resort to a strike or a lockout without the procedures designated by the minister. The Canadian province of Quebec has a rule of collective dispute consideration by an intermediary appointed by the Board of Labor Relations.

⁵⁴ Sozialplan. According to the law, it should be agreed upon since it entails planned changes in the activity of the employer, which may result in a change of working conditions.

⁵⁵ Лютов Н.Л. Проблема коллизии социальных прав работников и экономических прав работодателей в корпоративной деятельности: сравнительно-правовой аспект // Lex Russica. 2013. № 1. С. 56–69 [Nikita L. Lutov, *The Problem of Workers' Social Rights and the Employers' Economic Rights Conflict in Corporate Activity: A Comparative Legal Aspect*, 95(1) Lex Russica 56 (2013)].

An intermediary enjoys the right to recommend the terms of a collective agreement to the parties. The recommendations, if accepted by the parties, become a part of the collective agreement.⁵⁶

Legislations of Argentina, Brazil and Costa Rica presuppose similar administrative interference in collective labor disputes at an early stage of the conflict (pretrial).⁵⁷

Filipino law requires the state to interfere in labor disputes when it concerns matters of national interest:

Such intervention takes the form of either assumption of jurisdiction (AJ) by the Secretary, presuming the Secretary shall hear and decide the case, or certification of the dispute to the NLRC for compulsory arbitration (CCA), which means referral of the case to the Commission for hearing and decision by a Division.⁵⁸

Therefore, various countries state that an intermediary in a collective labor dispute resolution can be formalized (i.e. legal) and informalized (i.e. political). Such an intermediary can be mandatory or alternative. However, as Annie de Roo remarks,

The success of conciliation procedures correlates positively with the voluntary character of these institutions.⁵⁹

Conclusion

An intermediary in a collective labor dispute resolution is the most efficient means of overcoming economic disagreements, regardless of the country it is carried out in.

Countries worldwide exercise the following schemes of intermediary system formation in collective labor dispute resolutions:

1. Liberal, which presupposes an intermediary to be private in nature and considers it an alternative and optional procedure. In this case, if there is a formalized state intervention in such conflicts, the state gently assists both parties. A drawback of this approach is the risk of acute social and labor conflicts and that the state and its politicians will have to interfere, but informally. Consequently, a liberal approach turns out to be voluntary in overcoming its consequences.

2. The state-private intermediary system exists in a variety of options. The state facilitates the creation of various conciliation mechanisms, ranging from the intermediary national lists' creation to encouraging the formation of special

⁵⁶ Лебедев В.М., Воронкова Е.Р., Мельникова В.Г. Современное трудовое право (опыт трудового компаративизма). Кн. 1 [Vladimir M. Lebedev et al., *The Contemporary Labor Law (The Experience of Labor Comparison)*. Book 1] (Moscow: Statut, 2007).

⁵⁷ Sappia 2002.

⁵⁸ Sale, *supra* note 33.

⁵⁹ De Roo 2003.

intermediary bodies or organizations based on the principles of freedom in collective bargaining and freedom of association. Their creation and/or work involve either representatives of trade unions or employers. Within the frame of this system, state conciliation bodies can be established, but their decisions will not be binding. This approach presupposes a variety of shortcomings in certain national systems, ranging from the “spray” of some state bodies’ jurisdiction to others’ lack of competence. A collective labor dispute in such a legislative area runs the risk of being delayed whereas the lack of a quick resolution may result in a conflict escalation.

3. A pragmatic scheme, from our perspective, is a system where the state carries out a conciliation function. The state forms the appropriate administrative authorities and makes it obligatory for the disputing parties to apply to these authorities. The authorities’ decisions can be final if all the participants of the disputing parties were involved in the resolution of the conflict otherwise a dispute may be taken to court. The lack of adequate flexibility under this approach does not allow for the complete resolution of a conflict, making it latent for some time.

The classification proposed by the authors and, in particular, the titles of the selected generalized conciliation schemes are rather conventional. Notably, a liberal legislation in this area does not imply a complete liberal legislative policy in the appropriate state; however, a pragmatic approach that is not consistent with the basic principles of civil society will function in the society and be considered civil, with the state declaring democracy as the main value.

The lack of a direct interdependence of state legal policy and established system of national approach to the parties of a collective labor dispute conciliation is rooted in the fact that the system’s effectiveness depends on several factors: (1) the society’s level of socio-economic development and its labor relations quality; (2) the level of political processes development, public activity and national traditions; and (3) the political conjunction and informal relations development in the economy and public life.

It may seem paradoxical, but there is no alternative to conciliation in a collective labor dispute. Being formally settled by the state body, such a dispute cannot completely be resolved without real conciliation. The decision of a single issue neglecting the views of the parties, which economic interests dramatically oppose, is only a temporary settlement and not a final resolution. Lon L. Fuller⁶⁰ noted that as the parties to the employment relationships are significantly interdependent, it makes mediation the only effective method.

To date, no collective labor dispute resolution system is perfect; therefore, the search for new means of resolving collective labor disputes that aim to establish more effective and harmonious labor relations should be continued.

⁶⁰ Lon L. Fuller, *Mediation – Its Forms and Functions*, 44(2) Southern California Law Review 305 (1971).

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