MEDIATION IN INDIVIDUAL LABOR DISPUTES
The cases of SERCLA (Andalusia) and ACAS (UK)

LL.M in International and European Labour Law
Master’s Thesis

Virginia Vilches Such

Supervisor: Prof. Dr. Roger Blanpain

- Tilburg 2012 -
I am grateful to my supervisor Prof. Dr. Blanpain for the passion he puts in teaching. I also want to thank my family and friends for their unconditional support. Specially, I wish to thank to my best friends Pepa and Alberto, my “wife” Ana, my sister Cristina, my dude Barbora, my friend Araceli and my guides Valeriia.
TABLE OF CONTENTS

ABBREVIATIONS

CHAPTER 1: PRELIMINARY CONCEPTS.

1.1. Introduction.
1.2. Mediation.
   a. Definition of mediation.
   b. Theory of mediation.
   c. Mediation v. arbitration.
1.3. Mediation as means for improving the access to justice.
   a. Development of the concept of ‘access to justice’.
   b. Advantages of mediation for improving access to justice.
   c. Disadvantages of mediation for improving the access to justice.
   d. Mediation as complements to courts for improving the access to justice.
1.4. Labor disputes
   a. The gap in the access to justice in labor disputes.
   b. Labor disputes and mediation.
   c. Types of labor disputes.
1.5. Conclusion.

CHAPTER 2: THE CASE OF SERCLA (Andalusia).

2.1. Introduction.
2.2. Industrial Relations and the ‘Crisis of Justice’ in Spain.
2.3. Mediation for individual labor disputes in Spain.
2.4. Mediation for individual labor disputes in Andalusia (SERCLA).
2.5. SERCLA and the legal requirements for fair mediation.
   a. Voluntary nature.
b. Effect of mediation regarding the limitation periods.
c. Challengeability of the agreement.

2.5.2. Neutrality and impartiality of mediators.
2.5.3. The confidentiality of the information.
2.5.4. Conclusions.

2.6. Conditions for effective mediation
2.6.1. Economic aspects.
2.6.2. Skills of the mediator.
2.6.3. Authority of the parties.
2.6.4. Context of mediation.
2.6.5. Enforceability of the agreement.

2.7. Conclusions.

CHAPTER 3: THE CASE OF ACAS (United Kingdom).

3.1. Introduction.
3.2. Court System and the state of the Administration of Justice in the UK.
3.3. Mediation for individual labor disputes in the UK.
3.4. ACAS and the legal requirements for fair mediation.
3.4.1. Protection of the right to access to judicial protection.
a. Voluntary nature.
b. Effect of mediation regarding the limitation periods.
3.4.2. Challengeability of the agreement.
3.4.3. Neutrality and impartiality of mediators.
3.4.4. The confidentiality of the information.
3.4.5. Conclusion.

3.5. Conditions for effective mediation
3.5.1. Economic aspects.
3.5.2. Skills of the mediator.
3.5.3. Authority of the parties.
3.5.4. Context of the mediation.

3.5.5. Enforceability of the agreement.

3.5.5. Conclusions.

COMPARISON AND SUGGESTIONS.

ANNEX: Conciliation – Mediation Procedure Individual Form (SERCLA)

BIBLIOGRAPHY
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acas</td>
<td>Advisory, Conciliation and Arbitration Service</td>
</tr>
<tr>
<td>CC.OO</td>
<td>Comisiones Obreras (Worker’s Commission)</td>
</tr>
<tr>
<td>CMAC</td>
<td>Centro de Mediación, Arbitraje y Conciliación (Mediation, Arbitration and Conciliation Center)</td>
</tr>
<tr>
<td>EAT</td>
<td>Employment Appeal Tribunal</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention of Human Rights</td>
</tr>
<tr>
<td>ET</td>
<td>Employee’s Statute (Estatuto de los Trabajadores)</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Convenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IMI</td>
<td>International Mediation Institute</td>
</tr>
<tr>
<td>LRJS</td>
<td>Social Jurisdiction Act (Ley Reguladora de la Jurisdicción social)</td>
</tr>
<tr>
<td>PCC</td>
<td>Pre-Claim Conciliation</td>
</tr>
<tr>
<td>SERCLA</td>
<td>Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía (Extrajudicial Labor Dispute Resolution System of Andalusia)</td>
</tr>
<tr>
<td>SIMA</td>
<td>Sistema Interconferencial de Mediación y Arbitraje (Interconferencial System of Mediation and Arbitration)</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UGT</td>
<td>Unión General de Trabajadores (General Workers’ Union)</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>QAP</td>
<td>Quality Assessment Programme</td>
</tr>
</tbody>
</table>
INTRODUCTION

Less than 5% of people’s legal problems are solved by courts.¹ Court systems have also proved to be expensive, time-consuming and detrimental for relationships.² Nowadays there is a general feeling of dissatisfaction with the Administration of Justice³ provoked by the gap in the access to justice. This gap is defined as the difference between the type of protection that individuals require and what legal systems are able to offer. In order to face this problem, States are looking for new tools capable of satisfying people’s needs and improving the justice system.⁴ Mediation is one of the tools proposed for this.⁵ Mediation means a process by which parties utilize a third party, known as a mediator, to help them resolve a dispute.⁶ Some argue that mediation enhances psychological and personal satisfaction.⁷ For instance, mediation makes parties protagonists of the process and allows them to tell their story which makes people released and enhance their perception of fairness. Moreover, mediation can help improve the justice system by decreasing the workload of courts. However, there is controversy about the real effectiveness of mediation in practice. For instance, it is argued that mediation cannot work to remedy power differences between the parties.

---

⁴ Ibid.
unless it takes place in the shadow of low costs access to a court.\(^8\) Therefore more studies on how mediation systems work in practice are necessary in order to find out whether mediation serves as a means for improving access to justice.

Research on the effectiveness of mediation systems in practice is needed in order to adapt the legal systems to people’s need. Legal solutions are often incapable of fulfilling the real interests of people.\(^9\) For example, excessive technicality relegates law to experts and precludes ordinary citizens to understand their rights. Consequently, combining legal research with other areas of study such as sociology and psychology is necessary to adapt the legal systems to real situations and people’s needs.\(^10\) Therefore, in this thesis I intend to integrate the legal guarantees for fair mediation with the conditions for effective mediation pointed out by psychology and sociology.\(^11\) The objective is to see whether mediation in practice is effective as a means for improving the access to justice. Offering an integrated approach is important because the success of a dispute system depends in both the implementation of the legal guarantees and conditions for effective mediation.

Following this approach, in this thesis I study two mediation systems; SERCLA, the ‘Andalusian Extrajudicial Labor Conflict Resolution Service’\(^12\) in Andalusia (Spain) and Acas, the ‘Advisory, Conciliation and Arbitration Service’ in United Kingdom (UK). The aim is to see whether in these cases mediation is an effective means for access to justice. In Spain and UK mediation for individual labor disputes, is applied in contrasting manners. On the one hand, the UK established Acas, a deeply-rooted service


\(^10\) Ibid.

\(^11\) For more information about the research criteria see “Research Method” in this paper.

\(^12\) ‘Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía’
of conciliation/mediation provided by the labor administration. The public consultation held by the British Government on “Resolving Workplace Disputes” showed that 65% of the respondents think that mediation is likely to be an effective way of resolving disputes before they reach an employment tribunal. These facts make it interesting to study the strengths and possible weaknesses of this system. On the other hand, in Spain, mediation is hardly developed for individual Labor disputes. SERCLA, is one of the few attempts to use mediation for individual Labor disputes. The genuine nature of this institution and the way mediation is established in SERCLA makes it interesting to study this system. At SERCLA, mediation is conducted by a team of two mediators, one elected by the trade unions and the other by the employer’s organization. This institution was originally created for the resolution of collective disputes. However its success made it to extend its scope to individual disputes as well. I consider that studying and comparing mediation provided by these institutions is interesting because that will allow us to learn from the experience of such different systems.

1. RESEARCH QUESTION

Due to the reasons acknowledged before, in the following research, I intend to analyze ACAS and SERCLA as means for solving individual Labor disputes. The objective is to assess whether, in these cases, mediation is an effective means for improving the access to justice. The main research question of this paper is the following:

**In light of the legal guarantees and practical conditions for effective mediation, are SERCLA and Acas effective means for improving access to justice in individual labor disputes?**

In order to give a comprehensive response to the main research question, the following sub-questions will be addressed:

---

13 In the following research I do not make distinction between mediation and conciliation. Instead, we understand that there are different types of mediation according to the role of the mediator. See Chapter 1.2 of this paper.

1. Do SERCLA and ACAS fulfill the legal guarantees and the conditions for effective mediation?

2. In light of the previous outcomes and the data available, are SERCLA and ACAS a satisfactory means for solving individual labor disputes?

2. RESEARCH APPROACH.

In this thesis I will follow an integrated approach in which I will analyze the guarantees that legal research establishes for fair mediation and the conditions indicated by other areas of study such as psychology and sociology for effective mediation.

a. Legal guarantees for fair mediation.

In the context of access to the right to a fair trial, the principle of fairness includes “the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive”.15 Other aspects of a fair trial are: the equality of arms, the right to attend hearings and the expeditious disposal of proceedings.16 In the same way fair mediation would be that in which those conditions are also fulfilled for the mediation process. There is no unanimity in the legal literature on which requirements mediation should fulfill and which aspects of mediation should be regulated. Nonetheless, the EU Directive on Mediation Civil and Commercial Matters17 is one of the few documents that reflect a minimum degree of consensus on this matter. Therefore, I will use it as a reference for assessing the legal requirements that mediation


should fulfill. It is worth noting that some aspects regulated as legal guarantees have also been reported to be determinant factors in the effectiveness of dispute resolution mechanisms. For instance, if parties do not perceive mediators as neutral they will not trust them, which may undermine the effectiveness of the process.

1. The most important guarantee that mediation should comply with is the full accessibility to effective judicial protection. The right to fair and public hearing is a fundamental human right. Therefore, mediation should not be an obstacle to access to courts. There are three aspects that need to be analyzed in order to determine whether mediation is in line with the right to effective judicial protection.

   a. The voluntary nature of mediation and the consequences for non-appearance in compulsory mediation.
   b. The effect of mediation regarding the limitation periods.
   c. The challengeability of the agreement.

Additionally, the EU Directive on Mediation for Civil and Commercial matters establishes two more legal requirements which I will also analyze in this paper.

2. The first one is the impartiality and neutrality of the mediator.
3. The confidentiality of the information disclosed.

---

18 I acknowledge that this Directive is only applicable for transnational conflicts, but I think it can be taken as a guide for assessing the legal guarantees of national mediations as well.
23 See Chapter 2.5 of this paper.
b. Conditions for effective mediation.

Certain conditions such as the mediator being well trained in mediation\(^\text{25}\) or the fact of guaranteeing equal conditions to parties\(^\text{26}\) have proved to determine the effectiveness of mediation. However, it is thought that these conditions should not be regulated by the law because it may lead to excessive rigidity in mediation. Research demonstrated that the more legalistic dispute resolution becomes, the higher the costs, the greater the need for specialized legal representation and the longer the conflicts go unresolved.\(^\text{27}\) Nevertheless, when it comes to analyzing mediation in practice, it is essential to bear these conditions in mind because the success of a dispute system also depends on them. Likewise, systems in compliance with all the legal guarantees may not be effective if they fail to comply with the conditions for effective mediation. For instance, a very good system may fail if the mediator is not well prepared. Consequently, I carefully paid attention to the sociological and psychological aspects. For instance, to those that constantly appeared in manuals on mediation and research papers. The most determinant conditions for effective mediation are the following:

1. Economic aspects of mediation.\(^\text{28}\)
2. Skills of the mediators.\(^\text{29}\)
3. Authority of the parties to negotiate.\(^\text{30}\)


\(^{28}\) Ibis, 135.

\(^{29}\) Ibis, 134.

4. Context of the mediation.\textsuperscript{31}

5. Enforceability of the agreement.\textsuperscript{32}

Once the criteria selected, I assessed whether and how SERCLA and ACAS comply with them. Therefore, I analyzed statistics, reports and empirical research in order to see if users are satisfied with the mediation. Regarding SERCLA, I interviewed to Javier Millán\textsuperscript{33}, Services Director of SERCLA (Seville) and Emilio Sambuceti\textsuperscript{34}, coordinator of SERCLA in Algeciras. I have also assisted to a mediation session in order to acquire and contrast different opinions on the system. As far as Acas is concerned, it is worth noting that there are many reforms taking place in the British Industrial Relations some of which directly affect Acas. There are also proposals (not yet accepted) which may affect mediation. In this regard it is also worth mentioning that not even the official websites where legislation is published are completely updated. My research for chapter two is based in great extent in the publications made by the official websites of Acas, the Department of Employment and the Ministry of Justice. In order to check that the information provided in this work is updated up now I interviewed two agents of Acas Helpline\textsuperscript{35} and the Acas policy officer, Margaret McMahon.\textsuperscript{36} I repeat that the main objective of this paper is to identify the strengths and weaknesses of these institutions in practice and see whether Acas and SERCLA are satisfactory means for access to justice.

Consequently, in chapter 1, I will define the basic concepts on which this paper is based. First, in part 1.2 I will describe how the evolution of the concept of justice his

---


\textsuperscript{33} Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.

\textsuperscript{34} Emilio Sambuceti, Interview with SERCLA coordinator for Algeciras., 21.12.2011.

\textsuperscript{35} Due to confidentiality policies of Acas Helplines only the first name of the officers can be disclosed during the conversations. I interviewed to Bary, Lisa,

\textsuperscript{36} Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.
re-shaping the content of the right to access to justice. Second, in 1.3 I will clarify what I understand by mediation and I will distinguish it from other kinds of alternative dispute resolutions. Following, I will disclose the advantages of mediation as opposed to courts. The limits of mediation will also be pointed out. In the last part of this section, I will explain that mediation should be used as complementary tool to overcome the limits of courts and not a stand-alone process. Third, in 1.4 I will explain how the gap in access to justice affects employment. Then, I will describe employment disputes and I will present the main features that may affect the dynamic of the mediation. Next, I will disclose the main categories of labor disputes in order to settle and justify the scope of this paper.

In chapter 2, I will try to answer the two sub-questions of this paper. Thus, I will analyze how SERCLA complies with the legal requirements and the conditions for effective mediation. The objective is to assess whether this system is a satisfactory means for solving individual labor disputes. In chapter 3, I will evaluate Acas following the same process. Eventually, I will compare the weaknesses and strengths of the two systems and draw the main conclusions.
CHAPTER 1: PRELIMINARY QUESTIONS

1.1. Introduction.

Before starting the practical analysis of mediation as a means to improving access to justice there are a few preliminary questions that need to be addressed and clarified; What is mediation? What is access to justice, and how could mediation serve as a means for providing it? Why focusing on individual labor disputes? Responding to all these questions will help me to justify the importance of responding to my research question and determine its scope.

Firstly, defining mediation is important because there are different aspects to consider. For instance, some say that mediation and conciliation are different methods whereas others differentiate between different styles of mediation. In addition, in comparative studies such as this, delimiting the functions that will be analyzed is basic for two reasons. First, each system may name the same function differently. Likewise, in UK ‘conciliation’ is used when parties have already lodged a formal complaint before the Employment Tribunals (ET).\(^{37}\) However, in Spain they use mediation even if the formal complaint is already lodged before the Social Courts.\(^{38}\) Second, the same function may be performed by different institutions. In fact, Spain and UK have very different institutions that offer mediation for individual labor conflicts. Additionally, defining mediation is important in order to differentiate it from other alternative dispute resolutions that might be similar. Therefore, in part 1.2 I will describe mediation and the elements of mediation. Next, I will explain the theory on mediation that will be followed in this paper. Eventually, I will differentiate mediation from arbitration.

Secondly, this paper seeks to see whether mediation is a satisfactory means for access to justice. Therefore, the first logical step is to determine the content of the right to access to justice and see the advantages and disadvantages of mediation as a means for providing it. Thus, in section 1.3 I will first talk about the evolution of the concept

---


38 Courts specialized in employment issues are called ‘Juzgados de lo Social’ (Social Courts) in Spain. For more information see Chapter 2.3 of this paper.
of the right to access to justice. I will give an overview of the current approach to what access to justice means and how mediation can contribute to it. In order to do so, I will talk about the benefits and limitations of mediation as a means for access to justice. This part will conclude defending that mediation should be integrated in the justice system as a complement to the court system in order to improve the access to justice.

Thirdly part. 1.4 will deal with labor disputes. Particularly, I will explain why the gap in access to justice is especially important in employment matters so I will justify the necessity of using mediation in this sphere. Next, I will describe the main features of labor disputes that may affect the dynamic of the mediation process. I will also consider whether these characteristics determine that mediation is beneficial or not for this kind of disputes. At the end of this section, labor disputes will be distinguished in the two traditional categories; individual as opposed to collective and disputes over interests as opposed to disputes over rights. Subsequently, I will justify why we should encourage the use of mediation for individual labor disputes either over interests or over rights.

1.2. Mediation.

a. Definition of mediation.

I make use of the concept of mediation provided by the European Directive on certain aspects of mediation in civil and commercial matters which states:

Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.39

The elements of mediation are the following:

‘A structured process’: mediation being a structured process does not mean that the process has to be rigid and determined in advance. In fact, the mediation process is supposed to be flexible and adaptable to the necessities of the parties. I think mediation being a structured process means that it should be clear to all parties that they are engaging in a process headed to reach an agreement on the dispute so they can give their consent. For instance, the mediator should inform the parties about the characteristics and the objective of the process of negotiation. He or she should be sure that both parties agree with it.

‘Wherever named or referred to’ implies that the defining element of the mediation is not the name given to the process but the functions performed. As it has been said before, this is important because the same functions may be named differently in each country.

‘Two or more parties assisted by a mediator’: the important aspect of this element is that the parties are the central figures in the process whereas the mediator’s function is of mere assistance. The directive defines ‘mediator’ as any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.40

**b. The theory on mediation**

Nowadays, there is an on-going dialogue regarding the concept and limits of mediation.41 Broadly speaking mediation is “a process by which parties utilize a third party, known as a mediator, to help them resolve a dispute.”42 Some theories differentiate mediation from other kinds of alternative dispute resolution such as

---

40 Ibid.

conciliation. For instance, in the United States conciliation is considered to be less formal than mediation.  

In 1996 Leonard Riskin elaborated a theory in which he distinguished several models of mediation including evaluative, facilitative and transformative mediation. He created the Problem Definition Continuum, a grid of mediations systems in which he described “what mediators do” in terms of either evaluation or facilitation along the one axis, and “ways of defining the problem” on the other. The problems go from narrow such as litigation to broad issues such as community interests. Thus, the evaluative mediator helps parties understand the strengths and weaknesses of their case by offering prediction and direction. He or she evaluates who is likely to win. In this kind of mediation, the techniques are based mainly in private conversations with parties, until the mediator gets enough information to evaluate the situation, and make proposals that bring parties closer. The mediator will share this evaluation with the parties and will try to press parties to get an agreement. The facilitative mediator focuses on clarifying and enhancing communication and helping parties to decide. This process is not so focused on the legal merits of the cases but on the underlying needs of the parties. Eventually, there is a third mediation style in Riskin’s grid, the transformative mediation. This style is aimed to the empowerment and recognition of the parties. In transformative mediation the mediator does not evaluate the merits of the case and does not make any recommendations or suggestions. The settlement is not a goal but rather an outcome.

43 Ibid, 1.
46 Ibid.
47 Ibid.
49 Ibid, 137.
The EU Mediation Directive establishes that ‘Mediator’ means any third person who is asked to conduct a mediation in an effective, impartial and competent way, *regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation*.\(^{50}\) Given this broad concept of mediation, I understand that the three styles of Riskin can be embedded within the scope of the Directive. In this paper, I will also follow his theory.

Apart from this, each system may have its particular approach to mediation. In Spain, theoretically the conciliator should limit its actuation to improve communication and encourage empathy between parties whereas the mediator is allowed to offer proposals for settlement.\(^{51}\) However, in practice the limit between conciliation and mediation is vague.\(^{52}\) In UK, they differentiate between ‘conciliation’ and ‘mediation’ depending on the context rather than in the role of the third neutral. Thus, conciliation and mediation imply essentially the same process, but they refer to ‘conciliation’ where a formal complaint in already lodged or likely to be lodged before the employment tribunals. They refer to mediation where there is no formal complaint and it is not yet foreseen. In this sense mediation normally takes place in the workplace and conciliation before the Acas.\(^{53}\) In this regard it is worth noting that this thesis does not embrace mediation as a grievance procedure, rather I studied mediation as alternative dispute resolution in the course of a labor procedure. Therefore, I will study


\(^{52}\) *Ibid*, 212.

the mediation offered by SERCLA in Spain and the post-claim conciliation\textsuperscript{54} offered by Acas in UK.\textsuperscript{55}

c. Mediation v. Arbitration.

Mediation and arbitration are two different dispute mechanisms. Arbitration is a process by which a third party adjudicates on the dispute and comes to a decision, whereas in mediation parties have to agree on their own solution and the mediator’s function is of mere assistance.\textsuperscript{56}

SUMMARY

This section described the concept of mediation and its main elements. Next, I explain that in this thesis Riskin’s theory on mediation which differentiates between several styles of mediation according to the role of the mediator and the scope of the problem. Therefore, I do not differentiate between mediation and conciliation. I also clarified that this paper focuses on mediation as an alternative dispute resolution within the course of a labor procedure. Thus, in this thesis I will assess mediation offered by SERCLA and post-claim conciliation offered by Acas. I also explained that even I understand conciliation as a style of mediation, the original names of the process will be kept in order to maintain the accuracy of this study and not to confuse the reader. Eventually, I distinguished mediation from arbitration.

1.3. Mediation as means for improving the right to access to justice.

\textsuperscript{54} There are two kinds of conciliations offered by Acas, early conciliation, when it is likely that the problem ends in the tribunals but the complaint is not yet formally lodged. And post-claim conciliation, once there is a formal complaint before the ETs.

\textsuperscript{55} This paper follows Riskin’s theory so I do distinguish between conciliation and mediation. However, the original names will be kept for the sake of the accuracy of this paper and in order not to confuse the reader.

a. Development of the concept of ‘access to justice’.

Traditionally, international instruments for the protection of human rights have codified the concept of access to justice as the “right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” (Article 8 of the UDHR), “the right to a fair and public hearing by a competent, independent and impartial tribunal established by law” (Article 14 of the ICCPR), or “the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (Article 6 of the ECHR).

Normally, access to justice has been codified as the right to access to tribunals. Accordingly, the majority of justice systems are mainly based on judicial proceedings. However, it was already mentioned that these systems are unable to offer satisfactory responses to people’s needs creating gaps in access to justice. Nowadays, this traditional approach to access to justice is changing. Partly, because actual legal systems are basically focused on judicial proceedings and this has proved to be inefficient. In this regard, the European Union (EU), in the Green Paper on Alternative Dispute Resolution established that, in many countries of the EU, the problem with the administration of justice is due to the increasing volume of disputes brought before courts, the longer duration and high costs of the procedures and the quantity, complexity and technical obscurity of the legislation. Also, court proceedings are not able to offer satisfactory responses to users. In this vein, sociological research made it evident that adversarial legal systems with formal complaints about wrongful acts, defenses and extensive fact-finding, are unlikely to be an appropriate for certain categories of legal problems such as employment disputes. Interventions in these areas are likely to be better suited to the needs of disputants if they aim on settling issues, improve the relationship for the future, and focus on the consequences of termination”.

Therefore, the approach to access to justice is evolving. Carretero Morales states that the administration of justice should not exclusively be a system for solving cases before courts. He claims that we should look for different models of conflict resolution in order to offer more and better responses for different needs. The use of each model would depend in the nature of the problem. He claims the intervention of the administration should be reduced to the minimum.\textsuperscript{58} Along the same line, the proposals on reform of civil litigation funding and costs in England & Wales established that “access to justice is not just about allowing claimants to bring reasonable actions (…) It is about facilitating earlier resolution of any disputes between the parties wherever that is possible”.\textsuperscript{59} Moreover, the EU expressed in the Mediation Directive that the concept of access to justice should include “promoting access to adequate dispute resolution processes for individuals and business, and not just access to the judicial system”.\textsuperscript{60}

All in all, it is necessary to seek new ways for making the legal system more sustainable and capable to enhance people’s satisfaction when they are involved in dispute resolution. There is a broad opinion that alternative dispute resolution is necessary in order to achieve these goals. Mediation is one of the means particularly proposed for improving the justice system because mediation is designed to help parties to create new mutually accepted solutions adapted to their needs. Also because mediation offers an alternative to judicial proceedings diminishing the workload of courts and it makes the system more efficient. In this regard, the European Commission (EC) encourages the use of mediation\textsuperscript{61} because it is believed to have an “untapped

\begin{itemize}
  \item \textsuperscript{58} Helena Solete Muñoz, Mediación y Resolución de Conflictos: Técnicas y ámbitos Technos, Madrid (2011), 62.
\end{itemize}
potential as a dispute resolution method and as a means of providing access to justice for individuals.”

b. Benefits of mediation as a means for access to justice.

As I already pointed out that I believe mediation can improve the access to justice in two ways. First, making the justice system more efficient and second, increasing people’s satisfaction in the dispute resolution process. As for mediation as a means for making the system more effective, mediation can diminish the workload of courts, simplify the procedures, and solve problems in a quicker way. These benefits are likely to improve the whole legal system making it more efficient. Nevertheless, deep analysis on economic efficiency requires detailed economic analysis that exceeds the scope of this paper. I focus in the possibilities of mediation for improving access to justice from the perspective of the satisfaction of the users. Therefore, I will integrate legal research with the outcomes of psychology and sociology studies in order to adapt the legal system to what people need.

Assessing the potential of mediation for increasing people’s satisfaction in access to justice requires first understanding people’s needs when they are involved in a dispute resolution and second assessing how mediation can satisfy them. Therefore, in this section I will briefly point out the main theories of justice from the point of view of people’s perception of fairness. The objective is not to make an exhaustive list of conditions for people’s satisfaction with the justice system, but give the reader a general idea on the different aspects that influence people’s satisfaction. Later, I will note the benefits claimed for mediation in relation to each of these aspects.

As regards to the aspects influencing people’s perception of justice and fairness, psychologists studied the elements that determine what makes people feel treated fairly during a dispute resolution process. Based on these outcomes, new theories on the concept of justice were developed; each of them focuses on specific aspects that

determine people’s judgments on the fairness of the procedure. The theories that have been empirically validated are,\textsuperscript{63} theories on procedural justice, restorative justice, interpersonal justice and informational justice.

Procedural justice refers to various aspects that a procedure should meet in order to be perceived as fair by its user.\textsuperscript{64} Increasing procedural justice enhances acceptance of decisions and outcomes, and enhances obedience to laws. Moreover, procedural justice enhances feelings of self-determination.\textsuperscript{65} These aspects include: consistency, bias suppression, accuracy, correctness, representation and ethicality.\textsuperscript{66} For instance, people being able to decide over the content of the outcome will enhance their perception on the fairness of the procedure.\textsuperscript{67} In mediation, parties are the protagonists of the process and they are to assume the responsibility of the course of the procedure\textsuperscript{68} and they can decide over the outcome because they create their own solution to the problem.\textsuperscript{69} Another benefit of mediation is that it allows parties to be heard and tell their story because they are the main actors in the process.\textsuperscript{70}


\textsuperscript{65} Ibid. 1.

\textsuperscript{66} Ibid., 6.


Restorative justice focuses on repairing the damage caused by a wrongful act. This theory places the focus on including both parties in the resolution process, promoting reconciliation, and rebuilding relationships. For example, this theory claims that recognition of the harm is crucial in order to restore the relationship.\(^71\) In this regard, mediation is believed to limit the negative consequences and encourages the pacification of the industrial relations whereas courts are claimed to increase the probabilities of negative consequences in the industrial relations such as absenteeism, lack of professional development and parties taking reprisals.\(^72\) In addition, mediation allows parties to adjust the agreement to their real needs because in mediation parties can include any topic and criteria whereas in judicial proceedings only the law and the legally relevant facts count.\(^73\) The fact that the agreement is adapted to the parties’ interests and is based in the parties’ consensus increases the protection of the agreement against internal attacks and therefore enhances the probability of voluntary fulfillment.\(^74\) Mediated agreements are more flexible which favors collaboration of the parties with regards to possible changes.\(^75\)

Interpersonal justice refers to the manner in which people are treated during a procedure. For instance, people perceive a process as fair when the decision-maker treats them politely and with respect.\(^76\) In this regard, not only mediation helps parties to identify their own interests but it also encourages recognition of the interests of the other party. Recognition makes people feel that they are treated fairly.\(^77\) Besides, mediation is capable of transforming the relation of the parties by opening new channels.

---


\(^{74}\) Jesús Cruz Villalón, Por el ensanchamiento de la mediación y el arbitraje en los conflictos laborales (To the spread of mediation and arbitration in labor conflicts), Revista Andaluza de Trabajo y Bienestar Social, Sevilla (2003), 12–19, (13). Available at: http://www.juntadeandalucia.es/empleo/anexos/ccarl/33_621_3.pdf. Accessed on 20 June 2012.

\(^{75}\) José Javier Cortázlar Larracoechea, above n. 36.


of communications. Improving the communication of the parties may shape their relationship and teach them how to face future conflicts. Eventually, meditation is claimed to create empathy, enhance cooperation, and erase the feeling of winners and losers which is frequently present in court proceedings. Thus, mediation protects relationships while adversarial judicial systems affect and destroy relationships.

Last but not least, informational justice claims that the degree of information that people have about the process will determine their appreciation on the fairness of the procedure. Especially in legal processes, providing information is particularly important since most people are unfamiliar with the justice system. Mediation is claimed to provide coherent information to the parties.

Given these facts, I believe mediation can be a satisfactory means for access to justice capable of overcoming many of the limits of the court system.

c. Limits of mediation as a means for access to justice.

Despite the aforementioned potential benefits of mediation, it is necessary to acknowledge that mediation also has drawbacks. The main disadvantages of mediation are the following; cases in which parties do not want to settle the case in mediation and prefer to go to courts, problems related to the voluntary nature of mediation and the lack of power of mediation for imposing a final solution.

78 Ibid 24.
Parties may prefer to go to courts rather than settling a case in mediation in the following situations; where all parties’ interests are exclusive and they can only be satisfied by a complete victory, where a party wants to create doctrine or establish a reputation that will deter future litigation, and where one or both parties are using the suit for larger strategic or corporate ends.\(^8\)

Additionally, mediation may trigger what it has been called the submission problem. This phenomenon arises when parties are within a conflict and they do not agree on which process they want to follow in order to solve it.\(^9\) One of the causes of the submission problem is that parties may distrust the proposal of the other party to solve the conflict in a particular procedure.\(^10\) Eventually, mediation needs the threat of a court procedure in order to be effective. There are increasing worries that mediation cannot work to remedy power differences between the parties, unless it takes place in the shadow of low cost access to a court.\(^11\) In this regard Hazel Genn said that “Mediation without the credible threat of judicial termination is the sound of one hand clapping”.\(^12\) Therefore, mediation cannot work as a stand-alone mechanism, it requires the support of an effective legal system in order to display all its benefits. Consequently, mediation is not an appropriate means for any or every kind of disputes, therefore, mediation cannot substitute courts completely.

d. Mediation as complement to courts for improving the access to justice.

I believe mediation should be integrated in the judicial systems as a complement to courts, not as a substitute. Because despite mediation having important advantages as opposed to courts it also has important limitations that require an effective court system in order to support it. And, above all, it is important because access to courts is the core

---

\(^10\) Ibid, 11 .
\(^12\) Maurits Barendrecht , abone n.48, 5.
content of the fundamental human rights to access to effective judicial protection. Thus, Article 6 of the ECHR establishes that “everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law”.\(^{88}\) In this regard, the Council of Europe expressed in its recommendation that “even if parties make use of mediation, access to the court should be available as it constitutes the ultimate guarantee for the protection of the rights of the parties".\(^{89}\)

All in all, a good court system is essential in any justice system, but mediation has important advantages as opposed to courts and it may be an appropriate means for improving the access to justice. Thus, the European Commission (EC) claims that mediation has a value in itself. So, it does not see mediation as an alternative to courts proceedings. Rather, mediation is seen as “one of several dispute resolution methods available in modern society and which may be the most suited for some, but certainly not all, disputes”.\(^{90}\)

**SUMMARY**

This section gave an overview of the evolution of the content of the right to access to justice. This concept has evolved from being understood as the mere right to access to courts to the belief that it should also include access to adequate dispute resolution processes according to the needs of each case. In this context, it is believed that mediation can add a great value to the judicial system as means for increasing the effectiveness of the justice system and increasing people’s satisfaction. In order to support this statement, I brought the main theories on justice proposed by psychology that determine the conditions that influence people’s perception on fairness. Following, I analyzed the benefits that mediation can offer as regards to each of those conditions. Next, I pointed out that mediation also has limits, therefore I acknowledged that mediation is not suited to solve all kind of problems. As a conclusion, in this chapter I

\(^{88}\) See also UDHR, Art. 8; ICCPR, Art. 14.


claim that mediation is capable of improving access to justice if it is integrated a complementary mechanism for overcoming courts limits.

1.4. Labor disputes.

Finally part 1.4 will deal with labor disputes. In particular, I will explain why the gap in access to justice is especially present in employment matters and in doing so I will justify the necessity of using mediation in this sphere. Next, I will describe the main features of labor disputes that may affect the dynamic of the mediation process. At the end of this section, labor disputes will be distinguished in two traditional categories. This will serve for justifying why we should encourage mediation for individual labor disputes either over interests or over rights.

a. The gap in access to justice in labor disputes.

The gap in access to justice is especially present in employment matters for several reasons. Firstly, due to employment being one of the areas in which people invest the most. Labor disputes can affect morale, create stress and reduce productivity. Legal needs surveys elaborated by Tisco show that employment problems are in the top ten of the most pressing category of legal problems for people. This fact may lead to mutual dependency and imbalance of power. Thus, where conflicts arise, it may be hard

---


93 Tilburg Institute for Interdisciplinary Studies of Civil Law, and Conflict Resolution Systems.

to arrive at reasonable results in negotiations. Moreover, in industrial societies, employment disputes are one of the most common conflicts which affect to values of great importance such as basic economic resources, the quality of life, social stability and cohesion of the community. Therefore, establishing mechanisms that ensure that disputes in this area are resolved in fair terms is necessary. Due to this reason acknowledged above, States should put special effort in improving mechanisms headed to resolve employment disputes.

b. Labor disputes and mediation.

Labor disputes involve conflict arising out of a continuing or terminated employment relationship. Generally, the employment relationship is understood as the existing “relationship between a person called an employee and an employer for whom the employee performs work under certain conditions in return for remuneration”. The European Court of Justice (ECJ) established that there are three main elements in any employment relationship; the economic value of the service, the subordination of the employee to the employer and the remuneration for the work. Therefore, labor disputes are characterized by the subordination of the employee to the employer, the financial imbalance and the imbalance of power between both parties. Labor disputes are also identified by the information asymmetry between the parties and by the fact that are relational disputes.

Among these labor disputes’ features, there are three characteristics that they directly influence the dynamic of labor disputes. First, labor disputes are relational

---

95 Ibid, 37.
97 Maurits Barendrecht, Peter Kammenga, and Jin Ho Verdonschot, above n. 58, 37.
because labor contracts are continuing-performance contracts. This may lead to conflicts arising during the relationship in such which it is desirable that the solution does not represent a winner and a looser, as occurs with judicial proceedings. Because, when parties expect to keep linked in the future, having winners and losers may affect the relationship. At first glance, this aspect makes mediation an appropriate means for dealing with labor disputes because, as it has been mentioned before, if successful mediation protects relationships. Even though most conflicts are situated at the end of the employment relation, protecting the relationship is important for those conflicts where there is a possibility of keeping the relationship and because it enhances the chances of keeping the relation.

Second, labor disputes are asymmetric. Information asymmetries appear when each party has at least some material information that the other party does not have. This phenomenon appears in most conflicts, but in labor disputes it usually represents a disadvantage for workers. Therefore, this factor places the worker at a disadvantage in a mediation process. However, this circumstance affects worker in the same way when he is facing a suit. As this is an obstacle for the fairness of the mediation, so it is for the fairness of the court procedure. Nevertheless, it is more likely that parties are willing to share their information in the mediation session than in courts. Mediation attempts to create environment of trust in which parties feel secure to disclose information. The duty of confidentiality that rules mediation makes it easier. When it works, mediation would be able to reduce the asymmetry of the information and therefore be a satisfactory means for access to justice in this regard.

Third, labor disputes are hierarchical. By definition, parties involved in employment disputes occupy a different hierarchical position, because workers are subordinated to employers. Labor disputes being hierarchical affects cognition and

---

102 Jesús Cruz Villalón, Por el ensanchamiento de la mediación y el arbitraje en los conflictos laborales (To the spread of mediation and arbitration in labor conflicts), Revista Andaluza de Trabajo y Bienestar Social, Sevilla (2003), 5. Available at: http://www.juntadeandalucia.es/empleo/anexos/ccarl/33_621_3.pdf. Accessed on 20 June 2012.


emotions and influence behaviors and interaction and therefore affects the mediation process.\textsuperscript{105} Research show that after using mediation for solving labor disputes, subordinates may be less satisfied with the results.\textsuperscript{106} This study proved that the party with the most power presents less resentment than the party with less power. Low-power people normally experience more resentment with the other party and are likely to be more affected by the angry behavior of the counterpart. They are also more affected by uncertainty of the process due to the dependence to the other party and the lack of familiarity with the mediation process. This uncertainty affects their satisfaction. Reality shows that labor relations are power relations, and this is reflected in mediation. Still, the question is whether that difference in satisfaction also appears in courts. Or, if less satisfaction with the results of a quick and cheap mediation process is still higher than the satisfaction that a trial may cause. Therefore, mediation is not the perfect mechanism for solving hierarchical disputes, yet we do not know whether courts can perform this task better.

Consequently, mediation seems to be a proper means for labor disputes inasmuch as employment disputes are relational. However, informational asymmetry and imbalance of power may diminish parties satisfaction with mediation for labor disputes. Still, this does not imply that courts are able to perform better in these regards. Therefore, I believe it is worth keep on investing in improving mediation for individual labor disputes. In the same way, more research should be done in comparing mediation with courts in order to see which mechanisms should be used in each case and how we could improve them.

c. Types of labor disputes.

Traditionally, there are two classic categories of labor disputes. Namely individual versus collective disputes, and disputes over interests versus disputes over rights.

\textsuperscript{105} Ibid.

3. Disputes over interests as opposed to disputes over rights.

Disputes over interests are those in which parties attempt the modification or substitution of existing rules, for instance, the negotiation of a collective agreement.\textsuperscript{107} Whereas, disputes over rights are those which deal with the interpretation and application of existent rules such as laws or collective agreements.\textsuperscript{108} In practice, the limit between these two types of conflicts is not clear. Some argue that mediation is better for dealing with conflicts over interests and that judication is the natural stage for conflicts over rights. They say that judges should interpret the laws.\textsuperscript{109} Yet, I believe that mediation is also an appropriate means for dealing with conflicts over rights. In fact, alleged benefits of mediation in personal and psychological satisfaction do not depend on the content of the dispute. For instance, mediation gives parties the opportunity to be heard which enhances their satisfaction. In fact, mediation is already being used for this kind of conflict. Likewise, both SERCLA and ACAS use mediation for dealing with both types of conflicts. Therefore, in this paper I embrace both categories of disputes; over interests and over rights.

4. Collective disputes as opposed to individual disputes.

Individual disputes are those “arisen within the labor relationship between a single employee and his employer.”\textsuperscript{110} They emerge when a worker claims non-compliance with a certain provision or suggests a different interpretation of a valid rule related to an individual contract. Contrarily, collective conflicts are “those affecting the group as a whole, infringing upon the rights or interests of the group as such.”\textsuperscript{111} Moreover, plural disputes are those “affecting several individual workers at the same time but neither as a


\textsuperscript{108} Ibid, 10.

\textsuperscript{109} Ibid, 12.

\textsuperscript{110} Manuel Alonso Olea, Fermín Rodríguez-Sañudo, 'Up to date at April 2010' (2010), pp. 104, in Prof. Dr R. Blanpain, Colucci Prof. Dr M. (Eds.), Spain, \textit{International Encyclopaedia for Labour Law and Industrial Relations} (Kluwer Law International BV, The Netherlands).

\textsuperscript{111} Manuel Alonso Olea, Fermín Rodríguez-Sañudo, 'Up to date at April 2010' (2010), pp. 104, in Prof. Dr R. Blanpain, Colucci Prof. Dr M. (Eds.), Spain, \textit{International Encyclopaedia for Labour Law and Industrial Relations} (Kluwer Law International BV, The Netherlands).
whole nor as standard-bearers for the interest of the group.” For example, if three employees present a claim for unpaid salary. These three complaints can be gathered together in a plural claim. However, when three employees claim that their salary is under the minimum wage, the conflict is collective because the outcome will affect to all the employees in the same situation. In this paper, plural disputes are also deemed to be individual.

This thesis focuses on individual disputes for two main reasons. First, the capacity of trade unions for protecting workers is decreasing inasmuch as collective forms of expressing discontent have proved both difficult and expensive. Globalization has shifted the power in favor of capital and against the workforce. Business is international, and excessive pressure from trade unions may end in the delocalization of the company to places where labor is cheaper. Economic recession, massive unemployment and an overall pattern of individualization are reducing the capabilities for representation for trade unions. For instance, the Government of UK recognized that unions are facing difficulties in ensuring effective representation for certain groups of members such as shift workers, part-time workers, home workers and those with special needs, including language requirements. Second, collective disputes count on extra protection and support of trade unions and normally there are additional settlement mechanisms for the dispute resolution such as compulsory arbitration for impasses in the collective bargaining. However, in many countries, such as Spain, individual conflicts lack of well settled alternative dispute resolution complementing the judicial proceedings. Skeptical of mediation they think that this instrument is only appropriate for collective conflicts, while judicial intervention is better suited for individual conflicts. Especially, courts are considered to be the best arena for individual labor disputes where they are specialized and adapted for

---

112 Ibid 104.
113 Stephen Drinkwater and Peter Ingram, Have Industrial Relations in the UK Really Improved?, Fondazione Giacomo Brodoli and Blackwell Publishich Ltd 2005, 373–398, 393.
employment issues.\textsuperscript{117} However, I take the view that benefits such as procedural justice and psychological satisfaction make it desirable to expand mediation for individual conflicts as well.

Research suggests that in countries such as UK “decline in collective forms of unrest has been counterbalanced by an increase in individual manifestations of workplace disruption”. For instance, in Great Britain the number of individual disputes brought before ACAS and employment tribunals increased. This is to say, trade unions are becoming powerless to protect workers as a group, so it is necessary to protect the individual relationship. And, as part of this protection, more efforts are needed in order to improve the dispute resolution mechanisms for individual workers.

SUMMARY

In this section I stated that individual disputes are those arisen within the labor relationship between a single employee and his employer. The main features of labor disputes that may influence the mediation process are that labor disputes are relational, asymmetric and that one of the parties, the worker, is subordinated to the other, the employer. Next, I described the different categories of labor disputes and I clarified that the thesis focuses further on individual labor disputes either over interests or over rights. Two main reasons support this choice. First, there is a trend towards individualization of the labor relationship and trade unions’ power for protecting employers decreased. Second, alternative dispute resolution mechanism are scarce for individual labor disputes in many systems.

1.5. Conclusion

Summing up, chapter 1 gave an overview of the development in the concept of access to justice that nowadays refers to something else than just access to courts. Today, access

\textsuperscript{117} Jesús Cruz Villalón, Por el ensanchamiento de la mediación y el arbitraje en los conflictos laborales (To the spread of mediation and arbitration in labor conflicts), Revista Andaluza de Trabajo y Bienestar Social, Sevilla (2003), 12–19, (17). Available at: \url{http://www.juntadeandalucia.es/empleo/anexos/ccarl/33_621_3.pdf}. Accessed on 20 June 2012.
to justice refers to the settlement of a dispute system that counts with different tools and mediation is one of them. Later, I clarified that I make use of a broad concept of mediation including any process, however named or referred to, whereby two or more parties attempt, on a voluntary basis to reach an agreement with the assistance of a mediator.

Next, I pointed out the benefits and limits of mediation as a means for access to justice. I concluded that psychological benefits of mediation make it desirable to include this tool in the justice system. Therefore, I defend that mediation should be integrated in the justice system as a complement to court systems, and not as a stand-alone mechanism. Three reasons support this opinion. First, limits of mediation require another alternative for parties to solve their disputes. Second, mediation needs the support of a cheap court system in order to be effective. And, third, access to courts is the core content of the right to access to justice. Therefore having effective and strong courts is essential for a proper justice system.

Last but not least, I defined labor disputes as those involving conflict arising out of a continuing or terminated employment relationship. I also pointed out the main features that may affect the effectiveness of mediation for solving labor disputes. I also distinguished between collective and individual disputes and disputes over interests and over rights. Thus, I emphasized that this paper focuses on individual labor disputes either over interests or over right.

CHAPTER 2: THE CASE OF SERCLA (Andalusia).

2.1. Introduction

The regulation of industrial relations determines the shape of the administration of justice for labor issues. Therefore, knowing the basic features of industrial relations is necessary in order to understand the judicial system for labor issues. Likewise, the specificity of each judicial system determines the role that mediation can play. The Social context helps to explain the success and failures of the system.
Thus, in part 2.2 I will explain the Spanish industrial relations and the current situation of the administration of justice in Spain. Part 2.3 will describe the three possibilities that the social jurisdiction law in Spain establishes for using mediation in labor conflicts. Part 2.4 will explain the role that the SERCLA plays in Andalusia and will present a brief description of the system. In part 2.5 I will analyze how the SERCLA fulfills the legal requirements for fair mediation with all its guarantees. In part 2.6 I will assess how the ACAS complies with the conditions for effective mediation. Eventually, the main weaknesses and strengths of the system will be pointed out under “Conclusions”.

2.2. Industrial relations and the ‘crisis of justice’ in Spain.

In Spain, Labor Law is an independent branch of law which has been recognized long before the 20th century. It includes matters of collective and individual labor law. Frequently, labor law also refers to matters of social security law. There is also a specific labor court system specialized in labor issues; the social jurisdiction. They are regulated by the regulatory law of the social jurisdiction. This system is composed of the Labor Courts, Social Chamber of the Autonomous Regions Courts of Justice, Social Chamber of the National Court of Justice and Social Chamber of the Supreme Court. The Social Jurisdiction emerged as a critic to the Civil Law. In the same way, Labor Courts appeared as an alternative to Civil Courts because it was thought that

---

118 Manuel Alonso Olea, Fermín Rodríguez-Sañudo, 'Up to date at April 2010' (2010), pp. 1–1, in Prof. Dr R. Blanpain, Colucci Prof. Dr M. (Eds.), Spain, International Encyclopaedia for Labour Law and Industrial Relations (Kluwer Law International BV, The Netherlands).

119 ‘Jurisdicción Social’.


121 ‘Juzgado de lo Social’.

122 ‘Sala de lo Social de los Tribunales Superiores de Justicia’.

123 ‘Sala de lo Social de la Audiencia Nacional’.

124 ‘Sala de lo Social del Tribunal Supremo’.

125 Manuel Alonso Olea, Fermín Rodríguez-Sañudo, 'Up to date at April 2010' (2010), pp. 1–1, in Prof. Dr R. Blanpain, Colucci Prof. Dr M. (Eds.), Spain, International Encyclopaedia for Labour Law and Industrial Relations (Kluwer Law International BV, The Netherlands), 106.
labor conflicts should not be in hands of the bourgeois civil jurisdiction. According to the preamble of the Social Jurisdiction Act, the singular nature of the industrial relations and its specific necessities in procedural matters explain and justify the existence of this social branch of the law. The long tradition of these specialized courts has culminated in a high efficiency and social prestige of the social jurisdiction.

The existence of Labor Courts provoked a high intervention of the judiciary in Spanish industrial relations. During the Franco regime, courts were the only means for solving disputes and protests. And, the role of courts was intensified as a way means for compensating the lack of collective autonomy and autonomous dispute resolution mechanisms. Afterwards, the Spanish Constitution of 1987 reinforced the role of the social jurisdiction recognizing the fundamental right of effective judicial protection established in its Article 24. Later, Article 4, 2, g) of the Employee’s Statute (ET) formalized this fundamental right for workers.

Today, things have changed, and private autonomy has gained relevance, leaving more space for the autonomous mechanisms of conflict resolution such as mediation and arbitration, at least for collective conflicts. Already in 1991, the Constitutional Court of Spain welcomed the use of the alternative dispute resolution stating that:

The establishment of autonomous mechanisms of dispute resolution is beneficial for the parties because allows them to solve their disputes according to their

---


127 This law substitutes the ‘Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el Texto Refundido de la Ley de Procedimiento Laboral’ (Royal Decree 2/1995, of 7 April 1995, that passes the Labor Procedural Law) which was in force until 11th of December 2011.


129 ‘Estuto de los Trabajadores’.


131 Ibid, 27.
interests in a quicker and more comfortable way. It is also beneficial for the system because the use of these means lower the workload of the courts”.

In Spain there is a general dissatisfaction with Administration of Justice. This was made evident by the studies done in 2008 by the Sociological Research Center, in which they registered that the 70% of population think that the judicial system is very slow and that judgments are not effectively executed. Some of the main causes of this ‘Crisis of Justice’ are; slow and delayed processes, saturation of courts due to excessive workload, inadequate treatment of participants in the processes and low quality and unfair judgments due to the scant time that judges can dedicate to each case. Therefore, in Spain there is an urgent need to improve the administration of justice.

Consequently, the Spanish Government elaborated a Strategic Plan for the Modernization of the Justice System in Spain 2009-2012. Mediation has an important role within this new plan, for instance, they created a Civil and Commercial Mediation Project. Within this project they are establishing new pilot projects of intra-judicial mediation. Moreover, they have elaborated the Project Law on Mediation in civil and commercial matters, implementing the EU Directive in Civil and Commercial matters. In this regard, it is worthy to say that, in Spain the act implementing the EU Directive on certain aspects of mediation in civil and commercial matters excludes labor issues and reserves the regulation for the specific norms of the sector.

---


133 ‘Centro de Investigaciones Sociológicas’.


135 ‘Plan estratégico de Modernización del Sistema de Justicia 2009-2012’.

136 ‘Proyecto de Mediación Civil y Mercantil’.

137 ‘Proyecto de Ley de Mediación en Asuntos Civiles y Mercantiles’

In the scope of industrial relations, there are two pilot projects in mediation for labor issues; one in the Labor Court nº 3 Bilbao\(^{139}\) and another in eight labor courts in Madrid. Moreover, the new law regulating the labor proceeding refers directly to mediation as alternative dispute resolution. Before, mediation was accepted but not directly referred to the law. This can be seen as another act of support of the Government to the development of this mechanism as means for accessing to justice. The SERCLA is not part of this plan, but the fact is that it is offering an alternative to courts is in the same line as the measures taken by the Government. And, the extension of its scope of action to individual conflicts coincides with the beginning of the Strategic Plan. Therefore, the SERCLA can help to alleviate the problem of the Spanish administration of justice.

SUMMARY

This section explained that in Spain labor law is a different branch of the legal system with its own court system. The Regulatory Law of the Social Jurisdiction is the norm that regulates the labor procedure. Moreover, we have seen how the Spanish administration of justice is passing a crisis that provokes the dissatisfaction of users. Next, I presented the main measures that the Government is taking in order to face this crisis in the scope of labor conflict and how the SERCLA works towards the same ends.

2.3. Mediation for individual labor disputes in Spain.

The Regulatory Law of the Social Jurisdiction guides the labor procedure in Spain. In this norm, there are several options for using mediation in labor disputes. Mediation is already a deeply-rooted alternative dispute resolution mechanism for collective conflicts in Spain, however most of the times individual labor conflicts are excluded from the scope of action of the mechanisms available for mediation. The three most important

\(^{139}\) ‘Juzgado de lo Social nº 3 Bilbao’
possibilities for mediation in labor disputes in Spain are: the previous compulsory conciliation, alternative mechanisms offered by social partners in substitution of the previous compulsory conciliation and the possibility of establishing a joint committee by collective agreement.

5. Mandatory previous conciliation.

Article 63 of LRJS establishes a ‘mandatory previous conciliation’ before the Mediation, Arbitration and Conciliation Centers (CMACs) which are part of the labor administration. This process is a necessary step that parties have to follow before presenting the demand before Labor Courts. The procedure is very simple; first, the parties receive an appointment to which parties do not need to attend with representation. Nevertheless, parties usually bring their lawyers. At the meeting, the conciliator asks the parties if there is any agreement. From this point on, the process depends on the skills of conciliators and the time they dedicate to the case. In practice, conciliators usually dedicate few minutes to each case and their influence over the process is minimum. If parties achieve an agreement, they are required to write it. The agreement acquires condition of public document with executive effect (Article 68 LRJS). In 2009, there were 68,659 agreements made by previous conciliation before the labor administration in Spain. At first glance, it may seem a good result. However, critics argue that, in practice, this conciliation has the mere function of formalizing the agreements that parties might have reached. And this serves only for omitting the

140 Apart from the mechanisms mentioned here there are other two formulas for alternative dispute resolution of labor conflicts, one assigned to the Labor Inspection, and the other to the Labor Authority. Nevertheless, these options are practically obsolete. See also, Rodrigo Tascón López, La solución extrajudicial de conflictos laborales en el modelo español: a medio camino entre el desiderátum legal y el ostracismo social (Extrajudicial Conflict Resolution for Labor Disputes in the Spanish Model), Revista universitaria de ciencias del trabajo, La Rioja (Spain) 2009, 209–226 (29). Available at: http://dialnet.unirioja.es/servlet/articulo?codigo=3169719. Accessed on 20 June 2012.

141 ‘Comisión Paritaria’

142 ‘Centros de Mediación, Arbitraje y Conciliación’.


intervention of the judge in the formalization of the agreement. Indeed, there is a general unanimity on this point among different sectors. Along the same line, my experience as intern in labor law reaffirms this perception.

That been said, I think that, in practice, the previous compulsory conciliation does not bring the benefits that mediation is capable of offering as a dispute resolution mechanism. For instance, it does not open any new channel of communication and there are no real efforts to help parties to understand each other. This is the reason why this paper is focused in studying the SERCLA, as an alternative to this system.


The mandatory previous conciliation can be substituted by mechanisms created by social partners through sectorial collective agreements, or Agreements on Conflict Resolution. In these agreements, the most representative trade unions and employer’s organizations, can establish alternative dispute resolution mechanisms either at the level of the autonomous region or at national level. At the national level, the most representative trade unions and employer’s organizations of Spain established the National Agreement on Labor Alternative Dispute Resolution. This option is contemplated in Article 83, 3 ET. Through this agreement they created the Interconferencial Service of Mediation and Arbitration (SIMA). SIMA is an institution which offers mediation and arbitration services for collective conflicts whose scope exceeds the territory of one autonomous region. However, this instrument expressly excludes individual conflicts. At the regional level, social partners can also create agreements on conflict resolution. Today, every autonomous region has its own

---


147 ‘Acuerdos sobre Solución de Conflictos’

148 ‘Acuerdo Nacional de Solución Extrajudicial de Conflictos Laborales’. Following the possibility of Article 83,3 ET.

149 ‘Servicio Internconferencial de Mediación y Arbitraje’
Agreement on Conflict Resolution and has created its own system of dispute resolution. However, most of the regions exclude individual conflicts from their scope.

S.E.R.C.L.A, ‘Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía’ (Extrajudicial Labor Dispute Resolution System of Andalusia) was created following this path. Originally, it was meant for resolving only collective conflicts. Today, it is one of the few regional systems offering mediation for individual disputes as well. As it has been mentioned in the introduction, its genuine origin and composition makes it important to study this system. First, because it might serve as a model for other regions that do not see individual disputes yet and second, because this system may serve as a model for other States where social partners might be willing to acquire a more active role in the resolution of labor disputes.

7. Joint Committee.

The third possibility established by the LRJS is that social partners, in the framework of the collective bargaining, create a joint committee. This body is composed of representatives of trade unions, employers and the labor administration. Its main function is to solve possible conflicts on the interpretation and application of the collective agreements. The collective agreement can establish the preference of this body for trying to resolve disputes (collective and individual) about the interpretation and application of the collective agreement through mediation. The qualitative importance of this instrument is recognized by the Spanish jurisprudence which has established that turning to the joint committee is a previous requirement for presenting any demand before labor courts where the collective agreement clearly establishes this requirement. However, in practice this instrument is not used so frequently, so eventually this is making it not a very relevant dispute mechanism.

---


151 Rodrigo Tascón López, La solución extrajudicial de conflictos laborales en el modelo español: a medio camino entre el desiderátum legal y el ostracismo social (Extrajudicial conflict resolution for labor
SUMMARY

In this part, I have described the three possibilities for the autonomous mechanisms of conflict resolution in labor disputes; the mandatory previous conciliation, the alternative mechanisms for this mandatory previous conciliation provided by social partners and the joint committee established by the collective agreement. However, it was demonstrated that the previous compulsory conciliation is not effective in practice that most of the regional agreements do not embrace individual conflicts and that joint committee are not used. Therefore, more efforts are needed in order to increase the mechanisms for individual disputes and their effectiveness.

2.4. Mediation for individual labor disputes in Andalucía (The SERCLA).

The SERCLA is the dispute resolution system provided by social partners in. There are several ways by which the SERCLA can intervene in individual labor conflicts, so first of all it is important to make clear the role that the SERCLA plays within the course of individual disputes.

Once one individual labor conflict arises, we have to see whether there is an applicable collective agreement establishing any alternative mechanism for its resolution. If that is the case, there are two options; first, the collective agreement refers to the SERCLA as compulsory step before lodging the complaint before the labor, or the collective agreement creates a joint committee with the responsibility of trying to

---
settle the disputes on the application and interpretation of the collective agreement. In these cases, parties are compelled to exhaust those procedures before turning to the Labor Courts. If there is no collective agreement or the collective agreement does not establish any alternative dispute resolution, parties have to attend the mandatory previous conciliation as established in Article 63 and 64 of the LRJS. This step can be fulfilled by attending to conciliation before the labor administration or to mediation before the institutions created by social partners through collective agreements. In Andalusia, the SERCLA is the institution which assumes this competence in several matters. In some of these issues the attendance to mediation is compulsory. Therefore, the SERCLA substitutes the CMAC in these issues. In others, parties can choose either using the SERCLA or not. Once these steps are exhausted, parties are able to lodge their claims before labor courts. See figure 1.

Figure 1.

---


153 See also part 3.5.1. of this chapter.


155 See also part 3.5.1. of this chapter.

SERCLA

The SERCLA was created the 3 April 1996. It was an agreement signed by the Andalusian Business Confederation\textsuperscript{157} and the most representative trade unions (UGT and CC.OO)\textsuperscript{158} in the Region. The Government of Andalusia ratified the agreement that established the SERCLA as means for expressing support and compromise with the establishment and development of this system.\textsuperscript{159} Thus, Government offers the material, technical and personal support for the effective development of the system. Likewise, SERCLA is functionally linked to the Andalusian Council of Labor

\textsuperscript{157} ‘Confederación de Empresarial de Andalucía’.

\textsuperscript{158} ‘Unión General de Trabajadores’ (General Workers’ Union) and ‘Comisiones Obreras’ (Worker’s Commission).

Relations\textsuperscript{160} (CARL).\textsuperscript{161} It started functioning in 1999, but it was not until 2009 when it broadened its scope for individual labor conflicts as well.\textsuperscript{162} In the matters of individual labor disputes the SERCLA substitutes the previous compulsory conciliation at the CMACs. In January 2010, the SERCLA introduced the possibility of establishing a plural process where there are various individual claims with the same object against the same employer.\textsuperscript{163}

The SERCLA offers services of mediation and arbitration for both individual and collective conflicts but its main activity is mediation for collective disputes. SERCLA’s territorial scope of action embraces conflicts that take place within the autonomous region of Andalusia. As far as individual disputes are concerned, SERCLA is granted limited authority, for instance unfair dismissals are excluded. This can be explained by the fact that SERCLA is not a body created by the Government; it is created by the social parties. Therefore, it is necessary that social partners get a consensus on the competences they want to grant to SERCLA, which is not always easy. Moreover, authority for individual labor disputes has recently been given to SERCLA. Thus, it seems reasonable to wait until this system is properly defined and rooted in the society. Once it gains the trust of both workers and employment it will be easier to get the consensus of social partners and extend its authority. Looking at the trajectory of this institution and how well it is being accepted in Andalusian society, it can be expected that more authority will be given in the future. However, there is still a lot of work to do before arriving at that point.

The process of mediation in the SERCLA is quite straight forward. In order to open the mediation, parties have to make a writing request (see Annex 1) including the personal data and the data regarding the issue. They are to include personal identification of the worker, professional category, if there is any applicable collective

\textsuperscript{160} The ‘Consejo Andaluz de Relaciones Laborales’ is a tripartite institution, composed of the employer’s organization, the most important trade unions in Andalusia and the Andalusian Labor Administration. See http://www.juntadeandalucia.es/empleo/carl/portal/web/guest/institucional/presentacion. Accessed on 13 July 2012.

\textsuperscript{161} Ibid.


\textsuperscript{163} Ibid. Art, 7.2. .
agreement and the identification of the company among other. The request has to be submitted to one of the SERCLA offices. Parties will be summoned for the mediation meeting in the next five working days. The process is regulated by the principles of orality, celerity, adversarial, defense and equality. If parties achieve an agreement, the secretary will draw up record of it. Workers do not need to join a trade union in order to use SERCLA. Even though SERCLA is created by trade unions and employer´s confederations, their service is open to the general public. In each individual case, a team composed of two mediators and one secretary intervene in the mediation process. The mediators are elected from two different lists; one list of mediators is established by the trade unions and the other list is proposed by the employer’s confederation. The organizations are to appoint the mediators for each specific case and the secretary checks that there are not incompatibilities. For instance, they try to insure that mediators from the trade unions lists do not come from the same sector of the dispute and that they do not have any economic interests regarding to the conflict. Parties cannot decide on mediators. This limitation attempts to preserves the neutrality and objectivity of the system. The secretary is appointed by the CARL. The functions of the secretary are to attend the mediation sessions, put on record the agreement and register the documentation of each case. Parties do not need to be represented by lawyers in mediation, however they can decide to bring them if they wish to. Each party has the duty to prepare their case. If they want to be represented by a trade union lawyer they may. In that case they have to seek the trade union representative on their own as SERCLA does not provide this service.


165 Ibid, 7.2.

166 Ibid Art. 9.

167 Ibid.

168 Ibid.

169 Emilio Sambuceti, Interview with SERCLA coordinator for Algeciras, 5.10.2012.

170 Javier Millán, Interview to Services Director of SERCLA, Seville, 18.09.2012.

171 Ibid.
Here is one typical case brought before SERCLA. Nineteen workers of a clothes shop were transferred from their center of work to other shops, some of them in different cities. Workers did not agree with the changes so they lodged a complaint before social courts in order to reject the decision of the employer and claim compensation. These nine cases were accumulated and became a plural dispute and the mediation session took place at SERCLA. In the mediation they settled the cases. Eight of the workers signed the extinction of their contract due to changes in workers conditions and received a compensation between 4000€ and 28000€ depending on the case. The other accepted the transfer but with an increase of the time of work from 20 to 30 hours a week.

SUMMARY

This section described the course that individual disputes follow in Andalusia and the role that the SERCLA can play in this itinerary. Next, the SERCLA was introduced, its origins, its scope and a general overview of its functioning. Eventually, I gave a general overview of the process of mediation before SERCLA. The details of how the SERCLA works in each particular aspect will be described in the following sections. Particularly, section 2.5 will analyze how the SERCLA complies with the legal requirements for fair mediation and part 2.6 will assess how the SERCLA complies with the conditions appointed prescribed by sociological and psychological research for effective mediation.

2.5. SERCLA and the legal requirements for fair mediation.

In this section I will analyze how SERCLA fulfills the legal requirements for fair mediation the adequate guarantee of the right to effective judicial protection, the

---

172 Emilio Sambuceti, Interview with SERCLA coordinator for Algeciras., 5.10.2012.

173 Plural disputes are considered individual disputes because they do not affect a group of workers as a whole. See Chapter 1.4. of this paper.

174 For more information on the selection on the criteria see ”research method” of this paper.
impartiality and neutrality of the mediators and the confidentiality of the information disclosed. As I noted in the introduction, before analyzing each legal requirement, I will present a brief summary of the discussion on how mediation should be regulated. Next, I will explain the system in the SERCLA and I will point out the main strengths and weaknesses of this system supported by the data provided by satisfaction pools tables, interviews and research results available on the performance of the SERCLA.

The SERCLA has its own regulations. Still, as an alternative/substitute to the compulsory previous conciliation, the Social Jurisdiction Law (LRJS) is the subsidiary rule to be applied in many aspects. Therefore, I will generally mention the Social Jurisdiction Law. And I will refer to SERCLA’s own regulations where the SERCLA system differs from this regulation.

2.5.1. Protection of the right to access to judicial protection.

The way mediation is enshrined in the legal system may affect access to courts and therefore be an obstacle for the effective judicial protection of citizens. Particularly, there are three conditions that may affect a proper access to judicial protection: the voluntary nature of mediation, the possibility of appealing to courts after the agreement and the effect on of limitation periods of on the opening of the mediation procedures.

c. Voluntary nature.

Voluntary nature: the discussion.

176 Ibid.
One of the main questions regarding mediation is whether this should be a voluntary process or not.\textsuperscript{177} In this regard, the International Labor Organization (ILO) establishes that the existence of the obligation to start mediation does not affect the autonomy of parties neither modifies their position in the process.\textsuperscript{179} Along the same line, I take the view that even if attendance to the mediation meeting is compulsory, the voluntary nature of the process remains protected if parties are free to leave the mediation at any moment and turn to courts. However, given that the effectiveness of the mediation depends on the will of the parties to collaborate,\textsuperscript{180} some wonder what the real usefulness of establishing the obligation of entering in the mediation process is.\textsuperscript{181} People who think that mediation should not be compulsory argue that forcing the parties to attend to mediation would only make them persist in their views and positions.\textsuperscript{182} Making mediation compulsory has two important benefits. First, compulsory engagement on mediation solves one of the most important drawbacks of mediation; the submission problem. This phenomenon arises when parties are within a conflict and they do not agree on which process they want to follow in order to solve it.\textsuperscript{183} Second, compulsory mediation spread knowledge of the process, gives parties experience with mediation and enhances the culture of mediation. This is good because the lack of knowledge about mediation has been consistently referenced as a barrier to wider use of mediation.\textsuperscript{184} In this regard, Lisa Bigham concludes that those who have more experience with mediation value more the process and experience its benefits more. Particularly, individuals expressed that they believe that experience in mediation affected their subsequent approaches to conflict.\textsuperscript{185} Obviously, certain guarantees need

\textsuperscript{177} It is worth mentioning that making attendance to mediation meetings compulsory does not imply that the outcome is mandatory too.


\textsuperscript{180} European Commission, above n. 60, 25.

\textsuperscript{181} European Commission, above n. 60.

\textsuperscript{182} Annie de Roo and Rob Jagtengbert, Settling Labour Disputes in Europe, Society for Personality and Social Psychology, Inc. The Netherlands (2003), 24.


\textsuperscript{185} Tina Nabatchi and Lisa Bingham, Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists, Indiana University Bloomington - School of Public & Environmental
to be fulfilled if mediation is compulsory. As I said, parties should have the option to leave the process and appeal the agreement before the courts.\textsuperscript{186}

All in all, if the rest of guarantees for protecting the right to access to courts are met, making mediation compulsory is beneficial because it eliminates the submission problem and it enhances the culture of mediation.\textsuperscript{187}

**Voluntary nature: the system in Spain and the SERCLA.**

In Spain, Article 63 of the LRJS establishes the general rule that the previous conciliation is compulsory before presenting demand to any labor court. However, Article 64 establishes that the conciliation is not obligatory for the following cases:

4. Processes which require previous administrative claim.
5. Processes about social security matters.
6. Processes regarding holidays.
7. Electoral matters.
8. Geographic mobility.
9. Modification of substantial labor conditions.
10. Right of conciliation of professional and family life of art 130 LRJS,
11. Court-appointed processes.
12. Processes about impugnation of collective agreements and impugnation or modification of trade union’s statutes.
13. Processes about fundamental rights and public freedoms.
14. Processes about annulment of arbitral awards.
15. Processes about impugnation of conciliation, mediation and transaction agreements.
16. Processes about actions on the protection against gender violence.


\textsuperscript{187} Obviously, some guarantees are needed in order to avoid that mediation becomes an obstacle for access to courts. For the discussion on these guarantees see 2.5 of this paper.
Article 64.2 LRJS states that conciliation or mediation is not compulsory where the State or any other public body is defendant and it is necessary to start previous reclamation in the administrative jurisdiction; and where it is necessary to widen the demand to more people once the process has started.

In Andalusia, according to the Agreement of the monitoring commission, turning to mediation at SERCLA is compulsory for issues on:

6. Individual claims about professional classification functional mobility and mobility among different categories.
7. Individual classification about transfers and displacements.
8. Determination of vacation periods.
9. Disputes about licenses and working time.
10. Economic and retributive claims derived from the aforementioned.

Likewise, parties can voluntarily decide to go to the SERCLA for disputes concerning:

11. Geographic mobility.
12. Substantial modification of labor conditions.
13. Conciliation of personal and family life.

Previously, I have defended that in theory mediation being compulsory is beneficial because it would erase the submission problem and enhance the culture of mediation. However, as regards to mediation in the SERCLA we need to bear in mind that the SERCLA is still being developed. They are currently developing the statute of the secretary in which they will detail the competences in the mediation process and refine

---


the responsibilities of the secretary as to the legalism of the agreement. They are also elaborating a code of practice for SERCLA mediators. Therefore, I think it is first necessary to concrete these issues before compelling users to turn to the SERCLA instead of going to the previous compulsory conciliation.

So far, the 2011 satisfaction survey elaborated by the SERCLA shows that 85% of the cases brought before the SERCLA were voluntary. This is an indicator that people trust this system. In this year there were 705 individual disputes brought before SERCLA, which is not a high number in proportion with the cases in Andalusia. One of the causes for this low proportion is that SERCLA’s competences are still very limited. For instance, it is not possible to bring issues regarding unfair dismissal. The SERCLA promotes its services through divulgate actions among professional associations such as the Bar Association. Besides, in cases in which a company is attending to SERCLA for the first time they use to call the company in order to inform it about SERCLA’s role and explain the process. Still, out of the 705 cases brought before the SERCLA, 206 ended due to the nonappearance of the requested party. Therefore, more effort is needed order to indentify the cause of nonappearances and increase the participation in this mechanism.

Negative consequences for the failure to attend to mediation can be an obstacle for the access to judicial protection. Therefore, in order to analyze the accessibility to courts it is also necessary to assess the consequences for not attending mediation. As to the consequences for non-appearance, the SERCLA follows the system established by the LRJS. Likewise, where mediation is compulsory and the applicant does not

---

191 *Javier Millán*, Interview to Services Director of SERCLA, Seville., 18.09.2012.
192 Ibid.
196 *Javier Millán*, Interview to Services Director of SERCLA, Seville., 18.09.2012.
197 *CARL*, Memoria , above n. 194185.
attend, the request of mediation will have no effect and the limitation periods do not
stop. Where the respondent does not attend, this fact is to be put on record, and the
mediation request will have no legal effect. In this case, and where the ruling in the
judicial process coincides with the proposal of mediation, the judge would impose the
costs of the process to the party that, without justification, does not attend mediation.
Although it is not necessary to come to the mediation with a lawyer, parties can decide
to do so although the process will be kept purely informal. In that case the costs of the
lawyer would be included up to 600€. Before, judges had the discretionary power
of imposing the fine for non-attendance or not. In practice, fines for not attending
mediation were almost never imposed. Lately, the law has been modified in order to
make it effective in practice. Still, this fine is rarely imposed because it requires that the
ruling has to coincide with the proposal offered at the mediation, which is rather
uncommon.

Therefore, I believe this system guarantees the access to courts at the same time
that the fine system tries to encourage the proper use of mediation. It guarantees the
access to courts because the fine is not very high and is contemplated only for cases in
which the ruling coincides with the proposal of mediation. As well parties are free to
stop the process at any moment and turn to courts. It encourages parties to use
mediation because it includes the risks of paying all the costs if the ruling is the same as
the petition of mediation.

SUMMARY

In SERCLA, mediation is compulsory for issues about: about professional
classification, functional mobility and mobility regarding different categories; transfers
and displacements, determination of vacation periods, disputes about licenses and

---

199 Acuerdo de la Comisión de Seguimiento del SERCLA de 6 de febrero de 2009 (Agreement of the
Monitoring Commission of SERCLA, 6 February 2009), Mas.2009 Art.9.2. Available at:
200 Ley 36/2011 Reguladora de la jurisdicción social (Social Jurisdiction Act 36/2011) Spain, Boletín
201 The 'Colegio de Abogados de Madrid' (Madrid Bar Association) recommends lawyers to ask
honorary of 240€/h for a consult in their office. Excluding travel expenses and diets.
working time; and economic and retributive claims derived from the aforementioned. It remains voluntary for cases concerning geographic mobility, substantial modification of labor conditions, and conciliation of personal and family life.

SERCLA’s system protects the access to courts even in cases in which parties are compelled to turn to mediation because there are not severe consequences for those who decide not to attend to mediation and by the fact that parties are free to leave the process at any moment of the mediation. At the same time, the LRJS encourages parties to use mediation effectively because in case the requested party do not attend mediation and the judicial ruling coincides with the proposal the judge will impose a fine by which that party will have to bear with the costs of the process.

Moreover, I stated that making mediation compulsory eliminates the submission problem and enhances a culture of mediation. However, I believe it preferably not to make individual mediation at the SERCLA compulsory for more cases than is already established because the SERCLA is still being developed. Once this objective is accomplished, it would be desirable to compel parties to attend to the mediation meeting in order to erase the submission problem and enhance the culture of mediation.

d. **Effect of mediation regarding the limitation periods.**

**Effects of mediation regarding the limitation periods: the discussion.**

The effect of mediation regarding the limitation periods is likely to affect the access to courts. On the one hand, if mediation does not suspend the limitation periods parties can find themselves with a very short period of time at the end of the process for preparing the access to courts. On the other hand, if mediation stops limitation periods for too long it may be an obstacle for the judicial procedures. The Council of Europe stated in its Recommendation on Mediation that, when organizing mediation, States should strike a balance between the promotion of speedy and easily accessible mediation procedures.

and the effective judicial protection. In this regard, Article 8 of the EU Mediation Directive establishes that:

Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

Therefore, the EU also agrees with the suspension of the limitation periods but the rules should prevent excessive delay of the judicial process.

The effect of mediation regarding the limitation periods: the Spanish system.

In Spain, the LRJS establishes in Article 64 the interruption of time limit for expiry and prescription. The calculation of expiry would start the day after the completion of the mediation. Additionally, there are a few rules intended to prevent the excessive delay of the judicial process due to the misuse of mediation. Likewise, the calculation of the time limit starts again:

14. After 15 days since the request of mediation, if the meeting mediation is not undertaken or if there is no agreement.
15. Always, after 30 days, if there is no meeting, if the mediation is not initiated or if there is not agreement.

---

Where mediation is not compulsory but possible, the effects are the same if parties start mediation in due time, voluntarily and by common agreement. In this regard, the SERCLA system is also regulated by this article. In cases where mediation is voluntary, limitation periods are stopped only where both parties agree with recurring to mediation.

That having been said, I believe that this system balances in an appropriate way the opportunity of using mediation as alternative dispute resolution with a due protection to the right to access to courts, because, limitation periods are stopped but there are rules that re-establish the counting of the limitation periods where mediation is not being effective.

**SUMMARY**

It is believed that mediation should stop the limitation periods for starting a judicial proceeding. However, the system has to balance between encouraging an efficient use of mediation and a proper protection of the right access to courts. In Spain, the LRJS establishes that limitation periods are suspended where parties are compelled to engage in mediation or conciliation, but there are norms limiting the suspension where mediation is not concluded or parties do not reach an agreement. Where mediation is not compulsory the law requires the consent of both parties in order to stop the limitation periods. The SERCLA follows the same system regulated in the Social Jurisdiction law for the issues that it assumes. I believe this system is appropriate for allowing parties use mediation effectively, at the same time that protects the access to courts and avoids unduly delays in the judicial proceedings.

e. **Challengeability of the agreement.**

---

208 *Ibid.*, Art. 64.3.
210 *Ibid*, Art 64.
Challengeability of the agreement: the discussion.

As it has been mentioned before, in order to guarantee the access to courts, any mediation system has to be voluntary and/or allow parties to challenge the agreement before courts.\textsuperscript{211} Regarding SERCLA’s system, access to courts is especially important for two reasons. First, turning to the SERCLA is compulsory for some issues,\textsuperscript{212} therefore in these cases the changeability of the agreement is a must. Second, the intervention of the secretary in SERCLA mediation does not offer the same guarantees as the intervention of the labor administration in CMAC.\textsuperscript{213} The secretary does not make a strict control of the legality.

Challengeability: the system in SERCLA.

In Spain the LRJS establishes that mediated agreements have the same level of protection as private contracts.\textsuperscript{214,215} Therefore, agreements held in mediation can be challenged by all parties (parties in the dispute and third party who may be affected) that might be affected by the agreement. The court responsible for the dispute is in charge of seeing the claim of challengeability.\textsuperscript{216} Parties can base their claim on contracts being void.\textsuperscript{217} Third parties who want to challenge the agreement can allege that the mediated agreement is illegal or that it harms their interests.\textsuperscript{218} The action for...

\textsuperscript{213} Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.
\textsuperscript{215} For the possibilities of challenging private contracts in Spain see Código Civil Tecnos, Madrid (2007), Title II Chapter IV.
\textsuperscript{216} Ley 36/2011 Reguladora de la jurisdicción social (Social Jurisdiction Act 36/2011) Spain, above n 215.
\textsuperscript{218} \textit{Ibid.}
challenging the agreement expires thirty days after the agreement is adopted by all the parties.\textsuperscript{219} For third party affected this limitation period starts from the moment which they are informed of the existence of the agreement.\textsuperscript{220}

Mediated agreements in the SERCLA are signed by the secretary.\textsuperscript{221} The functions of the secretary are to attend to the mediation sessions, record the agreement and register the documentation of each case.\textsuperscript{222} As well, the secretary also creates a certain control of legality. This is to say, they identify gross contraventions of law, but their control of legality is not equal to the labor authority in CMAC. In fact, if they do not agree with the settlement agreement they can put their reservations on record, but they cannot force parties not to sign it.\textsuperscript{223} Further than this reference there is no specific statute regulating the functions and authority of the secretary yet. The monitoring commission is currently working on this issue.\textsuperscript{224} Therefore, settlement agreements signed at SERCLA have the same legal status as private contracts, so it is given that parties can challenge it accordingly.

**SUMMARY**

In the SERCLA settlement agreements can be challenged by the parties for the same causes as private contracts. Third affected can challenge the agreements if they argue illegality and harmfulness. This level of protection is in line with the requirements for access to justice because mediation before the SERCLA is compulsory for some issues and the secretary does not make an exhaustive control of legality,

\textsuperscript{220} Ibid.
\textsuperscript{222} Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.
\textsuperscript{223} Ibid.
\textsuperscript{224} Ibid.
All in all, the SERCLA offers mediation services for solving individual labor disputes. Sometimes, parties are compelled to turn to the SERCLA before lodging the demand in labor courts. Other times, parties can freely choose to turn to it. However, there is always the possibility of challenging the agreement for the same causes as private contracts. Moreover, opening a mediation process at the SERCLA stops the limitation periods for lodging the demand in the labor jurisdiction. This stop the clock mechanism is limited to a maximum of 30 days in cases in which mediation is not being effective. Likewise, this system allows parties use mediation without limiting their possibilities of attending to courts in case the mediation fails and without becoming an obstacle to access to courts. Given these facts, I conclude that the access to effective judicial protection is guaranteed by the SERCLA.

2.5.2. Neutrality and impartiality of the mediators.

Neutrality and impartiality of the mediators: the discussion.

Neutrality and impartiality are different concepts although sometimes they are used indistinctly. Neutrality refers to the absence of positive or negative relationships between the mediator and the parties, whereas impartiality refers to the absence of preference in favor of one of the parties in the conflict during the process. As to impartiality is concerned, the majority of the doctrine states that mediators must be impartial during the process. However, sometimes neutrality is not mentioned an essential requirement. For instance, the EU Mediation Directive only refers to the impartiality of the mediator and not to the neutrality.

---


226 Ibid.


Neutrality and impartiality of the mediators: the system in SERCLA.

In SERCLA, mediators are elected from lists of 20 people created by the employer’s confederations and trade unions.229 There is not an established procedure for selecting mediators for each specific case. Each organization chooses them according to their knowledge on the matter or their availability.230 Normally, they have taken into account their background, so they try that mediators not to come from the same economic sector as the dispute is about. It is worth noting that parties do not know the identity of the mediator before they arrive to the session. Normally, mediators are chosen from people close to these organizations,231 with a background in law or industrial relations. However, it is also possible to have mediators with no formal education.232 They are also asked to endorse the Letter on the Commitment of the Mediators Activity.233 This letter is a kind of code of conduct for SERCLA mediators.234 As part of this commitment, they are asked to intervene with impartiality and not to represent the group that elected them.235 They should not communicate to the parties their background during the mediation process so they avoid prejudices by the parties.236

This system may trigger doubts regarding the impartiality of the mediators during the process. Martinez Pecino, Doctor in Psychology by the University of Seville, studied this fact in his thesis; Effectiveness of Mediation in Labor Conflicts.237 According to him, in SERCLA the impartiality comes by the fact that there is one mediator from each side. The fact that mediators are close to the parties does not

---


230 Ibid.

231 Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.

232 Ibid.

233 ‘Carta de Compromiso de la Actuación Mediadora’

234 However, it is not a real Code of Conduct. According, to Javier Millán, Director of Services of SERCLA they are now working on a proper Code of Conduct. Javier Millán, Interview to Services Director of SERCLA, Seville, 18.09.2012.

235 Comisión de Seguimiento de SERCLA, Carta de Compromisos de la Actuación Mediadora (Letter on Commitment of Mediators).

236 Ibid, 5.

necessarily imply that the process is going to be affected. Contrarily, he concludes that having mediators close to both sides might be beneficial for making parties trust in the process. He also defends that the fact that mediators cooperate in the process can serve as a model of work for the parties.\footnote{238}{\textit{Roberto Martinez Pecino}, Efectividad de la Mediación en Conflictos Laborales (Efectiveness of Mediation in Labor Conflicts), Univeristy of Sevilla (2009), 77-78. Available at: \url{http://www.juntadeandalucia.es/empleo/anexos/ccarl/33_1067_3.pdf}. Accessed on: 15 June 2012}}

The 2011 satisfaction survey of SERCLA showed that the 96\% of the respondents perceived the actuation of the mediators as neutral.\footnote{239}{\textit{CARL}, Memoria Actuaciones SERCLA (Memory SERCLA Interventions), 2011, 176. Available at \url{http://www.juntadeandalucia.es/empleo/www/adjuntos/estadisticas/10_1339_MemoriaSercla2010.pdf}. Accessed on 22 June 2012.} This shows that users are satisfied with the actuation of SERCLA´s mediators in this regard. Therefore, I must conclude that having mediators closer to the parties does not affect user´s satisfactions singular as regards to mediator´s activity and that SERCLA fulfils the requirement for being a fair dispute resolution system in this regard.

SUMMARY

Neutral and impartiality are traditionally required in mediation. There is unanimity regarding the necessity of mediators being impartial during the process. However, not everyone sees neutrality as indispensable if it does not affect the impartiality of the mediator in the process. In SERCLA, mediators are elected from lists provided by trade unions and employer´s confederations. This fact may trigger doubts regarding their neutrality and impartiality during the process. However, Martinez Pecino claims that the impartiality is guaranteed by the fact that in each case there are two mediators, one proposed by the employer´s organizations and the other by the trade unions. Moreover In addition, he highlights that this system can serve as a model of cooperation for the parties that see the mediators working together. Satisfaction´s surveys show that users perceive mediator´s action as neutral. Therefore, I conclude that SERCLA system offers the impartiality required for mediation being a fair dispute resolution system.

2.5.3. The confidentiality of the information.
The confidentiality of the information: the discussion.

Confidentiality appears to be the key in the success of mediation because it helps guarantee the frankness of the parties and the sincerity of the communications exchanged in the course of the procedure.\(^{240}\) Therefore, regulating the confidentiality duty is essential for protecting the information disclosed during the process and create a save environment. However, establishing an excessive confidentiality duty may be a burden for the fact-finding of possible future judicial process.\(^{241}\) For example, one party may try to preclude the other party disclosing information during the procedure that they had got previously to the mediation. Therefore, States should strike the balance between the protection of the confidentiality of the information and the safeguard of the future process.

The EU Green Paper on Alternative Dispute Resolution\(^{242}\) establishes that the confidentiality obligation is binding on parties and the mediator. Thus, information that parties may interchange and disclose should not be admissible as evidence during the judicial proceedings. Additionally, as a rule, the mediator should not be able to be called as witness. Still, this obligation can be waived in case parties allow disclosing the information or where the legislation obliges the mediator to divulge information protected by the professional secrecy. The Directive on Mediation for civil and commercial matters establishes two exceptions in which mediators should disclose information: (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent physical or psychological harm to a person; or (b) Where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.\(^{243}\) That being said, the confidentiality of the information is one of the most delicate questions regarding the regulation of the mediation process.

\(^{241}\) Ibid.
\(^{242}\) Ibid. 29.
The confidentiality of the information: the system in SERCLA.

In SERCLA, there is no regulation of the duty of confidentiality.\(^{244}\) The monitoring commission of SERCLA is working in the elaboration a new agreement by which they want to update the regulation of the system. The inclusion of the regulation of the duty of confidentiality is one of the issues that will be taken into consideration.\(^{245}\) In practice, mediators are aware of the duty of confidentiality and they transmit it to the parties in the process. Despite the lack of legal regulation in this regard, they are morally bound by this duty and in practice there are not reported incidents in this regard.\(^{246}\) Still, it would be desirable to codify this responsibility in order to prevent future problems.

SUMMARY

Confidentiality of the information is directly related with the effectiveness of mediation. International documents refer to the duty of confidentiality of the mediators and of the parties and they recommend its regulation by law. SERCLA has not regulated it yet, although the monitoring commission is planning to do it in the future. So far, mediators and parties are informed by this duty to which they are morally bound-ed. Still, the lack of regulation of this issue is one of the SERCLA’s weaknesses.

2.6. Conditions for effective mediation.

In this section I will evaluate how SERCLA complies with the conditions for effective mediation.\(^{247}\) These conditions are: the economic aspects, the skills of the mediator, the authority of the parties, the context of the mediation and the way the agreement is to be enforced. Just as I did with the legal requirements, a brief summary of the main

---

\(^{244}\) Javier Millán, Interview to Services Director of SERCLA, Seville, 18.09.2012.

\(^{245}\) Ibid.

\(^{246}\) Ibid.

\(^{247}\) For more information on the selection of the conditions see “Research method” of this paper.
discussion regarding each of the conditions for effective mediation will be presented before explaining how SERCLA implements them.

2.6.1. Economic aspects.

Economic aspects: the discussion.

One of the main advantages of mediation is that it is claimed to be more economic than courts.\textsuperscript{248} Indeed, if costs of mediation were higher than the cost of judicial proceedings is very likely that parties will not turn to mediation. Besides, using mediation as a previous step in the judicial procedure has an advantage as opposed to intra-judicial mediation. Intra judicial mediation does not lead to substantial savings.\textsuperscript{249} Contrarily, establishing mediation as a previous stage decreases the costs for the administration of justice because procedures are not opened and judges do not intervene. Solving cases in mediation directly decreases the workload of courts.\textsuperscript{250} This is another important benefit because the excessive workload of courts is one of the main causes of the ‘Crisis of Justice’ in Spain.\textsuperscript{251}

Economic aspects: the system in SERCLA.

“The financial resources that support the system may make the difference between the success and failure. It includes who finances the system, who pays the mediators and so forth.”\textsuperscript{252} In SERCLA, costs of mediation are born by the Government of Andalusia,


\textsuperscript{251} Helena Soleto Muñoz, Mediación y resolución de conflictos: técnicas y ámbitos, Tecnos, Madrid (2011), 61.

including the salary of the mediators. The absence of economic barriers is a clear advantage for the accessibility of the system. This is especially important in Spain, because mediation has to compete with the labor court system which is fairly cheap. This is one of the main advantages of SERCLA mediation. However, it also entails a problem; the unsustainability of the service. As SERCLA is established today, the system depends of the finance of the Government, which is a clear disadvantage given the current situation of the Spanish economy. In fact, this economic dependence and lack of resources has already stopped some reforms that were planned for SERCLA. In this regard, the support of the system is a key factor for the success of the system. In this regard, it is not only necessary the political commitment of the Government but a financial support coherent with the policy.

As to the reduction of the costs for judicial administration, the fact that there are no judges involved and there is no use of the judicial administration capital or facilities decreases the costs for the system. Along the same line, administration of justice is also benefited if parties solve only part of the problem, because that reduces the issues left within the jurisdiction. In this regard, more concrete economic analysis and studies are needed in order to shed light over the costs SERCLA saves to the administration.

**SUMMARY**

One of the main advantages of SERCLA is that it does not charge any costs to the parties involved. All the costs are born by the Government of Andalusia. This fact enhances the accessibility of this system. However, the system is not self sustainable...
which implies that is economically dependent on the Government. In the current economic situation, this is a disadvantage because there is a lack of resources.

2.6.2. Skills of the mediator.

Skills of the mediators: the discussion.

The qualification of the mediators is one of the most important conditions for effective mediation since the success of the process is directly related with their interventions.258 The ILO Manual on Mediation establishes that mediators need some personal and professional characteristics.259 Personal characteristics are the empathy and the capacity to understand the perceptions and values of the parties.260 The professional characteristics are: impartiality, neutrality and professionalism. Impartiality and neutrality have already been discussed.261 Professionalism means that the mediator needs to know the context of the conflict. This is to say, mediators need to understand the special features of labor disputes, the functioning of the industrial relations, the law and similar solutions taken in other conflicts. However, this does not mean that he or she needs to have an exhaustive knowledge on the specific matter.262

Proper training is required to master the techniques involved in mediation.263 Thus, the EU Mediation establishes in Article 4 the duty for States to ensure the quality of medications by any means, and the development of voluntary codes of conduct and offering initial and further training. However, there are no harmonized international standards on what this training should contain. The International Mediation Institute (IMI) is a new international organization that attempts to create global, professional

261 See section 3.5.4 of this paper.
262 ILO, above n. 142, 16.
263 European Commission, above n. 141, 33.
standards for mediation. Therefore, it has created a Qualifying Assessment Program (QAP) in order to give certifications for mediation training programs that fulfill certain quality standards.264

Skills of the mediators: the system in SERCLA.

As it has already been mentioned, at SERCLA, there are not specific criteria for the selection of mediators regarding their qualifications, but the CARL provides a basic course on mediation for those who are selected.265 In practice, mediators at SERCLA are normally lawyers or they have a degree in Labor Law. In some cases mediators have no formal education or university diploma. It is also worth noting that normally mediators have other professions and they are dedicated to mediation part-time. Selected mediators are compelled to attend to a basic 12-hour course on mediation266 held in one day and a half.267 Until this training is held, future mediators are allowed to attend to mediations only as observers.268 Once they already have the course, the CARL still encourages mediators to attend to several mediations as observers before acting as mediators themselves in order to acquire more practice. This is not an official requirement and mediators can freely choose to do it or not.269 Additionally, the CARL offers superior level formative activities such as an advanced course on mediation and retraining activities.270 Mediators are free to follow these activities, although the Letter on the Commitment of the Mediators Activity establishes the moral obligation of mediators of showing interest in their training.271 The general feeling is that most of mediators are to receiving adequate training for their task.272 The website of CARL has published materials on the practice of mediation.273

264 See http://imimediation.org/about-imi
265 Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.
266 Comisión de Seguimiento de SERCLA, Carta de Compromisos de la Actuación Mediadora (Letter on Commitment of Mediators), unpublished.
267 Javier Millán, above n. 148.
268 Comisión de Seguimiento de SERCLA, above n. 267.
269 Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.
270 Ibid.
271 Ibid.
272 Ibid.
Logically, requiring any kind of specific qualification in mediation implies that mediators have not mastered the techniques of mediation at the moment they are chosen for the task. In a perfect world, it would be desirable to require formal qualification and experience in order to enable people become mediators. It is worth noting that in Spain the profession of mediator does not exist as such and proper training courses on mediation have been developed only in recent years. The development of this training is ongoing. Therefore, it is understandable that so far there are no requirements regarding specific training on mediation for two reasons. First, there would be problems in finding people fulfilling them. Second, there might also be problems in assessing which level of training is required since this training is still in process. However, this does not imply that for the future, it would be undesirable that SERCLA requires proper training in mediation as a requirement for being included on lists of mediators proposed by the organizations.

It would also be recommendable to offer higher level training on mediation from the beginning because a proper use of mediation techniques may require more than 12 hours. This would be a necessary step before requiring specific training as a prerequisite to becoming a mediator. Above all, further training on mediation is recommendable because most mediators are also engaged in other professions, which may lead to confusion in the role that they have to assume. Including requirements on certain number of hours of practice assisting other mediation sessions may also be desirable in order to allow mediators evaluate their skills in practice and receive the comments and recommendations of more experienced mediators. According to the IMI, establishing a requirement of 200 hours or 20 mediations is desirable in order to ensure a proper training on mediation. IMI also suggests that good mediation trainings should include a methodology for the evaluation of candidate’s performance in terms of the effectiveness of mediation process and mediation techniques, against high competency benchmarks. However, it is also true that all these would require financial, personal and material resources that are not available at the moment.

---

The last satisfaction surveys elaborated by CARL in 2011 established that 30% of users think that mediator’s actuation was excellent, 48% think it was very good and 19% think it was good. This data indicates that, despite being true that the training on mediation could be improved, mediator’s performance at SERCLA is highly valued by users. Therefore, I conclude that in this regard, SERCLA is also a satisfactory means for dispute resolution.

SUMMARY

Qualification of the mediators is very important because the success of the process depends on their intervention. SERCLA establishes no previous requirements for its mediators in order to be elected. Once they are in the lists, CARL offers a basic course on mediation that mediators are obliged to follow and further voluntary higher level mediation training. However, in the future it would be recommendable to require specific mediation training as a requirement to become mediator at SERCLA. At the present time, practical circumstances make it desirable to wait for the development and spread of proper training courses before establishing such a requirement. So, I would suggest increasing the level of mediation courses and hours of practice required as far as the economic circumstances allow so. In any case, satisfaction surveys show that users are highly satisfied with the quality of the intervention of mediators which is an indicator that the mediation quality is good.

2.6.3. Authority of the parties to negotiate.

Authority of the parties to negotiate: the discussion.

In order to make mediation effective, parties also play a very important role. Particularly, it is important that those seated at the table have authority to engage in the

---

agreement and decision-making. Normally, this is not legally regulated, but it is a condition for effective mediation. In fact, “ensuring that as far as possible parties, including the company representative, have the maximum authority possible to reach agreements” is one of the guidance points established by the Corporate Social Initiative of Harvard as a requirement for creating effective grievance mechanisms. In USA, personal attendance of someone with capacity of decision-making at the mediation session is a sine qua non. In fact, the Eight District Court of New York established sanctions for non-participating in good faith on two basis. First, the person with decision making power was not present and only available on the telephone. Second, the company only performed a minimal level of participation. The interesting point of the ruling is the reasoning the court followed in order to conclude that meaningful negotiations cannot occur if the person with authority to negotiate is not present. The court established that availability by telephone was not sufficient because the absent decision-maker does not have the full benefit of the mediation, the decision maker is not listening to the opposing party’s arguments and he or she is not receiving the neutral’s input. Additionally, the fact that the attorney may not accurately present the proceedings may cause the manager to decide erroneously. The court also states that changes in the attorney’s opinion may trigger doubts and suspicion in the manager in order to trust his or her new advice. The limits of the communication by phone are also pointed out as affecting the effectiveness of mediation. First, the decision-maker receives excessive information to be absorbed and analyzed in a matter of minutes. Second, it is very likely that the telephone call is viewed as a distraction from other business.

Despite being true that the lack of authority of the parties at the table may diminish the effectiveness of mediation, regulation of this issue is not desirable for two reasons. First of all, it would be really difficult to prove that parties have power of decision making. It is possible to prove that you have power to represent the party but not that you have the ability of changing the decision. Second of all, regulating this

---

278 Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.
aspect would increase the rigidity of the process and unnecessarily increase costs of mediation. For instance, in cases in which the head of the management of a big company is obliged to attend all the mediation sessions relevant to that company. Consequently, although having real decision-makers at the table is highly desirable,\footnote{See Corporate Social Responsibility Initiative, John F. Kennedy School of Government Harvard University, Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders, 01.2008. Available at: \url{http://www.hks.harvard.edu/mrcbg/CSRI/publications/Workingpaper_41_Rights-Compatible%20Grievance%20Mechanisms_May2008FNL.pdf}. Accessed on 3 March 2012.} regulating this aspect would damage economic interests of companies and decrease the flexibility of the process.\footnote{Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.}

---

**Authority of the parties to negotiate: the system in SERCLA.**

Lawyers or representatives willing to participate in mediation at SERCLA on behalf of one of the parties need to prove their power of representation by a power of attorney.\footnote{Acuerdo de la Comisión de Seguimiento del SERCLA de 6 de febrero de 2009 (Agreement of the Monitoring Commission of SERCLA, 6 February 2009), Mas.2009 Art.7. Available at: \url{http://www.boe.es/boe/dias/2011/10/11/pdfs/BOE-A-2011-15936.pdf}. Accessed on 15 June 2012.} In case they do not have the aforementioned document they may participate in the mediation if the other party recognizes them as legitimate representatives.\footnote{Javier Millán above n. 281.} However, as I said before, this does not imply that representatives have power of decision-making. In fact, often occurs that decision-makers are only available by phone and representatives -sat at the table only have limited authority to make agreements.\footnote{Emilio Sambuceti, Interview with SERCLA coordinator for Algeciras., 21.12.2011.} So they often need to call their superiors in order to ask whether they can accept of change the position they have been told to defend, and sign agreements accordingly. Secretaries of SERCLA recognize that not having the real decision-makers at the table may affect the effectiveness of the mediation because the process is slower and the real decision-makers are not influenced by the benefits of the mediation.\footnote{Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012; Emilio Sambuceti, Interview with SERCLA coordinator for Algeciras., 21.12.2011.} However, they also claim

---

\footnote{Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.}
that this is not a great obstacle and that when parties act with good faith this burden is normally overcome.\textsuperscript{285}

\textbf{SUMMARY}

The fact that parties attend mediation without decision-making power affects the effectiveness of mediation. However, it is not desirable to regulate this requirement by law because it may increase the rigidity of the process and raise the costs of representation for companies. In SERCLA representatives are allowed to participate in mediation on behalf of their clients if they present a power of attorney or if they are recognized and accepted as legitimate representatives by the other party.\textsuperscript{286} Nevertheless, this issue is not seen as a great problem by the secretaries of SERCLA I interviewed.\textsuperscript{287}

\begin{enumerate*}
\item Context of mediation.
\end{enumerate*}

\textbf{Context of mediation: the discussion.}

Literature on negotiation and mediation states that the place and the way the context is arranged influence the course of the negotiation or the mediation.\textsuperscript{288} We can define context of mediation as the combination of the external elements to the mediation which exert a special influence on the process that helps its adequate development. \textsuperscript{289} The

\begin{footnotesize}
\footnotesubscript{286} Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.
\footnotesubscript{287} Emilio Sambuceti, Interview with SERCLA coordinator for Algeciras., 21.12.2011; Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.
\end{footnotesize}
golden rule is that parties have to be and feel equal respect to the other. If there is no balance, the communication will be more difficult.\textsuperscript{290}

The place has to guarantee equal conditions of the parties. It is desirable to elect a neutral place, unless expressly accepted by the parties.\textsuperscript{291} Despite the acceptation, one of the parties might feel inferiority in respect to the other. Therefore, the mediator has to take measure to reestablish the balance. For instance, he or she should not allow manifestations that reflect superiority such as allowing the interruptions of the meeting or phone calls.\textsuperscript{292} Moreover, parties should count with the same conditions within the room such as the same number of chairs, the same high of the chairs, the same space in the table and illumination.\textsuperscript{293} It is also advisable to count with annexed rooms to allow having independent meetings with parties.\textsuperscript{294} There should be one room for the mediation and one or two annex rooms for the private meetings with the parties. The rooms should have the appropriate dimensions to host all the people, minimum conditions of, comfortability, temperature, illumination, sound quality and ventilation.\textsuperscript{295}

**Context of mediation: the system in SERCLA.**

SERCLA has ten offices in Andalusia.\textsuperscript{296} Each office is equipped with the necessary rooms, round tables and all the necessary material means for the mediation process. The possibility of using these facilities is an advantage. However, the region of Andalusia is very big and the limited number of offices might be an obstacle to the further development and spread of the service in zones that are distant to the offices. One option could be to move SERCLA mediations to other places perhaps using judicial facilities during the times that they are free. However, this option is not contemplated by SERCLA.\textsuperscript{297}

\begin{thebibliography}{4}
\bibitem{290} \textit{Ibid.}
\bibitem{291} \textit{Ibid.}
\bibitem{292} \textit{Ibid.}
\bibitem{293} \textit{Román Gil Alburquerque}, Concepto y Técnica de la mediación en el conflicto laboral (Concept of Mediation and Mediation Techniques in the labor conflict), Mediaci\~{o}n y soluci\~{o}n de conflictos: habilidades para una necesidad emergente (2011) 503–522, 516 in \textit{Helena Soleto Muñoz}, Mediaci\~{o}n y Resoluci\~{o}n de Conflictos: Técnicas y ámbitos Technos, Madrid (2011).
\bibitem{294} \textit{Ibid.}
\bibitem{295} \textit{Ibid.}
\bibitem{296} One in each capital of province; Málaga, Granada, Sevilla, Jaén, Córdoba, Huelva, Almería and Cádiz. And two additional offices in Cádiz; Algeciras and Jerez de la Frontera.
\bibitem{297} \textit{Javier Millán}, Interview to Services Director of SERCLA, Seville., 18.09.2012.
\end{thebibliography}
SUMMARY

The appropriateness of the place is one of the conditions for effective mediation. Parties need to feel treated equally during the process and the arrangement of the place and their location in the room influences this perception. SERCLA has ten offices properly equipped with the necessary facilities for mediation. However, this number may be insufficient to serve every city in Andalusia. Other options such as the displacement of mediators to other public facilities in areas where SERCLA offices are far away from are not yet contemplated by SERCLA.

2.6.5. Enforceability of the agreement.

Enforceability of the agreement.

In order to make mediation an effective means for access to justice, the agreements have to be enforceable. Otherwise parties would not turn to mediation instead to going to courts. In order to make agreement enforceable literature encourages putting them in writing. Indeed, writing down the agreement is commonly required by law. For instance, the EU Directive on Mediation requires agreements to be written with the objective of clarifying and specifying the terms in which parties are obliged to comply. Apart from this, each system has its own enforceability regime established by law.

Enforceability of the agreement: the system in SERCLA.

The LRJS establishes that mediated agreements are titles by which parties can start executive actions without necessity of ratification of any judge or tribunal. They can be executed following the rules of Book IV of LRJS On the Execution of the Sentences. The possibility of executing the agreement through the judicial may encourages parties to solve their problems autonomously because they count on the same guarantees as regards to the enforceability as a contract plus the advantage that in mediation they have the control over the content of the solution. Another advantage is that the possibility of enforcing the agreement through the judicial administration proves of the support and commitment of the Government with this system.

SUMMARY

Making the agreement enforceable is essential in order to make parties settle an agreement in mediation rather than turning to courts. In SERCLA, mediated agreements can be enforced in the same way as judicial rulings. Definitively, this is one of the most important strengths of SERCLA system because parties will have the same guarantees as they have for the ruling with the additional advantage that they determine the content of the solution.

2.7. Conclusions.

Given the aforementioned considerations, in this section I will answer the two sub-questions raised in this paper; does SERCLA fulfill the legal requirements for fair mediation? And does SERCLA fulfill the conditions for effective mediation?

In order to answer the first question, I studied whether SERCLA guarantees the right to access to courts, the impartiality and neutrality of the mediators and the confidentiality of the information disclosed. First of all, I concluded that SERCLA guarantees the access to judicial protection which is the basic legal guarantee. I base this statement in three arguments. First, SERCLA is voluntary for most of the issues of its


\[300\] ‘De la ejecución de las sentencias’ Ibid Art. 64.
authority, and where attending the mediation session is compulsory, parties still have the option of leaving the process at any stage and turning to courts. Additionally, the consequences for non appearance in compulsory mediation is enough to encourage parties using mediation at the same time that it does not represent a burden to access to courts. The fine would consist in paying the costs of the judicial proceedings in cases in which the ruling of the court coincides with the petition of mediation. Second, when parties turn to mediation the limitation periods are stopped in such a way that in case mediation fails, parties still have time in order to turn to courts. At the same time, the suspension of limitation periods has certain limits that preclude mediation being an obstacle for access to courts. Last but not least, parties are allowed to challenge the agreement for the same causes as the private contracts. The ability to challenge the agreement is an essential requirement in cases in which attend mediation is compulsory for the parties. Moreover, the possibility of challenging the agreement is an important guarantee given that the secretary of CARL does not elaborate a strict control of the legality of the agreement. Therefore, SERCLA mediation fully respects the fundamental right of access to courts.

Second of all, I determined that SERCLA´s system offers the impartiality required for fair mediation. Although mediator´s are elected by employer´s and employee´s organization, the fact that there is one mediator for each party adds the necessary impartiality in the process.

Third of all, I found out that the confidentiality of the information is not regulated by law. Mediators and parties are informed of their duty of maintaining the confidentiality of the information disclosed and they are morally bound by it. However, the importance of this factor for the effectiveness of mediation and the necessity of avoiding future problems, make it recommendable to fill this gap in the regulations. This is one of the weak points of SERCLA. However, in practice this issue has provoked no problems yet. Moreover, legal services are currently working in order to fill this gap as soon as possible.

All in all, the answer to the first sub-question of this paper is that SERCLA fulfils the legal guarantees for fair mediation.
In order to elucidate whether SERCLA is an effective and satisfactory means for access to justice, I studied how SERCLA fulfills the conditions for effective mediation established by psychology and sociology research. Likewise, I assessed the economic aspects of mediation, the skills of the mediators, the authority of the parties, the context of mediation and the enforceability of the agreement.

As regards to the economic aspects, on the one hand, I concluded that SERCLA is a satisfactory means for access to justice because it charges no costs for users. On the other hand, I pointed out that SERCLA has also the potential of saving costs to the administration of justice, because SERCLA acts before the judicial proceedings are started. Therefore, each case solved in SERCLA implies savings in the administration’s resources and the reduction in the workloads of courts. Still, I suggested that more studies are needed in order to shed light over the real economic savings of SERCLA.

Regarding the skills of mediators, first I concluded that not establishing previous qualification in mediation is not positive for the quality of mediators at SERCLA. However, sociological reasons justify this decision. In Spain, mediation is not a profession yet and formal education programs were scarce up until now. This would imply that it would be very difficult to find people fulfilling the requirements. Therefore, I would suggest increasing the requirements on qualifications and experience in the future, once proper training programs are developed, available and accessible to the public. Second, I concluded that it would be desirable to increase the level of the training given by CARL to mediators already selected, which would require higher investment by the Government. Nevertheless, satisfaction surveys show that users are highly satisfied with their action. Therefore, despite being true that mediation trainings could be improved, SERCLA’s has proved to be a satisfactory system for users.

As to the authority of the parties is concerned, it is proved that when parties at the table do not have power of decision-making the effectiveness of the mediation may be affected. In SERCLA, parties are not compelled to bring people with decision-making power to the table. Nevertheless, secretaries intervening in SERCLA’s mediation do not identify this issue as a burden for the effectiveness of the system. Besides, I stated that practical and economic reasons make it recommendable not to regulate it neither. First, because it would be almost impossible to ensure that parties
really have decision-making power. Second, because obliging decision-makers to be in the table would increase the economic costs of representation for companies.

Regarding the context of mediation, I conclude that SERCLA’s facilities are fully dotted with all the necessary requirements. Still, one drawback is that SERCLA only has ten offices for the region of Andalusia. Consequently, people living far away these offices face higher transportation costs and spend more time in getting to them. This may discourage people to use this system and be a burden for the development of SERCLA. One suggestion is either sending out SERCLA mediators or electing local mediators in remote zones. As to the material resources is concerned, other public facilities such as courts rooms or schools could be used in order to conduct the mediation sessions.

Eventually, as far as the enforceability of the agreements is concerned, agreement’s established at SERCLA can be enforced by the same procedure as the judicial rulings. This is one of the main strengths of this system because parties have the opportunity of controlling the content of the solution at the same time that the agreement that will count with all the guarantees of a public ruling.

That being said, responding to the second sub-question I conclude that, although some improvements would be necessary in order to increase the efficiency of the system, broadly speaking, SERCLA is a satisfactory means for access to justice in individual labor disputes.
CHAPTER 3: ACAS (UK)

3.1. Introduction.

Following the same method I used for analyzing SERCLA, in this Chapter I will assess Acas as a means to access to justice in individual labor conflicts. Therefore, part 3.2 will describe the basic features of the British Industrial Relations. Part 3.3 will first point out the three main ways mediation is integrated in the course of individual labor disputes and then describe the main characteristics of Acas and Acas’ functions. In part 3.4 and 3.5 I will analyze how Acas fulfills the legal guarantees for fair mediation and the conditions for effective mediation respectively. Eventually, I will point out the main weaknesses and strengths under “Conclusions”.

3.2. Industrial relations and the administration of justice in UK.

Trade unions are an essential piece of the British industrial relations. However, their attempts to get better wages and working conditions were often thwarted by the legislator and the judiciary. Therefore, trade unions asked for the non-intervention of the Government, also known as voluntarism. This voluntarism delegated the legislator’s role as a mere facilitator of the labor relations subservient to the self-regulating powers of employers and workers. Voluntarism shaped the British industrial relations until 1960. Therefore, British industrial relations were primarily established through collective bargaining.\textsuperscript{301} Voluntarism also influenced the labor dispute resolution mechanism in Great Britain. Until 1940’s and 1950’s employers, workers and the Government saw conciliation and arbitration as the more suitable mechanisms for preserving the voluntary system. However, in 1960’s Great Britain experienced a falling in investment levels. The Donovan Commission\textsuperscript{302} concluded that “the industry-wide

\textsuperscript{301} Annie de Roo and Rob Jagtengbert, Settling Labour Disputes in Europe, Society for Personality and Social Psychology, Inc. The Netherlands (2003), 41.

\textsuperscript{302} A Royal Commission composed of Trade Unions and Employers´ Associations created by the Labor Government of the Prime Minister Wilson.
The bargaining structure was not so effective anymore, while the enterprise level had become more efficient to protect rights.” As a consequence, there were too non-unionized workers, so the labor conditions could not always be effectively regulated by collective agreements. The Commission recommended giving individual employees a minimum of rights with the objective of establishing social peace while maintaining the voluntary system as far as possible. The Industrial Relations Act 1971 implemented the proposals of the Donovan Commission which supposed a restriction of the voluntarism.  

The Employment Tribunals (ETs) were introduced in Great Britain under the Industrial Training Act 1964. Their duty was to adjudicate in disputes arising from the imposition of levies on employers by Industrial Trainings Boards. ETs were expected to take into account the social policy intentions underlying legislation in a manner the regular courts had failed to do. They were composed of lay-experts and a legally qualified chairperson. There were three main reasons for this selection. First, give the tribunals a higher degree of expertise than regular tribunals. Second, facilitate access to justice for prospective applicants. Third, overcome the distrust of trade unions towards the regular courts which was perceived as a possible threat to the efficient enforcement of the new phenomenon of employment legislation.  

The ET’s role in improving access to justice is visible in at least 4 levels. First, parties do not need to have a representative. There are employee standard application forms and clear explanatory brochures which try to help the applicant to apply to the IT in person. Second, ET procedures not usually take too much time. In 85% of the cases, the ETs send a written judgment within four weeks. Third, the ET procedure is fairly informal and flexible. Depending upon whether the parties are represented or not, the tribunal chairperson may decide to adopt an interventionist approach, drawing

---

304 Ibid, 92.  
305 For more information of the ET procedure see Annie de Roo and Rob Jagtengbert, Settling Labour Disputes in Europe, Society for Personality and Social Psychology, Inc. The Netherlands (2003), 93.  
307 Ibid.
the evidence out in order to get a coherent story. Fourth, the ET procedure has a low financial threshold. Up until now no courts fees are due to the tribunal and the losing party does not normally have to pay the other party’s costs or expenses. However, as from 2013 tribunal fees will be tailored to encourage business and workers to settle a dispute. Apart from this, each party should meet his or her own expenses to the extent that they are not payable out of public funds. Party’s financial circumstances may qualify him or her to in facilitating obtain free legal assistance under any of the national legal aid schemes.

The jurisdiction of the ETs embraces matters concerning unfair dismissal, redundancy payments and discrimination. The Industrial Relations Act 1971 gave them the jurisdiction on unfair dismissal disputes. The Employment Tribunals (ET) were entrusted the jurisdiction of this right for three main reasons. First, they were not part of the ordinary judicial tribunals which was still deeply distrusted by the trade unions. Second, the ETs were considered to be attractive for complaints lacking sufficient financial means for litigating since the financial barrier to bringing an action was low. Third, the ETs were composed of experts. Nowadays, most of cases brought before the ETs concern unfair dismissals. The Sex Discrimination Act (SDA) 1975 and the Race Relations Act (RRA) 1976 coffers the ET’s jurisdiction on discrimination cases. ETs have to share this competence with the Country Courts, but only in

---


309 Ibid


311 For more information see, Annie de Roo and Rob Jagtengbert, Settling Labour Disputes in Europe, Society for Personality and Social Psychology, Inc. The Netherlands (2003).


313 Annie de Roo and Rob Jagtengbert, abone n. 309, 72.

314 Today Employment Tribunals (ET).

315 Annie de Roo and Rob Jagtengbert, abone n. 309, 72

316 Annie de Roo and Rob Jagtengbert, abone n. 309., 92.

employment cases parties can go to conciliation though.\textsuperscript{318} Additionally, the Wages Act 1986 extended ET’s competences once more. Thus, workers could complaint to an ET about alleged unlawful deductions from pay. Complaints regarding payment below statutory entitlement could be lodged either before the ET or to the Wages Inspectorate. Just as before, conciliation is available only in the IT procedure.\textsuperscript{319}

A conciliation phase was inserted within the ET procedure. The objective was to avoid excessive workloads for the ETs by promoting amicable settlements which would also preserve the voluntary system. In early stages, this duty was competence of servants of the Department of Employment. But this system was highly criticized by employers and employees for not being impartial. As a consequence, the Conciliation and Arbitration Service was established in 1974. One year later, it was renamed as it is known today; the Employment Protection Act in the Advisory Conciliation and Arbitration Service (Acas).\textsuperscript{320}

British industrial relations are being reformed. On 29 November 2010 the Government launched its Growth Review in which the British Government established its long term vision for creating the right conditions for future economic prosperity.\textsuperscript{321} One of the strategic priorities stated in this document is to remove the barriers for growth and job creation. In this frame, promoting early and effective dispute resolution mechanisms for labor disputes is one of the objectives. Therefore, the British Government launched “Resolving Workplace Disputes” a consultation about how to enhance early and effective dispute resolution for labor issues.\textsuperscript{322} As a result of this consultation, the Government is proposing further changes in order to improve the labor dispute resolution system. The Enterprise and Regulatory Reform Bill, published on 23 May 2012 by the Government, establishes further changes which are to be implemented

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{318} Ibid, 92.
\item\textsuperscript{319} Ibid, 92.
\item\textsuperscript{320} Annie de Roo and Rob Jagtengbert, Settling Labour Disputes in Europe, Society for Personality and Social Psychology, Inc. The Netherlands (2003).72.
\item\textsuperscript{322} Department for Business Innovatin & Skills, Resolving workplace disputes: A consultation (United Kingdom), 01.2011.
\end{enumerate}
\end{footnotesize}
as from April 2012. For instance, Acas pre-claim conciliation will become compulsory, ETs will be allowed to use their discretion to give employers a financial penalty of up to 5,000 pounds where they consider that there is a grave breach of an individual’s employment right such as malice or negligence and there will be fees in ETs and Employment Appeal Tribunals (EATs).

**SUMMARY**

British industrial relations have traditionally been characterized by a central role of trade unions in the defense and protection of worker’s conditions which were often thwarted by the legislator and the judiciary. As a consequence, trade unions demanded the non-intervention of the State and the British industrial relations have been shaped by a strong voluntarism. This condition also determined the way conflicts were resolve, so conciliation and arbitration are deeply rooted alternative dispute resolutions mechanisms in UK. The existence of especial Employment Tribunals dealing with labor disputes is another distinctive feature of the British Industrial relations. The creating of the ET responded to two main reasons. First, the trade union’s distrust towards the regular courts. Second, facilitate the access to justice by creating faster, cheaper and more flexible judicial procedures for labor disputes. There is a conciliation stage integrated in the labor procedure with the aim of promoting amicable settlement of the disputes and preserving the voluntarism in the system. However, British industrial relations are being reformed in order to create the better conditions for economic prosperity. Some of these reforms will shape the way dispute resolution system for individual labor conflicts. That having been said, in the following sections, I will comment how Acas fulfills the legal guarantees for fair mediation and the conditions for effective mediation. I will also explain some of the reforms affecting post-claim conciliation and their possible effect to the access to justice.

**3.3. Mediation for individual labor disputes in UK: ACAS.**


324 Charging fees will be further discussed in chapter 3.5.1. Economic aspects in Acas.
As it has been said in chapter one, in UK the term ‘conciliation’ is normally used if an employee where there is a formal complaint in the employment tribunals. Contrarily, mediation normally refers to the attempts to resolve disputes in the workplace. In theory, conciliators should have a less pro-active role than mediators. However, in practice both mechanisms imply essentially the same process. In the UK, Acas offers mediation for labor disputes in three stages of the conflict; before there is any formal complaint lodged in the employment tribunals (pre-claim conciliation); once the complaint is been lodged before the employment tribunals (post-claim conciliation), and once the labor procedure has started (judicial mediation).

a. Pre-Claim Conciliation.

In 2008 a pilot scheme on pre-claim conciliation took place in Newcastle, Nottingham and Manchester in order to identify appropriate cases to be held in previous. The project was a success, so in April 2009 the services were extended by a national roll-out of the “ACAS Pre-Claim Conciliation Service” (PCC). Under the new Enterprise and Regulatory Reform Bill proposed by the British Government on 23 May 2012, the pre-claim conciliation will be compulsory in order to lodge a formal claim before the ET.

In order to start a PCC parties need first to try the internal mechanisms for dispute settlement such as disciplinary and grievance procedures. Then, if parties face a dispute which is likely to end in a formal tribunal claim, but not claim has yet been made, outline details will be passed to a conciliator who will contact the parties of offer ACAS’ help. The pre-claim conciliation service is available for any type of workplace issue that may turn into an employment claim. This includes: unfair dismissal, all forms of workplace discrimination, redundancy payments or selection procedures, deductions

327 This Bill has not yet received final parliamentary approval, so it may be subject to change.
from wages or unpaid notice/holiday pay, rights to time off or flexible working and equal pay.\textsuperscript{329} PCC can be requested by anyone who is or might be involved in a workplace disputes, including advising people involved such as professional advisers or representatives, trade unions and voluntary advice agencies.\textsuperscript{330} In 2009, there were 9154 cases received for PCC, 3.5\% were resolved in initial discussion with the conciliator, 23.6\% were settled at ACAS, and 6.8\% were resolved otherwise.\textsuperscript{331} In 2011, the number of referrals rose until 23.777, 54.6\% of them were settled at ACAS.\textsuperscript{332}

b. Post-Claim Conciliation.

Acas has a statutory duty to conciliate after a claim has been presented to the employment tribunal. Therefore Acas offers conciliation to both sides with the aim of settling the matter without the need to attend a hearing. Post-claim conciliation voluntary but both parties must agree to the process.\textsuperscript{333} This service is known Post-Claim Conciliation or individual conciliation. If there is no agreement in this process parties still have the right to turn to the procedure at the ET. As I have mentioned in the introduction, this paper is focused on this kind of conciliation.

c. Judicial mediation.

The judicial mediation scheme in the ETs started as a pilot in 2006. From 2009 is formally available in UK.\textsuperscript{334} In Judicial Mediation parties are brought together for a


\textsuperscript{330} Ibid.


\textsuperscript{334} Stephen Hardy, 'Part I. The Individual Employment Relationship' (2010), 61, in Prof. Dr R. Blanpain, Colucci Prof. Dr M. (Eds.) International Encyclopaedia for Labour Law and Industrial Relations (Kluwer Law International BV, The Netherlands).
Mediation Case Management Discussion before a trained Employment Judge. The judge remains neutral and tries to assist the parties in resolving their disputes. He may include remedies which would not be available at a hearing before an Employment Tribunal. An Employment Judge at a Case Management Discussion identifies suitable cases and advises the parties of the possibility of Judicial Mediation. If both parties agree, the Regional Employment Judge considers the file and decides whether to make an offer of Judicial Mediation, depending upon resource constraints and the suitability of the issues to mediation. Parties are notified if an offer cannot be made. Offers of Judicial Mediation are made by a telephone Case Management Discussion, when a date is set for the Judicial Mediation and any consequential variations to existing orders are made. The Judicial Mediation is confidential. Therefore, nothing said or taking place at the Judicial Mediation may be referred to at any subsequent hearing. Additionally, the Employment Judge mediating is precluded from any further involvement in the case. Judicial Mediation is an alternative to the ET proceedings but not to ACAS conciliation. Therefore, the statutory duty placed on ACAS is not compromised by the judicial mediation and ACAS maintains its independence. Over 65% of cases which arrive to judicial mediation are settled. The majority of cases that do not succeed on the day of the mediation are settled before the hearing as a result of the impetus created by the Judicial Mediation.

Acas


337 Ibid.

338 Ibid.

339 Ibid.
Originally the Acas was created as the Conciliation and Arbitration Service on 2 September 1974 replacing the former Commission on Industrial Relations. But it was renamed by the Employment Protection Act in the Advisory Conciliation and Arbitration Service (Acas) one year later. Acas was an essential element in the Social contract package of statutory aids to collective bargaining and its main duty was to promote the improvement of industrial relations, but the functions of developing and reforming the collective bargaining were removed in 1993. As to the management structure, Acas is composed is directed by a Council and several regional offices which integrate the advisory, collective and individual conciliation tasks. The Council counts with nine members and a chairman, all appointed by the Secretary of State for Employment. The members are chosen one third from employee or trade union representatives, one third from employer representatives and one third from independent experts. Council members are appointed for up to five years at a time. They cannot be dismissed other than for reasons specified in s.249 (5) basically, long absences without consent, bankruptcy, and physical or mental unfitness.

ACAS operates in three key areas: (i) preventing and resolving disputes at the workplace (mediation), (ii) conciliating in actual and potential complaints to employment tribunals (individual and collective) conciliation, and (iii) promoting good practice and promoting information and advice. In preventing and resolving disputes, ACAS’s role falls into two main categories: (i) conciliation, mediation and arbitration in collective disputes which is out the scope of this paper; and (ii) which it calls advisory

---


343 Trade Union and Labour Relations (Consolidation) Act 1992, (UK) s.248(1).

344 See Trade Union and Labour Relations (Consolidation) Act 1992, s.248).

345 Trade Union and Labour Relations (Consolidation) Act 1992 s.249(3)
ACAS conciliators are to promote settlements on employment right disputes, including unfair dismissal, protection of wages, race and sex discrimination, equal pay and disability discrimination, which have been or could be made to an employment tribunal. All such complaints are directed initially to ACAS. Additionally, Acas also offers arbitration services as alternative dispute resolution mechanism. The Employment Rights (Dispute Resolution) Act 1998 gives Acas the central role in establishing and promoting voluntary dispute resolution mechanisms as an alternative to employment tribunal hearings. Under the Act, parties may agree in writing to submit their dispute to arbitration. In this case, the jurisdiction of employment tribunals will be ousted, hereby extending its arbitration role beyond collective disputes.

As we see, Acas intervenes in several stages of the conflict. Acas having such broad competences in conflict prevention and conflict resolution is the first strength that I identified in the British system. Acas encourages the prevention of the conflicts with the advisory and training services, then promotes early resolution with mediation in the workplace, then encourages amicable settlements with the pre-claim and post-claim conciliation and the judicial mediation, but it also leaves space to judicial procedures before the ETs.

Post-claim conciliation in brief.

Post-claim conciliation Acas tries to help parties to find a solution to their labor dispute that both sides find acceptable instead of going to a tribunal hearing. Post-claim conciliation is voluntary, free and confidential. Acas post-claim conciliation can start as soon as a complaint has been lodged. Either party may request assistance by contacting the Acas Helpline by phone. Normally, the whole process is conducted by phone. If conciliators think a join meeting is necessary and desirable in order to get an


347 Ibid 47.

348 Employment Rights (Dispute Resolution) Act 1998 (UK) s.

349 Here I will just offer the reader a general overview of Acas post-claim conciliation. Each specific characteristic will be further discussed in the coming sections of this chapter.

350 If there is no formal complaint lodged it would be pre-claim conciliation.
agreement, they will arrange it in one of Acas offices. Parties always keep the option of leaving the post-claim conciliation and having the complaint decided by a tribunal. Settlements usually involve the employer agreeing to pay the employee some money and the employee agreeing not to continue with the case before the ET.

Conciliators will talk through the issues with both sides to see if a solution can be found. Where appropriate, they may also explain the conciliation process, explain the way tribunals operate, and what they will take into account in deciding the case or information the parties about the options open to the parties, including arbitration where appropriate. Conciliators also try to help parties to understand the other side´s point of view and explore with them how it might be resolved without a hearing.

SUMMARY

In this part I first gave an overview of when mediation can be used as a means for solving employment disputes in Great Britain. Therefore, parties can turn to mediation before a formal claim is lodged to the ETs (pre-claim conciliation), once the formal complaint is already lodged before the ETs (post-claim conciliation or individual conciliation), and as part of the judicial proceedings (judicial mediation). In the second part of this section a general overview of Acas has been presented. Essentially, I explained that Acas is directed by a council composed of members elected from, experts and the employee´s and employer´s organization. I also commented that Acas works in three main areas: promoting mediation in the workplace, providing conciliation before and after a formal complaint is lodged before the labor courts, and offering information and advices regarding good practices in the industrial relations. Eventually I gave a general overview of the post-claim conciliation process, although each aspect of the process will be further explained in the coming sections.

351 Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.


354 ACAS, above n. 353.
3.4. ACAS and the legal requirements for fair mediation.

Just as I did with SERCLA, in this chapter I will analyze how ACAS fulfills the legal requirements for fair mediation. Likewise, I will analyze: the adequate guarantee of the right to effective judicial protection, the impartiality and neutrality of the mediators and the confidentiality of the information disclosed. In order to determine whether there right to effective judicial protection is guaranteed, I will assess the voluntary nature of post-claim conciliation and the consequences of not engaging in mediation. I will also analyze the effects of the post-claim conciliation in the limitation periods and the challengeability of the agreement. In this chapter I will not describe the full discussion of each issue. Instead I will make reference to what it has been mentioned in chapter 2.

UK’s judicial system for individual labor disputes offers a variety of mechanisms designed for different circumstances. As I noted in the introduction, this paper studies mediation as alternative dispute resolution integrated in the course of the labor procedure. Therefore, I focused on Acas post-claim conciliation. However, sometimes I will also refer to pre-claim conciliation because I understand both services are complementary and serve the same purpose.

3.4.1. Protection of the right to access to judicial protection.

a. Voluntary nature.

Post-claim conciliation is voluntary. Parties only engage in the process if both want and they can leave the conciliation at any time. In chapter 2.4.1 I claimed that making

---

355 For more information on the selection on the criteria see ”research method” of this paper.

356 These criteria are based in the EU Mediation Directive. See “Introduction: Research Approach” of this paper.

357 It is worth remembering that Acas´conciliation falls within the concept of mediation followed in the paper. See Chapter 1.2 of this paper.

mediation compulsory is desirable although the effectiveness of mediation is based in the will of the parties to collaborate. I based that opinion in the fact that compulsory mediation eliminates the submission problem and enhances the culture of mediation.

The UK is a different case for two reasons. First, mediation is already well known and deeply-rooted in the British industrial relations. Second, the British Industrial Relations have several possibilities for using mediation and the Government has already proposed to make the pre-claim conciliation compulsory. Therefore, once parties are compelled to try the pre-claim conciliation, making post-claim conciliation compulsory may lengthen the judicial process unnecessarily. Given the aforementioned reasons, I do not consider that post-claim conciliation should also be compulsory.

So far parties are free to decide not to engage in post-claim conciliation. However, the Government is studying the possibility of formalizing offers of settlement to be fine in to the ET if they are relented in the event that the ET subsequently makes a less favorable award. This would definitely encourage parties to use mediation, however, it is important not to make the consequences too severe in order to avoid parties feel pressed to engage in mediation when they do not think there is a case for it or avoid they feel compelled to sign something they do not really agree in order to avoid the risk of getting future fines.

All in all, post-claim protects the right to access to courts inasmuch as it is voluntary and parties can leave the process and turn to courts at any time. It will be interesting and necessary to study the concrete circumstances in which the fine is imposed in order to make sure that it does not establish too severe a punishment. However, at this point we can only conjecture on what will be.


360 This phenomenon arises when parties are within a conflict and they do not agree on which process they want to follow in order to solve it. See Maurits Barendrecht. Legal Aid, Accessible Courts or Legal Information? Three Access to Justice Strategies Compared, Tilburg University, 2010, 12. Available at: http://ssrn.com/paper=1706825; Chapter 2.5.1 of this chapter.


SUMMARY

Post-claim conciliation is voluntary and right now there are no consequences for those who reject engaging in the mediation process. Therefore, the voluntary nature of post-claim conciliation guarantees the right of access to justice. The Government has proposed to establish a fine for those who reject mediation if the ET subsequently makes a less favorable award. If the fine is too severe it might affect the right to access to justice however until the new system is actually in force, we can only engage in conjecture.

b. Effect of post-claim conciliation on limitation periods.

Right now post-claim conciliation is completely separated from the tribunal process and it has no effect on limitation periods. Cases will be listed for a hearing unless they have been settled or withdrawn. Therefore, it is important to comply with all the requirements and instructions of the judicial proceeding as it will continue while conciliation is taking place. It was mentioned in chapter 2.5.1 that if limitation periods are not suspended the right to access to justice may be affected if mediation fails and there is too little time left to prepare the judicial proceeding. This goes against the sense of the EU Mediation Directive which in art. 8 establishes that “Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.” Nevertheless, the British Government proposed to stop the clock for

---


365 Again, I acknowledge that the EU Mediation Directive is not applicable to national conflicts. Nevertheless, it is still meaningful to make reference to this document because it represents the agreement of the States of the EU.
one month once the claim is received by Acas.\textsuperscript{367} This proposal is part of the Enterprise and Regulatory Reform Bill which is currently in the House of Commons.\textsuperscript{368} I consider this to be a reasonable measure in line with art. 8 of the EU Directive on Mediation.\textsuperscript{369} A one month limitation period is enough to allow parties to prepare the judicial proceedings at the same time that it precludes mediation becoming an obstacle in the judicial process. Therefore, I consider the proposal of the Government will improve the system and will increase the guarantees for access to justice.

\textbf{SUMMARY}

Right now the post-claim conciliation process does not suspend the limitation periods, which is against the guarantees established for the protection of the right to access to justice. However, the Government proposed to stop the clock for one month. Thus, the access to courts will be fully protected as far as limitation periods is concerned.

c. \textit{Challengeability of the agreement.}

Agreements established in post-claim conciliation can be settled privately as a “compromise agreement” or through Acas.\textsuperscript{370} Compromise agreements are settlements


agreed directly between the employee and the employer, not through Acas.\textsuperscript{371} The effect of signing a compromise agreement is similar to signing an agreement through Acas; both will be legally binding.\textsuperscript{372} For the compromise agreement to be legally binding employees need to get independent legal advice from a qualified lawyer as to the terms and effect of the agreement.\textsuperscript{373} For a settlement to be declared void, one party would have to challenge its validity in a court or tribunal.\textsuperscript{374} An agreement to settle may be invalid if either party was induced into it because of:\textsuperscript{375} misrepresentation, mistake, undue influence or duress, lack of capacity or due to mental condition. It is Acas' policy that the terms of the settlement are the responsibility of the parties but that conciliators need to advise parties of the possibility of a settlement being void if there is any suggestion of these problems.

- \textbf{Misrepresentation}

Acas' policy is that conciliators do not have a specific responsibility to investigate whether one party is misrepresenting facts to the other. The terms of the settlement are the parties' responsibility. However, in encouraging the parties to consider fully the settlement terms and their implications before agreeing, the conciliator will seek to limit the chances of misrepresentation occurring.\textsuperscript{376}

- \textbf{Mistakes}

Similarly, it is Acas' policy that any mistakes in the settlement terms are the responsibility of the parties. Nevertheless, the likelihood of mistakes should be reduced


\textsuperscript{374} \textit{Margaret McMahon}, Interview Acas Policy Officer, 11.11.2012.

\textsuperscript{375} \textit{Ibid}.

\textsuperscript{376} \textit{Ibid}.
by the conciliator encouraging the parties to reach unambiguous settlement terms and to check their content and accuracy before agreeing. Where any mistake is the result of the conciliator erroneously transcribing the agreed text, the conciliator should offer to provide a new document with the correct text. If the parties decline this offer, it is the responsibility of the parties (as the responsibility remains theirs to check before signing) to take legal action to determine whether a binding agreement was reached and, if so, in what terms.  

- **Undue influence or duress.**

The Court of Appeal accepted the argument that economic and physical duress used to obtain a settlement could void that settlement where the will of the employee was overcome to such an extent that he or she involuntarily entered into the agreement. Conciliators should always offer parties time to consider offers and suggest sources of help if necessary. If mention is made by either party of duress, the conciliator should inform both parties of a Court of Appeal ruling and say that if such a claim were made in this case, an Employment Tribunal could decide that the agreement was void. It is not, however, the conciliator's responsibility to judge whether or not duress exists, or to decline to act if it is mentioned.  

- **Lack of capacity due to mental condition.**

The Employment Appeal Tribunal has held that it is at least arguable that lack of capacity due to a mental condition could render a settlement void *(Oatley v EMI (UK) Ltd - EAT 148/83)*. Those circumstances will be rare but where conciliators have reason to doubt that a party has the mental capacity to enter into an agreement they should consult their manager.  

---

**Minors**

377 *Margaret McMahon*, Interview Acas Policy Officer, 11.11.2012.


Acas’ policy requires conciliators to take special cautions when minors are part of settlement agreements. In England and Wales at common law there is a general rule whereby a minors are not bound by a contract into which they enter unless that contract is ratified on reaching the age of 18. This principle extends to all contracts except for beneficial employment contracts or contracts for the acquisition of a permanent interest in property. Whilst it can be argued that settlement agreements are "beneficial employment contracts" for this purpose there is no case law on this. Therefore, it is important to ensure that the claimant fully understands and accepts the settlement terms and their implications. Additionally both parties need to be informed that the settlement may not hold if tested simply because of the age of the claimant.\textsuperscript{381}

In Scotland the contractual capacity of those under the age of 18 is governed by the \textbf{Age of Legal Capacity (Scotland) Act 1991}. This provides, with some minor exceptions, that although persons between the ages of 16 and 18 have the legal capacity to enter into "transactions", these can be set aside on application to a court where this was a "prejudicial transaction" and the person making the application is under the age of 21. A "prejudicial transaction" is one which an adult, exercising reasonable prudence, would not have entered into in the circumstances of the claimant and has caused, or is likely to cause, substantial prejudice to the claimant. Our legal advice is that post-claim conciliation agreements are probably "transactions" which cannot be set aside although there is no case law on this point. It is Acas’ policy, therefore, that normal procedure should be followed in these cases but the parties should be informed that the agreement may not be legally binding if challenged.\textsuperscript{382}

\textbf{Challenging the decision of withdraw the tribunal claim.}

Lastly, it is also possible to challenge the decision of withdraw of the complaint before the ET. When parties want to withdraw the complaint lodged at the ET, they have to do it in writing to the tribunal. This should be done without delay because the tribunal

\textsuperscript{381}Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.

\textsuperscript{382}Ibid.
could award costs if they think someone acted unreasonably. The tribunals will then strike the case from the list. It is not possible to reopen the case unless it can be shown that, in compliance with the general principles of the law of contract, the employee’s decision to withdraw was based upon error or coercion, or the Acas officer operated outside his legal authority.

SUMMARY

Settlement agreements can be challenged in the same circumstances as private contracts guarantees the protection of the right to access to courts; if misrepresentation, mistake, undue influence or duress, lack of capacity and due to mental condition. Moreover, conciliators are to advice when minors are taking part in the settlement agreements. Thus, conciliators are to advice parties about the possibility that the settlements may not be legally binding in all circumstances. Lastly, there is also possibility to challenge the decision of withdrawing the claim in the ETs. Therefore I consider that the Acas post-claim conciliation protects the right to access to courts as far as the challengeability of the agreement is concerned.

All in all, post-claim conciliation is voluntary and offers possibilities for challenging the agreements and the decisions of withdrawing the judicial claim. As to the limitation periods is concerned, post-claim conciliation does not suspend the course of the judicial proceedings which is contrary to the requirements of the EU Mediation Directive. However, the British Government proposed to amend the system to stop the clock for one month when both parties engage on mediation as from April 2014. I believe that this is an appropriate measure because it ensures parties enough time to prepare the judicial proceedings if mediation fails. At the same time, the suspension of

---


384 Ibid.

the periods is limited to one month which will avoid mediation lengthening judicial procedures excessively. Therefore, if the proposal takes place the UK system will be improved and will be fully in line with the right to access to justice. Regarding to the proposal of the Government to establish fines when parties reject mediation and the ET subsequently makes a less favorable award, it is important to keep track of the consequences of the new system in order to avoid them converting mediation into a burden for access to justice.

That having been said, I conclude that post-claim conciliation protects the access to courts and that current changes regarding the limitation periods are good ways to improve the system.

3.4.2. Neutrality and impartiality of mediators.

It was stated in chapter 2 that neutrality and impartiality are not the same concept take out. Neutrality refers to the absence of positive or negative relationships between the mediator and the parties and impartiality refers to the absence of preference in favor of one of the parties in the conflict during the process.³⁸⁷ As I said previously, impartiality of the mediators is essential, whereas neutrality is not always considered to be fundamental if parties accept the mediator and he or she acts impartially during the process.³⁸⁸

At Acas, they use objective criteria in order to select conciliators: cases are distributed down from the main office to the conciliators officers following geographically considerations.³⁸⁹ As a general rule, conciliators do not know the parties

³⁸⁹ ACAS Helpline Interview, 02.10.2012.
so they are neutral and parties cannot choose the conciliator. During the first conversations by phone they gain the trust of the parties so they agree to engage in conciliation. Conciliators are thoroughly trained in order to get the skills to conduct the conciliation/mediation impartially. Therefore conciliators at Acas are both neutral and impartial which is another of the legal guarantees required for fair mediation.

SUMMARY

The objective system for distributing the cases protects the neutrality of the conciliators. Cases are distributed attending to geographical considerations and parties cannot choose them. Therefore, conciliators do not know parties, so neutrality is guaranteed. Moreover they are trained in order to acquire the skills to act impartially. Due to the aforementioned reasons, I conclude that Acas post-claim conciliation is in line with the legal guarantees for fair mediation as regard to the impartiality and neutrality of the mediators is concerned.

3.4.3. The confidentiality of the information.

The confidentiality of the information is essential for the success of mediation. As established in chapter 2 there are two referent documents regarding the confidentiality of the information. On the one hand, the EU Green paper that establishes that the confidentiality of the obligation is binding on parties and the mediator. On the other hand, the EU Mediation Directive establishes the exceptions in which

---

390 Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.

391 ACAS Helpline Interview, 02.10.2012.

392 The skills of mediators will be further discussed in chapter 3.5.2. of this paper.


394 For more detail on the discussion on the confidentiality duty see chapter 2.5.3. of this paper.

395 Green paper on alternative dispute resolution, above n. 294
mediators should disclose the information.\textsuperscript{396} In the UK, nothing communicated to a conciliation officer in connection with the performance of his duties is admissible as evidence in Tribunal proceedings unless the person who made the communication consents.\textsuperscript{397} This privilege is based on public interest considerations, for instance the desirability of bringing parties to agreed “out of court” settlements.\textsuperscript{398} The subsidiary legislation for confidentiality of the information is the “Data Protection Act.”\textsuperscript{399} Additionally, parties can agree to add a confidentiality clause in the agreement by which they commit themselves not to reveal the content of the document no anyone but their direct relatives.\textsuperscript{400} Therefore, confidentiality of the information is duly guaranteed at Acas.

### SUMMARY

Nothing communicated to a conciliation officer in connection with the performance of his duties is admissible as evidence in Tribunal proceedings unless the person who made the communication consents. In Acas, the duty of confidentiality if regulated by the Data Protection Act and parties can add a “confidentiality clause” by which they increase the level of protection of the information. By this clause, parties are not able to talk about the content of the agreement apart from their relatives. Therefore, Acas is in line with the legal guarantees for the protection of the information disclosed in mediation.

### 3.5. Conditions for effective mediation


\textsuperscript{397} Employment Tribunals Act 1996 (UK) s.18 (7).

\textsuperscript{398} See Grazebrook (M&W) Ltd v Wallens NIRC 1973 ICR 256, NIRC

\textsuperscript{399} ACAS Helpline Internview, 02.10.2012.

\textsuperscript{400} Ibid.
In this section I will analyze how Acas fulfils the conditions for effective mediation pointed out by psychology and sociology research literature.\(^{401}\) These conditions are: the economic aspects, the skills of the mediator, the authority of the parties, the context of the mediation and the way the agreement is to be enforced. In this section, I will also make reference to the main points of discussions described in chapter 2 regarding each of the specific criteria.\(^{402}\)

### 3.5.1. Economic aspects.

One of the main benefits claimed for mediation is that it is considered to be more economic than courts.\(^{403}\) Reducing economic costs is necessary if we want to make justice accessible for everyone. Post-claim conciliation is currently a free service. Parties do not need to be represented by a lawyer.\(^{404}\) First contacts are done by phone which saves transportation costs and time. It is only when conciliators consider that is desirable to have a joint meeting when they need to move to Acas’ office (If they agree to do so). Therefore, costs of post-claim conciliation are very low. The accessibility and affordability of the system is one of the main strengths of the Acas post-claim conciliation. Nevertheless, on 13 July 2012 the British Government announced that employment tribunal fees will be tailored in order to encourage mediation and arbitration from summer 2013.\(^{405}\) There will be two types of fees: issue fee going from 160 pounds to 250 pounds and hearing fees from 230 pounds to 950 pounds. There will be different fees where more than one person is making a claim against the same employer. And there will be fees for appeals, reviews, mediation, counter claims and

\(^{401}\) For more information as regards the selection of the criteria and the research method see “Introduction: Research Method” of this paper.

\(^{402}\) However, the whole discussion will not be repeated again.


applications to dismiss. There will also be a remission scheme for those who would find it difficult to pay. This remission scheme was criticized by both business and claimant groups. Business thought “it was too generous and didn’t take into account savings or recent payments of lump sums to employees.” Claimant groups argued”it was too complicated, would not protect as many individuals as suggested and was not generous enough.”

This measure responds to the claim of business representatives that say that today, it is too cheap to lodge an employment claim with the consequence that it is too easy for employees to make unmeritorious claims. The proposal provoked different reactions. On the one hand, groups representing business agree with the fees, if employment tribunals get more expensive economic reasons to settle the cases in post-claim conciliation will gain importance. On the other hand, groups representing claimants argue that “fees may deter claimants from making claims and that it was unfair that claimants were being asked to pay the majority of fees, particularly given the perceived financial inequality of employee versus employer.” Andrew Wareing, chief operating officer at Acas argue that “employer’s will not make the effort of settling in mediation if they do not see the employee is able to pay and start judicial proceedings because otherwise they do not gain anything.

---

406 There is not yet specific numbers of these fees.

407 There is no further information about the threshold and conditions to get this remission scheme.


411 [Louisa Peacock](http://www.telegraph.co.uk/finance/jobs/9048024/Acas-warns-new-tribunal-rules-will-lead-to-more-staff-disputes.html), Acas warns new tribunal rules will lead to more staff disputes, Telegraph.co.uk, 29.01.2012. Available at: [http://www.telegraph.co.uk/finance/jobs/9048024/Acas-warns-new-tribunal-rules-will-lead-to-more-staff-disputes.html]. Accessed on 26 September 2012.
employers to settle is to save some money;

therefore if they see there is no real economic risk or that risk is remote they may lose this motivation. Thus, ET fees may indirectly affect the effectiveness of post-claim conciliation. However, as the policy officer, Margaret McMahon said in her interview “That is a possibility but until the procedures for charging are actually in force, we can only engage in conjecture.”

Thus, it is desirable to follow the effects of the fines and identify possible negatives effects in the effectiveness of post-claim conciliation.

**SUMMARY**

Post-claim conciliation is free of charge for and accessible to all users. However, the proposal of imposing fees to ET’s has increased concerns about the effectiveness of conciliation if courts proceedings get expensive. On the one hand mediation may be encouraged in order to avoid fees. On the other hand, claimants representatives argue that employers will not be willing to settle unless they know employees are capable of affording the claim. We will have to wait until the changes actually take place in order to assess its impact of the effectiveness of post-claim conciliation.

**3.5.2. Skills of the mediator.**

Mediation success depends in a high degree on the skills of the mediator, therefore, the training and evaluation of the mediators is very important. The ILO establishes that mediators need some personal and professional characteristics such as empathy, capacity to understand the perceptions of the parties, impartiality, neutrality and

---


414 Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.

professionalisms. \textsuperscript{416} In the context of labor disputes, professionalism means that mediators need to understand the special features of labor disputes. \textsuperscript{417} In UK, mostly conciliators are promoted from within Acas, many have worked on the Acas Help line; sometimes they are recruited from other Government departments; less frequently they are recruited from outside the Civil Service. \textsuperscript{418} Normally, they start as a conciliation officer in individual conciliation combining it with some advisory work. Once they get some practice they may become collective conciliators. \textsuperscript{419} Conciliators seldom have a legal background. \textsuperscript{420} They are expected to study for a qualification after they are employed, but there are no previous requirements regarding qualifications or mediation skills. Once they are recruited, Acas provides initial training is five-days a week for six weeks. The trainings are practice oriented. Further training consists of regular three-day training courses plus regular updates on employment law and participative workshops. For day to day guidance on conciliation policy Acas has an internal handbook which is provided to conciliators. \textsuperscript{421} Moreover, the conciliation manager listens in to calls in order to assess performance. Managers also hold ‘reflective practice’ sessions with staff, encouraging staff to consider what techniques work particularly well in conciliation and what works less well. Appraisals of staff performance are carried out annually with a review held midway throughout the year. \textsuperscript{422} Therefore, this combination of six-week initial training with periodical re- trainings and regular evaluation is quite complete. The reflection sections, which are very important, have two great benefits. First, there is an on-going evaluation of the mediators’ performance which will control the quality of the service offered. Second, the experience of mediators is used to nurture the system. That being said, we can conclude that Acas’ training guarantees that mediators are provided with the necessary skills to conduct mediation properly. It also evaluates their performance over time so the quality of the service is maintained.

\textsuperscript{416} See also chapter 2.6.2. of this paper.

\textsuperscript{417} \textit{Ibid}

\textsuperscript{418} \textit{Margaret McMahon}, Interview Acas Policy Officer, 11.11.2012.


\textsuperscript{421} \textit{Margaret McMahon}, Interview Acas Policy Officer, 11.11.2012.

\textsuperscript{422}\textit{Ibid.}
SUMMARY

Acas’ conciliators are normally recruited from Acas’ helpline. Less frequently they may also come from other Government departments or outside the Civil Service. They are not required to have any previous mediation skills. However, once they are recruited they are expected to attend a six-week initial training, 3-days periodic re-trainings and regular updates on employment law and workshops. They are also provided with an internal handbook and the conciliation managers hold ‘reflective practice’ sessions in order to identify best practice and less effective ones. Therefore, mediators at Acas are fully trained and constantly evaluated and re-trained. This system guarantees that mediators acquire and maintain proper skills to conduct the post-claim conciliation.

3.5.3. Authority of the parties to negotiate.

In order to make mediation effective it is important that parties have authority to engage in the agreement and decision-making.\(^{423}\) If decision makers are not directly involved in the mediation procedure they will not be influenced by the benefit of the process and the action of the mediator.\(^{424}\) For instance, they just receive the information that their legal representatives can transmit them by phone. Conciliation at Acas is between the claimant (the instigator of the claim) or the claimant’s representative and the named respondent (employer) or their representative.\(^ {425}\) From 23 April 2007, the Compensation Act 2006 made it unlawful (in cases in English & Welsh Employment Tribunals only) to represent a Claimant without either being registered with the Claims Regulator or exempt from registering. This legislation does not affect respondents’ representatives.\(^ {426}\)

\(^{423}\) For more details on the discussion of the authority of the parties to negotiate see 2.6.3. of this paper.


\(^{425}\) Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.

\(^{426}\) Ibid.
As a general rule conciliation at Acas takes place by phone.\footnote{Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.} Therefore it is easier to get directly in contact with real decision makers because they do not need to move physically which saves money and time. Thus, conciliators have the direct impact on decision-makers. Conciliators will have face-to-face meetings with parties if they feel there is a need,\footnote{Ibid} for instance, one of the parties having disabilities or English not being their main language. Conducting the procedure by phone has a disadvantage though; parties do not hear each other. However, it also have a disadvantage, parties do not hear each other.\footnote{Ibid} Occasionally they will have joint meetings with both parties if they feel that it will help resolve the dispute.\footnote{Ibid} Thus, they overcome this disadvantage when they think it is useful.

That having been said, I consider that conciliation by phone makes it easier to get directly in contact with decision makers because travel costs in terms of money and time are eliminated. Given the high percentage of agreements achieved in post-claim conciliation; the 72.1\% of the cases brought before post-claim conciliation are resolved.\footnote{ACAS, ACAS Annual Report and Accounts 2011/2012 (2012), 40. Available at: http://www.acas.org.uk/media/pdf/q/e/Acas-annual-report-and-accounts-2011-2012-colour-contrast-version.pdf. Accessed on 23 July 2012.} I conclude that not having personal meetings does not affect the effectiveness of post-claim conciliation. Nevertheless, when conciliators identify phone communication as a burden to get an agreement they can arrange a personal meeting. only when the conciliators think joint meeting will help them reach an agreement. Thus, I think that Acas system to get in contact with the parties fulfills the conditions for effective mediation.

SUMMARY

Acas conciliation is generally held by phone which makes it easier for conciliators to address the issue directly with decision-makers. The high percentage of settlements
achieved at post-claim conciliation suggests that this system is quite effective. Moreover, for cases in which phone communication may be an obstacle conciliators can arrange a joint meeting to this burden is eliminated. In this regard, Acas post-claim conciliation has proved to be effective.

3.5.4. Context of the mediation

Given that Acas post-claim conciliation is normally held by phone, the physical context of mediation is not so important in this case. In cases where joint meetings are held parties need to move to one of the nine regional offices throughout England. There is also one office in Scotland and one in Wales. Each office has sufficient space for meeting parties.\textsuperscript{432} Eleven offices in total is not a high number of venues taking into account the area of United Kingdom. However, given that most of conciliations are done by phone this does not seem to be a big problem for conciliation effectiveness.

SUMMARY

The context of mediation is not so relevant at Acas because most of are held by phone. For the cases in which joint meetings are held, Acas has 11 offices in total. This is not a high number but given that the majority of processes are held by phone this has to real impact on the effectiveness of the system.

3.5.5. Enforceability of the agreement.

Guarantees for the enforceability of the mediated agreement is essential in order to make parties trust mediation and turn to this mechanism instead of going to courts.\textsuperscript{433} According to the British legislation, agreements do not have to be in writing in order to

\textsuperscript{432} Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.

\textsuperscript{433} For more details on the discussion of the enforceability of the agreement see chapter 2.6.5 of this paper.
be legally binding. However, at Acas the terms of the agreement will be recorded on a form to be signed by both sides. Each party will keep a copy. Acas will also save a copy, but only for a period of six months.\textsuperscript{434} Copies will serve as proof of the existence of the agreement.\textsuperscript{435} This goes in line with the requirements established by art. 6 of the EU Mediation Directive\textsuperscript{436} which establishes that “\textit{member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.}” \textsuperscript{437}

If the conciliator is contacted about the lack of compliance of the agreement, he or she will send a letter to the non-compliant party reminding them that the agreement they have signed is legally binding and can be enforced through the courts.\textsuperscript{438} They will need a copy of the settlement agreement to do so. If they do not have a copy, or do not have a copy signed by the employer, they should contact the conciliator. Acas do not retain copies of the settlements for longer than 6 months from the date that settlement was reached.\textsuperscript{439} Therefore, it is responsibility of the parties to keep it. If the situation persists, parties can enforce the settlement through the civil courts under s.142 of the Tribunals Court and Enforcement Act 2007.\textsuperscript{440} This is also in line with art. 62. of the EU Mediation Directive that says that “\textit{the content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an} 

\textsuperscript{434} Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.


\textsuperscript{437} Ibid.

\textsuperscript{438} Margaret McMahon, Interview Acas Policy Officer, 11.11.2012.


\textsuperscript{440} Ibid.
authentic instrument in accordance with the law of the Member State where the request is made.\textsuperscript{441}

As far as to the enforceability is concerned, it is worth mentioning two facts. First, during my interview to Acas’ officers made evident that, given that the agreement in based in mutual consensus, it is of natural consequence that parties do not want to challenge it.\textsuperscript{442} This confirms that one of the strengths of mediation as conflict resolution is the high compliance with agreements.\textsuperscript{443} Second, a study made by Rob Jagtenberg and Annie de Roo shed light on the main causes for the settlement of the agreements before Acas; 43% of employees interviewed settled because they considered that the offer was adequate or that they would not receive more from the ET, 16% settled in order to avoid stress and possible publicity as consequence of a hearing, and 14% of employees wanted to avoid the risk of getting nothing at the ET.\textsuperscript{444} As to the employers, 69% settled in order to save money and time, 25% suspected that the dismissal was unfair and 10% wanted to avoid possible publicity.\textsuperscript{445}

Given the aforementioned facts, I consider that the British system for the enforceability of the agreement fulfils the conditions for effective mediation.

SUMMARY

In UK agreements do not have to be in writing in order to be legally binding, but it is Acas policy record the terms of the agreement on a form to be signed by both sides. Three copies are made of this document, one will be kept by Acas during six months and the other will be for the parties as a proof of the existence of the agreement.


\textsuperscript{442} ACAS Helpline Interview, 02.10.2012.

\textsuperscript{443} See Jesús Cruz Villalón, Por el ensanchamiento de la mediación y el arbitraje en los conflictos laborales (To the spread of mediation and arbitration in labor conflicts), Revista Andaluza de Trabajo y Bienestar Social, Sevilla (2003), 12–19. Available at: http://www.juntadeandalucia.es/empleo/anexos/ccarl/33_621_3.pdf. Accessed on 20 June 2012.

\textsuperscript{444} Annie de Roo and Rob Jagtenberg, Settling Labour Disputes in Europe, Society for Personality and Social Psychology, Inc. The Netherlands (2003), 105.

\textsuperscript{445} Ibid.
In case of incompliance parties can contact the conciliators who will write a letter to the non-compliant party. In the situation persists, they can turn to courts to enforce the agreement. However, experience shows that given that settlement agreements are based on the consensus of the parties there is little risk of non-compliance. Therefore, I conclude that the British system for the enforceability of the agreement fulfils the conditions for effective mediation.

3.5.5. Conclusions.

Given the aforementioned facts, in this part I will answer the two sub-questions raised in this paper; “does Acas fulfill the legal requirements for fair mediation?” and ” does Acas fulfill the conditions for effective mediation?”

As for to the first question, I studied whether Acas guarantees the right to access to courts, the impartiality and neutrality of the mediators and the confidentiality of the information disclosed. Regarding the protection of the right to access to courts, I studied three conditions, the voluntary nature and the consequences for not engaging in mediation, the effect of post-claim conciliation on limitation periods and the challengeability of the courts. Acas post-claim conciliation is voluntary and right now there are not consequences for those who do not want to engage in mediation. Therefore, so far Acas fulfills this requirement. However, there are concerns about the proposal of imposing fines in cases in which one of the parties reject mediation and the ET subsequently makes a less favorable award. I consider this is an aspect that will have to be studied and assessed in the future when the concrete proposal is actually enforced in order to make sure it does not become a burden for the access to courts. Besides, currently Acas post-claim conciliation does not suspend the limitation periods which is not in line with the guarantees required to protect the access to justice. However, the proposal of the Government to stop the clock for one month will soon amend this contradiction. Lastly, settlement agreements signed at Acas can be challenged if either party was induced into it because of misrepresentation, mistake, undue influence or duress or lack of capacity due to mental condition. Conciliators are to take special precautions when one of the parties is a minor because the settlement may not hold if
tested because of the age of the claimant. Moreover, it is also possible to challenge the decision withdraw the tribunal claim. Therefore, I concluded that Acas post-claim conciliation fulfills the requirement of challengeability of the agreements. All in all, if bearing in mind the proposal of stopping the clock, I conclude that Acas post-claim conciliation guarantees the access to effective judicial protection. However, it is important to evaluate the impact of the fines system in order to secure that the right to access to courts is not affected.

Regarding the neutrality and impartiality of the mediators, Acas system of distribution of cases based on geographical considerations guarantees the neutrality of the mediators. At the same time that the training on mediation and the evaluation of mediator’s performance try to insure that they act impartially during the process. Therefore, I determined that Acas system guarantees the impartiality and neutrality of mediators.

I also concluded that post-claim conciliation is in line with the legal guarantees for the protection of the information disclosed. Two facts support this conclusion. First, the Data Protection Act offers explicit regulation of the duty of confidentiality. Likewise, nothing communicated to a conciliation officer in connection with the performance of his duties is admissible as evidence in Tribunal proceedings unless the person who made the communication consents. Second, parties can include an additional confidentiality clause by which they commit not to communicate the content of the agreement with anyone but their relatives.

All in all, the answer to the first sub-question of this paper is that Acas fulfils the legal guarantees for fair mediation.

Regarding the question of whether Acas fulfils the conditions for effective mediation, I studied the economic aspects of mediation, the skills of the mediators, the authority of the parties, the context of mediation and the enforceability of the agreement.

As to the economic aspects in Acas, I concluded that post-claim conciliation is accessible to all users inasmuch as it charges no fees. However, studying the system in a broader context, the Government proposal of imposing fees to ETs in order to encourage the use of mediation may have the negative consequence that employers will
not be willing to settle unless they know employees are capable of affording the fees to make the claim. I consider that further evaluation is necessary in order to see the impact of this measure on the access to justice of labor conflicts in UK.

Regarding the skills of mediators, I consider that Acas mediators are properly trained skilled in order to perform their tasks. Thus although there are no previous requirements for becoming mediators at Acas, Acas offers initial training, periodic re-training and workshops about employment law changes. Acas also conduct evaluation of the calls and reflective practice sessions. Therefore I concluded that in this aspect Acas fulfils the conditions for effective mediation.

As far as the authority of the parties is concerned, the fact that Acas mediation is conducted by phone makes it easier to communicate directly with decision-makers. It is also allowed that representatives of the parties conduct the conciliation. In any case, the high number of settlements achieved at post-claim conciliation suggest that doing mediation by phone if effective.

Regarding the context of mediation, the fact that post-claim conciliation is generally done by phone makes this condition less determinant of the effectiveness. Joint meetings for post-claim conciliation only take place when the conciliators think they may facilitate the agreement. For these cases, Acas has 11 offices which is not a high number taking into account the area of the country. However, this is just a back-up system not frequently used and again, numbers suggest that this systems works. Therefore, I concluded that in this regard, the Acas system of post-claim conciliation also fulfils the conditions for effective mediation.

Last but not least, I assessed the enforceability of the agreements. In UK, agreements do not have to be in written in order to be legally binding. However, it is Acas policy to record the terms of agreement on a form to be signed by the parties. When an agreement is not being complained parties have two options. First, they can contact the conciliator who will write a letter to the non-compliant party to remind that party of his or her duty to fulfill the terms of the agreement. Second, parties can go to courts either directly or after contacting the conciliator in order to enforce their agreement. Therefore, I considered that Acas offers due guarantees for the enforceability of the agreement which is in line with the conditions for effectiveness of mediation.
Thus, responding to the second sub-question I conclude that, Acas is a satisfactory means for access to justice in individual labor disputes.
COMPARISON AND SUGGESTIONS

Comparison

It has been proved that, apart from some necessary amendments, SERCLA and Acas offer the guarantees for fair mediation and the protection of the right to access to courts. SERCLA needs to regulate the duty of confidentiality and Acas needs to amend the labor procedure rules in order to make post-claim conciliation suspend the limitation periods, but generally speaking they are satisfactory means for access to justice. However, there is a big difference in the effectiveness of each of them; in 2010 SERCLA saw 978 individual disputes with a resolution rate of 33.3%\(^{446}\) whereas there were 87421 cases brought for post-claim conciliation at Acas with a resolution rate of 70.8%.\(^{447}\) Using the conclusions drawn in chapter 2 and chapter 3, I identified three main causes that would explain the positive outcomes of the British system and the limited impact of the Spanish system. These reasons are: the historical and sociological development of the industrial relations, the flexibility of the process and the skills of mediators.

- Historical reasons and sociological reasons.

Both Spain and UK have similar institutional systems; they have special labor courts separated from the civil jurisdiction and in both cases the creation of “social courts”\(^{448}\) or “employment tribunals” respond to the distrust of society to civil tribunals. However, the Spanish system is highly interventionist whereas the UK is marked by the voluntarism. This has the result that labor disputes are resolved in each country in very different manners. In UK there is a wide range of alternative dispute resolutions available for labor conflicts from early stages of the conflict: pre-claim conciliation, post-claim conciliation, judicial mediation and arbitration. This holistic approach to the resolution of individual labor disputes in all the stages of the conflict enhanced the culture of mediation which is essential in order to make it widely acceptable. Contrarily,

\(^{446}\) CARL, Memoria Actuaciones SERCLA (Memory SERCLA interventions), 2010.


\(^{448}\) ‘Juzgados de lo Social’
in Spain, courts are practically the only option available for individual disputes. SERCLA is one of the few attempts to offer some alternative dispute mechanism to courts. Thus, since 2009 SERCLA has been offering mediation for individual labor disputes for certain issues.

- The flexibility of the process.

As it has been said, one of the main benefits of mediation is the flexibility and adaptability of the process. I consider this being one of the key factors of the success of Acas. Post-claim conciliation is generally conducted by phone which makes the system affordable and accessible for everyone, although joint sessions can also be arranged when conciliators consider it necessary. The flexibility of the process helps to reduce costs for both Acas and parties at the same time that it adapts to the necessities of the particular case.

- The skills of mediators.

In the UK, Acas offers a complete training for its mediators which embraces initial trainings, periodical re-trainings, workshops, on-going evaluation of conciliators, ‘reflective practice’ sessions, manuals and updated study sessions on employment law. However, in SERCLA the training of conciliators is a less intense. It consists of a 12-hours initial training and some formative activities such as an advanced course on mediation and retraining activities. Given that the skill of mediators is key for the success of the mediation, I consider that this factor may influence the use and success rate of both systems.449

Suggestions

Given the aforementioned considerations, I think it is important that Spain elaborates an integrated policy in order to improve the way individual labor conflicts are handled in Spain. A policy offering several dispute resolution mechanisms adapted to the different stages of the disputes where mediation has a very important role to play is needed. In this context SERCLA can play an important role because it has already gained the trust

449 In 2010 the resolution rate was 33,13% in SERCLA and 70.8% in Acas.
of the users. As to the functioning of SERCLA, I think it is important to increase the number of cases brought before SERCLA. In order to do so, I consider it necessary to extend the authority of SERCLA, put more effort in promoting the system and work to make it more accessible, for instance establishing SERCLA mediators in other locations in Andalusia. Phone mediation has proved to be effective in the UK, however this is not compatible with a system in which there is a team of two mediators for each individual case. I think the SERCLA system is positive because the Spanish industrial relations are still not widely trusted and because there is no professionalization of mediators. However, having two mediators instead of one for each case is definitively less effective. So, in the future it would be desirable to design a system where there is just one mediator per case. Therefore, more effort is needed in order to improve mediator’s skills. Ideally, it would be desirable to have specific training in order to qualify the role of mediators.  

Once this point is achieved, I think it is worth trying to integrate the phone mediation in the same way as Acas does, because it has proved to be highly effective. Nevertheless, I acknowledge that these are structural changes. This requires structural changes of the way SERCLA is designed and a change in the way Spanish society faces disputes.

Where Acas is concerned, I believe it is a good example on how mediation can improve the access to justice and complement the court proceedings. This does not mean the system is perfect, and I already recommended a few changes that should be made such as the suspension of the limitation periods. However, numbers show that post-claim conciliation is already an effective means for resolving labor disputes. Nevertheless, I think it is important to follow and assess the impact of the reforms that the Government has proposed in order to insure that the right to access to courts is duly protected and the access to justice is not affected. I have concerns as to the fees for ETs procedures. However, this is a job that needs to be done once the amendments are actually enforced.

---

450 In recent years more specific trainings are being developed, for instance by the Bar Association of Madrid or the University of Cadiz.
Conclusion

All in all, mediation can be a proper means to improve access to justice if the system is designed according to the legal guarantees for fair mediation and attending to the conditions for effective mediation. SERCLA and Acas are different examples of how mediation can be adapted to the different social contexts. Therefore, I encourage the use of mediation as a complement to courts. However, even the best tool will not be effective if we do not know how to use it. Therefore, I would like to see more multi-disciplinary studies that can shed light on the best practices for integrating mediation as a complement to courts in order to improve the access to justice for individual labor conflicts.
ANNEX I

CONCILIATION – MEDIATION PROCEDURE\textsuperscript{451}

INDIVIDUAL CONFLICT
(Art. 63 Social Jurisdiction Law)

1. PARTY REQUERING THE MEDIATION.

Surnames______________________________________________________________

Name________________________________  National Passport:________

Speaking as (1)_______________________________________________________

Address for summons_________________________________________________

City __________________________________  Postal Code __________  Province_________

Telephone ____________  Fax __________________________________________

E-mail _____________________________________________________________

Accreditation of the representation________________________________________

\begin{itemize}
  \item Power apud acta________________________________________________
  \item Notarial power (if appropriate): executed before the notary________
          Protocol N\textsuperscript{o}___________
          Date_______________________________________________________
  \item Should appear advisor assisted:
          Surname_____________________________________________________
          Name________________________________  Profession________________
\end{itemize}

\textsuperscript{451} Original in Spanish, see
2. PARTY TOWARDS THE MEDIATION IS REQUIRED:
Surnames___________________________________________________________
Name___________________ National passport: ____________________________
Speaking as (1) ______________________________________________________
Address for summons________________________________________________
City ___________________Postal code______ Province _____________________
Telephone _________________Fax ______________________________________
E-mail _____________________________________________________________

3. APPLICABLE COLLECTIVE AGREEMENT/AND OR NORM APPLICABLE
• Name of the collective agreement ________________________________
• Scope of the collective agreement ______________ Publication Date______

4. PROFESSIONAL CATEGORY AND SENIORITY.
• Professional category ______________________________________________
• Segniorty _______________________________________________________

5. WORKERS REPRESENTATION.
Institution of representation (Committee / shopstewart) _____________________
Number of representatives____________________________________________
Composition of the institution (Distribution of the members from different organizations)
_________________________________________________________________
_________________________________________________________________

6. THIRD PARTIES INTERESTED (IF THERE ARE).
Surnames ___________________________________________________________
Name ______________________________ National Passport _________________
Address for summons _________________________________________________
7. **CAUSES FOR THE REQUIREMENT OF MEDIATION.**

- Classification of professional category.
- Functional mobility.
- Superior or inferior category.
- Substantial changes in working conditions.
- Transfers and geographical mobility.
- Holidays.
- Licenses and allowances.
- Working time reduction.

8. **OBJECT OF THE DISPUTE**

- Precedents and date of the fact causing the conflict:

  ____________________________________________________________
  ____________________________________________________________
  ____________________________________________________________

- Laws or norms which interpretation and application provokes the dispute.

  ____________________________________________________________
  ____________________________________________________________
  ____________________________________________________________

- Claim

  ____________________________________________________________
  ____________________________________________________________
  ____________________________________________________________

9. **INTERVENTION OF THE JOINT COMMITTEE**

- Nature of the intervention (voluntary/ obligatory) ______________________
- Accreditation (certification annex / copy of the application) (3) ____________

122
10. DOCUMENTATION PROVIDED.


11. APPEARING PARTIES DECLARE: THAT, UNDER THE PROVISIONS OF ART. 5 OF REGULATION SERCLA, HAS NOT BEEN RAISED NOR THERE IS ONGOING ANY JUDICIAL PROCESS OR ADMINISTRATE DISPUTE REGARDING THIS DISPUTE (4)

In ______________________, on ___________ of ______________ of 2012.

Signed Mr/Ms/Mrs_________________________________________________

INDICATIONS

(1). - Data for identification and proof of the legitimacy and / or representation that acts.
(2.) - If more than one subject compared to the start of the procedure, specify in additional sheets.
(3). - The proof shall be certified by the contribution of the Joint Commission in this regard, or by submitting a copy of the letter of request to the same, stating the date of made.
(4). - If you provide documents relating attach the duly ordered and numbered.
BIBLIOGRAPHY

- **Acas**, Acas: Conciliation, (UK) 04.03.2008
- **ACAS**, Guidance on the Acas conciliation service, 10.08.2005
- **ACAS** Helpline Interview, 02.10.2012
- **ACAS**, Pre-claim conciliation - a free Acas service, 09.11.2009.
- **Acas**, The Enforcement of Acas Settlements, 10.08.2009
- Acuerdo de la Comisión de Seguimiento del SERCLA de 6 de febrero de 2009
  (Agreement of the Monitoring Commission of SERCLA, 6 February 2009), Mas.2009 Art.3.2.
- **Annie de Roo and Rob Jagtengbert**, Settling Labour Disputes in Europe, Society


- *Emilio Sambuceti*, Interview with SERCLA coordinator for Algeciras., 5.10.2012.


• Javier Millán, Interview to Services Director of SERCLA, Seville., 18.09.2012.

• Jesús Cruz Villalón, Por el ensanchamiento de la mediación y el arbitraje en los conflictos laborales (To the spread of mediation and arbitration in labor conflicts), Revista Andaluza de Trabajo y Bienestar Social, Sevilla (2003), 12–19. Available at: http://www.juntadeandalucia.es/empleo/anexos/ccarl/33_621_3.pdf. Accessed on 20 June 2012.


• Louisa Peacock, Acas warns new tribunal rules will lead to more staff disputes, Telegraph.co.uk, 29.01.2012. Available at: http://www.telegraph.co.uk/finance/jobs/9048024/Acas-warns-new-tribunal-rules-will-lead-to-more-staff-disputes.html. Accessed on 26 September 2012.


• Manuel Alonso Olea, Fermín Rodríguez-Sañudo, 'Up to date at April 2010' (2010), pp. 104, in Prof. Dr R. Blanpain, Colucci Prof. Dr M. (Eds.), Spain, International Encyclopaedia for Labour Law and Industrial Relations (Kluwer Law International BV, The Netherlands).

• Margaret McMahon, Interview Acas Policy Officer, 11.11.2012


• Roberto Martinez Pecino, Efectividad de la Mediación en Conflictos Laborales (Efectiveness of Mediation in Labor Conflicts), Univeristy of Sevilla (2009). Available at:


Stephen Drinkwater and Peter Ingram, Have Industrial Relations in the UK Really Improved?, Fondazione Giacomo Brodoli and Blackwell Publishing Ltd 2005, 373–398.

