



International  
Labour  
Organization



# LABOUR DISPUTE SYSTEMS

Guidelines for improved performance





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Guidelines for improved performance

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First published 2013

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*Labour dispute systems: guidelines for improved performance*

ISBN 978-92-9049-677-9 - publication

ISBN 978-92-9049-678-6 - CD-ROM

ISBN 978-92-9049-679-3 - Web PDF

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Publications of the Centre, as well as a catalogue or list of new publications, can be obtained from the following address:

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Design and printing by the International Training Centre of the ILO, Turin – Italy

## Foreword

Dispute prevention and resolution is today attracting more and more attention, as the effective prevention and resolution of labour disputes is critical for sound and productive employment relations worldwide. Dispute resolution processes offer a collective bargaining resource to the interested parties, and strengthen social partnerships.

As conflict is inherent to and inevitable in employment relationships, establishing effective dispute prevention and resolution processes is key to minimizing the occurrence and consequences of workplace conflict. It is with this in mind that the guide aims to assist practitioners working to establish, assess, and improve such processes.

Many countries have put in place dispute prevention and resolution systems, both inside and outside their ministries of labour, with different organizational structures and roles. The International Labour Organization has been assisting member States, as well as workers' and employers' organizations, to set up, or strengthen, such systems.

This guide is part of the ILO's effort to strengthen the prevention and resolution of labour disputes by providing advice to both ILO constituents and industrial relations practitioners interested in dispute resolution. It provides advice on the steps to be taken to either revitalize an existing system, or establish an independent institution, ensuring that they operate efficiently and provide effective dispute resolution services.

This guide is a collaborative effort between the Industrial and Employment Relations Department of the ILO and the Social Dialogue, Labour Legislation and Labour Administration Programme of the International Training Centre of the ILO in Turin, Italy.

We wish to thank Mr Leon Robert Heron for preparing this guide. In addition to Ms Susan Hayter, Ms Minawa Ebisui, and Mr Sylvain Baffi who coordinated the project, a number of ILO officials have provided comments at different stages: Ms Katherine Torres, Ms Angelika Muller, Mr John Ritchotte, Ms Corinne Vargha, Mr Limpho Mandoro,

Mrs Susanna Harkonen, Mr Chang-Hee Lee, Mr Jules Oni, Mr Ibrahima Barry, Mr Jose Luis Daza, Ms Marleen Rueda Carty, Mr Wael Issa and Ms Dimity Leahy.

This guide was reviewed and validated during a workshop that took place in the Turin Centre in February of 2012. The following experts participated in the workshop: Mr Sok Lor, Arbitration Council Foundation, Cambodia; Mr Francisco J. Leturia, Permanent Mission of Chile to the United Nations Office and other International Organizations in Geneva; Mr Paolo Vettori, Regional Labour Inspectorate of Liguria, Italy; Mr Muhammad Haniff Peerun, Mauritius Labor Congress; Ms Hermogena Aquino, Employers' Confederation of the Philippines; Ms Nerine Khan, Commission for Conciliation, Mediation and Arbitration, South Africa; Mr José Antonio Zapatero, School of Labour Inspection and Social Security, Spain; Mr John Taylor, Advisory, Conciliation and Arbitration Service, United Kingdom; Ms Allison Beck, Federal Mediation and Conciliation Service, United States of America; and Ms Felicity Steadman, Professional Conciliator and Mediator.

We hope that this guide will be a useful tool for ILO constituents and industrial relations practitioners, and that it will contribute to the strengthening of labour dispute prevention and resolution systems. We will continue to support and expand this guide with technical advice and capacity-development for ILO constituents.

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*February 2013*

# Table of Contents

Introduction .....1

## CHAPTER 1

Industrial relations and dispute resolution.....3

## CHAPTER 2

Assessing existing arrangements ..... 25

## CHAPTER 3

Revitalizing an existing labour dispute system.....59

## CHAPTER 4

Establishing an independent authority ..... 77

## CHAPTER 5

Raising awareness and providing information..... 117

## CHAPTER 6

Performance improvement..... 131

## CHAPTER 7

Performance monitoring .....161

## CHAPTER 8

Managing conflict in the workplace .....173

## CHAPTER 9

Issues and challenges .....193

## CHAPTER 10

Attachments.....215



# Introduction

The aim of the practitioner's guide is to improve the effectiveness of dispute resolution and prevention, by establishing or revitalizing institutions and administrative units for mediation and voluntary arbitration, so as to reinforce consensus-based processes and reduce the systemic need for social partners to resort to adjudicative processes.

Traditionally, labour dispute management has been the responsibility of government ministries or departments of labour, with disputes being handled by government officials within the labour administration. However, labour administrations, with some exceptions, have been relatively slow to reduce their reliance on adjudication as a means of settling disputes, and today need to consider what can be done to improve their performance, on both dispute prevention and dispute resolution, through greater reliance on consensus-based arrangements. These guidelines aim to assist these bodies in strengthening and revitalizing their dispute management systems.

Some countries adopted institutional arrangements, either by creating a dedicated dispute-handling unit within labour administration, or by creating independent and autonomous statutory bodies which assumed responsibility for dispute prevention and resolution that had previously been undertaken by labour administrations. Such bodies remain dependent on State funding but operate without governmental interference and independently of business, employer, or trade union influence. This Guide includes an outline of what needs to be done if a country seeks to reorganize and restructure its entire labour dispute management system by the creation of an independent body or commission.

Whether disputes are handled by labour administrations or independent commissions, or through other arrangements including the use of private agencies, there is scope for improved performance. Performance improvement starts with a clear assessment of the

strengths and weaknesses of existing dispute prevention and resolution arrangements, the identification of performance gaps, and the planning and implementation of workable strategies for addressing the identified shortcomings. In some cases performance improvement may require major changes involving new institutions, new structures, and new operational arrangements. In other situations, improvement can result from relatively minor changes such as the re-design of forms, improved information flows, or the retraining of officers.

The Guidelines are targeted to the needs of persons engaged in the practical aspects of improving labour dispute systems and processes, who are in a position to assess an existing situation, and are willing to plan and implement positive change. The Guidelines are relevant for various change initiatives including the creation of a labour dispute management system where none existed before, either as part of the labour administration or as an independent commission, or the strengthening and improvement of an existing system whether government-run or independent.

This publication is concerned with both dispute prevention and dispute resolution. The prevention of disputes through conflict management in the workplace is presented as an important component of a sound industrial relations system, while the maturity of an industrial relations system is closely related to the capacity of employers and employees and their organizations, without State intervention, to resolve their disputes through information sharing, dialogue, consultation, negotiation, and bargaining.



## CHAPTER 1

### Industrial relations and dispute resolution

Introduction . . . . .	6
The interacting parties . . . . .	7
Interactive processes . . . . .	12
The outputs of interaction . . . . .	13
The outcome of interaction . . . . .	14
Inevitability of conflict . . . . .	16
Forms and causes of labour disputes . . . . .	17
Types of disputes . . . . .	18
Resolving disputes . . . . .	19



## Industrial relations and dispute resolution

**T***his chapter outlines the nature of an industrial relations system and the interactions that take place within it. The outcomes of these interactions can result in conflict and disputes between employees and their employers, thereby requiring that a dispute management system be in place to resolve disputes, and, wherever possible, prevent them from arising in the first place.*

*Although conflict is accepted as inevitable in a market economy, such disagreements can be prevented from escalating into major disputes and resolved, reducing the need for adjudication through the courts. This requires that dispute management systems provide a range of services to encourage employers and their employees to prevent disputes from arising through consensus-based initiatives, and at the same time provide them with conciliation/mediation and arbitration services when unable to prevent their differences from escalating into disputes requiring the intervention of third parties. Effective dispute management systems reduce both the cost and time associated with disputes.*

*This chapter refers to a continuum of dispute resolution processes starting with consensus-based approaches involving negotiation, bargaining, and conciliation/mediation, to arbitration and adjudication, to the use of strikes and lockouts on the part of the disputing parties. The control the disputing parties have over their disputes decreases as they move from consensus-based approaches to their reliance on power.*

## Introduction

Industrial relations is concerned with the interactions between employers and employees and their respective organizations – as influenced by governmental interventions – at work, or arising outside of the work situation.

These interactions can take place at various levels as, for example, between an individual employee and his or her employer within an enterprise or workplace; between a group of employees or a trade union and an individual employer; between a trade union or unions and an employers' organization at industry or sector level; and between peak representative bodies of employees and employers at the national level.

This indicates that worker-employer interactions can be:

- individual or collective;
- within individual enterprises or workplaces;
- within groups of enterprises or industries;
- at the provincial or state level;
- at the national level.

Irrespective of the level of interaction, it is clear that employees and employers, and their respective organizations, have both common and conflicting interests.

The common interest relates to the production process which generates the goods and/or services, and the resultant earnings that enable enterprises to survive, make profits and grow, and which at the same time, provide the means for employees to earn wages and receive benefits.

The conflicting interest relates to the share of production proceeds. Employees seek to improve their wages and non-wage benefits; employers seek to improve profits and returns for the owners and shareholders. A typical example of a conflicting interest is when employers seek discretion over hiring and firing, whereas workers want protection from unfair labour practices.



In industrial relations systems dominated by market forces, conflict between employees and employers and their organizations is inevitable, resulting in disagreements and disputes that need to be resolved. Disputes can be prevented and resolved by consensus-based actions of employers and employees themselves or, alternatively, through the actions of third parties through the processes of conciliation and bargaining.

## The interacting parties

A better understanding of the nature of industrial relations and the extent to which cooperation or conflict is dominant requires an examination of the nature and characteristics of the interacting parties on the one hand, and the environments in which they interact on the other.

The interacting parties include:

- the individual employee;
- the individual employer;
- an employees' group or trade union;
- an employers' organization;
- a trade union federation;
- an employers' federation;
- governmental agencies.

The interacting parties can be distinguished by:

- the power they possess;
- their values;
- the environment in which they operate.

## Power

Power simply means the ability to influence others as a result of the position a person or institution holds, the technical competence and ability of a person or institution, and the personal characteristics of the persons who are interacting. In short, power is a combination of position, technical competence, and personality.

An individual employee, for example, has limited position power. A trade union, however, particularly one representing all or a significant number of employees in an enterprise or industry, may have considerable power and thus be able to influence the outcome of its interactions with an individual employer or group of employers.

An individual employer, particularly one that is a major employer of labour or generates considerable government revenue has significant power and can dominate its interactions with individual employees, trade unions and, indeed, the Government itself.

The interactions between employees and employers are influenced not only by the power they possess but the way in which that power is used. Where power is used to dominate another party, or unilaterally determine an outcome (e.g., the level of wages and benefits payable to workers), and where no effort is made to share power in any shape or form, overt disagreement may be avoided but, inevitably, conflict will manifest itself in one form or another.

## Values

Employees and employers may bring different values or beliefs to their interactions. For example, employees may value the right to associate, consult and bargain to improve their situation, whereas an employer may believe in interacting with individuals rather than groups, and in making unilateral decisions on matters concerning the employment relationship.

A trade union may value the principles of social justice and the need for minimum standards to be established and duly implemented by law, whereas an employer may believe that the interventions





of governments and trade unions represent a distortion of market forces and are thus unwelcome.

Where the values of employees and employers are fundamentally opposed, conflict over ideology can underpin interactions, with outcomes more dependent on the power of the parties to promote their ideology. Where the values of employees and employers are similar as, for example, where both believe in the operation of market forces but tempered by balanced interventions to ensure minimum acceptable standards, conflict will still exist but will be more related to standards than driven by ideology.

Different values may underpin the interactions between employees and employers but this does not mean the parties lack integrity and respect for each other; in spite of different values the parties can still come to a consensus.

## Environment

The interactions between employees and employers take place in an environment comprising several factors that play a key role in determining the outcome of those interactions.

### *Political environment*

- Is it one in which the prevailing Government supports freedom of association and the right to bargain collectively, or does it instead oppose trade union activities?
- Is it one in which the principles of sound labour market governance are acknowledged and practised, including participation, inclusiveness, transparency, non-discrimination, equity and accountability, or is it one where decisions relating to labour market matters lack consultation, disregard standards of fairness and transparency, and generally lack a reasonable balance between the interests of employees and employers?

- Is it one which promotes compulsory government-operated dispute resolution systems, or are voluntary options supported and encouraged?
- Is it one that seeks to interfere in every aspect of employee-employer interactions, or one in which interventions are limited to encouraging employees and employers to resolve their own problems?

### ***Legal environment***

- Are labour laws consistent with political pronouncements? For example, political statements may elevate the importance of collective bargaining but actual labour laws may create various obstacles to collective bargaining in practice, including stringent requirements for union registration and recognition for bargaining purposes, and the approval of collective agreements.
- Do labour laws encourage and support institutional arrangements for dialogue between workers and employers at the enterprise level, and employers, employees and Government at the industry, regional, or national levels?
- Is the legal environment sufficiently flexible to accommodate changing circumstances? For example, in some countries, parliamentary amendments to labour statutes may take many years, thereby requiring that the legal environment provide for interventions through cabinet-approved regulations and ministerial orders in accordance with suitable consultative processes.
- As an extension of the political environment, are laws seen by employers, employees, or both as negative interference, or as positive interventions?
- What is the definition of 'employee'? Do atypical employees, including those engaged in the informal economy, and those seen by employers to be independent contractors, have access to dispute resolution procedures?



### ***Economic environment***

- Is the economy strong and growing, or weak and contracting?
- Is unemployment increasing?
- Are enterprises closing, leading to retrenchments?
- Is inflation increasing?
- Which sectors are expanding, and which are contracting?

### ***Technological environment***

- Is there an emphasis on labour-intensive or capital-intensive production methods?
- How skilled is the workforce?

### ***Social and cultural environment***

- What are the traditional ways of resolving conflict?
- Is there an emphasis on competition and winning, or on cooperation and compromise?
- Is there a tendency for religious beliefs to influence industrial relations interactions?
- Have labour laws been influenced by religion?

Environmental factors change over time, resulting in a change in the interactions between employers and employees. For example, a change in the political environment from one that is sympathetic to employees' rights and labour protection, to one with conservative values and that is driven by labour market reform, is likely to be accompanied by attempts to dilute union power and result in confrontations and conflict between employees and employers.

A change in the economic environment from growth and near full employment, to recession and higher levels of unemployment, will normally see employees' bargaining power decrease and reduce demands for improved wages and conditions.

## Interactive processes

The interactions between employees, employers and Government can range from nearly non-existent to extensive and detailed.

**Unilateral decision-making** refers to situations in which one party is dominant and dictates decisions without involving or consulting the affected parties; this represents zero interaction. Examples include a change by a government in the level of minimum wages without reference to the views of employers and employees; an employer changing the shift roster without any discussion with employees; and employees walking off the job without informing the employer and refusing to work because they consider the work too dangerous and/or the workplace unsafe.

**Bi-lateral or bi-partite interactions** between employees and employers encompass two main forms, namely, consultation leading to advice but with the employer making the final decision, and negotiation and bargaining leading to agreement. Collective bargaining resulting in a legally binding agreement between employers and employees represents a mature form of interaction, dependent of course on what is 'bargainable' and what is not. In some countries collective bargaining agreements simply re-state the minimum standards already established by law and thus are largely meaningless. In such cases, bilateral interactions take place but with the resultant agreement producing no new rights and obligations for either party.

**Tripartite interactions** between employees, employers, and Government usually take the form of consultation leading to advice to government rather than legally binding agreements. Consultations concerning matters such as changes in labour policy, labour law revisions, adjustments to minimum wages, or changes in work safety and health arrangements, although not resulting in binding agreements, are likely to



result in better decision-making by Government, and helps build trust and confidence between the parties.

The quality of interactions between employees and employers is largely dependent on:

- the willingness to interact;
- the ability to do so.

The **willingness** to interact refers to the extent to which the interacting parties are serious about power sharing and committed to reaching a mutually acceptable outcome. A willingness to interact is evidenced by the extent to which the parties share information, make concessions in response to good arguments, and genuinely attempt to reach agreement based on good faith practices. A lack of willingness can be seen in cases where the parties adopt fixed and unreasonable positions, withhold relevant information from each other, and generally make little effort to resolve the issues before them.

The **ability** to interact refers to the capacity of the parties to effectively communicate, including not only the ability to talk but also the capacity to listen, to prepare a bargaining plan and strategy, to analyse and assess information, to formulate sound arguments and counter-arguments, together with the ability to ensure that the words used to record agreements reflect the real intentions of the parties.

## The outputs of interaction

The interactions between employees and employers produce an output in the form of rules – new rules to govern their future dealings, or variations of existing rules.

Industrial relations is seen by some observers as a rule-making process requiring a consideration of the power and values of the interacting parties, the environment in which they operate, and the nature of their interactions (whether consultative or binding). The outputs or rules that result may be either,

- **substantive** rules; or
- **procedural** rules.

**Substantive rules** are those with a clearly measurable content and relate to new rights and obligations under the employment relationship. Examples of substantive rules include the following:

- wages will be increased by 5 per cent commencing next calendar year;
- employees will receive two additional days annual leave;
- employees will be provided with specific items of protective clothing and equipment;
- fifty workers will be made redundant over the next 12 months;
- the probation period for new employees will be reduced from 3 to 2 months.

**Procedural rules** concentrate on how things are to be done, rather than the actual measurable content of a particular rule. Examples of procedural rules include the following:

- the company, in consultation with employee representatives, will prepare a sexual harassment policy and related procedures;
- the company, in consultation with employee representatives, will prepare a new emergency and evacuation plan;
- employees will join a working group on how to improve the company's billing process.

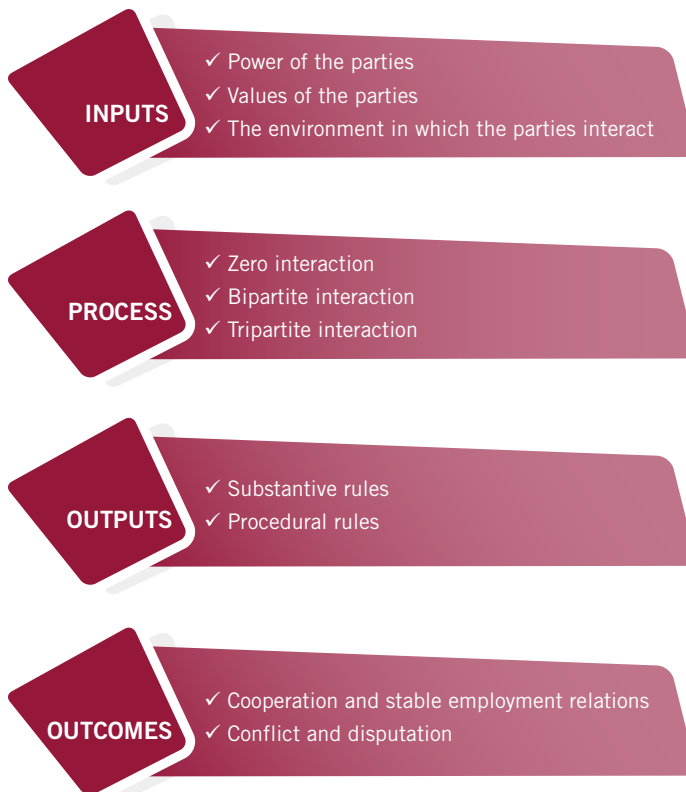
## The outcome of interaction

The outputs of genuine and sincere consensus-based interactions are likely to result in sound and stable employment relations and cooperation. This cooperation may last until one or both parties see a need to change those rules to meet changing circumstances. When this occurs, harmony and cooperation can be quickly replaced by conflict and disagreement until new rules are agreed upon. Conflicts and disagreements need to be addressed; suitable dispute resolution arrangements both internal and external to the enterprise provide powerful means to manage such conflicts.



The outputs that result from unilateral processes may lead directly to an outcome of conflict. This depends, of course, on the extent to which the rules themselves are deemed to be fair.

Conflict that results from one party using its power to impose rules on another may not be openly expressed (for example, where employees are afraid of reprisals from their employer if they complain about their working conditions). Such conflict, although real, may be difficult to detect because the communication between the employer and employees is one-way. It may show itself, however, in the form of low employee morale, poor product quality, high labour turnover rates, high wastage of raw materials, or even various forms of sabotage. Conflict that is not openly expressed needs to be addressed by changing the rule-making process from one based on 'power over' to one that emphasizes power sharing.



If the outcome of interaction is conflict, discord, disagreement and disputes, there is a need to change the outputs. This requires either different inputs (e.g., change of environment, change in values) or different processes (e.g., change from unilateral to bilateral process and thus more power sharing), or a change in both inputs and processes.

## Inevitability of conflict

Conflict and disputes can be minimized, but the nature of employee-employer interactions in a market economy point to the inevitability of conflict. Industrial relations in a market economy accepts and recognizes that employees and management have a separation of interests and that some conflict is inevitable and needs to be managed. Conflict may manifest itself as a dispute.

The separation of interests, however, does not have to mean constant disputes. Employees and employers can work together to resolve their differences and reach a common understanding without disagreements escalating into formal disputes. The conflicting interest creates the need to discuss and negotiate, while the common interest provides the impetus to reach compromise and agreement. Disputes can be prevented and resolved by the action of the parties themselves, without the intervention of third parties. It may also be prevented or resolved by services provided by State-supported or operated bodies, or private sector operators.

An effective dispute management system aims for prevention in the first instance, and subsequently for the orderly and peaceful resolution of any disputes that arise in spite of preventive efforts, primarily through the efforts of the disputing parties themselves.

The essence of an effective system is consensus-based approaches through collective bargaining. The role of government in such a system is to:

- encourage collective bargaining by providing a conducive legal framework;
- provide voluntary conciliation/mediation and arbitration mechanisms that are free and expeditious;





- discourage industrial action while conciliation/mediation and arbitration processes are operating;
- ensure that agreements reached through collective bargaining and conciliation/mediation, as well as arbitration awards, are written and legally binding.

## Forms and causes of labour disputes

Labour disputes may be minor or major, individual or collective, confined to one workplace or extend over many enterprises. The causes of these disputes are many and various, ranging from a simple complaint by an individual employee over pay entitlements, to a complaint by a group of employees concerning unsafe or unhealthy working arrangements, to a work stoppage by all employees within a workplace claiming they are being prevented from forming a union to further their interests.

Some disputes are resolved very quickly as, for example, a supervisor explaining to an individual employee how pay has been calculated on the employee's pay slip, and the employee accepting that explanation. The problem is resolved on the spot and the dispute is over.

Some disputes, however, will take longer to resolve. For example, a complaint concerning unsafe or unhealthy working arrangements by a group of employees may not be possible to resolve on the spot. If the complaint relates to the lack of machine guards or excessive dust or noise levels in a particular section of a factory, it may not be possible for the employer to resolve the situation immediately. There may be disagreement between the employer and employee over whether a hazard exists, the degree of risk posed by a hazard, and how the risk may be minimized. There may be a need for the employer to call on the services of a safety and health specialist for advice, but in the meantime the problem remains, conflict remains, and the possibility of a work stoppage or some other form of industrial action exists.

## Types of disputes

Some disputes are individual in nature, others are collective; some disputes are identified as disputes over rights, others as disputes over interests.

**An individual dispute** is a disagreement between a single worker and his or her employer, usually over existing rights. It can also include situations in which a number of workers disagree with their employer over the same issue, but where each worker act as an individual.

**A collective dispute** is a disagreement between a group of workers usually, but not necessarily, represented by a trade union, and an employer or group of employers over existing rights or future interests.

**A rights dispute** is a disagreement between a worker or workers and their employer concerning the violation of an existing entitlement embodied in the law, a collective agreement, or under a contract of employment. Such disputes usually take the form of a claim by employees that they have not been provided with their entitlements with regard to such things as wages, overtime payments, holidays, and the working environment – indeed anything which is an entitlement that already exists by law.

Rights disputes can be either individual or collective.

**An interest dispute** is a disagreement between workers and their employer concerning future rights and obligations under the employment contract. In practice most interest disputes are the result of a breakdown in the bargaining process with the parties failing to reach agreement on the terms and conditions of employment that will apply in future.

Interest disputes are generally collective in nature.

Some jurisdictions identify various special types of rights disputes including those relating to trade union recognition, the determination of bargaining units, the interpretation and application of collective agreements, and those concerning unfair dismissals. This raises the question as to whether such ‘special’ disputes should be handled differently from mainstream rights disputes, involving special institutions and processes.

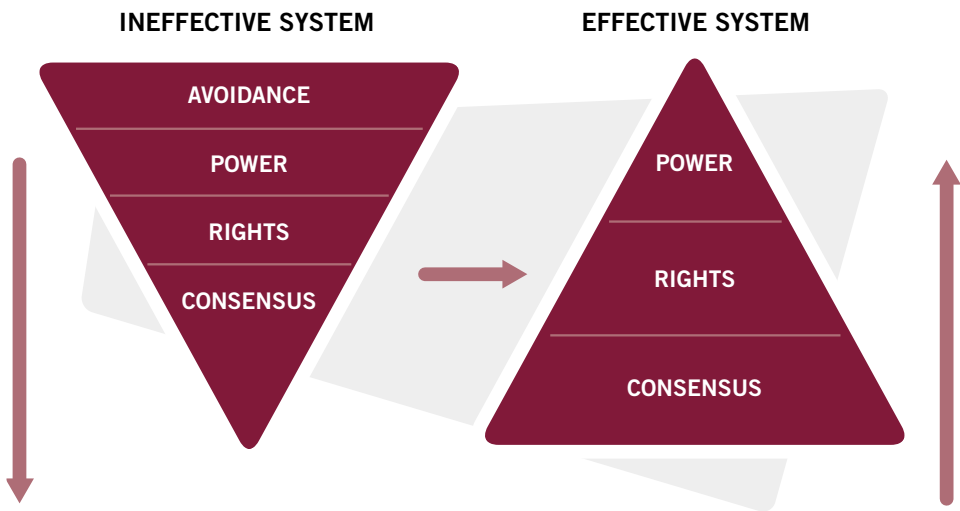


## Resolving disputes

Typically, there are four approaches to dispute resolution, namely,

- **avoidance**, where a party simply fails to deal with a dispute;
- **power**, where a party uses coercion to force another to do what it wants;
- **rights**, where a party uses some independent standard of right or fairness to resolve the dispute;
- **consensus**, where a party endeavours to reconcile, compromise or accommodate positions or underlying needs.

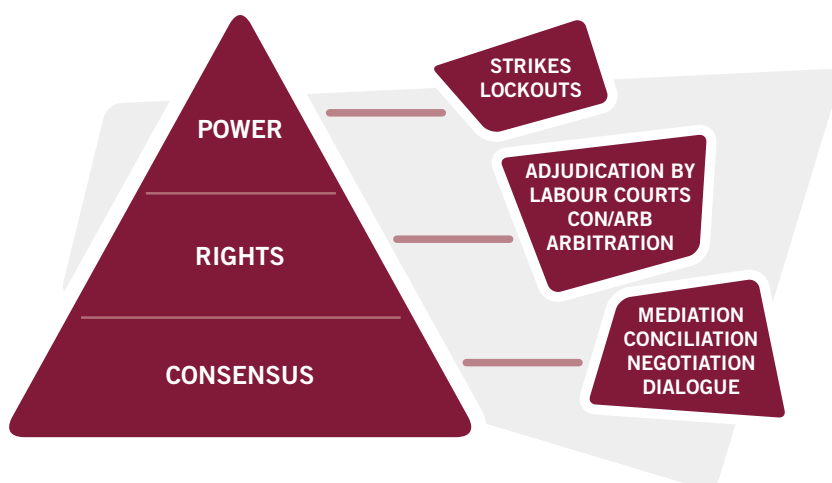
Frequently, the approach to dispute resolution follows the above sequence but, ideally, the approach should be in reverse order starting with consensus, then rights, and then power, with avoidance being eliminated entirely.



As we move up the pyramid in an effective system, the ideal sequence will be **consensus, rights, power**.

An effective system begins with consensus-based processes and places greatest weight on these, and proceeds to rights-based processes; power is only used where no other solution can be found. It should be noted that:

- the extent to which the parties control the outcome of the dispute decreases in this sequence;
- the extent to which the parties are likely to be satisfied with the outcome decreases with this sequence;
- the extent to which the real causes of the dispute are dealt with decreases in this sequence;
- the extent to which the parties are likely to comply with the outcome decreases with this sequence;
- the extent to which the real needs of the parties are dealt decreases with this sequence;
- the extent of alienation of the parties increases in this sequence;
- the extent to which the relationship between the parties may be damaged increases in this sequence;
- the time and costs involved are more likely to increase following this sequence.




Definitions of the abovementioned terms are presented in the following page.



## DEFINITIONS

<b>Dialogue</b>	A process of talking and listening, sharing information, ideas, and concerns.
<b>Negotiation</b>	A process in which two or more parties with both common and conflicting interests come together to talk and listen, with a view to reaching a mutually acceptable agreement.
<b>Compulsory conciliation/mediation</b>	A situation in which the disputing parties are required by law to use the conciliation service provided by the Government. (For present purposes the terms conciliation and mediation are used interchangeably.)
<b>Voluntary conciliation/mediation</b>	A situation in which arbitration is set in motion only with the agreement of the disputing parties.
<b>Compulsory arbitration</b>	A situation in which arbitration is imposed by law or by the government authorities. It also covers situation where an arbitration can be set in motion by either of the disputing parties without the agreement of the other, or invoked by the Government on its own initiative.
<b>Voluntary arbitration</b>	A situation in which arbitration is set in motion only with the agreement of the disputing parties.
<b>Adjudication</b>	A process of setting a dispute in court before a judge or magistrate, in accordance with the formalities and procedures required by law.
<b>Strike</b>	A concerted work stoppage of or withdrawal from work by a group of workers of an establishment or several establishments to express a concern or to enforce demands. Strike actions can be total or partial.
<b>Lockout</b>	A work stoppage in which the employer prevents workers from working by closing the business.

Further definitions are presented in the **Glossary of Terms in ATTACHMENT A.**



Industrial relations is concerned with the interactions between employees and their employers. The nature of their interactions is influenced by their respective values, power, and the environment in which they operate, and the type of dispute they seek to resolve.

Many disputes – but not all – are resolved by the parties themselves through consensus-based processes of dialogue, negotiation, and bargaining.

Where bargaining and negotiation fail and deadlocks occur, third-party interventions are required to assist the disputing parties to resolve their conflict. Some interventions such as conciliation/mediation are still consensus-based, but others, namely arbitration and adjudication, involve third parties deciding how a dispute should be settled.

Assistance to the disputing parties can be provided by labour departments operating as part of Government, or through commissions or similar bodies funded by the State but independent of political parties, business interests, employers, and workers.

Assistance can also be provided by private operators.

The effective operation of an industrial relations system is closely tied to the nature and quality of the dispute management system and the services it provides. The strengthening and revitalization of these service providers and, in some cases, their restructuring and reorganization, is an essential component of an industrial relations system that seeks to resolve issues without resort to adjudication through the courts.









## CHAPTER 2

### Assessing existing arrangements

Types of dispute management systems . . . . .	28
Assessing the existing situation . . . . .	29
Specific elements of an effective dispute resolution system . . . . .	30
Characteristics of good governance . . . . .	34
Assessing the existing labour dispute prevention and resolution system . . . . .	38
Using the guidelines . . . . .	50
Interviews with users . . . . .	53
Performance gaps . . . . .	55



# Assessing existing arrangements

**S**trengthening, establishing or revitalizing labour dispute mechanisms involves a consideration of the process of change.

*The logical starting point in the change cycle is an assessment of the existing situation, in order to determine who does what, how the system and its operation measure up against the general principles of good governance, and how the system compares with accepted principles of sound dispute management.*

*This chapter includes a diagnostic tool to assist in assessing the performance of a national, state or regional dispute management system and provides advice on how to use it. The diagnostic tool includes generally accepted benchmarks of good governance, as well as benchmarks that apply to an effective dispute management system.*

*It is stressed that the assessment is not meant to indicate whether a system is 'good' or 'bad' but to point the way towards improvement, consistent with the stage of development in each country, state, or region being assessed.*



## Types of dispute management systems

Dispute management systems vary from country to country. As noted in Article 1 of the ILO's Recommendation No. 92 concerning Voluntary Conciliation and Arbitration, dispute management systems must be appropriate to national conditions. This is integral to ensuring the system is effective and in engendering the confidence and trust of its users.

In general, however, dispute management systems fall into three main categories, as follows.

- **Ministries or departments of labour** where labour dispute prevention and resolution is the responsibility of national and state labour administrations operating as the part of the public service mandated to administer activities in the field of labour policies, and frequently including a range of functions unrelated to labour dispute resolution. The processes of conciliation and arbitration are firmly in the hands of labour department officials, although national circumstances may allow for some limited involvement of private agencies in the dispute resolution process.

This approach continues to operate in many African, Asian, European, Arab and American countries.

- **Independent statutory bodies** where labour dispute prevention and resolution is the responsibility of bodies funded by the State but which operate with a high degree of autonomy and independence. Dispute prevention and resolution fall under the responsibility of an independent commission, authority, or similar body operating under its own legislation, and with its own governing council or board. The mandate and function of such bodies is established by law, as is their independence from political parties, businesses, and trade unions. The involvement of private agencies in dispute resolution processes is normally encouraged and supported by the independent body. This category might be described as modern-independent, although some such bodies have been operating for over 60 years.

Typical examples include the Federal Mediation and Conciliation Service (FMCS) in the United States, established in 1947; the Advisory Conciliation and Arbitration Service (ACAS) in the United



Kingdom, established in 1976; the Labour Relations Commission (LRC) in Ireland, established in 1991; more recently, the Commission for Conciliation Mediation and Arbitration (CCMA) in South Africa, established in 1995; Ghana's National Labour Commission (NLC), established in 2005; and Tanzania's Commission for Mediation and Arbitration (CMA), established in 2007.

As independent statutory bodies, such commissions are not part of the central labour administration but are part of the wider labour administration system.

- **Shared arrangements** where labour dispute prevention and resolution is partly the responsibility of the labour administration and partly the responsibility of an independent body, as in the Department of Labour within the Ministry of Labour and Vocational Training (MOLVT) and the Arbitration Council in Cambodia.

Other types of shared arrangements include those where employers' organizations and trade unions are heavily involved, such as Spain's Intersectoral Service of Mediation and Arbitration (SIMA) which has jurisdiction over disputes extending beyond the boundary of an individual autonomous community. SIMA is funded by the State but managed by the social partners.

In Belgium, the social partners also share the responsibility of preventing and resolving collective disputes. If the collective conflict is not prevented by workers' and employers' representatives, it is referred to a bi-partite conciliation committee, the chairperson of which is a Government official who acts as a mediator and who is an independent, neutral person, appointed by the Federal Minister of Labour.

## Assessing the existing situation

In some countries, dispute management systems are performing at an acceptable level. However, many are not and need to adapt and change. The change process needs to be managed in an effective manner, starting with an overall assessment of the existing system.

This requires the use of some assessment criteria which are reflected in a number of the ILO's Conventions and Recommendations, in particular Recommendation No. 92 concerning Voluntary Conciliation and Arbitration (1951). These criteria fall into two categories, namely:

- the specific elements of an effective dispute resolution system;
- the general characteristics of good governance.

## Specific elements of an effective dispute resolution system

The specific benchmarks for an effective dispute management system are as follows,

- preventive emphasis;
- range of services and interventions;
- free services;
- voluntarism;
- informality;
- innovation;
- professionalism;
- independence;
- resource support;
- confidence and trust of users.

## Preventive emphasis

Article 1 of Recommendation No. 92 concerning Voluntary Conciliation and Arbitration (1951) states that the dispute resolution machinery established by the State should assist in the prevention of industrial disputes.



An emphasis on dispute prevention requires that resources are available to assist employers and employees to prevent disputes from arising, through the provision of advisory information and training services, including joint training, related to strengthening and improving arrangements and processes for dialogue, consultation, bargaining, and improved labour-management relations at the enterprise level.

## Range of services

An effective dispute management system should provide a range of services related to the needs of its clients, including the provision of information, advice, training, facilitation, investigations, conciliation, arbitration, as well as conciliation-arbitration (con-arb), and arbitration-conciliation (arb-con) sequences where appropriate. Services should be equally available to both the private and public sectors (including statutory bodies and government corporations).

Services may cover the full range of disputes including individual, collective, rights, and interests, as well as those relating to organizational rights, recognition for bargaining, interpretation of collective agreements, discrimination, unfair labour practices, retrenchments, and dismissals.

Article 3(2) of Recommendation No. 92 provides that these services should be made available at the request of any party to a dispute, and capable of being triggered at the initiative of the public institution with responsibility for overseeing industrial relations.

### *Free service*

Article 3(1) of Recommendation No. 92 states that voluntary conciliation procedures should be free of charge.

Free service requires that conciliation and arbitration services be made available free of charge to the disputing parties, but it is possible that some costs related to conciliation and arbitration processes, including interpretation services, witnesses, and costs associated with a party's representatives, will be borne by the concerned party.

## ***Voluntarism***

Voluntarism means that the disputing parties are free to decide whether or not to have recourse to conciliation and arbitration proceedings and are not required by law to use the State-funded conciliation and arbitration services. This principle is central to Recommendation No. 92, which anticipates that the conciliation machinery established by the State shall be voluntary.

Voluntarism also means the parties can choose a private third party as conciliator or arbitrator instead of the conciliation or arbitration machinery established by the State.

The principle of voluntarism is not seen to be compromised where the parties voluntarily make an agreement to submit to compulsory conciliation/mediation or arbitration as part of the bargaining process.

## ***Simplicity***

An effective dispute management system has procedures and operations that are clear, uncomplicated, and informal, and uses user-friendly forms for as many operational matters as possible (e.g., referral for conciliation, request for arbitration, etc.). Conciliation/mediation meetings and arbitration hearings should avoid as far as possible the appearance and practice of court proceedings.

Simplicity of procedures and operations is key to ensuring that the voluntary conciliation procedures established by the State are expeditious and timely, as advised by Article 3(2) of Recommendation No. 92.

## ***Professionalism***

Professionalism means that all staff in the labour dispute system have been fairly selected, have been well trained to meet the requirements of their job descriptions, and are subject to a code of behavior/conduct to regulate their behavior towards clients, fellow staff members, their employer, and the community as a whole.





## ***Innovation***

Innovation encompasses a willingness to be flexible and adjust in order to provide the best possible services for the benefit of clients. Innovation shows itself through new approaches to dispute resolution (e.g., con-arb, and arb-con) and the provision of a range of dispute prevention initiatives including facilitation, investigation, fact-finding, joint research, joint training, and relationship enhancement. Innovation also extends to the provision of mobile services for persons in remote locations and extracting the maximum benefits from computer information technology.

## ***Independence***

Independence means that the system neither belongs to nor is controlled by any political parties, business interests, employers, or trade unions, and operates without interference from Government. Providing for the equal representation of the social partners in the dispute resolution system, as contemplated by Article 2 of Recommendation No. 92, is an important element of ensuring the system's independence. Notably, however, independence does not mean financial independence from the Government, as dispute management systems operating as statutory bodies will be dependent on State-funding.

## ***Resource support***

An effective labour dispute system requires sufficient resources to meet the capital and recurrent expenditures associated with providing services to its clients, including sufficient professional and support staff, adequate space and equipment, including computer and telecommunication systems.

## ***Confidence and trust of users***

An effective labour dispute system provides services valued by its users and enjoys their confidence and trust. It takes the necessary steps to assess the extent to which its users are satisfied with the range and quality of services provided, does all within its capacity to maintain its impartiality, and delivers services fairly and without discrimination to all who fall within its jurisdiction.

## **Characteristics of good governance**

In simple terms, governance is concerned with the way decisions are made and implemented within an organization, including government ministries and departments, statutory bodies, enterprises, trade unions, and employers' organizations – indeed any organization where decisions are made and implemented, or in some cases made but not implemented at all. Thus it is common to speak of national governance, state or provincial governance, corporate governance, and local and district governance.

The concept of governance is not new; however, what is relatively new is the emphasis on 'good governance' and the extent to which accepted principles of sound governance are actually applied in practice. This closer scrutiny has also involved an examination of the role of key players, including but not limited to governments, in decision-making and implementation processes. This has also involved an assessment and analysis of the structures that have been established to both make and implement decisions.

Few countries or institutions, whether public, private or from civil society, can claim they satisfy all the characteristics of good governance. However, the existence of such an ideal provides a standard of performance against which actual and existing levels of performance can be compared and any appropriate action taken.

The generally accepted characteristics of good governance are presented as follows.



### ***Participation***

Participation in decision-making by concerned stakeholders, both men and women, is a key cornerstone of good governance. This is reflected in Article 2 of ILO Recommendation No. 92 concerning Voluntary Conciliation and Arbitration (1951), which states that

*“Where voluntary conciliation machinery is constituted on a joint basis, it should include equal representation of employers and workers.”*

Participation can be either direct or through legitimate intermediate institutions or representatives. Representative democracy does not automatically result in the concerns of the most vulnerable in society being taken into consideration in decision-making. In order for this to happen, participation needs to be broadly representative, informed, and organized. Freedom of association and expression and an organized civil society are essential for meaningful participation in decision-making.

### ***Rule of law***

Good governance requires fair legal frameworks that are enforced impartially. It also requires full protection of human rights, particularly those of minorities. Impartial enforcement of laws requires an independent judiciary, and impartial and incorruptible enforcement agencies.

### ***Transparency***

Transparency means that decisions taken and their enforcement are done in a manner that follows rules, regulations and known procedures. It also means that information is freely available and directly accessible to those affected by such decisions and their enforcement. In addition, transparency requires that sufficient information be provided to potential users of that information in a form that is easily understandable.

### ***Responsiveness***

Good governance requires that institutions and processes try to serve all stakeholders within a reasonable time frame. It also requires that decision-makers are sufficiently flexible to respond to new situations and the needs of new stakeholders.

### ***Consensus oriented***

There are many actors and many viewpoints in a given society. Good governance requires moderation of society's different interests to reach a broad consensus on what is in the best interest of the entire community, and how this can be achieved. It also requires a broad and longer-term perspective on what is needed for sustainable human development, and how to achieve the goals of such development. This can only result from an understanding of the historical, cultural, and social contexts of a given society or community.



### ***Equity and inclusiveness***

A society's well-being depends on ensuring that all its members feel that they have a stake in it and do not feel excluded from the mainstream of society. This requires that all groups, particularly the most vulnerable, have opportunities to improve or maintain their well-being.

### ***Effectiveness and efficiency***

Good governance means that processes and institutions produce results that meet the needs of society and, at the same time, make the best use of available resources. Efficiency in the context of good governance also encompasses the sustainable use of natural resources and the protection of the environment.

### ***Accountability***

Accountability is a key requirement of good governance. Not only governmental institutions but also the private sector and civil society organizations must be accountable to the public and to their institutional stakeholders. Who is accountable to whom depends on whether decisions or actions taken are internal or external to an organization or institution. In general, an organization or an institution is accountable to those who will be affected by its decisions or actions. Accountability cannot be enforced without transparency and the rule of law.

In all, 18 benchmarks are presented in the following diagnostic tool against which current performance can be compared. A system is not necessarily 'ineffective' if it does not meet all benchmarks; the intention is to identify areas where performance improvement is desirable and, subject to resource availability and demands on the system, to take action to address shortcomings.

# Assessing the existing labour dispute prevention and resolution system

(N/A = Not applicable)

<b>Participation</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
Were employers' and employees' representatives consulted in setting up the system? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Were other stakeholders consulted? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is the system currently guided by a representative council, committee or board? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>• If yes, was that body established by law?                             <ul style="list-style-type: none"> <li>- Are employers and workers equally represented? .....</li> <li>- Are independent experts (e.g., academics) represented? .....</li> <li>- Does it have a reasonable gender balance? .....</li> <li>- Does it meet regularly? .....</li> <li>- Are its activities included in an annual report? .....</li> </ul> </li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<b>Rule of law</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
Is there a legal framework in place? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are laws applied impartially? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is there any indication of corruption on the part of labour officials and/or judges? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is the adjudication of disputes handled by <ul style="list-style-type: none"> <li>• Special labour tribunals? .....</li> <li>• General courts? .....</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is the adjudication system subject to delays? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>• If yes, are these delays</li> </ul>			



- Less than 1 year? .....
- More than 1 year but less than 2 years? .....
- 2 years or more but less than 5 years?.....
- More than 5 years? .....

If disputes are referred to general courts, have judges received training on labour matters? .....

Is the labour dispute adjudication system available outside main cities? .....

- If yes, is this provided
  - Through a permanent court or tribunal in decentralized locations? .....
  - Through mobile or circuit courts?.....

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**Transparency** **Yes** **No** **N/A**

Are rules and procedures generally well known? .....

Is information concerning the application of rules and procedures available and accessible to those likely to be affected? .....

Are regular reports on the system’s operations made available to clients of the system? .....

Is an annual report on the system’s operations prepared and disseminated? .....

Does the system issue a regular newsletter or similar publication? .....

Does the system issue regular press releases? .....

Does the system operate a website? .....

Is the website interactive, and are social media and SMS services used? .....

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**Responsiveness** **Yes** **No** **N/A**

Does the system make every effort to respond to the interests of all legitimate stakeholders?.....

Is the system able to adapt to meet changing circumstances (e.g., an increase in rights disputes, disputes reported from employees in the informal economy)? .....

Does the system conduct user satisfaction surveys?.....

- If yes, does the system respond to the results of such surveys? .....

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**Consensus orientation** **Yes** **No** **N/A**

Does the system encourage the development of collective bargaining?.....

Does the system give every encouragement to consensus-based approaches to dispute resolution? .....

Are pre-conciliation and conciliation services readily available to assist the disputing parties to find consensus? ....

Have officers received training in the skills and techniques of consensus building? .....

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**Equity and inclusiveness** **Yes** **No** **N/A**

Is the system available to all employer-employee situations, including disputes that arise in the informal economy? .....





- Does the system serve both the private and public sectors (including public corporations and statutory bodies)? .....
- Is the system decentralized to enable access by persons outside the main centres? .....
- Are mobile services provided? .....
- Is there a reasonable gender balance of professional staff? ....
- Is there a reasonable gender balance of support staff? .....

<b>Effectiveness and efficiency</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
Does the system have clearly stated purposes and objectives? <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the system adhere to performance management procedures and practices? ..... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the system have clear, measurable, and attainable targets (e.g., conciliation success rates)? ..... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are measurable indicators available for comparing actual with planned performance? ..... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are arrangements in place to assess the impact of the system on the country's overall economic performance? ..... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the system make the best use of the human resources available to it? ..... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the system make the best use of the non-human resources available to it? ..... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are conciliations conducted within a definite time period from the date of notification of the dispute (e.g., within 30 days)? ..... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are arbitration hearings conducted within a definite time period from the date of request (e.g., within 30 days)?... <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Are guidelines set for the duration of the actual conciliation proceedings (e.g., 1 day)? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are such guidelines generally complied with? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are guidelines set for the duration of arbitration hearings? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are such guidelines generally complied with? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the system have a computerized case management system? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the case management system provide real-time information? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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<b>Accountability</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
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Is the system accountable to its stakeholders and the public at large? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the system have arrangements in place to ensure accountability (e.g., public pledges, code of ethics, mission statements, code of behavior, independent reviews, press conferences)? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is the system accountable for the use of the resources made available to it? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is the system accountable not only for its decisions but also for the processes by which decisions are made? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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<b>Preventive emphasis</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
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Does the system provide services to encourage employees and employers to adopt consensus-based approaches to their conflict and disputes? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Does the system provide information specifically directed to dispute prevention? .....

Does the system conduct training activities where employer and worker participants attend together? .....

Does the system provide advice on how to resolve conflict and disputes within the workplace? .....

Does the system receive information on potential areas of conflict from labour inspectors or any governmental agent? ....

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**Range of services** **Yes** **No** **N/A**

Does the system provide the following services? .....

- Information .....
- Advisory .....
- Training .....
- Investigation .....
- Fact finding .....
- Joint problem solving .....
- Conciliation .....
- Arbitration .....
- Con-Arb .....

Does the system cater to all types of disputes as follows? .....

- Existing rights .....
- Future interests .....
- Unfair dismissal .....
- Severance pay .....
- Retrenchment .....
- Probation .....

- Discrimination.....
- Organizational rights.....
- Recognition for bargaining .....
- Interpretation of collective bargaining agreements .....
- Disclosure of information .....
- Refusal to bargain .....
- Unfair labour practices.....

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**Free services** **Yes** **No** **N/A**

Does the system provide conciliation services free of charge to the disputing parties? .....

Does the system provide arbitration services free of charge?...

Does the system generate revenue from advisory, training, and information services it provides? .....

Are filing fees or administrative fees charged when a party submits a request for conciliation/mediation or arbitration services? .....

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**Voluntarism** **Yes** **No** **N/A**

Does the system as operated provide for voluntary conciliation/mediation (meaning agreed by both parties)? .....

Does the system provide for voluntary arbitration? .....

Does the system provide for the parties to agree on a private conciliator/mediator, paid by the parties? .....

Does the system provide for the parties to agree on a private arbitrator, paid by the parties? .....



<b>Simplicity</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
Are pro-formas used for notifying disputes? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>• If yes, are instructions provided to assist parties to complete them? .....</li> <li>- Are instructions provided in more than one language? .....</li> <li>- Are such forms available online? .....</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is information made available in a form suitable for the illiterate? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is a telephone helpline system available? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>• If yes, does the system use recorded messages? .....</li> <li>- Are messages in two or more languages? .....</li> <li>- Can a caller actually speak to an officer to receive help? .....</li> <li>- Does a caller have a choice of languages? .....</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<b>Professionalism</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
Were officers/professional staff engaged on the basis of open competition? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Do all staff have a detailed job description indicating tasks and performance standards? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Have all staff been provided with induction training? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Do officers/professional staff have opportunities for refresher and upgrading training? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Have managers in the system had the benefit of management training? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Do officers/professional staff have opportunities in work-time for self-learning? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is there a code of behavior/conduct for officers/professional staff? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is the code legally binding? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is there a staff performance appraisal system in place? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is there a mentoring system in place to assist in the development of less experienced staff? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are part-time staff required to undertake induction training? ..	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are criteria in place for the registration of accredited agents? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is induction training provided for accredited agents? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are systems in place for the de-registration of accredited agents? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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<b>Innovation</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
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Are con-arb procedures available? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are dispute prevention services (advice, information, training) provided for enterprises? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Are services provided for atypical employees (e.g., home workers, seasonal workers, contract workers)? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Do officers receive training on 'new' approaches to dispute prevention and resolution? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does the system make use of computer and information technology? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

- If yes, for teleconferencing with disputing parties?



- For staff training? .....
  - For case management records? .....
  - For administrative processes? .....
- Does the system accredit private agents for conciliation/mediation and arbitration work? .....
- Does the system delegate conciliation/mediation and arbitration functions to bargaining councils, or similar employer-union joint entities? .....

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**Independence** **Yes**    **No**    **N/A**

- Is the system independent of the Ministry or Department of Labour (or the Ministry responsible for labour matters)? .....
- If yes, has an independent body/commission been established by legislation? .....
- Does it have its own governing council? .....
- Does the system receive funds other than from the State? .....
- If yes, from fee-for-service activities?
    - Donations? .....
    - Grants? .....
    - Bequests? .....
    - Levies? .....
    - Projects? .....
  - If yes, does the system receive any funds from employers? (Other than fee-for-service payments)? .....
  - If yes, does the system receive any funds from trade unions? (Other than fee-for-service payments)? .....

**Resource support** **Yes** **No** **N/A**

Does the system receive sufficient funds to achieve its purpose and objectives to an acceptable level? .....

Relative to the demand for its services, does the system have sufficient

- Professional staff? .....
- Support staff? .....
- Equipment (including computers)? .....
- Telecommunications facilities? .....
- Transport facilities? .....
- Office space? .....

Does the system have dedicated rooms for conciliation/mediation and arbitration proceedings? .....

**Confidence and trust of users** **Yes** **No** **N/A**

Does the system conduct regular client satisfaction surveys? ..

Do trade unions publicly state their support for the system?...

Do employers' organizations publicly state their support for the system? .....

Has the system received any awards or honours in recognition of good service? .....

Is the number of enterprises using the system's advisory, training, and information services

- Generally increasing? .....
- Generally decreasing? .....
- Staying about the same? .....





Is the number of persons requesting conciliation/mediation services

- Generally increasing? .....
- Generally decreasing? .....
- Staying about the same? .....

Is the number of persons requesting arbitration services

- Generally increasing? .....
- Generally decreasing? .....
- Staying about the same? .....

Is the number of cases proceeding to adjudication (to a court or tribunal)

- Generally increasing? .....
- Generally decreasing? .....
- Staying about the same? .....

Is the head of the system appointed through a process of open competition?.....

Is the head appointed for a fixed term? .....

Is the head responsible to a governing council or body? .....

To a minister? .....

## Using the guidelines

The guidelines comprise a series of closed questions the answers to which cannot be expected to provide a full performance assessment of a dispute management system. The **YES** or **NO** or **NOT APPLICABLE** responses will give a general indication of the current status of the system; a follow-up questionnaire with more open questions can generate more detailed information.

The checklist can be used by:

- an individual or small team from within the dispute management system itself;
- a team composed of persons from within the dispute management system and representatives of employers and employees as clients of the system;
- an independent consultant.

An assessment could be informal as, for example, where a senior member of the dispute management system uses the checklist to undertake a 'desk assessment' of that system. No interviews are conducted, and the result is a relatively quick review of the system to highlight 'where we are at' and identify in broad terms areas where improvements could be made.

Alternatively, the assessment might be more formal and structured, involving more people, taking more time, and resulting in the preparation of a performance improvement report. Suggested steps to be taken in conducting a more formal and structured assessment are as follows.

- Step 1** The need to undertake the assessment is endorsed by senior officials or the governing council within the labour dispute system.
- Step 2** A small team or task force is formed, including client representation and possibly an independent person with expertise in dispute management.



- Step 3** Staff within the dispute management system are informed of the assessment exercise and advised of its purpose with the emphasis on performance improvement.
- Step 4** The task force prepares a work and time schedule with a clear indication of when the assessment will start and finish, who will be interviewed, and when.
- Step 5** The task force conducts interviews, including interviews with the system's users, using the checklist for interviews with staff of the dispute management system, and a separate set of questions (see below) for interviews with users/clients.

The checklist should be completed by the task force member and not given to the respondent to complete.

Interviews should result in the recording of YES, NO and NOT APPLICABLE responses but should also collect information from open questions where elaboration is required.

The interviewers should constantly remind themselves that the interview is not an interrogation: the purpose is to gather information.

The team should take the opportunity to observe the system in operation including, where possible, conciliators/mediators and arbitrators 'in action', the work of support staff, forms used within the system, the case management system, the helpline, and field offices.

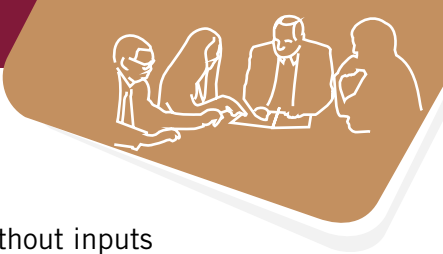
- Step 6** The task force should meet to discuss the completed checklists together with information collected through observation.
- Step 7** The task force should attempt to group the identified performance gaps in a systematic manner. It may, for example, assess some performance deficits as very important, important, or not very important, and at the

same time provide an indication of the ease with which it can be dealt with, such as easily addressed, less easily addressed, and very difficult to address. The result could be a nine-box-matrix as indicated below.

	Easy	Not so easy	Very difficult
Very important			
Important			
Not very important			

For example, the assessment may show that there is no computerized case management system, indicate that the current paper system is both inefficient and ineffective, and identify this issue as very important. Although it is very important that the problem be addressed, it may be very difficult to do so because of known budget constraints. Thus, this issue would be recorded in the 'Very Important/Very Difficult' part of the matrix.

- Step 8** The task force should prepare a 'Performance Improvement Report' highlighting priorities for action and an identification of options to be considered to address each identified performance deficit.



## Interviews with users

An assessment exercise would be incomplete without inputs from the dispute system’s users. This might include the use of a survey form that is a combination of closed questions, a ratings scale, and open questions on the following lines, but adjusted to meet local circumstances.

This form could be used for trade unions, employers’ organizations, individual employees and individual employers.

- Name (individual/organization) .....
  
- How many times have you used the services of the labour dispute system in the last year?.....
  
- In the last year did you use its services relating to dispute prevention and helping improve employer-employee relations at the enterprise level?  
 Yes                       No 
  - If yes, how would you rate your satisfaction with these services with regard to the methods and processes used?  
 Very satisfied                       Satisfied                       Not very satisfied
  - The outcomes achieved?  
 Very satisfied                       Satisfied                       Not very satisfied
  
- In the last year did you use its services relating to conciliation/ mediation?  
 Yes                       No 
  - If yes, how would you rate your satisfaction with these services with regard to the procedures and processes used?  
 Very satisfied                       Satisfied                       Not very satisfied
  - The outcomes achieved?  
 Very satisfied                       Satisfied                       Not very satisfied

- In the last year did you use its services relating to arbitration?  
 Yes  No 
  - If yes, how would you rate your satisfaction with these services with regard to the procedures and processes used?  
 Very satisfied  Satisfied  Not very satisfied
  - The outcomes achieved?  
 Very satisfied  Satisfied  Not very satisfied
  
- In the last year did you access the system's website?  
 Yes  No 
  - If yes, how would you rate your satisfaction with regard to the information provided?  
 Very satisfied  Satisfied  Not very satisfied
  
- In the last year did you access the system's helpline?  
 Yes  No 
  - If yes, how would you rate your satisfaction with regard to the services provided?  
 Very satisfied  Satisfied  Not very satisfied
  
- Overall, what do you consider to be the main strengths of the labour dispute system? .....
- .....
  
- What do you consider to be its main shortcomings?  
 .....
- .....
  
- Do you consider that the dispute resolution services offered by the system are a better option than taking your case to court?  
 Yes  No
  
- Why? .....
- .....
  
- What suggestions do you have for improving the services the labour dispute system provides? .....
- .....




## Performance gaps

The purpose of the assessment exercise is to help identify performance gaps in a country's labour dispute system. Some of these gaps are structural in nature, some relate to legislation, others concern consultative arrangements, focus and coverage of service, procedures, operations, information, management, staffing and resources. Addressing these gaps requires a consideration of two main alternatives, namely:

- the revitalization of an existing labour dispute system; or
- the creation of something new.

The issue of revitalizing an existing system is addressed in chapter 3. Establishing something new as, for example, an independent commission or similar body, is addressed in chapter 4.



Change is a process that needs to be managed. An essential starting point is to 'take stock' and assess the existing situation before plans and strategies are prepared to replace, restructure, revitalize, re-engineer or readjust.

Assessing an existing situation needs to be done systematically and objectively, and preferably in consultation with the clients and users of that system as well as those responsible for its operation.

A systematic and objective assessment of a labour dispute system should be driven by reference to the characteristics of well-functioning dispute prevention and resolution systems in different countries, as well as the generally accepted principles of good governance.

The assessment is a challenge in itself, but the real challenge is deciding what to do if the assessment shows the system is performing below an acceptable level. If performance gaps are small, improvements can be made through revitalization and readjustment. If performance gaps are large, more drastic change is required, including major restructuring and reorganization.









## CHAPTER 3

### Revitalizing an existing labour dispute system

Revitalization . . . . .	62
Planning and implementing change . . . . .	64
Planning for change . . . . .	66



## CHAPTER 3

# Revitalizing an existing labour dispute system

*The previous chapter outlined a diagnostic tool to help assess the performance of a country's dispute management system. The tool can be used to assess a system under the responsibility of a ministry or department of labour, or one that operates as an independent statutory body. The outcome of the assessment process is the identification of areas where performance improvement is required.*

*This chapter focuses on improving performance within an existing dispute prevention and resolution system. It applies to improvements within a system that is part of the responsibility of a government labour administration, as well as to an existing independent system under the responsibility of a statutory authority.*



## Revitalization

To revitalize means to enliven, refresh, renovate, energize, and reinvigorate. Revitalization, for current purposes, refers to the renewal of something already in existence. That 'something' may be either a department or ministry of labour, or alternatively, an independent statutory authority. A decision to revitalize a labour dispute system is one of three possible outcomes of the assessment process. The three possibilities follow below.

- **Take no action.** It is possible that an objective and detailed assessment reveals that the existing dispute management system is operating at an acceptable level of performance and that no improvements are required. For a well-resourced and well-managed system the 'do nothing' option may be appropriate; however, even in the best systems improvement opportunities exist, and a 'do nothing' outcome from the assessment exercise suggests:

  - a lack of objectivity and consultation in the assessment process itself;
  - a dismissal by decision-makers of the assessment process as unwanted and unnecessary;
  - a degree of complacency on the part of decision-makers;
  - an inward looking and self-serving approach that regards improvements as a hindrance;
  - fear of and resistance to change;
  - lack of resources as an excuse to take no action towards the identified improvements.
- **Revitalize by making internal adjustments to the system, in order to provide better services to the system's clients, but without major restructuring or reorganization.** The purpose and mandate of the system remain unchanged, with the revitalization focusing on improving existing processes rather than introducing new institutional arrangements. Some internal reorganization may be required, but the emphasis is on doing things better within an



institution which, to outward appearances remains much the same as before.

A decision to revitalize is made when the assessment process reveals that some improvements are required but, in general, the labour dispute system is operating reasonably well. The main requirements for good governance and institutional performance are satisfied, however some changes would be beneficial. This requires that the assessment process and the identification of performance gaps clearly pinpoint the areas where improvements are needed.

For example, the assessment exercise may indicate that:

- the design and operation of the dispute management system does not provide for sufficient consultation with the clients of the system, namely, employers, trade unions, and individual employees;
- the number of successful conciliations is unacceptably low;
- the system gives too little emphasis to dispute prevention;
- determinations in arbitration cases lack consistency;
- case management records are poorly maintained and not easily accessed;
- insufficient use is made of accredited agents from the private sector in dispute prevention and resolution activities;
- there is no systematic and planned approach for the training of labour officials in conciliation/mediation and arbitration;
- there is insufficient office space to enable the system to operate in all required locations;
- the telephone helpline system is underutilized;
- persons seeking to request conciliation/mediation services do not know how to proceed.

The changes required to address these performance gaps can be made from within the dispute resolution system itself. There is a

need to examine the operational arrangements and procedures, but no high-level policy changes or legislative revisions are required, with the possible exception of the use of private agencies in dispute prevention and resolution processes, where some legal interventions may be required.

- **Make fundamental change.** The assessment process may indicate that the dispute resolution system is performing significantly below an acceptable level, that the characteristics of good governance are not evident, that the elements of a 'good' labour dispute management system are lacking, and that the entire system needs to undergo fundamental change. The deficiencies within the system cannot be addressed from within the system itself but requires a new vision, a new mandate, and new operational arrangements, all underpinned by the general characteristics of good governance and the specific elements and features evident in an effective dispute resolution system. This issue is addressed in chapter 4.

## Planning and implementing change

Performance shortcomings to be addressed by revitalization initiatives should be examined in detail before specific action is planned and implemented, as shown in the following example. All issues, even ones that appear to be relatively minor, need to be considered in accordance with the following:

- What are the facts relating to the particular problem or shortcoming?
- What does an analysis of these facts show?
- What options exist for addressing the problem or shortcoming?
- What is the preferred solution to the problem?
- What arrangements are required to monitor whether the problem or shortcoming has been overcome?



**Example:**

**The number of successful conciliations/mediations by the labour dispute system is unacceptably low.**

**Facts**

What is the actual success rate for conciliation/mediation during the last 12 months (e.g., 25%)?

What is the performance target (e.g., 60%)?

What are the disaggregated success rates, for example, by location (district, province, or region); by type of dispute; by industry; by occupational groups; by years of experience of conciliators/mediators?

What proportion of successful conciliation/mediations is completed within stipulated time limits?

**Analysis**

Is the performance target realistic?

Is the problem more prevalent in one or more districts, provinces or regions?

Is the problem greater where inexperienced conciliators/mediators operate?

Is the problem industry-specific or more general in nature?

What do the conciliators/mediators themselves have to say about the problem?

What do employee and employer representatives have to say?

Are external factors (e.g., the economic environment) important?

**Options**

Plan and implement a training programme for conciliators/mediators based on a detailed assessment of training needs.

Prepare desk manuals for conciliators/mediators.

Appoint experienced conciliators/mediators to mentor those newly appointed.

Give confidential counseling.

Lower the performance target.

Set up debriefing sessions.

Introduce a system of awards for good achievements (collectively and individually).

**Decision** Assess training needs, design and implement a training programme, and appoint mentors (possibly on a part-time basis).

**Follow-up** Monitor the post-training success rate. If there is no improvement, re-assess the problem and solution. For example, training may have been the correct solution but the training course was poorly designed, poorly organized, or not well presented. Appointing mentors may have been part of the solution, but their actual selection may have been poor.

Identify specific champions to assist and establish a formal system for monitoring.

The above example shows that when a performance deficiency is broadly identified, further detailed examination is required before action can be taken to address the identified problem.

It is clear, however, that whatever action is taken requires careful planning, implementation, and follow-up. It is easy to say that ‘training will improve our performance’; ‘computers will make all the difference’; ‘better information systems will help us’; and ‘more staff will solve our problems’. But each initiative for change, as identified by the assessment process, requires careful planning and the appointment of a focal person responsible for leading the planning and implementation process.

## Planning for change

If the assessment exercise and the related fact-finding and analysis show that improvements are required, the planning process to effect the required changes will differ according to the magnitude of the change envisaged. Two examples are presented, namely planning a training activity for conciliators/mediators, and planning for the introduction of a computerized labour dispute case management system.



## Training for conciliator/mediators

A plan for the training of conciliators/mediators can take the form of an action plan identifying what the desired goal is, who needs to do what and when, what are the indicators of success, and what are the resource requirements.

### **Action plan: Example**

**Objective:** To plan, conduct, implement and follow-up a 5-day training course for conciliators/mediators to provide them with the knowledge and skills required to enable them to handle all aspects of the conciliation/mediation process more efficiently and effectively.

Action Steps	Who	Who Else	When	Remarks
Step 1				
Step 2				
Step 3				
Step 4				
Step 5				
Step 6				
Step 7				
Step 8				
Step 9				
Step 10				
Resource requirements				
Indicators of success				

Some of the **Action Steps** to be taken could include the following:

- Decide on the number of participants;
- Identify the actual participants;
- Identify the course director;
- Indicate the specific objectives of the training (e.g., what should participants be able to do on completion of the training?);
- Prepare a training course outline (objectives, content, methodology);
- Prepare a timetable showing the sequence of materials to be presented on a session-by-session basis;
- Identify key resource persons;
- Prepare training materials including handouts, exercises, role plays;
- Identify a suitable venue, including space for group work;
- Obtain training equipment (media players, computers, whiteboards, flip charts);
- Provide refreshments for breaks;
- Conduct the actual training;
- Conduct reaction evaluations (at the end of the course or possibly at the end of each day);
- Conduct performance evaluations some weeks/months after the training to assess whether the individual participants are more effective and efficient;
- Conduct an impact evaluation some months after the training to assess whether the overall conciliation/mediation system is performing better;

**Indicators of success** could include:

- Grades given for any exercises and tests conducted during the course;



- Attendance levels throughout the course;
- The number of positive reaction evaluations;
- Positive comments from participants on-the-job some time after completion of the training;
- Conciliation/mediation success rates before and after training;
- Number of positive responses in client satisfaction surveys;
- Mentors' reports on mentees.

Clearly, training activities need to be carefully planned if they are to have the desired impact on performance. Training has a cost beyond the direct expenditure for the training activity itself, and during training participants are not available for their normal duties and are therefore not productive. Careful planning, however, can ensure that the benefits of training are greater than its costs and that each activity represents 'good value'.

The issue of training is also addressed in chapter 6.

## Computerized dispute case management system

The computerization of a case management system requires more detailed planning than provided by a one-event action plan as indicated above. It requires the preparation of a detailed project proposal with clear objectives, outputs and ultimate outcomes, as well as activities, resource requirements, time frames and management and monitoring arrangements. A project of this magnitude will also involve the preparation and implementation of various action plans for specific activities under the overall project, including, for example, software development, procurement of equipment, staff training, and system monitoring. Further information relating to case management systems is provided in chapter 6.

A proposal for a project of this type might be developed under the following headings.

### ***Background and justification***

This section could outline the nature of the current case management system, highlighting its main shortcomings. The advantages of a computerized system could be outlined, including how it would impact the overall performance of the labour dispute system.

This section needs to provide an overview of the problems to be addressed by the project, convince decision-makers of the need for change, and provide an overview of how the new system will benefit the clients and users of the labour dispute system.

### ***Duration***

This section should indicate the duration of the project and its proposed commencement date. The conversion of a manual case management system to a computerized one will take considerable time, depending of course on the size of the caseload and the amount of information the system seeks to capture.

### ***Purpose and objectives***

This section should state in broad terms the overall purpose of the computerized system and, more specifically, what will be achieved by the end of the project. Some examples of 'by the end of project statements' include:

- 'a computerized case management system will be designed, trialled and fully operational';
- 'all officers will be trained to operate the new system';
- 'all field offices will be equipped with the necessary computers and able to both access and input information from and to a central data bank'.

The statement of objectives should be supported by the performance indicators that will be used to assess whether the stated objectives have been achieved. Normally, these would be measurable and include such things as the number of computers purchased and installed, the number of officers trained, and the number of cases in the system.



Stating the specific objectives of the project is important not only to guide project implementation, but also for the process of project evaluation in which actual results are compared with those forecast.

### ***Outputs and activities***

The achievement of the project's objectives requires that outputs be produced. These represent the planned results of the project, with each output supported by a number of activities to ensure that the output is actually produced. Thus, objectives require outputs, and outputs require activities.

For example, an output that states '200 officers will be trained to input and retrieve case information from the system' requires several activities including:

- planning a training programme;
- preparing operations manuals;
- conducting the training;
- providing follow-up support;
- monitoring performance.

The outputs should be presented in a logical sequence. For example, providing computer-skills training would normally take place after the computerized system has been designed and tested so that the training has the required focus.

### ***Resource requirements***

Outputs require activities and activities require resources. Each output and its related activities should have a cost estimate for items such as the cost of a training course, the purchase of hardware, the development of software, the fees for consultants, local transport costs – indeed, estimates for each and every expenditure required to enable the activity to take place and for the related output to be produced.

The project budget would normally be presented for each year, distinguishing between capital and recurrent expenditures. The total estimated cost, possibly including an amount for contingencies, should be clearly shown. Budget estimates should be as accurate as possible to support a realistic cost-benefit assessment of the proposed project in order to enable decision-makers to decide whether it represents good value for the required expenditure.

### ***Management and monitoring***

The project proposal should spell out how the project will be managed. Normally a project manager would be appointed, supported by a task force or team which ideally includes representatives of both employers and employees, as well as computer systems specialists.

The project manager may come from within the labour dispute system itself or be specially recruited for the task. External recruitment will add to the project's costs but provides an opportunity to recruit a specialist with the required experience.

The project manager together with the task force team need to address the issue of how to ensure that the development of a new computerized system does not cause a disruption to the services provided by the labour dispute system. Manual recording and the development of the computerized system will take place simultaneously and a change-over plan will need to be prepared and implemented to ensure that labour dispute services continue without interruption.

### ***Reporting***

The project manager would normally prepare a project inception report within 3–6 months of the project's commencement to keep senior decision-makers and resource providers informed of progress. Regular progress reports should be prepared thereafter, drawing attention to successes and achievements, as well as shortcomings and issues to be addressed.






## ***Evaluation***

The project manager and the task force have responsibility for the day-to-day monitoring of the project so as to ensure that activities are completed as planned and in a timely manner, that the project remains within its budget, and that planned outputs are actually produced.

As well as on-going monitoring of the project, there are advantages in having a mid-term project evaluation to assess whether the project is on track and likely to achieve its overall purpose or ultimate outcome. This might be conducted by an independent evaluator or team who can provide advice on any project design issue and suggest how project implementation might be improved.

An end-of-project evaluation can also be conducted to assess overall outcomes and impact. It can determine whether the computerized case management system is efficient, effective and generating the benefits for which it was designed.



Performance improvement for an existing labour dispute system can be achieved through revitalization, provided that the changes made are real rather than cosmetic, properly planned, and implemented with commitment and energy.

A well planned training programme, the computerization of existing manual systems, the redesign of forms and streamlining of procedures, improved management, better communication and improved industrial relations within the system itself, can all make a difference and result in better services for the system's clients. With the exception of computerization, the resource requirements for such changes are not excessive and might be generated through better use of those resources already available to the system.

However, if the system fails to provide meaningful services to its clients, has lost the respect of employees and employers and has no clear vision and mission, then revitalization is not enough. Change of a more fundamental nature is required.







## CHAPTER 4

### Establishing an independent authority

Policy direction .....	80
Establishing an independent authority: Getting the policy right .....	81
Taking the initiative: Who will lead the change process? .....	94
Legislative arrangements .....	95
An independent body: Structure and operations .....	108



## CHAPTER 4

# Establishing an independent authority

**T**he previous chapter examines the issue of performance improvement through revitalization and the strengthening of an existing dispute management system. Revitalization refers to doing things differently – to enliven, to energize, to stimulate, to rejuvenate – but without major restructuring or reorganization, policy and laws remain largely unchanged and improvements rely on increased resource support, training and related activities, computerization and modification of existing systems and procedures. Change is incremental and evolutionary but often fails to address fundamental problems.

This chapter considers what needs to be done when revitalization will not bring about the performance improvements required and the need for change of a more fundamental nature is recognized. It is intended to provide guidance for decision-makers seeking to replace a government-operated dispute management system as found in a typical department of labour, with an independent, autonomous authority operating under its own legislation and governing council.



In some cases, the assessment process concludes that revitalization will not overcome the performance deficits. Major restructuring is required, meaning that there is a need for a fundamental reorientation of the dispute management system, directed not only to doing things differently but also doing different things. Change is more total than partial, more revolutionary rather than evolutionary, involving the creation of new institutions and the introduction of new arrangements and procedures, underpinned by new policies and new laws as appropriate.

## Policy direction

Such fundamental and revolutionary change requires new policy direction. The term policy can be confusing. In some contexts it refers to operational procedures and rules as, for example, a corporate policy on safety and health, discipline, or workplace harassment. This level of policy focuses on rules that are applied and enforced, and sanctions applied when rules are broken.

In other contexts, policy is seen in the same light as laws: read the law and the policy becomes obvious.

However, for present purposes, policy refers to statements of intention that provide the guidelines for future action. Policies in themselves are not legally binding. They require the introduction of specific interventions in order to ensure that intentions are transformed into behavioral change in targeted institutions and individuals.

Fundamental change to a country's dispute management system requires sound policy guidelines prepared in close consultation with all stakeholders, resulting in the preparation of a policy document that elaborates why change is necessary, what changes are planned, and how these changes will be introduced. The policy document, once finalized and endorsed, will in most cases require specific legislative interventions – new laws or amendments to those already in place – to ensure that policy intentions are realized in practice.





## Establishing an independent authority: Getting the policy right

Bringing about fundamental reform and restructuring of a country's labour dispute system by creating a new body to replace an existing one requires clear policy guidance. Typically, the new, autonomous, independent commission or authority takes over the dispute prevention and resolution functions of a department of labour, but with a new vision, a new mission, and new arrangements.

The preparation of a policy paper supporting the creation of an independent authority might include the following components:

### Background

### Purpose and objectives

### Policy elements

### Structure and organization

### Operational arrangements

### Resource implications

### Transitory arrangements

## Background

This part of the policy document should indicate why change is necessary. It could include:

- a brief overview of the existing arrangements;
- the weaknesses and shortcomings of the existing arrangements, including factual and anecdotal information (e.g., predominance of adjudication with its related costs and delays, the adversarial nature of court proceedings, low conciliation/mediation success rates, an emphasis on settlement rather than prevention);
- the importance of consensus-based decision-making through negotiation and bargaining for both the prevention and resolution of disputes;

- the importance of effective conciliation/mediation and arbitration services as distinct from adjudication, not only for resolving disputes but also for their contribution to national social and economic progress;
- the economic benefits to the nation and its enterprises of an effective labour dispute system, and the importance of good governance and respect for its key characteristics;
- the importance of good practice relating to labour dispute systems and respect for the key elements of such systems.

The background section of the policy paper might give special emphasis to the need to create effective workplaces through new approaches to dispute prevention and resolution, as a means of enhancing enterprise productivity and profitability, and thereby encouraging employer support for the proposed new approaches.

## Policy purpose and objectives

This part of the policy document should indicate what the policy seeks to achieve in general terms, as well as the specific outcomes that will result from policy implementation.

**As an example, the policy paper might include a statement along the following lines.**

*The overall purpose of this policy is to restructure and reform the nation's labour dispute resolution system through the creation of a new institution titled the 'Conciliation and Arbitration Commission' funded by the State but independent of any political party, trade union, employer or business, directed to the prevention and resolution of labour disputes of all types, in both the private and public sectors, operating in accordance with the universal principles and characteristics of good governance, thereby contributing to national economic progress and social harmony.*

(Obviously, the title of the independent body is a matter for each country to decide. The use of 'Conciliation and Arbitration Commission' in this case is purely illustrative and not intended to be prescriptive in any way.)



**With regard to the specific objectives of the policy, reference could be made to the following.**

More specifically, the effective implementation of this policy is intended to:

- ensure that employers and employees assume greater responsibility for preventing and minimizing conflict and disputes in the workplace;
- encourage employers and employees to resolve their conflict and disagreement through consensus, negotiation, and bargaining without the intervention of third parties;
- ensure that disputing parties have access to free and voluntary conciliation/mediation and related services to assist them to resolve their differences;
- ensure that disputing parties in situations where conciliation/mediation has failed have access to impartial arbitration services to hear their dispute and make a determination;
- provide for the accreditation of private sector agencies and individuals, to enable them to play a role in the delivery of dispute prevention and resolution services;
- ensure that employees and employers throughout the country have ready access to the services provided by the dispute management system.

It is important that the statement of purpose and objectives focuses on what is realistically attainable. For example, a policy paper that states or implies that labour disputes will be eliminated as a result of the proposed changes is likely to be severely criticized as unrealistic and totally speculative.

## Vision and mission statements

A policy paper might spell out the vision and mission of the institution, although this would normally come later in order to ensure that the commission's governing council and director play a key role in the preparation of a vision and mission statement.

A **vision** is a written statement, usually short and simple, that indicates the aspirations of the institution, what it is striving for, how it sees itself, and how it wants to be seen by others.

### **The vision of the United Kingdom's Advisory, Conciliation and Arbitration Service (ACAS) is as follows.**

- To be Britain's champion for successful workplaces and a motivated workforce.

### **South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) has the following vision.**

- To be the premier dispute management and dispute resolution organization.

A **mission** statement sets out the what and why of an organization or institution, what it exists to do, and the end purpose for the things that it does. It can also provide the basis on which its overall performance can be assessed.

### **The CCMA in South Africa has the following mission statement.**

- The purpose of CCMA is to promote social justice and economic development in the world of work and to be the best dispute management and dispute resolution organization, trusted by our social partners.



**The mission of the National Labour Commission (NLC in Ghana) is stated as follows.**

- To develop and sustain a peaceful and harmonious industrial environment through the use of effective dispute resolution practices, promotion of cooperation between labour market players, and mutual respect for their rights and obligations.

Mission statements identify the general functional responsibilities of the institution and thus provide the essential foundation for creating the structures and operational arrangements to support its work.

## Policy elements

The policy paper should indicate what the new institution is intended to do. The policy elements might include the following.

### ***Dispute prevention and resolution in the workplace***

Under this policy element, reference could be made to the commission:

- helping to build a foundation of trust between employers and workers;
- encouraging and supporting employers' organizations and trade unions to help build this foundation;
- providing information and advice on workable arrangements for information-sharing and consultation in the workplace;
- providing information, advice and training on consensus-based approaches to decision-making and power-sharing in the workplace, with a particular emphasis on collective bargaining and collective bargaining agreements;
- providing advice on the preparation of policy documents in specific areas such as non-discrimination, harassment and bullying, and grievance handling;

- providing information and advice on the gender issues that might need to be addressed in the workplace through both collective bargaining and consultative processes;
- encouraging workers and employers to participate jointly in training activities;
- facilitating joint problem-solving activities, fact-finding, and investigations to help prevent deadlocks in the bargaining process;
- facilitating in every way possible its mandate to have disputes resolved within the workplace by the parties themselves.

### ***Conciliation/mediation of disputes***

Under this policy element, reference could be made to the commission:

- introducing systems to enable the referral for conciliation/mediation of all disputes except those specifically falling outside its jurisdiction (such as commercial disputes);
- providing pre-conciliation/mediation services with a view to filtering out those disputes that fall outside the jurisdiction of the conciliation/mediation service;
- providing conciliation/mediation services that are voluntary and free of charge to the disputing parties;
- ensuring that conciliation/mediation services are provided by qualified and competent conciliators/mediators, with a view to achieving the highest possible resolution rate for disputes at the conciliation/mediation stage;
- ensuring that the appointment of conciliators/mediators takes account of the relevant demographic characteristics of the country, including gender.

### ***Arbitration of disputes***

Under this policy element, reference could be made to the commission:



- introducing systems to enable the disputing parties to request arbitration for those disputes not resolved at the conciliation/mediation stage;
- providing arbitration services that are relatively informal, less legalistic, and quicker than court proceedings;
- providing for ‘conciliation-arbitration’ hearings in which unsuccessful conciliation is followed immediately by arbitration (on the same day where possible), as part of a ‘one-sitting, two step’ process;
- ensuring that arbitration hearings are undertaken by qualified, impartial, and neutral arbitrators;
- ensuring that the appointment of arbitrators is demographically representative of the population of the country.

### ***Private and public sectors***

Under this policy element reference could be made to the commission:

- providing dispute prevention and resolution services to both private and public sectors (including government departments and statutory bodies) on an equal basis;
- deciding whether the independent body needs to be structured and staffed in such a way as to accommodate the special interests of the public sector;
- deciding whether the independent body needs to be structured and staffed in such a way as to accommodate the special needs of particular industries in the private sector (e.g., mining, maritime, garment manufacturing).

### ***Bargaining councils***

Under this policy element reference could be made to the commission:

- encouraging the development of bargaining councils at industry, sector, or regional levels as appropriate, such bodies to be comprised of representatives of employers’ and workers’

representatives, and empowered to resolve disputes arising from collective bargaining for the concerned industry, sector, or region;

- arranging for a system of accreditation of such bargaining units, with a view to enabling them to provide the same range of services for their designated industry, sector, or region as provided by the commission itself.

### ***Private sector involvement***

Under this policy element, reference could be made to the commission:

- supporting the involvement of private sector operators in the dispute management system through an accreditation and re-accreditation system as approved by the commission's governing council;
- advising on a schedule of fees payable by the disputing parties to private conciliators/mediators and arbitrators;
- requiring private conciliators/mediators and arbitrators to subscribe to a code of behavior similar to the code required of the commission's conciliators/mediators and arbitrators.

### ***Atypical work arrangements***

Under this policy element, reference could be made to the commission:

- providing dispute resolution services to all employees including those engaged under atypical work arrangements such as contract workers, homeworkers, agricultural workers, domestic workers, street vendors, and others where an employer-employee relationship is evident.

### ***Countrywide services***

Under this policy element, reference could be made to the commission:

- ensuring that its services are available on a nationwide basis through the establishment of district, provincial, or regional offices, as appropriate;





- providing mobile services and technological innovation for employees and employers in those parts of the country where the commission's offices are not readily accessible.

### ***Gender issues***

Under this policy element, reference could be made to the commission:

- providing, as far as reasonably possible, for equal gender representation in its governing council;
- ensuring a reasonable gender balance in the appointment of conciliators/mediators and arbitrators;
- applying gender considerations in its accreditation of bargaining units and private sector operators;
- ensuring that gender issues are addressed in its information, advisory and training activities, as well as its conciliation/mediation and arbitration proceedings;
- establishing and maintaining relations with government ministries and agencies as well as civil society organizations responsible for gender issues.

### ***Governing council***

Under this policy element, reference could be made to the commission:

- having a broadly representative governing council established by law and indicating who will be responsible for appointing its members;
- having a chairperson of its governing council and indicating the procedures for appointing that chairperson;
- having legislation which will spell out the council's member-eligibility criteria and the council's responsibilities, which could include, for example, ensuring that the commission observes high standards of corporate governance, properly utilizes all funds at

its disposal, operates effectively and efficiently, and operates in accordance with its mission and vision.

### ***Director***

Under this policy element, reference could be made to the commission:

- having a director as its chief executive officer and indicating who is responsible for appointing the director;
- having the duties and responsibilities of its director stipulated by law;
- stipulating the term of office of the director.

### ***Reporting and transparency***

Under this policy element, reference could be made to the commission:

- preparing reports (quarterly or half-yearly) of its activities in print and electronic formats as appropriate;
- preparing an annual report of its activities, including an audited statement of income and expenditures, to be tabled in Parliament;
- engaging in awareness-raising activities and publicity in accordance with guidelines established by the governing council and consistent with the need to respect confidentiality.

### ***Labour administration***

Under this policy element, reference could be made to the commission:

- establishing and maintaining relations with other components of the country's labour administration system, particularly those parts that relate in some way to dispute prevention (e.g., labour inspection).



## ***Structure and organization***

The policy paper might provide guidance on the formation and operation of a governing council to oversee the work of the commission, monitor its overall performance in relation to its mandate, and ensure that the body operates in accordance with the requirements of good governance.

The policy paper might also make reference to the need for the governing council or board of the independent body to be established by legislation. This reference could include:

- the importance of an independent governing council;
- suggestions on the council's membership as, for example, equal representation from Government, employers and workers, as well as specialists in the field of industrial relations;
- a commitment to a reasonable demographic representation on the council;
- arrangements for the appointment of council members and the council's chairperson;
- responsibilities of the chairperson, including financial reporting requirements;
- arrangements for the appointment of the director and deputy director of the independent body;
- the role of the council in the appointment of the independent body's conciliators/mediators, arbitrators, and other staff;
- the role of the council in the preparation of the independent body's vision and mission statement, and its strategic plans.

The policy document could indicate whether the independent body should have a decentralized structure with field offices to be established in various locations, and whether mobile services could be provided to serve remote locations.

The policy should make some reference to the service units required to support the structure to provide financial, procurement,

administrative, human resource and information services. Particular reference could be made to the importance of computer technology, including Internet, intranet, SMS and email facilities consistent with the body's standing as a modern, progressive and client-oriented institution.

## Operational arrangements

The policy could make some reference to operational arrangements, to be further elaborated in legislation and internal procedures. These might include:

- the procedures for employers and employees to follow when requesting assistance for advisory and training services;
- the procedures and systems, including forms and templates, for notifying disputes and referring disputes for conciliation/mediation;
- procedures at the stage of pre-conciliation/mediation;
- procedures to be followed for the outcome of conciliation/mediation including both successful and failed conciliations/mediations;
- procedures for requesting arbitration services, including forms and templates;
- preparing the arbitration award, and indicating the limited circumstances in which appeals can be made;
- the procedures to be followed in 'con-arb' proceedings;
- the procedures and arrangements for the accreditation of bargaining councils and their scope of operations;
- the procedures and arrangements for the accreditation of private agents offering conciliation and arbitration services.

In addition to specific aspects of operational procedures, the policy might also refer to important operational matters that are of general application.



These include such things as:

- a code of conduct/behavior for staff including all conciliator/mediators and arbitrators, whether full or part-time, as well as accredited private agents;
- performance indicators and targets for conciliators/mediators and arbitrators and related monitoring process;
- qualifications and training requirements for all conciliators/mediators and arbitrators, including accredited private agents;
- a computerized case management system that provides real time information on each and every case referred to the commission.

## Resource provision

The policy document should make it clear that although the commission is an independent autonomous body, it is financially dependent on the State. The commitment of Government to finance the commission, based on the commission's annual budget estimates, needs to be stated in law.

In addition, the policy might give guidance concerning the circumstances under which the commission is empowered to receive donations, gifts and bequests, whether fees can be charged for the advisory and training services it provides, and whether administrative and filing fees can be charged.

## Transitory arrangements

A fundamental change in the labour dispute system requires that attention be given to the arrangements in place to accommodate the transition from the old to the new, from a traditional government-run system, to one that is independent.

Will the old system simply cease to exist and be replaced on a specified date by a new and different body, or will the old system continue to operate in parallel with the new for a given period?

The policy document could indicate a time frame for the commission to commence operations, ensuring that sufficient time is provided for debating the policy issues, amending existing laws or preparing new legislation, establishing the governing council, appointing the chief and deputy executive of the commission, appointing and deploying conciliators/mediators and arbitrators, establishing offices and procuring equipment, designing forms and templates, setting up operational procedures, and installing computerized systems.

## **Taking the initiative: Who will lead the change process?**

The drive for fundamental change may come from trade unions, which may see traditional labour administration systems as biased in favor of employers, thus providing few prospects for fair and impartial dispute resolution.

Alternatively, the drive may come from employers who see the system as favoring workers.

The drive for fundamental change may come from an enlightened labour administration, although this may require some power-shedding by that administration.

The drive may come from a political level, particularly where industrial conflict has had significant negative spillover effects in terms of strikes, lost production, lost earnings, and a disenchanting public.

The driving force behind fundamental change is a realization 'that something is wrong with the system' on the one hand, and that 'something has to be done about it' on the other.

The realization that 'something is wrong' may be the result of a major event or series of events (demonstrations and violence, enterprise closures), or it may be related to political change where a new party in power says 'we have known for some time that something is wrong and now we plan to do something about it'.



Ideally, the realization that ‘something is wrong with the system’ comes from a consortium of interests led by respected and responsible persons in a position to ‘do something about it’. This must include political representatives, hopefully also supported by union and business leaders, together with respected persons from civil society.

The realization that ‘something is wrong’ can lead the Government to appoint a high-level task force or body to assess the existing situation and propose a balanced agenda for change that meets the interests of employers, workers, and society as a whole. An independently-constituted, neutral commission, supported by enlightened policies and laws, professionally staffed and well-resourced, can lead the way forward in ‘doing something about it’.

Once the need for change is acknowledged, policy guidance is required to drive the change process.

The preparation of a policy paper on the establishment of an independent dispute management commission or similar body should be based on on-going consultations with all concerned parties, including submissions from interested organizations and individuals, in addition to the social partners.

A managed change process starts with the assessment of the existing situation but must then be supported by clear policy guidance.

## Legislative arrangements

Once a labour dispute prevention and resolution policy is in place, action needs to be taken to ensure the policy is effectively implemented. In some situations, policies may be implemented through the processes of information, education, and persuasion, but in most cases legislation is required to bring policies to life. Even then, enacting legislation is no guarantee that policy intentions will

be fully realized, in the same manner that laws are not always fully implemented for various reasons, including:

- a lack of knowledge of the content of the law on the part of those to whom it applies;
- a lack of knowledge as to what people actually need to do to comply with the law;
- a lack of resources by those agencies responsible for ensuring compliance;
- deliberate evasion of the law by some parties who see compliance as too costly;
- inertia and corruption on the part of implementing and enforcement authorities.

## Preparing the legal framework

Policy documents provide guidelines for action, while laws provide the substance and detail to support policy intentions by imposing legal obligations and providing legal protection, as appropriate. In preparing and implementing a legal framework to support a new approach to dispute management and create an independent authority for dispute prevention and resolution, the following issues should be considered.

### ***Congruence between policies and laws***

Legislation should be consistent with and support policy intentions.

#### **Examples**

A policy paper that seeks to encourage collective bargaining as a key element of dispute prevention and resolution will have little impact if legislative provisions make it very difficult for workers to organize, register, gain recognition, and actually bargain with their employers.





A policy that seeks to support voluntary conciliation/mediation and arbitration will be compromised if legislation makes conciliation/mediation and arbitration compulsory in some circumstances.

A policy that aims for a consensus-based approach to dispute resolution will be undermined by legislation that stresses adjudication as the main method for resolving disputes.

A policy that recognizes the need to provide for the prevention and resolution of disputes for all employees in all work situations will fail if: legislation contains very restricted definitions of 'employee', 'worker' and 'workplace'; specifically excludes certain categories of employees (e.g., domestic servants, agricultural workers); or totally ignores the situation of employees engaged in atypical work or alternative work arrangements (including employment in the informal economy, home-work activities, and work undertaken on a contract basis.)

A policy that encourages collective bargaining at the enterprise level as the main focus for dispute prevention and resolution will be discredited if laws require the introduction of works' councils or similar bodies empowered to negotiate with employers independently of trade unions.

### ***Comparison with other countries***

Although each country's circumstances are different, there is considerable benefit to be gained from learning how different countries approach legislative change. Countries considering establishing independent labour dispute resolution commissions can draw on the recent experiences of Tanzania, Ghana and South Africa, as well as the more established systems in the USA, Canada, the UK and Ireland, not only concerning the preparation of legislation but also on a range of operational matters to be considered in introducing a change of this type.

### ***Regulatory balance***

This involves a form of regulatory cost-benefit analysis that attempts to balance considerations of social protection with those of economic efficiency. There is a need to consider both the possibility of under-regulation and the related possibility of insufficient social protection,

as well as over-regulation and the related negative effect on economic efficiency. Under-regulation runs the risk of legislation failing to support policy intentions and purpose, while over-regulation runs the risk of planned avoidance and deliberate evasion.

There is also a need to introduce legislation that is seen as a positive intervention rather than a negative interference.

### ***Administrative capacity***

The drafting of laws should take account of the practicalities concerning its administration and application. Legal drafters should constantly ask whether the legislation being prepared can be effectively applied and enforced. This involves consideration of the existing institutional framework and available resource capacity, particularly staff, to enforce laws and secure compliance.

Where institutional and resource capacity is lacking, the law itself may need to include provisions directly designed to strengthen capacity or encourage greater self-compliance.

### ***New legislation versus amending existing legislation***

There are many challenges to amending existing legislation, or drafting new laws. Amending existing legislation involves deleting and inserting, and affords drafters relatively less freedom than the preparation of new legislation. New legislation involves preparing a law on a matter not previously legislated as, for example, the establishment of an independent conciliation and arbitration commission. This provides drafters with more freedom and will often be the preferred option, particularly where labour laws are outdated, poorly balanced between the goals of social protection and economic efficiency, unnecessarily complicated, poorly worded, and generally difficult to administer and apply.

The repeal of existing laws and their replacement in accordance with the guidelines in this section may be a more appropriate approach than one involving frequent amendments to meet changing circumstances.



### ***Compatibility with existing obligations***

Legislation needs to consider the rights established by the country's constitution, and its obligations under ratified international treaties, including ILO Conventions.

Enabling legislation should also take account of existing laws, unless of course the intention of the new legislation is to change those laws already in existence.

### ***Purpose of legislation***

Legislation to establish an independent dispute management authority should have a clear purpose and related objectives that reflect policy intentions. A clear statement of the purpose and objectives of the legislation in effect 'unites' the legislators and the parties to be affected by that legislation, and also assists in the interpretation and application of the law by the responsible administrative and judicial bodies.

## **Participation by stakeholders**

As with the formulation of the policy itself, the process of drafting legislation requires the participation of stakeholders affected by the law, as well as persons with special interests and expertise.

Participation can be through an *ad hoc* task force, representative of all stakeholder interests, created for this specific purpose or, alternatively, through a permanent tripartite body, or possibly a committee of that permanent body.

The actual modalities of participation may be in the form of detailed and ongoing involvement of stakeholders in the actual drafting of each section and sub-section of the law. Alternatively, participation may focus more on consultation with stakeholders after the law has been drafted by technical experts. A combination of these approaches can ensure that stakeholders are involved at all stages of the drafting process.

For example, the National Economic Development and Labour Council (NEDLAC) in South Africa strives for 'representative consensus' on a range of social, economic, and development issues. Its activities include a consideration of all draft legislation before it is submitted to Parliament. This process was followed, for example, in relation to the Labour Relations Act, 1995 which established the Commission for Conciliation Mediation and Arbitration (CCMA.)

Participation in the drafting process might also extend beyond the Ministry of Labour and representatives of the social partners. From within Government, representation can also come from the Attorney General's Department, the ministry of finance, the ministry of industry, the ministry of women's affairs, as well as from independent judicial bodies such as the law reform commission and the ombudsman's office.

In addition to representatives from employers' and workers' organizations, the drafting process could benefit from the involvement of chambers of commerce, export and manufacturers' organizations, consumer groups, law societies, academics, and representatives from civil society including religious groups and groups responsible for marginalized workers such as homeworkers, children and youth.

Inevitably, participation will lengthen the time period for formulating laws but should significantly enhance the overall quality of the legislation and improve the prospects for securing compliance. Parties who are actively involved in decision-making are much more likely to be committed to those decisions and thus more readily compliant.

Participation should extend beyond consultation relating to Acts of Parliament to include consultations relating to ordinances, regulations and orders that are the subject of executive authority without proceeding through Parliament.

## User-friendly language

The use of simple language in the drafting of legislation should be encouraged to make it easier for the end-user (or audience) to understand the law without compromising the law concepts and meanings.



Simple language encompasses the following:

- Using short sentences.
- Avoiding jargon and colloquial expressions.
- Using one word instead of several to convey the same meaning.
- Using short words rather than long ones.
- Avoiding double and triple negatives.
- Using the active rather than passive voice.
- Using words consistently (e.g., where there is reference to ‘days’ it should be clear whether this means calendar days or working days; using ‘shall’ for mandatory provisions and ‘may’ for discretionary ones).
- Identifying and removing ambiguities (e.g., as between employee and worker, between working days and calendar days, between ‘all harassment’ and ‘unlawful harassment’).
- Using examples to clarify meanings.
- Avoiding the use of Latin phrases.
- Placing verb immediately after subject.
- Avoiding the use of ‘he’ and ‘she’ unless required for a specific purpose.

## Structure and presentation

User-friendly laws extend beyond the use of simple language and should take into consideration a number of additional matters, including the following.

**Planning** Planning involves identifying the end-users of the law and accepting that ‘end-user’ includes persons other than lawyers. End-users may range from highly literate to illiterate persons and

includes potential future users (e.g., school leavers, vocational training students).

**Structure** Once the end-users have been identified, a suitable structure can be established enabling the law to flow in a logical sequence.

**Layout** The layout of the law should avoid long slabs of unbroken text, make generous use of spacing, and clearly separate conditions and exceptions from the articles to which they relate.

**Supplementary guides** End-users of the law can be assisted by the preparation of pamphlets and booklets that summarize the main provisions, provide examples, show calculations where appropriate and clarify meanings by the use of diagrams.

**Translations** In many cases, laws are drafted in one language and then translated into another. This reinforces the need for simple language to ensure that meanings are the same in both languages. After translation from English to Khmer, for example, it is advisable that a reverse translation from Khmer to English be undertaken by a different translator to ensure that meanings have not been lost in the initial translation.

**Sample testing** Once a law has been drafted, a test of understanding by identified end-users can be useful in identifying areas where meanings are unclear or language is too complicated.



### Legal framework for dispute prevention and resolution

- Laws should reflect and elaborate policy intentions.
- Laws should consider the experience of other countries, not necessarily in detail but certainly in intent.
- Laws should be drafted with issues of administrative capacity, enforcement and securing compliance in mind.
- Laws should strive for a suitable balance between social protection and economic efficiency.
- Laws should be consistent with a country's obligations under its constitution, international treaties and existing laws.
- Laws should state their purpose and objectives.
- Laws should be drafted and prepared in consultation with stakeholders.
- Laws should be presented in simple and user-friendly language.

## Establishing an independent body or commission

Invariably, the establishment of an independent dispute management authority will require new legislation and possibly some amendments to existing laws. New legislation might consider the following.

### *Establishment*

The law should indicate that the independent body or commission is formally created and 'hereby established', and given a name such as the Conciliation and Arbitration Commission, Commission for Mediation and Arbitration, Commission for Conciliation, Mediation and Arbitration, National Labour Commission, Advisory Conciliation and Arbitration Service, or such other title that meets national circumstances.

## ***Independence***

The law should indicate that the commission is an independent body and specify what independence actually means. For example, the law might state that the commission “shall be independent of any political party, trade union, federation of trade unions or employers’ organization” and “shall not be subject to the direction or control of any person or authority other than its own”. The law, however, might also make reference to the fact that independence does not mean independence from the Government’s financial requirements. An independent body receiving government funds, although free from government interference, is still required to operate in accordance with government and treasury regulations. Although a statutory body, it is still government-funded, and in this sense is not totally independent.

## ***Functions***

The law should indicate the functions of the independent body or commission. Its functions might include providing information, advice and training to employers and employees concerning the prevention and resolution of disputes, the provision of conciliation/mediation services, and the provision of arbitration services when conciliation/mediation has failed. National circumstances will determine the specific functions of the independent body.

## ***Governing council***

Enabling laws should include provisions for the creation and establishment of a governing council for the independent authority or commission.

The law should indicate the number of council members, the organizations they represent, the appointment of a chairperson (by whom, and the criteria for appointment), the period of office of the chairperson and council members, and their eligibility for re-appointment. The law could also indicate the circumstances and procedures for the termination of council members’ and chairperson’s tenure, and their entitlements to remuneration and or/sitting fees.





The law should make specific reference to gender representation on the governing council.

### ***Functions of the governing council***

The law should indicate the functions of the council by reference to its role in giving strategic direction to the commission's work, advising on policies and procedures, and monitoring the commission's activities to ensure the commission operates in accordance with its objectives and targets.

The law might also require that the council observe high standards of corporate governance for both itself and the commission for which it is responsible, stipulate that the council assume responsibility to ensure that the commission operates in accordance with sound environmental policies and practice, and ensure that the commission makes efficient and effective use of public funds.

### ***Director and deputy director***

The law should make some reference to the appointment of a director and deputy director of the commission, and indicate the procedures for their appointment (including the involvement of the governing council) and their responsibilities and powers (including the power to delegate). The law should also establish the director as an *ex-officio* member of the governing council and stipulate requirements concerning the director's attendance at meetings of the governing council.

### ***Appointment of conciliators/mediators and arbitrators***

The law should indicate the role of the governing council and the commission's director in the appointment of full-time and part-time staff, with specific reference to the appointment of conciliators/mediators and arbitrators. The law could also specify the qualifications and experience required for appointment as a conciliator/mediator or arbitrator, the body or bodies responsible for establishing the terms and conditions of their employment, and the circumstances under which such officers may be removed from office.

The law should stipulate that both men and women are eligible to be appointed as officers of the commission and that all officers shall comply with a code of behavior/conduct approved and endorsed by the governing council.

The law should also specify whether a person appointed as an officer/commissioner is empowered to undertake both conciliation/mediation and arbitration tasks, as well as provide information and advisory and training services to employers and workers.

### ***Powers of officers/commissioners***

The law should grant the officers/commissioners specific powers in relation to their conciliation/mediation and arbitration functions. These powers should be consistent with the need to respect the voluntary nature of instigating both processes.

The law should require officers/commissioners to ensure that they exercise their powers in a way that addresses and accommodates non-discriminatory and equality issues.

### ***Appointment of support staff***

The law should state that the director of the commission is empowered to appoint senior support staff after consultation with the governing council, and indicate the body or bodies responsible for the terms and conditions of employment for such support staff.

### ***Funds and resources***

The law should state that the commission and its governing council shall be funded from appropriations from the legislature, based on budget estimates prepared by the commission and presented to the legislature by the relevant minister.

The law should state that the commission is empowered to receive funds in the form of donations, grants or bequests, provided these do not compromise the commission's independence.



The law should state that the commission is empowered to collect fees as approved by the governing council for the provision of information and advisory and training services for the benefit of employers and workers.

The law should stipulate that all conciliation/mediation and arbitration services provided by the commission are free of charge, and indicate whether filing and administrative fees shall apply to parties instigating dispute resolution proceedings.

The law should stipulate that the commission shall maintain detailed financial records and indicate the standards and procedures for the preparation, audit and submission of financial reports to the parliament.

### ***Contracting***

The law should state that the commission is empowered to appoint contractors to undertake the work of the commission.

The law should state that contractors shall receive payment for their services from the commission and not from the commission's clients.

### ***Limitation of liability***

The law should state that the commission shall not be liable for losses suffered by any person for any action or omissions of the commission, governing board, officer/commissioner, staff member or a contractor, where the action or omission was done in good faith.

### ***Reporting***

The law should stipulate that the commission shall prepare and submit an annual report to the legislature in accordance with governmental reporting requirements. For example, the law could require that a report be submitted within six months of the end of the financial year, and that it include certain information. This information might include the audited accounts of the commission, the auditor's report, information on the operations of the commission, including performance-related statistical information and reference to

achievements and shortcomings, and any other information required as part of governmental reporting requirements.

The law should state that the annual report of the commission shall be issued under the signatures of the chairperson of the governing board and the director of the commission.

Policy intentions must be supported by legislation to ensure that the commission has a legal existence, with clear functions and powers. Legislation is also required to ensure the commission receives an annual appropriation from parliament and is held accountable for the expenditure of such funds.

The preparation of legislation can benefit from the experience of other countries that have opted for the establishment of independent commissions.

It is necessary, however, to ensure that legislation reflects national circumstances and realities.

## An independent body: Structure and operations

Once policies have been transformed into legislative action, it is then necessary to ensure that the institutional arrangements and procedures are in place to effectively implement the law and its related policy intentions. This represents a significant challenge for a new institution, but one that has been successfully managed by various countries that have chosen the independent approach to labour dispute resolution.

The institutional setting for an independent commission requires a consideration of the following:

- establishing the commission by law;
- establishing a governing council for the commission;



- establishing the office of director and deputy director of the commission;
- appointing and designating staff of the commission;
- establishing headquarters and decentralized offices of the commission;
- creating an organizational structure for the commission;
- establishing linkages with government departments and other statutory bodies;
- establishing linkages with the labour administration;
- establishing linkages with the social partners and other organizations.

## Organizational structure

Creating an organizational structure for an effective dispute prevention and resolution system is not just a matter of creating departments, divisions, sections, units and cells, finding suitable physical accommodation, procuring equipment and deploying staff, and then deciding what each division, section or unit will do. These are all necessary and important, but it is also necessary that organizational structures flow from the functions to be performed: an organization's structure should be a product of its function.

Structures also need to be created to accommodate the need for the decentralization of service provision. Regional, provincial, district or area offices may need to be established to enable services to be delivered to all who seek them. The number of such offices, their location and the actual services to be provided in each require careful consideration in relation to the institution's vision and mission and the availability of resources. The decentralization of activities also creates a need for effective coordination and communication between the structures in the field and headquarters.

Typically, an independent commission has three mandatory functional responsibilities, namely:

- the provision of information and of advisory and training services to employers and workers, relating to both dispute prevention and dispute resolution;

- the conciliation/mediation of disputes;
- the arbitration of disputes.

These functions suggest a structure of three departments or divisions supported by other sections or units for:

- finance and administration, including procurement, asset control, space management and building maintenance;
- human resource management, including recruitment, staff mobility, training and performance appraisal;
- computer systems management, including the planning and operation of case management systems;
- information management, including awareness-raising, media relations and website development.

Each part of the overall structure, whether it be a department, division, section, unit or district office, needs to be guided by objectives and targets. These need to be clear, specific, realistic, time-related and measurable if performance targets are to apply. Objectives set in consultation with the affected staff are more likely to be realistic and achievable.

## Operational procedures

Systems and procedures must be in place if the dispute management system is to function effectively and efficiently. The procedures must be clear and as simple as possible, and meet the requirements of good governance.

### *Information, advisory and training services*

Some examples of activities where operational systems and procedures are required to support the provision of information, and of advisory and training services, are:

- receiving requests for assistance from clients;
- assessing the needs of clients;



- responding to requests for assistance by, for example, designing tailored training activities, providing pre-negotiation advice and assistance, advising on and preparing workplace cooperation strategies, advising on establishing grievance handling systems;
- assessing fees for planned assistance;
- allocating staff for service delivery;
- recruiting contractors for specific service delivery activities;
- collecting fees for services delivered;
- assessing service performance and evaluating post-service impact;
- collecting and reporting on statistical information, including labour market and dispute resolution statistics, for the benefit of the system's management and stakeholders.

### ***Conciliation/mediation***

The provision of conciliation services requires that operational systems and procedures are in place in at least the following areas:

- receiving notification of disputes to be conciliated (usually on a Referral for Conciliation/Mediation Form) or identifying parties that might be interested by conciliation/mediation services;
- offering conciliation/mediation services and persuading the disputing parties that conciliation is in their best interests, in cases where the parties have not requested such services;
- evaluating the request for conciliation;
- assigning an appropriate officer to conduct the conciliation/mediation;
- dealing with cases where the appointed officer has a conflict of interest;
- identifying and accommodating needs for the conduct of cases, including venues, languages and requirements;

- notifying parties of the date, time and place of the conciliation/mediation;
- notifying parties of the nature of the conciliation/mediation process;
- conducting the actual conciliation/mediation (possibly involving the preparation of procedural manuals and desk books for less experienced conciliators/mediators);
- reporting on conciliation/mediation outcomes;
- preparing a record of non-conciliation/mediation in cases where the dispute remains unresolved;
- inputting information into the case management information system;
- ensuring the parties know the next steps to take in case of deadlock.

### ***Arbitration***


The provision of arbitration services requires that operational systems and procedures be in place in the following areas:

- receiving requests for arbitration (usually on a Request for Arbitration Form);
- assigning an officer to conduct the arbitration;
- assigning an officer where the parties have agreed upon a particular individual;
- assigning another officer where one of both parties party does not wish to have the same officer who handled the conciliation;
- notifying parties of the date, time, and place of the arbitration;
- notifying parties of the nature of the arbitration process;
- conducting the actual arbitration (possibly involving the preparation of procedural manuals or desk books for less experienced arbitrators);





- reporting on arbitration outcomes;
- preparing arbitration determinations or awards;
- ensuring the quality of the award before release;
- inputting information into the case management information system.



This chapter examined the policy issues relating to the creation of an independent labour dispute commission or similar body, and provided an overview of the legal issues to be addressed in order to provide such a commission with a legal identity.

Once the commission has been established by law it must create structures and operational procedures to ensure the delivery of quality services to its clients and thus achieve its fundamental goals.

Structures are the product of functions, functions are the outcome of the vision and mission. Structures flow from what an organization wants to achieve.

For an independent commission, the three main functional responsibilities are the provision of dispute prevention services, conciliation/mediation services, and arbitration services.

Headquarters and field structures should support these three areas. Structures must also provide for support in the areas of finance and administration, human resources, computer services and information management.







## CHAPTER 5

### Raising awareness and providing information

Involvement of social partners .....	<b>126</b>
Sponsored awareness-raising .....	<b>126</b>
Awareness-raising: An ongoing activity .....	<b>127</b>



# Raising awareness and providing information

**A** labour dispute authority is obliged to ensure that the parties it seeks to serve are aware of its existence, the policies it implements and the laws it administers. This requires that resources are made available to support a range of awareness-raising and information-transfer activities to ensure that existing and future users know what services are available and what they must do to access those services.

Some awareness and information activities have a general and promotional emphasis to ensure that the nature, purpose and functions of the labour dispute system are known and understood. Electronic and print media, together with computer technology, are essential components of such communications.

Other awareness and information activities are more directly related to the processes and procedures involved in accessing the services the system provides. Specific information of this type should accommodate the needs of different users and be available in simple language and user-friendly formats. Information technology including innovative websites, telephone help lines and electronic messaging can assist in ensuring specific information is made available to those who require it.

As with other functions of the dispute system, the tasks of raising awareness and providing information concerning the dispute system need to be well managed and sufficient resources should be made available on an ongoing basis.

A managed change process requires that those affected by the proposed and actual changes are well informed of their rights and obligations. This is reflected in ILO Recommendation No. 113 concerning Consultation and Co-operation between Public Authorities and Employers' and Workers' Organisations at the Industrial and National Levels (1960). This Recommendation emphasizes the importance of consulting social partners with respect to the preparation and implementation of laws and regulations affecting their interests, and with respect to the establishment and functioning of national bodies.

With regard to new approaches to dispute prevention and resolution, this process should commence at the policy formulation stage. However, while representatives of key stakeholders involved in policy development may be well informed of policy intentions, their constituents may not be equally so. Similarly, stakeholder representatives involved in drafting laws may not take the necessary steps to ensure that their constituents are fully aware of their legal rights and obligations once the legislation is enacted.

**At the policy development stage**, raising awareness requires that arrangements are in place to:

- publicize the content of policy proposals;
- invite comment from individuals and institutions on proposed policy interventions;
- invite public comment on policy proposals;
- acknowledge the receipt of all comments.

Awareness-raising methods will depend on the resources available to the sponsor of change; it may include information conveyed through:

- general print media including newspaper articles and regular columns, pamphlets, booklets, newsletters and posters;
- print media available to key constituents, namely employer and union organizations;
- radio broadcasts;





- general television news, as well as sponsored time slots;
- websites of all concerned institutions, or the use of various forms of social media;
- public meetings and rallies;
- telephone help lines.

The use of websites and electronic communications is an integral part of modern awareness-raising and is an essential component of a labour dispute management system. Accordingly, the planning and ongoing management of that communication system deserves high priority.

As the sponsor of change, there is a particular obligation on the part of Government to ensure that policy proposals are well publicized and in a form that is readily understood by those likely to be affected by the proposed changes. Governments need to ensure that resources are made available for such publicity campaigns and that such resources are utilized effectively, based on regular evaluation.

**At the legal enactment stage** when a bill becomes law, awareness-raising takes on a new dimension, as the rights and obligations of employers and workers are at stake. Stakeholders are no longer interested in policy intentions alone, but are also concerned about what they are required to do to comply with the law.

In these circumstances, awareness-raising should focus on:

- providing employers and workers with a very clear statement of the content of the law;
- providing information on what employers and workers are required to do to comply with the law;
- the arrangements that will be in place to secure compliance;
- the penalties that will apply in the event of non-compliance;
- the process to be followed if appeals are to be made against non-compliance.

As with raising awareness on policy matters, information on laws and procedures can be conveyed through print media, electronic means, interactive websites, public broadcasting networks, workplace notice boards, meetings and training sessions. Raising awareness on laws and procedures should be adapted to the needs of different groups of users. Further, detailed content should be presented in such a way as to ensure that the meaning of the message is conveyed and understood.

**At the operational stage**, awareness-raising and the provision of information take on yet another dimension.

It is necessary to identify the different target groups who require and could benefit from awareness-raising and information-giving activities. These include:

- employers' associations;
- employers;
- trade unions;
- non-union employees;
- persons about to enter the workforce for the first time;
- non-governmental organizations;
- community advice centers.

The information content and the way in which it is sent from sender to receiver can vary considerably. For example, information for illiterate employees should be based on voice and visual imaging, or through talk sessions conducted by officers of the dispute management authority, or through telephone helplines.

Information on dispute prevention and resolution provided to schools, for the benefit of persons who will enter the workforce in future years, would normally have a different content and emphasis from the information provided to employees with years of work experience.

It is also necessary to distinguish between general awareness-raising and specific information-giving.



**General awareness-raising** is more in the nature of promotional activities designed to make target groups aware of the work of the labour dispute authority. One way to do this is through messages presented by reputable celebrities and local champions (sportspeople, entertainers) through television and the print media. Such messages are normally short and repeated at regular intervals to inform people that assistance is available when disputes occur, and problems can be addressed without the need to resort to courts or tribunals.

**Specific information-giving** is concerned with assisting people who actually seek to use the services provided by the dispute management authority. This information can be provided through the authority's website, by users downloading forms and instructions from that website, and by forms and related information made available through government agencies, employers' associations and trade unions. Telephone help lines can also be very useful, enabling clients to speak to a well-trained, knowledgeable person who can readily provide relevant information, explain how the system operates, and clarify the steps to take in filing a complaint.

Another important part of information-giving is ensuring that the forms used by the dispute management authority are well designed and provide step-by-step guidance to assist clients wanting to complete the form. The forms should also contain minimal legalities.

For example, the referral of a dispute for conciliation to the dispute resolution authority requires that the party referring the dispute follow a set procedure. This normally involves completing a referral form or similar document, with the document itself containing important information.

**The form used in South Africa for referring a dispute for conciliation to the Commission for Conciliation Mediation and Arbitration (CCMA) includes valuable information on such matters as:**

- the purpose of the form;
- who can fill in the form;
- the receiver of the completed form (normally the provincial office of the CCMA in the province in which the dispute arose);
- the addresses and contact details of all provincial CCMA offices;
- the action that will be taken once the form is submitted (stating that a conciliator will be appointed who must attempt to resolve the dispute within 30 days of its notification);
- advice that the dispute may have to be handled by another agency (such as a bargaining council or statutory council) or under private procedures if they apply;
- advice that a copy of the form must be served on the other party and the proof required to show that this has been done;
- information relating specifically to disputes over unfair labour practices (indicating that such disputes must be referred within 90 days of the act or omission which gave rise to the unfair practice);
- information that interpreters are available in the official South African languages but that for other languages the parties may bring interpreters at their own cost;
- advice on how to complete the section of the form concerning 'Special features/Additional information' relating to the dispute (including such things as the urgency of the matter, the number of people involved, important labour or legal issues involved);
- information relating to the conciliation-arbitration process ('con-arb') indicating that arbitration can be held immediately after conciliation if the case remains unresolved, and advice that the party referring the dispute can object to the con-arb process if they wish;
- advice that there can be no objection to con-arb process in disputes relating to probation;
- information that dismissal disputes must be received by the CCMA within 30 days of the dismissal.



The CCMA adopts a similar approach with its form for requesting arbitration if the case remains unresolved after conciliation/mediation. As before, the form serves the dual purpose of raising awareness through the provision of information and advice, and providing the details of the parties and the matter in dispute.

Important information on the form itself includes:

- the need to ensure that a copy of the form has been served on the other party and the proof required to show that this has been done;
- the need to attach the certificate showing that the dispute was unresolved by conciliation;
- information on what to do if the requesting party does not want the same commissioner who conciliated the dispute to handle the arbitration;
- information on what to do if the parties have agreed on a particular commissioner to handle the arbitration;
- information on what to do if a party wants a senior commissioner to handle the arbitration.

*Awareness-raising and information-giving can be integrated into other aspects of the dispute resolution process. Well-designed forms requesting conciliation and arbitration proceedings can contain valuable information and advice on legal requirements and procedures in a manner that is simple and user-friendly.*

## Involvement of social partners

Awareness-raising and information-giving on dispute prevention and resolution matters is not the responsibility of the concerned government department or statutory authority alone. Trade unions and employers' organizations also have a vital role to play.

Through their own networks they can have direct contact with their members and thus are able to keep those members informed of new policies and laws, as well as operational procedures should a member become involved in a labour dispute.

## Sponsored awareness-raising

Resource limitations are a constant challenge to the awareness-raising activities of labour dispute prevention and resolution authorities. Trade unions and employers' organizations may gain assistance from their local memberships as well as their international affiliations to fund such activities, but government departments or statutory bodies are normally reliant on government budgetary allocations (meaning taxpayer-funding) for this purpose.

This raises the question of whether awareness-raising activities can be undertaken with the support of sponsors, particularly from the corporate sector. Sponsorship may be seen as compromising the independence of an autonomous commission or the impartiality of a government department. Legislation establishing independent commissions can allow such bodies to receive donations and grants, but guidelines need to be prepared to ensure that independence and impartiality are protected. For example, an awareness campaign in the name of an independent commission but funded jointly and equally by the corporate sector and trade unions would be more acceptable than one funded solely by corporations.

It is possible, however, for the labour dispute authority to secure support from its clients without compromising the authority's independence. For example, if the authority has conducted a successful training programme for a client, it might simply ask that

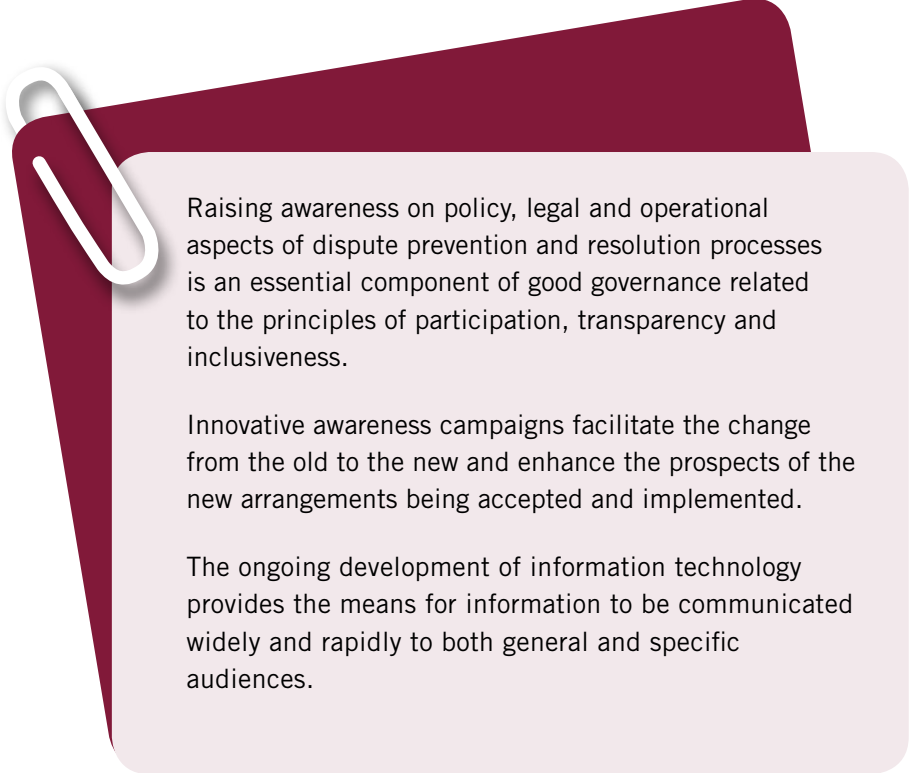


client ‘Can we publicize what we have done for you?’ Promoting success stories is an important part of awareness-raising.

## **Awareness-raising: An ongoing activity**

Awareness-raising and information-giving activities are not confined to situations where new policies are launched or new laws enacted. The dispute management authority should also make every effort to ensure that its procedures and processes are clear and understood by its clients and that information made available to its clients and the general public is regularly updated. The organizational structure of the dispute management authority should provide for information dissemination and awareness-raising as integral and essential components of the labour dispute system rather than something that is peripheral and of low priority.

As indicated in chapter 7 on Performance Monitoring, monitoring performance also applies to the dispute management authority’s activities concerning awareness-raising and information-giving. The authority should regularly assess whether its awareness and promotion campaigns are generating the intended benefits, one of which is to encourage disputing parties to use conciliation/mediation and arbitration services instead of taking their dispute to court.



Raising awareness on policy, legal and operational aspects of dispute prevention and resolution processes is an essential component of good governance related to the principles of participation, transparency and inclusiveness.

Innovative awareness campaigns facilitate the change from the old to the new and enhance the prospects of the new arrangements being accepted and implemented.

The ongoing development of information technology provides the means for information to be communicated widely and rapidly to both general and specific audiences.









## CHAPTER 6

### Performance improvement

Training and related issues .....	<b>134</b>
Specific skills .....	<b>138</b>
Codes of conduct .....	<b>150</b>
Case management information systems .....	<b>155</b>



## CHAPTER 6

# Performance improvement

**T**his chapter focuses on issues relating to improving the performance of the labour dispute system. Whether the system is under the responsibility of an existing department of labour or is an independent commission, the scope for performance improvement is ever present.

The chapter focuses on four main areas of possible performance improvement, namely: training and staff development; skills development in specific areas; computerized case management systems; and codes of conduct/behaviour for staff. These issues are equally important and relevant to both government-operated and independent labour dispute systems.

These four issues by no means exhaust the improvement agenda. But if addressed systematically and seriously, they can improve the effectiveness and efficiency of any dispute management system in a relatively short period of time.



## Training and related issues

Where the change strategy focuses on the revitalization of an existing dispute management system rather than the creation of a new one, staff members are already in position. However, consideration will need to be given to re-training the existing staff members based on an assessment of needs and to designing a training programme that serves the revitalization objectives.

There may be some advantage in conducting a staff performance audit to see how existing staff resources are utilized before proceeding with any training programme. Such audits, however, can appear threatening to staff, particularly if seen as a means to justify downsizing and retrenchments. Where such an attitude prevails, it is essential that steps be taken, before any audit or assessment exercise commences, to assure staff that the aim is not to identify retrenchment candidates, but rather to improve overall performance, identify training needs and determine whether staff talent is underutilized.

Where the change strategy involves the creation of a new institution, the issue of staffing and training is just one of many components of an overall change process. However, it can be one of the more challenging components of the change process.

A staffing plan should be prepared that reflects the purpose and objectives of the institution, including the total number of staff required, the number of managerial, technical and support staff, the terms and conditions of employment, and the deployment of staff in a decentralized dispute resolution system.

Job descriptions need to be prepared. Some of these may be generic in nature but they should provide details of the tasks to be performed and include performance indicators and targets where appropriate.

- Position profiles for various jobs need to be prepared.
- Job advertisements need to be prepared and circulated.
- Selection criteria including required competencies and their related attributes need to be established.
- Job interviews need to be conducted by a non-biased panel.
- Staff appointments need to be made.
- Orientation and induction training need to be provided.
- Desk manuals including both 'what to do' and 'how to do' need to be prepared.



The issue of staffing for a new institution can be particularly complicated where the new institution takes responsibility for dispute resolution from an existing institution, government department or ministry. Should the existing conciliators/mediators, arbitrators or other labour officials with some responsibility for dispute resolution (e.g. labour inspectors, industrial relations officers, assistant commissioners) be absorbed into the new system?

Automatically absorbing existing officers into a new system should be approached with caution, particularly if the poor performance of those officials is a driving force behind the creation of the new institution. Such officers should be eligible to apply for positions in the new institution. However, if their application is unsuccessful, they will need to be redeployed within the labour department or, indeed, the wider civil service. The issue of absorbing existing officers is particularly important when the socio-political situation of a country changes. Creating a new institution using existing staff may raise issues of credibility and legitimacy regarding the institution itself and the Government that created it, as users may have the perception that things have not really changed.

## Effective training

The issue of training is a vital component of any change strategy. Training is expensive and needs to be carefully planned if it is to be resource efficient and performance effective. *Ad hoc*, supplier-driven training offered by training providers often has limited impact for various reasons – it may not reflect the real needs of participants, it may be poorly presented, trainer-dominated, too theoretical, or may lack supporting materials and/or follow-up.

Whereas education is concerned with the development of general intellectual capacity, training is concerned with developing specific capacities that enable an individual to perform a specific task or set of tasks to a required standard.

Effective training requires:

- job descriptions that give a clear and detailed indication of the tasks to be performed;
- an assessment of existing performance levels by comparing actual with expected performance, thereby identifying performance gaps;
- an assessment that performance gaps can be addressed through training rather than some other intervention;
- a clear articulation of the objectives of the training activity;
- the design of the training activity that relates the content of training to the stated objectives;
- the identification of training methods that links the content to the objectives;
- a proper learning sequence;
- an appreciation of the needs of participants as adult learners;
- competent trainers familiar with interactive learning techniques, and trusted by the trainees;
- the preparation and utilization of support materials including audio-visual materials; and
- evaluation and follow-up activities to determine whether the training provided has actually contributed to improved performance, not only for the individual trainee but for the organization as a whole.





## THE TRAINING PROCESS



Training resources are sometimes wasted because of a failure to identify specifically what an individual or group needs to improve performance. Identifying needs should be approached systematically by conducting surveys, interviewing staff, examining staff reports, analysing statistical data, discussions with clients, performance appraisal reports, and observing staff in actual work situations.

Of course, some training activities do not relate to specific needs but are more general in nature, aimed at providing new knowledge and increasing intellectual capacity rather than developing specific skills. Such training is also to be encouraged, and lends itself well to individual, self-paced learning sessions, provided suitable materials are available.

The delivery of training has benefited significantly from computer technology: training materials are easily communicated; it can take place anywhere the Internet is available and computers are provided; individuals can learn at their own pace; interactive learning is possible; and large numbers of trainees can be reached.

Training can be provided by training providers external to the department of labour or independent commission, or by a special unit within the organization dedicated to training and staff development, and staffed by training professionals. Whichever approach is adopted, there are considerable benefits in preparing an annual training programme covering the entire organization, thereby enabling a systematic and coordinated approach to performance improvement through training and related activities.

## **Manager training**

The success of a change strategy depends not only on the capacities of the system's conciliators/mediators and arbitrators and support staff, but also on the capacities of the system's managers. Managers are responsible not only for their own work but also for the work of others. Thus, they should be selected and trained to enable them to lead and motivate others, analyse and interpret information, identify problems and make decisions, monitor performances and evaluate outcomes.

The dispute management authority, whether a government department or independent commission, should take the necessary steps to ensure that managers are able to perform the tasks stated in their job descriptions to an acceptable level. Well-designed group training sessions, together with structured self-paced learning, can make an important contribution to improved management of the overall system and its component parts.

## **Specific skills**

An effective dispute management system requires officers with skills and abilities in a range of tasks, including written and verbal



communications, report preparation, problem identification and problem solving, time management and planning, analytical abilities, attention to detail and knowledge of relevant computer applications.

Of particular importance are the skills required of officers in the three main functional areas, namely:

- dispute prevention;
- dispute resolution through conciliation/mediation; and
- dispute settlement through arbitration.

## Dispute prevention

In the world of work, disagreements, differences, discord, dissension and disputes between workers and employers are inevitable. Sometimes the dispute is minor and quickly resolved within the workplace itself. Sometimes the dispute is major, with spill-over effects beyond the immediate workplace.

Dispute prevention services will not eliminate disagreements. Rather, they place disagreements in a different context, allowing the parties to resolve their problems within the workplace, without disruption to the production of goods or the provision of services.

In this context, dispute prevention does not mean 'no disputes', but rather involves various non-adversarial activities that engender peace in the workplace, so that disputes are addressed:

- quickly;
- fairly;
- peacefully; and
- in an orderly manner.

This requires the implementation of systems in a work establishment which build dialogue and prevent the escalation of any disputes that arise. Dispute prevention systems apply to both individual and

collective disagreements and should be developed to respect the role of trade unions in such matters.

Enterprises can develop such systems on their own initiative through dialogue involving consultation, negotiation or both. Alternatively, they can call on the services of third-party specialists in industrial relations to advise on and assist in the establishment of workable systems and processes. A number of different interventions are possible, depending on the size of the enterprise, the nature of its existing systems, the prevailing industrial relations climate, and the resources available for dispute prevention activities.

The services of third-party specialists can be provided by:

- the dispute management authority (whether a government department or an independent statutory body); or
- private sector consultants.

The actual services provided include:

- building a platform of trust and mutual respect between workers and management and a positive workplace climate where they actually want to talk to each other, through culture-building exercises, joint training, joint research, and information sharing;
- specific initiatives designed to prevent the escalation of disputes, such as the introduction of institutional arrangements and processes that involve worker participation and allow problems to be aired and addressed. These arrangements include consultative mechanisms where problems can be presented for discussion and decisions reached that, although non-binding, represent considered advice to management. Arrangements can also include bargaining forums where problems are raised and resolved through negotiation leading to binding decisions;
- specific initiatives designed to resolve formal, written complaints made by workers against the actions of managers, co-workers or clients within the workplace, as well as initiatives to handle informal complaints through workplace mediation or reference to an ombudsperson. These arrangements typically require the existence of a dedicated grievance procedure that enables the



complaint to be heard and resolved within the enterprise. Alternatively, the complaint may be dealt with in accordance with the grievance procedures contained in a collective bargaining agreement, where such an agreement exists.

### ***Involvement of labour dispute authority***

Dispute prevention activities are owned by the enterprise, with the role of external persons confined to facilitation and the provision of advice. There are a number of advantages, however, in the labour dispute department or commission engaging in such facilitative and advisory activities.

- The officers of the department/commission are given an opportunity to visit enterprises and interact with workers and managers, assess the industrial relations climate, and participate in the development of tailor-made systems suited to the needs of each workplace.
- The officers of the department/commission can acquire a more detailed understanding of business operations in different industries, giving them the opportunity to specialize in fields such as transport, maritime, manufacturing or building and construction, if required.
- The department/commission can generate income from the information, advisory, training and related services provided by its officers.
- The department/commission as a whole benefits from an enhanced image and reputation as a professional organization committed to impartiality, fairness and technical competence.

From the viewpoint of the enterprise, and irrespective of whether dispute prevention services are provided by the department/commission or by private sector consultants, the enterprise benefits as follows.

- The enterprise voluntarily seeks assistance and has control of the system development process from the very beginning.

- A tailor-made system can be developed that meets the needs of a particular enterprise.
- The dialogue between workers and managers that takes place in the development of the system, particularly if facilitated by a competent and experienced person, helps build mutual trust.
- Developing a workable system is relatively inexpensive.
- An external third party can help identify potential ‘flashpoints’ for which specific advice can be given, in addition to advice on general system development.
- Enterprise privacy and confidentiality can be maintained.

The provision of dispute prevention services requires specific skills on the part of the service providers. Apart from their capacity to assess an industrial relations situation with objectivity and sensitivity, officers require high-level facilitation skills that encourage interaction between workers and their managers. Officers require the skills for effective communication, the capacity to listen and observe, the ability to act as a resource person when required without being dominant, and generally possess the personal attributes that encourage trust and respect, including integrity, tact, patience, enthusiasm and, in some cases, humour.

## Conciliation/mediation services

Where disputes cannot be prevented or resolved through dialogue between workers and employers, conciliation/mediation represents the next step in the process. It is possible, however, for conciliation/mediation to take place at any time, even before internal procedures have been exhausted.

In some jurisdictions, a distinction is made between ‘conciliation’ and ‘mediation’. However, for the purpose of this publication, no such distinction is made. The term ‘conciliation/mediation’ is used to cover a process that is:

- voluntarily entered into by the party initiating the dispute, with the other party then being required to join the process;



- an extension of the bargaining/negotiation process that commences when negotiations break down;
- conducted by an independent, impartial third party with no power to make a determination or judgment;
- conducted by a person whose role is to facilitate a negotiation process, with a view to assisting the parties to generate a wide range of options for consideration and reach a mutually acceptable resolution;
- free of cost to the disputants (other than the cost of time in attending conciliation meetings and preparing for the discussions);
- private and confidential;
- speedily set up, informal and flexible;
- non-adversarial;
- low risk in that it is supportive of the need to maintain and, if possible, improve the ongoing relationship between employer and worker.

Conciliation/mediation provides a means of exploring the parties' common and opposing interests, which can be a beneficial process even in rights disputes. Also, in some countries, conciliators/mediators may have industry-specific knowledge (e.g., transport, chemicals) that can be valuable in assisting the disputing parties to generate options.

### ***Traditional vs. new approaches***

As approaches to negotiation and bargaining change over time, so is there a need for the role of the conciliator/mediator to adjust.

### ***Positional bargaining***

Traditionally, conciliators/mediators have provided assistance to the disputing parties engaged in positional bargaining where the parties have simply exchanged proposals in order to attain a target position. The parties make demands and counter-demands, often exaggerated, but without really knowing or caring what the other party really wants.

Common interests are overruled by conflicting ones as the parties strive to win a larger share of the available proceeds of production in what is typically an adversarial process with a win-lose outcome. The future of relations between workers and employers are a relatively low priority, the emphasis being on winning today.

In positional bargaining, the parties state their positions and then, through a process of gradual and incremental concession and convergence, attempt to reach an agreement. In such an approach, a conciliator/mediator tends to act as a facilitator and conduit between the parties, concentrating almost exclusively on the process of conciliation/mediation without proposing solutions or offering remedies that might influence the final outcome of the interactions.

The conciliator/mediator's task in such situations is still challenging, but the fixed position of the disputing parties provides limited scope for innovation and exploration of wider issues on the part of the conciliator/mediator.

### ***Interest-based bargaining***

In some countries, there is increasing interest in the process of interest-based bargaining. There is abundant evidence that this approach to negotiation has been discussed and analysed in a theoretical framework, but the extent to which it actually operates in practice as a substitute for positional bargaining remains largely unknown.

Interest-based bargaining has a number of essential features, as follows:

- the interests of both parties are accepted as legitimate and to be advanced whenever possible;
- the bargaining issues are approached as problems to be solved jointly, rather than conflicts to be won or lost;
- the interests of the parties extend beyond sharing the existing available production proceeds to seeing how those proceeds can be increased;





- the parties are interested in sustainable outcomes and alternatives that help build their future relations.

The approach is non-adversarial but a great deal of time can be spent by each party discovering what is really important to the other side. The approach may well include ‘blue-sky’ sessions, where needs and interests are presented and discussed without any real outcomes arising from the discussions. Interest-based bargaining proceeds on the premise that common interests are paramount. In some situations, however, the interests of workers and employers are quite divergent as, for example, where an employer is interested in contract labour and outsourcing, and workers are keen to pursue job security.

Conciliation/mediation as an extension of interest-based bargaining is quite different from conciliation/mediation as an extension of a traditional positional bargaining approach. Interest-based negotiations can still have deadlocks and require third-party assistance, but the conciliator/mediator now requires new knowledge and skills that extend considerably beyond facilitation. The conciliator/mediator is required to assume the role of educator, resource person, and transformer to assist the parties to recognize their mutual interests and needs, but still without imposing a solution to the dispute. Just as the disputing parties engaged in interest-based bargaining require new knowledge, new skills, and a different mindset, so will conciliators/mediators. Accordingly, training activities need to be designed for employers and workers, ideally including joint training sessions, and conciliators/mediators will need to be trained in the skills and techniques of interest-based bargaining.

In practice, experienced conciliators/mediators tend to find the right sort of interventions irrespective of the negotiation approaches used by the disputing parties. If a deadlock arises from a positional bargaining approach, an experienced conciliator/mediator may see opportunities for the injection of some interest-based approaches by encouraging the parties to focus on their mutual interests and move away from their set positions.

If a deadlock arises from an interest-based bargaining approach, the conciliator/mediator may need to remind the parties that the common interest does not always provide automatic solutions to problems and that concessions need to be made.

In practice, therefore, positional and interest-based bargaining are not mutually exclusive. Competent conciliators/mediators need to understand and be ready to apply both approaches in their efforts to overcome bargaining deadlocks and assist the parties to reach agreement.

Conciliation/mediation is assisted bargaining. This requires that conciliators/mediators know and understand the bargaining and negotiation process in the first instance, including the different approaches to negotiation, as well as how to build on those processes to help the disputants reach an agreement.

The capacities required for successful conciliation/mediation are a mix of knowledge, skills, experience and personal qualities that include a willingness to listen, patience, sincerity, honesty and a sense of humour.

### ***Job description***

On appointment, the conciliator/mediator should be provided with a written job description, required to subscribe to a code of behavior, given induction training on the nature and operations of the dispute management system, provided with specific training on the conciliation/mediation process, allocated a mentor if he or she is inexperienced in this field of work, provided with copies of relevant laws, forms, and operational manuals, and introduced to the computerized case management information system.

The job description is important as it will indicate whether a person is required to perform only as a conciliator/mediator engaged in conducting conciliation/mediation meetings, or responsible for other tasks as well. These might include the conduct of pre-conciliation/mediation activities and the provision of information, advisory and training services relating to dispute prevention.



The job description will also indicate whether conducting arbitration hearings is part of the job. Whether officers are appointed as conciliators/mediators or arbitrators, or with responsibilities for both, could be determined by law. However, if the law is silent on this matter the dispute management system itself must decide. For a system that provides conciliation-arbitration (con-arb) services, there is an inherent advantage in one officer being able to perform both tasks, with arbitration following unsuccessful conciliation all in one sitting, possibly and preferably on the same day. The conciliation/mediation step follows the rules and procedures for a normal conciliation/mediation, and the arbitration step follows those for a normal arbitration. However, both steps are undertaken by the same officer, subject to the possible provision in the law for the disputing parties to have different officers handling each step.

The job description should be used as the basis for assessing the performance of a conciliator/mediator, with the assessment process also serving the purpose of identifying areas where training is required to improve performance.

## Arbitration services

If conciliation is unsuccessful, the disputing parties can submit the dispute to arbitration.

Arbitration is an inquisitorial approach to dispute settlement that requires a neutral third party to hear both sides and then make a decision to settle the case. Although it is a binding adjudicative process and appears similar to traditional court proceedings, there are several important differences.

**Voluntary** In most cases the parties expressly agree to arbitration, although in a statutorily-driven system the process may be compulsory.

**Control** The parties have some control over certain procedural aspects of the process such as the timing and possible location of the hearing as well as who may be present.

**Privacy** The parties meet with the arbitrator in private. In some cases the disputing parties choose the arbitrator.

**Informality** Although proceedings are less formal than a court, rules do apply, such as the principles of natural justice and the rules of evidence. Although the hearing sees the parties opposed to each other, the demeanor of the parties and nature of the process is determined by the parties and is less formal than a courtroom.

**Confidentiality** The process and outcome are confidential to the parties, although statutorily-driven arbitration requires that records are kept and are thus available to the public.

**Flexibility** The parties can revert to a consensus decision on all or some of the issues during the course of the arbitration hearing.

### ***Advantages of arbitration***

Arbitration has a number of advantages over adjudication, including the following.

**Speed** The parties can determine the time frame and avoid the sometimes lengthy preparation time involved in court proceedings.

**Flexibility** At any time the parties have the option of reverting to conciliation/mediation.

**Cost** The process is less costly than going to court.

**Choice** The parties can choose an arbitrator with special experience and expertise relating to the matter in dispute. In adjudication the parties do not choose the judge.

**Privacy** With some exceptions, arbitration hearings are private and confidential.

### ***Arbitration issues***

The outcome of an arbitration hearing is not consensus-based. The dispute may be formally settled but not necessarily to the satisfaction of the parties. One party may feel it has won and the other lost, or both may consider the outcome a lose-lose. Other issues include:



- limited right to appeal the arbitrator's award;
- the arbitrator may lack skills and experience;
- the arbitrator may advocate instead of arbitrate;
- lawyers representing the parties may lack experience in arbitration processes;
- the hearing may become dominated by the legal arguments of the lawyers representing the disputing parties at the expense of substantive issues;
- the hearing may take longer than anticipated due to the deliberate delaying tactics of one or both parties.

### ***Job description***

The job description for an arbitrator should indicate whether the position also involves conciliation/mediation and dispute prevention work. Staff who are able to handle a breadth of tasks provide the dispute system with an important degree of flexibility without adversely affecting overall performance.

In situations where a large number of disputes emanate from a particular industry or sector such as garment manufacturing, hotels and hospitality, or building and construction, there may be advantage in assigning arbitrators with the required experience to specialize in industry-specific hearings.

Arbitrators need to understand the basic principles of natural justice, the principles of evidence and their practical application, and the importance of allowing each side to be heard. Arbitrators need to be ethical, maintain their impartiality at all times, possess good analytical and writing skills, and display the qualities that command respect in a hearing room.

The operational effectiveness of a country's dispute management system is dependent on the professional competence of its conciliators/mediators and arbitrators.

They must be carefully selected not only with regard to their educational qualifications and work experience, but also their personal qualities. They should possess the characteristics required for positive interaction with people and that encourage respect, trust and confidence from clients and colleagues.

After selection, conciliators/mediators and arbitrators should be trained. Such training should provide them with knowledge of the legal processes and operational procedures they are required to follow, and the skills to enable them to 'do' as well as 'know'.

It is not necessary to be a lawyer to be a successful conciliator. Knowledge of the law is important but successful conciliators/mediators are drawn from a variety of backgrounds.

## Codes of conduct

The special nature of dispute prevention and resolution work has given rise to codes of conduct or behavior -- as established by the dispute resolution authority -- for conciliators/mediators and arbitrators. Such codes are intended to set rules and standards of professional behavior of staff and thereby contribute to improved performance.

There is, however, some confusion over terminology. Some organizations refer to codes of ethics, others to codes of practice, others to codes of conduct, and others to codes of behavior. For the purpose of this publication, the focus is on codes of behavior that set the standards of day-to-day behavior for staff within an organization. The term 'code of ethics' is more appropriately used in relation to the ethical behavior of businesses concerning their social, environmental and human rights issues. 'Codes of conduct' tend to relate to employee ethics and more specifically to such things as conflicts of interest and the receipt of gifts. 'Codes of behavior' focus more on what staff members are required to actually do or not



do in the performance of their various tasks and thus constitute a more useful tool in monitoring staff performance.

It may be possible to have a code of behavior for all persons employed in the dispute management system, covering general matters such as confidentiality, and a separate code for conciliators/mediators and arbitrators.

A code of behavior for conciliators/mediators and arbitrators within a dispute resolution system should:

- specifically identify the categories of staff covered by the code;
- indicate the statutory provisions that apply to staff covered by the code;
- indicate the legal enactments, if any, under which it has been created;
- state the purpose and objectives of the code as, for example, ‘to help staff understand their responsibilities and obligations to their clients (employees and employers), to their colleagues, to their own workplace, to the community, and to themselves, and ‘to provide guidance when faced with ethical issues and conflicts of interest’;
- state in simple terms the specific matters where standards of behavior apply;
- indicate the procedures including time limits to be followed in case of breach of the code, including the right of the employee to be heard and appeal arrangements.

## Content of codes of behavior

A code of behavior for conciliators/mediators and arbitrators might include the following.

### ***Statutory obligations***

<b>Self-monitoring</b>	Punctuality
	Impartiality

Confidentiality  
 Receipt of gifts  
 Personal hygiene  
 Dress  
 Professional development  
 Outside employment  
 Political activity  
 Public comment  
 Leaving the service (e.g., not to use confidential information gained during employment; not to disclose private information about former colleagues)

**Clients**

Equal treatment  
 Non-discrimination  
 Dignity, courtesy, and respect  
 Conflicts of interest  
 Personal relations

**Colleagues**

Equal treatment  
 Non-discrimination  
 Dignity, courtesy, and respect  
 Bullying and harassment  
 Personal relations

**Workplace**

Use of equipment (e.g., telephones, computers, internet, e-mail)  
 Care of equipment  
 Safe working environment  
 Healthy working environment (e.g., no smoking)

**Community**

Respect for the environment  
 Behaviour outside working time





The Code of Professional Conduct for Labor Mediators of the Federal Mediation and Conciliation Service (FMCS) in the USA refers to:

- the responsibility of the mediator to the parties;
- the responsibility of the mediator toward other mediators;
- the responsibility of the mediator to the service and the profession;
- the responsibility of the mediator to the public.

The FMCS Code is presented in **chapter 10** as **ATTACHMENT C**, along with the Code of Conduct for Commissioners of South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA).

Certain codes of behavior are legally binding and others are not. If the code is prepared under a statute and meets the standards of that statute, it can be legally binding. For example, Tanzania's Labour Institutions Act, 2004, which establishes the Commission for Mediation and Arbitration, indicates that 'the Commission shall prepare a Code of Conduct for mediators and arbitrators and ensure that they comply with the Code of Conduct in performing their functions.' Codes can also be binding if they are part of the contractual relationship between the employee and the employer.

Even if a code is voluntary and non-binding it can still have a positive impact on behavior. Standards can still be respected and acted upon even when voluntarily entered into. It must be stressed, however, that a code of behavior whether binding or non-binding does not guarantee good behavior. However, such codes can be a useful tool for improving staff performance. They establish clear standards of behavior for the staff of the organization, helping to reduce the incidence of misconduct, building the confidence and trust of the organization's clients, and helping to ensure that the organization's resources are not misused.

The mission statement of the Commission for Conciliation, Mediation and Arbitration in South Africa is accompanied by a statement of values and operating principles. Although not presented as a code of behavior for conciliators and arbitrators, the mission statement makes very clear the standards of behavior expected of its staff.

### **Integrity**

- We are honest and ethical in everything we do.
- We deliver on our commitments.
- We are accountable and responsible for our performance.

### **Diversity**

- We are a team of highly qualified individuals that is representative at all levels of our country's diversity.

### **Transparency**

- We work in a manner that is open and transparent, guided by our statutory obligations and commitments.

### **Excellence**

- We are committed to excellence.
- We continuously strive to deliver quality work.

### **Accountability**

- We continuously measure ourselves against our commitments and we hold ourselves responsible for our actions and the outcomes of our work.
- We are committed to each other and all we do.

### **Respect**

- We value differences in people and ideas and we treat others with fairness, dignity and respect.
- We foster a culture of trust, respect, teamwork, communication, creativity, equal opportunity and empowerment.



## Case management information systems

A case management information system captures the details of every case referred to the dispute resolution authority. Such a system serves three main purposes, namely:

- to support the management of the system's caseload with the ultimate objective of providing better service to clients;
- to provide real time information for statistical and labour market analysis;
- as a process and management tool, to ensure that cases follow the required processes.

Such systems accept and recognize that information is a resource which, together with people, finance, time, equipment and space, has to be managed if performance is to be maintained and improved.

A case management information system should:

- provide real time information for each case;
- indicate the time and events at each step for every case, from the date of initiation or activation, to the date of resolution;
- have controls on access;
- enable statistical information to be easily searched and filtered (e.g., by type, district or province, industry, occupation, successfully conciliated, or employee earnings level).

### What information?

Typically, a case management information system should include fields for the following:

- Case management file number
- Names of the disputing parties
- Type of dispute

- Office to which the dispute was referred
- Industry or sector of employment
- Occupational group
- Timeline
  - Date dispute arose
  - Date dispute referred
  - Date dispute activated
  - Initial process followed (e.g., pre-conciliation, conciliation, con-arb)
  - Dates of conciliation meetings and persons present, including any representatives of the parties, and progress made
  - Name of conciliator
  - Date resolved by conciliation
  - Date of non-resolution by conciliation
  - Date referred to arbitration
  - Dates of arbitration hearings and persons present, including any representatives of the parties
  - Name of arbitrator
  - Date resolved by arbitration
- Total number of days from referral to activation
- Total number of days from activation to end of conciliation
- Total number of days from activation to end of arbitration
- Outcomes
  - Details of pre-conciliation
  - Details of non-conciliation
  - Details of successful conciliation



- Details of arbitration award (whether favoring employer or workers, settlement amount)
  - Overall resolution rate for conciliation
- A field for notes or record keeping
  - Scanning facilities where possible
  - Digital records storage facilities.

The amount of information generated by the case management system will depend on the needs of each dispute resolution authority. It is important, however, that as much information as possible is captured as part of standard administrative processes.

For example, data on the number of pre-conciliation/mediation cases that do not proceed to conciliation/mediation, including the reasons, can be electronically generated if such information is systematically recorded in each case file as part of standard administrative procedure.

Similarly, data on the number of arbitration hearings where the parties in which the parties were represented by lawyers can be easily generated if the individual case files already indicate this information.

## Developing a case management information system

Developing a comprehensive and customized case management information system requires detailed planning, teamwork, technical expertise, training and money. Planning the system requires a clear indication of purpose and objectives. For example, is the system intended to generate statistical data only or is it required to assist in staff management as well?


The logical starting point is to document the workflow concerning all aspects of the dispute management process, starting with dispute referral and ending with archiving. Step-by-step checklists are required for each part of the process, with the system being documented on paper first, before a computer programme is developed.

For this process it is desirable to set up a task force with representatives from all parts of the dispute management system. Under the leadership of both a business process specialist and an information technology specialist, the team is required to identify and document the steps in the workflow which will then lead to the development of the software. The cost, both in time and money, may be considerable but should be seen as a valuable long-term investment rather than an item of short-term expenditure.

Once the software has been developed, staff must then be trained on how to use it. Training should also be seen as an investment in a system that will generate long-term benefits for the system and its clients.

The design and operation of an effective case management system represents a major challenge for the architects and operators of new approaches to dispute prevention and settlement. It is essential that the information available to the dispute management system as a whole is greater than the aggregated knowledge of its employees.

Clearly, an effective case management system must be computer-based, with the ultimate goal of creating a paperless or near paperless system. A computer file must be created for each case and all information produced in connection with that case added to that file. This provides real time tracking and allows case managers to see at a glance the current status of any case.



This chapter focused on four areas that a labour dispute system might consider in order to improve its overall performance: training in general, skills development relating to particular tasks, the introduction of staff codes of behaviour/conduct, and the introduction of a computerized case management information system.

These four areas by no means represent the totality of an improvement agenda. A full agenda for performance improvement should flow from an assessment process as outlined in chapter 2.

This may identify a need to improve in many areas, requiring that priorities be set, plans prepared, and action strategies implemented.

It is possible that the system can improve by adopting new approaches to its internal manager-employee interactions. Improving information flows and communications, building trust and confidence, and generally improving the industrial relations climate in the labour dispute system itself, could be a significant and relatively low-cost initiative.







## CHAPTER 7

### Performance monitoring

Setting targets .....	164
Managers' responsibilities .....	165
Information .....	166
Evaluating outcomes .....	168



# Performance monitoring

**T**he performance of the labour dispute system should be monitored on a continuous basis to assess the extent to which the institution as a whole is meeting its objectives and mandate.

Although monitoring can focus on the performance of an individual officer, a field office or a functional unit, this chapter focuses on the performance of the institution as a whole.

Inevitably, performance monitoring involves counting and measuring things. However, qualitative information, including client satisfaction surveys, can also play a very important role.

Monitoring should not be driven by the objective of 'proving' that the system is performing well or badly, but rather by the objective of 'improving' the system on a continuous basis, balanced against the demands of clients and the resources available to the system.



A performance management system should include a monitoring process that enables regular comparisons between planned or required performance, on the one hand, and actual performance, on the other. Progress can be monitored for the institution as a whole, a particular division or unit, a regional office and for each individual staff member.

Performance management involves establishing performance indicators and specific targets for each indicator. For example, the performance indicator may be the conciliation success rate, and a target for the institution as a whole of, say, 80 per cent. Sometimes the targets are set by law such as, for example, conciliation/mediation proceedings being completed within a period of 30 days from referral, or arbitration hearings being completed within 60 days. Although such standards can be set by law, it is unusual for sanctions to apply when they are breached.

Alternatively, performance indicators and targets can be set by the dispute management system itself either as a top-down decision made by senior management, or more consensus-based targets resulting from dialogue between managers and those managed.

For example, officers may be required to conduct:

- a minimum of 3 conciliation/mediation meetings per day; or
- a minimum of 2 con-arbs per day; or
- 4 pre-conciliation meetings per day; or
- 2 arbitration hearings per day.

## Setting targets

The actual target for a particular performance indicator must be set with care; if the targets are too strict, overall performance may actually decline. For example, a target of four conciliation/mediation meetings per day could result in a somewhat superficial approach to proceedings, resulting in a high level of non-resolutions, a lack of confidence in the conciliation/mediation system, and possibly more



pressure on the arbitration system. Quality is compromised in the quest for quantity.

Targets should be set in consultation with staff to ensure they are realistic. Consultation also increases the likelihood that staff will do their best to achieve the targets they have played a part in setting.

Once performance indicators and targets have been set, they must then be communicated to the staff, and officers and arrangements put in place to monitor progress. A case management information system can be designed to generate information on the performance of the overall system and its component parts and thus readily assist in the identification of performance gaps. But such a system cannot explain the reasons for such gaps or decide what remedial action is required.

## Managers' responsibilities

Managers in the labour dispute system are responsible for their own work as well as the work of their subordinates. These responsibilities include monitoring performance and interacting with staff to address performance shortcomings. This requires that each individual manager has the necessary leadership skills and knowledge to relate to subordinate staff as individuals and identify problems on a joint basis. Some individual officers may be tardy or lazy, some may be inexperienced and lack confidence in their ability, some may have personal problems that impact on their ability to perform, some may decide to adjourn cases as often as possible (e.g., part-time officers paid on an hourly basis), and some may lack skills and techniques. Each situation requires a different approach, suggesting that all managers could benefit from training in situational leadership. A dispute system organization can be likened to a business, and needs to be run as such. This entails conducting management meetings, preparing reports, and undertaking functions such as planning, organizing, delegating, and supervising, as well as monitoring and evaluation.

In some cases, however, the targets as set are simply unrealistic. This requires communication between line managers and top-

level management with a view to re-examining existing targets and modifying them as appropriate.

## Information

Monitoring progress requires access to relevant, up to date and reliable information. Some of this information may come from special-purpose surveys such as, for example, client satisfaction surveys to obtain the reactions of employers and employees to the services provided by the system. Much information, however, will come from the administrative records generated by the case management information system. This system should generate essential information for monitoring purposes as part of the system's normal operations, provided:

- (a) the right information has been collected;
- (b) the information is readily accessible;
- (c) the information is up to date;
- (d) the capacity exists to analyse that information and use the analysis as a basis for comparing actual and planned performance.

Information is a fundamental resource for decision-making and thus of fundamental importance for good governance. The introduction and operation of an effective case management information system as outlined in chapter 6 is essential not only for monitoring overall performance, generating statistical data, and preparing periodic reports, but also for following the day-to-day progress of every individual case within the system.

The monitoring process requires more than collecting statistical information, examining reports and conducting surveys. It should also rely on observations of what is happening in the system, on regular contact with clients, on media reports and articles – all of which can assist in pointing the system towards improvement.



## Scorecards and dashboards

Increasingly, performance monitoring relies on the use of scorecards and dashboards. Initially, ‘balanced scorecards’ were used by private sector corporations but now are commonly used in statutory authorities and government departments.

A balanced scorecard is a tool for translating an institution’s mission and overall strategy into specific measurable goals and for monitoring the institution’s performance in achieving those goals.

Traditionally, scorecards focused on four things, namely:

- financial analysis;
- customer/client analysis;
- internal analysis of processes and services;
- learning and growth analysis, particularly concerning employee satisfaction and retention.

A scorecard gives an indication of progress over time and can be adapted to the particular needs of an institution seeking answers to such questions as follows.

- How do we involve our stakeholders?
- How do our clients see us?
- What must we excel at?
- How can we continue to improve?

The scorecard shows a comparison of actual performance and planned performance over time. It shows numbers or ‘scores’ over a period of time.

A dashboard is also a monitoring tool and uses the information from scorecards to show performance at a particular point in time, such as the number of successful conciliations/mediations for this year, as of today.

Scorecards and dashboards can be used to quantify performance and highlight where improvement is required. They can also be used to illustrate to users of the system's services and other external parties, including those responsible for resource allocation, that the system is functioning well and worthy of continued support.

## Evaluating outcomes

Monitoring progress and evaluating outcomes are closely related. Monitoring is concerned with the ongoing process of keeping things on track on a day-to-day basis. Evaluation is more in the nature of taking stock at periodic intervals to determine whether we have achieved what we set out to do, or to determine whether the dispute resolution system has achieved its objectives and satisfied the terms of its mission statement.

The ultimate purpose of a change strategy is to make the future better than the current situation. Once the change strategy has been implemented for a given period of time, an assessment should be made as to whether the change has in fact made improvements. This, of course, will depend on what improvements were planned, and the measures and judgments used to determine whether they have been achieved.

If, for example, the plan called for an 80 per cent conciliation success rate within a period of two years, at the end of that period an evaluation should be undertaken to find out what was actually achieved. What if the success rate over the stipulated given period was only 50 per cent? Evaluation involves more than simply measuring the gap but also requires reasoned analysis as to why actual performance was less than that expected.

- Was a figure of 80 per cent too ambitious?
- Was a period of two years too short?
- Were conciliators/mediators inadequately trained?
- Did some conciliators reach the target but others did not? Why?
- Did some offices reach the target but others did not? Why?






- What do the disputing parties have to say about the process?

Information generated by the case management system, special purpose surveys, anecdotal evidence, the observations of independent observers, the inputs of governing council members, and responses from the representatives of employer and employee organizations all have a part to play in the evaluation process. This is of particular importance where the change in the dispute management system has been of a fundamental nature, such as when traditional labour administration arrangements for dispute prevention and resolution have been replaced by an independent commission.

- Has the independent commission made its expected contribution in accordance with its mission statement and objectives?
- Are clients of the system better served than before? How do we know?
- Has the system made the desired impact on national development aspirations?
- Has the system applied the principles of good governance?

Evaluation is part of the responsibilities of the system's managers. There is some advantage, however, in engaging external specialists, experienced in both labour dispute management, and in evaluation processes and techniques, to undertake a review of the system's overall performance every 2–3 years.



Performance management involves making plans, implementing those plans, and then finding out whether planned activities have enabled the organization to achieve what it set out to do. Performance monitoring is a core component of this process and a key task for line managers within the labour dispute system.

Successful monitoring requires access to relevant and reliable information and managers who are trained to analyse and interpret the information before them. Analysis and interpretation, together with consultation where appropriate, are part of the decision-making process and thus part of performance management and good governance.







## CHAPTER 8

### Managing conflict in the workplace

Workplace cooperation .....	176
Managing conflict .....	179



## CHAPTER 8

# Managing conflict in the workplace

**T***his chapter is directed to the needs of employers who are interested in the prevention of disputes in their workplaces, and interested in securing the cooperation of employees, whether unionized or not, in dispute prevention initiatives. It stresses the importance of early prevention and the need to establish a strong foundation of trust and mutual respect between employers and employees.*



## Workplace cooperation

The interactions between employees and employers within enterprises can be cooperative and harmonious, or characterized by conflict and disruption. Even where relations are generally cooperative and harmonious, the very nature of employment relations suggest that some conflict is inevitable. Such conflict, however, can be managed within the workplace itself without third-party intervention, although assistance from third parties may be accessed from time to time on a voluntary basis.

Workplace cooperation refers to the arrangements for establishing and improving relations between management and employees within the enterprise. It requires that suitable arrangements and processes are in place to enable employees and their managers to interact for their mutual benefit. Interaction involves:

- sharing information;
- talking;
- listening;
- discussing;
- negotiating;
- deciding.

Effective workplace cooperation requires that suitable systems be in place within enterprises to enable positive interaction. Such systems and interactions can:

- prevent disputes by resolving complaints and preventing them from escalating into larger conflict;
- resolve problems quickly by addressing complaints when they arise;
- improve working conditions and the working environment;
- increase labour productivity and improve the competitiveness of the enterprise;
- build trust and confidence between employees and managers;





- improve decision-making at all levels;
- promote common interests;
- increase employee motivation through participation and involvement.

Overall, an effective system of workplace cooperation,

- (a) improves the interaction process and indicates a commitment of the enterprise to improved corporate governance. These procedural benefits are not readily measurable but are an important indicator of willingness to share power.
- (b) contributes to improved performance through productivity gains, improved competitiveness and, depending on product market conditions, increased profitability. These performance benefits are measurable and represent a powerful motivation for a reticent employer.

In recognition of the significant benefits to be gained from an effective system of workplace cooperation, ILO Recommendation No. 94 concerning Consultation and Cooperation between Employers and Workers at the Level of the Undertaking (1952) encourages States to take appropriate steps to promote consultation and cooperation at the workplace. Recommendation No. 94 indicates that workplace cooperation may be facilitated by the encouragement of voluntary agreements between the parties and/or promoted by laws or regulations that establish bodies for consultation and cooperation.

The main features of workplace cooperation are as follows.

### **Voluntary**

Workplace cooperation is a voluntary process, although some forums for interaction may be required by law such as, for example, the establishment and operation of works councils, joint consultative bodies or other employee-manager committees. Even if the law requires the formation of such bodies, both parties must want to engage with each other if workplace cooperation is to operate successfully.

**Two parties**

Workplace cooperation is a bi-partite process. It involves interactions between managers and their employees. There is no government or third party involvement unless the employer seeks the assistance of a third-party agency to advise on suitable systems and processes related to the needs of the enterprise.

**Informality**

Although the institutional arrangements for workplace cooperation may be formally required by law (e.g., joint consultative committees, safety and health committees), the actual processes of interaction are decided by the parties.

**Union involvement**

Workplace cooperation can exist in both unionized and non-unionized enterprises. Where unions exist it is important that workplace cooperation initiatives include union representatives and are not used as a means to isolate or replace union involvement in enterprise activities. Where unions do not exist, employees can still elect representatives and engage productively in workplace cooperation activities.

**Flexibility**

Workplace cooperation is owned by managers and employees and provides them with considerable scope to set their own agenda for interaction. Managers and employees can interact on whatever they mutually decide, when they wish.

**Willingness**

Workplace cooperation requires willingness on the part of both employees and their managers to share information and communicate effectively, and to focus on issues rather than the personalities involved.

**Ability**

Workplace cooperation does not require any specific or formal qualifications on the part of its participants. However, it does require a capacity to absorb information, to listen to what others have to say, to identify problems, and to generally display personal qualities that make for good relations, including integrity, courtesy, and respect.



## Managing conflict

Conflict management at the enterprise level requires a consideration of three interrelated matters, as follows:

- Creating the environment;
- Dispute prevention;
- Dispute resolution.

### Creating the environment

Effective conflict management within an enterprise starts well before there are signs of discord or disputation. The starting point is the creation of a climate of mutual respect between employees and managers that establishes a firm foundation of trust and cooperation, and which includes:

- sharing information through both one-way and two-way communication processes such as, for example, posting information on notice boards, attaching information to employee pay slips, making public address announcements, sending electronic messages, operating suggestion box schemes, holding meetings, and issuing newsletters;
- recognizing employees as legitimate stakeholders;
- treating employees with respect and courtesy;
- addressing misunderstandings quickly and fairly;
- creating an environment of inclusiveness and trust.

ILO Recommendation No. 129 concerning Communications between Management and Workers within the Undertaking (1967) underlines the importance of creating an environment of mutual understanding and confidence, and sets out the key elements of an enterprise-level communications policy aimed at achieving this end.

Building a strong foundation of trust and cooperation requires a commitment from management. It also requires leadership styles that

reach a suitable balance between a concern for production on the one hand, and a concern for the people engaged in the production process on the other, and that emphasise the importance of fairness, inclusiveness and participation, rather than being autocratic or paternalistic.

Encouraging mutual respect and goodwill is fundamental to creating a positive environment in the workplace. Respect and trust are not things that can be imposed by one party on another: they are the result of positive personal relations where people treat others in the same way as they wish to be treated themselves.

#### **Creating a positive environment requires:**

- Sharing information
- Showing mutual respect
- Recognizing workers as stakeholders
- Fostering inclusiveness
- Addressing misunderstandings
- Building trust

## **Preventing disputes**

Dispute prevention within an enterprise requires a commitment to problem solving that focuses on addressing issues that have the potential to escalate into major conflict. This commitment includes:

- formulating policies on important issues such as safety and health, harassment and bullying, wages and benefits and work discipline;
- establishing rules that give effect to policy intentions;
- ensuring rules are communicated to those to whom they apply;
- making commitments to obey the rules;
- developing consultative processes between employees and managers on policy and operational matters;



- conducting joint research on issues, rather than employees and employers researching problems separately;
- conducting joint training activities for employees and their managers;
- encouraging negotiation and joint decision-making;
- encouraging collective bargaining whereby the parties enforce their own agreement;
- seeking the assistance of third parties to facilitate discussions, undertake fact-finding exercises and conduct relationship enhancement activities;
- supporting labour inspection activities.

Collective bargaining, as a rule-making process, establishes the rights and obligations of the parties as embodied in their collective agreement. The agreement provides the essential reference point for any problems that arise and thereby plays a key role in preventing issues from escalating. It is possible, of course, that matters may arise which are not included in the collective bargaining agreement; or that there are differences in the interpretation of existing clauses, leading to a breakdown in relations. For such eventualities it is important that the collective agreement include specific provisions for dispute prevention.

### ***The role of labour inspection***

Effective labour inspection can play an important role in dispute prevention. In some jurisdictions inspectors have multiple responsibilities, including conciliation/mediation work directed to finding consensus-based decisions to problems that arise in the workplace.

In its traditional form, labour inspection, including safety and health inspection, is concerned with securing compliance with laws relating to working conditions and the working environment. This is usually done by inspectors making visits to enterprises to check

on compliance, either as part of a schedule of planned visits, or in response to a complaint from employees. However, as set out in ILO Convention No. 150 concerning Labour Administration: Role, Function and Organisation (1978), labour inspectors should aim to play a broader role in facilitating harmonious industrial relations.

Disagreements between employees and employers over working conditions (wages, overtime, hours of work, leave) and the working environment (handling of materials, including the use and storage of chemicals, mechanical hazards, electrical and fire safety, and issues relating to noise, dust, temperature and illumination in the workplace) can easily escalate into disputes involving work stoppages and other forms of industrial action.

With timely action on their part, labour inspectors can play an important role in preventing such disagreements from becoming full-scale disputes by ensuring that:

- employees and employers are informed on the content of laws and regulations;
- employees and employers are advised of what they are required to do in order to comply with such laws and regulations;
- laws and regulations are enforced, and sanctions and penalties applied as appropriate, where compliance is not forthcoming in spite of information and advice being provided.

The preventive work of labour inspectors will have the greatest impact where inspectors are able to undertake regular routine inspection visits and where they are well trained, professionally competent, impartial, and not corrupt.

The work of labour inspectors can play an important role in the prevention of rights disputes in particular. Inspectors have knowledge of existing legal rights and obligations and can explain these to employees and employers. They may also be able to detail what both parties are required to do in order to comply with the law. For example, an employee claiming underpayment of wages and benefits can raise this with an inspector during an inspection visit, or by lodging a complaint with the labour inspectorate.



Where there is disagreement concerning the employee's rights, this may be quickly resolved by an inspector explaining to both the employee and the employer what the law says, and what they must do to comply, thereby achieving a consensus outcome. In such a situation, there is no declaration of a dispute, but the action of the inspector clarifies the situation, overcomes confusion and misunderstanding, and avoids a confrontation that might otherwise require recourse to more formal proceedings.

Effective labour inspection requires that inspectors not only observe work practices and examine relevant documentation during their inspection visits, but also talk to employee representatives and managers as a standard procedure. Conducting exit meetings with representatives of employees and management should also be a standard procedure, as it provides an opportunity for the inspector to build consensus and trust between the parties.

#### **Preventing disputes requires:**

- Making clear policies
- Establishing rules
- Obeying rules
- Establishing consultative processes
- Encouraging joint decision-making
- Conducting joint research
- Conducting joint training
- Encouraging collective bargaining
- Supporting the work of labour inspectors

## **Resolving disputes**

Irrespective of the dispute prevention mechanisms that exist within an enterprise, some problems will arise that need to be addressed if workplace harmony is to be maintained. These problems and

issues can be handled through collective bargaining and the dispute resolution procedures as stated in the collective bargaining agreement.

Where there is no collective agreement or the agreement is silent on a particular matter, an enterprise should have arrangements in place to handle such issues and problems. These arrangements normally take the form of a grievance procedure, which is a process whereby an employee can bring a workplace concern to the attention of management with a view to having that concern resolved within the workplace itself.

### ***Grievance handling***

A grievance is a concern, problem, or complaint that a worker raises with the employer about the way he or she has been treated at work. Such complaints represent a violation of a worker's rights on the job and normally are individual in nature. Complaints that fall within the scope of individual grievances include the following:

- A change in employment conditions seen as disadvantageous to the worker, such as changes in commencement and finishing times, introduction of night work, or broken shifts;
- Discrimination against a worker on grounds of sex, marital status, religious beliefs, ethical beliefs, colour, race, ethnic or national origin, disability, age, political opinion, or sexual orientation;
- Discrimination against a worker because of his or her involvement in union activities;
- Discrimination against a worker because of a refusal to do work the employee believes would cause harm;
- Sexual harassment or racial harassment or bullying of a worker by his or her employer, representatives of that employer, coworkers, clients, or customers of the employer.

The procedure for handling such grievances normally starts with an informal verbal complaint being made to the worker's immediate manager. Through discussion, they attempt to resolve the issue on





the spot. If the complaint remains unresolved, the employee then follows the formally established procedure.

The key elements of an effective grievance procedure are as follows:

- The procedure should be developed in consultation with workers;
- The procedure should be written;
- It should be communicated to workers;
- It should allow for complaints to be made in writing and give guidance as to what should be included in the complaint, including the facts of what happened, where, when, who was involved, and the action the worker would like the employer to take to resolve the problem;
- It should allow for the worker to meet with the employer or employer's representative to present the complaint;
- It should allow the worker to be accompanied during meetings with the employer (by a fellow worker, or a union representative);
- The accompanying person should have the right to speak;
- The employer should provide a written statement of what action will be taken to address the complaint;
- The worker should have the right to appeal the employer's decision, with the appeal being heard by a manager not previously involved in the case;
- The outcome of the appeal should be communicated in writing to the worker.
- The procedure should be time-bound with clear limits set for each step.

The procedure could also provide for the assistance of a third-party conciliator either from within the enterprise or from outside.

The purpose of a grievance procedure is to enable complaints to be handled within the enterprise quickly, fairly and at low cost. This does

not mean, however, that all grievances will be satisfactorily resolved. The worker retains the right to take his or her complaint outside the enterprise by lodging the dispute with the relevant authority and having it handled in accordance with the procedures contained in legislation.

For further guidance with respect to the principles and procedures to be established, see ILO Recommendation No. 130 concerning the Examination of Grievances within the Undertaking with a View to Their Settlement (1967).

### ***Collective bargaining***

Collective bargaining is a process of negotiation between an employer, group of employers or one or more employers' organisations, on the one hand, and one or more workers' organizations, on the other. The subject of those negotiations concern terms and conditions of employment and the regulation of relations between employers (and their organisations) and workers' organisations. The outcome of these negotiations is a collective agreement which is legally binding. Collective bargaining is likely to result in more stable workplace relations and continued cooperation between workers and employers.

The importance of establishing machinery to facilitate voluntary negotiations by way of collective bargaining is emphasized in Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949), which states in Article 4, that:

*“Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”*

This is further underscored by Convention No. 154 concerning the Promotion of Collective Bargaining (1981), which specifies that



collective bargaining should be permissible in all branches of economic activity and with respect to a broad range of matters. These include determining working conditions and terms of employment, regulating relations between employers and workers, and regulating relations between employers or their organizations and one or more workers' organizations.

Disagreements relating to collective bargaining are inevitable. Some of these disagreements relate to the interpretation of existing provisions under the agreement, others arise concerning the creation of new rights once the existing agreement expires.

Many of these disagreements are resolved within the enterprise through the process of negotiation. Conflicting interests give way to common interests, compromises are made, the needs and interests of both parties are recognized and accommodated through discussion, concession, and compromise, new rights and obligations are created, and power sharing continues.

Negotiation is the very foundation of consensus-based approaches to dispute resolution and keeps a dispute under the control of the disputing parties themselves. Dispute resolution through negotiation is indicative of a mature industrial relation system where interactions are based on power sharing and a consensus approach to decision-making is accepted as normal.

### ***Involving third parties***

However, some disagreements will not be resolved by the parties themselves. Negotiations will sometimes fail, attempts to recharge the negotiation process will sometimes fail, deadlocks will occur, and disputes will be referred to other parties for resolution. Collective agreements set out the procedures to be followed in such cases, but resolution is no longer in the hands of workers and employers alone.

Once negotiations fail, the disputing parties can resort to conciliation/mediation, arbitration or adjudication, depending on the procedures established by the collective agreement or the prevailing legislative framework.

**Conciliation/mediation** by an independent third party is suggested as the next step in dispute resolution once negotiations have broken down. Conciliation/mediation represents an extension of the negotiation process, with the conciliator/mediator having no power to determine the outcome to the dispute. The conciliator/mediator assists the parties to reach consensus, but fully accepts that the final decision is in their hands.

Depending on the provisions of the collective agreement, conciliation/mediation may be conducted by private sector conciliators/mediators or those employed by a governmental department including, in some cases, a labour inspectorate or statutory authority. In all cases the process is the same: the independent and impartial conciliator/mediator uses his or her knowledge, skills and techniques to assist the disputing parties to resolve their differences. The key difference between private and public conciliation/mediation is the cost incurred by the disputing parties. While government-funded conciliation/mediation processes are free, private conciliation/mediators will be paid a fee by the disputing parties, unless the process is subsidized by Government.

**Arbitration** by an independent and impartial third party should normally take place if conciliation/mediation fails. This brings a dispute to a new level, in that the third party is empowered to make a decision that is final and binding on the disputing parties. Consensus-based decision-making is now replaced by an award or determination by the arbitrator based on the evidence, witness statements, and cross examinations presented during the arbitration hearing.

The award of the arbitrator will settle the dispute but it is unlikely the result will be to the satisfaction of both parties, and the dispute may be settled but not necessarily resolved. As a result of the arbitrator's decision, the disputing parties may adopt an adversarial approach to their future interactions and thereby create a situation in which consensus-based approaches to resolving problems become more difficult.

Accordingly, the ILO's Committee on Freedom of Association has repeatedly found that parties to a dispute should not be required



to proceed to arbitration (i.e., be subject to compulsory arbitration) unless the parties:

- are involved in essential services; or
- include public servants exercising authority in the name of the State; or
- have agreed to submit to arbitration in the event that conciliation/mediation fails.<sup>1</sup>

Effective arbitration requires that the arbitrator always permit – indeed, encourage – the parties to revert to conciliation/mediation, even after arbitration commences. It also requires that the arbitrator adopt the mantra of ‘arbitrate not advocate’, meaning that the arbitrator must not try to make the case for either party.

**Adjudication** by a court or labour tribunal is the most formal and legalistic approach to dispute resolution. The disputing parties now surrender their dispute, not only to a third party with power to make a final settlement, but also to a process that is formal, legalistic, expensive, time-consuming and frequently delayed, along with the possibility of a result that satisfies neither party. In the same way as arbitration, the dispute may be settled but not necessarily resolved.

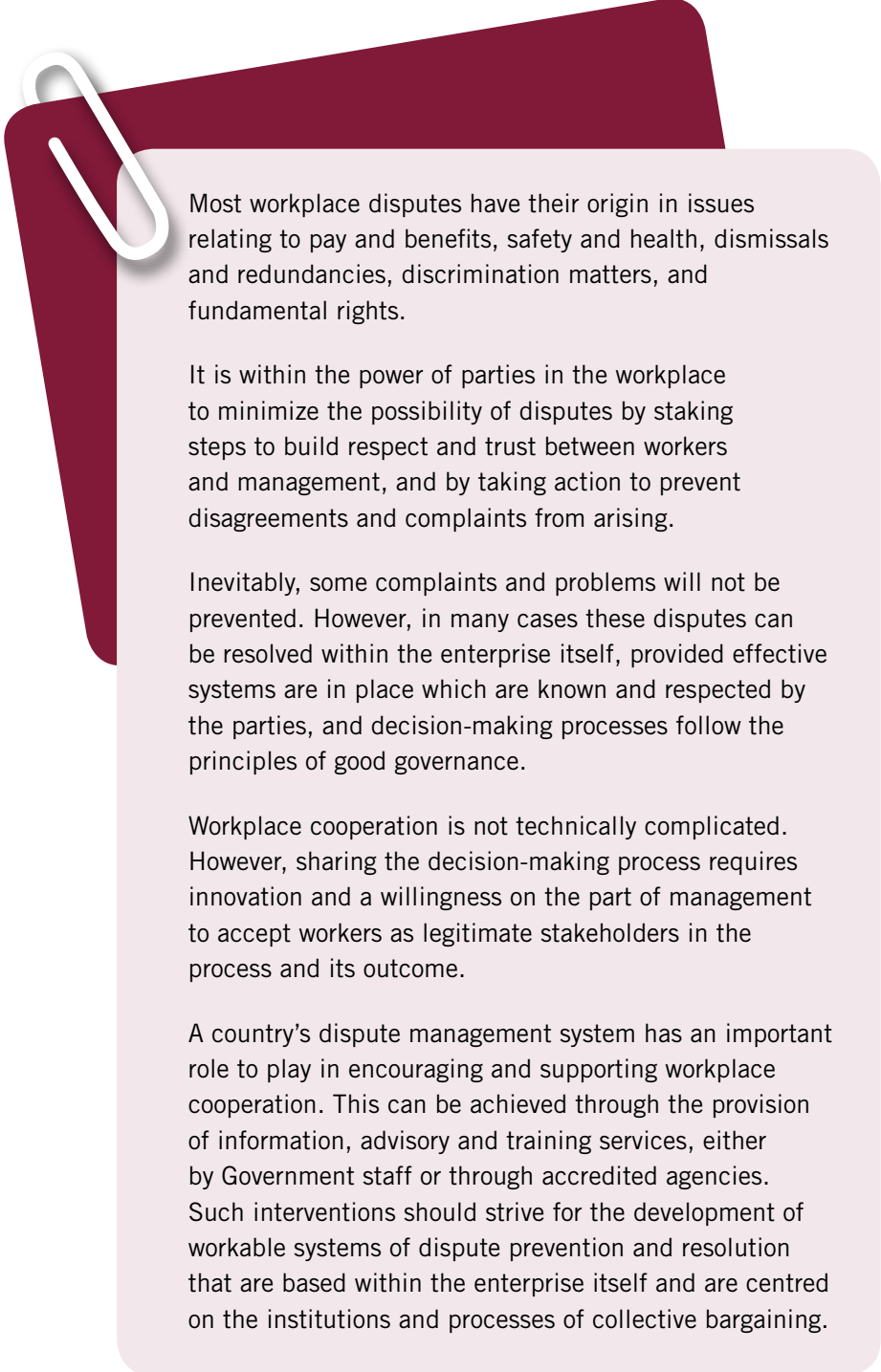
### Resolving disputes

### Grievance handling

### Negotiation and bargaining

### Involving third parties for conciliation/mediation, arbitration, adjudication

<sup>1</sup> *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva, International Labour Office, Fifth (revised) edition, 2006, paragraph 564.



Most workplace disputes have their origin in issues relating to pay and benefits, safety and health, dismissals and redundancies, discrimination matters, and fundamental rights.

It is within the power of parties in the workplace to minimize the possibility of disputes by staking steps to build respect and trust between workers and management, and by taking action to prevent disagreements and complaints from arising.

Inevitably, some complaints and problems will not be prevented. However, in many cases these disputes can be resolved within the enterprise itself, provided effective systems are in place which are known and respected by the parties, and decision-making processes follow the principles of good governance.

Workplace cooperation is not technically complicated. However, sharing the decision-making process requires innovation and a willingness on the part of management to accept workers as legitimate stakeholders in the process and its outcome.

A country's dispute management system has an important role to play in encouraging and supporting workplace cooperation. This can be achieved through the provision of information, advisory and training services, either by Government staff or through accredited agencies. Such interventions should strive for the development of workable systems of dispute prevention and resolution that are based within the enterprise itself and are centred on the institutions and processes of collective bargaining.









CHAPTER 9  
Issues and challenges

The challenge of change ..... 196

Funding support ..... 202



## CHAPTER 9

# Issues and challenges

**T**his chapter considers some of the issues and challenges that need to be addressed when the labour dispute system is reorganized, restructured or revitalized. Where the system is totally restructured and reorganized, for example, when an independent authority is created to replace an existing department of labour, the challenges are large and numerous. Where steps are taken to improve performance within an existing system – whether government-operated or independent – the challenges may be less formidable but still must be addressed.



## The challenge of change

The issues and challenges relating to the revitalization of an existing system are different from those relating to the creation of an entirely new institution. However, while the challenges of the change are different, the change process is the same in each case, involving six main steps as follows:

- Assessing the existing situation;
- Identifying the performance gaps;
- Advocating and convincing others of the need for change;
- Preparing a change strategy;
- Implementing and monitoring the change strategy;
- Evaluating outcomes.

## Assessing the existing situation

Assessing the existing performance can be challenging because it may signal the possibility for change and very often persons and institutions are resistant to changes. For example, transforming an underperforming government-operated labour dispute resolution system into an independent commission can be expected to attract resistance from the affected government officials. This was evident in Cambodia when its Arbitration Commission was formed; the Government's labour officials saw a loss of power and influence and thus assessed the existing situation as one where any required change should be tackled by strengthening an existing system rather than creating a new institution.

### The challenge

A self-assessment of the current situation is unlikely to be as thorough as one conducted independently and thus the challenge is to convince senior decision-makers that an independent and impartial assessment is an essential starting point for performance improvement.



## Identifying the gaps

Performance gaps can be identified and measured, but also denied or disputed by those resistant to change. This further reinforces the need for the involvement of independent and impartial parties in identifying performance shortcomings and generating the necessary statistical and anecdotal information that provides clear evidence of performance deficits. For example, low conciliation/mediation success rates, exceedingly long arbitration hearings, an arbitrator taking the role of advocate for one party, and a total absence of dispute prevention services are examples of performance deficits. Those officials resisting wholesale change will likely argue that performance problems obviously exist but deficiencies can be explained by ‘a lack of resources’, ‘insufficient training’, ‘uncooperative workers or employers’, and so on.

Such officials may see the solution to performance problems not in the creation of new systems but through the provision of additional resources. The persons charged with identifying performance gaps and their causes must be thorough, objective, and ideally identify those gaps that can be addressed by injecting further resources, and those that cannot. For example, where poor performance is assessed as the result of a lack of trust, corrupt officials, obvious partiality, and a culture of self-service rather than service to clients, an allocation of additional resources will simply provide the means to do more of the same.

### The challenge

The assessment of performance gaps must be done objectively and in close consultation with employer and employee representatives, as well as staff members. A reliance on top-down assessment by the dispute resolution authority itself is unlikely to generate the required information to support the performance assessment process.

## Advocating and convincing others

Those resistant to change can be expected to be strong advocates for the status quo. With regard to dispute prevention and resolution, employer and employee representatives – as clients of the system – have a vital role to play in convincing others of the need for change. If, for example, both employers and employees and their representative bodies strongly support the creation of a new and independent dispute resolution institution, the likelihood of its creation will be significantly enhanced. Without this support, and that of civil society and local champions, it will be difficult to create such an institution or garner adequate government budgetary support for its operations.

Advocacy requires clear communication directed to the achievement of a clear purpose. Oratory is important but it is the communication of intentions, meanings, activities and proposed benefits that will convince others of the need for change.

### The challenge

Mobilizing employee and employer support for the creation of a new and independent institution or for adjustments to an existing system is not only desirable but absolutely essential. Employees and employers must be convinced of the benefits of the change and provided with opportunities to actively participate in any change strategy directed at addressing performance gaps.

## Preparing a change strategy

The preparation of a change strategy for the revitalization of an existing department or institution requires:

- determining which functional responsibilities need to be revitalized, including information and advisory services, conciliation/mediation and related services, or arbitration and related services;



- ensuring that appropriate structures (divisions, sections, units, cells, task forces) are in place for each functional area;
- setting clear objectives for each division or unit that makes up the structure;
- identifying performance indicators and setting targets;
- establishing the operational arrangements to ensure that objectives, functions and structures work in harmony, including communication systems, case management systems, reporting systems, monitoring systems and computer systems;
- accessing and mobilizing the resources required to support the revitalization and to ensure that performance improvements achieved during the revitalization period are sustained over time.

The preparation of a change strategy for the creation of a new dispute resolution institution is more complicated. As indicated in chapter 4, the creation of an independent dispute resolution commission or similar body requires clear policy direction and the enactment of legislation to establish its legal existence.

### **The challenge**

The change strategy is intended to activate policy intentions and ensure the application of dispute prevention and resolution laws. It is the road map that links action and intentions. If the change strategy aims to establish a new autonomous organization, the preparation of that should involve the members of the organization's governing body, its director and senior staff, as well as representatives of employers and employees. It should also clearly indicate the organization's functions, objectives, structures, staffing plan and operational arrangements.

If the change strategy aims to improve an existing situation or process, it should clearly indicate the specific objectives of the proposed change, and should be prepared in consultation with those persons affected by the change, including the clients of the system.

## Implementing and monitoring the change strategy

Performance monitoring is one of the responsibilities of the managers of the labour dispute system. These managers must be trained to perform this task and be empowered to take action to address performance deficits within their particular area of responsibility.

Monitoring progress requires access to relevant, recent and reliable information. Some of this information may come from special purpose surveys, but much of it will be generated as a by-product of standard administrative procedures. Administrative records provide essential information for monitoring performance, provided:

- the right information has been collected;
- the information is readily accessible;
- the information is up to date;
- the capacity exists to analyse and interpret that information.

Information is a fundamental resource for decision-making and thus of fundamental importance for good governance. The introduction and operation of a computerized case management information system is essential, not only for monitoring overall performance, generating statistical data, and preparing periodic reports, but also for following the progress in real time of every individual case within the system.

The design and operation of an effective case management system represents a major challenge for the architects and operators of new approaches to dispute prevention and settlement. A situation must be avoided whereby the level of knowledge of the institution as a whole is less than the sum of the knowledge of its employees.

Clearly, an effective case management system must be computer-based. A computer file must be created for each case and all information produced in connection with that case added to that file. This provides real-time tracking for each case and allows case managers to see at a glance its current status.





### The challenge

Effective management of the change strategy requires access to real-time, relevant and reliable information requiring an information system that is well planned, largely paperless and readily accessible by various levels of decision-makers within the dispute management system. Managers must be encouraged to see information as a resource to assist in the decision-making process and be trained in the skills and techniques of information analysis and interpretation.

## Evaluating outcomes

Evaluation is a combination of measurement and judgment to help decide whether a change strategy has been successful. Measurement requires that information is collected and collated; judgment involves the capacity to analyse and interpret available information, and, if necessary, seek out further information to assist in performance evaluation.

Evaluation can be used to 'prove' right or wrong, good or bad, success or failure or, alternatively, used as a tool to 'improve' on a current situation. A dynamic dispute management system should embrace a culture of 'improvement', and should ensure its managers and staff acknowledge and accept evaluation as a positive rather than negative process.

### The challenge

The labour dispute system must ensure that evaluation processes are an integral part of the overall system, that managers understand the purpose and processes of performance evaluation, and that staff at all levels are encouraged to see evaluation in positive rather than negative terms.

## Funding support

The actions required to improve the performance of dispute management systems invariably require the allocation of additional resources to support the change strategy. Relatively minor improvements might be supported by a reallocation of existing resources. However, major change, including the creation of an independent, autonomous dispute management body, requires a significant injection of resources if such a body is to operate effectively and efficiently.

For example, the annual reports of Ghana's Labour Relations Commission clearly reflect a degree of frustration with the limited resources available to support its work, including insufficient budgetary allocations, limited staff, and limited office accommodation, as well as a lack of facilities in areas outside the capital city. The lack of funds has restricted the Commission's capacity to reach its full potential in Ghana and represents the biggest single obstacle to the establishment and operation of independent commissions in the developing countries of the world.

In many developing countries labour administrations are responsible for the operation of the dispute management system, together with various other functions including labour inspection, public employment services, and workplace safety and health. Traditionally, these labour administrations have attracted limited budget support; this is possibly because their activities are seen more in terms of social protection and social justice and of limited or no significance to economic progress. This perception must be vigorously challenged, and the advocates of change must be fully prepared and able to convince others of the economic benefits emanating from new systems and processes relating to dispute prevention and resolution.

Labour administrations, with the support of their employer and employee clients, need to do more to ensure that budget allocators are aware of the economic impact of labour administration activities.

The mission statement of the CCMA in South Africa referred to in chapter 4 is particularly interesting because it makes the linkage



between effective dispute resolution and economic development. This linkage needs to be emphasized not only as part of the day-to-day operations of labour dispute resolution systems, but also and in particular when seeking funding support for those systems. The prevention of disputes and the expeditious handling of those that cannot be prevented generate benefits in the form of improved employee-manager relations, increased labour productivity, less production time lost through industrial action and, ultimately, increased profitability. The economic arguments in favor of effective dispute prevention and resolution systems need to be actively promoted.

If an independent, impartial, respected and trusted institution is to be established and operate effectively, it clearly must have independent sources of funding. It cannot be financially supported by business, trade unions, political parties or any other organization with an agenda of its own. In some countries the law permits an independent commission to receive donations, gifts and bequests, provided these do not ‘compromise its independence’, but no guidance is given as to what does or does not result in such a compromise. A reliance on funds from business or unions is high-risk. Accordingly, an independent commission must be financed from government resources on an ongoing basis, and as part of that Government’s commitment to national progress. This gives rise to two issues:

**Firstly, how can government funds for the establishment and initial operating costs for a new institution be secured?**

This depends on advocating ability, political commitment, the support of constituents, the strength of arguments for change, the perceived benefits of the proposed changes, and the political and economic environment at the time. As evident from the experience in establishing the Arbitration Council in Cambodia, it may be possible to attract donor support as part of a technical cooperation project during the establishment phase. This, however, does not guarantee that government funding will be forthcoming once donor project funding comes to an end.

Ideally, a long-term commitment to government funding of an independent body should be secured before any such project commences. Of course, even if such commitment is given, this does not guarantee that funding will be made available. Funding institutional change of the type envisaged for dispute resolution through donor-funded technical cooperation projects is also relatively high-risk and a project may be very successful in achieving its objectives, but once funding ceases the dispute resolution system may flounder.

**Secondly, how can independent and adequate financial support be secured on an ongoing and long-term basis?**

The provision of conciliation/mediation, arbitration and related services should be free of charge to employees and employers. However, there may be scope for the institution to charge fees for advisory and related services, including systems development and training for enterprises seeking assistance with dispute prevention strategies. It may also be possible to charge filing or administrative fees when requests for conciliation/mediation or arbitration services are initiated. It is likely, however, that the income generated from such activities will represent a small portion of the system's overall requirements.

Clearly, governments must accept responsibility for providing the necessary funds to support the dispute management system as part of its ongoing commitment to national development. Employers' organizations, trade unions, civil society, and key individuals must be vigorous in their efforts to ensure governments continue to provide the necessary funds. In the end, and irrespective of lobbying, it is the State that must find the necessary money.

This might include the earmarking of a portion of existing fees imposed on enterprises, separate levies, or a portion of fines collected from enterprises that fail to comply with labour and business laws.

Some inspiration might be drawn from countries in which levies are imposed on employees and employers to compensate employees for injuries sustained at work or out of the work situation, or where employers are required to take out compulsory insurance against such



contingencies. Using part of the levy or insurance premium contributions to prevent accidents is in the interest of all parties. Could an added levy be applied for the prevention and resolution of labour disputes, with the funds so collected used to meet the operational costs (or part thereof) of an independent commission? Would such arrangements compromise a commission's independence?

### The challenge

The lack of funds represents the greatest obstacle for the creation of an independent dispute resolution system. Those driving the change process and supporting the creation of an independent dispute resolution body need to consider the issue of funding support as an integral component of the change itself, not something to be considered after the new institution is established.

Limited budgets are also a concern for labour administrations and their dispute management systems. Their challenge is to ensure that existing resources are well utilized and that sound economic arguments are presented to justify additional allocations.

## The informal economy

Work in the informal economy is prevalent in both industrialized and developing economies, but much more so in the latter where, in some instances, more than 80 per cent of a nation's workforce is engaged in such activities. Such persons have virtually no protection, and in many cases have no access to the country's dispute resolution system in spite of the fact that many are employees rather than independent contractors or self-employed workers.

Informal economy workers (as well as persons engaged as independent contractors and self-employed workers) often work under difficult conditions with poor wages and benefits, no safety and health protection, no social security, and no voice.

Many informal economy workers are in an employer-employee relationship, but have limited or no access to dispute resolution processes. Even if they had access, many workers would be reluctant to articulate their problems, complaints and disputes for fear of reprisals and losing their jobs, as they are in circumstances where a poor job is seen as better than no job at all.

Providing all workers in both the formal and informal economy access to a nation's dispute management system may place strains and pressures on that system, but such access is a fundamental aspect of good governance. Whether the system is operated by a department of labour or by an autonomous body, access by all employees is of fundamental importance.

### **The challenge**

In developing countries in particular, many informal economy workers have no access to the dispute resolution system and indeed, in many cases, have no right to address their complaints in any system at all. In part, this is a legal problem requiring legislative intervention, in order to ensure that all employees in all sectors and all occupations have access to the dispute resolution system. The challenge is to introduce arrangements which ensure that informal economy employees have access to dispute resolution processes, but which guard against the threats and real possibility of reprisals, particularly job loss, which informal workers may suffer.

## **The role of lawyers**

Labour dispute systems dominated by adjudication processes provide for the right of the disputing parties to be represented in court, and thus opportunities for specialist lawyers to advocate on their behalf.

The involvement of lawyers can sometimes create an adversarial atmosphere to proceedings that can be detrimental to the employee-employer relationship. Some lawyers may seek to delay proceedings through an over-reliance on legal arguments and excessive



adjournments; this not only adds to the cost of litigation but also leads to delays and a build-up of unsettled cases.

As conciliation/mediation and arbitration processes increasingly become the dominant forms of dispute prevention and resolution, the role of lawyers as advocates in the system will presumably decrease. Fewer cases will go to court, resulting in less demand for the services of specialist lawyers. Further, in conciliation/mediation proceedings lawyer advocates are not permitted, and their involvement in arbitration cases can be limited unless the parties and the arbitrator agree to their presence.

‘Fewer legalities’ in the dispute prevention and resolution system does not necessarily mean there is no role for lawyer advocates. It may, however, mean a different role. Labour lawyers, after retraining and satisfying accreditation requirements, may take positions as conciliators/mediators, either full-time or part-time, employed by the independent system or as private sector operators.

### **The challenge**

Less reliance on adjudication and greater use of conciliation/mediation and arbitration in dispute resolution could mean less involvement of lawyers as representatives of the disputing parties. This may see lawyers changing their involvement in dispute resolution from advocates to conciliators/mediators or arbitrators, requiring that they undertake the necessary training required and meet accreditation standards.

## **The role of private agencies**

An issue for consideration in planning new approaches to labour dispute prevention and resolution is the role to be played by private sector operators.

Under normal commercial contract arrangements, enterprises are free to purchase services associated with the normal and lawful conduct of

their business, including legal services, accounting services, computer services, engineering services, recruitment services, catering services, and other services under contracting-out arrangements. The scope of such services is agreed between the enterprise and the contractor, the fees negotiated, work undertaken, and payments made.

There is no reason why services related to improving industrial relations in the workplace or preventing and resolving labour disputes should be considered any differently. Enterprises are entitled to engage consultants to advise on workplace cooperation arrangements and receive a fee for their service. Indeed, provided consultants are reputable, professional, regulated by a code of conduct, respect employees' rights, and operate in accordance with the law, they can reduce the pressure on government-funded services, and enterprises should be encouraged to engage them.

Individuals or enterprises providing such services are not subsidized from public funds but this may not deter larger organizations which can afford to pay for such services. Furthermore, such services can be delivered with speed, informality, have the required focus, and with assurances of privacy, all of which appeal to some employers and which they may be willing to pay for.

In addition, some collective bargaining agreements stipulate the use of private conciliators/mediators and arbitrators in the event of a deadlock and breakdown in the bargaining process, with the cost of such services shared between the union and employer concerned.

Where private sector dispute prevention and resolution services operate in parallel with the State-funded system (whether provided through the labour administration or an independent commission), it is important that they not be totally isolated from each other and that they do not engage in behavior that undermines the other.

It is also possible for the labour administration or an independent commission to engage accredited agents to undertake some aspects of dispute prevention and resolution. Agents can be accredited and authorized to undertake work on behalf of the labour administration or independent commission as, for example, to advise on dispute





prevention, or to engage in conciliation/mediation or arbitration work, but without becoming employees of the system.

Such agents are paid a fee on the basis of a contract for service (as distinct from a contract of service) entered into with the responsible authority. Such agents have no direct relation with the enterprise and receive no payment from that enterprise. They simply provide services for the benefit of the enterprise (both employers and employees) as stipulated in their contract, a contract that emphasizes impartiality, avoidance of conflicts of interest, and the same general standards of professional competence and behavior expected of conciliators/mediators and arbitrators who are in the direct employment of the labour administration or commission.

The challenge to the dispute management system is to ensure that only well qualified and experienced contractors receive accreditation, that arrangements are in place to de-register contractors that prove to be unacceptable, and that accreditation renewal not be automatic. For the dispute management authority, the accreditation of agents requires that an effective management and monitoring system be in place, in order to ensure that contractors further the objectives of the authority and not reflect adversely on its status and reputation.

The engagement of accredited agents to undertake dispute prevention and resolution work is quite different from engaging part-time conciliators/mediators or arbitrators. Part-time conciliators/mediators or arbitrators are employees of the dispute management authority, possibly paid under different arrangements from full-time staff, but employees nevertheless. They are not contractors operating under a commercial contract for service but employees under a contract of service.

The dispute management system should provide conciliation/mediation and arbitration services that are free of charge to employers and employees. Accordingly, if a collective bargaining agreement negotiated between an employer and a trade union includes a provision for any disputes under the agreement to be referred to a conciliator/mediator or arbitrator as agreed by the parties, and paid

by the disputing parties themselves, such arrangements should be respected by the dispute management authority. The dispute resolution process is no longer free but is clearly based on the consensus of the parties and enshrined in **their** agreement.

Access to conciliation/mediation and arbitration services should also be voluntary. The term 'voluntary' deserves some explanation, in that the party requesting the services does so freely and willingly, but the other party to the dispute is then required to respond even if reluctant to do so.

### **The challenge**

The increased involvement of private sector agents in the provision of information, advisory, training, conciliation/mediation and arbitration services, as part of a country's dispute prevention and resolution system is inevitable. Whether such services are provided by the State or by the private sector, the key challenge remains the same: to ensure that impartial and high quality professional services are provided for the benefit of the disputing parties.

## **A changing labour market situation**

In some countries, there is a tendency for a weakening of collective bargaining processes and a greater emphasis on individual employment contracts. This emphasis on individualism in the employment relationship represents a different typology that emphasizes individual disputes predominantly over existing rights.

This does not mean that collective disputes over both rights and interests are no longer present. It does, however, represent a shift in the level of interaction and the need for labour dispute prevention and management systems to accommodate an increase in the number of individual rights disputes.



### The challenge

The weakening of collective arrangements between unions and employers has resulted in the labour disputes system having to handle more individual rights disputes. The challenge for the system is to be sufficiently flexible to accommodate this change while continuing to provide high quality conciliation/mediation and arbitration services for collective disputes.

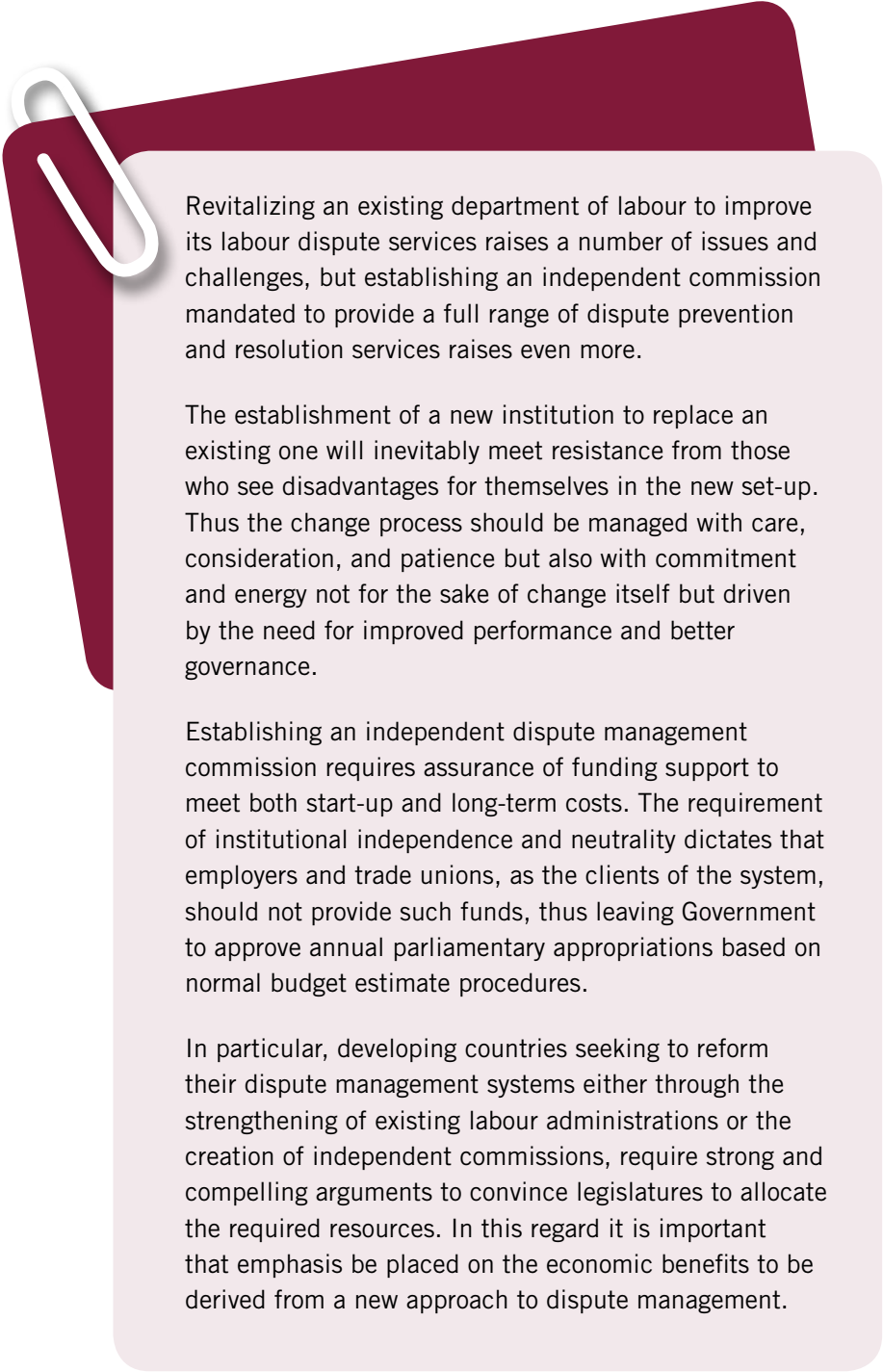
## Private and public sector disputes

Whether employment takes place in the private sector or the civil and public service, individual and collective disputes will occur. Establishing separate systems to handle public and private sector disputes does not necessarily ensure better outcomes for the concerned parties.

Accordingly, there is merit in one labour dispute agency assuming responsibility for both public and private sector disputes and for national laws providing a legal base for such arrangements. To the extent that public service disputes are seen as 'different' from those in the private sector it may be appropriate to designate some conciliators/mediators and arbitrators in the unitary dispute resolution system to specialize in the disputes emanating from a particular sector, but without being confined to that sector.

### The challenge

The dispute management system should be able to provide a full range of services equally to both the private and public sectors, and ensure that the highest level of professional service is available for the prevention and resolution of disputes irrespective of the sector of employment.



Revitalizing an existing department of labour to improve its labour dispute services raises a number of issues and challenges, but establishing an independent commission mandated to provide a full range of dispute prevention and resolution services raises even more.

The establishment of a new institution to replace an existing one will inevitably meet resistance from those who see disadvantages for themselves in the new set-up. Thus the change process should be managed with care, consideration, and patience but also with commitment and energy not for the sake of change itself but driven by the need for improved performance and better governance.

Establishing an independent dispute management commission requires assurance of funding support to meet both start-up and long-term costs. The requirement of institutional independence and neutrality dictates that employers and trade unions, as the clients of the system, should not provide such funds, thus leaving Government to approve annual parliamentary appropriations based on normal budget estimate procedures.

In particular, developing countries seeking to reform their dispute management systems either through the strengthening of existing labour administrations or the creation of independent commissions, require strong and compelling arguments to convince legislatures to allocate the required resources. In this regard it is important that emphasis be placed on the economic benefits to be derived from a new approach to dispute management.







## CHAPTER 10

### ATTACHMENTS

ATTACHMENT A	
Glossary of key terms . . . . .	<b>219</b>
ATTACHMENT B	
Relevant international labour standards . . . . .	<b>237</b>
ATTACHMENT C	
Codes of behaviour / professional conduct . . . . .	<b>239</b>





## CHAPTER 10

# ATTACHMENTS

**T***his chapter provides resources that may be of interest to those involved in the management of labour dispute systems. The Glossary explains commonly-used terms, the relevant international labour standards and associated recommendations are listed, and two examples of professional codes of conduct are provided in full, one from the United States and another from South Africa.*







# ATTACHMENT A

## Glossary of key terms

### Adjudication

A process of settling a dispute in court before a judge or magistrate, in accordance with the formalities and procedures required by law.

### Arbitration

The determination of a dispute by one or more independent third parties rather than by a court. During arbitration, an arbitrator hears the arguments of both parties to a dispute and settles the case by making an award.

The proceedings are less formal than a court but there are some similarities including the presence of witnesses, the right to cross-examination, and the right to legal representation.

In most cases the award is final and binding. Appeals are usually confined to cases in which the award is contrary to the law, or the parties' right to be heard was not respected.

› See also **Conciliation, Facilitation, Mediation.**

### Arbitrator

A person conducting an arbitration hearing and making an award. In some cases an arbitration hearing is conducted by a panel or board comprised of several members rather than an individual.

### Arb-con

A process in which arbitration (arb) precedes conciliation (con) in the dispute resolution process. The arbitration award is placed in a sealed envelope and not disclosed to the disputing parties. Conciliation then commences and if successful, the envelope is destroyed; if the conciliation fails, the sealed award then prevails.

## Award

The written decision of an arbitration hearing, sometimes referred to as a determination.

## Bipartism

It refers to bipartite relations between employers and workers and/or their respective organizations on issues of common interest concerning the world of work;

Bipartite social dialogue may take the form of collective bargaining or other forms of consultation and cooperation between both sides of the employment and labour relations.

- › See also **Social dialogue**, **Tripartism**.

## Blended bargaining

A form of bargaining that combines elements of traditional positional bargaining with elements of mutual gains bargaining, with a view to not only reaching an agreement but also enhancing future cooperation between the disputing parties.

- › See also **Interests-based bargaining**, **Positional bargaining**.

## Bullying

Behaviour by one person towards another intended to intimidate and humiliate, including verbal abuse or physical violence, often in front of work colleagues.

Examples of bullying behaviour towards a worker include the worker being:

- regularly unfairly treated;
- blamed for problems caused by others;
- given too much to do with the aim of causing the worker to fail to reach targets;
- regularly threatened with dismissal;
- unfairly passed over for promotion or denied training opportunities;



- physically or verbally abused.

Bullying can be face-to-face, in writing, over the phone, or by fax or email.

Bullying is a cause of conflict and disputes, usually handled by an enterprise grievance procedure in the first instance.

- › See also **Harassment**.

## Code of conduct

A written document that sets out standards of behavior expected of an employee or group of employees.

Some codes are legally binding, while others are entered into voluntarily.

A code of conduct is sometimes referred to as a code of behavior, or a code of ethics, or a code of practice.

## Collective bargaining

Collective bargaining is defined by Convention No. 154 as extending “to all negotiations which take place between an employer, a group of employers or one or more employers’ organizations, on the one hand, and one or more workers’ organizations, on the other, for--

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organizations and a workers’ organization or workers’ organizations.

The result of the bargaining process is typically referred to as a collective bargaining agreement (CBA).

- › See also **Freedom of Association and the protection of the right to organize, Negotiation**.

## Collective dispute

A disagreement between a group of workers usually, but not necessarily, represented by a trade union, and an employer or group of employers

over existing rights or future interests.

- › See also **Individual dispute**.

## Communication

The transfer of information from one party to another in the form of words, both written and oral, pictures, or gestures, with a view to enhancing understanding between them.

One-way communication involves the transfer of information by one party but without the receiver of that information providing feedback, or response, or any other indication that the message has been understood.

Two-way communication is an interactive process where both the sender and receiver of information respond to each other's words, pictures, or gestures to ensure mutual understanding.

## Compulsory arbitration

A situation in which arbitration is imposed by law or by the government authorities. It also covers situations where arbitration can be set in motion by either of the disputing parties without the agreement of the other, or invoked by the Government on its own initiative.

- › See also **Voluntary arbitration**.

## Compulsory conciliation

A situation in which the disputing parties are required by law to use the conciliation service provided by Government.

This is used in some countries where negotiation and bargaining processes are not well developed, leading to the possibility of deadlocks and recourse to industrial action. 'Compulsory' in this context means it is obligatory to attend a conciliation meeting, but because of the nature of the conciliation process itself there can be no compulsion to reach or even try to reach a resolution to the dispute.

- › See also **Voluntary conciliation**.



## Conciliation

A process in which an independent and impartial third party assists the disputing parties to reach a mutually acceptable agreement to resolve their dispute.

Conciliation extends the bargaining process by encouraging the disputing parties to reach a consensus but without imposing a solution to their dispute. It is sometimes referred to as assisted bargaining.

For the purpose of this publication conciliation and mediation are used to describe the same process, leading to the use of the terms conciliation/mediation and conciliator/mediator.

- › See also **Arbitration, Facilitation, Mediation.**

## Conciliator

An independent and impartial person who assists the parties in a dispute to find a mutually acceptable outcome.

A conciliator assists the process of bargaining but has no determinative role.

The term conciliator is sometimes distinguished from the term mediator. For example, a distinction might be made between a State-appointed conciliator and a private mediator, but their functions are the same.

In some jurisdictions (e.g., USA) there is a clear distinction between a mediator and conciliator. A mediator interacts jointly with the disputing parties to assist them to find a mutually acceptable agreement; a conciliator is solely concerned with conducting separate meetings with the disputing parties and does not bring them together.

## Conflict

A state or condition of discord, disagreement, antagonism, or opposition between an individual worker and his or her employer, between a group of workers such as a trade union and their employer, or between a union or groups of unions and groups of employers.

- › See also **Dispute.**

## Consensus

A process whereby the disputing parties reach a mutual agreement.

## Contract of employment

An agreement under which a person (employee) undertakes to carry out work for another person (employer) in exchange for payment or remuneration, under specified conditions.

A contract of employment may be verbal or written. A written contract is preferable as it provides documented information that can assist in the prevention and resolution of disputes.

## Discrimination

Any distinction, exclusion or preference made, among others, on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

## Dispute

Disagreement and conflict between two or more parties concerning a matter of mutual interest.

› See also **Conflict**.

## Dispute diagnosis

A process in which the disputing parties identify the symptoms of conflict and the causes of disputes to better equip them to resolve any disputes that arise.

The symptoms represent the signs and provide the evidence that conflict exists. The signs include the obvious, such as work stoppages and lockouts, but also the less obvious such as increased labour turnover, more absenteeism, increased wastage of raw materials, or workplace sabotage.





## Dispute prevention

Arrangements and processes that enable conflicts or disagreements concerning matters of mutual interest to be resolved by the actions of the concerned parties.

Arrangements that enable problems to be resolved fairly and quickly, thereby eliminating the possibility of escalation into major confrontation between the disputing parties and thus avoiding the formal declaration or notification of a dispute.

## Dispute resolution

A situation where a dispute ends and an agreement is reached as a result of consensus-based behavior of the disputing parties with or without the assistance of a third-party conciliator.

Also refers to the process or steps to be followed by the disputing parties to resolve their differences.

- › See also **Dispute settlement**.

## Dispute settlement

A situation where a dispute ends as a result of a decision of an independent third party, as for example the award or determination of an arbitrator.

The dispute is settled in the sense that a final and binding decision has been made but this decision may not be to the satisfaction of the parties concerned.

- › See also **Dispute resolution**.

## Employee/worker

The term employee is a legal term which refers to a person who is party to an employment relationship. The term worker is a broader term that can be applied to any worker (e.g., self-employed), regardless of whether or not she or he is an employee.

- › See also **Employer**.

## Employer

A person or institution who hires another person or persons (employees) under a contract of employment in which wages or salaries are paid in return for the work performed.

- › See also **Employee/worker**.

## Employers' organization

An organization whose membership consists of individual employers, other associations of employers or both, formed primarily to protect and promote the collective interests of members, to present a united front in dealing with organizations and/or representatives of workers, as well as to negotiate for and provide services to members on labour-related matters.

- › See also **Freedom of association and the protection of the right to organize, Trade Union**.

## Enterprise

An entity where resources are utilized to produce goods or services operating as a public company, a proprietary company, a partnership, or a sole trader.

One enterprise may have several establishments and is then commonly referred to as a multi-establishment enterprise.

An enterprise and an establishment are one and the same for a single establishment firm.

## Establishment

An entity that conducts business involving the production of goods or services, or where industrial operations are performed at a single physical location.

## Facilitation

One aspect of the pre-conciliation process in which an independent and impartial conciliator encourages the disputing parties to talk and listen to each other and gain a better understanding of each other's positions



before they commence formal bargaining.

- › See also **Arbitration, Conciliation, Mediation.**

## Fact-finding

A process in which an independent and impartial third party identifies, analyses and interprets data relating to a dispute (e.g., concerning the capacity of an employer to pay a wage increase) and presents recommendations to the disputing parties but without determinative powers and purely in the role of an expert.

The underlying purpose of fact-finding activities is to reduce and possibly eliminate conflict over data issues.

## Freedom of association and the protection of the right to organize

ILO convention No.87 (1948) concerns the right, freely exercised, of workers and employers, without distinction, to organize for furthering and defending their interests. Workers and employers, without distinction whatsoever, have the right to establish and join organizations of their own choosing with a view to furthering and defending their respective interests. Such organizations have the right to draw up their own constitutions and rules and, to elect their representatives in full freedom, to organize their administration and activities, and to formulate their programmes. Public authorities shall refrain from any interference that would restrict this right or impede the lawful exercise of this right. The organizations shall not be liable to be dissolved or suspended by administrative authority.

Organizations have the right to establish and join federations and confederations that shall enjoy the same rights and guarantees. Convention N°.87 also provides for the right to affiliate with international organizations. The acquisition of legal personality by all these organizations shall not be subject to restrictive conditions. In exercising the rights provided for in the convention, employers and workers and their respective organizations shall respect the law of the land. The law of the land and the way in which it is applied, however, shall not impair the guarantees provided by the Convention.

- › See also **Collective bargaining, Employers' organization, Trade Union.**

## Good faith

Good faith implies making every effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustified delays, complying with the agreements which are concluded and applying them in good faith.

## Governance

The process of making and implementing decisions in accordance with generally accepted principles including participation, transparency, responsiveness, equity, inclusiveness, efficiency, effectiveness, accountability, and adherence to the rule of law.

## Harassment

Harassment and pressure at the workplace can take the shape of various offensive behaviours. It is characterized by persistently negative attacks of a physical or psychological nature on an individual or group of employees, which are typically unpredictable, irrational and unfair.

- › See also **Bullying**.

## Individual dispute

A disagreement between a single worker and his or her employer, usually over existing rights. It can also include situations in which a number of workers disagree with their employer over the same issue, but where each worker acts as an individual.

- › See also **Collective dispute**.

## Industrial relations

The individual and collective relations between workers and employers at work and arising from the work situation, as well as the relations between representatives of workers and employers at the industry and national levels, and their interaction with the State.



### Industrial relations officer

An employee of the labour administration engaged in the prevention and resolution of labour disputes and related matters.

The term is also used to describe a person employed in the private sector with responsibility for industrial relations matters.

### Industry/sector/branch

A group of enterprises or employers producing a similar product or service such as, for example, a banking industry, a mining industry, or a garment manufacturing industry.

### Interest dispute

A disagreement between workers and their employer concerning future rights and obligations under the employment contract. Such disputes are not based on existing entitlements but rather the desire of one party to create new rights in the future, such as a higher level of wages and additional benefits.

Interest disputes are directed to the creation of new rights and emerge as a result of a breakdown in collective bargaining.

› See also **Rights dispute**.

### Informal economy

The term informal economy refers to all economic activities that are – in law or practice – not covered or insufficiently covered by formal arrangements. The term takes account of the considerable diversity of workers and economic units, in different sectors of the economy and across rural and urban contexts that are particularly vulnerable and insecure; that experience severe decent work deficits and often remain trapped in poverty and low productivity; – the informal economy includes wage workers and own-account workers, contributing family members and those moving from one situation to another; – it includes some of those who are engaged in new flexible work arrangements and who find themselves at the periphery of the core enterprise or at the lowest end of the production chain. Workers in the informal economy often have either limited or no access to dispute resolution services and processes.

## Interest-based bargaining

A process in which the disputing parties show an appreciation of each other's needs and issues and adopt no fixed positions as they would in a traditional positional bargaining approach.

Sometimes referred to as mutual gains bargaining to highlight the joint exploration of issues by the disputing parties.

› See also **Blended bargaining**, **Positional bargaining**.

## Investigation

A process in which an independent third party undertakes a detailed examination of and reports on an issue or problem.

The process may be used to provide information as part of a grievance procedure, particularly in cases where discrimination, harassment, or redundancy issues are in dispute.

## Joint problem solving

A situation in which the disputing parties agree to be non-confrontational and address the matters at issue in a systematic and structured manner, often with the assistance of a neutral third party.

This approach refocuses on the issues in dispute rather than the protagonists.

## Joint research

A situation in which an employer and trade union agree to research an issue or problem together rather than conduct separate studies of the same issue. The study may be carried out by a third party but under terms of reference and arrangements agreed to by both parties.

## Labour administration

Labour administration is defined by ILO Convention No. 150 as “public administration activities in the field of national labour policy.”



The key functional responsibilities of labour administration encompass labour inspection (including inspection relating to occupational safety and health), industrial relations, employment services, aspects of vocational training and labour information and research.

These activities take place in a labour administration system that includes government ministries and departments, regional and district agencies, coordinating and consultative bodies, statutory authorities and other agencies of the State.

An independent dispute resolution commission, as a duly constituted statutory authority, is thus part of the labour administration system.

### Labour officer

An employee of the labour administration system who may be engaged in labour inspection, industrial relations or employment service functions.

### Lockout

A work stoppage in which the employer prevents workers from working by closing the business.

A lockout is undertaken with the aim of compelling workers to accept the terms and conditions of the employer or comply with the employer's demands.

› See also **Strike**.

### Mediation

In most jurisdictions the term is synonymous with conciliation. There are, however, some more academic aspects of mediation which focus on different approaches to the process, but without changing its basic process orientation and non-determinative role.

Facilitative mediation concentrates on the process alone without any suggestions or remedies being offered to the disputing parties.

Evaluative mediation gives proposals and makes recommendations to the disputing parties but, by the very nature of the process, it cannot be binding.

Transformative mediation involves the mediator in having the parties recognize their mutual needs, interests, viewpoints and values, but still without imposing any solutions to their dispute.

- › See also **Arbitration, Conciliation, Facilitation**

## Monitoring

An accepted part of the management process in which the work performance of individuals, units, departments or an organization as a whole is regularly compared with objective standards and targets.

- › See also **Arbitration, Conciliation, Facilitation**.

## Negotiation

A process in which two or more parties with both common and conflicting interests come together to talk and listen, with a view to reaching a mutually acceptable agreement.

- › See also **Collective bargaining**.

## Positional bargaining

A negotiation process in which the parties adopt a fixed and predetermined objective or objectives in a bargaining situation from which they are not prepared to move or compromise.

Typically, the parties adopt a confrontational role in which each strives for a win/lose outcome.

- › See also **Blended bargaining, Interests-based bargaining**.

## Recognition of a bargaining agent

Acceptance by an employer to allow a union (bargaining agent) to negotiate agreements concerning employment terms and conditions on behalf of a particular group of workers referred to as a 'bargaining unit.'





Recognition may be voluntarily agreed between the employer and union. Alternatively, recognition may be determined by law, usually requiring the union to provide evidence that it represents a minimum number or percentage of workers in the workplace.

It is possible sometimes for a union to have exclusive or sole bargaining rights with an employer. Alternatively, the employer may recognize more than one union for bargaining purposes.

Recognition of a bargaining agent is used mainly in some common law countries.

### Rights dispute

A disagreement between a worker or workers and their employer concerning the violation of an existing entitlement embodied in the law, a collective bargaining agreement, or under a contract of employment.

A confrontation sometimes referred to as a legal dispute.

Such disputes can be either individual or collective.

› See also **Interests disputes**.

### Social dialogue

Social dialogue is the term that describes the involvement of workers, employers and governments in decision-making on employment and workplace issues. It includes all types of negotiation, consultation or information sharing among representatives of governments, employers and workers or between those of employers and workers on issues of common interest relating to economic and social policy. Social dialogue can take place at different levels and in various forms, depending on national circumstances.

Social dialogue is both a means to achieve social and economic progress and an objective in itself, as it gives people a voice and stake in their societies and workplaces. Social dialogue can be bipartite,

between workers and employers (which the ILO refers to as the social partners) or tripartite, including government.

- › See also **Collective bargaining, Employers' organizations, Freedom of association and the protection of the right to organize, Trade Union.**

## Social partners

Representatives of workers and employers and their respective organizations.

## Strike

A concerted temporary stoppage of or withdrawal from work by a group of workers of an establishment or several establishments to express a concern or to enforce demands such as working conditions (wages, working hours, working time) security of employment etc..

Strike action can be total as when all work ceases, or partial as, for example, when workers refuse to work overtime.

- › See also **Lockout.**

## Trade union

An organization of workers/employees that associate together to achieve their common goals particularly related to the protection and improvement of the terms and conditions of employment.

Some trade unions are associations of workers in the same occupational group (e.g. nurses). Others are associations of workers in different occupations and jobs but in the same industry or sector such as transport workers, hospitality workers, building workers.

Unions can and do associate with other unions to form federations and national councils.

- › See also **Freedom of Association and the protection of the right to organize, Employers' organization.**



## Tripartism

Tripartism is a foundational principle and fundamental value of the ILO that is at the very heart of the organization's work. Tripartism can be defined as “the interaction of government, employers and workers (through their representatives) as equal and independent partners to seek solutions to issues of common concern”.

- › See also **Bipartism, Social dialogue.**

## Voluntary arbitration

A situation in which arbitration is set in motion only with the agreement of the disputing parties.

- › See also **Compulsory arbitration.**

## Voluntary conciliation

A situation where the disputing parties are free to decide whether or not to use the available conciliation service.

It can also cover situations in which the disputing parties agree to engage a private third party as conciliator, instead of using the conciliation machinery established by the Government.

- › See also **Compulsory conciliation.**

## Workplace cooperation

Arrangements and processes that take place within an enterprise whereby workers or their representatives interact with management representatives to resolve issues of mutual concern.

It is a bipartite process, although neutral third parties may play a promotional and facilitative role.

Apart from information sharing, the most common forms of cooperation are through consultation leading to advice to management, and bargaining leading to a binding agreement.





## ATTACHMENT B

### Relevant international labour standards

#### *Conventions*

The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

The Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

The Workers' Representatives Convention, 1971 (No. 135)

The Labour Administration Convention, 1958 (No. 150)

The Labour Relations (Public Service Convention), 1978 (No. 151)

The Collective Bargaining Convention, 1981 (No. 154)

The Termination of Employment Convention, 1982 (No. 158)

#### *Recommendations*

Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)

Co-operation at the Level of the Undertaking Recommendation, 1952 (No. 94)

Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113)

Communications within the Undertaking Recommendation, 1967 (No. 129)

Examination of Grievances Recommendation, 1967 (No. 130)

Labour Administration Recommendation, 1978 (No. 158)

Labour Relations (Public Service) Recommendation, 1978 (No. 159)

Collective Bargaining Recommendation, 1981 (No. 163)





## ATTACHMENT C

### Codes of behaviour / professional conduct

***United States of America - Federal Mediation  
Conciliation and Arbitration Service  
Code of Professional Conduct of LABOR MEDIATORS***

#### ***Preamble***

The practice of mediation is a profession with ethical responsibilities and duties. Those who engage in the practice of mediation must be dedicated to the principles of free and responsible collective bargaining. They must be aware that their duties and obligations relate to the parties who engage in collective bargaining, to every other mediator, to the agencies which administer the practice of mediation, and to the general public.

Recognition is given to the varying statutory duties and responsibilities of the city, state, and federal agencies. This Code, however, is not intended in any way to define or adjust any of these duties and responsibilities nor is it intended to define when and in what situations mediators from more than one agency should participate. It is, rather, a personal code relating to the conduct of the individual mediator.

This Code is intended to establish principles of application to all professional mediators employed by city, state or federal agencies and to mediators privately retained by parties.

#### ***The Responsibility of Mediators Towards the Parties***

The primary responsibility for the resolution of a labor dispute rests upon the parties themselves. Mediators at all times should recognize that the agreements reached in collective bargaining are voluntarily made by the parties. It is the mediator's responsibility to assist the parties in reaching a settlement.

It is desirable that agreement be reached by collective bargaining without mediation assistance. However, public policy and applicable statutes recognize that mediation is the appropriate form of governmental participation in cases where it is required. Whether and when mediators should intercede will normally be influenced by the desires of the parties. Intercession by mediators on their own motion should be limited to exceptional cases.

The mediators must not consider themselves limited to keeping peace at the bargaining table. Their role should be one of being a resource upon which the parties may draw and, when appropriate, they should be prepared to provide both procedural and substantive suggestions and alternatives which will assist the parties in successful negotiations.

Since mediation is essentially a voluntary process, the acceptability of the mediator by the parties as a person of integrity, objectivity, and fairness is absolutely essential to the effective performance of the duties of the mediator. The manner in which mediators carry out their professional duties and responsibilities will measure their usefulness as a mediator. The quality of their character as well as their intellectual, emotional, social and technical attributes will be revealed by the conduct of the mediators and their oral and written communications with the parties, other mediators, and the public.

### ***The Responsibility of Mediators Towards Other Mediators***

Mediators should not enter any dispute which is being mediated by another mediator or mediators without first conferring with the person or persons conducting such mediation. The mediator should not intercede in a dispute merely because another mediator may also be participating. Conversely, it should not be assumed that the lack of mediation participation by one mediator indicates a need for participation by another mediator.

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort and should extend every possible courtesy to fellow mediators.





The mediators should carefully avoid any appearance of disagreement with or criticism of their mediator colleagues. Discussions as to what positions and actions mediators should take in particular cases should be carried on solely between or among the mediators.

### ***The Responsibility of Mediators Towards Their Agency and Their Profession***

Agencies responsible for providing mediation assistance to parties engaged in collective bargaining are a part of government. Mediators must recognize that, as such, they are part of government. Mediators should constantly bear in mind that they and their work are not judged solely on an individual basis but they are also judged as representatives of their agency. Any improper conduct or professional shortcoming, therefore, reflects not only on the individual mediator but also upon the employer and, as such, jeopardizes the effectiveness of the agency, other government agencies, and the acceptability of the mediation process.

Mediators should not use their position for private gain or advantage, nor should they engage in any employment activity, or enterprise which will conflict with their work as mediators, nor should they accept any money or thing of value for the performance of their duties – other than their regular salary – or incur obligations to any party which might interfere with the impartial performance of their duties.

### ***The Responsibility of Mediators Towards the Public***

Collective bargaining is in essence a private, voluntary process. The primary purpose of mediation is to assist the parties to achieve settlement. Such assistance does not abrogate the rights of the parties to resort to economic and legal sanctions. However, the mediation process may include a responsibility to assert the interest of the public that a particular dispute be settled; that a work stoppage be ended; and that normal operations be resumed. It should be understood, however, that the mediators do not regulate or control any of the content of a collective bargaining agreement.

It is conceivable that mediators might find it necessary to withdraw from a negotiation if it is patently clear that the parties intend to use their presence as implied governmental sanction for an agreement obviously contrary to public policy.

It is recognized that labor disputes are settled at the bargaining table; however, mediators may release appropriate information with due regard (1) to the desires of the parties, (2) to whether that information will assist or impede the settlement of the dispute, and (3) to the needs of an informed public.

Publicity shall not be used by mediators to enhance their own position or that of their agency. Where two or more mediators are mediating a dispute, public information should be handled through a mutually agreeable procedure.

### ***The Responsibility of Mediators Towards the Mediation Process***

Collective bargaining is an established institution in our economic way of life. The practice of mediation requires the development of alternatives which the parties will voluntarily accept as a basis for settling their problems. Improper pressures which jeopardize voluntary action by the parties should not be a part of mediation.

Since the status, experience, and ability of mediators lend weight to their suggestions and recommendations, they should evaluate carefully the effect of their suggestions and recommendations and accept full responsibility for their honesty and merit.

Mediators have a continuing responsibility to study industrial relations and conflict resolution techniques to improve their skills and upgrade their abilities.

Suggestions by individual mediators or agencies to parties, which give the implication that transfer of a case from one mediation "forum" to another will produce better results, are unprofessional and are to be condemned.

Confidential information acquired by mediators should not be disclosed to others for any purpose or in a legal proceeding or be used



directly or indirectly for the personal benefit or profit of the mediator.

Bargaining positions, proposals, or suggestions given to mediators in confidence during the course of bargaining for their sole information should not be disclosed to the other party without first securing permission from the party or person who gave it to them.

## ***South Africa - Commission for Conciliation Mediation and Arbitration Code of Conduct for Commissioners***

This code is developed in terms of Section 117 of the Labour Relations Act No 66 of 1995.

### ***1. PURPOSE***

The purpose of this code is to:

- 1.1 assist in maintaining the good repute of the conciliation, mediation and arbitration processes and in particular the office of the CCMA.
- 1.2 provide guidance to all commissioners on matters of professional conduct and practice generally.

### ***2. GENERAL ATTRIBUTES OF COMMISSIONERS***

In order for conciliation, mediation and arbitration processes to be seen to be fair, just and gain the confidence of the public, commissioners shall:

- 2.1 act with honesty, impartiality, due diligence and independent of any outside pressure in the discharge of their statutory functions;
- 2.2 conduct themselves in a manner that is fair to all parties and shall not be swayed by fear of criticism or by self-interest;
- 2.3 not solicit appointment for themselves. This shall not however preclude commissioners from indicating a willingness to serve in any capacity;
- 2.4 accept appointments only if they believe that they are available to conduct the process promptly and are competent to undertake the assignment;



- 2.5 avoid entering into any financial, business or social relationship which is likely to affect their impartiality or which might reasonably create a perception of partiality or bias;
- 2.6 not influence CCMA officials or employees by improper means, including gifts or other inducements.

### **3. CONFLICT OF INTEREST AND DISCLOSURE**

- 3.1 Commissioners should disclose any interest or relationship that is likely to affect their impartiality or which might create a perception of partiality. The duty to disclose rests on the commissioners.
- 3.2 Commissioners appointed to intervene in any matter should, before accepting, disclose directly to CCMA or through their accredited agents:
  - 3.2.1 any direct or indirect financial or personal interest in the matter;
  - 3.2.2 any existing or past financial, business, professional, family or social relationship which is likely to affect impartiality or may lead to a reasonable perception of partiality or bias;
  - 3.2.3 if the circumstances requiring disclosure are unknown to commissioners prior to accepting appointments, disclosure must be made when such circumstances become known to the commissioners. The disclosure in this regard could in arbitration proceedings, include witnesses who may have a relationship with the commissioners;
  - 3.2.4 after appropriate disclosure commissioners may serve if both parties so desire but should withdraw if they believe that a conflict of interest exists irrespective of the view expressed by the parties;

3.2.5 in the event where there is no consensus on whether commissioners should withdraw or not, commissioners should not withdraw if the following circumstances exist:

- if the terms of reference provide for a procedure to be followed for determining challenges to the commissioners then those procedures should be followed;
- if commissioners, after carefully considering the matter, determine that the reason for the challenge is not substantial and that they can nevertheless act impartially and fairly, and that the withdrawal would cause unfair delay or would be contrary to the ends of justice.

#### **4. HEARING CONDUCT**

- 4.1 Commissioners should conduct proceedings fairly, diligently and in an even-handed manner.
- 4.2 Commissioners should have no casual contact with any of the parties or their representatives while handling a matter without the presence or consent of the other.
- 4.3 Commissioners should be patient and courteous to the parties and their representatives or witnesses and should encourage similar behaviour by all participants in the proceedings.
- 4.4 Agreements by the parties for the use of mechanical recording should be respected by commissioners acting as arbitrators.
- 4.5 In determining whether to conduct an ex parte hearing, an arbitrator must consider the relevant legal, contractual and other pertinent circumstances.
- 4.6 A commissioner must be satisfied before proceeding ex parte that a party refusing or failing to attend the hearing has been given adequate notice of the time, place and purpose of the hearing.



- 4.7 In an event of more than one commissioner acting as either a conciliator, mediator or arbitrator, commissioners should afford each other a full opportunity to participate in the proceedings.
- 4.8 Commissioners should not delegate their duty to intervene in any matter to any other person without prior notice to and the consent of the CCMA.

## 5. **POST-HEARING**

- 5.1 Commissioners should not disclose a prospective award to either party prior to its simultaneous issuance to both parties.
- 5.2 Commissioners' awards should be definite, certain and as concise as possible.
- 5.3 No clarification or interpretation of an award is permissible without the consent of both parties.
- 5.4 Under agreements which permit or require clarification or interpretation of an award, commissioners shall afford each party an opportunity to be heard.

## 6. **CONFIDENTIALITY**

Information disclosed to commissioners in confidence by a party during the course of conciliation, should be kept by commissioners in the strictest confidence and should not be disclosed to the other party or to third parties unless authority is obtained for such disclosure.

## 7. **JURISDICTION**

- 7.1 Commissioners must observe faithfully both the limitation and inclusions of the jurisdiction conferred by an agreement or by statute under which they serve.

- 7.2 A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by commissioners as relieving him or her of further jurisdiction in respect of such issues.

## **8. CONCILIATION BY COMMISSIONERS ACTING AS ARBITRATORS**

Commissioners acting as arbitrators may suggest to the parties that they should conciliate if they are of the view that conciliation is appropriate. Commissioners should not pursue the matter if the parties do not agree.

## **9. RELIANCE ON OTHER ARBITRATORS' AWARDS AND INDEPENDENT RESEARCH**

Commissioners issuing advisory or binding awards may have regard to other arbitrators' awards, decided cases or independent research but must assume full and unimpaired responsibility in each matter for the decision reached.

## **10. AVOIDANCE OF DELAYS**

- 10.1 Commissioners have the duty to plan their work schedules in a manner that ensures that commitments to the CCMA are fulfilled timeously.
- 10.2 Commissioners should co-operate with the parties and the CCMA to avoid delays.
- 10.3 On completion of a hearing, commissioners must adhere to the time limits for issuing an award.

## **11. FEES AND EXPENSES**

- 11.1 Part-time commissioners acting as such should be governed by the fee structure of the CCMA and should not enter into any arrangement with the parties regarding fees.





- 11.2 Commissioners must maintain adequate records to support charges for services and expenses and must account timeously to the CCMA.

## **12. COMPETENCY**

- 12.1 Commissioners should decline appointment, withdraw or request technical assistance when they decide that a matter is beyond their competence.
- 12.2 Commissioners acting as conciliators should understand the issues which form part of the dispute before endeavouring to assist the parties with the settlement of that dispute. In this regard, commissioners should spend time at the beginning of the proceedings to make sure that they understand the positions, the needs and expectations of the parties.

## **13. BASIS OF CONCILIATION PROCEEDINGS**

Commissioners acting as conciliators should determine at the commencement of a matter whether the proceedings will take place on a “without prejudice” basis and should secure the agreement of parties in this regard.





