



On behalf of the  
*Ministry of Social Affairs of the Republic of Estonia*

**A LEGAL ANALYSIS ON PROCEEDINGS ON  
CONFLICT OF INTERESTS IN ESTONIA**

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# A LEGAL ANALYSIS ON PROCEEDINGS ON CONFLICT OF INTERESTS IN ESTONIA

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## **PART I**

### **PROCEEDINGS ON CONFLICT OF INTERESTS**

*A legal analysis of the Estonian statutory framework  
and proposals of amendments*

# PROCEEDINGS ON CONFLICT OF INTERESTS

## *A legal analysis of the Estonian statutory framework*

This is the final version of the analysis concerned with proceedings on conflict of interests in Estonia. After presenting the preliminary results of the research in the meeting held in Tallinn the 30<sup>th</sup> of June 2011, the research team updated the analysis according to the specific requests of the contracting authority.

\* \* \* \* \*

**1.** The research team focused on the definition of strike as provided in article 2 § 2 of the Collective Labour Dispute Resolution Act: *a strike is an interruption of work on the initiative of employees or a union or federation of employees in order to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.*

**2.** According to this definition the right to strike in Estonia could be classed as a *relative right*, i.e. a right to which a person is entitled in consequence of his relation with another person, that is the employer or a federation of employers. As a relative right, the right to strike should therefore be claimed by employees or unions only against employers or federation of employers. Consequently, secondary actions and political strikes should be regarded as unlawful in Estonia, or just as an expression of freedom not covered by those guarantees related to the ordinary rules governing obligations and rights in civil law countries. An illegal strike can lead to the dismissal of the workers who took part in this action or to the obligation to pay damage compensation. Differently, in some jurisdictions, as in Italy, Belgium and to some extent France, the right to strike is an absolute right that could be claimed also against the government, for example, that is not a party of the employment relation although has a relevant influence on labour policies. However, art. 18 § 2 of the Collective Labour Dispute Resolution Act provides that *“support strikes are permitted in support of employees engaging in a strike. The duration of such strikes shall be decided by the representative, union or federation of the employees who makes the decision to organise the strike. A support strike shall not last longer than three days”*. Sympathy strikes and other forms of secondary actions seem therefore to be lawful. It remains undefined how political strikes should be regarded as in Estonia.

**3.** Under the international labour law the right to strike does not cover political strikes. According to the *European Committee of Social Rights (ECSR)* the strike recognized by the *European Social Charter* in article 6 § 4 has to be linked with collective bargaining. This first of all means that political strikes are prohibited. Thus the governments are free to prohibit political strikes because they are obviously quite outside the purview of collective bargaining and therefore exceed the scope of article 6 § 4 of the *European Social Charter (ECSR Conclusion II 27; Conclusions XIII-4 361)*. ILO supervisory bodies also agree that strikes that are purely political in character do not fall within the scope of freedom of association (ILO Committee of experts on the application of conventions and recommendations, General survey, n. 34 paragraph 165; ILO Governing Body Committee on freedom of association, Digest of Decisions (1996), n. 26 paragraph 481). Apart from Belgium, Denmark, Finland, France, Italy and Norway political strike is regarded as unlawful in most European countries. Elsewhere, in Portugal for instance, although in view of the Constitution political strike cannot be classed as unlawful, this does not mean that this constitutes a true right that may be asserted by employees against employers. Hence, such strikes are tolerated within the general system of law as an

expression of freedom of action on the part of employees and their representative organizations, but do not operate as a cause justifying non-performance of the contract of employment. Also in Spain, political strike is to be distinguished from a *politico-industrial strike*, which is also aimed at the Government but only because the attainment of its labour objectives depends directly or indirectly on the authorities. This form of strike is not illegal, but may be deemed improper practice if it causes the employer unreasonable damage. Both political and politico-industrial strikes usually take the form of a general strike.

With reference to political strikes, the Estonian system seems therefore to be consistent with the international framework. Hence the research team suggests to uphold the current statutory framework according to which political strike is to be regarded as unlawful or just as an expression of freedom, i.e. a breach of the employment contract, potentially leading to the dismissal of the employee. EAKL is in the position that political strikes must be allowed if all other opportunities to influence the government policies have not had result. However, if a specific regulation on the lawfulness of political strike should be provided, the structure of the right to strike in Estonia will change from a relative right to an absolute right. This will require an amendment to the definition of strike as currently provided by the Collective Labour Dispute Resolution Act.

Lawful	Unlawful	Expression of freedom
Belgium, Denmark, Finland, France, Italy, Norway	Austria, Bulgaria, Croatia, Cyprus, Czech Rep., Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, The Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden, UK	Portugal, Spain

4. The right to strike seems to be limited to those events related to conflict of interests (see point n. 6) to the extent that, according to the definition, “*a strike is an interruption of work (...) to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.*” Basically this means that it is not possible to strike if the dispute is concerned with a subject already covered by the collective agreement. However this aspect will be widely discussed in the following points.

5. Aside from the definition of strike, the meaning of *collective labour dispute* is the second and consequent defining point around which the research has been carried out. According to article 2 § 1 of the Collective labour dispute resolution act a collective labour dispute *is a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises upon entry into or performance of collective agreements or establishment of new working conditions.* This definition is in line with the definition of strike, which is regarded as a relative right.

6. Collective labour disputes could arise over interests or over rights. While disputes over interests refer to those matters not covered by the collective agreement and therefore concerned with changes in the establishment of collective rules (i.e. contract renewal), conflict of rights refers to the interpretation and application of existing contractual and statutory rights.

7. Example of conflict of rights: while a collective agreement is in force, a dispute arises on the interpretation of the criteria (regulated by the parties in the contract) to determine the objectives which variable pay should be linked to. Another typical example of conflicts of right refers to the case in which one of the parties refuse to enforce an existing contractual or statutory rule.

8. As far as disputes of interests are concerned, the conflict is strictly related to the bargaining process, specifically to the conclusion of a collective agreement: (...) *disagreement (...) which arises upon (...) establishment of new working conditions*. Coherently, the statutory selective peace obligation clauses provides that *the parties are required to comply with the terms and conditions of a collective agreement during the term of the collective agreement and refrain from calling a strike or lock-out in order to amend the terms and conditions provided for in the collective agreement* (art. 11, par. 5 of the Collective agreements act). Accordingly, strikes not relating to the conclusion of collective agreements should be regarded as unlawful.

9. **The ban on strikes not aimed at achieving a collective agreement.** As for the previous point, it should be highlighted that according to several conclusions of the *European Committee of Social Rights* the ban on strikes not aimed at achieving a collective agreement is contrary to Article 6 § 4 of the *European Social Charter* (*ECSR* Conclusions XV-1, 335; Conclusions XVI-1, 140–142; Conclusions XVII-1). For instance, the Committee found that the ban in German law on all strikes not aimed at achieving a collective agreement is contrary to the abovementioned provision of the Charter. Indeed pursuant to German Law, a strike is only justified if it aims at obtaining a collective agreement (Judgment 5 March 1985 – 1 AZR 468/83 (n 16) 168-170). Considered as an aid for safeguarding the right to collective bargaining it can only be used in order to achieve an arrangement in a collective labour agreement Judgment 5 March 1985 – 1 AZR 468/83 (n 16) 168-170; Judgment 10 June 1980 – 1 AZR 822/79 (n 4) 1643). In reply to the Committee’s request for information on how the German authorities have taken account of this negative conclusion, the report issued by the German Government stated that for reasons of constitutional law as well as for political reasons it is not possible to change the situation. The Committee reminded the Government of its obligation to take steps to bring the situation into conformity with the Charter as soon as possible. The Committee learnt however, that the Gelsenkirchen labour court in a judgment of 13 March 1998 relating to the dismissal of a worker following strike action found reason to express doubts that the national law with respect to strikes not aimed at a collective agreement and not led by a trade union is compatible with Germany’s international obligations, notably under Article 6 par. 4 of the Charter.

10. The right to strike is explicitly acknowledged as a means of collective action in article 6 § 4 of the *European Social Charter* which provides: *with a view to ensuring the effective exercise of the right to bargaining collectively, the Parties ... recognize: 4. the right of the workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into*. The European Committee of Social Rights defines the legitimate aims of strike which are protected by the Charter as follows: the strike recognized by the Charter has to be linked with *collective bargaining*. This first of all means that political strikes are prohibited (*ECSR* Conclusion II 27; Conclusions XIII-4 361). On the other hand, the right to strike is not limited to strikes aiming at the conclusion of a collective labour agreement (*ECSR* Conclusions I 184). Such a limitation is not provided for under any article of the Charter (*ECSR* Conclusions III 37; Conclusions IV 50). Instead, any bargaining between one or more employers and a body of employees – whether *de jure* or *de facto* – aimed at solving a problem of common interest, whatever its nature may be, should be regarded as “collective bargaining” within the meaning of Article 6 (*ECSR* Conclusions IV 50). Collective bargaining is not restricted to claims relating to working conditions (*ECSR* Conclusions XIII-3 140f). Thus, strike aiming at compelling an employer to comply with safety regulations is protected by article 6 § 4 (*ECSR* II 28). Moreover, the announcement or contemplation of dismissals can call for strike (*ECSR* Conclusion IV 48-50). Furthermore, strikes in favour of trade union recognition clearly come within article 6 § 4 being a means for trade unions to ensure its participation in

collective bargaining (*ECSR* Conclusions XVI-1 416f). The right to strike may be exercised in all cases of conflicts of interest between workers and employers (*ECSR* Conclusions I 38; Conclusions XIV-1 594). In later Conclusions, the Committee has constantly upheld these principles as regards the permissible objectives of strike (*ECSR* Conclusions XII-1 129; Conclusions XII-2 113; Conclusions XIII-1 155; Conclusions XIII-4 361; Conclusions XIV-1 301; Conclusions XV-2 167ff).

**11.** Conflicts of interest should be worked out with extra juridical procedures and there is no doubt that it is possible to call a strike under these circumstances (see point n. 10), of course within the limits of the selective peace obligation (see point n. 12) and the proceedings to be carried out before calling a strike (see point n. 14).

**12. Selective peace obligation as a limit to the right to strike.** As far as the peace obligation is concerned, in previous supervision cycles, the European Committee of Social Rights regarded strike aiming at revising an existing collective agreement during its currency as not falling within the protective scope of article 6 § 4 of the Charter since this was considered to be a conflict of rights (*ECSR* Conclusions I 38; Conclusions II 28). This finding does not apply to matters which were subject to bargaining during the negotiations but were finally not covered (*ECSR* Conclusions XIII-2 282f). Thus, in respect of those matters and all other matters not covered by collective agreement, the collective agreement must not constitute an obstacle to strike (*ECSR* Conclusions XIV-1 617ff). However in the XVI supervision cycle, the Committee of Social Rights changed its case law by stating that under the Charter a peace obligation must not be imposed by statute, such as in Estonia, or by case law, but should be stipulated by the parties to an agreement themselves (*ECSR* Conclusions XVI-1 179, 248; *ECSR* Conclusions XIV-1 156f). Consequently, it is not in conformity with the Charter if courts consider the peace obligation to be an unwritten clause or inherent in a collective agreement (*ECSR* Conclusions XVI-1 179, 181). In other words if an obligation is not explicitly stipulated in the agreement the European Committee of Social Rights did not find the situation in conformity with the Charter (European Committee of Social Rights Conclusions XVI-1 251). These conclusions referred to the German system, where the selective peace obligation is thought to be inherent (see the comparative report). However, with reference to Germany, in the last cycle, i.e. the XIX (2010), the Committee noted that even if such obligations are not stipulated explicitly in collective agreements, they are based on a historical commitment by the social partner which is evidence of their absolute intent. It therefore concluded that in this respect the German situation is in conformity with the Charter. The Committee however has not dealt with the question related to statutory peace obligation (Estonian system) and therefore its position continues to be the one of the XVI supervision cycle.

**13.** Taking into account of these conclusions, the research team wishes to highlight that for the peace obligation to be effective in Estonia this should be agreed by the parties in the collective agreement, even if it is provided by the law.

**14. The principle of last resort as a limitation of the right to strike.** The European Committee of Social Rights has found that a *cooling-off* period prescribed by legislation for periods of negotiation or conciliation or arbitration proceedings between employers and workers is compatible with the Charter, since such a provision does not impose a real restriction of the right to collective action; instead it merely regulates the exercise thereof (*ECSR* Conclusions I, 38f; Conclusions XIV-1 594ff). Moreover, it found provisions to be compatible with article 6 § 4 of the Charter according to which negotiations or attempts at negotiations on the demands presented must have proved fruitless despite the efforts of a

mediator for the decision to call a work stoppage to be legal (ECSR Conclusions XIV-1 388ff).

**15.** Conflict of rights concerns the interpretation and application of existing contractual rights. In this case, the collective labour dispute arises while a collective agreement is in force: (...) *disagreement (...) which arises upon entry into or performance of collective agreement (...)*.

**16.** Apart from what has been observed in point n. 4, it is not evident from the Collective Labour Dispute Resolution Act whether it is possible to call a strike to solve these kinds of disputes in Estonia.

**17.** Irrespective of the conclusions of the European Committee of Social Rights according to which the right to strike cannot be invoked in case of violation of an existing contractual right (ECSR Conclusions I (n 66) 38), as regards the possibility to call a strike in case of conflict of rights there are two theories in literature.

**18.** According to the first one, conflict of rights, regarded as legal conflicts, must be worked out in courts (or bodies entitle to function as courts, e.g. arbitration bodies): if the legal order allows a direct action of the parties aimed at solving conflict of rights, this would represent a derogation to the principle of exclusive juridical power and sovereignty of the State. This is the reason for which, for example, in Germany it is not possible to strike in case of legal conflicts. This approach seems to be much more relevant to the Estonian case where the right to strike is regarded as a relative right, there is statutory selective peace obligation and the right to strike should be exercised collectively. Moreover this approach is in line with the opinion of the European Committee of Social Rights according to which the right to strike cannot be invoked in cases of conflicts of right i.e. as to the existence, validity or interpretation of a collective labour agreement or its violation (ECSR Conclusions I (n 66) 38).

**19.** According to a second doctrine, it is possible to strike even in the case of disputes concerned with the interpretation or application of existing contractual rights. This is because in this perspective, once employees decide to call a strike in order to solve the conflict, their action is not aimed at reaching those results that only a judge can provide (juridical decisions), rather it is aimed at achieving a new contractual regulation clarifying the old contractual discipline. In other words, once the parties decide to call a strike to solve the conflict, this becomes a conflict of interest. This is the reason for which in several countries (e.g. in Italy, France, Spain, Belgium) the difference between conflict of interest and conflict of rights doesn't exist. From this point of view, in Estonia also conflict of rights should be regarded as covered by the selective peace obligation, because in this case dispute of rights becomes, *de facto*, dispute of interests.

**20.** With reference to the principle of simplification and harmonization, which the analysis is expected to be inspired to, and taking into account of the conclusions of the European Committee of Social Rights, the research team is intended to propose to amend the law on collective labour dispute by introducing an explicit ban of strike in case of conflict of rights. To some extent, this is already provided in the Collective Labour Dispute Resolution Act insofar as article 12 § 1 provides that *failing agreement between a federation of employers and a federation of employees **in a dispute arising from the performance*** (i.e. a conflict of rights) *of a collective agreement, the federations **have the right of recourse** to labour dispute committees or the courts for resolution of the dispute.*

**21.** Therefore the proposal should be in the direction to add the words “*of rights*” next to the word “dispute”, in order to make explicit that the article refers to conflict of rights, and to add a final sentence providing that there is no possibility to strike in case of conflict of rights (i.e. *Strikes or lockouts can not be carried out in case of conflict of rights*). In this perspective, paragraph two of article 12 should be erased, since the right to strike is inhibited for conflict of rights in general, and not only in the case the parties decide to turn to courts (~~*Organisation of strikes or lock-outs is prohibited as of the date of recourse to a labour dispute committee or court*~~).

**22.** As far as a conflict of rights could also occur between employees and employers not involved in unions or federations, it is however not clear the reason for which article 12 states that “*failing agreement between a federation of employers and a federation of employees (...)*”. There seems to be an obligation of recourse to the procedure provided by article 7 (*Resolution of labour disputes by federations of employers and federations of employees*) of the Collective labour dispute resolution act before turning to the court. This sounds discordant with art. 3 paragraph 3 of the Collective agreements act according to which *collective agreements in enterprises, agencies and other organisations shall be entered into by unions of employees. If employees are not represented by a trade union in an enterprise, agency or other organisation, an authorised representative of the employees shall enter into the collective agreement*.

**23.** Hence the research team proposes to change the sentence “*Failing agreement between a federation of employers and a federation of employees in a dispute arising from the performance of a collective agreement, the federations*” into the sentence “*The parties to a dispute of rights arising from the performance of a collective agreement*”.

**24.** Since a conflict of rights could also refer to the interpretation or application of the law, the research team suggests to add the following sentence “*or resulting from the interpretation or application of the law*” next to the sentence “*arising from the performance of a collective agreement*”.

**25.** Taking into account the results of the comparative analysis (see paragraph 2.1.1. of the comparative report), the research team also proposes to provide an arbitration procedure in the event of a conflict of rights. The procedure of arbitration could be regulated by the law and collective agreements. In this perspective, parties of a dispute could opt between arbitration or courts in case of conflict of rights. As reported in the comparative analysis, the importance to provide a judicial alternative to courts in the event of a conflict of rights lies in the fact that the parties of the dispute can choose to turn to a body that they autonomously decided to set up, through the collective agreement, with their rules, timing and *ad hoc* procedures. Moreover arbitration bodies are certainly more suitable in those countries, such as Italy, Estonia and the Netherlands, where ordinary courts deal with labour conflicts. This is because, according to a traditional theory, the resolution of industrial disputes, in this case rights disputes, requires, in order to ensure social justice, that cases be heard and decided rapidly, at no or with a minimum of cost to the litigants, with a relative lack of formality, and by bodies with a specialized capability in labour matters. While ordinary courts are not appropriate to the end of rapidity in deciding cases arbitration committees could certainly represent a proper alternative. By contrast, in countries where specific labour courts are set up, such as Germany, arbitration committees are unusual.

**26. Functioning of the arbitration procedure.** Collective agreements shall regulate the arbitration procedure in compliance with art. 6 § 1 point n. 12 of the Collective Agreements Act. In the absence of a contractual regulation the arbitration function is

effected through the discipline provided by the Code of Civil Procedure. The arbitration decision is binding to the parties and cannot be appealed against, except for the following cases: a) if the contractual provision regulating the arbitration procedure is invalid or the arbitration decision is not concerned with conflict of rights; b) if the arbitration body is not appointed in compliance with the contractual provisions regulating the arbitration procedure; c) if the arbitration body is not complying with the contractual provision regulating the arbitration procedure; d) if the right to counsel is not guaranteed during the arbitration procedure.

**27.** The arbitration procedure replaces the possibility of recourse to *labour dispute committees*.

**28.** The amended version of art. 12 paragraph 1 of the Collective Labour Dispute Resolution Act should be like: *The parties to a dispute of rights arising from the performance of a collective agreement or resulting from the interpretation or application of the law have the right of recourse to an arbitration commission or the courts for resolution of the dispute. Strikes or lockouts cannot be carried out in case of conflict of rights.* Paragraph 2 of article 12 shall provide the following: *Collective agreements shall regulate the arbitration procedure in compliance with art. 6 point n. 12 of the Collective Agreements Act. In the absence of a contractual regulation the arbitration procedure is regulated pursuant to the Code of civil procedure. The arbitration award is binding to the parties and cannot be appealed against, except for the following cases: if the contractual provision regulating the arbitration procedure is invalid or the arbitration commission has no jurisdiction over the dispute; if the arbitration commission is not appointed in compliance with the contractual provisions regulating the arbitration procedure; if the arbitration commission is not complying with the contractual provision regulating the arbitration procedure; if the right to counsel is not guaranteed during the arbitration procedure.*

Original version	Revised version
<p>§ 12. Resolution of labour disputes in court</p> <p>(1) Failing agreement between a federation of employers and a federation of employees in a dispute arising from the performance of a collective agreement, the federations have the right of recourse to labour dispute committees or the courts for resolution of the dispute.</p> <p>(2) Organisation of strikes or lock-outs is prohibited as of the date of recourse to a labour dispute committee or court.</p>	<p>§ 12. Resolution of labour disputes <b>of rights in court</b></p> <p>(1) <del>Failing agreement between a federation of employers and a federation of employees in a</del> <b>The parties to a dispute of rights</b> arising from the performance of a collective agreement, <del>the federations</del> <b>—or resulting from the interpretation or application of the law</b> have the right of recourse to <del>labour dispute committees</del> <b>an arbitration commission</b> or the courts for resolution of the dispute. <b>Strikes or lockouts cannot be carried out in case of conflict of rights.</b></p> <p>(2) <b>Collective agreements shall regulate the arbitration procedure in compliance with art. 6 point n. 12 of the Collective Agreements Act. In the absence of a contractual regulation the arbitration procedure is regulated pursuant to the code of civil procedure. The arbitration award is binding to the parties and cannot be appealed against, except for the following cases:</b></p> <p>1) if the contractual provision regulating the arbitration procedure is invalid or the</p>

	<p>arbitration commission has no jurisdiction over the dispute;</p> <p>2) if the arbitration body is not appointed in compliance with the contractual provisions regulating the arbitration procedure;</p> <p>3) if the arbitration body is not complying with the contractual provision regulating the arbitration procedure;</p> <p>4) if the right to counsel is not guaranteed during the arbitration procedure.</p>
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**29.** The revision of art. 12 of the Collective Labour Dispute Resolution Act requires the amendment of art. 6 point n. 12 of the Collective Agreements Act. Hence the research team proposes to add the following sentence *and the arbitration procedure to solve collective labour disputes of rights according to article 12 § 2 of the Collective labour dispute resolution act, including the composition of the arbitration commission and the timeliness of the arbitration procedure* next to the sentence *the procedure for submitting demands of employees and employers in the event of a collective labour dispute*. The new version of art. 6 point n. 12 of the Collective Agreements Act should be as follow: *((1) A collective agreement entered into by the parties specified in clauses 3 (2) 1–3) of this Act may determine: 12) the procedure for submitting demands of employees and employers in the event of a collective labour dispute and the arbitration procedure to settle collective labour disputes of rights according to article 12 § 2 of the Collective labour dispute resolution act, including the composition of the arbitration commission and the timeliness of the arbitration procedure.*

**30.** The research team wishes to underline that probably trade unions will contest the framework provided by the new version of article 12 of the Collective labour dispute resolution act. It is the opinion of *EAKL* that the right on strike should be banned only under very few and limited circumstances in Estonia. Especially considering the fact that in Estonia there have had very few and small strikes, which certainly will not cause big damages and problems in the future as well. However, as already recalled in points n. 17 and n. 18, the proposal is compatible with the conclusions of the European Committee of Social Rights according to which the right to strike cannot be invoked in cases of conflicts of right i.e. as to the existence, validity or interpretation of a collective labour agreement or its violation (*ECSR Conclusions I (n 66) 38*).

**31.** As far as conflicts of interests are concerned, basically they can be managed through the procedures provided in the Collective labour dispute resolution act, namely *Resolution of labour disputes by federations of employers and federations of employees* or *Conciliation procedure*.

**32.** In order to make it clear that the right to strike and lockout could be exercised only in the event of a conflict of interests, the research team proposes to revise the definitions of strike and lockout as provided in article 2 § 2 and 3 of the Collective labour dispute resolution act. This will also require the insertion of the definitions of conflict of rights and conflict of interests. The amendments are aimed at clearly distinguish between the two kinds of collective labour dispute. The importance of this distinction lies in the fact that the two kinds of disputes need to be resolved by means of different proceedings.

Original version	Revised version
<p>§ 2. Definitions</p> <p>(1) A collective labour dispute is a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises upon entry into or performance of collective agreements or establishment of new working conditions.</p>	<p>§ 2. Definitions</p> <p>(1) A collective labour dispute is a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises upon entry into or performance of collective agreements or establishment of new working conditions.</p> <p><b>(2) Collective labour disputes concerned with the application or interpretation of existing contractual or statutory rights shall be regarded as conflicts of rights.</b></p> <p><b>(3) Collective labour disputes concerned with any matters where a legal base is not available to determine them shall be regarded as conflicts of interests.</b></p>
<p>§ 2. Definitions</p> <p>(2) A strike is an interruption of work on the initiative of employees or a union or federation of employees in order to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.</p>	<p>§ 2. Definitions</p> <p>(2) A strike is an interruption of work on the initiative of employees or a union or federation of employees in order to achieve, <b>in the event of a conflict of interests</b>, concessions from an employer or an association or federation of employers to lawful demands in labour matters.</p>
<p>§ 2. Definitions</p> <p>(3) A lock-out is an interruption of work on the initiative of an employer or association or federation of employers in order to achieve concessions from employees or a union or federation of employees to lawful demands in labour matters.</p>	<p>§ 2. Definitions</p> <p>(3) A lock-out is an interruption of work on the initiative of an employer or association or federation of employers in order to achieve, <b>in the event of a conflict of interests</b>, concessions from employees or a union or federation of employees to lawful demands in labour matters.</p>

**33.** In order to clarify that the procedures of conciliation shall apply only to conflicts of interests, the research team proposes to amend articles 8 and 9 of the Collective labour dispute resolution act as follow:

Original version	Revised version
<p>§ 8. Conciliator</p> <p>(1) Conciliators are impartial experts who help the parties to labour disputes reach mutually satisfactory resolutions.</p>	<p>§ 8. Conciliator</p> <p>(1) Conciliators are impartial experts who help the parties to labour disputes <b>of interests</b> reach mutually satisfactory resolutions.</p>
<p>§ 9. Duty of conciliator</p> <p>The duty of a conciliator is to effect conciliation of the parties. A conciliator shall identify the reasons for and circumstances of a labour dispute and shall propose resolutions.</p>	<p>§ 9. Duty of conciliator</p> <p>The duty of a conciliator is to effect conciliation of the parties. A conciliator shall identify the reasons for and circumstances of a labour dispute <b>of interests</b> and shall propose resolutions.</p>

34. According to art. 13 *the right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees **to resolve a labour dispute** arises **only if there is** no prohibition against disruption of work in force, if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, if an agreement is not complied with, or if a court order is not executed.*

35. In accordance with point n. 28, the case in which “an agreement is not complied with” refers to conflict of rights and therefore this could not represent a reason to strike anymore. Therefore the research team proposes to remove the words “*if an agreement is not complied with*” as well as the words “*or if a court order is not executed*” from article 13 of the Collective labour dispute resolution act.

36. Moreover the research team proposes to insert the words “*over interests*” next to the words “*to resolve a labour dispute*” in article 13 of the Collective labour dispute resolution act. The amendment is clearly intended to confirm that the right to strike is restricted to the events of conflicts of interests.

37. According to points number 35 and 36, the new version of article 13 of the Collective labour dispute resolution act should be as follow: *The right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees to resolve a labour dispute **over interests** arises only if there is no prohibition against disruption of work in force and if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, ~~if an agreement is not complied with, or if a court order is not executed.~~*

Original version	Revised version
<p>§ 13. Creation of right to strike or lock out</p> <p>(1) The right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees to resolve a labour dispute arises only if there is no prohibition against disruption of work in force, if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, if an agreement is not complied with, or if a court order is not executed.</p>	<p>§ 13. Creation of right to strike or lock out</p> <p>The right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees to resolve a labour dispute <b>of interests</b> arises only if there is no prohibition against disruption of work in force and if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, if an agreement is not complied with, or if <del>a court order is not executed.</del></p>

## PROPOSALS OF AMENDMENTS

*to the Collective labour dispute resolution act and to the Collective agreements act*

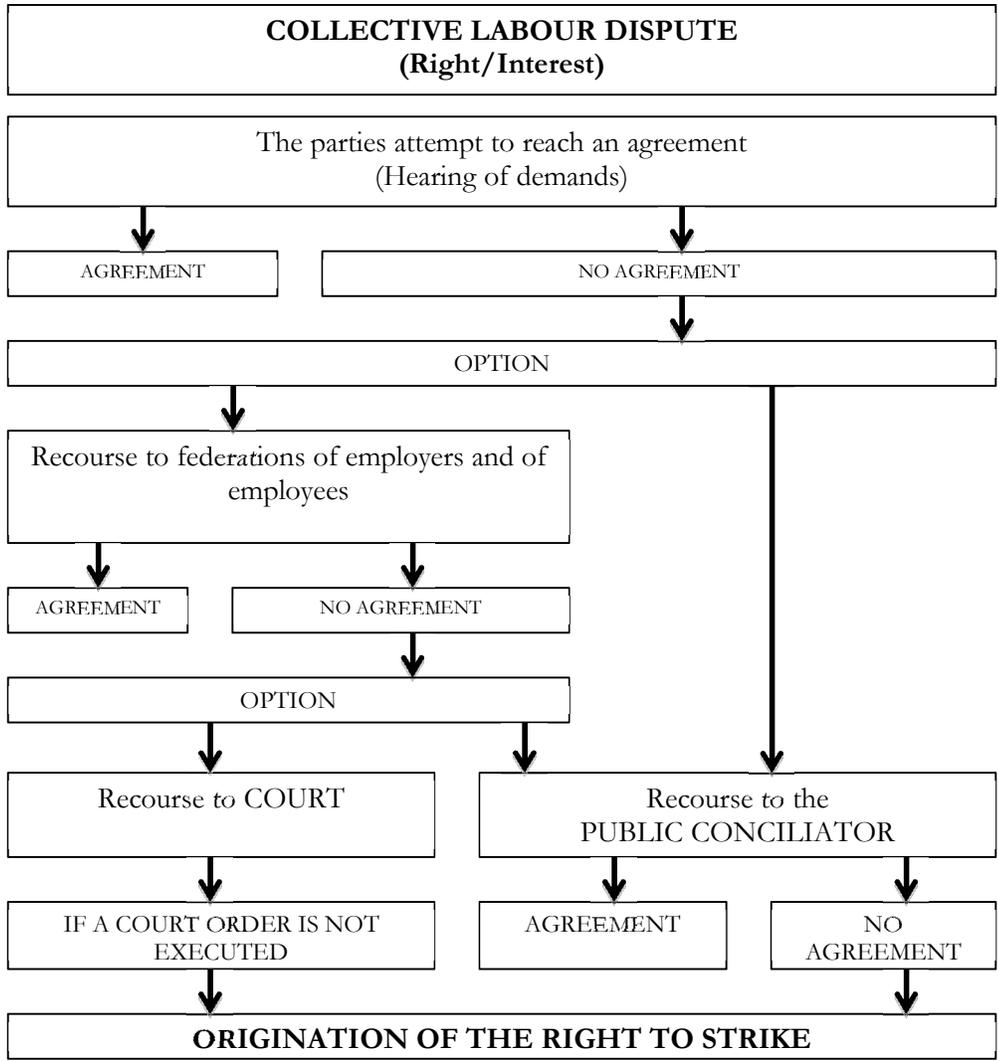
Original version	Revised version	Aim of the amendment
<p>§ 2. Definitions</p> <p>(1) A collective labour dispute is a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises upon entry into or performance of collective agreements or establishment of new working conditions.</p>	<p>§ 2. Definitions</p> <p>(1) A collective labour dispute is a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises upon entry into or performance of collective agreements or establishment of new working conditions.</p> <p><b>(2) Collective labour disputes concerned with the application or interpretation of existing contractual or statutory rights shall be regarded as conflicts of rights.</b></p> <p><b>(3) Collective labour disputes concerned with any matters where a legal base is not available to determine them shall be regarded as conflicts of interests.</b></p>	<p>The amendments are aimed at distinguish between the two kinds of collective labour dispute. The importance of this distinction lies in the fact that the two kinds of disputes need to be resolved by means of different proceedings.</p>
<p>§ 2. Definitions</p> <p>(2) A strike is an interruption of work on the initiative of employees or a union or federation</p>	<p>§ 2. Definitions</p> <p>(2) A strike is an interruption of work on the initiative of employees or a union or federation of employees</p>	<p>The amendment is intended to restrict the right to strike to the event of a conflict of interests.</p>

Original version	Revised version	Aim of the amendment
of employees in order to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.	in order to achieve, <b>in the event of a conflict of interests</b> , concessions from an employer or an association or federation of employers to lawful demands in labour matters.	
<p>§ 2. Definitions</p> <p>(3) A lock-out is an interruption of work on the initiative of an employer or association or federation of employers in order to achieve concessions from employees or a union or federation of employees to lawful demands in labour matters.</p>	<p>§ 2. Definitions</p> <p>(3) A lock-out is an interruption of work on the initiative of an employer or association or federation of employers in order to achieve, <b>in the event of a conflict of interests</b>, concessions from employees or a union or federation of employees to lawful demands in labour matters.</p>	The amendment is intended to restrict the possibility to lock-out to the event of a conflict of interests.
<p>§ 8. Conciliator</p> <p>(1) Conciliators are impartial experts who help the parties to labour disputes reach mutually satisfactory resolutions.</p>	<p>§ 8. Conciliator</p> <p>(1) Conciliators are impartial experts who help the parties to labour disputes <b>of interests</b> reach mutually satisfactory resolutions.</p>	The amendment is aimed at clarifying that the procedure of conciliation shall apply only to conflicts of interests.
<p>§ 9. Duty of conciliator</p> <p>The duty of a conciliator is to effect conciliation of the parties. A conciliator shall identify the reasons for and circumstances of a labour dispute and shall propose resolutions.</p>	<p>§ 9. Duty of conciliator</p> <p>The duty of a conciliator is to effect conciliation of the parties. A conciliator shall identify the reasons for and circumstances of a labour dispute <b>of interests</b> and shall propose resolutions.</p>	The amendment is aimed at clarifying that the procedure of conciliation shall apply only to conflicts of interests.
<p>§ 12. Resolution of labour disputes in court</p>	<p>§ 12. Resolution of labour disputes <b>of rights in court</b></p>	The amendments are aimed at clarifying that the courts shall resolve the disputes of rights.

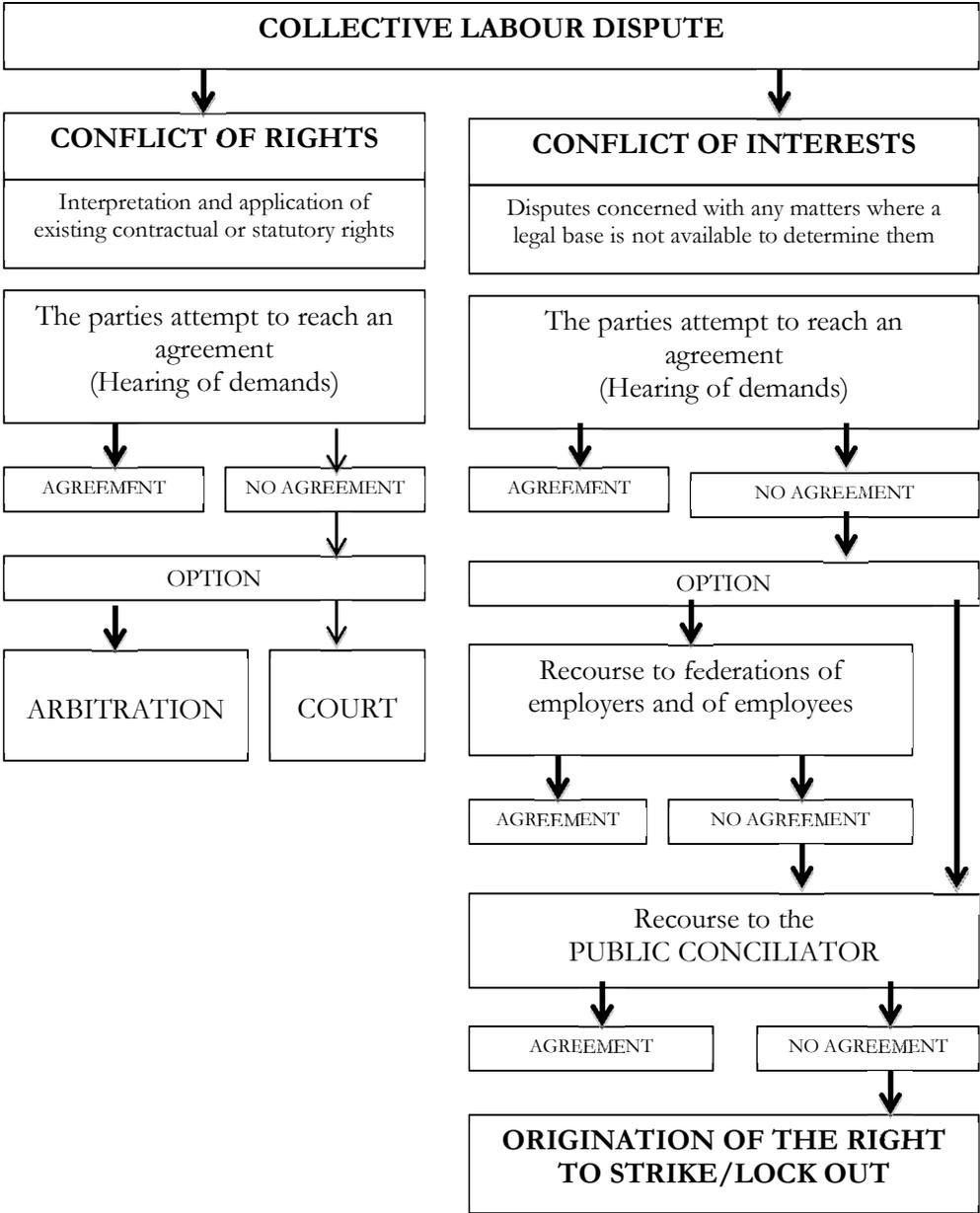
Original version	Revised version	Aim of the amendment
<p>(1) Failing agreement between a federation of employers and a federation of employees in a dispute arising from the performance of a collective agreement, the federations have the right of recourse to labour dispute committees or the courts for resolution of the dispute.</p> <p>(2) Organisation of strikes or lock-outs is prohibited as of the date of recourse to a labour dispute committee or court.</p>	<p>(1) <del>Failing agreement between a federation of employers and a federation of employees in a</del> <b>The parties to a dispute of rights</b> arising from the performance of a collective agreement, <del>the federations or</del> <b>resulting from the interpretation or application of the law</b> have the right of recourse to <del>labour dispute committees</del> <b>an arbitration commission</b> or the courts for resolution of the dispute. <b>Strikes or lockouts cannot be carried out in case of conflict of rights.</b></p> <p>(2) <b>Collective agreements shall regulate the arbitration procedure in compliance with art. 6 point n. 12 of the Collective Agreements Act. In the absence of a contractual regulation the arbitration procedure is regulated pursuant to the code of civil procedure. The arbitration award is binding to the parties and cannot be appealed against, except for the following cases:</b></p> <ol style="list-style-type: none"> <li>1) <b>if the contractual provision regulating the arbitration procedure is invalid or the arbitration commission has no jurisdiction over the dispute;</b></li> <li>2) <b>if the arbitration commission is not appointed in compliance with the contractual provisions regulating the arbitration procedure;</b></li> </ol>	<p>The original version of article 12 seems to lay down an obligation of recourse to the procedure provided by article 7 (<i>Resolution of labour disputes by federations of employers and federations of employees</i>) of the Collective labour dispute resolution act before turning to the court. This sounds discordant with art. 3 paragraph 3 of the Collective agreements act according to which collective agreements in enterprises, agencies and other organisations could be signed by subjects that are not involved in unions.</p> <p>Moreover paragraph two of article 12 should be erased, since the right to strike is inhibited for conflict of rights in general, and not only in the case the parties decide to turn to courts.</p> <p>The new version of paragraph 2 is aimed at regulating the arbitration procedure.</p>

Original version	Revised version	Aim of the amendment
	<p>3) if the arbitration commission is not complying with the contractual provision regulating the arbitration procedure;</p> <p>4) if the right to counsel is not guaranteed during the arbitration procedure.</p>	
<p>§ 13. Creation of right to strike or lock out</p> <p>(1) The right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees to resolve a labour dispute arises only if there is no prohibition against disruption of work in force, if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, if an agreement is not complied with, or if a court order is not executed.</p>	<p>§ 13. Creation of right to strike or lock out</p> <p>The right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees to resolve a labour dispute <b>of interests</b> arises only if there is no prohibition against disruption of work in force and if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, <del>if an agreement is not complied with, or if a court order is not executed.</del></p>	<p>The amendment is intended to clarify that the right to strike is restricted to the events of conflicts of interests.</p> <p>The case in which “<i>an agreement is not complied with</i>” refers to conflict of rights and therefore this could not represent a reason to strike anymore according to previous amendments.</p> <p>The case in which “<i>a court order is not executed</i>” could not be referred to conflicts of interests anymore according to previous amendments.</p>

**ORIGINAL FRAMEWORK OF THE**  
*Collective labour dispute resolution act*



**REVISED FRAMEWORK OF THE**  
*Collective labour dispute resolution act*



## CONSULTATION ON PRELIMINARY ANALYSIS

*Feedbacks of the consulted parties*

<b>Proposals and topics</b>	<b>Contracting authority</b>	<b>Employers</b>	<b>Trade Unions</b>	<b>Academics</b>
The right to strike as a relative right.	The contracting authority agrees on the definition of the right to strike as a relative right.	The employers agree on the definition of the right to strike as a relative right.	According to trade unions the right to strike should be regarded as an absolute right.	Professor Merle Muda agrees on the definition of the right to strike as a relative right.
The exception represented by the provision on secondary actions (Art. 18).				
The undefined question related to how political strike should be regarded as.	The contracting authority wants the research team to analyse how political strikes should be handled according to the law.		Trade unions stated that in the practice of industrial relations the issue of lawfulness of political strikes has been raised on several cases but so far there has been no real steps or attempts to punish somehow those few strikes called by unions against the policy of the government (2002, 2003, 2009). Trade unions are in position that political strikes must be allowed if all other opportunities to influence the	

<b>Proposals and topics</b>	<b>Contracting authority</b>	<b>Employers</b>	<b>Trade Unions</b>	<b>Academics</b>
			government have not had result.	
The definition of strike seems to be referred exclusively to conflict of interests.	According to the contracting authority the law does not make a clear difference between the conflict of rights and conflict of interest. But since legislation gives other ways to solve conflict of rights, they have been used instead.	The employers agree.	Trade unions do not agree: strike must be allowed in the case of violation of the collective agreement in force.	Professor Merle Muda agrees that the definition of strike seems to be referred exclusively to conflict of interests.
The importance to distinguish between conflicts of rights and conflicts of interests.	The difference is clear and relevant.	The difference is clear and relevant.	The difference is clear and relevant.	According to prof. Merle Muda the distinction is theoretically clear but not at all in the law.
Proposal to add a definition of (and therefore an explicit distinction between) conflict of rights and conflict of interests in article 1 of the Collective labour dispute resolution act.	The contracting authority agrees.	Employers do not think the proposal be useful. The same idea could be regulated differently by using the existing terms in the text of law.	According to trade unions the definition of strike needs clarification.	Professor Merle Muda agrees.

<b>Proposals and topics</b>	<b>Contracting authority</b>	<b>Employers</b>	<b>Trade Unions</b>	<b>Academics</b>
The need to deepen the question concerned with the ban of strikes not aimed at reaching a collective agreement.	The contracting authority wants the final report to deal with this topic.	Employers have no interest in deepen this question.	According to trade unions it would be really useful if the final report would support the idea that the right on strike should be banned only under very few and limited circumstances in Estonia. Especially considering the fact that we have had very few and small strikes and strikes will not cause big damages and problems in the future as well.	According to prof. Merle Muda it is not clear how the peace obligation should be regarded as from this perspective.
The possibility to call a strike in case of conflict of rights.	The contracting authority shows a preference for the German model where strikes on conflict of rights are not permitted.		According to trade unions the problem is that the court case can last for years and in reality this means that union does not have effective means to influence the employer that could lead to massive violation of collective agreements.	
The procedure regulated by art. 12 of the Collective labour dispute resolution act (recourse to courts) seems to refer only to conflict of rights: <i>failing</i>	The contracting authority commented as follow: "maybe".		According to trade unions strike must be allowed in the case of violation of the collective agreement in force.	

Proposals and topics	Contracting authority	Employers	Trade Unions	Academics
<p><i>agreement between a federation of employers and a federation of employees <b><u>in a dispute arising from the performance</u></b> (i.e. a conflict of rights) of a collective agreement, the federations <b><u>have the right of recourse</u></b> to labour dispute committees or the courts for resolution of the dispute.</i></p>				
<p>The research team proposes to explicit that art. 12 (possibility to turn to court) refers to conflicts of rights. Accordingly, the new version of the article should be as follow: <i>failing agreement between a federation of employers and a federation of employees in a dispute <b><u>of rights</u></b> arising from the performance of a collective agreement, the federations <b><u>have the right of recourse</u></b> to labour dispute committees or the courts for</i></p>	<p>The contracting authority agrees.</p>	<p>Employers strongly agree with the direction of this proposal. It is important that strikes and lockouts can't be carried out at the time of valid collective agreement, i.e. at the time there is prohibition against disruption of work in force.</p>		<p>Prof. Merle Muda agrees.</p>

Proposals and topics	Contracting authority	Employers	Trade Unions	Academics
<p><i>resolution of the dispute.</i>  <u><b>Strikes or lockouts can not be carried out in case of conflict of rights.</b></u></p>				
<p>As far as a conflict of rights could also occur between employees and employers not involved in unions or federations, it is however not clear the reason for which article 12 states that “<i>failing agreement between a federation of employers and a federation of employees (...)</i>”. There seems to be an obligation of recourse to the procedure provided by article 7 (<i>Resolution of labour disputes by federations of employers and federations of employees</i>) of the Collective labour dispute resolution act before turning to the court.  The research team expressed some</p>	<p>The contracting authority agrees that this provision doesn’t make sense.</p>		<p>According to trade unions the mediation of the dispute by the union federation and employers association, mentioned in article 7 of the Collective labour dispute resolution act, is just an opportunity, not an obligation and additional to appeal to the state conciliator.</p>	<p>According to prof. Merle Muda in practice, there is no such obligation. The wording of art. 12 is not clear/successful.</p>

<b>Proposals and topics</b>	<b>Contracting authority</b>	<b>Employers</b>	<b>Trade Unions</b>	<b>Academics</b>
uncertainties about such a provision: why the parties of the dispute, not always involved in unions, should be requested to recourse to federation of employers and federation of employees before turning to courts for the resolution of the dispute?				
The possibility to add a procedure of arbitration in case of conflict of rights. The procedure of arbitration could be regulated by law and collective agreements. In this perspective, parties of a dispute could opt between arbitration or courts in case of conflict of rights.	The contracting authority is not so sure that an arbitration body is needed, but asked the research team to bring out the advantages of this kind of system and how it would work (by who it would be done etc.) in order to consider it.	According to employers there is no need for any new arbitration body in Estonia.	Trade Unions consider arbitration as a possible option. But in this case it is necessary to set up clear procedure and rules.	Prof. Merle Muda agrees in principle. Although she stated that there are no such traditions in Estonia. Also, there are quite few collective agreements and collective labour disputes. The creation of new system needs finance.
According to art. 13 <i>the right of employees or unions or</i>	The contracting authorities agrees with the proposals.	Employers agree with the proposals.		Prof. Merle Muda partially agrees. She is contrary to the

Proposals and topics	Contracting authority	Employers	Trade Unions	Academics
<p><i>federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees <b>to resolve a labour dispute</b> arises <b>only if there is</b> no prohibition against disruption of work in force, if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, if an agreement is not complied with, or if a court order is not executed.</i></p> <p>According to the previous proposals of amendments, the case in which “an agreement is not complied with” refers to conflict of rights and therefore this could not represent a reason to strike anymore.</p> <p><b>Do you agree with the proposal to remove the words “if an agreement is not</b></p>				<p>removal of the sentence <i>if an agreement is not complied with.</i></p>

Proposals and topics	Contracting authority	Employers	Trade Unions	Academics
<p><i>complied with” as well as the words “or if a court order is not executed” in article 13 of the Collective labour dispute resolution act?</i></p> <p><b>Do you agree with the proposal to insert the words “over interests” next to the words “to resolve a labour dispute” in article 13 of the Collective labour dispute resolution act?</b></p> <p>The new version of article 13 of the Collective labour dispute resolution act should be as follow: <i>The right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to lock out employees to resolve a labour dispute <b><u>over interests</u></b> arises only if there</i></p>				

<b>Proposals and topics</b>	<b>Contracting authority</b>	<b>Employers</b>	<b>Trade Unions</b>	<b>Academics</b>
<p><i>is no prohibition against disruption of work in force and if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved, <del>if an agreement is not complied with,</del> or if a court order is not executed.</i></p>				

## **PART II**

### **PROCEEDINGS ON CONFLICT OF INTERESTS**

*An international and comparative analysis*

# PROCEEDINGS ON CONFLICT OF INTERESTS

## *An international and comparative analysis*

*Summary:* 1. Conflict of rights and conflict of interests. – 1.1. Conflict of interests and peace obligation clauses. – 2. Proceedings on collective labour disputes. – 2.1. Proceedings on conflict of rights. – 2.1.1. Arbitration as a means to resolve conflict of rights. – 2.2. Proceedings on conflict of interests. – 2.2.1. Conciliation. – 2.2.2. Mediation. – 2.2.3. Arbitration. – 2.3. Proceedings on conflict of interests: the German joint dispute resolution bodies. – 2.3.1. Composition of the joint dispute resolution boards. – 2.3.2. Initiation of the joint dispute resolution procedure. – 2.3.3. The function of joint dispute resolution. – 3. Proceedings on conflict of interests and the origination of the right to strike. – 4. Bibliography.

### **1. Conflict of rights and conflict of interests.**

Collective labour disputes could arise over interests or over rights. Since industrial relations practices involve high degrees of complexity the border between the two kinds of disputes remains often undefined and difficult to outline. Nonetheless for the industrial relations system to be efficient such a distinction seems to be crucial as shown by countries where conflicts of rights and conflicts of interests have been regarded as differently. By contrast contexts where this distinction has not been experienced negative outcomes of collective labour disputes seems to prevail.

From a theoretical perspective while disputes over interests refer to those matters not covered by the collective agreement or the law and therefore concerned with changes in the establishment of labour rules (i.e. contract renewal or non-negotiated topics, terms and work conditions etc.), conflict of rights refers to the interpretation and application of existing contractual or statutory rights.

Hence a rights dispute arises where there is disagreement over the implementation or interpretation of statutory rights, or the rights set out in an existing collective agreement. Generally speaking rights issues concern any matter where a normative base (legal or contractual) is available to determine them. Disputes of rights are commonly categorised by their direct relation to a particular labour agreement, arising either through sparring over interpretation or fulfilment of rights defined by an existing contract.

By contrast, an interest dispute concerns cases where there is disagreement over the determination of rights and obligations, or the modification of those already in force. Interests issues concern any matters where a legal base is not available to determine them and therefore they typically arise in the context of collective bargaining where a collective agreement does not exist or is being renegotiated. Basically a conflict of interest occurs if one party – a trade union, an employee, an employer, an employers' association – suggests to regulate a matter in a certain way – e.g. to rise wages by a certain percentage or to regulate working time at establishment level in certain way – and the other party, who is not obliged to agree, in fact does not agree.

#### **1.1. Conflict of interests and peace obligation clauses.**

A conflict of interest between parties to a collective agreement may arise at any given time. However, usually statutory or contractual peace obligation clauses impede the conflict over interests related to those matters already covered by a collective agreement. As a consequence, a conflict of interest between parties to a collective agreement may primarily arise after the termination of a collective agreement or if the matter in question has not been regulated in a collective agreement before. The peace obligation places the parties to a

collective agreement under an obligation to maintain industrial peace and to refrain from taking industrial action regarding matters covered by the agreement.

In many countries, such as Germany and Lithuania, it is the general opinion that even if the collective agreement does not explicitly contain such a clause, a relative duty of peace is nevertheless immanent. This is based on the idea that it is an expression of a general principle of the law of contracts (*pacta sunt servanda*) and therefore, should be respected. The peace obligation could therefore be implicit in a juridical system. In Germany, for instance, two duties are binding on the parties to a collective agreement, even if they are not explicitly mentioned in the collective agreement neither in the law: the peace obligation (*Friedenspflicht*) and the duty to exert influence (*Einwirkungspflicht*). These duties are deemed to be inherent in the very existence of the collective agreement. Even if parties to a collective agreement explicitly contracted out those duties, they would nevertheless apply. Any abrogation would be null and void. The peace obligation places the parties to the collective agreement under an obligation to maintain industrial peace for the duration of the agreement in question. Specifically, neither of the parties may seek to push through demands to alter the existing content of the agreement by taking any form of industrial action. If they violate this, they make themselves liable for damages both with respect to the association that has not violated the agreement and with respect to an individual member of that association. Since this obligation is limited to the content of the agreement in question it is called “relative peace obligation”. It does not, however, preclude industrial action aimed at achieving a collective agreement on terms and conditions not already laid down in the content of the agreement in question. Consequently, if parties to a collective agreement wish to prohibit any industrial action for the duration of the collective agreement a specially agreed arrangement on “absolute peace obligation” is necessary. In practice this possibility is, however, not used at all.

As far as the Lithuanian case is concerned, according to Article 78.3 of the Labour Code, striking is prohibited when a collective agreement is in force and an employer has and is abiding by it. In another word, the above mentioned legal norm of the Labour Code, establishes the statutory peace obligation clause. It means that in the time when the collective agreement is valid and the employer keep it, the collective labour dispute can't be organized and the right to strike can't be materialized as well. In other words, in such period the collective labour dispute of rights can't be arising. But in the same moment theoretically the collective labour disputes of interest (economic matter disputes) can emerge. According to the Labour Code (Article 63.2) the collective agreement of an enterprise shall be valid until the signing of a new collective agreement of the enterprise or until the deadline set in the agreement. Where the fixed-term collective agreement of the enterprise has been concluded, the parties shall start negotiations for its renewal two months before the termination of its validity. So, if the collective bargaining of the new collective agreement falls down, the employees representatives have the right to initiate the collective labour disputes of the interests and after the not successful resolving this disputes in manner of conciliation or mediation, the strike can be organized with requirement to continue the collective bargaining and concluding the new collective agreement. The same situation can arrange in the case when the different level collective agreement are valid in the enterprise. For example, if the sectoral collective agreement is valid in the enterprise and employer keeps it, in the same time the trade union or works council can ask the employer to start collective bargaining for concluding the enterprise level collective agreement. If such process falls down, again the collective labour dispute of interest can be organized and finally it can be resolving by the strike events (in the case of not successful mediation or conciliation processes).

If we speak about the contractual peace obligation clauses, the situation is very common the statutory obligation. The majority of all collective agreements concluded in the Lithuania automatically repeat the same obligation from the Labour Code. In other words,

the trade union or works council undertakes not to strike during the time when collective agreement is valid and employer is keeping it. But again this obligation binds employees' representatives to suspend of organizing the legal collective labour dispute and going on strike on the background of issues regulating in the valid collective agreement. But this obligation not means that trade union or works council are not allowed to go on strike if the collective interests labour dispute arising in the same time.

Likewise Lithuania, law regulates the selective peace obligation in Estonia. According to art. 11, par. 5 of the Collective agreements act the parties are required to comply with the terms and conditions of a collective agreement during the term of the collective agreement and refrain from calling a strike or lock-out in order to amend the terms and conditions provided for in the collective agreement.

Unlike Germany, Lithuania and Estonia, there is no implicit or statutory obligation to keep industrial peace in Italy and the Netherlands. According to the model of these countries, each collective agreement represents the momentary balance between interests always subjected to be modified by reason of changes in bargaining power and strength of the industrial relations forces. Nevertheless, most collective agreements in these countries contain no-strike clauses or peace obligations (relative peace obligation). In the Netherlands if a union called a strike during the period covered by the peace obligation, the Court would order it, by summary procedure, to withdraw from the strike under pain of payment of fines. The relative peace obligations concern only matters which are regulated by the agreement and are valid during the period the collective agreement is in force. This implies that no-strike obligations do not prohibit collective actions aimed at future negotiations unless an absolute peace obligation exists. Only the signatory parties of the collective agreement are bound by the peace obligation and they have to put pressure on their members to refrain from commencing a strike.

	PEACE OBLIGATION		
	<i>Implicit</i>	<i>Statutory clause</i>	<i>Contract clause</i>
<b>Germany</b>	Yes		*
<b>Lithuania</b>	Yes		*
<b>Estonia</b>	Yes	*	
<b>The Netherlands</b>	No		*
<b>Italy</b>	No		*

## 2. Proceedings on collective labour disputes.

In terms of collective labour disputes, the kind of dispute often has important legal and strategic consequences for determining the method for resolving it. In the case of a rights dispute where there is a valid collective agreement in force, this same agreement might include provisions setting out the mechanism the parties must follow in the event of a dispute. Depending on the country, there may be legal provisions requiring certain collective disputes to proceed in a specified manner to arrive at a resolution (e.g. a collective interest dispute involving an essential public service may be subject to compulsory arbitration under the law).

### 2.1. Proceedings on conflict of rights.

As befits its definition, the contractual/legal nature of rights disputes enables them to be handled largely by the court system or legally binding arbitration committees. The reason for which conflict of rights, regarded as legal conflicts, must be worked out in courts (or bodies entitle to function as courts, e.g. arbitration committees) lies in the fact that if the

legal order allows a direct action of the parties aimed at solving conflict of rights, this would represent a derogation to the principle of exclusive juridical power and sovereignty of the State. This is the reason for which in Germany and the Netherlands it is not possible to strike in case of conflicts of rights. In the Netherlands, the resolution of labour disputes over rights may be dealt with by the regular courts: unlike Germany and many other countries, the Netherlands represents a system where there is essentially no distinction made between the handling of labour and other civil cases. Labour disputes over rights in the private sector may be brought before the court, that is the Sector Kanton (Cantonal Sector of the District Court). The Kantonrechter (Cantonal judge) has a special civil jurisdiction extending to small claims, and disputes arising from employment contracts and collective labour agreements. The decisions of the Kantonrechter are subject to appeal to the Arrondissementsrechtbank (District court) and appeal in cassation to the Hoge Raad (Supreme Court).

As stated above, in Germany the competence for legal conflict proceedings lies exclusively with the labour courts. Labour courts, as all other courts, have jurisdiction only over disputes of rights and not over disputes of interests: they are exclusively competent in all disputes of rights between parties to a collective agreement or between them and third parties, whether it concerns a dispute arising from collective agreements or whether it concerns a dispute about the existence of collective agreements. The German labour courts are tripartite and the system is three-tiered: labour courts of first instance (*Arbeitsgerichte* – ArbG), *Land* labour courts (*Landesarbeitsgerichte* – LAG) in the second instance, and on top the Federal Labour Court (*Bundesarbeitsgericht* – BAG). Moreover a special settlement procedure – known in German as the *Einigungsstelle* – is foreseen in the law for disputes on works council matters (e.g. in respect of co-determination on social matters and in respect of restructuring plans). The *Einigungsstelle* arrangement offers a possibility of dispute settlement inside the enterprise for disputes occurring between the employer and the works council. It is a way out of disputes on enterprise level, given that the works councils do not have the right to strike, due to a peace obligation laid down by law. The procedure before the *Einigungsstelle* is designed to compensate for this lack of collective action.

The Lithuanian case presents specific characteristics in relation to proceedings on collective labour disputes. The most evident is that neither conflict of rights nor conflict of interests are heard by courts. Pursuant to the concept entrenched in art. 68 of the Labour Code, in Lithuania there exist collective labour disputes of rights originating from claims alleging violation of personal rights laid down in valid laws, other statutory and local legislation and/or collective agreements, and collective labour disputes of interests, which are determined not by the enforcement of personal rights, but by a problem of interests of different parties to labour relations. In practice, however, these two different types of collective labour disputes do not play any major role, because the same system is applied to the resolution of collective disputes irrespective of the subject matter or the type of the dispute. This system could be divided into two blocks, i.e., arbitration-conciliation methods, the so-called positive methods for the resolution of collective labour disputes, and collective actions, i.e., strike phase. It should be noted that even collective labour disputes originating from non-enforcement of law are not heard in the court. According to the Lithuanian system, it therefore seems that strikes can be called also in the contest of conflict of rights once the abovementioned proceedings has been tried.

As far as the Estonian system is concerned, it is currently not clear which proceedings should be carried out in case of conflict of rights. Certainly the parties *have the right of recourse to labour dispute committees or the courts for resolution of the dispute* as provided in article 12 of the Collective labour dispute resolution act. In these circumstances organisation of strikes or lock-outs is prohibited as of the date of recourse to a labour dispute committee or court. However often rights conflicts are dealt with by the Public conciliator too and this is practically possible to the extent that the law does not make a clear distinction between

proceedings governing the two kinds of disputes. Accordingly, if the Public conciliator fails to make the parties reaching an agreement on a rights conflict there seems to be room, according to the law, to strike also in the contest of conflict of rights.

In other countries, such as Italy, both theoretical and practical distinction between disputes over rights and disputes over interests has not been developed and, concretely, it is possible to strike even in the case of disputes concerned with the interpretation or application of existing contractual rights (unless a statutory or conventional peace obligation is in force). This approach is coherent with a subsidiarity perspective of the industrial relations system according to which social forces should regulate their interests autonomously, i.e. without the intervention of the State. Strike (and lockouts) is therefore regarded as an instrument – like court, mediation, conciliation or arbitration – the parties can choose to face a dispute, irrespective of its nature (rights/interests). In this perspective, once employees decide to call a strike in order to solve the conflict, their action is not aimed at reaching those results that only a judge can provide (juridical decisions), rather it is aimed at achieving a new contractual regulation clarifying the old contractual discipline. In other words, once the parties decide to call a strike to solve the conflict, this becomes a conflict of interest. This is the reason for which in several countries (e.g. in Italy, France, Spain, Belgium) the difference between conflict of interest and conflict of rights doesn't exist. However also in Italy most of the conflict concerned with the application and interpretation of existing contractual or statutory rights are dealt with by the courts. Like in Estonia and the Netherlands, labour disputes over rights are settled by ordinary courts. However rights conflicts are subjected to a procedure more rapid than that provided for other cases and they can be heard by judges who have a special competence in labour matters. One can note here that the Italian system does in fact bear some aspects of a labour court system.

	PROCEEDINGS ON CONFLICT OF RIGHTS		
	<i>Court</i>	<i>Arbitration Conciliation Mediation</i>	<i>Possibility to strike</i>
<b>Germany</b>	*		No
<b>Lithuania</b>		*	Yes (strike as <i>ultima ratio</i> )
<b>Estonia</b>	*	*	Yes if the court order is not executed. Yes in case the conciliation fails (strike as <i>ultima ratio</i> ).
<b>The Netherlands</b>	*	*	No
<b>Italy</b>	*	*	Yes

### 2.1.1. Arbitration as a means to resolve conflict of rights.

Arbitration as a means to resolve conflict of rights represents an alternative to turn to court. Among the countries that have been chosen to compare, Lithuania and the Netherlands presents a system of arbitration covering rights disputes. In the Lithuanian case, however, the courts never hear collective labour disputes, irrespective of their nature (statutory or contractual based) and type (rights/interests). Unlike Lithuania where a statutory proceeding of arbitration is provided, in the Netherlands arbitration bodies are set up by collective agreements. In the collective labour agreement of Dutch Universities for

example, conflict resolution through an arbitration committee is prescribed. According to appendix H of the agreement, “*the collective agreement (CAO) parties shall submit any dispute arising between them with regard to the interpretation, application of or compliance with this agreement to an arbitration committee to be appointed by them*”. The arbitration committee can be called up by the parties the moment a dispute arises. The committee is set up for an indefinite period of time and is of a fixed composition. The majority of the committee members are not affiliated to any university. After a dispute has been submitted, the arbitration committee shall decide on a case within a reasonable term. The committee is composed of equal numbers of representatives and comprises a chairman who is not affiliated to the university, four members and four substitute members.

The importance to provide a judicial alternative to courts in case of conflict of rights lies in the fact that the parties of the dispute can choose to turn to a body that they autonomously decided to set up, through the collective agreement, with their rules, timing and *ad hoc* procedures. Moreover arbitration bodies are certainly more suitable in those countries, such as Italy, Estonia and the Netherlands, where ordinary courts deal with labour conflicts. This is because, according to a traditional theory, the resolution of industrial disputes, in this case rights disputes, requires, in order to ensure social justice, that cases be heard and decided rapidly, at no or with a minimum of cost to the litigants, with a relative lack of formality, and by bodies with a specialized capability in labour matters. While ordinary courts are not appropriate to the end of rapidity in deciding cases arbitration committees could certainly represent a proper alternative. By contrast, in countries where specific labour courts are set up, such as Germany, arbitration committees are unusual.

In a way, the Estonian system currently provides an option between turning to court or labour dispute committee and recourse to the Public conciliator in the contest of conflict of rights. However the system is not clearly defined in the Collective labour dispute resolution act and this could bring some juridical inconveniences: as for example for the parties to strike there could be the possibility once the conciliation procedure fails. Differently the arbitration procedure, like the judicial procedure, ends with an act that is binding to the parties.

In Italy the Law on strike in essential public services provides a system of arbitration in case of conflicts related to the application or interpretation of the collective agreements concerned with the definition of what should be considered as an essential public service in each sector. A Commission in charge of guaranteeing the implementation of this law was established and, among other functions, could be requested by the parties of the dispute to act as an arbitration body.

Following the Spanish reform of collective bargaining, Italian social partners and the government are currently working on a text seeking to introduce the following scheme for the private sector: collective agreements shall establish mediation and/or arbitration procedures to resolve conflict of rights. In the absence of such a contractual provisions conflicts concerned with the interpretation and application of existing contractual rights shall be settled through an arbitration procedure carried out by the Ministry of labour (or its territorial bodies where the conflict has a local relevance). This proposal is in line with a subsidiarity approach to industrial relations according to which there are separated areas of competence between the juridical order and the industrial relations system and the State interferes only when social partners are not in the condition to regulate their interests autonomously.

## **2.2. Proceedings on conflict of interests.**

Since interests disputes are not grounded in law or contractual provisions, but rather occur during contract negotiations, instruments and procedures such as conciliation, mediation, arbitration and industrial action are usually employed. Except for strike, all of these

alternatives involve the intervention of a third party and it is rather the degree of intervention that differentiates one from the other.

It is relevant to note that in some countries, such as Lithuania and Estonia, proceedings on conflicts of interests are regulated by law, while elsewhere they are mostly grounded on contractual arrangements. In the Netherlands, for instance, mediation, conciliation and arbitration may occur on an occasional basis, if the industrial conflict lasts for a long time. However, all these forms of conflict resolution take place on a strictly voluntary basis. There is no law in this field, except in relation to the civil servants. Industrial relations in the Netherlands are characterised by the willingness to reach agreements. This co-operative mood and the practice of mutual consultation (so-called Polder model) had greatly contributed to restore the competitiveness of Dutch industry. In this climate, the social partners thus far felt no need to introduce a permanent mechanism for settling employment disputes. Nevertheless, mediators do appear from time to time in Dutch collective disputes. Their intervention is occasionally written into dispute settlement clauses in collective labour agreements. It is estimated that of the current 900 collective labour agreements, concluded at enterprise and sectoral level, 25% provide for dispute resolution clauses. The procedures prescribed in these clauses show a great variety. In some procedures, reference of the dispute takes place on a voluntary basis, sometimes reference is compulsory. The technique most frequently stipulated seems to be arbitration, not mediation.

In Germany the system is partially regulated by law: joint dispute resolution bodies consisting of an equal number of representatives of both sides are established at Land level by the Land Ministers of Labour and Social Affairs. The decisions of the board are binding on the parties only if they have agreed in advance that this should be so. Nonetheless these bodies are called to operate as a subsidiary element for cases in which a voluntary procedure either does not exist or turns out to be unsuccessful and in practice are rarely used. In practice the exclusive conflict proceeding method for a conflict of interest between parties to a collective agreement is the *voluntary joint dispute resolution* established by agreement between the parties (*vereinbarte Schlichtung*). Generally these joint dispute resolution boards have several functions and no distinction is made between conciliation and mediation or the terms tend to overlap. On the contrary, in other countries such as in Lithuania there is a definite if subtle difference between the two. While both conciliation and mediation are processes involving the intervention of a neutral third party, the role of a conciliator is to help facilitate communication between the parties, without making any specific proposals for resolving the dispute. Conciliation uses the expertise of a neutral third party to assist negotiations and foster agreement among the social partners. On the other hand, in addition to keeping the lines of communication open, a mediator's role may also include proposing terms of settlement, which the parties are free to accept or reject. Mediation takes one additional step by permitting the neutral third party to make recommendations in order to resolve the conflict. The third mechanism, arbitration may be compulsory or voluntary, binding or advisory – depending on the legal circumstances or the choice the parties decide to follow once the procedure is regulated in the collective agreement. In any case, arbitration involves the intervention of a neutral third party who is empowered to examine legal arguments and evidence from both sides and to make a (in most cases binding) decision in the case.

### **2.2.1. Conciliation.**

Conciliation uses the expertise of a neutral third party to assist negotiations and foster agreement among the social partners. This is somehow the Estonian model of the resolution of labour disputes by federations of employers and federations of employees outlined in article 7 of the Collective labour dispute resolution act.

Several countries consider conciliation and mediation to be one and the same (e.g. Germany), but technically speaking, conciliation is different in that, unlike a mediator, the conciliator does not make any suggestions to the parties on a possible resolution. Rather, the aim of the conciliator is to bring the parties together and assist them in arriving at a mutually agreed solution. According to this distinction the Estonian model of resolution of labour disputes by Public conciliator seems to be a mediation procedure rather than conciliation. This is because under article 9 of the Collective labour dispute resolution act the conciliator shall identify the reasons for and circumstances of a labour dispute and shall propose resolutions.

In theory, both collective interest and rights disputes can be settled through conciliation. In practice, however, conciliation is more commonly used at the negotiation phase of collective bargaining when there are disputes of interest.

Lithuania has a unique approach to conciliation through the use of what is known as conciliation commission. These commissions are empowered to deal with both collective interest and rights disputes and are a mandatory step in the collective dispute resolution process. Consistent with the emphasis on the role of the social partners in resolving collective disputes through bilateral consultation, a conciliation commission is established by the parties who also select an equal number of representatives who are then responsible for considering the dispute and taking a decision by mutual agreement – a decision that is binding on both parties and that has the validity of a collective agreement. Hearing of a dispute in the conciliation commission shall be a mandatory stage of collective dispute resolution, unless one of the parties to the collective labour dispute requests that the collective labour dispute should be heard through a mediator. The *ad hoc* conciliation commission shall be formed from an equal number of the authorized representatives of the subjects who have made or received the demands. The number of the Commission members shall be set by agreement between the parties. If the parties fail to reach an agreement on the number of members of the conciliation commission, they shall at their discretion delegate their representatives to the conciliation commission. Each party may have not more than five representatives on the commission.

Representatives of the parties shall have the right to invite specialists (consultants, experts, etc.) to the meeting of the conciliation commission in which the collective dispute is heard. The conciliation commission shall elect its chairman and its secretary from among its members. The employer must provide the conciliation commission conditions for work: provide premises and furnish the necessary information.

The commission must be set up within seven days from the day of refusal to meet the demands by the party who has received the demand or in the absence of a response within the said period.

The conciliation commission must hear the collective dispute within seven days from the day of formation of the conciliation commission. The time limit may be extended by agreement between the parties. The decision of the conciliation commission shall be adopted by agreement between the parties, executed by drawing up a record and shall be binding on the parties within the time limit and in accordance with the procedure specified in the decision. If the conciliation commission fails to reach an agreement on all or part of the demands, the commission may refer them for hearing to the labour arbitration, a Third Party Court or wind up the conciliation procedure by drawing up a protocol of disagreement. The decision of the Conciliation Commission shall be announced to the employees.

### **2.2.2. Mediation.**

Mediation is equally suited also in situations of collective rights disputes before turning to courts. However it is commonly used in case of conflict of interests. In many countries this

proceeding could be integrated with conciliation within a system that provides different stages in conflict resolution procedure.

In Lithuania mediation is alternative to conciliation. According the Article 75 of the Labour Code instead of hearing the collective labour dispute in conciliation commission, the parties shall be heard through a mediator. This possibility was regulated in the Labour Code in 2008. Before that, the mediation procedure wasn't legitimated by Labour Code and didn't used in practise. The aim of the resolution of collective labour disputes through a mediator shall be to reconcile the interests of the parties and to reach an agreement satisfactory to both the parties. A mediator shall be chosen by the parties to the collective labour dispute by common agreement from the list of mediators approved by the Minister of Social Security and Labour (only natural persons of high moral character and with special knowledge which is necessary for settling collective labour disputes may be entered in the lists of mediators) within three working days from the receipt of the notification by the employer of the decision regarding the demands received. In case of failure by the parties to reach an agreement on the appointment of a mediator, a mediator shall be selected by lot by the secretariat of the Tripartite council not later than within two working days after the application by one of the parties to the collective labour dispute. The resolution of the collective labour dispute through a mediator must be achieved within ten days from the date of the appointment (selection) of a mediator. The time limit may be extended by agreement between the parties. The employer or the employers' organisation must provide the mediator conditions for work. An agreement reached between the parties to the dispute during the mediation process shall be executed in writing. It shall be binding on the parties to the dispute within the time limit and in accordance with the procedure specified in the agreement. In case of failure to reach an agreement by the representatives of the parties to the collective labour dispute during the mediation process, a protocol of disagreement shall be drawn up. The agreement or the protocol of disagreement shall be signed by the representatives of the parties to the dispute and the mediator. The Minister of Social security and labour has concluded the permanent *list of the mediators* in 2010 (there are 8 persons, who were recognized as professional experts having competence to take part in collective labour disputes resolutions procedures as mediators). There hasn't been held any official mediation procedures from the list of the Mediators was made.

Mediation proceedings are voluntary and often contractual grounded in the Netherlands. In many cases, *ad hoc* mediators are appointed by the parties, particularly in the event of strikes with a major social impact. These *ad hoc* mediators are often well known public figures, such as politicians. Often, such mediations take place against the background of court injunctions. Occasionally, the judge decide on the lawfulness of a strike to direct the negotiation process, as has happened in the KLM pilots dispute.

### **2.2.3. Arbitration.**

Arbitration exists in the vast majority of EU Member States (24 out of 26, the two exception are Belgium and Estonia), but is not widely practiced, leaving conciliation and mediation as the most popular mechanisms when it comes to solving collective disputes. This quasi-judicial process, in which a neutral party renders a decision, is generally considered to be an option of last resort in cases where the social partners cannot otherwise resolve their differences. More specifically, arbitration typically follows after attempts at mediation between the parties have proven unsuccessful. The European Foundation notes that many countries only associate arbitration with collective *rights* disputes (i.e. disputes over the interpretation or implementation of a collective agreement) but that arbitration is also relevant, if not always suitable, in cases of *interest* disputes.

In Lithuania, Labour Arbitration and Third Party Court are two alternative bodies, which may take part in hearing a collective agreement dispute if the Conciliation Commission fails

to reach a dispute resolution or the mediation procedure was finished by signing the protocol of disagreement. Unlike the Conciliation Commission, which is a mandatory stage of a collective dispute resolution, hearing by Labour Arbitration and Third Party Court is not obligatory. As said above, these two institutions are alternative bodies in resolving collective agreement disputes, i.e. the hearing of a case may be delegated to any of these bodies.

The *ad hoc* Labour Arbitration shall be formed under district court within the jurisdiction whereof the registered office of the enterprise or the entity, which has received the demands made in the collective dispute, is located. The composition of the Labour Arbitration, the dispute resolution procedure and the procedure of execution of the adopted decision shall be specified by the Regulations of Labour Arbitration approved by the Government. The Labour Arbitration shall include a judge who is appointed by the head of the district court from the judges of this court and who will chair the Labour Arbitration; and six other arbitrators in the collective agreement dispute – three arbitrators from each side of the dispute. Unlike the Conciliation Commission, the Labour Arbitration shall make its decision by a majority of votes. The decisions of the Labour Arbitration are executed according to the civil process regulations. In 1992-2002, with the Law on the Regulation of Collective Disputes in force, only three labour arbitrations were formed to resolve collective agreement disputes: two of them were formed at Klaipeda district court in 1997, the third was formed at Vilnius district court in 2000. Since the Labour Code was enforced on 1 January 2003, no applications to form labour arbitration have been submitted.

The Third Party Court is another alternative body hearing of the collective agreement dispute. Similar to Labour Arbitration, the Third Party Court is a provisional body, which is formed to hear a certain collective agreement dispute. But unlike Labour Arbitration, the formation of which is initiated by a judge of the respective district court, after he has received the decision of the Conciliation Commission about the delegation of hearing the collective agreement dispute to Labour Arbitration, the Third Party Court is formed by agreement of the parties to the collective agreement dispute; it is formed from the arbitrators who are appointed by the parties to the collective dispute. The Labour Code does not specify the procedure of Third Party Court formation, the procedure of hearing or making decisions by Third Party Court, hearing collective agreement disputes by third party court; labour code only states that resolution of collective agreement disputes by Third Party Court shall be specified by the Regulations of Third Party Court approved by the Government. According to these Regulations, the Third Party Court may be formed by a special written agreement of the parties to the dispute in the case when the Conciliation Commission fails to reach an agreement on all or part of the demands and the commission decides to refer them for hearing to the Third Party Court. Parties to the collective agreement dispute shall agree on the composition of the Court and execute the appointment by a written contract.

The Third Party Court judges shall be appointed from the persons who do not have any particular interest in the results of the collective labour dispute resolution; they shall not be employees of the enterprise, agency or organisation which is party to the collective labour dispute, nor persons under age or in ward. The appointed Third Party Court judges shall not be changed for the whole period of the dispute hearing by this court.

Decisions of the Third Party Court shall be adopted by a majority of votes and drawn up in a record. The decisions of the Third Party Court shall be binding upon the parties to the dispute. If the employer does not execute the decision of the Third Party Court, a strike may be declared according to the procedure laid down in the Labour Code.

### **2.3. Proceedings on conflict of interests: the German joint dispute resolution bodies.**

The de facto exclusive conflict proceeding method for a conflict of interest between parties to a collective agreement is voluntary joint dispute resolution established by agreement between the parties (*vereinbarte Schlichtung*). But even the practical impact of joint dispute resolution procedures should not be overestimated. The huge amount of collective agreements, at least so far, is a result of free collective bargaining without involvement of dispute resolution.

As the details of the procedure are laid down within the collective agreement itself, it differs from industry to industry,

In an agreement between the German Federation of Trade Unions (*Deutscher Gewerkschaftsbund* - DGB) and the Confederation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände* - BDA) of 1954, the following basic terms were fixed:

*'Thereby the DGB and the BDA as well as their member associations are obliged to take serious efforts to primarily conclude collective agreements by way of free negotiations. If those negotiations do not lead to a result it is the common conviction of DGB and BDA that state boards should not be involved in dispute resolution in collective bargaining, but only joint dispute resolution boards based on voluntary agreements. This, however, requires that the necessary preconditions for such a voluntary system are established by the contracting parties.'*

The same agreement contains a model of such an agreement on joint dispute resolution which is recommended to the member associations as a sort of model. At the same time, member associations were urged to conclude corresponding agreements as quickly as possible. They, of course, were free to modify the model agreement offered by DGB and BDA. It is interesting to note that the model agreement already offered two alternative types of joint dispute resolution boards: one only composed of the contracting parties, the other chaired by a neutral president.

Meanwhile agreements on the establishment of joint dispute resolution cover all areas of the private sector. It has to be stressed, however, that there is no homogeneous pattern; it differs from industry to industry and from sector to sector. In order to give an idea of the wide range of variety, three agreements on the establishment of joint dispute resolution are selected to illustrate this phenomenon: the agreement for the food industry, the agreement for the metal industry, and the agreement for the chemical industry.

#### **2.3.1. Composition of the joint dispute resolution boards.**

One basic difference refers to the structure of the joint dispute resolution boards. In the food industry two instances are provided for: a board of first instance, and a board of appeal. The board of first instance consists exclusively of trade union representatives and representatives of employers' association, four from either side. Each group of representatives elects a chairperson. Those two chairpersons act as presidents, both having equal rights. The board of appeal, consisting also of four representatives of each side, is chaired by a neutral president. This president is selected from a list compiled by agreement of the two sides. The list contains three names. If the two parties cannot agree on whom to select within three days after the appeal has been initiated, the choice is made by lot.

The metal industry has a board for joint dispute resolution in general and a board for special dispute resolution during strike and/or lock-out. The board for joint dispute resolution in general is composed of two representatives of each side, and two presidents of whom only one is entitled to vote. The two presidents are to be nominated by agreement of both sides. If no agreement is reached either side has the right to nominate

one of the two presidents. The question who has the right to vote, and who is prevented from voting, has again to be resolved by agreement. If agreement cannot be reached immediately, the lot has to decide. The composition of the special dispute resolution board is basically the same. There are, however, not only two but three representatives of both sides.

In the chemical industry the board is composed of three representatives of each side. It is exclusively up to the board members to elect a president among themselves. The presidency, however, has to rotate between union representatives and employers' association representatives.

In spite of all these differences one common feature has to be underlined: there is always a distinction between regional boards for regional agreements and national boards for industry-wide agreements.

### **2.3.2. Initiation of the joint dispute resolution procedure.**

According to the agreement for the food industry, it is sufficient that one of the two parties takes the initiative to involve the joint dispute resolution board; the respective other side is obliged to participate. The initial step, however, has to meet some formal requirements (a written, detailed description of the issues at stake, etc.). If joint dispute resolution fails to be successful in the first attempt, each party may appeal to the board of appeal in the same way.

According to the agreement for the metal industry, joint dispute resolution is only available either before negotiations take place, or after negotiations have failed. Failure has either to be agreed upon by both sides or has to be declared in writing by one side to the other. After negotiations have failed both parties can jointly initiate the dispute resolution within two days. If this does not happen each party can unilaterally initiate joint dispute resolution within another day. Such a unilateral attempt of initiation, however, leads to joint dispute resolution only if the counterpart, within another period of two days, agrees to participate. In other words, neither side has the power to impose joint dispute resolution on the other one. This in particular applies to the special joint dispute resolution during a strike or lockout, which can only be involved on mutual request of both sides.

Just like the agreement for the metal industry, the agreement for the chemical industry allows joint dispute resolution only on condition that negotiations already took place and that failure of negotiations has been declared by at least one party. There is, however, an exception which can only be understood in view of the fact that German law does not know a duty to bargain. That is why the agreement for the chemical industry allows access to joint dispute resolution if negotiations on a new collective agreement or on a new subject matter are refused by the counterpart. If within a period of 30 days no consensus on a date for the beginning of negotiations is reached, joint dispute resolution can be initiated. In the chemical industry, unlike the metal industry, either side has the right to impose joint dispute resolution on the other side unilaterally. The other side is obliged to participate.

There is one feature common in all industries: none of the boards meets in public. Whereas in the food industry it is up to the board whether experts or persons who can give information are invited, this is different in the two other industries. In the chemical industry each side can bring its own experts and/or persons who can give information. In the metal industry the situation is a little more complicated. Both sides are free to make offers in this respect. But if the board decides to hear an expert or another person of one side, the other side has the right to bring in an equivalent person.

According to all three agreements, the board has to hear the parties and to evaluate the documents, etc. presented by the parties. It is, however, mainly up to the board itself to develop specific procedural rules; the agreements contain no procedural rules. According to

all three agreements the boards primarily have to make an effort to stimulate an agreement between the parties instead of presenting a proposal themselves.

In the food industry a recording clerk has to write minutes. These minutes, however, are to be kept secret. The recording clerk as well as the members of the board are obliged to keep the content of the proceedings secret. Even if the respective clauses in the other two agreements are not as detailed, the regulations are the same. In the food industry the board decides with simple majority. No board member may abstain from voting. Normally it is up to the parties whether or not they accept the proposal of the board. But there is one important exception: if, at least six of the eight board members have voted for the board decision it is binding on the parties. If the board of first instance does not reach a decision, or if its decision is not accepted by the parties, the board of appeal can be involved. For the decisions of the board of appeal almost the same as for the board of first instance applies: it is generally up to the parties whether or not they accept it, but if seven of the nine board members have voted for the decision it is binding on the parties. Parties may, however, also agree in advance that they shall be bound by each of the board decisions. Such an agreement cannot be repealed later.

In the metal industry there is a provision according to which the board has to propose a decision within a certain period. The proposal has to be in writing. Decisions are also made by simple majority. But the decision is in no case binding. It is always up to the parties to accept the proposal or to refuse its acceptance. It is, however, possible to agree in advance that the decision of the board shall be binding. This effect can be restricted to board decisions by qualified majority or to unanimous board decisions. There is no difference between the procedure in general joint dispute resolution and in joint dispute resolution during strikes and lock-outs. In the chemical industry board decisions based on the simple majority of votes are binding. Finally it should be mentioned that the expenses of the joint dispute resolution machinery in all three industries are shared by the parties.

### **2.3.3. The function of the joint dispute resolution.**

Joint dispute resolution aims to serve two purposes: to promote an agreement and to prevent strikes and lock-outs or, at least, to terminate strikes and lock-outs. It has to be kept in mind that negotiations in different branches do not take place at the same time every year. Usually a big trade union is put in the role of a trendsetter, and the others more or less follow. Thereby a fairly homogeneous overall pattern is established.

It is usually either the IG Metall or ver.di which phonorarys the role of trendsetter. In those trend-setting situations joint dispute resolution is customarily not used to prevent a strike. If a collective agreement cannot be reached easily industrial action has to be taken in order to show each side's constituency that every attempt is being made to improve the results of bargaining. But once strikes (and lock-outs) have started, joint dispute resolution is usually used to terminate the conflict. And here joint dispute resolution has proved to be a rather successful instrument, defining the pattern of the final outcome. This is due to quite a few factors.

In both sectors, in the public services as well as in the metal industry, external mediators play a decisive role. They are usually people of high authority, capable to promote compromises and especially to sell those compromises to the general public. As already indicated these bargaining rounds – especially the trend setting bargaining round – enjoy high public attentiveness. Public opinion is shaped by all kinds of statements: figures and evaluations published by different economic research institutes, figures and evaluations published by the advisory Economic Research Council which delivers an annual report on the economic perspectives to government, the view of government on the economic perspective and, of course, the views of the two counterparts of the bargaining table are published in the media. This mixture of information discussed daily in all media helps to

create an understanding that an agreement should be fixed within a certain range. The mediator's main task is to convince parties to a collective agreement that his proposal meets this expectation. Hence, the support of the general public and the support of the constituency of each side is more or less guaranteed.

In order to assure this goal the media are involved once the joint dispute resolution board is making a proposal. The medias' positive reaction, at least in principle, guarantees the approval of the proposal by the parties and their constituency. This analysis, of course, would be incomplete without mentioning that the general public and the media consider strikes (and lock-outs) to be something which has to be stopped quickly. This attitude, of course, helps to support the attempts of joint dispute resolution.

Once the trend setting bargaining round is terminated, bargaining in other branches starts. In this context joint dispute resolution is quite often used to prevent a strike. In such a situation there is not much need to go on strike for reasons of legitimacy. Hence, joint dispute resolution can serve a preventive function. It normally turns out to be sufficient to enable the party representatives at the bargaining table to sell the results to their respective constituencies.

As far as political mediation is concerned, it never works if politicians try to interfere directly in the conflict. This rather alienates parties to a collective agreement and is considered by them to be an attack on their constitutionally guaranteed autonomy in collective bargaining. However, to shape public opinion by spreading statements in the media is a very efficient strategy of political joint dispute resolution, which is used regularly. On the whole the system of voluntary joint dispute resolution has turned out to be an instrument which helps a great deal to promote suitable compromises without infringing the autonomy in collective bargaining of the parties involved. If from time to time individual politicians or legal scholars are pleading for a revival of dispute resolution by state authorities – especially for the public sector – this should not be taken too seriously. At least so far such attempts have remained irrelevant and will probably remain irrelevant in the future.

Since, however, no third party intervention is able to force the parties to reach an agreement the only remaining instrument to put pressure on the parties is industrial action. This is why the legal regulation of industrial action is very important for the structure and functioning of the German system of collective bargaining.

### **3. Proceedings on conflict of interests and the origination of the right to strike.**

In most countries the origination of the right to strike is subject to the attempt in resolving the conflict by means of proceedings on collective labour dispute. These may include compulsory conciliation or mediation, a period of notice and a strike ballot. Such procedures may be required by legislation or a legally enforceable collective agreement. However, according to the international labour law, the imposition of these preconditions is subject to certain limitations. Generally the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations. For example, strikes should not be rendered illegal on the basis of minor procedural flaws. Nor should the procedural stages be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.

Among the compared countries Italy is the one where industrial action may be embarked irrespective of the attempt to resolve the dispute by means of conciliation, mediation or arbitration proceedings.

Unlike Italy, in Estonia the right of employees or unions or federations of employees to organise a strike and the right of employers or associations or federations of employers to

lock out employees to resolve a labour dispute arises, among other things, only if conciliation procedures have been conducted but no conciliation has been achieved. Similarly, in Lithuania strikes may be called only after conciliation commission, mediation or labour arbitration have been tried.

The European Committee of Social Rights has found that a *cooling-off* period prescribed by legislation for periods of negotiation or conciliation or arbitration proceedings between employers and workers is compatible with the Charter, since such a provision does not impose a real restriction of the right to collective action; instead it merely regulates the exercise thereof (European Committee of Social Rights Conclusions I, 38f; Conclusions XIV-1 594ff). Moreover, it found provisions to be compatible with article 6 § 4 of the Charter according to which negotiations or attempts at negotiations on the demands presented must have proved fruitless despite the efforts of a mediator for the decision to call a work stoppage to be legal (European Committee of Social Rights Conclusions XIV-1 388ff). With a view to the Netherlands the Committee did not criticize the situation that the lawfulness of a strike also depends on whether the negotiation possibilities between the parties have been exhausted i.e. serious bargaining must take place and the employer must be informed before a strike is called (European Committee of Social Rights Conclusions XV-1, Addendum Netherlands). In the 16th supervision cycle, the Committee regarded the principle of last resort used as a criterion to assess the lawfulness of strike as sufficiently clear and in compliance with the Charter (European Committee of Social Rights Conclusions XVI-1 577).

According to the German case law a strike may only be carried out as a last resort. This so-called principle of *ultima ratio* (*Ultima ratio-Prinzip*) implies that all means of negotiation shall be exhausted and joint dispute resolution shall be attempted before a strike can be called. Of course, it is up to the trade union to declare that negotiations have failed whenever it seems that further negotiations would be useless. Seriousness and execution of negotiations is definitely not subject to judicial control.

According to the Federal Labour Court, the principle of *ultima ratio* does not require a formal declaration that collective bargaining has broken down as a prerequisite for initiating industrial action of any kind. That initiation rather reflects the free declaration of the party concerned, a declaration which is not open to review and, hence, solely determining, that it considers the possibilities of reaching an understanding without recourse to pressure to be exhausted. This means that there is no later determining point of time as from which industrial action other than warning strikes ... becomes lawful. There is a uniform point as from which a warning strike, like any other form of industrial action, is not excluded, even though collective bargaining continues ...?

The Federal Labour Court has consistently held that a strike may only be called after the exhaustion of all possibilities to achieve an agreement by collective bargaining i.e. strike is only permissible as *ultima ratio* (Judgment 21 April 1971 – GS 1/68 (n 22) 1669; judgment 18 February 2003 – 1 AZR 142/02 [2003] NZA 866 (Federal Labour Court) 869). This principle determines the point in time from which on strike is allowed (Judgment 21 June 1988 – 1 AZR 651/86 [1989] NJW 57 (Federal Labour Court) 59). It implies that the trade union must have submitted its demands with regard to a new collective agreement and that negotiations must have taken place except if negotiations are refused by the opponent. Moreover, a strike is not allowed if the demands were accepted (Judgment 21 June 1988 – 1 AZR 651/86 (n 146) 60). A formal declaration of failure is not necessary (Judgment 21 June 1988 – 1 AZR 651/86 (n 146) 59-60; judgment 18 February 2003 – 1 AZR (n 145) 866, 869). Begin of collective action rather contains the free declaration of the social partners that the possibilities for negotiations without pressure are exhausted; this declaration cannot be supervised by the courts (Judgment 18 February 2003 – 1 AZR 142/02 (n 145) 866, 869). This principle of last resort requires the serious attempt to negotiate in respect of a collective agreement. However, since the decision to go on strike

cannot be examined by the courts the principle of last resort in fact only entails the presentation of the demands to the social partner and the obligation to wait for response. It therefore only prohibits calling for strike without having confronted the social partner with the demands. Like cooling-off periods, it aims at preventing strikes during negotiations whereas the decision whether the possibilities for negotiations are exhausted entirely lies in the hands of the social partners. Taking into consideration that the European Committee of Social Rights considers to be compatible with the Charter firstly cooling-off periods for negotiation conciliation and arbitration and secondly provisions according to which negotiations or attempts at negotiations on the demands presented must have proved fruitless despite the efforts of a mediator for the decision to call a work stoppage to be legal, the principle of last resort in German case law does not constitute a breach of the Charter. This finding is confirmed by the Committee's own view that the principle of last resort is compatible with the Charter (European Committee of Social Rights Conclusions XVI-1 577).

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