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Introduction to International Mediation and Arbitration: Resolving Labor Disputes in the United States & the European Union

May Olivia Silverstein

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INTRODUCTION TO INTERNATIONAL MEDIATION AND ARBITRATION: RESOLVING LABOR DISPUTES IN THE UNITED STATES & THE EUROPEAN UNION

MAY OLIVIA SILVERSTEIN*

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* J.D. Candidate, May 2011, Catholic University of America, Columbus School of Law; Bachelors of Science of Industrial and Labor Relations, January 2005, Cornell University, School of Industrial and Labor Relations. Thank you to: my friends and my family for unyielding support and understanding, and Professors Roger Hartley and James Pope for inspiration and knowledge.

I. INTRODUCTION

Conflict resolution is a crucial part of any country's sustainable industrial relations system.¹ It is essential to find a balance between core labor rights and employment market flexibility, because both are necessary ingredients for healthy economic and social development.² One important tool in promoting the amicable development of these interests is effective dispute resolution. It is necessary to settle labor disputes through framework procedures designed to bring about effective, efficient, and equitable resolutions for the benefit of involved parties and the greater economy.³ Without the use of effective dispute resolution methodologies, disputes will increase and ultimately undermine national workplace productivity.⁴ This possibility is especially troubling, because a changing economy threatens to make relied upon and originally effective methodologies obsolete.⁵

The world is becoming increasingly intercontinental. Companies are transforming into multinational operations, which execute work in different cities, countries, and continents. There is now a global economy that functions to internationalize many aspects of the traditional employment relationship.⁶

1. See Paul Teague, *Path Dependency and Comparative Industrial Relations: The Case of Conflict Resolution Systems in Ireland and Sweden*, 47 BRIT. J. INDUS. REL. 499, 502 (2009) (defining conflict resolution as a system "made up of the institutions and practices used to help solve workplace and other industrial relations problems and disputes").

2. See, e.g., Mark Anner & Teri Caraway, *International Labor Standards and Workers' Rights: Between Labor Standards and Market Flexibility*, 45 STUD. COMP. INT'L DEV. 151, 152 (2010) (juxtaposing how the IMF and World Bank favor labor market flexibility with how labor rights advocates instead favor greater protection for worker benefits and union rights).

3. See, e.g., John Budd & Alexander Colvin, *Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice*, 47 INDUS. REL. 460, 461-63 (2008) (arguing that instead of measuring the success of dispute resolution techniques through the traditional criteria of speed and subjective party satisfaction, evaluations should focus on efficiency, equity, and party participation).

4. Cf. National Labor Relations Act § 1, 29 U.S.C. § 151 (2006) (acknowledging the need for dispute resolution systems in order to "eliminate the causes . . . [of] obstructions to the free flow of commerce and to mitigate and eliminate these obstructions").

5. See generally Matthew Bartmes, *Interest Arbitration in the New Economy* (2009) (unpublished manuscript), available at <http://www.kentlaw.edu/academics/plel/Interest-Arbitration-in-the-New%20Economy-Matthew-Bartmes.pdf> (discussing how the shock of the 2008 U.S. economic collapse has affected arbitration awards).

6. See James B. Boskey, *The Resolution of Disputes in Transnational Employment: Arbitration and its Discontents*, 3 J. SMALL & EMERGING BUS. L. 189, 192 (1999) (explaining that transnational employment agreements often limit the role of national courts); Eric D. Green, *International Commercial Dispute Resolution: Courts, Arbitration and Mediation - Introduction*, 15 B.U. INT'L L.J. 175, 178 (1997)

Employees, many represented by unions that continue to act as their exclusive representatives for collective bargaining purposes, are increasingly entering into agreements with employers located in different legal jurisdictions.⁷ Collective bargaining is the process by which unions meet, discuss, and negotiate work conditions with employers.⁸ Such bargaining normally results in a written contract called a collective bargaining agreement, which sets wages, hours, and other conditions of employment for a stipulated period.⁹ While such contracts usually include a dispute resolution provision that describes which kind of dispute resolution method the parties will use in case of conflict, the expansion of global economic borders sometimes challenges the efficiency and effectiveness of relying on these provisions.¹⁰

This Article first defines labor disputes in the context of a global realm.¹¹ It considers the history of labor arbitration and mediation methodologies in the United States and compares them to those utilized by countries affiliated with the European Union.¹² Next, this Article seeks to evaluate

(noting that “mediation . . . has yet to make . . . an impact on international [and transnational] disputes”).

7. See Reynald Bourque, *International Framework Agreements and the Future of Collective Bargaining in Multinational Companies*, 12 JUST LABOUR 30 (2008) (studying the emergence of negotiated International Framework Agreements between international labor and multinational companies).

8. See, e.g., BLACK’S LAW DICTIONARY 299 (9th ed. 2009) (defining collective bargaining as “[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline and fringe benefits.”).

9. See e.g., *id.* (noting that collective bargaining agreements are “[a] contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.”).

10. See Rosetta Ellis, Note, *Mandatory Arbitration Provisions in Collective Bargaining Agreements: The Case Against Barring Statutory Discrimination Claims from Federal Court Jurisdiction*, 86 VA. L. REV. 307, 308 (2000) (observing that it is estimated that over ninety-five percent of private-sector collective bargain agreements negotiated in the United States in 1990 contained mandatory arbitration provisions); Jeff Faux, Founding President & Distinguished Fellow, Econ. Policy Institute, Rethinking the Global Political Economy, Address at the Asia-Europe-U.S. Progressive Scholar’s Forum: Globalization and Innovation of Politics (Apr. 24, 2002), available at http://www.epi.org/publications/entry/webfeatures_viewpoints_global_polit_econ/ (arguing that “the net impact of neo-liberalism has been negative,” because the goals of the “financial liberalization of the 1970s,” such as an “increase in economic growth,” remain unachieved).

11. See *infra* Part II (fashioning a definition of the term “international labor dispute”). For a contrasting, generic definition of labor disputes in the U.S. domestic realm, see, for example, 29 U.S.C. § 152(9) (2006), defining a “labor dispute” as “any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.”

12. See *infra* Part IV–V (studying alternative dispute resolution forms in the United

the use of these methodologies in resolving labor disputes.¹³ Finally, this Article concludes with a description of potential ways to make these methodologies more effective and efficient at addressing international labor disputes.¹⁴

It is certain that national legal regimes must provide for the effective resolution of transnational labor disputes, in order to promote global economic stability.¹⁵ Otherwise, an ineffective legal regime risks undermining the ability of companies to remain competitive and viable in an increasingly cutthroat, international marketplace, and any nation fostering such an ineffective legal regime risks a downward economic spiral.¹⁶

II. DEFINING INTERNATIONAL LABOR DISPUTES

A. *The Definition of “International”*

The first step toward defining international labor relations is to define the scope of “international” labor disputes. Practitioners and scholars currently lack a common definition.¹⁷ Bob Hepple, a prominent professor in the realm of law, politics, and sociology, states that the definition of the word “international” varies from state to state and even among different international institutions.¹⁸

Professor William W. Park provides more clarity. He asserts that there

States and the European Union).

13. See *infra* Part VI (arguing for negotiated international legal uniformity).

14. See *infra* Part VII (concluding that flexibility remains an important supplement to uniformity).

15. See, e.g., Kerry Rittich, *Between Workers’ Rights and Flexibility: Labor Law in an Uncertain World*, 54 ST. LOUIS U. L.J. 565, 567 (2010) (asserting that, to be successful, any revised understanding of the social contract must preserve certain basic values such as collective action, shared workplace governance, and a guarantee of some basic economic security and prosperity for workers).

16. See *id.* (warning that a failure to incorporate certain essential social contract values would consign any new or transitional legal regime to short-lived instability).

17. Cf. BUREAU FOR WORKERS’ ACTIVITIES, INT’L LABOUR ORG., *Definition of International Law*, http://actrav.ilo.org/actrav-english/telearn/global/ilo/law/lablaw.htm#Definition_of_international_law (last visited Oct. 17, 2010) (explaining international labor law in terms of its history and general international law concepts, instead of directly defining it).

18. See Bob Hepple, *Mapping International Labor Disputes: An Overview*, in LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT 35, 45–46 (Int’l Bureau of the Permanent Court of Arbitration ed., 2003) (admitting that the word “international” may distinguish disputes that are “truly national and those which in some way cross national boundaries” but also arguing that “the special feature of public international labor law is that it applies international labor standards and dispute mechanisms not only to transnational employment, but also . . . to purely domestic employment and labor relations”).

are two possible principal factors to take into account: the residence of the parties to a transaction and the nature of the transaction.¹⁹ Generally, when parties are citizens of two different nations and their transaction relates either to the sale of goods and services across national borders, or to some contractual agreement concerning the rights of those providing such transnational goods or services, the dispute is international in scope.²⁰

B. The Definition of International “Labor Disputes”

The definition of “labor disputes” is far less varied. According to *Black’s Law Dictionary*, labor disputes are “controvers[ies] between an employer and its employees concerning the terms or conditions of employment, or concerning the association or representation of those who negotiate or seek to negotiate the terms or conditions of employment.”²¹ A collective bargaining agreement often dictates the terms of employment. These disputes often center on the conditions of employment and whether discipline was progressive and imposed for just cause.²² In *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Roger Blanpain defines international labor relations as those relations that exist “between [employers with] headquarters in one country and employees in one or more other countries.”²³

Thus, international labor disputes arise in an internationalizing marketplace when an employer has its headquarters in one country and oversees employees residing in another country. These disputes, much like domestic labor disputes, also focus on the terms and conditions of employment.²⁴

19. See William W. Park, *Why Courts Review Arbitral Awards*, 16 MEALEY’S INT’L. ARB. REP. 5 (2001).

20. *But see id.* (favoring using only a “residence-based” approach instead of using a “nature of the transaction” approach).

21. BLACK’S LAW DICTIONARY 342 (9th ed. 2009).

22. *Cf.* Roger Blanpain, *Comparativism in Labour Law and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 3, 5 (Roger Blanpain et al. eds., 8th rev. ed. 2004) [hereinafter *Blanpain*] (explaining that “the phenomenon of employees involving different national jurisdictions has become a normal fact of life.”).

23. *Id.*

24. See INT’L LABOUR ORG., HIGH-LEVEL TRIPARTITE SEMINAR ON THE SETTLEMENT OF LABOUR DISPUTES THROUGH MEDIATION, CONCILIATION, ARBITRATION AND LABOUR COURT 2 (2007) [hereinafter *ILO SEMINAR ON SETTLEMENT*], http://www.ilo.org/public/english/region/eurpro/geneva/download/events/cyprus2007/cyprus_dialogue.pdf (discussing the differences between “rights” and “interest” disputes).

III. THE CONTEXTS IN WHICH INTERNATIONAL LABOR DISPUTES OCCUR

Global markets permit greater access to economic opportunity for both multinational employers and international workers to take advantage of more and larger markets around the world. Because they exercise greater geographic flexibility in hiring their workforce, employers may now face labor disputes that are both domestic and international, even if both ultimately involve the same issues found in domestic labor disputes including—wages; benefits; leave; and other terms, conditions, and/or benefits of employment.²⁵

To address the growing global economy, unions are transforming into international forces with a presence on multiple continents.²⁶ As a condition of obtaining employees, an employer may have entered into a labor contract with a group of unionized workers and may have vowed that they will provide an agreed amount of wages and healthcare and that she will discipline only for just cause. Thus, disputes may mirror traditional domestic labor disputes and relate to disciplinary issues or conditions of employment like wages, hours, and health and pension benefits.²⁷ Such agreements deal with “individual rights.”²⁸

For instance, the United Steelworkers of America (USW), an American union headquartered in Pittsburgh, Pennsylvania, affiliates with the International Federation of Chemical, Energy, Mine and General Workers’ Unions (ICEM), which represents twenty million workers on a wide variety of continents.²⁹ Both of the unions represent Goodyear workers. This structure is premised on the understanding that deteriorating labor relations in one locale could affect Goodyear’s negotiations with unions representing workers in all corners of the globe.³⁰

25. *Cf. id.* at 4–5 (providing a case study example in which conflict concerned employees’ bullying, discrimination, and other harassment concerns).

26. See *The ICEM – Who We Are, What We Do*, INT’L FEDERATION OF CHEM., ENERGY, MINE & GEN. WORKERS’ UNIONS (Sept. 22, 2010), <http://www.icem.org/?id=12&doc=1225> [hereinafter *ICEM – Who We Are*] (revealing that “more than 20 million workers worldwide are already members” of the International Federation of Chemical, Energy, Mine and General Workers’ Unions).

27. *Cf.* Universal Declaration of Human Rights, G.A. Res. 217 (III)A, U.N. Doc. A/RES/810 Art. 23 (Dec. 10, 1948) (promulgating aspirations for universal working rights).

28. *Cf. id.* (using the word “everyone”).

29. *ICEM – Who We Are*, *supra* note 26; see *ICEM Calls for Support of Striking USW Goodyear Workers*, RELIABLE PLANT MAG., <http://www.reliableplant.com/Read/2926/icem-calls-for-support-of-striking-usw-goodyear-workers> (last visited Dec. 13, 2010) [hereinafter *Goodyear Workers*]; *Who We Are*, UNITED STEELWORKERS OF AM., http://www.usw.org/our_union/who_we_are (last visited Nov 16, 2010).

30. See *Goodyear Workers*, *supra* note 29; see also *Global Agreements*, INT’L FEDERATION OF CHEM., ENERGY, MINE & GEN. WORKERS’ UNIONS,

Unions, like the ICEM, focus on negotiating and monitoring multinational compliance with global agreements on workers' rights; equality at work; and the promotion of high standards of health, safety, and environmental protection worldwide.³¹ They also network with trade union representatives within global corporations and coordinate solidarity and support for members during labor disputes.³² They seek to actively organize strong unions in countries where unions are weak or non-existent in order to provide strength to all international workers employed by a particular employer.³³ In 1999, at the ICEM's Durban Congress in South Africa, the ICEM made it "a priority to achieve negotiated Global Framework Agreements with multinational companies."³⁴

Similar to the ICEM, the Service Employees International Union (SEIU) has adopted a global approach. SEIU is in the process of constructing a "21st-century global union to help ensure that workers, not just corporations and CEOs, benefit from today's global economy."³⁵ Like the ICEM, "SEIU is working with unions in similar industries across the globe to challenge multinational employers to provide comparable wages and benefits and to allow workers in every country the freedom to form unions."³⁶ School bus drivers in the United States, with the help of SEIU, have formed a transatlantic partnership with the Transport and General Workers Union in the United Kingdom in order to hold accountable their common employer—FirstGroup and its U.S. subsidiary, First Student—on both sides of the Atlantic.³⁷

Global unions also act to provide information and expertise on topics ranging from collective bargaining to health and safety standards. They function to represent workers' interests within similar sectors of the global

<http://www.icem.org/en/69-Global-Framework-Agreements> (last visited Oct. 5, 2010) [hereinafter *ICEM – Global Agreements*] (discussing how ICEM creates global agreements with local affiliates in order to supplement local collective bargaining by establishing "a set of principles in all operations of a multinational regardless of whether or not those standards exist in an individual country's legal statutes").

31. See, e.g., *ICEM – Who We Are*, *supra* note 26.

32. *Id.*

33. *Id.*

34. *ICEM – Global Agreements*, *supra* note 30.

35. *A Closer Look Inside Labor's Fastest-Growing Union*, SERV. EMPs. INT'L UNION, <http://www.seiu.org/a/ourunion/a-closer-look-inside-labors-fastest-growing-union.php> (last visited Oct. 5, 2010).

36. *Id.*

37. See Mike Link, SERV. EMPs. INT'L UNION, *Skilled Bus Drivers Keep Kids Safe*, <http://www.seiu.org/2008/09/skilled-bus-drivers-keep-kids-safe.php> (last visited Nov. 5, 2010); see also *Our Company*, FIRSTAMERICA, http://www.firstgroup.com/north_america/our_company/ (last visited Dec. 13, 2010) (listing FirstGroup's U.S. businesses, which include First Student and Greyhound).

economy and to promote a global economy that is sustainable in its focus and works for all international laborers.

As a result of the growing international presence of labor unions, it is increasingly common to have employers in one country and union-represented employees in another country. Disputes over the terms codified in collective bargaining agreements, therefore, lead to strikes with greater frequency than they have ever before.³⁸

Still, methods for resolving labor disputes vary greatly across the United States and the countries belonging to the European Union; these methods, however, may fail to sufficiently address the changing times.³⁹

IV. RESOLVING INTERNATIONAL LABOR DISPUTES IN THE UNITED STATES

In the United States, there are two primary methods of resolving labor disputes: labor arbitration and labor mediation.⁴⁰ Use of these methods applies for disputes with ties to the United States, regardless of whether the dispute is international in scope.⁴¹ In practice, parties often use labor arbitration to resolve labor disputes.⁴² The American court system favors

38. See generally *Economic News Release*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/wkstp.t01.htm> (last visited Oct. 17, 2010) (accounting for all work stoppages, also called strikes, involving more than 1,000 workers from 1947-2009); *Strike and Lockout Statistics*, FED'N OF EUROPEAN EMP'RS, <http://www.fedee.com/strikes.html> (last visited Oct. 17, 2010) (detailing strikes and lockouts among major European Union countries, on average, for the past three years).

39. See generally Richard Block et al., *Comparing and Quantifying Labor Standards in the United States and the European Union*, 19 INT'L J. COMP. LAB. L. & INDUS. RELATIONS 441 (2003) (quantifying labor standards in both the United States and the European Union and concluding that the European Union has much higher labor standards).

40. Cf. Julius Getman, *Was Harry Shulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15, 16 (2007) (restating Dean Schulman's conclusion that arbitration is preferable to litigation, because an arbitrator is more familiar with the disputing parties and can therefore more easily foresee the consequences of their decision); *Arbitration and Mediation*, REFERENCE BUS., <http://www.referenceforbusiness.com/encyclopedia/A-Ar/Arbitration-and-Mediation.html> (last visited Nov. 5, 2010) (differentiating between labor mediation and arbitration by explaining that "arbitration is the procedure by which parties agree to submit their disputes to an independent neutral third party, known as an arbitrator" and that "mediation . . . involves the active participation of a neutral third party whose role is to facilitate the dispute resolution process and to suggest solutions to resolve disputes" and that "in contrast to arbitration, mediation is a process whereby the parties involved have to solve the dispute, although the mediator does suggest various proposals to help the parties find solutions).

41. See generally Getman, *supra* note 40, at 16 (proffering that labor arbitration has increased due to the fact that arbitrators are able to understand the common goal of uninterrupted production and understand the particular needs of an organization or challenges in a dispute).

42. Cf. Ann Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 383 (2004) ("Almost all collective bargaining agreements contain grievance and arbitration procedures designed to resolve disputes about the

labor arbitration.⁴³ On the other hand, parties also use labor mediation, and in some employment industries, mediation is becoming more common.⁴⁴

Still, the overall objective of national labor law alike is to promote industrial peace among employers and unions and to punish party actions that jeopardize and work to thwart collective bargaining.⁴⁵ The settlement of industrial disputes through peaceful means is both an end in itself and a basic means for achieving industrial peace.⁴⁶

A. Arbitration

Labor arbitration is “a contractual proceeding, whereby the parties to any controversy or dispute . . . select [a third party decision maker] of their own choice and by consent submit their controversy to [him or her]” for a binding, “speedy” and “inexpensive” determination of the matter involved.⁴⁷ Labor arbitration usually involves a sole arbitrator instead of a panel.⁴⁸ If the parties decide that the arbitrator should follow precedent, the arbitrator may apply the law of the jurisdiction in which they sit or whatever law the parties agree is applicable.⁴⁹ But the arbitrator does not have to follow established law, and rules of evidence typically do not apply

interpretation and application of the agreement.”).

43. See, e.g., *Rent-A-Center, West, Inc. v. Jackson*, No. 09-497, slip op. at 2 (U.S. June 21, 2010) (Stevens, J., dissenting) (dissent separately paginated), <http://www.supremecourt.gov/opinions/09pdf/09-497.pdf> (explaining, under the Federal Arbitration Act, arbitration is a contractual matter and the Act “envisions a limited role for courts asked to stay litigation and refer disputes to arbitration”).

44. See, e.g., *Hodges*, *supra* note 42, at 384 (observing that, in the past twenty years, there has been a resurgence in mediation because it resolved disputes with far less cost and resources and has seemed to increase party satisfaction).

45. See National Labor Relations Act § 1, 29 U.S.C. § 151 (2006) (stating that friendly methods of organization and collective bargaining promote and encourage the flow of commerce).

46. See *id.* (encouraging “practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.”).

47. *Gates v. Ariz. Brewing Co.*, 95 P.2d 49, 50 (Ariz. 1939).

48. See Theodore J. St. Antoine, *Internationalization of Labor Disputes: Can ADR Mechanisms Help?*, in *LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT* 51, 58 (Int’l Bureau of the Permanent Court of Arbitration ed., 2003) (“In the United States, the single arbitrator has become the norm in labor disputes.”); see also FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* 3–5 (Alan M. Rubin et al. eds., 6th ed. 2003) (providing some historical examples of famous arbitrators).

49. See generally Jessica Thorpe, *A Question of Intent: Choice of Law and the International Arbitration Agreement*, 54 *DISPUTE RESOLUTION J.* 16 (1999) (discussing the power of parties to select their applicable choice of law for purposes of arbitration and studying how far such a power can extend to procedural issues).

in full.⁵⁰

Arguably the biggest stimulus toward using arbitration to resolve labor disputes and industrial grievances occurred during World War II, and was instigated by the National War Labor Board.⁵¹ This entity had the power to resolve labor disputes and regularly ordered that arbitration clauses be included in new collective bargaining agreements when the parties were not able to agree upon their own grievance procedures.⁵² While fewer than ten percent of collective bargaining agreements in the 1930s provided for arbitration, seventy-seven percent of labor contracts included arbitration provisions by 1944.⁵³

In many U.S. states, either statutory or common law rules permit voluntary arbitration.⁵⁴ State arbitration statutes fit into three categories: (1) general statutes used in commercial disputes but often adaptable to labor disputes; (2) statutes designed specifically for labor disputes; and (3) statutes that promote arbitration by directing state officials to encourage its use.⁵⁵

In 1955 the National Conference of Commissioners on Uniform State Laws promulgated a proposed Uniform Arbitration Act, based on the New York Act, which itself applied contractual arbitration provisions to labor-management agreements.⁵⁶ By 2003, thirty-five jurisdictions adopted the Uniform Arbitration Act.⁵⁷

50. See *id.*; ELKOURI & ELKOURI, *supra* note 48, at 2–3 (distinguishing between arbitration and judicial proceedings).

51. See Calvin W. Sharpe, Introduction to Symposium, *An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration*, 39 CASE W. RES. L. REV. 505, 508–09 (1989) (pointing out that although some believe the National War Labor Board instigated modern grievance arbitration, modern grievance arbitration actually began as early as 1871).

52. See generally *id.* (discussing the evolution of arbitration brought about by the National War Labor Board).

53. See SUMNER S. SLICHTER ET AL., THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 739 (1960); see also Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 576 (1983) (noting that because of the lack of recordkeeping prior to World War II, it is unclear as to how many contracts contained arbitration clauses, but it is estimated that between sixty-two percent to seventy-six percent of agreements before World War II contained these clauses).

54. See ELKOURI & ELKOURI, *supra* note 48, at 95–101 (explaining the relationship between statutes and common law in the arbitration process); see also CLARENCE M. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* 23–26 (3d ed. 1972) (analyzing how arbitration works under the common law and state statutes).

55. See OFFICE OF THE SOLICITOR, DEP'T OF LABOR, *LABOR ARBITRATION UNDER STATE STATUTES* 3, 6 (May 29, 1943).

56. See UNIF. ARBITRATION ACT., 7 U.L.A. 1A, 2 (2000) (“[T]he primary purpose of the 1955 Act was to insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law.”).

57. See *id.* (stating that as of 2000 forty-nine of the states have arbitration statutes,

Since state arbitration statutes tend to be general, common law rules fill in the gaps.⁵⁸ The United States Department of Labor summarized these principles:

Common law arbitration rests upon the voluntary agreement of the parties to submit their dispute to an outsider. The submission agreement may be oral and may be revoked at any time before the rendering of the award. The tribunal, permanent or temporary . . . must be free from bias and interest in the subject matter, and may not be related by affinity or consanguinity to either party.⁵⁹

Further, “[t]he parties must be given notice of hearings and are entitled to be present when all evidence is received” but the “arbitrators have no power to subpoena witnesses or records.”⁶⁰ An award can either be oral or written; but if it is written, all of the arbitrators must sign it and such an award must dispose of all relevant issues.⁶¹

Even the United States Supreme Court has recommended the use of labor arbitration to resolve labor disputes and has stated that while commercial arbitration is a “substitute for litigation . . . [labor] arbitration is the substitute for industrial strife.”⁶² Despite judicial recognition of the rights of employers and unions under collective bargaining agreements, court procedures are often prolonged, technical, and costly, and are not necessarily the best vehicle to rectify labor disputes.⁶³ Arbitration saves time and expense.

Unsurprisingly, parties rely on arbitration more often than upon court proceedings to resolve labor disputes. Arbitration clauses dominate American collective bargaining agreements. In fact, one study led by the Bureau of Labor Statistics (BLS) revealed that within over 1,500 collective bargaining agreements, ninety-seven percent provided for arbitration of disputes, particularly for grievances occurring during the duration of the

and of these forty-nine states, thirty-five have adopted the Uniform Arbitration Act and the other fourteen have adopted similar legislation).

58. See OFFICE OF THE SOLICITOR, *supra* note 55, at 3 (articulating that the common law rests on a principle that the parties submit voluntarily to resolution of their dispute by an arbitrator, who must be neutral and free from bias).

59. *Id.*

60. *Id.*

61. *Id.*

62. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

63. See generally Charles B. Craver, *Symposium on Labor Arbitration Thirty Years After the Steelworkers Trilogy: Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990) (arguing that the grievance arbitration process is a superior dispute resolution strategy compared to judicial proceedings or strikes).

union contract.⁶⁴ Today, thousands of labor disputes settle in binding, voluntary arbitration without either party resorting to the use of economic pressure or appeals to the public.⁶⁵ Arbitration allows employers and unions to have greater self-regulation because it is a private rather than a governmental proceeding.⁶⁶

There are two basic categories of labor arbitration. First, arbitration can settle labor disputes over the substantive terms and language used in a collective bargaining agreement.⁶⁷ This type of arbitration is an arbitration of interests and is primarily a public sector tool to help parties resolve questions over collective bargaining agreements.⁶⁸

The other main category of labor arbitration, “grievance” arbitration, is an arbitration of rights that deals with labor disputes arising over the duration of a contract.⁶⁹ The arbitrator acts in such proceedings as a quasi-judge and interprets and applies the provisions of the parties’ contract without adding to or deleting from its terms.⁷⁰ The decision of an arbitrator is binding unless it does not derive its essence from the collective bargaining agreement; the arbitrator acts outside of the scope of her contractual authority, or the award runs contrary to public policy.⁷¹

64. See U.S. BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, BULL. NO. 1957, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS 94 (1981) (demonstrating that of the 1,514 agreements of 1,000 workers or more as of July 1, 1975, 1,496 of them provided grievance and arbitration provisions, equaling approximately ninety-seven percent).

65. See CLARENCE M. UPDEGRAFF & WHITLEY P. MCCOY, ARBITRATION OF LABOR DISPUTES 149–150 (2d ed. 1961) (explaining how union and employer arbitration interactions avoid strikes and economic pressures in the public utility sector).

66. See Craver, *supra* note 63, at 573 (positing that both unions and management can avoid costly and time-consuming procedures by participating in arbitration).

67. Cf. BLACK’S LAW DICTIONARY 119–20 (9th ed. 2009) (classifying labor arbitration as including “arbitration of an employee’s grievance, usu[ally] relating to an alleged violation of the employee’s rights under a collective-bargaining agreement.”).

68. See *id.* (specifying that interest arbitration is a separate entity from grievance arbitration because it involves settling the terms of a contract while the contract itself is being negotiated).

69. See Charles C. Killingsworth, *Standards of Arbitral Decision*, in THE LAW AND LABOR-MANAGEMENT RELATIONS 228, 230-31 (Univ. of Mich. ed., 1951) (providing that the arbitrator’s powers are grounded in the collective bargaining agreement and the provisions that provide her with the authority to interpret the agreement).

70. See *id.* at 230 (“[A]n arbitrator has only those powers which the parties grant to [her]. In grievance arbitration . . . the arbitrator must turn to the agreement for definition of [her] jurisdiction.”).

71. See *Major League Baseball Players Ass’n. v. Garvey*, 532 U.S. 504, 507, 509 (2001) (per curiam) (expressing doubts about the permissibility of an arbitrator to “stray[] from interpretation and application of [an] agreement” to the point of effectively “dispens[ing] his own brand of industrial justice” (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))); see also *E. Assoc. Coal Corp. v. United Mine Workers Dist. 17*, 531 U.S. 57, 62 (2000) (observing that a collective bargaining agreement can be contrary to public policy and

Arbitration proceedings in the United States work in this way regardless of whether the union-represented employees and employer are both residents of the United States.

B. Mediation

In America, labor mediation is different from labor arbitration because it allows for more procedural control by the parties.⁷² Mediation creates a larger forum that allows the parties to discuss everything affecting their relationship, instead of resolving a particular dispute.⁷³

Thus, mediation focuses on evaluating all of the wants of the parties—including what is important to them in their lives and business operations. Mediation encourages the parties engaging in a labor dispute to reach an agreement through their own initiative with the facilitation of a neutral third party.⁷⁴

Mediators function as intermediaries between the parties.⁷⁵ They lead the parties through an exploration of the issues.⁷⁶ The process opens with both parties first seeking to understand the issue or problem.⁷⁷ Next, they identify their underlying interests and positions.⁷⁸ Then, they can generate options to determine solutions together; they become, in essence, joint problem solvers.⁷⁹ Mediators probe and challenge the parties to assess the durability of their agreement, with the underlying assumption that the partnership should focus on creating a stable, viable work environment.⁸⁰

therefore unenforceable only if the public policy is “‘explicit,’ ‘well defined,’ and ‘dominant’” (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

72. See MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 25 fig.1-1 (Nat’l Inst. of Trial Advocacy ed., 2d ed. 2005) (detailing the stages of the mediation process to include intake; contracting; information gathering and issue identification; agenda setting; resolving each issue; reaching and drafting the agreement).

73. See *id.* at 25–27 (examining and describing the steps involved in the mediation process).

74. See *id.* at 26 (providing that mediators help assist the parties in gathering information, identifying the issues in the dispute and agenda setting for mediations).

75. See *id.* at 27 (“[M]ediators frame the issues in neutral terms which define the problems that the parties bring to mediation for resolution.”).

76. See *id.* (noting that mediators seek to obtain a full description of the issues, based on statements from the parties themselves).

77. See *id.* (identifying the issue and framing the issue in neutral terms allows for the mediator to present the issue to the parties in dispute).

78. See *id.* (describing the facts, perceptions, feelings and reactions from the parties allows for the mediator to fully understand all aspects of the issue at hand).

79. See *id.* (organizing and prioritizing the issues in dispute between the parties).

80. See *id.* at 29 (questioning whether or not tentative agreement would be realistic).

Labor mediation often resolves impasses reached in the *process* of negotiating a collective bargaining agreement. However labor mediation may directly resolve grievances as well.⁸¹ Most collective bargaining agreements provide for grievance procedures, traditionally culminating in arbitration—should more informal procedures fail.⁸² Grievance mediation is a voluntary step, often taken prior to arbitration, and provides an opportunity for a neutral third-party to assist the parties in reaching a resolution of the dispute, before an arbitrator decides for them.⁸³

In grievance mediation, the parties create their own solution.⁸⁴ The mediator does not make a binding decision but instead helps them to determine a mutually acceptable solution. While grievance mediation is not a substitute for a contractual grievance procedure in a collective bargaining agreement, it can function to supplement such procedures, or it can act as part of a larger program to help the parties focus on their joint interests.⁸⁵

The Federal Mediation and Conciliation Service (FMCS) is an independent agency of the United States government which was founded in 1947. FMCS helps mediate labor disputes around the country.⁸⁶ FMCS offers its services upon request or in disputes affecting interstate commerce, and parties must notify FMCS within thirty days of the expiration of a contract when either side proposes modification or termination of their existing collective bargaining agreement.⁸⁷

Through their direct knowledge and experience with labor disputes, FMCS mediators supplement their skills by enhancing communication between the parties and by building confidence that an agreement is

81. See 1 JAY E. GRENIG, *ALTERNATIVE DISPUTE RESOLUTION* § 19:16 (3d ed. 2010) (suggesting that unions and employers could utilize a mediator in order to resolve disputes and grievances), available at Westlaw ADR.

82. See *What is Grievance Mediation?*, FED. MEDIATION & CONCILIATION SERV., <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=46&itemID=15885> (last visited Oct. 5, 2010) (“[G]rievance mediation is a completely voluntary step, prior to arbitration, which provides an opportunity for a third-party neutral, such as an FMCS mediator, to assist the parties in reaching their own resolution of the dispute.”).

83. *Id.*

84. *Id.*

85. *Id.*

86. *FMCS: Who We Are*, FED. MEDIATION & CONCILIATION SERV., <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=21&itemID=15810> (last visited Feb. 9, 2011).

87. See *Filing a Notice to Mediation Agencies (F-7) with FMCS*, FED. MEDIATION & CONCILIATION SERV., <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=127&itemID=19661> (last visited Dec. 14, 2010) (explaining that the National Labor Relations Act also requires written notice to the other party covered by a collective bargaining agreement within sixty days “prior to the expiration date of a proposed termination or modification of a collective bargaining agreement”).

possible through the parties' diligence.⁸⁸ Mediators, however, usually lack the authority to impose binding settlements in labor mediation and instead operate to facilitate the parties to arrive at a resolution.⁸⁹

The FMCS is not the only governmental branch created to help facilitate labor disputes through mediation. The Railway Labor Act (RLA) is a U.S. federal labor law that governs labor relations in the railway and airline industries.⁹⁰ The RLA also created the National Mediation Board (NMB), which operates as a mediating agency dealing primarily with interests-related disputes.⁹¹

The NMB has three ultimate goals: "1. The resolution of disputes arising out of the negotiation of new or revised collective bargaining agreements; 2. The effectuation of employee rights of self-organization where a representation dispute exists; and 3. The resolution of disputes over the interpretation or application of existing agreements."⁹²

Mediation might not work in every circumstance. Typically, if informal negotiations do not culminate in an agreement, before either party can exercise self-help, the law requires the parties to submit their dispute to the NMB for mediation.⁹³

V. RESOLVING INTERNATIONAL LABOR DISPUTES IN THE EUROPEAN UNION

Members of the European Union frequently have their own, unique legislative rules or policies that provide for labor dispute resolution.⁹⁴ In

88. See *Who We Are: What Can a Mediator Add to Collective Bargaining Negotiations*, FED. MEDIATION & CONCILIATION SERV., <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=22&itemID=16485> (last visited Oct 15, 2010) (describing improvement of communication between parties as rephrasing statements, to mediator supposals and meeting off of the record to encourage "shuttle diplomacy").

89. See *What is Grievance Mediation?*, *supra* note 82 (stating that the parties are ultimately responsible for coming to a resolution of the issue and that the mediator merely assists in guiding them to a resolution).

90. See *Frequently Asked Questions: Mediation*, NAT'L MEDIATION BD., <http://www.nmb.gov/mediation/faq-mediation.html> (last visited Oct. 5, 2010) (noting that the RLA only governs collective bargaining agreements in the airline and railroad industries).

91. See *NMB and RLA Fact Sheet*, NAT'L MEDIATION BD., http://www.nmb.gov/mediation/factsheet_thru-fy10.pdf (last visited Feb. 12, 2011) (detailing that the NMB was created in 1934 as an amendment to the 1926 RLA in order to minimize work stoppages in the railway and airlines industries).

92. *FY 06 National Mediation Board Annual Performance and Accountability Report*, NAT'L MEDIATION BD., 4, available at http://www.nmb.gov/documents/nmb_ar06_web.pdf (last visited Feb. 12, 2011).

93. *NMB and RLA Fact Sheet*, *supra* note 91, at 1.

94. Cf. ILO SEMINAR ON SETTLEMENT, *supra* note 24, at 9 (detailing the differences between individual EU countries that legislate dispute resolution methods).

Hungary, the framework is incorporated in the country's labor law.⁹⁵ Meanwhile, in Lithuania and Slovenia, the rules are "scattered across a host of different statutes, regulations or decrees governing labor relations."⁹⁶ Still other countries, which include Bulgaria, Latvia, and Poland, adopt a sole piece of legislation that governs their labor dispute resolutions.⁹⁷ And while some European countries have extensive legal rules on the subject, other countries like the Netherlands have no specific provisions pertaining to labor dispute resolution.⁹⁸

The International Labour Organization (ILO) is a specialized agency of the United Nations that deals with labor issues; its main objectives are to "promote rights at work, encourage decent employment opportunities, enhance social protection, and strengthen dialogue on work-related issues."⁹⁹ Its main instrument to aid dispute prevention and settlement is the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), which recommends that voluntary procedures "should be made available to assist in the prevention and settlement of industrial disputes between employers and workers."¹⁰⁰ It also recommends the equal representation of workers and employers and indicates that parties should not engage in strikes or lockouts while conciliation procedures are underway, although the Recommendation does not limit the right to strike.¹⁰¹ The ILO also runs an Administrative Tribunal, which meets twice a year at the headquarters of the ILO in Geneva.¹⁰²

Despite differences in legislative procedure across the countries of the European Union, the ILO attempts to bring uniformity to the approaches E.U. countries take to resolve labor disputes. In the international forum, there are essentially three common extra-judicial options: conciliation, mediation, and arbitration.¹⁰³ "All three alternatives involve the

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 10.

99. *About the ILO, INT'L LABOUR ORG.*, http://www.ilo.org/global/About_the_ILO/lang--en/index.htm (last visited Dec. 14, 2010).

100. INT'L LABOUR ORG., Recommendation No. 92, Voluntary Conciliation and Arbitration Recommendation, ¶ 1 (Apr. 29, 1951) [hereinafter ILO Recommendation No. 92], available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R092> (last visited Oct. 5, 2010).

101. *See id.* at ¶ 6 (suggesting that the parties engaged in a dispute should refrain from strikes and lockouts while the matter has been submitted to arbitration).

102. *The Tribunal, INT'L LABOUR ORG.*, <http://www.ilo.org/public/english/tribunal/about/index.htm> (last updated Oct. 28, 2010).

103. *See ILO SEMINAR ON SETTLEMENT, supra* note 24, at 2, 17 (noting, however,

intervention of a third party; it is the degree of intervention that differentiates one from another.”¹⁰⁴

A. Arbitration

In the European Union, labor arbitration largely resolves labor disputes that fall into the same two categories confronted in American labor arbitration—interests and rights.¹⁰⁵ An interest dispute occurs when a collective bargaining agreement does not exist or the agreement is being renegotiated, and there is disagreement over the contractual obligations that a collective bargaining agreement should impose or when there is a disagreement over modification of such obligations during a renegotiation of an agreement. To the contrary, a rights dispute occurs when there is a disagreement between the parties over the implementation or interpretation of statutory rights or the rights in an existing collective agreement.¹⁰⁶ The European Foundation notes that many countries only associate arbitration with rights disputes, even though arbitration is also relevant, if not always suitable, in resolving interest disputes.¹⁰⁷

Many countries provide procedures for resolving labor disputes through arbitration. For instance, arbitration exists in at least twenty-four of the twenty-six E.U. member states, although it is not widely used.¹⁰⁸ Conciliation and mediation are the more popular means for resolving collective disputes.¹⁰⁹ Indeed, arbitration is generally an option of last resort.

The ILO supervisory bodies, through the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association, have established specific principles for arbitration in the context of collective bargaining.¹¹⁰ The ILO Committee of Experts

that “[a]rbitration . . . is not widely practiced”).

104. *Id.* at 3.

105. *Id.*

106. *Id.*

107. *Id.* at 10 n.18 (citing András Tóth & László Neumann, *EIRO Thematic Feature on Collective Dispute Resolutions in an Enlarged European Union—Case of Hungary*, EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING & WORKING CONDITIONS, (2005), <http://www.eurofound.europa.eu/eiro/2005/08/word/hu0508102t.doc> (last visited Nov. 10, 2010)).

108. *Id.* at 17.

109. *See id.* (“More specifically, arbitration typically follows after attempts at mediation between the parties have proven unsuccessful.”).

110. *See generally* Eric Gravel and Chloé Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: Its Dynamic and Impact*, INT’L LABOUR ORG. (Jan. 1, 2003), http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_087808/lang--en/index.htm (providing an analysis of

has said that arbitration should be optional but that, if chosen, an arbitrator's final decision should bind parties.¹¹¹ Compulsory arbitration is "generally contrary to the principle of voluntary negotiation of collective agreements established in Convention No. 98, and thus the autonomy of bargaining partners."¹¹² There is an exception for its imposition, however, in cases involving essential public services, when their interruption would endanger the life, personal safety, or health of the public.¹¹³

Some E.U. countries do not allow for arbitration to resolve labor disputes in whole or in part. For instance, Danish law fails to provide for the resolution of collective interest disputes through arbitration.¹¹⁴ Rather, the ruling principle is that interest disputes should be resolved by negotiation and bargaining between employers and unions only.¹¹⁵ Where these efforts do not succeed, an interest dispute can then serve as a legitimate basis for industrial action, and arbitration can be used where the parties are unable to resolve their differences after a prolonged strike or lockout.¹¹⁶

On the other hand, rights disputes, arising where parties have a collective agreement and have a dispute over its implementation or interpretation, are perceived differently.¹¹⁷ Danish customs indicate that a "peace obligation"

the Committee of Expert on the Application of Conventions and Recommendations since 1977).

111. ILO SEMINAR ON SETTLEMENT, *supra* note 24, at 8.

112. ILO, 1994, *Freedom of Association and Collective Bargaining: Promotion of Collective Bargaining*, ¶ 256–57 (1994), available at http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=11&chapter=25&query=%28%23docno%3D251994G*%29+%40ref&highlight=&querytype=bool&context=0 (last visited Feb. 11, 2011).

113. See, e.g., *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, at ¶ 570-71 (5th ed. 2006), available at: <http://www.ilo.org/ilolex/english/23e2006.pdf> (allowing a general prohibition on strikes in event of "an acute national emergency" and allowing suspension of strikes in event of a national security or public health crisis but also indicating that an independent, non-governmental body should have responsibility for deciding whether to order such suspensions).

114. See OLE HASSELBALCH & PER JACOBSEN, *LABOUR LAW DENMARK* §§ 745, 746 (1999) (stating that the Dutch resort to resolving disputes through strikes and lockouts, due to the desire to preserve their right to free bargaining and that "all trade disputes should be negotiated by mediation between the organizations involved").

115. E.g., *id.* at § 741 (observing that collective agreements are limited to "an agreement between an organization of wage earners and an organization of employers . . . relating to the wage and working conditions").

116. See *id.* at § 747 (providing that if no solution can be reached through the established rules of settlement then the matter is referred to arbitration, in instances where local disputes of interest are common).

117. See *id.* at § 673 ("It is the main rule of collective labour law in Denmark, that the conclusion of a collective agreement has the effect of making the initiation of collective agreement has the effect of making the initiation of collective industrial action illegal within the period of validity of the agreement, because attempts to gain

requires the parties first attempt to resolve the conflict through negotiation at the local level.¹¹⁸ Where unsuccessful, workplace mediation transpires.¹¹⁹ If, however, the dispute goes unresolved, most remaining cases go to either an industrial arbitration tribunal or the Labor Court.¹²⁰

Unlike Denmark, in Bulgaria, when other modes like conciliation and mediation fail to resolve a labor dispute, the parties may voluntarily agree to arbitration.¹²¹ Before reaching a legally binding determination, the arbitrator or panel of arbitrators listens as both the union and employer present their versions of the underlying events.¹²² Alternatively, during the arbitration process, the parties may instead sign an agreement, which has the same legal effect as an arbitration decision, although parties freely choose it.¹²³

To the contrary, in the Czech Republic, parties must try to resolve the labor dispute first through mediation, before mutually agreeing to use arbitration to resolve their labor dispute.¹²⁴ Mutual agreement to arbitrate, however, is unnecessary if a dispute arises in a workplace where strikes are prohibited or if it concerns the fulfillment of commitments under a collective agreement, either party may request the appointment of an arbitrator. If the dispute is an *interest* dispute, the arbitrator's decision amounts to the conclusion of a collective agreement and is not subject to appeal. In the case of a *rights* dispute, the parties may appeal the decision of the arbitrator, which can be reviewed by a court at the request of one of the parties.¹²⁵

Under this arbitration scheme, neither the union nor the employer pay to use the arbitration process. Instead, the Ministry of Labour and Social Affairs pays the cost for arbitration and mediation in order to make these options more economically advantageous compared to pursuing a strike or lockout.¹²⁶

improvements on the stipulations of the agreement and the perquisites of the agreement.”).

118. *See id.* at § 673–74, 745–47 (defining a peace obligation and construing that such peace obligations provide that disputes should be resolved by mediation and negotiation by the organizations involved—the wage earners and the employers).

119. *See id.* at § 757 (explaining that the Conciliation Service exists to assist the parties in resolving collective bargaining disputes).

120. *See id.* at § 486, 487 (discussing the procedures and jurisdiction of the Labor Court).

121. ILO SEMINAR ON SETTLEMENT, *supra* note 24, at 17.

122. *Id.* at 18.

123. *Id.*

124. *Id.* at 16.

125. *Id.* at 18.

126. *Id.*

The process also differs in Lithuania. Arbitration occurs through a Third Party Court, which is “presided over by a district court judge and six arbitrators appointed by the parties to the dispute.”¹²⁷ This Court is quite different from most courts in that it is not permanent; rather, it is “an *ad hoc* body where the parties each appoint one or several arbitrators who have fourteen days to resolve the dispute.”¹²⁸ While most members of the E.U. have arbitration provisions, there is great variance among the nations as to how it works.

B. Mediation

Some European Union nations fail to differentiate between mediation and conciliation.¹²⁹ There is, however, one big difference: “the conciliator does not make any suggestions to the parties on a possible resolution.”¹³⁰ Like arbitration and conciliation, mediation is a popular means of resolving labor disputes.¹³¹ Unsurprisingly, how mediation is used to resolve labor disputes continues to vary across countries.

In the Czech Republic, there is an informal, pre-mediation stage: “parties . . . hold negotiations *in the presence* of a mediator” and, only then, if the mediator is unable to resolve their dispute, are employees able to resort to economic pressure.¹³² Strikes and lockouts are unlawful until this mediation has transpired.¹³³

Mediators can either be party-appointed through a process which the union and employer mutually agree to employ, or the parties can select them “from a list kept by the Ministry of Labour.”¹³⁴ The union and employer can only move on to arbitration if mediation is unsuccessful, which is when “no solution is reached within [thirty] days.”¹³⁵

127. *Id.* at 18.

128. *Id.* (emphasis in original).

129. *See id.* at 14 (stating that between the E.U. nations there seems to be no preference between the two dispute resolution methods and that certain countries do not even differentiate between the two methods).

130. *Id.*

131. *See id.* at 16 (noting that mediation is the most widely used dispute resolution method); *see also* Christian Welz & Mike Eisner, *EIRO Thematic Feature on Collective Dispute Resolutions in an Enlarged European Union*, EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING & WORKING CONDITIONS, 18 (July 26, 2006), <http://www.eurofound.europa.eu/pubdocs/2006/42/en/3/ef0642en.pdf> (last visited Oct. 7, 2010) (comparing the incidence of mediation, arbitration, and conciliation throughout the European Union and determining that mediation is the most popular method of interest dispute resolution).

132. ILO SEMINAR ON SETTLEMENT, *supra* note 24, at 16.

133. *Id.*

134. *Id.*

135. *Id.*

The mediation process is different in Estonia, where “mediation is the only method for industrial dispute resolution that is regulated by statute.”¹³⁶ The statute creates the position of a Public Mediator, who is “appointed to a three year term following tripartite consultation” and is “responsible for selecting local mediators . . . and for managing mediation services between disputing parties for the entire country.”¹³⁷

The mediation process in Hungary differs from that in the Czech Republic and Estonia. In Hungary, labor law does not regulate mediation unless “the parties choose a mediator from the register of the Labour Mediation and Arbitration Service (MKDSZ) . . . [and then] the internal rules of [the] Service apply.”¹³⁸ The union and employer must jointly decide the scope and nature of the mediation process if they choose to appoint a non-MKDSZ mediator.¹³⁹ Regardless of how parties structure mediation, all reached agreements are legally binding.¹⁴⁰

In Poland, the process for mediation is different still; illustrating the wide variation across the European Union in the use of mediation. Mediation occurs only after private negotiations between the parties have failed to resolve a collective dispute. The union and employer, after reaching an impasse in collective bargaining, have five days to select a mediator, or else one may be appointed by the Labor of Ministry.¹⁴¹ Mediation often occurs preemptively to forestall full-fledged disputes.¹⁴² This trend, “is largely the consequence of amendments to the Tripartite Commission Act,” which encourages mediators to adopt a “role as ‘goodwill emissaries’” and intervene to “resolve situations that threaten industrial peace.”¹⁴³ Mediation is one popular form of labor dispute resolution among the nations belonging to the European Union, but, as with arbitration, there is great variance in how mediation works across countries.

C. Conciliation

As a form of alternative dispute resolution, conciliation differs from both arbitration and mediation, though the overall objective is not dissimilar: “to bring the parties together and assist them in arriving at a mutually agreed

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 17.

142. *Id.* (citing European Industrial Relations Observatory On-Line, *Collective Agreements in 2004 Examined*, <http://www.eurofound.europa.eu/eiro/2005/08/feature/pl0508106f.htm>).

143. *Id.*

solution.”¹⁴⁴ Out of the three forms, conciliation is the least formally structured and often occurs without the involvement or intrusion of government.¹⁴⁵ Still, this form also varies greatly across the European Union.

In Hungary, for instance, “interest disputes are supposed to be settled first through conciliation, which is initiated by written submission from one party to the other setting out the grounds of dispute.”¹⁴⁶ Resolutions of labor disputes through this process become legally binding.¹⁴⁷ This process has shifted—before 1999 the government, through the Hungarian Labour Code, mandated that unions and employers “undergo pre-court conciliation at the company level” as a first step in resolving the labor dispute.¹⁴⁸ The modern trend, however, is a lack of government intervention, as union and employer may optionally incorporate mandatory company level conciliation in their agreements, although “such provisions are rare.”¹⁴⁹

In contrast, practice in both Latvia and Lithuania often involves a form of conciliation referred to as “conciliation commissions.”¹⁵⁰ These commissions resolve interest and rights disputes and are often a mandatory step in the labor dispute resolution process. The members of commissions are union and employer representatives; the union and the employer each select an equal number of representatives to voice their positions and advocate on their behalf.¹⁵¹ Any agreement reached in conciliation commissions is legally binding.¹⁵² Where a commission cannot reach a resolution, however, the dispute proceeds as prescribed in the collective bargaining agreement or, where not specified in the agreement, to other fora, such as to arbitration or a judicial proceeding.¹⁵³ Similar to arbitration and mediation, conciliation varies greatly across the nations belonging to the European Union.

VI. IMPROVING INTERNATIONAL LABOR DISPUTE RESOLUTION

While the United States relies largely on uniform labor arbitration and labor mediation procedures employed by the states across the country, the

144. *Id.* at 14.

145. *Id.* at 15.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

nations affiliated with the European Union use a wide variety of dispute resolution practices and approaches.¹⁵⁴ The ILO continues to try to bring increased uniformity to labor dispute resolution in the European Union¹⁵⁵ Still, most of the affiliated countries operate in their own unique fashions.¹⁵⁶ Thus, the means by which international labor disputes are addressed depends largely on the part of the world in which they occur and on dispute resolution provisions in party contracts.

Allowing flexibility of choice for international labor dispute resolution may contribute to securing and preserving industrial peace and to preventing and resolving labor disputes.¹⁵⁷ But it may also spark confusion, which is likely to increase as employers and unions in different countries enter into work relationships. These parties might not be versed in the specific dispute procedures in place in each country. Such different backgrounds could color each party's expectations, intentions, and perceptions about dispute resolution and can lead to problems in drafting, executing, and enforcing dispute resolution provisions in collective bargaining agreements.

Labor disputes can undermine international economic stability, productivity, efficiency, and effectiveness, and, as such, each nation has a stake in the development of a sustainable, effective resolution process aimed at international labor disputes.¹⁵⁸ Uniform standards and procedures for addressing international labor disputes would be most beneficial. The United States and the European Union should work with the ILO to advocate that, at least in the case of international labor disputes, nations adopt identical standards for handling these issues as they arise. Once these three parties work together to design uniform standards, they should

154. See ILO SEMINAR ON SETTLEMENT, *supra* note 24, at 2 (analyzing the similarities and differences between resolving labor disputes among E.U. member states).

155. *Cf. id.* at 19 (noting that while there is not a best way to resolve disputes, there is a need for all countries to have "well regulated system[s] that guarantee[] access, transparency and legitimate outcomes"). See generally Getman, *supra* note 40 (explaining that labor arbitrations in the United States has increased due to the fact that arbitrators are able to understand the common goal of uninterrupted production and understand the particular needs of an organization or challenges in a dispute).

156. See, e.g., Manwel Debono, *EIRO Thematic Feature on Collective Dispute Resolutions in an Enlarged European Union – Case of Malta*, EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING & WORKING CONDITIONS (2005), <http://www.eurofound.europa.eu/eiro/2005/08/word/mt0508103t.doc> (last visited Oct. 7, 2010) (surveying Malta, one of the newest members of the European Union, and its unique system of dispute resolution).

157. *Cf. ILO SEMINAR ON SETTLEMENT*, *supra* note 24, at 19 (concluding that the best way to maintain industrial peace is to have flexible methods of resolving international labor disputes).

158. See *id.* (finding that because labor disputes can contribute to instability, it is important for countries to have transparent and effective dispute resolution systems).

draft legislation that codifies the process and seek to get as many signatories as possible.¹⁵⁹

Unfortunately, each nation may favor its own ways of handling labor disputes and may resist adopting new standards. After all, current procedures may be deeply rooted in a nation's culture and value set.¹⁶⁰ While uniform standards should be the long term goal, the ILO, at the very least, should appoint neutral third parties that can help explain the specifics of resolution procedures employed by certain countries and help employers and unions take them into account when drafting labor dispute procedures in their collective bargaining agreements.¹⁶¹ A special area on the ILO website should publish these specifics where parties can easily access them.

Confusion about dispute resolution will prolong labor disputes, increase economic instability, and undermine the operations of business enterprises around the world.¹⁶² Uniform standards are one way to eradicate confusion.¹⁶³ Publicizing the dispute procedures applied to resolve labor issues in each country is another step in the right direction.

VII. CONCLUSION

Work binds us together regardless of the continent on which we reside. The global economy internationalizes many components of the employment relationship; it simply must provide for the effective resolution of transnational labor disputes through arbitration, mediation, conciliation, and/or additional forms of alternative dispute resolution.

While it may be possible for arbitration, mediation, and conciliation to resolve labor disputes, the wide variety in procedure and practice may serve to disadvantage non-locals and make it harder for parties to arrive at a resolution. Allowing the parties to determine where disputes will be resolved and how they will be resolved is important, but there is still a need

159. *Cf.* St. Antoine, *supra* note 48 (finding that international commercial arbitration has become an effective form of dispute resolution, especially as the world has become increasingly more global).

160. *See generally* Debono, *supra* note 156 (highlighting Malta, one of the newest members of the European Union, and its unique process of labor dispute resolution).

161. *Cf.* ILO SEMINAR ON SETTLEMENT, *supra* note 24, at 19 (concluding that a lack of transparency in dispute resolution can contribute to industrial instability).

162. *See generally* Blanpain, *supra* note 22 (comparing a variety of different countries' labor laws and noting that the differences between all of them can cause confusion for international labor transactions).

163. *But cf.* ILO SEMINAR ON SETTLEMENT, *supra* note 24, at 2 ("While each country has developed its own practices based on distinctive policy priorities, the unique labour market and industrial relations landscape of each country is a fundamental consideration in designing a dispute resolution framework and accounts for the variety of approaches taken by different countries. . . . there is perhaps no one size fits all solution.").

for international organizations like the ILO to make these procedures easily understood by all the parties and more uniform in their approaches.

Resolution methods already used must respond to a new international role. As global economic interdependence continues to progress rapidly, such methods must become adept at addressing labor disputes on an international scale.