

IMPLICATIONS OF NORTH AMERICAN CONCILIATION AND ARBITRATION FOR THE DEVELOPING WORLD

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Arnold Zack

Labor and Worklife Program at Harvard Law School

For those coming from the world of Works Councils, Industry Councils, Labor Courts and CCMAs, the system of worker protection in effect in the United States lags far behind.

The US System of Resolving Workplace disputes

The United States is often hailed for development of tranquil dispute resolution machinery negotiated between employers and unions as the model for avoiding workplace stoppages and wildcat strikes.

Under United States and Canadian labor law, employees have the right to engage in collective bargaining when a majority of employees vote to be represented by a union, and the employer is then required to negotiate in good faith with that government certified union over wages, hours and working conditions. If they are unable to reach agreement on the terms of those contracts, the Federal and state and provincial Governments offer the services of government employed mediators to help them reach agreement through mediation/conciliation. The parties also provide in their collective bargaining agreements for a grievance system at which ever higher levels of union and management discuss allegations of contract violation, including improper discipline and termination. They contract to submit unresolved disputes to mutually selected private arbitrators for final and binding resolution, decisions which are endorsed and enforced by the courts. Employees retain their individual rights to sue employers for violation of statutory protections in courts of law.

There are some industries such newspaper publishing, rapid transit where the parties have historically turned to private rather than government arbitrators to resolve their interest disputes. And there are occasions where the parties use mediation to help resolve rights disputes either as a routine procedure or when grievances back up and the parties introduce grievance mediation of rights disputes to reduce pending grievance backlogs. A somewhat different procedure has been in place for the United States airline and railroad industries where, since 1925 the Federal government has provided a parallel system of mediation and arbitration of both interest and rights disputes.

Thus in the unionized sector the US and Canadian governments provide mediators to help bring the parties to agreement on interest disputes, while the parties negotiate between themselves to utilize the services of mutually designated private arbitrators to resolve rights disputes. This system has resulted in a minimal number of strikes over new contract terms,¹ and virtually eliminated wildcat strikes or strikes occurring during the life of a collective bargaining agreement, an awesome record compared to many countries where short term interruption of public service reflects the absence of collectively negotiated grievance and arbitration systems. This system of grievance arbitration is often hailed as an effective way of reducing workplace service disruption.

But, as workable and as effective as it may seem, it applies only in the unionized sector, and when one realizes that unionization in the US has dropped to its lowest levels of 8.5% of the organizable workforce,² that means that of a workforce of 120,000,000 more than 110,000,000 do not belong to unions and lack any of the protections of grievance and arbitration procedures afforded by collective bargaining agreements.

¹ The Bureau of Labor Statistics on April 8, 2005 reported that in 2004 there were only 17 strikes involving 1000 or more employees with .01 % of national man hours worked lost therein

² The Bureau of Labor Statistics on January 25, 2005 reported that in 2004 12.5 percent of workers were union member down from 12.9 % in 2003, 36% in the public sector and 8 percent in the private sector

They are, under US parlance, employees at will, who may be terminated by their employers with recourse only to courts of general jurisdiction to protest the terminations if there is proof of discrimination because of union membership, gender, age, race, or disability or other protection afforded by statute. There is in the US, unlike in most industrialized countries, no access to job protection through works councils, labor courts, CCMA's or the like, and no legislation providing termination pay based on length of service, or statutory notice for termination.

In that enormous non unionized sector many non unionized employers have invoked the 1925 Federal Arbitration Act,³ a statute crafted for commercial vendor arbitration and not intended to apply to employment. The statute has been relied upon to cover agreements signed with job applicants as a condition of hire, or continued employment, requiring them to surrender their right to appeal to the courts by agreeing to utilize an employer crafted internal arbitration process to resolve any challenge to employer action including discrimination, termination, etc. In 1991, the United States Supreme Court in its Gilmer⁴ decision held that such employer imposed procedures were properly covered by the Federal Arbitration Act. Under such imposed agreements employers could hire the arbitrator, or at least select the roster from which the employee could choose an arbitrator, pay the arbitrators full fee, bar the employees right to counsel, preclude adherence to statute and even bar a written opinion.

Despite the establishment of the Due Process Protocol⁵ in 1995 to encourage adherence to standards in fairness in employment mediation and arbitration, now applying to some 12,000,000 non unionized employees, the best that non unionized employees can hope for is a questionably fair review of the employers rights in an employer created arbitration forum.

Thus access of workers to statutory protection is scant in the United States. Arbitration under negotiated systems with mutual access to and joint compensation of arbitrators is available to some 10% of the workforce, arbitration under schemes created solely by the employer with surrender of their right to sue may cover another 10% of the work force, while the great remainder are left to sue in courts of general jurisdiction on very narrow grounds for workplace rights deprivations. And there is access to conciliation on rights disputes only if a collective bargaining agreement provides therefor, or if conciliation is provided for in the employer promulgated Gilmer type arbitration agreement.

The Changing US Economy

The paucity of workplace protections in the United States is also a reflection of the reduction in percentage of organized workers from a high of 34% in the 1950s before manufacturing began to move offshore as a consequence of increasing international trade, growth of markets and increases in worker skills and industrialization abroad. The US has shifted to a service economy. American companies have become globalized in an era of evaporating tariffs, free trade zones and ever more rapid communication and commerce.

Implications of Globalization on Workplace Protection

What happens to those workplace protections as American jobs and employers move abroad? In some moves as to Europe the benefits of the employees may increase as they move into countries with traditions of works and industry councils, labor courts and code protection of worker rights and entitlements. But the very high cost of providing those societal benefits in industrialized countries usually impels movement to developing countries with scant dedication to providing workplace protections, statutory rights or governmental enforcement of workplace rights. And too frequently the luring of foreign firms is accompanied by a governmental willingness to turn a blind eye to protecting the rights of its working citizens in preference to lining the pockets of the government officials, top to bottom, charged with their

³ Federal Arbitration Act, Title 9 US Code Section 1-14, February 12, 1926 (43 Stat.883)

⁴ Gilmer v. Interstate/Johnson Lane Corporation 500 US 20(1991)

⁵ Dunlop, John T. and Zack, Arnold M. Mediation and Arbitration of Employment Disputes, Jossey Bass Publishers, pp 171-178, 1997

protection. Workers and employers in the industrialized world thus find themselves competing against companies and workers in the developing world where the profits are increased on the shoulders of the workers. The competition is not on lower prices, or even lower wages, it is too often based on wages made ever lower by imposition of child and forced labor by denying minimum wage protection and by preventing employees from exercising any opportunity to engage in unionization

We all know and see daily the consequences of this industrial race to the bottom, to increase profits at the expense of the sacrificed rights of the workers. The ILO has since 1919 been the institution that has proclaimed the norms for acceptable workplace conditions. In 1995 on the occasion of its 75th anniversary, the ILO identified Eight Conventions as being

“fundamental to the rights of human beings at work, irrespective of levels of development of individual member States. These rights are a precondition for all others in that they provide for the necessary implements to drive freely for the improvement of individual and collective conditions of work.

Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87)
Right to Organize and Collective Bargaining Convention 1949(No. 98)
Abolition of Forced Labor Conventions 1930 (No. 29), 1957 (No.105)
Discrimination in Employment and Occupation Convention 1958 (No.111)
Equal Remuneration Convention 1951 (No.100)
Minimum Age Convention, 1973 (No.138)
Worst Forms of Child Labor Convention 1999 (No.182)”

Since then over 70 Countries have ratified these Eight Core Conventions Yet these basic universally affirmed standards for providing workplace fairness are widely ignored by too many governments. They are seldom reflected in national legislation. (The United States has ratified only 2 of the Core Eight Conventions). They are not referenced, let alone deemed mandatory in the expanding number of free trade agreements around the world. They are not made conditions of loans by the World Bank or regional Banks. They are seldom articulated as prerequisites for foreign investment in developing countries. .

Additionally many of the companies moving to the developing world, particularly those with high consumer profile as in garment and shoe manufacture also proclaim adherence to the Core Conventions. They promulgate Codes of Conduct by which they commit themselves to be bound. Some may be merely posted on workshop walls, but others are widely disseminated in a good faith effort to conform to the standards they proclaim, even to the point of hiring monitoring teams, which they pay, expecting critical assessments of their convention compliance. But the sheer number of contractors, sub contractors and sub-sub contractors of these well meaning firms make effective code compliance virtually unattainable particularly in countries where the government lacks the will, interest, funds and personnel to effectively monitor code or convention compliance

There may indeed be universal standards for workplace fairness, but too often they are universally ignored standards for workplace fairness.

Is Enforceable Workplace Protection Attainable?

Is there then, any prospect that these workplace standards of fairness may be met?

Certainly they are not transferred from the country from which the industry fled to avoid such legal impediments. Likewise they are presumably unattainable within the legal systems of the countries where new factories are built.. Even if the receiving governments have endorsed the Conventions, very few if any have incorporated them into national statutes, and even if so adopted, the prospect are scant that the receiving national government would bite the hand that feeds (or bribes) it by requiring the local manufacturing plant to adhere to such tight statutory regulation as might lead it to think of moving its facility to the protection of a less stringent neighboring government.

Additionally, there is no overriding international law which binds countries to adopt or adhere to ILO Conventions, and of course there is no international judicial body to which an employee, a union, or an

NGO may bring a claim or file a legal suit. Sometimes one hears of companies or enterprises arbitrating disputes with other countries or enterprises, but such commitments to arbitrate are voluntary and require agreement on an enforcing jurisdiction to which a winning party may appeal for enforcement of an international arbitration award. And in the employment field, there is little likelihood that an enterprise, even if party to a code would concur with a challenging union, NGO or local government to private arbitration of such alleged code or convention breach.

Thus there appears to be no public or private agency or legal or judicial structure in the global scene which has the authority to demand or require adherence to international labor standards, or even to require national governments to adhere to their own statutory workplace requirements.

The Place of Conciliation

International agencies, national governments have all been quite deliberate in shying away from workplace protections. Intellectual property of individuals and companies has been the focus of strong protections in the globalizing sphere, but not the workplace rights of individuals working for such enterprises. The only remaining vehicle for helping to stem the violation of workplace rights or of codes or of ILO conventions appears to be persuasion, the demonstration to disputants that their self interest benefits from resolution of such conflict. That certainly does occur in direct negotiations between disputants, but too often the benefits attainable by compromise are outweighed by the publicity, the financial appeal and the institution standing that accrues from resistance to compromise.

One would assume that the ILO as the originator and sponsor of such high ideals would provide some monitoring, or even enforcement device to assure conformity to those standards. The Conventions are, of course the result of tripartite agreement among workers, management and government. Yet, as noted above, employers often disregard such standards in their quest for maximized profits. Governments as well, while endorsing such standards for the rest of the world, are often less than scrupulous in adopting, let alone enforcing such standards at home. And unions, whose members should be the beneficiary of such standards, are often weak or even missing, or at worst corrupted by government and employer to keep from protesting unfair conditions. Despite this vacuum, there are some unions, some consumer groups, some customers of the retailers, some NGOs which do enter the fray to fight for improved conditions. Most such efforts tend to become confrontational with adverse impact to all the players, the employers who get negative publicity, the workers who run the risk of losing their jobs in the protest, and the governments which run the risk of losing the factories to other countries. Confrontation seems to be the name of the game despite the risks it entails for the players.

Unfortunately there has been no place for international conciliation; no role for a neutral facility committed to encouraging the parties to resolve disputes over fair working conditions. and no undertaking by any government, national or international to provide such service.

Global Conciliation Institution

But that need can be readily met. The ILO despite its allegiance to its tripartite legacy needs to recognize that there is a new player in the field of worker protection. It is the NGOs bringing world focus on unsafe and unfair working conditions, child labor violations, gender exploitation, forced labor and the like. Although the interests of NGOs may not extend to pressure for freedom of association or collective bargaining, issues that are more within the province of unions, the NGOs have proven effective in developing coalitions to pressure managements and governments to conform to fair labor conditions.

At present, there is limited awareness of the benefits of conciliation for international labor standards disputes, and there is no institution maintaining a roster of available multilingual conciliators specializing in labor disputes, or qualified to train conciliators in pertinent labor laws and standards.

Although a number of international organizations share an interest in resolving disputes concerning international workplace standards, no single international organization has the reach or resources to

establish such a facility within its existing structure. There is a clear need for a conciliation institution to be established, to take on these tasks.

For increased effectiveness, such an institution should operate as an independent entity with the guidance and endorsement of all those parties sharing its objectives. In particular, it would be expected to work most closely with the ILO in order to ensure that it did not duplicate, but rather supplemented that organization's work. The WTO, the World Bank (and regional banks) are also seen as playing a role. The institution would seek their endorsement and support in encouraging their member states to adopt national policies promoting enterprises to utilize conciliation to resolve disputes involving labor standards.

A most important role would be to conciliate disputes beyond ILO conventions to disputes concerning compliance to Codes of Conduct. It could act as an independent monitor and verifier of these Codes.

The independent status of the institution would enhance its credibility, ensuring that it would not be perceived as an instrument of government or corporate power or unions or NGOs.

Areas of Activity

The main goal of the institution would be to support universal workplace implementation of international labor standards by promoting the use of conciliation to resolve workplace disputes. The institution would seek to work with the ILO, in order not to duplicate, but to supplement its work in this field.

Education and Awareness Raising

The institutionalization of international workplace conciliation will require initial investment and effort to achieve credibility and acceptability. At the outset, it will require extensive outreach to the various international organizations working in this area for acceptance and endorsement together with an educational effort to advise potential non-governmental users of the benefits of conciliation.

Efforts to gain support and affiliation with national governments must be an integral part of the educational awareness effort. Such approaches to those countries already possessing conciliation services will be essential to gain access to their conciliators for their potential participation in developing the international conciliation roster. For those countries which are host to enterprises involved in international trade but which may lack conciliation services, outreach is likewise important to recruit potential conciliators for training and to alert such national agencies to the availability of the institution's services should such international disputes arise involving enterprises or institutions under their jurisdiction.

Panel of Conciliators Specializing in Labor Disputes

The creation of a panel must include qualified conciliators competent in the process of conciliation, knowledgeable in the applicable international workplace standards and able to function within the language proficiency of the disputants.

In order to assure the competence of its services the institution must establish standards of qualification for conciliators both as to process skills and as to substantive knowledge of the disputed areas. As such, it is vital to assure that existing conciliators who join its ranks meet those standards while providing training and education for those who do not.

Training of Conciliators

It should also provide full training for those it selects for its roster. Included in those efforts must be an undertaking to include conciliators with proficiency in the diverse languages in which disputants may be working. Continuing education and evaluation for the institution's efforts are also essential for inclusion in its program planning.

When fully developed its training programs could help to promote a uniform standard of qualification for various national conciliation services while helping to develop such conciliation services for countries previously lacking them.

Although the details of a particular conciliation might at the request of the participants be kept private, an important role of the institution will be to provide reports of its activities, including the nature of the disputes resolved, and by those reports advise potential users of the benefits of embracing the conciliation mode.

Designating Agency Procedures

Beyond creating such a global or regional panel is the need to develop procedures for initiating the conciliation, selecting the conciliator, monitoring the process and evaluating the handling of the case and its outcome. Disputes might come to the attention of the institution by joint submission of all the disputants, or by only one or some of the potential parties invoking the services of the Institution to encourage the other crucial and perhaps reluctant parties to join in the effort. Complaints and requests for conciliation may come from governments, NGOs, unions, vendors, manufacturers or even international organizations. Since the process is voluntary and requires the participation of all the disputants, it may be necessary for the Institution to negotiate with relevant parties to attempt to get them to participate

Disputes may also be forwarded by state conciliation agencies lacking the jurisdiction over some of the employers when the locus of the conflict is beyond its borders or when there is need for greater conciliation expertise than available within the conciliation services of the country involved. In cases involving Codes of Conduct the referral to the institution might come from one of the disputants or even from the Code Administrator or its monitoring facility.

Referral of the dispute to the institution would logically trigger a series of events. Among these might be solicitation of all parties to participate in the conciliation, agreement to adhere to the institution's administrative rules and procedures, designation of the conciliator acceptable to the parties, determination of the locus and schedule of the conciliation, determination of the allocation of costs for providing the service, procedures for monitoring the progress of the conciliation, and procedures to be followed in the event of the breakdown of the conciliation or achievement of resolution and certification of that result. Evaluation procedures would likewise need to be developed and implemented throughout the conciliation including assessment by the participants of the role of the conciliator and the institution's role in the process.

Much of the foregoing may be implemented through the early development of an accessible web site setting forth a description of the process and the substantive standards, the procedures for utilizing the procedures, a listing with supportive biographical material of those on the panel and evaluation materials to be used in an effort to enhance future effectiveness.

Structure of the Conciliation Institution

The Conciliation Institution would be an independent entity operating under the guidance and with the cooperation of supportive international organizations. The ILO would be foremost in that role with the PCA offering its administrative and organizational support. The World Bank, Regional Banks and WTO might also be responsive to inclusion among these institutions. In addition, it is hoped that interested institutions such as trade unions, NGOs, employer groups, manufacturer groups and perhaps consumer groups would likewise undertake to participate in the efforts of the organization.

Governing Board

With such a diverse cross section of participating organizations, development of an effective and durable governing body might lead to considerable problems and potential conflicts. To avoid the difficulty which might stem from institutional membership, a Governing Board composed of individuals designated by participating international organizations and as representatives of the various sectors (such as employers, trade unions, NGOs etc.) should be considered with rotating, or fixed terms, assuming on going participation of the several main players.

The Governing Board would handle large policy and direction issues with the administration of the operation entrusted to a professional staff, seconded perhaps from participating organizations or established on a permanent basis as a separate international organization or as an affiliate within an existing international organization.

Secretariat

The daily management of the Conciliation Institution would be run from a small central secretariat consisting of a Director and several support staff.

Location

Locus should be determined by the need for integrated services with such supporting institutions presumably with an initial central institution, which might later develop with regional subsidiary institutions in those geographic areas where the source of the institution's activities emanate.

Funding

Funding such an undertaking and structure is obviously a challenge. It comes on the scene at a time when all the main players, particularly international organizations, are already under substantial economic pressure in fulfilling their existing obligations. Eventually, it is envisioned that the institution will support itself from fees charged for its services. However, this may take time and there is need for initial funding of seed money to support the start up activities and early outreach phases, including training and continuing education. Even thereafter, one can foresee the need for subsidizing some disputants who may lack the resources to pay their share of any fee for services provided.

Although the Open Society Foundation was most generous in funding the Labor and Worklife Program at Harvard Law School in arranging our initial planning meeting, the funding requirements grow larger as we progress. Attention must be paid to the funding of any launch meeting, global or regional publicity efforts, costs associated with enlisting the support and participation of the crucial participating organizations, costs associated with pulling together the initial administrative structure and developing outreach training and roster maintenance efforts.

Proposed Time Line

The warm reception accorded the concept of an international conciliation institution at the November 4, 2003 convened by the Labor and Worklife Program at Harvard Law School and held at the London School of Economics constituted a good start. It has been difficult to get the ILO to recognize that participation in such an endeavor is not a threat to its tripartite traditions or obligations. However on October 13, 2005 Director General Somavia wrote me that he had asked Prof. Jean-Claude Javillier of the ILO Institute "to put together a think piece on a practical ILO response to the issues" I had raised.

My hope is that we can develop a positive approach toward proceeding with the project, perhaps through a larger conference including more of the major players including companies, retailers, unions, NGOs and interested international institutions such as the ILO and PCA. There after we could proceed with the development of a more detailed structure and set of procedures for establishing the administration of the institution on either a global or regional basis with a formal launching announcement of training and roster procedures, being provided thereafter.

This proposal is no panacea for achievement of the Core ILO Conventions or for assurance that company Codes of Conduct will be met and workplace fairness automatically put into place. But it is an initial effort to bring transparency to such disputes, to bring the players, each with positions vital to their survival to the table in an effort to reduce conflict and hostility through the tools of conciliation which have proven so effective in reducing conflict in so many arenas. It is a start,; the players are getting on board, and if it works it will bring an era of more rational management of conflict, and hopefully a move toward more rapid implementation of workplace fairness in the ever shrinking world of globalization.

