ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 15, ISSUE 2 **Spring 2015**

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IMPORTANT NEWS

The ADRC is developing the agenda for the Thirteenth Annual ADRC Workshop which will be held Friday, October 16, 2015 at Lipscomb University in Nashville. Please make plans to attend! Please note that the Workshop will *always* satisfy the CME requirements for *BOTH* general civil and family listed mediators.

Fast Stats: There were 5,451 mediations reported for 2014. Of those, 3,391 (62.2%) had all issues resolved; 474 (8.7%) had issues that were partially resolved; and 1,586 (29.1%) had no issues resolved. There were 325 pro bono mediations plus 6 additional court ordered pro bono mediations conducted in 2014.

These mediation statistics were compiled from online mediation reports submitted by Rule 31 listed mediators. Per ADRC Policy 10, "Effective January 1, 2008 all mediators listed pursuant to Supreme Court Rule 31 will be required to submit reports as prescribed by the Commission, regarding any mediation beginning on or after January 1, 2008 except as to matters pending in state courts outside of Tennessee and the Federal Court System. Mediators will have 15 calendar days from the date of the last mediation session to submit the report to the AOC. This policy does not affect any other reporting obligation required of a Rule 31 listed mediator."

You can find the online mediation report on the AOC website at: **http://www.tncourts.gov/programs/mediation/resources-mediators**. If you have lost your username and password and are unable to submit an online mediation report, please contact Claudia Lewis at (615) 741-2687 or by email at **claudia.lewis@tncourts.gov**. Because of the sensitive nature of the information, she will fax your username and password to you.

Per the Supreme Court Order filed February 21, 2015, the Rule 31 amendments adopted by the Supreme Court will become effective July 1, 2015. Rule 31, which can be found on the AOC website at **http://www.tncourts.gov/rules/supreme-court/31**, will be updated on the AOC website at that time.

The European Union's experiment: Mediation without a mediator

By: D. Bruce Shine, Esq.

Author's Introduction

This piece discusses the labor management procedure currently being discussed by Volkswagen and the United Auto Workers of America, AFL-CIO, at the former's Chattanooga facility. While the article was published some years ago, it remains legally accurate and structurally sound. While certain advances (EU Directive 2009/38 EC) have been introduced since initial publication, those changes/improvements are not applicable to the mediation process.

Employment arbitration and mediation in the United States occurs routinely in both union and non-union settings. The European Union, however, is experimenting with a different form of social dialogue, the European Works Councils (EWC). The EWC attempt to achieve many of the same results as those achieved through mediation, except, however, the EWC do not rely on a mediator.

The U.S. approach. Under the aegis of the Mediation Research Education Project, Inc., of Northwestern University Law School, grievance mediation in the United States has been advanced as an alternative to arbitration after all other pre-arbitration steps in the contractual grievance procedure have been exhausted. According to a publication issued by the Chicago-based Project, in excess of 2,500 grievances have been resolved since November 1980. The success rate according to the project has reached 83 percent.

A 1996 survey of Chicago-area labor leaders by Helen Elkiss, University of Illinois at Urbana-Champaign, and Eugenia McAvoy, St. Xavier University, Chicago, in association with the Institute of Labor and Industrial Relations of the University of Illinois, has shown excellent results for participants in grievance mediation. Cost, speed, openness, and introduction of new ideas and flexibility appear from surveyed respondents to be the primary assets of grievance mediation over arbitration.

Early this year, the Equal Employment Opportunity Commission (EEOC) announced a $13 million program for fiscal year 1999 to hire mediation coordinators at every agency district office, to hire core internal and external mediators, and to increase education and training concerning the mediation process.[1] The agency remains opposed to mandatory arbitration, arguing the process would prevent the evolutionary caselaw process in discrimination law.[2]

The EU approach. While the U.S. experiments with using mediation to resolve individual employment disputes, the European Union (EU) has implemented a framework and procedure for resolving structural labor and economic conflicts cross-borders and company-wide. The EU approach is more expansive than any effort in the U.S. and seeks to create a company-wide climate of mutual trust between labor and management by joint goal-setting, information sharing and dispute resolution.

This new approach is in addition to the respective individual dispute-resolution processes utilized or statutorily mandated in each Member Sate comprising the EU. Those undertakings with 1,000 or more employees including at least 150 employees in one of two or more of the EU Member States, are covered by the EWC mandate. The number of undertakings impacted in 1998 was believed to be about 13,000.

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[1] EEOC Press Release, February 9, 1999; CCH Employment Practices, No. 1014, Report 612, February 19, 1999.
[2] CCH EEOC Compliance Manual, No. 144, January 29, 1998.

Worker participation. Few issues divide European Union management and labor more significantly than the issue of "worker participation" in corporate governance. The divisiveness of this issue has its genesis in the diverse cultural, political and economic traditions of the Member States. It has become even more divisive because critics now argue that the EWC make it more difficult to generate jobs with the same degree of success enjoyed in the past decade and a half by Japan and the U.S. Thus, "worker participation" goals within the EU are perceived to be inconsistent with economic growth scenarios. Many argue that the European Union cannot enjoy significant economic growth and job expansion while at the same time broadening worker rights and entitlements, or simply put, market forces must dominate and take precedence over worker rights.

Given the tortured and diverse history of advancing worker participation within the corporate sector of the EU, this article will examine the evolving and contracting parameters the term has generated as well as the differing degrees of participation within the Member States. The formula ultimately adopted by the EU, which has given rise to its limited success achieved to date, will be discussed. This discussion will explore the decision to facilitate employee participation by embracing the principles of mediation rather than those of collective bargaining. And finally, it will address whether further progress on a broader scale is achievable given both current economic trends and the political, economic and cultural diversity within the EU.

EU level of success

What does the EU mean and intend when it advocates worker information, consultation and participation? The answer to this question changes depending upon when the question was posed because, over time, the Community attitude towards worker participation has grown and evolved. The notion of employee participation has long existed within the Community; the different interpretations of this concept are rooted in the politics and history of the respective Member States.

Before proceeding further, it would be wise first to define the terms "information," "consultation" and "participation," and any "off-shoots" those terms generate within the context of the EU.

Trinity College, Cambridge, EU, employment law scholar Catherine Barnard has written:

> ***Information***: . . . involves the provision of information by management to the workforce. . . . the weakest form of worker participation: it is unilateral and workers have no formal opportunity to respond. ***Consultation:*** . . . does envisage the active involvement of both management and workers representatives . . . . ***Participation:*** . . . can be regarded as a generic term embracing all types of industrial democracy (*footnote omitted*) - ranging from the provision of information, consultant, and collective bargaining to more extensive involvement in the employer's decision-making process . . ."[3] (*emphasis added*).

Employee participation can either be direct, one-on-one, or indirect through representatives of the employee. Examples of the latter include trade unions, workers councils or *ad hoc* groups created by employees having as their primary concern, wages, hours, terms and working conditions for the employee.

A tortured path. As noted previously, the EU has experienced a tortured path toward worker/ employee participation. The conflict has its genesis in the diverse cultural, political and economic heritage of the Member States comprising the Community. For example, the United Kingdom has been among the major Member States at the nadir of statutory worker participation, while France, Germany and The Netherlands are at the opposite end of the spectrum.

[3] Barnard, C., *EC Employment Law*, J. Wiley & Sons, Rev'd. Ed., 1995, at 403-404.

Relying upon a tradition of trade union representation, or as some would term an adversarial relationship with minimal statutory involvement, workers in the United Kingdom have looked to their trade union to protect their job interest. Little regard to involvement with management in terms of long-range corporate planning or corporate governance has been the cornerstone of this relationship, with the worker primarily interested in his[4] wages, hours, terms and conditions of employment.

In a contrary posture, German law since 1972 has mandated a Works Council be formed in every plant with five or more employees, coupled with board of director membership for employee representatives for certain larger corporations.[5] The Netherlands statutorily has granted employee representatives the right to veto nominations to the undertaking's supervisory board, whose task is "to guide and supervise management on behalf of the stockholders and the employees."[6] France, like Holland, has statutorily mandated Works Councils; in France undertakings having at least 50 employees must provide such councils, while Holland's threshold is lower at 35 employees.[7] Each of these structures contemplates an increasingly cooperative, less adversarial relationship between the employees and the employer. Whether this goal actually is achieved in these Member States is another matter.

When discussing labor relations between worker and employer, the issue of economic power and its exercise must be considered. Whether the underpinnings for some of the procedures for employee participation applicable to EU and national undertakings are, as Lord Wedderburn has suggested, "honeyed words" or what "employers will accept," remains to be seen.[8]

During the past three and a half decades, the EU has entertained worker participation with management in a variety of proposals including, but not limited to, employee membership or representation on the boards of undertakings.[9] The initial legislative initiative to provide for worker participation was the Statute of a European Company (Societas Europaea or "SE").[10] Two years after placing the SE's first draft before the Community for discussion, what has become known as the Fifth Directive on the structure of public companies was issued by the Commission.[11] Promulgated in two parts, a Regulation and accompanying Directive, the document was intended to be complimentary to the SE, as well as its own two parts.[12] Under the Regulation, the SE could come into existence in one of four (4) methods:

1. "the merger of existing companies (footnote omitted),
2. the creation of a joint holding company (footnote omitted),
3. the creation of a joint subsidiary (footnote omitted) or
4. the conversion of an existing public limited company."[13]

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[4] An Equal Rights Note: Wherever in this piece "man," "men," or their related pronouns may appear, either as words or parts of words (other than with obvious reference to male individuals), they have been used for literary purposes and are meant in their generic sense (i.e., to include all human man-kind, both female and male sexes).
[5] Note 3 at 405.
[6] *Id*. At 412.
[7] *Id*. At 418.
[8] Wedderburn, Lord, *Consultation and Collective Bargaining in Europe: Success or Ideology*, (1997) 26 Ind. L.J. 1, at 33 and 32.
[9] Kolvenbach, Cf. W., *EEC Company Law Harmonisation and Worker Participation*, (1990) U. Penn J. of Int'l Bus. L 709, at 764-764.
[10] OJ 1970, C 124/1.
[11] OJ 1972, C 131/49.
[12] COM (89) 268 Final-SYN 218 and 219.
[13] Note 3 at 415.

Worker participation models. Although mandatorily based in one Member State, the SE offered four models for worker participation within either a single or two-tiered board, without employee involvement in its day-to-day management.[14] Those four models were:

1. Utilizing the law of the Member State in which the undertaking was based, one-half to one-third of the supervisory board must be appointed by the firm's employees or representatives and elected pursuant to national law of the Member State in which the firm is based. This proposal is similar to the German model.[15]

2. The supervisory board can be selected by management, but shareholders or employee representatives can nominate at the annual meeting, with veto powers similar to those found under the law of The Netherlands.[16]

3. A two-tiered board, one tier comprised exclusively of worker representatives, separate from the management or second board, with required notification to the worker tier prior to action by the undertaking in five areas directly impacting upon job security and crucial corporate structure and strategy.[17]

4. The last alternative constitutes a potential for modification of each of the above with an administrative board having the ability through collective bargaining to structure a scheme of worker participation by agreement with employee representatives.

In 1980, the Commission concluded that the Fifth Directive would not be adopted, in no small measure due to its requirement for mandatory employee participation in corporate governance. The Commission then issued the "Verdling" Directive,[18] named after its Commissioner of Social Affairs at the time of its issuance, and amended three years later by the "Richard" proposal,[19] which limited Verdling's impact by contracting its application. The 1980 proposal was limited to undertakings and subsidiaries employing 1,000 or more workers with a presence in more than one Member State. Undertakings were to engage in employee consultation with a view to reaching an agreement.[20]

Fearing inequality of treatment between national and transnational undertakings, the employer group Confederation of Industries of the EEC (UNICE) opposed the Verdling proposal. The Commission responded by seeking to correct the perceived inequity with its Richard proposal. The corrective amendment again applied the Directive to undertakings with a minimum of l,000 employees within the Community, irrespective of whether the firm was located in only one Member State. The Richard proposal allowed for the Fifth Directive to provide undertakings a "cafeteria system" of employee participation instead of the limited selection contained in the Verdling proposal.[21]

A detailed structure for the communication of information to employees concerning job security, advance consultation on changes in corporate structure and planning, cooperative efforts, and health and safety issues remained key provisions within the Directive's final but unrealized text.

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[14] Note 12, Article 2.
[15] *Id*., Article 4(1).
[16] *Id*., Article 4(2).
[17] *Id*. Article 5.
[18] OJ 1980, C 297/3, EC Bull Supp 3/80.
[19] OJ 1983, C 217/3, EC Bull Supp 2/83,3.
[20] Note 3 at 421.
[21] OJ 1983, C 240/2.

Supported in principle by the European Trade Union Confederation (ETUC), the Verdling Directive and its amendment, however, still failed to satisfy UNICE.[22] In 1986 the Council, recognizing the divisiveness of its requirement for employee participation, coupled with its scope, decided to postpone until 1989 its further consideration. Today it still languishes without action.

Small but incremental steps. Reluctant to walk away from the goal of employee participation, the Council commended the Commission for its efforts while urging it to come back another day with a proposal on the subject.[23] It was here where the matter remained until the Maastricht Summit and Treaty.

Before, however, jumping into a discussion of the changes wrought by the Maastricht Treaty, it would be helpful to note small but incremental steps toward achieving worker participation within the Community.

The first meaningful and successful step toward employee information, consultant and participation was the Council's 1975 Directive on Collective Dismissals.[24] Introduced under Article 100 of the Treaty,[25] requiring unanimity in the Council, the proposal had its origins in the Social Action Programme of 1974[26] to improve employee living and working conditions during a period when the EU experienced increased mergers, corporate concentrations and worker displacement.

The Directive uses a sliding scale to determine coverage. First, the displacement, or dismissal, must occur during a 30-day period for reasons "unrelated" to the individual worker. Its sliding scale application utilizes work force employment figures, to-wit:

1. 10 affected employees in an establishment employing more than 20 and less than 100;
2. 10% or more of the affected employees out of a work force of at least 100 but less than 300; and
3. at least 30 affected employees in a workforce of over 300.[27]

When the displacement will occur over a 90-day period, the threshold is 20 employees, whatever the number of persons employed.[28] The Directive does not cover, among other exceptions, temporary layoffs for limited periods of time.[29]

Crucial to our discussion is the recognition by the Directive of the role of employee representatives within the process of information and consultation. The employer is to inform employee representatives "in good time with a view to reaching an agreement" once it is "contemplating collective redundancies."[30] The process of consultation seeks to reduce "the number of workers affected."[31] To facilitate consultation, employers are required to provide information to employee representatives in six specific categories.[32] Information also must be provided to the Member State in which the collective redundancies, or layoffs, are to occur. Worker representatives are given an opportunity to "send any comments." Each step of the process is detailed and takes place within a predetermined time frame.[33] No dismissal may occur until 30 days *after* the public authority within the Member State has been notified of the proposed redundancies.[34]

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[22] Weiss, M., "The European Community's Approach to Workers' Participation", Chapter within A.L. Neal and S. Foyn, *Developing the Social Dimension in an Enlarged European Union*, Centre for European Law, University of Oslo, Issue No. 16 (1995).
[23] V 86/C 203/01, Council Conclusions of 21 July 1986.
[24] 75/129 EEC.
[25] Directive Introduction, Foster, N., *Blackstone's EC Legislation*, 7th ED. (1996), at 281.
[26] Bourn, C., *Amending the Collective Dismissals Directive: A Case of Rearranging the Deckchairs?* (1993) 9 IJCLLIR 227, at 231.
[27] Note 25, Article 1.1.(a).
[28] *Id*.
[29] *Id*., Article 1,2.(a).
[30] *Id*., Article 2,1.
[31] *Id*., Article 2.2.
[32] *Id*., Article 2,3(b)(i)-(vi).
[33] *Id*., Article 3 and 4.
[34] *Id*., Article 4,1.

Displaced workers and their representatives are thus included in a process that allows them to share and comment upon:

- the reasons for their job loss,
- the number to lose their jobs,
- the period over which the job loss will occur,
- the criteria utilized to determine who will lose their job, and
- the redundancy payments to be paid by the employer over and above that to which the worker is statutorily entitled.[35]

Most importantly, this process mandates consultation "in good time with a view to reaching an agreement."[36] Without intervention of a third-party neutral, the process takes on the trappings of mediation without a mediator.

The scope of the Directive was broadened two years later to cover any "transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."[37] As with the original Directive, notification and consultation with employee representatives remained key ingredients, coupled with providing information giving rise to the transfer/merger.[38] Additionally, where no employee representatives at the work place exist, employees "must be informed in advance when a transfer" is to occur.[39]

The Directive and its amendment constitute an impressive array of rights for workers and their employee representatives to participate in the process of employee consultation, notwithstanding its limited scope of coverage and purpose.

The Social Charter. Having achieved limited success concerning employee participation, the Council never lost sight of its ultimate goal. At Strasbourg in December 1989, 11 Member States (excluding the United Kingdom) adopted the Charter of Fundamental Rights of Workers. The Charter highlighted 12 fundamental social rights.[40] It was a purely political manifesto without legal effect in that it is not a treaty, an amendment to the Treaty, or a convention. Nor are the 12 rights enumerated within its text legally binding or enforceable by those to whom it sought to empower.[41]

The manifesto was not without significance, however. It became known as the Social Charter and in 1990 gave rise to a draft directive on European Works Councils (EWC), opposed with gusto by the United Kingdom.[42]

While the Community sought to develop a progressive social dimension to accompany the drive toward a single economic market following the adoption of The Single European Act in 1986, the United Kingdom opposed its every step. Under Prime Ministers Thatcher and Major, the United Kingdom pursued an anti-labor "de-collectivise" approach in its domestic labor relations from 1979 to May 1997, geared towards reducing the legal posture and impact of the UK trade union movement and freeing employers from the perceived or real restraints trade unions placed upon market forces. The United Kingdom thus positioned itself against the philosophical tide within the European Union.

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[35] *Id*., Article 2.3.
[36] *Id*., Article 2.1.
[37] 77/187/EEC, Article 1.1.
[38] Id., Articles 3, 4, 5, and 6.
[39] Id., Article 6.5.
[40] Reported in "Social Europe" 1/90 at 45.
[41] Note 3, at 61.
[42] COMMA (80) 581 Final. OJC 39/91.

At the Maastricht Summit, the United Kingdom's determination to "go against the flow" was illustrated by its decision to "opt-out" of what became known as the Social Agreement signed by other Member States within the EU. As a compromise, the United Kingdom agreed to a Treaty of European Union amendment that permitted the subsequent adoption of a Directive encompassing the goals of the Social Agreement without the United Kingdom's consent or inclusion.[43]

The somewhat unusual agreement became necessary because the United Kingdom opposed extending the qualified majority voting provisions of Treaty Article 1OOa in the Council of Ministers to "a range of employment and industrial relations issues including the information and consultant of workers."[44] In essence, the United Kingdom formally opposed making it easier to pass EU legislation restricting employers and empowering workers.

By not entering into the Social Agreement, the United Kingdom ceased to be a player on these issues and accordingly surrendered whatever influence it might have possessed in "watering down" proposals. And, as it turned out, subsequent proposals for employee participation ultimately impacted upon the UK's own transnational undertakings anyway. The decision to "opt out" might well have been politically popular at the annual Conservative Party Conference, but profoundly limited the United Kingdom's role in this essential aspect of long-term employment policy.

Much has been written concerning the nuances surrounding the UK's opt-out and its legal standing within the EU. The victory of the Labour Party in the United Kingdom's parliamentary election of May 1997, however, has rendered much of that discussion moot. Council Directive 97/74 EC of December 15, 1997, extended the European Works Council to Great Britain and Northern Ireland and put the United Kingdom under the EU's Social Agreement.[45] Once again the UK has become a player in this arena of the EU's social dimension. The decision by the United Kingdom was made with the Council on July 24, 1997, prior to its execution of the Amsterdam Treaty.

European Works Council. Armed with the United Kingdom's agreement at Maastricht not to impede its fellow Member States' desire to enhance information, consultation and participation of workers in their place of employment, on September 22, 1994, the Council issued Directive 94/45 EC calling for "the establishment of a European Works Council or a procedure in Community scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees."[46] The jurisdictional underpinnings for the Directive require that it have application only to undertakings "employing at least a 1,000 employees on the territory of 'Member States.' "[47]

Thus, the Directive impacted upon and required compliance by numerous United Kingdom undertakings, notwithstanding the "opt-out" provisions of the Social Agreement and the Directive's negotiated non-application in the United Kingdom. Recognizing that denying UK-based employees the Directive's protection enjoyed by co-workers who simply happened to be working in offices or plants located in other Member States might create morale problems, numerous UK undertakings voluntarily included their statutorily opted-out home based employees in their Community-wide EWC's.

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[43] OJC 244/127, 31.8. (1992).

[44] Lorber, P., *An Attempt to Assess the Curious Impact of the European Works Council Directive on the United Kingdom System of Industrial Relations and Labour Law* (1997) 9 Jagellonian University Yearbook of Labor Law and Social Security 95, at 97.

[45] Concurrently with Directive 97/74, the United Kingdom joined in adopting Council Directive 97/81, which formally bound the United Kingdom to the Community Charter of the Fundamental Social Rights of Workers. Lastly, on that same day, December 15, 1997, Council Directive 97/75 extended coverage to the United Kingdom of Council Directive 96/34, framework agreement on parental leave.

[46] Summary, "Proposals for Council Directive extending Directive 94/45 EC on European Works Councils and Directive 96/34 on Parental Leave," COM (97) 457 final of 23 September 1997.

[47] Note 42 of 98; See also: Directive 94/45 EC, Article 2(1).

Under Article 13 of the Directive, undertakings could remove themselves from its provisions by entering into a voluntary agreement with their employees prior to September 22, 1996, the Directive's deadline for setting up an EWC or an equivalent procedure covering their entire workforce. If an employer did not take itself outside the Directive, then it had two options:

First, the Company's central management could initiate negotiations for the establishment of an EWC,[48] or the process would commence at the "written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States."[49] Upon the occurrence of either option, a Special Negotiating Body (SNB) would be established with a minimum of three and a maximum of 18 members under procedures determined by the Member States from which the membership is elected.[50]

Additionally, where no employee representatives exist, Member States shall provide for the election or appointment of SNB members.[51] Each Member State in which the undertaking has one or more establishments must have at least one SNB member, and representation must otherwise be proportional in terms of the employer's workforce. The precise proportions can be legislated by the Member State.[52] Once management has been informed of the SNB's composition,[53] the parties commence negotiating concerning the scope, composition, functions, and terms of office of the EWC, or implement a "procedure for the information and consultation of employees."[54] The SNB can utilize "experts of its choice" in conducting negotiations leading to an EWC.[55]

Negotiations leading to an EWC can be terminated by a vote of two-thirds of the SNB, and no future action will occur for two years unless the parties negotiate a shorter period.[56] Lastly, the cost relating to the negotiations are to be borne by central management, including the cost of the SNB's expert (typically a trade union official).[57]

"[I]n a spirit of co-operation with a view to reaching an agreement," central management and the SNB are to negotiate toward achieving an agreement that will define the:

- establishments covered by the EWC;
- composition of the EWC, its number and their term of office;
- functions, procedure for information and consultation of EWC;
- venue, frequency and duration of EWC meetings;
- financial and material resources to be allocated to the EWC; and
- duration of the agreement and procedure for its renegotiation.[58]

While the above clearly seems to define the scope and structure of EWC under the Directive, the parties may decide to establish one or more information and consultation procedures to discuss transnational issues affecting workers' interests instead of an EWC. In doing so, the agreement must provide a procedure for the employee's representatives "to meet and discuss the information conveyed to them."[59] Lastly, in accomplishing its multiple tasks, the SNB shall act by majority vote of its members.[60]

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[48] Directive 94/45,Article 5.1.
[49] *Id*.
[50] *Id*., Article 5.2.(b) and 2.(a).
[51] *Id*., Article 5.2.(a).
[52] *Id*., Article 5.2.(c).
[53] *Id*., Article 5.2.(d).
[54] *Id*., Article 5.3.
[55] *Id*., Article 5.4.
[56] *Id*., Article 5.5.
[57] *Id*., Article 5.6.
[58] *Id*., Article 6.2.(a)-(f).
[59] *Id*., Article 6.3.
[60] *Id*., Article 6.5.

Subsidiary requirements. Where central management refuses to commence negotiations within six months of a request or after three years of a request, and the parties have not concluded an agreement, the provisions of the Directive's Annex ("Subsidiary Requirements") come into play.[61] Under the principle of subsidiarity, Member States shall provide for the election or appointment of EWC members; in accordance with the laws of the Member States in which the workers reside, the EWC shall be composed of a minimum of three and a maximum of 30 members. The procedure contemplates the Annex EWC will assume those functions provided within the Directive for negotiated EWCs, with near identical rights, duties and prerogatives to be achieved pursuant to national legislation. Thus central management is faced under the Annex with the proposition of either negotiating the parameters of the EWC or having the Annex EWC imposed upon it under terms mandated by its own national legislature.

Recognizing that information shared with the EWC will often contain items confidential to the undertaking, Member States are empowered to insure its continued confidentiality by those comprising the EWC, even "after the expiry of their terms of office."[62] Member States also are obligated to insure by national legislation that employees or their representatives are free from retaliation in performing their functions. Employee EWC members are to receive their regular wages and expenses while performing their duties.[63] Lastly, the EWC and central management, as with the SNB, shall perform their function "in a spirit of cooperation."[64]

The Directive acknowledges the subsidiarity principle, which means Member States are charged with enacting national legislation that implements EU Directives. In other words, the Member States must enact national legislation that protects the EWC.[65] As with nearly all Directives, a time frame exists for this Directive's review and possible subsequent amendment, depending on experience with its provisions.[66]

In 1997, a plan was put forward by former Belgian Commissioner Etienne Davignon ("Davignon Report") to allow the establishment of pan-European companies. Efforts to agree on a European Company Statute, with worker participation in undertaking governance and decision-making, have been promoted for over 30 years, but an agreement on its terms and conditions is as elusive today as when the efforts commenced.

Work of the Social Partners

The Social Chapter envisages active and cooperative participation by European Union employee and management representatives, collectively known as the "Social Partners." While not designating these Social Partners by name, the entities must be organized at the European level, recognized within the Member States as integral elements within the labor management dialogue, and structured in such a manner as to participate effectively in the consultation process. A number of organizations have achieved that status, including UNICE, CEEP (the public sector employers' association) and ETUC, with others seeking entry into the elite designation.

[61] *Id*., Article 7.
[62] *Id*., Article 8.
[63] *Id*., Article 10.
[64] *Id*., Article 9.
[65] *Id*., Article 11.
[66] *Id*., Article 15.

The Social Partners are empowered to implement Community measures at the national level[67] and to develop collective agreements having EU-wide jurisdiction.[68] Three of the Social Partners, UNICE, CEEP and ETUC, in 1991 developed a detailed framework for their consultation. The end result of that process is to produce opinions and recommendations, from employer and employee representatives, which might lead to agreements within their respective sphere of competence.[69]

The process provides for the Commission to seek consultation with the Partners before submitting definitive proposals, with a six-week review period for the Partners. Once the Commission has decided upon the content of its proposal, a second six-week period exists among the Partners for the proposal's review.[70] Conversely, management and labor can advise the Commission of its desire to initiate the process to negotiate Community-level agreements.[71]

Agreements among the Social Partners can be implemented under procedures specific to the parties and the Member States or under national rules for collectively bargained-for agreements.[72]

Resulting Directives. Those matters referred to the Social Partners under Article 2 of the Social Policy Agreement and which result in an agreement can go to the Council for implementation. Without going further into the nuances of the process, two Directives have issued as a result of the efforts of the Social Partners. The Partners entered into a Framework Agreement on Parental Leave on December 14, 1995, which resulted in Directive 96/34 EC on June 3, 1996. Thereafter the Social Partners, in response to a proposal from the Com- mission concerning part-time and temporary work, entered into a Framework Agreement on that issue on June 6, 1997, which resulted in Directive 97/81 issued on December 15, 1997.

The ratio of success for employee participation has not been significant when compared to the number of proposals generated by the Social Partners. Currently the process is under cloud due to the refusal of UNICE to go along with planned new rules to ensure that workers in national undertakings are told about plans for major restructuring. The issue has been highlighted as a result of the Renault company's plant closing (1998) at Vilvoorde, Belgium.[73] The core dispute between EC Social Affairs Commissioner P. Flynn and UNICE concerned whether worker consultation in national companies is unnecessary. UNICE's position, based on the principle of subsidiarity, is that a decision of this nature should be made locally.[74]

Indeed the Renault plant closing in 1998 gave rise to newspaper headlines and editorials proclaiming the whole concept of social dialogue ---- mediation without a mediator ---- within the EU to be in jeopardy due to UNICE's posture.[75] The possibility for the "intransigence of one side" among the Social Partners was raised by EU scholars in "A Manifesto for Social Europe" in mid-1997, which concluded that such an occurrence might give rise to the proposition that the Social Partners' "competence may be exercised at a different level."[76]

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[67] Social Policy Agreement, Article 2(4).
[68] *Id*., Article 4(1).
[69] COM (93) 600.
[70] Note 67, Article 3(2) and (3).
[71] *Id*., Article 4.
[72] *Id*., Article 4(2).
[73] *European Voice*, "UNICE Defies Deadline on Consultation," January 22-28, 1998, at 5.
[74] Id.
[75] *European Voice*, "Social Dialogue in Jeopardy" and (editorial) "Let the Talking Begin," March 19-25, 1998, at 1 and 13.
[76] Bercussion, Dealkin, et al., "*A Manifesto for Social Europe*," (1997) 3 European LJ 189, at 192.

Conclusion

EU-based trade unions have watched the EWC with hostility, fearing employers will substitute works councils processes for collective bargaining. Many employers have in fact approached the process as a means of circumventing trade unions and going directly to the employee.

Recently, worker consultation plans to strengthen the rights of millions of employees have been quietly shelved under the center-left EU presidency of German Chancellor Gerhard Schroder. The hope, however, is that when the Finnish representative assumes the EU presidency in July 1999, there will be more support for expansive consultation rights.

The question remains-can the parties alone, through a process that occurs outside of collective bargaining, actually change corporate attitudes and governance? Given the diversity in social, economic and political traditions within the current Member States, let alone those awaiting entry into the EU, one must question whether the mediative approach currently being utilized may soon reach its realistic limitations. Will a genuine third-party non-governmental neutral mediator become necessary? The ultimate success or failure of the European Works Councils in jointly setting goals and reducing the frictions natural to the labor/management setting will answer the question.

About the Author

D. Bruce Shine, Esq., is licensed to practice law in Tennessee, New York, and the District of Columbia, though the latter two licenses are inactive. He earned his B.S. degree from Tusculum College, J.D. from Vanderbilt University School of Law, attended Columbia University School of Graduate Legal Studies, and received an LL.M. from University of Leicester (U.K.), and LL.D. (Hon.) from Tusculum College. Mr. Shine is a Fellow of the Tennessee and American Bar Foundations. Mr. Shine is a past chairman of the Tennessee Supreme Court's Alternative Dispute Resolution Commission and was a member of the Commission from 1996-2015. He is approved as both an Arbitrator and Mediator by the United States District Court for the Eastern District of Tennessee, is a Tennessee Supreme Court Rule 31 listed general civil mediator, and is a registered Arbitrator with the Financial Industry Regulatory Authority. Mr. Shine, whose office is in Kingsport, Tennessee, primarily practices in the areas of labor and employment law.

~ Roll Call ~

Congratulations to the following Newly Listed Rule 31 Mediators! These mediators were approved for listing at the ADRC Quarterly Meeting on April 28, 2015.

Mr. Brian N. Bailey, General Civil
Ms. Jennifer Paige Beach, General Civil
Mrs. J. Jill Qualls Baxter, Famiy
Mr. Randall G. Bennett, General Civil
Ms. Kendra T. Biggs, General Civil
Mr. Wade H. Boswell, II, General Civil
Ms. Carolyn Alifragis Boyd, General Civil
Mr. Kirk A. Caraway, General Civil
Ms. Jennifer L. Chadwell, Family
Ms. Christian L. Cid, Family
Mr. Thomas (Toby)W. Compton, Jr., General Civil
Mr. Chris A. Cornaghie, General Civil
Mr. Wade B. Cowan, General Civil
Ms. Loretta Crossing, Family
Ms. Paula B. Davis, General Civil
Mr. Terry L. Dicus, Jr., Family
Mrs. Joanna Douglass, General Civil
Ms. Renee S. Edwards, Family/DV
Ms. Sara H. Evans, Family
Ms. Laura A. Frost, Family
Mr. Charles A. Giannetto, Family
Mr. Morris A. Goldstein, General Civil/Family
Mr. Robert B. Gray, General Civil/Family/DV
Ms. Dominique C. Gutierrez, General Civil
Mr. Marc H. Harwell, General Civil
Mr. Jeremiah A. Hassler, General Civil
Mr. J. Chadwick Hatmaker, General Civil
Ms. Traci Hartley Haynes, General Civil
Ms. Mary E. Henderson, Family
Mr. Frank M. Holbrook, General Civil
Mr. John W. Honeysucker, II, General Civil
Mr. William L. Horn, Family
Mr. Roger D. Hyman, General Civil/Family/DV
Mr. Logan W. Key, General Civil
Mr. Jay W. Kiesewetter, General Civil
Mr. Matthew D. Lavery, General Civil
Ms. Robin K. Littlefield, General Civil
Ms. Yvonne Yee Won Louie-Horn, Family
Mr. T. Ryan Malone, General Civil
Mr. Robert A. Mathis, General Civil
Mr. Neil M. McIntire, General Civil
Mr. Samuel F. Miller, General Civil
Ms. Elizabeth A. Morrow, General Civil
Ms. April Watkins Nemer, Family
Mr. Jacob R. Nemer,Family
Mr. Robert P. Noell, General Civil
Mr. Emmanuel O. Ojo, General Civil
Mr. James R. Omer, Jr., General Civil
Ms. Mariella L. Pachero, General Civil
Mr. Jeffery D. Parrish, General Civil
Ms. Cynthia D. Plymire, General Civil
Ms. Lynn K. Questell, General Civil
Mr. W. Justin Reynolds, Family
Ms. Heather B. Stanford, General Civil
Mrs. Allison J. Starnes-Anglea, Family
Ms. Teresa Ennica Street, General Civil
Ms. Toni L. Stuart, General Civil
Mr. Jimmie D. Turner, Family/DV
Ms. Carol Davis Watkins, General Civil
Mr. John S. Wesson, General Civil
Ms. Nicole C. Wonsey, General Civil/Family/DV

Important ADRC Dates

August 20, 2015 ..... Rule 31 Mediator Applications Deadline for ADRC review on October 15, 2015

October 15, 2015 ..... ADR Commission Meeting, Nashville

October 16, 2015 ..... ADRC Mediation Workshop, Lipscomb University, Nashville

We Would Like to Hear From You!

In an effort to encourage education and communication between and for Rule 31 listed mediators, the ADRC accepts proposed article submissions from Rule 31 listed mediators and others in the *ADR News*. All submissions may or may not be published and are subject to editing according to the Program Manager's discretion. If you are interested in submitting an article for possible publication in the *ADR News*, please contact Claudia Lewis, AOC Programs Manager, at Claudia.Lewis@tncourts.gov.