CAMS
Social dialogue and the changing role of Conciliation, Arbitration Mediation Services in Europe
CAMS

The role of Conciliation and Arbitration in Italy

Marina Garattoni

co-authors:
Matteo Acciari, Manuela Del Monaco, Bruno Laudi, Alberto Piccinini, Sabrina Pittarello, Cesare Minghini, Volker Telljohann

January 2010
A. INDIVIDUAL CONCILIATION TOOLS.

1. Compulsory preliminary conciliation attempt.

Within the meaning of Article 410 c.p.c. (Civil Procedure Code), “Workers wishing to file a claim related to Labour relations under article 409 and do not intend to benefit from conciliation procedures set out by collective contracts and agreements are required to lodge a conciliation attempt with the conciliation board, by means of the trade union that they belong to or that they have appointed, according to the criteria set down by article 413 c.p.c.”. The following art. 411 c.p.c. sets out that if a conciliation attempt fails, the minutes, to be issued and signed by the president of the Arbitration Committee, shall certify the authenticity of the subscription or the impossibility for the parties to subscribe them. The minutes are lodged with the Court Registry by the party concerned or by the office in charge, in the area of jurisdiction where the judge was trained, at the request of the claimant. The formal regularity of the minutes of conciliation is ascertained and declared enforceable by decree.

As far as individual and collective disputes are concerned, the law envisages a mandatory preliminary conciliation attempt, which is regarded as an admissibility pre-requisite of the complaint. This implies that the lawsuit shall necessarily have to be preceded by a conciliation attempt. Any failure to do so shall be officially recorded by the judge, judgment shall be suspended and a deadline shall be set that shall have to be met by the parties.

Upon the entry into force of legislative decree no. 80/1998, the above mentioned out-of-court conciliation attempt is now become compulsory. Therefore, workers who wish to file a lawsuit can resort to two types of conciliation: a trade union conciliation, based on conciliation procedures envisaged by individual or collective agreements (art. 411 c.p.c.), or an administrative conciliation, in the event in which they do not wish to benefit from the above-mentioned proceedings, but rather to go before the Conciliation board, at the Provincial Labour Directorate (art. 410 c.p.c.), also through their own trade union.

As far as labour disputes are concerned, art. 412 c.p.c. provides that “the execution of the conciliation attempt is an admissibility prerequisite for the claim”.

2
Art. 410 b, 1st paragraph, c.p.c. sets forth that “the conciliation attempt, even in the forms envisaged by the collective agreements or contracts, must be executed within 60 days since the filing of the request”; “if no action is undertaken in the meantime, the conciliation attempt shall be considered to be executed within the meaning of art. 412 B. c.p.c. (the same for 2nd paragraph of art. 412 B. c.p.c.).

At the end of the 60 days’ deadline, envisaged by art. 412 B. c.p.c., reference should be made to the date when the claim was submitted to the Conciliation board and not to the date when the claim was notified to the company. Nevertheless, the mere filing of the request to the Conciliation board, lacking its notification shall not entail any interruption or suspension according to art. 410 c.p.c., 2nd paragraph.

Under this article “the notification of the execution of request for conciliation attempt shall interrupt the prescription and suspend the running of the limitation period, for the whole duration of the conciliation attempt and for the 20-day-long period, following its conclusion”.

The mere filing of the request to the Conciliation board, lacking its notification, shall not entail any interruption or suspension effect under art. 410 c.p.c., 2nd paragraph, since these effects are related to its notification. For this reason, the 60 days’ deadline, upon which the conciliation attempt shall be regarded as executed, runs from the claim filing date to the Conciliation board, even when no notification is provided to the company.

1.1. The conciliation procedure

In the private sector, the compulsory preliminary conciliation attempt can be executed either within the trade union headquarters (in the manner prescribed by collective bargaining), in accordance with art. 411 c.p.c., namely at administrative level, in accordance with art. 410 c.p.c.

Conciliation at the union headquarters can be executed in the event in which collective agreements envisage the possibility to execute conciliation procedures related to collective and individual disputes on the implementation of provisions set by the agreements themselves.

If the conciliation succeeds, the minutes shall be lodged with the Provincial Labour Directorate directly by one of the parties concerned or by means of the
trade union organisation. The director of the Provincial Labour Directorate, or his delegate, shall have to ascertain their authenticity and then lodge them with the Court Registry in the area of jurisdiction where they have been drafted.

The judge, at the request of the party concerned, having ascertained the formal regularity of the conciliation minutes, shall order them to be made enforceable (As per art. 411, 3° co., c.p.c.). As provided for in Article 412 c.p.c., if conciliation is unsuccessful, a deed shall be issued explaining the reasons for failure. Parties may illustrate the arrangement, even a partial one, which they agree upon, by specifying, if and whenever possible, the amount to be awarded to the worker in the minutes of unsuccessful cases.

In this case, the minutes shall acquire validity as an enforceable deed, and comply with provisions applying to successful conciliation cases.

Any worker or employer, who may decide to settle the dispute at an administrative level, must file a request for a conciliation attempt before a Provincial Conciliation Board (to be appointed according to provisions set by art. 413 c.p.c.), which will convene the parties or the examination of the dispute. The motion to dismiss the complaint must be objected by the defendant according to and due to art. 416 c.p.c. and it may also be approved by the judge, yet not before the first discussion hearing takes place pursuant to article 420 c.p.c.

If no conciliation attempt is filed or if the complaint is filed before the expiry of 60 days' notice since the filing of the attempt (upon which the conciliation procedure is anyway regarded as executed), the judge shall suspend the trial and set a compulsory deadline of 60 days, within which the parties are allowed to file a conciliation procedure. At the expiry of this deadline, the trial has to be completed before a further deadline of 180 days.

Any renunciation deriving from a successful conciliation attempt is incontrovertible, as provided by Article 2113 c.c., last par. The non incontestability according to article 2113 c.c. of the conciliation agreement does not rule out the admissibility of invalidity, voidability and contestability actions, as also envisaged by the general legislation on agreements.
1.2. The conciliation attempt in the public sector.
In the new regulatory framework, conciliation in public labour disputes is regulated as a special proceeding and against conciliation procedures in the labour disputes in the private sector as per art. 410 c.p.c., regarded as a special case in the general framework. The conciliation procedure in the public sector is formalised by a few specific aspects, since both workers and the public administration are required to comply with specific requirements. In particular, as far as the public administration is concerned, a so-called pre-conciliation phase is envisaged. The public administration must provide its written answer, unless it decides to accept the worker’s claim, within a 30 days’ notice since the receipt of the registered letter notifying the request for a conciliation attempt. Such a request must contain: the description of the claim and its underlying reasons. A conciliation procedure shall be initiated in the event in which the public administration does not accept to fulfill the worker’s claim and therefore, as already above-mentioned, a representative shall be appointed within the Arbitration Committee. The complaint - within the meaning of art. 65, 2nd par., Legislative Decree no. 165 dated 2001, "shall become enforceable at the expiry of a 90 days’ notice, since the filing of the conciliation attempt". An extension of the deadline, as against the one set forth by art. 410 B appears to be understandable taking into account the greater formal nature of the conciliation procedure in the public sector and, in particular, with reference to the requirements to be fulfilled by the parties involved, and depending on the composition of the Arbitration Committee.

2. Waivers and transactions ex art. 2113 c.c.
According to art. 2113 c.c., “Waivers and transactions related to worker’s rights deriving from legally binding provisions, agreements or collective agreements concerning labour relations in accordance with art. 409 C.p.c., are not valid”. Hence, the legislator prevents workers from waiving their fundamental rights, to protect them from any unwanted waivers or transactions, deriving from workers’ weakness or subordination conditions towards their own employers.

More specifically, the last paragraph of art. 2113 c.c. excludes from the invalidity scheme all those conciliation cases brought before the judge, ex art. 420 c.p.c., or before the joint trade union Conciliation Committee set up at the
Provincial Labour Directorate (former UPLMO) or at the trade union headquarters, ex art. 410 and 411 c.p.c. This provision is compulsory and cannot be automatically extended to other forms of conciliation. The reason underlying this exception lies in the will to protect workers in conditions of weakness or subordination towards their own employers, through the assistance provided by experts. Any worker’s waiver or transaction occurring under the circumstances envisaged under last paragraph of art. 2113 c.c. are therefore regarded as valid and effective.

For conciliation to be legally enforceable and incontrovertible within the meaning of the law under question, the judge’s decision is required, since a dispute settlement, although formalised by procedural documents, would not be not sufficient.

Court-based conciliation is based on negotiation, and therefore, it depends on the parties’ will and it is up the be judge to decide and rule.

The conciliation cases concluded before the Joint Trade Union Conciliation Committee set up within the Provincial Labour Directorate, ex art. 410 c.p.c. are also incontrovertible. Both employees and employers can address themselves to this Committee, also orally, provided that claims are put on record. For the purposes of indefeasibility of conciliation, the Committee is not expected to play an active role, but it shall confine itself to taking into account the settlement that has already been freely agreed upon by the parties concerned. The validity of a conciliation case orally concluded before the Committee can be impugned by resorting to the same nullity and annulment provisions that apply to other agreements.

Art. 411 c.p.c., art. 2113 c.c. also exclude the conciliation cases settled at the trade union headquarters, with the support of the trade union. Such a support can also be possibly regulated by collective contracts and agreements, as explicitly envisaged by art. 410, par. 1, c.p.c. According to a part of the doctrine, if a collective regulation exists, only collective conciliation shall be regarded as incontrovertible.

Reference to the trade union venue does not mean that trade unions are legitimatated to establish binding conciliation cases applying to the workers concerned. They must be filed personally by individual workers or by means of ad hoc proxies, entrusted with the necessary powers, even though there might
be acquiescence by workers, through their unequivocal behavior, towards conciliation concluded by a trade union, or they might explicitly ratify it, since the minutes of conciliation must not necessarily contain a specific written approval.

For the purposes of indefeasibility of conciliation, according to a more recent school of thought, although it does not deem a general support by trade union as sufficient per se, it does not require trade unions to play an active role and it provides that trade unions should simply confine themselves to ratifying an already settled agreement, in case it has replaced a previous arrangement, initially explicitly in disagreement with the previous one, which thus requires an «effective support» by trade union representatives in favour the worker concerned. As far as this more recent stance is concerned, a critical approach has been undertaken by the doctrine, thus pointing out the fact that in this way the employers shall be more exposed to the transaction annulment risk due to reasons unrelated to their behavior or will.

3. Monocratic Conciliation

Monocratic Conciliation (before a single professional judge) is provided for by article 11 of the Legislative Decree no.124/2004 (inspection reform). It entered into force on May 27th, 2004 and it is a procedure aimed at speeding up the dispute settlement process related to workers’ property rights (the majority of labour lawsuits concern wage-related claims and disputes).

Monocratic Conciliation applies not only to employees but also to self-employed workers. In particular, it can also be applied to cases of task work or temporary work, envisaged by Legislative Decree no. 276/03; whereas it does not apply to employment relations, which have obtained certification.

Monocratic Conciliation can be executed at the same time as the inspection performed by the labour inspectors, or preventively before the labour inspection takes place. Nevertheless, in both cases, for Monocratic Conciliation to apply, all evidence of criminal violations should be ruled out. In the latter case, the labour inspection would be compulsory.

Preventive Monocratic Conciliation can be filed, if so requested by a worker or by his trade union. In this case, an official from the Provincial Labour Directorate shall summon the parties for a conciliation attempt.
Monocratic Conciliation can be executed during a labour inspection. The labour inspector can receive the approval by the parties to carry out a conciliation attempt.

In both cases, should the conciliation attempt fail, the labour inspectors are required to carry out the labour inspection as such.

It should be pointed out that Monocratic Conciliation becomes effective and leads to the completion of labour inspection procedures only upon the payment of the Social Security charges, which shall be determined according to the rules and regulations in force and corresponding to the amount that has been agreed upon during conciliation, concerning the working period identified by the parties and upon the payment of the amount due to the worker.

4. Arbitration in the field of disciplinary sanctions.

Art. 7, under paragraphs 6 and 7, of the Workers’ Statute provides that a worker charged with a disciplinary sanction, shall have three alternative dispute resolution opportunities. He can file a conciliation claim - also through its trade union, which he joins as a member or which has been entrusted with the task to represent him, as envisaged by collective agreements; or a he can go before the Conciliation and Arbitration Committee within a 20-days’ notice since the notification of the claim (in this case, the sanction shall be suspended and if the employer does not appoint a representative within the Arbitration Committee, or if he does not bring the case before a court, under the same terms, within a 10-days’ notice since the request by the Labour Directorate, the sanction shall automatically be resolved); or, finally, he can go before the court within the statutory time (yet, in this case the sanction shall not be suspended).

The Conciliation and Arbitration Committee shall be set up by the Provincial Labour Directorate: the Arbitration Committee shall be made up of one representative for each party and by one third party appointed jointly by the authorities; if no agreement is reached, the third party shall be appointed by the director of the Provincial Labour Directorate.

If no action is undertaken within a 10-days’ notice since the summons addressed by the Provincial Labour Directorate to the employer to appoint his own representative within the Arbitration Committee, the disciplinary sanction shall have no effect.
As far as this point is concerned, according to the case law, "art. 7, paragraph 6, envisages an informal arbitration procedure and entrusts arbitrators with the power to reach an out-of-court settlement, through a demonstration of negotiation will, with the possibility to cancel or to reduce the sanction (yet not to increase it). In case of a court settlement, the merit evaluations made by arbitrators, according to their discretionary power, cannot be challenged, except for the check of procedural mistakes, which would stultify the decision made by arbitrators due to their wrong perception or false representation of facts, both on the compliance with the statutory law provisions, contracts or collective agreements".

Furthermore: "In the event in which the worker impugns a disciplinary sanction by asking for the setting up of the Arbitration Committee, sanction shall have no effect if the employer does not appoint his own representative within the Arbitration Committee, within 10 days since the notification by the Provincial Labour Directorate. On the other hand, it is up to the worker to provide the evidence of the expiry of the above-mentioned deadline".

The informal arbitration award, ex art. 7 Law no. 300 dated 1970 (Workers’ Statute), is impugnable only due to procedural mistakes in the declaration of the negotiation will and not on the grounds of nullity, within the meaning of Article 829 c.p.c. Given the nature of the informal arbitration procedure, the considerations of merit in court cannot be challenged and they shall be left up to the discretion of arbitrators, without calling into question the judiciary authority to check any procedural mistakes, which would be sufficient to nullify the arbitrators’ decision, due to their altered perception or false representation of facts, and the observation of imperative law provisions, agreement or collective agreements clauses.

The award issued upon an informal arbitration cannot be challenged based on the statement of facts and their attribution to a certain category of disciplinary offence. Hence, arbitrators shall de facto check that the prerequisites exist for the enforcement of a disciplinary sanction on the employee, in compliance with collective bargaining. Such a de facto assessment cannot be challenged at a later stage by means of the refutation of the arbitral award, except for the case in which such an award – which has a merely bargaining nature – is affected by vices of the will of negotiation, such as mistake, duress or fraudulent
misrepresentation; only the substantial or essential mistake (art. 1428 and 1429 c.c.) are taken into account, concerning the will of arbitrators, in the event in which they have had a false representation of facts (Cass. 4025/06).

In case a worker initially chooses to submit a claim to the Arbitration Committee, as per art. 7, 6th paragraph, Law no. 300 20 May 1970 (Workers’ Statute) – which gives rise to an informal arbitration – the action addressed to the assessment of nullity of the disciplinary sanction can be brought before the Employment Tribunal, provided that the arbitration judgment has not been passed, which is the case when all arbitrators have accepted the appointment, since the alternative between ADR arbitration procedure and civil process is still available until the moment when the arbitration procedure is entered (Cass. 12798/03).

5. The certification of labour contracts.
Legislative Decree no. 276/2003, as amended by Legislative Decree no. 251/2004, also following the adoption of new labour rules and regulations, aimed at reducing the number of labour disputes, envisages the possibility to obtain the certification of labour contracts as a whole agreements to the voluntary procedure provided by art. 75-84, as summarized here below.

According to art. 75 of Legislative Decree no. 276/2003 voluntary procedures apply to all labour contracts, including the task contracts and the partnership agreements.

The certification procedure.
The certification committees are responsible for certification. They are set up by joint industry boards at the national or local level, within the Provincial Labour Directorates and provincial authorities, public or private universities, including registered university foundations, in accordance with art. 76, set up by the Ministry of Labour. Voluntary certification procedures are envisaged and they are applied following to a joint written claim by the parties involved in the labour contract. In particular, a claim must be filed:

- in case of committees set up by within the Provincial Labour Directorates, the claim shall be filed by the worker to the Committee in the same area of jurisdiction where his enterprise or branch is located;
- in case of committees set up by within the joint industry boards, the claim shall be lodged with the committees set up by the employee and employers’ associations.

Certification procedures are regulated by the memorandum of association of committees and must be enforced according to codes of good practice, in accordance with art. 78 (set up by the Ministry of Labour by means of its own decree for the identification of unavailable clauses for the purposes of certification of employment relations, with specific reference to workers’ rights and economic and regulatory norms).

More specifically, once the certification request has been submitted, the Provincial Labour Directorate shall forward the notification to the competent public authorities, towards which the certification is bound to produce effects and the procedure shall have to be accomplished within thirty days since the filing of the claim, namely since the receipt of the documents requested for the procedure.

The certification deed shall have to be motivated and explicitly mention the civil, administrative, social security and tax effects in relation to which parties request certification.

5.1. The effects of assessment

Within the meaning of art. 79, the effects of assessment shall also affect third parties until one of the claims that have been filed shall be approved by a judgment of merit, within the juridical sphere where the deed is bound to take effect, in accordance with the following art. 80.

More precisely, through the employment relationship certification administrative deed, it is possible to lodge a petition with the Employment Tribunal or the Regional Administrative Court (TAR).

The petition lodged with the Employment Tribunal can impugn the wrongful treatment of the agreement, namely challenge the mismatch between the certified negotiation programme and its following implementation, or to report any procedural mistakes (mistake, duress or fraudulent misrepresentation) of the consensus that is granted. In case in which the judge verifies the wrongful treatment of the agreement, of the employment relationship, this assessment shall enter into force upon the conclusion of the agreement. On the contrary,
the jurisdictional assessment of the mismatch between the agreed and actually implemented negotiation shall enter into force at the time when the judgment certifying the mismatch is passed.

The petition filed with the Administrative Court (in the jurisdiction where the Committee that has certified the agreement is based) can instead be submitted only in case of violation of the procedure or abuse of power by the body that had issued the certification.
**Individual Conciliation**

**Compulsory conciliation attempt**
- For private labor relations is a condition for legal remedies
- Union: certain procedures in contracts and collective agreements
- Administrative: payable in front the Conciliation Commission at DPL
  - Subcommittees at the DPL are formed subcommittees consisting of 3 members
  - Subcommittees are trying to reach a conciliatory solution
  - non-appearance of parties or the lack of agreement are not penalized

**Monocratic conciliation**
- For public labor relations is a condition for legal action.
- Union: where under the contracts and collective agreements
- It takes place in front of DPL as a result of the request of the employee or the union that represents him
- Must take place within 60 days the date of filing the request
- Competent organ is the Conciliation Court composed of 3 members
- Takes effect only if the employer pays the amounts requested by the employee and the contributions

**Arbitration**
- In case of disciplinary action, the employee may appeal to the Board of Conciliation and arbitration
- Public Administration called within 30 days must draft a document setting out its defences
- Must take place within 90 days of the request for convening
- The court is composed of one representative from each party and a third member
- It takes place in front of DPL as a result of the request of the employee or the union that represents him
- If the company fails to comply within 10 days of the appointment of its representative, the penalty falls
B. COLLECTIVE CONCILIATION TOOLS.

1. Trade union consultation procedures with reference to the Wages Guarantee Fund (cassa integrazione guadagni. – CIG).

The Wages Guarantee Fund is a fund in support of factories in financial difficulties to protect worker’s income, by making up for the pay of employees. An enterprise that intends to benefit from the Wages Guarantee Fund must notify the corporate trade union representatives, or in lack of them, the most representatives workers’ trade organisations at the provincial level. Within 3 days since the notification, the employer or workers’ representatives must submit a joint company assessment request to the competent regional office, within the area where the enterprise is located.

The joint company assessment concerns the plan that the enterprise intends to implement, including the duration and number of workers concerned by lay-offs, as well the measures envisaged for the management of a few redundancy workers, the criteria to identify the employees to be laid off and the employed labour turnover among the various manufacturing units affected by dismissals. This trade union procedure must be completed within 25 days (10 days for enterprises up to 50 employees).

The aim of the trade union consultation is to reach an agreement on the implementation of the Wages Guarantee Fund. According to the rules and regulations now in place, the trade union should not really act as the workers’ representative but rather to protect the general workers’ best interests. Therefore, the trade union agreement has the same value as a court-related decision, whereas the employer’s lay-off decision is an expression of its unilateral power, even when the trade union agreement is fully implemented. Consultation procedures related to the Redundancy Fund are thus not aimed at the co-management of the corporate crisis but rather as a way to discourage the improper use of the employer’s power to put an end to employment relations.

2. Trade union consultation procedures with reference to collective layoffs.

In comparison with individual dismissals, collective lay-offs are especially significant, given the relevance of the phenomenon of redundancy workers in
the framework of a suitable corporate management, on the one hand, and
given the protection of individual, collective and public workers' best interests,
on the other hand.

Law no. 223 dated 1991 regulates the issue of redundancy workers, by
promoting co-operation between social partners, who can put forward
alternative solutions to lay-offs. Following any unsuccessful results of trade
union consultations, the law prescribes mobility allowances for redundant
workers placed on a preferential hiring scheme list, economic support for
unemployed workers, and measures to facilitate the reintegration of dismissed
workers into the labour market.

From this point of view, Law no. 223 dated 1991 that regulates the issue of
collective lay-offs adopts "procedural" and "participative" techniques, to
guarantee redundancy workers' best interests.

Collective lay-offs discipline is covered by art. 4, 5, and 24 of Law no.
223/1991: art. 24, connected to the previous norms, regulates collective lay-offs
as such; art. 4 and 5 regulate the so called Mobility allowances ("messa in
mobilità"): if the Redundancy Fund does not allow the company to re-establish
a good financial situation, the workers can be entitled to mobility allowances,
which are put in place by the employer, under a scheme of special Wages
Guarantee Fund, through redundant workers' dismissal and downsizing. In this
case, the shift from the adoption of the special Wages Guarantee Fund (CIGS)
scheme to collective dismissal shall take place.

The collective dismissal procedure takes place in two interconnected phases: a
trade union phase and an optional administrative phase.

The trade union phase opens with the preventive written notification to the
parties involved, identified by the legislator as eligible actors to carry out a
proper social control task (in order to assess the redundancy causes, and the
possibility to the reinstate redundant workers, also through Solidarity Contracts
or other flexible labour management solutions). The joint trade union-employer
investigation process takes place at the headquarters of the regional authority,
for layoffs within its territory, or at the Labour Ministry for other cases. It might
be requested by workers' representatives and by their respective associations
within 7 days since the receipt of the notification and it can be concluded either
with a successful agreement, which shall avoid dismissals, or with no
agreement. As a whole, consultation can last up to 45 days. Furthermore, it should be pointed out that, in case of agreement, Law no. 223/1991 envisages clauses which, derogating the general principles, may reallocate redundant workers to different tasks, also at a lower level, or temporarily transfer them to other manufacturing units.

Once the trade union consultation has been concluded, regardless of its outcome, the administrative phase will start. The employer shall notify the consultation outcome to the competent regional authority, or to the provincial authority delegated by it. If no agreement is reached after the notification by the company, a new negotiation round shall be launched between the parties and shall last up to 30 days, or up to 15 days if the company hires less than 10 workers. During this period, the competent office shall summon the parties to carry out a further investigation and to study new proposals to reach an agreement and to identify useful solutions for the reinstatement or reallocation of dismissed workers.

Once the administrative phase procedures are concluded, even though no agreement has been reached, the employer can legitimately serve a summons of employment termination on redundancy workers, to be chosen based on objective criteria, which can be negotiated and agreed upon during a trade union consultation or set by CCNL. If no specific criteria are set by the parties, the workers to be laid off shall be identified, based on the criteria set by art.5 law 223/91 (such as family burdens; technical and manufacturing needs; the length of service within the company), which shall be taken into account to guide the employer's decision.

3. Trade union consultation procedures with reference to company transfer.

The assumption of a company transfer occurs when in case of sale, rental, commodate, bailment or usufruct, the owner of the corporate assets changes. The Company Law takes into account company transfers to protect and reallocate workers. The continuity of the employment relationship is thus secured for workers, under the new ownership, thus strengthening the protection of credits that workers were entitled to upon the company transfer.
(based on the assumption that rights and duties would be transferred to the new employer).

To guarantee the protection of workers involved in a branch or company transfer, the legislator imposes both on the transferor and on the transferee the task to carry out the specific trade union consultation procedures envisaged by Law no. 428 dated 1998.

As a matter of fact, if the company transfer concerns enterprises with more than 15 employees, art. 47, Law no. 428/1990 (amended by art. 1, Legislative Decree no. 18/2001), a special procedure shall be envisaged, thus involving also workers' union organisations.

In this case, 25 days before the transfer, or transfer order, the transferor and the transferee must notify the company trade unions and the manufacturing units concerned by such a transfer as well as the trade unions that have entered the collective agreement applied to the enterprises being transferred. If no company trade union representatives exists, the notification should be served on the most representative trade union organizations existing within the local territory.

His procedure is aimed at enabling trade union organisations to ask the transferor and the transferee to start a joint investigation over the next seven days. This investigation has to take place within a seven day-long period following the receipt of the request.

As explicitly envisaged by the law, a failure to implement the above-mentioned consultation procedures shall be regarded as an anti-trade union conduct. As for the consequences on employment relations, various controversial opinions exist. As far as these issues are concerned, a few judges have claimed that the failure to implement the above-mentioned consultation procedure shall be regarded as nullifying the validity of the transfer transaction itself. According to other expert opinions, the failure to implement the above-mentioned consultation might nullify the validity of the individual workers’ transfer procedures, without affecting the validity of the transfer agreement itself. The court of cassation has in turn stated that the failure to implement the above-mentioned consultation procedure would only harm the trade union’s interests, thus legitimating it to declare the anti-trade conduct, but would not be a

Finally, it should be pointed out that the guarantees envisaged under art. 2112 civ. cod. do not apply in the event in which the transfer concerns enterprises having declared a state of financial crisis or bankruptcy, composition before bankruptcy, consequent assignment of property to creditors, compulsory winding up, temporary receivership, stoppage of production, cessation or discontinuance of business, or in case an agreement even for a partial protection of employment has been reached by the trade union.

In substance, in this event, unless the union agreement does not envisage any better conditions for workers, the workers transferred to the transferee shall not be entitled to the rights accrued during the previous employment relationship with the transferor, and the joint and several liability by the transferor and transferee does not apply to the credits accrued upon the transfer date.

The underlying reason is self-evident: faced with the case of the transfer of an enterprise in financial difficulties, exposed to the risk of bankruptcy, and at a high risk of loss of jobs, the legislator has decided to privilege the continuity of employment although to the detriment of the preservation of the rights accrued during the previous employment relationship with the transferor.

In substance, faced with the transfer of an insolvent enterprise and with the need to protect jobs, the law might envisage to accept worse workers’ conditions.

Consequently, the law acknowledges the lawfulness of agreements reached between the trade union and the transferee employer, thus relinquishing workers’ rights and benefits deriving from previous length of service.

The union agreement might also envisage the possibility that a few so-called redundant workers might still continue to work as employees for the transferor. The latter shall have a priority in the hiring of new staff by the transferee employer within one year since the date of transfer, or within the deadline that might be agreed upon by the trade unions.

4. Conciliation related to strike in essential public services.

Law no. 146 of 1990 for the first time regulated the issue of strike in so-called essential public services, namely those public services which, according to art.