COMPLAINING TO THE OMBUDSMAN – ALTERNATIVE DISPUTE RESOLUTION IN THE BRAZILIAN WORKPLACE

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ABSTRACT

This thesis discusses the adoption by Brazilian companies of Alternative Dispute Resolution (ADR) methods for individual workplace conflicts. Brazil is an interesting case to study ADR due to its high level of institutionalized individual workplace conflicts and its extensive workplace statutory regulation. Investigating the case of four Brazilian private companies of different sectors and sizes, I found that Brazilian companies are developing their own ADR practices, focusing on ombudsman offices, instead of using the mediation and arbitration methods that are predominant in the US. I argue that the adoption of the ombudsman can be explained by institutional and workplace level factors, which include the characteristics of Brazilian industrial relations system, each company's human resources strategy and the relationship between companies and unions. Furthermore, I discuss how the usage rate of the ombudsman offices might vary according to the ombudsman office's internal structure and its functioning rules.

BIOGRAPHICAL SKETCH

Paulo Marzionna earned a Law degree in 2006 from University of São Paulo (USP), and a Master's in Business Administration in 2009 from Fundação Getúlio Vargas (FGV – EAESP), both in Brazil. Before joining the Cornell ILR MS/PhD Program in 2012, Paulo worked as an Employment Lawyer and as a Human Resources Business Partner in Brazil.

To Bárbara

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TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

LIST OF ABBREVIATIONS

ADR – Alternative Dispute Resolution
CBA - Collective Bargaining Agreements
CCP - Preliminary Conciliation Commission *(Comissão de Conciliação Prévia)*
CCP – Previous Conciliation Commission (*Comissão de Conciliação Prévia*)
CLT – Consolidation of Labor and Employment Laws (*Consolidação das Leis do Trabalho*)
CNJ – National Council of Justice (*Conselho Nacional de Justiça*)
CSJT - Superior Council of the Labor Courts (*Conselho Superior da Justiça do Trabalho*)
HPWS – High Performance Work Systems
HR – Human Resources
IBP - Integrative Business Partners
STF - Supreme Court (*Supremo Tribunal Federal*)
STJ - Superior Court of Justice (*Superior Tribunal de Justiça*)
TRT - Regional Labor Courts (*Tribunal Regional do Trabalho*)
TST - Superior Labor Court (*Tribunal Superior do Trabalho*)

CHAPTER 1 - INTRODUCTION

Every year, Brazilian workers file 2.3 million new lawsuits to the Brazilian Employment Courts (CESTP 2015). This staggering number leads to complaints against employment courts[1] from both employees and employers about its speed, cost, and effectiveness (Paroski 2009; Raboni 2013; OAB 2010; Folha 2010). Similar litigation pressure, combined with union substitution and human resources strategies, were in the origin of a movement towards adoption of alternative dispute resolution (ADR) methods for workplace conflicts in the US (Colvin 2003a; Lipsky et al. 2003; Colvin 2003b; Colvin 2013; Feuille & Delaney 1992; Olson-Buchanan 1996). ADR in this case should be understood as a wide variety of dispute resolution methods, including arbitration, mediation, grievance procedures, peer-review panels, and ombudsman offices, among others. In all cases, those methods are considered *alternatives* to what might be considered the *traditional* dispute resolution methods, which include litigation and union grievance procedures.

In Brazil, a similar scenario of litigation pressure led to increasing adoption of private arbitration for commercial conflicts between companies, which was supported by courts, lawyers and arbitration bodies (Valverde 2006; Amaral *n.d.*; Lemes 2014). In the employment field, however, organized attempts to promote private ADR, such as the Previous Conciliation Commissions (CCPs, as per the acronym in Portuguese), failed in the 2000s, due to courts, lawyers, and unions' resistance. Despite such strong resistance, the use of ADR for workplace conflicts was not completely abandoned in Brazil. Incentivized by superior courts and by a 2010 resolution of the National Council of Justice (CNJ, as per the acronym in Portuguese), court-connected mediation programs have developed significantly in Brazilian employment courts for

[1] In this thesis I use the terms Employment Courts and Labor Courts interchangeably to refer to what in Brazil is known as *Justiça do Trabalho*.

the past years (CNJ 2015). But are those court-connected programs a good enough response to employers' complaints about Brazilian employment litigation system? Or, influenced by foreign practices and successful strategies from other law fields, are Brazilian companies promoting other forms of workplace ADR?

Considering this scenario, in this thesis I propose to answer the following research questions:

1) How are Brazilian companies using ADR to solve individual workplace conflicts outside employment courts?

2) How do ADR theories developed under the US setting hold up in a different national context?

In order to answer these questions, I have conducted case studies in four Brazilian companies of different sizes and sectors, identifying how workplace conflicts are treated outside the realm of the employment courts. The cases suggest that Brazilian companies tend to adopt some form of in-house ADR for workplace conflicts, mainly when facing higher threats of litigation. However, the resistance of the employment courts towards private arbitration and private mediation, in conjunction with institutional pressures and human resources strategies, led companies in different sectors, and with different levels of workplace conflicts, to adopt some form of an Organizational Ombudsman solution.

The International Ombudsman Association defines an Organizational Ombudsman as "an individual who serves as a designated neutral within a specific organization and provides conflict resolution and problem-solving services to members of the organization (internal ombudsman) and/or for clients or customers of the organization (external ombudsman)" (IOA). Moreover, Organizational Ombudsmen are usually described by the principles of independence, neutrality,

confidentiality, and informality, and their work usually covers "communications and outreach; issue resolution, and identification of areas for systematic change; and issue prevention" (Howard 2010). Despite this general definition, it is noteworthy that Organizational Ombudsmen vary significantly in relation to their activities and responsibilities depending on their company and country (Rowe and Gadlin 2014).

Given that the option for an Organizational Ombudsman is not the most used solution for workplace conflicts in the US (Lipsky et al. 2003), the observance of multiple cases of adoption of Organizational Ombudsman by Brazilian companies leads to the proposal of another research question:

3) Why are Brazilian companies adopting Organizational Ombudsmen instead of other ADR methods to deal with individual workplace conflicts?

Looking specifically at these Brazilian case studies, although the Ombudsman Offices[2] present some similar characteristics in those different companies, the usage rates and results obtained by the Ombudsman Offices in each company seems to be influenced by internal characteristics of the companies and the role and position of the unions towards the ombudsman and workplace conflicts in general. With this in mind I propose a final research question to be answered in this thesis:

4) What determines the usage and importance level of Organizational Ombudsmen in different companies in Brazil?

Figure 1 presents a schematic model of this thesis main argument, which will be developed in the next chapters. In Chapter 2 I present a literature review on the development of ADR for workplace conflicts in the United States and the main research on the area outside the

[2] In this thesis I use the terms Organizational Ombudsmen, Ombudsman Offices and Ombudsman Programs interchangeably. When using only the term *Ombudsman* I am referring to the Director of the Ombudsman Office, or the equivalent position in each company.

US. Chapter 3 brings an overview of Brazilian labor relations and legal system, in order to ensure a proper understanding of the following chapters. Methodology is described in Chapter 4. Chapter 5, 6, 7 and 8 provide in depth description and analysis of each of the four companies studied. In Chapter 9, I develop a comparative analysis of the four cases. An overall conclusion is presented in Chapter 10.

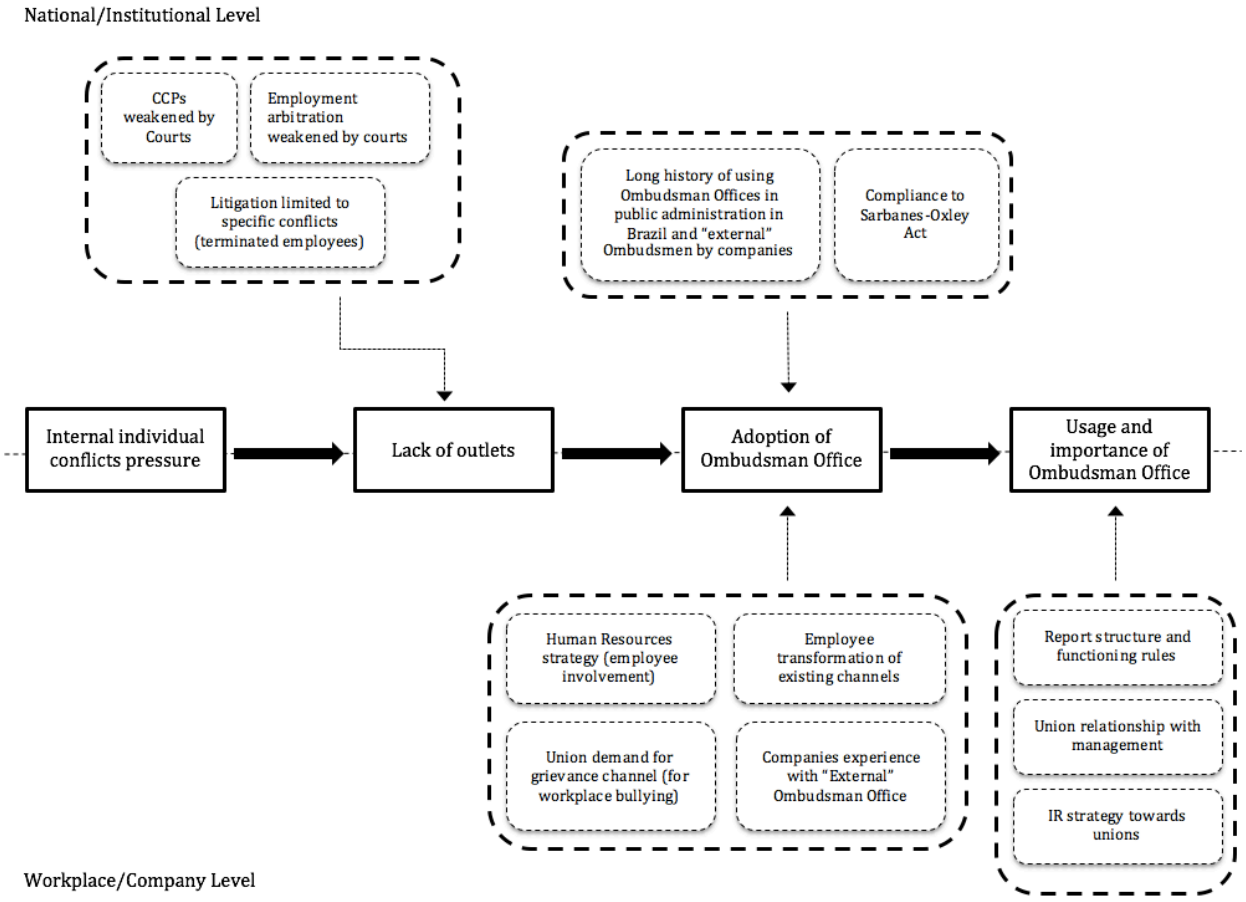

Figure 1 - Main Argument Schematic Model

CHAPTER 2 - LITERATURE REVIEW

Workplace Conflict

Before starting any discussion over conflict management and dispute resolution methods, it is essential to first define what should be understood as conflict. Although it is recognized that different models of conflict give origin to different conflict management strategies (Budd and Colvin 2014), most research in the conflict management field seems to assume the existence of a common definition of conflict, from which conflict management can be discussed. For the purpose of this study, conflict is not limited to industrial conflict (i.e., "Collective aggressive action by employees in opposition to their employers" (Wheeler 1985)). In this research, I look at conflicts in the workplace involving workers (not necessarily employees from a legal standpoint) and their managers (or employers). By conflict I understand not only those divergences that can be formalized in the form of a grievance or a lawsuit, but any disagreement among workers, or between workers and management, over formal written rules as well as informal rules or expectations over behavior in the workplace. This might include conflicts over interpretation of the law governing the workplace or its application, as well as what is known in organizational behavior literature as relationship[3] and task conflicts[4]. By using this broad definition of workplace conflict, my goal is to capture workplace conflicts occurring in the Brazilian environment, which would otherwise be ignored if using a definition of conflict made to fit a different institutional setting (i.e., the US labor relations environment).

Moreover, it is worth mentioning the four main frames of references on conflict in organizations, as presented by Budd and Colvin (2014): neoliberal egoist, critical, unitarist and

[3] "interpersonal incompatibilities among group members, which typically includes tension, animosity, and annoyance among members within a group" (Jehn 1995:258)
[4] "disagreements among group members about the content of the tasks being performed, including differences in viewpoints, ideas, and opinions" (Jehn 1995:258)

pluralist. Understanding these frames is important, because different views on conflict lead to different preferred methods of conflict management, which is ultimately our main interest in this research.

In the neoliberal egoist framework, conflict plays a secondary role in the workplace, since all the actors interacting in a work relationship are believed to have free choice, and the market would resolve any rising conflict. On an extreme version of this framework, the market would be the only conflict management system. In the critical framework, conflict and power are in the center of the model. Employee-employer conflicts are the result of power imbalances, which are socially embedded, and each party of the employment relationship has antagonistic interests. The unitarist frame, by contrast, assumes that employees and employers have shared interests, and conflicts are interpersonal or merely the result of a dysfunctional organization. Finally, the pluralist view integrates the unitarist and critical framework, by indicating the existence of some shared interests and some conflicting interests among employees and employers (Budd and Colvin 2014).

As described above, different perspectives on conflict in the workplace lead to different approaches to conflict management. For instance, whereas a neoliberal perspective would minimize the importance of any formal conflict management system (the market solves conflicts in the most efficient way), a unitarist view would lead to the adoption of human resources (HR) policies focusing on aligning employers and employees' interests.

In the next section, I present a general overview of the current research on workplace conflict management in the US, which will constitute as the initial framework to analyze the current status of workplace dispute resolution in the Brazilian institutional settings.

Conflict Management and Dispute Resolution

Research in the US

Using the US as the departure point of the analysis, collective bargaining and grievance procedures (usually ending in labor arbitration) traditionally were the main formal methods of dispute resolution in unionized workplaces. In the last five decades, however, notably after the enactment of the Civil Rights Act of 1964, workplace conflicts in US have shifted away from collective labor relations towards individual litigation (Estlund 2014).

As Estlund (2014) explains, although collective bargaining and litigation are opposite approaches to workplace conflict in several aspects (e.g., origin from bottom-up mobilization vs. top-down legislative enactments; privatized system of dispute resolution vs. public and judicial system of dispute resolution), they also have several points in common. For instance, employers develop strategies to avoid both (union avoidance and litigation avoidance strategies) and the two models serve as a mechanism of conflict resolution and as a catalyst of new conflicts.

The first parallel presented above (avoidance strategies) lead the analysis to the rise of another important form of workplace dispute resolution: the methods that came to be known as Alternative Dispute Resolution (ADR), which include techniques such as mediation, arbitration, ombudsman, and peer review panels. The rise of ADR in the US and avoidance strategies are connected, because union avoidance and litigation avoidance are believed to be two of the main triggers for company's adoption of ADR. Alignment with HR practices in High Performance Work Systems (HPWS) [5] is also seen as an ADR trigger, and, as explained above, this would be

[5] HPWS are characterized by the presence of some of the following practices: self-managed work teams, high levels of ongoing training, higher wage levels, employment stabilization, less hierarchical layers, and flexible and contingent system of compensation (Appelbaum 2000; Batt 2002).

the reflex of a unitarist or pluralist approach to workplace conflicts (Colvin 2003a; Lipsky & Avgar 2008; Rowe 1997).

Litigation Avoidance

Litigation avoidance is pointed out as the first motive to explain expansion of nonunion ADR in the US. The American legal system has been characterized by sparse regulation of the individual employment relations, generally marked by the employment-at-will rule. Although some regulations in other areas were enacted (e.g., OSHA and FMLA), no statute had such an impact in the levels of employment litigation as the Civil Rights Act of 1964.

Although it is debatable the statement that employment-at-will is not the current rule in US anymore, due to the high amount of exceptions to it (Ballam 2000; Massingale 1989), it is undeniable that employment litigation gained in importance after the Civil Rights Act. Whether the risk is real or it was overstated by professionals (Dobbin & Kelly 2007), litigation avoidance can explain part of the expansion of nonunion ADR.

The risk, costs, and uncertainties involved in employment litigation may help to explain management effort to change the forum of the litigation from the public to the private sphere, thus explaining the adoption of employment arbitration as an alternative to employment litigation. Despite the critiques to the employment arbitration (Stone 1995), the Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20* (U.S. 1991) also played an important role in boosting the adoption of employment arbitration. It is important to note that courts played an important role not only in the expansion of employment arbitration, but also in the expansion of nonunion grievance procedures (Edelman 1990).

Although there is evidence that litigation avoidance is associated with the adoption of employment arbitration (Colvin 2003a), and arbitration (along with mediation) was adopted by

the majority of the Fortune 1000 companies (Lipsky et al. 2003), the threat and the costs related to employment litigation can only partially explain adoption of ADR in the American workplace.

Union Avoidance

The threat of unionization may help further explain the raise of ADR in nonunion workplaces in the US. Being the grievance procedure one of the main characteristics of unionized workplaces in the US, nonunion grievance procedures could work as a tool to substitute union, thus weakening any eventual desire of employees in a certain workplace to unionize. In fact, union avoidance has been found to be associated with the adoption of specific ADR methods, such as peer review (Colvin 2003b), which could work as a voice mechanism to workers, similar to what a union can provide.

However, the influence of unions or of the unionization threat on the adoption of ADR in the workplace is not as simple as it seems. On the one hand, unionization does not seem to be a real threat for most companies. On the other hand, employers may adopt ADR as a complement to collective bargain for its own nonunion employees (Avgar et al. 2013). In both cases, adoption of ADR would be a part of the employer's strategy, dependent on management's goals and relationship with unionism (Avgar et al. 2013).

This view of ADR as part of the employer's strategy about unionism leads to the third widely accepted trigger for the expansion of ADR (i.e. human resources strategy), which will look not only at external pressures (litigation and unionization risks), but also at the company's internal factors, as well as the business overall strategy.

Human Resources Strategy

In traditional firms with low wage patterns (Katz & Darbishire 2000), which are marked by high turnover rates, adoption of ADR can be explained by a pursuit to diminish the costs involved in conflict resolution (litigation avoidance) or by the loss of managerial control over conflict resolution (unionization avoidance). However, companies adopting practices related to HPWS may adopt more complex conflict management systems pursuing other goals aligned with the business and HR strategy.

Companies operating under the HPWS not only may see new forms of conflicts arising due to the transformation of the workplace relations, but also may use ADR (or more specifically, conflict management systems) to achieve other goals such as greater involvement and commitment of workers in the workplace (Colvin 2003b; Colvin 2013; Feuille and Delaney 1992; Olson-Buchanan 1996).

Therefore, HPWS may help explain the raise of complex conflict management systems which aim at enhancing voice experience, thus trying to diminish exit from employees (Freeman and Medoff 1984). This goal is extremely important in a workplace that must have lower turnover rates, since hiring, training and firing are costlier than in firms that follow a low wage pattern (Katz & Darbishire 2000). Hence, it is not a surprise that organizations with team-based work are more likely to adopt innovative conflict management system (Colvin 2004). Moreover, high levels of employee involvement are associated with less workplace conflict and lower rates of dispute resolution activity. Nevertheless, this does not necessarily mean that it is a result of greater perception of fairness of management decisions, as employees may also be afraid of their image before their peers for filing a grievance in a team based organization (Colvin 2013).

This brief overview of the literature on ADR in the American workplace indicates that decisions on how to approach workplace conflicts are strongly connected to the context in which those conflicts take place. For instance, if initially dispute resolution moved away from the collective sphere towards the individual realm of litigation, the risk, costs and uncertainties involved in employment litigation led to a further shift of the individual conflicts from the public to the private sphere, explaining the adoption of employment arbitration as an alternative to employment litigation (Colvin 2003a). Likewise, the way in which conflicts were traditionally resolved in unionized workplaces, along with how American management sees the presence of unions, also helps to explain the rise of certain ADR techniques (e.g., peer review panels) in connection to other union avoidance strategies (Colvin, 2003b). Finally, companies operating under HPWS might see new forms of conflicts arising due to the transformation of the workplace relations, and might also use ADR to achieve goals such as greater involvement and commitment of workers in the workplace (Colvin 2003b; Colvin 2013; Feuille and Delaney 1992; Olson-Buchanan 1996).

The previous paragraphs indicate that the adoption of certain ADR methods in the US is a phenomenon strongly related to the context in which it takes place. Expanding this understanding to an international perspective, if the adoption of employment arbitration in the US is connected to the risk, costs and uncertainties involved in litigation, one would not expect to find significant space for this form of ADR in a country where the risks involved in litigation are not similar. Likewise, if peer review panels and nonunion grievance procedures are directly related to union avoidance strategies and the traditional grievance system in unionized workplaces, the same ADR methods would probably manifest differently in countries where a more coordinated or

harmonious relationship between employers and unions would be expected, or in countries where grievance systems are inexistent in unionized workplace.

With this in mind, in the next section I briefly review the current state of the literature about ADR outside the US.

Research in Other Countries

Although the research in ADR in the American workplace is substantial, research in workplace dispute resolution in other countries is still incipient, and it tends to be mostly descriptive, listing the existing methods of dispute resolution in the studied country.

Benson's (2012) work on Japan is exemplary. Japan's traditional dispute resolution system was based on enterprise level collective bargaining and the integration of employees into the company's decision-making process. This system, presented as the Japanese traditional dispute resolution system, was based on enterprise unions, strong internal labor market, and *de facto* lifetime employment. With the crisis experienced by Japanese economy during the 1990s and the consequent reorganization of Japanese business environment, the traditional dispute resolution forms were abandoned in favor of a system focused on the individualization of workplace disputes through the introduction of a labor tribunal system, whose decisions are not legally binding before it goes through the civil court system (Benson 2012).[6] The Labor Tribunal System is characterized by its *expeditiousness* (complaints must be solved in three to four months, and mediation is always attempted), *expertise* (besides the professional judge, each case is also analyzed by two lay judges with specialized expertise), and *elasticity* (the tribunal has

[6] In this case the use of the term Alternative Dispute Resolution is debatable. In most cases, the use of state led tribunal system (whether administrative or judicial) would not be considered an alternative dispute resolution method. This brings to the surface the question that whenever the term ADR is used, one must have clear which are the traditional dispute resolution methods to which the new method is an **alternative to**. This is even more relevant in comparative studies, as researchers must be sure to be comparing "apples to apples."

wide discretion to resolve the disputes) (Araki 2013). Although grievance procedures exist in some Japanese companies, they are barely used by employees (Yamakawa 2012).

Whereas in the Japanese case the rise of ADR is connected to the economic crisis experienced by the country in the 1990s, the Chinese case is directly related to the market-oriented reforms of the last decades. Despite those differences, the result is similar, with the end of a system based on lifetime employment and informal dispute resolution systems, and the rise of individualized adversarial relationships, followed by new models of dispute resolution (mediation, arbitration, and court trials) that coexist with the informal methods in the workplace. Dispute resolution methods internal to companies include mediation, consultation, and other employer initiated voice mechanisms, such as suggestion boxes and employee hotlines. The inefficiency of those internal methods led to the development of dispute resolution systems external to the companies and under a closer relationship to Chinese government. These external systems include industry-based mediation, which is followed by arbitration, and finally, litigation (Liu 2014).

In New Zealand, employment disputes are concentrated in specialized government bodies, which involve a first step of mediation, followed by adjudication by the Employment Relations Authority and, finally, the Employment Courts, whose decision may be appealed to the general court system. It is worth noticing that New Zealand also experienced a process of individualization of labor dispute in the 1970s – until then the Employment Courts dealt only with collective disputes. Since the Employment Relations Act of 2000, mediation has gained importance as the main ADR method in the country, offered through the department of labor mediation services. Although private arbitration and mediation are lawful, they are barely used

due to the existence of publicly funded employment mediation and adjudication bodies (Roth 2013).

Australia is another case of recent individualization of employment disputes. Although historically characterized by the use of compulsory conciliation and arbitration for solving collective labor disputes, a series of recent reforms in the Australian system led to a concentration of individual grievances in the industrial tribunal system. Given the relatively informal nature of the processes in the industrial tribunals, private ADR providers remained underdeveloped in relation to workplace dispute resolution. Laws that encouraged the adoption of private ADR were enacted in 1996 and 2006, but both were short lived, being unable to cause any effect on the overall structure of workplace dispute resolution. In general, the adoption of private ADR methods in Australia seems limited to informal in-company mediation procedures (McCallum et al. 2013).

Those above are just a few examples of the current status of workplace dispute resolution in Asia and Oceania. Purcell (2010) provides a comprehensive overview of the adoption of ADR in European countries for individual workplace conflicts. Although there is a clear movement in search of new forms to solve individual workplace conflict (15 European countries have introduced new laws or procedures between 2000 and 2010 to provide alternatives to employment litigation), a clear picture of the current status of the actual usage of ADR in Europe is not available, due to the lack of substantive data for most countries. Moreover, whereas some countries rely mostly in court-connected ADR, as in France (Clarke et al. 2012), and others rely mostly on non-judicial ADR due to their long history of social partnership (e.g., Austria, Denmark, Germany, and Sweden), some countries use both types of ADR (e.g., Ireland, Italy, Luxembourg, and UK) (Purcell 2010).

This brief literature review is far from being comprehensive regarding the existing literature on workplace dispute resolution outside the US. But this small sample of papers is important to reinforce two different points that I have made earlier: (a) the transformation of dispute resolution methods in the workplace is not a phenomenon exclusive to the US, and (b) local context plays an important role in determining the development of dispute resolution system in different countries. For instance, if in the US union avoidance helps to explain the development of nonunion grievance procedures, in other countries in which the state plays a more active role in industrial relations, as in China, dispute resolution systems were developed externally to the companies, and under a closer relationship to the government.

With this in mind, this study tries to contribute to the existing ADR literature in different ways. Firstly, by analyzing how Brazilian companies are dealing with workplace conflicts, this study expands the research on ADR in different national contexts, adding to the knowledge on ADR in civil law countries, where research is still limited. Moreover, for scholars interested in Brazilian labor relations, this research points to other levels and playfields in which Brazilian managers and employees are dealing with workplace conflicts. Finally, the research can point to alternatives not currently considered by practitioners in the US or in other countries, which could be adapted after considering the peculiarities of the Brazilian context. However, in order to fully comprehend how Brazilian companies are dealing with workplace conflicts, it is first necessary to understand Brazilian labor relations system, which will be explained in the next chapter.

CHAPTER 3 - BRAZILIAN INDUSTRIAL RELATIONS ENVIRONMENT

General Overview

The Brazilian Industrial Relations system has its origins in the 1930's under the Vargas dictatorship, inspired by the corporatist system of the Italian *Carta del Lavoro*, enacted during Mussolini's fascist regime[7]. The original industrial relations system was based on the complete control of the state over all labor relevant labor topics and actors, including unions (Nascimento 2008; Pinto 2007).

It is clear that in its origins, the Brazilian industrial relations system focused on the empowerment of the state to reduce class conflict. In that sense, (1) workers' interests were coopted by the state through abounding labor legislation and regulation of workplace relations, (2) unions were dominated by the state, therefore moderating labor movement demands, (3) collective bargaining was discouraged, and (4) labor courts were raised to central role in the solution of labor conflicts (Delboni 2009).

Although the system has gone through some transformation in the last decades, mostly after the redemocratization process of 1980's, the core of the labor and employment legislation in Brazil remains the same, albeit with lesser state intervention on the organization, recognition and administration of unions. The Consolidation of Labor and Employment Laws (*CLT - Consolidação das Leis do Trabalho*), enacted in 1943 and which consolidated a series of labor legislation in place since the 1930s, is still the main labor legislation in Brazil, maintaining defining characteristics of Brazilian union system (e.g., *unicidade sindical* and mandatory union dues), employment system (e.g., great amount of employee's minimum rights defined in law), and dispute resolution system (e.g., the existence of a specialized Labor and Employment Court).

[7] For a discussion over the correctness of the claims that Brazilian labor and employment law system is a copy of the fascist Italian model see French (2004).

In the next pages, I provide a brief overview of the Brazilian industrial relations system. This overview is far from being exhaustive, but aims to provide the minimum information necessary to understand the case studies presented later.

The Union System

Brazilian union system is defined not only by the CLT and other statutes, but also by the Brazilian Constitution of 1988. The Constitution prohibits the former requirement of state authorization to the creation of a union or state intervention in unions, guarantees freedom of association[8], makes union's participation in collective bargaining mandatory, guarantees the right to strike, and guarantees employment protection for union directors. Most important, the Constitution maintains the system of *unicidade sindical*, present since the enactment of the CLT in 1943. In this system, only one union can exist in the same territorial base (no smaller than a municipality) to represent a professional and economic category. This means that workers of the same sector, in the same city, will always be represented by the same union.

Besides the Constitution, it is also necessary to look at the legal provisions of the CLT and other statutes, which define the overall structure of Brazilian union system. Brazilian unions are organized under a system of professional and economic categories. This means that in most cases a Brazilian employee will be represented by the union that represents the category correspondent to his/her employer's main activity. For instance, an employee in the Banking sector will be represented by the local Union of Workers in the Banking Sector, no matter the activity exercised by him/her in the company[9]. Moreover, unions represent all workers of the sector in their territorial base, no matter if they are unionized or not. This is also the case for collective bargaining coverage. Taking the banking sector as an example, a bank employee who

[8] Both positive (i.e. freedom to join a union) and negative (i.e. freedom to not join a union).

[9] The only exceptions are special professional categories, such as secretaries, drivers, and elevator operators, among others, who might be represented by their specific unions, and covered by their collective bargaining agreement, as long as the employer was also represented in the negotiation.

is not a member of the union will be covered by the collective bargaining agreement, as long as he was represented by his union in the collective bargaining process, and his employer took part or was also represented by the employer's association in the collective bargaining process. It is worth noting that most of collective bargaining in Brazil takes place in the sectorial level (although not always nationally, but usually in the municipal level), rather than in the company or plant level[10]. Collective Bargaining Agreements (CBA) are valid for a maximum period of 2 years, and if the parties fail to reach an agreement they can opt for private arbitration or ask the labor court to decide on the terms of the new CBA (*Dissídio Coletivo de Natureza Econômica*)[11]. It is also noteworthy that all employees must pay one day of their salary per year as union dues (*contribuição sindical*), no matter if unionized or not. This amount is divided between unions, federations, confederations, and *centrais sindicais*, and it also contributes to the government fund used for unemployment insurance and other employment benefits (*Fundo de Amparo ao Trabalhador*). In 2011, Brazilian unionization rate was of 17.2% (IBGE 2013). Information about collective bargaining coverage is hard to obtain, but it is definitely superior to the reported unionization rate. Visser (2015) reports a coverage rate of 35% for 2008. ILO numbers from 2006 suggest 60% (Hayter and Stoevska 2011). The differences are attributed to the informal sector (not covered by CBAs), which are taken into consideration by Visser, but not by the ILO data. In both cases, however, the data confirms that collective bargaining coverage is superior to the unionization rate in Brazil. It is also worth noticing that due to the existence of the *unicidade sindical* and the *contribuição sindical*, an unknown number of Brazilian unions might be considered only formal organizations, known in Brazil as "stamp unions" (*sindicatos de*

[10] Company level negotiations are observable at some sectors, usually involving bigger companies, and usually covers only some company-specific issues, such as a company specific profit sharing scheme or benefits package. Just as the employment law sets the minimum standard, which can only be improved by collective bargaining, company level collective agreements will also respect the minimum standards set by the sectorial-level agreement.

[11] Until 2004, there was no need for both parties agreement to use the labor courts to decide over the terms of the new CBA. The Constitutional Amendment 45 of 2004 created the requirement of the agreement between union and employer to take the case to the labor courts for a *Dissídio Coletivo de Natureza Econômica*).

carimbo). They receive this name as they dedicate themselves only to formal and bureaucratic activities, in order to continue receiving the money from the *contribuição sindical*. In these cases, they are not necessarily representative of the worker's interests, being in some circumstances dominated by particular individuals or by the employers.

In the previous chapter, it was discussed that union avoidance and union substitution might have worked as triggers for ADR adoption in the US. Given the union system just described, the concept of union avoidance or substitution in Brazil must be interpreted differently. Considering that union representation in the workplace is not directly related to union density, and that collective bargaining coverage is not directly related to union membership, it is unlikely that US-like union avoidance and union substitution strategies could be reproduced in the Brazilian environment with similar effects. However, although union substitution tactics might not generate a union free workplace (an unknown concept for Brazilian industrial relations), it might impact on union power or union influence in the workplace.

Employment Law

A wide array of individual labor rights (or employment rights) is guaranteed to employees in Brazil by the Constitution, the CLT, and other statutes. CBAs and individual employment contracts can also be a source of employment rights, as long as their conditions are more beneficial to the employee than the ones in the existing statutes.

Article 7 of the Constitution brings a list of 34 rights guaranteed to all employees[12], such as: unemployment insurance; minimum wage; irreducibility of wages; a thirteenth-month salary; additional payment for night work; work time limits of 8 hours per day, and 44 hours per week; overtime pay rate at least 50% higher than the normal pay rate; paid weekly rest; an annual paid vacation, at a rate at least one-third higher than normal pay; maternity leave; advance notice of

[12] Domestic workers had limited rights in some cases, although a recent constitutional amendment extended most rights to them (EC 72/2013).

dismissal; additional remuneration for strenuous, unhealthy or dangerous work; etc. This list of employment rights, which is not exhaustive, is further detailed and expanded by the *CLT* and other statutes. For instance, the CLT defines: the minimum duration for the lunch break and for the interval between two workdays; how to calculate total work hours for night work; the duration of the annual vacations and how it can be divided by the employer; the procedure to be adopted in the termination of the employment contract and the amounts owe as severance package; cases in which it is possible to terminate an employee for cause (and therefore diminishing the amounts that must be paid to the terminated employee); among other rights, including rights applicable to only specific professional categories[13].

The list above is just a small sample of employment rights guaranteed to all employees. Although the level of compliance to this comprehensive employment legislation is debatable, this extensive statutory employment protection will have a direct impact on the use of litigation or other available forms of enforcing employment legislation, as it will be discussed in the next sections.

Before moving to the issue of law enforcement and litigation, it is worth bringing to attention the rules regarding termination in Brazil. As a general rule, Brazilian employers may fire their employees without any cause, albeit the law determines some form of notice and severance pay. The minimum notice is of 30 days, up to 90 days depending on the employee tenure at the company. The company might opt to pay the equivalent amount of workdays in money, instead of demanding the employee to work for the determined legal period. In terms of severance payment, the company must pay to the employee a penalty of 40% over the amounts deposited by the company to the *FGTS - Fundo de Garantia do Tempo de Serviço* (a mandatory

[13] For instance, Art. 224 of CLT defines a special 6 hours workday for employees in the banking sector.

government managed severance payment fund[14]). Brazilian legislation also determines very specific cases in which the employer might terminate the employee with cause (*rescisão por justa causa*)[15]. In this case, the employee is not entitled to notice or any severance payment. There are also some special cases where the law provides employment protection to the employee (e.g., union director - from the candidacy up to one year after the direction term; employee representative in the Internal Commission of Accidents' Prevention - from the candidacy up to one year after the direction term; pregnant employee - until 5 months after the birth of the child). In those cases, the employee might only be terminated with cause. Finally, it is worth noticing that it is not usual for employees to have employment protection granted by CBAs.

Employment Litigation System

The large amount of employment rights guaranteed by Brazilian laws, and the historic difference between the law as written and the law as enforced (French 2004), makes conflicts over employment conditions common in Brazil. Historically, litigation has been the main form to solve individual employment conflicts, via the specialized labor courts. Brazilian labor courts just became a specialized arm of the judiciary branch after the end of the Vargas' dictatorship, with the 1946 Constitution. Under this model, the labor courts would work under the Supreme Court in three different levels, all of them with a tripartite formation. Hence, in the lower courts (*Juntas de Conciliação e Julgamento*) the cases would be judged by one professional judge, one representative of the employers, and one representative of the employees. In the Regional Labor Courts of Appeals (*Tribunais Regionais do Trabalho - TRTs*) and in the Superior Labor Court (*Tribunal Superior do Trabalho - TST*), employees' and employers' representatives would also

[14] Employers deposit per month 8% of the employee monthly wage to this fund, which results, basically in a severance pay of 1 monthly salary per year worked. There are other legal situations in which the amount deposited in the *FGTS* might be withdrawn, such as retirement, death, etc.
[15] CLT, art. 482.

take part in the decision process, together with professional judges. In the superior courts, however, there would be proportionally more professional than lay judges (de Abreu 2005).

This model was abandoned only in 1999, with the Constitutional Amendment 24. The role of the lay judges was eliminated under the justification that this tripartite model was not adequate for a modern and solid labor court system under the judiciary branch. According to the justification of the Amendment Proposal, "*we cannot conceive a modern judiciary, in which the judges' freedom and impartiality are fundamental, whose members should divide their responsibilities, issuing decisions with the participation of the interested parties. This is an anachronistic and anomalous situation. It was comprehensible during the early years of the labor courts. There is no doubt that the lay judge (...) became a strange body within the current system of labor courts."* News articles of that time reveal that in reality, the expenses with lay judges and tripartite bodies were the main concern of the Congress[16].

The last major reform involving the labor courts in Brazil was the one provided by the Constitutional Amendment 45/2004, focused on enhancing access to justice and the efficiency of the judiciary branch. During the 12 years in which the Amendment Proposal was in the Congress, the existence of a specialized labor arm of the judiciary branch came close to an end, although in its final approved version it ended up expanding the jurisdiction of the labor courts as a part of a bigger judiciary reform.

The possibility of ending with the specialized labor courts, which would be incorporated by the general system of federal courts, was highly criticized by labor lawyers and the Association of Labor Judges (*ANAMATRA*), who saw in the extension of a specialized court a menace to effectiveness of labor law enforcement (Paiva 2012).

[16] It is worth noting that the Workers' Party, the main opposition party at that time, also voted in favor of the extinction of the lay judge role and the tripartite model (Diário do Grande ABC 1999).

After the Constitutional Amendment 45/2004 the labor courts' jurisdiction encompasses all individual and collective claims originated in "working relationships," and not only from employment contracts.

The labor courts are organized in three levels. The Lower Courts (*Varas do Trabalho*) are composed by a single professional judge, the 24 Regional Labor Court of Appeals (*Tribunais Regionais do Trabalho*) are composed by at least 7 professional judges, and the Superior Labor Court (*Tribunal Superior do Trabalho*) is composed by 27 professional judges. In order to be a judge in the lower courts, the requirements are the same for labor and general courts: the candidate must be approved and ranked in a public exam, and he must have at least 3 years of experience in legal professions. The CLT states that the judges in all levels must make efforts to conciliate the parties, and that the parties may decide to settle at any time. If a settlement is reached and ratified by the judge, the agreement is binding and enforceable. The plaintiff may act *pro se* or be represented by a lawyer or the union[17]. After the filing of the claim, there is no legal time limit for the scheduling of the initial hearing.

In theory, all the procedural acts should be concentrated in one single hearing session, which is initiated with an attempt to conciliate the parties. If the parties do not settle, the defense will be presented in the hearing, which will also encompass the discovery stage. In the discovery hearings, each party may present up to three witnesses. The final decision should also be issued in the same hearing session. If at any moment it becomes necessary to separate the hearings (conciliatory, discovery, and decision sessions), the judge can do it, scheduling the next hearing to the next available day in the labor court.

[17] Although there is no precise data, it is known that *pro se* cases are observed very rarely in labor courts, even facing opposition of labor judges if there is evidence that acting *pro se* might be significantly prejudicial to the plaintiff/employee. Moreover, the majority of lawsuits are filed by attorneys not connected to specific labor unions, as not all unions might have the necessary infrastructure to offer these legal services.

Cases that discuss amounts below 40 minimum monthly wages[18] follow a simpler procedure. In this procedure the initial hearing must be scheduled at maximum 15 days after the filing of the labor claim, the discovery procedure is simpler (limit of 2 witnesses per party), and if the hearing must be delayed for any reason, the new hearing session must be scheduled no later than 30 days after the original hearing.

All final decisions of the lower courts can be appealed within 8 days. In the court of appeals, a panel of professional judges makes the decision. In specific cases, the parties can appeal from the decisions of the Regional Labor Court of Appeals to the Superior Labor Court, where the decision will also be made by professional judges. After the decision of Superior Labor Court, a last appeal to the Supreme Court (*Supremo Tribunal Federal*) might also be possible.

Regarding the court costs or *custas processuais* (i.e. administrative costs related to the court functioning), the loser party must pay the whole amount due. However, the defendant will be considered responsible to pay the costs if the plaintiff has succeeded in any of the several claims that may be involved in a specific case. Although the court proceeding is not free for any of the parties, the plaintiff may request the benefit of "free justice" (*benefício da justiça gratuita*) based on the Law 1,060/1950. According to this law, in order to have right to this benefit the plaintiff just have to state that he does not have financial conditions to support the judicial procedure. The defeated defendant will be mandated to pay the plaintiff's attorneys fees only if the plaintiff is represented by the union, not by a private lawyer. As a consequence, this basically means that almost all plaintiffs have no costs for filing their lawsuits, considering that most plaintiff attorneys work under contingent fees (usually 30% of the final award).

[18] 40 minimum monthly wages are approximately USD 7.580 (currency rate of 11/16/2015)

As a consequence of this formal access to justice and the lack of legal enforcement in Brazil, the Brazilian labor courts are overloaded with lawsuits. The result is that in 2014, 2,365,547 new employment lawsuits were filed to the Lower Labor Courts. Even though 2,287,879 lawsuits were adjudicated, the residual amount of unsolved labor claims was 1,199,790. If all three levels of the Labor Judiciary are included (the labor judges and two levels of court of appeals), the numbers become even more impressive: 3,544,839 new cases or appeals were received in 2014, of which 95.8% were decided, while 1,576,425 cases remain without a solution, including residuals of the previous years (CESTP 2015). Figure 2 shows the evolution of cases filed and adjudicate in all the Labor Court System since its creation in 1941.

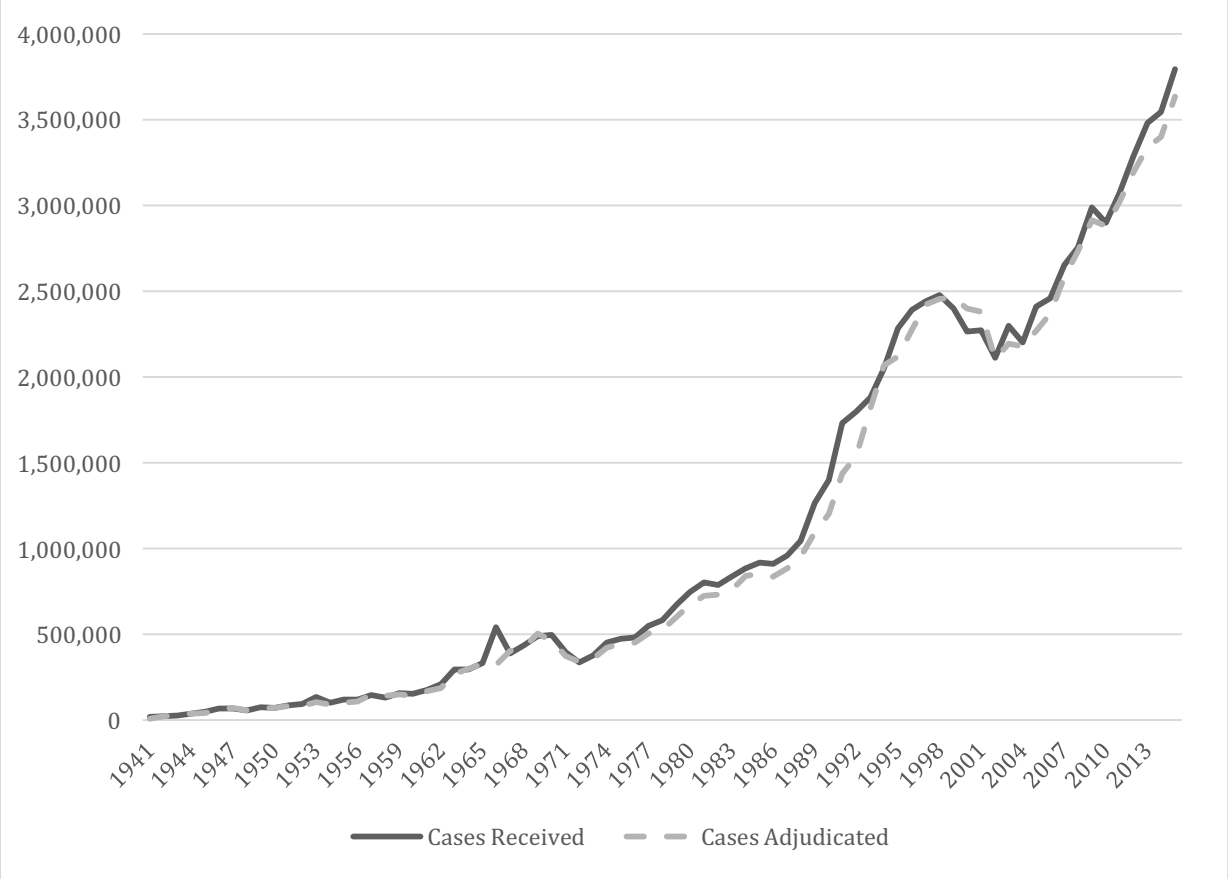

Figure 2 - Cases Received and Cases Adjudicated in the Labor Court System from 1941 to 2015 (CESTP 2015)

These data reveal that the risk of employment litigation is a real threat for employers in Brazil. A total of R$16,322,936,054.17[19] has been spent by employers in awards in 2014. Besides the costs to employers involved in litigation, both employees and employers must also face the problems related to the time spent in litigation. In the whole country the average between the filing of the lawsuit and the final payment of the definitive award to the employee is of 2,319.73 days (or 6.4 years)[20].

It should be clear by now that employment litigation is a significant threat to Brazilian employers, which could theoretically lead employers to push for the adoption of ADR-type conflict resolution procedures in the Brazilian workplace, following the US example presented earlier.

Human Resources and HPWS

Just like in the US environment, HPWS have spread throughout Brazilian management since the 1990's (Rocha 2009). Examples of participatory methods and high involvement workplaces are observable in the Brazilian academic literature (Barbieri 2003; Rocha 2009). Notwithstanding the fact that no national level data is available on the overall adoption of human resources practices[21], a brief review of professional publications (Revista Época) and the lists of Best Places to Work (Revista Você S/A 2013) reveal that practices such as self-managed work teams (Marx and Simonetti 2013), high levels of ongoing training, less hierarchical layers and flexible and contingent system of compensation are found not only in multinational companies operating in Brazil, but also in national companies.

[19] USD 6,145,221,422.92 in the exchange rate of December 31st 2014.
[20] This average excludes the cases in the expedite procedure, which are applicable only for cases of less than 40 minimum wages. (CESTP 2015)
[21] Tonelli et al. (2003) highlight the limitation of Brazilian academic production in Human Resources management. In their review of the peer-reviewed publication in Human Resources between 1991 and 2000 in Brazil, the authors identify the predominance of qualitative research, specifically single case studies (explanatory or descriptive), which helps explain the lack of reliable systematic information on the adoption of HR practices by Brazilian companies.

The explanations on how and why those management practices were adopted in Brazilian companies may involve a hypothesis of a tendency towards a "global best practices" pattern (Muller-Camen et al. 2001), as well as mimetic and normative isomorphism (DiMaggio & Powell 1983).

ADR in Brazil

So far I have explained that some of the characteristics that are believed to have triggered the adoption of ADR in the US are also observable in Brazil (i.e. litigation avoidance and HPWS), whereas others might be harder to translate to the Brazilian environment (i.e. union avoidance or union substitution). In this section, I provide an overview of the current status of ADR in Brazil. Although I briefly touch the issue of ADR in other areas in addition to workplace conflicts, my main focus in this thesis is on the development of ADR to employment related conflicts.

Private Arbitration and Mediation

Arbitration was first regulated in Brazil with the enactment of Law 9.307/1996 (later amended by Law 13,129/2015), which defines that arbitration might be used by the parties to solve conflicts over *direitos patrimoniais disponiveis* (negotiable individual rights – i.e., individual rights that can be negotiated by the party who is entitled to this right). With the enactment of this law, arbitration gained popularity for the solution of civil and commercial conflicts between companies. Mediation was only regulated by the Law 13,140/2015, but it has also gained in popularity since the creation of the several Arbitration and Mediation organizations that followed the enactment of the 1996 statute.

The cited legislation, however, is not applicable to individual employment conflicts[22]. By and large, most decisions of the Superior Labor Court consider employment arbitration unlawful, given that employment rights are not considered negotiable rights under Brazilian labor and employment law, due to the power imbalance between the parties in employment relationship sand the principle of employee protection[23]. In the case of mediation, the Law 13,140/2015 expressly defines in *art.* 42, *parágrafo único*, that mediation in labor and employment relations will be regulated by a specific law, which has not been enacted so far.

Conciliation and Mediation for Employment Conflicts

Court Connected Mediation Programs

Overloaded by cases, Brazilian courts have also looked for other alternatives to litigation, within the realm of the courts themselves. As mentioned before, in employment litigation the *CLT* expressly states that the judges in all levels of the labor courts must make efforts to conciliate the parties. Moreover, in 2010 the National Council of Justice (*CNJ – Conselho Nacional de Justiça*) issued the Resolution 125/2010, which created a national public policy of conflict resolution, applicable to all courts in Brazil. According to this resolution, all courts must create a Permanent Center for Consensual Conflict Solving (*Núcleo Permanente de Métodos Consensuais de Resolução de Conflitos*). In other words, all courts in Brazil, including labor courts, must have a court connected mediation and conciliation program, with trained staff and data collection on the results of the mediation and conciliation attempts. It is important to notice that although the existence of these programs is mandatory, its usage is still optional for the parties.

[22] The law 13,129/2015 tried to include express authorization for the use of arbitration in employment conflicts involving employees in the position of company administrators or directors constituted in the company's bylaws. This section was vetoed by President Rousseff.
[23] TST, SBDI-I, E-ED-RR-79500-61.2006.5.05.0028, Rel. Min. João Batista Brito Pereira, *DEJT* 30.03.2010

Since 2008 *CNJ* promotes the National Conciliation Week, in which all courts should pay special attention to conciliation, and in 2014 the Superior Council of the Labor Courts (*CSJT - Conselho Superior da Justiça do Trabalho*) created the "National Week of Labor Conciliation"[24], which aims to promote quicker solutions in labor courts and to improve consensual conflict resolution techniques in the labor courts.

As explained before, the labor courts in Brazil have a long tradition of promoting conciliation or court settlements in lawsuits filed to the courts. From 1981 to 1989 more than 50% of the cases brought to the labor courts were settled. From 1990 to 2013, settlement rates have always been above 40%. 2014 was the first year in which settlement rates in the labor court fell below 40%, with 39.3% of the cases being settled (CESTP 2015).

It is clear, therefore, that Brazilian courts have provided consistent support to alternatives to litigation within the realm of the courts, via court connected mediation programs or national conciliation efforts. However, the same cannot be said about ADR outside the domain of the labor courts[25]. Besides the courts' barriers to the adoption of employment arbitration and private mediation for employment conflicts, the attempt to create a private conciliation model with the Preliminary Conciliation Commissions was also resisted by the courts, as it will be explained in the next section.

The Preliminary Conciliation Commissions (CCPs – Comissões de Conciliação Prévia)

Based on some isolated cases of successful local level non-judicial conciliation experiences, Brazilian congress enacted Law 9958/2000, which created the Preliminary Conciliation Commissions (*CCPs – Comissões de Conciliação Prévia*).

[24] Ato CSJT 272/2014.
[25] A similar situation is observable in France, where mediation and arbitration is common, but also only under the auspices of the judiciary system (Clark et al. 2012)

According to the law, the CCPs should be created by one company and the correspondent labor union, and it should have representatives from both employers and employees (in the same amount), with the function of conciliating only individual employment conflicts. CCPs can also be constituted by a group of companies or a group of labor unions. The statute determines that all individual labor claims should be submitted first to the CCPs (where they exist), as a condition for the filing of a lawsuit to the labor courts. The conciliation session should be held in no more than ten days after the attempt of conciliation notice, and any agreement reached by the CCPs should be considered binding and final.

Despite the efforts of the Brazilian legislator, the CCPs have been severely criticized and weakened by the labor courts. For instance, Brazilian Supreme Court has considered unconstitutional the obligation to submit all cases to CCPs before the filing of the labor claim, since it violates the constitutional right of access to Justice. Critics of the CCPs see the institute as a forum to increase frauds (the employer would use the CCPs to pay only partially amounts that he knows that are owed to the employee through the CCP in order to be released from any further responsibility related to the employment contract). Other critiques are related to the lack of supervision or control by a state representative (Hirano 2009) and the fact that the plaintiff does not have to be represented by a lawyer (Souza 2004). On the other hand, employers have avoided the use of the CCPs due to the risk of having the agreement further reviewed by a judicial decision.

It is worth noticing that most of the critiques currently made to the CCPs' agreements also apply to agreements settled in the labor courts (Hirano 2009), since judges might approve settlements in which the employer is paying only partially amounts that he knows that are owed

to the employee, in order to be released from any further responsibility related to the employment contract[26].

As a result of the described courts' resistance, CCPs are currently used in very few sectors, for very specific types of conflicts, as I will explain in Financo's case study.

Ombudsman Offices

Although the goal of this chapter is not to cover all possible alternative dispute resolution methods, it is worth taking a special look at the development of ombudsman offices in Brazil. As it will become clear in the case studies, some Brazilian companies are opting to use ombudsman offices to solve workplace conflicts, and understanding the origins of the ombudsman in Brazil will be helpful to understand why this specific method was "chosen" by Brazilian companies.

Ombudsman origins are usually traced back to 19th century Sweden and it is connected to the idea of an independent person representing the interest of the public in face of the government. However, the use of the term in Portuguese for Ombudsman (i.e. *Ouvidor*) has a longer history in Brazil, dating back to 1549, when Governor-General Tome de Sousa appointed Pero Borges as the first *ouvidor geral* (i.e. general ombudsman). As *ouvidor geral*, Pero Borges would have extensive appellate jurisdiction as well as investigative functions and obligations over local magistrates in Brazil. In the next decades, the occupants of the *ouvidor geral* position would accumulate other functions as a way to increase Portuguese royal crown centralized control over its colony (Schwartz 1973).[27]

[26] In my personal experience as a lawyer in Brazil, I have seen cases settled in the Labor Courts without the Labor Judge having any personal contact with the parties, which might increase the chances of frauds similar to those that can occur in the CCPs, according to its critics. This does not mean that this is the normal procedure, nor the procedure followed by most Labor Judges.

[27] Several reports suggest that Pero Borges would not investigate most of the claims that were presented to him, as those would be critiques to governor general Tome de Sousa, and that complainants would then suffer different forms of retaliations by the government. For this reason, later the functions of *ouvidor* would be transferred to the Catholic Church. (Ouvidoria Anatel 2007). However, those reports do not cite any source for those facts.

More important than looking at the first uses of the term *ouvidoria* (i.e. ombudsman office) in 16th century Brazil, one should also pay special attention to the evolving roles of the *ouvidorias* since mid-1980s. In the public administration area, the mayor of the city of Curitiba created the first modern *ouvidoria* in Brazil. The goal of this *ouvidoria geral* was to receive grievances and complaints from citizens against the municipal public administration (CMC 2015). In 1991, the Decree 022/1991 created the *ouvidoria geral* at the state level in Paraná, and finally in 1992 the Law 8.490/1992 created the role of *Ouvidor Geral da República*, being the first ombudsman role at the federal level. In the following years, ombudsman-like positions gained space in the public administration. The Constitutional Amendment 19 of 1998 determined that public institutions should provide some channel to receive complaints from users of public services, the Constitutional Amendment 45 of 2004 created *ouvidorias* in all Brazilian courts, and several regulatory agencies created ombudsman channels.

In the private sector, some ombudsman channels focused on customers' complaints evolved from customer care services channels. Bradesco, for instance, one of the biggest Brazilian private banks, created its first customer care service ("Alô Bradesco") in 1985. In 1990, with the enactment of the Consumer Defense Code, several companies created their customer care services (later regulated by the Decree 6,523/2008). Those customer care services could later develop into ombudsman channels, as it happened with Bradesco in 2005. In this same year other banks, such as Itaú and Banco do Brasil, created their ombudsman channels. Currently, regulation makes mandatory the creation of ombudsman channels for all companies operating in the following sectors: banking (*Resolução CMN 3477/2007*), electricity power distribution (*Resolução* ANEEL 470/2011), insurance (*Resolução* CNSP 279/2013), and health insurance (*Resolução* ANS 323/2013). In 2007, a bill proposed by Congressman Sérgio Barradas

Carneiro tried to make mandatory the creation of *ouvidorias* for all public or private companies with more than 300 employees (PL 342/2007). The bill was rejected by the Constitution and Justice Commission of the Congress in 2015, due to its unconstitutional interference on entrepreneurial activity.

It is important to notice that in the cases cited above, ombudsman offices are targeted to external audiences, i.e. customers in the case of private companies, and citizens and users of public services in the cases of ombudsman offices in the public administration. There is no evidence that any of those ombudsman offices might also be used by employees[28]. However, the widespread adoption of ombudsman offices in several different sectors might help explaining the option to use a similar structure to deal with workplace conflicts by a coercive and mimetic isomorphism process (DiMaggio and Powell 1983), as it will be explained in detail in the next chapters.

Workplace Bullying

Before presenting the case studies it is important to define the concept of *assédio moral*, here translated as workplace bullying. Although this is not directly connected to any specific form of conflict resolution, this is an important element in workplace conflicts in Brazil, as it will be clear in some of the cases analyzed in the following chapters.

Sometimes also translated as mobbing, the concept of *assédio moral* gained space in Brazil with the work of the French psychiatrist Marie-France Hirigoyen (1998). *Assédio moral* in the workplace can be defined as the constant and intentional disqualification of the employee-victim, in order to neutralize him in terms of power (Heloani 2004), or the repeated exposition of the worker to embarrassing or humiliating situations during the exercise of his job, characterized

[28] In my personal experience in a Brazilian private bank, whenever an employee filed a complaint using the general ombudsman office, the Ombudsman would direct the grievant employee to other existing HR channels.

therefore as an inhuman, violent, and unethical attitude, usually perpetrated by the worker's manager (Barreto 2003), although it can also be conducted by the victim's peers (i.e. horizontal bullying).

As explained by Hirigoyen (2013:20) workplace bullying are behaviors, words, gestures, and attitudes that tend to destabilize an individual employee, or a group of employees, at their intimate level. Although each of those acts might seem harmless when analyzed individually, the repetition over time of those behaviors generate the workplace bullying situation. Moreover, there is a great element of subjectivity to the concept, since each person might respond differently to the same behavior, words, or gestures, and the consequence of those for the health and dignity of the worker is taken into consideration when defining the occurrence of workplace bullying.

Facts as different as excessive demands by management, creation of "awards" or punishments for the worst employee of the month, public classification of workers by their comparative performance[29], denial of access to colleagues or work tools, might be considered workplace bullying **depending on the context**.

Although consolidated national statistics on workplace bullying are not available, some of the existing data suggest that the banking sector concentrates most of the workplace bullying cases being litigated[30]. Moreover, in 2009 there were already 434 cases of workplace bullying being decided at the Superior Labor Court (TST), and in 2014 there were 115 cases of collective

[29] http://exame.abril.com.br/negocios/noticias/6-casos-de-motivacao-que-viraram-assedio-moral
[30] http://odia.ig.com.br/noticia/economia/2014-04-24/de-cada-dez-denuncias-de-assedio-moral-no-brasil-tres-sao-contra-bancos.html

workplace bullying filed to the courts by the *Ministério Público do Trabalho* (Labor Prosecutor Office)[31].

[31] http://classificados.folha.uol.com.br/empregos/2014/02/1416120-acoes-contra-assedio-moral-coletivo-crescem-no-brasil.shtml

CHAPTER 4 - METHODOLOGY

In order to identify how Brazilian companies are handling workplace conflicts, I have conducted four in depth case studies[32] in different Brazilian companies: Irco S.A. (Irco), Financo Holding S.A. (Financo), Cosmetico S.A. (Cosmetico), and Construco S.A. (Construco)[33]. All the four companies are Brazilian owned. The decision to not include foreign owned Multinational Companies (MNCs) operating in Brazil in this research was to avoid adding another layer of discussion over system effects and dominance effects that might characterize adoption of HR practices in MNCs (Edwards et al. 2014) in management decisions on how to deal with workplace conflicts. Although all the four companies have some level of international operations, their headquarters, main operations, and the majority of the workforce are located in Brazil, under direct influence of Brazilian industrial relations institutions.

The use of multiple case studies is appropriate for inductive theory construction (Eisenhardt 1989) and has been successfully used in different areas of industrial relations (e.g., Amengual 2014; Pyman 2005). This research design seems the most adequate for answering the proposed research questions, given the exploratory nature of this research, and the lack of existing theory and empirical knowledge on the development of ADR for workplace conflicts in Brazil. Multiple case studies have the advantage over single case studies, as it allows not only for within-case analysis, but also cross-case analyses (Eisenhardt 1989).

Sampling, in this case, does not need to be random, as cases should be selected in order to provide adequate information for inductive theory generation (Eisenhardt 1989). In this research, I looked for companies where some level of workplace conflicts would be expected, so an adequate analysis of companies' response could be generated. In the selection of the four cases,

[32] I also collected data on a fifth case, of an IT company (*Jobco*), which was later dropped from this Thesis. The company holds an extreme version of a horizontal structure, with no managers.
[33] I am using fictional names for all the companies in order to guarantee their anonimity.

special attention was given to the variance in elements such as sector, size, labor unions' influence in the workplace, level of workplace conflicts, employment litigation levels, and general human resources practices. Each company operated in a different sector (Mining, Banking, Cosmetics, and Engineering) and varied in number of employees (Construco, the smallest case, has 2,459 employees, whereas Financo has 88,910 employees worldwide). Union strength and union influence in the workplace also varied across the cases. Whereas Irco and Financo face overall strong unions, with relative high influence in the workplace for Brazilian standards, Cosmetico's main union has little influence in the workplace, albeit some effort to mobilize its employees. Construco, on the other hand, faces a weak union, with little to none influence in workplace. Companies also experience very different levels of formal workplace conflicts, as measured by employment litigation levels. Whereas Financo faces 57,192 ongoing employment lawsuits, and Irco faces approximately 20,000 ongoing employment lawsuits, Cosmetico faces only 515 ongoing employment lawsuits, and Construco only had 5 employment lawsuits in the past 10 years. Financo is currently the 6th company with most cases in the Superior Labor Court, whereas Irco is the 15th in the same ranking (CESTP 2015). Cosmetico and Construco are not among the 454 companies that compose the litigation ranking in the Superior Labor Court. In terms of Human Resources practices, all the four companies hold some form of structured HR department and HR practices such as performance pay, climate surveys, and some form of employee participation mechanism. Table 1 brings details of each company's main characteristics.

Table 1 – Cases' Basic Information

	Irco	Financo	Cosmetico	Construco
Sector	Mining	Financial sector (banking, insurance, etc.)	Cosmetics	Engineering, consulting, and telecommunications.
Size (#Employees)	83,286	88,910	7,000	2,459
Union's influence in the workplace	Strong unions, big influence in the workplace	Strong unions, big influence in the workplace	Moderate influence in the workplace	Weak unions, no influence in the workplace
Litigation Levels (# of open cases)	Approximately 20,000 cases	57,192 cases	515 cases	5 cases in the past 10 years
Employee Participation Mechanisms	Employee representative in the board	Suggestion box	Ad hoc employee committees	Several mechanisms. All shareholders are employees.
Formal ADR structure for workplace conflicts	Ombudsman (since 2013. Also on company's CBA).	Ombudsman (since 2008. On sectorial CBA since 2010)	Ombudsman (since 2006. Not on CBA).	Open door policy; Considering the creation of Ombudsman office.
Ombudsman – Union Relationship	Cooperative	Conflictive	No relationship	N/A
Interviews	- HR Business Partner - IR Manager - Legal Department Manager - Ombudsman Director - Union leader	- HR Director - IR Manager - Legal department manager - Ombudsman supervisor	- HR Business Partner - IR Manager - Legal department manager - Former Legal Director - Ombudsman manager	- HR Director

Data used on this research come from two main sources. First, I conducted a series of semi-structured interviews with managers from the four companies studied. In all four companies HR managers were interviewed in relation to the company's overall structure, HR strategies and policies, workplace conflict, and the availability of channels for employees to deal with workplace conflicts within the company. In the case of Irco, Financo, and Cosmetico, representatives of the Legal Department were also interviewed in relation to employment litigation levels and the company's main strategies towards litigation and other dispute resolution methods. In these companies, Labor Relations managers were also interviewed regarding the companies' overall labor relations strategies, union influence in the workplace, and the importance of the topic of workplace conflicts for collective bargaining. Finally, representatives

of the Ombudsman Office in each of these three companies were also interviewed, regarding the structure and functioning of the ombudsman channel. Table 1 also details the interviewees in each company. In addition to managers, I also conducted a semi-structured interview with a union leader of railway workers (Irco), and unstructured interviews with a labor judge in the São Paulo Regional Appeal Labor Court (TRT2), employment lawyers for management side in the banking sector, and labor relations specialists from a relevant national employer association. In total I have conducted 22 interviews with an average duration of one hour and a half each.

The second main source of data were archival data available online. Irco, Financo, and Cosmetico are public traded companies, with stocks traded at BM&F Bovespa, the Brazilian stock market. Therefore, for regulatory reasons they are mandated to publish thorough annual reports, with detailed information about the companies' operations, strategies and financial information. Those reports include detailed information about the workforce profile, litigation, and grievance channels such as ombudsman offices, which are relevant to confirm and deepen my understanding of topics covered in the interviews. In the case of Construco, although it is not public traded, the company also publishes similar annual reports for its employee-shareholders, containing the same kind information. All companies follow Global Reporting Initiative Guidelines (GRI) in their reports (Construco and Irco follow GRI version 3, and Financo and Cosmetico follow GRI version 4), and all financial information was audited by an external auditing firm. Finally, when available (Irco, Financo, and Cosmetico) labor unions' newspapers and newsletters were also used as sources for information on the union perspective over relevant workplace conflict issues, and how they communicate with their members over those topics.

Moreover, there are also elements of participant observation in this thesis. From 2007 to 2012 I worked as a Human Resources Business Partner and as an Employment Lawyer in a

private Brazilian bank. Moreover, during 10 months in 2005 I worked as an intern at the Labor Relations department of the Brazilian Federation of Banks (*FEBRABAN*). Although those experiences are not directly connected to any of the cases analyzed in this thesis, this first hand experience in the Brazilian workplace contributed to the development of the research and the analysis of the cases.

Unless stated otherwise, all data and numbers provided here refer to the year 2014, when the field work was conducted. Likewise, whenever I use the word "current," and "currently," I am referring to the year 2014, unless stated otherwise.

It is important to notice that most sources (interviewees and annual reports) provide a managerial perspective on the issues being studied. Although this is taken into consideration during the analysis, this is a minor problem for the research in its current stage, considering that the goal is to understand how **companies** in Brazil are dealing with workplace conflicts under Brazilian industrial relations system.

In the next chapters, I present detailed information in each of the four cases, proceeding with within-case analysis by the end of each chapter. After the presentation of the four cases, I follow with the cross-case analysis, an important element of the multiple-case studies design (Eisenhardt 1989).

CHAPTER 5 - CASE STUDY – IRCO

In this chapter I describe and analyze the case of the Brazilian mining company Irco. First I describe the Human Resources and Industrial Relations practices and strategy. I follow with the Legal Counsel perspective on employment litigation, and then I describe some issues related in general with workplace conflicts. Afterwards, I describe in details the functioning of the Ombudsman Office. Finally, I present a within-case analysis of the main points related to the issue of workplace conflicts in the company.

Company Overview

Irco is a former state owned Brazilian mining company, which was privatized in 1997. Currently it is one of the three largest metals and mining company in the world, and the world's largest producer of iron ore and nickel[34]. The company has operations in 30 countries in the five continents.

Human Resources

By the end of 2014 Irco had a total of 206,400 workers worldwide, including employees (76,500) and contractors (129,900). Seventy-seven percent of all those workers operate in Brazilian plants and offices. Of the totality of employees, 66% are between 30 and 50 years old, 23% are below 30 years old, and only 11% are older than 50[35]. In 2014, Irco's turnover rate was 8.1% (9.6% for women and 7.8% for men) as a result of the low performance of the iron ore market in that year. The rate in 2012 was 5.1%, and in 2013 6.6%[36].

Human Resources management is at the core of Irco's strategy. Among the company's strategic pillars is the mission to "take care" of company's people, by developing professionals

[34] Fact Sheet, 2015.
[35] Annual Report 2014, p. 55.
[36] Annual Report 2014, p. 59.

who are trained and accountable for their decisions, and by creating a "great place to work" with development opportunities and work-life balance[37].

Irco's HR structure is composed of the Labor Relations department, the Regional Business Partner department, the department of Education, Employee Engagement and Equity, and the HR Solution Center. Moreover, the Integrative Business Partners (IBPs) play a key a role in the HR structure. Three IBPs report directly to the HR executive, who is located in Brazil, and they are responsible for all the HR issues involving any of the company's department. All HR related information goes through the IBP, who is responsible to distribute it to the respective area within the HR department. Therefore, the IBPs work very closely to the business executives, concentrating most HR related information.

The company structure allows up to seven hierarchical management levels depending on the department. However, tests have been made in some departments in order to eliminate at least one level of middle managers (*Gerentes de Áreas*), aiming at bringing together the executives and the company's operations. The goal is to make executives closer to supervisors, who are the first link between management and employees, therefore making the management of workplace climate easier. The decision to eliminate one management level was motivated mostly by complains from management and employees over the quality and speed of internal communication. Both groups felt that information on relevant issues taking place at the operations level (e.g., conflicts with indigenous communities in one of the company's plant) had to go through an excessive number of managers, with the same problem being experienced for the communication of decisions made by top executives, which took too much time to reach the

[37] Annual Report 2014, p. 17.

employees. In other words, the main motivator of the new hierarchical structure was to enhance communication within the company[38].

Irco's compensation strategy includes at least some form of variable remuneration to all employees, and it aims to be in the third quartile of the market. The variable remuneration is always based on the accomplishment of defined goals for the company, the department, and, in most cases, the individual employee. Since 2013, the variable remuneration is dependent on the company's overall profit. Moreover, employees in all the company's business unities around the world go through a similar performance assessment procedure, which serve as a base for their variable compensation. For the last 2 years, 97% of all employees received performance assessments[39]. Career development and preparation for promotion opportunities are based on skill mapping and a "development individual plan," which covered 76% of all employees in Brazil, and which will be extended to Mozambique, Oman and Malaysia in 2015.

Since most of the activities of the company require company-specific skills, the company promotes high investment in training for all levels in the company's operational and technical areas[40]. Whereas for operational positions the focus is on young professionals (high school graduates) from the operation's local community, for technical positions (e.g., railway engineers) college graduates are recruited all over Brazil and receive high investment for the development of company specific skills through in-company graduate programs. Despite those efforts, the company still has 1,400 employees in Brazil without a certificate of completion for elementary and high school level education[41]. Moreover, 15,000 technical and operational level employees were trained and certified since 2009 in a process to the development of the skills necessary for

[38] Interview #7, HR Manager, 07/24/2014.
[39] Annual Report 2014, p. 58.
[40] Total investment in training in Brazil for 2014 was US$25 million (Annual Report 2014, p. 56) with an average of 54 training hours per employee per year in 2014 (Annual Report 2014, p. 57).
[41] This number already represents a reduction of 63% in comparison to previous year data, thanks to the company's educational effort established in 2012 (Annual Report 2014, p. 56).

the safe execution of their job duties[42]. Given the risky nature of several of the mining activities, in 2014 3,100 leaders and 60,000 operational technicians were trained in workplace safety issues[43].

Besides the election of two members of the board of Directors by the employees[44], the company does not have any formal structure for employee participation on management. Therefore, each business unity is responsible to organize its own model to integrate employees in the decision making process, or at least to communicate them about relevant business decisions. A common practice is the organization of monthly meetings between managers and employees of each department or business, in which managers explain about important decisions and events since the last meeting, and employees have the opportunity to present reactions, questions and complaints. If the employee does not feel comfortable in discussing a specific issue with the manager in the meeting, the labor relations' analysts present in every plant might also work as a channel for employees to voice their questions and concerns[45].

Irco's employee engagement survey (Global Employee Survey) is applied worldwide every two years, with a response rate of 82%, and the results obtained generate action plans to respond to the employees' concerns. These action plans are developed in conjunction by employees and high-level leaders.

Considering the company's long history of acquisition processes, it is worth noting that although in the past the company would maintain the existing HR policies of the acquired company, currently all the business and unities of Irco around the world follow the same global HR policy. Moreover, the company has been focusing on respecting local peculiarities of each operation, therefore giving preference for local hiring

[42] Annual Report 2014, p. 56.
[43] Annual Report 2014, p. 57.
[44] This is not required by law, being a model specific to Irco.
[45] Interview #7, HR Manager, 07/24/2014.

Labor Relations

The Labor Relations department works in close connection with the legal department, despite being functional independent areas. Labor Relations main activity is preventive, focusing on the monitoring and interpretation of the existing relations. The department has one director, who is responsible for the labor relations in all the company's unities, in Brazil and abroad, and several managers, who report to this director and are responsible for each specific business unity. Labor relations analysts are allocated in the plants, and not only provide information to labor relations' managers, but they are responsible to support local plant management in their daily interaction with workers and union

Currently labor relations' strategy and activities are not restricted to the collective bargaining period. One of the department's main activities is to train leadership for a more transparent and effective communication process with their employees, therefore avoiding misalignment of expectations, which the company understands might generate conflicts[46].

Besides focusing on general communication skills, the Labor Relations Department also tries to involve the business and plant leaders in the collective bargaining process of their plant, which generally focuses on each plant's or business' peculiarities. On the other hand, company wide collective agreements, in which only top managers are directly involved in the negotiation process, regulate general work condition issues, such as benefits and wages. Through the formal consultation of general managers at each round of negotiation, and managers' duty to inform their own teams about the evolution of the negotiation process, the company tries to guarantee a high level of transparency in its collective bargaining process[47].

During the bargaining process, labor relations analysts also play a central role in the plants, by monitoring employees response to the collective bargaining process, and therefore

[46] Interview #5, Labor Relations Manager, 07/24/2014.
[47] Interview #5, Labor Relations Manager, 07/24/2014.

influencing the strategies to be adopted in the following negotiation rounds. With this in mind, the company tries to look more at its own workforce rather than at the union's reaction in order to evaluate its collective bargaining strategies. Currently, 96% of Irco's employees worldwide are covered by some form of collective agreement[48].

It is worth noting that according to our interviewee, Irco is not interested in dealing with weak unions, and the Labor Relations Department counts on a relatively strong union to implement the company's strategy. Unions were described as an important tool to avoid excess by the company, and to represent employees' interests[49]. Anyway, the last strike in one of the Brazilian plants occurred in 1989, and no strikes were recorded in 2014[50] in any of plants worldwide.[51]

Although the Labor Relations Department closely monitors union behavior in Irco's international operation, and participates in the definition of the overall labor relations strategy in those countries, employees of the department do not sit at the negotiation table outside Brazil. The negotiation is completely conducted by local actors, who tend to be more easily accepted by their counterparts. Moreover, the company prefers not to work with global collective agreements, as they consider that their "generic terms" tend to simply increase the risks for the image of the company, without any positive effect[52].

Legal Counsel

Since 2000 the entire legal department reports to the company's CEO and not to each business unity or operations. This structure should guarantee to the legal department the necessary autonomy to agree or disagree with each business decision. The legal department

[48] Annual Report 2014, p. 63.
[49] Interview #5, Labor Relations Manager, 07/24/2014.
[50] Annual Report 2013, p. 63.
[51] It is worth noting that in 2010 Irco's operation in Canada faced a year long strike. For more details, see Peters (2010).
[52] Interview #5, Labor Relations Manager, 07/24/2014.

works closely with the Labor Relations Department, in order to deal collectively with broader workplace issues, as well as with the recently created ombudsman office.

Within the legal department, the labor law counsel has both consulting and litigation activities. A report over the status of all the approximately 20,000 lawsuits is made quarterly and presented to the board of directors[53]. The information gathered at those reports might lead the legal department managers to meet with the outside litigation attorneys in order to define new court strategies or defense thesis that should be used. Those attorneys are outsourced, and they report to each region's legal department. Each outsourced attorney is responsible to evaluate the loss probability of each new lawsuit. In cases in which the loss is considered probable, the attorneys have some general company's orientations for court settlement, defining maximum values and stages of the case in which a settlement would be authorized.

Although one could expect that the Legal Counsel focus on the company's preventive strategy, the large amount of existing lawsuits (about 20,000) makes litigation the company's main legal activity in the employment area. Despite this focus on litigation, it is worth noting that legal managers do not describe all litigation as negative. Cases where the company's winning percentage is relatively high are considered worth being discussed in the courts[54].

Regarding the lawsuits, approximately 80% of them could be considered "repetitive claims" (*demandas repetitivas*, i.e. several employees file lawsuits over the same topic, with similar requests, such as overtime payment*)*, focusing mainly on working time issues (i.e. overtime pay, payment of commuting time, time spent in donning and doffing protective gear, etc.). According to the legal department, factors that help explaining variance in litigation rates are related to the existence of very active plaintiff oriented law firms in certain regions, and

[53] The provision for litigation at December 31, 2014, was of US$706 million for labor claims. Claims in which the likelihood of loss is reasonably possible but not probable, and for which the company did not make provisions, amounted to a total of US$1.955 billion for labor claims. [Form 20F 2015, p. 104]
[54] Interview #6, Legal Counsel Manager, 07/24/2014.

repeated decisions in favor of the employees by certain regional labor courts. Moreover, workers in regions with low supply of qualified workforce, mainly for skill specific activities in the railways, usually present higher litigation rates, since the company tends to not terminate this kind of employees, even if a lawsuit is filed[55].

The Legal Counsel to international operations is under a specific legal manager, whose main activity focus is on Canada, the second largest international operation of Irco in number of employees, only behind Mozambique. Although there is no formal mechanism for the exchange of information between legal managers or lawyers working in different countries, the high number of expatriate employees ends up generating a high level of interaction between the legal departments of different countries.

Disciplinary Policy and Termination

Irco has a company-wide disciplinary policy, for which the manager is ultimately responsible for its application. This does not mean that the HR is not involved in disciplinary process. In order to avoid that this policy is used as a retaliation tool by management, an HR business partner is always involved in the decision making, in order to verify if the misbehavior described by the manager actually happened. The disciplinary penalties go from verbal warning to termination, and the employee is always informed about the reasons for his penalty. Even for cases of verbal warnings, the HR is involved in order to confirm that this is a case of simple verbal warning and not another penalty. Moreover, the HR always involves the Labor Relations Department, who will also be a "guardian" of the disciplinary policy. Although this general process is applied for technical issues and general misbehaviors, cases of breach of the code of conduct or of safety golden rules follow a more rigorous process, in which the manager does not hold the same degree of discretion in the decision making.

[55] Interview #6, Legal Counsel Manager, 07/24/2014.

In the cases of decisions to terminate the employment contract, HR, Labor Relations Department and the Legal Counsel are involved before the manager makes the final decision, in order to guarantee that the decision is the most adequate both from a managerial and legal standpoint. All terminated employees are interviewed by HR, which consolidates the information obtained in order to inform the department executive. Whenever a problem is identified in a termination interview, the HR department, in conjunction with the Labor Relations Department, will investigate the issue, starting by hearing the manager who the complaint was about. Likewise, if the issue is identified in a lawsuit, the legal department will involve the Labor Relations Department, who will then involve the HR business partners.

In case of layoffs involving multiple employees due to the end of certain activities or closure of entire plants, a committee is organized beforehand in order to identify workers who could be employed in other plants in Brazil or in another country, depending on the worker's hierarchical and technical level. Unions are involved throughout the process in order to define the severance package to be offered to employees who will be laid off. The recent layoffs were described as peaceful by the HR, due to the key role played by the Labor Relations Department in the negotiations with unions, and the transparency in the communication of the reasons for layoff[56]. The union's version is not so bright, though. Between January and March of 2015, approximately 120 terminations led the Railway Workers Union to resort to work stoppages and strike threats until the company suspended terminations[57].

Workplace Conflicts

So far I have presented a general picture of the company's structure and its HR, labor relations and litigation strategies. Although the issue of workplace conflict has not been

[56] Interview #5, HR Manager, 07/24/2014.
[57] See Jornal Raízes #588, 03/17/2015; #580 01/16/2015; #581 01/20/2015; #583 01/28/2015; #587 03/05/2015; #589 03/18/2015.

expressly discussed yet, the company's general approach to it should be clear by now: communication with employees and transparency are in the center of the company's strategy to deal with workplace conflicts. This is clear by the IR department preoccupation of involving plant managers in the collective bargaining process, and the focus on the employees' responses to determine the strategies in the bargaining process. This was also evidenced by strategies adopted in layoffs and the decision to eliminate a middle management level in order to eliminate communication obstacles between top management and workers.

With this in mind, in the next pages I describe how the company decided to deal with potential conflictive issues in the workplace and explain in detail the formal structures for workplace conflict resolution existing in the company.

The Elimination of one Level of Middle Management

The case of the elimination of one level of middle management is illustrative of how the company deals with potential conflictive situations. As explained earlier, the company has made an attempt in some departments to bring top management closer to operations' supervisors, by eliminating one management level. This new structure, however, also diminished promotion opportunities, by diminishing the existing managerial positions. Moreover, in some cases, managers saw their own positions being eliminated. Therefore, these changes impacted in several employees' expectations about their own careers, creating room for potential conflicts. In order to deal with that, the company opted to enhance the technical career path of its career structure for those who lost their managerial position. In accordance to the HR statement that conflicts (or in this case, potential conflicts) can sometimes also be seen as opportunities to enhance performance, this restructuring process was also considered an opportunity to identify the managers with managerial skills and those who were previously occupying managerial positions,

despite not being necessarily qualified for that. This allowed the company to take advantage of the technical skills of employees who formerly occupied managerial positions only because they did not have anywhere else to grow within the company's technical career path. In order to avoid dissatisfaction (and legal liabilities), managers who left the managerial career path for the technical career path were guaranteed their former "management benefits" for the remainder of their tenure at Irco.

The decision to promote this structural change was based on the benchmark of other companies that have a strong technical component in their activities (e.g., auto and chemical industry), but also counted on the close support of the Legal Counsel and Labor Relations Department, which were responsible to evaluate the legal viability of the proposed solution, as well as possible impacts in labor relations. Unions evidently responded well to the new structure, since employees' jobs were not affected and promotion opportunities were expanded for employees in the technical career path[58].

Gender Discrimination

The company's Code of Ethics and Conduct and its Human Rights Policy seek to reinforce the idea of a zero tolerance policy for discrimination in the workplace. Results from the company's engagement survey regarding employee's perception of diversity supportive workplace and leadership were relatively high[59].

Although conflicts over gender discrimination are not common, the company decided to reinforce the importance of gender equality in the workplace, by expressly bringing the issue up in internal communication and annual reports. The company adopts the position that "there is no

[58] Interview #5, HR Manager, 07/24/2014.
[59] 85% of employees believe that company's leadership supports diversity in the workplace, and 89% agree that the company promotes a working environment that accepts differences between men and women (Annual Report 2014, p. 60).

job that cannot be exercised by a woman," so the low number of women in the workforce should be improved[60]. Bringing the issue to the frontline of the debate led the company to evaluate if all the worksites were really prepared to receive women, verifying the amount of women locker rooms in each site, the existence of uniforms adapted to pregnant women, among other issues. The long-term goal is to change the culture of Irco's employees, so they understand that diversity and equality of gender, race, etc., is a core value for the company. This has been done also via training of women to assume leadership positions, and workshops discussing topics such as pregnancy and inclusion of women in a traditionally male sector. Thus far, Irco is still a predominantly male company, with only 12.9% of female employees, of which 8% occupy some form of managerial position. It is worth noting that those changes were originated within the company, and not due to pressure of law enforcement agents or any other external actors. Similar actions are also taking place in some of the international unities, such as Mozambique, where 20% of the workforce was trained or took part in workshops over gender violence and sexual harassment[61].

Workplace Bullying **(Assédio Moral)**

Workplace bullying was already an important and recurrent negotiation topic brought by the unions, when the Ombudsman Office was created in 2012, as will be explained in detail later on this chapter. Since workplace bullying is a common claim in several lawsuits in different sectors, the company has established training programs for managers focused on workplace bullying, with the support of the legal department. The goal in these training is not only to clarify what is a workplace bullying situation, by the use of famous cases from other companies, but also to generate some fear among managers, so they think twice before taking any attitude that

[60] Interview #5, HR Manager, 07/24/2014.
[61] Annual Report 2014, p. 60.

might be later interpreted as workplace bullying[62]. The company's goal is to have all managers trained in workplace bullying prevention.

The issue of workplace bullying has also always been central to some of the unions dealing with Irco, and since 2014 the CBA includes a section on moral harassment prevention[63].

Formal ADR Structures

***Previous Conciliation Committees* (Comissões de Conciliação Prévia - CCPs)**

The company established two CCPs in the past: one with the Union of Mine Workers in Rio de Janeiro (*Sindimina-RJ*) and the Rail Workers Union at Belo Horizonte (*STEFBH*). However, the usage rates of both CCPs were extremely low. According to the legal manager interviewed, the initiative might have failed because the company was unable to convince the unions that this was interesting not only for the company, but that it actually was a true accomplishment for the union, which would ultimately also benefit the workers[64]. As it will be seen next, this might help explain the relative success of the Ombudsman Office, which the company managed to portray to the unions as a workers' achievement. Despite not being able to convince the unions that the CCPs could actually be a viable and fair alternative to the courts, management also feels that the fact that the CCPs were physically installed at the unions' offices also contributed to make workers unaware of the differences between using the CCP and filing a lawsuit sponsored by the unions' attorneys[65]. In the view of a union leader of SINDFER (a union which never installed CCPs with Irco), the lack of excitement of the union and workers towards

[62] Interview #6, Legal Counsel Manager, 07/24/2014.
[63] *CLÁUSULA VIGÉSIMA TERCEIRA - RESPEITO E VALORIZAÇÃO DO EMPREGADO: PREVENÇÃO AO ASSÉDIO MORAL*
O respeito aos empregados no ambiente de trabalho é uma prioridade para a Irco.
Questões relativas a violação do Código de Ética, assédio moral e sexual ou questões de qualquer outra natureza que representem ações impróprias ou prejudiciais aos empregados poderão ser encaminhadas à Ouvidoria, através do Canal de Denuncias.
[64] Interview #6, Legal Counsel Manager, 07/24/2014.
[65] Interview #6, Legal Counsel Manager, 07/24/2014.

CCPs might be explained by a culture of litigation maintained both by union leaders and attorneys[66].

Ombudsman

History and Structure

Irco's Ombudsman Office was officially created in 2005, as a channel for fraud reports and whistleblowing, in compliance with Sarbanes-Oxley[67]. However, the ombudsman position remained vacant, given that a simple PO Box, where employees could present their fraud related claims, was enough to comply with Sarbanes-Oxley regulation[68]. From 2005 to 2010 the PO Box was the only whistleblowing channel, and it received between 20 and 40 reports per year. In 2010 the company expanded the ombudsman channel to include a toll free hotline, an e-mail address and a website in which employees could report frauds. With the new channels available, the number of reports and complaints skyrocketed, reaching 1,397 in a single year. Despite that, the Ombudsman position remained vacant until 2013[69].

In its first 8 years, the whistleblower channel operated under the Auditing department, which reported to the Administration Board. In 2013, the Board decided to finally hire someone to occupy the ombudsman position, which should be independent from the Auditing department. Therefore, although the Ombudsman Office exists in Irco since 2005, an Ombudsman exists only since August 2013.

Although the original focus of the Ombudsman Office was to work as a whistleblowing channel, currently more than 50% of the cases that arrive to the Ombudsman are somehow

[66] Interview #9, Union Representative, 08/04/2014.
[67] Irco shares are traded in the NYSE through the use of ADR (American Depositary Receipts) of levels 2 and 3, therefore having to comply with Sarbanes-Oxley regulation.
[68] Section 301 of Sarbanes-Oxley Act requires corporate Audit Committees to create mechanisms for receiving anonymous employee concerns about financial improprieties or questionable accounting or auditing matters. Moreover, Section 806 creates civil protection for whistleblower employees and section 1107 creates new criminal penalties for whistleblowing retaliation (Westman 2005).
[69] Interview #8, Ombudsman Manager, 07/24/2014.

related to labor relations or workplace conflicts. In the first semester of 2014, 24% of the cases referred to workplace bullying, 23% referred to operational personnel issues (e.g., nonpayment of overtime or night hours additional), and 8% referred to other workplace misbehaviors that were not severe or pervasive enough to be considered workplace bullying[70]. The rest of the complaints involve breaches of the code of conduct, conflicts of interests, minor frauds, among other issues in smaller amounts[71]. It is worth noting even in those other types of complaints, the vast majority of them (more than 90%) deal with problems related to people and their conduct. The overall image that was spread after the effective creation of the Ombudsman Office in 2013 was that the Ombudsman Office deals with people-related problems, whereas the auditing team deals with process-related problems, although the same issue can involve both types of problems (e.g., a case of misuse of corporate credit card is first analyzed as an ombudsman-like case, since the conduct of a certain employee is under consideration. However, the investigation may lead to the identification of a procedural problem, in which case the auditing team will be also involved). This idea is reinforced by the Ombudsman FAQ, that highlights that the Ombudsman Office "do not modify internal processes," although contributing for their improvement[72].

Besides the already mentioned four communication channels (PO Box, E-mail, Toll Free and Website), since the hiring of the ombudsman, a fifth channel was also created: the personal conversation. Although this channel is not widely used, it is starting to gain popularity among employees, as it also allows for the Ombudsman to exercise a mediator role, in comparison to the other communication channels, which usually lead to investigation, rather than any form of mediation. An ongoing case at the time of the interview illustrates how Irco's ombudsman sees

[70] In 2013, 577 cases dealt with discrimination and some form of harassment. Investigation was concluded for 407 cases, and in 155 investigations confirmed the occurrence of the alleged misbehavior. Although no information on harassment complaints are available for 2014, discrimination cases were only 11 (Annual Report 2013, p. 44 and Annual Report 2014, p. 24).
[71] The number of fraud cases was 80 in 2012, 62 in 2013 and 72 in 2014. Of those 72 cases in 2014, 23 resulted in termination or some other form of disciplinary punishment (Annual Report 2014, p. 23)..
[72] Accessed at http://www.irco.com/brasil/EN/aboutvale/ethics-and-conduct-office/faq/Pages/default.aspx (May 15, 2015)

the possibility of exercising a mediator role. In that case, an employee who had filed a lawsuit against the company and who had been reinstated by a judicial order, personally looked for the Ombudsman to present his dissatisfaction with the course of the lawsuit (which thus far favors the employee), and asked for the ombudsman's help to reach an agreement with the company. Before the creation of the Ombudsman office, the only way for an employee in this situation to present this kind of request to the company would be via his own attorney, in one of the case hearings in the labor court. Currently, however, the Ombudsman is trying to make the Legal Counsel, HR department, and the employee and his plaintiff sit together in order to settle the case in the best interest of all the parties. The ombudsman is, therefore, trying to go beyond what is seen as his traditional role in the company: impartial and independent investigation[73].

It is worth noting that the decision to hire an ombudsman and separate the ombudsman structure from the auditing department structure is not related to any lack of results or efficiency of the former structure. In reality, the main trigger was the negative image of the former whistleblowing channel among workers. In the former structure, for all complaints or reports, an investigation process would be initiated, which would inevitably involve questioning and interrogation of the investigated employee's peers, most times without the knowledge of the employee whose behavior was under investigation. That procedure generated wide discomfort among employees, who started seeing the channel negatively, as an internal "police department." When those complaints reached the board of administration, it was decided that the Ombudsman Office should be redesigned, in order to gain an image of a department that is a partner of the business, without losing its independence. The ombudsman's first measure was to give more transparency to the office's activities, in order to change employees' former impression of the channel. This means always talking first to the manager of the employee being investigated, in

[73] Interview #8, Ombudsman Manager, 07/24/2014.

order to better understand the content of the complaint. Likewise, in the new model, since the filing of the grievance the grievant is aware that he will be informed about the final result of the investigation. This change in the essence of the ombudsman and whistleblower channel was only possible due to the full support of the board of directors, as evidenced by the video presenting and supporting the Ombudsman Office recorded by the company's CEO and board member, which is used in all ombudsman promoted events[74].

In order to guarantee full independence for the Ombudsman to investigate anyone in the company, including its CEO, the Ombudsman reports directly to the president of Board of Directors. Complaints involving HR and workplace related issues (e.g., workplace bullying, sexual harassment, and inadequate behavior) are investigated by the Ombudsman Office itself, whereas issues involving frauds are forwarded to the auditing department. In the case of issues involving theft, property damage and contract frauds are forwarded to the Corporate Security (*Segurança Patrimonial*) department, and, finally, corruption issues are forwarded to the compliance office, which is located under the legal department.

In the current structure of the Ombudsman office, five employees receive the reports and complaints and forward it to the department responsible for the case's investigation. Two employees are responsible for the first analysis of the received cases, in order to identify if there is enough information to initiate the investigation. Finally, two other employees are responsible for the management of the ombudsman's system, process and data analysis, in order to identify any conflict pattern that should be solved collectively. Moreover, there is an Ombudsman Supervisor, who is responsible for the ombudsman team management and daily operations,

[74] Interview #8, Ombudsman Manager, 07/24/2014.

whereas the Ombudsman Director is the institutional face of the department, visiting the company's plants and interacting with the top executives and board of directors[75].

The Ombudsman Office works very closely connected to the Labor Relations Department, given that unions often use the ombudsman channel, being the authors of several complaints. As a whole, unions tend to see the Ombudsman very positively, a perception confirmed in my interview with a union leader from *SINDFER*. It is not unusual for the unions to receive complaints from its members and then file the complaint to the Ombudsman as a union grievance, so the Ombudsman will exercise the investigation activities that were once conducted by the unions[76]. This shows that it is not incorrect to state that unions see the Ombudsman as body independent from company's management, and as a structure that could be considered a victory for workers in their quest for a healthier workplace.

The relationship with the Legal Counsel, on the other hand, is more technical, in order to identify if certain conducts can be classified as sexual harassment or workplace bullying, for instance, or to determine the best way to contact employees without increasing the company's liability. Finally, HR employees give support to the Ombudsman investigatory activities by conducting interviews and meetings on plants outside Rio de Janeiro, where all ombudsman employees are located.

Besides the investigation activities, the Ombudsman Office is also responsible for promoting ethics within the company. This is done through training and divulgation of the Code of Conduct[77] via internal newsletters and newspapers and the "itinerant ombudsman" program, in which the ombudsman travel to different plants to introduce the area to managers and employees, so managers and employees do not feel afraid to use the channel. In 2014 4,000 employees

[75] Interview #8, Ombudsman Manager, 07/24/2014.
[76] Interview #9, Union Representative, 08/04/2014.
[77] In 2014 90% of the workforce signed the new Code of Ethics and Conduct (Annual Report 2014, p. 22).

attended the 40 Itinerant Ombudsman meetings, which took place not only in several plants in Brazil, but also in Canada, Malaysia, Oman and Mozambique[78].

The Procedure for Filing a Grievance or Reporting a Fraud

As mentioned earlier, an employee who wants to report a case to the Ombudsman Office must choose one of the five following available channels: (1) e-mail (an e-mail address is available both in Portuguese and English); (2) hotline (a toll free number is available in all the countries where Irco operates. In countries as Mozambique, where there is no structure for a toll free number, employees should use collect call); (3) Ombudsman website form (the most popular channel); (4) PO Box; (5) a personal talk with the ombudsman[79]. If the problem was initially directed to a manager or employee in another department (e.g., HR), this department will forward the complaint to the Ombudsman using one of the first four methods, so the case can be registered and controlled in the ombudsman system.

Once the case is received, the Ombudsman Office will analyze if enough information was provided in order to initiate the investigation or solution process. In case more information is deemed necessary, the author of the complaint is asked to provide more information. Although approximately 60% of all the complaints are anonymous, it is still possible for the Ombudsman Office to communicate with the author of the complaint via the ombudsman system. If a request for more information is not answered for more than 30 days, the case is closed. Once there is enough information, each case is classified by its risk and importance level (high, medium and low). Low importance issues (i.e. all cases not classified as medium or high) are treated by the office's analysts, and are not reported to the Board of Directors. Medium importance cases (i.e.

[78] Annual Report 2014, p. 24.
[79] In Canada for issues related to workplace conflicts must be reported directly to a local manager.

all workplace bullying cases; frauds of less than R$1MM; environmental issues with low catastrophic potential) are treated by the Ombudsman supervisor and are reported to the Board. Finally, high importance cases (i.e. all sexual harassment cases; frauds of more than R$1MM; environmental issues with catastrophic potential) are under the Ombudsman Director's responsibility. Once the case's importance level is identified, the person responsible for authorizing this level of cases receives all the information available in order to start the investigatory process. The investigatory process will be initiated only if there is some indication of the legitimacy of the claim, so no employee is wrongly exposed to an investigation, thus avoiding that the Ombudsman is being used as a threat tool. The investigation, which lasts an average of 40 days, is conducted by the responsible department (i.e. ombudsman, auditing, corporate security, and compliance, as explained earlier), which will generate a report to the ombudsman office. This report brings not only a summary of the complaint and the investigation, but also an action plan to solve the identified problems. Only employees who are in a position high enough to authorize investigations of a certain level are authorized to close the investigation procedure. Once finalized, the result is informed to the author of the complaint, using a standard base text approved by the legal department, but not informing any specific details, such as the penalty applied. If the author of the grievance is not satisfied with the final result of the investigation, he may bring new information to the Ombudsman Office (e.g., to show that workplace bullying is still happening in the workplace), so the investigation is reopened[80]. Figure 3 summarizes the functioning of the Ombudsman office.

[80] Interview #8, Ombudsman Manager, 07/24/2014.

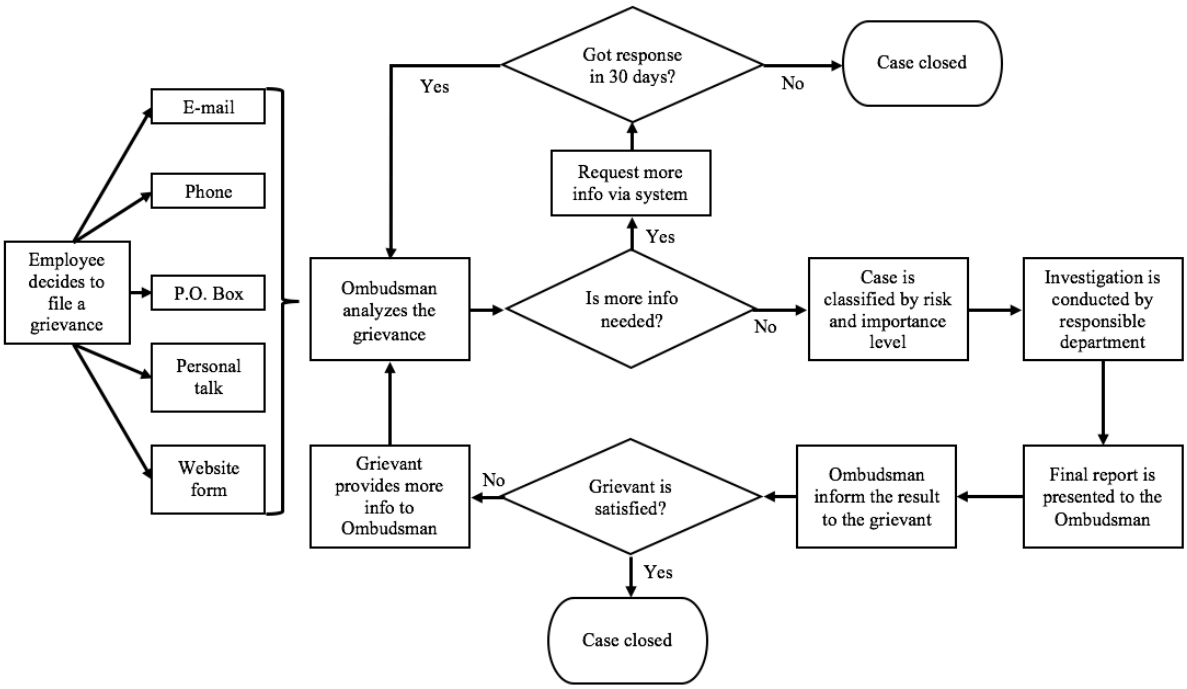

Figure 3 - Functioning of Irco's Ombudsman

Monthly, the Chairman of the Board and the four members of the Committee of Governance and Sustainability receive a report containing numbers, tendencies and detailed results of all the claims. The action plans that result from an investigation usually involve disciplinary actions, which can vary from an informal counseling from the manager or formal coaching sessions accompanied by the HR department, up to written warnings, suspension, termination and just cause termination. Since the employee's department manager is responsible for the definition of the action plan, one of the Ombudsman office's main challenges is to harmonize penalties and action plans throughout the company in order to guarantee equal treatment for similar situations. This is done through discussions between the Ombudsman Office and the manager. If both parties do not agree on a solution, the issue might be taken to the Ethics Committee (composed by Directors of Ombudsman, Auditing, Legal Counsel and HR) – a

measure that has not been necessary so far. Although deemed necessary, the Ombudsman Office has not yet developed a system to follow up the implementation of all the action plans.

The idea of using mediation to solve some of the problems that arrive to the Ombudsman is recent and it has been used very few times so far. It is not a structured procedure, and the few cases in which mediation was used were identified and conducted by the Ombudsman Director in a case-by-case analysis. It is clear for the Ombudsman Director that when the Ombudsman Office was implemented it was not clear for the company that it could play an important role in preventive conflict resolution – its main focus has always been the investigation of misbehaviors and breaches of the code of conduct. Although the mediation process is still unstructured – the Ombudsman does not sell himself as a mediator, and his strategies are still limited to making the parties meet face to face to discuss possible solutions – he hopes that the success in this few cases might change the characteristics of the ombudsman's activities[81].

Besides facilitative mediation, it is clear by the Ombudsman interview that some form of transformative mediation (Bush and Pope 2002) - although this term is never used - is also sought. The ombudsman tries to sell to employees and managers the idea that the Ombudsman Office should be seen as the last resort for the conflict resolution within the company, since most conflicts can be solved by the persons involved in the conflict themselves. This is done through the promotion of the ethics in the workplace and an effort to make workers generate a relationship of trust among them and their managers, in which conflicts are natural and can be solved without a third party intervention.

The Ombudsman Office has its own performance analyzed through metrics such as (i) claims by thousand employees (currently 12.7 versus 14 of the company's benchmark); (ii) productivity (i.e. claims and investigations finished per month by employee of the Ombudsman

[81] Interview #8, Ombudsman Manager, 07/24/2014.

Office – a metric that has direct impact in the employees annual variable remuneration); (iii) elapsed time between the filing of a complaint and the receiving of the final answer by a claim author (currently 50 days versus 30 days of the benchmark); (iv) average number of claims.

It is worth noting that the Ombudsman Office does not authorize the legal department to use any information from an ombudsman investigation in a lawsuit defense. Although they are aware that usage of investigation related information could significantly increase the company's rate of success in lawsuits filed in the labor courts, the information is not provided so the author anonymity of the ombudsman process is not negatively affected. Moreover, to provide this kind of information would benefit the company in detriment to the employee, which is considered incompatible with the Ombudsman's mission, who should be always independent from the company[82].

The ombudsman channel is also available for employees in all the company's international unities, although its usage rate is much lower when compared to Brazil (i.e. average of only 4 complaints by thousand employees). This can be explained by the fewer communication efforts to divulgate the Ombudsman Office to employees in the international operations, a factor that is being corrected by the inclusion of international plants in the *itinerant ombudsman* program. Moreover, even if the number of grievances rises significantly, the lack of qualified Irco employees to conduct the investigation in the international unities might become a problem. As a result, the investigation activities in international unities are being outsourced via specialized service providers.

The Union's Perspective

Although the Ombudsman Office creation is completely unrelated to any specific collective bargaining process, Irco was able to depict the creation of the channel as an important

[82] Interview #8, Ombudsman Manager, 07/24/2014.

union achievement. If before the creation of the Ombudsman Office grievances would arrive to the company in a loose and unstructured way, currently collective problems can be identified more easily by the Labor Relations Department, allowing for specific correcting measures. Evidently, not all unions reacted well to the initial creation of the ombudsman office, raising questions about its effectiveness and anonymity. In order to deal with this distrust, union leaders are constantly invited to the company's headquarters in order to get to know the structure and functioning of the ombudsman office, therefore being persuaded to help selling the idea and the advantages of the ombudsman channel to their union members. As a whole, unions have responded positively to the creation of the ombudsman office, according to Irco's Labor Relations Department[83].

In order to confirm that opinion, I was able to interview one of the Directors of the Union of Railway Workers in Espírito Santo and Minas Gerais (SINDFER). According to union information, since 2007 the union is trying to include in the final text of the CBA a section on workplace bullying[84]. In 2011 a generic provision on workplace conflict made into the final text of the CBA, but the term *assédio moral* was omitted[85]. It is worth noting that in this CBA the company agreed to review all its existing grievance and whistleblowing channels within 6 months of the agreement. In 2013 the company finally accepted the text desired by the union, which was largely inspired by the Union of Workers in the Banking Sector CBA detailed elsewhere in this thesis, and which expressly included the term *assédio moral* and had the ombudsman as the channel for its solution[86]. After this moment, the union started advertising to

[83] Interview #5, Labor Relations Manager, 07/24/2014.
[84] Interview #9, Union Representative, 08/04/2014.
[85] CLÁUSULA VIGÉSIMA PRIMEIRA - RESPEITO E VALORIZAÇÃO DO EMPREGADO
O respeito aos empregados no ambiente de trabalho é uma prioridade para a Irco.
De forma a garantir maior transparência e abertura no diálogo entre os empregados e a empresa, a Irco se dispõe, no prazo de até 6 meses, reorganizar os canais hoje existentes pelos quais os empregados podem encaminhar questões críticas e com impacto no clima organizacional
[86] CLÁUSULA VIGÉSIMA TERCEIRA - RESPEITO E VALORIZAÇÃO DO EMPREGADO: PREVENÇÃO AO ASSÉDIO MORAL
O respeito aos empregados no ambiente de trabalho é uma prioridade para a Irco.

its members the Ombudsman as a union achievement and to incentivize employees to directly access the channel.

Although the union has no metric about the usage rate of the Ombudsman, the general feeling is that employees are responding well to the existing structure, since grievances had been presented and results that are positive to the eyes of the union were achieved[87]. It is interesting to notice that the example of a positive result given by our interviewee was a case in which the company terminated a manager in the port operation in Vitoria after a grievance was filed in the ombudsman channel. This case clearly played an important role to reinforce the idea of independence of the channel in the eyes of the union.

It is worth noting how the creation of the Ombudsman Office changed the relationship between workers and the company in cases of conflicts. Currently, when an employee has an individual grievance the union orientation is that the employee himself files this grievance to the ombudsman. If the union understands that grievance might have great impact (e.g., affects several employees), the union itself handles the grievance – but once again using the Ombudsman channel. If the solution obtained via the Ombudsman channel was not satisfactory for the union, then they would resort to other traditional union tools that were used before[88].

An analysis of SINDFER's newsletter for Irco's employees is also revealing of the impact that the creation of the Ombudsman Office had in how the union deals with conflicts in the workplace. Whistleblowing and disclosure of grievances has always been in the union's radar. In the first two months of 2014, a series of grievances were published in details in the union's weekly newsletter. According to the newsletters (*Jornal Raízes*), those grievances included complains about management pressure to not observe workplace safety rules,

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Questões relativas a violação do Código de Ética, assédio moral e sexual ou questões de qualquer outra natureza que representem ações impróprias ou prejudiciais aos empregados poderão ser encaminhadas à Ouvidoria, através do Canal de Denuncias

[87] Interview #9, Union Representative, 08/04/2014.

[88] Interview #9, Union Representative, 08/04/2014.

nonpayment of overtime work, excessive control by management of the time spent by employees in the company's restrooms, workplace bullying targeted at homosexual employees, among others. In all those cases, the newsletter also brought the observation that all the grievances published in the newsletter were already reported to the HR department (in February 2014 the standard text substituted HR for Ombudsman), and called other employees to also report their grievances to the union or to the "grievance channel" made available by the company: The Ombudsman. It is worth noting that every time that the ombudsman channel was cited in any union newsletter it was followed by the information that "the Ombudsman channel was an achievement by the Union" (*uma conquista do sindicato*) obtained in the Collective Bargaining.

The importance of filing a grievance was reinforced even more in the Newsletter 550 (03/13/2014), in which SINDFER's president (and also employees' representative in Irco's board) is quoted in the cover of the newsletter saying that "Filing a grievance is an act of union responsibility" and incentivizing other employees to report their problems to the union, or to the company, via the Ombudsman e-mail and hotline, or via "the managers that value their employees (which I believe to be the majority) instead of harassing them [and who] deserve our credit."

Later, in August 2014, the Ombudsman Office was once again the main topic in a SINDIFER's newsletter (JORNAL RAÍZES 563, 08/20/2014). In that occasion, the newsletter highlights how a grievance filed by the union to the Ombudsman led to the identification that managers were abusing their power in the Harbor Directory (*DIOP)*. The grievance was motivated by an accident in the *Harbor of Tubarão*, and the subsequent attitude of managers of the harbor who blamed workers for the incident and decided for suspending some employees and terminating others. The newsletter highlights the Ombudsman final report, which considered the

disciplinary actions taken against the employees disproportionate to their responsibility in the incident, and informs that based on the Ombudsman final report the union formally asked the Labor Relations department to nullify the terminations and suspensions, and to punish the responsible managers. It is worth noting some of the words chosen by the union in the newsletter to report the incident. First and most important, although the Ombudsman is an independent body, the union underlines the fact that it is a part of the company, which means that the Harbor managers were considered responsible for the accident **by the company itself**. Moreover, a box in the Newsletter explains to the workers what is the Ombudsman office, as reproduced below:

> "OMBUDSMAN IS AN ACHIEVEMENT OF THE UNION
> *Unthinkable in a recent past, the existence of an internal structure in the institutional environment of Irco to receive and investigate each and every type of abuse of ethical or moral nature, environmental or human rights violation, as well as irregularities and conditions in the workplace and harassment by the managers, is now a reality thanks to the union movement that functions within the company. Associated to the Code of Conduct, the Ombudsman is a structure that deals with the grievances filed to the Union through a channel designed specifically for that. The internal Grievance Channel of the Irco functions via phone (XX) XXXX-XXXX, and e-mail xxxxxx@irco.com." (Jornal Raízes 563, 08/20/2014)*

Evidently, the adoption of the Ombudsman as the main channel for grievances did not lead unions to abandon other traditional tools. As shown earlier, not only the union uses Ombudsman reports as basis and trigger for other union activities in order to pressure management for change, but traditional weapons such as strike threats and work stoppages were used in the beginning of 2015 when 120 employees were terminated. A detailed picture of how the union defines when and how to use the Ombudsman channel and other tools, such as strikes,

work stoppages, litigation and the direct relationship with management, would demand a deeper immersion on the union decision structure and overall strategy making, which goes beyond the scope of this research. At this point, what can be identified is that the ombudsman channel is used by the union as a complementary tool to other existing union channels to deal with individual and collective grievance from its members and employees in general.

Analysis

The case of Irco proved interesting, given its peculiar history of how the Ombudsman Office was developed, and how this process impacted on how unions and workers in general understand and use this conflict resolution tool. Before analyzing this, it is worth reviewing Irco's other approaches to conflict in the workplace.

In general, workplace conflicts can be described as a central issue for Irco's management and its relationship with labor. Although historically the company has faced few relevant strikes, unions have constantly use strike threats as a bargaining tool. Moreover, issues closely connected to individual workplace conflicts, such as workplace bullying, have been a recurrent item in unions' agenda in Collective Bargaining.

It is also worth noticing that Irco faces a considerable amount of lawsuits on the labor courts, which, unsurprisingly, tend to deal with work time issues. Irco faces an interesting peculiarity in employment litigation. As explained earlier, by and large employment litigation in Brazil is in practice exclusive to terminated employees: an employee that files a lawsuit against his own current employer will almost inevitably be discharged as soon as the employer is aware of the lawsuit. However, the characteristics of a certain part of Irco's workforce (i.e. railway workers whose competence and skills are so specific that cannot be easily substituted) allow those workers to actually use the courts without fearing any sort of subsequent employer

retaliation. Therefore, for this small amount of employees, employment courts can actually work as a *voice* mechanism (Farrel 1983). But one should not draw any general conclusions from those workers, as they constitute a very small amount of the totality of Irco's employees. For the vast majority, employment courts are a resource to be used only after termination.

This does not mean that Irco employees do not have any institutional *voice* mechanism or that there is no need for them – and that is probably where Irco's case becomes most interesting. In the lack of any adequate institutional voice mechanism, Irco's employees took control of the mechanisms that were available, until forcibly transforming them in an adequate *voice* channel. Irco's ombudsman channel history can basically be summarized as the story of how international regulation (Sarbanes-Oxley) can have indirect positive impacts in a foreign workplace, and how employees and unions can transform inadequate *voice* channels into an effective conflict resolution instrument and as a leverage tool for traditional union activity.

Evidently, the apparent success of Irco's ombudsman channel cannot be attributed simply to employees, unions, or the influence of external regulation. If Union's currently incentivize its members to directly access Irco's Ombudsman, some of this success must be attributed to Irco's management ability to depict to the Union that the creation of the Ombudsman Office was an achievement of labor. Of course, this only became possible by taking advantage of the support of top management to the creation of the Ombudsman Office and the care taken to guarantee the confidentiality of all the processes involved in the Ombudsman structure[89]. Moreover, it must be highlighted how unions were able to use the Ombudsman channel to strengthen their own position in several ways. First, by reproducing the speech that the Ombudsman was an achievement of the Union, they are able to reinforce their importance to their current and

[89] The option to not allow the legal department to use Ombudsman related information to defend the company in employment lawsuits is a strong example of how important the idea of confidentiality and independence is to the Ombudsman.

prospective members. Secondly, by including the Ombudsman channel (and the topic of workplace bullying) in the Collective Bargaining Agreement, they guarantee that the issue of workplace conflict and its resolution remain central for Irco's management. Finally, by strategically using the results of Ombudsman investigation that identify managerial misbehavior, the Union is able to leverage its own position in traditional union activities and in their negotiation with Irco.

Finally, it is worth noting that the Ombudsman channel is not Irco's first effort in what could be generally considered Alternative Dispute Resolution, and it is probably also not the last effort in that area. In the past, the company tried unsuccessfully to use CCPs as alternative to litigation. CCPs however, present some of the same limitations of employment litigation: *de facto* it covers only terminated employees, therefore only providing economic compensation for a terminated relationship. The Ombudsman, on the other hand, has been proving capable of dealing with interpersonal and management conflicts in ongoing relationships, which cannot be necessarily repaired by a monetary compensation (e.g., workplace bullying). Moreover, the Ombudsman Office has been able to be seen as an independent body, the lacking characteristic that was identified as determinant to CCPs failure in Irco. Finally, it is interesting to follow how Irco's Ombudsman will develop in the coming years. What began as a whistleblowing channel and developed into a more complex investigation body seems to slowly start the transformation into a mediation-focused structure.

CHAPTER 6 - CASE STUDY – FINANCO

In this chapter I describe and analyze the case of the Brazilian bank Financo. First I describe the Human Resources and Industrial Relations practices and strategy. I follow with the Legal Counsel perspective on employment litigation, and then I describe some issues related with workplace conflicts. Afterwards, I describe in details the functioning of the Ombudsman Office. Finally, I present a within-case analysis of the main points related to the issue of workplace conflicts in the company.

Company overview

Financo is the largest Brazilian private bank by assets, the largest private bank in Latin America, and the 58th largest bank in the world, according to SNL Financial Ranking as of September 2013. Financo is a full service bank, with operations in 19 countries in Europe, Asia, USA, and, mainly, Latin America. The bank is among "The Best Companies to Start Your Career" according to the Você S/A ranking (Revista Você S/A 2014a), and "The Best Places to Work" according to the Great Place to Work (GPTW) (Revista Época 2014) and the Brazilian business magazine Exame (Revista Exame 2014b).

Financo is the result of the merge in 2008 between Financo *(*founded in 1943) and Bank1 (founded in 1924). Financo is currently listed in the BM&F Bovespa in São Paulo and in the New York Stock Exchange.

Human Resources

By the end of 2014 Financo had a total of 93,175 employees worldwide. Of those employees, 92.5% are located in Brazil. The 6,983 employees in operations in other countries are concentrated mainly in South America, with 6,207 employees in Argentina, Chile, Uruguay and

Paraguay[90]. In Brazil the company also uses 29,882 subcontracted workers. Of the totality of employees, 55.1% are between 30 and 50 years old, 37.6% are below 30 years old, and only 7.3% are older than 50[91]. In 2014, Financo's turnover rate in Brazil was 10.9%, a decrease in comparison to previous years (11.1% in 2013 and 15.6% in 2012), as a result of the new "Employee Redeployment Program" which aimed to create in-house opportunities for employees about to be terminated. This program was responsible for 7,723 transferences of employees between the bank's departments and unities in 2013[92], and 578 transferences in 2014[93].

Human Resources department objective is to guard and consolidate the organizational culture and principles. Those principles (e.g., meritocracy, focus on innovation and on people, ethical leadership, agility, among others) are reinforced by a variety of HR tools, such as the Annual Leadership Meeting, innovation and sustainability awards for employees, internal communication campaigns, and the overall performance assessment system[94]. Pursuance of a meritocratic environment is observed since the attraction of new employees, until the performance assessment, passing through the training programs and remuneration packages[95].

The HR department is structured with three HR directors, who respond to the same Vice President, who is also responsible for other departments, such as marketing and institutional relations. One of the HR directors is responsible for a part of the HR Business Partner structure, other is responsible for another part of HR Business Partner structure as well as other support areas and labor relations, and finally the third director is responsible for the HR products (e.g., training, remuneration, benefits) and the ombudsman office. Approximately 700 employees work in all three HR departments.

[90] Annual Report 2014.
[91] Annual Report 2014, p. A-183.
[92] Annual Report 2013.
[93] Annual Report 2014, p. A-153.
[94] Annual Report 2014, p. A-20.
[95] Interview #3, HR Manager, 07/18/2014.

Variable pay plays an important role in the remuneration policy of the company. All the employees participate at least in one program of variable pay. Whereas lower level employees will receive the profit sharing value determined in the collective bargaining agreement (*PLR – Participação nos Lucros e Resultados*), some departments and levels of employees are also entitled to other variable pay programs, such as Result Sharing (*PR – Participação no Resultado*) or High Performance Compensation Program (*PRAD – Programa de Remuneração do Alto Desempenho*), which are also based in the individual performance of the employee and his/her respective area. Finally, employees in leadership positions, and with outstanding performance in people management, self-development, and team development, are also eligible for the Differentiated Performance (*PD – Performance Diferenciada*), a form of stock options program.

Besides the benefits guaranteed to employees in Collective Bargaining (e.g., luncheon vouchers, day-care/baby sitter allowance, transportation allowance, and health care), the bank also offers dental care, private pension plans (with no employer co-participation), limited educational allowance, and personal and emotional assistance by external provider.

Financo's training and development programs are conducted by the company's internal Business School, which offers trainings in technical and behavioral competences. In 2014 R$ 109 million[96] was invested in training, with an average of 26 hours of training per employee[97]. The topic of financial education is also core to the Bank strategy. Since 2009 all employees have access to financial education training, focused on financial planning, credit use and investment, aiming at increase employees' savings and investments. Up to 2014, 70,000 employees had taken the online training[98].

[96] US$ 41 million with exchange rate of 12/31/2014.
[97] 2014 Consolidated Annual Report, p. A-182.
[98] Annual Report 2014, p. A-145.

Although there is no forum for the employee direct participation in the decision-making, which tends to be top-down, all employees take part in the definition of their performance goals, which will be a part of each employee's individual performance assessment, which covers 100% of the workforce. Moreover, the company holds several communication channels for the employees, for filing of suggestions or complaints.

For suggestions and employees' feedback, the bank holds the *Sustainable Ideas Database* (*Banco de Ideias Sustentáveis* - a suggestion system that received 704 suggestions in 2013), as well as a yearly climate survey (Speak Frankly – *Fale Francamente*), and a quarterly mini-climate survey (Pulse - *Pulso*). Moreover, since 2010 the Open Doors program (*Programa Portas* Abertas) provide the opportunity for some employees of all levels to meet with the CEO, the Chair of Board of Directors, or other high level manager, to discuss about the bank strategy, products, work environment, or other relevant topic for the involved parties. In 2014, there were four Open Doors meetings[99]. Whereas the Open Doors project does not generate a formal output, the two types of climate surveys do. With a response rate of approximately 90% of all the employees[100], the results of those surveys are disclosed to each area of the company, which will be responsible to generate a plan to deal with the issues raised in the survey.

Labor Relations

The labor unions of bank workers (*Sindicatos dos Bancários*) are among the most active unions in Brazil[101]. With a long history of strikes[102] and collective bargaining, the relationship with unions is an important part of the bank strategy.

[99] Annual Report 2014, p. A-144.
[100] Annual Report 2014, p. A-156.
[101] As an example of the union activism, bank workers went on strike for 7 days in 2014, for 23 days in 2013, for 7 days in 2012, for 14 days in 2010, for 15 days in 2009, and for 15 days in 2008.
[102] In 2014, 25.4% of Financo's offices were closed due to strikes. In 2013 this number achieved 31.6%, similar to the 30% rate of 2012.

The Labor Relations Department is under one of the HR directors, and currently counts with 46 employees, who are responsible for the relationship with the different unions in all the countries in which Financo operates and for the settlements in the Previous Conciliation Commissions (*Comissões de Conciliação Prévia - CCPs*), which will be analyzed later in this chapter.

The bank deals with 186 different unions of the bank sector, 15 federations, and 2 confederations, besides other unions of employees of other categories such as information technology, insurance workers, and secretaries, in a total of 10 different categories[103].

The Labor Relations department is the main contact channel for unions, and it also works closely with the HR business partners, who are the first contact point for labor relations when there is a complaint, orientation or suggestion coming from one of the unions. The department is also responsible for any specific negotiation in the company level (*Acordos Coletivos de Trabalho*) as demanded by law (e.g., profit sharing programs and working time control).

Although labor relations management recognizes that the department was originally seen as a department that would tend to block activities or decisions of other areas of the company, currently the department is trying to develop a more "proactive role," by taking part in business decision before they impact labor relations[104].

Dialogue with the unions is seen as the core of the department's strategy, but this does not mean that conflict has been eliminated of this relationship. According to Bank's management, what has changed in this relationship is the way to deal with the conflicts. If in the

[103] Interview #1, Labor Relations Manager, 07/17/2014.
[104] Interview #1, Labor Relations Manager, 07/17/2014.

past appeals to the courts were used constantly, mainly when seeking for an injunction during strikes, currently the "judicialization" of conflicts is being avoided[105].

Legal Counsel

The labor law area of the Legal Counsel counts with 250 employees between lawyers and *prepostos* (employees that attend the court hearings representing the employer, but who are not exercising the role of an attorney). The high number of employees in the area is necessary in order to deal with the massive amount of lawsuits in which the bank is a party all over the country. In 2014 there were a total of 62,641 lawsuits filed against the bank in the Brazilian labor courts. In that year R$ 1.255 million[106] was spent in settlements in the labor courts or in final awards in labor claims[107].

As it is common in all banks, due to specific statutory rights only applicable to employees in this sector, the main requests in employment related lawsuits include (1) salary differences arising from the application of the 30 working hours per week limit (CLT Art. 224); (2) Salary differences arising from overtime not duly registered in the internal systems; (3) Claims with respect to the method to establish the overtime work pay; and (4) Salary parity with other employees in the same office, exercising the same job, in accordance with Brazilian law[108].

The high volume of lawsuits and values involved is not exclusive to the labor and employment law cases. The high volume of cases in the civil courts[109] led the bank to start a plan of diminishing the total number of lawsuits in the civil courts, which is now being expanded to the labor law area. The goal of this program, which the pilot was implemented in the Superior Court of Justice (*STJ*), is to promote a more uniform experience for the courts when dealing with

[105] Interview #1, Labor Relations Manager, 07/17/2014.
[106] USD 472,500.00 with exchange rate of 12/31/2014.
[107] 2014 Consolidated Annual Report, p. A-117.
[108] 2014 Consolidated Annual Report, p. A-117.
[109] Those are not labor or employment related cases, but mostly lawsuits filed by customers of the bank.

Financo as the defendant party. This means tighter control over external attorneys representing the bank in the courts and a more restricted appeal policy: the bank only appeals in cases that it believes to be right, trying to settle earlier in the case otherwise[110].

The project is being presented to judges and justices in the Regional Labor Courts (*TRTs – Tribunais Regionais do Trabalho*) and in the Superior Labor Court (*TST – Tribunal Superior do Trabalho*), in a clear attempt to restore the currently discredited image of the banking sector in part of the court system. It is worth noticing that in July 2014 Financo was the 9th organization with most lawsuits in TST, with a total of 4,629 lawsuits (all appeals from one of the parties involved) (CESTP 2014). The problem is not new. In 2004 the bank agreed with the president of TST to withdraw at least 500 appeals that were pending in the Superior Court and to act preventively in order to avoid new lawsuits (TRT3 2004).

According to bank's management, the response of the courts once they learn about the project is extremely positive, since the courts are institutionally interested in enhancing settlement rates[111], as explained in chapter 3.

Although the project aims to decrease expenses involved in lawsuits, high settlement rates tend to make managers and high executives apprehensive. Their biggest fear is to generate what is known in the area as the "settlement industry" (*indústria do acordo*): knowing that the company is settling earlier and in more cases, employees may interpret this as an incentive for filing their own lawsuits[112].

Settling more cases and reducing the number of appeals is just a part of the department strategy to deal with workplace issues. By identifying common issues that are recurrent in different lawsuits, the legal department is trying to come up with solutions, orientations to

[110] Interview #2, Legal Manager, 07/18/2014.
[111] Interview #2, Legal Manager, 07/18/2014.
[112] Interview #2, Legal Manager, 07/18/2014.

management or new internal rules. In order to implement those rules, the compliance department and high executives' support is considered essential.

Disciplinary Policy and Termination

Besides a code of ethics, the company also has in place disciplinary policies to deal with employee misconduct in the workplace. Depending on the misconduct, the HR, the audit or the investigations department is responsible for the application of the disciplinary policy. The possible penalties are oral warning, written warning, suspension, and just cause termination, although in very few cases the application of the penalties will follow this exact scale for a single employee (i.e. the employee might get a suspension or just cause without having been previously warned).

In case of unjustified termination, the employee's direct manager is responsible for the decision to terminate, although the HR Business Partner is always informed about the decision. The HR Business Partner may try to influence the manager's decision, or to conciliate the parties in case of conflicts, but the final word is always from the employee's direct manager. The only exception is the case in which a fraud or severe misbehavior was identified by the investigation department or by the ombudsman office, which can then determine the termination of the employee.

An interview with the terminated employee is not mandatory, but is conducted in some departments by the HR Business Partner. If a possible workplace conflict is identified in this interview, it is the role of the HR Business Partner to work in a solution with the involved parties or their managers. If the case may generate legal liability, the legal department is informed. In reality, HR and the legal department work closely together, with monthly meetings to discuss potential legal risks observable in the workplace.

Workplace Conflicts

So far I have presented a general overview of the company's structure and the organization of its HR, Industrial Relations and Legal Counsel departments. The topic of workplace conflict was briefly touched when the disciplinary policy was explained, as well as the general industrial relations and legal counsel strategies. When discussing how workplace conflicts are dealt outside the realm of the labor courts, the already cited climate surveys, and the daily preventive and counseling role of industrial relations, legal counselors and HR business partners, play a significant role. But there are two specific formal channels, which the sole reason to exist is to deal with workplace conflicts, which should be studied more closely. Before that, however, I will analyze two common important sources of workplace conflict: discrimination and workplace bullying.

Discrimination

The company supports the Memorandum of Understanding signed by the Brazilian Federation of Banks (FEBRABAN), which aims to reduce distortions in social inclusion rates in the financial sector. In 2007 FEBRABAN created the Program for the Valuing of Diversity with the participation of several banks operating in Brazil, including Financo, with the objective of (i) identifying the real situation of the banking sector in terms of diversity; (ii) providing an environment for the banks to exchange information on best practices related to workplace diversity; and (iii) increasing diversity in the banking sector, therefore incentivizing similar actions in other sectors. The first "Diversity Census" of the sector was promoted in 2008, with a response rate of 49.9% in the sector. The second "Diversity Census" was promoted in 2014, with a 41% response rate (FEBRABAN 2014).

Looking specifically at Financo from the perspective of workplace diversity, currently 60% of all the employees are women, including 50.3% of the management positions, and one member of the executive board. Afro-descendants represent only 20% of the total employees, a number that the company is trying to raise through the achievement of proportional rates of afro-descendants applicants in the selection process. Moreover, 4.54% of the employees are disabled workers[113], slightly below with the minimum rate (5%) established by Brazilian law[114]. Furthermore, aiming to increase diversity and to promote the culture of diversity in the workplace, lectures and workshops are also being provided to Financo's recruitment and training suppliers, as well as outsourcing companies with contract with the bank[115].

Workplace Bullying (Assédio Moral)

Workplace bullying has been a central issue in the banking sector since the early 2000s. Since at least 2006 the labor union has tried to negotiate with Brazilian banks a sector wide program for "Collective Prevention of Conflicts in Workplace" (Sindicato dos Bancários do Ceará 2006). In 2010 the national sectorial collective agreement finally included a clause about prevention of conflicts in the workplace, which pointed to a company level agreement (*Acordo Coletivo de Trabalho*) that could be signed by each bank. This company level agreement expressly states to have the goal of promoting workplace practices and behaviors that might prevent unwanted conflicts in the workplace[116]. In order to reach this goal, all signing banks should provide to its employees a specific channel for grievances, complaints, suggestions and questions. Moreover, those channels should be evaluated semi-annually in meetings between

[113] Annual Report 2014, p. A-153
[114] Lei nº 8.213, de 24 de julho de 1991, art. 93, IV.
[115] Annual Report 2014, p. A-152.
[116] *"O objetivo do presente Acordo Coletivo de Trabalho Aditivo voltado à prevenção de conflitos no ambiente de trabalho é promover a prática de ações e comportamentos adequados dos empregados dos bancos aderentes, que possam prevenir conflitos indesejáveis no ambiente de trabalho."*

union and banks' representatives, by using sectorial statistics to be provided by FEBRABAN. In addition, all signing companies agree to take into consideration for promotion to management positions the behavioral, leadership and interpersonal skills of the employee being considered for promotion. It is worth noting that not only the signing banks must provide this grievance and complaints channel, but also all signing unions would also need to provide a similar channel to bank employees.

The functioning of the mentioned channel is also defined by this agreement: if the employee files the grievance to the union, the union has ten working days to present a written grievance (or question) to the bank[117]. The assessment of the facts that the grievance is about, and any necessary investigation by the employer, must be finalized within 60 days of the filing, and during this period, neither the bank nor the union may disclose any information on the grievance. The response to the grievance is addressed to the person who originally filed it to the employer (i.e. if the employee personally accessed the grievance channel, he/she will receive the response by the employer. If the employee used the union to file the grievance, the response will be addressed to the union, who will then inform the employee of its result). Finally, anonymous grievances or complaints filed to the bank shall be investigated, even if there is no one to formally receive a response. Unions are not allowed to forward to the employers anonymous grievances, although the union can opt to omit the name of the grievant when forwarding a grievance to the bank. In all cases, both union and employers must preserve the identity of the employees involved in the grievance. Except for a reduction from 60 to 45 days of maximum time to conclude any investigation over a grievance, which was changed in the 2013 bargaining process, the text of the collective agreement has not been changed since 2010. Currently 10

[117] Although in this case the union might decide not to forward the grievance to the employer.

banks sign this specific collective agreement, including Financo, whose Ombudsman channel already exists since before the signature of this agreement.

As mentioned above, the described agreement is the result of the central role that the workplace bullying issue has occupied in collective bargaining process and in the union speech since early 2000s. Banking unions' newsletters for the past 15 years bring cases described as workplace bullying to the attention of bank employees. Union reports of workplace bullying in the banking sector is usually connected to management pressure to achieve "unrealistic goals" (*cobrança de metas abusivas*) or management bullying towards the employees with the lowest productivity at a certain month, as reported by the union newspaper (e.g., Folha Bancária 5351[118]). It is worth noting that although prevention of workplace conflicts was a central issue of the collective bargaining process in 2010 (a survey conducted by the union before the negotiation period showed that 75% of bank employees considered the end of unrealistic goals as a priority for the collective bargaining, according to the union newspaper [Folha Bancária 5360]), during the 14 days strike that year the main issues that the union would use to justify the maintenance of the strike were economic (mainly the banks' wage raise proposal), and not related to the non agreement on the prevention to workplace conflicts clause (Folha Bancária 5358, 5362 and 5363). Sector wide, the workplace bullying issue is still central to union leaders and employees: reports of workplace bullying cases are still one of the main topics covered by the union newsletter, stats on the increasing cases of workplace bullying in different sectors being filed to the courts are highly publicized by unions' publications[119] and attempts to make the existing agreement more strict to employers are topics of the yearly process of collective bargaining, as evidenced by the reduction in 15 days of the response deadline obtained in the 2013 agreement.

[118] http://www1.spbancarios.com.br/fbmateria.asp?c=8286
[119] E.g., http://www.contrafcut.org.br/noticias.asp?CodNoticia=41992&CodSubItem=29 and http://www.contrafcut.org.br/noticias.asp?CodNoticia=42493&CodSubItem=29

Finally, it is worth noting that the proposed semi-annual meetings between unions and employees to discuss stats of the grievance channels are actually occurring, and in those meetings unions have been presenting their concerns over the high number of grievances dismissed or rejected by the banks and the lack of information on corrective measures taken on the cases in which the investigations confirm an employee's grievance or complain[120].

Formal ADR Structures

Previous Conciliation Committees (Comissões de Conciliação Prévia - CCPs)

As explained earlier, the CCPs were created by the Law 9,958/2000 with the goal of reducing the number of conflicts reaching the labor courts. The CCPs' goal is to settle the cases before a lawsuit is filed on the labor courts. Although the CCPs experience in general has failed due to legal professionals' resistance and a ruling of the Supreme Court (STF) that established its mandatory characteristic as unconstitutional (Fragale Filho 2013), the banking sector is one of the few sectors where the CCPs are still active, and that is the case in Financo.

The Bank has been using CCPs even before the law that first regulated the topic was passed in 2000. In Campinas, for instance, Financo was the first bank to create a CCP with the region's union in August 6th, 1997. This CCP, which resulted from an agreement between the bank and the Union of Bank Employees from Campinas and Region, was the first of its kind in the sector. According to the union, the CCP's main goal was to provide the terminated bank employee with an alternative to quickly and effectively resolve any employment related dispute, without having to go to the labor courts. Although the CCP covered only complaints of terminated employees, the committees were seen as part of a bigger strategy of workplace conflict management, which should include in the future union workplace representation and the

[120] See http://www.contrafcut.org.br/noticias.asp?CodNoticia=40553&CodSubItem=29

opening of the CCP to active employees. In 1999, the Collective Agreement in Campinas even included the possibility of collective complaints for active employees in case of repetition of similar complaints in one single workplace. It is worth noting that Financo was chosen at the time to start the CCPs project because it was the banking employer with highest number of lawsuits in the region covered by the Campinas union. According to the union, when first implemented it made the number of formal grievances by total terminated employees rise from 65% to 79% (Sindicato dos Bancários Campinas e Região 2000).

In the first two years of the functioning of the CCP in the region, 77 cases were brought to the committee, of which 71 were settled after 43 days on average, in comparison to 1339 days on average for the cases that went to the labor courts in the region (Sindicato dos Bancários Campinas e Região 2000). Under the specific rules defined for the CCP in Campinas, when a terminated employee files a grievance and a request to conciliate, the union informs the company, which has the right to decide if a negotiation process should start. In those cases, the employer is responsible to pay to the union the amount referring to the administrative costs of the conciliation process. All the conciliation process must take place within the offices of the union, and the bank is forbidden to create an internal conciliation commission, without the union, in the same region covered by the existing CCP.

Currently Financo has CCPs' collective agreements with other unions beyond Campinas, including one with the Union of Bank Employees from São Paulo and Region, which concentrates the highest number of Financo's employees.

São Paulo concentrates most of the approximately 2,000 cases discussed by Financo in the CCPs in 2013, with an overall settlement rate of 93%. The relatively high usage of the

CCPs[121] is also due to the possibility of the union to inform the terminated employee about the CCPs during the process of "homologation of termination" (*homologação da rescisão*), a process that is mandatory by law. Only in the city of São Paulo, between 2013 and 2014, 2,259 terminated employees were able to settle in the CCPs, which generated payments by Financo on a total of R$ 92 millions[122] (Rosa 2015). Although from a legal standpoint any employee (active or terminated) from any department might try to use the CCPs, the definition of what "types" of employees will be able to access the CCPs is made in conjunction between union and company via a company level collective bargaining (*Acordo Coletivo de Trabalho*) (Alves 2014). Currently, only terminated employees can use the CCPs in São Paulo.

The determination of over which topics a settlement is possible for the bank is determined in conjunction by the Legal Counsel and Labor Relations, which is the department responsible for all the procedures involved in the CCPs. The participation of the Legal Counsel in this definition is important, since the CCP settlement strategy may affect and be affected by the settlement strategies used in the lawsuits: if values offered in the court settlements are too high, employees will have less incentive to settle in the CCPs. Moreover, an employee that settles over a certain topic on the CCPs is barred to discuss the same topic in the courts, although other issues can still be discussed. It is worth noting that the bank strategy involves CCP settlements over the most common lawsuits issues cited before (i.e. overtime work related issues).

[121] In 2013 a total of 5,996 employees were terminated in the South and Southeast Regions where those approximately 2,000 CCPs cases are concentrated.
[122] $34.6 millions with the currency rate of December 31st 2014.

Ombudsman

The Superintendence of Ethics and Ombudsman is composed by two different teams, one responsible for the ombudsman related activities, and other for the management of the code of ethics in the organization.

The Ombudsman structure exists for a longer time than the current Superintendence structure, and it was a result of the merging process between Financo and Bank1. During the merging process the question of organizational culture was central to top management, with focus on people and process management. The necessity of an ombudsman is described as "a natural result of this focus on people management, because a company of the size of Financo should have a direct channel with the employees focusing on their support." Initially the image of the Ombudsman was connected to an idea of a protector of the employees, which generated some resistance by managers. Currently, however, the Ombudsman Office has good access not only to employees, but to managers as well[123].

Before the creation of the Ombudsman office, there was no structured channel to receive the types of grievance that are today under the ombudsman responsibility. This activity used to be conducted mainly by the HR business partners, since they were already the closest HR professionals to the other department's teams. Moreover, all the structure involved in the program of *performance culture*[124] implemented during the merging between Financo and Bank1 would also work as an outlet for employees' grievances and complaints. That was the case, because once the team responsible for the performance culture project would enter a department to discuss people and process management, it was natural for employees to look for them to discuss other workplace related issues. Finally, direct supervisors have always been also

[123] Interview #4, Ombudsman Employee, 08/01/2014.
[124] A program conducted by the HR department after the merge of Financo and Unibanco designed to promote a better and more open workplace environment and identify better internal procedures in order to guarantee better performance by all the employees of the company.

empowered as the first outlet for employees' grievances on the workplace, so employees and managers themselves can solve their own conflicts.

Ten employees compose the Ombudsman team, and their activities are divided between (i) receiving the grievance and giving the first counsel, and (ii) conducting investigations and mediations. Any Financo employee can reach the Ombudsman Office via phone, e-mail, intranet and in person. The Ombudsman Office advertises internally its own service as focused on behavioral issues (i.e. interpersonal conflicts), as well as conflicts of interests. The Ombudsman Office may also receive other issues, such as complaints about benefits, but they are then forwarded to appropriate department (e.g., in the case of benefits, the question is forwarded to HR). For cases involving interpersonal issues or conflict of interests, the grievant can decide if he will file his grievance anonymously or not, in order to avoid any fear of retaliation. In all grievances referring to a specific employee behavior, the Ombudsman will make sure to listen not only to the employee or manager whose behaviors are being questioned, but also the HR business partner, who works closely to the management and the team, and therefore is aware of the functioning of the department.

One of the Ombudsman main initial challenges was to differentiate itself from the investigation department (*Inspetoria*), which had existed for a long time before the creation of the Ombudsman office. The strategy adopted was to demonstrate to the employees that the Ombudsman Office goal is not simply to punish employees, but to work as a dialogue channel, targeting at preventing conflicts rather than solving or punishing employees involved in it. The Ombudsman Office considers that the strategy has been successful so far, given that cases where the Ombudsman adopts the role of counselor or mediator[125] are growing each year. Currently, cases in which the Ombudsman Office is expected to investigate the complaint are seen as a last

[125] The term mediator and mediation was loosely used by the Ombudsman Office during the interview

resource for solving the conflict, as it is understood that this kind of procedure might destabilize the team involved in the grievance. By focusing on the role of counselor or mediator, the goal is to empower employees and managers to solve their own present and future conflicts[126].

This current focus on preventive strategies, however, was only obtained after years of maturation of the Ombudsman structure within the company. When the Ombudsman channel was first created, it was understood by most of the company as a form of a whistleblowing channel, although that has never been the intention of top management. As more employees used the Ombudsman Office, more clear it became for them that the Ombudsman Office could work as a preventive conflict management tool, focused on counseling and mediation[127].

The detailed functioning of the Ombudsman Office is as follows. An employee contacts the Ombudsman Office by any of the existing channels and informs the workplace issue. The Ombudsman first attempt is to solve the problem via counseling, by talking to the grievant employee, understanding the situation, and generating together with him solutions or possible solution paths. If the counseling is not enough, the second step is what is internally referred as "mediation." This mediation can take various forms. It might involve a direct conversation with the grievant direct manager, or it might use the HR business partners as intermediates in this conversation with the manager. This decision is made case by case, and takes into consideration the characteristics of the case being discussed as well as of the manager involved. Another alternative is talking with both parties involved in the conflict separately, and, in case there is an agreement over the issue, bring all the parties to the same room for a conversation. However, if the case is related to a severe misbehavior or breach of the code of conduct, instead of the "mediation," the Ombudsman Office may start an investigation procedure. This investigation

[126] Interview #4, Ombudsman Employee, 08/01/2014.
[127] Interview #4, Ombudsman Employee, 08/01/2014.

will look for evidences for the employee's claim, and will hear peers and managers of the people involved in the issue. This kind of investigation, mainly when it includes hearing the peers, might generate some buzz in the department under investigation. Therefore, the procedure is conducted with considerable caution. After the investigation, the final decision is always made by a group, which will always include, besides the Ombudsman, the HR Business Partner and the manager of the employee or manager involved in the issue, counting on the support of the Legal Counsel and Labor Relations department whenever necessary. Figure 4 summarizes the functioning of the Ombudsman Office.

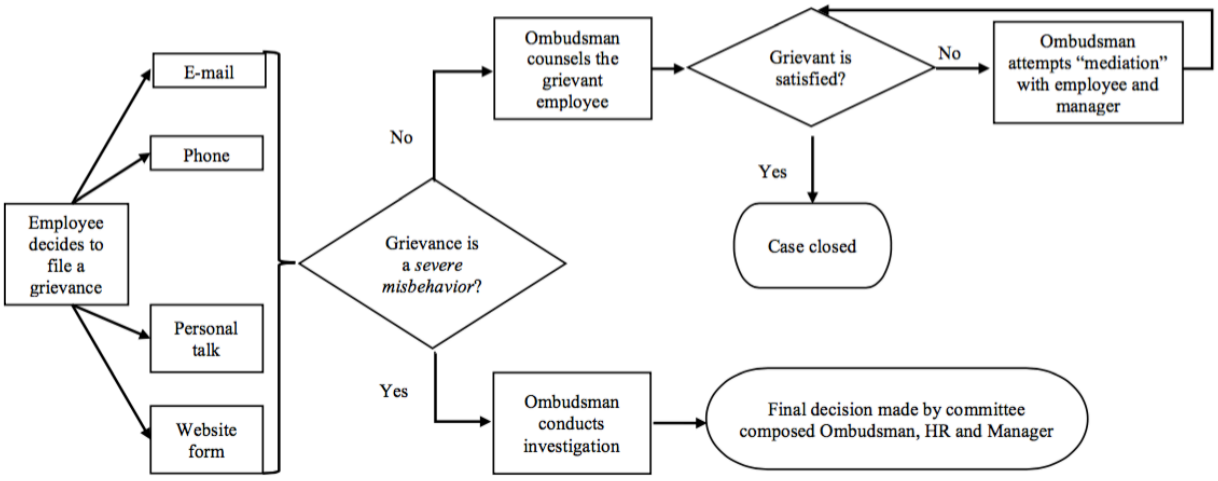

Figure 4 - Functioning of Financo's Ombudsman

Cases are treated as confidential all over the process, thus involving only employees and managers who need to be heard in order to reach an adequate solution. Moreover, the claimant may opt to remain anonymous throughout the process. If the solution proposed by the Ombudsman makes identification necessary (e.g., when mediation will be tried or when the

characteristics of the case will lead the people involved to identify the claimant), the claimant might opt between dropping his anonymity request or dropping the claim[128].

The Ombudsman Superintendence is hierarchically located within the HR department, reporting to the HR Executive. This report, however, is described as a mere formality, given that the Ombudsman Office must report to an existing department. This structure, however, should not impact the Ombudsman independence, which is a defining characteristic of the department, along with impartiality, anonymity and confidentiality. Despite being part of the HR structure, the Ombudsman has freedom to access any department or professional of the company. Although I was not given access to the quantitative data involving claims brought to the ombudsman[129], I was informed about the existence of grievances filed by other employees in the HR department, which was said to not impact the Ombudsman job, since all employees are able to recognize its exemption and independency within the company[130].

The Ombudsman Office is a channel available mainly for the company's own employees. Suppliers and subcontractors might only use the Ombudsman if their claim is tightly related to a current employee of the company. This does not mean, however, that employees must access the Ombudsman channel personally – this can be done through the union. In this case, an employee presents his grievance for the union, and the union might use the Ombudsman channel to try to solve the specific situation. Although this possibility already existed since the creation of the Ombudsman Office structure, it was reinforced by the 2010 Collective Bargaining Agreement, which made mandatory the existence of a channel for employee's grievances in all the banks.

The usage of the Ombudsman channel is monitored through monthly metrics regarding (i) the main topics brought to the Ombudsman, (ii) access channels used most often, and (iii) if

[128] Interview #4, Ombudsman Employee, 08/01/2014.
[129] The last year that Ombudsman related data was made publicly available (2010), the Ombudsman channel received 2,545 complaints, grievances or questions over the year (Relatório Sustentabilidade 2010, p. 99).
[130] Interview #4, Ombudsman Employee, 08/01/2014.

the claim was anonymous or the author identified himself. These metrics are classified by business, and the information is taken to top management in periodical committees. If it is identified a trend in certain kinds of grievances at certain areas, the Ombudsman Office will work closely to management in the identified problematic department in order to understand the causes of the complaints and how to solve it.

The Ombudsman Office is also responsible for claims and complaints brought by employees in the international unities of the company. However, the fact that the department is physically located in Brazil is a barrier for the use of the ombudsman channel by employees in international unities[131]. Whenever a case is originated in an international unity, the Ombudsman Office counts on the support of local HR or Legal Department employees.

The Union's Perspective

As explained earlier, workplace conflict is a central issue for the banking sector labor unions. Since the 1990s the banking unions have played an important role by trying innovative solutions on workplace conflicts issues (e.g., the creation of the CCPs). One could imagine that Financo's Ombudsman Office, which is in place since 2007, would be seen as positive by the union, who was trying to force banks to adopt similar alternatives at the time, until it finally resulted in the Agreement for Collective Prevention of Conflicts in Workplace signed in 2010. An analysis of how the Ombudsman Office is depicted in union's newsletters and websites reveal a more complex scenario.

In 2009, therefore before the signature of the Agreement for Collective Prevention of Conflicts in Workplace, the Union in São Paulo published in its website a news with the title "Grievance to the Ombudsman can lead to termination." Two cases were reported. In one the employee affirmed that after filing a grievance to the Ombudsman he not only did not receive a

[131] Interview #4, Ombudsman Employee, 08/01/2014.

response, but also was fired shortly after. In the second case, the Ombudsman allegedly disclosed the identity of the grievant, and the manager who was the subject of the complaint retaliated against the grievant employee. In response to that, the union started to instruct employees to BCC the union in all the complaints filed via e-mail to the Ombudsman, so the union could keep track of it (Fernandes 2009).

In another news published by the Union in São Paulo in May 2010, the Ombudsman channel is described as inefficient. An employee terminated allegedly due to poor performance reported to have contacted the Ombudsman eight times during the year that preceded her termination, without obtaining an adequate response. One of the Union directors stated that this was another case in which the use of the Ombudsman channel led to retaliation and termination (Giorgi 2010).

Similar cases were not restricted to São Paulo. In Campo Grande, a case in which the employee who filed a grievance over a workplace bullying case was fired led the president of the National Confederation of Workers in the Financial Sector (Contraf-CUT) to say that "[…] the Ombudsman is not a serious institution. Financo created this structure, to where bank employees can channel their dissatisfaction, in order to remove them from the labor unions. […] But the Ombudsman is just another tool to weaken and punish workers." (CONTRAF CUT 2013)

The signature of the Agreement for Collective Prevention of Conflicts in Workplace in 2010 just slightly changed how unions relate to the Ombudsman channel. Given that the signature of the agreement obliged unions to create their own channels to receive grievances (which would then be forwarded to the Ombudsman), unions started incentivizing bank employees to only access the Ombudsman channel via the union, never directly.

Just as an illustration, when the Union of Niteroi published in its newsletter the story of workplace bullying being conducted by three local managers, it was asked that employees filed complaints about those managers, using the "Workplace Bullying Complaint" form available in the union website, which guarantees "confidentiality and a solution" (SEEB Niterói).

In other cases, unions make sure to differentiate the union channel from the company Ombudsman. In July 2015 a Union Director in São Paulo warned Financo's employees that they should be careful to differentiate the Ombudsman channel from the Union's channel for complains, given that "Although [in both cases] the issue is investigated by the same department [i.e. the Ombudsman], if the grievance is filed directly to the Ombudsman there is nothing that we can do about it," therefore instructing employees to always use the union in order to access the ombudsman channel. She also suggests that when filing a grievance to the Ombudsman channel, employees might mistakenly believe to be accessing the union channel, guaranteed by the Collective Agreement.

In the beginning of 2015, the Director of the Federation of Bank Workers in the São Paulo State (Fetec-CUT/SP) reinforced via the Union newsletter that Financo employees should only file their grievances through the Union, in order to avoid retaliation to the grievant (Fetec CUT/SP 2015). In some cases, Union leaders are even harsher in their speech in order differentiate the channels, asking for the end of the Ombudsman channel. In the words of the Secretary General of the Federation of Bank Workers in Bahia and Sergipe, "The Ombudsman transforms victims in defendants. The goal of the Union is to end with this tool that should have another function, but just became another form of retaliation." (SEEB Bahia 2013)

Evidently, the unions do not only criticize the Ombudsman channel in its communications with workers or the company. In a meeting to discuss the problem of

"unreasonable goals" set by management, the union in Belo Horizonte used results of Ombudsman's investigations as a leverage tool during negotiations. Cases of workplace bullying confirmed by the Ombudsman were presented to the company as evidence that something should be done regarding managerial behavior in the workplace (SEEB BH e Região 2013).

Analysis

As explained earlier, Financo is an interesting case to be studied due to the characteristics of the sector, its unions and how central the issue of workplace conflict is to the collective bargaining process and to the company strategy.

Looking first at the company's perspective, diminishing the negative effects of workplace conflicts seems really central to the company strategy. Even if it were to be questioned how much the company's principles and culture are determinant to any management decision, it is clear that high levels of workplace conflicts have presented several financial costs for Financo. Given the amount of money invested in employee training, it is no surprise that diminishing employee turnover has been one of the company's goals in the past years. Although initiatives such as the "Employee Redeployment Program" are not specifically targeted at workplace conflicts, by diminishing the number of terminations it reduces a significant source of costly conflicts (i.e. litigation in labor courts). Likewise, the same can be said in relation to other initiatives such as the yearly climate survey or the *open doors* meetings, which although not expressly focused on workplace conflicts, try to function as an outlet to employees' voice, which might eventually impact on how they perceive their workplace.

Looking specifically at workplace conflicts, some issues should be analyzed individually: the cases in courts, the use of CCPs, the Ombudsman Office and the issue of workplace bullying.

The banking sector is historically one of the sectors with the highest number of lawsuits in Brazilian labor courts for a series of reasons that can be elaborated elsewhere[132]. Financo, being the largest Brazilian private bank, is unsurprisingly among the top litigators in Brazilian labor courts. The direct and indirect costs involved in the more than sixty thousand lawsuits makes natural to the bank to look for alternatives to employment litigation. The most recent one, basically a court settlement strategy, tries to use the court structure itself as the tool to avoid lengthy and costly litigation. Counting on judges' own settlement goals and the legal security provided by a settlement reached in court, this program tends to be successful. However, no matter how successful it is, it can only solve conflicts that reached the stage of litigation, which in Brazil means that the employment relation does not exist anymore[133].

The CCPs are not too different. Although they can prevent litigation (and therefore the costs connected to it), only terminated employees can take advantage of it. Despite its optimistic goals in its origins, CCPs did not develop as expected, proving a limited solution. The fact that Financo (and the banking sector) was pioneer in the adoption of CCPs shows not only how relevant the employment conflict issue is to management, but also indicates how unions in the sector are open to alternatives to litigation. One important fact that should be noticed about the CCPs is that the bank basically only uses it to settle over wage and hour issues, whereas other questions, such as workplace bullying cannot take advantage of this tool.

Workplace bullying is a central point in labor relations in the banking sector[134]. Although it seldom will be the sole motivator of employment litigation (it might be one among a series of claims, mainly wage and hour issues), it is constantly in the core of the speech of unions,

[132] Strong unions and specific legal provisions for workers in the sector are the most important elements of the explanation.
[133] Although current employees can file lawsuits against their employers, it is common practice for employers to terminate any employee who files a lawsuit against it. In general, this is a lawful practice.
[134] According to the Labor Prosecutors Office (*Ministério Público do Trabalho - MPT*) 30% of the workplace bullying claims presented to the MPT refer to bank employees. (http://economia.ig.com.br/2014-04-24/de-cada-dez-denuncias-de-assedio-moral-no-brasil-tres-sao-contra-bancos.html)

whether to its members, whether in the negotiation table during a collective bargaining process. With this in mind, the Ombudsman channel substantially differs from the other available relevant channels for workplace conflict solution (i.e. litigation and the CCPs), because it is the only one that can center in noneconomic issues of an ongoing employment relationship. Although this was not necessarily its focus when the company created it, this is how unions apparently see the Ombudsman channel. Invariably, whenever the Ombudsman is mentioned in the unions' speech, it is in the context of the attempt to solve workplace bullying or similar kinds of workplace conflicts.

This, of course, does not mean that company and unions share the same views on the Ombudsman channel. In the speech of the company, the Ombudsman is depicted as impartial and independent structure that initially acted more as an investigatory body, and that is slowly changing into an in-company mediation body[135]. The unions, on the other hand, describe the Ombudsman mostly as an investigatory structure, but clearly differentiate between the Ombudsman Office accessed internally and the Ombudsman Office accessed via the union. Although the difference is only in relation to the access, as the employees conducting the investigation are the same and the rules they follow in this process are exactly the same, unions tend to depict that union access is the only legitimate way to use to the Ombudsman channel. By and large, company accessed Ombudsman channel is described by union leaders as a tool to weaken, punish and retaliate grievant employees (some even suggest that it was created as a "union substitution tool"), whereas access through union is the only way to guarantee an adequate and fast response to the grievance. Evidently, since those quotes were obtained in union publications targeted at union members, one must be careful in considering how much they

[135] In one of the interviews with the employee from the Ombudsman department it seems clear that an idea of a very raw transformative mediation is being formed, although the concept might be formally unknown in the company.

reflect the real perception of unions over Financo's ombudsman channel, or to which extent they should be read as an attempt by unions to reinforce their own importance to workers.

CHAPTER 7 - CASE STUDY – COSMETICO

In this chapter I describe and analyze the case of the Brazilian cosmetics company Cosmetico. First I describe the Human Resources and Industrial Relations practices and strategy. I follow with the Legal Counsel perspective on employment litigation, and then I describe some issues related in general with workplace conflicts. Afterwards, I describe in details the functioning of the Ombudsman office. Finally, I present a within-case analysis of the main points related to the issue of workplace conflicts in the company.

Company Overview

Cosmetico is the biggest Brazilian company in the cosmetics, perfumery and personal care sector, and the sixth biggest direct sales company in the world. The company has operations in Brazil, Argentina, Chile, Mexico, Peru, and France. Founded in 1969 and using a direct sales model since 1974, the company has won several sustainability and innovation awards in the past years[136].

Human Resources

In December 2014 Cosmetico had 6,591 employees in operations in 7 different countries. The majority of employees are located in Brazil (5,232) and other Latin American countries (1,313), with only 46 employees in the company's new operations in France[137]. Besides that, the company also counted on another 2,998 workers worldwide, between apprentices (117), interns (172), temporary workers (873), and long-term subcontractors (1,836)[138]. The turnover rate in 2014 was 10% (9.5% in Brazil), with a total of 1,048 terminations in 2014 (755 in Brazil).

The company's strategy and vision is based on the idea of harmonious relationship between people (consumers, employees, sales force, suppliers, etc.) among themselves and with

[136] Annual Report 2013, p. 13-15.
[137] Caderno de Indicadores 2014, p. 46.
[138] Those numbers do not include the core of Cosmetico's sales force in the direct sales system since they are not considered employees nor subcontractors under Brazilian law.

the environment. Therefore, the idea of "quality of the relationships" is in the core all company's strategies and decisions, and the human resources department plays a central role in promoting these concepts among employees[139].

The HR department is divided in three main areas: (1) corporate HR, which is responsible for definition of the company's policies and HR strategy; (2) services center, which is responsible for personnel management; and (3) the HR Business Partners, who are responsible to apply the HR strategies to the business. All the three areas respond to the same Vice President (i.e. the VP of Culture and People – *VP de Pessoas e Cultura*).

All employees are entitled to receive a profit sharing (PLR) variable pay, as well as a 14th monthly wage. Variable pay (i.e. PLR plus sales commissions for the sales department) represented 28.4% of the total pay in 2013 (R$ 360.67 million were spent in salaries, whereas R$ 143.32 million were spent in variable pay). Evidently, this numbers vary considerably among different levels and departments. In one end, Administrative employees variable pay represented only 10.3% of their total pay, whereas, in the other end, for the sales department variable pay represented 46.9% of their total pay[140]. In 2014 the variable pay strategy for executives and selected high performance top managers was reviewed, including not only stock options, but also direct concession of company's shares. Moreover, for all managers the profit sharing scheme now takes more into consideration company wide performance, both financial and environmental, whereas only 10% refer to the manager's individual performance[141].

Regarding benefits, the company offers a large number of benefits to its employees in Brazil, which include day care assistance, life and health insurance, free transportation to the plants, limited scholarships for employees and family members, individual psychological and

[139] Interview #11, HR Manager, 08/07/2014.
[140] Annual Report 2013, p. 28.
[141] Annual Report 2014.

legal support for specific situations, and defined contribution pension plan, to which the company matches 60% of the employee contribution, up to a limit of 5% of the salary[142]. Some of those benefits (e.g., free transportation, labor gymnastics, gifts for mothers' day, fathers' day and Christmas, among others) are also granted to long-term subcontractors.

In 2014 Cosmetico reviewed its corporate training programs, in order to align it to the new human resources management and company strategies. Training is focused both in in the development of employees and the direct sales force ("sales consultants"), as well as the development of all local community via *Instituto Cosmetico.* Currently the training program is divided between the "acceleration axis" and the "leadership axis". The former focuses on administrative workers and coordinators, and tries to acclimate those workers to the company's strategy and prepare them to assume leadership positions in the future. The leadership program, on the other hand, aims to train 100% of Cosmetico's managers in a short period. In this case, managers are responsible to define and comply with their own training goals, based on their individual development plans. The new training programs led the company to experience in Brazilian operations a fall in the average training hours per year in 2014 (78 hours per year per employee) in comparison to 2013 (96 hours per year per employee)[143]. Currently the average training hours per employee in international operations is very close to the Brazilian data (76 hours per year per employee), a significant rise from previous years (in 2012 international operations employee had an average of only 58 hours per year)[144].

In relation to hiring and recruitment strategies, the company's internal labor market is often used, and current Cosmetico employees fill approximately 74% of the vacant job positions. Before a termination, it is not unusual for HR to try to relocate the employee in another

[142] Annual Report 2013, p. 82.
[143] Annual Report 2014.
[144] Caderno de Indicadores 2014, p. 61.

department in order to avoid the dismissal. Since 2013, long-term subcontractors are also considered for vacant employee positions. If a vacant position cannot be filled by an existing employee or subcontractor, the company recruits the new employee externally, giving preference for workers of the local community. This preference for employment of local community is also observable in the hiring of temporary workers and subcontractors – in 2013, 90% of the temporary workers in Cajamar and Benevides were from the local community. Regarding top management positions, promotion of current managers is favored, and for international unities, local managers tend to be hired, in order to respect the peculiarities of each market[145].

Starting in 2015, performance assessment for all employees will follow a 360 degrees model, and its results will be discussed in the "People Forum" (*Forum de Pessoas*), a committee composed by employee's managers and invited people from departments that relate to the assessed employee[146]. This performance assessment will be the basis of each employee's "Individual Development Plan," which shall be reviewed annually[147]. The 360 degrees performance evaluation model is just another manifestation of how important the "quality of the relationship" is to the company – in this case, the relationship between employees and their internal clients and suppliers. In general, the company seems to seek constantly consensus among the employees, managers and different departments, mainly through the constitution of several committees (e.g., Ethics Committee, Education Committee, Communication Committee), which might in some cases include the participation of the employees, not only managers[148].

Moreover, the company tries to promote a culture of transparency, listening, dialogue, collaboration and co-creation, in what is described as an attempt to guarantee that all

[145] Annual Report 2013, p. 81.
[146] In 2013, under the old performance evaluation model, 96% of the operational employees and 88% of the administrative employees received their performance evaluation (Annual Report 2013, p. 83).
[147] Annual Report 2014.
[148] Interview #11, HR Manager, 08/07/2014

stakeholders have a voice in the company's management. As an example of this collaboration environment that the company tries to promote, in the administrative headquarters of the company in Brazil, workers do not have fixed workstations, possibly using a different one everyday, therefore being stimulated to interact with workers form other departments[149]. Moreover, in the shop floor the operation is organized in "semi-autonomous" working cells, in which the employees of the working cell might make their own group decision over some topics, related to work procedures, work shifts, and other minor decisions.

Climate surveys have been conducted annually over ten years, and each department manager is responsible for any HR related results of his/her department. Managers have goals regarding their department's climate survey results, which are taken into consideration in the definition of their variable annual compensation. Moreover, in 2014 the company also conducted an employee engagement survey in order to understand how much employees are integrated to the company's value and culture[150].

Labor Relations

The department of Labor Relations is relatively new in the company. Before December 2013, although there was an employee responsible for dealing with union related issues, the company did not have a specific labor relations strategy. Since December 2013 the company has a Labor Relations manager, who responds to the Vice President of People and Culture, and who is responsible to design the company's labor relations' strategy, constantly interacting with the Ombudsman Office, the Legal Counsel and the HR Business Partners. The goal of the new

[149] Annual Report 2014.
[150] Annual Report 2014.

department is to maintain open dialogue channels with the labor unions and to prepare managers to avoid conflict in the workplace[151].

The labor relation's strategy involves maintaining open dialogue with the unions, mainly because Brazilian legislation demands the participation of the union in a series of relevant workplace management decisions (e.g., profit sharing plans and work shifts). Therefore, the company will inevitably have to deal with unions in order to implement its HR strategies.

In the department's first year, its main goal was to train managers to deal with unions and employees, and how to effectively communicate with them. Communication is understood to be essential in order to align expectations and therefore avoid conflicts. Despite the dialogue strategy, unions were described by management as entities who depend on conflict to survive, and who will take advantage of the communication failures of the company in order to gain power[152]. Cosmetico has no history of strikes in any of its plants, but that does not mean that there are no conflicts taking place within the company[153].

The company deals with several different unions in its different plants and operations, each with very different political positions and strategies towards the employer. Among those unions, the most important is the Union of Industry Workers in Cajamar, where the company's main production plant is located, and the Union of Chemical Workers of Campinas. Since Cosmetico is the biggest company in the Cajamar region, most actions of the union in that region

[151] Interview #10, Labor Relations Manager, 08/07/2014.
[152] Interview #10, Labor Relations Manager, 08/07/2014.
[153] Although Cosmetico has not yet faced a strike, strike threats are not uncommon. In 2007 (http://exame.abril.com.br/negocios/noticias/funcionarios-da-natura-ameacam-entrar-em-greve-m0140701) and 2014 (http://www.intersindical.inf.br/noticias_det.php?id=1533) short stoppages were promoted by employees, in a possible preparation for a strike attempt. In those two cases, according to the Union of Chemical Workers, the company used support from police force in order to block union activity within Cosmetico's plants (http://www.quimicosunificados.com.br/1385/natura-agride-direito-de-organizacao-e-usa-forca-policial-para-impedir-assembleia/)

tend to focus on Cosmetico. Despite the strike threat at the beginning of 2014[154], the relationship is described as stable and cordial[155], as the no-strike history reinforces.

Approximately one-third of the chemical workers of the company are unionized in Cajamar. Since they represent one-fourth of all the union members in the region, Cosmetico's employees play a decisive role in the union's electoral campaign, which also helps to make the company a relevant target to union activities and grievances[156].

Although the union is present at the workplace (one of the union's director is a Cosmetico employee), the union is not the main channel for employees' grievances. According to Cosmetico's management, usually the Ombudsman Office is the employees' preferred first channel to present their grievances to the company[157].

The union has never used the Ombudsman Office to present a grievance, nor has ever asked for the Ombudsman reports. Unions still use the company's managers and the Labor Relations Department as their main channels for their grievances, or for grievances brought to them by their members. Any case involving a union related topic addressed by an employee to the Ombudsman Office is directed to the labor relations manager, which will be responsible to provide the answer to the grievance or question. Most of the grievances presented by the union to the Labor Relations Department involve issues of workplace health and safety, with very few cases of workplace bullying.

In the international operations, currently the HR Business Partners, with the support of local legal advisory, are responsible for labor relations issues, although the goal is to establish a

[154] This strike threat was connected to the company's decision to not allow the union to hand out its newspapers in the charter buses (but indicating another location).
[155] Interview #10, Labor Relations Manager, 08/07/2014.
[156] Interview #10, Labor Relations Manager, 08/07/2014.
[157] Interview #10, Labor Relations Manager, 08/07/2014.

global labor relations strategy in the future, under the responsibility of the Labor Relations Department.

The Labor Relations Department works closely with the Legal Counsel, in order to try to anticipate any possible collective problem, which might be identified in the existing lawsuits or individual conflicts. Moreover, the Legal Counsel also revises the labor relations training program. The goal of this program is to enhance management ability to communicate with his/her employees, as well as explain them the legal and political issues involved in the relationship with unions. The goal is that all managers and HR Business Partners participate in this training in the coming years.

Finally, at Cosmetico, regarding decisions that might affect a *working team*'s work conditions, members of the team will be invited to participate in an employee committee, which will be responsible to discuss the issue and the solutions being proposed[158].

Legal Counsel

The legal department in the company has 7 managers, and the topics related to labor and employment law are divided between two areas within the legal department. Whereas employment issues related to the company's direct sales model is under the responsibility of one legal manager, another legal manager is responsible for most of the litigation and legal counseling related to labor and employment law issues. This department is in constant interaction with HR, Ombudsman Office, the Ethics Committee and the Labor Relations department, which uses their legal support for the collective bargaining process.

In the interaction with the Ombudsman Office the legal department will actively participate in the investigation process depending on the type of grievance, always defining the

[158] Interview #10, Labor Relations Manager, 08/07/2014.

limits of the investigation and how it should be conducted in order to avoid any future legal liability.

Regarding litigation, a contracted law firm is responsible for all the procedures in the labor courts, whereas the company's legal department validates the strategy and arguments that will be used, and collects the necessary information from the other departments in the company. In December 2013 the company had 615 open lawsuits filed against it in the labor courts[159], of which around 80% referred to claims from subcontractors. Among the employees' lawsuits, most claims are related to overtime payment and worker's health issues. Although there are some cases discussing workplace bullying, they are not relevant in terms of volume.

Questioned about the reasons for such a relatively low level of employee litigation, the legal counselor suggests that this is due to the quality of the termination process (in which the manager carefully explain the reasons for the decision to terminate), overall management's transparency and constant communication with employees, and Cosmetico's option to provide benefits that are better than the minimum granted by the sectorial collective bargaining agreement[160].

The legal department also closely follows metrics of the most recurrent topics being discussed in the lawsuits, and whether they are concentrated in certain plants or departments. Those metrics can point to an existing legal risk, which shall be addressed by the responsible department, or by one of the company's committees (e.g., Ergonomics Committee), before they become lawsuits.

At the Labor Courts the company's strategy is to avoid unreasonable appeals and early settlements. In other words, once a decision is issued by the lower court, the company will try to

[159] Balanço Patrimonial 2013, Nota Explicativa 18.
[160] Interview #12, Legal Manager, 08/07/2014.

appeal only in cases where there is a chance of wining, in order to avoid a negative image in the Superior Labor Court (*TST*), as well as extra expenses related to the prorogation of the cases final decision (e.g., legal costs, attorneys fees, etc.). Although the company tries to settle most cases in which the first or second decisions are in accordance with the dominant case law, settlement before trial is highly unusual. The goal is to avoid that pre-trial settlements work as incentives for more employees to file lawsuits.

In the lawsuits involving workplace bullying claims the existence of the Ombudsman Office is used as an employer's argument: the details over the functioning of the channel and its anonymity are presented as a way to demonstrate that the company has actively tried to promote a healthy work environment. According to the interviewee, the courts tend to respond positively to the channel, since it is structured very similarly to state-led investigation tools[161].

From the consulting standpoint, the legal department is always involved in the elaboration of workplace rules and policies. Although the Legal Counselor recognizes that initially most areas avoided consulting the legal department, fearing that this might generate legal barriers for implementing the desired policies, currently the legal department is described as a partner of the other areas, mainly HR and ombudsman, who will try to generate solutions for the implementation of the desired policies[162].

Disciplinary Policies and Termination

The company has in place disciplinary policies and a Code of Conduct, which is updated yearly. This code of conduct defines for employees what should be considered conflict of interests, fraud, harassment, discrimination, drug abuse, misuse of company's email, among other misbehaviors. Situations in breach of the code of conduct shall be reported to the

[161] Interview #12, Legal Manager, 08/07/2014.
[162] Interview #12, Legal Manager, 08/07/2014.

Ombudsman office, which is responsible for the investigation of the claim, and to provide information to the Ethics Committee, who will define the disciplinary sanction, which can go from verbal warning up to just cause termination. I will analyze the functioning of the Ombudsman and Ethics Committee in detail further in this chapter.

In the case of other disciplinary policies, HR department and the employee's manager are together responsible for the decision to apply any disciplinary penalty. The same is true to decisions to terminate any employee without just cause. HR department and the employee's manager are responsible for the decision to terminate. In those cases, the manager is responsible to conduct the termination process, whereas HR is responsible to conduct interviews with the terminated employee. The information that is originated in those interviews will be further used by HR and other departments (i.e. auditing, ombudsman, and legal) to identify and solve any evident workplace conflict.

By and large, just cause terminations are extremely rare, and the company decides for them only in extreme cases, always counting with the legal department input and following the ethics committee decision[163]. As explained earlier, in cases of termination without just cause, it is not unusual for the HR department to try to relocate the employee to a different department.

Workplace Conflicts

So far I have presented a general overview of the company's structure and the organization of its HR, Industrial Relations and Legal Counsel departments. The topic of workplace conflict was briefly touched when I explained the role of HR Business Partners, the disciplinary policy, as well as the general industrial relations and legal counsel strategies. When discussing how workplace conflicts are dealt outside the realm of the labor courts, the already cited climate surveys, and the daily preventive and counseling role of industrial relations, legal

[163] Interview #11, HR Manager, 08/07/2014.

counselors and HR business partners, play a significant role. In the next section I explore the functioning of the ombudsman office, whose main goal is to deal with workplace conflicts and other conflicts in general. Before that, however, I will analyze other common important sources of workplace conflict: discrimination, workplace bullying, and health and safety issues.

Discrimination

The issue of diversity and the search for a discrimination-free work environment are central to Cosmetico's strategy. Cosmetico's vision[164], raison d'être[165] and beliefs[166], are all based on the idea of a harmonic relationship between the company and all its stakeholders, and among the stakeholders themselves. The word "diversity" is even expressly used in one of the beliefs statement: "The bigger the diversity of the parties, the bigger the wealth and vitality of the whole."

Looking at Cosmetico's workforce, 59% of all employees are women, which include 56% of all the managerial positions and 34% of Director positions[167]. Employees with some form of disability represent 5% of the total workforce[168], therefore in accordance to Brazilian legislation[169].

Regarding female employees, the company offers several benefits specifically focused on pregnant employees such as the program *Cuidando de quem Cuida*, for pre and post birth

[164] "A Cosmetico, por seu comportamento empresarial, pela qualidade das relações que estabelece e por seus produtos e serviços, será uma marca de expressão mundial, identificada com a comunidade das pessoas que se comprometem com a construção de um mundo melhor através da melhor relação consigo mesmas, com o outro, com a natureza da qual fazem parte, com o todo."
[165] "Nossa Razão de Ser é criar e comercializar produtos e serviços que promovam o bem-estar/estar bem. **bem-estar** é a relação harmoniosa, agradável, do indivíduo consigo mesmo, com seu corpo. **estar bem** é a relação empática, bem-sucedida, prazerosa, do indivíduo com o outro, com a natureza da qual faz parte, com o todo."
[166] "A vida é um encadeamento de relações. / Nada no universo existe por si só, tudo é interdependente./ Acreditamos que a percepção da importância das relações é o fundamento da grande revolução humana na valorização da paz, da solidariedade e da vida em todas as suas manifestações. / A busca permanente do aperfeiçoamento é o que promove o desenvolvimento dos indivíduos, das organizações e da sociedade. / O compromisso com a verdade é o caminho para a qualidade das relações. / Quanto maior a diversidade das partes, maior a riqueza e a vitalidade do todo. / A busca da beleza, legítimo anseio de todo ser humano, deve estar liberta de preconceitos e manipulações. / A empresa, organismo vivo, é um dinâmico conjunto de relações. Seu valor e sua longevidade estão ligados à sua capacidade de contribuir para a evolução da sociedade e seu desenvolvimento sustentável."
[167] The goal is to have women representing 50% of top management positions by 2020 (Annual Report 2014).
[168] Caderno de Indicadores 2014, p. 64.
[169] Law 8,213/1991 (art. 93) establish that employees with disabilities should represent at least 5% of the workforce in companies with more than 1,000 employees.

orientation to the mother, in company childcare for children up to 2 years and 11 months old, and the extension of paid maternity leave to six months[170]. In 2014 the retention rate for employees returning from maternity leave[171] was of 77%, in comparison to 94% in the previous year[172].

In relation to workers with disability, the company has conducted a great effort to raise their proportion in the workforce. In 2013 the company inaugurated a new distribution center where the picking process is completely adapted for employees with disability. In this plant, currently 18% of the employees are legally considered employees with disabilities, and the goal is to increase this number to 30% in the coming years. Although Brazilian legislation demands only that 5% of the workforce is composed by employees with disabilities, Cosmetico's goal is to have employees with disabilities representing 8% of the total workforce by 2020. In order to guarantee the adaptation of those employees to the company, new employees go through a mentoring process, and managers are also trained on diversity issues[173].

As it will be explained later, all discrimination related grievances are investigated by the Ombudsman Office. To date, no discrimination grievance was found to be with merit by the company[174]. In 2013, 6 discrimination complaints were filed to the Ombudsman office, in comparison to only one in the previous year. This increase might be explained by the publishing of the new Code of Conduct and other communication actions by the Ombudsman office, which tried to raise awareness to issue of ethics and discrimination in the workplace[175].

[170] Brazilian legislation requires only 4 months, although the extension for 2 extra months can be negotiated with the union, in exchange for a fiscal benefit for the company (Law 11,770/2008).
[171] Total number of employees who remain in the company one year after their return from the maternity leave, divided by the total amount of employees the used the maternity leave in the previous year.
[172] Caderno de Indicadores 2014, p. 55.
[173] Annual Report 2014.
[174] Caderno de Indicadores 2014, p. 72.
[175] Annual Report 2013, p. 71.

Workplace Bullying

Although allegations of workplace bullying exist, they are not significant, nor constitute a central issue to the topic of workplace conflicts at Cosmetico. Workplace bullying was not described as a main litigation issue by the Legal Counsel and it is not a recurrent topic of union's newsletters and newspapers distributed to Cosmetico's employees. Moreover, there is no record of any attempt by the union to include the workplace bullying related issues in Collective Bargaining with Cosmetico.

Health and Safety

Worker's health and safety issues are a central concern to Cosmetico. In 2 years the investment on accident prevention and occupational disease prevention more than doubled[176]. As a result, absenteeism rates dropped from 5.83 in 2011[177] to 3,33 in 2014[178]. Moreover, in relation to subcontractors and suppliers, the company is also increasing their auditing over the outsourcing and supplying companies' health and safety related practices. In 2013, 186 suppliers were audited, generating 118 plans to improve work conditions and other work related issues[179].

Formal ADR Structures

Previous Conciliation Committees (Comissões de Conciliação Prévia - CCPs)

Cosmetico has no past experience with CCPs.

Relationship Quality and Ombudsman Office

Cosmetico's focus on the relationship quality led to the creation of a department of "Relationship Quality and Ombudsman Office" (*Qualidade das Relações e Ouvidoria*). The goal

[176] In 2012 the company invested R$582 and R$942 per employee for the prevention of accidents and diseases respectively. In 2014 those investments were R$1,200 and R$2,905 (Caderno de Indicadores 2014, p. 58).
[177] Annual Report 2013, p. 92.
[178] Caderno de Indicadores 2014, p. 58.
[179] Annual Report 2013, p. 109.

of the area is to reinforce the relationship dynamics, considered a social variable under the company's vision of the *triple bottom line*[180]. Therefore, quality of relationship is considered a strategic goal by the company, which should constantly be measured[181].

In the company's annual strategic planning, the relationship quality is expressly discussed and measured, so it can be a relevant driver for all the business decisions. This is measured through the "loyalty" index – an index created by the company more than ten years ago, which measures the employees general satisfaction within their employment relationship, their intention to continue this relationship and his willingness to recommend this relationship to family and friends. The same index is measured not only for employees, but also for all the relevant stakeholders for the company: customers, suppliers, sales consultant, management consultants and supplier communities. This index is so central to the company's strategy that a percentage of the variable payment depends on it[182].

Since relationships take place all over the company, the department describes itself as being responsible for raising awareness over the topic to all employees, and also to promote a dialogue culture among employees and other stakeholders.

Although the Relationship Quality department is the overall responsible for the relationship topic in the company, each stakeholder also has a specific responsible manager, who is responsible to implement and monitor the development of all the relationship quality related initiatives for this public. In the case of employees, the HR Director is the responsible manager. Since the Relationship Quality department is not responsible to implement any of these initiatives, it is composed only by two managers and 2 trainees, reporting to the Vice President of People and Organizational Culture.

[180] The idea that a company should be measured not by its financial results, but also by its social and environmental performances (Norman and MacDonald 2004)
[181] Interview #13, Ombudsman Manager, 08/07/2014.
[182] Interview #13, Ombudsman Manager, 08/07/2014.

In order to translate the subjective concept of relationship quality in measurable elements that can be monitored by the company, the department started a program to map all the relationship elements involved in a normal day for each stakeholder, starting with the employees. Through interviews and focus groups, all the relationship steps involving employees were mapped, from recruitment to termination, and employees were given the opportunity to present their view over these procedures. The department will then use this information from each stakeholder to influence the manager responsible to take the measures to develop the relationships, before any potential conflict may arise.

Although Quality Relationship and the Ombudsman Office are part of the same department, each area within the department reports to a different executive. Whereas Quality Relationship activities are under the Vice President of People and Organizational Culture, the Ombudsman Office currently reports to the President of Ethics Committee[183].

The Ombudsman Office

The Ombudsman Office exists in the company since 2006[184], and it was created not only as a whistle-blowing channel, but as a dialogue channel between the company and the employees – although currently the intention is to expand it to the use of outside stakeholders. The channel was created after the strategic planning process in 2005, when the company defined its relationship principles and how the company would relate to its stakeholders. Once the relationship principles were defined and published, it was necessary to create a channel so the employees would be able to report any case in disagreement with those principles. This channel is the ombudsman office.

[183] Interview #13, Ombudsman Manager, 08/07/2014.
[184] It is worth noticing that although Cosmetico does not have its stocks negotiated in the NYSE, since 2009 the company voluntarily complies with Sarbanes-Oxley legislation. Since 2014, operations in Argentina, Mexico, and Peru, are also voluntarily complying with Sarbanes-Oxley (Annual Report 2014)

In 2006 the Ombudsman Office, which also incorporated a previous internal channel for questions (*Fale com a Cosmetico*), would respond only to queries and complaints by employees in Brazil. In the following years the channel was also opened to employees in other countries and suppliers in Brazil, as well as some extraordinary cases involving Cosmetico's sales consultants and final customers. Currently, employees and subcontractors in any of Cosmetico's operations and suppliers in Brazil might access the Ombudsman Office. Customers and sales consultants have their own specific channel to file their grievances and queries, which will only be investigated by the Ombudsman Office if it involves behavioral issues, or when the other channel was unable to give the problem a proper solution[185].

The Relationship Principles that gave origin to the Ombudsman Office were rewritten in 2013 in the form a Code of Conduct, in order to give more precision and tangibility to the employee's expected behavior. This was motivated by (i) the lack of precision of certain terms used (e.g., the principles vetoed employees from receiving gifts from suppliers, except if those gifts were of *symbolic* value, whereas the Code of Conduct established a *certain value* over which gifts could not be accepted), and (ii) the high incidence of some critical questionable attitudes (e.g., contracting of family members). In 2014 a Code of Conduct was also published for sales consultants, and other stakeholders shall have their own codes in the future.

When the Ombudsman Office was implemented in 2006, the company also created an Ethics Committee, which is currently composed by the Vice President of Finances and Legal, Vice President of People and Organizational Culture, the director of the Legal Department, and the Ombudsman. The President of the company also participates as a guest[186]. In every meeting, representatives of other departments relevant to the discussion (e.g., auditing department) might

[185] Annual Report 2014.
[186] Código de Conduta, p. 34.

be invited to participate, as well as the direct manager of the employee whose conduct is being discussed, since he/she will be the one responsible to implement or enforce the Committee's final decision. The Committee meets on demand, depending on the issues to be discussed (in 2013, there were a total of 12 meetings). The cases that are brought for the Ethics Committee to decide are only those considered critical. Simple relationship conflicts are managed by the responsible manager and the ombudsman, who will closely monitor the implementation of the action plan decided by both. The ombudsman closely monitors the amount of grievances from each department, as well as the solution metrics.

In order to reach the Ombudsman Office, the employee might use any of the five channels: e-mail, intranet, Internet form, phone, and personal meeting. Since 2014 the phone option is available 24/7, in Portuguese, Spanish, and English. The first contact (except for personal meeting) will always be done by a subcontractor (*ICTS*), which is a company specialized in security, risk management, auditing, investigation, and outsourcing of ombudsman and compliance channels. *ICTS* is responsible for the first screening of any grievance that arrives at the ombudsman office, collecting information that might be useful for the further investigation of the case. E-mail and intranet form are the preferred channels to contact the Ombudsman office, which can be made anonymously. Currently, only in 28% of the cases the claims are anonymous – usually in behavioral cases[187].

Currently, approximately 70% of the grievances and queries addressed to the ombudsman channel are simple critiques or questions related to a specific process (e.g., performance evaluation tool, training, company provided transportation to the plant), and of those, more than 50% are related to HR issues (e.g., benefits, training policy). In those cases, the question/complaint is forwarded to the department responsible for the process being questioned,

[187] Interview #13, Ombudsman Manager, 08/07/2014.

in order to answer the question, clarify any procedure or correct any mistake. If the amount of complaints over the same topic points towards the existence of a structural problem related to certain process, the Ombudsman works together with the manager responsible for the process in order to achieve a structural solution and not only case-by-case answers. When this happens, the Ombudsman will monitor the implementation of the action plan defined by the responsible manager.

The other approximately 30%[188] of the claims addressed to the Ombudsman Office are considered "behavioral issues," which might include a breach of the code of conduct, sexual harassment or workplace bullying. In those cases, the Ombudsman contacts the manager of the person who is object of the complaint, in order to understand the situation, which will be under investigation. This manager is responsible for elaborating an investigation plan to check with the team the merit of the complaint. The owners of this investigation process are the ombudsman and the manager, whereas the HR department is involved only to provide any evidence that can help in the investigation (e.g., provide a copy of the performance evaluation of the employee under investigation).

All the cases that involve workplace bullying and sexual harassment, frauds, misuse of the company's resources, and corruption, will ultimately be decided by the Ethics Committee. The Ombudsman will simply provide the information of the results of the investigation to the Committee, based on its own investigation (for behavioral cases) or in the investigation of the auditing or risk departments (for procedural cases). The decision of the Ethics Committee is final (e.g., just cause termination, suspension, written warning) and it is the employee's manager (who is always a guest in the committee meeting) who is responsible to enforce it, with the support of the HR department. Figure 5 summarizes the functioning of the Ombudsman Office.

[188] 28% in 2012 and 2013 (Annual Report 2013, p. 72).

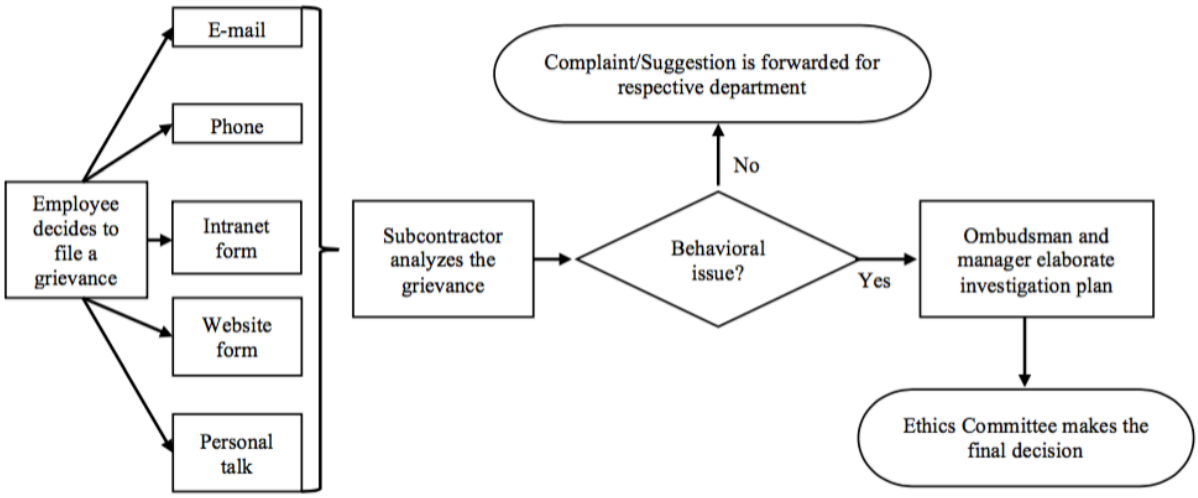

Figure 5 - Functioning of Cosmetico's Ombudsman

Although most of the grievances are about technical issues or questions, the Ombudsman believes that those cases should be channeled directly to the responsible departments, leaving to the Ombudsman Office only the behavioral issues and critical breaches of the Code of Conduct[189].

When the ombudsman channel was first launched in 2006, its usage rate was low, mainly due to lack of communication about the new tool and fear of retaliation by managers. However, in 2014, employees in Brazil presented 1,256 grievances or queries[190], similar to 2013, when 1,293 claims were filed by Brazilian employees[191]. The numbers in 2013 are a big increase in comparison to the previous year, when only 687 grievances were filed by employees in Brazil[192]. The company credits this change to the publishing of the new Code of Conduct, and the effort of institutional communication about the functioning of the department, which was promoted in

[189] Interview #13, Ombudsman Manager, 08/07/2014.
[190] Caderno de Indicadores 2014, p. 71.
[191] Besides the employees' grievances, 1,774 Sales Consultant's grievances and 41 customer's grievances ended up being treated by the Ombudsman office (Annual Report 2014), in comparison to 794 and 39, respectively, in the previous year (Annual Report 2013, p. 71). Moreover, between 2011 and 2013 the number of grievances filed by suppliers vary from 4 to 10 (Annual Report 2013, p. 73).
[192] Annual Report 2013, p.73.

2013[193]. However, it is worth noticing that in 2011 employees in Brazil filed 1,025 grievances, but with a rate of only 68% of grievances or queries solved, in comparison to 93% and 96% in the following 2 years. The difference in those numbers can be explained by the fact that until May 2011, technical queries were not solved by the Ombudsman, but the grievant employee would be oriented to directly look for the responsible department or manager[194].

Currently the main challenge is to reinforce the availability and the importance of the channel for workers in the international units of the company. In the first six months of 2014, less than 20 claims were presented by employees from international units – a slight raise from the previous 3 years when workers at international operations filed between 7 and 11 grievances per year[195]. An important difference though is that almost 100% of the claims from international units refer to behavioral cases, in comparison to the dominance of "technical" queries observed in Brazil. According to the ombudsman, this low usage rate is less the result of lack of knowledge about the channel, and more a consequence of the distance between the headquarters and the international units, and the inexistence of a local representative of the ombudsman office. Although each unit has its own local HR professional, who ends up executing some of the roles of the Ombudsman in international units, the perception by employees that HR is aligned with management make international employees feel that they lack an adequate tool to present their grievances[196].

At the end of any case taken to the ombudsman office, all authors of the claim receive a survey to express their satisfaction with both the solution and his experience with the Ombudsman Office. Currently the response rate is about 11%[197], with a satisfaction rate of 83%,

[193] Annual Report 2013, p.72.
[194] Annual Report 2013, p.73.
[195] Annual Report 2013, p.73.
[196] Interview #13, Ombudsman Manager, 08/07/2014.
[197] Caderno de Indicadores 2014, p. 87.

a decrease in comparison to 2013, when 29% of the employees who used the Ombudsman responded to the survey, with a satisfaction rate of 92%[198]. This numbers should be analyzed in conjunction with the results of the companywide climate survey in which in 2013 the statement "I trust in the Ombudsman as a channel for dialogue to forward critiques, grievances, suggestions, and praises" received 71% of favorable responses, an increase of 6% in comparison to 2012[199].

The Ombudsman Office works closely to the legal department, given that all the cases that are evaluated by the Ethics committee will be subject to a legal opinion, which might be followed or not by the committee.

Although only 28% of the claims are anonymous[200], the Ombudsman Office never reveals the identification of the author of the complaint, unless this is essential for reaching a proper solution to the case. In those cases, the author's identification is disclosed only after his/her express authorization to do so. The question of anonymity is of extreme importance for the Ombudsman Office, mainly after the 2011 climate survey revealed that the results for Ombudsman credibility had fallen considerably in comparison to the previous year. The climate survey process showed that employees that used the channel felt exposed by their managers, once they found out about their complains. Currently the Ombudsman Office is putting a great effort to train managers to conduct their role in the process of solving situations that come to the knowledge of the Ombudsman preserving the employees anonymity or privacy whenever possible. This has been done through constant participation in management meetings, where the Ombudsman explains their role in those conflicts[201].

[198] Annual Report 2013, p.73.
[199] Annual Report 2013, p.72.
[200] Annual Report 2013, p.72.
[201] Interview #13, Ombudsman Manager, 08/07/2014.

The unions have never directly used the Ombudsman channel, nor there is any request to do so. That does not mean that there are no experiences of collective usages of the channel (e.g., a great number of anonymous repetitive claim over the same topic), but there is no evidence that this kind of action was somehow promoted or influenced by the union.

Analysis

Cosmetico is an interesting case to study for several reasons, such as the centrality of dialogue and quality of the relationship among stakeholders for the company's strategy, the long history of its Ombudsman Office, and the relatively low rates of workplace conflicts.

Firstly, any analysis over Cosmetico workplace must take into consideration how much the issue of dialogue and quality of relationship is a part of the company's DNA. As I have presented earlier in this chapter, the concern over how managers, employees, sales consultants, consumers, suppliers and local communities interact are an actual part of Cosmetico's business strategy. In general, this is clear not only from the company's organizational structure (e.g., self-managed work teams) and the HR and management tools (e.g., climate survey and "relationship map"), but also from my interaction with Cosmetico's managers in my field work.

Looking at the overall low level of workplace conflicts (i.e. no strike history and reduced number of employment lawsuits), it is hard from the available data to reach a single conclusion over what is cause and what is consequence of Cosmetico's work environment. The lack of strike history in Cosmetico's plants might be the consequence of above the market human resources practices and an open dialogue relationship between management and employees as suggested by Cosmetico. But one cannot ignore that union's reduced role and influence on the workplace of one of the main companies of the union's "territory" also signals the lack of power of the unions representing Cosmetico's employees. The fact that the company does not provide unions with

any form of access to the Ombudsman channel, and the fact that the unions have never asked for any form of access to what the company considers its main channel to deal with workers grievances, reinforce the idea that it is not possible to identify what is cause and what is consequence in relation to unions' behavior in Cosmetico's workplace.

Likewise, the low numbers of employment litigation are not easily explained. Although the legal manager's hypothesis that the litigation level is a consequence of the quality of the termination process might partially explain Cosmetico's litigation numbers, other factors should be taken into consideration. As we have seen in other cases in this research, sectorial factors, such as union's support to individual lawsuits, and sector specific legislation over employment law, also help explaining litigation levels in different sectors. In the case of Cosmetico, unions' low influence level on the workplace, and the non-identification so far of any structural legal problem in the sector, should all be added to the quality of the employment relationship and the termination process in order to understand low litigation rates.

In addition, looking at the Ombudsman Office as the main formal ADR structure of the company, some facts are worth being highlighted. For instance, the fact that the Ombudsman Office "share" the structure with the "Quality of the Relationship" department, reinforces how central the question of relationship is to the company, and makes clear what kind of conflicts the Ombudsman Office is supposed to deal with. Moreover, ombudsman activity data also provide interesting information. First, the raise in the number of grievances filed in the past two years (with no similar increase in litigation or collective labor unrest) seems to be a direct response to the company's review of the code of conduct and the ombudsman procedures, and the publicizing effort about the ombudsman channel to current employees. This suggests that Cosmetico was effectively trying to bring workplace conflicts to the surface (i.e. to the

Ombudsman), so they could be treated, therefore contributing to an improvement on the overall "quality of the relationship" in the company. Moreover, it is worth comparing the Ombudsman numbers to the litigation data analyzed earlier. For a company with historical low litigation rates (615 employment lawsuits in 2013, of which 80% were from subcontractors), the amount of grievances filed to the Ombudsman Office (1,256 in 2014) is significant. Given that around 30% of these grievances deal with "behavioral issues", and 35% are HR related issues, it is not incorrect to assume that those are conflicts that would not be addressed otherwise, given the low level of litigation and the inefficacy of the union in Cosmetico's case.

CHAPTER 8 - CASE STUDY – CONSTRUCO

In this chapter I describe and analyze the case of the Brazilian engineering company Construco. First I describe the company's Human Resources practices and strategy, also paying special attention to issues related in general with workplace conflicts. Finally, I present a within-case analysis of the main points related to the issue of workplace conflicts in the company.

Company Overview

Construco was founded in 1960 from a joint venture between an American engineering company (Procon) and a Brazilian construction company (Montreal Montagem e Representação Industrial). In 1966, when Procon decided to terminate its operations in Brazil, a group of 12 company's executives acquired Procon's share of Construco, repeating the operation with Montreal's shares in 1970. When those executives acquired full control of Construco's shares, they also invited the other Construco employees to become shareholders of the company, originating the employee-shareholder model that is still used today by the company[202].

The company that originally focused solely in engineering projects expanded its operations to other areas. The holding (Construco S.A., owned by the company's employees) currently controls or participate in the direction of five companies[203]: (i) Construco Engenharia (operates in the market of engineering and integrated solutions for infrastructure, and was the biggest company of the group up to 2013); (ii) Construco Consulting[204] (Construco's consulting firm, which uses the group's expertise developed in the several projects that the company participated in the last five decades); (iii) Construco Investments (a joint venture between Construco and Patria Investimentos, specialized in private equity investments in infrastructure); (iv) Construco Meio Ambiente (the socio-environmental arm of the group, which controls three

[202] http://www.promon.com.br/en-us/sobre-o-grupo/Pages/Historia.aspx
[203] On November 2014 Construco sold its participation on Trópico Sistemas e Telecomunicações (a joint venture between Construco, CPqD Foundation and Cisco Systems, which develops software and hardware for the corporate and Telecommunications market).
[204] The names of the companies have been changed in order to guarantee anonimity.

other companies); (v) Construco System Latin America (the company for systems integration in the market of Information Technology and Communication, which is a joint venture with the British Logicalis, currently being the biggest operation of the group)[205].

Human Resources

Considering all the companies under Construco S/A, the group had 2,297 employees by the end of 2014[206], including 442 employees outside Brazil, working for Construco System. Among workers employed in the Brazilian operations of the group, Construco Engenharia had 717 employees and Construco System 970 employees, constituting therefore, the two biggest operations of the group. Table 2 details the evolution of Construco's workforce between 2010 and 2014.

Table 2 - Construco - Total Number of Employees

Total employees (includes trainees and Directors)					
Company	**2010**	**2011**	**2012**	**2013**	**2014**
Construco Engenharia	883	882	904	821	717
Construco System Brasil	406	528	665	799	970
Trópico	220	243	258	202	
Construco Meio Ambiente				117	150
Construco Consulting				23	18
TOTAL IN BRAZIL	1509	1.653	1.827	1,962	1,855
Construco System Exterior	273	368	442	497	442
TOTAL	**1782**	**2.021**	**2.269**	**2,459**	**2,297**

Source: Annual Report 2014, 2013, 2012, 2011

The group's turnover rate has experienced some raise in the past two years, going from 12.5% in 2012 to 17.2% in 2013, and to 18.2% in 2014. Whereas the 2013 numbers are highly impacted by the higher turnover rate at *Tropico*, Construco Engenharia experienced the most significant increase in 2014, going from 11.8% in 2012 to 15.8% in 2013, and finally 23.2% in

[205] Annual Report 2013.
[206] Annual Report 2014.

2014, after a total of 156 terminations[207]. The number is most impressive among employees in Construco Engenharia who are 50 years old or older, whose turnover rate of 7.2% in 2011[208] increased to 20.1% in 2012 and 38.7% in 2014[209]. The reduction of the number of workers at Construco Engenharia was not exclusive to employees, also affecting top management. From 2011 to 2014 the number of Directors at Construco Engenharia fell from 44 to 30[210].

Regarding Construco's overall Human Resources strategy, it is worth noticing that the company has won several awards due to its HR practices: it has been elected the one of all time best companies to work for in Brazil by the Great Place to Work Institute, and it has been present in the list of "The 150 Best Companies for You to Work For," of Você S/A-Exame since the ranking's first edition[211].

As mentioned earlier, Construco is 100% owned by the employees, and only current employees are allowed to be shareholders of the company. This is a fundamental characteristic of the company, and it is the basis of all company's human resources strategies. The idea that the employees are responsible for the future of the organization has a deeper meaning at Construco, given that, as shareholders, the employees are able to actually determine the direction that the company will follow in the coming years[212]. By December 2013, 77% of the employees of all levels were shareholders of the company[213]. It is worth noting that although employees are incentivized to become shareholders through a company funded loan system, the roles of employee and shareholders are treated as independent by the company. For instance, HR department does not have access to the information of the name of the shareholders, nor the

[207] The rise in terminations of engineers was observed among almost all engineering companies since 2012, according to the Brazilian Association of Industrial Engineering (http://epoca.globo.com/colunas-e-blogs/felipe-patury/noticia/2014/09/bdemissoes-dos-engenheirosb-de-projetos-em-todo-o-pais.html)
[208] Annual Report 2013.
[209] Annual Report 2014.
[210] Annual Report 2014.
[211] Annual Report 2013.
[212] Interview #14, HR Manager, 08/05/2014.
[213] Annual Report 2013.

amount of shares that each employee has. This is done in order to guarantee that no HR decision (e.g., promotion, dismissal, wage rise) is influenced by employee's shareholding status. Likewise, no employee should feel forced to become a shareholder[214].

The ownership structure of the company and the need to allow the shareholders to participate in company's decision-making turns communication into an essential activity in the company, according to the HR department. Although all major HR decisions are discussed with the employees-shareholders, that does not mean that decisions can only be made with complete consensus of all the employees. The focus is on transparency and communication, but not necessarily consensus. As in other incorporated companies (*sociedade anônima*), shareholders' main tool to influence the company's direction is through the election of the board of directors. In this electoral process, each share corresponds to one vote.

As suggested by the turnover data above, the profile of Construco's workforce has changed considerably in the last years. Up to the 2000's the workforce was characterized by low turnover rates and long tenure of the employees in the company. Most employees would start their career in the company as interns, and it was not unusual to find employees that would work in the company for their whole career. According to the interviewed HR manager, these characteristics of the workforce made it easier for employees to understand Construco's ownership model and the organizational culture. In the last five years, however, the profile of the workforce has change significantly: according to the HR manager, approximately 50% of the employees were hired in the last 5 years and 40% are 30 years old or younger. In order to manage this new workforce, HR is experiencing new challenges in order to efficiently communicate the company's culture for its own employees[215].

[214] Interview #14, HR Manager, 08/05/2014.
[215] Interview #14, HR Manager, 08/05/2014.

In order to fulfill this mission, the HR department has currently 19 employees. It is worth noting that companies in which Construco has a partnership (i.e. Tropico up to 2014 and Logicalis) have their own HR department, although the HR from the holding company is responsible to align the HR strategies of all the companies.

Regarding remuneration strategies, all the employees are eligible to the same profit sharing scheme, which is based on the company and employee's performance. Moreover, Construco has a system of "self proposed" wage raise, by which any employee can propose their own salary by using a standard form, and justifying the request on the market wide wage survey provided by a specialized company. Management then analyzes and discusses the request with the employee, therefore defining if the wage raise will be granted or not[216].

Training is an essential part of the company's HR policy. In 2014 7% of all company's investment were in workforce training, with an average of 14 annual training hours per employee in technical positions (which includes engineers and architects) and 15 hours for middle managers (leaders/supervisors)[217]. These numbers represent a significant decrease in comparison to 2012, when 14% of all the company's investment was in workforce training and the average annual training hours for technical employees was 33 and for middle managers 43[218].

Regarding work organization, the employees are organized by projects and not by departments. This means that every employee is allocated in at least one specific project, which tend to be multidisciplinary. Each project has its own project manager, who is responsible for the project's integration, scope, time, cost, quality, human resources, communications, risk, procurement and stakeholders management, in accordance to the knowledge areas of the "Project Management Body of Knowledge Guide," published by the Project Management Institute.

[216] Annual Report 2013.
[217] Annual Report 2014.
[218] Annual Report 2013.

Throughout the duration of the project, the employees' there allocated respond to the project manager. Although in *professional services* projects, all the employees working on the project are from Construco, in projects that involve construction, Construco will always partner with at least one more company.

Although the project manager is hierarchically responsible for all the employees working in the project, each employee also responds to the "knowledge area" coordinator, therefore forming a matrix organization structure. Those knowledge area "departments" exist only virtually, and are divided in four big groups: engineering, project management, supply chain management, and construction. The knowledge area coordinators, who are technical references in the field, exercise these management functions only part-time, since they are also working on a specific project, and they are responsible for (i) procedures and knowledge dissemination within all the employees in the area; (ii) definition and dissemination of the information over the working tools to be used by all the professionals of the area (e.g., software and hardware); (iii) the allocation of employees to specific projects, as well as termination and hiring of employees in the area. The coordinator is the one who has the final word regarding any hiring, promotion or firing decision, since he is the only one who knows the current status and activities of all the employees under his/her coordination. He is also the final responsible to determine the training/education plan for each worker in the area. The goal of this structure is to maintain a workforce of optimum size, avoiding lack or excess of workers in any area. It is clear that the coordinator is responsible for most human resources management in the company. In fact, the HR department see themselves as having the mission to prepare those coordinators to manage the company's employees[219].

[219] Interview #14, HR Manager, 08/05/2014.

Labor Relations

The relationship between the company and the *Engineers' Union* is described as calm. The interaction between the company and the union is usually restricted to the signature of the Profit Sharing Collective Agreement (*Acordo Coletivo de Trabalho*), and therefore the company does not have a department structured specifically for dealing with industrial relations[220]. It is worth noticing that the Engineers' Union is not a particularly strong union, with very limited influence in the workplace nationally.

Legal Counsel

External law firms conduct most of the legal related activities. In the case of labor and employment law issues, there is one Construco employee lawyer who is responsible to intermediate the relationship with the law firms who are responsible for any legal opinions. Historically, Construco has a very low number of lawsuits filed in the labor courts by former employees (five lawsuits in the last ten years). Although the number of lawsuits filed by subcontractors involved in the projects is higher, they too are not significant in terms of amounts or risks involved[221].

Disciplinary Policy and Termination

The HR department is responsible for defining all discipline related policies (e.g., code of conduct, ethical codes, e-mail policy) and the breach of any of those rules may lead to disciplinary action. However, disciplinary actions are unusual in the company, although warning letters have been issued in some rare cases. Just cause termination is highly unlikely, and it has been registered only once in the history of the company[222].

[220] Interview #14, HR Manager, 08/05/2014.
[221] Interview #14, HR Manager, 08/05/2014.
[222] Interview #14, HR Manager, 08/05/2014.

In case of unjustified termination, the final responsibility for the decision and its communication is always of the knowledge area coordinator, while the HR department is responsible solely for the support and formal and legal procedures related to it. The HR department interviews all terminated employees and if a potential for further conflict or other management related issues is identified, HR professionals will work those issues with the knowledge area coordinator. Moreover, all interview data is consolidated in a monthly report in order to identify any source of future conflicts.

Workplace Conflicts

So far I have presented a general overview of the company's structure, the organization of its Human Resources department, and how Industrial Relations and Legal issues are treated. In the next section I explore the company's available tools to deal with workplace conflicts. Before that, however, I present the company picture on diversity and workplace bullying, generally seen as potential conflict issues.

Diversity

Construco is predominantly a male company: for the past years women have represented only 31% of the workforce, and only 9 of the 62 company's executives are women[223]. Regarding employees' age, by the end of 2014 39% of the company's workforce was 30 years old or younger, 52% was between 30 and 50 years old, and 9% was 50 years old or older. Despite those characteristics of the workforce, the company has no history of any discrimination related complaint.

[223] Annual Report 2014.

Workplace Bullying

Workplace bullying cases, which are usually described as important issues in companies in several sectors, as explained in previous chapters, are not a relevant type of workplace conflict in Construco. Historically, the company has faced only two lawsuits with workplace bullying claims, being considered not guilty in both. Sexual harassment claims are also unusual[224].

Conflict resolution tools

The types of conflicts that the company has been experiencing in the workplace has been changing in the last years, partially due to the new profile of the workforce described above. When long tenured employees composed most of the workforce, the existing tools for conflict communication and resolution (i.e. climate survey and open door policy, which will be explained later in this section) seemed sufficient according to the HR department. The new workforce, younger and with short tenure in the company, seems to distrust the existing tools, and the need for a more structured conflict resolution channel, such as an ombudsman office, is currently being considered by the company[225]. While an ombudsman channel is not created, employees are using the tools that they find available to voice their concerns and frustrations with the company's decisions.

In Construco's matrix organizational structure, the knowledge area coordinators exercise an essential role regarding workplace conflicts, since they might be able to identify problems being faced by the knowledge area workers allocated in different projects. When a coordinator identifies a workplace conflict he/she looks for the HR support in order to define how to deal with the conflict. Likewise, if the HR department is communicated about an existing conflict, an HR employee contacts the responsible coordinator in order to establish a solution plan, which

[224] Interview #14, HR Manager, 08/05/2014.
[225] Interview #14, HR Manager, 08/05/2014.

invariably will focus on a dialogue solution with all the parties involved. If the issue at place involves fraud or a breach of the company's code of conduct, the legal department or the auditing department might also be involved in it.

Moreover, the company's open door policy has been in place for several years, and it is structured to enable employees to request a private meeting with any member of the Board of Directors or Executive Committee to discuss whatever matters of concern they may have[226].

The climate survey is another important tool that employees use to exercise their voice in the workplace. It has been in place for 18 years, and once the results are consolidated and analyzed by the HR department, focus groups with some employees are conducted in order to obtain qualitative information to better understand the numerical results.

In addition, Construco holds three annual events for formal interaction between top management (the Board of Directors and Executive Committee) and the shareholders, who are all employees: one Annual General Meeting and two annual Community Meetings. Those events are held at Construco's head offices in São Paulo, and transmitted via real-time webcast to all other branches. At these meetings detailed reports on the organization's performance, challenges and aspirations in all strategic perspectives are presented by management, which is followed by a debate with the participation of all attendants to the meeting[227].

In addition, top management also organizes ad-hoc meetings with groups of professionals for informal open discussion of any issues in which they are interested. The participant groups might include new hires, supervisors, and employees with outstanding performance, or members of a specific operation, for example.

[226] Annual Report 2013.
[227] Annual Report 2013.

It is clear then, that the company has several mechanism and channels through which employees can manifest their concerns, but none of those channels are specifically structured to deal with workplace conflicts as its main focus. In the absence of a structured and conflict oriented channel, such as an ombudsman office, employees end up using other available communication channels, even if they are not originally designed to receive manifestations over workplace conflicts or employees discontentment. For instance, the company has used for a long time a suggestions program (*Idea Scale*), originally designed to receive suggestions over technical procedures or possible innovations. It is not unusual for employees to also use the program to expose management related problems or other kinds of workplace conflicts, and mainly complaints and questions over the fairness of the salaries or profit sharing scheme. In another similar program (*Construco 360*), flip charts are made available in all break rooms, so employees can openly propose questions or issues to be discussed by the company management. The recent workforce instability of the company and the increase in the turnover rates led to questions such as "Why costs are being cut only in relation to lower level employees, but no manager is being terminated?" When the employees raise questions like this, the HR department will work in conjunction to management to explain to the employees the rational behind the company's decisions.

According to our interviewee, the change in the profile of the workforce also led to increase in conflict rates due to the misalignment of the company's overall policies and the employees' expectations. Most incentive and compensation policies of the company were designed having in mind long tenure employees, looking at the long-term returns for the workers, which might be incompatible to the new employees expectations and their previous professional experience in other companies in the sector. Moreover, new employees have been showing a

higher level of distrust in the existing company tools for workplace management[228]. For instance, intentional misidentification when responding the climate survey might indicate a lack of trust in how the results are going to be later used by management.

Different types of conflicts are not determined solely by the new profile of the workforce, but also by the type of project in which each employee is allocated[229]. Whereas service projects are conducted by teams composed exclusively by Construco employees, in construction projects Construco employees will always work side by side to employees of at least one other company. Because Construco's ownership structure and matrix organization model is not the standard in the sector, in construction projects Construco employees will inevitably face different organizational cultures and management practices on a daily basis. Although Construco tries to maintain the core of its management practices in those projects, partnering with other companies demands adaptation of work practices, that can vary from simple questions of flexibility of work time to more complex issues of management models. When this kind of conflict arises, knowledge area coordinators are usually sought by the grievant employee, given that Construco's project manager might be too attached to the projects goals to question the partner company's practices. Moreover, the HR department also promotes team-building activities, in order to align workers and managers with different organizational culture background.

Another important factor that might impact the types of workplace conflict in Construco is the matrix organization structure. When the structure was originally implemented in 2003, project managers resisted to the idea of losing control over decisions related to the employees that would work in his/her project. Project managers that used to have full decision power over the project's employees did not accept easily the idea that knowledge area coordinators would

[228] Interview #14, HR Manager, 08/05/2014.
[229] Interview #14, HR Manager, 08/05/2014.

define the worker allocation to each project, as well as hiring, firing and promotion decisions. The positive experience on the last decade using this matrix structure led this type of conflict between project managers and area coordinators to disappear at the company, according to the HR department[230].

Analysis

Although Construco is far from representing a typical Brazilian company, it is still an interesting case to study. Construco is a very peculiar case, mainly due to two important organizational characteristics: the fact that (i) Construco is an employee owned company, and (ii) that work is organized following a matrix structure. Although the issue of workplace conflict does not seem as central for Construco as seen in other of the case studies, when this issue is discussed in the Construco case, it must be done with these specific company characteristics in mind.

Firstly, the fact that the majority of Construco's employees are also shareholders of the company, clearly influences the company's overall human resources strategy and, consequently, how workplace conflicts are dealt with. As an example, the need of transparency in decision-making and open dialogue with shareholders ends up being translated into a dialogue-focused human resources strategy. Moreover, shareholders' "voice channels," such as the Annual General Meetings, or even the election of the board of directors, might as well work as an employee voice channel, given the "overlapping" identities of shareholders and employees.

Likewise, the matrix structure is essential for understanding not only the origin of some workplace conflicts, but also who has, in general, the responsibility of giving the first immediate response to any rising workplace conflict. It is worth noticing that in Construco's case, workplace conflicts might rise not only from misalignment between two managers responsible

[230] Interview #14, HR Manager, 08/05/2014.

for the same employee (i.e., the project manager and the knowledge area coordinator), but also from misalignment between managers from different companies, given the amount of projects involving Construco and another engineering company.

The case of Construco also highlights how changes in the demographics and general characteristics of the workforce might impact the amount and intensity of conflicts in the workplace and usage rates of the existing channels for conflict resolution. Although Construco is still far from being characterized as conflictive workplace, it is undeniable that some form of unrest has risen in the past years. Although there is not enough data to confirm any causal relationship between the change in the profile of the workforce and the rise in workplace conflicts manifestation, the data collected suggest that those two variables are closely connected. Likewise, it is worth noticing how unsatisfied employees were not prevented from voicing their discontentment due to the perception of inexistence of adequate voice channels. On the contrary, disgruntled employees opted to broaden the scope of existing channels, in order to use them to manifest their grievances.

Furthermore, it is worth noting that although there is some evidence of an increment on conflict rates in the workplace, this did not reflect in an expansion of formalized conflicts. Despite rising turnover rates, Construco did not experience any significant increment in its litigation levels (which remains almost inexistent), nor in the influence of union in the workplace.

CHAPTER 9 – COMPARATIVE ANALYSIS

In the previous chapters, I have explained in details the structure of the four companies studied, as well as the functioning of their dispute resolution systems. In this chapter I compare the four cases in terms of conflict level in the workplace, formal ADR structures and their development. From this comparative analysis I highlight the main findings of this research, and point the directions of future research on ADR in Brazilian workplaces.

Workplace Conflicts

Before comparing the four companies in terms of their ADR methods, it is important to understand how they differ in the levels and the nature of their conflicts in the workplace. Those differences can be explained not only by different management strategies and company's size, but sectorial characteristics, including union strength, must also be taken into consideration.

It is possible to state that Financo and Irco face the largest quantities of formalized workplace conflicts. Looking at the most straightforward measurement of workplace conflicts, i.e. numbers related to employment litigation, it becomes clear the differences between the four cases. With 62,641 open employment lawsuits in 2014 (approximately 726 per thousand employees), Financo is among the top litigators in Brazilian employment courts. Although Irco's 20,000 lawsuits (approximately 261 per thousand employees) are significantly smaller than Financo, those are still considerable, mainly when compared to the 615 lawsuits (mainly from subcontractors) from Cosmetico (approximately 93 per thousand employees), and the five employee lawsuits in the past ten years from Construco[231]. Evidently, company size partially explains the difference in numbers, but other factors must also be taken into consideration.

[231] The numbers of lawsuits per thousand employees must be seen with some caution. The total number of lawsuits includes not only lawsuits filed by employees, but also by subcontractors and other workers. Those subcontractors can even be considered employees by the courts, depending on the decision. Moreover, the number covers only currently "open" lawsuits, and not only lawsuits filed in a certain period. In other words, a lawsuit filed in the previous year, but which has already been finalized in the courts (whether via a final de decision, settlement, or any other legal form of finishing a lawsuit) will not be counted on the total number of lawsuits, whereas a lawsuit filed ten years ago, and still being

As explained earlier, almost the totality of Financo's lawsuits include the same requests, some of which are about legal rights exclusive to employees in the banking sector, such as the 30-hour workweek (CLT, art. 224). It is important to bear in mind that in the Brazilian employment litigation system, the plaintiff might make all the claims related to his employment contract in the same lawsuit[232]. However, although other claims might also appear in high numbers, it is suggested by Financo's legal manager that the mentioned sectorial specific rights are the main trigger for employment lawsuits in the sector. This suggestion is in accordance with my personal experience as a lawyer in the banking sector in Brazil.

Irco's employment lawsuits also tend to be over *demandas repetitivas* (i.e. several employees file lawsuits over the same topic, with similar requests, such as overtime payment), mostly over working time issues. Those issues also tend to be industry specific, as it includes discussions about overtime payment of commuting time to the plants or mining sites, as well as payment of time spent in donning and doffing protective gear. But can industry characteristics regarding, for instance, the location of work sites (which could impact commuting time related claims), explain the totality of the differences in lawsuits volume between Cosmetico and Irco? Can the specific legislation alone explain the difference in litigation levels between Financo and Construco, both companies that operate in the service sectors? It does not seem to be the case, and a more comprehensive explanation should look at company and union's characteristics, management strategies, as well as the attorneys and labor judges' role in litigation.

One point that must be taken into consideration is union strength and its influence in the workplace. Unions can influence litigation levels in different ways. The most straightforward would be by filing collective lawsuits representing a group of employees (*substituição*

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discussed in the courts, will be considered in the total number. Finally, the total number of "open" lawsuits is divided by the number of current employees, which does not include subcontractors.

[232] As explained earlier, the judicial cost system (*custas* processuais) actually incentivizes plaintiffs to make as much claims as possible in the same lawsuit.

processual), which is allowed by Brazilian legislation in specific cases (Marzionna 2006). However, cases of *substituição processual* are infrequent, given the limited topics that it might cover. What is probably a more convincing explanation is the fact that Brazilian legislation only makes the defendant pay the plaintiff's attorney's fees in cases in which the union's attorney is representing the employee in an individual lawsuit. Moreover, it is worth to remember that all terminations must be confirmed in the union office (*homologação da rescisão*), which provides the union with at least one opportunity for personal contact with the terminated employee, when the idea of a lawsuit might be suggested. Although more data would be necessary in order to identify the amount of lawsuits filed by the union's attorney in each case, it is no surprise that the companies dealing with stronger unions (Financo and Irco) face the largest numbers of lawsuits.

Moreover, plaintiff attorneys and characteristics of the labor courts' decisions also might influence the litigation levels of each company. Most plaintiff attorneys are hired under a contingent fees system (usually 30% of the final award or settlement), therefore it is logical that attorneys seek more clients in former employees of industries or specific companies that tend to produce higher awards or who tend to settle more easily. Given the above characteristics of the banking sector (i.e. the existence of specific and more protective legislation regarding wage and hours for employees in the sector), it is no surprise that Financo presents the highest litigation levels among all the cases. Since companies with high litigation levels face internal and external pressures to settle in courts (as evidenced by Financo's settlement strategy), attorneys will also look for plaintiffs in those industries, where court settlements might be achieved quicker and involving higher amounts of money. It is worth remembering that the fear among high management in Financo that a settlement strategy might result in more lawsuits being filed (*indústria do acordo*) was also cited by management in Cosmetico and Irco, suggesting that in

fact there might be a relationship between settlement rates and filing of new lawsuits. Moreover, since most claims in the case of Financo and Irco tend to be over *demandas repetitivas*, attorneys tend to follow the same template when filing lawsuits for different employees working in similar positions, as well as taking advantage of the connection of their clients with current or former employees, who will be called as witnesses, to expand their clientele in a certain industry. In addition, courts might impact litigation levels not only by pressuring for early settlements, but also by issuing favorable decisions to plaintiffs of a certain industry. Although numbers were not provided, legal managers in Financo and Irco suggested that a higher concentration of lawsuits are found in regions where courts tend to issue decisions more favorable to the plaintiffs or higher awards. Therefore, companies with operations spread all over the country, such as Irco, and mainly Financo, might face bigger litigation threats in specific regions.

Other elements that might impact litigation rates can be connected to each company's human resources strategy. Cosmetico's management suggested that their low level of employment litigation was a consequence of the "quality of the termination process" in the company, referring specifically to the levels of transparency in the decision-making and the quality of the communication between supervisors and their employees. Although Financo and Irco also argue to promote similar termination process (which involve interviews with some or all of the terminated employees), the size of the company might have some impact over the quality of the termination process. Whereas in Cosmetico, HR professionals are able to participate more actively and directly in the termination, the size of Irco and Financo make those companies delegate more of the termination activities to local managers, not directly connected to the HR department, who will simply provide some sort of remote support to the termination process.

Finally, labor market characteristics might also have a direct impact on litigation levels. As explained earlier, in Brazil, lawsuits tend to be filed only by terminated employees, since current employees are usually terminated if filing a lawsuit. The overall impact of this is that higher termination rates might be connected to higher litigation rates. Another consequence is that this general rule will not apply to positions with very company specific skills and where there is difficulty in hiring new employees with the same set of skills. That is the case of the rail workers in Irco, who constitute one of the few group of workers who might use litigation without the fear of being terminated in retaliation, due to the lack of qualified workers in the labor market. I will come back to this characteristic of Brazilian litigation system later on this chapter, when discussing how alternative dispute resolution methods compare to litigation in Brazil.

Development of Alternative Dispute Resolution Methods

Before comparing the development and functioning of the ombudsman offices in Financo, Cosmetico and Irco, it is worth comparing the four cases in terms of the development of different ADR methods for workplace conflicts in the past years.

In the four cases the issue of workplace conflicts has been significant enough to make all companies develop some method to diagnose and treat ongoing conflicts in the workplace. For instance, although with a much wider objective than simply identifying workplace conflicts, the four companies report using companywide climate surveys for several years, which has proven an important tool to identify some specific sources of conflicts in the workplace.

However, the most interesting ADR method to analyze besides the Ombudsman are the *CCPs* or "Previous Conciliation Commissions." As explained earlier, the *CCPs* were authorized by law in 1999, for the declared purpose of functioning as an alternative to employment litigation. The reasons for its overall failure have already been exposed in Chapter 3, but it is

worth analyzing how the experiences of Financo and Irco with *CCPs* can be compared. Considering that the *CCPs* were created with the goal of being an alternative to litigation, it is no surprise that companies with lower litigation levels, such as Cosmetico and Construco have no past experience with *CCPs*.

Although both Irco and Financo face high levels of employment litigation, their experience with CCPs are significantly different. Financo was a pioneer company in the use of CCPs, implementing the first one of the banking sector even before its legal regulation. Moreover, despite the overall failure of CCPs in the national level, about 2,000 cases are still settled annually by Financo in CCPs. Irco, on the other hand, had an experience similar to most companies who tried to use CCPs after the 1999 regulating law. Usage rates of the CCPs in Irco were low, since neither employees nor unions seemed interested in using a settlement channel outside the realm of the courts. Irco's management suggested that this failure might be connected to (1) the prevalence of the litigation culture among employees and union leaders; (2) the failure of Irco's management in convincing the union that CCPs could be favorable in comparison to litigation not only to the company, but also to employees; and (3) the lack of understanding of employees about the functioning of the CCPs. Once the Supreme Court decided that making CCPs mandatory before the filing of a lawsuit was an unconstitutional requirement, it was natural to expect the complete abandonment of the CCPs by most Brazilian companies and unions.

It is worth noticing that Financo's pioneering in the use of CCPs as well as its ongoing use of it cannot be considered a surprise. With a strong employers' association (*sindicato patronal*) and a strong labor union, the banking sector has been the source of several innovations in labor relations, later influencing other sectors with different levels of success. Financo,

specifically, has not only pioneered in the adoption of CCP, but also in the adoption of the Ombudsman office, as I am going to analyze in the next section. With a strong labor union as a counterpart, the banking sector has also been the source of the first sectorial collective agreement to expressly cover the issue of workplace bullying and to make mandatory the creation of some sort of grievance channel in which employees can report cases of workplace bullying and other forms of conflicts in the workplace. As stated by one of the rail workers union leader, the banking sector is seen as a benchmark in terms of collective bargaining and other workplace issues by several unions in other sectors, directly influencing the adoption of similar grievance procedures in other sectors. Evidently, this is not *per se* a guarantee of success of any ADR method in a different setting, as evidenced by the overall failure of the CCPs outside the banking sector.

The Ombudsman Office

Development

As mentioned previously, Cosmetico, Irco, and Financo have in common the fact that all three companies have in place an Ombudsman Office. Construco, on the other hand, currently considers the creation of one. Determining whether this is a nationwide trend in Brazilian companies is not the goal of this research. However, looking on the differences in the development histories of the ombudsman offices in each company might help understanding why Brazilian companies might have opted for the Ombudsman channel in comparison to other ADR methods more common in other countries, and in what context Brazilian companies might expect to be able to successfully implement an ombudsman office.

In terms of development of the channel, Financo and Cosmetico's cases are more similar, mainly in comparison to the history in the case of Irco. In Financo's case, the creation of the

Ombudsman Office is depicted as a natural consequence of the focus on organizational culture during the merging process between Financo and Bank1. Company management identified the need of a channel specifically focused on giving support to grievant employees, who until then would usually resort to HR business partners, who were the most accessible HR professionals in the company. Although the reasons behind the creation of the Ombudsman Office instead of any other grievance channel or ADR method is not clear, it seems to be a well thought process led by HR professionals. Although the Collective Bargaining Agreement that makes mandatory for all banks the creation of some sort of grievance channel was just signed years after the creation of Financo's ombudsman office, it is worth remembering that the issue of workplace bullying and the necessity of tools to tackle it have been a central issue to the banking union since early 2000s.

The case of Cosmetico, which has an Ombudsman Office in place for the longest time among the companies in our study, seems to be the one where the creation of the channel was the most planned of all. It was created in 2006, as a consequence of the strategic planning process that defined the company's relationship principles, as well as the need to have a channel through which employees would be able to report any case in disagreement with the company's principles.

Irco's case is probably the most interesting one. Although the Ombudsman Office formally exists since 2005, it just assumed its current form 8 years later. Originally created as whistleblowing PO Box to comply with Sarbanes-Oxley regulation, the tool gained another importance level in the company once access to the Ombudsman channel was expanded by the creation of an Ombudsman email, which was then transformed by employees from a whistleblowing channel to a grievance channel. Irco's case is interesting as it makes one

questions whether other companies that also have to create a whistleblowing channel to comply with other regulations might also face this kind of transformation of the channel by its grievant employees.

Construco case might be similar to Irco in two ways. Firstly, just as it happened in Irco, where in the absence of an adequate tool for voicing their discontentment employees hijacked and transformed the existing whistleblowing channel, Construco employees seem to be doing something similar with HR tools. As described earlier, in a moment of crisis, tools originally developed to enhance employee participation in the workplace (similar to suggestion boxes), ended up being used by Construco employees as a channel to voice their grievances about the criteria used to terminate employees. It is no surprise that after these events, the company started considering the creation of an Ombudsman Office. Secondly, in a different level, Construco case might replicate Irco in the future in relation to the indirect impact that other regulation, such as Sarbanes-Oxley, might have in workplace conflict resolution. Given that engineering and construction companies were in the center of the corruption scandals involving the Brazilian oil company Petrobras, it is possible to expect that engineering companies might face bigger pressure to create mechanisms to prevent and identify frauds and mismanagement, which, similarly to what happened with Irco's compliance with Sarbanes-Oxley, might be the embryo of an Ombudsman Office.

The Option for the Ombudsman Model

In the previous paragraphs I have described how the Ombudsman Office was developed in each of the studied companies. The level of existing workplace conflicts and the need for a channel for employees to voice their complaints help explain the emergence of dispute resolution methods, but do not explain why the Ombudsman Office prevailed over other possible dispute

resolution methods. The context in which the Ombudsman Offices emerged allows some hypotheses to be drawn, which I explore in the following paragraphs.

As explained earlier, employment litigation has traditionally been the main outlet for individual workplace conflicts in Brazil. However, the fact that it is in general only used by terminated employees, makes litigation an inadequate method to solve conflicts of current employees. Moreover, the time involved in litigation, from the filing of the lawsuit to the issue of the final decision might be too long, therefore not working as a proper tool for solution of ongoing workplace conflicts.

Although court connected mediation tends to provide a quicker solution in comparison to litigation, it has the filing of a lawsuit as a prerequisite for the start of the mediation process. Therefore, it might still be a channel preferred by terminated employees, as current employees might reasonably fear retaliation after filing the lawsuit.

Conciliation committees structured outside the courts, as the CCPs, could in theory overcome those barriers posed by employment litigation. However, experience with real CCPs showed that companies were willing to settle in the CCPs only cases involving terminated employees. Moreover, all settlements referred to specific issues that could be translated in monetary values (e.g., overtime payment). Additionally, the dubious position of some labor courts on the enforcement of settlements obtained in the CCPs, added to the Supreme Court decision that declared unconstitutional the requirement to attempt to settle on CCPs before the filing of the lawsuit, made this a limited alternative to litigation.

The case of employment arbitration, which could be considered a straightforward substitute to litigation, must also be analyzed. Although arbitration has gained space in the past years for commercial conflicts involving companies, labor courts have considered arbitration

unlawful for employment cases. The several attempts to use employment arbitration in the 1990s and 2000s faced resistance by the courts, which would be unwilling to enforce any arbitration award, given the principles of *hipossuficiência* of the employee (i.e. the employee is the weakest party, who should be protected by employment legislation), inalienability and *indisponibilidade* of employment rights (i.e. employment rights cannot be negotiated by the employee), and the constitutional guarantee of access to the Justice system to all citizens. Therefore, employment arbitration could not be considered a viable alternative method to solve workplace disputes.

It would also be unlikely to find companies choosing to use some form of nonunion grievance procedure. In the US, where this method is adopted by some companies, it is clear that nonunion grievance procedures basically replicate traditional union grievance procedures in a nonunion setting. Therefore, it assumes the existence of a form of union grievance procedure over which the nonunion version would be based on. However, Brazilian companies and unions have historically no experience with any kind of union grievance procedure system to base on their alternative dispute resolution method. The explanation to the lack of this kind of experience is probably connected to the corporatist origins of Brazilian labor relations system and the dominance of the state as the main responsible to solve any form of work-related conflicts. Future research could look at American companies operating in Brazil, in order to identify if there might be any form of grievance procedure reproduced in Brazil, as well as looking at Brazilian multinational companies who might have experienced grievance procedures in its North American operations.

This scenario leaves basically three alternatives to Brazilian companies looking to solve workplace conflicts outside the courts: employment mediation, peer review panels, and the Ombudsman offices.

Employment mediation might face the same restrictions observed for arbitration. Given the inalienability and *indisponibilidade* of employment rights, agreements settled on employment mediation might not be enforced by the labor courts. It is worth noticing that there is a tendency in courts to consider that settlements reached outside the courts might be used to hurt the weaker party (the employee), and to fraud employment rights. That is one of the reasons to the rejection by the courts to the CCPs, and the argument would be used with even more strength in mediation cases in which the participation of the union would not be required.

In the case of peer review panels, there are no institutional barriers to its adoption. Actually, it would be no surprise if companies such as Cosmetico, which already has experience with self-managed work teams, developed some form of peer review panels. The same could be said about companies with different employee involvement tools, such as Construco, which is employee owned. As a matter of fact, another company to which I had access, Jobco, might be developing some form of an unstructured peer review panel, since all management decisions (e.g., hiring and firing) are made after the whole team reach a consensus on the decision[233]. Evidently, any decision made by a peer review panel could still be challenged in the courts, due to the constitutional guarantee of access to the Justice system, which will also be applicable to the Ombudsman alternative.

The option for the Ombudsman Office might be explained by several reasons. Firstly, it is worth noticing that there are no legal barriers for the adoption of an Ombudsman office. Since the Ombudsman, by and large, will not be responsible for making any final decision or establishing some form of penalty to a faulty employee or manager, it would be incorrect to say that the Ombudsman's decisions could be challenged in the courts. The Ombudsman will usually

[233] Jobco is an IT Company that adopts an extreme horizontal structure, with no managers. This case was dropped from the Thesis due to its very peculiar characteristics, with no significant equivalent in Brazil.

conduct the independent investigation and provide suggestions to the committee or manager responsible for the final decision, so what might be challenged in courts is not the Ombudsman's decision, but the employer's decision, which could occur no matter the participation of the Ombudsman in the process. Moreover, in several cases the Ombudsman tries to reach a consensual agreement between the parties involved, therefore not occurring any decision that could actually be challenged. Additionally, all ombudsman offices described in the previous cases count on the legal department support and are extremely careful in the conduction of any investigation, always guaranteeing the possibility of non-identification of the grievant employee, which might help the courts to see the investigatory procedures with positive eyes. It is worth noticing that although all Ombudsman Offices are described as independent structures, it is unlikely that they would be considered as so by employment courts. Given the use of employer resources and the fact that Ombudsman are appointed/hired by the employer, it is likely that from a legal standpoint the Ombudsman is no different from any other manager or employer representative.

Evidently, several of those characteristics could also refer to other alternative dispute resolution methods, such as mediation. However, more interesting than looking at the lack of legal barriers to the usage of Ombudsman offices, it is to analyze how Brazilian institutional environment might have incentivized the option for the Ombudsman Office over other alternative methods.

As explained in Chapter 3, Ombudsman origins are usually traced back to 19th century Sweden, but the use of the term in Portuguese for Ombudsman (i.e. *Ouvidor*) has a longer history in Brazil, dating back to 1549, and it became preeminent in the Public Administration arena in mid-1980s. Moreover, as explained before, in the private sector, some ombudsman channels

focused on customers' complaints evolved from customer care services channels since the 1990s, which was later enhanced in 1990, by the enactment of the Consumer Defense Code, which made several companies create their customer care services (later regulated by the Decree 6523/2008). Those customer care services could later develop into Ombudsman channels, as it happened with bank Bradesco in 2005. In this same year other banks created their Ombudsman channels, such as Itaú and Banco do Brasil. Currently, regulation makes mandatory the creation of Ombudsman channels for all companies operating in the following sectors: banking (*Resolução CMN 3477/2007*), electricity power distribution (Resolução ANEEL 470/2011), insurance (Resolução CNSP 279/2013), and health insurance (Resolução ANS 323/2013). In 2007 a bill proposed by congressman Sergio Barradas Carneiro tried to make mandatory the creation of *ouvidorias* for all public or private companies with more than 300 employees (PL 342/2007). The bill was rejected by the Constitution and Justice Commission of the Congress in 2015, due to its unconstitutional interference on entrepreneurial activity.

Although those ombudsman offices are targeted to external audiences (i.e. customers in the case of private companies, and citizens and users of public services in the cases of ombudsman offices in the public administration), the widespread adoption of ombudsman offices in several different sectors might help explaining the option to use a similar structure to deal with workplace conflicts, by a coercive and mimetic isomorphism process. According to DiMaggio and Powell (1983), isomorphism is "a constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions" in order to succeed in the competition for political power and institutional legitimacy. Coercive isomorphism, is related to the formal and informal pressures exerted by other organizations and by cultural expectations in the local environment, including government mandates through laws and regulations, whereas

the mimetic process does not derive from a coercive authority, but from the environment uncertainty, which leads organizations to model themselves after other organizations, in order to gain legitimacy and increase survival rates (DiMaggio and Powell 1983). The case of use of Organizational Ombudsman for workplace conflicts might reflect organizational (i.e. Unions) and cultural expectations for a channel similar to the one existing to other kinds of conflicts (coercive isomorphism). Or, maybe, facing the uncertainty of the inexistence of a viable alternative to litigation, companies model their grievance mechanisms after their successful experience with different kinds of conflicts (mimetic isomorphism).

This process would be similar to the spread of the grievance procedure as a rational response to the need for compliance with EEO law in the US (Edelman et al. 1999). In that case, due process protection via nonunion grievance procedures was a response to threats posed by the legal environment, mediated by the personnel profession and by changing ideologies of workplace governance (Edelman 1990). Just as grievances procedures might not have flourished in Brazil due to the lack of the experience with grievance procedures in the unionized setting, the option for the Ombudsman model for dealing with workplace conflicts might be a consequence of the experience with Ombudsman channels in different settings[234]. It is worth noticing that even simple hotlines for general questions to the HR department, such as Financo's former *Fale com o RH*, follow a similar model to the Customer Care Services which flourished after the Consumer Protection Code. In order to test this hypothesis, future research might try to find if companies or sectors in which ombudsman offices for customers are usual (or even mandatory), also developed more ombudsman offices for employees (*Ouvidorias internas*).

[234] In order to differentiate the Ombudsman targeted at employees from the Ombudsman for customers use, companies might adopt the expression *Ouvidoria* ***Interna*** for the former, in contrast to simply using *Ouvidoria* for the latter.

The Role of Unions

The cases must also be compared in relation to the role reserved for unions in each company's ombudsman office. The three companies studied with an Ombudsman Office in place deals with very different unions in terms of strategy, strength and representativeness, as examined in depth in each chapter. To recapitulate, the several bank workers' unions that Financo has to deal with are among the strongest in the country. National mobilizations among bank employees are not unusual, with almost yearly occurrences of national strikes. Moreover, the union reserves a special place for the topic of workplace conflicts, workplace bullying, and dispute resolution in the collective bargaining and overall relationship with employers. In the case of Irco, the rail workers constitute one of the main unions that the company has to deal with. This union is also considered fairly strong and representative, with a good ability to mobilize Irco's workers, although with no recent strike history. In the case of Cosmetico, the two main unions that the company has to deal with lack overall strength or representation power in the workplace, with no history of strike, and very small influence in managerial decision. Finally, the engineers' union that deals with Construco has small membership among Construco workers, and closer to no influence in the workplace daily issues.

With this overall picture in mind, it is interesting to observe how the unions in Irco, Cosmetico and Financo relate to the Ombudsman Office. Irco's case could be presented as the one with the closest relationship between union and ombudsman. Union leaders understood the creation of the Ombudsman channel as a union achievement, and they were able to advertise it to their own members. Rail Workers are incentivized by the union to directly access the Ombudsman office, although the union might also do it as a representative of the employee.

In the case of Financo, however, although the union tries to expand ombudsman-like channels to other banks, the relationship is not as open as in the case of Irco. Bank Unions

recommend their members to not access the Ombudsman directly, always prioritizing the union as an intermediate between the grievant employee and the ombudsman office.

Finally, in the other extreme, Cosmetico's ombudsman is not accessible to unions. Employees must directly access the channel, and there is no information that unions have ever asked for access to the Ombudsman channel, nor to statistics related to it.

With this in mind it is worth noticing how in the case of Irco the union sees the Ombudsman as a tool that helps the union to exercise its power, or to at least increase workers' satisfaction in the workplace. In this case the union does not seem to perceive the Ombudsman as a threat to union activities, but actually as complement to union managed tools. Moreover, as seen in Irco's chapter, the union is also able to use Ombudsman reports as leverage tools for traditional union activity and bargaining with management.

If in the case of Irco, the Ombudsman might be seen as a complement to unions, the same cannot be said about Cosmetico and Financo, where the perception is closer to the idea of union substitution. The banking union expressly informs its members that the Ombudsman, as controlled by management, and accessed directly by the employee, is a clear attempt of the employer to substitute the union, in detriment to bank workers. In the case of Cosmetico, although I did not have access to any document which suggest what is the union's perspective on the Ombudsman channel, management speech as a whole suggests that the ombudsman, among other HR strategies, might work as a substitute to the workers need for a union.

Functioning and Usage of Ombudsman Channel

Looking at the functioning of the ombudsman offices some differences between the three cases must be highlighted regarding the ombudsman's position in the company hierarchical

structure and the role of ombudsman offices' employees. Later, I compare the three cases in relation to the usage patterns of the ombudsman channel by employees of the companies.

Regarding the hierarchical position of the ombudsman office, Cosmetico and Irco present a similar structure. In the cosmetics company, the Ombudsman Office currently reports to the President of Ethics Committee, and in the mining company the Ombudsman reports directly to the president of the Board of directors. In justifying the option for this structure, both companies state that the goal was to promote the independence of the Ombudsman, who should be able to investigate and question the actions and decisions of anyone in the company, including CEOs, top executives and HR managers. It is worth noticing that in the case of Irco, when the Ombudsman functioned solely as a whistleblowing channel, it would operate under the Auditing department (which is under the Administration Board), switching to an even more independent structure once it became a proper Ombudsman Office. In the case of Cosmetico, the concern over the independence is clear, since the structure of the Quality Relationship and the Ombudsman Office department has two different hierarchical reporting structures – one for the quality relationship employees, who report to the Vice President of People and Organizational Culture, and one for the Ombudsman Office, which functions under the President of Ethics Committee.

The case of Financo differs significantly from the two others. Although in the interview we were informed that the report to HR Executive is a mere formality, which does not affect the Ombudsman independence, it makes sense to question if this mixture between HR and Ombudsman does not contribute to the unions perception that the Ombudsman in the case of Financo might work as a union substitution tool, whenever it is accessed directly by the employee.

Another issue worth comparing the three cases is related to the role of employees of the Ombudsman Office and who is responsible for conducting investigations in each company.

In the case of Financo, all ombudsman related activities are conducted internally by the Ombudsman department employees. The department is responsible to receive the grievances and to conduct the investigation over the grievant employee's allegations. A similar situation is observed in the case of Irco. In the case of Cosmetico, however, the option is for using a contractor to handle the first contact with the grievant employee, leaving to the Ombudsman Office the main activity of investigation.

It is also worth noticing that although the main Ombudsman's activities are related to investigation of the employee's allegations, in all three companies there is some evidence that some form of transformative mediation is being attempted. Although the term *transformative* is never used, in the three cases the interviewed Ombudsman representatives reported the existence of an effort to make the Ombudsman the last resort in a workplace conflict case, and that it should be the role of the Ombudsman to empower employees and managers to be able to solve their own problems. Despite that desire, the concrete cases in which mediations has been actually conducted by the Ombudsman are limited to very special situations.

Looking specifically on how employees use the Ombudsman channels the issue of anonymity and confidentiality must be highlighted. Firstly, the three companies provide employees with the possibility of not having to identify themselves when filing a grievance or question. In all cases the grievant employee also has the guarantee that his identity will not be revealed without his consent, and even in cases where identification is necessary to proceed with the investigations, the grievant employee will be given the option to drop the claim if he prefers to remain anonymous. Although detailed data is not available for the three companies, it is worth

noticing that in Irco, approximately 60% of the grievances presented are filed without the employee identification. In the case of Cosmetico, anonymous complaints are only 28%, but they represent the majority of the "behavioral issues." In the case of Irco, the Ombudsman's commitment with the idea of secrecy and protection of the employee identity is so big, that investigation material is never provided to the company legal team in case of litigation, even if this material might help the company's defense in courts. The protection of the employee's identity and the possibility of using the Ombudsman channel anonymously is important because it allows employees to voice their grievances without fear of retaliation. Whereas the filing of a lawsuit can generate fear of retaliation in both current employees (who fear termination) and terminated employees (who fear having difficulty to being hired by other employers in the same sector), the Ombudsman's possibility of anonymity might make different kinds of grievances and a higher volume of grievances being brought to surface.

This is connected to a last consideration that must be made regarding the volume of grievances presented to Ombudsman in the studied companies, in comparison to other forms of dispute resolution, mainly employment litigation. Although the three companies vary significantly in terms of number of employees and volume of litigation, they have relatively similar absolute numbers in relation to Ombudsman usage: 1,256 cases for Cosmetico in 2014 (approximately 240 cases per thousand employees), 2,545 cases for Financo in 2010 (approximately 25 cases per thousand employees), and approximately 1,000 cases for Irco on 2013 (approximately 13 cases per thousand employees)[235]. What this numbers might suggest is that the cases that go through the Ombudsman differ in nature from the litigation cases. If the same kind of cases were being channeled to the two different systems, one could expect to find

[235] Those numbers include not only behavioral grievances (e.g., workplace bullying related), but also technical questions (e.g., regarding benefits or calculation of overtime).

similar numbers among the same company, which is not observed. Cosmetico probably presents the most interesting case, considering that Ombudsman usage rates are higher than the current total number of employment lawsuits. However, that is not surprising, given the previous explanation about the functioning of the litigation system. Given that (i) the cosmetics sector lacks the same kind of external pressures for employment litigation observed in the banking sector (i.e. strong unions, active attorneys, and special sectorial legislation), and (ii) considering the fear of retaliation involved in litigation, current employees who would be unlikely to file a lawsuit might see in the Ombudsman an appropriate channel for voicing their grievances.

This finding has important consequences to the study of ADR in Brazilian companies and on how ombudsman offices should be evaluated by those same companies. By and general the concept of Alternative Dispute Resolution assumes the existence of a *traditional* dispute resolution method to which the other method is an alternative. In the case of Brazilian labor relations system, the traditional outlet for workplace dispute resolution is the employment court, accessed via litigation. What those case studies suggest is that several of the cases taken to these companies' ombudsman offices were not being taken to the courts in the absence of the Ombudsman channel. In reality, those conflicts might have been partially explored in litigation, but effectively only after termination. The creation of this new outlet for voicing grievances made possible that conflicts that were being ignored, or at least not treated, are now brought to the attention of the company, who must be able to provide an appropriate solution to them. The advantage in comparison to litigation is that, given the fact that all users of the Ombudsman channel are still employed by the company, there is a real possibility of using non-monetary solutions to these conflicts, which is highly unlikely in litigation cases. With all this in mind, it might be more accurate to refer to the ombudsman offices in those cases as Complementary

Dispute Resolution method, rather than Alternative Dispute Resolution method, given that the conflicts that it deals with are essentially different from conflicts solved via litigation.

Finally, this has a significant impact on how those programs should be evaluated by the companies using Ombudsman offices. Whereas with methods such as the *CCPs,* a company might reasonably expect to experience a reduction in litigation cases, considering that cases of the same nature are channeled through *CCP*s and the Courts, the same cannot be said in relation to the Ombudsman office. The use of Ombudsman might have some indirect positive impact in litigation numbers, but only as it might help generate a healthier work environment, which could eventually impact turnover rates. This could indirectly impact litigation rates, given that terminated employees are the only ones using litigation. The companies studied seem to already understand this – it is not a coincidence that in none of the cases the Ombudsman Office originated in initiatives of the legal department, which has been solely focusing on what could effectively be considered alternatives to litigation, such as *CCP*s or court settlement programs.

CHAPTER 10 – CONCLUSION

In the previous chapter I provided a thorough compared analysis of the four cases, presenting the main findings of this research, as well as the answers to the research questions presented in the first chapter. In the next paragraphs I briefly summarize the main findings of this research, explain its limitations, and propose the paths for future research in the topic.

Main findings

The first research question asked how Brazilian companies are using ADR to solve individual workplace conflicts outside employment courts. Although these four case studies are far from giving a complete picture of overall companies' strategies towards workplace conflicts in Brazil, they constitute an important initial step in understanding the development of ADR for workplace conflicts in Brazil, which should later be completed by further research.

These case studies were able to confirm that despite the predominance of litigation in the Brazilian industrial relations system, private ADR is experiencing some development in Brazilian companies. Although there are limitations for the adoption of some specific forms of alternatives to litigation, such as employment arbitration, Brazilian companies are clearly looking for the resolution of workplace conflicts outside the labor courts. Among the available alternatives, the cases suggest that Ombudsman Offices might be trending.

This leads to the answer to the third research question, about the reasons that might explain the adoption of Organizational Ombudsman by Brazilian Companies instead of other ADR methods. As discussed in Chapter 9, the option for the Ombudsman Office might have several concurrent explanations. Firstly, I have suggested the existence of a process of institutional isomorphism, in which companies replicate for workplace conflicts the same system that has been used for decades for conflicts in different settings. Moreover, the failed attempts or

the existing barriers to other private ADR methods (e.g. the *CCPs* failure and barriers to employment arbitration), in conjunction with the limitations of state-led alternatives (e.g. court-connected mediation programs), might also explain the rise of the Ombudsman Offices. Additionally, Human Resources strategies also played an important role in the development of the Ombudsman Office in some cases. Likewise, unions' demands for a grievance channel and the employee transformation of the existing channels must also be taken into consideration for the explanation of the Ombudsman Office development in Brazil.

The differences in the functioning of each of the three ombudsman offices analyzed in this thesis provide important lessons for researchers and practitioners in Brazilian industrial relations, and responds to the fourth research question over the factors determining the usage and importance level of Organizational Ombudsman in different companies in Brazil. Internal structure and functioning rules helped to define the level of independence and easiness of access to each Ombudsman Office, and therefore were among the factors that determined how ombudsman offices would be used in each company. Moreover, the company's strategy towards unions, as well as the union strategy towards the company and the possibility to use the Ombudsman Office as a leverage tool for traditional union activities, also proved to be extremely important elements in how Ombudsman Offices were used in each case. Those elements can eventually determine the impact that the Ombudsman can have in the conflict level in the workplace.

Finally, the second research question asked how ADR theories developed under the US setting would hold up in a different national context. The cases have been able to demonstrate that context matters for ADR development. By and large, Brazilian companies faced different

institutional pressures and limitations, and therefore adopted a different strategy to deal with workplace conflicts.

All those findings provide important information not only for scholars interested in the Brazilian workplace, but also for researchers and practitioners interested in labor relations in other countries. The fact that ADR theory and models applicable to the US environment are able to only partially explain the development of ADR in different settings is a relevant warning not only for researchers, but also for practitioners in industrial relations, mainly in multinational companies, who might be tempted to simply reproduce their home country ADR models in a different environment. Furthermore, the experience of ombudsman offices in Brazil might also serve as an inspiration or alternative model to practitioners in other countries, such as the US. Finally, union leaders might want to pay special attention to the case of Irco, which suggests how unions can use company-managed ADR methods to leverage their own bargaining position over the issue of workplace conflicts.

Limitations and Future Research

As explained earlier, this thesis has some clear limitations. Firstly, four cases are not an appropriate sample to suggest any conclusion on how widespread is the adoption of Ombudsman Offices by Brazilian companies. Although we have elements to believe that a considerable amount of Brazilian companies currently has in place structures similar to an Ombudsman Office to deal with workplace conflicts, a different research would be necessary to confirm this. A national or a sector-wide survey might reveal not only the number of companies in Brazil with internal ombudsman offices, but also the characteristics associated to the companies or sectors in which this ADR method is more likely to be found.

Another important limitation of this research is related to the role of unions in the development and usage of Ombudsman Offices in the cases researched. Although my main focus in this thesis is related to how **companies** are dealing with workplace conflicts, unions are an important part of this story. The cases of Irco and Financo are important to show how unions might have a different form of interaction with different Ombudsman Offices. Although the information obtained via union newsletters and other news sources were helpful to suggest some of the reasons behind this different union behaviors or strategies, the lack of interviews with union members at Financo is an important limitation of this study. Future research need to adequately consider the unions' perspective in the development and usage of the Ombudsman Offices in Brazil, which would only be possible with interviews of union leaders and access to other union documents.

Finally, future research might give a broader and more complete view of the role of Brazilian national institutions in the shaping of the Ombudsman Offices by including multinational companies in the research. Comparison on how Brazilian multinationals deal with workplace conflicts in Brazil and in their different countries of operations, as well as the analysis of foreign multinationals operating in Brazil, might reveal interesting interactions between home country and host country models of workplace conflict resolution.

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