

Collective agreements

National reporter: Judge Annelie Marquardt
Richterin am Bundesarbeitsgericht
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Erfurt

1. Definitions

There are two kinds of collective agreements in Germany: agreements between trade unions and employers associations on one hand (Tarifverträge) and agreements between employers and works councils on the other hand (Betriebsvereinbarungen).

There are collective agreements for different industries, crafts, public and private services. Often they are territorially limited. Instead of an employers association a trade union may also make a collective agreement with a single employer (like Volkswagen).

2. History of collective agreements in Germany

With the transition from craft production to industrial production since the beginning of the 19th century came unlimited exploitation of workers, particularly of women and children. The only way to oppose was the foundation of workers' associations who were able to bargain with the employers. Mainly as a result of the revolution in 1848 national organisations were founded. When the revolution failed, all workers organisations were banned again. However, the bans on coalitions or associations were reduced gradually, so in some states of Germany in 1861 trade unions were founded , e.g. the unions of the cigar workers, the book-printers and the tailors. They strove not only for better wages and working conditions but also for support of their members in case of sickness, accident, unemployment and in their old age. The Industrial Code of 1869 removed all remaining bans on the formation of trade unions, and transferred the agreement of wages and conditions of employment to the employers and the employees. In 1873 the printers concluded the first major collective wage agreement in Germany. The Anti-Socialist Act of 1878 tried to ban most trade unions once again but was only able to slow down the development temporarily. The year of 1890 can be seen as the start of development of trade unions on a larger scale. Before the beginning of the First World War in 1914, about 2.5 million workers were organized in the free (social-democrat) unions, 340.000 in the Christian trade unions and 105.000 in the Liberal Workers' Association, which accounted altogether to 10% of the whole working population. Since 1890 more and more employers associated, in order to counterweigh the increasing power of the unions.

The time after the First World War brought a real upsurge in the trade union movement and thus also in the employers associations. The Collective Agreements Ordinance of 1918 gave the right to negotiate the conditions of employment to the opposite associations. However, the economical decline and the growing number of unemployed workers weakened the unions

decisively. When the national-socialists took over power in 1933 they abolished unions as well as employers' associations. Now the state regulated all the conditions of employment according to the Act on the Regulation on National Labour.

After the war there was a short period of restrictions of unions' activities imposed by the allied forces. In 1947 the German Trade Union Federation (Deutscher Gewerkschaftsbund) was founded. In 1950 the Federal Union of German Employers Associations, founded by the allies as a self-administering organisation for the employers, was acknowledged.

The Act on Collective Agreements (Tarifvertragsgesetz -TVG) came into force in April 1949. It is still the legal basis for collective agreements and has undergone only a few changes and amendments.

In the Eastern part of Germany there was no collective bargaining whatsoever. The socialist state, allegedly having abolished opposing interests in society, regulated even the smallest aspects of working conditions. After the reunion of Germany in 1990, the TVG is applicable in the entire Federal Republic of Germany.

The Works Constitution Act of 1952, replaced by the one of 1972 and recently by the one of 2001, is the legal basis for the relations between the works council and the employer. It has always been a source of constant political dispute.

3. Collective agreement as a source of law

3.1 The constitutional ground of collective agreements is Article 9 para 3 of the German Basic Law

(Grundgesetz). It guarantees every individual the right to form associations – trade unions as well as employers associations – in the field of labour- and economic conditions. The principle of positive freedom of association contains the right to form associations, to participate in the forming of associations, to become a member of an existing one, to remain in one and to leave it again. The Principle of negative freedom of association –acknowledged by the Federal Constitutional Court in 1979 – means that the individual is also entitled to not belonging to any association. Any law, ordinance, agreement whatsoever violating these two principles are invalid. So no employer has the right to oblige the employee to either belong or not to belong to a trade union and no association has the right to oblige an employer only to employ union-members or non-union-members.

The right to strike for employees and the right to lock-out for the employers are also derivated by the constitutional rule as being part of the freedom of association.

As stated above, the legal sources of collective agreements are the Act of Collective Agreements and the Works Constitution Act.

On the international scale there is Art 23 para 4 of the Declaration of Human Rights of Dec.10,1948; Art 22 of the International contract on civil and political rights of Dec. 19, 1966; Art. 11 of the European Convention of Human Rights; and the ILO conventions Nr. 87 and 98 which guarantee the freedom of forming associations.

3.2 A collective agreement has a contractual status for the contracting partners, i.e. the trade union and the employers association or the single employer. They can rule their mutual rights and duties, like obligations to negotiate further items, keep peace as long as the agreement lasts, and also establish rights for third parties, like non-members. This part of the collective

agreement is treated as part of the law of obligations with the consequences it provides for the case of violation of duties, e.g. damage claims.

The most important part of the collective agreement is setting standards for the members of the contracting parties. The norms have the same effect as laws and are to be interpreted according to the same methods and principles.

3.3.1 Collective agreements receive legal status immediately from Art. 9 para 3 of the constitution and the Act of collective agreements. They are considered a further source of law

3.3.2. A) 1)a) The hierarchy of standards which collective agreements are subject to begin with the constitution and the core of the basic laws (unalienable rights) stated in it. Especially the principle of equality (Art. 3) is an important measure when rules of a collective agreement have to be inspected. Next come the „simple“ laws which the norms of the agreement must comply with.

b) Principally there is no hierarchy of levels between collective agreements, although there might be a framework agreement complemented by several agreements concerning wages and other specific items. When there is a concurrence of several agreements which might be applicable there are methods to solve the problem, especially the principle of speciality: The agreement which has the more specific rules for the enterprise in question (regionally, personally or concerning the subject). will be applied, But only one collective agreement will be in power at the end.

2) According to § 4 of the Act of Collective agreements the norms of an agreement are mandatory in the sense of minimum standards and can not be altered to the worse by individual contracts – even if both parties are not aware of the applicability of a collective agreement. Neither can works agreements derogate the tariff standards except when the collective agreement itself allows it. The employee cannot waive his rights except with the permission of the parties of the collective agreement. This happens very rarely. More favourable working conditions can always be provided by individual contracts.

In general, works agreements may not cover subjects of a collective agreement, even if they are favourable (§ 77 para 3 of the Works Constitution Act).

B) 1) and 2) The question if collective agreements may set conditions of unequal treatment is -like almost every question in the context of collective agreements - debated controversially in the juridical literature. Simplified it might be said that collective agreements may not set conditions of unequal treatment except when there are due reasons for it. However, the parties of the collective agreement have a wide prerogative of assumption for good reasons when they form different groups of employees and treat them differently (e.g. salary earners and workers). The courts have often ruled out unequal treatments in collective agreements, though, especially between women and men.

C)1) The term of „Arbeitsrecht“ covers all rules and regulations concerning the relationship between employees and employers as well as between the representatives of the employees and the employers or their representatives in the collective field. The term „Sozialrecht“ covers the field of social security and social welfare.

2) A distinction between absolute and relative law and order is not common to the German law. In the constitution there are basic laws whose core may not be violated by other laws and

measures. There are other basic rights under legal reservation. There are laws which open possibilities for ordinances or collective agreements.

D) As the part ruling the relations between the parties of the collective agreement underlie the law of obligations there is the duty of good faith between them.

3.3.3.A)1) Collective agreements are allowed to abridge rights which employees have been given by law only if the law establishes an „opening clause“ for this.

2) Normally the law may not annex a collective agreement. However, the Employee Sending Act rules that the norms of the collective agreements of the construction business concerning minimum wages and vacation are applicable on the employments between an employer with a registered seat in a foreign country and his employees working in the regional area of application of these collective agreements, if the latter have been declared generally binding by the ministry of labour.

3) A law may open certain materials of ruling to a collective agreement.

B) For many professions there are collective agreements which have been declared generally binding, i.e. applicable also for the non-members of the parties in the regional, personal and substantial scope of the collective agreement. This happens according to § 5 of the Act of Collective Agreements. The ministry of labour will issue the declaration on the application of one of the two parties after having obtained the mutual agreement of the collective-bargaining committee. This committee consists of 3 representatives of the national federation of employers (BDA) and the trade unions (DGB) each. If the committee refuses there will be no declaration. This means that such a declaration cannot be made against the will of any side. The employers and organisations of employees concerned by such a declaration may give formal statements on the issue before the committee gets together. The declaration is only possible if the employers bound by the collective agreement employ at least 50% of the employees under the scope of the collective agreement, and if there is a public interest for a general binding. This may be the case if otherwise conditions of employment would fall below the socially acceptable level. It is mainly the construction business, agriculture and forestry, textile-industry, inns and hotels, metal-working craft enterprises, retail-business, and the cleaning-business where there are generally binding collective agreements. Partly there are joint institutions founded by the parties of the collective agreements concerning guarantees of vacation, professional training, and pensions in old age. The number of generally binding collective agreements increased from 158 in 1968 to 448 in 1975 and to 596 in 1984. After the reunion of Germany there was another increase especially in the former GDR, but after a peak in 2000 the number is declining. In 2004 there were 476 collective agreements in the old Federal Republic and 179 in the new parts. This amounted to 0.8% of the total number of registered collective agreements.

2) Collective agreements are not subject to approval by ministerial orders

C) 1) Customary law can overrule a collective agreement only if it is favourable.

2) It is possible that that a general application of a collective agreement by an employer not bound by this agreement may constitute a custom. However, most employers would establish the applicability of a general agreement in the employment-contract.

E) 1) As the rights of a collective agreement cannot be waived it is not possible to agree to clauses in a contract of employment less favourable to the employee than in the relevant collective agreement.

2) If the parties of the contract of employment are both members of the associations who contracted the collective agreement it is not necessary to incorporate this collective agreement in the contract of employment. If one of them is not a member the applicability of the collective agreement must be agreed to in the contract. As employers usually do not ask a candidate if he is a union-member they usually stipulate the applicability in the individual contract.

3) In most cases the parties agree to the application of the respective relevant collective agreement in force, however it may change the conditions since the beginning of the employment. It is possible, though, that only a certain collective agreement is stationarily agreed to. Then later changes do not affect the clause in the contract of employment.

4. Elaboration of collective agreements

4.1.1 and 2.. Usually there is only one level of bargaining. The tariff-committee of the trade union head-organisation decides on the actual demands. Then the trade union representatives negotiate with the representatives of the employers union or one employer. If negotiations fail there can be an arbitration process in order to prevent industrial action or to finish it. There is a sample arbitration agreement between the BDA and the DGB which they recommend their respective members to adopt. Usually a well-trusted person, (like the former minister of labour Georg Leber in 1984) is agreed to as arbitrator by both parties. There is no compulsory state arbitration unlike in the time prior to 1933.

Sometimes the parties agree to a framework collective agreement on the federal level and leave wage-tariffs and other details to smaller units of bargaining, like employers organisations and unions in one or several Länder.

4.1.3. In general, collective bargaining is freely decided by the organisations. However, during the duration of the collective agreement there is a duty to keep peace for both parties concerning the items which are regulated in the collective agreement. If there are items not yet regulated by the collective agreement the association may formulate its demands and ask to negotiate them. If an employers association or employer refuses to bargain there might be a strike to force them back to the table.

4.1.4. The subjects generally included in collective bargaining are wages,(i.e. also additional allowances, benefits, bonuses, piece-wages) vacation, sick leave, professional training, rules of employment contracts, e.g. terms of notice. Any part of the industrial relations can be subject to a collective agreement.

4.2. 1. On the side of the employees only unions and their representatives can be a party to the collective agreement. On the side of the employers it can be their associations or a single employer. A works council can never be a party to a collective agreement according to the Act of collective agreements (Tarifvertrag). It is party though to the works agreements on the level of the local establishment, the enterprise, or the combine or trust (Betriebsvereinbarung).

b) The parties must meet the conditions for being recognized as a trade union or employers association. That means the ability to bargain with a certain strength acquired by the members. There is no fixed quorum and the question of mightiness is sometimes subject to

law-suits. When a smaller trade union, like the Christian union of metal-workers, have concluded a Tarifvertrag the stronger union might apply to the court that this agreement be void because of the lacking quality of the small organisation as a union in the sense of the Act of Collective Agreements. This just happened recently and the Federal Labour Court acknowledged the Christian union as being able to negotiate collective agreements.

c) The agreement must be signed by one union. If the employer concludes an agreement with another union the multiplicity of applicable collective agreements must be solved. Until now the principle of tariff-unity has been upheld by the courts in the sense that only one collective agreement may be applicable for the specific enterprise. This is very much in discussion and might be revised, for instance if the association of medical doctors in hospitals succeeds in concluding a collective agreement of its own, while the union for the public services has already concluded a collective agreement for the entire staff of hospitals including doctors

d) A right to opposition would not accord to the system of free bargaining.

4.2.2. a) Collective agreements must be made in writing and they must be signed by the parties.

b) They must not be published formally. However employers are obliged to display them in their enterprise which is not a requirement for validity.

c) Collective agreements are registered by the Federal ministry of Labour. This is not a formal requirement either.

5. The enforcement of collective agreements

5.1.1. Their scope can be national, regional, and local. They may not cover any territory beyond the Federal Republic of Germany. An exception exists for sent staff to foreign countries. Party of the collective agreement may also be a foreign employer (e.g. an airline) residing out of Germany. Supra-national unions have concluded collective agreements for the international naval business on the basis of a sample-agreement.

The directive 94/45 EC on European works councils opens the possibility for international agreements without establishing a right to force negotiations.

5.1.2. In general, all jobs, professions and branches can be subject to collective agreements, if employees, trainees or apprentices are concerned as well as people working at home (those have state-regulated wages, though). According to the Act of Collective agreements also people with a status similar to an employee can be subject to a collective agreement under certain conditions. Sales Agents are exempted from collective agreements if they comply to § 84 of the Commercial Code, i.e. are essentially independent. On the employers side the churches are exempted from the state labour law as long as their clerical personnel is concerned. For their employees there are restrictions in the enforcement of labour law due to the religious character of the employing unit. The two big churches have concluded agreements for their staff with intern parity-commissions, which are not considered as collective agreements in the technical sense, though.

5.2.1. The collective agreement itself defines the range of validity concerning the nature and activity of the respective unit. It may exempt certain activities or personnel even if they are part of the enterprise. In general, in order to determine if an enterprise subsidises a certain collective agreement we look at the kind of activity which more than half of the staff are concerned with.

5.2.2. The mandatory application of „extended“ collective agreements is covered under 3.B.

5.2.3. An employer can voluntarily apply a collective agreement which does not apply to his business by stating this in the employment contracts or by establishing an enterprise-custom. The latter is harder to prove. Roughly it can be said that a repetition of payments for three years without stating a reserve of voluntariness may establish such a custom.

5.2.4. In case of coincidence of several agreements the one with the most specific rules for the enterprise is applicable.

5.3.1. The parties usually agree to the date when the collective agreement is to be in force. If they do not specify this it will be the date of the signature

5.3.2. Collective agreements apply automatically to the members of the associations who agreed to it. If they have been declared generally binding this is the case for everybody within its scope.

5.3.3. (see above)

6. Content of collective agreements

6.1. and 6.2. The content is not mandatory but may cover the whole range of questions in the context of the employment, e.g. work-hours, wage, protection against accidents, professional training, (vicarious) liability, exclusion clauses for claims not raised in a certain period of time, duties before the conclusion of the employment contract and after its end, also negative norms which forbid a certain content of the employment contract, like work on Sundays, over-hours exceeding a certain number. It may also rule rights and duties concerning the relation between works council and employer according to the Betriebsverfassungsgesetz.

6.2.1. see 3.1.

6.2.2 Form and content of the contract of employment

- Fixed-term contracts can be banned in an collective agreement but usually are not. Often a certain maximum time for their conclusion is agreed to. A law states that the time-limit is only valid if it is written down in the contract of employment.

- Since the year of 1995 there is a law ruling that all employment-contracts must be done in writing, so this is no longer subject to collective agreements

- covenants not to compete and their modifications as well as their compensation can be covered by collective agreements within the limits stated by law.

- The length of and the extent of mutual rights during a probationary period are generally covered by collective agreements.

6.2.3. Minimum wages are the major subject of collective agreements. Usually there are short-term wage agreements and longer-rangeing framework-agreements.

6.2.4. Classification and career of staff members is a another major subject. The question if an employee is classified correctly is often debated in front of the labour-courts.

6.2.5. Hours of work

-Regulations concerning on-call time and hours of „equivalence“ (e.g. in hospitals) , vacation, over-time and fixed wages, compensatory rest, part-time work are generally covered by collective agreements For minimum rest time and maximum work time there are regulations stated by law. Within those limits collective agreements can set standards.

6.2.6.Sick leave

Most of the rights of an employee who is sick are ruled by law, e.g. 6 weeks of continued pay by the employer (afterwards social security sets in) – sometimes collective agreements prolong the period of continued pay . The contract can be terminated by notice for the reason of long sickness but does not end automatically.

6.2.7 Rules on discipline in collective agreements (Tarifverträge) are rare. Mostly they are subject to agreements between works council and employer and concern only the enterprise. There might be agreements on conventional penalties.

6.2.8. Vocational training: In large areas there are joint institutions established by collective agreements which organize the vocational training of apprentices, i.e. construction, agriculture and forestry, hotels and inns, public services, chemistry. Otherwise most rights and duties are ruled by a law concerning professional training (Berufsbildungsgesetz)

The agreement ends at the set date of expiration or when given notice within the set time limits. However, the normative part of the agreement remains in force until it is replaced by a new agreement (Nachwirkung; § 4 para 5 of the Act of Collective Agreements).

7. Interpretation and litigations

7.1.1 -3. According to §§ 101 - 110 of the Code of Procedure for Labour-Law litigations the parties of a collective agreement can exclude the jurisdiction of the labour-courts and establish a joint board for arbitration. This concerns collective arbitration clauses for litigations between the parties of a collective agreement over their rights and duties resulting from the obligational part of the agreement, and the existence or non-existence of a collective agreement. These are not very common, though.

So-called singular arbitration clauses may cover litigations between employers and employees about rights and duties resulting of the normative part of a collective agreement. This is restricted to stage-artists, film-staff, circus and variété-artists and captains and sailors. The final decision may be contested in front of a labour-court again for certain reasons. As a result these conflicts take a long time until finally decided. Principles of procedure are ruled in §§ 104-110 of the Code of Procedure for Labour Law-Courts, like oral hearings, testimonies, compromise.

The German Trade unions Federation (DGB) entertains an arbitration board for disputes over the material competence for collective agreements among eachother.

Those boards do not set generally binding standards of interpretation but decide the single case.

7.1.4. The judges of labour-law-courts are entitled to interpret collective agreements themselves. In fact, this is a major field of activity of jurisdiction.

7.2.1. Normally the collective agreements do not provide penalties against breach. On the contrary, after a legal strike and/or lock-out the thus achieved agreements usually contain

clauses against measurements concerning damage claims (obligatory effect) between the parties as well as the prohibition of disciplinary action or damage claims against single employees

7.2.2. and 3. A violation is ascertained by the labour-courts in case of damage claims or demands to take or not to take certain actions in the course of industrial action.

7.3. The greatest part of litigations concerning collective agreements are handled by the principles of civil law-procedures, i.e. hearings and procedure leading to a judgement. This includes litigations between employers and employees and employees among oneanother on the grounds of the employment relationship as well as litigations between employers or employees and the joint institutions established by a collective agreement. Also included are litigations between the parties of the collective agreement or between these and third parties on the grounds of a collective agreement with regard to the existence or non-existence of collective agreements, and on the grounds of measures for the purpose of industrial action.

The litigations between the works council and the employer are handled by proceedings leading to a ruling. The main difference between the proceedings is the court's investigation of the facts ex-officio.

7.3.2 The labour-courts have the jurisdiction over legal matters relating to collective agreements.

7.3.3. In most cases the parties inform the judges about the existence of a collective agreement. The more important ones are known anyway. The tariff-register can be used as well. Sometimes we ask the parties of the collective agreement to send a copy of a certain one we do not find in our library.

8. Altering and challenging of collective agreements

8.1.1. In a normal law-suit any party can claim that a certain rule of a collective agreement may be considered void because it violates a higher-ranking norm.

8.1.2. If the employer leaves the employers' association he keeps being bound to the normative part of the collective agreement till it ends (§ 3 para 3 of the Act of Collective Agreements). If the enterprise is merged with another one or sold to another one which is under the rule of another collective agreement the same applies until a new agreement is concluded. The norms of a collective agreement become content of the employment contract and cannot be changed to the worse for one year (§ 613a of the Civil Code) An exemption is made if the employee is member of the union which concluded the collective agreement in force at the new enterprise. Then the latter will apply to the employment right away.

8.1.3. According to § 4 para 5 Act of Collective Agreements the norms of a collective agreement stay in force until they have been replaced by another agreement (which must not necessarily be collective).

8.1.4. When the parties of a collective agreement have negotiated and concluded a new one the latter replaces the old one automatically, if nothing else is provided.

8.2. See above

9. Conclusions

9.1.As there is a tendency among the employers of trying to leave the bondage of collective agreements this has become a delicate subject. The state policy is not entitled to mingle with collective bargaining. Nevertheless the state tends to favour collective agreements because of their order and peace-keeping function but has no effective means except the declaration of general binding if so required.

9.2 and 9.3.There is the clear rule that contracts of employment can only change tariff-standards for the better.