

**Tenth Meeting of European Labour Court Judges
Stockholm, September 2, 2002**

Questionnaire

GENERAL REPORT

**Judge Harald Schliemann,
Federal Labour Court (Bundesarbeitsgericht)
Assistance: Judge Ulrike Brune**

At the meeting of the European Labour Court Judges in Stockholm taking place on September 2, 2002, organised by Michael Koch, President of the Labour Court of Sweden, in co-operation with the ILO (Mr. Bronstein, Mr. Marin, Mrs. Moguillansky), the role of collective bargaining will be discussed. The participating judges submitted their answers on a questionnaire which had been sent to them in advance. This report is based upon the responses of 15 participants which were submitted to the general reporter until August 23rd 2002. The responses were filed by:

- Christian Storck, Conseiller à la Cour de cassation de Belgique, Belgium
- Jorma Saloheimo, Vice President of the Labour Court, Finland
- Bernard Boubli, Doyen de la 1ère section, Cour de Cassation, France
- Harald Schliemann, Federal Labour Court (Bundesarbeitsgericht), Germany
- Tünde Handó, Labour Court of Budapest, Hungary
- Eggert Óskarsson, President of the Labour Court, Iceland
- Kevin Duffy, Deputy Chairman of The Labour Court, Ireland
- Elisheva Barak, Vice President of the National Labour Court, Israel
- Giovanni Mammone, Supreme Court, Italy
- Prof. Stein EVJU, Norwegian School of Management BI, Past President of the Labour Court, Norway
- Janez Novak, Supreme Court, Republic of Slovenia
- Bartolomé Ríos Salmerón, Supreme Court – Social Chamber, and Francisca Ferrando García, University of Murcia, Spain
- Carina Gunnarson/Inga Åkerlund, National Labour Court, Sweden
- Peter Clark, Employment Appeal Tribunal, United Kingdom
- Juan Rafael Perdomo, Supreme Court – Social Chamber, Venezuela.

I greatly appreciate your invitation to the meeting, Your organisation and all the support You gave to me in this matter.

Unfortunately I did not receive the replies from Denmark, sent by fax, until the date mentioned. Therefore I owe an apology for having not mentioned the Danish replies in my general report.

I. Introduction

1. The right of Trade Unions, employers' federations and individual employers to negotiate pay and conditions by collective bargaining is a very important instrument for promoting their member's interests and bringing their influence to bear on economic and working conditions. However, regarding the legal framework and the social conditions for collective bargaining, the types of collective agreements and their political importance vary as does the role of the Labour Courts (LC) in the collective bargaining process.

II. The legal framework of collective bargaining

2. In most countries, the right of Trade Unions and employers' federations to negotiate pay and conditions without state interference is protected by the constitution.

3. In **Italy**, although there is a constitutional regulation specifying that only the registered Trade Unions can obtain legal status and make collective agreements valid *erga omnes*, this provision was never actuated.

4. **Ireland, Israel, Norway, Sweden** and the **United Kingdom** did not yet enact provisions on collective bargaining in their constitution. The jurisdiction in **Israel** considers the right to strike and to take other industrial action as a basic right of the Trade Unions, which, however, have to obey to the principle of commensurability; otherwise the action is considered to be illegitimate. The **United Kingdom** does not recognise a legal right to collective bargaining other than under a determination of the Central Arbitration Committee, which compels employers to recognise a Trade Union for certain limited collective bargaining purposes.

5. Collective bargaining is mostly regulated by special laws.

6. In **Italy**, there is a law on collective bargaining only for public workers. In **France, Hungary, Norway** and **Venezuela**, collective bargaining is regulated by the Labour Code. In **Norway**, the legal framework of collective bargaining is set out in the Public Service Labour Disputes Act, 1958, which applies to the state civil service, and the Labour Disputes Act, 1927, which covers the rest of the labour market. In **Sweden**, collective bargaining is regulated by the Employment Act, 1977.

7. While labour courts have not played a particular role in framing the right to collective bargaining in some countries (i.e. **Belgium, Hungary, United Kingdom, Slovenia ...**), there are numerous decisions on this issue in others (i.e. **Germany, Norway, Sweden, Spain, Venezuela**). In **Ireland**, the LCs encourage the parties to engage in collective bargaining and assist them to conclude agreements.

III. Types of collective agreements

8. In most countries there are mainly two kinds of collective agreements: One is a general collective agreement between a Trade Union or a Federation of Trade Unions and an employers' federation, which applies to the whole area of the State or a part thereof,

mostly respecting particular branches, sectors or industries. The other kind is a specific collective agreement on the enterprise level, which applies to a particular undertaking or employer. It might be mentioned that, in **Ireland**, agreements concluded covering an entire industry or a sector are less common than enterprise level agreements. In **Norway**, general agreements predominantly provide for the conclusion of local follow-up agreements at the enterprise level. In **Slovenia**, there are collective agreements of general validity which apply throughout the country, governing the level of activities and the level of individual employers. In **Spain**, the rules for the future bargaining in the sector are settled by so called “collective agreements for bargaining”.

IV. Works agreements concluded by a non union body

9. Legally binding “enterprise collective agreements” or “works agreements” are not common and of minor importance in most countries.

10. In **Ireland**, there are a small number of staff associations that represent non-Union workers, in certain enterprises, who may negotiate collective agreements. Works committees and shop stewards in unionised enterprises would not negotiate collective agreements. Although Trade Unions in Iceland are entitled to elect shop stewards, those stewards do not have the competence to negotiate collective agreements. Nevertheless, most **Icelandic** collective agreements permit that collective agreements are made by Trade Unions on behalf of their members on enterprise level either as part of the sectorial collective agreement or as a separate collective agreement in some matters. In **Venezuela**, works agreements do not exist.

11. The same applies to **Finland**: Specific contractual agreements between the employer and a shop steward representing a group of employees are proper during the consultation procedure regarding business restructuring and other major changes in business and in certain matters concerning health and safety at work. Agreements concluded between the employer and the local Trade Union or a shop steward representing the union are regarded as extensions of the original agreement, or, as independent contracts.

12. In **France**, there are enterprise committees whose members are closely related to the representative unions. They can negotiate agreements with the employer on specific subjects (incentives, etc.). Those agreements can be unilaterally terminated by the employer.

13. Although in **Israel** most working places have chosen a group of employees representing them, these bodies do not have the capacity to be a party to collective agreements; contracts between those bodies and employers are so-called collective arrangements. Among those, there is a distinction between “one sided” collective arrangements, which govern managerial instructions, and “two sided” collective arrangements, which include contracts that do not comply with the strict provisions of the collective agreement law. These arrangements are regarded as part of the personal contract as implied terms.

14. An exception is to be made in **Germany** and in **Spain**. **German** law defines collective agreements between works councils and the employer as “works agreements”, which have binding effects to all workers of the establishment. Works councils, that are, in practise, closely related to the unions, can be elected in establishments who regularly employ a minimum of five employees. Though the parties to a works agreement are not permitted to

negotiate wages and working conditions, certain topics concerning social welfare require full co-determination. In these cases the employer needs to obtain approval – mostly through a works agreement – before being allowed to take certain actions. Thus, works agreements are very common in **Germany**. In **Spain**, worker's representatives at the workplace, who are expressly supported by Trade Unions, are elected by the workforce. They have a wide range of competence regarding rights to receive information from the enterprise and be heard in respect with certain issues. They are also able to call for strikes at the enterprise level. Together with the employer, they can negotiate collective agreements at enterprise level as well as works agreements that address a partial regulation of certain terms or conditions of employment with *erga omnes* and, sometimes, normative efficacy.

15. In **Hungary**, there are similar rules to the German law concerning the election and the rights of works councils. However, the provisions about agreements on the enterprise level between the employer and the works council will be invalid from 1st of September 2002, granting the right to negotiate collective agreements exclusively to the Trade Unions. Special issues of national significance pertaining to labour relations and employment relationship are reconciled through the National Interest Council.

16. In **Norway** and in **Sweden**, law provides for bipartite Working Environment Committees in enterprises with more than 50 employees. These committees must have to be informed and consulted by the employer in matters of health and safety, but are not empowered to conclude legally binding agreements.

17. In the **United Kingdom**, the old Wages Councils, which set minimum wage rates in low paid industries, were abolished in 1993.

V. Conditions of validity

18. In all countries, a collective agreement is void unless it is in writing. Additionally, in **Belgium** there are special language requirements, according to the region the agreement relates to. **Hungary** and **Slovenia** provide promulgation. While, in **Iceland**, a collective agreement may be rejected in a secret ballot within four weeks of the date of signature, **Israel** requires registration within a certain time span. **Spain** and **Venezuela** require registration and publication, in **Venezuela** the collective agreement has to be deposited with the labour authority.

VI. Effects and extension of collective agreements

19. Collective agreements are, by implication, binding to the signatories and their members. Due to the system of representation in **Belgium**, **France** and **Israel**, they automatically apply to all employees of the groups included in the agreement provided that the employer is signatory to the agreement or member of the signatory employers' federation; the same applies to **Finland** and **Slovenia**. In **Iceland**, collective agreements automatically have *erga omnes* effect. Under **Spanish** legal System, collective agreements which were concluded according to the legal rules are valid as *erga omnes* agreements and legally binding. In **Finland**, collective agreements are always national, covering the whole field or craft in question. A **Finnish** employer bound by a collective agreement shall apply its terms to non-unionised employees performing work covered by the agreement, the same applies to **Hungary** and practically happens in **Sweden**. In **Israel**, all those provisions of a collective agreement concerning terms of employment and termination of

employment, any personal obligations imposed on, and rights granted to, are regarded as part of the personal contract of every employee.

20. In **Germany**, **Norway** and in **Italy**, collective agreements are compulsory only for the parties enrolled in the unions who have signed the collective agreement relevant in the case, in **Germany** the term of a collective agreement concerning factory or works affairs or matters of industrial constitution are binding for all employees of the company. In **Norwegian** law, the norms of inderogability apply to provisions less favourable to the employee as well as to those more favourable than in the collective agreement.

21. Extension of collective agreements by (royal) ministerial or governmental decree is a fairly widespread practice in **Belgium** as well as in **France**, where extension is frequently used in practice. There, the Minister of Labour follows an opinion by the National Commission for Collective Bargaining. In **Finland**, a tripartite board decides on extension; there are ca. 140 collective agreements declared to be generally applicable. In **Ireland**, the parties to a collective agreement are allowed to register the agreement with the Court, which makes the agreement legally binding also to non-members of the signatory parties. But, only a minority of agreements are registered with the Irish Court. Although in **Norway** there exists a special Act on the topic, this Act has not yet been put to use. However, a **Norwegian** employer is generally under the obligation (*vis-à-vis* to the Trade Union) to respect the collective agreement also in employment contracts with non-unionised employees. Because of the high degree of organisation and the extensive coverage afforded by collective agreements, a general validation of collective agreements in **Sweden** has not been considered necessary. Extension is not possible in **Italy**. In **Germany**, it is rarely used in practice, but some extended collective agreements are very important (i.e. building & construction, sales & retailing). The Federal Minister of Employment and Social Affairs is entitled to declare a collective agreement generally applicable in accordance with a board of three representatives of the central bodies of the Trade Unions and of the employers' federations. Similar rules apply to **Hungary**, where there are only two extended collective agreements (electric power and baking industry). In **Venezuela**, extension is practised frequently in certain industrial sectors like textile, construction, metal, cars etc.

VII. The parties to collective bargaining

22. In general, the parties to collective bargaining are Trade Unions on the employees' side and employers' federations or single employers on the other. In **Italy**, parties of collective agreements are Trade Unions and associations of employers only. On the **Norwegian** labour market except of the public service sector, any combination of workers acting in concert to represent their interests *vis-à-vis* their employer is regarded to be a Trade Union.

VIII. Workers representation by a Trade Union

23. In many countries, Trade Union representation for collective bargaining purposes is not an important issue, because the Trade Union has the capacity to negotiate in accordance with its statutes. Thus, minority unions can claim collective bargaining rights in the area concerned in same way as the leading Trade Union. Their bargaining capacity is, of course, directly related to their power, which depends on their presence in the enterprises concerned, the total number of their members and their effectiveness. In **Norway**, this issue applies only to the public service sector: Trade Unions have to fulfil

certain minimum requirements for having the right to bargain and conclude collective agreements with the State at national level.

24. However, in other countries, Trade Union representation is an important issue. In **Belgium** workers' organisations must have at least 50,000 members to be regarded as representative. In **Hungary**, one has to distinguish between representation at enterprise and at sector level. However, all Trade Unions represented at the employer may attend the negotiations for the conclusion of a collective agreement. An **Israeli** Trade Union which comprises the greatest number of organised employees to whom the agreement shall apply is regarded to be representative for the purpose of a general or a specific collective agreement. In **Ireland**, in case of multi-Union organisation there is generally a high degree of co-operation. In many cases Trade Unions are organised in formal groups and negotiate collectively with employers. In the **Italian** public work sector, the law indicates principles of representation to individuate the unions who can stipulate collective agreements with the government. In **Slovenia**, this issue is governed by law as well. In the **Spanish** legal system, representation is a rather important issue. It is determined by the number or percentage of workers' representatives they have obtained in the past elections conducted at workplaces. Where there is a multiplicity of Trade Unions which accrue representation, all of them have the right to take part in the collective bargaining process. In the **United Kingdom**, representation of a Trade Union is determined by agreement between employers and Trade Union(s) and subject to CAC determination.

25. Entering into an existing collective agreement or to certain rules thereof is possible in most countries (i.e. **Belgium, France, Germany, Israel, Slovenia, Venezuela**), providing signature of an instrument of accession. In **Spain**, signing of a so called "extraestatutario" and thus not legally binding collective agreement by third parties is possible. In **Finland**, the consent of the original parties to the agreement is necessary as well. In **Ireland**, this rarely happens. In **Norway** and in **Slovenia**, a right for a Trade Union to unilaterally join an existing collective agreement is not provided for. The prevailing practise is to conclude an identical "parallel" or a "substitute" collective agreement.

IX. Procedural rights of Trade Unions

26. Generally, Trade Unions can initiate litigation on their own behalf in collective bargaining purposes. In Germany Trade Unions may file a litigation against the employer to omit dumping of the collective agreement. In some countries litigation on the workers' behalf is possible, too. In **Slovenia**, however, a Trade Union may participate in a procedure of enforcing individual rights only at the request or with the consent of the worker concerned. In **Hungary, Germany, Norway** and **Spain**, litigation on the workers' behalf is limited; Trade Union agents may only act as counsels in a worker's lawsuit, if authorised by the worker. In the **United Kingdom**, collective agreements are hardly ever legally enforceable by their signatories.

27. In **Hungary** and in **Ireland**, a collective agreement is not enforceable by law. However, in case of breach of agreement the **Hungarian** Supervisor of Labour Relation Agency may impose a fine to the employer. In most other countries, a suit may be filed with the LC, which may order the party who does not apply or recognise the agreement to pay damages, loss, and – sometimes - fines (**Finland** - up to 22,000 Euro -). In **Finland**, according to most collective agreements, proceedings at the LC must be preceded by a grievance procedure. Finnish associations which are parties to the agreement are under a statutory surveillance duty involving an obligation to see to it that their members follow

the clauses of the agreement; the duty can be enforced by the LC by imposing a compensatory fine. In **Norway**, prior dispute bargaining between the (superior) parties to the collective agreement is a prerequisite to bringing suit with the LC, similar rules apply to **Slovenia** and **Sweden**. In **France**, the enforcement of an agreement by the other party can be executed by a writ in the employment tribunals or by civil action in ordinary law courts, who can order to pay compensation. In **Germany**, there are special remedies available in case an employer grossly offends against the rules of a works agreement, but not of a collective agreement. LC can impose a fine up to 10.000,- Euro.

28. In **Sweden**, an employees' association can order a collection blockade for the purpose of exacting payment of uncontested and accrued wages and other remuneration for work which has been performed. In **Italy**, only individual action is possible of a worker who demands the enforcement of the agreement to him. The same applies in the **United Kingdom**: Collectively agreed terms are only enforceable through the individual contracts of employment, if incorporated.

29. In the Spanish legal system, a special procedure is provided for collective disputes. The judgement has *quasi* normative nature and is not enforceable by itself. Thus, individuals must bring a claim before the LC to make the judgement apply. If the employer does not comply with the decision, LC can impose compulsory fines.

X. The role and (political) importance of collective agreements

30. In **Finland**, 95 % of the workforce and 60 % of the enterprises are covered by collective agreements, of which about 800 are in force throughout the country. In **Germany**, there are about 57,000 collective agreements in force throughout the country. Due to the recent reunion, there are separate statistics for the western and the eastern part of the country: In 2001, 70% of the West German and 55% of the East German workforce were covered by collective agreements. In **Hungary**, there are 3,351 collective agreements in force, covering about 42% of all employees. In **Iceland**, about 86% of the workforce are covered by collective agreements. In **Israel**, since 1957, there were 1,366 general collective agreements and, since 1982, 10.433 specific collective agreements have been registered. Since 1985, 13 collective arrangements have been registered in public service locations that have more than 100 employees. 56% of the workforce are bound by collective agreements. In **Norway**, about 84% of the public sector and about 50% of the private sector employees are unionised. Due to the Union multiplicity, it is common to find employees of the same category affiliated with different trade unions. Collective agreement coverage is at 100% in the public sector, while it is only about 40% in the private sector. In **Slovenia**, two general collective agreements and 38 branch collective agreements are currently in force. In 1999, the number of **Spanish** collective agreements in force was 5,110, of which 3,074 were enterprise level agreements, covering 82% of the workforce. In **Sweden** about 80% and, in the public sector, 100% of the workforce are directly covered by collective agreements. Less than 10% of all employees are estimated to work outside the coverage of a collective agreement. In **Venezuela**, there were 658 collective agreements valid in 2001. In the **United Kingdom**, in 1998 41% of the employees were covered by collective agreements.

XI. Subjects generally addressed

31. In most countries, all of the subjects itemised in the questionnaire are governed by collective agreements, with the exception of health and safety (**Finland, Slovenia**), workers welfare (**Finland, Italy, Slovenia**), workers' rights in the enterprise (**Finland, Iceland**), regulations concerning settlement of disputes (**Iceland**) and interpretation/administration of the agreement (**Iceland**). In **Norway**, general collective agreements regulate specific terms and conditions of employment, while the other issues indicated in the questionnaire are dealt with in basic collective agreements. In the **United Kingdom**, disclosure of information, redundancy programs (selection, consultation, redeployment) and procedures to avoid industrial action are additional subjects to collective agreements. In **Spain**, provisions concerning the probation are not dealt with in collective agreements, but matters of discipline are widely regulated.

XII. Issues governed by law

32. The law mostly contains binding minimum rights in a way that collective agreements may add legal provisions but not derogate from them (**Finland, France, Germany, Hungary, Iceland, Israel**). In **Hungary**, collective agreements typically repeat the provisions of the Labour Code; only in some areas where special arrangements have to be settled (i.e. liability for damages) there may exist real collective agreements. The wages and other conditions of employment governed by collective agreements are generally minimum terms (**Finland, Iceland, Slovenia, Sweden, Spain ...**), in **Germany** (public sector), **Italy, Ireland** and the **United Kingdom** *de facto* often standard terms.

XIII. The role of Labour Courts in the collective bargaining process

33. In most countries collective agreements are achieved by bargaining, and, if not successful, mediation (in **Finland** and in **Sweden** by the State Conciliation Officer, in **France** not always used, in **Hungary** very rare, in **Spain** compulsory at the request of one of the parties, and prior to strike) follows. The ultimate mean in reality and *de jure* is strike (*ultima ratio*). In **Germany** the rules of industrial action are based only on case law.

34. In **Norway**, certain procedural apply, involving a "cooling off" period and mediation through a National Mediator, who is, in the public sector, obliged to summon the parties to mediation. If mediation fails, industrial action may be implemented.

35. In **Ireland**, in the vast majority of cases, after fruitless bargaining, the dispute is referred in the first instance to conciliation; then to the Court. If the Court's recommendation is rejected, industrial action may be taken.

36. In **Israel**, the area of collective labour law was the first legal area in which law defined ways to resolve disputes. When bargaining was fruitless, a Chief Labour Relations Officer, appointed by the Minister of Labour and Social Affairs, will be given notice by one of the bargaining parties. He may attempt to conciliate. By consent of the parties, arbitration is possible, too. Otherwise the LC tries mediation; however, the LC judges are not entitled to act as arbitrators. Ultimately, there is strike. However, the law demands that a party to a dispute gives the other party and the Chief Officer notice of any strike or lockout at least fifteen days prior to the action.

37. Provided that strike is unlawful or illegal, LC can declare the strike unlawful (**Hungary** – non-litigation process within 3 days) and stop it by issuing an injunction (**Germany, Iceland, Italy, Norway, Slovenia**) and/or by ordering a compensatory fine (**Finland, Italy**). In **Sweden** the LC may order the employees to return to work and award damages. In **France** and in **Ireland**, however, the LC cannot stop a strike but only mediate a collective dispute. In **Spain**, LCs can neither mediate nor stop a strike or other form of industrial action. LCs may only rule whether a stoppage is lawful when considering a claim (either by the employer who claims damages or by the employee who challenges a lockout or dismissal) respecting its effects. In **Venezuela**, LCs cannot stop a strike under any condition. In the **United Kingdom**, the LCs deal with individual, not collective rights.

38. Binding arbitration cannot be imposed by the LC. In **Spain**, the strike could end by a compulsory arbitration decided by the government authority, when its long duration and serious effects on the national economy make this advisable.

XIV. Interpretation of collective agreements by the labour courts

39. There is a main distinction to be notified regarding the interpretation of collective agreements. In **France, Germany, Israel, Italy, Slovenia** and in **Spain**, the normative parts of collective agreements are interpreted like written law, however, taking into account their special character as a contract. Thus, the wording as well as the context and the circumstances are examined, and, if necessary, the parties to the agreement assist the court by evidence (this is not common in **Iceland** and **Germany**, but in **Finland, Slovenia, Sweden** and in **France**, provided that there is an interpretation clause, and in **Norway**). As far as rights and duties of the employees are determined by a collective agreement, the objective aspect is more emphasised.

40. In **Finland** and in **Sweden**, however, the rules of interpretation mainly follow those of private law contracts. Thus, the highest priority is accorded to the common intention of the contracting parties.

41. In **Hungary**, there is no ranking while the basic rule is pleading of parties' agreements. In **Ireland**, while collective agreements are not drafted with the precision normally found in a legal instrument, the LC tries to ascertain the intention of the parties.

42. In **Spain**, the parties who sign the collective agreement lay out a bipartite commission in charge of the interpretation of it. LCs will usually take into account its point of view.

XV. Extension and restriction legitimacy of LC

43. The **Finnish** Labour Court is confined to disputes arising from collective agreements. However, extension of terms is allowed only within the limits of the general rules of interpretation. A restriction is possible if warranted by rules of mandatory law, but the LC is not allowed to void any clause.

44. In **France**, the percentage of LC cases dealing with the interpretation of collective agreements ranges between 10 and 15. By interpretation, extension and restriction of the clauses is possible. The same applies to **Slovenia, Spain** and **Sweden**.

45. At the **German** Federal LC, 20% of the cases deal with the interpretation of collective agreements. However, extension or restriction is not common; voiding of terms is not allowed.

46. In **Iceland**, LCs often deal with the interpretation of collective agreements. The extension or restriction of the terms of a collective agreement is not allowed, and, the LC cannot void a “not interpretable” term. The same applies to **Venezuela**.

47. The **Irish** LCs rarely deal with the interpretation of collective agreements. They are not permitted to extend, restrict or void a clause. The same applies to **Italy** and **Norway**.

48. Changing terms of a collective agreement by the **Israeli** LCs is common and happens frequently in most countries, provided that the wording makes no sense or contradicts to public policy or to the demand of good faith. Due to the fact that LCs deal with the whole range of labour disputes, the percentage of collective labour disputes is very low (1%).

49. In **Hungary**, there are only few collective disputes before the court.

XVI. Summary

50. Collective Bargaining is a well known and important method and instrument to negotiate the conditions and terms of labour in all the above mentioned countries. Works agreements are a speciality in Germany and in Spain. Trade Unions and Employers Associations are the traditional autonomous partners in collective bargaining. The effects and extensions of collective agreements are different. Collective agreement coverage is in the public sector up to 100 %, in the private sector between 95% (Finland) and 41% (United Kingdom), in the rough average about 65 %. The replies are showing big differences with regard to the role of the Labour Courts in the field of collective bargaining.