

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

**The Role of Collective Bargaining
Questionnaire
General Reporter: Judge Harald Schliemann,
Federal Labour Court of Germany**

GERMANY

National Reporter: Judge Harald Schliemann

A. The legal framework of collective bargaining

Please describe the legal framework for collective bargaining in your country:

1. Constitutional provisions. Does your country's Constitution or Basic Law include the right to collective bargaining? If it does, please quote the relevant provisions.

Yes. The right of trade unions and employers' federations to negotiate pay and conditions without state interference is protected by the German constitution, Art. 9 Abs. 3 Basic Law (GG).

Legislation:

- a. Please, indicate if collective bargaining in your country is regulated by:
 - i) the Labour Code or a general labour law (e.g. the Workers' Charter in Spain) No
 - ii) a law on collective bargaining

As collective labour law can be subdivided into two levels, there is the Collective Bargaining Act (Tarifvertragsgesetz – TVG) on the level dealing with relations between trade union, employers' federations and individual employers, and the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) on the level dealing with relations between employer and workforce – (works council) - in individual establishments.

- iii) a framework (central) agreement No

- b. If your country does not have a law on collective bargaining, is this subject dealt with under civil law? (for example the Civil Code or the Code on Obligations)

(Inappropriate see above)

- c. To what extent have the labour courts played a decisive role in framing the right to collective bargaining and in determining the legal effects of collective agreements?

There are numerous LC decisions on those subjects.

3. Types of collective agreements:

- a. Are there differences or distinctions between “collective agreements” at national, regional or sectorial level (the German “Tarifvertrag”), i.e. collective agreements whose parties are trade unions and (federations of) employers; and “enterprise collective agreements” at the enterprise level (the German “Betriebsvereinbarung”), i.e. collective agreements between the works council and the enterprise?

These are the main distinctions:

collective agreement
(Betriebsvereinbarung)

works agreement

stipulation of working conditions and terms of employment (i.e. conclusion, content and termination) as well as questions concerning matters within the company and works constitution	generally no determination of wages and working conditions, but co-determination in social affairs e.g. working-hours, overtime, vacancies, schema of payments
Provided that either the employer is a direct party to the agreement or he belongs to the signatory employers' federation, he is bound by the regulations concerning the works constitution, whereas the working conditions laid down in the agreement are compulsory only to those workers who are in the signatory trade union(s). Very often collective agreements are applicable by contract of employment.	rules are mandatory to all workers of the establishment

- b. Are there any other types of collective agreements in your country? Please specify.

Yes: General regulations or working conditions with the churches and their establishments; they are not agreements, but adoptions by committees with an equal representation of workers and employers.

4. Conditions of validity of a collective agreement: Does the law provide for certain requisites to be filled for a collective agreement to become legally binding, such as the following:

- | | |
|--------------------------|----|
| a. Governmental approval | No |
| b. Registration? | No |

- c. Publication? No
- d. Other? Yes. Collective agreements must be in writing.

For a collective agreement to be valid, is its conclusion enough? Yes

5. Effects of a collective agreement: To whom are collective agreements and/or enterprise collective agreements or work agreements binding or compulsory? Are they related to union membership and/or to the association of employers? See above (3.a)

6. Extension of collective agreements: In your legal system, is it possible to extend a collective agreement to non members of the employers' federation that has signed it so that it can have erga omnes effects in a branch of industry or a sector?

Yes, but only in (geographical) area the collective agreement describes.

a. Is extension frequently or rarely used in practice?
Rarely (in 2001 only 534 out of 57594), but some are very important e.g. in the field of building & construction, sales & retailing.

b. When extension is possible:

i) what procedure has to be followed for an agreement to be extended to third parties?

The minister of labour 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 (§ 5 TVG). The extension has to be promulgated.

ii) what is the usual coverage of an extended collective agreement (i.e. a province, a region, the whole state)?

There is no geographic extension possible (see 6a)

B. The parties to collective bargaining

7. Who are the parties of collective agreements? Trade unions? Associations of Trade Unions and /or works Council (the German "Betriebsrat") on the one side? Employers, enterprises, associations of employers on the other side? Who else?

Collective Agreements: All of them, except Works council.

Enterprise Collective = Works Agreements : Employer and works council (general works council or concern works council).

8. Workers' representation by a trade union:

a. Is trade union representativeness an important issue in your country? No

If so:

i) how is the representativeness of a trade union for collective bargaining purposes determined at the different bargaining levels (i.e. the establishment, the enterprise, the industry or branch of economy, an occupational group or at national central level)?

Not applicable, but there is a general determination of the representativeness of trade unions: They have to be strong enough to push their demands.

ii) what procedures are available to settle disputes, when trade union representativeness has been challenged? Are Labour Courts competent to settle disputes on union recognition or union representativeness for collective bargaining purposes? Is this an important issue in your country?

Yes they are. However, this is not an important issue.

b. Where there is trade union multiplicity:

i) how organised is the workers' representation for collective bargaining purposes? The bargaining power of a trade union depends upon the number of its members and the effectiveness of the organisation. The German trade Unions represented in the German Trade Unions Association (Deutscher Gewerkschaftsbund) are very strong by membership and organisation.

ii) can minority unions claim collective bargaining rights? Is this an important issue in your country? Does your country have a case law on this issue?

Yes, they can. This is an important issue in Eastern-Germany. There are just now some cases pending concerning the representativeness of minority "christian" trade unions.

iii) can a union join an existing collective agreement to which it has not originally been a signatory party? If it can, what rights does a union enjoy as a result of its adhesion to that agreement. For example, is the union recognized as locus standi before a tribunal to engage in litigation in case of breach of a collective agreement?

Yes. The joining party enjoys the same rights as original signatories to the agreement.

c. Can a union represent non unionized workers for collective bargaining purposes? No, non unionised workers are free from any union.

d. Can a collective agreement be applied to non union members? Yes, if the parties of the employment contract so agree or the agreement has been declared generally applicable (see 3.a)

e. What procedural rights and obligations are granted to Trade Unions that have signed a collective agreement? For example

- i) can they initiate litigation on the workers' behalf?
No, but they are allowed to represent the unionised worker in litigations, if the worker wants to sue.
- ii) can they initiate litigation on their own behalf? Yes
- iii) others No

f. What procedures and recourses are available in your country for unions or employers to demand the enforcement of an agreement by the other party?

Each signatory to collective agreement can sue the other side for declaratory judgement on the existence or non-existence of a collective agreement and its terms. If, on the employer's side, a single employer is the signatory party to the collective agreement, he can be directly sued by the trade union for carrying out its terms. Otherwise, the signatory parties can only claim for prevailing on their members to act in accordance with the tariff regulations. According to § 80 Abs. 1 BetrVG, the works council is capable to claim the application of a pertinent collective agreement and of a works agreement by the employer.

g. What remedies are available when it is held that one of the parties is in breach of a collective agreement by which it is legally bound? For example, can a labour court impose a fine or issue an injunction in these cases?

The LC impose a fine in the case of breach of a collective agreement provided that a party does not submit to a restraining LC order. When it is held that the employer violates crassly the rules of a (enterprise collective) = works agreement ("Betriebsvereinbarung") and he does not submit to a final judgement on that case, the LC can impose a fine up to 10.000,- Euro (§ 23 Abs. 3 BetrVG). Authorised petitioners are the works council and a trade union.

9. Work agreements concluded by a non union body:

a. For your country, please indicate whether there are legal or collectively agreed rules that provide for the representation of all workers, at enterprise or establishment level, by a body elected by all the workers of the enterprise or the establishment whether unionised or not (e.g. works councils, enterprise committees, shop stewards, staff delegates). If such bodies exist, how are they appointed or elected?

The works council is elected by the workforce. The legal rules are governed by the BetrVG. Works councils can be elected in establishments who regularly employ a minimum of five employees. The number of the members of the works council varies, depending on the number of employees. Employees who are at least 18 years old are eligible to vote. Employees who have been employed by the establishment for a minimum of six months are eligible to hold office. The election is a secret and direct proportional vote.

b. What kind of relationship - legal or de facto - exists between these bodies and the unions?

There is a close relationship between the unions and the works councils. The basic philosophy of the law on labour relations at the workplace is to ensure there is trusting co-operation between the employer, the works council, the trade unions and employers' federations represented at each workplace, to the benefit of employees.

c. What specific competences do these bodies have, and to what extent can they negotiate collective agreements, or other legally binding agreements such as work agreements (Betriebsvereinbarung)?

Most of the competences of the works council to be negotiated in works agreements are itemized in the BetrVG. Its immediate purpose is to perform a number of general tasks, such as monitoring operations to make sure that all legal requirements, safety regulations, collective agreements and works agreements designed to benefit employees are adhered to and implemented as necessary. Certain topics concerning social welfare require full codetermination (§ 87 Abs. 1 BetrVG), which is the strongest form of participation. In cases in which the works council has such rights, the employer needs to obtain its approval before being allowed to take certain actions. If the works council refuses its consent, the case is referred to an arbitration board, made up of employer and works council representatives on an equal basis, with a neutral chairman. Personnel matters have to be communicated to and considered with the works council provided that more than twenty employees are regularly employed. The employer is required to inform the works council, to hear its views or to consult with it. In some individual personnel actions (i.e. hiring, displacement, firing), the works council is to be heard and may under certain conditions object to the employer's plan. In economic matters, provided that there are more than 100 employees regularly employed, the employer has to inform the economic committee of the works council.

d. Are enterprise collective agreements or works agreements common in your country? Yes

e. Do these agreements include rules or procedures to settle disputes concerning their interpretation or application? Frequently

f. Can these agreements be enforced before a Labour Court? Yes

g. If they can:

i) who can bring litigation before the Court? (e.g. a union, a works council, the individual worker)

The works council can bring litigation before the court; the individual worker can only claim for individual rights accruing from a works agreement; the union in general cannot appeal to the court.

- ii) what measures can a labour court take to enforce these agreements?

The court can issue an injunction in case of breach or non-appliance of the agreement by the employer.

- c. The role and (political) importance of collective agreements

10. If data are available, please provide information on the following:

- a. The number of collective agreements that are in force in your country;

In 2001: 48.669 (West Germany), 8926 (East Germany)

- b. Their distribution, according with their coverage:

- i) sectorial, industrial, and enterprise level agreements;

In 2001:

collective agreements signed by an employers's federation: 29.991 (W), 4446 (E);

collective agreements on enterprise level: 18.678 (W), 4.480 (E).

- ii) national, regional, provincial or local agreements;

In 2000 45% of west German and 23% of east German establishments were covered by a sectoral collective agreement. The proportion of employees covered by a sectoral agreement was 63% in west Germany and 46% in east Germany. A relatively high number of companies with no collective agreement, however, use existing sectoral agreements as a point of reference for determining pay and working conditions.

- iii) the percentage of the workforce that are covered by collective agreements;

in 2001: 70,1 % (W), 55,4 % (E)

- iv) the percentage of enterprises that are covered by collective agreements.

in 2001: 48,1 % (W), 27,5 % (E)

11. What subjects are generally addressed in collective agreements, or in works agreements concluded with works councils or other staff representation bodies?

- a. Terms and conditions of employment? (e.g. wages, overtime <payment>, hours of work, job classification) collective agreement (c.a.)

- b. Provisions concerning the contract of employment: hiring, probation, discipline, fixed-term contracts, termination of employment, other?

c.a.

- c. Health and safety?

c.a., works agreement (w.a.)

- | | | |
|----|--|------------|
| d. | Training? | c.a. |
| e. | Workers' welfare | c.a., w.a. |
| f. | Workers' rights in the enterprise: right of expression, data protection, other? | w.a. |
| g. | Trade union rights and facilities to be afforded to union stewards? | c.a. |
| h. | Settlement of disputes? | c.a. |
| i. | Peace obligation? | c.a. |
| j. | Interpretation and administration of the agreement? | c.a. |
| k. | Procedures for denunciation and renewal of the agreement? | c.a., w.a. |
| l. | Other? | |
| | social welfare, personnel, economic issues on the enterprise level: | w.a. |
| | holiday entitlement, part-time work, protection against dismissal for elder employees: | c.a. |
12. Which of the above subjects are normally addressed by collective agreements concluded with a union, and which by works agreements between an employer and staff representatives
- (i.e. works councils or the like)?
- see above
13. Which issues are governed only by law and /or are not allowed to be dealt with in collective agreements or work agreements?
- Protection against unfair dismissal (Unfair dismissal Act – Kündigungsschutzgesetz – KSchG) and against dismissal without any notice (Para 626 Civil Code . § 626 BGB); minimum rights for paid vacation, governed by the Federal Holidays Act (Bundesurlaubsgesetz - BUrlG), for sick pay, governed by the Continuation of Pay Act (Entgeltfortzahlungsgesetz – EFZG), for part time work and limited-term employment, governed by the Part-time and Limited-term Employment Act (Teilzeit- und Befristungsgesetz – TzBfG).
14. In collective agreements, are the wages and other conditions of employment minimum or standard terms of employment?
- minimum terms, de facto often standard terms, in the field of public services de facto maximum terms too.

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

15. By what means are collective agreements achieved? (Bargaining, or if not successful, striking, or by taking another industrial action? Mediation? Arbitration?)

Mostly by bargaining, and, if necessary, striking. Mediation and arbitration are possible and previously necessary if agreed upon in an arbitration agreement. There were no major strikes at sector level in 2001.

16. Can a labour court stop a strike or other form of industrial action:

a. While negotiating a collective agreement?

Basically not. However, if a strike or an industrial action is unlawful, specially if it not corresponds to the principle of commensurability, the LC can stop the action.

If it can, how does it proceed (for example, by issuing an injunction)?
The LC can issue an injunction.

b. Where such action is in breach of the peace obligation? Yes, by issuing an injunction.

17. Can a labour court mediate in a collective dispute? No

18. Can a labour court impose binding arbitration? No

E. Interpretation of collective agreements by the labour courts

19. Are there rules of interpretation of collective agreements (Interpretation as a <written> law? Interpretation as a treaty? Interpretation with respect to the usual practice?)

The Method of interpretation is approximate to the interpretation of written law.

20. Is there any ranking between the wording, motives, sense of a clause or term in a collective agreement?

The wording and it's sense is on top, and, secondly, the connecting clauses have to be regarded. Besides that, there is no ranking between the other means of interpretation.

21. Is it common, allowed or prohibited, that a labour court asks the parties of the collective agreement for their interpretation?

It is allowed, but not common. The answers are only applicable, if they concur; but most times they do not and seem to be a trial to continue collective bargaining on a strange way.

22. Is a labour court allowed to extend or restrict the rules or terms of a collective agreement?

Yes, but extending or restricting is not common.

23. How much or how often (in relation to other cases) do labour courts deal with the interpretation of collective agreements?

About 20 % of the Supreme LC cases deal with that issue.

24. Are labour courts allowed to void a “not interpretable” (i.e. extremely unclear) term of a collective agreement? Yes.