

**FOURTH STUDY COMMISSION
2006**

QUESTIONNAIRE

(Answers by German Judges Association)

Do we need special Labour Court procedures and alternative disputes methods

This Questionnaire does not deal with settlement of collective interests i.e. between trade union and employers association to change tariffs or between works council and employer regarding new plant agreements. In most countries there exist specific procedures and institutions to handle this kind of collective disputes. The main objective of this questionnaire is the settlement of a specific points of law regarding claims of employees. This also involves the question how trade unions and statutory representative bodies may be involved in supporting this by supporting the individual employee or representing employees interest in specific procedures.

I - Are there new initiatives to make Labour Court hearings more efficient?

1. Are there any pre-trial procedures ?

There are no pre-trial procedures in most (that is more than 95 percent) labour trials with a few exceptions:

- a) The chambers of trade handicraft and the chambers of industry and commerce can set up mediation committees for litigations between trainees and professional instructors. If such a committee has been set up a hearing in the committee is mandatory before a labour court trial is permitted. If the decision of the committee is not accepted by either party the labour court trial is opened and the regular mandatory mediation hearing at the labour court is abolished (see below letter d).
- b) Collective parties like trade unions and employers associations also may provide a regulation in their collective agreements that a (private) court of arbitration has to be set up instead of filing a claim at the state run labour court system, if the litigation arises from the collective agreement or concerns its validity.
- c) The same goes for litigations between employees and employers based on a collective agreement, if the collective agreement mainly concerns stage and film artists or captains and crew members of offshore ships.
If according to letter b) or c) a court of arbitration is provided in the collective agreement the state labour court can only be appealed with the aim of crushing the arbitration decision if the proceedings of the court of arbitration were illegal or its decision is based on a violation of the law or a criminal offence of one of the parties or the arbitrator.
- d) As a part of the labour court trial (not really pre-trial) in all labour law litigations a mandatory mediation hearing by the presiding judge is provided by the code on labour courts (which is technically a supplement to the civil procedure code). For further details see below Nr. 4.

The following letters a) to d) deal with the mediation hearing according to above letters a) to c):

- a. **Are they mandatory?** If a mediation hearing is provided by the law or the collective agreement it is mandatory.
 - b. **In which way is the court involved?** See above, it is the arbitrator who runs the hearing.
 - c. **How long may they go on?** There are no legal provisions and no factual investigations.
 - d. **Who has to bear legal cost?** There is no regulation in the procedure code concerning the lawyers costs so each party has to bear its own legal expenses. According to the material law there might be a regulation which gives one of the parties the right to claim the payment from the other party. There is no legal provision for the costs of the arbitration court, it depends on their own statute.
 - e. **Which effect do they have on the time of prescription ?** Prescription is ceased during arbitration.
2. **Are there specific ideas to give assistance to the plaintiff to raise his claim more effectively?** There are no actual legal initiatives known. But since a long time there is an assistance at the labour court to help the plaintiff formulate his bill of claim. This assistance though does not give legal assistance or advise, this is forbidden to courts.
3. **What interest has to be paid for remunerations, which are not paid at the date of maturity ?** By law the interest rate is 5 percent above the basic interest rate of the CEB and has to be paid since the moment the remuneration is due.

4. **Are there procedural regulations for mediation?**

a) **Is mediation compulsory ?** In a litigation between an employee and an employer arising from the employment a labour court mediation is compulsory. It aims to close the litigation by a settlement. Mediation is part of the court trial and is run by the presiding judge who is in charge of the case if it is not finished by mediation. In collective law cases the presiding judge may order a mediation hearing.

There are no legal provisions for other court or private mediations. They may be done by private initiative but in the labour court practice they do not exist because they do not interrupt the legal deadlines for a labour court trial and the court mediation satisfies all practical needs. So the following explanations do only deal with the court mediation.

b) **How are the mediators selected ? In which way is the court involved ? Are judges different from trial judges ?** As the court mediation is run by the presiding judge there is no selection of mediator. Mediation is part of the trial. The mediator is the same judge who runs the adversary trial.

- c) **Is it confidential ?** The mediation as part of the trial is open to the public. The public though may be excluded under certain circumstances such as endangering the public order or security or if a party asks for exclusion because he has to reveal commercial- or enterprise secrets or inventions. An exclusion also is permitted if the party asks for it to safeguard personal interests. The public may even be excluded to achieve a better arbitration atmosphere.
- d) **How long may mediation go on? How is it finished ?** Usually there is only one mediation hearing. If the parties agree another mediation hearing may be scheduled. There is no regulation on the duration of mediation, it may last between 10 and 75 minutes. The law provides that the hearing for mediation is to be scheduled within two weeks after the bill of claim has got in to the court. In practice this lasts according to the workload of the court between two and eight weeks. Mediation ends either by a settlement that is taken to the minutes or by passing it to the adversary trial.
- e) **Who has to bear the legal cost ?** If the parties come to a settlement there are no legal costs of the court, each party has to bear its lawyer`s costs. In case of an adversary litigation the expenses of the mediation form part of the trial expenses and have to be born by the party who in the end loses the trial.
- f) **Which effect does mediation has on the time of prescription ?** As the court mediation is part of the trial mediation interrupts prescription.
- g) **What training in law and procedure is given to mediators ?** As it is a professional judge who does the mediation he has full professional training in law and procedure. There is no special training in mediation skills.

II - Collective (class) action

1. **What kind of collective actions have You got ?** There is a special action called the “Beschußverfahren” (court order proceedings) in which the trade unions and the staff committees may sue the employer for breach of law.
 - a) The trade unions represented in an enterprise have certain own rights according to the law of the constitution of enterprises such as the right to contest an election to the staff committees, to ask for a nomination of the election committee for the staff committee elections by the labour court, to get access to the enterprise or to ask for a court interdiction of certain actions of the employer that would touch the rights of the staff committee. These court order proceedings are also applied if the trade unions want to defend themselves against agreements of the employer with the staff committee within the enterprise that contradict collective agreements. Using the court order procedure trade unions also can file a claim against illegal actions during strike and lockout.
 - b) Staff committees may use the court order procedure to sue the employer for violating their participation rights according to the code on the constitution of enterprises.

- c) Employers may use to court order procedure to contest an election for the staff committees or to get an exclusion of a member of the staff committee or to terminate the labour contract of a staff committee member extraordinarily.
- d) Minimum three employees may contest the result of staff committee members elections in the court order procedure.

2. Who are the Parties of these procedures ?

1a): Usually one trade union represented in the enterprise on the one hand and the employer on the other.

1b): Usually staff committee and employer.

1c): Usually employer and staff committee or trade

1d): Employees, staff committee and employer

3. Which courts are competent ? Labour courts of first instance and the district labour courts in second instance. In all cases of principal importance/interest there is a third instance, the Federal Supreme Labour Court.

4. Which effects has their decision ? The decision is binding for the parties and offers the possibility of execution.

5. To whom is this decision binding ? The decision is binding for the parties of the litigation. The decisions of the Federal Supreme Labour Court also serve as guideline for the lower courts.

6. Is it possible for a works council or trade union to sue or request for ascertainment of rights or legal relations, if some employees are involved? Do they have to specify these employees? Trade unions and staff committees/work councils are not authorised to litigate against the employer relying on individual rights of employees. In the court order procedure they may only rely on their own rights if members of the union are affected by measures of the employer. Even if trade union members are asking for a court interdiction the employees have to be named personally in a claim if only they personally are affected by the measure of the employer. But if the employer applies regulations of collective agreements or deviating agreements on all employees regardless of their membership to the trade union, the motion of omission is given to the trade union itself, it does not have to specify the employees.

7. Who has to bear the cost ? The court order procedure is free of legal costs.

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