



Fourth Study Commission  
Public and Social Law

Meeting in Siofok, 27 September - 2 October 2006

Conclusions

**DO WE NEED SPECIAL COURT PROCEDURES AND ALTERNATIVE DISPUTES METHODS ?**

**Introduction:**

This general report intends to summarize the main impressions obtained by studying the national reports.

Generating the questionnaire the general reporter was well aware of the great differences especially regarding the influence of collective labour law and the mechanism for settlement of collective interests i.e. between trade union and employers association. So these kinds of procedures i.e. to change tariffs or between works council and employer regarding new plant agreements were not put into the focus of the survey .

It should be more focused on the procedural aspects of handling conflicts of the individual employee. Nevertheless the specific procedures and institutions to handle collective disputes and the different impacts of collective agreements on employment contract could render an explanation for significant differences in procedural handling of individual conflicts.

The first objective of the questionnaire was, to get information about the different procedural provisions in participating countries regarding claims of employees. This also involves the question how they try to improve this procedures especially by new forms of conflict settlement especially pre trial procedures, the other procedural provisions, mediation and conciliation.

The second part tried to gather new initiatives how trade unions and statutory representative bodies are enabled to support individual employees by collective - "Class"- action .

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

## Pre-trial Procedure

	AUSTRIA	BELGIUM	GERMANY	HUNGARY	IRELAND	IVORY C.	JAPAN	LITHUANIA	MACEDONIA	MEXICO	PORTUGAL	TAIWAN
1. Are there any pre-trial procedures?	Generally No statutory provisions but in some collective agreem. And for disabled P	Conciliation. Exist for some groups-trainees seamen,..	Written proceeding	Mediation Arbitration in collective labour disputes	Commis-sioner; 6 weeks for appeal; Equality tribunal 42 days for appeal; Submission	Yes	Yes	Yes.	New, statute, but no experiences yet	Yes	Only in Azors	
a) Are they mandatory?	No	Yes		No	Yes	No	Sometimes	Yes	No, except for admin. law appeal	Some, some only on request	No	
b) In which way is the court involved?	No	Done by court. Court tries to persuade.	No	No	Secretariat Of the court – time scale	Ensuring enforcem.	Yes	No, permanent committee in The enterprise	Not involved		Not involved	
c) How long may they go on for?	No Limit	No legal provision		90 days			3 hearings, usually 3 months,		grievance negotiation: max 6 weeks; others: no specific regulations on max. time		3 month	
d) Who has to bear the legal ost?		No	Parties pay for the procedure; sometimes only costs of representatives	Employer if there is no other agreement	Each party		Applying Party; the court may also oblige the other party		parties bear their own costs;Exception: Court of Conciliation		No fees	
e)What effect do they have on the time of prescription?		No	Ceased during arbitration	interrupt	No separate Effects;		Suspended		Administrative Appeal or court of Conciliation-interruption;	Interrupted	No	

**Conclusions:** The understanding of “pre-trial” procedure is very different. In most countries there exist one or the other form of pre-trial procedure but they vary. One aim of these pre-trial procedures seems to be, to prevent procedures therefore they are usually **mandatory and the court is not or less involved**. Some countries (Italy, France; Germany) also reported negative experiences (delay; lacking competence)

To help claimants to come to an rapid settlement or to perceive that a procedure before the court will be inevitable it seems useful to have **some time limits** or provisions about the procedure. Furthermore it should be provided, that **the time of prescription** is interrupted or stopped. It may be helpful to have some consequences if a party is not willing to comply with provisions regarding pre-trial procedure.

### “LEGAL AID”

	AUSTRIA	GERMANY	HUNGARY	IRELAND	IVORY C.	JAPAN	MAECDONIA	MEXICO	PORTUGAL	TAIWAN
2. Are there specific ideas for providing assistance to the plaintiff in order to raise his claim more effectively ?	Assistance by Chamber of Labour Trade unions Equality Authority; Discrimination Cases- transfer of burden of proof	Civil servants help to formulate actions; legal aid.	Assistance of lawyers	Guidelines of the Court for submissions on the website of the court	Assistance by the court	No	No assistance by judges	Procedures are free	No	Legal aid for low income, assistance by city government; private associations

**Conclusions :** In almost all countries there exist forms of legal aid or assistance by associations. In some countries this associations also sue on behalf of their members. Also the court may assist to cope with formalities. Transfer of burden of proof is also a product of EC directives regarding “Equality”.

	AUSTRIA	BELGIUM	GERMANY	ICELAND	IRELAND	IVORY C.	JAPAN	MACEDONIA	MEXICO	PORTUGAL	TAIWAN
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3. What interest has to be paid for remunerations, which are not paid at the date of maturity ?	10%; if not paid because of an acceptable error in the interpretation of law- 4%	5%+ basic interest rate	17%	No specific	Special rate above normal	6 % Pensions- 14.6	General Interest rate	12% per annum	Fixes by statute	the normal bank interest; 5 %
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**Conclusions:** To make proceedings more efficient some countries pursue the idea that high interest rates will induce the debtor to pay earlier. Perhaps in some cases this may also prevent new defences which are not substantial.

## MEDIATION

## Out of court mediation seems to be unknown in a lot of countries

	AUSTRIA	BELGIUM	GERMANY	HUNGARY	IRELAND	IVORY C.	JAPAN	LITHUANIA	MACEDONIA	MEXICO	PORTUGAL	TAIWAN
8. Are there procedural regulations for mediation ?	Consent parties; information of parties esp. about necessity of legal advice + forms ; documentation of begin , end and result (on demand) of mediation		No provisions regarding mediation out of court	Yes	Rights commissioners and Equality Officers – Recommendation	Yes f	For labour court procedure	Yes	Yes, new statute, but no experiences	No	Only some projects	Code of Civil Procedure
a) Is mediation compulsory ?	No		No, only by court	No, only in some collect. agreem.	No	In some cases	Not necessarily	Yes			No	Yes
b) How are the mediators selected? In what way is the court involved? Are the judges different from trial judges?	Parties select from a list- special admission; involved person are excluded; different form trial judge;		court	Parties select from a special list- run by ministry. Court is not involved.	Public servants special trained civil servants – judge not involved	By parties or Form a list	By the court	Permanent committee in the enterprise			Independent, impartial, specialized mediators	rt of court procedure; mediators appointed by court ; list, also judge if appropriate; different from trial judge – exceeding 15,400 \$
c) Is it a confidential?	Yes		No	Yes	Yes. Disclosed Information may not be used		Yes				No	Yes
d) How long may mediation go on for ?	Until parties stop		Court mediation; one hearing	90 days; or if a party stops	Until parties or mediator stop	30 days	3 hearings				Until agreement, three month	Agreement; trial on request of one party
e) Who has to bear the legal cost?	Each party		The parties. In the event of a settlement – no court fees	Each party	Each party		Applying party				Each party 50 €	Parties
f) What effect does mediation have on the time of prescription?	Stopped		Court mediation interrupted	interrupted	No special effects – hearing		Suspended				No	
g) What training in law and procedure is given to mediators ?	Special training		No special training ;	Special training- 5 days	Special training;	Special knowledge and experience	Some training is given by the Court				Independent mediators trained in labour law	Training by district courts

**Conclusions:** One difficult question is how to get the correct definition of mediation. It seems to be a form of **voluntary** communication where a neutral person, which was not involved in the conflict, uses some special **communication techniques** to promote the understanding of parties of the conflict of the mutual point of views so that they can solve the conflict by themselves. In this context it seems useful that mediation is **confidential**. It may be helpful if the mediator is different from trial judge. An other important aspect is that there are lists or procedures how to nominate mediators which ensure that mediators are also perceived as neutral persons. Parties will then disclose their real intentions and problems. It is typical that there are only few or **no legal provisions** for this procedure because it is **not meant to entitle someone to decide** the conflict on a legal point of view. It is not necessarily linked with court proceedings. Therefore it is possible to try mediation without interruption of a court procedure. On the other hand the procedure may be stopped for a certain period. It is very important to have well trained mediators, who are able to use modern communication techniques. Regarding labour cases one aspect of training should also deal with jurisprudence. This will avoid that result of mediation could be less favourable for economically **weak parties**. Regarding the problem of the time of **prescription** in many countries it is stopped during mediation procedure.

## II “Collectiv(class) actions”

	AUSTRIA	BELGIUM	GERMANY	HUNGARY	IRELAND	IVORY C. JAPAN	MACEDONIA	MEXICO	PORTUGAL	TAIWAN
1.What Kind of collective actions have You got ?	a. works council/employer can file a claim for a declaratory judgement of rights or legal action b. association able to be partner of a coll. agreement can apply for a declaratory decision; in both cases this must be relevant for min 3 employees		Trade unions and staff committees may sue for breach of law regarding participation rights	No	No, Just leading cases; others agree to accept judgement for themselves. Other cases are stayed	Only collective actions No class Actions; only “leading cases”	No class actions	Associations can intervene and represent their members;	Collective rights	Appointed persons or associations may sue or be sued on behalf; Associations with permission of government authority

	AUSTRIA	BELGIUM	GERMANY	IRELAND	IVORY C.	JAPAN	MACEDONIA	MEXICO	PORTUGAL	TAIWAN
2. Who are the parties to these procedures?	a) works council/employer b) (potential) parties of coll. agreement		trade unions, employers association or single employers	Trade unions: employers		Individuals			Trade unions or employees	Appointed persons
3. Which courts are competent?	a) Court of first instance b) Supreme Court		Labour Courts of all instances	Labour Courts		Labour Courts		Court of conciliation and Arbitration	Labour Courts	Labour or district courts
4. What effects does their decision have?	Declaratory		Binding	Binding for all cases covered by the determination		No special effects				Binding for appointing individuals
5. For whom is this decision binding?	Only for the parties; but in practice it is important also for individual disputes		Parties	Binding for all cases covered by the determination		Parties			Parties	Parties and appointing individuals
6. Is it possible for a works' council or trade union to sue or to request for ascertainment of rights or legal action? Do they have to specify employees?	Yes They do not have to specify them		No, but possibility to assert collective agreements by action	Trade unions Can apply to LC for Fixing of terms and Conditions of employ., if Employers are not bargaining. Director of Equality Tribunal identifies Which clauses of coll. agreem.. are void and gives guidance to non-discriminatory provisions.		No			Yes	Trade unions can sue employers also on individual rights of employees; they have to be named.
7. Who has to bear the cost?	a) losing party b) each party		Free of legal costs	Each party		Loser		No fees	Parties	Parties

**Conclusions:**

“Class actions” in the American style make it possible to concentrate interests of individuals regarding a certain point of view.

Then one or more members of a class may sue or be sued as representative parties on behalf of all.

There are some prerequisites to a Class Action (Rule 23 of Federal Rules of Civil Procedure):

1. The class is so numerous that it is impracticable if all members join.
2. There are questions of law or fact common to the class.
3. The claims or defences of the representative parties are typical for the claims or defences of the class.
4. The representative parties will fairly and adequately protect the interests of the class.
5. The prosecution of separate actions would create the risk of varying adjudication which would establish incompatible standards or diminish chances of other members to protect their interests or the opposing party has acted on generally applicable grounds or the court estimates that questions of law or facts which are common to all members are predominate over any questions affecting only individual members and a class action superior to other available methods (individual actions; already commenced actions; desirability of concentration; management).

One reason why there are no provisions for “Class actions” in the American style exist in Europe could be, that in Europe there are already associations existent to represent the interests of their members and to create “ collective agreements”.

They generate a lot of the provision , which are important in employment relationship therefore they are sometimes also involved in “enforcing” this rights. One way is to give them the possibility to sue for declaratory judgement on the interpretation of such collective agreements.

In some countries this judgements have a binding effect also for the members. Another concept of “collective action” is that associations sue on behalf of their members or weak employees groups with their consent.