Put stereotypes aside and take advantage of your works council

The works agreements – a tool also for employers

By Caroline Bitsch and Dr. Jens Jensen

Besides mandatory laws, Germany has basically three sources of law concerning employment terms: First, and most obvious, is the employment contract. This falls under employment law or individual law as an employment contract concerns the relationship between an employer and an individual employee. Collective bargaining agreements, which are agreements between a union and a single employer or, more commonly, an employers' association, lie at the other end of the spectrum. Both unions and employers' associations act on behalf of their respective members – that is, employees and employers of a certain industry, respectively. A third source of employment terms, one that is at least as important as collective bargaining agreements, is the works agreement. This type of agreement is made between an employer and the works council.

The beauty of a works agreement lies in the fact that it automatically binds the entire workforce (with the notable exception of board members and the most senior of managers) even though the employer only has a single contract partner, the works council. Of course negotiations with a works council are usually tougher than negotiations with a single employee, but what would a company prefer more: having just a single contract partner or hundreds of them including the notorious few who are not willing to agree with their employer on anything?

The power of a works agreement

Data protection is a perfect example illustrating the power of a works agreement: Under German law, employers are not allowed to use any personal data without the employee's consent unless the data is absolutely necessary for the ongoing execution of the employment relationship as is the case with payroll-relevant data. What do you do, however, if you want your employees to agree to the use of their personal data for talent management purposes? Approaching each staff member and explaining data protection laws, the idea behind a career development database and why it would make sense to participate in the program is a daunting task. If, however, the company manages to convince the works council to agree to the program and to the use of personal data in the form of a works agreement, obtaining consent from an individual employee on the use of his or her personal data is no longer an issue.

An employee must obtain the works council's consent.

→

The law in action

Statutory laws and Federal Labor Court *(Bundesarbeitsgericht, BAG)* case law provide a comprehensive framework for the coexistence of these three sources of law. Broadly speaking, room for works council codetermination rights – and thus for works agreements – is only found at the business level when there are no applicable collective bargaining agreements or where collective bargaining agreements leave room for works agreements (opening clauses).

But what about the relationship between a works agreement and the employment contract?

By command of law, works agreements apply directly to the employer on the one side and individual members of the workforce on the other, thus further implementation is unnecessary. Works agreements also have a binding effect. This means an employee must obtain the works council's consent to waive entitlements rooted within a works agreement.

But what happens if the same aspect of employment is governed by both an employment contract and a works agreement? Until recently, the answer to this question was quite clear: The employee was entitled to the more favorable term, regardless of whether the employment contract or the works agreement would prevail. An exception would apply only in the rare case that the employment contract explicitly foresaw that a works agreement would prevail over the terms in an employment contract.

BAG is heading in a new direction

In recent rulings, the First Senate of *BAG* has shifted away from this "favorability principle" and returned to the doctrine of the "replacement principle," which the Grand Senate of *BAG* only relinquished with its famous, far-reaching ruling on November 7, 1989. At the core of the replacement principle lies the conviction that labor law, due to its nature, constitutes a higher legal source in the hierarchy of norms and would have already beaten the employment contract, which constitutes a lower legal source.

The First Senate had to reach into its bag of tricks quite a bit in order to not clash with the Grand Senate's ruling. When it, though, it did this quite cleverly: Opening clauses in employment contracts, especially older ones, are rare birds, so the Senate held in its ruling on March 5, 2013, that standard contract terms necessarily have a collective element as these terms frequently appear in employment contracts. As a result, aspects governed by standard contract clauses are, in the view of the First Senate, implicitly open to replacement by a works agreement. This reasoning makes it irrelevant whether or not an employment contract contains language that collective agreements would prevail over the terms of the contract.

In a later ruling dated February 17, 2015, the First Senate took yet another approach: From the fact that the works council was informally (!) involved in a framework agreement between an employer and employee, the First Senate concluded that the employment terms in the agreement could obviously – from the employee's perspective – be replaced by a works agreement.

Subsequently, the Third Senate of *BAG* also jumped on the bandwagon and held that both commitments to the entire workforce and company practices can be replaced by a works agreement (see the rulings dated March 3, 2015, and February 2, 2016). In one of its latest rulings dated July 19, 2016, however, the Third Senate failed to confirm that standard employment terms can be replaced by a works agreement to the disadvantage of the employee. That the Senate did not apply the new case law might have to do with the fact that the case dealt with company pension claims, which are heavily protected under German law.

A small question remains as to whether or not all standard employment terms can be validly replaced by works agreements. Still, in contrast to the legal situation that was in place for almost a quarter of a century until the First Senate issued a ruling on March 5, 2013, the chances have never been that good here in Germany that employment terms or company practices could be replaced with works agreements with future effect.

Within this context, it is important to note that works agreements not only can be concluded on matters that statutory law have declared subject to works council's codetermination. Section 88 of the Works Constitution Act *(Betriebsverfassungsgesetz, BetrVG)* also allows voluntary works agreements on matters not subject to mandatory codetermination. For example, it is permissible to agree with the works council on a works agreement that stipulates not only how a performance bonus is to be distributed among employees (by means of bonus criteria and the definition of on-target performance), but also who is entitled to such a bonus. The latter does not →

belong to the catalogue of mandatory codetermination matters as prescribed by Section 87 of *BetrVG*.

To conclude: a recommendation

Codetermination by a works council does, of course, limit decision-making to a certain extent. But as this article demonstrates, the existence of a works council also brings into play attractive strategic instruments to define or alter employment conditions for the workforce as a whole. For this reason, our recommendation is to take advantage of your works council! <–

Caroline Bitsch
Attorney, Partner
JUSTEM Rechtsanwälte, Frankfurt am Main

c.bitsch@justem.de

Dr. Jens Jensen
Attorney, Specialist Attorney for Labor Law, Partner
JUSTEM Rechtsanwälte, Frankfurt am Main

j.jensen@justem.de

www.justem.de