How to deal with the works council
Overview of the principles of codetermination

Dr. Arno Frings
Hans-Christian Ackermann
Fundamental principles
Role of the works council

- Representation of the employees
- Codetermination
- Consultation
- Information

- Applicable Act: Works Constitution Act (Betriebsverfassungsgesetz, BetrVG)

- Scope
  - Works with regularly at least five permanent employees eligible to vote, of whom three are eligible to be elected, sec. 1
  - Number of members depends on the number of employees in the works, sec. 9
Institutions of the works constitution

**Company**: Legal entity consisting of one or more works

**Works**: Organisational unit, where employer continually pursues labour purposes with technical and immaterial means

**Joint works**: Uniformly controlled and managed over a substantial period

**Principle**: One works, one works council
Case Studies – Dealing with the Works Council

Case 1 – Implementation of a Works Council
Case 1 – Implementation of a Works Council

Facts

- ABC Inc. is a car manufacturer
- ABC's Berlin production site employs 300 employees
- No Works Council
- On Friday evening, ABC management receives a letter from IG Metall asking to distribute invitations for an all employees meeting the next week
  - aim of the meeting is to vote an election committee for elections to a works council
  - meeting shall take place during normal working hours
Case 1 – Implementation of a Works Council

The employer’s first reaction:

- Company never had a works council
- ABC’s US mother company has no experience with works councils
- ABC wants
  - to avoid elections at all cost
  - no distribution of invitations provided by the union
  - employees to work instead of attending the election meeting
  - to take measures against employees who support the union letter or invite themselves
- ABC was considering closing down the Berlin production site
  - ABC wants to know if measure can be carried out without involving a possible works council
Case 1 – Implementation of a Works Council

Legal background

- Unions may initiate work council elections
  - Important: Unions do not run the works council, only the elected members do!

- Obstruction of works council elections is unlawful
  - Sec 20 para.1 BetrVG: „Noboby shall obstruct the election“.
  - Sec 20 para. 2 BetrVG: „Any attempt to influence the elections shall be unlawful“
  - Sec 119 BetrVG: Obstruction of elections constitutes a criminal offence

- Employer has to bear the costs of the elections, employees are entitled to attend election events during working time receiving full salary

- Organizers and several participants of elections are protected against dismissal
Case 1 – Implementation of a Works Council

How to proceed?

- Explain client that i) election can’t be stopped and ii) works councils can be helpful

- No obstruction of initiated election process!
  - However, before initiation, employer can try to convince employees that works council is not necessary for the company
  - In case of rumours regarding an election, RIFs, closure of business etc. should be initiated immediately in order to avoid codetermination rights

- Recommendable:
  - Motivate reasonable employees to run for works council office
  - Cooperate with union/ election committee ➔ trustful cooperation
  - Show client that implementation of works council is a normal process, German system of codetermination „works“
Legal status of works councils‘ members (I)

- Term of office 4 years, sec. 21, ending after
  - Resignation, sec. 24
  - Termination of the employment relationship (in case of a lawsuit not until validity of the judgment), sec. 24
  - Removal from works council due to grossly violation of duties, Sec. 23, 24

- Duty of confidentiality, sec. 79

- Release from work if necessary after reasonable consideration, sec. 37, para 2

- Continued remuneration, sec. 37, para 2

- Training and education courses, sec. 37, paras 6 and 7

- Members must not be disadvantaged or advantaged due to their activities, sec. 78
Legal status of works councils’ members (II)

- **Extraordinary protection against dismissal**, sec. 15 KSchG (Protection Against Unfair Dismissal Act)
  - For term of office and one year afterwards, exception: closure of works
  - Extraordinary dismissal only with approval of the works council
  - Members of election committee and election candidates are protected for 6 months after announcements of election results
  - Alternate members are protected for one year after end of representation
Costs and expenditures of the works council

- To be borne by the employer, sec. 40

- Principle of necessity and proportionality to save costs

Examples

- Lawyer’s fees / legal representation
- Costs of experts (agreement with employer required), sec. 80, para 3
- Rooms and offices
- Office materials and equipment
- Literature
- Technical equipment (Internet, PC)
Organisation and management
Organisation and management (I)

- **Chairman of the works council, sec. 26**
  - Representative of the works council

- **Committees** in large works councils and to assign tasks, sections 27 and 28

- **Works assembly, sections 42 and 43**
  - Regular: every three months during working hours, sec. 43
  - Extraordinary: At request of employer or ¼ of employees, **possible without employer**, beyond working hours, sec. 43, para 3
  - Works assemblies in separate divisions: every six months for special reasons during working hours, sec. 43
Organisation and management (II)

- **Meetings** of the works council, sec. 30
  - Basically during working hours
  - Meetings shall not be public

- **Resolutions**, sec. 33
  - Participation of at least 50% of the members required
  - Majority of the members present (simple majority) or of all members (qualified majority)

- **Minutes**, sec. 34
  - Evidence whether or not resolutions have been passed correctly
  - Information about the course of events of each meeting
Principles of codetermination
Working together in good faith and mutual trust - Principles of collaboration, sections 2, 74

mutual trust, forthrightness and honesty

mutual consideration

meet monthly

summon extraordinary meetings

act legally (comply with applicable collective bargaining agreement)

not to interfere with or refuse rights of codetermination

refrain from strikes and lockouts and from party politics

refrain from activities that could impair work flow or general order

discuss with a sincere desire to reach consensus
Duty to inform the works council

- **General duty** to assure works council can fulfill its tasks and duties, sec. 80
- **Prompt and complete** information with all necessary documents

  - As early as possible when employer is still considering alternatives
  - Only available documents and information, no need to produce documents
  - Employer has not to provide experts, but works council can consult them

- **Examples:**
  - Reports, statistics, balances
  - Inspection of the payroll, including gratifications
  - Documents of **every** applicant
  - Content of the personnel file, but duty of confidentiality
  - Business secrets, but duty of confidentiality
Enforcement of the rights of codetermination

- Measures can be invalid (indirect pressure on employer)

- Conciliation Board, sec. 76
  - Mandatory arbitration
  - Also applicable to voluntary codetermination if agreed upon
  - Impartial chairman
  - Resolutions replace agreements with same effect as a works agreement

- Court proceedings before the Labour Court
  - to enforce a right
  - for determination
  - to prohibit certain actions in case of grossly violation of duties
  - Interim injunction

- Penalties and administrative fines
Works agreements, sec. 77

- **Law of the works**: Direct and imperative effect, written form required
- **Content**: Regulation of content, formation, termination of employment relationships and both of operational and works constitutional matters
- **Terminability**: No reason and justification required
- **Restrictive/barring effect**: Subjects (normally) regulated by collective bargaining agreements
- **After-effect**: Depends on mandatory or voluntary codetermination
Case Studies – Dealing with the Works Council

Case 2 – Implementation of Short Time Work („Kurzarbeit“)
Case 2 – Implementation of Short Time Work („Kurzarbeit“)

Facts

- ABC forecasts a temporary shortage of orders during the next months
- ABC will not be able to provide its 300 employees with work during this period
- ABC does not want to terminate employees as they are skilled and experienced; ABC will need them once the economy recovers
- Employment contracts do not contain a stipulation allowing the employer to implement Kurzarbeit
Case 2 – Implementation of Short Time Work („Kurzarbeit“)

**Employment law issues**

- Terminations would mean a loss of skilled employees the company would later have to hire once again during the next boom.

- Employer is not authorized to shorten the working time and to reduce the salary without the employees‘ consent if he is not able to provide them with work (Sec. 615 German Civil Code („BGB“)).

- Difficult - if not impossible - to seek the consent of every single employee.

- Employer would have to pay the employees without receiving a service in return ➔ terminations would be unavoidable.
Case 2 – Implementation of Short Time Work („Kurzarbeit“)

Definition „Kurzarbeit“

- Kurzarbeit allows companies to reduce work hours and salary, with the government making up some of the lost wages.
- One of the main reasons for „German Wunder“ during current crisis
- Maximum duration: 24 months
- Aims
  - employer can retain skilled workers
  - employer is not obliged to pay the full salary
- Problem: Without works council, employee‘s consent is necessary
Case 2 – Implementation of Short Time Work („Kurzarbeit“)

The Benefits of a Works Council

- Employer and Works Council can negotiate and conclude a works agreement regulating short time work
- The employees‘ consent is **not** necessary
- Works agreement is **binding**, employees **cannot oppose**
- Financial relief for the company
- Jobs are secured
- Company is prepared for next boom period
Scope of codetermination
Scope of codetermination

Codetermination

- with regard to social matters, sec. 87-89
- with regard to personnel matters, sec. 92-105
- with regard to economic matters, sec. 106-113
„Real“ Codetermination with regard to social matters

- Enforceable codetermination with right of initiative and equal rights as employer

- **Employer cannot carry out measure** without agreement with works council

- Amount of remuneration is **not** subject to codetermination

- **Limits**: No codetermination in matters that are regulated by
  - exhaustive statutory provision
  - collective bargaining agreement (unless there is an exemption clause)

- Decision of the **Conciliation Board** can replace agreement between employer and works council
“Real” Codetermination pursuant to section 87

- Questions of the order and the conduct of the employees
- Beginning and end of the working hours (not length and duration)
- Overtime / short-time work
- Method of payment of remuneration
- General principles on vacation
- Technical equipment to monitor employees
- Prevention of accidents
- Social services
- Wage structure / principles and methods of remuneration
- Remuneration related to performance (bonus etc.)
- Principles of group work
- Suggestion system

Social matters pursuant to sec. 87 where codetermination applies
Individual personnel measures, sec. 99

Measures subject to approval

- Hiring
  - Factual integration matters
  - Extention of temporary limited contracts, changes into unlimited contracts
  - Temporary workers
  - Takeover after apprenticeship

- Classification and re-classification
  - Determination of the salary group and changes

- Transfer
  - Factual assignment of another task area for longer than one month or under a significant change in the circumstances of work
Individual personnel measures, Sec. 100, 101

- Employer can provisionally carry out personnel measures, but must inform works council without delay

- Employer has to apply before the Labour Court to replace consent of the works council

- Works council can apply to make the employer revoke the measure if rights of codetermination are neglected

- Works council may apply for a coercive fine
Codetermination with regard to dismissals

Compulsory hearing of the works council, Sec. 102

- Prior to any dismissal employer must hear the works council in order to provide preventive protection
- Extensive information about the person and the reason, otherwise: dismissal invalid!
- Statement of the works council is not binding

Objection of the works council

- Only in case of certain reasons
- In writing and within one week / three days (otherwise fictional consent)
- Consequences of a prompt and proper objection
  - Employee can be dismissed anyway but is entitled to claim for continuing employment under the same conditions during the lawsuit
Codetermination with regard to economic matters

- Operational changes, Sec. 111
  - Measure with significant disadvantages for the personnel or a considerable part of the personnel
  - Meaning of „operational changes“: Closure or cutbacks of works or of a significant part, relocations, amalgamations or fundamental changes
  - Employer must provide information and consult works council
Codetermination with regard to economic matters

- **Reconciliation of interests due to operational changes, Sec. 112**
  - „If, when and how“ of the measure
  - Sincere desire to reach a consensus required
  - Otherwise: *compensation for disadvantages*

- **Social Plan, Sections 112, 112a**
  - Settlement and mitigation of financial disadvantages that employees will suffer
  - *Compulsory*, except
    - operational change solely consists of layoffs that do not exceed a certain number of employees
    - not applicable to works during the first four years
Case Studies – Dealing with the Works Council

Case 3 - Reduction in Force with the help of the Works Council
Case 3 - RIF with the help of the Works Council

Facts:

- ABC's Berlin site produces three types of automobiles (X, Y, Z)
- ABC employs 300 employees in Berlin, Works Council exists
- ABC's SUV "X" sells badly due to high fuel consumption
- ABC decides
  - to stop the production of Automobile X
  - to shut down 1/3rd of the Berlin site
  - to dismiss 100 employees who are producing Automobile X
Case 3 - RIF with the help of the Works Council

Employment law issues:

- Terminations can lead to high severance costs
- Obligation to “Social Selection” may require termination of high performers while “problematic” employees would stay
- Violations of principles of Social Selection lead to invalid terminations
- Risk of numerous claims for unlawful dismissal
  - Many employees have legal expenses insurance!
  - Court proceedings can take long and be costly for employer
Case 3 - RIF with the help of the Works Council

Involvement of Works Council:

- Works Council has codetermination rights due to
  - mass dismissal and
  - partial closure of business

- Employer and Works Council have to
  - negotiate “Reconciliation of Interests Agreement” ("How is the measure carried out?")
  - and to conclude “Social Plan” ("Compensation of financial losses of affected employees")
Case 3 - RIF with the help of the Works Council

How to benefit from the involvement of the Works Council?

- Prudent employer can use Works Council to smoothly carry out measure
  - Severance payments:
    - Instead of negotiating with 100 employees individually, the employer only has to deal with the Works Council

- Social Selection:
  - Employer and Works Council can agree on „list of names“ („Death List“)
  - Listed employees are considered to be selected validly
  - Employer can choose „Dream Team“ and avoid loss of high performers

- Risk of claims for unlawful dismissal
  - Legal prospects of employees who are on the list are reduced drastically
  - Number of legal claims will be reduced considerably
Summary

- Work together with the works council
- Anticipate codetermination rights
- Have a clear position
- And you will have no problems !!!
Thank you for your attention

Dr. Arno Frings
Certified Employment Lawyer
Partner

Orrick Hölters & Elsing
Immermannstraße 40
40210 Düsseldorf
Phone: +49 211 36787 239
Fax: +49 211 36787 253
E-Mail: afrings@orrick.com

Hans-Christian Ackermann
Certified Employment Lawyer
Partner

Luther Rechtsanwaltsgesellschaft mbH
Graf-Adolf-Platz 15
40213 Düsseldorf
Phone: +49 211 5660 18772
Fax: +49 211 5660 110
E-Mail: hans-christian.ackermann@luther-lawfirm.com
www.luther-lawfirm.com