



August 2010

German Employment Law Update



German labor courts continue to argue about gray hound-principle to be used for appointing an arbitration board

The labor court for Berlin-Brandenburg disputes about gray hounds (ruling of 01/22/2010 – 10 TaBV 2829/09). On 01/22/2010 the court issued a ruling to establish an arbitration board according to § 98 ArbGG (Arbeitsgerichtsgesetz – German Labor Court Law). Such proceedings are not unusual for companies who are often busy with disputes resulting from the German Works Constitution Act (Betriebsverfassungsgesetz). Where management cannot reach an agreement with the works council on questions where the works council can claim co-determination, even an agreement about who should sit on arbitration board (Eini-gungsstelle) to resolve the question is often impossible. In these situations, the special fast track proceeding according to § 98 ArbGG becomes relevant.

In such cases of disputes with the works council a court-ordered appointment of the arbitration board quickly provides an instrument for conflict resolution. This exactly happened in the decision of the Berlin-Brandenburg court: Following the works council's request, an arbitration board was established by court order. However, with one particularity that outreaches this individual case:

Concerning the chairman of the arbitration board, the court states that it feels itself bound to the claim of the plaintiff who suggested an individual as chairman to the court; in other words: The court believes it should always appoint the individual the plaintiff wants to act as chairperson. An exception should be only possible in cases of being evidently biased or not qualified for the job. As a

result, following the decision of the Berlin-Brandenburg court the following would apply: The party who first files a claim to establish an arbitration board, is the one who gets the chairperson it wants. This is called the “gray hound-principle” or just first come, first served.

The explosiveness of this ruling is obvious: in many cases management and works councils are right, if they think that the decision about the chair of their arbitration board is a preliminary decision about the complete arbitration proceeding. Because the chairperson's vote is the most influential in the arbitration board (see § 76 para 3 BetrVG). This means in practice that a very high number of cases before an arbitration board are decided by the chairperson's vote.

The gray hound-principle endangers the arbitration board as a system of fair conflict solution. Every chairperson appointed by court by gray hound-principle always has to fear to rank as favourite of the one side or the other. This is an unnecessary burden for the – in any case never free of conflict – proceedings in front of the arbitration board. The solution in practice: If management and works council cannot agree on the individual as chairman, the court should always pick a third person.



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Imprint

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