Report on Austria

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I. The system of labour relations (brief outline of general features)

Institutions and instruments of Austrian Labour Law

Since 1945 the Austrian system has been strongly influenced by the principle of **social partnership**, the members of which are the ÖGB (union, see below), the Chambers of Labour, the Chambers of Commerce and the Chamber of Agriculture. Apart from concluding collective agreements and sending representatives in a great number of institutions (e.g. social insurance institutions, conciliation boards) the social partnership's main task becomes particularly evident in the area of collective labour law by helping to avoid industrial action such as strike etc.

Austrian collective labour law is laid down in the Arbeitsverfassungsgesetz (= Labour Constitution Act = ArbVG), which governs the provisions concerning the collective bargaining. Very important instruments to attain social peace are the **collective agreements**. These are written agreements concluded between employers' associations (mainly the chambers of commerce or one of its sections, compulsory membership) and employees' associations (mainly the union, voluntary membership) for the purpose of regulating working conditions (see § 2 par 2 Arbeitsverfassungsgesetz). In Austria such agreements apply to all businesses or all employees of a whole industry (that means: all over Austria or in at least one federal country) because of the "outsider effect" (see § 12 par 1 Arbeitsverfassungsgesetz). All employees of an employer, who is member of the concluding employers' association, become subjects to the collective agreement, independent of their own memberships in the concluding union. Collective agreements applicable for only one company exist, but yet they are exceptional. The main task of collective agreements is to guarantee minimum rights to the concerned employees. Therefore their rules have to be of a special legal quality, which they are given actually by law, the so called "norm effect" (see § 11 par 1 Arbeitsverfassungsgesetz). The provisions of a collective agreement affect directly each single employment contract and become binding for the employment contract. Therefore they cannot be revoked or restricted by the employer. Yet the employer may grant to the employee conditions which are more favourable than those laid down in the collective agreement. **Subjects** to the provisions of a collective agreement are on one hand all employers who are member of the section of a chamber of commerce that has concluded the collective agreement

and on the other hand all employees (independent of a union membership), who work for an employee being member of the concluding section. Therefore no employees can be excluded from the application and effects of a collective agreement as soon as the collective agreement applies to their employer. Apart from guaranteeing a minimum standard the "outsider effect" prevents competition advantages for employers who only employ non-union-members.

The main voluntary trade organisation in Austria is the ÖGB (**Austrian Trade Union Association**), a registered non-governmental association (private law body), which represents the interests of its 1,5 million members (out of three million employees of all kinds no matter if blue or white collar workers or civil servants). Its duties are laid down and determined in its statutes. The union is divided into various professional groups, which represent the whole union and their employees in situations such concluding collective agreements for a special professional group. Apart from the ÖGB only a few voluntary employees' associations of importance have been able to establish, they can be found in areas such as agriculture and pharmacies. The **Chambers of Labour**, though public law bodies with legally laid down compulsory membership (of all employees) and the ability to conclude collective agreements as well, do not play a relevant role in concluding collective agreements.
The employers are organised in compulsory chambers as well, the Chambers of Commerce. But different from the employees' situation the **Chambers of Commerce** (public law bodies) do the main representation of the employers especially in the area of collective bargaining, whereas voluntary associations such as the Austrian Association of Industrialists are of minor relevance. Both the Chambers of Commerce and the Chambers of labour are organisations of public law established by specific statutes (see Wirtschaftskammergesetz = Act on Chambers of Commerce = WKG and Arbeiterkammergesetz = Act on Chambers of Labour = AKG) and they are self-administrative bodies.

Whereas some institutions act on a collective level referring to whole branches and industries, others mainly confine their activities to their companies such as the works council. The Labour Constitution Act also governs the provisions concerning the organisation of employees' representatives. If a business (company) permanently employs at least five employees older than 18, a **works council** (body consisting of at least one member) has to be established (see § 40 par 1 Arbeitsverfassungsgesetz). A business is a special type of workplace which forms an organisational unit, in which a production process or operation is complete mostly independent of other steps in the company. When a company comprehends

several businesses, in each of them satisfying the conditions a works council has to be organised. The works council is **elected** by all employees who are older than 18 and working on the ground of an (part-time) employment contract. Nationality is of no further relevance. But free employees, members of the management and executives are excluded. The number of persons to be elected to the works council is legally laid down (see § 50 Arbeitsverfassungsgesetz) and cannot be changed by contract or agreement. It depends on the number of employees working in the business (5 to 9 employees => 1 member, 10 to 19 =>2, 20 to 50 => 3 etc ...), but it does not increase proportionally (e.g. 1001 1400 employees => 14 members). The works council is elected for a period of 4 years. Members of the works council may be members of a union at once, furthermore co-operation with the union is laid down by law, but the works council is not identical with the union and does not depend on it.

Apart from general **tasks** such as consulting and supporting the employees the works council has to represent the interests of the workforce towards the owner of a business or company. It is entitled to several legally laid down rights of participation mainly concerning obtaining information from the employer or participation in personnel matters (such as recruitment, relocation, disciplinary measures, termination) or in economic matters (the works council may take one third of the seats in the supervisory boards of stock corporations).

An important instrument of participation is the concluding of **works agreements**, which are written agreements between the works council and the owner. They are confined to matters which either the law or collective agreements specifically reserve to works agreements (see § 29 Arbeitsverfassungsgesetz). The quality or better strength of such agreements depends on the issue. In some areas the employer is not allowed to introduce certain measures without such an agreement (especially control measures), in other cases the conclusion is principally free leading simply to a unified treatment or standard in the business, furthermore some issues may be referred to a conciliation board to be decided. Like the collective agreement the rules laid down in a works agreement affect directly the employment contract like law ("norm effect") and must not be stacked against the employees ("binding character", see III.3.).

Role of Rules and Collective Bargaining

In Austria labour law statutes mainly aim at guaranteeing a minimum standard for employment conditions, which must not be lowered to the disadvantage of the employees by the employers (relatively binding)[1]. Others, such as the rules laid down in the Labour

[1] Especially in the area of Protective Provisions such as the Employees' Protection Act (ArbeitnehmerInnenschutzgesetz = ASchG), Working Hours Act (Arbeitszeitgesetz = AZG), Hours of Rest Act (Arbeitsruhegesetz = ARG), Federal Act on the Employment of Children and Young Persons (Kinder- und

Constitution Act must not be changed at all by collective or works agreements, not even in favour of the employees (absolutely binding, e.g. larger number of employee's representatives). So far there does not exist a fixed statutory imposition of minimum wages, instead the minimum wages are laid down in collective agreements, which by the way can comprehend all kinds of working conditions in connection with the employment contract (see § 2 par 2 Arbeitsverfassungsgesetz). The fixation of wages in collective agreements, which are negotiated upon every year by the social partners, plays a very important role.

II. Labour conflicts and the means for solution

1. In your code, is there a legal typology of labour conflicts (e.g. Individual/collective, or legal/of interests)? If this is so, does the nature of conflicts have a bearing on the solution?

Labour conflicts can be divided into Rechtsstreitigkeiten (**legal conflicts**) and Regelungsstreitigkeiten (conflicts of interest). The first ones refer to application and interpretation of current law and are mainly dealt with at **court**. The decisions are developed by "subsumption". Legal conflicts may concern **individual conflicts** comprehending disputes between workers and employers (working hours, payment, dismissal), or those among workers (sexual harassment of an employee by a colleague). Legal questions in connection with the works council's election, organisation and common activities, the rights and duties of its members etc. belong to the **collective conflicts**.

Conflicts of interest deal also with on disputes between two parties, but the referred to forum may set up new rules or conditions for a specific problem, which have to be obeyed by the claiming parties in the following. For example in the area of works constitution (relations between workforce and management) the decisions made are able to lay down a new situation of rights and duties (e.g. general rule of order to regulate the employees' conduct in the business). Relevant examples of institutions to be referred to are the conciliation boards and the federal **conciliation board** (see III.3).

2. In your code, is there a notion of collective conflict? If this is so, what are the effects of such a notion?

The Austrian Labour Law has established various systems of dealing with collective disputes depending on the type of conflict. The most obvious difference between them is the fact that for almost each form a special institution is reserved by law.

Legal conflicts in the area of **collective** labour law (such as contestation of the works council's election, owner's refusal of the works council's right to inspecting documents,

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Jugendlichenbeschäftigungsgesetz = KJBG), furthermore most of the rules in the Salaried Employees Act

dismissal of a member of the works council by the employees' assembly) have to be referred to the **labour and social courts** for decision. According to § 3 Arbeits- und Sozialgerichtsbarkeitsgesetz (Act on Labour and Social Courts = ASGG) first instance labour law matters must be referred to the provincial courts (Landesgerichte)[2], acting as labour courts. Only in Vienna a separate "Labour and Social Court" has been established. The local jurisdiction depends on the place of the employee's residence during the employment, but optionally also the registered residence of the company may be agreed upon. In the first instance the labour and social courts exercise jurisdiction in chambers consisting of a professional judge, who is presiding, and two expert laymen, one nominated by the employer representatives, the second by the employee representatives. Contrary to other types of civil procedure the parties of a labour law procedure need not to be represented by a qualified attorney at law, but also by functionaries or employees of the chambers of labour/commerce or the union; the parties, including the employees, can even represent themselves at court. As a consequence compared to other procedures the court has a rather wide duty to instruct and inform the parties on their rights, options and obligations during the labour procedure. A first instance judgement can be appealed to the Superior Provincial Court (*Oberlandesgericht*)[3] and in some restricted cases further to the Austrian Supreme Court (*Oberster Gerichtshof*), both mainly exercising their jurisdiction in panel consisting of professional judges and laymen either.

Collective **conflicts of interest** are dealt with at the **conciliation boards**, which have to decide on disputes concerning the conclusion, amendment or cancellation of a special type of works agreements, especially the so called **enforceable works agreements**. In this case the board's decision is not a mere result of examing whether the rules of the works agreement go along with the law, but the conciliation board's decision may also contain a new works agreement (see below).

Disputes on conclusion and amendment of **collective agreements** are dealt with by the **Federal Conciliation Board** on application of either party (e.g. Chamber of Commerce or Austrian Trade Union Federation). This institution is set up in the Ministry of Economy and Labour and consists of a presiding chair(wo)man and his/her substitutes being nominated for an unfixed period but on revocable terms after hearing the Austrian Chamber of Commerce and the Federal Chamber of Labour; the further members are nominated according to proposals of the Austrian Chamber of Commerce and the Federal Chamber of Labour for a

(Angestelltengesetz = AngG) e.g. those concerning notice of termination.

[2] In federal countries with a larger number of inhabitants more than one provincial court has been established that's why 14 courts of that type exist in Austria, though there are only nine federal countries.

period of five years. The decision of this board may be treated as a collective agreement, if both parties abide in writing by the Board's decision in advance. The further conditions such as the collective agreement's publication in a defined journal ("Amtsblatt zur Wiener Zeitung") have to be satisfied in the following.

3. Nature of the means envisaged for solution (judicial, administrative and conventional).

The above mentioned institutions' decisions are of different legal nature. The judgements by the **courts** are of **judicial** character, whereas the decisions of the **conciliation boards** are considered to be **administrative** ones because the boards are "administrative bodies with judicial character" (for further information see III.3.). In case of the parties' preceding submission agreement to the **Federal Conciliation Board**'s decision the result of disputes on collective agreements may be regarded as **conventional**, because the inner reason for the formation of a contract, the concord of wills, is satisfied. The typical conventional character makes it necessary that additionally the remaining steps of becoming a collective agreement such as publication of the collective agreement etc have to be fulfilled as usually.

III. Extra-judicial means for the solution of labour conflicts

1. The role of the State and social actors (policies of abstention/policies of promotion; facilities for their creation/legal obstacles).

2. Extra-judicial means for the solution of labour conflicts: general overview

Arbitration meaning the submission of a disagreement to an impartial institution and at once abiding by the arbitrator’s decision so far has not been that popular in Austria as in other parts of the world. To labour law matters this statement applies almost comprehensively: According to § 9 par 2 Act on Labour and Social Courts (Arbeits- und Sozialgerichtsbarkeitsgesetz) agreements on **private arbitration** between two parties concerning **collective conflicts** are expressis verbis **prohibited**, in case of individual disputes arbitration is only valid, if it deals with an already existing conflict.

Other parts of the Austrian system integrate rules on arbitration. The Act on Civil Procedure (Zivilprozessordnung = ZPO) defines and permits the so called **contract of arbitration** according to its § 577: a written agreement laying down that a conflict has to be submitted to one or more impartial persons, the arbitrators. But because of the special rules on labour procedure (see above) such an agreement is null and void in matters of collective labour law (lex generalis derogat legi speciali). Therefore, if in spite of the legal prohibition a contract of arbitration is concluded, arbitration proceedings are conducted and an award is made, the

[3] In Austria there are four courts of that type.

latter is to be overturned on the ground of legal invalidity. The overturning has to be claimed during three month after the delivery of the award. Unless the arbitration award is not objected to in time, the award remains valid with all effects, which means that it has be performed completely by the liable party. Relating to this binding character of such an unlawful arrangement time and again critics remark that on the ground of ignorance concerning the legal situation it may happen that arbitration is carried out despite contravening rules.

In matters of **individual labour law** the contract of **arbitration** is not generally forbidden, but nevertheless quite restricted by the legal condition that it may only concern a specific dispute that has already risen, and must not deal with repeatedly occurring or future conflicts. Furthermore, arbitration awards underlie control by the courts. On the ground of severe irregularities the overturning of arbitration awards in labour law matters may be claimed at the provincial court as labour and social court.

Yet, a **conciliation clause,** saying that a third party which is to defined in the contract brings the parties together to discuss settlement before they are going at court, can be lawfully concluded as part of an employment contract. The clause can comprehend all controversies or claims arising out of the employment contract such as questions of termination, working hours etc.

To sum up it can be stated that private arbitration can be found only in a quite restricted field and plays a minor role, yet the **State** itself offers various **institutions** to be referred to and strictly laid down **instruments** to deal with arbitration. Regarding its law-policy the Austrian State cannot be considered as a promoter of private arbitration, but as the one who establishes bodies providing various forms of arbitration and conciliation instead.

3. Conciliation, mediation and arbitration in collective labour conflicts

Collective agreements may contain so called **conciliation clauses** (Schlichtungsklauseln), meaning that all disputes arising out of the present contract, or the breach thereof, shall finally be settled under the rules of the collective agreement before complaining to court. This form of resolving a dispute shall never replace court decisions. It can be divided into facultative and obligatory conciliation. In the second case the parties have to turn to the impartial institution at any rate, otherwise the missing preceding conciliation proceedings give rise to an objection at court because of defect admissibility for legal action.

The collective agreement may lay down the employer's as well as the employee's obligation to refer to a specific neutral forum, of which the main task is to mediate between the parties and

to settle the dispute for good. The institution may be organised in form of a conciliation board, but the parties may as well establish a forum according to own ideas. Yet, important conditions to be satisfied are that the proceedings must be clearly defined and the objectivity of the institution has to be guaranteed by the collective agreement (consistence of the forum, selection and qualification of its members, quorum, share of costs).

As we have already seen above, the main facilities of **conciliation in collective labour law matters** are organised and held by the State: the **conciliation boards**, administrative bodies of judicial character which are set up with the respective labour and social court on the application of either party (employer/works council). The board's procedure has to follow the provisions of the Act on General Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz = AVG), the result of which, the decree (Bescheid), can be challenged at the Supreme Administrative Court.

A **conciliation board** is established for a specific dispute, therefore its composition varies from case to case because the **members** always change. According to law (see § 144 Arbeitsverfassungsgesetz) the presiding judge is appointed from among the professional judges of the respective provincial court. Additionally each party has to nominate two assessors, one of which shall be appointed from a list of proposals by the Austrian Chamber of Commerce in case of the employers, and for the employees' side from a list made by the Federal Chamber of Labour. Each other assessor (for employer's as well as works council's side) ought to be named out of employees in the concerned business.

Principally as soon as owner and works council agree upon an issue mentioned by law or collective agreement, they may conclude a special type of contract, the **works agreement**. Like the collective agreement it is given some important features by law as well: the "norm effect" and the "binding character" mainly meaning that the rules in the works agreement directly affect the concerned workers' employment contracts and that they can neither be revoked nor restricted by an individual contract for the benefit of the employer.

Yet, in some matters the employer absolutely needs the works councils permission, without it he/she must not take planned measures: **necessary** works agreements (e.g. control measures such as strip-searches). There exists no further institution or legal remedy to get the approval.

Whereas in other matters both employer and the works council can enforce the conclusion of a works agreement by referring the case to an impartial "person", the conciliation board, unless they do not agree upon a certain subject (**enforceable** works agreements). According to

the law (see § 97 par 1 to 6a Arbeitsverfassungsgesetz) enforceable participation concerns the following matters: general rules of order to regulate employee conduct in the business, principles of employment of staff provided for hire, rules concerning working hours (the fixation of the begin and end of daily working hours, length and timing of breaks), provisions on the calculation/payment of wages, measures to prevent, eliminate or alleviate adverse effects of an alteration of the company, the use of in-house facilities and measures to alleviate effects of night work.

Thus, principally the parties negotiate and afterwards conclude a works agreement (subjects see below). But if they do not find a common point of view on their own, they may turn to a neutral forum which seeks for a special solution in favour of the involved parties and the business. On application of one of the parties the conciliation board does not only decide upon legitimacy of the employer's suggested measure, but it formulates and creates new rules (see conflicts of interest, II.1.), which shall apply to the subjects of the works agreement. Yet it would be false and incomplete to define the result of the conciliation board's decision in case of enforceable participation simply as a works agreement. Instead, the decision – though from a material point of view it contains a works agreement – is regarded as decree (Bescheid: administrative decision concerning one conflict) from the parties' (employer's/works council's) view so that it can be challenged at the next instance, the Supreme Administrative Court. Additionally it is considered to be general directive (Verordnung: general rule by administration to concretise law) with the effects of a works agreement for all employees in the company. Until the conciliation board's definite decision it is allowed that the employer carries out or maintains the planned measures either by giving direct orders to the employees or concluding corresponding clauses in the employment contracts. After the decision is made, on the ground of the works agreement's "norm effect" and "binding character" contravening rules (e.g. in contracts or orders) to the disadvantage of the employees are not valid at any rate, therefore they must not be introduced or continued.

Yet, a second form of participation in concluding works agreements occurs in connection with conciliation boards: the so called **necessary, enforceable** works agreements. Principally computer-aided personal data systems or personnel evaluation systems must neither be introduced nor used without the work's council's consent. But § 96a Arbeitsverfassungsgesetz lays down that if the works council refuses to approve the conclusion, and the employer wants the application of the systems, he/she has to refer to the conciliation board whose decision can replace the work's council's consent after judging on the legitimacy of the planned measure

(see legal conflicts). Without the council's consent and before the board's decision the owner must not carry out the planned measures, e.g. direct orders by the employer or only the single employee's approval would not suffice to install certain computer programmes. The decision of the board is a decree (Bescheid, see above) like in the case of enforceable participation, and therefore can be challenged by the parties at the next instance, the Supreme Administrative Court. For the concerned employees it can be regarded as a general directive with all the effects of a works agreement.

IV. Assessment of extra-judicial means for the solution of labour conflicts.

1. some statistical indicators, number of conciliations

The rules on conciliation boards according to the Arbeitsverfassungsgesetz have been laid down in the mid-seventies, yet the establishment of a conciliation board does not occur very often. Nevertheless these rules must be understood as a signal of bad legal construction. If owner and works council do not agree upon a matter of enforceable participation, the referring to the conciliation board is at hand like a “menace”, of which the result is not predictable that much. Facing this uncertainty the parties are more inclined to find a solution corresponding to both parties, which can be regarded as the actual will and aim of the lawmaker.

Future Tendencies

The last years brought an increasing number of discussions on new forms of resolving disputes apart from court. In some areas such as children rights and marriage-law mediation has already been established in Austria. In 2001 the Ministry of Justice has presented a rough concept on mediation comprehending all forms of procedures except criminal and wide areas of administrative procedurse. At the moment the concept is discussed upon, questions in the area of labour law and social security will mainly arise because the current proposition does not consider at all/sufficiently the nature of the involved parties such as social insurance institutions (self-governing public law bodies) or works councils (law bodies with partly legal capacity).