Plurality in Unity - Change in the Case Law of the Federal Labor Court regarding the Principle of One Shop, One Collective Bargaining Agreement

The Issue	It is possible to have differing forms of coexisting collective bargaining agreements in one business operation. Where the areas being regulated overlap and the collective bargaining agreements do not complement each other, this is called rivalry of collective bargaining agreements (e.g. coexistence of collective bargaining agreements of an association and of the company). Plurality in collective bargaining will exist if an employer is bound by several collective bargaining agreements entered into with differing trade unions for employment relationships of the same kind (e.g. due to its membership in an association and the declaration of the universal application of a collective bargaining agreement). Up to now, the case law had resolved the resulting rivalry in both constellations in accordance with the principle of the unity of collective bargaining. The rule of conflicts to be applied was thus the principle of the closer relationship and specialty. The collective bargaining agreement with the closer relationship to the business operation in terms of territory, business considerations, industry and the personnel involved, and thus most suited to do justice to the requirements and unique nature of the business operation will prevail. The grounds for supporting this included a reference to practical considerations (one shop, one collective bargaining agreement). The solution applied by the case law for the plurality of collective bargaining, namely in accordance with the principle of the unity of collective bargaining, has been criticized for a long time, also with a reference to the freedom to form coalitions protected under the German Constitution. The Federal Labor Court has now followed this criticism.
The Order of the Federal Labor Court on 27 January 2010, File No.: 4 AZR 549/08 (A)	The plaintiff was a salaried physician in the defendant's hospital. He is a member of Marburger Bund, the trade union of physicians. The defendant is a member of the Alliance of Municipal Employer Associations (*Vereinigung der Kommunalen Arbeitgeberverbände* (VKA)). Prior to 30 September 2005, the Collective Bargaining Agreement for Federal Employees (BAT) applied directly and mandatorily for both parties due to their respective memberships in the associations party to that collective bargaining agreement, while Marburger Bund and ver.di, the trade union of public employees, had formed a joint collective bargaining relationship. On 1 October 2005, the Collective Bargaining Agreement

	for Public Employees (TVöD (VKA)) replaced the BAT under an agreement between ver.di and VKA. However, Marburger Bund had terminated the joint collective bargaining relationship prior to this. The BAT was not replaced by a separate collective bargaining agreement (TV-Ärzte) between Marburger Bund and VKA until this agreement came into effect on 1 August 2006. The plaintiff had filed claims to a vacation premium for October 2005 under the regulations of the BAT. The Federal Labor Court could have dismissed the claim by invoking the case law up to that time concerning the application of the principle of the unity of collective bargaining in cases of collective bargaining plurality because it could have been presumed that the BAT had been displaced by the TVöD (VKA) as the more specific collective bargaining agreement for the entire shop. In an order dated 27 January 2010, the 4th Division of the Federal Labor Court had already announced, however, that it wanted to abandon this legal practice: The collective bargaining agreement to which both parties are bound on the basis of their mutual membership in the coalitions entering into the collective bargaining agreement is directly and mandatorily applicable. There is neither any statutory rule on the displacement of this reciprocal duty to be bound by the collective bargaining agreement nor any gap in the Collective Bargaining Act to justify a progressive judicial interpretation exist. In addition, if the plurality of collective bargaining is a result of the duty to be bound to the respective collective bargaining agreement, the protection under the German Constitution (Art. 9 (3)) does not allow that this is mandatorily dissolved by merely invoking the principle of the unity of collective bargaining. The effects of a plurality of collective bargaining agreements on other legal areas (e.g. the law of labor disputes) are to be resolved in those areas. Because the 10th Division had previously decided differently, the 4th Division had asked the 10th Division if it intended to maintain its case law. Following the order of the 10th Division (cf. supra), the 4th Division could then finally decide the matter.
Federal Labor Court, Order of 23 June 2010, File No.: 10 AS 3/10	In an order dated 23 June 2010, the 10th Division of the Federal Labur Court has now concurred with the view of the 4th Division. From now on, the plurality of collective bargaining agreements will no longer be resolved through the principle of the unity of collective bargaining, but each collective bargaining agreement will be applicable in the relationship of the parties originally bound by collective bargaining.
Practical Advice	The ramifications of the change in the case law described above for individual businesses depend on the respective obligation of the employer to adhere to a collective bargaining agreement. Where there has as yet been only one collective bargaining agreement with a single trade union, care must be taken, particularly with respect to newly

	founded trade unions in the company and in the event of a change in the employer association. The duties to be bound by several collective bargaining agreements will result in direct consequences beyond that. The collective bargaining agreement must then be implemented in accordance with the individual employee's membership in a trade union; the invoking of a "more specific" collective bargaining agreement is possible for neither the trade unions nor the employer. If the duty of an employee to be bound by collective bargaining is unclear, the employer may withhold benefits under collective bargaining until this is clarified by the employee. The wording of reference clauses in employment contracts to collective bargaining agreements must be drafted with even more care because a reference to "the collective bargaining agreements applicable in the business operation" could be deemed to be vague and thus invalid if several collective bargaining agreements apply side by side at a later date. The employee would thus have good chances of forcing through the application of the collective bargaining rules which are most advantageous for him. In addition, the principle of the most favorable rule will apply in relation to the originally applicable collective bargaining agreement and the one in force by reference. It also remains to be seen if there will be an outbreak of more labor disputes, and also if and how lawmakers will react. The confederation of trade unions, the DGB, and the alliance of employers, the BDA, have already launched an initiative to create a statutory regulation of the principle of the unity of collective bargaining they have practiced until now.
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