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Informal Procedures in Japanese and Dutch Labour Law

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1. Introduction

Labour Law is a field where traditionally informal procedures are often used. While formal procedures may take long, informal procedures should settle matters in a relatively short time. Informal procedures should also be cheaper and therefore attractive for workers who are afraid they can not afford the high salaries of lawyers in case they lose their case. The availability of informal procedures should make it easier for workers to defend their rights and therefore should promote the observance of labour law by employers.

In this paper a comparison will be made of the practice of formal and informal procedures in Dutch and Japanese Labour Law. Of course, both countries do also know informal procedures in other fields, like consumer and rent law. However, the labour law example may give a good impression of the different approach in both countries.

2. The Dutch system

A. THE FORMAL SYSTEM

Ordinary cases

Every labour dispute in the Netherlands can principally be brought before a court. The general courts are competent: unlike most European countries, the Netherlands do not know a special system of labour courts.

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All civil disputes with regard to a contract of employment or a collective agreement fall in first instance under the jurisdiction of the judge of the cantonal court (kantonrechter).¹ The cantonal court is always a single judge. The decisions of the cantonal court are subject to appeal to the district court (arrondissementsrechtbank). These cases are normally decided in a chamber of three judges. After this, appeal in cassation is possible to the Supreme Court (Hoge Raad). The Hoge Raad decides in a chamber of five judges.

The cantonal court is the court of first instance for petty offences in criminal law, and small claims in civil law. Besides this, it deals with all cases related to some specific contracts, like labour cases and the lease of real property. The most important difference with the district courts is that the cantonal judge is always sitting alone. The procedures are faster than the district courts procedures and the parties are not obliged to have a legal representative. In many cases a representative of a trade union or insurance company, rather than an attorney defends workers. Sometimes, they are not represented at all. The employer who wishes so, can send his own staff members to defend his case in this court.

Procedures

The rules of procedure are foreseen in the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering). The ordinary procedure is the contentious procedure. This procedure opens with a '*dagvaarding*,' directed to the other party and including summons, complaint and the facts on which the complaints are based. This procedure is used for most labour cases. Cases for the cantonal court may take a few months up to two years, depending on the amount of witnesses, complexity and urgency of the case and the activities of the parties. Normally, an ordinary case is handled within six months. Appeal cases use to take longer, normally about a year. If the case reaches the Supreme Court, it may decide five

¹ An exception is being made for the director (member of the executive board) of a stock or limited-liability company. For this employee the court of first instance is the district court. In appeal the court of appeal is competent.

years after the original procedure was started. In extreme principle cases, in which the Court of Justice of the European Communities is asked for a preliminary decision, this period will be even longer. For instance, a landmark case of a mrs. Dekker, who was refused a job because of her pregnancy in 1981, was finally decided in 1991 by the Supreme Court.

Dissolution of employment contracts

A special, but frequently used procedure to end an employment contract is the dissolution-procedure.

In most cases it is the employer who sends a request to the cantonal judge to dissolve the employment contract on severe grounds, more specifically a change of circumstances (art. 7:685 Dutch Civil Code). In these procedures different procedural rules are applicable. They are subject to so-called voluntary jurisdiction. This is a special procedure, initiated by a request to the court, which organises a hearing by itself. The rules of evidence are lighter in this procedure. Usually the decision is made within a few weeks. Although principally the different procedure in these cases is not very logic, in practice the advantage is the short time in which it leads to a decision. Appeal against the judgement of the cantonal court in a dissolution-procedure is not allowed. Only in case the court violated certain procedural rules, appeal is allowed. Also the Procurer-General of the Supreme Court is allowed to bring cases before the Supreme Court 'in the interest of law.' This procedure is practically important for future cases; the position of the parties involved in the particular case cannot be changed by the result. This procedure is seldom followed. The lack of the possibility of appeal is criticised by many lawyers. However, many practising labour lawyers feel comfortable with it: it leads to a definite decision within a short period.

Summary procedures

In case of urgency, it is possible to ask the cantonal court to give a provisional order. This can also be asked from the President of the District Court in a so-called 'short procedure' (Kort geding). However, in these

cases the courts can not take a final decision. It is always possible that the ordinary procedure leads to another solution in the end. In many cases, parties are guided by the provisional order. The principal case would take too long to wait for, and they prefer to accept the provisional decision as the definitive solution, or as the basis for further negotiations to reach a settlement.

B. THE INFORMAL SYSTEM

Since World War II, the Netherlands know an informal procedure in case of dismissals. Every employer that wants to dismiss an employee must ask permission from the Regional Director of the Employment Office (RDA).² This is regulated in the Extraordinary Decree on Labour Relations (BBA) of 1945, originally a piece of emergency legislation that was enacted by the government at the end of World War II. The BBA remained over the years in spite of pressure of employers to abolish it, especially in periods of economic decline. The BBA worked in the first years of its existence as a measure to restore order on the labour market. Later it developed into a protection for workers to ensure that dismissals had a just reason. It also was used as an instrument of government to influence the labour market and to check the access to unemployment benefits. The procedure is the following. The employer sends a request to the RDA, which contains the grounds for dismissal and the motivation for it. The RDA might ask the employer for additional information (like accountant reports). The RDA enables the employee to defend himself in writing. A committee consisting of representatives of employers' associations and trade unions advises the RDA on the basis of both documents. Most of these advises are unanimous and in that case the RDA will follow it. In most cases the permission for dismissal is granted. However, if the request is not serious enough, it is possible that in the beginning of the procedure this is made clear to the employer, and as a result, the request will be either withdrawn or reformulated.

² Regionaal Directeur voor de Arbeidsvoorzieningsorganisatie.

In case of collective dismissals, the employer has to negotiate with unions first before he asks permission to dismiss.³ This rule, based on a European Community Directive, has promoted self-regulation. It has led to the practice that companies conclude so-called 'social plans' with unions. In the social plan, agreements are made for the way workers are dismissed (like replacement, outplacement or financial compensation). If the unions accept the collective dismissal in such an agreement, the RDA and/or the court will only marginally check the grounds for collective dismissal.

During the 1980s and 1990s, the BBA-procedure came under fire, because during this period of recession it took too long before the decision to permit dismissal was taken. The restrictions were felt as obstructive for the often-necessary rapid reduction of the workforce of companies in financial problems.

Access to a court

Also legal arguments against the BBA-procedure got more attention. The decision of the RDA is not subject to appeal to a court. It was argued that this is a violation of article 6 of the European Convention on Human Rights, which requires access to a court with regard to the determination of civil rights and obligations. The Dutch Government took the position that there is access to a court:

- The employer who does not get permission to dismiss from the RDA can go to the cantonal court to request dissolution of the employment contract.⁴
- The employee who is dismissed with permission of the RDA can ask for damages or reinstatement on the basis of 'apparently unjustified dismissal'.⁵
- In case of improper handling of cases by the RDA, one can claim damages from the State. The District court in The Hague declared itself

³ Act on Notice of Collective dismissals (Wet Melding Collectief Ontslag).

⁴ Article 7:685 BW (Dutch Civil Code).

⁵ Article 7:681 and 682 BW (Dutch Civil Code).

competent in these cases.⁶ Also complaints may be filed to the National Ombudsman, which also may lead to compensation of damages.

However, these procedures do not imply a full revision of the RDA-decision. And an order to reinstate the employee can always be bought off by the employer. It is questionable whether the present situation is sustainable in the future when a case might be brought before the European Courts of Human Rights in Strasbourg.⁷

Alternative ways for employers

Deregulation attempts in the 1980s had not much effect, although procedures were speeded up. In practice, employers found other ways to deal with the need to reduce their personnel:

- More often, employees were hired on a temporary contract.
 - The use of other forms of flexible labour relations was extended: so-called on-call contracts and temporary workers (dispatched workers).
 - Older personnel was laid-off by the use of early retirement-schemes.
 - The schemes for disabled benefits were abused to solve personnel problems of companies.⁸
- In case of the need for a dismissal, the alternative procedure of dissolution of the employment contract by the cantonal judge was often used.

Dissolution of the employment contract

The alternative procedure of dissolution of the employment contract by the cantonal court became very popular during the 1990s. There are several reasons to explain this preference for a more formal procedure:

⁶ District Court The Hague July 6, 1988, *NJCM-Bulletin* (1988) 181 (Pally).

⁷ In the past the former European Commission on Human Rights held up the BBA-procedure. However, a comparable Austrian procedure was not accepted by the Court, ECHR June 28, 1990, *Series A*, Vol. 179 (Obermeier).

⁸ These schemes are far more used in the Netherlands than in comparable other countries.

- In case the worker is sick, dismissal is not allowed;⁹ dissolution is then the only way to terminate the contract. Sometimes workers get sick during the BBA-procedure. In order to prevent further delay, the employer often anticipated this by immediately starting the dissolution-procedure.

- In the dissolution-procedure the court often excepts the opinion of the employer that the contract should be ended. If the reason for termination is not very strong, this will be compensated in the sum that the employer will have to pay to the employee. But employers often prefer this above the risk that the RDA will refuse to give permission for a dismissal.

- Lawyers who advise employers often prefer the legal knowledge of the cantonal court and the correct and open procedure that they follow, above the unpredictable 'black box' of the RDA.

During the 1990s, the dissolution-procedure became so popular that, in 1998, the cantonal courts received even more requests for dissolution than the RDA's received requests for permission for dismissal. Because of the unpredictability of the severance payments that were to be granted in dissolution-cases, certain formulas were developed to calculate these payments. It was more and more criticised that there was no official recognised formula. Therefore in 1996, the Circle of Cantonal Judges (a society of these judges without any formal competence) decided to give Recommendations. These recommendations content procedural rules and a method to calculate severance payments. Today this method is generally accepted. They are used by a large majority of the cantonal courts, although formally they are not bound, since the Recommendations are no official legislation or other formal legal instrument.

Pro forma-procedures

A specific feature of the Dutch dismissal law is the practice of '*pro forma*'-procedures. This term is used for those procedures that are followed although parties agree that the employment contract should be terminated. Often such an agreement also foresees in a severance payment for the

⁹ Article 7:670 BW (Dutch Civil Code).

employee. Nevertheless, the parties follow either the RDA-procedure or the dissolution-procedure. This can be explained by the fact that the Social Security Authorities will only provide the employee with an unemployment benefit when his dismissal was not culpable. The fact that the RDA or the court has checked the ground for dismissal will easily satisfy the Social Security Authorities that such is the case. When an employer and employee just agree to terminate the employment contract without check of the RDA or the court, the question will be examined whether a prolongation of the contract could have been expected from the employee. Therefore a considerable part of the requests for approval for dismissal from the RDA and for dissolution are of a 'pro forma'-nature.

Reinforcement of the BBA-procedure

In an attempt to renew his grip on the labour market the Minister of Social Affairs and Employment tried to reinforce the BBA-procedure as 'the highway of dismissal law.' He did so in the Act on Flexibility and Security, that entered into force in 1999. The Act promoted the use of the RDA-procedure by the following means:

- The prohibition to dismiss a sick employee is no longer effective when the sickness came up after the RDA received the request for approval of dismissal.

- In case the RDA approves a dismissal purely on economic grounds, the employee is guaranteed that the Social Security Authorities will not consider his unemployment culpable.

- In case the employee gives the employer a statement of 'no objection' to a dismissal on economic grounds, the RDA will follow a short procedure and decide within a few days.

- The RDA-procedures are made more efficient.

- In case the RDA-procedure is followed, the period of notice may be reduced with one month. A minimum period of one month still has to be observed in any case.

- The dissolution-procedure is made less attractive in two ways. In case the worker is sick, a 'reintegration-plan' has to be submitted to the

cantonal court, which is a bureaucratic burden on the employer. In case the worker is granted a severance payment from the court, the unemployment benefit will not be granted, before a term is observed that is equal with the period of notice in case of an ordinary dismissal.

In practice, these attempts to promote the RDA-procedure seem to have effect. Over the year 1999, in many more cases the RDA-procedure was followed compared with the dissolution-procedure. On the other hand, the high economic growth resulted in 1999 in problems to find personnel for many employers. This also might have changed the dismissal-practice.

Other procedures

The procedures described above are the most general procedures used in labour law-practice in the Netherlands. However, it must be noted, that also other forms of informal procedures are used. The following can be mentioned:

- In the field of education, the RDA-procedure is not applicable because of the constitutional freedom of education. Therefore committees are installed by the national organisations of private schools. There are committees for the catholic, protestant and neutral private schools that decide on dismissals and other labour disputes in this field. During the last century, it is discussed whether it is possible to exclude the access to the official courts in these cases. It is also questioned that these committees have a really different approach than a court would have. Therefore it is discussed whether the system should be changed or even abolished.

- Traditionally some branches knew a system of arbitration that was obligatory in all labour cases in that field. Especially in the printing branch this was a well-known phenomenon. However, employees can only be obliged to use this system on a voluntary base.¹⁰ Therefore, this system could only work under the regime of a 'closed shop': membership of all employers and employees to the organisations that agreed on the

¹⁰ Again, article 6 of the European Convention on Human Rights and Fundamental Freedoms guarantees access to a court.

collective agreement. The closed shop-policy however is today no longer sustainable. This is a result of more individuality among employees, but also because of the decisions of the European Court of Human Rights with regard to the freedom of union membership. Since the decline in membership in recent decades, this system is gradually weakened also in branches where it was based on a long tradition.

- In collective labour law, arbitration committees in case of disputes on the interpretation of collective agreements are often provided. They deal with conflicts between the parties to the collective agreement (employers and unions). Sometimes also individual members may consult the committees. Often employers and unions may appoint one member of the committee and the two together appoint an independent chairperson. Decisions are made on the basis of the rules foreseen in the collective agreement, which are often unspecific.

- Also committees are active in case of a restructure of a company. Employer and unions use to agree certain conditions for the employees in a so-called 'social plan.' Often the social plan also foresees in a committee that can decide on conflicts that may arise during the process. The committees are often composed in the same way as the above-mentioned arbitration-committees.

- In most disputes with regard to the rights of works councils the cantonal court is competent. But in these cases, the parties usually first must ask mediation and advise of a so-called 'industrial committee' (bedrijfscommissie). This committee is composed of an equal amount of members of management and labour in a specific branch. Because of its bipartite composition, it is often not possible to reach a unanimous opinion within the committee. Although their work might contribute to the final decision of the court, there are many critics to their actual functioning.¹¹

- The General Act on Equal Treatment¹² prohibits discrimination in several fields with regard to religion, conviction, political opinion, race, gender, nationality, sexual orientation or civil status. The Act also fore-

¹¹ J.C.M. van Horne, *In het voorportaal van de rechter* (Sdu; Den Haag 1997).

¹² Algemene Wet Gelijke Behandeling.

sees in a Committee on Equal Treatment.¹³ The Committee can examine whether a distinction is being made that is contrary to that Act or certain articles of the Civil Code.¹⁴ Although the Committee can not give binding decisions, it is often consulted, sometimes by both parties together. Its opinions are published in yearbooks, that can help to prevent discrimination and to decide which distinctions are allowed and which are not. However, the courts do not always follow the opinions of the Committee.

- During the first year of sickness of the employee, the employer has to pay wages. However, it is possible that the company-doctor does not recognise the illness. In that case, the employer may stop the payment of the wages of the worker. The employee who wants to appeal against this, is required to ask an advisory opinion from the doctor of the Social Security Authorities. This advice will help the cantonal court to take a decision on the matter.

- In case of violation of the Health and Safety Act (*Arbeidsomstandighedenwet 1998*) or Working Hours Act (*Arbeidstijdenwet*) employees can file a complaint to the Labour Inspectorate of the Ministry of Social Affairs and Employment (*Arbeidsinspectie*). This inspectorate is empowered to give instructions to employers to obey the law. If an employer fails to do so, the Labour Inspectorate may make an official report and handle the case over to the prosecutor to start a criminal case. However, the prosecutor has a wide margin of discretion ('principle of opportunity') and many cases are dismissed because of fear that the case is not hard enough to lead to a conviction by the court. However, since 1999, the Labour Inspectorate is also enabled to force the employer to pay fines in case of smaller offences. If the employer does not want to accept this, it is up to him to go to the court. This will probably make the activities of the Labour Inspectorate more efficient and effective.

- Some of the bigger companies know a system of internal grievance-procedures. It implies that an employee may file a complaint against his

¹³ Commissie Gelijke Behandeling.

¹⁴ These articles 7:646-648 BW (Dutch Civil Code) foresee in a prohibition of discrimination on grounds of sex and part-time-work.

superior, a colleague or his treatment by the company. Normally an independent committee is treating the complaint and will advise how to respond to it. This system is useful for smaller disputes that do not justify to go to a court. Attempts to give these procedures a legal basis failed during the last decades.

- The actual tendency to promote mediation as a special form of alternative dispute resolution seems not to be too popular in labour law. Probably this is caused by the many procedures that already exist. Another explanation is the need for the employee that the official procedures are followed in dismissal cases, in order to obtain an unemployment benefit.

C. DEVELOPMENTS

The Dutch Government is undertaking a major reform of the judicial organisation. Part of this project is the integration of the cantonal courts with the district courts. This would make the judicial organisation more uniform and transparent, and give it a better administrative organisation. This plan was criticised, because of the fear that the district court procedures are more time consuming, costly and because the place of these courts is often further away from the citizen. Also the judges of the cantonal courts resisted heavily against the integration in the bigger and more bureaucratic district court organisations. Therefore, the government found a compromise: the cantonal courts organisation will become member of the district court-organisation, but the judges will continue to work separated from the other district court judges and within their traditional court houses in small places. In practice, it will imply that the integration will be introduced more smoothly. Decisions in appeal will be attributed to the Courts of Appeal. The operation should enter into force at January 1, 2002, but the legislation has still to pass both Chambers of Parliament. The practical consequences of this development for the need for informal procedures are not clear. Part of the project is also a modernisation of the Code on civil procedures in order to speed up civil court procedures. It

will depend on the success of these efforts how popular the formal procedures will become.

During the discussions on the Act on Flexibility and Security in 1998, both Chambers of Parliament opposed to the present complicated system of procedures in dismissal-law. The Second Chamber (Lower House) forced the Minister to examine whether there should be a change in the system of severance payments. The First Chamber (Senate) went even further and forced the Minister to install an Advisory Committee on the so-called 'Dual System of Dismissals.'¹⁵ This Committee reported in November 2000. The title of the report is clear: 'Farewell to the Dual System of Dismissal Law.'¹⁶ Its advice promotes the abolition of the previous check on dismissals by the government. It should be replaced by a hearing of the worker by the employer in the presence of a counsel. The report is now under consideration in several bodies, like the Foundation of Labour (central organisations of employers and unions), the National Social Insurance Institute, the Dutch Society of Judges and the Dutch Bar Association.

3. The Japanese system

A. THE FORMAL SYSTEM

In Japan, civil labour disputes can be brought in first instance for the District Court. This is the ordinary court for all civil and criminal cases, except those specifically stipulated by law to fall under the jurisdiction of other courts. Most cases are handled by a single judge, serious cases by a panel of three judges. In appeal the High Court is competent. Here, a panel of three judges decides cases. Finally, appeal in cassation is allowed to the Supreme Court. The Supreme Court decides either by the Grand Bench (full court, in principal cases) or a petty Bench (three judges). The Supreme court only decides on constitutional questions and questions of

¹⁵ Adviescommissie Duaal Ontslagstelsel (ADO).

¹⁶ Adviescommissie Duaal Ontslagstelsel, *Afscheid van het duale ontslagrecht* (Elsevier; Doetinchem 2000).

law. Finding of facts is limited to the courts of first and second instance. Violations of the Labour Standards Act and the Trade Union Act are also falling under criminal law. Principally, the same courts are competent.

Procedures may take three to four years, during which every one or two months hearings are held, to hear witnesses. Parties use to defend their interests very extensively, because of the important interests that are at stake. Although legal representation is no condition, usually a lawyer represents the parties. In case a provisional decision is requested, in principle no full procedure with exhausting evidence gathering is necessary. However, in dismissal cases the court usually organises hearings and asks for proof, which makes that these procedures often take a year. These provisional decisions are in principle temporarily and may set aside afterwards by an ordinary procedure in the same case. But like the Dutch 'kort geding'-procedure, it often foresees in a permanent solution because parties accept it. However, in principle the provisional decision-procedure is submitted to the aim to preserve the pretended rights in order to enable the parties to enforce them in the ordinary procedure. One must prove that future rights are threatened, and make clear that there is a reasonable chance that they will be recognised in a ordinary procedure. It must also be possible to decide the question quickly.

Japan traditionally has a low litigation rate. The reasons for this are usually sought in the fear for disturbance in the labour relation that is caused by the starting of a procedure. However, the number of labour cases before the courts has been increasing rapidly in recent years.

Table: Number of Labour-related civil cases received by Courts (All instances), selected years¹⁷

	Regular procedure	Provisional decision
1956	91	286
1966	627	605
1976	887	1070
1986	1043	806
1990	1035	426
1991	1099	445
1992	1523	555
1993	2110	716
1994	2523	836

B. THE INFORMAL SYSTEM

The most important system of informal procedures in Japan is based on the Trade Union Law. Directly after World War II the Authorities of the Allied Forces governed Japan. In order to break the power of the Japanese War industry and to democratise Japanese society, they promoted the introduction of trade unions in Japanese companies. In order to protect the new unions, the Trade Union Law foresaw in procedures against employers who suppress unions, the so-called ‘unfair labour practices.’ To this end 47 local Labour Relations Committees are installed and one Central Labour Relations Committee in Tokyo.¹⁸ They decide in collective (trade union as a whole) as well as individual (for instance dismissal related with union activities) cases.

¹⁷ Nakakubo 1996, source: *Hōsō Jihō* [Lawyers Associations Journal] Vol. 47, no. 7 (1995) 169.

¹⁸ Besides this, special Labour Relations Committees exist for seafarers and local and central Labour Relations Committees for Government Enterprises. A National Personnel Authority handles complaints of civil servants.

The local and central Labour Relations Committees are independent government-committees, composed of members who represent respectively labour, management and the general interest. The last members are practising lawyers and university professors. The president is appointed from this group. The employee and employer-members are usually officials from trade unions and employers associations of managers of middle-sized and big companies. The members fulfil this task part-time. The Labour Relations Committees deal with individual and collective cases. Individual employees as well as unions can start the procedure.

The decisions of the Labour Relations Committees are binding for the parties. If a party disagrees he may appeal to the Central Labour Relations Committee. The appeal to the District Court is possible after the decision in first instance of the local Labour Relations Committee, as well as after the decision of the Central Labour Relations Committee. It is possible that two decisions of Labour Relations Committees are followed by three decisions of ordinary courts in the same case. These appeal procedures are cases against the (Central) Labour Relations Committee. The administrative procedural law is applicable.¹⁹

There is no provisional decision foreseen, but the Labour Relations Committees may give advice or recommendations. If parties follow these, they do so voluntarily. But if the employer appeals to the District Court, the possibility exists that the Labour Relations Committee asks for a specific type of provisional decision, the so-called 'kinkyū meirei.' In this procedure the court can order the employer to obey the decision of the Labour Relations Committee for the time of the appeal-procedure.

The procedures before the Labour Relations Committees were originally seen as an informal procedure that could lead to a decision in a short time. In practice, the procedure is formalised, and it takes as long as a provisional decision by the court. In every case three members are appointed to hear the case: one general interest-member, one employer-member and one employee-member. They organise sessions that are

¹⁹ Also criminal cases against the employer because of violation of the Trade Union Act or Labour Standards Act are possible. They fall outside the scope of this paper.

open to the public. There is an extensive examination of evidence and both parties are represented by lawyers. Also because the members of the Labour Relations Committee do this work next to their ordinary work, it takes a lot of time to organise the sessions. For a dismissal case because of discrimination on ground of trade union-membership, usually three to four sessions are held to hear witnesses. Because of the loaded agenda of the members, one month lies between every two sessions. The formalisation is encouraged by the fact that full judicial review by the ordinary courts afterwards is possible. The Labour Relations Committees are therefore afraid to make mistakes.

The most important reason to bring the case before the Labour Relations Committee instead of going directly to a court, is the fact that the Committees more often succeed in mediation. A dismissal case before the court leads to a formal decision. If the employer loses the case he will usually go in appeal. Thus, it may take years before the final decision is made. This leads to a long period of uncertainty. Eventually, if the case is lost, it will lead to high proceeding costs. It even takes very long to get a provisional decision. In the Japanese system of lifetime employment, it is also important for the employee not to lose his job. He is more served with a settlement that will give him his job back, than with a financial compensation.

As a result of the work of the panel of three members of the Labour Relations Committee, in practice 70% of the cases are settled. In 40% of the cases this happens in the presence of the panel. In the other 30% of the cases parties settle themselves, but often on the basis of suggestions from the panel. A settlement may imply a withdrawal of the dismissal, a renewed employment, a 'voluntary' retirement after withdrawal of the dismissal or an acceptance of the dismissal. In the last cases the employee will collect a considerable amount of severance payment to compensate the dismissal.

However, it must be noted that also the ordinary courts consider it as important to achieve a settlement. It turns out that 43% of the ordinary civil cases and 30% of the provisional decision-cases lead to a settlement

during the hearing. Besides this, 24% of the ordinary civil cases and 23% of the provisional decision-cases are withdrawn because a settlement is reached outside the hearing. Judges are actively striving for this result, because of their conviction that in labour disputes this is the best solution.

The following table makes clear that the differences are not as big as the preference for the Labour Relations Committee-procedure suggests:

	Settlement in hearing	Settlement outside hearing	No Settlement
Courts—regular procedure	43%	24%	33%
Courts—provisional decisions	30%	23%	47%
Labour Relations Committees	40%	30%	30%

The number of cases before the Labour Relations Committees (a few hundred every year) have been declining over the last years. The importance of the Committees in individual cases has become less important.

Besides this, there is also an informal procedure on the basis of the Act on Equal Treatment. In every prefecture exists a Women's and Young Worker's Office. The director of this office is competent to give advice or instructions to parties in disputes with regard to gender discrimination with regard to employment if either parties or one party asks for this. The Director is also authorised to refer the dispute to the Equal Opportunity Mediation Commission for mediation. Since a Revision of this Act in February 2000, this is possible when either one or both of the parties concerned apply for mediation and the Director considers mediations necessary to settle the said dispute (article 13, paragraph 1 Act on Equal Treatment). The Committee can make a proposal for mediation and recommend this. This procedure was not very often followed in the past, partly

because before 2000, both parties had to agree to do that. In 1996, Nakakubo reported that since the enactment of this Act in 1995 there had been only one case of initiated mediation under the Act, which also failed. Since the Revision of the Act in 2000, only the consent of one party is required. However, in the first case that was referred to the Commission after this Revision, the Japan Airline Affaire, the parties refused to accept the proposal of the Commission.²⁰

C. DEVELOPMENTS

In Japan, just like but even to a larger extent than in the Netherlands, employees are reluctant to go to a court. This gives a need for simple systems of dispute resolution. Therefore, since October 1, 1998, a new system of administrative assistance for dispute resolution was introduced by an amendment of the Labour Standards Act. Article 105-3 now provides that the chief of the Prefectural Labour Standards Office may give advice or instruction regarding a dispute over working conditions if one or both parties to the dispute ask for assistance in its resolution. The Labour Standards Inspection offices were in the past rather inspecting agencies than neutral dispute resolution bodies. Their jurisdiction is also limited to matters specifically regulated under the Labour Standards Act. They may not exercise authority over disputes including such issues as whether a discharge is an abuse of the employer's right, since the Act does not have a provision regulating reasons for discharge. The jurisdiction of the new system is still limited because it does not cover disputes with regard to equal employment opportunity, over which the Women's and Young worker's Offices have jurisdiction.

In 1998 a rewritten Civil Procedure Code was introduced. This new Code established small claim procedures covering cases under 300.000

²⁰ With thanks to Professor Kanto OWADA of Shiga University, for providing this information.

Yen.²¹ The cases are heard and decided within one day. This could be interesting for labour disputes as well.²²

4. Comparison and evaluation

Japan and the Netherlands both have several informal procedures, next to the ordinary formal procedures. Although part of the *raison d'être* of the informal procedures are the shorter period they are supposed to take, the practice in both cases is not that simple. This explains why in both countries formal as well as informal procedures are chosen by parties for strategic reasons.

Japan's most important informal procedures are with regard to unfair labour practices, which is related to union discrimination. In practice, this has been developed into a procedure with a wider scope. In the Netherlands, the RDA dismissal-procedure is the predominant informal procedure. In both cases, the informal procedure is not an initiative of private parties, but officially promoted by the government.

The distinction between formal and informal procedures is often not so large: formal procedures in labour law are made more accessible with informal elements; informal procedures tend to formalise. A high case-load may lead to further formalisation (more rules of procedure, more substantive rules for predictability, less place for equity). In practice the difference between the two seems often marginal.

A specific element is the participation of social partners (employers and unions) in making case-law. In the informal procedures like the RDA-procedure in the Netherlands and the Labour Commissions in Japan, there is some involvement of social partners. The purpose of this element may be twofold: on the one hand it aims to guarantee that the decisions substantially are in line with the needs of practice, and that the decision-makers are aware of the relevant labour relations, customs, and

²¹ See also the contribution of Professor OKINO to this publication.

²² With thanks to professor Takashi ARAKI of Tokyo University for some information on actual developments.

industrial problems. On the other hand their presence should shape confidence in the bodies that decide. The fact that both interest groups are represented will make the decisions more acceptable in itself. With a paraphrase on the famous criterion for the impartiality of judges: justice must not only been done, but also seen to been done (by the social partners). Whether this involvement in practice really is so meaningful, is often a well-kept secret.²³

The reason to choose for informality in Japan is often that it improves the chances for a successful mediation. In the Netherlands, mediation is becoming more popular today. However, in individual labour disputes it is not often used. The reason is, that in case of dismissal the Social Insurance Authorities will demand that the official (formal or informal) procedures are followed. It may be worthwhile to examine how mediation in the Netherlands Labour Law could get more support.

In the end it may be concluded that both Japan and the Netherlands do still not have found the definitive receipt for a satisfying way of solving labour disputes informally and rapidly. The introduction of more internal complaint procedures could be helpful in the Netherlands. Mediation may become of increasing importance in both countries in the future.

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²³ In 1994, the lay-participation in the Social security Tribunals was abolished in the Netherlands as a result of the integration in the administrative Chambers of the ordinary courts. Research had showed that the influence of the lay-judges had been only marginal: N.H.M. Roos, *Lekenrechters* (Kluwer; Deventer 1982).

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