Resolution of Disputes in the Context of Labour and Employment Relations: the Example of Germany.

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I. Introduction

A well known and distinguished German scholar, Franz Gamillscheg, wrote in an article in 1964, "the judge ist the real master of (German) labour law."[1] Of course, this is only a metaphor, but is often quoted as such and, in my view, it contains more than a grain of truth as it describes quite correctly one essential element of our labour law culture. In fact, Labour Courts play a major role in our practice of "industrial relations." Without going into depth, I will just indicate that with about 630.000 per year (2003) the number of legal actions in Labour Law in Germany is roughly 15 times as high as the corresponding number in Great Britain.

This might scare rather than convince you as an argument that our system of conflict resolution, or at least some of its elements, could serve as a "model" for other countries. But I can assure that, according to the overwhelming opinion of the experts and despite all criticism in detail, conflicts in labour law are resolved by the Courts rapidly and in a satisfying manner. I will give you some statistics on this later.

Before dealing with our Labour Courts, I would like to emphasize that Courts do not hold a "monopoly position" for the resolution of labour law conflicts. In fact there are different instruments or bodies of labour law resolution depending on the nature of the conflict.

II. Different Instruments/Levels of Labour Law Resolution.

1. Collective Bargaining Resolutions Arranged by an Agreement

To understand German labour law and by that labour law resolution one must keep in mind that Labour Courts are competent for conflicts involving *individual and collective rights*.

A large number of conflicts however do not concern *legal disputes (Rechtsstreitigkeiten)* but serve to balance interests, the so-called *settlement disputes (Regelungsstreitigkeiten)*. Think for example of a conflict between a union and employers' association or an individual employer about a *collective*

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[1] *Gamillscheg*, Die Grundrechte im Arbeitsrecht, AcP (Archiv für die civilistische Praxis) 1964, pp. 385, 388.

agreement on the increase of wages or the duration or distribution of working time. These kinds of conflicts are not decided by the Labour Courts but are an area for *conciliation*, since a discretionary decision is involved that is taken for the purpose of expedience (except in the case of a strike which, similar to the Japanese situation, happens comparatively seldom).

I would like to stress that, despite all criticism, collective agreements still leave a strong mark on our labour law reality. There are about 60.000 in effect and the issues range from wages or working hours to settlements on job security, qualification etc.

A *typical resolution* of bargaining *conflicts about collective agreements* consists in prior agreements, signed by the parties involved-, union and employers' association or an individual employer-, and containing the proceedings how and by whom the conflict is to be settled. So, just to give you an example, these agreements establish rules about the organs of a *conciliation board (Schlichtungsstelle)* including an impartial chairman, the initiation of conciliation proceedings (automatically or through invocation by one side), the effect of conciliation (binding or not) etc. All this is strictly volontary, as indicated, based on an agreement of the parties of a collective agreement and *is not the matter of Labour Court decisions*.[2]

2. The Conciliation Committee, Resolving Disputes on Work Agreements

As you certainly know, in Germany, apart from and at the same time additionally to collective agreements, so-called *work agreements* exist. Work agreements are similar in their effect to collective agreements in many ways. The parties, however, are the work committe elected by all employees and not only by the union members and the employer of the respective company.

Conflicts are resolved by a so-called *conciliation committee* (*Einigungsstelle*) that can be described as an "institutional company-internal conciliation proceeding." The prerequisites for this type of concilation are that the work council has co-determination rights, above all with respect to the so-called "matters of social concern" from Section 87 of the Works Constitution Act, e.g. organisation of the company, distribution and to a limited extend, the scope of work hours and wage issues, and with respect to the so-called "social plan" in accordance with Section 111 of the Works Constitution Act (which, amongst other things, provides for compensation payments in case of the dismissal of a large number of employees).

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[2] In more detail, *Zachert*, Labour conciliation, mediation and arbitration in Germany, in Labour conciliation, mediation and arbitration in European Union Countries, ed. Fernando Valdés Dal-Ré, 2003, pp. 171.

Generally, the internal conciliation committee is set up anew *from case to case*, which is to say a board is established for each conflict, and ceases to exist when the conflict has been settled: Section 76 Works Constitution Act. The conciliation committee consists of an equal number of members named by the the works council on one side and the employer on the other. Depending on the difficulty of the case there are often two or three members from each side.

Normally, the biggest problem is agreeing on an impartial chairman who tips the scale if doubts exist on the vote of the conciliaton committee. If the parties cannot agree on the person, then he or she is appointed by the *Labour Court*, wich receives proposals from both sides, the works council and the employer. The same occurs in case of a dissent regarding the number of the committee members: Section 98 Labour Court Act (Arbeitsgerichtsgesetz).

Conciliation committee procedures themselves are quite informal. The Works Constitiution Act establishes only a few framework procedures. In its decisions, the conciliation committee must consider the interest of the company, which means weighing economic interests and the social concerns of the employees and striking a balance between them. If the conciliation board exceeds its authority, e.g. uses co-determination rights as a basis when the works council is not entitled to them, then the results may be annulled by the Labour Courts. The same applies if the conciliation board exceeds the limits of its discretionary power: Section 76 par. 5 Works Constitution Act. These are the so-called "*order procedures" (Beschlussverfahren*), according to Section 2a of our Labour Court Act.

Studies have shown that conciliation committees are in a position to resolve internal conflicts practically, and within a short time.[3] The advantage of these proceedings is that the conciliation committee has more direct access to internal conflicts of the company than the Labour Court (however, mostly the chairman of the committee is a labour judge). Meetings are held at the company and negotiations are conducted -in a figurative sense- at "the round table." After all, the conciliation committee follows the logic of the German Works Constitution Act, which is based on discourse and consensus between the parties. *Labour Courts* in these cases, play a kind of "*guardian role*" so that the system of co-determination, which, in general, follows the principal of auto-regulation may work out well.

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[3] Documentation in *Pünnel/Isenhardt*, Die Einigungsstelle des BetrVG, 1972, 4th. ed. 1977 pp. 5, Rn. (border number) 6 following.

The by far greatest number of Labour Law conflicts, however, regard *individual disputes*, the so-called "*Judgement Procedures" (Urteilsverfahren)* according to Section 3 Labour Court Act. I will deal with this point that certainly is of a special interest to this conference later on. Beforehand I would like to give a short overview on the history of our Labour Courts' jurisdiction.

III. History of Labour Courts – Overwiev

The idea to have labour disputes decided by special Courts with the participation of representatives of employers and employees dates back to the time of French Revolution (see actually "les conseils de prud'homme" in France).[4]

An obligation for the creation of Courts, responsible for disputes between employers and their workers in trade and industry or commercial clerks, however, was established in the German empire only in 1890, and in 1904 for municipalities with more than 20.000 inhabitants. These so-called *Trade and Commercial Courts* existed until the period of the Republic of Weimar (1918 – 1933).

In 1926 the *Labour Court Act* entered into force. This act established, for the first time, a comprehensive jurisdiction for all individual labour disputes and labour disputes with regard to collective agreements. A higher level instance of appeal was established for ensuring unity of jurisdiction. The trade unions considered this introduction of an independent jurisdiction in labour matters as a success. The new Labour Courts were divided into three instances. The *Labour Courts* (*Arbeitsgerichte*), as the first instance, were organisationally completely autonomous. The *Regional Labour Courts* (*Landesarbeitsrgerichte*) were, as second instance, affiliated to the Regional Courts. Both were composed by a professional judge and two honoray judges, each on the proposal of the unions and the employers associations. The *Supreme Court* (*Reichsarbeitsgericht*), with its seat in Leipzig, was attached to the the Supreme Court (Reichsgericht) of the German Reich.

After 1945, autonomous jurisdiction in labour law was established again, even if it was initially limited to the first and second instances.

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[4] From the numerous articles on the history of labour law jurisdiction, see only recently *Linsenmaier*, Von Lyon nach Erfurt – Zur Geschichte der deutschen Arbeitsgerichtsbarkeit, Neue Zeitschrift für Arbeitsrecht (NZA) 2004, pp. 401; for the history of the legal protection by the unions: *Tenfelde*, Die Entstehung des gewerkschaftlichen Rechtsschutzes in Deutschland 1894 -1933, Arbeit und Recht (AuR) 1995, pp. 289.

Since 1953 the new Labour Court Act is in force. This Act sets up a complete autonomy of jurisdiction in labour law matters with respect to the ordinary judiciary and, with some "pushes of modernisation" (namely in 1979 with the purpose of accelerating proceedings), has remained unchanged in its structure until now. The seat of the *Federal Labour Court (Bundesarbeitsgericht*) was Kassel in North-Hesse until 1999 and, after unfication (in 1989) was moved to Erfurt, in Thuringia, one of the new Länder of the Federal Republic in East Germany.

IV. Competence and Structure of Labour Law Jurisdiction

1. Competence of Labour Law Jurisdiction

As mentioned (see chapter II. 1), labour law jurisdiction is competent for individual and collective conflicts.

The by far most frequent legal actions in numbers are the disputes on *individual matters* according to Section 2 para. 1 no. 3 Labour Court Act. This article defines that the Courts for labour matters have exclusive jurisdiction in civil litigation between employees and employers

a) relating to the employment relationship;
b) regarding the existence or non-existence of an employment relationship;
c) relating to negotiations as to the entering into an employment relationship and relating to its subsequent effects;
d) relating to torts insofar as they are related to the employment relationship;
e) regarding employment records...

Among these types of conflicts actions against *unfair dismissals* amount to around 60 % whereas around 30 % are disputes on *wages*.[5]

Even if, in view of the total workload of the Labour Courts, cases dealing with *matters on collective labour law* only represent a small proportion, Labour Courts' activities are also very important in this field.[6] Section 2 para. 1 no. 2 Labour Law Act stipulates that Courts for labour matters have exclusive jurisdicition in civil litigation

- between parties to a collective bargaining agreement or
- between them and third parties relating to the collective bargaining agreements or

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[5] *Grotmann/Höfling*, Zur Lage der Arbeitsgerichtsbarkeit im Jahr 2000, Zeitschrift für Rechtssoziologie 1997, pp. 205, 209.

[6] See *Weiss*, Labour Law and Industrial Relations in Germany, 1995, p. 200.

- as to the existence or non-existence of collective bargaining agreements.

It has already been mentioned (chapter II. 1) that apart from these so-called *"judgement procedures"* (*Urteilsverfahren*), also the so-called *"order procedures"* (*Beschlussverfahren*) are within the competence of Labour Courts. Section 2 a para. 1 no. 1 Labour Law Act determines that additionally the Courts for labour matters have exclusive jurisdiction over matters relating to the Works Constitution Act.

The "judgement procedures" differ from "order procedures" amongst other things by some rules of procedure, e.g. for "order procedures" applies the principle of official investigation (Untersuchungsgrundsatz).

2. Structure of Labour Law Jurisdiction

Labour Law jurisdiciton has a *three-level* structure.

According to Section 14 following Labour Law Act, in *the first instance Labour Courts* (*Arbeitsgerichte*) decide the case. They are composed of one professional judge as presiding judge and two honorary judges coming from the ranks of employees (generally on the proposal of the unions) and employers (generally on the proposal of the employers associations): Section 23 Labour Law Act.

Everyone may appear himself or have himself represented before the Labour Court, for example by a lawyer. In particular however, the empoyee may have himself represented by his trade union, and the employer may himself represented by a representativ of his employers' association: Section 11 para. 1 Labour Court Act. Because of the permanent appearence before Labour Courts and their familiarity with working life, representatives of the trade unions and the employers' associations are especially well suited for the representations of this type.

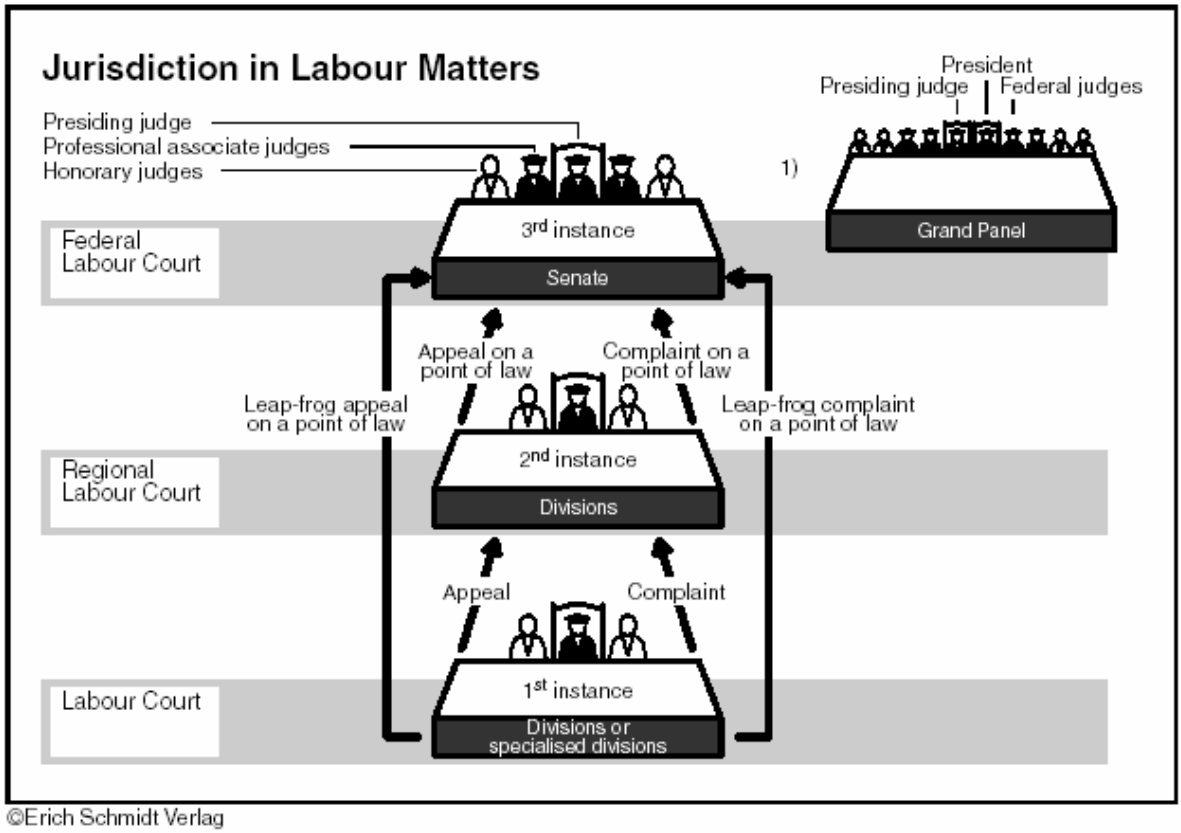
C*onciliation proceedings* (*Güteverfahren*), presided only by the professional judge (not the two honorary judges), are obligatory. If there is no compromise, the judge fixes the date for the full session of the chamber: Section 54 following Labour Court Act.

In *the second instance* the *Regional Labour Courts* (*Landesarbeitsgerichte*) decide. They are also composed of one professional judge and two honorary judges coming from the ranks of employees and employers respecivly. In proceedings leading to a judgement, the parties must have themselves represented by a representative of an employers' association or of a trade union or by lawyers: Section 11

para. 2 Labour Court Act. The preriquisits to grant leave to *appeal* (*Berufung*) are stipulated in detail in Section 64 Labour Court Act.

The third instance is the *Federal Labour Court* (*Bundesarbeitsgericht*), since 1999 in Erfurt/Thuringia (see chapter III). The present ten senates of the Federal Labour Court consist of three professional juges and two honorary judges coming from the ranks of employees and employers respectively. The reason why the ratio between professional and honorary judges is different to the first two instances is that the third instance, the *Court of last resort* (*Revisionsinstanz*), exclusively decides on law not on facts. In these proceedings, the person concerned must have himself/herself represented by a lawyer: Section 11 para. 2 Labour Law Court. The prerequisites to grant leave to *appeal on a point of law* (*Revision*) are stipulated in detail in Section 72 Labour Law Court.

The structure of German Labour Law Jurisdiction is illustrated in the following diagram:



1) Composition from January 1, 1992 onwards:President, one professional judge per panel where the president is not the presiding judge and three honorary judges per panel.

V. Some Empirical Facts and Outlook

Judgement Procedures of *Labour Courts*	1995 (new entry)	627.935[7]
	1996	675.637
	1997	661.185
	1998	584.686
	1999	568.469
	2000	569.161
	2001	598.732
	2002	625.323
	2003	630.666
Order Procedures of Labour Courts	1995 (new entry)	10.224
	1996	9.649
	1997	8.800
	1998	9.245
	1999	9.746
	2000	9.457
	2001	8.697
	2002	10.304
	2003	12.709
Appeal proceedings to Regional Labour Courts		
	1995 (new entry)	25.336
	1996	25.917
	1997	28.477
	1998	28.064
	1999	25.095
	2000	23.023
	2001	21.916
	2002	21.280
	2003	23.571

[7] The following is based on the statisics of *Grotmann-Höfling*, Arbeitsgerichtsbarkeit im Lichte der Statistik, AuR 1997, pp. 268; 1997 pp. 474;1998, pp. 394; 1999, pp. 335; 2001, pp. 54; 2002, pp. 90; 2002, pp. 449; 2003, pp. 416; 2004, pp. 406.

Appeal proceedings on point of law to the Federal Labour Court

1995		1.039
	(new entry)	910
1996		1.803
	(new entry)	812
1997		1.632
	(new entry)	774
1998		1.792
	(new entry)	no data
1999		1.540
	(new entry)	700
2000		1.534
	(new entry)	762
2001		1.485
	(new entry)	709
2002		1.538
	(new entry)	695
2003		1.565
	(new entry)	676

Just to draw some conclusions and to give some further information, I would like to emphasize the following points.

Firstly the number of legal actions in all type of procedures and all instances was *relatively* stable over the years. But it is not contested that the state of economy, namely the situation of the labour market, has an impact on the number of legal disputes in labour law. The number of legal actions is in some way anti-cyclical to the economic situation. The worse the situation is on the labour market, the higher is the strain on labour judges. So the number of new actions in "judgement proceedings," of which more than 60 % are actions against unfair dismissals (see chapter IV. 1), increased by about 5% to 6% from 1999 (568.469) to 2001 (598.732).[8] The statistics prove that this evolution continues.

[8] See e.g. *Grotmann-Höfling*, Die Arbeitsgerichtsbarkeit im Lichte der Statistik, AuR 2002, p. 416, 417.

Secondly, only 3,7 % of all Labour Law proceedings go to appeal and just 0,24 % to appeal in point of law.[9]

Thirdly, compared to other branches of judiciary, the duration of Labour Court proceedings is short. This should be demonstrated by the example of *protection against unfair dismissals*, which, over the last years, scientifically was thoroughly examined.[10]

In contrast to a wide spread opinion, the "job turn-over rate" in Germany is high. Around four million people, that is between 10 % and 13 % of all employees, loose their job each year and (most of them) are newly employed.

Of about 300.000 actions against unfair dismissals roughly 90 % are not finished by a judgement but by an *amicable settlement*, suggested by the judge and terminating the labour contract in exchange for a compensation pay. Around 70 % are brought to an end during the conciliation proceedings (Güteverfahren) after *three months* and nearly 90 % after *six month*s.

Forth, it may be interesting to mention that 2/3 of dismissals are those for "economic reasons", whereas only 1/3 are "related to the person" or "the behaviour of the employee". 20 years ago the share of dismissals for economic reasons accounted only for 1/3 of all dismissals.[11]

Fifth, conflicts in large companies with a good "human relation management," including a structure of co-determination, are less frequent than in other (small) companies.[12]

Sixth, Labour Court proceedings are not only rapid but also cost effective. Different to other branches of jurisdiction, e.g. in civil procedure, each litigating party bears its own costs, regardless of whether it wins or loses the action. However the parties do not pay any costs or charges if they are member either of the union or the employers association since the legal representation in Labour Court is covered by the membership fee.

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9 *Lipke*, in „Große Justizreform", Informationen zum Arbeits- und Sozialrecht, ed. Deutscher Gewerkschaftsbund, Bundesvorstand 8/2005, pp. 19, 20.

10 For the following, *Pfarr/Ullmann/Bradtke/Schneider/Kimmich/Bothfeld*, Der Kündigungsschutz zwischen Wahrnehmung und Wirklichkeit, 2005, pp. 44.

11 For the reasons, *Pfarr/Ullmann/Bradtke/Schneider/Kimmich/Bothfeld*, op. cit., pp. 52.

12 See also *Grotmann-Höfling,* Prozessflut und kein Ende, Betriebsberater (BB) 1996, p. 1996, 158, 162 with references.

All these are only some facts and arguments, why in my view proposals to integrate Labour (and Social) Court Jurisdiction into "ordinary jurisdiction" should be rejected.[13] German "structures of industrial relations", of which Labour Courts and other bodies to resolve conflicts are an essential part, prove themselves much more flexible and effective than scholars and other experts often pretend.

[13] E.g. recently, Informationen zum Arbeits- und Sozialrecht, ed. Deutscher Gewerkschaftsbund, Bundesvorstand, 8/2005 with contributions of different authors; this "merger" has already taken place in some "Federal States".