

RECENT DEVELOPMENTS IN GERMAN LABOR LAW: FREEDOM OF ASSOCIATION, INDUSTRIAL ACTION, AND COLLECTIVE BARGAINING

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I. INTRODUCTION

"America needs strong unions balanced by strong employers, each able, if necessary, to resist the unjust demands of the other."¹ If one agrees with this dictum attributed to Justice Brandeis, one probably would think that it also applies to Germany. A predominant feature of the structure of German labor and employment law is that it has no single format established by the government. The content of German labor and employment law, as well as working conditions, are determined not only by legislators, but also, to a large extent, by trade unions and employer organizations. As parties involved in negotiating and completing collective agreements, trade unions and employer organizations are bound by the Basic Law of the Federal Republic of Germany (Germany's written constitution) to lay down comprehensive terms and conditions of employment and to adjust these terms and conditions continually to suit prevailing economic and social developments. German trade unions and employer organizations work independent from governmental influences, but still operate within the framework of the constitution and current legislation.

The terms and conditions of employment set forth in collective agreements apply only to employers and employees who are members of the organizations concluding the agreements.² However, in practice, collective agreements are also largely extended to cover all other employment contracts.³ Thus, unions and employer associations are important and

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1. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 149 (1946).

2. See *Tarifvertragsgesetz*, art. 3, § 1 [Collective Agreement Act], v. 8.1969 (BGB1. I Nr. 83 S.1323) [hereinafter *Tarifvertragsgesetz*]. Members of the parties to a collective agreement and the employer who is himself a party thereto shall be bound by the collective agreement. See *id.*

3. According to German law, every employee has an employment contract. This contract may be in oral, or as in most cases, in written form. As a rule, presumably more than 90% of the time, the employment contract refers to a collective agreement. Where an oral contract is concluded, the employee whose contract is not limited to one month and

powerful organizations in Germany.

Due to its nationally-centralized format and high degree of organization, as compared to the United States,⁴ the German workforce exhibits an impressive number of union members. In fact, the largest union in the world is the *Industriegewerkschaft Metall* (the German metal workers union), which has more than three million members. Collective agreements with this union determine the working conditions for an entire branch of German industry. Those involved in reaching collective agreements are primarily responsible for creating a uniform standard of terms and conditions of employment, and they, therefore, assume a particular responsibility extending beyond union relations.

The preceding summary of German labor law indicates the importance of the law of collective bargaining in Germany and the role of the law of industrial action. Both areas of law have developed mainly through judicial decisions because every effort in the past to enact statutes concerning strikes and lockouts has failed and because the Collective Agreement Act⁵ regulates only the most fundamental questions, explicitly leaving many other questions open. Therefore, describing recent developments in the German law of industrial action and collective bargaining requires an examination of recent court decisions.

II. FREEDOM OF ASSOCIATION AND THE NEW INTERPRETATION OF ARTICLE 9, SECTION 3 OF THE BASIC LAW

The freedom of association in Germany is granted by the Basic Law of the Federal Republic of Germany:

The right to form associations in order to safeguard and improve working and economic conditions shall be guaranteed to every individual and all occupations and professions. Agreements restricting or intended to hamper the exercise of this right shall

exceeds a weekly working time of eight hours has a claim against the employer to get a document listing the main duties and rights of his employment contract. See *Nachweisgesetz*, § 1 [Act on the Notification of Conditions Governing an Employment Relationship], v. 20.7.1995 (BGBl. I S. 946). See also GÜNTER HALBACH ET AL., *LABOUR LAW IN GERMANY: AN OVERVIEW* 55-57 (5th rev. & extended ed. 1994) (providing an excellent introduction and summary of German labor and employment law).

4. Though the rate has been declining, about 30% of the German workforce belongs to a union. See GREGOR THÜSING, *DER AUßENSEITER IM ARBEITSKAMPF* 17 (1996). In the United States, union membership is about 17.7%. See MICHAEL HARPER & SAMUEL ESTREICHER, *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 113 (4th ed. 1996). About 80% to 90% of employers in Germany are members of an employer organization. See THÜSING, *supra* at 21.

5. See *Tarifvertragsgesetz*, art. 3, § 1.

be null and void; measures to this end shall be illegal.⁶

Although the German Constitution mentions only the right to form associations by employees or employers, the courts have recognized that such a right would be a mere formality unless the activities of these associations were also protected, at least minimally, by law. The right to join an association which is forbidden to pursue its ends is useless, as is constitutional protection of such a mere formal right. Therefore, in 1954, the Federal Constitutional Court held that article 9, section 3 of the Basic Law also protects a minimum level of union activity and ruled that employers' associations cannot be restricted by legislation without amending the Constitution.⁷ This minimum area of activity was called *Kernbereich* (core area).

The *Kernbereich* included the right to conclude collective agreements, to strike, and to lock out.⁸ In some of the decisions that followed, the Court held that every restriction of the *Kernbereich* of union activity was unconstitutional. However, the *Kernbereich* was still construed rather narrowly and was seen to comprise only the fundamental structures of the law of industrial action and collective agreement.⁹ Numerous court decisions have stated that the activity of the unions is protected by the constitution only to the extent that must be considered as imperative for the preservation and safeguarding of the association.¹⁰ In other decisions — and sometimes even in different parts of the same decision — the Court seemed to have a different understanding of the *Kernbereich*. A restriction on protected union activities was held unconstitutional if that restriction was not justified by the legitimate intentions of the legislation, especially if it was not appropriate, necessary, and proportional to protect other constitutional rights. Using these formulations, the Court seemed to have a broad understanding of the *Kernbereich*, not as the absolute (and thus very limited) restriction on distinct kinds of state action, but as a general requirement that any restriction of

6. GRUNDGESETZ [Constitution] [GG] art. 9(3).

7. See Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 4, 96. See also HALBACH ET AL., *supra* note 3, at 303.

8. In contrast, only a few U.S. courts have found a constitutional protection of the right to strike. See ARCHIBALD COX ET AL., LABOR LAW 567 (12th ed. 1996) (referring to United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971)). See generally Charles O. Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191 (1950); Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WISC. L. REV. 149.

9. See BVerfGE 17, 319 (333). See also BVerfGE 19, 303 (322); BVerfGE 28, 295 (304); BVerfGE 57, 220 (245).

10. See, e.g., BVerfGE 17, 319 (333); BVerfGE 19, 303 (322); BVerfGE 28, 295 (304); BVerfGE 57, 220 (245).

union activities needs to be justified to be constitutional.¹¹ For almost forty years, the courts followed and affirmed the concept of *Kernbereich*, thereby establishing it as a solid foundation of German labor law.

Nevertheless, many uncertainties continued as a result of these two approaches to *Kernbereich*, largely due to the fact that they were very difficult to reconcile. In regard to these uncertainties, the Court's view changed in a decision in January of 1995.¹² The decision concerned the constitutionality of a statute regulating (and in fact hindering) collective agreements on ships run by German enterprises but sailing under foreign flags. Here, the Federal Constitutional Court declined to use the term *Kernbereich* and found instead that the ability to establish collective agreements is part of the protected freedom to act as a union and that this freedom was unconstitutionally restrained by some of the statute's provisions.¹³

Similarly, in a July 1995 decision, the Court continued to distance itself from the former approach.¹⁴ A union alleged the unconstitutionality of a statute regulating the provision of unemployment insurance to employees that, while not themselves on strike, nevertheless could not work due to a particular strike's effect on the production process. Once again the Court avoided the term *Kernbereich*, stating instead that the restraint on the rights conferred by article 9, section 3 of the Basic Law was justified by the legislative aim of protecting other constitutional rights; however, an explicit rejection of the *Kernbereich* approach as the exclusive means of protection was still absent.¹⁵

The rejection of the exclusivity of *Kernbereich* finally came with a decision in November of 1995.¹⁶ The case concerned the question of whether a union member had the right to distribute flyers and other

11. See BVerfGE 19, 303 (321); BVerfGE 50, 290 (368); BVerfGE 57, 220 (245).

12. See BVerfGE 92, 26.

13. See *id.*

14. See BVerfGE 92, 365. The constitutional complaint concerned article 116 of the Employment Promotion Act. See *id.* See also Arbeitsförderungsgesetz, art. 11 [Employment Promotion Act], v.25.6.1969 (BGB1. I S.582), amended by BGB1. I S.1554 (1983), and BGB1. I S.637 (1986). For the history and reasoning of why the unions assumed article 116 was unconstitutional, see Manfred Weiss, *Labor Law and Industrial Relations in Germany*, in INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW AND INDUSTRIAL RELATIONS 165 (Roger Blanpain ed., 1994), and Manfred Weiss, *Recent Trends in the Development of Labor Law in the Federal Republic of Germany*, 23 LAW & SOC. REV. 759, 764 (1989) (both works were written before the decision of the Federal Constitutional Court).

15. See BVerfGE 92, 365.

16. See Wolfgang Däubler, *Tarifaufstieg — Erscheinungsformen und Rechtsfolgen*, 1996 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 225, 231. See also BVerfGE 93, 352; ENTSCHEIDUNGSSAMMLUNG ZUM ARBEITSRECHT (No. 60, concerning art. 9 of the Basic Law, with a comment by Gregor Thüsing).

informational materials during worktime in a plant or whether the employer had the right to forbid this distribution, as he in fact did. The Federal Constitutional Court stated explicitly that not only is *Kernbereich* protected by the constitutional right of article 9, section 3, but that all other conduct that serves the purpose of achieving the goals of the union, including the safeguarding and improvement of working and economic conditions, was also protected.¹⁷

Based upon the Federal Constitutional Court's decision, a statute is unconstitutional when it limits this conduct, unless the statute is appropriate, necessary, and proportional to protect other constitutional rights. This concept is similar to the previously-described second approach taken by the Federal Constitutional Court in attempting to define the *Kernbereich*. Nevertheless, it is an important difference now that all union conduct is explicitly protected. This analysis conforms to the general understanding of constitutional rights, namely, that one must first determine whether a certain type of conduct is constitutionally protected and, second, whether its limitation is justified. Depending on the particular constitutional right, such justifications may be derived from other constitutional rights or from general notions of public welfare.¹⁸ However, the Court left open the question of whether the legislature can limit the right granted by article 9, section 3 for other, non-constitutional reasons of general welfare.

In a decision in April of 1996,¹⁹ this new approach was affirmed. The Court had to decide whether the state is allowed to enact a statute replacing the terms of a collective agreement, even if the statutory provisions give employees fewer rights than they previously enjoyed under the collective agreement. More specifically, the issue was whether a statute could limit, after a distinct period of time, the extension of temporary employment to university employees working on their doctoral theses or habilitations, where the collective agreements in force at the time allowed such extensions.²⁰ The Court held that the creation of a collective agreement is part of the protected freedom of union activities; therefore, a statute that regulates areas that could also be regulated by collective agreements must be justified.²¹ The more a distinct area is regulated by collective agreements, the more onerous the

17. See GG art. 9(3).

18. See Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 45* (Ulrich Karpen ed., 1988); E. STEIN, *STAATSRICHT* 180 (13th ed. 1991).

19. See BVerfGE 94, 268; *ENTSCHEIDUNGSSAMMLUNG ZUM ARBEITSRECHT* (No. 61, concerning art. 9 of the Basic Law, with a comment by Thomas Müller & Gregor Thüsing).

20. See Gesetz über befristete Arbeitsverträge mit wissenschaftlichem Personal an Hochschulen und Forschungseinrichtungen [Act on Temporary Employment with Scientific Employees at Universities and Research Institutes], v. 14.6.1985 (BGBl. I S. 1065).

21. See BVerfGE 94, 268.

burden of establishing a justification for its infringement. The burden is certainly present when the statute seeks to preclude the union from enacting certain kinds of collective agreements in the future. Furthermore, the burden is especially onerous if the statute is enacted to replace a collective agreement already in existence.

The rationale supporting the infringement of a collective agreement follows from the belief that the legislators have a legitimate goal in protecting the freedom of employment of the younger academics.²² In essence, the Court found that the younger students should be given the opportunity to secure one of the limited employment positions at the university during their work on dissertations or habilitations. Moreover, the Court held that the objective of safeguarding the functionality of the university in teaching science to the next generation, which the Court considered to form a part of the freedom of science and research, was also a compelling justification for this statute.²³ These interests were held to prevail over the limitation of the union's right. However, the Court again left open the question whether legislation can limit the right granted by article 9, section 3 to not only protect other constitutional rights, but also to protect common aspects of general welfare.

III. RECENT DECISIONS CONCERNING THE LAW OF INDUSTRIAL ACTION

Three recent decisions in the field of industrial action are presented in this section. The first decision concerns whether an employer has the right to close a plant during a strike even though some employees want to continue working and to maintain a claim to be paid for any work completed. The second decision concerns whether a union can strike against an employer who is a member of an employer association, not to achieve a collective agreement with the association as a whole, but to enter into a collective agreement with the employer. The final case concerns whether it is permissible for an employer, at the conclusion of a strike, to lock out only those employees who participated in the strike.

1. *The Right of an Employer to Close a Plant During a Strike*

When employees take part in a strike, they lose pay for the time not worked, including the time they are locked out. In such a situation, the employment contract continues, but the legal strike and lockout suspend the

22. *See id.*

23. *See id.* Article 5(3) of the Basic Law states: "Art and scholarship, research and teaching, shall be free. Freedom of teaching shall not absolve anybody from loyalty to the constitution." GG art. 5(3).

employment contract for those who take part in the strike or who are locked out. In addition, employees who do not take part in a strike and who are not locked out lose their right to remuneration if, as a result of industrial action, it has become impossible for them to work or because their continued employment is no longer economically prudent. The latter scenario might arise with respect to employers indirectly affected by an industrial action. An example of this occurs when an automobile factory cannot produce because a supplier, against whom a union has struck, cannot deliver parts. An example of an employer directly affected by an industrial action occurs when only part of the employees are on strike, but the entire production process ceases.²⁴

The rationale for lost remuneration is explained with what has been called the "sphere-theory." The sphere-theory provides that, because the employees gain the advantages of the strike, they should also bear the disadvantages.²⁵ Additionally, German courts have more recently justified their position on the rationale that payment of remuneration in these types of cases endangers the parity of bargaining power between the parties embroiled in an industrial conflict.²⁶

Thus, for more than seventy years, the prevailing view has been that employees could lose their right to remuneration only because of (1) taking part in a strike, (2) being locked out, or (3) due to employment becoming impossible because of an industrial action.²⁷ The German Federal Labor Court later affirmed this doctrine explicitly in a case decided in December of 1994.²⁸ However, three months later, the Court explicitly overruled the December 1994 decision and created a new doctrine where the employer's duty to pay remuneration to employees who do not participate in a strike can be suspended.²⁹ The Court decided that in the case of a strike, an employer against whom the union strikes can close the entire plant even though only a minority of the employees in the plant take part in the strike. A lockout of the remaining employees is not necessary in order to suspend the employment contract for all employees. This is an important shift in the balance of power between the union and the employer because the right to

24. See Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 428, 437; HALBACH ET AL., *supra* note 3, at 336.

25. This was the main argument in the leading case, the *Kieler Straßenbahn-Entscheidung*, decided by the Reichsgericht (Federal Supreme Court during the Republic of Weimar) in 1923. See *Entscheidungen des Reichsgerichts in Zivilsachen* [RGZ] 106, 273.

26. See Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 202.

27. This view was similar to the view taken in some foreign countries, such as Switzerland. See MANFRED REHBINDER, *SCHWEIZERISCHES ARBEITSRECHT* 84 (12th ed. 1995).

28. See 1994 DER BETRIEB 632.

29. See 1995 DER BETRIEB 100. Since the last decision, two of the three professional judges in the senate have changed.

lock out is limited in German law by the principle of appropriateness of means,³⁰ and it is sometimes difficult to prove that it would not have been possible to employ parts of the workforce in the face of the strike.

The American reader may recognize parallels here to *Betts Cadillac Olds, Inc.*, where the National Labor Relations Board (NLRB) stated that an employer may take "reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike."³¹ It is precisely this restriction which the German Federal Labor Court no longer requires. The decision has been heavily criticized by German labor writers. These writers are of the opinion that if employers do not want to pay their employees, employers should use the lockout to suspend the duties of the employment contract even though the employees want to work and it would be possible to employ them.³² Despite this criticism, the Court has affirmed its holding in several decisions, and there is no indication the Court will return to the former doctrine.³³

2. *Striking for a Single-Employer Collective Agreement against an Employer who is a Member of an Employer Association*

According to article 2 of the German Act of Collective Agreements,³⁴ unions may arrange collective agreements either with a single employer or with an employer association. In contrast to America where less than fifty percent of employees are covered by multi-employer agreements, most German employers are members of an employer association. The majority of collective agreements are arranged between employer associations and the unions. The employer associations can conclude collective agreements that impact all of their members, a part of their members, or a single member. Usually an agreement covers all members of an industry in a certain region,

30. See Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 421.

31. *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 286 (1951).

32. See Heinz-Jürgen Kalb, *Arbeitskampfrisiko und Regelungsbetroffenheit*, in *ARBEITSGESETZGEBUNG UND ARBEITSRECHTSPRECHUNG: FESTSCHRIFT ZUM 70. GEBURTSTAG VON EUGEN STAHLHACKE* 213 (Farthmann et al. eds., 1995); Manfred Löwisch, "Suspendierende" Stillelegung als Arbeitskampfmaßnahme, in *FESTSCHRIFT FÜR WOLFGANG GITTER* 533 (Meinhard Heinze & Jochem Schmitt eds., 1995); M. LEIB, *SAMMLUNG ARBEITSGERICHTLICHER ENTSCHEIDUNGEN* 257 (1995); M. RÜTHERS & M. FISCHER, *ENTSCHEIDUNGEN ZUM ARBEITSRECHT* (No. 115, concerning art. 9 of the Basic Law); *ENTSCHEIDUNGEN ZUM ARBEITSRECHT* (No. 119, concerning art. 9 of the Basic Law, with a comment by Gregor Thüsing); Gregor Thüsing, 1995 *DER BETRIEB* 2607.

33. See, e.g., 1995 *DER BETRIEB* 1409; 1995 *DER BETRIEB* 1469; 1995 *DER BETRIEB* 1817.

34. "The parties to collective agreements shall be unions, individual employers or associations of employers." *Tarifvertragsgesetz*, art. 2, § 1.

or for some industries, an agreement can cover the entire territory of the Federal Republic.³⁵ It is clear that an employer is still able to execute a separate collective agreement when he has joined an employer association,³⁶ and it is also clear that a union can strike for a collective agreement with an employer association that concerns only one member of the association.³⁷ The doubtful case occurs when a union strikes against an employer who is a member of an employer association, not to achieve a collective agreement with the association, but to achieve a collective agreement with the employer.

Last year the Labor Court of Appeals of Cologne found that a strike in the above-described "doubtful case" is illegal if a union is bound by a peace obligation of a collective agreement when the peace obligation also covers the employer against whom the union strikes.³⁸ The court referred to the prevailing view that the peace obligation of a collective agreement covering several or all members of the employer association protects all employers who are bound by that agreement.³⁹ Furthermore, a collective agreement protects employers against a strike based upon a separate agreement with the employer that is intended to replace the multi-employer agreement in the plant. The separate agreement need not be mentioned in the collective agreement, because the peace obligation generally does not need to be explicitly mentioned, but rather is assumed to be a necessary part of every collective agreement. The reason for this common view is that, otherwise, the settlement that has led to the conclusion of the collective agreement would afterwards be called into question.⁴⁰

But what is the law if no collective agreement exists or if the union strikes against a single employer to achieve a collective agreement that concerns areas that are not regulated by the collective agreement with the employer association? It is an established view that a union can lawfully

35. See Weiss, *Recent Trends in the Development of Labor Law in the Federal Republic of Germany*, *supra* note 14, at 766. See also HALBACH ET AL., *supra* note 3, at 309. In 1994, there were 41,700 collective agreements in force, and 12,800 of them were company agreements. See *id.* However, in the territory of the former German Democratic Republic (East Germany), the organization rate of employers is very low, 30-40%, and even less in some branches of the industry, and plants are often not covered by any collective agreement. See *id.* at 309.

36. See HALBACH ET AL., *supra* note 3, at 333; see also MANFRED LÖWISCH & VOLKER RIEBLE, *TARIFVERTRAGSGESETZ*, § 2, ¶ 52 (1992).

37. See Gregor Thüsing, *Die Erstreikbarkeit von Firmentarifverträgen verbandsangehöriger Arbeitgeber*, 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 294, 295.

38. See 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 327. See also Thüsing, *supra* note 37, at 295.

39. See 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 327.

40. See HERBERT WIEDEMANN & HERMANN STUMPF, *TARIFVERTRAGSGESETZ*, § 1, ¶ 323(ff) (5th ed. 1977). The 6th edition will be published in the Spring of 1999.

strike against *the employer association*; however, the question of whether the union can strike against *the single employer* is uncertain, as the German Federal Labor Court has not decided this issue.

Additionally, the Labor Court of Appeals has held that where a union is not bound by a collective agreement with the employer association, it is free to strike against a single employer.⁴¹ "The achievement of a collective agreement with a single employer through industrial action is not unlawful just because the employer is a member of an employer association."⁴² Though many German lawyers are of the opposite opinion,⁴³ the court held that the undoubted capability of the employer to conclude a collective agreement has as its consequence that a union must be allowed to carry a strike through to its conclusion; the capability to execute collective agreements includes the capability to be the target of a strike or lockout. Although there is disagreement within the legal community as to the wisdom of the court's decision, the decision is, for present purposes, final. As the employer only sued for temporary relief, the Labor Court of Appeals was the last venue, and thus, the decision cannot be appealed to the Federal Labor Court.

3. *Locking Out Only the Employees Who Took Part in a Strike*

The last decision in the area of industrial action to be discussed is also one decided by the Labor Court of Appeals. The Labor Court of Appeals of Düsseldorf held that an employer is allowed to limit a lockout to those employees who took part in a strike on the previous day.⁴⁴ The court further held that this limitation did not violate the freedom of association of the locked-out employees because the lockout did not distinguish between union members and non-organized employees. The lockout only distinguished employees who took part in the strike from employees who did not.⁴⁵ Thus, the employer did not discriminate because of membership in a union, and therefore, the lockout was lawful.

41. See 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 327.

42. See *id.*

43. See Herbert Buchner, 1970 DER BETRIEB 2029; P. HANAU & K. ADOMEIT, ARBEITSRECHT 87 (11th ed. 1994); Ulrich Krichel, 1986 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 731; Dieter Reuter, 1990 ZEITSCHRIFT FÜR ARBEITSRECHT 535; Thüsing, *supra* note 37, at 294.

44. See ENTSCHEIDUNGEN DER LANDESARBEITSGERICHTE [LAG] (No. 95 to art. 9 of the Basic Law, with a comment by Gregor Thüsing).

45. This lockout method was held to be unlawful by the Federal Supreme Court in a decision on June 10, 1980. See ENTSCHEIDUNGEN ZUM ARBEITSRECHT (No. 37, concerning art. 9 of the Basic Law). Nevertheless, there are many German commentators who think this type of lockout should be allowed. See Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 423; THÜSING, *supra* note 4, at 74.

It is very doubtful, however, whether the Labor Court of Appeal's decision is sound. As noted above, the ability to take part in a strike is an element of freedom of association; thus, to distinguish between strikers and non-strikers is precisely to distinguish between those employees who exercise their right granted by article 9, section 3 of the Basic Law, and those employees who do not. The contrary view to that taken by the court might be more persuasive because agreements "restricting or intended to hamper the exercise of this right shall be null and void; measures to this end shall be illegal."⁴⁶ Nevertheless, a report of recent developments in the law of industrial action should mention this decision in view of the uncertainty and discussion in American law concerning "partial lockout;"⁴⁷ the decision of the Supreme Court in *American Shipbuilding Co. v. NLRB*⁴⁸ does not make the distinction between these two kinds of partial lockouts.

IV. RECENT DECISIONS CONCERNING THE LAW OF COLLECTIVE BARGAINING

To understand recent developments in the law of collective bargaining, it is helpful to consider that over the last few years union membership in Germany has continuously declined. Furthermore, increasing numbers of employers have discontinued membership in employer associations. One reason for this movement on the employee's side may be the continuous process of individualization in modern industrial society. Other mediating bodies and institutions have also declined in importance (e.g., churches and political parties), and one can see this phenomenon not only in Germany but also in other European countries.⁴⁹ However, at least on the employer's side, there is another important reason for the movement.

As stated above, most collective agreements cover a specific region of an industry, or even the entire territory of the Federal Republic for certain industries. Thus, the assigned conditions cannot take account of particular circumstances within individual companies. At the moment, there is extensive discussion in Germany as to how to create a more flexible system of collective agreements, and whether it should be possible for an employer covered by a collective agreement to alter the conditions concerning his plant

46. GG art. 9(3).

47. See WALTER OBERER ET AL., *LABOR LAW* 539 (4th ed. 1994); ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 361 (1976).

48. 380 U.S. 300 (1965).

49. For example, in other countries of the European Union (e.g., France, Italy, and the Netherlands) the organization rate of the workforce has fallen. See H.L. BAKELS, *SHETS VAN HET NEDERLANDS ARBEIDSRECHT* 155 (8th ed. 1987).

by agreements with the Works Council.⁵⁰ Last year, the Labor and Employment Law of the *Deutscher Juristentag* section, a biennial meeting of German lawyers that makes proposals for amending the law, discussed this phenomenon and ways to react to it. It decided *inter alia*:

A change in the relationship between the parties of collective agreements and the Works Council concerning the competence to regulate is not recommended; rather the parties of the collective agreements should use their competence to regulate . . . in such a manner that different situations in different establishments can be better taken into account.⁵¹

Despite this declared belief in the associations and the law of collective bargaining, courts must, on a daily basis, solve the juridical problems that derive from the movement away from collective agreements. A discussion of two of these decisions follows.

1. *Membership in an Employer Association Without Being Bound by Collective Agreements*

Under American law, mere membership in an employer association does not necessarily mean that the association can conclude collective agreements covering a particular employer's plant. The association member must affirmatively manifest an intention to be represented by the association in a multi-employer group during collective bargaining in order to be bound by that bargaining unit.⁵² Things are different in Germany. Article 3, section 1 of the Collective Agreements Act reads: "Members of the parties to a collective agreement and the employer who is himself a party thereto shall be bound by the collective agreement."⁵³

Thus, under German law, unless the collective agreement limits the plants it covers, every employer who is a member of the organization entering the agreement is bound by it, and authorization of the employer associations is not necessary. Beginning in the late 1980s, employer associations began to create a special kind of membership, the *Mitgliedschaft ohne Tarifbindung*, under which members are not bound by collective

50. See also Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 350.

51. 2 VERHANDLUNGEN DES EINUNDSECHZIGSTEN DEUTSCHEN JURISTENTAGES 1, at K 193 (Ständige Deputation des Deutschen Juristentages ed., 1996).

52. See Rock Springs Retail Merchants Ass'n, 188 N.L.R.B. 261 (1971); Alvin L. Goldman, *Labor Law and Industrial Relations in the United States*, in INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW AND INDUSTRIAL RELATIONS, ¶ 544 (R. Blampain ed., 1994).

53. Tarifvertragsgesetz, art. 3, § 1.

agreements entered into by the organization. In addition to this feature, employers with this kind of membership still enjoy all of the advantages of membership in an employer association.⁵⁴ This favorable treatment was intended as a measure against the declining number of members. In fact, there are some employer associations, especially in the territory of the former East Germany, where most of the employers who joined an association chose this kind of membership.

It is doubtful, however, whether this form of membership is lawful, and the ongoing controversy serves as an excellent example of how different interpretations of a statute in German law leads to different results. Some writers are of the opinion that the explicit wording of article 3, section 1 of the Collective Agreement Act does not allow for the *Mitgliedschaft ohne Tarifbindung*.⁵⁵ If the "members of the parties to a collective agreement . . . shall be bound by the collective agreement," then there cannot be such a thing as unbound membership.⁵⁶ Legal scholars further argue that the advantages of membership should also carry the disadvantages. Finally, jurists refer to the principle of the equality of bargaining power. An undesirable shift in power to the employer could threaten the functionality of the system of collective bargaining if, in the case of an industrial action, the employer association was supported by all of its members; in contrast, the union could strike successfully only in plants covered by the collective agreement. As in other plants, it would be very difficult to mobilize employees for a strike from which they would not benefit. Thus, the allowance of memberships without being bound — which never before existed in the history of German collective bargaining — weakens the unions' ability to strike in a manner that the Collective Agreement Act does not contemplate.

Many other commentators disagree with this point of view and consider the *Mitgliedschaft ohne Tarifbindung* permissible.⁵⁷ They argue that article

54. Probably the most important advantage is that the association provides legal counsel at no cost and may hold a briefing for the benefit of employers as well as the unions. Manfred Weiss presumes that this "for many employees is the main reason to join a trade union. Hence the trade union somehow is functioning as a sort of insurance in case of disputes." Weiss, *Labor Law and Industrial Relations in Germany*, *supra* note 14, ¶ 298.

55. See Wolfgang Däubler, *Tarifaussstieg — Erscheinungsformen und Rechtsfolgen*, 1996 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 225; Günter Schaub, *Aktuelle Streitfragen zur Kostensenkung bei der Arbeitsvergütung*, 1994 BETRIEBS-BERATER 2006, 2007; Johannes Röckl, *Zulässigkeit einer Mitgliedschaft in Arbeitgeberverbänden ohne Tarifbindung?*, 1993 DER BETRIEB 2382.

56. Tarifvertragsgesetz, art. 3, § 1.

57. See Herbert Buchner, *Mitgliedschaft in Arbeitgeberverbänden ohne Tarifbindung*, 1994 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 2; Sven-Joachim Otto, *Die rechtliche Zulässigkeit einer tarifbindungsfreien Mitgliedschaft in Arbeitgeberverbänden*, 1996 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 624; Dieter Reuter, *Die Mitgliedschaft ohne Tarifbindung*

3, section 1 of the Collective Agreement Act merely limits the most extreme binding effects of a collective agreement. They contend that *only* members of the parties to a collective agreement shall be bound by the collective agreement.⁵⁸ The reason for this limitation is that by joining the union or employer association, the members — and *only* the members — have authorized the parties to enter an agreement that binds them. Consequently, it is clear that the parties may enter a collective agreement only for a portion of their members, namely those in a distinct part of an industrial branch or in a distinct region. Thus, limiting the area of application of a collective agreement by a new kind of membership in an association should be allowed; according to the terminology and the policy of article 3, section 1 of the Collective Agreement Act, there is no difference between *Mitgliedschaft ohne Tarifbindung* and being a party to a collective agreement.

The Labor Court of Appeals of Baden-Württemberg was the first appellate court to decide whether a difference exists between *Mitgliedschaft ohne Tarifbindung* and being a party to a collective agreement.⁵⁹ A union member sued his employer for the remuneration granted by the collective agreement. The employer had chosen this new kind of membership. The court considered the *Mitgliedschaft ohne Tarifbindung* to be effective, explaining its decision mainly on the basis of the goal of article 3, section 1 of the Collective Agreement Act. Thus, the employer was held not to be bound by the collective agreement, and the suit was dismissed.⁶⁰ On October 10, 1996, the Federal Labor Court reversed this decision because of a procedural error and remitted the case to the court of first instance.⁶¹ Thus, the case must again proceed through the judicial channels leading back to the Federal Labor Court, and a decision is not expected before the end of 1998. Until then, the question remains open.

2. *The Relationship Between Collective Agreements and Agreements with the Works Council*

Perhaps the most famous case in the recent development of the law of collective bargaining is the *Viessmann* case.⁶² The Viessmann company produces heating systems and was a member of an employer association.

(OT-Mitgliedschaft) im Arbeitgeberverband, 1996 RECHT DER ARBEIT 201; Gregor Thüsing, *Die Mitgliedschaft ohne Tarifbindung in Arbeitgeberverbänden*, 1996 ZEITSCHRIFT FÜR TARIFRECHT 481.

58. See sources cited *supra* note 57. See also Tarifvertragsgesetz, art. 3, § 1.

59. See ENTSCHEIDUNGEN DER LANDEsarbeitsgerichte (No. 10, concerning art. 9 of the Basic Law, with a comment by Gregor Thüsing).

60. See *id.*

61. See 1996 DER BETRIEB 2232.

62. See 1996 DER BETRIEB 1925.

Therefore, Viessmann was bound by the collective agreement concluded by the association. Nevertheless, in 1996, the Works Council agreed with the company's decision to increase its employee's workweek from 35 to 38 hours without increasing wages. In exchange, Viessmann promised not to shift the manufacturing of a new product to the Czech Republic and not to dismiss any employees for the next three years for purely economic reasons.⁶³ More than ninety-six percent of the workforce consented to this agreement.⁶⁴

Though approval by almost the entire workforce indicates the usefulness and the fairness of this agreement, under the law in force, it was invalid for two reasons. The first reason is that an organized employee who is protected by a collective agreement cannot agree to a contractual provision that places him in a worse position.⁶⁵ The second reason lies in the law of the "Works Constitution." Article 77, section 3 of the Works Constitution Act declares: "Remuneration and other conditions of employment governed or normally governed by a collective agreement shall not be the subject of work agreements. This shall not apply if a collective agreement explicitly authorizes the conclusion of supplementary work agreements."⁶⁶

Although the law is unambiguous and nullifies the work agreement made by Viessmann and the Works Council, the agreement was in fact effective, as no employee sued Viessmann for additional wages for the additional working time. The District Labor Court of Marburg decided that the union could not enforce the collective agreement against the will of the employees, especially to compel the dismissal of the Works Council or to enforce a fine against Viessmann.⁶⁷ If no one complains, no one will judge;

63. For another example of how companies influence employee support of unions, see *Eldorado Tool, Div. of Quamco, Inc.*, 325 N.L.R.B. 1236 (1997). By creating a "UAW WALL OF SHAME" on which shut-down plants were depicted and by sending its employees "factually accurate" letters referring to plant closings and job loss, an employer unlawfully conveyed the message that its plant would close and jobs would be lost if the union won a representation election. *Id.* at 1245.

64. See 1996 DER BETRIEB 1925

65. See Tarifvertragsgesetz, art. 4, § 3 [Collective Agreements Act] art. 4, § 3. "Arrangements which depart from the foregoing shall be permissible only if they are authorized by the collective agreement or if the departure is to the employees' advantage." *Id.*

66. Betriebsverfassungsgesetz, art. 77, § 3 [Works Constitution Act], v.15.1.1972 [hereinafter Betriebsverfassungsgesetz].

67. See 1996 DER BETRIEB 1925, 1929. The union claimed that article 77, section 3 of the Works Constitution Act created a duty not to conclude agreements that are incompatible with the Act, and that the Works Council and the employer neglected this duty. See *id.* The union referred to article 23, section 3 of the Works Constitution Act. Article 23, section 3 of the Works Constitution Act reads as follows:

One quarter or more of the employees with voting rights or the employer or the trade union represented in the establishment may apply to a labor court

the practice finds its own solutions.

V. CONCLUSION

The recent developments discussed throughout this article raise problems and uncertainties in an important part of German law. In fact, the increasing rate of unemployment in Germany is often considered a result of the country's labor and employment law.⁶⁸ A comparison with the situation in the United States indicates that some aspects of United States law may be preferable, but at the same time, this article presents some advantages and strengths of the German system. For example, in Germany, the unions and employer organizations think of themselves as *Sozialpartner* (social partners), and because of this, partnership strikes in Germany are less frequent than in most other countries of the European Community or the United States.⁶⁹ The German government has never had to fix a minimum wage, which it is empowered to do under the provisions of the Work Constitution Act of 1952.⁷⁰ However, setting a minimum wage has not been necessary because most employment contracts continue to refer to a collective agreement and because there are collective agreements for almost every branch of industry.

Considering these facts, one may agree with the opinion of American Professor Thomas Kohler, who spoke to the *Deutscher Juristentag* two years

for the removal of a member of the Works Council on the grounds of serious dereliction of statutory duties. A Works Council may also apply for the removal of one of its members.

Id. The Act further declares the following:

If an employer seriously neglects his duties under this Act, the Works Council or the union represented in the establishment may petition a labor court to order the employer to desist from an act, to permit an act to be performed or to perform an act. If the employer fails to comply with a final judicial decision requiring him to desist from an act, to permit an act to be performed or to perform an act, the labor court shall, on application and after warning, fine him for each offence. If the employer fails to perform an act required of him by a final judicial decision, the labor court shall, on application, accept that he is to be caused to perform the act by a coercive fine. The Works Council or a union represented in the establishment shall be entitled to make an application to a labor court. Fines shall not exceed 20,000 DM.

Id.

68. See Wolfgang Zöllner, *Vorsorgende Flexibilisierung durch Vertragsklauseln*, 1997 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 127 (discussing recent issues on this topic).

69. On average, between 1989 and 1993 there were only 18 days of striking per year, per 1000 employees. In Greece there were 586 days of striking per year per 1000 employees, 420 in Spain, 223 in Italy, 70 in the United Kingdom, 66 in the United States and 39 in France. See BUNDESARBEITSBLATT 5 (1995).

70. See generally Betriebsverfassungsgesetz § 87.

ago.⁷¹ Professor Kohler noted an important observation that, during the discussion part of the meeting, "the question was often asked, whether and to what extent [the American] legal system might be and should be an example to Germany."⁷² He later mentioned some of the advantages of American law, beginning with its great flexibility. But he also mentioned some advantages of the German system. The advantages of the German system noted by Professor Kohler were that the strong and centrally-organized unions are important mediating bodies, and that the existence of such bodies, is important, perhaps essential, to the functioning of democracy. Thus, he closed, as does this article, by stating: "The German system has many possibilities, which are lacking in our system. In other words: Perhaps Germany might, to some extent, also be an example for us."⁷³

71. See VERHANDLUNGEN DES EINUNDSECHZIGSTEN DEUTSCHEN JURISTENTAGES, *supra* note 51, at K 172-74.

72. *Id.* (translation by the author).

73. *Id.* (translation by the author).

