The Mechanism for Establishing and Changing Terms and Conditions of Employment

Rolf Wank
Professor, Dr., Ruhr-Universität Bochum

A. GENERAL CHARACTERISTICS OF THE LABOR LAW IN GERMANY

I. Basic Law Regulating Working Conditions

Working conditions in Germany are regulated on three levels,
- by European law,
- by the Constitution and
- by statutes and judge-made law on the one hand, by collective bargaining agreements, works council agreements and employment contracts on the other hand.

Reference: Textbooks on German labor law by: *Brox/Rüthers*, 15th ed.; *Dütz*, 8th ed.; *Hanau/Adomeit*, 12th ed.; *Hromadka/Maschmann*, volume 1, 2nd ed. 2002, volume 2, 1999; *Junker*, 2nd ed.; *Lieb*, 8th ed.; *Löwisch*, 6th ed.; *Otto*, 3rd ed.; *Preis*, Individualarbeitsrecht, 2nd ed. 2003; Kollektivarbeitsrecht, 2003; *Söllner/Waltermann*, 13th ed. 2003; *Wollenschläger*, 2nd ed.2003; *Zöllner/Loritz*, 5th ed. 1998.

1. EC Law

Reference: comprehensive: *Hanau/Steinmeyer/Wank*, Handbuch des europäischen Arbeits- und Sozialrechts, 2002; besides: *Fuchs/Marhold*, Europäisches Arbeitsrecht, 2001; *Krimphove*, Europäisches Arbeitsrecht, 2nd ed. 2001; *Schiek*, Europäisches Arbeitsrecht, 1997.

In the beginning of the EC, labor law was of little importance; main items were the economic freedoms. In EC law there is no difference between labor law and social security law as in Germany. There were two starting points for labor law, equal pay for men and women, and health and safety law. The freedom of movement has consequences in labor law and in social security law, but with few changes in German law.

This situation changed by the Maastricht Treaty and by the Nizza Treaty. They gave the EC competence for a lot of materials in labor law. Meanwhile health and safety law of the EC has enormously grown. Besides, quite a number of materials are regulated by EC law.

The way EC law works in Germany is – especially in labor law – by Directives which are then transferred into German law so that their EC origin does no longer show.

This has happened to the following materials:
- Directive 91/533/EWG – Nachweisgesetz
- Directive 2001/23/EG – sec. 613 a Bürgerliches Gesetzbuch
- Directive 80/887/EWG – sec. 183 et seq. Sozialgesetzbuch III
- Directive 98/59/EG – sec. 17 Kündigungsschutzgesetz
- Directive 97/81/EG – Teilzeit- und Befristungsgesetz
- Directive 1999/70/EG – Teilzeit- und Befristungsgesetz
- Directive 91/383/EWG – Arbeitnehmerüberlassungsgesetz
- Directive 93/104/EG – Arbeitszeitgesetz
- Directive 94/53/EG – Jugendarbeitsschutzgesetz
- Directive 96/34/EG – Bundeserziehungsgeldgesetz
- Directive 95/46/EG – Bundesdatenschutzgesetz.

The Directives 2000/43/EG and 2000/78/EG concerning forbidden discrimination must still be transformed into German law.

Besides, EC law works by the “EC corresponding interpretation”. That means that German

law must always be interpreted in accordance with EC law. If there is any doubt if this is the case, an interpretation must be chosen that corresponds with EC law. But this must be within the limits of German interpretation. If it is not possible, German law, that does not correspond with EC law and cannot be interpreted to make it correspond, is not valid.

***Example*:** In the German Arbeitszeitgesetz (Law on Working Time), time of attendance was seen as rest; the ECJ interpreted the Working Time Directive so that time of attendance is working time. The BAG (Federal Labor Court) held that a new interpretation of German law was impossible and that the Arbeitszeitgesetz must be adopted by the legislator to EC law (see BAG 18.2.2003 – 1 ABR 2/02 - comment *Wank*, Recht der Arbeit 2004).

A common interpretation of EC law in the member states is reached by the duty of all higher courts and the option for all courts to ask the ECJ for interpretation, if there are doubts in a current case.

2. The "Grundgesetz" (GG, the German Constitution)

As far as the relationship between the Constitution and "einfaches Recht" ("normal law," meaning all law under the constitution) is concerned, three aspects may be stated.

a) There are Grundrechte (freedoms) with special relationship to labor law.

aa) Art. 12 GG contains the freedom of work. It is the freedom for self-employed and for employees as well. The state may only interfere into this freedom by following the principle of proportionality.

***Example*:** The law of dismissal must make a compromise between the freedom of the employer and the freedom of the employee, Bundesverfassungsgericht (Federal Constitutional Court) volume 84, page 133, 147 (BVerfGE 84, 133, 147).

bb) Art. 9 para. 3 GG states a freedom to join labor law associations. This means associations of employers and of employees ("Koalitionen," coalitions). By interpretation of the Bundesverfassungsgericht this freedom contains:

- the freedom of the individual employer and the individual employee to join a labor law association (so different from Japan a union shop agreement is void),
- the freedom of said persons to keep away from such an association,
- the freedom of employers and of employees to found such an association,
- the freedom of these associations to exist and to act,
- a guarantee that the state will create and maintain a functioning system of these associations (including a system of collective bargaining agreements and of labor disputes, BVerfGE 50, 290, 368).

***Example*:** advertising of a trade union during working time (BVerfGE 93, 352).

The state plays two roles: on the one hand this system needs an organizing by the state, by creating the necessary rules. E.g. trade unions are only recognized for the aims of article 9 para. 3 GG if they are powerful enough (BVerfGE 58, 233). On the other hand the state may intervene into the freedom of the coalitions and must therefore be controlled by the courts.

Collective bargaining agreements themselves are bound by the Constitution, especially by the other freedoms of the Constitution. There is a debate whether this takes place in the same way as the state is bound (direct influence) or in a different way (indirect influence of the Constitution). There is a far spread agreement, that the principle of equal treatment is the same for collective bargaining agreements as for the state (see Erfurter Kommentar-*Dieterich*, GG, 4th ed. 2004, Einl. Rdnr. 46 f.).

b) Other articles of the constitution have no special relationship to labor law, but must be regarded in labor law, too. For example, the freedom of the personality of the employee must be respected (art. 1, 2 GG). The freedom of religion (art. 4 GG) requires that the employer tolerates a headscarf (BAG, NZA 2003, 483).

c) The original idea of the freedoms is to give the citizen a way of defense against measures of the state. But from an early stage of interpretation these freedoms have also become ways of

interpreting “einfaches Recht” (basic law). This is done by “constitution corresponding interpretation” (see *Schlaich/Korioth*, Das Bundesverfassungsgericht, 5th ed. 2001, p. 294 et seq.). In a similar way, as national law must be in accordance with EC law, “einfaches Recht” must be in accordance with the Constitution.

If an interpretation nearer to the constitution is possible, it must be chosen. If it is not possible and if basic law does not correspond to the Constitution, it is not valid. But this cannot be stated by any other court than the Constitutional Court (art. 100 GG).

3. Labor law

Labor law is divided into individual labor law, collective labor law and labor struggles; health and safety law is a special part of individual labor law. Most of labor law is meanwhile regulated by statutes. What is almost entirely judge-made law is the law of labor struggles. But as there is a great number of lawsuits in German labor law and as there is a special jurisdiction, there is quite a lot of judgments concerning these statutes, especially in the law of dismissal.

a) Individual labor relations law

aa) In individual labor relations law, there is no codification of the *employment contract*. Some rules are to be found in sec. 611 et seq. BGB (Civil Law), others in sec. 105 et seq. Gewerbeordnung (trade regulations Act). Rules how to conclude a contract are to be found in the BGB, including the questions of break of contract and of limitation. General formulas for labor contracts are ruled by the general rules in sec. 305 et seq. BGB, as referred to in sec. 310 para. 4 BGB. A labor contract need not be concluded by writing; but the most important parts of the contract must be given by the employer in written form (Nachweisgesetz, law on evidence; similar to art. 5 para. 1 of the Japanese LSL enforcement Order).

A control concerning *discrimination* in the moment of hiring at the moment in fact only takes place among men and women, sec. 611 a BGB, which is based on EC law. There will be more items following the new EC Directive 2000/78/EG, so that the results will be different from the Japanese Mitsubishi Jushi case, 27 Minshu 1536.

bb) As *atypical work* are regarded work for a limited period, part-time work (both in the Teilzeit- und Befristungsgesetz (TzBfG, Law on Part-Time Work and Work for a Limited Period) and dispatch work (AÜG, Arbeitnehmerüberlassungsgesetz, law on dispatched work).

Work for a limited period is only allowed in correspondence with a list of good reasons, like for a special task or as a deputy. Besides, a limited contract is possible for two years, including three prolongings, sec. 14 TzBfG. Since January 1st 2004 during the first four years of a newly founded enterprise no reason for a limited period is necessary (sec. 14 para. 2 a TzBfG). No reason is further required for employees older than 58 years, but it is controversially discussed if this is according to EC law.

Part-timers and employees for a limited period must be treated equal to those in fulltime or working for an unlimited period. This means that they get equal pay, following the principle of proportionality. Therefore to employ a part-timer or, like it is possible in Japan, a quasi-part-timer to save costs of wages is of no help for the German employer.

The difference between contract work and dispatch work which is in Japan ruled by the employment security Act, is part of the interpretation of the AÜG.

The principle of equal treatment is now also applicable on employees that are dispatched, sec. 3 para. 1 Arbeitnehmerüberlassungsgesetz. Special collective agreements are, however, allowed, following their own system (see the collective bargaining agreement in Recht der Arbeit 2003, 311).

There is a special law for old-age-part-time (Altersteilzeitgesetz). It allows to work less during the last years of the employment or – which is more often chosen – to work some years in fulltime and to retire earlier.

cc) *Working hours* are ruled according to EC-law by the ArbZG (Arbeitszeitgesetz, Law on Working Time). The general rule is to work no more than eight hours a day and in special cases no more than ten hours. But collective agreements may provide different terms, especially if

they contain attendance.

There is also the Ladenschlussgesetz (Law on Opening Hours), which is still said to be part of labor law and which is regarded by some scholars as against the Constitution as an unnecessary interference with the freedom of the employer.

The Bundesurlaubsgesetz (Law on Paid Leave) grants paid leave for at least 24 working days per year; collective agreements provide even longer periods. Different from Japan paid leave is always taken, if possible. If not (e.g. because of sickness or dismissal), the employee gets money instead.

dd) *Liability* follows the normal rules of civil law, in contract and tort. But there is a reduction for employees, who are fully liable only for acting on purpose or with gross negligence. When they act with normal negligence, the damage is divided between employer and employee. This is judge-made-law; the legislator tried to fix it in sec. 615 sentence 3 BGB.

ee) In cases of *sickness* the employee gets his wages up to six weeks by the employer, sec. 3 EFZG (Entgeltfortzahlungsgesetz, Law on continuation of wage payments) ; after this, it is paid by the social security system (SGB V).

ff) *Risks that make work impossible* which arise from the sphere of the employer are carried by the employer himself, sec. 611, 615 BGB, which means he has to continue paying wages without work being done (by 100 %, not by 60 % according to article 26 of the Japanese LSL).

gg) There are special laws for the protection of *special groups*, like the Mutterschutzgesetz (MuSchG) for protection of pregnants and mothers, the Jugendarbeitsschutzgesetz (JArbSchG) for the protection of youths, Sozialgesetzbuch IX (SGB IX) for the protection of disabled persons.

As far as dismissals are concerned this means: sec. 9 MuSchG leads de facto to the result that it is impossible to dismiss a pregnant employee. Before the dismissal of a disabled person, an authority must give its consent. Members of a works council can only be dismissed by extraordinary dismissal and with the consent of the other members of the works council, sec. 15 KSchG and sec. 103 BetrVG.

hh) There are special laws forbidding *discrimination* because of sex (sec. 611 a, b BGB, sec. 612 para. 3 BGB; because of part-time or because of employment for a limited period (TzBfG); or because of dispatched work (AÜG). More forbidden items will come following Directive 2000/78/EG.

ii) The basis for *health and safety law* is sec. 618 BGB (Bürgerliches Gesetzbuch). But this rule of private law is entirely implemented by the administrative law of health and safety, containing especially the Arbeitsschutzgesetz, the Arbeitsstättengesetz and a lot of others.

jj) In cases of *dismissal* the Kündigungsschutzgesetz (KSchG), applicable to employees at least employed for half a year in an enterprise of at least ten employees (ten since January 1st 2004), requires a special reason for the dismissal and, for a dismissal by economic reasons controlled choice between those that could be dismissed.

Reference: Commentaries by *Ascheid*, Erfurter Kommentar, 4th ed. 2004; *Ascheid/Preis/Schmidt*, 2nd ed. 2004; *Becker u. a.* (KR), 6th ed. 2002; *Hueck/v. Hoyningen-Huene*, 13th ed. 2002.

The Kündigungsschutzgesetz is one of our most important laws. A great number of lawsuits are taken because of dismissals. If the Kündigungsschutzgesetz is applicable, the employer needs a good cause for an *ordinary dismissal*, sec. 1 para. 2 KSchG. It may be in the behavior of the employee or in the aptitude of the employee or in economic reasons.

A dismissal based on the behavior of the employee is possible if the employee acts against the duties of the employment contract.

The dismissal based on the aptitude is possible if the employee does not come up to the required level. But the employer must tolerate that an employee becoming older may not be able to learn new techniques. Another reason refers to sickness. Sickness itself is no reason for a

dismissal, but only the organizational difficulties arising from it. Besides, there must be a negative prognosis for the employee, which is generally only due to a permanent disease.

A dismissal based on economic reasons is only possible, if there is an entrepreneurial decision which will lead to working places becoming unnecessary. The decision itself is controlled by the courts only if it is arbitrary; but the courts control all steps between the decision and the consequences for the single employee. If it is possible to transfer (Japanese "haiten") the employee on another (free) working place, the employer must do so.

A control of dismissals because of unjust discrimination, like it is widespread in America, is - as far - of little relevance in Germany.

But because a dismissal "because of" a transfer of undertaking is forbidden, sec. 613 a para. 4 BGB, there is a lot of lawsuits to find out if there was a transfer or a continuing of enterprise or simply a new partner to a contract, and if the dismissal was justified by economic reasons. The law of transfer of undertaking refers to all kinds of change, not only to split-offs like in Japan.

(***Reference:*** *Wank*, JILL Forum Special Series no. 12, March 2001)

In *enterprises with less than ten employees* it seems that dismissals are possible at will. For a long time there has been almost no control by the courts. But the Constitutional Court forces the labor courts to control excesses by sec. 242 BGB ("Treu und Glauben").

An *extraordinary dismissal* without a period of notice is possible if an employee acts strongly against his contractual duties. This instrument is only rarely accepted by the courts.

There has been an intensive discussion about the reform of the law of dismissal recently. Although the law and the courts still regard the reinstatement of the employee in the enterprise as aim of the law, in reality hardly any employee dismissed goes back to the enterprise. Therefore it has been suggested to replace an action for reinstatement by an action for a settlement. The newly established sec. 1 a KSchG points in this direction.

In reality, only few of the dismissed employees (but far more than in Japan) sue their employer. In most cases there is no judgment by the court, but a settlement following the proposal of the court. As there is quarrel about how high the settlement should be, sec. 1 a KSchG provides one half of wages per month for each year of the labor relationship.

kk) The typical normative *retirement age* is 65 years. It is allowed by labor law to terminate the employment contract as far as there is – which is generally true – a pension by the social security system. But meanwhile quite a lot of employees do not reach this age, due to sickness or to a contract of cancellation.

Details of retirement allowances are ruled by the BetrAVG (Gesetz zur Verbesserung der betrieblichen Altersversorgung, law on retirement allowances). Their introduction is voluntary, but once introduced they are ruled by detailed statute law and judge-made law.

ll) To understand the German system of labor law it is necessary to give a look at the *social security system*. Sickness payments for the first six weeks are given by the employer, further payments are given by the social security system. In cases of works accidents the employee can not sue the employer but gets payments by the "Berufsgenossenschaft" (mutual assurance, different from the Japanese workers' accident compensation insurance law). Retirement payments are given by the social security system (often supplemented by retirement allowances from the enterprise).

b) Collective labor relations law

Collective labor relations law is divided into the three areas of works council law, collective bargaining law and the law of labor struggles. The law of industrial co-determination must also be mentioned.

It is a specialty of German law that the interests of the employees are granted by three different ways, as named above.

aa) The *Betriebsverfassungsgesetz* (BetrVG, Law on works councils) contains a number of rights given to works councils. They are elected by all employees and they represent the whole staff. Although most members of the works council are also members of a trade union, and

although the law allows them to refer to the help of the trade union, this institution is strictly different from trade union representation.

This is a different situation from that in Japan, where the employer can conclude a labor-management agreement with the majority representatives of workers of an establishment. Also in contrast to Japanese law, works council agreements on special subjects named in the BetrVG have a normative effect.

Therefore the subjects ruled by sec. 87 BetrVG and those of Japanese "work rules" are only partly the same, concerning formal conditions of the work and supplementary wages, but different as far as wages in concurrence with collective bargaining agreements are concerned.

The rights of works councils referring to co-determination (enterprise co-determination in contrast to industrial co-determination) comprises personal subjects, social subjects and economic subjects. Co-determination in *personal subjects* means, that before each dismissal the works council must be heard, although its statement is not binding. But if it is not heard, the dismissal is void, sec. 102 BetrVG. The BAG interprets the section so that a works council has only been heard correctly, if it has been given enough information. Although the employer need not give the dismissed employee reasons for the dismissal, this duty is sometimes used by the courts as vehicle for the control of the dismissal itself.

Works councils also can, based on enumerated reasons, prohibit transfers of employees, sec. 99 BetrVG.

Most rights are given in *social subjects*, sec. 87 BetrVG. Works council have a right of co-determination e.g. with short-time work, with the plans for paid leave, for health and safety measures, and especially for the wage system, but only as far as it is not ruled by collective bargaining agreements. Although sec. 77 para. 3 and sec. 87 BetrVG say that works council agreements must not interfere with collective bargaining agreements, especially on wages, in reality there are often two rounds of wage rise, first by collective bargaining agreements, second by works council agreements.

Alterations of works council agreements follow the rules of altering law and are not (or little) controlled by the courts. Therefore the same benefit granted by a works council agreement can more easily be changed than the same benefit granted by an individual labor contract.

Very important is also the co-determination on *economic subjects*, especially on social plans, sec. 112 BetrVG. In cases when e.g. a certain number of employees is dismissed, a social plan must provide settlements. This leads to a strange situation: If a single employee is dismissed, he can only sue for reinstatement, but not for a settlement. But if a certain number of employees is dismissed, they get a settlement, even if it costs the enterprise a lot and even if the idea of the organizational change was to save money.

bb) Collective bargaining is ruled by the *Tarifvertragsgesetz* (TVG, law on collective bargaining agreements). According to the jurisdiction, a trade union is only acknowledged fulfilling this Act, if it has a certain size and power.

Other elements are organization and independence of the employer (see art. 5 of the Japanese trade union law). Collective bargaining agreements between a trade union and either an employers' association or one single employer have a binding effect, sec. 4 TVG. They rule not only working hours and wages, but everything that can be part of an individual labor contract.

cc) *The law of labor struggles* is judge-made-law. The main rules are that there is no judicial control of the demands in such disputes. But, different from Japan, they are ruled by the principle of proportionality. This means that there must be negotiations before a strike is allowed and that e.g. the number of employees locked out must proportionally correspond to the number of those striking.

A right to strike is limited to trade unions. A strike led by a trade union after the collective bargaining agreement has run out is not unlawful. Wildcat strikes, political strikes and sympathy strikes are illegal. Although the number of strikes in Germany is lower than in some other European countries, the strikes that happen are very effective. The trade unions have developed a tactic of short strikes in a rolling system from enterprise to enterprise. Lockouts are very seldom in Germany.

dd) Another German specialty is the *industrial co-determination*. Stock companies in Germany have not one single board, but a board of control and a board of managers. The board of control consists of members sent by the owners, the share-holders, and by members sent by the part of the employees, partly by the employees of this enterprise and partly by trade unions. The competence of this board of control is to choose the managers and to conclude the contracts with the managers as well as to formulate the guidelines of the enterprise and to control management. This dimension of industrial co-determination is unique in Western-Europe.

What is said in favor of this system is that the interests of employees are integrated into the politics of the enterprise which leads to a more peaceful way of solving conflicts. In contrast it is said that this system leads to compromises making enterprises unable for competition; and the employees do not realize if their representatives are part of the management or really representatives of employees' interests.

c) *Labor lawsuits* are very common in Germany, especially concerning dismissals.
Most lawsuits are finished by a settlement, based on a proposal of the judge. The employment is finished, but the employee gets a settlement, the height of which refers to the number of years of employment. Even if employers believe that the dismissal was lawful they trend to agree to a settlement, because as long as the lawsuit runs they have to pay wages without getting work, sec. 611, 615 BGB. Because of a (to my opinion) wrong interpretation of the statute by the BAG they even cannot employ their employees just for the time of the lawsuit. So after some months the costs of creditor's delay are higher than a settlement.

II. Legal Tools Regulating Employment

1. Statutes

In a contrast to countries like the US, a lot of rules concerning labor law is to be found in *statutes* (see A. I. 3.); and as lawsuits are common, there is quite a lot of jurisdiction to almost any question in labor law.

2. Collective bargaining agreements

As shown above, the most important instrument to regulate conditions of employment are *collective bargaining agreements*. By law, they are only applicable, if the employee is a member of a trade union and the employer is a member of an employers' association. In reality, most employment contracts refer to collective bargaining agreements, especially if the employer is a member of an employers' association.

One reason is that it is forbidden for an employer to ask at the time of concluding the employment contract if the applicant is a member of a trade union. On the other hand, if an applicant is employed at lower wages than that of a collective bargaining agreement, as soon as he enters the trade union he is granted its wages. Finally employers want to have equal conditions for all employees and they do not want to make trade unions attractive.

3. Works council agreements

Another source of regulations are *works council agreements*. The law on works councils (BetrVG, Betriebsverfassungsgesetz) provides them as the regular instrument of works councils participation if a general rule is required. Those agreements are mandatory, that means that if employer and works council do not reach an agreement, an arbitration procedure can be obtained.

Besides, voluntary agreements are possible, but they are less important.

Works council agreements have the same binding effect as collective bargaining agreements; the difference is that they are binding for all employees of an enterprise.

4. Individual contracts

As shown above, there is little left for *individual contracts*. But different from Japan, in many cases the employer is provided for a special task. That means that the employer cannot make changes referring to this task unilaterally.

Among labor contracts, German law differs between contracts based on a general formula and (real) individual contracts. *Formula contracts* are since the recent reform of the law of obligations ruled by a special part of the BGB (305 et seq.), granting fairness.
Reference: There is a lot of articles; the latest is *Thüsing/Leder*, Betriebs-Berater 2004, 42

Individual employment contracts are only controlled by sec. 138, 242 BGB.

The law of the individual employment contract follows the general rules for obligations in the BGB, with some modifications.
Reference: *Gotthardt*, Arbeitsrecht nach der Schuldrechtsreform, 2nd ed. 2003; *Wank*, Festschrift für Schwerdtner, 2003, p. 247 - 257.

III. Concurrence between the Various Legal Tools

1. Statutes

In labor law, quite a lot of *statutes* are mandatory. But this only works in one way. Collective bargaining agreements, works council agreements and individual contracts which lead to a solution more in favor to the employee, are nearly almost possible. On the other hand, all these tools must not go under the standard given by statute law. This relationship between statutes and private agreements is not called "Günstigkeitsprinzip," but it follows the same idea.

Modern statutes, however, allow collective bargaining agreements to go under this standard, following the idea that there will be a compensation in another material. In these cases, especially enumerated in the statutes, individual employment contracts referring to the collective bargaining agreement may also follow this exception.

2. Collective bargaining agreements

Although statutes rule quite a lot of materials and of details, there is still enough room for *collective bargaining agreements*. They either rule materials not ruled by statute law or they go into details of rules by statute law or they give better conditions. As most labor contracts refer to collective bargaining agreements, statute law and collective bargaining agreements are the main instruments to rule an employment relationship.

3. Works council agreements

Works council agreements are typically on the materials provided by sec. 87 BetrVG. So the materials of statutes and collective bargaining agreements on the one hand rule what are the contents of the working contract whereas works council agreements rule the working conditions, like working time, in the special enterprise.

4. Concurrence of collective bargaining agreements and works council agreements

There is a problem concerning the concurrence of *collective bargaining agreements and works council agreements*. The BetrVG says in sec. 77 para. 3 and sec. 87, that collective bargaining agreements prevail; but there is a dispute about how far this prevailing goes (see B. II.).

5. Individual employment contracts

As far as *individual employment contracts* are concerned, even if the employee is bound by the collective bargaining agreement or by the works council agreement, the individual employment contract is valid if it is more in favor of the employee ("Günstigkeitsprinzip," see B. II.).

IV. Employees' Representatives

In Germany the interests of employees are represented by three ways,
- trade unions and collective bargaining agreements,
- works councils and works council agreements and
- enterprise co-determination.

1. Trade unions

Although *trade unions* are also part of the political scene and although they are represented in political commissions, as far as labor law is concerned, they only represent those employees that are members of the trade union. Only these employees are bound by the collective bargaining agreement (and only if the employer is a member of an employers' association). In reality, most individual labor contracts refer to collective bargaining agreements, regardless if the employee is a member of a trade union. If he is not, the collective bargaining agreement is valid by this referring as part of the individual labor contract.

Main subject of collective bargaining agreements are all matters that could be part of an individual employment contract.

In general there are two kinds of collective bargaining agreements, those on wages, running in general only for one year, and those on other working conditions, running in general for several years.

At the moment there are two new tendencies: One is to make collective bargaining agreements more flexible and open for works council agreements, another is to reduce costs of wages.

Labor struggles are only allowed for trade unions and employers' associations.

2. Works councils

Although the Betriebsverfassungsgesetz allows the staff to make elections for *works councils*, if there are at least five employees, in reality it is true that all big enterprises have those works councils, but most of the small enterprises do not have one.

The election refers to the special enterprise; and voters are only the employees of this enterprise. In general the candidates are on a list of the trade union, eventually concurring with a special list in this enterprise.

While collective bargaining agreements may contain all materials, the Betriebsverfassungsgesetz gives works councils only a limited reach of competence, especially

- co-determination on personal subjects,
- co-determination on social subjects and
- co-determination on economic subjects.

Voters for the works councils are all employees of this enterprise, and the works council agreements are valid for all employees. All this has nothing to do with the membership in a trade union.

3. Industrial co-determination

Besides there is an *industrial co-determination* in as far as the boards of all big enterprises are constituted half by representatives of the owners and half by representatives of employees.

We have three different laws of industrial co-determination.

- The first was introduced in the coal and steel industry (Montanmitbestimmungsgesetz, MontanmitbestG). Here the Aufsichtsrat (board of control) exists of the same number of representatives from owners and of representatives from employees (5/5). There is an "eleventh man" to equalize.
- The second system is that for minor enterprises and it is ruled by the *Betriebverfassungsgesetz 1952*. Here 1/3 of the members of the board of control represents the employees.
- Since 1976 for all big enterprises the *Mitbestimmungsgesetz* (MitbestG) is applicable. Here the board of control consists at one half of the representatives of owners and at the other half of the representatives of employees (sent by the employees of the enterprise and by the trade unions). In case of a deadlock the chairman (always by the owners' side) has two votes.

V. Differences between Japan and Germany

1. Trade unions

The rights of a *trade union* are at least the same in Germany, granted by the Constitution and by the Constitutional Court (see A. I. 2.).

The general idea is that labor law grants a basic standard and that collective bargaining agreements go further, leaving enough place for even better conditions in the enterprise. In fact, statute law has meanwhile reached a high standard, and collective bargaining agreements no longer guarantee a minimum standard, but a standard surpassing statute law.

Collective bargaining agreements are binding, but only for members of the trade union.

2. Works councils

There is no equivalent to work rules in Germany. Two situations are possible: Either there is a *works council*. Then almost everything that does not refer to the work itself but to working conditions is ruled not unilaterally by the employer but by works council agreements.

Only if there is no works council, the *employer* can rule these materials himself.

In any case, either with works council or without, you have to divide between

- conditions outside the contents of the *labor contract* and
- orders inside the reach of the labor contract.

E.g. whether an employee has to work 35 hours per week or 40 hours, is ruled by the labor contract. It can only be changed by contract, not unilaterally by the employer. But which tool the employee has to use is due to the orders of the employer. At which time work starts every day is also due to the order, either by works council agreements or, if there is no works council, by the employer.

In an enterprise, employees are not represented by the trade union, but only by the collective bargaining agreement. The rules of works council agreements are binding for all employees in this enterprise, regardless of their membership in a trade union.

3. Instruments for flexibility

In comparison with Japan, German labor law lacks effective *instruments for flexibility* (see D.).

Different from Japan, an employment contract in Germany normally states a special task for which an employee is engaged. A new task or different working conditions cannot be ordered unilaterally by the employer. Either the parties agree to change the contract or the employer is in a bad position. He must apply the “Änderungskündigung” (Japanese “hengo-kaiyaku-kokuchi”), which is, as is generally accepted, an inflexible instrument. In Japan, in contrast, transfers within the enterprise (“haiten”) are more easily possible because the task provided by the contract is broader.

Changes in collective labor law are easier, as they follow the principle of lex posterior (the latest rule is valid). But the employer needs the consent of the employees’ representatives.

On the enterprise level the employer may convince the works council that a change of the works council agreement is necessary.

As far as collective bargaining agreements are concerned, the situation may be different for an industry as a whole and in one single enterprise. The problem is, how the conditions in this enterprise can be changed without destroying the collective bargaining agreement in general (see B. II.).

B. SIGNIFICANT CHANGES

I. Various Factors and Attitudes

There has been a debate about deregulation about ten years ago which is still continued. In reality, there has not been deregulation in statute law but rather a continuing increase of *statute* regulations. The demand for more flexibility has also not been fulfilled by statute law.

There has only been more flexibility in *collective bargaining agreements*, allowing the parties on the enterprise level to conclude some modifications.

There has been a continuing increase of flexibility concerning working time. Some years ago every employee had certain working hours, with a fixed time for the beginning and the end of the working day. Meanwhile gliding time is widespread and there are contingents of working hours that are flexibly used.

As far as the problem of harmonizing work with family life is concerned the debate is characterized by state hypocrisy. The state has not yet been able to supply families with enough care-centers for young children and kindergarten or looking after at school, so that mothers either quit their job or change to part-time. At the same time the state claims that employers should do more in favor of equal treatment for men and women!

Other general factors like global competition and structural changes in industry have not led to changes in labor law but have led to a lot of cuts of employees' rights in social security law.

There is a tendency among enterprises to transfer the production to countries where the costs of wages are lower. In eastern Europe, e.g., they are only 1/5 of those in Germany. This means that a continually increasing number of employees are no longer needed in Germany. The result should be to make conditions for employment easier and more flexible by statute law and by collective bargaining agreements. However, politicians and employers' associations and trade unions fail to inform the employees about this inevitable development.

II. The Relationship Between Individual and Collective Regulations

1. Individual contract

In general this relationship has not changed in German labor law. There is a long debate about the role of the *individual contract* in contrast to collective labor law. But it is rather academic. A big number of statutes, collective bargaining agreements, works council agreements and judge-made law has not much left for individual regulations. Besides, those scholars who refer to individual freedom neglect the real powers in an enterprise. Only specialists can pursue their own interest against the employer, whereas most employees have to accept the conditions proposed by the employer.

2. The principle of more favorable conditions ("Günstigkeitsprinzip")

a) There has been a strong discussion in the interpretation of the "*Günstigkeitsprinzip*" (principle of more favorable conditions for the employee). The origin of the principle is to help the individual who has managed to conclude a favorable contract against collective institutions. There is, as shown above, not much room for it, but this principle is still valid.

b) In recent years the opinion has developed to *interpret this principle in a different way*. There are mainly three items to be considered referring to the "Günstigkeitsprinzip." This goes together with the political and scientific debate of transferring competence from collective bargaining agreements to the enterprise level.

Reference: *Adomeit*, NJW 1984, 26; *Bonin*, Standortsicherung versus Tarifbindung, 2003; *Buchner*, Der Betrieb 1996, Beilage 12, 1; *Buchner*, Festschrift für Herbert Wiedemann, 2002, 211; *Dieterich*, Der Betrieb 2001, 2398; *Ehmann/Schmidt*, NZA 1995, 193; *Hromadka*, Der Betrieb 2003, 42; *Hromadka*, NJW 2003, 1273; *Löwisch*, Juristenzeitung 1996, 811; *Möschel*, Betriebs-Berater 2003, 1951; *Schliemann*, NZA 2003, 122; *Wolter*, NZA 2003, 1317; *Zachert*, Der Betrieb 2001, 1198

The prevailing interpretation of the principle is that the comparison between the collective regulation and the individual regulation can neither extend to both whole contents nor include only two paragraphs which are compared, but two *coherent materials*, like paid leave ("Sachgruppenvergleich").

The second item is that the comparison can only be made from an *objective* point of view and not by the individual employee himself.

Finally the idea of the Günstigkeitsprinzip is to protect the *individual* against collective organizations.

Since some years some scholars try to transform the interpretation of the principle. There are two typical situations for this new interpretation:

- Employees want to work longer than provided by a collective bargaining agreement (and to earn more money).
- The employer threatens to close the enterprise. The employees agree with a reduction of wages to secure their employment.

In these cases the new opinion argues:

The height of wages and the security of the job can be compared. - The prevailing opinion says this means to compare apples and pears.

The new opinion says, that it must be left to the arbitration of the individual, which regulation is more favorable. - This sounds like tax law is valid, if a citizen agrees with its validity.

Finally, those cases referred to, mean that the collective organization of the staff votes against the collective organization of trade unions, whereas the "Günstigkeitsprinzip" looks at the individual employee.

Taken all in all, the new interpretation has nothing to do with the original idea of the "Günstigkeitsprinzip". The changes preferred by this opinion can only be reached by changing statute law and not by a single transformation of the interpretation of the "Günstigkeitsprinzip."

C. SIGNIFICANT CHANGES IN THE COLLECTIVE LABOR RELATIONS LAWS

I. Derogation from Legal Norms

In Germany the legislator does not trust anyone else to find such a good and fair solution as he has found. Therefore most of labor law statutes are binding for anyone. For example the statute on dismissal does not allow any modification for either collective bargaining agreements, works council agreements or individual contracts.

As shown above, without a statute saying that it is allowed, it is only possible for all said instruments to rule different from statute law, if this is in favor of the employee.

Any regulation not in favor of the employee is in general not allowed. There are a few statutes, with an increasing number, that allow at least collective bargaining agreements to modify the regulation even to the disadvantage of the employees. In these cases, individual contracts referring to the collective bargaining agreement may also derogate legal norms. The idea of the legislator is that trade unions are able to protect the interests of employees and are able to find a compensation in other materials.

Individual labor contracts without reference to a collective bargaining agreement are not allowed to derogate from mandatory legal norms.

II. Alternatives to the Principle of More Favorable Conditions ("Günstigkeitsprinzip")

1. "Günstigkeitsprinzip"

As said above (see B. II.), in cases of a conflict between saving the employment and reducing wages, some scholars and politicians try to find the solution in a transformation of the "*Günstigkeitsprinzip*." The BAG has so far objected to this (BAG AP Nr. 89 zu Art. 9 GG).

The argument behind it is that if you allow this, an employer could easily demonstrate that the situation for the enterprise is dangerous and that cuts of wages are necessary. There would be no legal instrument to control the process. As the problem does not refer to a single employee but to the whole staff, it cannot be solved by a simple modification of the single employment contract, but only by a general process.

2. Modification Clauses

Other ways, which are to be preferred, are to install *modification clauses* in collective bargaining agreements. So far, quite a number of collective bargaining agreements have such clauses, but there is still a lack of those clauses in a lot of collective bargaining agreements.

3. Changes with the consent of the two parties of the collective bargaining agreement

Besides, the law which is already valid allows a deviation from a collective bargaining agreement on an enterprise level with the *consent of the two parties* of the collective bargaining agreement. This is practiced in a lot of cases, although the partners of the collective bargaining agreement do not want to have publicity. In these cases the employer together with the works

council develops a solution to save employments by deduction of wages. If the employer and the works council are able to persuade the partners of the collective bargaining agreements that in the end the solution is more agreeable for employees than to fulfill the collective bargaining agreement, they agree and for a limited time a deviation is possible for this enterprise.

There is a strong political movement to install such a possibility in a statute. It is suggested that there should be a limited period for the parties of the collective bargaining agreement either to consent or to veto the solution found in the enterprise. The parties on the enterprise level should be forced to inform the parties of the collective bargaining agreement about the solution (see *Dieterich/Hanau/Henssler/Oetker/Wank/Wiedemann*, Recht der Arbeit (RdA) 2003, 193).

4. An enterprise in danger of becoming bankrupt

When the *enterprise is in danger of becoming bankrupt*, it is a situation which is different from those mentioned before. In this situation it is not only a matter concerning the parties of the employment contract, but also a matter concerning banks, owners and creditors. Therefore a solution can neither be found by a re-interpretation of the "Günstigkeitsprinzip" nor by modification clauses in collective bargaining agreements but by a special solution which is only possible by a new statute. The difference between bankruptcy cases and this situation is that there is a period before an enterprise is bankrupt in which there is the possibility that it will recover. In this case it needs a deduction of claims not only by employees but also by owners, banks and managers. Therefore the procedure must be similar to that of bankruptcy, but it has to be different to give the enterprise the chance to recover. There is a suggestion to install a procedure similar to Chapter 11 in the US Bankruptcy Act (see *Dieterich* et al., to be printed in RdA 2004).

III. Decentralization of Collective Bargaining

Some politicians, scholars of economy and some scholars of labor law demand that the collective bargaining system should be decentralized. They claim that the system that is valid now does not take the situation on enterprise level at view. The discussion about the new "Günstigkeitsprinzip" (see B. II.) is connected with this argument.

Whereas in Japan there are mostly enterprise unions, in Germany there a industry unions. They include all employees working in that industry, regardless of their special job in the enterprise (like a cook in a steel company).

Those in favor of this argumentation seem not to recognize the diversification in the collective bargaining system that we already have. They seem to have the idea that there is one collective bargaining agreement for the whole of Germany and for every labor contract. In contrast, there are more than 50,000 collective bargaining agreements today valid in Germany. It is true, that although there are different collective bargaining agreements in the different regions of Germany, those of one trade union are very similar. But even if you accept this, there is so much differentiation by collective bargaining agreements differing by branches and by regions that the argument against the system does not convince.

Instead the idea to transfer more power from collective bargaining agreements to the enterprise level would mix two systems. As shown above, the system of collective bargaining agreement is based on the legitimacy of membership whereas the legitimacy of works council agreements is based on the vote of the staff. Besides, collective bargaining agreements may deal with almost all materials, whereas works council agreement may only cover a limited reach of materials. Finally only the partners of collective bargaining agreements are allowed labor disputes and not the partners of works councils. There has not been yet any proposal how these two different systems could be changed in an agreeable way by transferring power from collective bargaining agreements to works council agreements.

D. LABOR LAW INTERVENING IN THE LABOR MARKET

There has been a recent discussion about the relationship between the law of dismissal and unemployment. There are different opinions about this connection, but the prevailing idea is that

if law binds enterprises too much in their choice for hiring and firing employees, they trend to refrain from hiring and use other methods instead. They can extend working hours or go over to contracting out, to employ employees for a limited period or to use dispatched work.

Reference: *Bauer*, NZA 2002, 529; *Buchner*, NZA 2002, 533; *Hromadka*, NZA 2002, 783; *Preis*, RdA 2003, 65; *Rüthers*, NJW 2002, 161; *Wank*, NZA Sonderbeilage 21/2003, 3

Another much discussed item is how enterprises can react to changes in the market by changing the labor conditions. An overview on our system shows that the legal system does not contain agreeable ways for change.

In individual labor law, one way is to to make provisions by taking up in the labor contract clauses that allow the employer to make unilateral changes for an adoption to market situations.

If a labor contract does not contain those clauses – and they are only allowed to a certain extend – then there is only the way of "Änderungskündigung" (dismissal combined with an offer for a modified contract, sec. 2 KSchG). Whoever writes about the "Änderungskündigung" must state that, at least as far as mass Änderungskündigungen are concerned this a method which is not appropriate.

Therefore employers in Germany have turned to changes by ways in a collective labor law – especially by contracting out so that the new enterprise is ruled by collective bargaining agreements more in favor for the employer.

Taken all in all, German labor law lacks effective methods of a quick and appropriate way to change working conditions.

The question therefore is less in what manor labor law should intervene in the labor market but that labor law should supply enterprises with effective ways to act as entrepreneurs. That protection of employees by labor law is necessary is not denied in general.