Prof. Dr. Wolfgang Däubler

German Labour Law Report

I. Legal Practice in Germany

Strikes and other collective actions are legally recognized as such in Germany, but they only rarely occur. Figures show that e.g. in 2003 163 281 working days were lost by strikes, whereas in 2000 the loss had only amounted to 10 776 days. Statistically, this corresponds to 3 minutes for each employee in 2003 and to 10 seconds for each employee in 2000.[1] Cross-border collective actions are even more exceptional; some cases can be mentioned but it would be exaggerated to qualify the few court decisions as producing "case law".

It may be useful to distinguish three forms of collective action:

1. Coordinated actions in different countries

One possible form of common action in more than one country may be to synchronise collective bargaining in a certain branch. Unions may have different aims – in one country the wage increase seems to be the most important point whereas in another one restrictions on dismissals for economic reasons take the first place. Separate agreements are possible, but a national union would probably hesitate to sign before the colleagues in another country have reached a compromise, too. There are two advantages of such actions. In case of industrial action, it is difficult to shift production to a country where strikes take place, too. Second point: If an international corporation shows a high degree of resistance in collective bargaining, it will be faced with strikes on an international level.

[1] See Statistisches Jahrbuch für die Bundesrepublik Deutschland (=Statistical Yearbook of the Federal Republic) 2005 p. 245

Actions of that kind do not create special legal problems. If they respect the conditions of a legal strike in the national framework, the pure fact of a "parallel" action in another country is of no relevance.[2]

The situation grows slightly more complicated if there is a common aim like the creation of – let´s say - a world-wide representation body modelled after the EWC- directive. The realisation of the demands does not lie exclusively in the interest of the (national) strikers but expresses a common interest. The same can happen if the action wants to preserve workplaces in accordance to a common plan within the framework of the same multinational corporation. This has been the case of GM-Europe, where protest strikes occurred in several European countries including Germany in 2001[3] and especially in 2004. The German part of the action at "Opel-Bochum" was legally contested but only for the fact that there was no official trade union decision to go on strike. The cross-border nature provoked no objection. As a comparable example the St. Gobain case of 1970/1971 may be mentioned, but there were only strikes in Italy and the US, not in the German subsidiary.[4]

2. The solidarity strike

The second form of trans-border collective action is characterized by the fact that the strikers in one country want to support their colleagues in another one. There may be an own interest, too (e.g. to show the mobilizing power which will improve the position in future negotiations), but it is not situated on the first place.

It is difficult to find concrete examples in Germany. Many authors refer to the "Times"-case, but the Regional Labour Court of Frankfurt found that the union had just organized a public demonstration and not a strike.[5]

Because of a dispute with the unions, the "Times" was no more published in December 1978 and the following months. In April 1979, the publishing house wanted to produce in Germany a new "Times" for continental Europe and the USA. The German printers´ union organized solidarity actions which created a

[2] Hergenröder, Der Arbeitskampf mit Auslandsberührung, Berlin 1987, S. 358 ff. und in: Henssler-Willemsen-Kalb (im Folgenden: HWK), Kommentar Arbeitsrecht, Köln 2004, Art. 9 GG Rn 364; Junker, Internationales Arbeitsrecht im Konzern, Tübingen 1992, S. 497

[3] S. Röper EuroAS (=Europäisches Arbeits- und Sozialrecht) Heft 5/2001 S. 87

[4] Hergenröder, Arbeitskampf mit Auslandsberührung, aaO, S. 359

[5] LAG Frankfurt/Main, 25.6.1985, BB (=Betriebs-Berater)1985, 1850

"high tension" around the building of the printing firm. After three days, the owners of the "Times" gave up their plans. They asked damages from the union; their complaint was accepted in principle (the amount being uncertain) by the regional labour court of Frankfurt.[6]

Whether the Michelin-case in the beginning of the seventies contained solidarity strikes, is difficult to say; an observer of that time mentions "solidarity measures" in connection with strikes in Clermont-Ferrand and Bad Kreuznach.[7]

The legal situation of the solidarity strike shall be examined later.[8]

3. Refusal to perform the work of the strikers

If there is a strike in one plant the employer may try to transfer the tasks of the strikers to a second plant or to conclude a contract with another enterprise that will take over the work. The question is whether employees of the other plant or the other firm may refuse to fulfil the functions of the strikers and perform "Streikarbeit" (literally: "strike-work").

Courts and doctrine distinguish two cases. "Direkte Streikarbeit" means to take over the concrete tasks of strikers. "Indirekte Streikarbeit" means all other functions which are necessary for the production interrupted by the strike.[9]

"Direct strike-work" was refused by a German stewardess in 1985. When her Lufthansa plane arrived in Barcelona, the cleaning personnel was not available because there was a general strike in Spain.[10] "Indirect strike-work" would be performed by German air traffic controllers if a foreign airline would pick up waiting Spanish passengers and bring them to Germany.

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6 LAG Frankfurt/Main, 25.6.1985, BB 1985, 1850

7 Piehl, Multinationale Konzerne und internationale Gewerkschaftsbewegung, Frankfurt/Main 1974, S. 110 („erfolgreiche Solidaritätsmaßnahmen")

8 See II 4 and III 4 below

9 Colneric, in: Däubler (Hrsg.), Arbeitskampfrecht, 2. Aufl., Baden-Baden 1987, Rn 591 ff.; HWK-Hergenröder Art. 9 GG Rn 206

10 Details in LAG Frankfurt/Main 14.1.1987 – 2 Sa 1032/86 – Arbeitsrechts-Blattei (D) Arbeitskampf VIII Internationales Arbeitsrecht, Entscheidungen 1

The right to refuse direct strike-work is recognized as an individual right by the German courts.[11] Considering the increasing world-wide division of labour this principle is of high importance. Details shall be examined below.[12]

4. Boycott

The boycott is used especially in the maritime sector. In 1973 the Union of public service and transportation (organizing seafarers, too) lanced a boycott against several German shipowners who did not want to join the collective agreement concluded with the employers´ association. Unlike the regional labour court of Baden-Württemberg[13] the Federal Labour Court decided that the boycott is legal as a traditional form of collective action.[14] Nevertheless, German unions participated in the ITF-organized boycott against ships under flags of convenience only after 1996.[15] When a shipowner whose ship was not unloaded because he had not accepted ITF-conditions asked for damages, the local court of Bremen decided that the behaviour of the union was lawful.[16]

A boycott can also refer to an employer´s products and services ("Don´t buy grapes from California"). This has occurred in Germany as to commodities coming from apartheid South Africa; it could be used in the framework of labour conflicts, too.[17]

II. The legal status of "domestic" collective action

1. Legal recognition of the right to take collective action

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11 BAG 25.7.1957, AP (=Arbeitsrechtliche Praxis) Nr. 3 zu § 615 BGB Betriebsrisiko Blatt 2; BGH 19.1.1978, AP Nr. 56 zu Art. 9 GG Arbeitskampf Blatt 2 Rückseite; BAG 10.9.1985, AP Nr. 86 zu Art. 9 GG Arbeitskampf Blatt 4

12 See II 3

13 8.8.1973, DuR (=Demokratie und Recht) 1974, 326 ff.

14 BAG, 19.10.1976, AP Nr. 6 zu § 1 TVG Form.

15 Details at Däubler, Der Kampf um einen weltweiten Tarifvertrag. Probleme des deutschen Arbeitsrechts bei der Verbesserung der Arbeitsbedingungen auf Billigflaggenschiffen, Baden-Baden 1997

16 ArbG Bremen 7.10.1999, NZA-RR (=Neue Zeitschrift für Arbeitsrecht, Rechtsprechungs-Report) 2000, 35

17 Such actions are normally lawful based on freedom of speech (Meinungsfreiheit). See Däubler, Das Arbeitsrecht 1, 16. Aufl., Reinbek 2006, Rn 691 They would be unlawful if used for market purposes, especially to weaken a competitor

Strikes, lock-outs and other possible forms of collective action are not guaranteed as a "right" or a "fundamental right" in the text of the German Constitution. Its Art. 9 § 3 guarantees individuals the right to form associations (whether trade unions or employers´ associations); contract clauses or unilateral measures which restrict this freedom are forbidden. "Collective actions" ("Arbeitskämpfe") are only mentioned as a phenomenon which must not be an object of measures in a state of emergency, but nothing is said about the conditions under which strikes or lock-outs can be lawful.

The case law of the Federal Labour Court (Bundesarbeitsgericht – BAG) and of the Constitutional Court (Bundesverfassungsgericht – BVerfG) have become the most important legal sources in this field. In its first decisions, the Federal Labour Court stated in the mid fifties that "strike and lock-out" (which have always been seen together) are a part of the free and social order of the Federal Republic.[18] Only in 1980, the Court declared that "today everybody agrees that the right to strike is a necessary part of the free order of fight and compromise which is guaranteed by article 9 § 3 of the Constitution in its core".[19] In the same decision, the legality of the lock-out was confirmed and based on the argument that each side should have equal chances to influence the outcome of collective bargaining. This so-called "parity principle" is of a fundamental importance as to admissible forms of collective action. The lock-out is therefore submitted to certain quantitative restrictions and has to obey to the principle of proportionality.

The unions were dissatisfied by the recognition of the lock-out and asked for a decision of the Constitutional Court. In a judgment of 1991, the Constitutional Court developed a precise interpretation of Article 9 § 3:[20] The associations mentioned there are characterized by the purpose to safeguard and improve the working and economic conditions ("Wahrung und Förderung der Arbeits- und Wirtschaftsbedingungen"). This purpose comprises the conclusion of collective agreements. The associations are free to choose the ways they think adequate in order to come to such agreements. The Constitution therefore guarantees the right to go on strike in such a situation. On the other hand, the Federal Labour Court did not violate the Constitution when it developed the parity principle and gave the right to lock-out to the employer´s side.

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[18] BAG, 28.1.1955 und 4.5.1955, AP Nr. 1 und 2 zu Art. 9 GG Arbeitskampf

[19] BAG DB (=Der Betrieb)1980, 1266 rechte Spalte: „Heute besteht Einigkeit darüber, dass das Streikrecht einen notwendigen Bestandteil der freiheitlichen Kampf- und Ausgleichsordnung darstellt, die durch Art. 9 Abs.3 GG im Kern gewährleistet ist."

[20] BVerfG (=Bundesverfassungsgericht), 26.6.1991, BVerfGE (=Amtliche Sammlung, Band und Seite) 84,212 = AuR (=Arbeit und Recht) 1992, 29

2. The uncertain influence of the European Social Charter

During a long time, the Federal Labour Court did not really refer to the European Social Charter which Germany had ratified in 1965. Article 6 § 4 was sometimes mentioned but not as giving a "right" to strike. In 1984 the Court seemed to become more open-minded: if there is a loophole in the law the judge has to fill it by realizing the international obligations of the Federal Republic.[21] Or in other words: as part of government the courts have to develop a solution which is not in contradiction with international treaties ratified by Germany. However, in the following decisions, the court interpreted article 6 § 4 in a way as if it were part of its case law: It would only guarantee a strike organised by a union with has the aim of reaching a new collective agreement.[22] The fact that article 6 § 4 gives the right to strike to "employees" (and not to unions) and that the committee of experts had constantly taken another position did not impress the court. The fact that Germany gives the same legal power to an international treaty as to a domestic act, remained without any practical effect.

In 1998, the Council of Europe´s Committee of Ministers decided with a two-thirds-majority that Germany has neglected its obligations under art 6 § 4 by outlawing the "wild-cat strike" and the strike for other aims than collective agreements. The Committee recommended the Federal Republic to change the situation.[23] It took 4 years and a half before the court reacted declaring that it has to be "re-examined" whether a strike is only lawful when it is used as means to get a new collective agreement.[24] This is a quite clear hint that the situation has become open.[25]

3. Classification of collective actions

The case law of the Federal Labour Court recognizes the principle of "free choice" as to collective actions.[26] Unions and employers´ associations have the right to develop new

[21] BAG, 12.9.1984, AP Nr. 81 zu Art. 9 GG Arbeitskampf = RdA (=Recht der Arbeit) 1985, 52, 59 („völkerrechtskonforme Auslegung")

[22] BAG, 29.1.1985, DB 1985, 1697 rechte Spalte

[23] The text of the recommendation can be found in AuR 1998, 154 ff. See further Däubler AuR 1998, 148

[24] BAG, 10.12.2002, NZA (=Neue Zeitschrift für Arbeitsrecht) 2003, 734, 740

[25] Dazu Kohte-Doll ZESAR (=Zeitschrift für Europäisches Sozial- und Arbeitsrecht) 2003, 393 ff.

[26] BAG, 17.12.1976, BB 1977, 595; BAG, 13.7.1993, DB 1994, 149. Dazu Dieterich, in: Dieterich/Müller-Glöge/Preis/Schaub (Hrsg.), Erfurter Kommentar, 6. Aufl., München 2006 (im Folgenden:

means of pressure outside the strike and the lock out. They can for instance invite people not to buy the products of certain firms. The local labour court of Hamburg accepted e.g. that the competent union distributed leaflets in the restaurant cars of trains in which the working conditions of the waiters and waitresses were severely criticized.[27] The organization of a demonstration against the employer(s) is equally permitted.[28]

A collective exercise of individual rights is not considered to be a "collective action". The fact that it may produce a kind of pressure against the employer remains without any legal importance. An individual right is not lost because of the pure fact that other individuals exercise a comparable right at the same time and based on a common decision.[29] There are three important examples:

- If the employer does not fulfil his duties derived from the employment contract employees have the right to refuse performance until counter-performance is effected. If e.g. wages are not fully paid the workers may stop working and continue only after payment. This so-called right of retention can be exercised by all employees concerned.[30] If health protection at the workplace is below legal standards, the same principle applies.

- Based on the EC-Directive on acquired rights, the individual employee can veto the transfer of his labour contract to another employer. According to the case law of the Federal Labour Court, that can be done collectively.[31] It constitutes however an abuse if the employees would use this right to improve their working conditions or to make the transfer of the undertaking impossible.

- As mentioned above,[32] employees can refuse to perform the work of strikers. This is based on the conception that there can be no obligation to break solidarity.[33] The Federal

ErfK), Art. 9 Rn 266

27 ArbG Hamburg, 30.6.1992, AiB 1992, 530 mit Anmerkung Grimberg

28 LAG Frankfurt/Main, 28.6.1985, BB 1985, 1850. Cf. also BAG, 12.9.1984, AP Nr. 81 zu Art. 9 GG Arbeitskampf

29 BAG, 30.9.2004, NZA 2005, 43 ff.

30 BAG 20.12.1963 und 14.2.1978, AP Nr. 32 und 58 zu Art. 9 GG Arbeitskampf; BAG, 9.5.1996, DB 1996, 2337

31 BAG, 30.9.2004, NZA 2005, 43 ff.

32 I 3

33 BAG, 25.7.1957, AP Nr. 3 zu § 615 BGB Betriebsrisiko; BGH, 19.1.1978, AP Nr. 56 zu Art. 9 GG Arbeitskampf; BAG, 10.9.1985, AP Nr. 86 zu Art. 9 GG Arbeitskampf. In the same sense Colneric, aaO, Rn 590 ff.; Däubler, Arbeitsrecht 1, aaO, Rn 620 f.; Gamillscheg, Kollektives Arbeitsrecht, Band I, München 1997, § 25 I 7 a (S. 1197); KassArbR(= Kasseler Handbuch des Arbeitrechts, herausgegeben von Leinemann)-Kalb, Band 2, 2. Aufl., Neuwied 2000, Abschnitt 8.2 Rn 171; MünchArbR (=Münchener Handbuch des Arbeitsrechts, herausgegeben von Richardi und Wlotzke)-Otto, 2. Aufl. München 2000, § 287 Rn 32; Rüthers ZfA(=Zeitschrift

Labour Court accepted this principle even in cases where the strike as such was unlawful.[34] It is of no importance if only one person refuses to work or if this is done by a whole group of persons.

Three kinds of collective action need special attention: The solidarity strike, the boycott and the strike accompanied by an occupation of the plant.

4. The solidarity strike

"Solidarity strike" – sometimes also called "sympathy strike" – means a strike in support of a collective action undertaken by other workers. There is e.g. a strike in the metal industry for a reduction of working time and the employees of hospitals stop work for one day in order to express their common views. In specific cases, the solidarity strike may happen without a "main strike": The union of the workers concerned may be too weak, the right to strike may be limited or even excluded in the public interest.

As to the lawfulness of a solidarity strike, two points are out of discussion. If the "main strike" is illegal, the solidarity strike will be unlawful, too; otherwise the legal order would be in contradiction to itself. The peace obligation derived from an existing collective agreement is not touched by a solidarity action because it does not aim at modifying or replacing the collective agreement.[35]

During a long time, the legality of the solidarity strike was more or less uncontested. In 1985 the Federal Labour Court decided, however, that it is in general unlawful, but can be legitimized under certain circumstances.[36] This position was confirmed in 1988[37] and repeated in 1991.[38] The reasoning refers to the principle that strikes are legally recognized only if they aim at the conclusion of a collective agreement for the striking workers.[39] In

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für Arbeitsrecht) 1972, 403 ff.; HWK-Hergenröder Art. 9 GG Rn 206 ff. (qualifying it as a collective action); a. A. Nicolai, Verweigerung von Streikarbeit, Baden-Baden 1993, restricting the principle to strikes in the same plant.

34 BAG, 25.7.1957, AP Nr. 3 zu § 615 BGB Betriebsrisiko

35 BAG, 21.12.1982, BB 1983, 1410; s. also Birk, Die Rechtmäßigkeit gewerkschaftlicher Unterstützungskampfmaßnahmen, Stuttgart 1978, S. 34

36 BAG, 5.3.1985, NZA 1985, 504 = AP Nr. 85 zu Art. 9 GG Arbeitskampf

37 BAG, 12.1.1988, NZA 1988, 474 = AP Nr. 90 zu Art. 9 GG Arbeitskampf

38 BAG, 9.4.1991, DB 1991, 2295 = NZA 1991, 816

39 The argument is somewhat similar to the legislation in the UK – see Germanotta-Novitz, The International Journal of Comparative Labour Law and Industrial Relations 18 (2002) p. 67 ff.

addition, the employer is by no means able to influence the outcome of the main conflict; insofar, the solidarity strike is disproportionate.

The doctrine is split into two "camps".[40] There are indications (but not more) that the Federal Labour Court could change its position. If the declaration that the European Social Charter can modify the linkage between collective agreements and strike[41] would be taken seriously, the solidarity strike would also be judged in another (and less restrictive) way. A second argument seems to be even more promising. If there is an industrial conflict about a new collective agreement on branch level, unions are entitled to organize strikes even against employers who are no more members of the employers´ association: It is up to the unions to decide, by which way they want to exercise pressure. The fact that the "outsider" has no more any influence on decisions taken by the association is without legal importance.[42] If the main conflict concerns a collective agreement a solidarity strike organised by the same union would have a similar function.

For the time being, it is, however, more important to have a look at the "exceptions" mentioned in the decision of 1985. The Court distinguishes two cases which are considered to be examples, not excluding other exceptions.[43] A solidarity strike is lawful when the employer is no more "neutral" in the main conflict and takes over work which was done by the strikers before. This gives the opportunity to react on "indirect strike-work".[44] The second case means "economic unity" between the employer in the main conflict and the employer whose workers take solidarity action; this is the case if they belong to the same group of enterprises or to the same employers´ association giving money to employers who cannot continue their activity because of a strike.[45] In doctrine, a third case is mentioned: If the employers in the main conflict threat to relocate the production to another country the bargaining power of the union affected will decline dramatically. To re-establish a certain level of "parity" a solidarity strike should be admitted.[46]

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40 See the references at Gamillscheg, Kollektives Arbeitsrecht, § 24 I 3 a (1) and (2); HWK-Hergenröder Art. 9 GG Rn 270; Kissel, Arbeitskampfrecht, München 2002, § 24 Rn 31 Fn 86

41 See above I 2 at the end

42 BAG, 18.2.2003, NZA 2003, 866, 869

43 BAG, 5.3.1985, NZA 1985, 504 = AP Nr. 85 zu Art. 9 GG Arbeitskampf

44 Cf. about this notion above I 3

45 More details at Bieback, in: Däubler (Hrsg.), Arbeitskampfrecht, Rn 379 ff.

46 Preis, Anmerkung zu BAG EzA Art. 9 GG Arbeitskampf Nr. 73 S. 21; Däubler, Arbeitsrecht 1, 16. Aufl., Rn 669

5. The boycott

The boycott is normally used as an instrument to support the collective action of other workers. There will be no legal problems if the declaration wants other people not to conclude labour contracts with the employer concerned, especially not to work as strike-breakers. A decision of the Federal Labour Court considered a boycott to be a traditional form of industrial action and therefore admitted that it can even aim at a "partial strike" in the sense that workers should not unload ships belonging to the employers of the main conflict.[47] This view is in a certain contradiction to the case law in the field of solidarity strikes (because the execution of the boycott is a kind of solidarity action) but is has been largely accepted by the doctrine.[48] In the uncertain situation on the field of solidarity strikes the decision on boycotts may even influence the court to accept a wider range of exceptions or to give up the interdiction of solidarity strikes.

Boycotts on the markets of products and services have already been mentioned.[49]

6. The occupation of the plant

The Federal Court of Labour considers the occupation of the plant to be unlawful.[50] Many authors express their fundamental disapproval to this kind of "revolution in small format";[51] others try to legitimize it at least in certain cases.[52] The discussion is shifting to the "blockade" of the plant which can be the only means to interrupt in an effective way the functioning of the plant. Enterprises printing newspapers are often taken as an example where the production can be continued at least for some time by using a small number of strike-breakers. The principle of parity may in such cases demand the blockade (often called "intensive picketing") in order to re-establish a countervailing power.[53]

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47 BAG, 19.10.1976, AP Nr. 6 zu § 1 TVG Form = DB 1977, 405

48 Berg et alii, Tarifvertrags- und Arbeitskampfrecht, Frankfurt/Main 2005, AKR Rn 98; ErfK-Dieterich Art. 9 GG Rn 274; Gamillscheg, Kollektives Arbeitsrecht I, § 21 IV 1 (S. 1053); Hueck-Nipperdey, Lehrbuch des Arbeitsrechts, 7. Aufl., Band II/2, München und Frankfurt/Main 1970, S. 911

49 See above I 4 Fn 17

50 BAG, 14,2,1978, AP Nr. 58 zu Art. 9 GG Arbeitskampf

51 See for instance Hellenthal NZA 1987, 52; Loritz DB 1987, 223

52 See Derleder BB 1987, 819; an overview is given at Däubler, Das Arbeitsrecht 1, Rn 717 ff.

53 See the detailed study by Treber, Aktiv produktionsbehindernde Maßnahmen. Zur Zulässigkeit von Betriebsbesetzungen und Betriebsblockaden unter Berücksichtigung des Funktionszusammenhangs von Privatautonomie, Tarifautonomie und Arbeitskampfrecht, Berlin 1996. See also the sceptical view by ErfK-Dieterich Art. 9 GG Rn 273

As to seafarers, their presence in their cabins on board the ship is not considered to be an occupation. The employer´s obligation to provide lodging is not suspended by the strike. If there is a sufficient number of cabins, the employer can hire a "replacement crew" and continue his operations.[54] A penal sanction against strikers for "mutiny" is not possible.

7. Procedural restrictions to collective action

If a strike is organized by a union, the procedural requirements are quite modest: The union has to declare which concrete fields of activities are called to strike. There is only one attempt required to come to negotiations – if the employer refuses or if the talk does not lead to an agreement, the union is free to go on strike. Unlike in some other countries there is no obligation to announce the strike with a certain delay.

The by-laws of the unions require normally a ballot if the strike is not limited to some hours or one day. If these rules are neglected, the lawfulness of the action is not challenged. The Federal Labour Court has stated that only for short-time-strikes[55], but nearly all authors agree that the situation with other strikes will not be different.[56]

If a strike is unlawful the competent labour court can stop it by injunction. This instrument is often used.[57] Some courts require that the legal situation must be clear,[58] but this sound principle is not always followed.[59]

III. Issues related to cross-border collective action

1. The general rule

As far as we can see German law does not distinguish between purely national conflicts and collective actions having a cross-border element. The only problem is, that cross-

[54] These rules have been confirmed by a non-published decision of the Regional Labour Court of Hamburg – information given by Dieter Benze, responsible for seafarers in the German service union "ver.di".

[55] BAG, 17.12.1976, AP Nr. 51 zu Art. 9 GG Arbeitskampf Blatt 3

[56] Gamillscheg, Kollektives Arbeitsrecht I, S. 1011; G. Müller RdA 1971, 325; Seiter, Streikrecht und Aussperrungsrecht, Tübingen 1975, S. 509 ff.; Zöllner-Loritz, Arbeitsrecht, 5. Aufl. München 1998, § 40 VI 4 a cc

[57] See Steinbrück, Streikposten und einstweiliger Rechtsschutz im Arbeitskampfrecht der Bundesrepublik Deutschland, Baden-Baden 1992, S. 28 ff.

[58] Cf. LAG Köln, 14.6.1996, NZA 1997, 327 and ErfK-Dieterich Art. 9 GG Rn 223

[59] See for instance LAG Rheinland-Pfalz, 22.4.2004, AP Nr. 169 zu Art. 9 GG Arbeitskampf mit Anmerkung Däubler

border actions are rare and court decisions are still a rarer exception. Even in doctrine the cross-border aspect is often not dealt with. Sometimes we move on unknown ground.

2. The "synchronized" strike

As mentioned in the first part[60] a strike does not become unlawful because there are "parallel" strikes in other countries. This is even the case if unions have planned a coordinated action. In theory, the situation could happen that there is a consensus on all important points in one country but a still ongoing conflict in the other. If the union would continue the strike in such a situation, it would change its nature and become a solidarity action. As this would create legal problems in many countries, unions will in practice avoid such a situation by declaring that there are remaining still some open points in the national context, too.

3. The solidarity strike

The principles applying to solidarity strikes are not changed because of cross-bordernature of the conflict.[61] The Regional Labour Court of Frankfurt has therefore declared a cross-border solidarity strike to be lawful[62] - a decision which was made, however, before the 1985 judgment of the Federal Labour Court.

In the present situation the legality of solidarity strikes in general is in a certain way unclear.[63] The exceptions which the Federal Labour Court has admitted, are of considerable importance in the international context. A solidarity strike against the German part of a multinational enterprise in order to support actions taken by workers in a foreign subsidiary, would be considered to be lawful.[64] The same is probable if a German employer would take over tasks which had to be fulfilled by workers in foreign enterprises who are currently on strike.

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[60] Above I 1

[61] Bieback, in: Däubler (Hrsg.), Arbeitskampfrecht, Rn 398 ff.; Birk, Unterstützungskampfmaßnahmen, aaO, S. 74 f.; Däubler, Arbeitsrecht 1, 16. Aufl., Rn 698; Hergenröder, in: Löwisch (Hrsg.), Arbeitskampf- und Schlichtungsrecht, aaO, Part 170.8 Rn 76; Junker, Internationales Arbeitsrecht im Konzern, aaO, S. 501

[62] LAG Frankfurt/Main, 25.6.1985, BB 1985, 1850

[63] See above II 4

[64] Cf. Hergenröder, in: Löwisch (Hrsg.), Arbeitskampf- und Schlichtungsrecht, aaO Rn 77, who advocates to take this in consideration

4. The refusal to perform the work of strikers

In the Barcelona-case mentioned above[65] a German stewardess had refused to clean the airplane because that was the task of Spanish workers the very day on strike. The Regional Labour Court of Frankfurt did not refer to the case law of the Federal Courts[66] and declared that art. 9 § 3 of the Constitution would not be applicable to such a case: As this provision was in its view the only possible legal basis, the behaviour of the stewardess was considered to be illegal.[67] The Federal Labour Court accepted an appeal on non-admission (Nichtzulassungsbeschwerde) stressing on the point that the decision raises important questions not yet decided by the Federal Labour Court.[68] Unfortunately, there was no decision as to the merits of the case because the conflicting parties had reached a compromise.

5. Boycott

The boycott-decisions of the Federal Labour Court[69] and of the local court of Bremen[70] referred to cross-border actions: In both cases the boycott measures had to be executed abroad. In this field, there is no distinction between German and international cases, either.

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65 I 3 (note 10)
66 See above note 11
67 LAG Frankfurt/Main (note 10)
68 BAG, 18.8.1987, AP Nr. 33 zu § 72a ArbGG Grundsatz referring to the linkage of production and service processes in different countries
69 BAG, 19.10.1976, AP Nr. 6 zu § 1 TVG Form
70 7.10.1999, NZA-RR 2000, 35