

## PART XII

### SPECIAL SUBJECT MATTERS

#### CHAPTER 4

#### LABOUR PROCEEDINGS IN THE JUDICIAL SYSTEM: A COMPARATIVE ANALYSIS\*

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## 1 INTRODUCTION AND CHARACTERISTICS OF LABOUR DISPUTES

- 1 This chapter provides a comparative study of the labour dispute resolution process in the judicial system,<sup>1</sup> taking into account the following characteristics of labour disputes:
  - a. Inequality between the parties: often in a labour dispute, one of the parties involved is an employee, while the other party is the employer, resulting in the situation where the former is often economically disadvantaged. Especially when wage payments are involved, such disputes are closely related to the right to property, the right to work, and the right of individual employees to minimum livelihood. Individual employees are usually at a disadvantage with their insufficient ability to confront and negotiate with their employer.
  - b. Difficulty in finding facts: labour disputes often occur in the workplace, and the evidence is usually under the control of the employer. Claims related to occupational injuries or harassment in the workplace often rely on backtracking the sequence of the incident. It is often not easy to recall causal interactions.
  - c. Maintenance of harmonious labour relations and compatibility: labour relations are successive relationships that work best when both parties are in harmony. To prevent the parties from further opposition, thorough considerations of the parties' interests and a consensus to resolving disputes are indispensable.
  - d. Complexity and legal uncertainty: labour disputes have a level of complexity that requires experience or expertise in understanding labour relations. The rights and obligations arising from labour relations, in terms of their constitutive elements, often depend on the interpretation of

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<sup>1</sup> M Ebisui, S Cooney and C Fenwick, *Resolving Individual Labour Disputes: A Comparative Overview* (International Labour Office 2016) 11 [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_488469.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488469.pdf) accessed 15 December 2022; S Corby and P Burgess, *Adjudicating Employment Rights. A Cross-National Approach* (Palgrave Macmillan 2014); S Araujo, B Safradin and L Brito, Comparative Report on Labour Conflicts and Access to Justice: The Impact of Alternative Dispute Resolution. ETHOS (EU Commission H2020 Research Project 2019). [https://www.ethos-europe.eu/sites/default/files/docs/d6.5\\_website\\_report\\_complete.pdf](https://www.ethos-europe.eu/sites/default/files/docs/d6.5_website_report_complete.pdf) accessed 15 December 2022; P Windel, 'Brauchen Wir Arbeitsgerichtsbarkeit' in M Henssler, J Joussen, M Maties and U Preis (ed), *Moderne Arbeitswelt, Festschrift für Rolf Wank* (2014), 679-694.

uncertain legal concepts, such as 'reasonable range',<sup>2</sup> 'reasonably compensate',<sup>3</sup> 'based on business needs',<sup>4</sup> 'serious violation',<sup>5</sup> and 'without good cause'.<sup>6</sup>

- 2 Based on the above-mentioned characteristics of labour disputes, procedures for labour dispute resolution are usually designed, to appropriately handle the disputes and achieve procedural justice, as follows:<sup>7</sup>
- a. Guaranteed access to the courts: reasonable or mitigated costs should be ensured to safeguard employees' rights to access the courts. In addition, facts and evidence should be collected in such a way that employees have access to the evidence held by the employer in order to ensure substantive equality in the process. The allocation of the burden of proof may be adjusted under certain conditions.
  - b. Efficiency and promptness: prolonged delays in the procedures are usually unacceptable to workers for reasons of livelihood maintenance. Furthermore, in incidents involving a large number of people, to prevent more considerable economic loss and social chaos, an effective, efficient, and expeditious procedure is essential and a simplified procedure is therefore needed.
  - c. Consensual resolution: to maintain harmonious labour relations, there is a greater need to adopt non-litigious or non-adversarial procedures in the handling of labour disputes. Consensual settlement is a possible solution to help minimize conflicts between the parties, avoid confrontation in labour relations, and reduce the impact on social stability. Also, linking mediation and litigation, or combining the negotiated adjustment

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<sup>2</sup> For example, Labour Standard Act 2020 Art 9-1 (3) (Taiwan): 'The period, area, scope of occupational activities and prospective employers with respect to the business strife limitation shall not exceed a *reasonable range*' (emphasis added).

<sup>3</sup> For example, Labour Standard Act 2020 Art 9-1 (4) (Taiwan): 'The employer shall reasonably compensate the employee concerned so long as they do not engage in business strife activities for the losses incurred by them'.

<sup>4</sup> For example, Labour Standard Act 2020 Art 10-1 (1) (Taiwan): 'The employee shall be transferred based on business needs and without improper motive or purpose'.

<sup>5</sup> Labour Standard Act 2020 Art 12 (4) (Taiwan).

<sup>6</sup> Labour Standard Act 2020 Art 12 (6) (Taiwan).

<sup>7</sup> K-L Shen, 'Reconstructing the Labour Mediation Process: Diversifying the Dispute Resolution System and Transforming the Process', in Seminar of the Civil Litigation Law Research Association (ed), *Discussion of Civil Litigation Law 24* (Angle 2019) 211, 211-305; J-P Waite, A Payne QC, D Hobbs, *The Employment Tribunals Handbook: Practice, Procedure and Strategies for success* (6th ed, Bloomsbury Professional, 2021) 1, 124.

between the parties with summary judgment procedures, may enhance the efficiency of dispute resolution.

- d. Discretionary and specialized composition of judges: the labour courts have greater discretion to facilitate proceedings and to investigate facts and evidence to make appropriate decisions. Therefore, the labour courts are composed of professional judges and lay judges to facilitate convincing resolutions. Judges must have extensive expertise in labour relations so that they can quickly grasp and focus on the core issues of the disputes and render appropriate decisions while balancing the interests of all parties.<sup>8</sup>

- 3 Although the out-of-court dispute resolution system also plays an important role in avoiding labour disputes from occurring or expanding, this chapter mainly focuses on labour proceedings in the judicial system and analyses how individual labour disputes can be resolved timely, effectively, and efficiently in different jurisdictions.

## 2 OVERVIEW OF LABOUR PROCEEDINGS IN THE JUDICIAL SYSTEM

- 4 Labour proceedings in courts in different jurisdictions can be broadly classified into the following three categories:
  - a. Specialized labour courts, such as those in many European countries (Germany, France, Belgium, the UK);
  - b. Specialized labour divisions or tribunals in ordinary courts, such as those in some East Asian countries (Taiwan, Japan);
  - c. Neither specialized labour courts nor labour tribunals, but rather ordinary civil courts as in other civil cases, such as those in North America and China.

### 2.1 Specialized Labour Courts or Tribunals

- 5 Many countries in Europe have established specialized courts or tribunals and special procedural regulations, such as Germany, the United Kingdom, Belgium, and France. The

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<sup>8</sup> See K Sugeno, R Yamakawa, Y Saito, M Sadazuka, S Otozawa, *Labour Trial System-Basic Purpose and Ordinance Commentary* (2nd ed, Koubundou 2007) 29.

common feature is that the labour courts are composed of professional and lay judges.<sup>9</sup> The primary duties of a lay judge in the labour court are to provide direct observations of labour domains, have professional knowledge in labour relations, and have their own professional experience in trials. Allowing representatives from both parties to join the panel reflects the statutes of inverse interest in the labour world and can potentially increase parties' acceptance of the verdict, ultimately leading to the harmony in the Rule of Law.<sup>10</sup>

- 6 Germany legislated *Arbeitsgerichtsgesetz* (a specialized Labour Court Act (ArbGG)) in 1926, which continued throughout the wars.<sup>11</sup> After World War II, the specialized labour court jurisdiction system was maintained. The labour court is isolated from the civil court<sup>12</sup> and has a separate system with three tiers: *Arbeitsgericht* (the district labour court), *Landesarbeitsgericht* (the state labour court), and *Bundesarbeitsgericht* (the federal labour court).<sup>13</sup> Its jurisdiction vastly included labour incidents related to both individual and group agreements. From the very beginning, Germany's labour court has required lay judges to participate in trials throughout all instances. The district and state labour courts require one professional judge and two lay judges in the form of a collegiate panel to trial. In the Federal Supreme Labour Court, the collegiate panel comprises three professional judges and two lay judges, totalling five judges. Individual labour disputes are conducted, as a rule, like civil proceedings in the district courts (Art 46 of ArbGG), but there are many special provisions that honour the special characteristics of labour disputes. For example, the defendant is not requested to respond to the complaint in writing.<sup>14</sup> At the beginning of the procedure, the presiding judge conducts an oral hearing for the purpose of reaching an amicable agreement between the parties (*Güteverhandlung*, conciliation hearing). The presiding judge may also refer the parties to a judge designated for this purpose but unauthorized to make decisions for the conciliation hearing. The judge for conciliation may use all methods of dispute

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<sup>9</sup> P Burgess et al, 'The Roles, Resources and Competencies of Employee Lay Judges: A Cross-National Study of Germany, France and Great Britain' Working Paper Forschungsförderung No 051' (Hans-Böckler-Stiftung, Düsseldorf 2017) <https://www.econstor.eu/bitstream/10419/215982/1/hbs-fofoe-wp-051-2017.pdf> accessed 25 December 2023. <https://nbn-resolving.de/urn:nbn:de:101:1-201711153217> accessed 15 December 2022.

<sup>10</sup> B Opolony, *Der Arbeitsgerichtsprozess* (C.H. Beck 2004) 6, para 17; R Künzl, 'Die Beteiligung ehrenamtlicher Richter am arbeitsgerichtlichen Verfahren' (1990) 104 *Zeitschrift für Zivilprozess* 150, 156; Windel (n 1) 679-694, 683.

<sup>11</sup> Justice of the State of North Rhine-Westphalia, 'Geschichte der Arbeitsgerichtsbarkeit' (2022) [https://www.justiz.nrw.de/Gerichte\\_Behoerden/fachgerichte/Arbeitsgericht/grundsaeetze/geschichte\\_ag/index.php](https://www.justiz.nrw.de/Gerichte_Behoerden/fachgerichte/Arbeitsgericht/grundsaeetze/geschichte_ag/index.php) accessed 15 December 2022.

<sup>12</sup> Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) Art 95 (Germany) [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0535](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0535).

<sup>13</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 1 Gerichte für Arbeitssachen (Germany): Die Gerichtsbarkeit in Arbeitssachen - §§ 2 bis 3 – wird ausgeübt durch die Arbeitsgerichte - §§ 14 bis 31 –, die Landesarbeitsgerichte - §§ 33 bis 39 – und das Bundesarbeitsgericht - §§ 40 bis 45 – (Gerichte für Arbeitssachen).

<sup>14</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 47(2) (Germany).

resolution, including mediation (Art 54 (6) of ArbGG). Especially in the case of dismissals, the conciliation hearing should take place within two weeks of the suit being filed,<sup>15</sup> in order to settle the dispute as quickly as possible.

- 7 In the United Kingdom, the Employment Tribunal (ET) was initially called the Industrial Tribunal (IT) and was founded based on the Industrial Training Act 1964.<sup>16</sup> The ET is an individualized judiciary specializing in resolving disputes in labour relations between employer and employee. Until 2007, through the legislation of the Tribunal, Courts and Enforcement Act, it had established its status as a judiciary and as a subordinate of Her Majesty's Court & Tribunal Service (HMCTS). Managed by the HMCTS along with other tribunals,<sup>17</sup> its procedures are based on the Employment Tribunal Procedure Rules (ETPR) and other applicable rules, such as the Employment Rights Act 1996, the Equality Act 2010, and the Trade Union and Labour Relations (Consolidation) Act 1992. Its most common disputes are related to unfair dismissal, redundancy payments and employment discrimination. As the jurisdiction of the IT expanded through the years, it grew to include most statutory individual labour relations proceedings; hence, the IT system has evolved and now comprises complex, official procedures. According to the Employment Rights (Dispute Resolution) Act 1998, it changed its name to the ET. The ET panel consists of a chair with expert legal qualifications (so-called *Employment Judges*) and two non-legal experts in labour relations cases. The Lord Chancellor appoints one after consultation with organizations or associations representing employees, and the other represents employers.<sup>18</sup> However, when the case is unambiguous, a trial can also be conducted solely by a legally qualified employment judge—a member of the tribunal.<sup>19</sup> In contrast to Germany, the UK has a mixed court system. Appeals go from employment tribunals to the Employment Appeal Tribunal. It is equivalent in status and as a court of record to the High Court. Appeals from the Employment Appeal Tribunal are heard by the 'ordinary' courts, Court of Appeal, Civil Division, in England and Wales. Final appeals are heard in the UK Supreme Court.
- 8 Belgium has specialized jurisdiction over labour disputes. *Tribunal de travail – arbeidsrechtbank* (the Labour Tribunal) has specific jurisdiction concerning matters of individual labour law and social security law—not for matters of collective labour law (such as strike or lockout), which are resolved by means of negotiations and are kept from the

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<sup>15</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 54, 61a (2) (Germany); E Helml, 'ArbGG § 61a' in E Helml and S Pessinger (ed), *Arbeitsgerichtsgesetz: ArbGG* (C. H. Beck 2021), para 8.

<sup>16</sup> Industrial Training Act 1964 Art 12 (UK).

<sup>17</sup> GOV.UK, 'Employment Tribunal' <https://www.gov.uk/courts-tribunals/employment-tribunal> accessed 15 December 2022.

<sup>18</sup> The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Art 8 (UK).

<sup>19</sup> The Employment Tribunals Act 1996 Art 4(2) (UK).



judiciary as a whole.<sup>20</sup> As part of the 2014 reform, the Labour Tribunals are organized at the level of the Court of Appeal and are located in 5 different cities: Antwerp, Brussels, Ghent, Liège, and Mons.<sup>21</sup> However, to ensure access to justice, all 27 judicial districts are maintained as local divisions of the scaled-up centralized courts where hearings are held. The composition of Labour Tribunal is similar to that of Germany, consisting of one professional judge and two lay judges—one of them is an employer representative and the others are a union representative or a representative of the employee (or the self-employed).<sup>22</sup> A party who disagrees with the judgment of the Labour Tribunal can appeal to a Labour Court of Appeal. As with the Labour Tribunal, the sections of the Labour Court consist of a professional judge and two or four lay judges. Belgium's Supreme Court, the Court of Cassation, has three divisions: one for labour and social security cases, one for civil (including business) cases, and one for criminal cases. All members of Cassation are professional judges, but five of them must have practiced for at least five years in a Labour Tribunal or Labour Court of Appeal. A comparative feature is that there is a labour prosecutor in each Labour Court, who represents the public interest and intervenes specifically in social security matters or in cases involving discrimination, harassment, or violence.<sup>23</sup>

- 9 France has a unique labour justice system different from Germany and the UK.<sup>24</sup> The first instance of the labour court (the Labour Council, *Conseils de prud'hommes*) is composed of only lay judges (labour councillors, *conseillers prud'hommes*)—one from the employers' side and the other from the employees' side (Art L1421-1 of the Labour Code) that are elected and not nominated by social partners. The labour court is exclusively competent for cases concerning individual labour disputes, such as employment contracts, disputes involving public sector employment under private-law conditions, and disputes between employees during work (Arts L1411-1-L1411-4 of the Labour Code). A mandatory conciliation is held by the labour court before two lay judges. However, only fewer than 10% of disputes are resolved at the conciliation stage.<sup>25</sup> The labour court judges disputes when conciliation has not been successful (Art L1411-1 of the Labour Code) and plays the role of civil courts of first instance. The labour court applies several specialized procedures for labour matters and is independent from other civil courts of first instance. Each labour court consists of at least

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<sup>20</sup> P Taelman and C V Severen, *Civil Procedure in Belgium*, 75 (2021, Wolters Kluwer).

<sup>21</sup> Taelman and Severen (n 20) 39.

<sup>22</sup> European e-Justice Portal, National ordinary courts: Belgium, [https://e-justice.europa.eu/18/EN/national\\_ordinary\\_courts?BELGIUM&member=1](https://e-justice.europa.eu/18/EN/national_ordinary_courts?BELGIUM&member=1) accessed 15 November 2023.

<sup>23</sup> Taelman and Severen (n 20) 44; N Simon 'The Labour and Employment Disputes Review: Belgium' in Nicholas Robertson (ed), *The Labour and Employment Disputes Review* (4th ed, The Law Review 2021) <https://thelawreviews.co.uk/title/the-labour-and-employment-disputes-review/Belgium> accessed 15 December 2022.

<sup>24</sup> Corby, Burgess (n 1) 9, 44, 49, 53

<sup>25</sup> Corby, Burgess, (n 1), 9, 54.

four lay judges to conduct a full hearing (*bureau de jugement*). If the lay judges cannot reach a majority decision, the case proceeds to another hearing to break the tie: a settlement hearing (*audience de départage*) held with the same lay judges and an additional professional judge who acts as 'the fifth member'. The referral rate to a 'tie-break' hearing appears to have increased in recent years.<sup>26</sup> Appeals go from the first instance of a labour court to special sections of appellate civil courts, which only consist of professional judges.<sup>27</sup> In cases concerning collective labour relations (*conflits collectifs*), the Labour Code provides three dispute resolution mechanisms, which are conciliation (*conciliation*), mediation (*médiation*) and arbitration (*arbitrage*). Apart from these mechanisms, in cases concerning collective labour relations, the conventional method of dispute resolution is to file a suit in ordinary civil courts of first instance (*tribunal judiciaire*).

## 2.2 Specialized Tribunals in Civil Court

- 10 In some jurisdictions, although there are no special labour courts, special divisions or special tribunals in ordinary civil courts are established in consideration of the characteristics of labour disputes. There are two subtypes of courts within this category: those that have some special rules that differ from the Code of Civil Procedure, such as in Taiwan and Japan, and those that have no special procedural rules and still apply the Code of Civil Procedure, such as those in South Korea and China.

### 2.2.1 Specialized Tribunal with Special Procedural Rules

- 11 Taiwan legislated the new Labour Incident Act (LIA) at the end of 2018 and implemented it on January 1, 2020. The LIA was enacted for the purposes of ensuring expeditious, proper, professional, effective, and equal treatment of labour cases, the protection of the rights and interests of employers and workers, and the promotion of harmonious labour relations to pursue the healthy development of everyday life in society.<sup>28</sup> Taiwan does not have a specialized labour court, such as in Germany, but it has a specialized labour tribunal within the civil court. Civil courts of all instances (except for specialized courts) shall establish a specialized labour tribunal focusing on labour matters to ensure professionalism.<sup>29</sup> Concerning the serving of labour tribunals, judges with proficient knowledge and experience in labour law are preferred. Labour tribunals in Taiwan's courts, however, are composed of professional judges, not lay judges. To make up for the lack of lay judges in labour litigation procedure, before litigation, there is a mandatory mediation procedure in court. The Labour Mediation Committee is composed of one labour tribunal judge and two experts in labour

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<sup>26</sup> Corby, Burgess, (n 1), 9, 56.

<sup>27</sup> Corby, Burgess, (n 1), 14.

<sup>28</sup> Labour Incident Act 2018 Art 1 (Taiwan).

<sup>29</sup> Labour Incident Act Art 4 (1) (Taiwan).

relations.<sup>30</sup> If mediation fails, the same labour judge will continue the specialized labour litigation procedure. This pre-trial mediation in Taiwan functions similarly to the settlement proceedings that are part of the oral argument session of the adjudicative process in Germany.

- 12 Labour mediation is distinguished from labour litigation by emphasizing reaching a mutual agreement among opposing parties. The mediation committee is authorized to resolve the dispute at its discretion and does not necessarily have to conform to the law. The mediation committee may devise and determine the terms of mediation to resolve the dispute with the consent of all parties. Should the parties not reach an agreement, the committee shall consider all things and present ex officio a suitable proposal based on the balanced interests of both parties, without violating the parties' primary intention.<sup>31</sup> This kind of proposal is not binding. If the parties involved and other interested parties participating in the mediation raise objections to the proposal within 10 days, the mediation is deemed unresolved.
- 13 In Japan, there is no specialized labour court. The labour disputes concerning either individual or group agreements are under the jurisdiction of the Civil Court, where the Code of Civil Procedure is applied. However, before the civil litigation procedures, individual labour disputes may try to settle through the so-called labour tribunal proceedings. Japan legislated the Labour Tribunal Act in 2004 and implemented it on April 1, 2006.<sup>32</sup> The labour tribunal proceeding is a conciliation proceeding at the district court,<sup>33</sup> which is an informal non-contentious procedure to achieve prompt, proper, and effective dispute resolution depending on the circumstances of the dispute.<sup>34</sup>
- 14 The labour tribunal is composed of one labour tribunal judge and two labour tribunal members with knowledge and experience in labour relations,<sup>35</sup> depending on the circumstances of the case.<sup>36</sup> The labour tribunal judge is designated by the district court from among its judges<sup>37</sup> and is responsible for conducting labour tribunal proceedings.<sup>38</sup>

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<sup>30</sup> Labour Incident Act 2018 Art 21 (1) (Taiwan).

<sup>31</sup> Labour Incident Act 2018 Art 28 (1) (Taiwan).

<sup>32</sup> Labour Tribunal Act 2004 Art 1 (Japan): 'The purpose of this Act is to establish procedures whereby, with regard to a dispute concerning civil affairs arising between an individual employee and an employer about whether or not a labour contract exists or about any other matters in connection to labour relations'.

<sup>33</sup> Labour Tribunal Act 2004 Art 2 (1) (Japan).

<sup>34</sup> T Asano, 'Labour Tribunal Proceedings: The Paradigm Shift in Labour Dispute Resolution' (2023), 7 (43) Japan Labour Issues 34, 34 <https://www.jil.go.jp/english/jli/documents/2023/043-03.pdf> accessed 15 December 2023.

<sup>35</sup> Labour Tribunal Act 2004 Art 7 (Japan).

<sup>36</sup> Labour Tribunal Act 2004 Art 10 (1), (2) (Japan).

<sup>37</sup> Labour Tribunal Act 2004 Art 8 (Japan).

<sup>38</sup> Labour Tribunal Act 2004 Art 13 (Japan).

The labour tribunal member, appointed by the supreme court and assigned to the designated district court, has a term of two years.<sup>39</sup> The task of the labour tribunal is to conduct conciliation. Should the case fail to be settled by the parties, the labour tribunal renders a decision by the majority opinion of the labour tribunal judges and members,<sup>40</sup> taking into account the rights and interests of the parties. If the parties refuse to comply with that decision, any one of them may propose their opposition within two weeks. Such opposition is regarded as a lawsuit and the case then proceeds to ordinary civil litigation. Since labour tribunal proceedings are not considered a 'trial' under Art 23(1)(vi) of the Japanese Code of Civil Procedure, the labour tribunal judge can continue to conduct the civil proceedings.<sup>41</sup>

### 2.2.2 Specialized Tribunal without Special Procedural Rules

- 15 South Korea has not established specialized labour courts. Labour disputes related to labour contracts, wage payments, dismissal payment, and occupational injury damages fall under the jurisdiction of the District Court, Appeal Tribunal of the District Court, High Court, and Supreme Court. For efficiency, it has founded special labour divisions in district courts and high courts,<sup>42</sup> but judges designated therein face staffing or work changes every two years. Such changes therefore may limit expertise in dealing with labour disputes. Some suggest that labour proceedings should be treated in a more systematic manner, for example, by hiring legal experts experienced in labour relations as labour judges or judges appointed to conduct labour proceedings longer term.<sup>43</sup> Recently, there were discussions about reforming procedures to establish labour courts.<sup>44</sup> In practice, labour disputes are rarely brought to the courts without going through the Labour Relations Commission (LRC), which is an administrative organization, as procedures in courts can be costly and time-consuming.<sup>45</sup> Civil litigation requires attorney's fees (except if it is a small claims trial, which can be conducted without an attorney), and it can take up to two years for the Supreme Court to render the final verdict.

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<sup>39</sup> Labour Tribunal Act 2004 Art 9 (2) (Japan); Rules of Labour Tribunal Member Art 1, 3, 4 and 7 (Japan) [https://www.courts.go.jp/toukei\\_siryou/kisokusyu/minzi\\_kisoku/minzi\\_kisoku\\_40/index.html](https://www.courts.go.jp/toukei_siryou/kisokusyu/minzi_kisoku/minzi_kisoku_40/index.html).

<sup>40</sup> Labour Tribunal Act 2004 Art 12 (1) (Japan).

<sup>41</sup> N Satosi, *Labour Law* (3rd ed, Nippon Hyoron sha 2020) 148.

<sup>42</sup> Korea Judicial Policy Research Institute, *Research on the improvement of the labour disputes settlement procedure in Korea* (2019) 40 <https://jpri.scourt.go.kr/post/postView.do?lang=ko&menuSeq=35&boardSeq=32&search=&searchName=&researchYears=&curPage=10&pageNum=6&seq=1034> accessed 15 December 2022.

<sup>43</sup> Korea Judicial Policy Research Institute (n 42) 44.

<sup>44</sup> President Mun Jae-In has promised during his presidential election, regarding the issue, stating 'establishing labour courts as courts that are suitable for new generations' <https://m.lawtimes.co.kr/Content/Art?serial=153591> accessed 24 January 2022.

<sup>45</sup> Korea Judicial Policy Research Institute (n 42) 15.

- 16 In China, there is no specialized labour court. Labour disputes are handled by People's Court of first instance and second instance civil court. The fundamental procedures in dealing with labour disputes are three stages of 'mediation-arbitration-litigation', which means the case must go through mandatory mediation and arbitration outside of court before bringing a lawsuit.<sup>46</sup> Labour arbitration in China is actually not the same as the internationally accepted arbitration based on the arbitration agreement and shows the feature of *administrative arbitration*. It has been criticized for its lengthy procedures and prescriptions, where labour dispute arbitration only has 60 days in the statute of limitations, starting from the time the labour dispute occurred. If arbitration is not filed within the statute of limitations, then the court will not hear the case if it is filed, which causes labourers' rights to be infringed without remedy.<sup>47</sup>
- 17 In 2007, the Labour Dispute Mediation and Arbitration Law (thereafter *the New Law* as the framework for China's labour dispute system was enacted). There are many changes in favour of employees. Firstly, there is no prerequisite to arbitration and the parties may choose to seek arbitration directly by bypassing the mediation stage entirely (Art 5 of the New Law). Secondly, the New Law extended the statute of limitations period to one year and the period does not start until the party knows or should have known that his or her labour rights were infringed upon (Art 27 of the New Law). Thirdly, to promote the efficiency of arbitration, the New Law stipulates that an arbitration proceeding must generally be completed within 45 days after the date the Arbitration Commission accepts the arbitration application. In complicated cases this limitation can be prolonged, but for no more than 15 days (Art 43 of the New Law). If the Arbitration Commission exceeds this limitation, the party may file the suit in People's Court directly. Fourthly, if the employer is in possession or control of the evidence in connection with the labour dispute, the employer has the obligation to provide such evidence (Article 39 of the New Law). Any party who disagrees with an arbitration result has 15 days to file an action at the People's Court. There are two instances. The losing party at the first instance of court can appeal to the court at higher levels.
- 18 The China's Court has also been criticized for overly expensive litigation costs, unreasonable allocation of the burden of proof and the tribunal's formation is unable to adapt to the nature of the labour dispute. To resolve practical issues, the Supreme People's Court concluded their case practices and implemented the Supreme People's Court 'Explanations

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<sup>46</sup> W Zhuang and F Chen, "Mediate First": The Revival of Mediation in Labour dispute Resolution' (2015) *The China Quarterly*, 380-402.

<sup>47</sup> The National People's Congress of the PRC, 'The Labour System in the PRC' (China) [http://www.npc.gov.cn/zgrdw/npc/xinwen/2006-03/21/content\\_347935.html](http://www.npc.gov.cn/zgrdw/npc/xinwen/2006-03/21/content_347935.html) accessed 15 December 2022; Z Wang, C Wang, *Labour Disputes Settlement System in China: Past and Perspective*, 18-20 (IDE Asian Law Series No. 22, *Dispute Resolution Process in Asia* (China), 2003), <https://www.ide.go.jp/library/English/Publish/Reports/Als/pdf/22.pdf> accessed 24 November 2023.

of Applicable Laws for Labour Dispute Cases'<sup>48</sup> on January 1, 2021. China's first court specializing in labour disputes was then established on July 16, 2021, in Suzhou City, Jiangsu Province, as a division of the Intermediate People's Court.<sup>49</sup> However, not all courts have labour tribunals and there are no special rules for litigation procedure.

### 2.3 No Specialized Labour Courts or Tribunals

- 19 Some countries have not established specialized courts or tribunals. If parties did not reach a consensus during mediation proceedings out of court, the case would proceed to civil procedure in ordinary courts. Such countries where this applies include the US,<sup>50</sup> Canada,<sup>51</sup> and most provinces of China.<sup>52</sup>
- 20 In the US and Canada, there are no specialized labour courts or rules for labour litigation proceedings. Under the federal system in the US,<sup>53</sup> the courts apply the Federal Rules of Civil Procedure and the Federal Rules of Evidence for labour proceedings. In the US courts, compared to other countries that have established specialized labour courts (or labour tribunals), professionalism and efficiency in resolving labour proceedings are insufficient;<sup>54</sup> this is because the US does not have specialized labour courts or labour tribunals, and a federal court judge has to conduct both civil and criminal cases, while the state court judge has no specialization and needs to run through the entire civil case. Most disputes rely on administrative mechanisms for resolution.<sup>55</sup> Before filing a suit in the courts, it is mandatory to file a complaint with the Equal Employment Opportunity Commission (EEOC), which is an administrative agency.<sup>56</sup> Many statutes require the complaining party to exhaust administrative procedures before seeking redress from the court system. This requirement induces the government agency charged with enforcing the particular regulation to investigate the charges and seek conciliation before bringing a lawsuit.<sup>57</sup> Considering the

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<sup>48</sup> Explanations of Applicable Laws for Labour Dispute Cases (1), (China) <https://www.court.gov.cn/fabu-xiangqing-282121.html>.

<sup>49</sup> <https://buse.de/en/insights/china-establishes-first-labour-court/>.

<sup>50</sup> C Beveridge, *Employment Litigation Handbook*, (2nd ed, American Bar Association 2010), 1, 67, 222.

<sup>51</sup> Canada and USA, see Ebisui, Cooney and Fenwick (n 1) 11.

<sup>52</sup> Labour Dispute Mediation and Arbitration Law of the People's Republic of China (China).

<sup>53</sup> Ebisui, Cooney and Fenwick (n 1) 311.

<sup>54</sup> Ebisui, Cooney and Fenwick (n 1) 330.

<sup>55</sup> Ebisui, Cooney and Fenwick (n 1) 330.

<sup>56</sup> Ebisui, Cooney and Fenwick (n 1) 10.

<sup>57</sup> E K Connors and B Bashore-Smith, 'Employment Dispute Resolution in the United States: An Overview' (1991) 17 Canada-United States Law Journal 319, 332.

expense in time and finance of litigation, the US's solution to disputes leans heavily on mediation or arbitration out of court.<sup>58</sup>

- 21 Similar to the US, Canada has not established a specialized labour dispute procedure in court. However, the use of private arbitration in individual labour disputes in Canada is much less prevalent than in the US.<sup>59</sup> The provinces of Ontario and Quebec have specialized labour tribunals. In 2016, the *Commission des relations du travail* (CRT) was merged into a new Administrative Law Tribunal, called the *Commission des normes, de l'équité, de la santé ET de la sécurité du travail* (CNESST).<sup>60</sup> It is not a court or a tribunal in court, but an administrative law tribunal. Seventy per cent of complaints are settled and do not go to court.<sup>61</sup> Although labour claims can be brought to civil courts, civil court procedures are expensive and lengthy due to lawyers' fees and fee-charging mediation in Canada.<sup>62</sup> Since most administrative tribunals in Canada do not require employees to pay a fee for filing a complaint, whereas employees must pay the applicable court filing fee when litigating in a civil court, very few cases are filed directly to court. The court's function is limited to reviewing the correctness of mediation or arbitration by the administrative law tribunal. In general, the court tends to respect the decisions made by the administrative law tribunal. The scope of judicial review is limited: only in cases where the tribunal violates procedural requirements, lacks jurisdiction, or issues an award that is 'patently unreasonable'.<sup>63</sup>
- 22 In China, most courts have not established specialized labour tribunals. Labour relations disputes are still under the jurisdiction of the civil court, which aligns with the tradition of 'not distinguishing between labour disputes and civil disputes'. Although some courts have started to establish labour dispute divisions to handle labour disputes, in reality, judges are appointed to conduct labour dispute proceedings on a regular basis, so this does not make a significant difference. Such procedures are also seemingly unable to adjust to the particulars of the labour dispute at hand. Some criticize that the current conditions are harming the quality and effectiveness of labour proceedings. Since China is currently undergoing a period of social transformation and contradiction, and labour relations are undergoing profound adjustment, labour disputes are rapidly increasing. Recently, it has been suggested that a specialized labour court should be established. Treating labour

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<sup>58</sup> W B Gould IV, *A Primer on American Labour Law* (C-K Chiao tr, 3rd ed, National Institute for Translation and Compilation 1996) 259-261.

<sup>59</sup> Ebisui, Cooney and Fenwick (n 1) 10.

<sup>60</sup> Commission de norms du travail before 2016, Commission des normes, de l'équité, de la santé et de la sécurité du travail after 2016.

<sup>61</sup> Ebisui, Cooney and Fenwick (n 1) 70-71.

<sup>62</sup> Ebisui, Cooney and Fenwick (n 1) 19, 87; ICLG, *Employment & Labour Laws and Regulations – Canada*, <https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/canada> accessed 15 November 2023.

<sup>63</sup> D J Brown, 'The adjudication of labour relations disputes in Canada' (1991) 17(2) *Canada-United States Law Journal* 343, 348.

disputes as ordinary civil cases, however, will negate the social and affiliated nature of labour disputes, the efficiency, and the social and professional characteristics of labour dispute handling—which is not conducive to the speedy and fair resolution of labour disputes.<sup>64</sup>

### 3 BASIC PRINCIPLES FOR LABOUR PROCEEDINGS

- 23 The following analyses the important basic principles of labour proceeding in courts, including: 1) Facilitation of Consensual Resolution; 2) Expedited Proceedings; 3) Legal Aid and Minimization of Court Costs; and 4) Ex Officio Powers of the Court and Gathering of Fact and Evidence.

#### 3.1 Facilitation of Consensual Resolution

- 24 To maintain harmonious labour relations, even in court proceedings, the importance of consensual dispute resolution is emphasized, but in slightly different ways in different jurisdictions.

##### 3.1.1 Conciliation as a Part of the Oral Argument Session of Adjudicative Procedure

- 25 In Germany, as soon as an action is filed, the Labour Court should schedule the oral arguments and begin the conciliation procedure (Art 54 (1) of the German Labour Court Act). Conciliation procedures are obligatory and are a specialized procedure in the first instance of labour proceedings that forms part of the oral argument session. Moreover, the parties cannot abandon the conciliation procedure, and the court should not proceed with the conciliation procedure even if the parties are unlikely to reach a consensus.<sup>65</sup> The conciliation procedure is conducted by the presiding judge alone, without any lay judge (*ehrenamtlicher Richter*). The presiding judge should liberally discuss with the parties all the circumstances of the case, elucidate the conditions of legality and the facts where the parties are unfamiliar with the procedures, and indicate legal opinions. The presiding judge may also indicate the possible result of the litigation and means of attack or defence, the time spent and cost of the litigation, and the risk of taking evidence to the parties. Where the case is obscure, and although there is no evidence-taking at the conciliation procedure, the presiding judge can still evaluate the documentation provided by the parties, such as receipts, payroll documents, certificates of diagnosis, etc, to judge the causal process of the facts and propose suggestions on reconciliation. To allow the parties to discuss the case

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<sup>64</sup> Y Jiang, 'Prospect to Establish Labour Court in People's Court of China' (2007) 25(11) *Habei Law Science*, 38, 42,

<sup>65</sup> E Berscheid, '§ 54 Güteverfahren' in N Schwab and S Weth (ed), *Kommentar zum ArbGG* (DE Gruyter 2008) § 54, para 2.



freely, the conciliation procedures comprise the following: 1) limitations of an open court: to achieve reconciliation, the presiding judge may limit the publicity of the court (Art 52 of the German Labour Court Act); 2) limitations on the effects of admission: admission in the negotiation procedure should only be bound if the admission is specifically stated by the party on the record (Art 54(2) of the German Labour Court Act); and 3) consultation of the present witness: generally, the presiding judge, not a panel, would conduct the negotiation procedure, so evidence-taking should not be allowed in the negotiation procedures. However, if the witness is present, the presiding judge may seek information from or question the witness.

### 3.1.2 Non-Compulsory Mediation Proceeding

- 26 Since 2012 in Germany, in addition to the conciliation procedures described above, the labour court may propose mediation or other out-of-court dispute resolution procedures to the parties.<sup>66</sup> If the parties decide to conduct mediation or another out-of-court dispute resolution procedure, the court shall order the litigation proceedings to be suspended. At the request of one of the parties, a date for an oral hearing shall be set. Otherwise, the court shall resume the proceedings after three months, unless the parties agree that mediation or out-of-court dispute resolution is still being pursued (Art 54(a) of the German Labour Court Act).
- 27 In the United Kingdom, reform of the employment tribunal has been focusing on the essential facilities of conciliation and mediation in collective and individual labour disputes.<sup>67</sup> Judicial mediation by the employment tribunal was introduced as a pilot scheme in 2006<sup>68</sup> and is now available in all tribunals in England and Wales for any claim that is otherwise referable to an ET. Mediations are conducted by trained employment judges. When the claimant files the form with the court, the employment judge will consider if the case is suitable for mediation and provide mediation services to the parties at a non-public preliminary hearing. The actual mediation follows a typical four-stage format including: identification of the issues, generating and evaluating opinions, deciding on alternatives, and developing the plan for implementation.<sup>69</sup> If the mediation fails, the parties may not mention anything from the mediation in the court hearing. Anything communicated to a

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<sup>66</sup> H Prütting 'ArbGG § 54a' in C-H Germelmann, H-C Matthes and H Prütting (ed) *Arbeitsgerichtsgesetz: ArbGG* (C. H. Beck 2022), para 1.

<sup>67</sup> Ebisui, Cooney and Fenwick (n 1) 269.

<sup>68</sup> P Urwin, V Karuk, P Latreille, E Michielsens, L Page, B Siara, S Speckesser with A Boon and P-A Chevalier, *Evaluating the use of judicial mediation in Employment Tribunals* (Ministry of Justice 2010) <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluating-judicial-mediation-march10.pdf> accessed 15 December 2022.

<sup>69</sup> A Boon, P Urwin and V Karuk, 'What Difference Does It Make - Facilitate Judicial Mediation of Discrimination Cases in Employment Tribunals' (2011) 40 (1) *Industrial Law Journal* 52.

conciliation officer in connection with the performance of their functions shall not be admissible in evidence in any proceedings before an ET, except with the consent of the person who communicated it to that officer.<sup>70</sup> Additionally, the ET judge presiding over the mediation shall not appear as a trial judge without the consent of the parties.<sup>71</sup>

### 3.1.3 *Compulsory Court-Annexed Mediation or Conciliation and Multi-Tier Proceedings*

- 28 Taiwan instituted a special judicial mediation, stipulating mediation as the precondition for litigation. The judicial mediation mechanism is conducted by the Labour Mediation Committee in the district court, in consideration of the characteristics of labour incidents (wide variety, complexity, and difficulty in fact-finding), as well as the demand for a harmonious and expeditious settlement different from traditional administrative mediation which is directed by the municipal or county (city) competent authority. Mediation before litigation is mandatory. Unless there is a reason specified by law,<sup>72</sup> such as unsuccessful mediation by another legally authorized mediatory agency, or the notification to be served upon the opposing party should be effectuated either by constructive notice or in a foreign country, all labour cases shall be subject to labour mediation by the court before an action is initiated. For cases that do not mandate pre-trial mediation, a party may also apply for mediation before initiating an action. The labour mediation shall be completed within three months with a maximum of three mediation sessions.
- 29 Unlike German law, which provides for judge-conducted conciliation, Taiwan's labour mediation is conducted by a Labour Mediation Committee consisting of one judge and two mediators who are equipped with expertise or experience in labour relations or employment affairs.<sup>73</sup> They contribute to the proceedings by providing observations, experience, and knowledge of the practical issues in the relevant field. This formation is designed to include both the legal perspective and specialized knowledge in relevant fields with the aim of paving the way for the autonomous consensual resolution of disputes between employers and employees. Parties' opinions regarding whom to select shall also be respected. In cases where a party has objected to any of the appointed mediators, or where parties have agreed to appoint other appropriate persons, the judge may re-appoint such agreed-upon persons. This allows parties to place more faith in mediation proceedings, thereby increasing the likelihood of reaching an agreement. In terms of deliberating mediation terms or proposing resolutions, the mediators and the judge are on an equal footing, as the final outcome is decided by a majority vote.<sup>74</sup> Nevertheless, the judge shall

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<sup>70</sup> The Employment Tribunals Act 1996 Sec 18 (7) (UK).

<sup>71</sup> The Employment Tribunals Act 1996 Sec 7B (3) (UK).

<sup>72</sup> Labour Incidents Act Art 16 (Taiwan).

<sup>73</sup> Labour Incidents Act Art 21 (Taiwan).

<sup>74</sup> Labour Incident Act Art 27 (Taiwan).

have exclusive authority over matters involving admissibility of the process and jurisdictions for the purpose of ensuring procedural efficiency (Art 22 (1)(2) of Labour Incident Act).

- 30 The labour mediation shall be completed within three months with a maximum of three mediation sessions.<sup>75</sup> The parties shall promptly present the facts and evidence before the end of the second session unless there are reasons not imputable to the parties. The Labour Mediation Committee shall hear the parties' arguments, coordinate pertinent issues and evidence, elucidate potential outcomes at appropriate times, and facilitate settlement. The committee may also, upon motion or on its own initiative, investigate facts and necessary evidence. The parties and known interested parties shall have the opportunity to speak about the results of the investigation.
- 31 This form of labour proceeding in court is multi-tiered and consists of four tiers:
- a. the settlement agreement reached by the parties' consensus;
  - b. the committee's proposal of mediation terms with the agreement of the parties;
  - c. the appropriate resolution proposed at the committee's own initiative and to which the parties do not object; and
  - d. the judgment made by the labour court.
- 32 These four tiers occur in different phases of dispute resolution. To put these four tiers on a spectrum, the parties have the most autonomy in tier (a), and the least in tier (d); a third-party, independent body intervenes the most in tier (d), and the least in tier (a). It is noteworthy that the four tiers are not dissociated. Instead, they are interconnected and reflect the 'multi-tiered' concept.<sup>76</sup> On the one hand, the mediation committee's discretion is strengthened. In cases where parties cannot reach an agreement, the committee shall propose appropriate resolutions on its own initiative. However, such resolutions only take effect when no objection is raised. Therefore, as consent is one of its significant features, this mechanism also falls under ADR. On the other hand, in light of the fact that this is still an in-court procedure, transition to subsequent litigation is facilitated.

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<sup>75</sup> Labour Incident Act Art 24 (Taiwan).

<sup>76</sup> K Shen, 'Multi-tier Dispute Resolution in Taiwan' in A Reyes (ed), *Multi-tier Approaches to the Resolution of International Disputes: A Global and Comparative Study* (Cambridge University Press 2021) 110, 126.

- 33 The labour judge who conducted the mediation will also be the litigation judge.<sup>77</sup> Therefore, mediation also operates as a process where the issues under dispute are formulated and outlined. Since the judge is a member of the mediation committee, by the time the litigation is resumed, relevant issues and evidence would have already been outlined during the mediation sessions. Therefore, the judge, with a fully developed sense of the case, can resolve the conflict promptly and sufficiently. However, to obviate prejudiced prejudgment during the mediation sessions and to ensure the parties can communicate in good faith, the advice given by the labour mediation committee members or the judge in the mediation proceedings, and the statements or concessions made by the parties that are unfavourable to themselves, shall not be adopted as grounds for judgment when said case moves to litigation.<sup>78</sup> This method has proven to be effective. Since its implementation in 2020, the success rate of mediation has significantly increased from 20% to more than 60%.<sup>79</sup> In short, compared to ordinary civil mediation and litigation, Taiwan's labour dispute mediation has stronger cohesion and can smoothly converge with litigation procedures.
- 34 In Belgium, each dispute claim may be conciliated on the request of one party or both parties by a judge competent at the first instance before the hearing (Art 731 of the Judicial Code). However, conciliation is compulsory before litigation, insofar as the litigation concerns work contracts (Art 734 (1) of the Judicial Code).<sup>80</sup> This is largely a formality which does not help to bring the parties to an agreement,<sup>81</sup> and is therefore criticized as 'unproductive' and 'an expensive nuisance'.<sup>82</sup>

### 3.1.4 Combination of Labour Conciliation Proceedings and Labour Tribunal Proceedings

- 35 In the case of Japan, labour tribunal proceedings are a combination of two types of judicial ADR procedures: 'labour conciliation proceedings' and 'labour tribunal proceedings'. Labour tribunal proceedings function based on 'being able to conciliate during labour tribunal proceedings'. Even if consent cannot be reached in conciliation during the proceedings, the labour tribunal should still make a written labour tribunal decision in which the main text of the decision and a summary of the reasons therefore are noted.<sup>83</sup> If no lawful challenge is

<sup>77</sup> Labour Incident Act Art 29 (Taiwan).

<sup>78</sup> Labour Incident Act 2018 Art 30 (Taiwan).

<sup>79</sup> News of Judicial Yuan (2022), <https://www.judicial.gov.tw/tw/cp-1459-587810-1a50b-1.html>, accessed 5 May 2022.

<sup>80</sup> C Storck, 'The Use of Mediation/Conciliation by Labour Court', 24 [https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed\\_dialogue/@dialogue/documents/meetingdocument/wcms\\_189533.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/meetingdocument/wcms_189533.pdf), accessed 5 November 2023.

<sup>81</sup> Simon (n 23) 8, 9; Storck (n 80) 25.

<sup>82</sup> Civil Justice Council, CJC ADR Working Group, 'ADR and Civil Justice' (2017), 42. <https://www.judiciary.uk/wp-content/uploads/2021/02/20210205-ADR-Interim-Report-for-consultation-October-2017.pdf>, accessed 5 November 2023.

<sup>83</sup> Labour Tribunal Act 2004 Art 20 (3) (Japan).

filed or the challenge is illegal, the labour tribunal decision has the same effect as a judicial settlement and as a final and binding judgment.<sup>84</sup>

- 36 Labour tribunal proceedings at the district court level have the characteristics of non-contentious proceedings. The labour tribunal is composed of one labour tribunal judge and two labour tribunal members.<sup>85</sup> The former is designated by the district court from among its judges;<sup>86</sup> the latter is designated in every single labour tribunal case by the court after taking into account the knowledge and experience of the labour tribunal members and any other relevant circumstances, and with due consideration to ensure the appropriate composition of labour tribunal members in the labour tribunal.<sup>87</sup> The labour tribunal member must have expertise in labour relations and perform their duties from a neutral and fair standpoint.<sup>88</sup> Labour tribunal proceedings are led by the labour tribunal judge.<sup>89</sup> Other than the power to instruct the proceedings, schedule a specific date for labour tribunal proceedings, and summon the persons concerned with the case to appear, the duties of the labour tribunal judge and labour tribunal members do not differ.<sup>90</sup>
- 37 Unlike Taiwan, labour tribunal proceedings in Japan are not a mandatory pretrial procedure. The same civil labour dispute pending in labour tribunal proceedings would not hinder actions being filed for ordinary litigation. However, an ordinary civil court in charge of the case may suspend court proceedings in the action until the labour tribunal case has been closed.<sup>91</sup> If the parties reach agreement and the labour tribunal proceedings should close, such has the same effect as a judicial settlement. On the other hand, if agreement between the parties cannot be reached within the third session of the labour tribunal proceedings, the labour tribunal should declare the proceedings terminated and render a labour tribunal decision based on the development of the proceedings and the interest of the parties in written form.<sup>92</sup> The parties may file a challenge with a court against the labour tribunal

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<sup>84</sup> Labour Tribunal Act 2004 Art 21 (4) (Japan).

<sup>85</sup> Labour Tribunal Act 2004 Art 7 (Japan).

<sup>86</sup> Labour Tribunal Act 2004 Art 8 (Japan).

<sup>87</sup> Labour Tribunal Act 2004 Art 10 (Japan).

<sup>88</sup> Labour Tribunal Act 2004 Art 9 (Japan): (1) Labour tribunal members, as provided for by this Act, participate in the labour tribunal proceedings held by the labour tribunal and perform the duties necessary for processing the labour tribunal case from a neutral and fair standpoint. (2) Labour tribunal members are appointed from among persons who have expert knowledge and experience in labour relations. (3) Labour tribunal members serve part-time and, in addition to what is provided for in the preceding paragraph, the necessary matters concerning their appointment and dismissal are prescribed by the Rules of the Supreme Court. (4) Labour tribunal members are paid an allowance as separately provided by law as well as travel expenses, a daily allowance, and lodging expenses, at amounts specified by the Rules of the Supreme Court.

<sup>89</sup> Labour Tribunal Act 2004 Art 13 (Japan).

<sup>90</sup> Labour Tribunal Act 2004 Art 14 (Japan): The labour tribunal judge must specify a date for labour tribunal proceedings and summon the persons concerned with the case to appear.

<sup>91</sup> Labour Tribunal Act 2004 Art 27 (Japan).

<sup>92</sup> Labour Tribunal Act 2004 Art 19-20 (Japan).

decision within an unextendable period of two weeks.<sup>93</sup> If no lawful challenge is filed, the labour tribunal decision has the same effect as judicial settlement.<sup>94</sup> Oppositely, if a lawful challenge is filed, the labour tribunal decision ceases to be valid and the petition to labour tribunal proceedings is treated as an action to the district civil court.<sup>95</sup> The case would automatically transfer to the ordinary civil court. Since the implementation of the labour tribunal system, cases related to provisional injunction have been significantly fewer in quantity, and cases related to motions for provisional injunction have decreased by at least 50%. Furthermore, cases in ordinary litigations have become fewer,<sup>96</sup> demonstrating the efficiency of this mechanism.

### 3.2 Expedited Proceedings

- 38 Expeditious resolution is crucial for labour matters, as they not only affect the worker's individual right of personality, property, work, and minimum livelihood, but also the livelihood of the worker's family. To resolve labour matters swiftly and efficiently as to make immediate judicial remedy readily available for workers, courts of all levels are expected to enhance their efficiency and litigants should also cooperate in good faith with court proceedings. Different approaches have been adopted in different countries to realize this common idea as follows.
- 39 The German Labour Court Act stipulates that the labour procedures in all instances of the court shall be handled in an expeditious manner (Art 9(1) of German Labour Court Act). The oral argument session should end after one session where possible (Art 57 (1) of German Labour Court Act). The court is required to take measures to speed up the dismissal procedures (Art 61a of German Labour Court Act). The conciliation procedures should be conducted within two weeks after the action is filed. If the conciliation hearing is unsuccessful, or the procedures cannot be concluded in an oral hearing immediately following, and the defendant has not yet responded or has not responded sufficiently to the claim, the presiding judge shall order the defendant to respond to the claim in detail in writing within a reasonable period of time (which must be at least two weeks) and to provide evidence. The presiding judge may also set a reasonable time limit for the plaintiff, which must be at least two weeks, to respond in writing to the statement of defence. Parties who fail to present their means of attack or defence within the appropriate time as set by the

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<sup>93</sup> Labour Tribunal Act 2004 Art 21 (1) (Japan).

<sup>94</sup> Labour Tribunal Act 2004 Art 21 (4) (Japan).

<sup>95</sup> Labour Tribunal Act 2004 Art 21 (3), 22(1) (Japan).

<sup>96</sup> L-J Lin, 'An Analysis of the Japan Labour Tribunal Act from Dispute Resolution: Comparison with the Legislative Policy Meaning of the Mediation System in Taiwan Labour Incidents' in C-G Huang (ed), *Litigation on Labour Law Issues and Labour Incident Act* (Angle 2021) 283, 302.

court may only present it when the court determines that the presentation would not prolong the proceedings, or if the party sufficiently excuses the delay.

- 40 Similar legislative purposes can also be found in Taiwan law. In labour cases, the court shall generally conclude the oral argument within one session and the first instance trial should be concluded within six months unless the case is complex or more time is needed for trial.<sup>97</sup> When preparing the oral argument session, the court should clarify relevant issues as soon as possible, and may take the following measures: 1) order the parties to give supplementary statements on the contents of preparatory pleadings to submit documentary evidence and relevant physical evidence, and, if necessary, inform the parties of deadlines and the effects of an abridgment of rights; 2) request that organizations or public legal persons to provide relevant documents or other official information; 3) order the parties to appear in person; 4) notify either of the parties' witnesses, including experts, to be present on the date of the oral argument session; and 5) invite labour mediation committee members to participate in the consultation.
- 41 In Japan, there are no special rules for labour litigation. However, in Japan's labour tribunal proceedings, to avoid the precarious status of the worker, and further impact on the worker's income and family life,<sup>98</sup> the labour tribunal must hear the statements of the parties and arrange issues and evidence promptly (Art 15 of the Japanese Labour Tribunal Act).<sup>99</sup> Unless other rules apply, the labour tribunal proceedings should conclude within three sessions. Over 70% of the cases could be closed within three months. This is obviously faster than the time taken in civil litigation for labour cases, which was around 15 months.<sup>100</sup>
- 42 In the UK, the Tribunal may at any stage of the proceedings make a case management order on its own initiative or upon application.<sup>101</sup> To facilitate the proceedings, it may also impose limits on the time that a party may take to present evidence, question witnesses, or make submissions; it may also prevent the party from proceeding beyond any time so allotted.<sup>102</sup>
- 43 In France, some provisions in the Labour Code stipulate a maximum limit on the duration of a procedure. For instance, if an application for qualification of termination of the employment contract is filed with the Labour Court by the employee based on the facts he

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<sup>97</sup> Labour Incident Act 2018 Art 32 (Taiwan).

<sup>98</sup> Sugeno, Yamakawa, Saito, Sadazuka, Otozawa (n 8) 90.

<sup>99</sup> Labour Tribunal Act 2004 Art 15 (1) (Japan).

<sup>100</sup> 14.2 months to 14.7 months between 2015 and 2018, and then 15.5 months in 2019 and 15.9 months in 2020. See Asano (n 34).

<sup>101</sup> The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 The Employment Tribunals Rule of Procedure 29 (UK).

<sup>102</sup> The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 The Employment Tribunals Rule of Procedure 45 (UK).

alleges against his employer, the case shall be decided on the merits within one month from the date of its referral (Art L1451-1 of the Labour Code). In addition, it is provided that, in a number of situations, *la procédure accélérée au fond* ('the accelerated procedure on the merits') shall apply (Art R1455-12 of the Labour Code).

### 3.3 Minimization of Court Costs

- 44 As the financial disadvantages of the worker often result in an inability to afford court costs, it is necessary to reduce the costs of litigation and provide workers with legal assistance for their accessibility to courts so they may defend their rights. Although the rules on labour litigation costs vary significantly by country due to different underlying principles of litigation costs, the common philosophy is to reduce the burden on employees. The first way is that the plaintiff or claimant does not have to prepay court fees, such as in Germany, the UK, and France; the second way is to reduce the amount of court fees, such as in Taiwan.

#### 3.3.1 No Prepayment of Court Fees

- 45 In Germany, costs of civil procedure are based on the principle that the loser pays.<sup>103</sup> There are two types of costs: court fees and out-of-court expenses, including attorney fees, travel, fees for court-appointed expert witness, and all other costs. The amount of the court fees to be paid is provided in *Gerichtskostengesetz* (the German Court Fees Act) and the amount of attorney fees is stipulated in *Rechtsanwaltsvergütungsgesetz* (the Remuneration of Attorneys Act). In civil courts, the court fees are due when the statement of claim, application, objection or appeal is filed or when the corresponding declaration is made on the record (Art 6(1) of the German Court Fees Act).<sup>104</sup> However, this rule is not applied in a labour proceeding—that is, the plaintiff does not have to prepay for the cost of labour proceedings (Art 11 of the German Court Fees Act). Moreover, there is no cost to be paid in a ruling proceeding.
- 46 In the UK, the Employment Tribunals and the Employment Appeal Tribunal Fees Order (the Fees Order) had been in force since 2013. Prior to the Fees Order, claimants were not required to pay fees to bring tribunal claims or appeals. However, under the Fees Order, the claimant had to pay the issue fee for filing the claim and the hearing fee for the first substantive hearing, unless there were circumstances where the cost could be mitigated. If the claim was successful, the court could issue an order for the employer to bear the cost of the proceedings. Nevertheless, this Fees Order was declared unlawful by the Supreme

<sup>103</sup> *Zivilprozessordnung* (Code of Civil Procedure) Art 91 (Germany).

<sup>104</sup> *Gerichtskostengesetz* (The Court Fees Act) (Germany).



Court in 2017, *R (Unison) v Lord Chancellor*,<sup>105</sup> as it prevented access to justice and was indirectly discriminatory. Those who paid the cost of the proceedings in the past can file an application for a refund. As a result, since 2017, individuals have not been subject to pay for employment tribunal claims<sup>106</sup>. Therefore, the number of claims has risen significantly.<sup>107</sup>

- 47 In general, claimants are responsible for their own costs in Employment Tribunal claims. However, if the court finds that one party has acted unreasonably, it may make a 'costs order' to require that party to bear the other party's costs. In country courts, there is an even higher likelihood of obtaining 'cost orders', so claimants there are more prone to settle their claims as a means of avoiding unexpected loss in advance. Claimants might even accept unfavoured settlement or confidentiality clauses in the face of a big opponent—the government or a large company. This further shows the cruel fact: 'without legal aid, there is no protection'.<sup>108</sup> The Equality Act 2010 attempts to help individual claimants by offering legal opinions (such as in the negotiation with the other party) and providing assistance from legal representatives. However, the Employment Tribunal allows the application of legal representation only after the entry of an appeal, leaving claimants to look for an attorney at their own expense or to represent themselves in the first instance. The accompanying result is that only few claimants can access face-to-face advice, let alone the 0.5% access rate of the legal representation aid.<sup>109</sup> Despite the existence of the Exceptional Case Funding, none of the ten legal representation aid applications in the past five years got reciprocal responses. The House of Commons Women and Equalities Committee pinpoints that the core problem lies in the 'merit test' before the approval of legal aid. The 'merit test' evaluates the cost and benefit of a legal aid application. Only when the expected benefit exceeds the expected expense can the claimants access legal aid.<sup>110</sup> Most applications fail

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<sup>105</sup> M Ford, 'Employment Tribunal Fees and the Rule of Law: *R (Unison) v Lord Chancellor* in the Supreme Court.' (2018) 47(1) *Industrial Law Journal* 1, 1–45.

<sup>106</sup> D Pyper, F McGuinness and J Brown, *Employment tribunal fees* (House of Commons Library 2017) 4 <https://researchbriefings.files.parliament.uk/documents/SN07081/SN07081.pdf> accessed 15 December 2022.

<sup>107</sup> Waite, Payne QC, Hobbs (n 7) 1.

<sup>108</sup> House of Commons Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission* (House of Commons 2019) 58, para 209 <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 9 July 2023.

<sup>109</sup> House of Commons Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission* (House of Commons 2019) 56, para 195 <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 9 July 2023.

<sup>110</sup> House of Commons Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission* (House of Commons 2019) 57, para 203 <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 9 July 2023.

to pass 'merit test',<sup>111</sup> because in most discrimination cases, the court only grants a small number of damages to the claimant. Even in cases with nearly every prospect of success, the ceiling of injury to feelings (GBP 44,000) tightens up the court's hands to award satisfying compensation to the claimant, not to mention the doomed result in a damages-based cost and benefit evaluation.

- 48 In France, the personnel and operating expenses of the Labour Council are borne by the State (Art L1423-15 of the Labour Code). Parties are therefore free to resort to the Labour Council to resolve labour disputes.

### 3.3.2 Mitigated Court Fees

- 49 In Taiwan, the plaintiff has to prepay court fees, but court fees can be mitigated in some situations. Taiwan's Labour Incident Act (LIA) stipulates provisions that adjust court fees in certain situations. The cost of litigation is related to the value of the subject matter of the lawsuit. While cases regarding the confirmation of the existence of employment are related to claims for regular payment, according to Art 77-10 of the Taiwan Code of Civil Procedure, the value of subject matter shall be the total amount of income for the entire duration of the right to such payment. In labour disputes, as the worker's livelihood usually relies on such a claim for regular payment, Art 11 of Taiwan's LIA therefore provides that if such duration is more than five years, only income for the duration of five years shall be calculated to reduce court fees. In addition, if a worker or a labour union initiates an action for the confirmation of the existence of employment, wage payments, pensions or severance payment, two-thirds of the court cost may be temporarily waived. Moreover, court costs are waived for cases of collective action for injunctive relief initiated by a union that comply with Art 40 of Taiwan's LIA (Art 13 (2) of LIA). If the value of the claim exceeds NTD 1 million, the court fees of the excess portion shall temporarily be waived (Art 13 (1) of LIA).
- 50 When workers meet the criteria of a low-income family and middle-low-income family as stipulated in the Social Relief Act, they may petition for legal aid (Art 14 (1) of LIA). When workers or their surviving dependents initiate a suit over an occupational accident, the court shall grant legal aid by the plaintiff's motion to protect the litigation rights of the workers and their surviving dependents. While the LIA provides no explicit conditions regarding legal aid, the Act for the Settlement of Labour-Management Disputes and the corresponding regulations, the Regulations on Aid for Legal Services and Living Expenses of Labour-Management Disputes stipulate the requirements and procedures for the application for

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<sup>111</sup> Equality and Human Rights Commission, *Access to legal aid for discrimination cases* (2019) 28 <https://www.equalityhumanrights.com/sites/default/files/access-to-legal-aid-for-discrimination-cases-our-legal-aid-inquiry.pdf> accessed 9 July 2023.

motion fees, litigation fees, representation fees for attorneys, and necessary living expenses during mediation and litigation.

### 3.3.3 No Special Regulations

- 51 In the US, unlike the way to resolve labour disputes through administrative agencies, the court entails legal expenses (federal courts cost around USD 350), which may not be affordable to some workers. The procedures in federal court and higher instances of state courts are commonly more complicated and time-consuming.<sup>112</sup> In most cases in the United States, the party has to bear the cost of litigation and other costs, which results in workers being unwilling to sue their employer due to the burden of litigation. Moreover, workers in the US have difficulties accessing legal services. To most workers, proceedings are very hard to manage without lawyers. It is very difficult for workers in the US to find attorneys for two main reasons: a) handling disadvantaged labour cases does not make economic sense to lawyers—statistics show that only 5% of labour discrimination cases obtain private legal services, and most parties to litigation are managers or professionals (white-collar workers); and b) the employer of the disadvantaged workers are generally non-official companies or smaller companies, which prompts lawyers to consider that enforcement would be more challenging.<sup>113</sup>
- 52 However, cases related to employment discrimination, salary, and working hours have a 'fee-shifting' mechanism to compensate workers; if the worker wins the lawsuit, there may be reasonable compensation to cover the cost of litigation. Furthermore, the attorney can also guarantee their remuneration. However, there have been cases where the cost of the attorney has exceeded the subject of the claim; nevertheless, this mechanism has the potential to increase the willingness of the worker to file an action.<sup>114</sup> The National Labour Relation Board (NLRB) in the United States, which is an independent federal agency, is a more financially accessible forum for labour disputes resolution than ordinary courts. Filing fees are not required and translation services are offered.
- 53 In Canada, civil suits are also expensive and lengthy due to lawyers' fees and fee-charging mediation, which is borne by the parties. However, the employee is represented by the union and does not have to incur costs for legal representation. The union and the employer pay the arbitrator's fees and disbursements as determined by the collective bargaining agreement.<sup>115</sup>

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<sup>112</sup> Ebisui, Cooney and Fenwick (n 1) 330-331.

<sup>113</sup> Ebisui, Cooney and Fenwick (n 1) 332.

<sup>114</sup> Ebisui, Cooney and Fenwick (n 1) 333.

<sup>115</sup> Ebisui, Cooney and Fenwick (n 1) 87-88.

### 3.4 Ex Officio Powers of the Court and the Burden of Proof

- 54 As labour matters fall under the category of civil disputes, procedural guarantees provided by the Code of Civil Procedure should be applied to labour cases. While some jurisdictions still adopt an adversary system and do not have special rules regarding court procedures in labour matters (such as Germany, the US, and Canada), there are some jurisdictions that have expanded the court's authorities to investigate facts and evidence, taking into account the weakness of employees (such as the UK and Taiwan). However, the scope of authorities differs. The following describes cases where special laws are in place.

#### 3.4.1 Adopting the Doctrine of Facts and Evidence Provided by the Parties

- 55 Labour court proceedings in Germany are mostly the same as civil proceedings where the principle of adversary applies. In accordance with Art 46(2) of the German Labour Court Act, unless otherwise provided for in this Act, the provisions of the Code of Civil Procedure regarding district court proceedings shall apply to labour proceedings. Therefore, the doctrine of parties' disposition and the doctrine of facts and evidence provided by the parties are also applicable to labour court proceedings. That is, the court would judge based on the facts that the parties have presented. If there are issues in determining the facts, the court cannot clarify them on its own, so the party who has the burden of proof under substantive law must bring the evidence. In principle, a party must assert the facts and bring forward the evidence, that, under substantive law, constitutes the party's claim.<sup>116</sup> If no evidence is presented, or if the evidence presented is insufficient for the judge to establish the facts, the party with the burden of proof will lose the case. For example, in the case of dismissal on the grounds of illness, the employer must assert and prove that the employee's health condition is not expected to be conducive to work, or the employer must demonstrate that the dismissal is for good cause and state that the employment is no longer needed due to an urgent business need.
- 56 In overtime litigation, the Federal Labour Court ruled that the employee must still show and demonstrate that the employer has ordered or approved the overtime worked. Where a delivery driver did not demonstrate that the hours worked were required considering his workload and to what extent the employer was aware of these circumstances, he therefore failed to fulfil this burden of proof.<sup>117</sup>

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<sup>116</sup> R Künzl 'ArbGG § 46' in C-H Germelmann, H-C Matthes and H Prütting (ed) *Arbeitsgerichtsgesetz: ArbGG* (C. H. Beck 2022), para 1-3; Helml (n 15) para 17.

<sup>117</sup> Case 5 AZR 359/21 (BAG, Germany), Order 4 May 2022 [ECLI:DE:BAG:2022:040522.U.5AZR359.21.0] para 18-19, 29.

- 57 In discrimination cases, Art 22 of *Allgemeines Gleichbehandlungsgesetz* (the General Equal Treatment Act) provides that

[w]here, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.

- 58 This Article transposes the requirements of EU Directive 2000/43/EC<sup>118</sup> so that the burden of proof in the proceedings before the relevant litigation or authority will be divided into two stages. First, under the general principle of burden of proof, the claimant will prove the existence of unlawful adverse treatment by the other party. At this stage, the burden of proof is relieved, and the claimant is only required to convince the court that there is a higher probability of a fact of unlawful discrimination (specifically, a causal link between the adverse treatment and the manifestation of discrimination) than there is of no discrimination. After the claimant has met this lower burden of proof, the other party must prove that there was no unlawful discrimination or that a deterrent to unlawful conduct existed.<sup>119</sup>
- 59 However, unlike courts in the US, German courts still have the obligation to clarify to the parties important but insufficient statements of fact for adjudication, and to do so in a clear manner, is not misleading, and gives the parties an opportunity to supplement the statements as appropriate. If it becomes apparent that the parties have misunderstood the court's clarification, the court should clarify further and allow the parties to express their views.
- 60 In addition, the court has the authority to maintain the promptness and fairness of proceedings to a certain extent. The presiding judge shall prepare the hearing in such a way that it can be completed in one sitting, if possible. For this purpose, the presiding judge may take the following measures, if necessary: 1) order the parties to supplement or explain their preparatory pleadings and to submit documents and other items suitable for filing with the court; 2) set a deadline for clarification of certain issues; 3) request relevant documents or official information from authorities or public officials; 4) order the parties to appear in

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<sup>118</sup> See Bernd W, 'New Developments in Employment Discrimination Law Country Report: Germany' (2008) New Developments in Employment Discrimination Law, 55,71. <https://www.jil.go.jp/english/reports/documents/jilpt-reports/no6.pdf> accessed 25 December 2023.

<sup>119</sup> C Roloff 'AGG § 22' in C Rolfs, R Giesen, R Kreikebohm and P Udsching (ed) *Arbeitsrecht: BeckOK ArbR* (C. H. Beck 2011), para 3; M Schlachter 'AGG § 22' in R M-Glöße, U Preis and I Schmidt (ed) *Erfurter Kommentar zum Arbeitsrecht* (C. H. Beck 2023) para 2 ff.

person at court; and 5) summon a party's witnesses and experts to the oral hearing.<sup>120</sup> If the parties' methods of attack and defence are not presented within the time limit set by the judge, they may be presented only when the judge deems that it will not cause delay to the proceedings or if the party has justifiable reasons for the delay.<sup>121</sup> The judge shall instruct the parties as to the legal effect of the late filing.

### 3.4.2 More Flexibility of Procedures and Broader Authorities of Courts

- 61 In the United Kingdom, the proceedings of the ET are more flexible according to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (referred to as the 'Rules'). The Tribunal has broad powers to regulate procedures and has adopted an increasingly active role in the management of cases.<sup>122</sup> Tribunals may conduct hearings based on the case in pursuing justifications. They may inquire of parties or witnesses to collect evidence on their own authority, insofar as it is appropriate in order to clarify the issues or elicit evidence. The ET is also not restricted by any rules related to the admissibility of evidence in court. The ET shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective to avoid undue formality. Since it must still comply with the fundamental principles of procedural safeguard, the ET generally should consider any written statements of the party and any witness statement as the primary evidence should be able to be examined by the public who attended hearings (Rule 44).
- 62 However, the ET may conduct a non-public hearing regarding evidence if the evidence presented may violate the law or confidentiality, or would cause great damage to the company.<sup>123</sup> The ET may sit in private for the purpose of hearing evidence from any person which, in the opinion of the tribunal, is likely to consist of a) information which they could not disclose without contravening a prohibition imposed by or by virtue of any enactment; b) information which has been communicated to them in confidence or which they have otherwise obtained in consequence of the confidence reposed in them by another person; or c) information, the disclosure of which would, for reasons other than its effect on negotiations, cause substantial injury to any undertaking of theirs or in which they work. Moreover, any hearing may be conducted by use of electronic communications if the employment judge or tribunal considers it just and equitable to do so. It must be guaranteed

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<sup>120</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 56 (1) (Germany).

<sup>121</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 56 (2) (Germany).

<sup>122</sup> Waite, Payne QC, Hobbs (n 7) 138.

<sup>123</sup> The Employment Tribunals Act 1996 Sec 10A (Confidential information) (UK); The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Rule 41 (UK).

that the attendants and the public can hear what the court can hear and are able to see any witnesses (Rule 46).

- 63 The ET may investigate evidence on its own authority to avoid unnecessary procedure. It can interrogate parties or witnesses on its own to clarify issues or collect evidence.<sup>124</sup> The ET may also issue a case management order by petition or on its own authority at any stage of the proceedings, including disclosure of the relevant documentation, request for specific witnesses to attend the hearings, issue deposit orders, etc. At the preliminary hearings, if the tribunal considers that the plaintiff has a limited reasonable possibility for the claim to be successful, the ET may on its own authority decide to issue a deposit order requiring the plaintiff to pay the cost of the proceedings within a specific period of time (usually within 28 days) as a condition to continue the proceedings. If the plaintiff does not pay the cost of the proceedings within the specific period, the claim will be dismissed.<sup>125</sup>

- 64 There is a specific rule of burden of proof regarding anti-discrimination cases:

The burden is on [c]laimant to establish facts from which it might be presumed there has been discrimination but once that is done, the burden shifts to the [d]efendant to show, on the balance of probabilities, that there was no discrimination.<sup>126</sup>

The burden of proof is in this sense on the defendant: if the defendant fails to prove the absence of unlawful discrimination, the court must allow the claim.

- 65 In Japan, labour tribunal proceedings are pre-litigation procedures in court and are considered non-contentious procedures. They apply the principles of *ex officio* into evidence instead of adversary.<sup>127</sup> The labour tribunal may investigate facts and evidence on its own authority, but not by petition only.<sup>128</sup> It should hear the statements of the parties and a third person, examine witnesses, investigate documentary evidence, and close the proceedings by the ruling.<sup>129</sup> As the labour tribunal proceedings involve individual labour relations, which are civil disputes, the parties still have the right to request the court to

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<sup>124</sup> The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Rule 41 (UK).

<sup>125</sup> The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Rule 29-40 (UK).

<sup>126</sup> Equality Act 2010 Sec. 136 (UK).

<sup>127</sup> Labour Tribunal Act 2004 Art 17 (Japan): '(1) The labour tribunal may study facts on its own authority and may examine evidence that it considers necessary upon petition or on its own authority. (2) Examination of evidence is governed by the rules of civil procedure'.

<sup>128</sup> Labour Tribunal Act 2004 Art 17 (Japan).

<sup>129</sup> Sugeno, Yamakawa, Saito, Sadazuka, Otozawa (n **Fehler! Verweisquelle konnte nicht gefunden werden.**) 93.

investigate evidence.<sup>130</sup> The investigation of evidence should fall under the Code of Civil Procedure.<sup>131</sup> The Japanese Labour Tribunal Act does not have any special provisions on the allocation of the burden of proof. As previously mentioned, labour tribunal proceedings take the *ex officio* route, and the Labour Tribunal seeks to find a flexible and suitable resolution to disputes within three sessions. Therefore, when providing evidence of the circumstances of a de facto relationship of subordination with an employer that suggests it appropriate for such proceedings to be applied to reach a conclusion, the requirement should be to provide prima facie evidence, and that is sufficient.<sup>132</sup>

### 3.4.3 Strengthening the Authority of the Labour Court

66 In Taiwan, labour courts do not have the same broad authority as English employment tribunals, and the Code of Civil Procedure is still applicable in principle. However, compared to German law, special provisions have been added to protect workers. Labour judges (or labour courts) have to take more initiative than their colleagues in ordinary civil procedure. For instance:

- a) As a modification of the adversarial system, to uphold substantive fairness, the court shall elucidate necessary facts to enable the parties to supplement unclear statements of facts.<sup>133</sup> The court may, if necessary, initiate an investigation of evidence while safeguarding the parties' right to be heard. If the worker and the employer adopt standard contract terms as the contract of evidence and said contract is obviously unfair, the worker is not bound by such contract.<sup>134</sup>
- b) For the purpose of effective and integrative treatment for multiple related labour cases, the labour judge may conduct a joint mediation either by motion or on their own initiative.<sup>135</sup> If the parties are unable to reach an agreement in the mediation, the labour mediation committee shall present an appropriate proposal on its own initiative.<sup>136</sup>
- c) When an action for payment filed by the worker is ruled in favour of the worker, the labour judge shall declare a provisional execution on its own initiative to implement

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<sup>130</sup> Sugeno, Yamakawa, Saito, Sadazuka, Otozawa (n **Fehler! Verweisquelle konnte nicht gefunden werden.**) 93-94.

<sup>131</sup> Labour Tribunal Act 2004 Art 17 (2) (Japan).

<sup>132</sup> Asano (n 34) 42 <https://www.jil.go.jp/english/jli/documents/2023/043-03.pdf> accessed 15 December 2023.

<sup>133</sup> Labour Incident Act 2018 Art 33 (1) (Taiwan).

<sup>134</sup> Labour Incident Act 2018 Art 33 (2) (Taiwan).

<sup>135</sup> Labour Incident Act 2018 Art 19 (1) (Taiwan).

<sup>136</sup> Labour Incident Act 2018 Art 28 (1) (Taiwan).



the right of the worker effectively. The labour judge shall declare that the employer may provide security or lodge the subject of the claim to avoid provisional execution. This is to prevent the employer's risk of undue damages if the case turns in favour of the employer in the appellate court, therefore balancing the interests of both parties.<sup>137</sup>

- 67 Concerning the burden of proof, in principle, a party shall bear the burden of proof for the fact which is of their benefit (Art 277 of Taiwan's Code of Civil Procedure). In labour cases, however, it is difficult for the employee to prove or assert their rights, as key documents in the litigation usually lie in the hands of the employer. Therefore, in cases filed by the worker, the employer is obligated to provide relevant documents<sup>138</sup> (for example, attendance records and payroll roster, etc<sup>139</sup>). If the holder of the documents demanded, the objects to be inspected, or the information required for examination defies the court's order to present such evidence without justifiable reason, the court may impose a fine and may rule compulsory measures in necessary situations (Art 36 of LIA). As the employer is obligated under the Labour Standards Act to preserve records of attendance and payment and is in a presiding position to rectify such documents, the employer is usually more capable of proving the remunerative and regularity of the payment, as well as the working hours of the worker. In wage disputes between workers and employers, particularly on the pension calculation, if it can be proven that the worker received payments from the employer based on a working relationship, the remuneration is presumed to have been paid for the work performed and not a bonus.<sup>140</sup> In disputes concerning overtime pay, there is also a presumption that the work hours recorded on the worker's timesheet indicate that the worker performed their duties with the employer's permission during the recorded hours.<sup>141</sup>
- 68 In anti-discrimination cases, Art 31 of the Act of Gender Equality in Employment (hereinafter the AGE) states:

After employees or applicants make prima facie statements of the discriminatory treatment, the employers shall shoulder the burden to prove the non-sexual or non-sexual-orientation factor of the

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<sup>137</sup> Labour Incident Act 2018 Art 44 (Taiwan).

<sup>138</sup> Labour Incident Act 2018 Art 35 (Taiwan).

<sup>139</sup> Labour Standard Act 2020 Art 30 (5) (Taiwan): Employers shall prepare and keep worker attendance records for five years; Labour Standard Act 2020 Art 23 (2) (Taiwan): an employer shall keep a worker payroll roster in order to record entries such as wages payable, the details of wage computation and the total sum of wages paid. This payroll roster shall be kept on file for at least five years.

<sup>140</sup> Labour Incident Act 2018 Art 37 (Taiwan).

<sup>141</sup> Labour Incident Act 2018 Art 38 (Taiwan).

discriminatory treatment, or the specific sexual factor necessary for the employees or the applicants to perform the job.

- 69 This provision is established in consideration of the disadvantageous position of workers in the traditional allocation of burdens of proof and specifies the evidentiary responsibility of employers with regard to differential treatment.<sup>142</sup> In practice, the court recognizes that the advantageous position of employers in relation to workers often makes it difficult for employees to provide evidence when determining whether an employer has directly or indirectly treated them unfavourably in matters such as retirement, layoff, resignation, and dismissal based on gender factors. Therefore, the law stipulates that employees only need to fulfil the duty of *prima facie* demonstration, and the burden of proof is shifted to the employer.<sup>143</sup> Therefore, in the investigation and determination initiated by the Gender Equality Committee (under Executive Yuan) on whether an employer has subjected job seekers or employees to differential treatment based on their gender or sexual orientation, employees are only required to explain the facts of such differential treatment and the burden of proof lies with the employer to demonstrate that the differential treatment is ‘not based on gender or sexual orientation factors’.<sup>144</sup>
- 70 In civil torts cases, the AGEE also includes provisions on the reverse burden of proof compared to the traditional allocation of evidentiary responsibility in civil tort liability. Art 26 of the AGEE states: ‘When employees or applicants are damaged by the employment practices referred to in Articles 7 to 11 or Art 21 of the Act, the employers shall be liable for any [damages] arising therefrom.’ In other words, in civil torts cases involving gender discrimination, if the employer's treatment has been determined to involve gender discrimination, the employer's negligence is presumed. Case 2019 (Tai Shang) 1062 (Supreme Court, Taiwan) holds as follows:

Art 26 of the AGEE states the employer shall be liable for any damages arising from situations in Art 7 without specifying a transfer of burden of proof as in Art 184 Sec 2 of the [Taiwan] Civil Code. However, seeing that the main purpose of AGEE is to ‘protect gender equality in the workplace, [to] implement thoroughly the constitutional mandate of eliminating gender discrimination, and [to] promote the spirit of substantial gender equality’ (see Art 1 AGEE), Art 26 can be understood as in nature a statutory protection enacted for the protection of others. During its legislation process, the legislators deleted ‘intentional or negligence’ from the preliminary draft of Art 26 and referred to German

<sup>142</sup> The Purpose of Statute of Art 31 of the AGEE.

<sup>143</sup> Case 2010 (Jian) 110 (Taipei High Administrative Court, Taiwan) Judgment 28 October 2010.

<sup>144</sup> Case 2009 (Su) 993 (Taipei High Administrative Court, Taiwan) Judgment 22 October 2009.

Civil Code Sec 661a, where the general allocation of burden of proof is transferred to the employers when they violate the principle of gender equality and causes damage to the labourers. Also, in Art 31 AGEE, the transferral of burden of proof to the employer is conspicuously seen. It shall in this sense be concluded that employers should suffer from a presumption of negligence: the burden of proof is transferred to the employers, and they can only be exonerated from such liability when they prove themselves without fault.

A similar holding also appears in Case 2021 (Tai Shang) 576 (Supreme Court, Taiwan):

Determinations regarding retirements, layoffs and dismissals shall not be based on gender or sexual orientation discrimination. Once the labourer preliminarily alleges discrimination, the employer has to prove that such discrimination is based on non-gender, non-sexual orientation factors, or specific gender factors relevant to the occupation (see Art 11 Sec 1, Art 31 AGEE). Discrimination based on pregnancy constitutes 'gender discrimination' under Art 11 Sec 1 AGEE, and in this regard, retirements, layoffs and dismissals based on pregnancy signify the violation of the said article. The employers would therefore have to prove that their determinations are non-discriminatory, irrelevant to the pregnancy of the labourer, after the labourer has preliminarily alleged a discrimination. 'Preliminary allegation' in this context only requires the factual allegation to be 'generally and legally' convincing to the court, which is different from 'proof', where litigants have to provide enough factual evidence for the court to affirm the truthfulness of their allegations. Art 31 AGEE only requires the pregnant labourer to make preliminary factual allegations of discrimination; the burden of proof instead goes to the employer.

- 71 There is disagreement regarding the applicability of the reverse burden of proof in cases of employment discrimination that are not covered by the AGEE, as there are no similar provisions in other applicable laws. Some argue that the AGEE, as part of the legal framework for addressing employment discrimination, conflicts with the principle of equal protection under the law and equal opportunities for all citizens in obtaining employment if the benefits of reverse burden of proof are limited to cases of gender discrimination only. Therefore, in other employment discrimination cases where there is unequal evidentiary capacity between employers and employees, it is suggested to analogously apply the reverse burden of proof provisions of the AGEE or apply the provision in Para 2, Art 277, of

the CCP, which allows for the reverse burden of proof.<sup>145</sup> With the enacted Labour Incident Act, it is also possible for the court to order the opposing party to present necessary evidence under Art 33 of the Labour Incident Act or request the court to conduct an investigative duty, to balance the burden of proof between employers and employees.

## 4 JURISDICTION

- 72 Throughout the world, *actor sequitur forum rei* serves as a general legislative guideline for the jurisdiction of civil cases. However, in cases of labour matters, it is common that the worker is financially disadvantaged, and the dispute often takes place where labour services are provided. To protect the right of workers to litigation and to have access to the courts, there are special provisions regarding international jurisdiction and venue (territorial jurisdiction) in labour dispute matters.

### 4.1 International Jurisdiction

- 73 In the EU, according to Regulation (EU) No 1215/2012 (the Brussels *Ibis* Regulation), the employer can sue the employee only in the Member State where the employee is domiciled (Art 22). But if the employee files a suit against the employer, the employee has the choice to sue the employer (Art 21): at the place of domicile of the employer; at the place where or from where the employee habitually carries out their work; or where the place of habitual work is not situated in any one country, the place where the business which engaged the employee is or was situated. An international jurisdiction agreement may be only valid if when the agreement is entered into after a dispute arises, or if it allows the employee to bring proceedings in courts other than those statutory jurisdictions (Art 23).
- 74 Similar provisions can be found in Japanese and Taiwanese law. In cases where the plaintiff is the employee, Taiwan has international jurisdiction if the location where the plaintiff provides their service, or the domicile, residence, main business, or main office of the defendant is located within the territory of Taiwan (Art 5 (1) of Taiwan's LIA). In addition, the employee would not be bound by any jurisdictional agreement that violates the preceding provision (Art 5 (2) of Taiwan's LIA).
- 75 In Japan, the international jurisdiction of individual labour relations disputes is stipulated in Japan's Code of Civil Procedure Art 3-4(2). If the plaintiff is an individual worker where the labour contract states the location to provide labour is within the territory of Japan, the

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<sup>145</sup> B-S Fu, 'The Burden of Proof and Concerns of Labour Discrimination Cases in Labour Incident Act – Taipei District Court (100) Jhong Lao Su Tzu No. 3 Judgment' (2020), 97 Court Case Times 76, 87; B-S Fu, 'The Burden of Proof and the Similarly Situated Comparator in the Employment Discrimination Law - A Comparative Research between America and Taiwan Law' (2018), 69(9) The Law Monthly 73, 93-96.

plaintiff may file an action with a Japanese court; if the labour contract did not establish the location, jurisdiction is subject to the court in the location where the worker was hired.<sup>146</sup> If the plaintiff is the employer, according to Art 3-4 (3) of the Code of Civil Procedure, the employer should comply with *actor sequitur forum rei* unless parties agree to an international jurisdiction<sup>147</sup> or accept the jurisdiction.<sup>148</sup> Moreover, international jurisdiction would be subject to a Japanese court if the location of the worker's domicile is in Japan.<sup>149</sup> The international jurisdiction agreement of individual labour relations disputes is stipulated in Art 3-7(6) of Japan's Code of Civil Procedure; regarding an individual labour relations case arising in the future, the international jurisdiction agreement is only valid under the following circumstances: 1) when the agreement is made and established at the time that the labour contract ends, an action may be filed to the court of the country in which labour was provided; and 2) the worker, based on the international jurisdiction agreement, filed an action to the court of the agreed-upon country, or the employer filed an action at a court in Japan or in a foreign country and the worker invoked said agreement. Moreover, in accordance with the Code of Civil Procedure Art 3-7(6)(i) proviso, the international jurisdiction agreement in a labour tribunal case should be considered a 'coexist jurisdiction agreement' if the parties agreed upon exclusive jurisdiction; unless the worker agreed that an action be filed or the invocation is solely for defence,<sup>150</sup> it should hinder the worker's right to file actions at courts other than in an agreed-upon country.

- 76 In the UK, pursuant to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 S.8(2) and (3), a claim can be presented in the Employment Tribunal where: a) a respondent or one of the respondents resides or carries out business in England, Wales, or Scotland; b) one or more of the acts or omissions complained of took place in England, Wales, or Scotland; c) the claims related to a contract under which the work is or has been performed partly in England, Wales, or Scotland; or d) the Tribunal has the jurisdiction to determine the claim by virtue of a connection with Great Britain and the

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<sup>146</sup> Code of Civil Procedure Art 3-4 (2) (Japan): 'An action involving a dispute over a civil matter that arises between an individual worker and that worker's employer with regard to the existence or absence of a labour contract or any other particulars of their labour relations (hereinafter referred to as an 'Individual Civil Labour Dispute'), which is brought by the worker against the employer, may be filed with the Japanese courts if the place where the labour is to be provided as per the labour contract to which the Individual Civil Labour Dispute pertains (or if such a place is not established, the location of the place of business that hired the worker) is within Japan'.

<sup>147</sup> Code of Civil Procedure Art 3-7(6) (Japan).

<sup>148</sup> Code of Civil Procedure Art 3-8 (Japan).

<sup>149</sup> Code of Civil Procedure Art 3-2 (1) (Japan).

<sup>150</sup> Code of Civil Procedure Art 3-7(6)(ii) (Japan).

connection in question is at least partly a connection with England, Wales, or Scotland. This Rule reflects leading cases.<sup>151</sup>

#### 4.2 Venue (Territorial Jurisdiction)

- 77 In Germany, territorial jurisdiction at the first instance labour court is determined by the same rules as in regular civil proceedings and normally subjected to the court of the defendant's domicile.<sup>152</sup> For disputes arising from and disputing the existence of a contractual relationship, the court of the location where the obligation is to be performed also has jurisdiction. However, in the practice of labour litigation, it is more common that the jurisdiction is subject to the court of the location where the worker provides services.<sup>153</sup> In 2008, Art 48 (1a) of the Labour Court Act was added to Art 2 of the Labour Court Act to provide that the jurisdiction of individual labour relations disputes may be subject to the court of the location where the employee regularly provides services or most recently provided services regularly. This stipulation can be beneficial to those who had been assigned to work at a location other than the location of the business office. In addition, parties in a labour agreement may agree on territorial jurisdiction following incidents.<sup>154</sup>
- 78 For labour cases with plaintiff workers in Taiwan, the court where the defendant's domicile, residence, main business, or main office is located, or where the plaintiff provides labour services, shall have jurisdiction over the case. For labour cases with plaintiff employers, the court where the defendant's domicile or residence is located, or where the current/last labour service is/was provided, shall have jurisdiction over the case. As a general rule for cases of concurrent jurisdiction, the plaintiff shall have the option to file suit in any jurisdictional court (Art 22 of Taiwan's Code of Civil Procedure). Nevertheless, in cases filed by the employer, the employee may petition to transfer the case to the jurisdictional court of their choice before the beginning of oral arguments. This is to ensure the protection of the rights and interests of the disadvantaged litigant and for the convenience of the worker responding to the suit (Art 6 (2) of Taiwan's LIA). If a court choice agreement exists between the employer and the employee but the agreement is clearly unfair, the employee-defendant may petition to transfer the case to the jurisdictional court of their choice before the beginning of oral arguments (Art 7 (1) of Taiwan's LIA). This provision may prevent abuses of agreement from employers; it safeguards the rights and interests of financially disadvantaged litigants.

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<sup>151</sup> *Lawson v Serco Ltd* (HUK), 2006 [ICR 250]; *Ravar v Halliburton Manufacturing and Services Ltd* (UKSC 1), 2012 [ICR 389].

<sup>152</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 46 (2) (Germany), which refers to *Zivilprozessordnung* (Code of Civil Procedure) Art 12 f (Germany).

<sup>153</sup> *Zivilprozessordnung* (Code of Civil Procedure) Art 29 (1) (Germany).

<sup>154</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 48 (2) (Germany).

79 In Japan, the district court has jurisdiction over labour disputes of the first instance.<sup>155</sup> Regarding territorial jurisdiction, there are four possibilities:<sup>156</sup>

a) The district court has jurisdiction where the defendant is domiciled or has a residence, business office, or any other office. Offices purely under the command and supervision to carry out business should be excluded.<sup>157</sup>

b) The district court has jurisdiction where the employee currently provides services (the current employer's business office) has jurisdiction. This jurisdiction is stipulated for the purpose of easing the burden of travel for parties (especially for the worker) to respond to the lawsuit. Since the employer is generally in control of where to locate its business office and provide the work environment, it seems fair (or at least does not cause legal detriment) for the employer to respond to the lawsuit at the district court in the location where the worker is currently providing services. Moreover, it is highly likely that the business office possesses a considerable amount of information related to labour relations, which could be beneficial for the court's accessibility to evidence. In addition, 'business office', as explained, is not required to be independent as previously defined, as long as it is the location where business is conducted.<sup>158</sup>

c) The district court has jurisdiction where the worker last provided services at the employer's business office. If the labour relations between both parties ended before a party instituted the labour tribunal case, jurisdiction under this section shall not apply. However, it may be necessary to authorize jurisdiction where the worker 'last' provided services when considering the parties' access to court, the relevancy in the dispute, and the probability of locating existing evidence. However, if the business office has closed permanently, the district court where the office is located may cause unfairness to the employer. Additionally, the jurisdiction of that particular court may seem unlikely to be beneficial to the supplementary interest of elucidation in labour

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<sup>155</sup> Labour Tribunal Act Art 2 (Japan).

<sup>156</sup> Labour Tribunal Act Art 3 (1) (Japan): When the court finds that the whole or a part of a labour tribunal case is not under its jurisdiction, it will, upon petition or on its own authority, transfer the case to a court with jurisdiction. (2) Even where a labour tribunal case brought before the court is under its jurisdiction, when the court finds it appropriate in order to process the case, it may, upon petition or on its own authority, transfer the whole or part of the labour tribunal case to another court with jurisdiction.

<sup>157</sup> Sugeno, Yamakawa, Saito, Sadazuka, Otozawa (n **Fehler! Verweisquelle konnte nicht gefunden werden.**) 63.

<sup>158</sup> Sugeno, Yamakawa, Saito, Sadazuka, Otozawa (n **Fehler! Verweisquelle konnte nicht gefunden werden.**) 63-64.

tribunal cases. As a result, in these circumstances, that particular court should not have jurisdiction.<sup>159</sup>

d) Based on the principle of autonomy of the parties, parties may choose a desirable court by agreement. In principle, jurisdiction clauses are valid and binding.

- 80 According to Japan's Labour Tribunal Act Art 2(2), where the respondent is not a juridical person, association, or foundation, and has no known domicile or residence in Japan, the district court has jurisdiction in the respondent's last place of domicile. Moreover, Japan's Labour Tribunal Act Art 2(3) stipulates that, where the respondent is a juridical person or nonforeign association or foundation and has no office in Japan, the labour tribunal case is subject to the jurisdiction of the district court in the domicile of the respondent's representative or other principal person in charge of its business in Japan. According to Labour Tribunal Act Art 2(4), where the respondent is a foreign association or foundation and has no business office or other office in Japan, the labour tribunal case is subject to the jurisdiction of the district court in the domicile of its representative in Japan or another principal person in charge of its business.
- 81 In countries that do not have special procedural rules for labour disputes, there are also no special rules for jurisdiction. For example, in the United States, federal courts only accept two types of litigation: action brought according to federal law or action in which the parties come from different states (which is very uncommon in labour cases). If the federal court accepts the case, all other concomitant 'non-federal rule claims' may also be tried. In comparison, the state court have broad jurisdiction to take actions according to local, state, and federal rules. For example, New York State distributes its cases to different state courts by subject-matter and value. The Small Claims Court is in charge of claims of and under USD 5,000; the Civil Court is in charge of claims of and under USD 25,000; and the Supreme Court is in charge of claims over USD 25,000. Generally speaking, cases with higher values have more sophisticated and extended procedures, and the complexity of the procedure and the time required to resolve the case intensifies.<sup>160</sup>
- 82 In China, there are no specialized rules for international jurisdiction or venue of the labour disputes in the Code of Civil Procedure. However, the Supreme People's Court of the People's Republic of China explained in 2021 that labour dispute cases shall be under the jurisdiction of the primary people's court in the place where the employer is located or the place where the labour contract is performed. If the place of performance of the labour

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<sup>159</sup> Sugeno, Yamakawa, Saito, Sadazuka, Otozawa (n **Fehler! Verweisquelle konnte nicht gefunden werden.**) 64-65.

<sup>160</sup> Ebisui, Cooney and Fenwick (n 1) 330.



contract is not clear, the primary people's court at the location of the employer shall have jurisdiction.<sup>161</sup>

## 5 REPRESENTATION

- 83 Most countries do not require attorney representation in the first instance of litigation. This helps to minimize the cost and burden of the process on the parties. Such is the case in Taiwan, Germany, and the United Kingdom. In contrast, Japan requires legal representation but provides legal aid for labour tribunal proceedings.

### 5.1 No Compulsory Attorney Representation

- 84 In Germany, a party may proceed in labour litigations by itself without representation by an attorney at the first instance labour court. This is quite different from other civil litigation under the Code of Civil Procedure, which generally requires attorney representation before *Landesgericht* (the regional court) and *Oberlandesgericht* (higher regional court).<sup>162</sup> In labour court, a party may appoint an attorney. Members of a union may appoint the union or juridical person whose responsibility law is to provide the union and its members with legal advice or act as its agent in litigation. If the party cannot afford the cost of the litigation without damaging the necessary living cost of the party and their family and cannot be represented by the union or a member of the employer or employee and the other party has appointed an attorney, the presiding judge of the labour court should appoint an attorney for the party by petition (Art 11-1(1) of the Labour Court Act). However, if the court has a justifiable reason to consider this unnecessary or if performance in the litigation is demonstrated as wilful, it may not appoint an attorney. Unlike in civil procedure in Germany, lawyer's fees shall be borne by the client in the first instance of the labour proceeding, since mandatory legal representation is not adopted. By contrast, in civil proceedings, the cost can be borne by the defeated party, or the burden of cost can be agreed upon by the parties. That is, the prevailing party shall not be entitled to compensation for loss of time or to reimbursement of the costs incurred in obtaining the services of an attorney or counsel. On the other hand, a losing client does not have to worry about incurring additional attorney's fees. When the attorney accepts an appointment from the party, they should explain the burden of cost in labour proceedings.<sup>163</sup> At the second instance of labour proceedings, if the cost of the proceeding has been shared proportionally according to Art 92 of the Code of Civil Procedure, and one of the parties is represented by an attorney and the other is represented by a group representative, the cost of the other

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<sup>161</sup> The Interpretation of the Supreme People's Court on the Application of Law to the Labour Dispute Cases I (China) Art 3 <https://www.court.gov.cn/fabu-xiangqing-282121.html> accessed 15 December 2023.

<sup>162</sup> Code of Civil Procedure (Germany) Art 78.

<sup>163</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 12 a (1) (Germany).

party is considered as the cost of the attorney. However, this is limited to the actual cost that has been spent which may be claimed.<sup>164</sup>

- 85 In Taiwan, legal representation is not required for civil litigation proceedings in the first and second instance. According to Art 15 of the Taiwan Labour Incident Act, labour cases shall apply to Art 68 of the Code of Civil Procedure regarding litigation representation. Therefore, although labour cases can be litigated by the parties themselves, if they want to be represented in the litigation, in principle, they must still be represented by lawyers. Only with the permission of the presiding judge, non-attorneys may act as an advocate as well. However, in respect of injunctive actions filed by the labour union pursuant to Art 40 of Taiwan Labour Incident Act, mandatory legal representation applies, which means lawyers should be retained for advocacy for such actions (Art 40 (2)), as such actions require a high level of expertise, not only in the assembling of litigative documentation but also the assertion of legal relations and the presentation of evidence to prove facts.
- 86 In the ET of the UK, a party may appear in person or be represented by counsel or a solicitor, a representative of a union or an employer's association or any other person whom they desire to represent them.<sup>165</sup> In Belgium's labour courts, parties may also be assisted or represented by a representative of a trade union.<sup>166</sup>

## 5.2 Compulsory Legal Representation

- 87 In Japan's labour tribunal proceedings, parties must be represented by attorneys, or another person allowed by relevant rules to act in civil litigation (except for agents who can perform judicial acts under laws and regulations). However, when the court finds it necessary and appropriate to protect the rights and interests of the parties and to ensure smooth progress in labour tribunal proceedings, it may permit a person who is not an attorney to serve as an agent (Art 4 (1) of Japan Labour Tribunal Act). This is because, on the one hand, labour tribunal proceedings are to be concluded within three sessions expeditiously and require the representative to carry both knowledge and experience in substantive law and procedural law;<sup>167</sup> on the other hand, labour tribunal proceedings need to meet their function as the pre-phase of civil litigation characterized by an expeditious and convenient non-contentious proceeding. Non-lawyers are therefore needed when the court deems it necessary—often under the consideration of both parties' interests and the progress of the labour tribunal proceeding. If the approved representative is found to be unqualified after

<sup>164</sup> *Arbeitsgerichtsgesetz* (The Labour Court Act) Art 12-1 (2) (Germany).

<sup>165</sup> Employment Tribunals Act 1996 Sec 6 Conduct of hearings (UK).

<sup>166</sup> Judicial Code §3 Art 728 (Belgium); Taelman and Severen, (n 20) 63, 107.

<sup>167</sup> T Asano, 'Labor Tribunal Proceedings: The Paradigm Shift in Labor Dispute Resolution'(2023), 7 (43) Japan Labor Issues 34, 36-37 <https://www.jil.go.jp/english/jli/documents/2023/043-03.pdf> accessed 15 December 2023.

appointment or they are no longer qualified, the court may revoke the approval (Art 4 (2) of Japan Labour Tribunal Act).<sup>168</sup>

## 6 COLLECTIVE REDRESS PROCEDURES

- 88 Collective redress comprises two forms: one is representative action for regulatory relief, and the other is class action for multi-party monetary relief.<sup>169</sup> In many jurisdictions, labour unions have the right to sue on behalf of workers. However, unlike consumer protection matters, collective redress for individual labour protection is not facilitated much;<sup>170</sup> fewer jurisdictions have special provisions for collective actions, and Taiwan is one example.

### 6.1 Permanent Injunctive Relief

- 89 Actions in Taiwan for injunctive relief, as provided by Art 40 of the LIA, shall be filed in the form of collective action through a labour union. As such actions are based on the collective rights of the workers rather than the rights of the individual worker, the undertaking of the action does not require authorization from individual workers. Mandatory representation is stipulated for the purpose of the proper progression of the litigation (Art 40 (2) of the LIA). To effectively protect workers' rights and to prevent vexatious litigation, the union's right for litigation is delimited by the interests of its members; thus, if the suit violates the interests of the members of the union, the case shall be dismissed (Art 40 (3) of the LIA). Moreover, as such actions are mainly concerned with the common interests of the individual and of the workers as a collective, there are limitations on the principle of party disposition; hence, the withdrawal, abandonment, or settlement of such a lawsuit shall be subject to the approval of the court (Art 40 (4) of the LIA).

### 6.2 Monetary Relief

#### 6.2.1 Joinder of Actions

- 90 If there are multiple workers who want to assert their rights together, a simple and fundamental approach is the joinder of actions or to consolidate the lawsuits. Although parties based on similar factual and legal issues may sue jointly, each claim remains individual and therefore each party must present their own evidence and facts.<sup>171</sup> In

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<sup>168</sup> Sugeno, Yamakawa, Saito, Sadazuka, Otozawa (n **Fehler! Verweisquelle konnte nicht gefunden werden.**) 69-70.

<sup>169</sup> C Hodges, 'Europeanization of civil justice: trends and issues' (2006) 28 Civil Justice Quarterly 96, 114-115.

<sup>170</sup> Z Rasnača, 'Collective redress in labour and social law disputes: An (attractive) option for the EU?' (2021) 12(4) European Labour Law Journal 415, 415-435.

<sup>171</sup> Ebisui, Cooney and Fenwick (n 1) 333.

disputes involving a large number of claimants, the joinder approach may not be efficient enough. Some jurisdictions have added the following collective dispute resolution.

### 6.2.2 *The Opt-In Model*

- 91 In addition to the joinder of actions system, the opt-in model has been adopted in some jurisdictions, such as Taiwan. The labour union may file a collective action by the appointment of individual workers.<sup>172</sup> To resolve common issues through a single proceeding, the appointed labour union may file additional claims to request a declaratory judgment confirming the existence of the common basis perquisites concerning the claim and legal relationship between the appointing persons and the defendant before the end of oral arguments in the first instance trial. When the appointed labour union files the additional declaratory claim, the court may seek the consent of the appointed labour union, or the appointed labour union may file a motion to which the court deems appropriate, and then make public announcements to notify other workers with common interests that they may submit a pleading to join the case within a certain period of time. The person petitioning to join the case shall be deemed to have appointed the labour union.<sup>173</sup> This opt-in model is devised to maximize the effectiveness of such actions.<sup>174</sup> Accordingly, workers who share common interests based on the same cause may request joint litigation or a joint trial. Such workers are not limited to members of the suing union. Concerning the additional claim, the court should give priority to conducting argument and adjudication; before the adjudication concerning the additional claim is finalized, the original litigation proceedings may be stayed by the court.<sup>175</sup>
- 92 In the US, the Fair Labour Standards Act (FLSA) is a remedial statute specifically created to protect employees' federal wage and hour rights. It adopts an opt-in model for wage and hour collective actions (Section 216(b) of the Fair Labour Standards Act, thereafter (FLSA)). In contrast to the opt-out model (class action) under Rule 23 of the USFRCP, an individual who wants to participate in a collective action of FLSA must clearly state the willingness to join the action and the circumstances between each individual must be similar. If the individuals do not file a written consent to participate in the collective action, they will not be part of the action and will not be bound by the judgment of the court (Section 216(b) of the FLSA).<sup>176</sup> However, the employer may seek to transfer all related actions to a single

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<sup>172</sup> Code of Civil Procedure Art 44-1 (Taiwan).

<sup>173</sup> Labour Incident Act 2018 Art 42 (Taiwan).

<sup>174</sup> K-L Shen, 'Developments of *Labour Collective Action* and New Changes' (2020), 49(4) National Taiwan University Law Journal, 1979, 2006; K-L Shen, 'The Developments of Collective Redress in Taiwan' (2019), 23(3), KCI Civil Procedure, 167, 196-197. DOI: <https://doi.org/10.30639/cp.2019.10.23.3.167>.

<sup>175</sup> Labour Incident Act 2018 Art 41(1) (Taiwan).

<sup>176</sup> 29 USC § 216(b): 'No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought[...]'.

judge and ask that those actions be consolidated into one case for trial (Rule 42(a) of USFRCP, 28 USC § 1407). As a benefit, this mechanism allows cases that have no (or little) litigation interest (such as claims of low overtime payment), through the collective of many workers to balance the cost of litigation, appointing an attorney, and hiring expert witnesses. This is more beneficial to disadvantaged workers.<sup>177</sup>

### 6.2.3 The Opt-Out Model

- 93 In the US, in addition to the above-mentioned collective actions under Section 216(b) of FLSA, large-scale cases of FLSA violations are often brought as class action under Rule 23 of the USFRCP. These are referred to as ‘hybrid’ actions.<sup>178</sup> If the case of the party complies with the class criteria of class actions, individuals would automatically be included as the parties in the class action, unless they have clearly stated to opt-out. In this case, the plaintiff may be the class representative for all individuals and they may appoint an attorney collaboratively. This mechanism is applicable in the New York Labour Law (NYLL) and federal and state court cases or local discrimination cases. The benefit of class actions is that the employees are not required to participate actively in the case and do not have to incur enormous costs during litigation. The employer would be less likely to seek ‘revenge’ on a particular employee.<sup>179</sup>

## 7 INTERIM RELIEF

- 94 If a party (usually the employee in a labour dispute) is in dire need of legal protection, they need interim relief because the litigation process takes too long. In dismissal disputes, the employee usually wishes to continue working in order to get paid. This is where an interim injunction is needed, ordering the employer to tolerate the employee's continued employment. While some jurisdictions do not have specific provisions on temporary injunction or interim relief in labour proceedings, and apply the rules of civil procedure to deal with such situations, such as Taiwan prior to 2020, the possibility of interim award still is recognized, albeit infrequently and with differing opinions. In order to resolve the controversial issues and divergent decisions in practice, Taiwan's legislators referred to German law (Art 102 of Work Constitution Act)<sup>180</sup> as well as the Judgment of the German Federal Labour Court,<sup>181</sup> and passed the new legislation in 2020 with special rules for interim

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<sup>177</sup> Ebisui, Cooney and Fenwick (n 1) 334; J-S Gonzalez, ‘Solving Fair Labour Standards Act Collective Action Law’ (2023), 58 Tulsa Law Review 45.

<sup>178</sup> W Jhaveri-Weeks and A Webber, ‘Class Actions Under Rule 23 and Collective Actions Under the Fair Labour Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws’ (2016), 23(2) The Georgetown Journal on Poverty Law & Policy, 233, 246.

<sup>179</sup> Ebisui, Cooney and Fenwick (n 1) 334.

<sup>180</sup> *Betriebsverfassungsgesetz* Art 102 (5) (Works Constitution Act) (Germany).

<sup>181</sup> Case GS 1/84 (BAG, Germany), Order 27 February 1985, C. I. 1.

relief, particularly regarding temporary status for continued employment.<sup>182</sup> There are two types of temporary status quo injunctions for labour cases: monetary payment and maintenance of status. While the former guarantees the worker's right to existence by sustaining the livelihood of the worker, the latter is related to the personality rights of the worker.

### 7.1 Temporary Status Quo Injunction for Continuous Employment

- 95 The purpose of taking a request for continuous employment is to preserve the occupational skills and competitiveness of the worker, whereas the payment of wages is merely a consequence of the status of employment. However, requiring the employer to continue employment would have a significant impact on the employer's business operations. Therefore, the labour courts must weigh the interests of the employee against those of the employer.
- 96 In Germany, in dismissal protection proceedings, according to Art 102(1) of *Betriebsverfassungsgesetz* (the Works Constitution Act, *BetrVG*), the works council must be heard before each dismissal. In case of an ordinary dismissal, the works council can expressly oppose the dismissal if reasons to object exist in accordance with Art 102(3) of the *BetrVG*. Then the employee may make a claim for continued employment. If the works council has objected to a dismissal and if the employee has filed an action under the Dismissal Protection Act claiming that the employment relationship has not been terminated by the dismissal, the employer must, at the request of the employee, continue to employ him/her under the same working conditions until the conclusion of the dispute by a court decision that cannot be contested anymore. On application by the employer the court may issue an interim order releasing him from his obligation under sentence 1 to maintain the employment relationship in the following cases: 1. if the action brought by the employee is not reasonably likely to succeed or appears abusive; or 2. the continuation of the employment relationship imposes an unreasonable financial burden on the employer; or 3. the objection raised by the works council is manifestly unfounded.
- 97 In addition, to the above-mentioned cases under Art 102 of *BetrVG*, the German Federal Labour Court extended this right of the dismissed employee to request reinstatement during the litigation procedure to other cases in an important decision of 1985. The dismissed employee can demand temporary reinstatement if the dismissal is evidently unlawful or if the labour court of first instance declares the dismissal to be unlawful. In these cases, the employee's interest in continuing to work, a constitutionally protected individual

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<sup>182</sup> Labour Incident Act Art 46 to 50 (Taiwan).

right, would outweigh the employer's interest in terminating the employment relationship.<sup>183</sup>

- 98 According to the Taiwan Labour Incident Act, if the court recognizes that the case for confirming the existence of an employment relationship (as initiated by the employee) has a chance of prevailing and that the employer has no major difficulties in continuously employing the worker, the court may order a temporary status quo injunction by motion for continuous employment and payment of wages (Art 49 of the LIA). In order to properly weigh the interests of both parties and the requirements of injunction, the court shall allow the parties to be heard before ruling.<sup>184</sup> These rulings of temporary injunction are enforceable.
- 99 Where the worker initiates an action to confirm the ineffectiveness of a job transfer or for re-employment, if the court recognizes a high possibility for the transfer to violate labour laws, group agreements, work rules, labour-management conference resolutions, labour contracts or labour norms, and that the employer has no significant difficulties in continuously employing the worker in their original position, the court may grant a temporary status quo injunction, based on the worker's motion, for continuing employment in the original position or a new position to which both parties agree.<sup>185</sup> Regarding the necessity of temporary status quo injunctions in disputes over job transfers, the court shall consider not only the worker's disadvantages caused by the transfer and the subject matter of the imminent danger of which the injunction is to prevent, but also whether the transfer violates law or contract, or whether the employer will encounter significant difficulty in re-employing the worker. This way, the interests of both parties may be equally attended to.
- 100 In the United Kingdom, an employee who presents a complaint to an ET that they have been unfairly dismissed may file a pre-verdict request to the tribunal for interim relief to maintain their current status, such as reinstatement, re-employment, or salary payments and other benefits according to the contract until the claim is concluded. The applicant must show they have a 'pretty good chance' of succeeding at the final hearing (*Taplin v C Shippam Ltd* [1978] ICR 1068, EAT). The test is set 'comparatively high' due to the potential prejudice to the employer (*Dandpat v University of Bath* UKEAT/0408/09/LA). The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination. The tribunal shall resolve the application for interim relief as soon as practicable after receiving it and give the employer no later than seven days before the date of the hearing a

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<sup>183</sup> M-H Korinth, *Einstweiliger Rechtsschutz im Arbeitsgerichtsverfahren*, (3rd edn, Verlag Dr. Otto Schmidt 2015) 260-261.

<sup>184</sup> Code of Civil Procedure Art 538 (4) (Taiwan).

<sup>185</sup> Labour Incident Act Art 50 (Taiwan).

copy of the application and the notice of the date, time, and place of the hearing. The tribunal shall not exercise any power to postpone the hearing of an application for interim relief except where it is satisfied that special circumstances exist that justify it doing so.<sup>186</sup>

## 7.2 Temporary Status Quo Injunction for Payment of Wages

- 101 In Taiwan, the court should inform the worker that they may motion for a temporary status quo injunction to receive a certain payment *ex ante* when the court discovers that a litigation case in which the worker motions for payment of wages, workers' compensation, pension or severance pay, will cause great hardship to their livelihood.<sup>187</sup> This Article of the LIA is provided for the maintenance of the worker's right of existence and human dignity. The object of the temporary status quo injunction may either be a singular payment or a continuous payment, while the necessity of interim relief should be evaluated by the financial survivability of the worker.

## 7.3 Unenforceable Interim Measures in Conciliation Proceedings

- 102 In Japan, the Labour Tribunal Act did not stipulate any rules on temporary remedy,<sup>188</sup> but the Civil Conciliation Act may be *mutatis mutandis* applied in labour tribunal cases.<sup>189</sup> Since the labour tribunal may try to conciliate during labour tribunal proceedings, the labour tribunal may, upon petition of a party, order to prohibit the respondent or any other person concerned with the case from changing the existing state of or disposing of any property or order them to cease and desist from any act that would make it impossible or extremely difficult to achieve the subject matter of the conciliation when it finds it particularly necessary for conciliation. 'Particularly necessary' normally means in consideration of the purpose of the rules, the possibility for successful conciliation, the party's interests, damage due to the measure, and the urgency with which the applicant's interest should be protected.
- 103 However, such measures are not enforceable.<sup>190</sup> If the respondent fails to comply with the obligation of pre-conciliation measures, the effect of the sanction would only be a fine under

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<sup>186</sup> The circumstances under which monetary relief may be requested are stipulated in the Employment Rights Act 1996 Art 128(1) (UK) and the Trade Union and Labour Relations (Consolidation) Act 1992 Art 161(1) (UK).

<sup>187</sup> Labour Incident Act 2018 Art 48 (Taiwan).

<sup>188</sup> Labour Tribunal Act Art 29 (2) (Japan): The provisions of Arts 11, 12, 16, and 36 of the Civil Conciliation Act (Act No. 222 of 1951) apply *mutatis mutandis* to labour tribunal cases.

<sup>189</sup> Civil Conciliation Act Art 12(1) (Japan).

<sup>190</sup> Civil Conciliation Act Art 12(2) (Japan): The measure set forth in the preceding paragraph shall not be enforceable.



JPY 100,000.<sup>191</sup> Since pre-conciliation measures are not enforceable, some suggest that the applicant needs to provide a security deposit.<sup>192</sup>

## 8 ADR OUT OF COURT

104 ADR out of court is an important mechanism for labour dispute resolution. In some countries, it plays an even more meaningful role than court proceedings. The following discussion focuses on mediation, conciliation, and arbitration.

### 8.1 Administrative Mediation and Conciliation

105 In Taiwan, mediation or conciliation is the most important way to resolve an individual labour dispute—not only in the court procedure described in section 3.1., but also in proceedings out of court.<sup>193</sup> As the administrative mediation mechanism, the competent authority may designate a sole mediator or notify the disputants to appoint 3–5 persons as members of the Labour Mediation Committee. Either the mediator or the Labour Mediation Committee will then engage in the mediation and investigation and shall complete the mediation in 20 and 49 days, respectively. The resolution proposed by the mediator, or the Labour Mediation Committee shall be agreed upon by both parties and will become a contract between the two parties. The mediation is deemed unsuccessful where the disputants could not agree on the proposed resolution, a quorum of the committee is not met in two consecutive meetings, or the committee could not decide on a proposal.<sup>194</sup> In those scenarios, the parties can continue to settle their dispute via the mechanisms of litigation, labour dispute arbitration or arbitration pursuant to the Arbitration Law.

106 Regarding individual labour relations disputes in Japan, the director of the Prefectural Labour Bureau should provide the worker and employer with relevant information, consultations, and other assistance to prevent individual labour relations disputes and promote voluntary resolution.<sup>195</sup> When a party files an application for mediation of an individual labour relations dispute to the Prefectural Labour Bureau, the Dispute Coordinating Committee may conduct mediation if the director finds it necessary for resolution.<sup>196</sup> Mediation by Committee is to be conducted by three members whom the

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<sup>191</sup> Labour Tribunal Act 2004 Art 32 (Japan).

<sup>192</sup> A Ishikawa and T Kachimura, *Civil Conciliation Act [Civil Conciliation Rule]* (Seirin-Shoin 1993) 184-185.

<sup>193</sup> For example, in 2020, out of the 27,520 labour dispute cases, 27,501 were mediated; 68 were arbitrated; and 177 were coordinated, see: <https://statdb.mol.gov.tw/statis/jspProxy.aspx?sys=210&kind=21&type=1&funid=q05031&rdm=R66216> accessed 15 December 2022.

<sup>194</sup> Act for the Settlement of Labour-Management Disputes Art 20-21 (Taiwan).

<sup>195</sup> Act on Promoting the Resolution of Individual Labour-Related Disputes Art 3 (Japan) [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=66121&p\\_country=JPN&p\\_count=645&p\\_classification=02&p\\_classcount=15](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=66121&p_country=JPN&p_count=645&p_classification=02&p_classcount=15).

<sup>196</sup> Act on Promoting the Resolution of Individual Labour-Related Disputes Art 5 (1) (Japan).

chairman designates to each case from among committee members.<sup>197</sup> Mediation members may hear the opinions of the parties or request that these parties and any witnesses submit written opinions. Members may also prepare a mediation plan as necessary to resolve the dispute by unanimous decision of all members and present it to the disputing parties.<sup>198</sup> However, the mediation plan is unenforceable (or has no coercive power) whether or not the parties agree to it. The Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment stipulates that the Director of the Prefectural Labour Bureau may provide opinions, guidance, or any recommendations on disputes related to equal opportunities and treatment.<sup>199</sup> If the Director finds it necessary for the resolution of the dispute, they may have the Dispute Adjustment Commission conduct the conciliation.<sup>200</sup> The difference between conciliation and mediation is that the commission may recommend the parties to agree to the conciliation proposal,<sup>201</sup> whereas the mediation plan can only be proposed.

- 107 The principal characteristics of mediation are that it places great emphasis on the autonomy of labour relations and that, in the absence of strict statutory methods, the methods of mediation can be varied. In practice, when one of the parties refuses a group negotiation, the other party may apply for mediation to resolve disputes.<sup>202</sup> The chairman of the Labour Relations Commission may, by petition or on their own authority, appoint a mediator with relevant expertise to assist in the settlement of the labour dispute.<sup>203</sup> The mediator must act as an intermediary between the parties concerned, ascertain their respective point of view, and assist them in resolving the dispute.<sup>204</sup> When the dispute cannot be settled, they must report the key points of the dispute to the Labour Relations Commission.<sup>205</sup>
- 108 In Japan, conciliation<sup>206</sup> must be applied to both parties based on the provisions of a labour agreement. But, in cases concerning public welfare businesses, the conciliation may also be brought by the Labour Relation Committee on its own authority if it deems it necessary.<sup>207</sup>

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<sup>197</sup> Act on Promoting the Resolution of Individual Labour-Related Disputes Art 12 (1) (Japan).

<sup>198</sup> Act on Promoting the Resolution of Individual Labour-Related Disputes Art 13 (Japan).

<sup>199</sup> Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment Art 17 (1) (Japan).

<sup>200</sup> Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment Art 18 (Japan).

<sup>201</sup> Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment Art 22 (Japan): The Commission may prepare a conciliation proposal and recommend its acceptance to the parties concerned.

<sup>202</sup> Satosi (n 41) 153.

<sup>203</sup> The mediation of collective labour disputes is provisioned in Art 10-16 of the Labour Relations Adjustment Act (Japan).

<sup>204</sup> Labour Relations Adjustment Act Art 11, 13 (Japan).

<sup>205</sup> Labour Relations Adjustment Act Art 14 (Japan).

<sup>206</sup> The conciliation of labour disputes is provisioned in Art 17-28 of the Labour Relations Adjustment Act.

<sup>207</sup> Labour Relations Adjustment Act Art 18 (Japan).

The conciliation committee consists of representatives of the employer, the worker, and the public interest. The number of representatives of the employer and the worker must be equal.<sup>208</sup> The conciliation committee may draft a conciliation proposal, present it to the parties, and recommend that it be accepted. The committee may publish the conciliation proposal along with its reasoning, and it may request the media (such as a newspaper or radio program) to make the matter public (Labour Relations Adjustment Act Art 26).<sup>209</sup>

- 109 In the United Kingdom, The Advisory, Conciliation and Arbitration Service (ACAS) is an independent and unprejudiced facility that is assigned to prompt and conduct conciliation of individual labour relations disputes.<sup>210</sup> Since 2014, the implemented 'early conciliation' service must provide information of the case in advance to the ACAS (except in exclusive circumstances and before the ET accepts the claim). Within the specified time period, the conciliation officer shall endeavour to promote a settlement between the persons who would be parties to the proceedings.<sup>211</sup> The burden on the ET is reduced by allowing the ACAS to conduct conciliation. Only 9% of early conciliation cases progressed to an ET process in 2022–2023.<sup>212</sup>
- 110 As discrimination cases follow the same procedure as a typical labour case, the litigants have to notify ACAS in advance and exhaust their attempts of settlement (early conciliation service). When a pre-litigation settlement fails, the awarded 'early conciliation certificate' serves as a 'ticket' to the ensuing litigations, but litigants can still decide whether to bring the conflict to the court within one month.<sup>213</sup>
- 111 In Canada (Quebec), as of January 1, 2016, the Administrative Labour Tribunal (ALT) replaced the *Commission des relations du travail* (CRT) and the *Commission des lésions professionnelles* (CLP) to deal with labour relation disputes to ensure compliance with the Act Respecting Labour Standards and to manage the compensation scheme for workers

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<sup>208</sup> Labour Relations Adjustment Act Art 19 (Japan).

<sup>209</sup> Labour Relations Adjustment Act Art 26 (1) (Japan): The conciliation committee may draft a conciliation proposal, present it to the parties concerned and recommend that it be accepted, as well as publish the conciliation proposal together with a statement of the reasons therefor. If necessary, the conciliation committee may request the cooperation of newspapers and radio stations in making these matters public.

<sup>210</sup> The Trade Union and Labour Relations (Consolidation) Act 1992 Section 247 (UK).

<sup>211</sup> Employment Tribunals Act 1996 Sec18a (UK).

<sup>212</sup> Acas, Annual Report 2022-23, 2, 11: 'Out of the 105,000 early conciliation (EC) notifications we received, we helped over 72,000 find an early resolution to their issue, avoiding the need to proceed with a tribunal claim. This reduced demands on employment tribunals and delivered up to £100m savings to the taxpayer.' <https://assets.publishing.service.gov.uk/media/64b009dffe36e000146fa912/advisory-conciliation-and-arbitration-service-acas-annual-report-and-accounts-2022-to-20223-accessible.pdf> accessed 15 December 2023.

<sup>213</sup> Relating procedures, see <https://www.gov.uk/employment-tribunals>; <https://www.acas.org.uk/early-conciliation> accessed 25 December 2023.

who have suffered workplace injury.<sup>214</sup> With the consent of the parties in a matter, the president of the ALT, or an ALT member or personnel member designated by the president, may conduct a pre-decision conciliation process and ask a conciliator to attempt to bring the parties to an agreement.<sup>215</sup> If an agreement is reached, it may be submitted to the ALT for approval at either party's request. If no request for approval is submitted to the ALT within 12 months after the date of the agreement, the matter is terminated.<sup>216</sup> If no agreement is reached or if the ALT refuses to ratify the agreement, the ALT must hold a hearing as soon as possible to make a decision.<sup>217</sup>

- 112 The ALT may call the parties to a pre-hearing conference to define the issues to be argued at the hearing, assess the advisability of clarifying and specifying the parties' contentions and the conclusions sought, ensure that all documentary evidence is exchanged by the parties, plan the conduct of the proceeding and the order of presentation of evidence at the hearing, examine the possibility of the parties admitting certain facts or proving them by means of sworn statements, and examine any other matter likely to simplify or accelerate the conduct of the hearing. The pre-hearing conference may also allow the parties to come to an agreement and thus terminate the matter.<sup>218</sup> Before rendering its decision, the tribunal must allow the parties to be heard by any means provided for in its rules of evidence and procedure. However, with the parties' consent, the tribunal may proceed on the record if it considers it appropriate.<sup>219</sup> The matter is decided by the member who heard it. Subject to a special rule provided by law, the tribunal must render its decision in principle within three months after the matter is taken under advisement and, in the case of the occupational health and safety division, within nine months after the originating pleading is filed.<sup>220</sup> The tribunal's decision is final, enforceable, and may not be appealed. The persons concerned must immediately comply with the decision.<sup>221</sup> However, decisions of this tribunal are subject to internal review or revocation in cases where a new fact is discovered, a substantive or procedural defect likely to invalidate the decision, or where a party did not have sufficient opportunity to make representations or to be heard. A review proceeding must be brought by way of a motion filed with the tribunal within a reasonable amount of time after the discovery of the new fact or defect that could invalidate the decision.<sup>222</sup> Only

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<sup>214</sup> An Act to group the Commission de l'équité salariale, the Commission des normes du travail and the Commission de la santé et de la sécurité du travail and to establish the Administrative Labour Tribunal (the 'Act'); Act to Establish the Administrative Labour Tribunal (Canada) <https://www.legisquebec.gouv.qc.ca/en/document/cs/t-15.1> accessed 15 December 2023.

<sup>215</sup> Act to Establish the Administrative Labour Tribunal Section 21 (Canada).

<sup>216</sup> Act to Establish the Administrative Labour Tribunal Section 23(2) (Canada).

<sup>217</sup> Act to Establish the Administrative Labour Tribunal Section 24 (Canada).

<sup>218</sup> Act to Establish the Administrative Labour Tribunal Section 27 (Canada).

<sup>219</sup> Act to Establish the Administrative Labour Tribunal Section 35 (Canada).

<sup>220</sup> Act to Establish the Administrative Labour Tribunal Section 45 (Canada).

<sup>221</sup> Act to Establish the Administrative Labour Tribunal Section 51 (Canada).

<sup>222</sup> Act to Establish the Administrative Labour Tribunal Section 49 (Canada).

in certain exceptional cases can an application for 'judicial review' be made before courts.<sup>223</sup> This kind of administrative tribunal is less formal than courts and is not part of the court system, but plays an essential role in resolving disputes in Canadian society.

- 113 In the US, while there are no special rules on labour dispute mediation specifically, mediation is very common as a method to relieve grievances and dissatisfaction,<sup>224</sup> mainly because mediation is not restricted by any procedural rules, substantive rules or precedent. The outcome of mediation can be decided by the parties, and it emphasizes whether the outcome can satisfy the interests and needs of the parties and create win-win situations.<sup>225</sup> Therefore, mediation suffices to process where the parties have complicated jural relations and affinity, or for disputes between parties that are in dependencies. The Equal Employment Opportunity Commission (EEOC) is an administrative agency that provides pre-court mediation and conciliation for discrimination claims under federal statute. Before going to court, a complaint must be filed with the EEOC.<sup>226</sup> Mediation can also be conducted by the Federal Mediation and Conciliation Service (FMCS) and similar facilities in other states, and most first and second instance federal and district courts have established a mediation system conducted by a judge or mediator appointed by the court. The mediator's role in the US is to assist the parties in scheduling mediation sessions and to discuss and propose recommendations to resolve the dispute. The main function of mediation is to let the parties concerned negotiate. The success of mediation is highly related to the parties' level of trust in the mediator.<sup>227</sup>

## 8.2 Arbitration

- 114 Arbitration proceedings must in principle be conducted on the basis of the parties' arbitration agreement, which must exist between the employer and the employee. However, in Taiwan, labour arbitration is divided into voluntary and mandatory arbitration. If mediation out of court is unsuccessful, both parties may jointly apply to hand over arbitration to the municipal or county (city) competent authority. Labour arbitration may also be initiated without undergoing the mediation procedure upon written consent of both parties (arbitration agreement). Nevertheless, it may also be mandated *ex officio* by the municipal or county (city) competent authority if such authority regards the dispute to have a great impact on public welfare, or in response to a request from the competent authority

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<sup>223</sup> For example, Quebec Court of Appeal overturns labour tribunal's interpretation of litigation privilege, see: <https://lawinquebec.com/quebec-court-of-appeal-overturns-labour-tribunals-interpretation-of-litigation-privilege/> accessed 4 July 2024.

<sup>224</sup> C-C Cheng, 'A Study to Improve the Labour Dispute Mediation and Arbitration System in Taiwan—A Focus on Sole Mediator and Sole Arbitrator' (2011) 80 Taipei University Law Review 117, 135.

<sup>225</sup> Cheng (n 224) 135.

<sup>226</sup> Ebisui, Cooney and Fenwick (n 1) 13.

<sup>227</sup> Cheng (n 224) 137-138.

of the related business. In addition, if one of the parties is a worker in a telecommunication business or in a business which may affect public safety, national security, or essential public interests, either party may apply to hand over arbitration to the Central Competent Authority.<sup>228</sup> After the competent authority receives an application for arbitration, the arbitration will be treated either by a designated arbitrator or the Labour Arbitration Committee.<sup>229</sup> Including the investigation of evidence and the declaration of the arbitration award, arbitration proceedings shall be completed within 45–55 days with an arbitrator and within 69–79 days with the committee, starting from the day the arbitrator is designated or the committee is assembled. An arbitration award for interests dispute will be deemed as a contract between the disputants, whereas an award for rights dispute will have the same effect as the final ruling of a court.<sup>230</sup> Compared to mediation, arbitration is used less in labour dispute resolution in Taiwan.<sup>231</sup>

- 115 In Japan, arbitration in relation to labour disputes<sup>232</sup> may only be requested by the parties concerned, or by one or both of the parties concerned based on the provisions of a group agreement, to the Labour Relations Commission. The Labour Relations Commission may not carry out arbitration on its own authority.<sup>233</sup> Arbitration of a labour dispute by the Labour Relations Commission is carried out by an arbitration commission that comprises three arbitration committee members.<sup>234</sup> After asking the opinions of the parties concerned, the chairperson of the Labour Relations Commission should nominate the arbitration committee members from among the members of the Labour Relations Commission or from among special members for adjustment representing the public interest. However, when there is an agreement on the nomination of a member of the arbitration committee between the parties, the chairperson of the Labour Relations Commission should nominate according to that agreement.<sup>235</sup> Lastly, an arbitration award has the same legal effect as a labour agreement.<sup>236</sup>
- 116 In the US, labour disputes are normally conducted following the grievance procedure by the grievant proposing the complaint to their immediate supervisor. If the dispute cannot be

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<sup>228</sup> Act for the Settlement of Labour-Management Disputes Art 25 (Taiwan).

<sup>229</sup> Act for the Settlement of Labour-Management Disputes Art 26 (1) (Taiwan).

<sup>230</sup> Act for the Settlement of Labour-Management Disputes Art 37 (Taiwan).

<sup>231</sup> According to news report in Taiwan, in 2022, there will be 23,217 labour disputes handled through administrative dispute resolution procedures, of which 23,081 will be handled through mediation and only 102 through arbitration. <https://www.chinatimes.com/realtimenews/20230718001860-260405?chdtv> accessed 15 December 2023.

<sup>232</sup> In Japan, rules of arbitration are provisioned Art 29 to 35 of the Labour Relations Adjustment Act (Japan).

<sup>233</sup> Labour Relations Adjustment Act Art 30 (Japan).

<sup>234</sup> Labour Relations Adjustment Act Art 31 (Japan).

<sup>235</sup> Labour Relations Adjustment Act Art 31-2 (Japan).

<sup>236</sup> Labour Relations Adjustment Act Art 34 (Japan): An arbitration award has the same effect as a labour agreement.

resolved in that procedure, the complainant must file a complaint in writing or be represented by the grievant's union representative to file the complaint to the superior of the supervisor, and therefore, the hierarchy of receipt of the complaint increases. The next grievance level is the cooperative representative in the trade who files the complaint to the head of the human resource department. There are generally three to four phases in a grievance procedure. Even when disputes cannot be resolved via grievance procedure, it may be beneficial for the parties to clarify the issues of the case and remove irrelevant arguments (such as a request that the complaint submitted be in written form) during the second phase of the complaint as an effective way to eliminate unreasonable complaints; procedurally, it may help both parties recognize each other's necessities and claims and may prompt both parties into discovery. Moreover, the grievance procedure would also allow the trade union to be in control of the process of the case, and they may decide to continue, drop, or settle the dispute.

- 117 If the grievance procedure fails to resolve the dispute, a party may seek resolution by arbitration according to the arbitration agreement. In the US, the early stage of labour relations dispute resolution plays a role similar to the consensus-seeking mediator, the mission of which is to assist both parties in deciding suitable labour conditions.<sup>237</sup> However, the modern labour relations arbitrator plays the role of a private judge since the arbitrator may be required to interpret the provisions of an employment agreement.<sup>238</sup>
- 118 The US courts have adopted the 'hands off' policy, strictly restricting judicial reviews of the award of labour arbitration.<sup>239</sup> Therefore, the court is not prone to overturn or modify the award. Even when the award might misinterpret the facts, the court will not overturn the award simply because of a difference in interpretation of the agreement. Statistically, only 1% of arbitration awards will be requested to be reviewed by the court, and only a very small percent is overturned.<sup>240</sup>

### 8.3 Decisions on Unfair Labour Practices

- 119 In Taiwan, the mechanism of the Decisions on Unfair Labour Practices, established by Art 39-52 of the Act for the Settlement of Labour-Management Disputes, is to provide an

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<sup>237</sup> Cheng (n 224) 138-148.

<sup>238</sup> T Antonie, 'Labour and Employment Arbitration Today: Mid-Life Crisis of New Golden Age' (2017), 32(1) Ohio St. J. Disp. Resol. 1. <https://repository.law.umich.edu/articles/1934> accessed 15 December 2023; C Coleman and G Coleman, 'Toward a New Paradigm of Labour Arbitration in the Federal Courts' (1995), 13(1) Hofstra Labour and Employment Law Journal 1, <https://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss1/1/> accessed 15 December 2023.

<sup>239</sup> D Ray, 'Court Review of Labour Arbitration Awards under the Federal Arbitration Act' (1987), 32 Villanova Law Review 57. <https://digitalcommons.law.villanova.edu/vlr/vol32/iss1/2> accessed 15 December 2023.

<sup>240</sup> Connors and Bashore-Smith (n 57) 328.

expeditious and professional treatment of unfair labour practices through the hands of labour law experts and to avoid excessive costs caused by litigation, settle the dispute efficiently, and prevent the employer from infringing on the worker's rights. The worker may initiate the proceeding by filing a request to the Ministry of Labour; if a decision is requested during which an action for the same cause is pending, the court shall rule *ex officio* a stay of action, and the dispute shall be treated under the Board for Decisions on Unfair Labour Practices (referred to as the 'Board') that is assembled by the Ministry of Labour. The Board then designates one to three persons to investigate, *ex officio*, the essential facts and evidence and presents a report within 20 days, following which the Board shall convene and the parties shall be notified for oral statements. Finally, the Board shall offer a decision award. The procedure takes approximately 84–134 days in total. Where a party objects to a decision pursuant to Art 39 of the Act for the Settlement of Labour-Management Disputes, they may file for civil litigation; where neither side of the party objects to the decision, or if the party withdraws their lawsuit, it shall be deemed that the parties have agreed on the decision award, which, according to Art 48 and 49, has the same effect as the final ruling of a civil court. If a party objects to a decision made under Art 51, as such a decision is essentially an administrative sanction, it shall be redressed through administrative litigation.<sup>241</sup>

- 120 In Japan, the administrative remedy of unfair labour practice is stipulated in Art 18–27 of the Labour Union Act to ensure the recovery of ordinary collective labour relations.<sup>242</sup> It functions by an individualized administrative commission (the Labour Relations Commission) for administrative relief. If the employer's labour practice is considered to be unfair, the Labour Relations Commission may issue an order to retribute. The Labour Relations Commission is to be composed of the same number of representatives as the employer, worker, and persons representing the public interest.<sup>243</sup> However, only the representative member for public interest has the power to review the labour practice and issue an order for administrative relief. The representative of the employer or the worker may only participate in the hearing and investigating procedure and state the opinion of the order for administrative relief.<sup>244</sup> When the worker files a motion, the Labour Relations Commission must conduct an investigation without delay, and, if necessary, hold a hearing on whether there are reasons for filing the motion. In this case, sufficient opportunity to submit evidence and to cross-examine witnesses must be given to the employer and the worker as part of the procedures of the hearing.<sup>245</sup> Prior to the commencement of the

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<sup>241</sup> Explanation of Unfair Labour Practices on the Official Website of the Ministry of Labour of Taiwan. <https://www.mol.gov.tw/media/brjp0zps/d3924197f2fd0fb7182d4c5628aed005.doc?mediaDL=true9> accessed 15 December 2023.

<sup>242</sup> Satosi (n 41) 625.

<sup>243</sup> Labour Union Act Art 19 (1) (Japan).

<sup>244</sup> Labour Union Act Art 27-12(2) (Japan).

<sup>245</sup> Labour Union Act Art 27 (Japan).



hearing, the Labour Relations Commission must hear the opinion of both parties and establish an examination plan.<sup>246</sup> The examination plan should include the issues and evidence recognized in the investigating procedure, the sessions of examination and times, the number of witnesses, and the scheduled date for the issue of remedy to be made.<sup>247</sup> The Labour Relations Commission and the parties must endeavour that the examinations be conducted according to the examination plan to effect proper and expeditious examinations.<sup>248</sup> The Labour Relations Commission may investigate evidence on its own authority and within the premise of identifying the facts. It may order issues to make a disposition and to submit objects if it finds it difficult to identify the facts, but considerations for the protection of individual and business secrets should be made.<sup>249</sup> When the Labour Relations Commission finds it appropriate to issue an order for remedy, the order should be based on the identification of facts and in accordance with the motion of the applicant.

- 121 In the United States, when a worker is discriminated against or avenged due to attending group actions, the National Labour Relations Act (NLRA) does not endow its personal rights; only the NLRB may prosecute such claims. The worker may file a charge on discrimination and unfair labour practices to allow the NLRB to investigate, and, if after investigation the NLRB finds the evidence sufficient, it must prosecute such claim.<sup>250</sup>

## 9 CONCLUSION

- 122 Labour disputes are handled differently from ordinary civil disputes due to their characteristics and the nature of labour relationships. Many countries have thus developed their ways of attaining resolution. The systems for handling labour disputes vary from country to country based on the specificities and differences in labour relations in their societies and cultures. Despite these differences, some common elements in the resolution of labour disputes across nations are observed, such as the involvement of experts besides professional judges, the resolution of disputes in swift manners, and the promotion of resolution on consensual grounds. Even in countries like the United States or Canada that are absent in specialized labour litigation procedures or labour courts, there are specialized mechanisms outside of the court system for resolving labour disputes.
- 123 A comparative analysis of different national systems reveals that countries with stronger out-of-court systems tend to have weaker judicial processes for labour dispute resolutions. On the contrary, countries with weaker out-of-court ADR systems have integrated

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<sup>246</sup> Labour Union Act Art 27-6 (1) (Japan)

<sup>247</sup> Labour Union Act Art 27-6 (2) (Japan).

<sup>248</sup> Labour Union Act Art 27-6 (4) (Japan).

<sup>249</sup> Labour Union Act Art 27-7 (1) (Japan).

<sup>250</sup> Ebisui, Cooney and Fenwick (n 1) 319-320.

consensual dispute resolution more thoroughly into their judicial systems. In such countries, there are additional specialized rules that differ from those of ordinary civil litigation. The establishment of specialized labour courts or tribunals, as well as specific procedural norms regarding jurisdiction, costs, collection and investigation of facts and evidence, burden of proof, and collective action, all underscore the tailored approach required for handling labour disputes effectively.

- 124 Specialized labour proceedings within judicial systems have been influenced by historical factors or through adaptations of experiences from other countries. This evolution is not only related to the structure of the judicial system inherent to each jurisdiction but also encapsulates the socio-cultural dynamics of labour relations. For example, the civil litigation systems in Japan and Taiwan, primarily transplanted from German law in the early twentieth century, have seen their labour dispute resolution mechanisms in the judicial system evolve distinctly in the twenty-first century. They have developed more emphasis on pre-trial mediations or conciliation processes in court, where professional judges and experts from both sides of labour and employer work together to resolve disputes in expectancy of a harmonious relationship. This accentuation on mediation comes from its importance in Japanese and Taiwanese culture and highlights how judicial systems accommodate the different needs of each society for harmonious labour relations. In recent years, Taiwanese society has exhibited an increased inclination towards employee protection, empowering labour judges with enhanced authority or discretion to modify the adversarial system in favour of labour rights, particularly when mediation yields no resolution. Consequently, more specialized regulations have been instituted regarding the collection of facts and evidence that favour employees, which signifies a departure from German Law.

**ABBREVIATIONS AND ACRONYMS**

|        |  |
|--------|--|
| ACAS   | Advisory, Conciliation and Arbitration Service                               |
| ADR    | Alternative Dispute Resolution   |
| AGEE   | Act of Gender Equality in Employment   |
| ALT    | Administrative Labour Tribunal   |
| ArbGG  | <i>Arbeitsgerichtsgesetz</i> (the Labour Court Act) [Germany]                |
| Art    | Article/Articles   |
| BetrVG | <i>Betriebsverfassungsgesetz</i> (the Works Constitution Act) [Germany]      |
| CCP    | Code of Civil Procedure  |
| CJC    | Civil Justice Council  |
| CLP    | Commission des lésions professionnelles                                      |
| CNESST | Commission des normes, de l'équité, de la santé ET de la sécurité du travail |
| CRT    | Commission des relations du travail  |
| EC     | European Council   |
| ECLI   | European Case Law Identifier   |
| ed     | editor/editors   |
| edn    | edition/editions   |
| EEOC   | Equal Employment Opportunity Commission                                      |
| ET     | Employment Tribunal  |
| etc    | et cetera  |
| ETPR   | Employment Tribunal Procedure Rules  |
| EU     | European Union   |
| ff     | following  |
| FLSA   | Fair Labour Standards Act  |
| FMCS   | Federal Mediation and Conciliation Service                                   |
| GBP    | Great Britain Pound  |
| HMCTS  | Her Majesty's Court & Tribunal Service                                       |
| IT     | Industrial Tribunal  |
| JPY    | Japanese Yen   |
| LIA    | Labour Incident Act  |
| LRC    | Labour Relations Commission  |
| n      | footnote (internal, ie, within the same chapter)                             |
| NLRA   | National Labour Relations Act  |

|                |   |
|----------------|---|
| NLRB           | National Labour Relation Board  |
| no             | number/numbers  |
| NYLL           | New York Labour Law   |
| para           | paragraph/paragraphs  |
| PRC            | People's Republic of China  |
| Sec            | Section/Sections  |
| the Fees Order | the Employment Tribunals and the Employment Appeal Tribunal<br>Fees Order |
| trans/tr       | translated, translation/translator  |
| UK             | United Kingdom  |
| US / USA       | United States of America  |
| USC            | United States Code (US)   |
| USFRCP         | Federal Rules of Civil Procedure (US)                                     |
| USD            | United States Dollar  |
| v              | versus  |
| vol            | volume/volumes  |

## **LEGISLATION**

### **International/Supranational**

EU Directive 2000/43/EC

Regulation (EU) No 1215/2012 (the Brussels Ibis Regulation)

### **National**

Act for the Settlement of Labour-Management Disputes (Taiwan)

Act of Gender Equality in Employment (Taiwan)

Act on Promoting the Resolution of Individual Labour-Related Disputes (Japan)

Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (Japan)

Act to Establish the Administrative Labour Tribunal (Canada)

Act to group the Commission de l'équité salariale, the Commission des normes du travail and the Commission de la santé et de la sécurité du travail and to establish the Administrative Labour Tribunal (Canada)

Allgemeines Gleichbehandlungsgesetz (General Equal Treatment Act) (Germany)

Arbeitsgerichtsgesetz (the Labour Court Act) (Germany)

Betriebsverfassungsgesetz (Work Constitution Act) (Germany)

Civil Conciliation Act (Japan)

Code of Civil Procedure (China)

Code of Civil Procedure (Germany)

Code of Civil Procedure (Japan)

Code of Civil Procedure (Taiwan)

Commission des lésions professionnelles (Canada)

Commission des normes, de l'équité, de la santé ET de la sécurité du travail (Canada)

Commission des relations du travail (Canada)

Employment Rights (Dispute Resolution) Act 1998 (UK)

Employment Rights Act 1996 (UK)

Employment Tribunal Procedure Rules (UK)

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (UK)

Employment Tribunals Act 1996 (UK)

Employment Tribunals Rule of Procedure (UK)

Equality Act 2010 (UK)

Explanations of Applicable Laws for Labour Dispute Cases (1) (China)

Fair Labour Standards Act (USA)

Federal Rules of Civil Procedure (USA)

Federal Rules of Evidence (USA)

Gerichtskostengesetz (Court Fees Act) (Germany)

German Labour Court Act (Germany)

Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) (Germany)

Industrial Training Act 1964 (UK)

Judicial Code (Belgium)

Labour Code (France)

Labour Dispute Mediation and Arbitration Law (China)

Labour Incident Act (Taiwan)

Labour Incident Act 2018 (Taiwan)

Labour Relations Adjustment Act (Japan)

Labour Standard Act 2020 (Taiwan)

Labour Tribunal Act (Japan)

Labour Tribunal Act 2004 (Japan)

Labour Union Act (Japan)

National Labour Relations Act (USA)

New York Labour Law (USA)

Rules of Labour Tribunal Member (Japan)

the Employment Tribunals and the Employment Appeal Tribunal Fees Order (UK)

Trade Union and Labour Relations (Consolidation) Act 1992 (UK)

Zivilprozessordnung (Code of Civil Procedure) Art (Germany)

## CASES

### National

Case 2009 (Su) 993 (Taipei High Administrative Court, Taiwan) Judgment 22 October 2009

Case 2010 (Jian) 110 (Taipei High Administrative Court, Taiwan) Judgment 28 October 2010

Case 2019 (Tai Shang) 1062 (Supreme Court, Taiwan) Judgment 4 July 2019

Case 2021 (Tai Shang) 576 (Supreme Court, Taiwan) Judgment 23 June 2022

Case 5 AZR 359/21 (BAG, Germany), Order 4 May 2022  
[ECLI:DE:BAG:2022:040522.U.5AZR359.21.0]

Case GS 1/84 (BAG, Germany), Order 27 February 1985

*Dandpat v University of Bath* UKEAT/0408/09/LA

*Lawson v Serco Ltd* (HUK), 2006 [ICR 250]

*R (UNISON) v Lord Chancellor* [2017] UKSC 51

*Ravar v Halliburton Manufacturing and Services Ltd* (UKSC 1), 2012 [ICR 389]

*Taplin v C Shippam Ltd* [1978] ICR 1068



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