

## Summary of the Dissertation by Friedrich Schellen

(Title: "Die verständigen Arbeitsvertragsparteien")

The *reasonable employer* ("verständiger Arbeitgeber") and the *reasonable employee* ("verständiger Arbeitnehmer") are constructs of argumentation used by labor law courts in Germany. Lower labor law courts, state labor law courts, and the Federal Labor Court ("BAG") refer to these constructs ("Rechtsfiguren") in about 800 court decisions. Since 1954 the BAG alone has been referring to these constructs of argumentation in 176 cases over 49 different areas of application. Despite this frequent usage of the *reasonable employer* and the *reasonable employee*, the BAG rarely explicitly comments on their background and legal functions. The labor law literature, on the other hand, heavily criticizes the BAG's references to these legal constructs in the first place. However, only few authors make the attempt at analyzing the constructs' background and function within the jurisdictional process. Besides, these rare comments are only based on particular cases and lack a more holistic view across multiple areas of application. Thus, neither jurisdiction nor literature provide a systematical foundation for such constructs.

Analyzing *all* 176 BAG court decisions with reference to the constructs of argumentation from the past 67 years ("Rechtsprechungsanalyse"), the first main part of the dissertation allows for a number of conclusions:

- The constructs are used across 49 different areas of application. In the far majority of these cases, such constructs are used to specify indefinite legal terms
- In 62% of the cases the legal constructs are part of the process of creating a legal standard under which the specific facts of the case can be subsumed. On the other hand, in 38 % of the cases the legal constructs are simply used as phrases to shorten the process of argumentation or to confirm a certain result. If the legal constructs are only used as "termination or confirmation phrases" that do not require further argumentation (in contrast to legal premises), a proper and balanced argumentation may be shortened or completely substituted. This is highly problematic, not only from a methodical but also from a practical viewpoint regarding the concrete results for inferior parties
- In most of its applications the *reasonable employee* is used within the argumentative process of interpretation of contractual agreements between the employer and the employee ("Auslegung von Willenserklärungen"). By referring to the *reasonable employee* in this specific area of application, the courts may undermine the standards of interpretation of contracts that are normatively based in §§ 133, 157 BGB
- Upon evaluation of the linguistic and argumentative context in which the legal constructs are used in all 176 cases, the *reasonable employer* and the *reasonable employee* each have a connection to a certain line of argumentation. As pointed out, in most cases the *reasonable employee* is used within the argumentative process of interpreting contractual agreements. The *reasonable person* is mostly referred to as a personification of the process of balancing interests ("Interessenabwägung"). However, for none of the legal constructs there is a clear and coherent concept for their jurisdictional usage ("kein eindeutiges und kohärentes Verwendungskonzept"). If the courts are referring to a *reasonable person* as a construct of argumentation, a clear and coherent concept for its application would be necessary to guarantee transparent and foreseeable judicial decisions. To the contrary, the *reasonable employer* and *employee* both seem like thoughtless legal standards which are easily applied by courts at their own discretion to reach pre-intended results. As such, the legal constructs may lead to arbitrary court decisions

The *reasonable person* is a general construct of argumentation which is not only found in labor law jurisdiction but also in several other areas of the law: the *reasonable owner* ("verständiger

Eigentümer”) or the *reasonable consumer* (“verständiger Verbraucher”) for example in the general civil law, the *reasonable average person* (“verständiger Durchschnittsmensch”) in private neighbor law, the *reasonable patient* (“verständiger Patient”) in medical malpractice law or the *reasonable investor* (“verständiger Anleger”) in capital market law. A comprehensive evaluation of the different constructs in the mentioned legal fields (“Rechtsbereichsübergreifende Untersuchung”) as another main part of the dissertation allows to characterize the *reasonable person* in general terms. In short, the *reasonable person* is a rhetorical and argumentative construct which embodies an objectified and situation-based balance of interest as a technique of argumentation to approach a legal problem.

The last main part of the dissertation elaborates on the future use of the *reasonable employer* and the *reasonable employee* by German labor law courts. Given the mentioned structural deficits and downsides of the legal constructs in their current application by the BAG, the question is raised whether the courts are legally obliged to discontinue the references to these legal constructs. To answer this question, the usage of the constructs is reviewed in light of constitutional boundaries of judiciary law-making (“Grenzen richterlicher Rechtsfortbildung”). However, despite the structural deficits the *general* use of the legal constructs by the BAG (in all 176 cases and 49 different areas of application) cannot be qualified as illegal judiciary law-making. Such a conclusion can only be drawn in a case-by-case assessment. Still, German labor law courts, especially the BAG, should voluntarily discontinue the references to the legal constructs. Besides the above-mentioned structural downsides of the constructs, there are two other arguments in favor of a discontinuation. First, the *reasonable person* is methodically characterized as a method of balancing interests. This argumentative approach does methodologically not fit with the interpretation of contractual agreements as the area of law in which the *reasonable employee* is mainly used by the courts. Second, the legal constructs, mainly the *reasonable employer*, have specific negative impacts on the actual employees seeking a fair and transparent verdict. All in all, the dissertation can be understood as a plea for the full and unconditional discontinuation of the *reasonable person* as a construct of argumentation in the labor law jurisdiction.