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Appellate Subject Matter Organization: The German Design from an American Perspective

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Appellate courts can be organized in several ways. One way is on the basis of the subject matter of the cases. Under this method the court's entire docket is divided into several groupings based on the subject matter of the litigation—for example, suits involving building construction contracts, suits for damages arising out of automobile mishaps, controversies over interests in land, and so on. Such groupings of cases are then assigned on a continuing basis to the same designated group of judges—a division or a panel—within the court.

Although this method of judicial organization exists in some courts in the United States, there is a traditional American aversion to

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The information in this Article is drawn from the books, articles, statutes, and other printed materials cited in the footnotes and from interviews conducted by the author in the Federal Republic of Germany. In November, 1978, interviews were conducted with officials of the Federal Ministry of Justice in Bonn, judges and other personnel in the *Bundesgerichtshof*, and judges of the *Oberlandesgericht* in Karlsruhe. In March, 1980, interviews were conducted with officials of the Bavarian Ministry of Justice and judges of the *Oberlandesgericht* in Munich. In March 1982, interviews were conducted at the *Oberlandesgericht* in Bremen and the *Kammergericht* in Berlin, and with justice officials in these two cities. The information presented here is derived from the above-mentioned sources. The persons interviewed, of course, bear no responsibility for any errors or misinterpretations that may appear here. This Article is not an in-depth study of the German courts, nor is it based on extensive empirical data. To one well-versed in the German legal system, it may appear to be an over-simplified explanation. It is intended for those American readers who know little or nothing about the subject.

structuring courts and allocating judicial business on this basis. Yet its desirability is becoming increasingly evident within American appellate courts, both state and federal, especially at the intermediate appellate level. Since one of the best-functioning appellate systems embodying a subject matter design is in Germany, American lawyers and judges can gain insights into this kind of appellate structure by a clearer understanding of the German plan. The purpose of this Article is to assist Americans in gaining that understanding.

To appreciate the significance of this German arrangement from the American standpoint, one must first understand the problem afflicting appellate courts in the United States. The problem has grown acute, and will worsen, in the federal courts and in the larger state systems. The cause of the problem is the growth in appellate case loads over the past fifteen to twenty years, which in turn has caused a substantial increase in the number of judges sitting on appellate courts, chiefly at the intermediate level. Increases in the number of judges result in increases in the number of decisional units within a given appellate system. In the federal system there are now twelve courts of appeals established on a geographical basis. Within each of those courts, however, there are multiple and continually shifting panels of three judges. On the Ninth Circuit, for example, there are twenty-three judges; it is theoretically possible to have 1,771 different panels of three. Eight circuits have more than nine judges each,¹ and they all sit in shifting threesomes. The state judicial systems have a variety of organizational structures at the intermediate appellate level, but they, like the federal appellate courts, are not structured or organized internally on any subject matter concept. The single court of last resort sitting at the apex of each judicial system is unable, because of the sheer quantity of decisions being turned out at the intermediate appellate level, to resolve conflicts among the decisional units, to eliminate uncertainties and unevenness in the case law, and, in general, to monitor an overall, evenhanded development of the jurisdiction's law.

As appellate litigation continues to grow, the natural tendency is to add more judges and hence more decisional units; this, of course, will heighten the threats to stability and uniformity in the law. In short, the challenge to American judicial architects is to devise a structure and procedure that will accommodate the number of appellate judges needed to handle the volume of business without destroying doctrinal uniformity and stability.

1. 28 U.S.C. § 44 (1980).

A promising solution to this dilemma lies in the adoption of subject matter organization. A better understanding of how such an organization can work may dispel some of the mythology and theoretical objections that are found in the American legal world. Although many American lawyers and judges are generally aware that the German judicial system incorporates this design, there is a lack of information in English about the details of that system. This Article attempts to fill that void by describing for Americans how subject matter organization pervades the German judiciary and how, particularly, it is employed in the German appellate courts.

I. THE GOVERNMENTAL STRUCTURE— A UNITARY FEDERALISM

The Federal Republic of Germany (FRG), as its name indicates, is a nation whose political organization is based on federalism. In reality, however, the allocation of German governmental power is so different from the federalism of the United States that the system is virtually another form of government. There is a superficial similarity in that both the United States and the FRG have central, national governments coexisting with constituent territorial units—the states—having governments of their own. In two important respects, however, the German form of government is closer to a unitary system than it is to federalism, at least as compared with federalism in the United States.²

One substantial difference is that the bulk of German law is federal. The eleven constituent political units—the *Länder* (*Land* in the singular), which are analogous to American states—have parliamentary bodies that enact statutes.³ However, in the totality of the German legal universe, those statutes do not loom large. Some estimates are that more than ninety-five percent of all the law involved in litigation in Germany is federal.⁴ This situation is almost reversed in the United States, where the overwhelming bulk of law is state law. Despite the

2. Descriptions of the governmental structures and political system of the Federal Republic of Germany, published in English, can be found in W. GER. PRESS AND INFORMATION OFFICE, *FACTS ABOUT GERMANY* 102-31 (1975) and in U.S. DEP'T OF ARMY, *PAMPHLET* No. 550-173, *AREA HANDBOOK FOR THE FEDERAL REPUBLIC OF GERMANY* 205-58 (1975).

3. The 11 *Länder* are Baden-Württemberg, Bavaria, Berlin, Bremen, Hamburg, Hessen, Lower Saxony, Northrhine-Westphalia, Rhineland-Palatinate, Saarland, and Schleswig-Holstein. The current boundaries of the *Länder* have been fixed since the Second World War, but in the main they follow historic lines.

4. Interviews conducted with officials of the Bavarian Ministry of Justice and judges of the *Oberlandesgericht*, Munich, W. Ger., March, 1980 [hereinafter cited as Interviews 1980].

growth of congressional enactments in recent decades, federal law is still a relatively thin overlay. In Germany, criminal law, criminal procedure, the great mass of private law, and civil procedure were brought under nationwide uniformity by the five major codes adopted in the last quarter of the nineteenth century.⁵ American lawyers would find it strange, for example, that ordinary automobile negligence cases and private contract disputes are governed by federal law, but that is the situation in Germany. *Land* law deals with such matters as education and local law enforcement.

Another significant difference between the two judicial systems is that in Germany, from the lowest trial courts to the highest appellate courts, there is a single nationwide court structure, which is created by federal law.⁶ There are no parallel or duplicating courts at any level similar to the dual federal-state systems in the United States. Not only does federal law establish all German courts, it also provides comprehensively for their civil and criminal procedures⁷ and prescribes the responsibilities, status, and compensation for all judges at all levels.⁸ However, all of the courts except the courts of last resort and a few other specialized tribunals are regarded as *Land* courts. The *Land* courts for criminal cases and private civil litigation include two levels of trial courts and a tier of appellate courts. With reference to these courts, the responsibility of the *Land* government is to provide financial support, appoint the judges, and provide for day-to-day administration. The federal government has a corresponding responsibility for the top appellate courts of the country.⁹

5. These are the Criminal Code (*Strafgesetzbuch*), the Code of Criminal Procedure (*Strafprozessordnung*), the Civil Code (*Bürgerliches Gesetzbuch*), the Commercial Code (*Handelsgesetzbuch*), and the Code of Civil Procedure (*Zivilprozessordnung*). With later modifications, these codes are still in effect in the FRG.

6. The federal law establishing the courts and their jurisdictions is the Court Constitution Act (*Gerichtsverfassungsgesetz*). This statute was originally enacted in 1877.

7. See note 5 *supra*.

8. The basic federal law dealing with all German judges is the German Judges Law (*Deutsches Richtergesetz*).

9. English language descriptions of the German courts and legal system and the organization of the German judiciary can be found in 1 E. COHN, *MANUAL OF GERMAN LAW* 3-55 (2d ed. 1968); W. HEYDE, *THE ADMINISTRATION OF JUSTICE IN THE FEDERAL REPUBLIC OF GERMANY* (1971); A. VON MEHREN & J. GURDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 126-39 (2d ed. 1977). The court structure for ordinary civil and criminal cases dates from the 1870s with the creation of the German *Reich*. See R. ENSOR, *COURTS AND JUDGES IN FRANCE, GERMANY AND ENGLAND* 52 (1933). Despite changes in the administration of justice under National Socialism from 1933 to 1945, the basic court structure was not altered. The system did, however, become more centralized during that period. See Shartel, *Background Material on Germany* (n.d.) (unpublished, The Judge Advocate General's School, U.S. Army, Ann Arbor, Mich.). The

One result of this quasi-unitary system in Germany is that there is never a question of federal-state choice of forum, as there is in the United States. Nor is there anything like the federal-state choice of law problem which exists under the *Erie* doctrine,¹⁰ whereby a federal trial court must determine whether federal or state law is to govern a particular question. Rarely, if ever, is there any doubt as to the source of the governing law in the German courts; it is almost always federal, as to both substance and procedure.

II. AN OVERVIEW OF THE JUDICIAL SYSTEMS

The German courts, although entirely creations of federal law, are not organized into a single judicial system. Rather, there are five distinct systems. These are spoken of as "the five jurisdictions," and each is nationwide in scope. These jurisdictions are not territorial; they are erected along subject matter lines. Within each jurisdiction there is a trial level and an appellate level. The top appellate court in each jurisdiction—the supreme court of the jurisdiction—is federal. The trial courts in each jurisdiction are *Land* courts. In some jurisdictions there are intermediate appellate courts; these are also *Land* courts. Indeed, as pointed out above, the only federal courts in Germany are the five top appellate courts in these jurisdictions plus a few highly specialized tribunals and the Federal Constitutional Court. The five jurisdictions are, in English translation, the ordinary, the administrative, the financial, the social, and the labor. Each is briefly described below.¹¹

The Ordinary Jurisdiction. This jurisdiction embraces all criminal cases and all civil litigation between private parties, except litigation within the labor jurisdiction. The judicial structure designed to handle these cases is the focus of this Article and will be described more fully below.

The Administrative Jurisdiction. This jurisdiction includes all dis-

present court structure came into being with the creation of the FRG in 1949; it is essentially the same as that which was established in the late 19th century. However, the court system in East Germany—now the German Democratic Republic—has been significantly altered. See U.S. DEP'T OF ARMY, PAMPHLET NO. 550-153, AREA HANDBOOK FOR EAST GERMANY 126-28, 274-75 (1972); E. COHN, *supra*, at 34-36.

10. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

11. The description of the German judicial system given here is taken from the sources cited in notes 2, 4, and 9, *supra*. The author also gathered information from interviews conducted with officials of the Federal Ministry of Justice in Bonn, judges and other personnel in the *Bundesgerichtshof*, and judges of the *Oberlandesgericht* in Karlsruhe in November, 1978 [hereinafter cited as Interviews 1978]. In March, 1982, the author interviewed in Bremen and Berlin, as noted in the acknowledgment, *supra*.

putes between citizens and the government that are not included in the social and financial jurisdictions. Its business is the equivalent of American administrative law. This jurisdiction is structured in three levels: trial courts throughout the country, regionally organized appellate courts with at least one in each *Land*, and the Federal Supreme Court, the *Bundesverwaltungsgericht*, which sits in Berlin.¹²

The Financial Jurisdiction. This jurisdiction includes all controversies between citizens and the government concerning taxes. These include what Americans would refer to as internal revenue cases. Unlike the other four jurisdictions, this jurisdiction has only two tiers: a trial level within each *Land* and the Federal Supreme Court, the *Bundesfinanzhof*, sitting in Munich.¹³

The Social Jurisdiction. This jurisdiction includes cases dealing with unemployment compensation, health and accident insurance, social security, and other social benefit programs. There are trial courts and intermediate appellate courts in the *Länder*; the Federal Supreme Court is the *Bundessozialgericht*, sitting in Kassel.¹⁴

The Labor Jurisdiction. This jurisdiction includes all disputes between employees and employers concerning terms and conditions of employment in private industry. As in the administrative and social jurisdictions, the structure is three-tiered, with trial courts and intermediate appellate courts in the *Länder*. The Federal Supreme Court is the *Bundesarbeitsgericht*, sitting in Kassel.¹⁵

The accompanying diagram portrays the structure of these five jurisdictions (Table 1).

In addition to these five jurisdictions, there is one other—the constitutional jurisdiction. Unlike courts in the United States, the ordinary courts and the courts exercising the jurisdictions described above do not have the authority to decide constitutional questions that may

12. The trial court is the *Verwaltungsgericht*; the intermediate appellate court is the *Oberverwaltungsgericht*. These are *Land* courts. For a description of this jurisdiction see Lorch, *German Administrative Courts*, 58 JUDICATURE 293 (1975). Before 1933 there were trial and appellate courts in the *Länder* for administrative cases; however, there was no nationwide appellate court such as the *Bundesverwaltungsgericht*. See R. ENSOR, *supra* note 9, at 76.

13. The *Reichsfinanzhof*, the predecessor to this court, also sat in Munich. R. ENSOR, *supra* note 9, at 76.

14. The trial court is the *Sozialgericht*; the intermediate appellate court is the *Landsozialgericht*. This is the newest of the five jurisdictions, a split-off from the administrative jurisdiction.

15. The trial court is the *Arbeitsgericht*; the intermediate appellate court is the *Landarbeitsgericht*. The predecessor of the present *Bundesarbeitsgericht* was the *Reichsarbeitsgericht*, established in 1926. R. ENSOR, *supra* note 9, at 70-73.

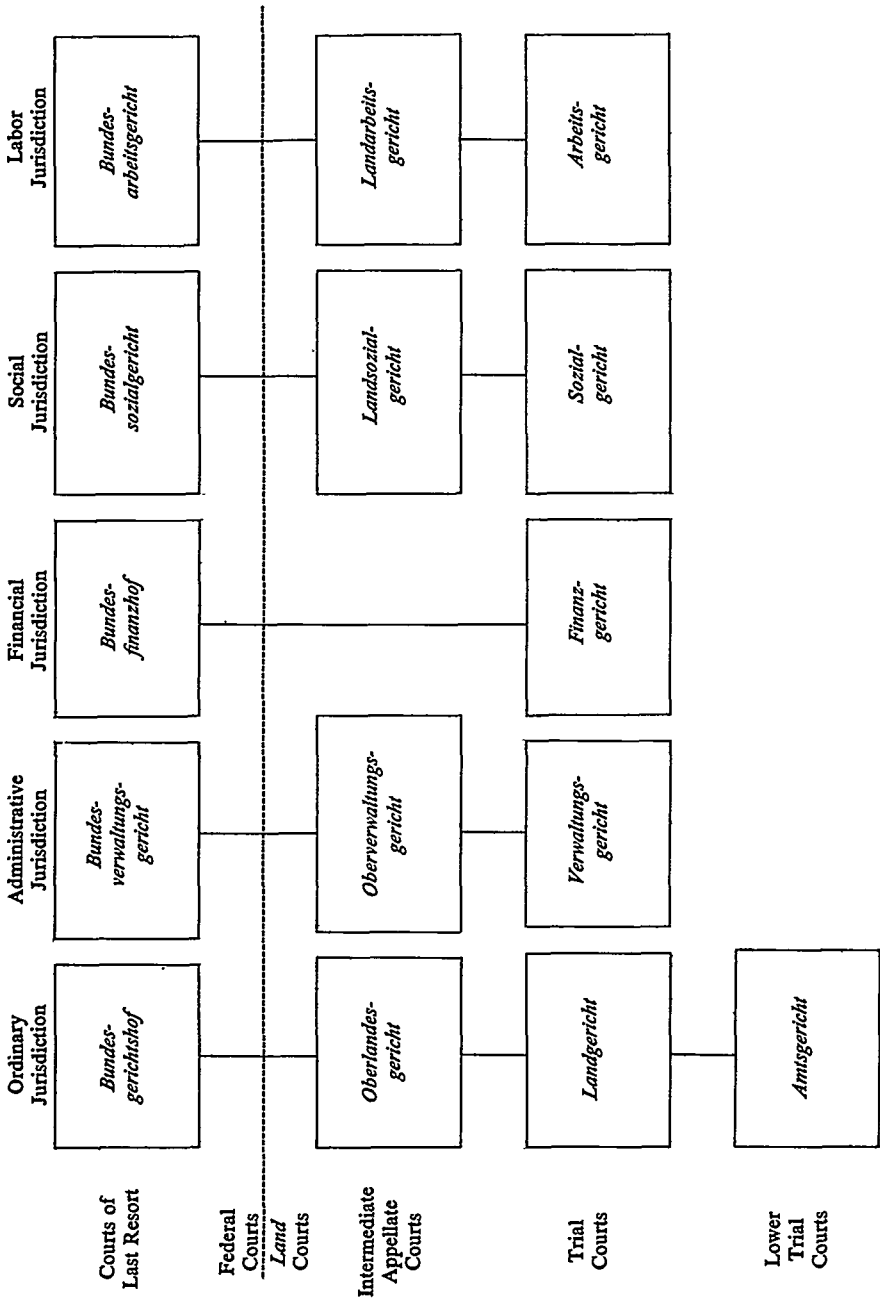


Table 1 - The Five Jurisdictions

arise in the course of litigation. The authority to decide these questions is vested in special constitutional courts at both the *Land* and federal levels. Each *Land* has its own constitutional court to decide *Land* constitutional questions.

The Federal Constitutional Court (*Bundesverfassungsgericht*) is the only forum with authority to decide federal constitutional questions. This court is above the top courts in the other five jurisdictions in the sense that its rulings on constitutional questions are binding on all other courts. As an independent constitutional organ, it occupies a unique position outside of the judicial structure outlined above. Cases come to the Federal Constitutional Court in a variety of ways. Questions can be presented by parliamentary bodies and executive agencies. A losing litigant, at the end of the judicial process, can present a claim to the court that the judgment violates his constitutional rights. When any other court is confronted with the necessity of making an adjudication of unconstitutionality, the proceedings must be stayed and the question submitted to the Federal Constitutional Court. Within the constitutional jurisdiction of each *Land* and of the federal system there is one court only; there are no trial and appellate levels as there are in the other five jurisdictions.¹⁶

A feature of the German judicial landscape which may seem curious to Americans is the dispersal of the highest courts of the country among various cities, rather than their being located in the national capital. This pattern dates back to the foundation of the German *Reich* under Bismarck. When the *Reichsgericht*, the Imperial Supreme Court, was established in 1879, it was placed in Leipzig, not in Berlin. The reasons for this are obscure, but one suggestion, based on a bit of German folklore, is that Bismarck wanted the judges away from the capital city so that they would not become involved in political intrigue.¹⁷ One explanation for the current dispersion is that when the Federal Republic was established in 1949, Bonn was viewed as only the temporary seat of government, a provisional location awaiting the day when the

16. For discussions of the work of this court, see Rupp, *The Federal Constitutional Court in Germany: Scope of Its Jurisdiction and Procedure*, 44 NOTRE DAME LAW. 548 (1969); W. HEYDE, *supra* note 9, at 86-98. A brief history of the first quarter-century of this court was published in a booklet entitled 25 JAHRE BUNDESVERFASSUNGSGERICHT, 1951-1976 (1976).

17. An observation to this effect was made by Dr. Fabian von Schlabrendorf, then a judge on the Federal Constitutional Court, during an informal discussion with students at the University of Virginia Law School, April 11, 1975. A more likely explanation may be that the *Reichsgericht* was an outgrowth of the commercial court already existing in Leipzig, which had been established by the North German Federation. R. ENSOR, *supra* note 9, at 62.

capital of a reunited Germany would be reestablished in Berlin. Hence, the top courts were placed temporarily in various cities. This arrangement has become permanent, leaving the five supreme courts sitting in four different cities, with no one of them at the seat of government. If any city can be deemed the headquarters of the judiciary, it is probably Karlsruhe, the seat of the Federal Constitutional Court and the Federal Supreme Court for the ordinary jurisdiction.

III. THE ORDINARY JURISDICTION

The German courts most closely resembling the appellate courts in the United States are the appellate courts in the ordinary jurisdiction. These are the Federal Supreme Court and the nineteen intermediate appellate courts in that jurisdiction. Thus, this Article focuses on these courts. First, however, it is necessary to present a more detailed description of all the courts within the ordinary jurisdiction.

A. The Trial Courts

There are two levels of trial courts. The lowest court in the ordinary jurisdiction is the *Amtsgericht*.¹⁸ It resembles in part what Americans would think of as an inferior trial court. It has jurisdiction over minor criminal cases and over civil cases of relatively limited monetary amounts. But the *Amtsgericht* does much more. It has jurisdiction in family matters (including divorce), probate matters, bankruptcy, and a miscellaneous assortment of non-contentious business. It also serves as a registry of deeds.

There are about 800 of these courts in the FRG. Although the business of the court is always conducted by a single judge, the total number of judges in each court varies considerably. In small towns and rural areas there are as few as two or three judges on the *Amtsgericht*; in larger towns and cities there can be as many as fifty or more on each court. These judges are dispersed throughout the country so that every citizen has relatively convenient access to the civil and criminal court at this level.

Although the *Amtsgericht* is a court of first instance and is the lowest court in the German judiciary, in the United States much of its

18. A literal English translation of this word is "office court." Heyde's translation is "county court." Neither translation fully conveys the nature of this tribunal. As long as the reader understands the functions this court performs, clarity seems better served by retention of the German word. Because of this difficulty in conveying accurately by the use of an English substitute the nature of German courts, officials, and procedures, German words coupled with English explanations will be used throughout this Article.

business would be handled by trial courts of general jurisdiction, probate courts, domestic relations courts, bankruptcy courts, or administrative officials.

The next higher court in the ordinary jurisdiction is the *Landgericht*.¹⁹ This is what Americans would think of as a trial court of general jurisdiction. It has original jurisdiction over the more serious criminal cases and over civil cases which exceed in monetary amount those within the *Amtsgericht* jurisdiction. There are ninety-three *Landgerichte* in the FRG. Numerous judges serve on each of these courts, typically sitting in panels of three.²⁰ These courts, like the *Amtsgerichte*, sit in geographical districts; however, the territorial jurisdiction of each *Landgericht* is considerably larger than that of each *Amtsgericht*. All of the *Amtsgerichte* lying within the territory of a given *Landgericht* are subject to an appellate review in that *Landgericht* for certain cases. Thus, the *Landgerichte* have both a reviewing function over the lower trial courts and a large amount of original trial jurisdiction of their own.

B. The Intermediate Appellate Courts

The next higher court in the ordinary jurisdiction, and the highest *Land* court, is the *Oberlandesgericht*.²¹ There are nineteen *Oberlandesgerichte*, or "courts of appeals," in the FRG. They are organized regionally with at least one located in each of the eleven *Länder*. As judged by their functions and by their place in the judicial hierarchy, these courts blend the functions of American intermediate appellate courts and state supreme courts. Each has appellate jurisdiction over most decisions of the *Landgerichte* and directly over some decisions of the *Amtsgerichte* within its territorial jurisdiction.²² On questions of purely *Land* law, which are relatively few, the *Oberlandesgericht* is the court of last resort. Also, it is the court of last resort for some other kinds of cases even though those cases are governed wholly by federal law, such as civil cases where the amount involved does not exceed a certain monetary amount (presently DM 40,000).

19. "Land Court."

20. There are special combinations of judges in commercial and shipping cases. In criminal cases, three professional judges sit with varying numbers of laymen. These details need not be explored here.

21. "Higher Land Court." This court is often referred to in English as "court of appeals."

22. The size of each *Oberlandesgericht* district varies considerably in population and geographical area. Two districts embrace only one city: Hamburg and Berlin. Other districts cover substantial territory and include several *Landgerichte*.

An *Oberlandesgericht* is not precisely analogous to a state supreme court in the United States for at least two reasons. Its decisions are subject to review by a higher court to a far greater extent than are those of American state supreme courts. Secondly, there is more than one of these courts in some of the *Länder*.²³ In Baden-Wurtemberg, for example, there are two *Oberlandesgerichte*; thus, neither of them can be said to be the highest court of that *Land*.²⁴

Like all German appellate courts, these courts are extraordinarily large by American standards. They consist of as many as 149 judges, with an average number of seventy-two. However, each *Oberlandesgericht*, like all German appellate courts, functions through divisions²⁵ typically consisting of four or five judges each. More will be said of this later in connection with the subject matter organization of appellate business.

The accompanying table shows the nineteen *Oberlandesgerichte* with the number of judges on each, the number of *Landgerichte* over which each has appellate jurisdiction, and the population within each court's geographical region (Table 2).

23. In six of the *Länder* there is a single *Oberlandesgericht*: Berlin, Bremen, Hamburg, Hessen, Saarland, and Schleswig-Holstein.

24. Bavaria is unique among the *Länder* in that it has a single supreme appellate tribunal known as the *Bayerisches Oberstes Landesgericht*. This court is a carry-over from the 19th century before the creation of the German *Reich*. To a large extent, this court is vested with the criminal review jurisdiction which in other *Länder* is vested in the *Oberlandesgerichte*. Because of its unique nature, this court is not dealt with in this Article.

25. The German word for a division within an appellate court is *Senat*. The word is sometimes translated into English as "senate" or as "chamber." From the American standpoint, however, the word "division" conveys more accurately the idea of a grouping of judges within an appellate court. The word "panel" would also be meaningful to American judges and lawyers, but it implies a less permanent grouping than "division."

INTERMEDIATE APPELLATE COURTS²⁶
(*OBERLANDESGERICHTE*)

<i>Oberlandesgericht</i> ²⁷	Number of judges	Number of <i>Landgerichte</i>	Population of the <i>Oberlandesgericht</i> District ²⁸
Karlsruhe	78	9	3,831,000
Stuttgart	89	8	5,290,000
Bamberg	27	7	2,245,000
Munich	122	9	5,891,000
Nuremberg	46	5	2,683,000
Berlin ²⁹	126	1	1,927,000
Bremen	21	1	703,000
Hamburg	83	1	1,680,000
Frankfurt am Main	125	9	5,541,000
Braunschweig	17	1	963,000
Celle	84	7	4,179,000
Oldenburg	32	3	2,082,000
Düsseldorf	127	6	4,915,000
Hamm	149	10	8,573,000
Cologne	90	3	3,542,000
Koblenz	60	4	2,343,000
Zweibrücken	28	4	1,297,000
Saarbrücken	35	1	1,081,000
Schleswig	43	4	2,587,000
Total	1,382	93	

Table 2

26. The number of judges and number of *Landgerichte* for each *Oberlandesgericht* have been compiled from DEUTSCHER RICHTERBUND, HANDBUCH DER JUSTIZ (1978).

27. Each *Oberlandesgericht* is identified by the city in which it is based. That is also the city in which the court sits, except that a few of these courts have some divisions sitting in nearby cities.

28. The figures in this table reflect population as of December 31, 1977, and have been compiled from STATISTISCHES BUNDESAMT WIESBADEN, RECHTSPFLEGE: FACHSERIE 10, at 6-11 (Reihe 2.2: Strafgerichte 1977).

29. The court that performs the functions of an *Oberlandesgericht* in West Berlin is the *Kammergericht*. That court was established in the 18th century by the Prussian monarchy. After the formation of the *Reich* in 1871, it was in the same judicial tier as the *Oberlandesgerichte*, but it continued to have an unusual amount of prestige. See R. ENSOR, *supra* note 9, at 61. Apparently for historical and sentimental reasons the name *Kammergericht* is retained, but the court today is simply an *Oberlandesgericht*. Its original building has been occupied since the Second World War by the Allied Air Control Council. The court hopes eventually to regain those quarters; in the meantime, it functions under over-crowded conditions in the building that once housed Germany's highest military court. For a history of the *Kammergericht*, see E. SCHMIDT, *KAMMERGERICHT UND RECHTSSTAAT: EINE ERINNERUNGSSCHRIFT* (Schriftenreihe der juristischen Gesellschaft, No. 31, 1968).

C. The Court of Last Resort

The highest court in the ordinary jurisdiction is the *Bundesgerichtshof*, often referred to in English as the "Federal Supreme Court." That translation, however, is misleading in that the *Bundesgerichtshof* is the supreme court only in the ordinary jurisdiction. As described earlier, each of the other four jurisdictions has its own supreme court. No one of these five federal appellate tribunals is considered superior to the others. In other words, in Germany there is no one court analogous to the United States Supreme Court or to the House of Lords in England.³⁰ Since this study is concerned with the appellate courts in the ordinary jurisdiction, however, the *Bundesgerichtshof* is the highest court to which attention will be given.

This court has jurisdiction to review decisions of all the *Oberlandesgerichte*; in certain cases it can directly review decisions of the *Landgerichte*. The court consists of 110 judges organized in divisions of typically seven judges each.

Although the *Bundesgerichtshof* dates only from the establishment of the FRG in 1949, it is considered to be the successor to the *Reichsgericht*, which was created in 1879 and sat at Leipzig until the close of the Second World War.³¹ The present court's internal organization, procedures, nomenclature, and publications are essentially the same as those of the *Reichsgericht*. The court today is located in Karlsruhe, occupying the former Ducal Palace, with extensive grounds and a total of three buildings.³² These buildings house all of the judges, the court's library of 250,000 volumes, numerous courtrooms, the administrative staff of approximately 212 persons, and the offices of the Federal Prosecutor General.³³

30. Although, as pointed out earlier, the decisions of the Federal Constitutional Court are binding on all other courts, that court is a distinctive constitutional organ; unlike the United States Supreme Court and the House of Lords, it is not part of the regular trial and appellate judicial structure. See text at note 16 *supra*.

31. For a perspective on this court in the 1920s, see Simons, *Relation of the German Judiciary to the Executive and Legislative Branches*, 15 A.B.A.J. 762 (1929). See also R. ENSOR, *supra* note 9, at 62.

32. The Ducal Palace was constructed in the late 19th century. Today it is the court's main building; two modern buildings have been constructed nearby on the palace grounds. One criminal division of the court sits in Berlin.

33. Although the Ducal Palace provides impressive quarters for the *Bundesgerichtshof*, it is doubtful that they are superior to those of the *Reichsgericht*. That court was housed in a building constructed especially for it in Leipzig between 1888 and 1895. It was described in part by Baedeker as follows:

The building, with its two court-yards, covers an area 136 yds. long and 83 yds. broad, and has four stories, of which the highest, intended for the preservation of

D. The Judiciary

At all four levels of courts in the ordinary civil and criminal jurisdiction, every court is manned by professional judges. Each of these judges has had the same basic university education in law, has gone through a similar period of practical training, and has passed two state examinations administered under the authority of a *Land* government.³⁴ On the two levels of trial courts (the *Amtsgerichte* and the *Landgerichte*) and on the intermediate appellate courts (the *Oberlandesgerichte*) every judge is chosen through a procedure in which the *Land* ministry of justice plays the most significant part. The presidents of these courts and the chairmen of the various divisions have likewise been selected through the ministry of justice of the *Land*. The judges on the *Bundesgerichtshof* are chosen through a process involving the Federal Ministry of Justice, the eleven *Land* ministers of justice, and members of the *Bundestag*—the lower house of the Federal Parliament. Almost all of the federal judges have come from the ranks of judges on the *Land* courts. In Germany, there is a much higher level of uniformity in education, training, and experience among the judges than exists in the United States, or even within a single jurisdiction in the United States.³⁵

documents, is lighted from the court-yards only. The central edifice, containing the court-rooms, is crowned by a conspicuous copper-sheathed dome, 224 ft. in height, upon which stands a bronze figure of Truth, by O. Lessing, 18 ft. high. The principal facade, on the E. side, fronts a wide square formed by covering over the Pleisse [River]. The imposing portico of six Corinthian pillars supports a pediment containing a group of Justice, flanked by niches with statues of Emp. William I and Emp. William II. Behind this portico is the large hall for the meetings of the united 'senates'. . . . The N. wing, the centre of which is adorned with six massive semi-columns, contains the library, as is indicated by the statues of German jurists on the attica. The W. wing accommodates the six courts of law in its central portion (three on each floor); the sculptures in and on the pediments and on the attica illustrate the Might of Law. The S. wing is devoted to the dwelling and reception rooms of the President of the court, with appropriate sculptures. . . . [Beyond the main vestibule] are the great *Waiting Room* and the staircase. This imposing room (109 ft. long, 75 ft. broad, and 76 ft. high) is adorned with sculpture referring to the condemning and the acquitting powers of justice, while the stained glass in the semi-circular windows illustrates the entire sphere of German legislation. . . .

K. BAEDEKER, *NORTHERN GERMANY* 281 (14th ed. 1904). Despite heavy damage suffered by Leipzig during the Second World War, this building survived. Now located in East Germany, it currently houses an art museum.

34. For a description of German legal education and preparation for entry into the various legal careers, see Griess, *Legal Education in the Federal Republic of Germany*, 14 J. Soc'y PUB. TCHRS. L. 166 (1978); Rheinstein, *Law Faculties and Law Schools. A Comparison of Legal Education in the United States and Germany*, 1938 WISC. L. REV. 5.

35. Federal law governs all judicial ranks and the duties and responsibilities of all judges, through the *Deutsches Richtergesetz* (German Judges Law). However, federal law

Although every court is manned by these professional judges, and is presided over by them, the German judiciary often incorporates lay judges. These are used in criminal cases and in certain kinds of civil cases. This blending of lay and professional judges is a distinctive feature of the German judicial system, mainly at the trial levels (*e.g.*, cases of a commercial nature). These lay judges should not be confused with American jurors; they hold office for terms of years, sit with the professional judges, and have the same decisional duties and responsibilities as those judges.

As this brief description of the ordinary jurisdiction and the other four jurisdictions reveals, the German judiciary is simultaneously structured in three different ways: hierarchically, geographically, and by subject matter. The courts have trial and appellate levels. The courts sit to exercise jurisdiction within defined territorial areas of the country. Both of these ways are familiar to Americans. Finally, the nation's judicial business is divided into six jurisdictions defined by nature and types of cases.

Subject matter organization is also employed in the internal structure of the appellate courts of the ordinary jurisdiction—the *Bundesgerichtshof* and the nineteen *Oberlandesgerichte*. The structure and workings of those courts will be examined more closely in the remainder of this Article.

IV. NATURE AND SCOPE OF APPELLATE REVIEW

Appellate procedure in the German courts is, in general, designed to provide two kinds of review for most cases: a first review encompassing both law and facts, and a subsequent review on questions of law only.³⁶ The system is also designed so that no case goes through more than three levels of courts.

The first review, extending to law and fact, is called the *Berufung*. The entire record made in the court of first instance is filed with the reviewing court. That court examines the record *de novo*, and it can receive new evidence. This is not identical to the American-style "trial *de novo*"; the entire case is not tried anew as though it had not been

provides that the education of the judges and the content of the two state examinations are the responsibilities of each *Land*. The *Länder* also select the judges of the *Land* courts. Thus, there is a peculiar interplay of federal and *Land* law concerning the courts and their judges that would be wholly novel to an American observer.

36. For a general description of appellate procedure in civil law systems, including specific references to German procedure, see R.B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT AND MATERIALS* 424-35 (4th ed. 1980).

tried previously. It is, however, a *de novo* consideration of the factual questions on the record made below with the possibility for additional evidence to be received in the discretion of the reviewing court. The procedure affords a more expansive review of facts than is customary in American appellate courts.

The second level of review, which is limited to questions of law, is called the *Revision*. This is the kind of review that American lawyers and judges associate most typically with appeals in state or federal appellate courts. Review is based solely on the record made below and is limited to specified questions of law.

Since the *Berufung* and the *Revision* are both forms of appellate review, but of quite different scope, there are difficulties in translating these terms into modern American legal language. The word "appeal" could be applied to either. If one were to revert to usage in English practice before the merger of law and equity, the word "appeal" would correspond more or less to *Berufung*, in that "appeal" was the term used in equity where the review was a rehearing of the case. The English writ of error would be analogous to the *Revision*, since the writ of error was the procedure in the law courts for reviewing judgments of lower courts, where review was limited to alleged errors of law, and the facts were not open to appellate reconsideration. To avoid misunderstanding stemming from translation, this Article will employ the terms *Berufung* and *Revision* in referring to these two types of German appellate review.

For most cases originating in the *Amtsgericht*, the lowest level in the judiciary, the first review—the *Berufung*—takes place in the next higher court, the *Landgericht*. Although the *Landgericht* itself is a trial court, it provides this first-level review for most cases in the *Amtsgericht*. In these cases (to the extent that none are criminal cases) a second and final level of review—the *Revision*—is provided by the *Oberlandesgericht*, an appellate court. These cases terminate in the *Oberlandesgericht*, having gone through three judicial levels. The highest court in the ordinary jurisdiction, the *Bundesgerichtshof*, has no jurisdiction over them. There are, however, certain cases originating in the *Amtsgericht*—family law cases, for example—which bypass the *Landgericht* and go directly to the *Oberlandesgericht* for review of law and fact. Those cases then can go to the *Bundesgerichtshof* for *Revision*.

For cases originating in the *Landgericht*, the *Berufung* is in the *Oberlandesgericht*. For there to be further review by way of *Revision* in the *Bundesgerichtshof*, civil cases decided by the *Oberlandesgericht* must involve more than a specified amount of money (presently DM

40,000). One exception to this pattern of review is that the more serious criminal cases tried initially in the *Landgerichte* go directly to the *Bundesgerichtshof* and thus receive only one level of review, the *Revision*.

For the large volume of criminal cases originating in the *Amtsgericht*, the *Oberlandesgericht* is the court of last resort. In those cases, the *Oberlandesgericht* is serving in a role which Americans would recognize as that served by the "highest state court," the state supreme court. As to the large number of civil as well as criminal cases originating in the *Landgericht*, however, the *Oberlandesgericht* ordinarily is in the role of an intermediate appellate court, with its decisions reviewable by the *Bundesgerichtshof*. Since the law being applied in the *Oberlandesgericht* is overwhelmingly federal, the reviewing role of the *Bundesgerichtshof* is not a narrowly limited one such as that performed by the United States Supreme Court in relation to state supreme court judgments.

The *Bundesgerichtshof*, like all German appellate courts, has a heavy case load. In the year ending with October, 1978, for example, the court decided 2,151 civil cases, 3,642 criminal cases, and 44 patent appeals, making a total of 5,837 dispositions.³⁷ This amounts to an average of just over fifty-three dispositions per judgeship. Thus, although the total case load of the court is astronomical by American standards, the work burden on each judge would be viewed as quite reasonable, and indeed light, by American appellate judges. Even so, the President of the Court, in commenting on its case load growth, said that the *Bundesgerichtshof* would only be able to fulfill its duty to guarantee uniformity and further development of law if it did not choke on its work.³⁸

37. These statistics were announced by the President of the *Bundesgerichtshof* at a press conference held at the Court in November, 1978. They were reported thereafter in the news media. See, e.g., *Badische Neueste Nachrichten* (Karlsruhe) Nov. 17, 1978. The President said that there had been a 10.3% increase in civil cases and a 2.7% increase in criminal cases over the number for the previous year. These figures do not include 24 opinions rendered to the Ministry of Justice and 17 opinions rendered to the Federal Constitutional Court. This kind of press conference is apparently held annually by the President to report publicly on the work of the *Bundesgerichtshof*. The conference on November 17, 1978, was attended by approximately 15 judges of the court, 14 representatives of the print media, and several radio and television reporters. However, there was no live radio or television coverage.

38. *Id.*

V. SUBJECT MATTER ORGANIZATION—DIVISIONS OF JUDGES AND ALLOCATION OF DOCKETS

The key to the ability of the German appellate courts to manage huge dockets and numbers of judges while maintaining coherence in the law is the subject matter basis of their internal organization. The remainder of this Article will attempt to convey to Americans some understanding of how judges are grouped and dockets divided under this subject matter scheme. Brief consideration will also be given to the procedures for administering this system. Since the internal structure and procedures of the nineteen *Oberlandesgerichte* and the *Bundesgerichtshof* are quite similar, what can be said of one of these courts is in large part true of the others.

The basic idea is quite simple. Each appellate court is organized into numerous divisions of several judges each, and each division is assigned cases of certain types.³⁹ These divisions and docket assignments are semi-permanent; they can be altered annually, but changes from year to year are few. Each appellate court has civil divisions and criminal divisions. These are designated by number—for example, Civil Division I, Civil Division II, Criminal Division 1, Criminal Division 2, and so on.

In the *Bundesgerichtshof* there are eleven numbered civil divisions, five criminal divisions, and seven special divisions.⁴⁰ Each division consists of seven judges, with one of them designated as the chairman of the division, *i.e.*, the presiding judge.

Since the *Oberlandesgerichte* vary greatly in size, they also vary in the number of their divisions. The *Oberlandesgericht* in Karlsruhe, which has seventy-eight judges, has nineteen divisions. Typically four or five judges are assigned to each division, one of whom is the chairman.

A. The Work Distribution Plan

In each court this arrangement is embodied in a document known

39. The German word for this type of judicial division is *Senat*. See note 25 *supra*.

40. See *Plan for the Division of Responsibilities of the Bundesgerichtshof* for 1980, in the Appendix, *infra*. In this plan the civil divisions are numbered from I to X (with a IVa and a IVb). The criminal divisions are numbered from one to five. The special divisions are unnumbered; they are referred to by their subject matter: cartel, *Dienstgericht des Bundes*, notary cases, attorney cases, patent agent cases, chartered accountant cases, and tax advisor and tax agent cases. No other English translation of the work distribution plan for any German appellate court has been located.

as the "work distribution plan."⁴¹ This is a key document embodying the entire subject matter plan of organization. Within each appellate court the plan is revised and published annually. Copies are available to the public in printed form. The work distribution plan sets out the names of the judges and categories of cases assigned to each division. The Appendix to this Article contains that portion of the work distribution plan of the *Bundesgerichtshof* showing the assignment of cases to the divisions.⁴² This is quite similar to plans used in the *Oberlandesgerichte*. Each court develops its own work distribution plan through its *Präsidium*, a small group of judges elected by all the judges of the court.⁴³ No features of the plans are mandated by statute, although the formulation of such a plan is statutorily required.

An examination of the work distribution plan for the *Bundesgerichtshof* shows how an appellate court can be organized internally along subject matter lines without casting its judges into narrowly specialized roles. For example, Civil Division III is assigned cases arising under the Convention on Human Rights, cases involving aircraft noise, suits based on loans and debts, and cases involving water rights and mining rights. That docket is a rich mixture of international law, tort law, commercial law, and real property law. Another diverse mixture is found in the docket of Civil Division IVa, which handles cases involving inheritance, gifts, brokerage contracts, and insurance claims. Judges sitting on dockets such as these are hardly confined to one set of technical legal questions. They are, of course, dealing with a defined set of legal subjects spanning less than the full range of the court's jurisdiction. This enables the judges to develop a measure of expertise which would not be possible if they were forced to deal randomly with the entire corpus of the law. Although empirical data are not available, the likelihood is that this degree of expertise, in turn, makes it possible for the judges to consider and decide cases more rapidly, and for the law on any given subject to be applied and developed more coherently.

From the standpoint of lawyers and litigants, this docket arrange-

41. *Geschäftsverteilungsplan*. In the Appendix, *infra*, this is translated as "Plan for the Division of Responsibilities."

42. See *Plan for the Division of Responsibilities*, in the Appendix, *infra*. The Appendix omits that part of the plan listing the names of the judges assigned to each division; several administrative provisions and the case assignments to the special divisions are also omitted.

43. The *Präsidium* includes the President of the court as well as several judges elected by their colleagues. It is provided for in every appellate court by the Court Constitution Act (*Gerichtsverfassungsgesetz*). The *Präsidium* is the governing administrative body of the court. It resembles executive committees of judges found in some of the larger courts in the United States.

ment means that in every case the judges before whom any appeal would come are known in advance. In a suit involving aircraft noise, for example, it would be known by all from the outset of the litigation in the trial court that any appeal which ultimately might be taken would be decided by Civil Division III. Since all aircraft noise cases have been decided for a period of years by Civil Division III, the law on the subject should have a high degree of predictability. The stability or evenhandedness of application of the law of aircraft noise is not affected by the fact that the appellate court as a whole has 110 judges, because only Civil Division III, with its seven judges, decides appeals in those cases.

The breadth or narrowness of the docket fixed for a particular division can vary. While some of the divisions in the *Bundesgerichtshof* are assigned a considerable diversity of legal questions, others have a docket more heavily concentrated in one area of the law, albeit the area may be rather large. For example, the docket of Civil Division IVb is composed almost entirely of family law cases, and the docket of Civil Division V consists of what can be described generally as real property cases.

On the criminal side, the work distribution plan, with some exceptions, is not based on the concept of subject matter organization. Rather, criminal cases are assigned to divisions mainly on a territorial basis. Criminal Division I, for example, decides all cases coming from four specified *Oberlandesgericht* districts. Criminal Division II is assigned all cases from three other *Oberlandesgericht* districts. In other words, each of the five criminal divisions is assigned all cases coming from designated *Oberlandesgericht* districts. This means that each criminal division deals continuously with the entire range of criminal law questions. However, since "criminal law" itself is a defined subject matter of limited scope, there is no departure here from the subject matter concept. But this docket arrangement does mean that the appellate system may be less able to achieve the degree of national uniformity in the criminal field than that achieved in civil cases. A burglary case, for example, coming out of Bamberg will not be decided in the court of last resort by the same judges who decide an identical burglary case coming out of Berlin. Although this arrangement means that there is no single tribunal routinely deciding all criminal law questions nationwide, it does ensure that all criminal cases within any one geographical area will go before the same appellate judges.⁴⁴

44. Originally in the *Reichsgericht* all divisions were organized on this kind of territorial

In assigning the civil docket among the various divisions, the work distribution plan employs several techniques of description and degrees of specificity. The plan sometimes uses broad and general language. In other instances, the case category is described in detail. An alternative method of specifying the case category is by reference to specific statutory provisions under which the cases arise. Presumably, the controlling consideration in the choice of descriptive language is clarity and workability. If German judges and lawyers—as well as the administrative officials within the court—can understand the category of cases intended to be routed to each division, the language in the plan is adequate.

An example of an allocation of business by general descriptive words is the provision assigning to Civil Division I “suits involving literary copyright law, publishing rights, and design copyright law.”⁴⁵ Another example is the provision assigning to Civil Division IVb “suits involving . . . family law.”⁴⁶

The more detailed style of description is frequently used in the plan. Civil Division V, for example, is assigned “damage claims given rise to by dereliction of duty of land registry officials in land registration cases, including right of recourse claims against officials.”⁴⁷ Civil Division II is assigned “suits arising out of towing contracts and the insuring (including guarantees) of ships or goods for sea or river transport alone, or in conjunction with land transport.”⁴⁸

The other commonly used technique for assigning cases to divisions is by specific statutory citation. For example, Civil Division VIII is responsible for “claims arising out of the acquisition of a commercial enterprise (Court Organization Act, § 95, no. 4d).”⁴⁹ Docket assignments through the use of statutory citations are sometimes quite specific and detailed, as, for example, the following: “Decisions under § 47, paragraph 2, Tenants’ Protection Act, in conjunction with § 28,

basis. Later, when the nationwide codes were adopted, the organization of the civil divisions was changed to a subject matter basis like that of the civil divisions of the *Bundesgerichtshof* today. However, the criminal divisions have continued on a territorial basis. R. ENSOR, *supra* note 9, at 63.

45. Civil Division I(1), Appendix *infra*. (One of 12 case types assigned to this division).

46. Civil Division IVb(1b), Appendix *infra*. (One of four case types assigned to this division).

47. Civil Division V(2h), Appendix *infra*. (One of 14 case types assigned to this division).

48. Civil Division II(1d), Appendix *infra*. (One of 17 case types assigned to this division).

49. Civil Division VIII(1b), Appendix *infra*. (One of 12 case types assigned to this division).

paragraphs 2 and 3, Law on Non-Contentious Jurisdiction, and decisions under article III of the Third Act to Amend Tenants' Rights Provisions of December 21, 1967 (Federal Statute Book I, page 1248)."⁵⁰

Each of the provisions quoted above represents only one of several categories of cases assigned to a particular division. These provisions are cited here simply to illustrate the ways in which categories of cases can be described; no one division is limited to any single category of case such as those indicated here.

Express cross-referencing avoids possible confusion where cases in related legal areas are assigned to different divisions. This is a frequently used device. For example, Civil Division VI is assigned "claims arising out of accidents in which an airplane, a motor vehicle, a railroad train or a streetcar is involved, even if they are based on a shipping contract, with, however, the exception of freight contracts for goods which are within the responsibility of Civil Division I (no. 7)."⁵¹ Civil Division III is assigned "suits involving damage claims . . . against officials under § 839, Civil Code, to the extent that neither Civil Division V (no. 2h) nor Civil Division VI (no. 5) is responsible."⁵²

There is a general catchall provision in the plan assigning to Civil Division III responsibility for "all suits and decisions for which no other Division is responsible."⁵³

B. Administration of the Plan

An efficient and accurate means of routing cases to the correct divisions is essential to the smooth operation of this organizational arrangement. In the *Bundesgerichtshof*, this routing function is in the hands of a senior administrative official called an *Oberamtsrat*. This official is currently not a lawyer, but he has had long experience in the workings of the court. His office receives the papers initially filed by the lawyers; these include the opinion of the court below and a paper equivalent to the American notice of appeal which specifies the particular grounds on which review is being sought. On the basis of these papers, the *Oberamtsrat* designates the division to which the case is to be assigned. Each case is given a number indicating that division, and all the papers in the case are sent forthwith to the chairman of the des-

50. Civil Division VIII(4), Appendix *infra*.

51. Civil Division VI(2), Appendix *infra*. (One of six case types assigned to this division).

52. Civil Division III(1b), Appendix *infra*. (One of 20 case types assigned to this division).

53. Civil Division III(10), Appendix *infra*.

ignated division. In each of the *Oberlandesgerichte* there is a similar system for routing cases to the appropriate division. This routing function in the German appellate courts is similar to the screening and routing function performed by central staff attorneys or clerks in some American appellate courts.⁵⁴

Instances of misdirection apparently are not common. When a case arrives in a division which believes the case has been assigned incorrectly, the procedure in the *Bundesgerichtshof* calls for that division to send the case to the division which it considers appropriate. If the transferee division accepts the case, the matter is settled. On the other hand, if the transferee division believes it is not the appropriate division, the case will be returned to the original division and the matter ends there. It is estimated that approximately ten percent of the cases are transferred from one division to another because of improper initial assignment.⁵⁵

Similar problems of misdirection also arise in the *Oberlandesgerichte*. In at least some of those courts where two divisions are in disagreement as to the correct assignment of a particular case, the matter is referred to the *Präsidium* of the court, which then makes the assignment.

The allocations of business among the various divisions are in no sense "jurisdictional." They are purely a matter of internal administration and afford no rights to litigants.

VI. HEARING AND DECIDING APPEALS

German appellate practice combines features of American and English procedure. Like American appellate courts, the German appellate courts receive briefs from lawyers (limited to legal argument and containing no statement of facts) and a full written record from the court below. Like the English Court of Appeal, the German appellate courts devote a substantial amount of time to oral hearings; at the first level of review, where both law and fact are open to appellate consideration, these courts can hear witnesses and receive new evidence. However, where appellate consideration is limited to questions of law, typically at the second level of review, the German courts decide the issues solely on the record made below, in the American style. Overall,

54. For descriptions of similar staff attorney screening and routing in various American appellate courts, see D. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974); Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1976).

55. Interviews 1978, *supra* note 11.

German appellate practice at the first level of review probably resembles that of England more closely than it does that of the United States because of its visibility and reliance on oral hearings, sometimes with witnesses.

A. The *Bundesgerichtshof*

In the *Bundesgerichtshof*, the many courtrooms in the court's complex of buildings are kept busy every day with oral arguments. Each division of the court sits in panels of five. Typically, one lawyer appears for each side.⁵⁶ At the conclusion of the argument, one of the five judges is designated to prepare the court's decision. A disposition is sometimes announced within a few days, although a full written opinion may not be forthcoming for several weeks. These later-delivered written decisions are reported in a dual set of reports—one for civil cases and one for criminal cases.⁵⁷

German appellate judges do not have law clerks. That is, there is no legally trained personal assistant available to help each judge. However, in the *Bundesgerichtshof* each division is assigned the American equivalent of a staff attorney.⁵⁸ This is a person of considerable experience drawn from the ranks of those qualified for the judiciary in the *Länder*. Typically, persons selected for these positions have served

56. A curious feature of the German legal profession and *Bundesgerichtshof* practice—at least to American eyes—is the extreme restriction on admission to practice before that court in civil cases. On the civil side, the bar of the court is limited to approximately 20 lawyers. Any civil case from anywhere in the country going to the *Bundesgerichtshof* for review must be placed in the hands of one of those lawyers. They constitute a bar specialized in the practice of this one court at the top of the judicial system for private civil litigation. There appears to be no significant discontent among the lawyers of the country with this extreme limitation on the privilege of practicing there. In criminal cases, however, there is no such restriction, and lawyers throughout the country are eligible to take criminal cases to the court. In those cases the government is always represented by a lawyer from the office of the *Bundesstaatsanwalt*, the Federal Prosecutor General, whose offices and staff are housed in the precincts of the court.

57. The civil reports are cited as BGHZ (*Bundesgerichtshof Zivil*). The criminal reports are cited as BGHS (*Bundesgerichtshof Straf*). Cases are never cited by the names of the parties but only by these report names, decision date, and case number. Although precedent in a civil law system such as that in Germany does not play the part it does in the common law world, prior decisions nevertheless may be significant.

58. In German the official title for this position is *Wissenschaftlicher Mitarbeiter*. This is almost untranslatable into English. The usual translation employed is "scientific advisor." However, that is quite misleading to Americans in that it implies that the individual provides advice to the judges on technical questions or in the field of the physical sciences. That is not the case. The individual is simply a law-trained person assisting the judges as do American staff attorneys. The position has a long and honorable history; it dates back to the beginnings of the *Reichsgericht* in 1879. Interviews 1978, *supra* note 11.

on one or more *Land* courts and sometimes also in a *Land* ministry of justice for a period of several years. Often such persons have served as judges on both an *Amtsgericht* and a *Landgericht*. They are selected for assignment to the *Bundesgerichtshof* by the *Land* ministry of justice on the basis of performance on the second state examination and on work as a judge on the *Land* courts. Selection is considered an honor. Assignments in the *Bundesgerichtshof* are for terms of approximately three years. At the conclusion of that time, these legal assistants return to positions on *Land* courts, often judgeships on the *Oberlandesgerichte*. While on assignment to the *Bundesgerichtshof* such persons work for a particular division assisting the judges with their work much as central staff attorneys do in some American appellate courts.

In addition to this legal assistant, each division of the *Bundesgerichtshof* is assigned an administrative official to assist in managing the docket and maintaining case papers. This official, in effect, serves as a kind of clerk for that division. Each division schedules its own arguments and runs its own business, although there must be some degree of coordination with the central administrative office of the court in the use of courtrooms and in other matters.

Since a division in the *Bundesgerichtshof* typically consists of seven judges, and cases are heard and decided by panels of five, not every case is decided by precisely the same group of judges. This practice might seem at odds with a major theory and purpose of subject matter organization—the maintenance of a high degree of uniformity in the law by assigning a specified group of cases to the same group of judges. However, with five out of seven judges sitting, the variations in the composition of the panels will be relatively slight from case to case. The group of seven is also small enough to allow for the maintenance of continuous communication and informal discussions about various legal issues. Moreover, unlike the situation in many American appellate courts, any panel sitting on any case will always be a majority of the “court,” that is, the division with responsibility over that category of case.

B. The *Oberlandesgerichte*

In the *Oberlandesgerichte* most of the work involves a review of both law and fact. Thus, the nature of the hearing on the appeal varies from that of the *Bundesgerichtshof* where review is limited strictly to questions of law. The main difference is that the *Oberlandesgerichte* can accept new evidence, including live testimony. Although the court does not do this in every case (some showing of why the evidence was

not presented below is required) it is not an uncommon occurrence. This sometimes results in scheduling difficulties similar to those encountered in trial courts, since dates for hearings must be arranged to accommodate witnesses, lawyers, and litigants. It is in this style of appellate hearing that the procedure of the *Oberlandesgericht* most nearly resembles that of the English Court of Appeal, particularly in English criminal appeals.⁵⁹

Although divisions in the *Oberlandesgerichte* typically consist of four or five judges, they sit in panels of three. The chairman of the division always sits as one of the three. The hearings are quite informal—English-style—with lively exchanges between the judges and the lawyers; the parties themselves sometimes join in the discussion. There appears to be no fixed time limit on the proceedings; as is true of the English appellate judges, the judges appear to be willing to sit as long as necessary to sort out the issues and bring the matter to a conclusion. However, unlike English appellate judges, German judges do not announce decisions immediately from the bench. The court retires and one member of the panel is designated to prepare the decision, which is issued later in writing. As in the *Bundesgerichtshof*, dispositions may be announced within a few days, with full opinions coming several weeks later.

Decisions of the nineteen *Oberlandesgerichte* are published only selectively. An opinion is printed in the official reports only if it seems significant. There is one set of reports which includes the selected decisions of all nineteen *Oberlandesgerichte* throughout the country.

The *Oberlandesgerichte*, unlike the *Bundesgerichtshof*, do not have the services of staff attorneys. However, these courts do have assigned to them several recent university law graduates who are there as part of their required practical training between the two state examinations.⁶⁰ Each division in an *Oberlandesgericht* also has an administrative offi-

59. For a description of comparable procedures in English criminal appeals, see D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 71-87 (1973). Unlike American and English appellate courts, the German courts concentrate during the appellate hearings on inducing settlement. Indeed, the hearings resemble mediation sessions more than they resemble American or English-style appellate arguments.

The *Oberlandesgerichte* also dispose of a significant volume of matters in chambers, on written submission of counsel without oral argument. Matters handled through this procedure include orders from the lower courts fixing fees and costs, and certain orders under the non-contentions jurisdiction; these are referred to as *Beschwerden*.

60. The German title for a person who has completed a university legal education, has passed the first state examination, and who is undergoing the required practical training is *Referendar*. For an explanation of the training requirements, see the sources cited at note 34, *supra*.

cial assigned to it to assist in docket management, although sometimes one administrative official has responsibility for two or more divisions.

An *Oberlandesgericht* is often a very busy place. In Munich, for example, the main *Oberlandesgericht* building, built for that court around the turn of the century, has 14 courtrooms which are occupied with appellate hearings every day. These courtrooms are used only for civil cases; criminal cases are heard in another building a short distance away.

Most appellate courtrooms in Germany are relatively small and unpretentious; the buildings housing them are often not distinguishable from other government buildings. They are a contrast to the courtrooms in which the various divisions and panels of the English Court of Appeal sit, with their high ceilings and rich panelling and furnishings.⁶¹ These differing physical settings may be a reflection of the relative status of German judges and courts as compared with their English counterparts, or, more generally, the difference between judges and courts in civil law systems and those in the common law world.

A sense of the volume of business and of the time taken to decide cases in the *Oberlandesgerichte* can be gained from a few statistics about that court in Karlsruhe. With seventy-eight judges, it is close to the average *Oberlandesgericht* size. During a recent year that court concluded some 6,800 cases. This figure includes both civil and criminal cases, interlocutory appeals, review of cases on law and fact (*Berufungen*), and review of cases on questions of law only (*Revisionen*).⁶² In that court 16% of civil cases are disposed of within three months; 23% require from three to six months; 28.9% take from six to twelve months. More than a year is required to dispose of 33% of the civil cases; a handful of these (1.1%) require as much as thirty-six months.⁶³

VII. MAINTAINING UNIFORMITY IN THE LAW

In any judicial system with multiple decisional units at the same

61. The different architecture and ambience in the English Court of Appeal are suggested in Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349, 1350-51 (1978).

62. This figure is derived from the statistics published periodically by the German government in two booklets, one for civil courts and the other for criminal courts. The one for the civil courts is for the year 1976; the one for the criminal courts is for the year 1977. STATISTISCHES BUNDESAMT WIESBADEN, RECHTSPFLEGE: FACHSERIE 10, at 42, 46-47, 60 (Reihe 2.1: Zivilgerichte 1976), and at 49 (Reihe 2.2: Strafgerichte 1977).

63. Statistics for civil cases disposed of during the year 1977. Interviews 1978, *supra* note 11.

appellate level, there is risk of conflicting decisions on the same legal questions. There are two potential sources of such conflicts at the top of the German system. One is internal, within the *Bundesgerichtshof*, where one division may reach a decision on a question of law different from that reached by another division.⁶⁴ The other source of potential conflict is among the top courts of the five jurisdictions: one supreme court may reach a decision on a question of law different from that reached on the same question by another of the supreme courts. Although the subject matter division of business both within the *Bundesgerichtshof* and among the five jurisdictions should work to keep such conflicts at a low level, there are nevertheless occasions when the identical legal question will arise in cases of more than one type. Thus, the system needs some mechanism for maintaining doctrinal uniformity.

Within the *Bundesgerichtshof*, the device used is the "Great Division."⁶⁵ This is not a body with a permanently fixed membership. It is made up of a group of judges from within the *Bundesgerichtshof* whose composition varies depending on the divisions involved. The body is brought into being when a division of the court has before it a case in which it desires to reach a decision different from a decision rendered by another division on the same question. When that situation occurs, the division with the pending case notifies the President of the Court, who then takes steps to convene the Great Division.

Convening the Great Division can be avoided if the division which previously decided the point agrees to concur in the view of the division before which the case is pending. In that event, a formal notation is made in the later decision.

The President of the *Bundesgerichtshof* always sits with the Great Division. The remainder of the division is made up of the chairmen of the divisions involved, that is, the chairman of the division before which the case is pending and the chairman of the division or divisions in which a decision on the identical question has previously been rendered. In addition, designated judges from the divisions involved with

64. Since this Article focuses on the appellate courts in the ordinary jurisdiction, consideration is confined here to the *Bundesgerichtshof*. However, a similar problem of internal conflict can arise in each of the other four supreme courts, as each of these courts is organized into multiple divisions.

65. *Grosser Senat*. Actually there is a Great Division for civil cases and a Great Division for criminal cases. There is also a "Combined Great Division," spanning both civil and criminal divisions.

the question also sit, for a total of nine judges. The Great Division's resolution of the question binds the entire *Bundesgerichtshof*.

The Great Division can also be convened in the absence of a pending conflict of decision if a division has before it a question of fundamental importance whose definitive resolution would promote uniformity.

The Great Division in the *Bundesgerichtshof* can loosely be compared to the "limited en banc" procedure being used in the United States Court of Appeals for the Ninth Circuit under a recently enacted statute. That statute authorizes any federal court of appeals having more than fifteen judgeships to sit en banc with fewer than all of its judges.⁶⁶

Among the *Oberlandesgerichte* there are no formal procedures for resolving conflicts between the divisions. The only means available is review in the *Bundesgerichtshof*. However, the judges in an *Oberlandesgericht* make efforts through informal discussions to maintain uniformity among the divisions. Where a conflict arises between two supreme courts of the five jurisdictions, the mechanism for resolving it is called the "Combined Great Division."⁶⁷ This body consists of nine judges—the presidents of the five supreme courts and two judges from each of the supreme courts involved. When one of the supreme courts has before it a case in which it has decided to reach a decision different from that previously reached by one of the other supreme courts, the Combined Great Division is convened to consider the question. This body meets at Karlsruhe where it takes up the case for discussion and ultimately decides the question.

Apparently conflicts such as these are not frequent. The Great Division within the *Bundesgerichtshof* and the Combined Great Division of all five jurisdictions do not have a high volume of business.

VIII. AMERICAN PERSPECTIVES AND POSSIBILITIES

The two characteristics of the German appellate courts which most sharply differentiate them from their American counterparts are the large number of judges and the subject matter style of organization. These two characteristics are closely related. The large number of judges makes the subject matter style of organization imperative in or-

66. 28 U.S.C. § 41 as amended by P.L. 95-486, H.R. 7843, 92 Stat. 1629 (Oct. 20, 1978).

67. *Vereinigter Grosser Senat*. For a description of the procedure for dealing with conflicts among the five jurisdictions at the initial stage of litigation, see A. VON MEHREN & J. GURDLEY, *supra* note 9, at 134-37; R.B. SCHLESINGER, *supra* note 36, at 482.

der to maintain doctrinal coherence. This style of organization in turn permits the employment of a cadre of judges large enough to handle the docket without impairing doctrinal stability.

In Germany there are far more judges on the intermediate appellate courts and the supreme court in the ordinary civil and criminal jurisdiction than in any single American judicial system, or, indeed, in several of the largest American systems combined. With 110 judges on the *Bundesgerichtshof* and 1,382 judges on the nineteen *Oberlandesgerichte*, there are altogether 1,492 appellate judges in the ordinary jurisdiction. If one adds the judges at the intermediate appellate levels and top appellate levels in the other four German jurisdictions, the numbers become almost staggering to the American mind. This is the judiciary for a nation of sixty-two million people. By comparison, in the largest American state—California, with a population of nearly twenty-four million—there are fifty-eight judges at the intermediate appellate level and seven judges on the state Supreme Court. The German total still would not be reached if all of the intermediate appellate and supreme court judges in the states of Illinois, Michigan, Ohio, and New York were added to the number of California appellate judges.⁶⁸ In the United States federal judiciary there are only 132 court of appeals judges and nine Supreme Court justices. Another sharp contrast with the German judiciary is found in England, where the appellate judiciary consists only of the eighteen judges on the Court of Appeal, ten Lords of Appeal (the full-time judges in the House of Lords), and a few other high-ranking judicial officers.⁶⁹

If one disregards system-wide figures and examines only the numbers of judges sitting on individual appellate courts, the contrast is equally startling. One of the largest American appellate courts, in terms of number of judges, is the United States Court of Appeals for the Ninth Circuit, with twenty-three judges. Appellate courts with twelve or fifteen judges are considered large in the United States. When the figure rises much above that, apprehensions increase about unmanageability and threats to coherent, uniform jurisprudence. In-

68. In Illinois there are 43 intermediate appellate judges and seven Supreme Court judges. In Michigan there are 18 intermediate appellate judges and seven Supreme Court judges. In Ohio there are 45 intermediate appellate judges and seven Supreme Court judges. In New York there are 45 intermediate appellate judges and seven judges on the highest state court. Adding the appellate judges in these four states to those in California produces a total of 244. The combined population of these five states is just over 72 million.

69. The Court of Appeal of England serves England and Wales (population 48,400,000), but not Scotland and Northern Ireland. The House of Lords is the court of last resort for the entire United Kingdom (population 55,900,000).

deed, there is a widespread American belief that a single appellate court having more than nine judges is unmanageable. In Germany, by contrast, the smallest of the intermediate appellate courts has seventeen judges; the largest has 149 judges.⁷⁰ The average number of judges on all of the nineteen intermediate appellate courts is seventy-two. If these appellate courts, or the top court with its 110 judges, were organized and operated like American appellate courts, there would be chaos in the law.

The key to the viability of appellate courts of such sizes lies in the system of internal subject matter organization. With a carefully designed plan of subject matter allocation of the docket among the judges, there is almost no limit to the total number of judges who may serve on the court without destroying the coherence of the decisional law. Subject matter organization may indeed be the ultimate answer to the problem of high volume in appellate courts. To handle the volume, numerous judges are necessary, but without an internal subject matter organization, the number of judges necessary to handle the volume of appeals would threaten the stability and uniformity of the law.

An examination of the *Bundesgerichtshof* work distribution plan in the Appendix will show that subject matter organization of an appellate docket need not lead to the kind of narrow specialization about which there is much apprehension in the United States. The docket of any appellate court can be distributed among groups of judges in such a way that no one group is restricted to an overly specialized slice of the law. Each group can be given a varied mixture of legal questions drawn from different subject matters and different legal areas. This work distribution plan makes available to American lawyers and judges for the first time in English an exact plan for the organization of an appellate docket on a subject matter basis.

This approach holds rich possibilities for high-volume American intermediate appellate courts, either state or federal, where an increasing number of judges is necessary to decide the cases within a reasonable time. In any such court the docket can be divided into packages containing a variety of types of legal questions drawn from various subject matters and areas of the law.⁷¹

70. The *Oberlandesgericht* in Braunschweig has 17 judges. The *Oberlandesgericht* in Hamm has 149 judges. Large appellate courts are not new in Germany. In 1932 the *Reichsgericht* had 94 judges; the *Kammergericht* (the Berlin court of appeals) had 182 judges. R. ENSOR, *supra* note 9, at 125, 133.

71. A proposal to incorporate subject matter docket assignments in the U.S. Courts of Appeals was made in Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to*

Whenever the idea of subject matter docket assignments is discussed among American lawyers and judges, two objections are voiced. One stems from ingrained fears of specialization. The other stems from apprehensions about boredom in the work of appellate judges. Both objections can be overcome in a carefully designed subject matter plan.

The specialization objection can be avoided by grouping cases for assignment to a particular panel so as to include a variety of subject matter. Illustrations of such varied groupings can be seen in several of the division assignments in the work distribution plan of the *Bundesgerichtshof*. The specialization point would be relevant only if an appellate panel were assigned one specific and relatively narrow category of cases.

A mixed grouping of cases going to each appellate panel would also prevent boredom among the judges. The business of each judge would be sufficiently diverse to obviate attitudes among the judges that they were dealing with the same questions day after day. Another means of avoiding boredom is to provide for a gradual, staggered rotation of judges among panels. Each judge, for example, could be assigned to a given panel for a three-year period, but each would come and go at a different time. On a division of five judges, for example, no more than one or two judges would rotate to other divisions each year. This would prevent the kind of rapid turnover that destabilizes the decisional law.

A well-designed comprehensive plan of subject matter organization has never been tried in any American appellate court. Without such experience there is no way to know with assurance how well such a plan would work. While the German plan cannot be copied precisely in an American court, it does provide a useful source of ideas for experimentation. Moreover, the German experience does provide evidence that this style of organizing appellate business is an effective way of accommodating large numbers of judges within a single court. As the volume of cases and the number of judges continue to grow in the United States, we may come increasingly to see this as the most promising method of preventing doctrinal chaos in the legal system. Certainly it is worth a try.

the Function of Review and the National Law, 82 HARV. L. REV. 542 (1969). This idea was developed further in P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 204-07 (1976). In the latter at pages 205-06 there is a table illustrating a proposed subject matter docket assignment plan for a U.S. Court of Appeals with 16 judgeships and 1,500 dispositions on the merits annually.

APPENDIX

PLAN FOR THE DIVISION OF RESPONSIBILITIES OF THE *BUNDESGERICHTSHOF* FOR FISCAL YEAR 1980*

I. CIVIL DIVISIONS^a

Civil Division I has assigned to it

1. Suits involving literary copyright law, publishing rights, and design copyright law;
2. Suits in the area of protection of industrial rights, to the extent that they are not assigned to Civil Division X, particularly suits involving
 - a. trademarks,
 - b. claims under the Law Against Unfair Competition, the Rebates Law, and the Overweight Charges Act,
 - c. rights to a firm name or name, to the extent that they involve the possibility of confusion of names in commercial transactions;
3. Suits under the Brand Protection Law, to the extent that disputes over brand names are involved;
4. Decisions concerning complaints against decisions of the Federal Patent Court in trademark and design copyright cases, as well as brand protection cases, to the extent that brand names are involved;
5. Suits involving the contractual relationships of commercial agents (HGB^b §§ 84 and following);

* Translated from the German by Kevin P. Jewell, October, 1980. Mr. Jewell, a member of the University of Virginia Law School Class of 1981, served as a translator with the U.S. Army in Berlin from 1977 to 1979.

Translator's Note: An effort has been made to adhere closely to the original German text, even in such matters as sentence structure (with, of course, the modifications needed in a translation from one language to another). While this translator does not disclaim all responsibility for any shortcomings of this translation, it should be noted that very few liberties have been taken with the translation. As a result, those ambiguities and inconsistencies in style and choice of language which were present in the original text remain, for the most part, in this translation. The title of the text in German is *Geschäftsverteilungsplan des Bundesgerichtshofes für das Geschäftsjahr 1980*.

a. The word "Division" is used throughout this text as the translation of the German word *Senat*. The word "panel" might be equally accurate from the perspective of American appellate courts. Although the German word *Senat* is often translated into English as "Senate," that translation may be misleading to Anglo-American lawyers. The term *Grosser Senat*, however, is left untranslated. See note 25 *supra*. Civil Divisions are designated here by Roman numerals, and Criminal Divisions by Arabic numerals, as in the original.

b. *Handelsgesetzbuch* = Commercial Code. Abbreviations from the original German are retained throughout this text (except for abbreviations of such common words as "para-

6. Suits involving
 - a. claims arising out of current accounts (HGB § 355),
 - b. claims arising from commission business (HGB §§ 383 and following);
7. Suits involving claims arising out of forwarding, warehousing, and freight transactions;
8. The determination of the responsible^c court under § 36 and § 9, EGZPO,^d to the extent that Civil Division IVb is not responsible;
9. Decisions under § 7, paragraph 2, LwVG^e (by operation of law);
10. Decisions which become necessary before the responsible Division for the handling of a given case can be determined;
11. Claims against a patent agent which arise in connection with his duties as a patent agent (Patent Agent Act), inclusive of claims for damages, to the extent that activities are involved which are within the areas of law assigned to Civil Division I.

Civil Division II has assigned to it

- 1.a. maritime cases (HGB §§ 476 and following, together with the law of wreckage, including collisions of ships with other objects),
- b. suits arising under the imperial laws on inland shipping and rafting (including collisions of ships with other objects) as well as those arising out of tonnage contracts concerning inland ships,
- c. damage claims against juristic persons of the public law arising out of the dereliction of duties to maintain, or ensure the safety of traffic on, waterways,

graph" or "page"), with an expansion and a translation provided in a footnote the first time the abbreviation appears. For a helpful English description of the role of many German statutes and of the German Court System, see E. COHN, *supra* note 9.

c. "Responsible" is the translation used here for the German word *zuständig*. That is the translation used in this text in most places where *zuständig* was used in the original, because the usual meaning being conveyed is one of an assigned responsibility of a given court. Occasionally in this text, *zuständig* is translated as "competent," but only where competence in the Anglo-American understanding of that term is being addressed (although *zuständig* is very often translated as "competent" without regard to the distinction in meaning).

d. *Einführungsgesetz zur Zivilprozessordnung* = Introductory Law to the Code of Civil Procedure.

e. *Gesetz über das gerichtliche Verfahren in Landwirtschaftssachen* = Law on Judicial Proceedings in Agricultural Cases.

- d. suits arising out of towing contracts and the insuring (including guarantees) of ships or goods for sea or river transport alone, or in conjunction with land transport,
 - e. suits arising under the Law on Rights in Respect of Registered Ships and Ships Under Construction of November 15, 1940, concerning possession and ownership of ships and ships under construction,
 - f. suits involving ships' liens and distraint of ships (ZVG^f §§ 162 and following);
2. Suits involving
- a. claims arising out of the purchase and sale of securities,
 - b. claims arising out of possession and ownership (including cases under § 771, ZPO^g), usufructuary rights and liens (including the merchant's right of retention, HGB § 369) on securities, as well as claims arising out of legal transactions involving such,
 - c. claims based on the Stock Exchange Act and the Act Concerning the Duties of Merchants in Connection with the Custody of Foreign Securities;
3. Suits involving
- a. claims arising out of partnerships (BGB^h §§ 705 and following) and common holdings (BGB §§ 741 and following),
 - b. internal relationships of commercial corporations, silent partnerships, as well as registered cooperatives and associations (also mutual insurance associations), including suits between these corporations, cooperatives or associations and their board members or executives,
 - c. firm name law (HGB §§ 17 and following), to the extent that Civil Division I is not responsible (no. 2c);ⁱ
4. Suits involving bills of exchange and checking matters, and claims arising out of commercial drafts;
5. Suits involving mandate relationships (BGB §§ 662 and following) between credit institutions and their customers, or among credit institutions, to the extent that the institutions are engaged in cus-

f. *Zwangsversteigerungsgesetz* = Forcible Execution Law.

g. *Zivilprozessordnung* = Code of Civil Procedure.

h. *Bürgerliches Gesetzbuch* = Civil Code.

i. This refers to the provisions under Civil Division I above dealing with firm name law (2c). This style of cross-referencing to other Divisions is used at numerous points throughout the text.

tomary banking business and are not involved in specialized areas (e.g. construction savings banks, partial-payment institutions, and the like);

6. Decisions under § 28, FGG,^j to the extent that they involve
 - a. the keeping of shipping registers, inland shipping registers and shipping construction registers, and other powers of the companies registrar, or the keeping of accounts of average,
 - b. the keeping of commercial registers, cooperative registers and association registers and other powers of the companies registrar,
 - c. decisions under AktG^k §§ 98, 99.

Civil Division III has assigned to it

1. Suits involving damage claims
 - a. by juristic persons of the public law against their officials, judges, and soldiers based on terms of employment, to the extent that neither Civil Division V (no. 2h) nor Civil Division VI (no. 5) is responsible,
 - b. against officials under § 839, BGB, to the extent that neither Civil Division V (no. 2h) nor Civil Division VI (no. 5) is responsible,
 - c. against juristic persons of the public law on the basis of article 131, WRV^l and article 34, GG,^m to the extent that neither Civil Division V (no. 2h) nor Civil Division VI (no. 5) is responsible,
 - d. against all juristic persons of the public law arising out of the dereliction of duties to maintain the roads or ensure the safety of traffic on streets, with, however, the exception of waterways, which are the responsibility of Civil Division II (no. 1c);
2. Suits involving
 - a. claims for compensation based on
 - aa. expropriation (including expropriatory interventions) as well as measures of a dispossessory nature,
 - bb. prosecutorial measures,
 - b. financial claims arising out of sacrifices for the common good and out of public dedications, as well as damage claims

j. *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* = Law on Non-Contentious Jurisdiction.

k. *Aktiengesetz* = Law on Stock Corporations.

l. *Wohnungsrechtvorschriften* = Tenants' Rights Provisions.

m. *Grundgesetz* = Basic Law (Constitution of the FRG).

- arising out of the dereliction of public duties (VwGOⁿ § 40, paragraph 2, sentence 1),
- c. claims arising out of the Convention on Human Rights;
3. Decisions in cases involving building sites;
4. Suits involving claims under the Law for Protection from Aircraft Noise of March 30, 1971;
5. Endowments (BGB §§ 80 and following), usufruct of property (BGB §§ 1085 and following), and lifetime annuities (BGB §§ 759 and following);
6. Suits involving loans (BGB §§ 607 and following) or naked debt relationships (BGB §§ 780-808a), to the extent that neither Civil Division I (no. 6a) nor Civil Division II (no. 2c) is responsible;
7. Suits involving
- a. mining rights (EGBGB,^o article 67), including exploitation rights (EGBGB, article 68) as well as water rights (EGBGB, article 65), including dike and sluice rights (EGBGB, article 66),
- b. hunting and fishing rights, together with contracts concerning such rights;
8. Decisions under § 109, BRAO^p (also in conjunction with § 108, BNotO^q); § 77, paragraph 2 of the Chartered Accountant Act; § 56, paragraph 2 of the Tax Adviser Act; and § 93, paragraph 2 of the Patent Agent Act;
9. Decisions under § 159, paragraph 1, GVG^r in civil cases, together with § 2, FGG;
10. All suits and decisions for which no other Division is responsible;
11. Decisions concerning election petitions in accordance with § 21b, paragraph 6, GVG, in the Draft of the Act Amending Nominations of Judges and Honorary Judges and the Organization of the Presidency of the Courts of May 26, 1972;
12. Suits involving mandate relationships (BGB §§ 662-76) and transacting of business without authority (BGB §§ 677-87), with respect to claims by and against attorneys, to the extent that Civil Division VI (no. 5) is not responsible;

n. *Verwaltungsgerichtsordnung* = Administrative Court Act.

o. *Einführungsgesetz zum bürgerlichen Gesetzbuch* = Introductory Law to the Civil Code.

p. *Bundesrechtsanwaltsordnung* = Federal Attorneys Act.

q. *Bundesnotarordnung* = Federal Notaries Act.

r. *Gerichtsverfassungsgesetz* = Court Organization Act.

13. Suits involving arbitration agreements and arbitration awards (ZPO §§ 1025 and following; § 274, paragraph 2, no. 3).

Civil Division IVa^s has assigned to it

1. Suits involving inheritance rights, including purchases of inheritances, to the extent that Civil Division V is not responsible;
2. Suits involving gifts (BGB §§ 516 and following), to the extent that neither Civil Division II nor Civil Division V is responsible;
3. Suits concerning insurance relationships, to the extent that they are not assigned to Civil Division II (no. 1d);
4. Suits concerning brokers' contract relationships (BGB §§ 652 and following), including those of mercantile brokers (HGB §§ 93 and following), as well as claims under § 354, HGB;
5. Decisions of the *Bundesgerichtshof* in accordance with § 23, paragraph 1, § 29, paragraph 1, EGGVG,^t concerning the legitimacy of the orders, dispositions, or other measures which are taken by judicial officials for the regulation of individual matters in the area of civil rights, including commercial law, civil procedure, and non-contentious matters;
6. Decisions in cases covered by § 28, FGG, where probate matters are concerned which do not exclusively or predominantly involve law concerning the succession to agricultural land which deviates from the general law.

Civil Division IVb has assigned to it

1. Suits involving
 - a. personal rights, especially the law of right to the use of a name (BGB § 12), to the extent that Civil Division I is not responsible (no. 2c), including placement in the care of trustees and declarations of death,
 - b. family law;
2. Decisions in cases under § 28, FGG, to the extent that they involve personal rights and family rights;
3. The determination of the responsible court, in accordance with § 36, nos. 3 and 6, ZPO, as well as § 9, EGZPO, in all cases covered by

s. Prior to March 1, 1980, all cases shown here as being assigned to Civil Divisions IVa and IVb were assigned to a single Civil Division IV.

t. *Einführungsgesetz zum Gerichtsverfassungsgesetz* = Introductory Law to the Court Organization Act.

the 6th chapter of the ZPO (family matters, childhood matters, including cases covered by § 650, paragraph 3, ZPO).

Civil Division V has assigned to it

1. Decisions concerning complaints in agricultural land cases;
2. Suits involving
 - a. claims arising out of contracts for parcels of land and land rights (including options and redemptions),
 - b. land lease contracts (Land Lease Law of June 25, 1952, § 1),
 - c. claims arising out of possession and ownership of land parcels or items which are physically attached to a parcel of land or a building, including superstructures and boundary relationships (BGB §§ 912-16, 919-23), as well as suits arising out of options on realty and legal transactions concerning such options,
 - d. claims arising out of in rem rights to real property and rights similar to real property rights, and legal transactions concerning such rights,
 - e. neighbors' rights and transgressions thereof (BGB §§ 903-10, GewO^u § 26),
 - f. inheritance rights, when they involve exclusively or primarily law concerning the succession to agricultural land which deviates from the general law,
 - g. distraint of land, including the purchase and exchange of the rights of the highest bidder (ZVG § 81),
 - h. damage claims given rise to by dereliction of duty of land registry officials in land registration cases, including right of recourse claims against officials,
 - i. church law relationships, as well as school construction debts and cemeteries (EGBGB articles 132, 133),
 - k.^v family estates and holdings (EGBGB article 59);
3. Decisions in cases
 - a. under § 28, FGG, where probate matters are concerned which exclusively or predominantly involve law concerning the succession to agricultural land which deviates from the general law,
 - b. under § 79, GBO,^w

u. *Gewerbeordnung* = Industrial Code.

v. There is no subsection "j" in the original.

w. *Grundbuchordnung* = Land Registration Act.

- c. under § 2, ZVG and § 3 of the Act to Amend the Provisions of the Entailment and Bequests Law of December 28, 1950.

Civil Division VI has assigned to it

Suits involving

1. Claims arising out of unlawful transactions, to the extent that neither Civil Division II (nos. 1a, b, c), Civil Division III (nos. 1a and 7b) nor Civil Division V (nos. 2c and h) is responsible; damage claims arising out of medical treatment, even if the claims are based on a contract, as well as claims arising out of the right to one's own picture (§§ 22 and following of the KunstUrhG^x of January 9, 1907);

2. Claims arising out of accidents in which an airplane, a motor vehicle, a railroad train, or a streetcar is involved, even if they are based on a shipping contract, with, however, the exception of freight contracts for goods which are within the responsibility of Civil Division I (no. 7);

3. Damage claims based on other special provisions of the law (e.g. ZPO § 302, paragraph 4, §§ 717, 945), to the extent that they are not specifically assigned to another Division;

4. Terms of employment, to the extent that neither Civil Division I (no. 11), Civil Division II (no. 3b), Civil Division VII (nos. 1b and 2) nor Civil Division X (no. 7) is responsible;

5. Damage claims based on the dereliction of duty

- a. of notaries, even to the extent that the notaries are officials,
- b. against attorneys and legal assistants.

Civil Division VII has assigned to it

1. Suits involving

- a. labor contracts, to the extent that Civil Division VI (nos. 1 and 2) is not responsible,
- b. terms of employment of architects and other persons employed in construction;

2. Suits involving mandate relationships (BGB §§ 662-76) and transacting of business without authority (BGB §§ 677-87), to the extent that neither Civil Division II (no. 5) nor Civil Division III (no. 12) is responsible;

3. Suits involving unjust enrichment (BGB §§ 812 and following), to the extent that it does not appear appropriate, in light of the law

x. *Künstliches Urhebergesetz* = Law on Artistic Copyright.

to be applied along with these provisions, that the case be handled by the Division which is normally responsible for this area of law;

4. Decisions in cases under § 28, FGG, to the extent that neither Civil Division II (no. 6), Civil Division IVa (no. 6), Civil Division IVb (no. 2), Civil Division V (no. 3a), nor Civil Division VIII (no. 4) is responsible.

Civil Division VIII has assigned to it

1. Suits involving

- a. claims arising out of the purchase and exchange of movable property and rights, to the extent that neither Civil Division II (no. 2a) nor Civil Division V (nos. 2d and g) is responsible,
- b. claims arising out of the acquisition of a commercial enterprise (GVG § 95, no. 4d),
- c. renting and leasing relationships, to the extent that neither Civil Division II (nos. 1a and b) nor Civil Division V (no. 2b) is responsible,
- d. loans and deposits (BGB §§ 598 and following, 688 and following), to the extent that neither Civil Division II (no. 2c), Civil Division III (no. 2b), nor Civil Division V (no. 2a) is responsible,
- e. sureties (BGB §§ 765 and following); however, in suits involving a surety, the principal obligation determines which Division is responsible, if it is the existence of the principal obligation alone which gives rise to the dispute;

2. Suits involving

- a. claims arising out of the possession and ownership of either movable property or funds (BGB §§ 965 and following), as well as the presentation of property (BGB §§ 809-11), to the extent that Civil Division II (nos. 1 and 2b) is not responsible,
- b. claims arising out of usufruct and liens on movable property and rights, including the merchant's right of retention (HGB § 369), and legal transactions concerning such, to the extent that neither Civil Division II (nos. 1 and 2b) nor Civil Division V (no. 2d) is responsible;

3. Suits involving

- a. distraint of other than immovable property (including motions for discharge from distraint decisions, and including

§ 771, ZPO, with the exclusion, however, of §§ 767-69, ZPO),

- b. distraint to effectuate delivery of property and to effectuate transactions or restraints (ZPO §§ 883 and following), as well as oaths of disclosure and detention (ZPO §§ 889 and following), to the extent that Civil Division III (no. 1a) is not responsible,
- c. contesting of legal transactions of a debtor to the detriment of his creditors, in and out of bankruptcy (KO^y §§ 29 and following, 196; *AnfechtungsG*^z), even to the extent that sham transactions are alleged;

4. Decisions under § 47, paragraph 2, MSchG,^{aa} in conjunction with § 28, paragraphs 2 and 3, FGG, and decisions under article III of the Third Act to Amend Tenants' Rights Provisions of December 21, 1967 (BGBl^{bb} I, page 1248);

5. Decisions, in accordance with § 17 of the Law for the Carrying out of Agreements of September 27, 1968, involving judicial competence and the enforcement of judicial decisions in civil and commercial cases (BGBl 1972 I, page 1328).

Civil Division IX has assigned to it

1. Suits involving matters covered by the Federal Law for Compensation of Victims of National Socialist Persecution (Federal Compensation Law) and the Federal Law Regulating the Restitution to Members of the Civil Service for National Socialist Injustice;

2. Suits involving recourse claims which are connected to restitution cases.

Civil Division X (Patent Division) has assigned to it

1. Suits involving patent law and the law of right to use of design copyrights, together with contracts concerning such;

2. Suits arising out of contracts for the use of a secret process or the exclusive exploitation of unprotected commercial products;

3. Suits arising in the area of employee inventions;

y. *Konkursordnung* = Bankruptcy Act.

z. *Anfechtungsgesetz* = Law of Avoidance (no section number was given in the original).

aa. *Mieterschutzgesetz* = Tenants' Protection Act.

bb. *Bundesgesetzblatt* = Federal Statute Book (Federal Gazette).

4. Suits arising out of the Brand Protection Law, to the extent that they are not assigned to Civil Division I (no. 3);

5. Patent nullification cases, compulsory license cases, and patent revocation cases;

6. Decisions involving complaints against decisions of the Federal Patent Court in cases involving the right to use of a patent or design copyright, as well as brand protection cases, to the extent that the latter are not assigned to Civil Division I (no. 4);

7. Claims against a patent agent which arise in connection with his duties as a patent agent (Patent Agent Act), inclusive of claims for damages, to the extent that they are not assigned to Civil Division I (no. 11).

II. CRIMINAL DIVISIONS

Criminal Division 1 has assigned to it

1. Review^{cc} in criminal cases for the Bamberg, Karlsruhe (with the exception of the Mosbach, Heidelberg, and Mannheim *Landgericht* Districts), Nuremberg, and Stuttgart *Oberlandesgericht* Districts;

2. Review in military criminal cases (second part of the Defense Criminal Law in the May 24, 1974 version, BGBl. I, page 1213);

3. Review in criminal cases involving offenses against the National Defense (§§ 109-109k StGB^{dd}), to the extent that Criminal Division 3 is not responsible;

4. Decisions under § 138c, paragraph 1, sentence 3, StPO,^{ee} when the proceeding is pending before the normally responsible Criminal Division 2.

Criminal Division 2 has assigned to it

1. Review in criminal cases for the Frankfurt am Main, Koblenz, and Cologne *Oberlandesgericht* Districts;

2. Decisions of the *Bundesgerichtshof* as the joint superior court (e.g. StPO §§ 12 and following; JGG^{ff} § 42, paragraph 3), to the extent

cc. "Review" is used throughout this text as the translation of the German word *Revision*. This procedure involves an appellate review limited to specified questions of law based on the record made below. It contrasts in German appellate practice with *Berufung*, translated in this text as "appeal," which means a review de novo of the entire proceeding. See text accompanying notes 36-38 *supra*.

dd. *Strafgesetzbuch* = Criminal Code.

ee. *Strafprozessordnung* = Code of Criminal Procedure.

ff. *Jugendgerichtsgesetz* = Juvenile Courts Act.

that Criminal Division 3 (no. 3a) is not responsible; the determination of the responsible court under § 19, paragraph 2 of the Competence Supplementary Law of August 7, 1952, BGBl. III, pages 310-11, and the other decisions which are assigned to no other Criminal Division (among others, those under § 138c, paragraph 1, sentence 3, StPO);

3. Decisions of Criminal Division 4 where there is a referral of the case to another Criminal Division.

Criminal Division 3 has assigned to it

1. Review in criminal cases of sentences of the *Oberlandesgerichte* in the first instance and sentences of the criminal courts designated in § 74a, GVG, in all the *Oberlandesgericht* Districts; however, for the *Kammergericht* District^{gg} only to the extent that the sentences are not in cases of kidnapping or political suspicion (§§ 234a, 241a, StGB; Berlin Law for the Protection of Personal Freedom of June 14, 1951, GVBl.,^{hh} 417);

2. Complaints against

a. decisions and dispositions of the *Oberlandesgerichte* in the cases designated in § 304, paragraph 4, sentence 2, StPO; § 310, paragraph 1, StPO; and § 102, sentence 2, JGG, as well as in cases under § 304, paragraph 4, sentence 3 (in conjunction with § 138d, paragraph 6), StPO, to the extent that the decision is made in proceedings under §§ 138a, 138b, StPO, in which Criminal Division 3, in accordance with no. 1 [*supra*], is to decide about the means of review,

b. decisions of the examining judges of the *Bundesgerichtshof*;

3.a. decisions of the *Bundesgerichtshof* as the joint superior court (e.g. StPO §§ 12 and following; JGG § 42, paragraph 3), to the extent that they involve the competence, established by §§ 74a, 120, GVG, of the *Landgerichte* and *Oberlandesgerichte* and that established by § 102, JGG, for the juvenile jury courts,

b. decisions under § 121, paragraph 9, StPO,

c. decisions in accordance with article 5, paragraph 1, paragraph 5, and paragraph 6, sentences 1, 3 of the Law for the General Introduction of a Second Instance in State Protective Criminal Cases,

d. decisions under §§ 35 and 37, paragraph 4, EGGVG,

gg. *Kammergericht* is the name of the *Oberlandesgericht* for Berlin. See note 29 *supra*.

hh. *Gesetz und Verordnungsblatt* = Statutes and Legal Decrees Gazette.

- e. decisions under § 138c, paragraph 1, first half-sentence of sentence 2, StPO (decisions under §§ 138a, 138b in cases in which the examination is conducted by the Chief Federal Prosecutor;ⁱⁱ

4. Review in criminal cases for the Düsseldorf *Oberlandesgericht* District as well as the Mosbach, Heidelberg, and Mannheim *Landgericht* Districts.

Criminal Division 4 has assigned to it

1. Review in criminal cases for the Hamm, Saarbrücken, and Zweibrücken *Oberlandesgericht* Districts;

2. Review in traffic criminal cases (including railroad and airplane accidents, with the exception of accidents on the Berlin *Stadtbahn*^{jj});

3. Decisions under § 27 of the German Extradition Law of December 23, 1929;

4. Decisions under the Law Amending the Law Concerning Inter-German^{kk} Legal and Official Assistance in Criminal Cases of October 18, 1974 (BGBl. I, page 2445);

5. Decisions in the event of a referral of a case to another Criminal Division of the *Bundesgerichtshof*, to the extent that Criminal Division 2 is not responsible.

Criminal Division 5 (Berlin) has assigned to it

1. Review in criminal cases for the *Kammergericht* District and for the Braunschweig, Bremen, Celle, Hamburg, Oldenburg, and Schleswig *Oberlandesgericht* Districts;

2. Review of decisions of the criminal courts designated in § 74a, GVG, for the *Kammergericht* District, which involve cases of kidnapping or political suspicion (StGB §§ 234a, 241a);

3. Review in criminal cases of the decisions of all courts, if they involve application of the Berlin Law for the Protection of Personal Freedom of June 14, 1951, GVBl., page 417;

ii. The German is *Generalbundesanwalt*. This is sometimes translated as "Federal Attorney General," but that title would imply too wide a range of duties. In Germany, the Minister of Justice is closer to the American concept of Attorney General. The *Generalbundesanwalt* has only prosecutorial duties and may properly be called the "Federal Prosecutor General."

jj. *Stadtbahn* = "city train," one of Berlin's two fixed-rail mass transit systems, one under control of the German Democratic Republic (GDR or East Germany).

kk. Between the Federal Republic of Germany (FRG) and the GDR.

4. Decisions of the *Bundesgerichtshof*, in accordance with §§ 23, paragraphs 1 and 29, paragraph 1, EGGVG, as well as §§ 116, StVollzG,¹¹ and 121, paragraph 2, GVG, concerning the legitimacy of the orders, dispositions, and other measures taken by judicial authorities in regulating individual matters in the area of criminal jurisdiction or taken by enforcement authorities in enforcing prison sentences, security and reform measures, arrest of juveniles, and investigative detention.

* * *

[Omitted are the special division dockets, the list of judges assigned to each division, and miscellaneous procedural and administrative provisions.]

11. *Strafvollzugsgesetz* = Act on the Execution of Criminal Sentences.