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Litigation 2023

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Germany: Law & Practice

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Pfitzner Legal

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GERMANY

Law and Practice

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1. General

1.1 General Characteristics of the Legal System

The Federal Republic of Germany consists of 16 federal states. While not only the Republic itself, but also every state, has the constitutional right to regulate private procedural and substantive law, almost all areas of private law are regulated exclusively by federal law.

Being a civil law country, founded on the Roman law tradition, statutes are by far the most common source of law. The Civil Code and the Commercial Code, both implemented prior to 1900, are the most important substantive rulesets. These two codes have undergone major changes over the years. In many cases they can be regarded as the basic structure of a legal matter, while additional statutes contain specific rules for certain legal issues.

Influence of Case Law and Scholars

Although being governed by a civil law doctrine, the German legal practice is heavily influenced by German and European case law. Judicial precedents of the Federal Court of Justice and higher regional courts are largely recognised by the lower courts when applying the relevant statutes. There is no doctrine of a binding precedent (stare decisis) in Germany. However, the longer there is a coherent line of precedents by higher courts, the less likely it is that a lower court will deviate from the established case law.

Furthermore, law scholars play an important role in the legal debates. With their critical voices, they strongly influence the development of the law. Handbooks and commentaries are available on basically all statutes and legal matters. Academics are often quoted in judgments and pleadings and consulted by the parliament when new statutes are drafted or existing statutes amended.

Judicial Practice

In civil matters, the judicial practice generally takes an adversarial approach. As a basic rule, courts will only consider the facts presented by the parties. The submission of evidence is also the responsibility of the parties, and the court is strictly bound by what the parties submit to it. However, the taking of evidence is the task of the court only, and the judge plays the leading role in defining issues and supervising the proceedings.

In special legal matters, such as custody or marriage, the adversarial principle is completely replaced by an investigative model.

In general, a judgment can only be based on the facts presented orally at the hearing. However, procedural law allows the parties to refer to their written pleadings in the hearing. Therefore, in practice, court proceedings are mainly conducted by means of written submissions.

1.2 Court System

The German court system is divided into five different jurisdictional branches:

- "ordinary" courts dealing with civil and commercial matters and criminal matters;
- labour courts;
- administrative courts;
- fiscal courts; and
- social courts.

The courts in each of these jurisdictional branches have exclusive jurisdiction over disputes falling within their jurisdiction.

With a few exceptions, the court of entry for a civil dispute is either a local court or a regional court. Which court has jurisdiction as the entry court usually depends on the value of the dispute, while special rules apply to certain matters, eg, tenancy law or family law. The regional courts have special chambers for commercial matters. In very rare cases, higher regional courts may act as entry courts.

Appeals and Requests to the ECJ

An appeal may be lodged against decisions of the entry courts with the competent (higher) regional court.

Judgments handed down on first appeal may be appealed to the Federal Court of Justice.

In pending proceedings, a German court may request an authoritative resolution by the European Court of Justice on unresolved questions of European law material to the outcome of the case. The European Court of Justice has jurisdiction only to answer the specific questions of European law and will not rule on the whole matter.

In theory, the Federal Constitutional Court can overrule any civil judgment for a violation of the fundamental guarantees on civil procedure and substantive law in the German Basic Law. Such extraordinary objections on grounds of constitutional rights are, however, rarely granted.

1.3 Court Filings and Proceedings

As a rule, the German Basic Law requires that court proceedings are open to the public. Restrictions and exceptions may apply, eg, to the protection of trade secrets, other secrets, the safety of a person, or state interests.

Court records are not public. While any third party may apply to the court for access to certain court files, such a request will be granted only if the applicant has a legitimate legal interest in inspecting the files.

Judgments are only published in an edited and anonymous form.

1.4 Legal Representation in Court

Only attorneys admitted to the German bar can represent a party before regional courts and higher regional courts. However, certain acts may be performed by the party itself at the court's offices. Also, in cases where the Code of Civil Procedure does not require representation by lawyers, the parties may conduct the litigation themselves. With respect to the Federal Court of Justice, in civil cases only lawyers admitted to the specialised bar of this court may appear before it.

Foreign lawyers can conduct cases in German courts if they have been admitted to the German bar. European lawyers can be admitted to the bar as Established European Lawyers who are entitled to practice as attorneys in Germany under the professional title of their country of origin.

2. Litigation Funding

2.1 Third-Party Litigation Funding

Third-party litigation funding is becoming increasingly common. There are no legal regulations that deal directly with such funding. Its framework derives from statutes such as the Legal Services Act, the Federal Lawyers' Act and the Lawyers' Fees Act. It emerges from them, eg, that the funder is prohibited from providing legal advice to their client. In general, the funder concludes the financing agreement with their client, and the client instructs an attorney so that the funder and attorney have no contractual relationship with each other. There is no obligation to disclose a funding arrangement in court.

The market is in a state of upheaval, partly due to legal technology companies such as online platforms and service providers that do not finance legal disputes in the conventional sense, but instead have the claims of their customers assigned to them and then assert them in court in their own name and at their own risk. In the event of success, the customers receive a certain percentage of the sum awarded.

2.2 Third-Party Funding: Lawsuits

The Federal Court of Justice has classified the profit sharing of litigation funders in profit absorption actions as an abuse of law. Otherwise, there are currently no restrictions on third-party funding. Therefore, in general, all types of lawsuits are available for third-party funding.

2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding is available to both plaintiffs and defendants.

2.4 Minimum and Maximum Amounts of Third-Party Funding

There is no limit on the amount a third-party funder can provide.

2.5 Types of Costs Considered Under Third-Party Funding

Third-party funding can cover all fees and expenses, including costs of legal representations and court fees. In addition, the agreements can include any costs of the other party to be borne by the funded party if it loses the case.

2.6 Contingency Fees

A contingency fee in litigation that transfers part of the proceeds to the attorney may be agreed:

- for (attachable) monetary claims up to EUR2,000;
- in summary proceedings for a payment order;
- in enforcement proceedings; or
- in individual cases if the client's financial circumstances prevent them from litigating without agreeing a contingency fee.

Agreements by which the attorney undertakes to bear court costs or costs of other parties are inadmissible. In extrajudicial matters, a contingency fee may as of recently be agreed for (attachable) monetary claims up to EUR2,000 and for permitted collection services.

2.7 Time Limit for Obtaining Third-Party Funding

There are no restrictions on when a party may obtain the services of a third-party funder.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

In general, there are no specific rules on pre-action conduct before commencing court proceedings. However, in some federal states, under certain procedural conditions, the parties are required to seek mediation or conciliation before initiating court proceedings.

It is nevertheless common practice to send a warning letter, a request for payment or a notification to the opponent or to initiate collection proceedings prior to the commencement of court proceedings. This can avoid potential cost disadvantages, and some pre-trial measures can also trigger legal consequences favourable to the plaintiff, such as the suspension of the limitation period or the initiation of the debtor's default, which leads to an interest claim.

3.2 Statutes of Limitations

Statutes of limitations are considered part of German substantive law. The limitation periods applicable to civil actions are therefore contained in the Civil Code. The general limitation period for the assertion of a claim is three years, beginning at the end of the year in which a claim arises and the plaintiff is aware of the claim or at least should have known that a claim exists. Depending on the subject matter, special limitation periods may apply, ranging from a few days to 30 years.

The limitation period may be suspended by various events, most importantly negotiations, the filing of a statement of claim or the initiation of proceedings with a registered conciliation institution. The parties may also conclude a waiver of limitation agreement.

The plea of limitation is subject to party autonomy. A court may dismiss a claim based on statute of limitations only if the defendant invokes the statute of limitations. If such a statement is not made by the defendant, the court will not take the limitation aspect into account in the decision, even if the claim is obviously time-barred.

3.3 Jurisdictional Requirements for a Defendant

When a claim is filed, the court determines on its own whether an international, subject matter, local and functional jurisdiction exists based on the facts and law pleaded at the time the claim became legally pending.

The determination of international jurisdiction is based either on EU law, in particular the Recast Brussels Regulation or the Lugano Convention 2007, or on the provisions on local jurisdiction contained in the Code of Civil Procedure.

In principle, a defendant must have its domicile or registered seat of business in Germany to be sued in Germany. In addition, other factors, such as the location of a branch, or the place of performance of the contract, the occurrence of damage or the commission of an unlawful act, may establish the jurisdiction of German courts. Actions for monetary claims against a person not domiciled in Germany will fall within the jurisdiction of the German court in whose district that person’s property is located, if the subject matter of the dispute has a sufficient domestic connection with Germany.

Agreements made between the parties regarding the choice of place of jurisdiction are generally accepted; however, such agreements may be invalid if a consumer is a contracting party.

The appearance of a defendant in court without objecting to the jurisdiction of the court generally gives the court international and local jurisdiction.

If the circumstances determining the jurisdiction of the court change later, the court does not lose its jurisdiction (perpetuatio fori).

3.4 Initial Complaint

Court proceedings are initiated by filing a statement of claim with the court. As of 1 January 2022, documents may only be filed via the special electronic attorney mailbox.

The statement of claim must meet certain mandatory requirements, such as being written in German and signed, and setting out the facts on which the relief sought is based. It may refer to exhibits. It is at the discretion of the court to allow exhibits in a foreign language, provided that the court has sufficient command of the respective language. If a court does not permit foreign-language exhibits, the party relying on them must, at the request of the court, prepare translations in whole or at least of the relevant passages.

There is no procedural rule requiring the plaintiff to include a legal analysis of the case, but this is common practice and advisable.

The plaintiff may amend the claim in subsequent submissions or add additional claims if the defendant gives its consent or the court deems the amendments appropriate. Specific types of amendments are not subject to these limitations, such as the correction, extension or restriction of the original motions or the addition or correction of the original factual statements.

3.5 Rules of Service

Once the statement of claim has been filed, the plaintiff is required to make an advance payment of the full court costs. As long as this mandatory requirement is not fulfilled, the court will not serve the statement of claim on the defendant. While subsequent submissions may be served directly between the parties' attorneys, the statement of claim can only be served by the court.

If a defendant refuses service, or if the defendant cannot be reached at their domicile or place of business, the statement of claim may be left in these premises or deposited at the post office or the competent local court with a notice to the defendant, in lieu of service itself.

For defendants domiciled outside Germany within the EU, service of process is governed by Regulation (EU) 2020/1784 (EU Service Regulation), which replaced the 2007 Regulation as of 1 July 2022. The new EU Service Regulation allows for electronic service; insofar Germany currently only allows service by means of a qualified electronic registered delivery service. Service in other countries may be affected in accordance with the provisions of the Hague Civil Procedure Convention, the Hague Service Convention or one of the bilateral treaties to which Germany has acceded. In the absence of a treaty, service of process will be affected in accordance with the international principles relating to reciprocity in granting judicial assistance.

If service of process is not possible, the court may order service by public notice, ie, by displaying a summary of the statement of claim and a notice where the statement of claim can be inspected on the notice board of the court and by publication in the Federal Gazette and, if appropriate, in daily newspapers. The statement of claim is deemed to have been served one month after the date of the last of these publications.

3.6 Failure to Respond

If the defendant fails to respond to the statement of claim or does not appear before the court at the hearing, the court may, at the request of the plaintiff, issue a default judgment granting the plaintiff's claim(s).

If a judgment by default has been delivered, the defendant may lodge an objection within two weeks of service of the judgment. The proceedings are then restored to the state in which they were before the defendant's default.

3.7 Representative or Collective Actions

Representative or collective actions are not traditionally recognised. It is a fundamental principle of German civil procedural law that only the parties to civil proceedings are bound by the outcome of such proceedings. In recent years, however, the legislator has created certain forms of collective actions in some areas.

The most important form of collective proceedings has been the right of certain registered interest groups to bring an action for injunctive relief on behalf of their members and in the common interest, particularly in cases involving unfair business practices by companies towards consumers, invalid general terms and conditions or other practices that violate consumer protection law or copyright law.

Model Proceedings in Capital Market Disputes

In case of false, misleading or incomplete capital market information, certain legal or factual issues relevant to many pending civil proceedings can be decided in model proceedings with binding effect for all. Such model proceedings take place if at least ten plaintiffs file a corresponding petition in individual proceedings. The model proceedings are then conducted before the competent higher regional court and, on appeal, before the Federal Court of Justice. The issues established in the model decision are binding for the parties in the individual proceedings. All other aspects of the respective cases, eg, causal connection or amount of damage, are decided by the courts of the individual proceedings.

Model Declaratory Action

In November 2018, the legislator introduced a model declaratory action to facilitate collective redress for consumers in cases of mass damages caused by large companies. It cannot be initiated by individual consumers, but only by certain qualified institutions. Once a qualified institution has filed such a claim, each individual consumer can decide to opt in and apply for registration. Consumers who opted in are not directly involved in the conduct of the action. The model declaratory action does not end with an enforceable judgment, but with the determination of the (non-)existence of factual and legal conditions for the (non-)existence of a claim or legal relationship between a consumer and a company. To obtain an enforceable judgment, each individual consumer must then bring an individual action in which they can benefit from the binding determinations of the model declaratory decision.

This model declaratory action is to be integrated into a new representative action implementing Directive (EU) 2020/1828 at the end of 2022 (see **14.1 Consumer Rights Enforcement Act**).

3.8 Requirements for Cost Estimate

German attorneys are required, under the rules of professional conduct, to inform their clients of the estimated costs that may arise during legal proceedings. The standard of advice is that the client must be able to decide, on an informed basis, about the potential costs and cost risk, whether or not to file an action.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

German civil procedural law provides for several interim applications a party may file before the commencement of proceedings. These applications are not limited to case management issues. They include interim injunctions to ensure the enforceability of a claim or to protect a party from irreparable harm. Further interim applications are motions for the preservation of evidence and security for costs.

4.2 Early Judgment Applications

Courts have a legal obligation to expedite the proceedings. German procedural law does not provide for a general form of “early judgment”, but specific types of judgments are available that are comparable to the concept of early judgment.

If a court is convinced that liability and at least some damage has been incurred, it can make an interlocutory judgment based on the claim, leaving the quantification of the claim open. Such judgments often motivate the parties to settle the amount of damages. A court may also issue an interlocutory judgment on certain contentious procedural issues. Such judgments are at the sole discretion of the court. A court may also, at its discretion, decide on only part of the claims or counterclaims when this part is ripe for a final decision.

Early judgments can also be declaratory in nature and cover basic legal issues underlying the dispute, eg, if a plaintiff claiming complex damages as a shareholder of a company is a shareholder at all. The court must decide on such an application of a party. At the discretion of the court, a judgment under reservation may be made in cases where the defendant has declared the set-off against the claim. If the claim is fully heard but the circumstances of the set-off are not, the court may decide on the claim subject to the judgment being later adjusted based on the set-off.

A special form of this judgment under reservation is the judgment in summary proceedings based on documentary evidence or on a bill of exchange. In these proceedings, the parties may rely only on documents and party testimony for evidence. All other means of evidence are excluded, and counteractions are not permitted. However, even after a judgment under reservation has been rendered, the proceedings remain pending and the defendant may raise objections and submit evidence at a later stage of the proceedings, without the limitations of the evidentiary means. Such expeditious proceedings therefore entail a risk for the plaintiff that the judgment under reservation will be set aside at a later stage. If the plaintiff has enforced the judgment under reservation, it is liable to the defendant for all damages resulting from such enforcement on a no-fault basis.

4.3 Dispositive Motions

German procedural law offers specific objections a defendant can raise to prevent the court from hearing a case at all, for example, if a valid arbitration clause covers the matter in dispute, the court must dismiss the claim without looking at the substantive facts of the dispute.

4.4 Requirements for Interested Parties to Join a Lawsuit

If a new plaintiff wishes to join a pending lawsuit, the existing plaintiff, and possibly also the defendant, must declare their consent to the joining. Subsequent participation in an action as a defendant is only possible if the plaintiff expressly sues the other defendant.

A person who is not a party to the original lawsuit may intervene in the proceedings to support the position of one of the parties whose success or defeat will legally affect the interests of the intervener. Such a third-party intervention can be filed at any stage of the proceedings before the judgment becomes final. An intervener does not become a formal party to the proceedings but may act only in the interest of the party whom it assists.

The intervener is not legally bound by the judgment. However, in a subsequent action between the intervener and the party it supports, the intervener is largely prohibited from arguing that the judgment is incorrect.

4.5 Applications for Security for Defendant's Costs

In cases where the plaintiff is domiciled outside Germany, the EU or the EEA, the defendant may require the court to order the plaintiff to provide security for the defendant's costs, unless an international convention provides otherwise. If a plaintiff who is obliged to provide a security refuses to do so, the action will be dismissed. In proceedings for interim injunctions, the defendant is generally unable to claim such security for costs.

4.6 Costs of Interim Applications/Motions

As a rule, the unsuccessful party bears the costs of the proceedings. The costs of an action are allocated between the parties according to the outcome of the case. This general rule also applies to the costs of interim applications/motions.

4.7 Application/Motion Timeframe

The timeframe for the processing of an application by the court depends on the quantity and complexity of the issue to be examined. Courts have the general obligation to expedite the proceedings by law. If possible, the court should close the case within one single oral hearing. The court is then generally obliged to give a final judgment within three weeks of the conclusion of the oral hearing.

5. Discovery

5.1 Discovery and Civil Cases

The concept of discovery does not exist in German civil cases. Each party usually bears the burden of proof for the facts on which the party's claim or defence is based. In certain circumstances the burden of proof lies with the other party. Each party decides for itself which facts and documents are submitted to the court. No rule obliges a party to disclose all available information that might be relevant to the case. However, the information provided to the court must be true and correct.

Consequently, German law does not provide tools for discovery. However, there are some disclosure obligations to which a party may be subject, eg, if the opposing party is in possession of a certain relevant document.

German substantive law or contractual agreements may also grant a party a legal claim against the opposing party for disclosure of certain information that is not otherwise available. Such a claim may be asserted in court. A special form of such proceedings is the action by stages. Such an action is divided into two phases: first, the court decides on the claim for disclosure of information, and second, on the request related to this information, eg, a payment claim.

Since 1 July 2022, it has been possible, under certain narrow conditions, for Germany to allow legal assistance for requests from foreign courts for pre-trial discovery of documents under the Hague Evidence Convention. Such requests can be executed if the documents to be produced are precisely described in detail, are of direct and clearly recognisable importance for the respective proceedings and their outcome, and are in the possession of a party involved in the proceedings. Furthermore, the request must not violate fundamental principles of German law.

5.2 Discovery and Third Parties

Third parties are not subject to discovery. However, a court may, in very limited circumstances, order a third party to provide a particular document in its possession. The third party may object to the court's order on the grounds that the order imposes an unreasonable burden on it. A third party may also be subject to substantive or contractual claims for disclosure of information, eg, an insurer of a party.

5.3 Discovery in This Jurisdiction

German law does not recognise a common-law-style discovery. Under certain circumstances, however, a court may order a party to produce a document.

5.4 Alternatives to Discovery Mechanisms

Before filing a statement of claim, a plaintiff usually must collect most of the relevant facts for its case. Generally, the preparation of a case starts with a review of all available documents and interviews with persons who have direct knowledge of the facts. In complex cases a party can also consult a certified expert to clarify technical or commercial issues relevant to the case.

Other sources of information are public registers. Germany provides for multiple public registers that can be consulted on request, eg, the Commercial Register, the Debtor Register, the Register of Associations, the Land Register, the Register of Residents and the public announcements in insolvency matters. In addition, any citizen may by law require that information held by a public authority be disclosed. Such a request is only rejected if the public interest does not permit disclosure, eg, to protect secret information.

5.5 Legal Privilege

German law recognises the concept of attorney-client privilege. Attorneys may not testify before authorities in relation to their mandates without the prior consent of their client. The fact that an attorney refuses to testify does not allow the courts to draw conclusions. The attorney-client privilege also covers work products, including attorneys' files and correspondence between an attorney and their client. Disclosure of client information without consent is a criminal offence. In-house counsel admitted to the bar may also invoke legal privilege.

5.6 Rules Disallowing Disclosure of a Document

In principle, neither party is obliged to disclose all available information provided that all submissions are correct and true. If a (third) party is nevertheless ordered to disclose certain information, it may decline to disclose it for the following reasons:

- professional secrecy, eg, attorney-client, tax consultant, doctor privilege;
- civil servant privilege;
- family privilege;
- subject matter privilege, eg, trade secrets;
- the information is not available; or
- the disclosure represents an unreasonable burden for the party.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

A party may claim for injunctive relief if the substantive law grants the injunctive relief. Due to their urgency, injunctive relief claims are often asserted in interim proceedings such as preliminary injunctions and attachments. Both remedies serve to secure a possible future judgment or the temporary regulation of a legal relationship before a final judgment can be issued.

The type of interim injunction available depends on the nature of the claim. An attachment secures monetary claims, while preliminary injunctions can secure all other types of claims.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Interim proceedings are very quick. If required, an interim injunction can be obtained within a few hours. The content of an application for an interim injunction is subject to lower standards than the content of a statement of claim. In particular, the applicant does not have to provide complete evidence. The presentation of prima facie evidence is sufficient.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

An application for an interim injunction does not necessarily have to be served on the opposing party so that the order can be issued ex parte without a hearing. Such ex parte decisions are common practice. A potential opponent can ensure that its arguments are heard from the outset by filing a protective brief beforehand. The court will then consider the opposing party's arguments set out in the protective brief when issuing the injunctive order.

If the court deems it necessary before issuing an injunctive order, or upon protest by the opposing party after the order was issued, it will schedule a hearing. After this hearing, the order may be set aside or confirmed by a judgment.

6.4 Liability for Damages for the Applicant

The applicant seeking an interim injunction is exposed to the risk of comprehensive strict liability. Such liability is triggered when an interim order executed by the applicant is thereafter set aside upon protest or appeal by the opposing party. The applicant will be held liable on a no-fault basis for any damage suffered by the opponent in connection with the execution of the order. Such liability will not be recognised automatically but only upon request of the opposing party in regular court proceedings.

In general, the applicant is not obliged to provide security for such possible claim for damages by the opposing party. The opponent may, however, arrange for an interim injunction of its own regarding such costs.

6.5 Respondent's Worldwide Assets and Injunctive Relief

German courts may issue interim orders and judgments concerning worldwide assets, at least if the court of the main action has international jurisdiction, eg, through international treaties.

If the German courts do not have jurisdiction to hear the main action because the main action falls within the jurisdiction of a foreign court, the German courts nevertheless have jurisdiction to issue injunctive orders if the assets covered by the order lie within the German jurisdiction.

In general, injunctive orders and judgments of German courts can be enforced abroad under international conventions. However, conventions such as the Recast Brussels Regulation or the Lugano Convention 2007 often do not allow ex parte orders to be enforced or at least impose an additional burden on the applicant if the order was issued ex parte.

6.6 Third Parties and Injunctive Relief

An applicant may apply for an injunctive order against any party. It is not necessary that the opponent is a party to the main action. However, an injunctive order is only granted if the applicant has its own claim against the third party. The latter is the case, eg, if a third party can be held liable vis-à-vis a party for the negative outcome of the main action.

6.7 Consequences of a Respondent's Non-compliance

A party that does not comply with the provisions of an injunction faces the same consequences as a party that does not comply with a regular judgment. In addition, if a party violates an injunctive order, the other party may request a fine of up to EUR250,000 or, in rare cases, arrest.

7. Trials and Hearings

7.1 Trial Proceedings

In German civil proceedings usually an oral hearing takes place. A purely written procedure is the exception. In the oral hearing, the presiding judge will open the proceedings with a summary of the view of the court regarding the factual and legal issues of the case, usually followed by a discussion with the parties and their attorneys.

Since the oral hearing is prepared to a large extent by the written pleadings of the parties, generally the discussion will focus on the points raised by the court. The essentials of the hearing are recorded by the presiding judge in the presence of the parties.

The court and the parties are under an obligation to conduct the proceedings as expediently as possible and to limit the number of hearings to a minimum. Therefore, generally only one hearing takes place if no taking of evidence is necessary. If evidentiary proceedings are necessary, these usually take place on a separate date.

Based on the introduction of the case and the discussion with the parties and their attorneys, the court will usually try to settle the case. This applies at every stage of the proceedings.

7.2 Case Management Hearings

German procedural law does not expressly provide for case management hearings. In practice, the court mainly structures the proceedings through written court orders, in which the court sets deadlines for written pleadings and prepares the oral hearing. However, the court also has the option of ordering an early first hearing in which it discusses the case with the parties at an early stage and, on basis of these discussions, can decide on the further course of action. This possibility has been strengthened by the legislator in recent years.

7.3 Jury Trials in Civil Cases

There are no jury trials in civil cases in Germany.

7.4 Rules That Govern Admission of Evidence

In civil proceedings, each party is responsible for presenting the evidence in support of its case. The court will only consider evidence submitted by the parties and will not investigate the facts itself. Therefore, the initial written pleadings of the parties must already contain detailed factual statements and specify the evidence on which the party intends to rely. There are five types of evidence under German civil procedural law: documents, inspection by the court, witness testimony, expert opinions, and party testimonies.

Comparative Analysis

To streamline the proceedings, the court will only take evidence relevant to the decision on the case. By applying the method of "comparative analysis", the court determines which facts are relevant for the resolution of the case, which of those facts are undisputed and which are contested. The court then determines which party bears the burden of proving the facts in question and which evidence is offered by that party. Documents are by far the most important evidentiary means in German litigation.

If the court concludes that facts must be proved by hearing witnesses or obtaining an expert opinion, it will list the facts in question together with an indication of which party bears the burden of proof for the disputed fact in a procedural order, order the witnesses to appear before the court, and/or select an appropriate expert and instruct them to draw up a written expert opinion and then appear before the court for questioning.

Evaluating Evidence
The court evaluates the evidence obtained and then makes a factual determination based on that evidence. It may evaluate most forms of evidence according to its sound judgment and common sense, without being bound by rules for the evaluation of evidence. The court is obliged to review all facts presented by the parties and all evidence comprehensively when making a decision.

The standard of proof in civil cases is strict, in that the court must be "fully convinced" that a particular disputed fact is true in order to base its judgment on that fact. This means that the court must be sure, with a practically viable level of certainty that silences doubt without completely eliminating it. A lower standard of proof may apply to damage and causal links.

7.5 Expert Testimony
If the determination or the assessment of certain facts requires expertise, the court may appoint an independent expert. The expert serves as the court's objective and impartial assistant. If the parties themselves submit written expert opinions, these opinions are not treated as expert evidence but as part of the party's pleadings. To prove the factual assertion made in such an expert opinion, the party must submit a request to the court to appoint an independent expert to confirm the assertion. Only the evidence submitted by a court-appointed expert constitutes evidence by expert testimony.

Experts usually submit their expert opinions in writing. The parties have the opportunity to comment on the expert's findings, request that additional questions be put to the expert and apply to the court to summon the expert to an oral hearing to be questioned on their written opinion. The court has discretion to evaluate the expert testimony. In practice, it is very rare for a court to deviate from an opinion rendered by a court-appointed expert.

7.6 Extent to Which Hearings Are Open to the Public
Oral hearings are open to the public. In exceptional cases, the court may order the exclusion of the public at the request of one of the parties. In commercial matters, the discussion of business or trade secrets may be a reason for this exclusion. The court may also formally order all persons who participate in the hearing to maintain strict confidentiality.

While the principle of public proceedings allows the public to be physically present at hearings, it does not extend to photographs, recordings or public transmissions from the courtroom.

7.7 Level of Intervention by a Judge
The judge plays an active role in German civil proceedings. The judge leads through the proceedings, gives indications and directs the taking of evidence. Judges will ask the parties, their attorneys, witnesses or experts questions at any

time during the hearing. It is normal for a judge to give a preliminary opinion on the factual and legal issues of the dispute right at the beginning of a hearing, which often leads to a settlement between the parties.

7.8 General Timeframes for Proceedings

Due to the general duty of the courts to expedite proceedings, German proceedings are considered to be completed quickly. However, there is no general rule as to how long a particular dispute might take. The timeframe depends on factors of complexity and efficiency.

Court proceedings can last from a few weeks – in the case of preliminary injunctions even just a few hours – and up to several years in very complex matters. Usually, proceedings take about one year per court instance if the parties are willing to present their case quickly and efficiently.

8. Settlement

8.1 Court Approval

Civil proceedings often end with a settlement between the parties. Generally, court approval is not required to settle a lawsuit. Exceptions apply, eg, to settlements in collective actions where the approval of the court is required.

8.2 Settlement of Lawsuits and Confidentiality

A settlement under German law has the legal nature of a contract between the parties to the settlement, even if it is recorded by the court. Therefore, settlements can be kept confidential if the parties so agree. However, settlements recorded by the court may become public because of the principle that hearings are generally public. If the parties wish to ensure confidentiality, it is advisable to negotiate the settlement out of court and include a confidentiality clause.

8.3 Enforcement of Settlement Agreements

A settlement recorded by the court is an execution title and can be enforced in the same way as a final judgment. An out-of-court settlement is not enforceable per se. A party claiming a breach of an out-of-court settlement usually must file a new civil action to enforce the settlement agreement. Out-of-court settlements may be enforceable if they are notarised by a notary public or signed by the parties' attorneys on the condition that the debtor expressly submits to immediate enforcement, and if they are filed with the local court where one of the parties is domiciled.

8.4 Setting Aside Settlement Agreements

As a contractual agreement, a settlement is generally binding due to the rule of pacta sunt servanda. Out-of-court settlements can be set aside like any other contract, eg, on the grounds of exceptio doli.

A settlement recorded by the court generally cannot be withdrawn. For this reason, the parties often conclude a settlement in court under the condition precedent that it becomes final unless one of the parties formally objects to it in writing to the court within an agreed time period. Such a conditional settlement is advisable, eg, if a party needs the consent of internal corporate bodies or third parties such as an insurer.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

German procedural law provides for three main categories of judgments:

- judgments for affirmative relief, eg, performance, payment, omission, or compensation;
- declaratory judgments in which the court confirms if a specific legal relationship exists or not under the condition that the plaintiff can show a certain interest as regards the declaration; and
- judgments directly altering a legal relationship, eg, the exclusion of a shareholder.

9.2 Rules Regarding Damages

With a few exceptions, courts only award damages to the extent expressly claimed and quantified by the plaintiff (ne ultra petita).

German law understands damage as an involuntary loss of property. If such loss occurs, the damaged party can, in principle, demand the natural restoration of the status before the harmful conduct/event. In theory, monetary relief for a loss is treated as an exception to this principle of natural restoration. However, if damage occurs to a person/an object, the injured party may alternatively claim the amount of money necessary for the restoration. Furthermore, if the restoration of the status prior to the occurrence of the harmful conduct/event is not possible or sufficient, the injured party may immediately claim the sum of money necessary for the restoration. The common practice is financial compensation for loss or damage.

In addition, an injured party may claim compensation for future losses due to loss of profit. The courts apply strict rules regarding the substantiation of the profits that would have accrued in the absence of the harmful conduct/event.

Furthermore, a plaintiff may claim compensation for immaterial losses, such as pain or damage to reputation. Such compensation is usually granted only if expressly provided for by law.

Punitive damages that add a penalty element are generally not awarded under German substantive law due to the principle of restoring the situation prior to the harmful conduct/event. However, punitive damages are awarded if the parties to the dispute agreed on a contractual penalty. Such punitive damages are well known in competition law.

9.3 Pre- and Post-judgment Interest

According to the basic principle of ne ultra petita, interest is granted only if the plaintiff has expressly claimed that interest. For monetary claims, the plaintiff generally claims interest from the date of service of the statement of claim at five percentage points above the base rate, or nine percentage points above the base rate for certain disputes with non-consumers.

In addition, if the defendant is in default of payment, the plaintiff may claim interest before service of the statement of claim. Such delay usually requires that the claim has become due and the plaintiff has requested performance before filing the statement of claim.

If the court grants interest, it will be calculated until the date of payment of the claim.

9.4 Enforcement Mechanisms of a Domestic Judgment

The means of enforcement depends on the judgment to be enforced and the nature of the assets against which enforcement is sought. In the case of pecuniary claims, the garnishment of monetary claims or other proprietary interests, the execution against real property or tangible personal property are typical means of enforcing judgments. Execution titles for specific performance can be enforced by eviction, substitute performance or the imposition of penalties.

9.5 Enforcement of a Judgment From a Foreign Country

Foreign judgments are enforceable under international treaties and conventions and, in the absence of such treaties, under German procedural law.

Within the European Union, foreign judgments in commercial and civil matters are enforced in accordance with the Recast Brussels Regulation. The enforcement of judgments from another EU member state does not require a separate declaration of enforceability and is subject to the same conditions as German judgments. The same applies to judgments rendered in Switzerland, Norway or Iceland under the Lugano Convention 2007.

If German procedural law applies to the enforcement of a foreign judgment, a formal declaration of enforceability (exequatur) is necessary. In exequatur proceedings, the debtor may invoke grounds of defence against enforcement such as satisfaction of the judgment or the following grounds for non-recognition or non-enforcement of the foreign judgment:

- the foreign court had no international jurisdiction under German law over the subject matter and the parties to the dispute;
- there was no service of process;
- other proceedings take precedence;
- German public policy is violated, eg, in a case of judgments of US courts for punitive damages; and
- reciprocity was not granted.

The EU ratified the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters on 29 April 2022. This ratification will come into force on 1 September 2023. The EU's ratification also binds Germany, but the practical use of this convention appears to be limited, since, apart from the EU, only Ukraine has ratified the convention to date.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

In principle, all acts of the court and its officers may be appealed by the aggrieved party. German procedural law essentially offers three types of remedies: the first appeal against judgments of the courts of first instance, the second appeal against judgments of the courts of appeal, and the complaint against procedural, minor and/or interlocutory decisions of the courts. In addition, several other remedies, such as protest or objection, are available against other decisions of the court or its officers.

10.2 Rules Concerning Appeals of Judgments

In general, all appeals suspend the effect of the judgment, order or decision under appeal.

The first appeal is the remedy against judgments of the courts of first instance and is always heard by the next higher court.

Appeal judgments are subject to a second appeal. Second appeals are, however, not admissible against appellate judgments in interim proceedings for injunctive relief. If a party appeals only on legal grounds, a judgment of the entry court can be appealed directly at the second level of appeal, skipping the first appeal. The competent court for a second appeal is always the Federal Court of Justice.

10.3 Procedure for Taking an Appeal

The first appeal is only available to a party that is burdened by a judgment. It is only admissible if the value of the appeal exceeds EUR600. Otherwise, the entry court may allow an appeal by certifying its judgment for appeal. A first appeal is lodged with the appellate court by submitting a statement of appeal within one month of service of the full version of the judgment.

The grounds for appeal are generally set out in a subsequent written pleading, which must be filed no later than two months after service of the judgment, but may be extended. The appellee may then submit a written pleading defending the judgment appealed. If the appeal is inadmissible or if the appellate court finds that it has no chance of success on the merits and that an appellate judgment is not relevant for similar cases or for the development of the law, the appellate court dismisses the appeal by court order without an oral hearing, otherwise it will render a judgment after an oral hearing.

A second appeal is admissible if the appellate court expressly admits it in its judgment. Otherwise, the appellant may file a complaint against the refusal to grant leave for the second appeal within one month of service of the appellate judgment. Both the second appeal and the complaint are admissible only if the value of the second appeal exceeds EUR20,000. Complaints against the refusal to grant leave for the second appeal are usually unsuccessful.

10.4 Issues Considered by the Appeal Court at an Appeal

The purpose of the first appeal is the review of the judgment and the correction of any errors of law and fact made by the entry court. The appellate court is in principle bound by the factual findings of the lower court, unless these are erroneous. The appellant may base its appeal on concrete indications which cast doubt on the correctness and completeness of the factual findings in the judgment, a violation of procedural or substantive law, or – in very limited circumstances – new evidence, if such evidence could not have been provided in the first instance.

The second appeal is a review only on points of law. It is designed primarily not to obtain correct judgments in individual cases, but to render decisions on issues of law which are important for the entire system of justice. The Federal Court of Justice must accept the factual findings of the lower courts as correct in principle and will examine only whether the contested judgment is based on a violation of procedural or substantive law.

10.5 Court-Imposed Conditions on Granting an Appeal

The entry court cannot impose conditions on granting an appeal. A second appeal is only admissible if the appellate court expressly admits a second appeal in its judgment. An appeal on points of law is to be admitted if the legal matter is of fundamental importance for the further development of the law or if the maintenance of consistency in court rulings requires a decision of the Federal Court of Justice. The appellate court cannot impose any additional conditions for the granting of a second appeal.

10.6 Powers of the Appellate Court After an Appeal Hearing

The appellate court may dismiss or grant the appeal. If the appeal is granted, the appellate court will usually replace the judgment of the lower court with its own judgment. At the request of one of the parties, the appellate court may also remit the case to the court of first instance for further proceedings.

The Federal Court of Justice may decide the case itself if no additional fact finding is necessary. In many cases, however, the proper application of the law will require further factual findings by the lower courts. The Federal Court of Justice will then remit the case back to the lower court, which is bound by the legal analysis of the Federal Court of Justice on the legal issues which have been subject of the second appeal.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

As a rule, the party losing the case must bear all the costs of the proceedings. If both parties lose parts of the dispute, the costs will be allocated between the parties in proportion to win and loss.

In principle, the costs of the court and the attorneys are strictly linked to the amount in dispute. In relation to this amount, statutory law provides for specific fixed rates. A party can agree much higher billing rates with its attorney, which is common in complex commercial matters. However, in litigation, the winning party can only demand payment from the losing party of the sums calculated based on the fixed statutory rates. In arbitration proceedings, deviating agreements generally apply.

11.2 Factors Considered When Awarding Costs

The general, allocation of costs is linked to the proportion of win and loss between the parties. However, if one party caused additional costs, it will usually have to bear them. For equity reasons, certain exceptions may apply.

11.3 Interest Awarded on Costs

Upon request, the judicial officer orders interest on the reimbursable costs at a rate of five percentage points above the base rate from the date on which the cost application is submitted.

12. Alternative Dispute Resolution (ADR)

12.1 Views of ADR Within the Country

ADR has increasingly gained acceptance in the German business community, and there is a refined legal framework for ADR procedures under German law. The number of mediations in Germany may be positively influenced by the fact that more and more insurance companies include mediation in their legal expenses insurance. The recognition of mediation procedures is reflected, inter alia, in the fact that mediation procedures suspend the limitation period.

12.2 ADR Within the Legal System

As a rule, ADR proceedings are only conducted on a voluntary basis in Germany. The Mediation Act regulates the main features of the mediation procedure for private, out-of-court mediation. In civil proceedings, the trial judge may refer the parties to a conciliation judge appointed for this purpose; however, if the parties do not give their consent, the conciliation hearing is conducted before the trial judge as part of the normal civil proceedings.

12.3 ADR Institutions

Several German institutions promote ADR or offer a platform on which various forms of ADR can be pursued, eg, the European Institute for Conflict Management (EUCON). The German Institution of Arbitration (DIS) provides for a procedural framework in its Mediation Rules and a service infrastructure for mediation procedures.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

The German arbitration law is set out in the Tenth Book of the Code of Civil Procedure, which is modelled after the UNCITRAL Model Law. The arbitration law is based on the key principles of a successful arbitration, ie, party autonomy, and fair and efficient arbitral proceedings.

Parties can contractually agree that any institutional or other rules may also apply to the conduct of the arbitration. The DIS offers a set of rules (DIS Rules) recognising and implementing internationally developed standards.

Germany is a member state to the New York Convention 1958, the ICSID Convention, and other important international treaties. Especially the New York Convention 1958 allows for easy and efficient recognition and enforcement of foreign arbitral awards within the German legal system.

13.2 Subject Matters Not Referred to Arbitration

In general, any claim involving an economic interest is arbitrable under German law, as are non-economic claims if the subject matter of the dispute can be settled. Only a few subject matters cannot be referred to arbitration, such as criminal law matters, employment law disputes, certain aspects of family law such as divorce or the custody of minors, and disputes regarding tenancy relationships for residential accommodation in Germany.

13.3 Circumstances to Challenge an Arbitral Award

An arbitral award generally has the same final effect as a court judgment (res judicata). It can only be challenged under certain circumstances, which resemble Article V of the New York Convention and Article 34 of the UNCITRAL Model Law. These grounds for challenge are:

- a party's incapacity to conclude an arbitration agreement;
- the invalidity of arbitration agreement;
- a violation of the right to be heard;
- the subject matter is beyond the scope of the arbitration agreement;
- a failure in the composition of the arbitral tribunal;
- the subject matter is not arbitrable (see **13.2 Subject Matters Not Referred to Arbitration**); and
- the recognition or enforcement of the award would lead to a result contrary to public policy (ordre public).

The party seeking to challenge the arbitral award must file its request within a period of three months after having received the award, or within the time limit agreed by the parties. The court deciding on the challenge of the arbitral award cannot modify the award but can only set it aside or dismiss the request. Under appropriate circumstances the court can remit the case to the same arbitral tribunal for a new decision.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Domestic arbitral awards can be enforced under the Code of Civil Procedure upon application to the competent higher regional court. The request is not bound to any specific time limit, but to certain formal requirements. In principle the court decides upon the enforceability without an oral hearing by order. However, if the opposing party challenges the award, either by raising grounds for setting aside the award or objections that came into existence after the arbitral proceedings had been closed, eg, a set-off situation, an oral hearing must be held.

Foreign arbitral awards are to be recognised and enforced according to the New York Convention 1958, however the formal requirements of the New York Convention, such as submitting a certified translation of the arbitration agreement and the award, need not be fulfilled. The requesting party bears the burden of proof as to the existence of a valid arbitration agreement, and the court will rule on that question without being bound by the finding of the foreign arbitral tribunal. If the court denies enforcement, it cannot set aside the award but can only declare that it cannot be recognised in Germany. If the denial is based on a procedural defect which is subsequently remedied, a further application for recognition and enforcement is possible.

14. Outlook and COVID-19

14.1 Proposals for Dispute Resolution Reform

Several mass proceedings in recent years, as well as the COVID-19 pandemic, have challenged the traditional practice of individual paper file processing in court and face-to-face hearings in the courtroom. The digitisation of the judiciary is at the forefront of the reform discussions. In concrete terms, an online litigation tool will soon be tested on a voluntary basis for small claims with similar facts, in which the parties and the court only meet online. However, such online proceedings are highly controversial from a constitutional point of view. Furthermore, the possibility of recording the facts of a case in a structured manner in a basic online document, which is completed by both parties, is to be tested.

In the next few years, more commercial courts will be set up where commercial disputes can be heard in the English language. Currently, this is already possible at some courts such as Stuttgart, Mannheim, Frankfurt and Hamburg.

Further reforms are being intensively discussed at various levels, including by a working group on the “Modernisation of Civil Procedure” commissioned by the Federal Court of Justice and the Higher Regional Courts.

Consumer Rights Enforcement Act

With Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the “Representative Actions Directive”), which entered into force and is to be implemented by 25 December 2022, the EU has taken a further step towards cross-border consumer participation in civil actions. Under the directive, qualified entities may bring representative actions for injunctions and redress on behalf of a group of consumers against infringements of Union law harmful to consumers’ collective interests. Due to the possibility to obtain enforceable judgments, it offers a higher level of consumer protection compared to the current German model declaratory action (see **3.7 Representative or Collective Actions**). A new Consumer Rights Enforcement Act will implement the requirements of the directive, which introduces a new type of representative action for performance or damages applying to all disputes between consumers and businesses. As in the existing model declaratory action, which will be integrated into the new law, the opt-in principle will apply to this new representative action, ie, once a qualified institution has filed such a claim, each individual consumer can decide to opt in and apply for registration.

14.2 Impact of COVID-19

The German legislature has refrained from passing COVID-19-related legislation regarding civil procedure law. Pre-existing mechanisms in the Code of Civil Procedure and the Courts Constitution Act have proven to offer sufficient solutions to challenges arising from the pandemic.

In particular, during the COVID-19 pandemic, the possibility already contained in the Code of Civil Procedure to hold an oral hearing as a videoconference where only the court has to be present in the courtroom while the parties, their attorneys, witnesses and experts can be elsewhere, was given life. However, details are still controversial, such as whether attorneys who are abroad will be allowed to participate via video link. Witnesses who are located outside Europe may in principle not be examined by video. The recast EU Taking of Evidence Regulation No 1783/2020, which entered into force on 1 July 2022, allows, inter alia, courts in cross-border civil and commercial proceedings to hear witnesses, parties and experts who are in another member state by videoconference, on condition that the following provisions are met: the court considers this appropriate in the specific circumstances of the case; the person to be heard co-operates voluntarily; and the foreign member state authorises the examination, whereby a fictitious authorisation applies under certain conditions.

In November 2022, the German legislature introduced a bill to strengthen video hearings when all parties are located in Germany. Video hearings shall become standard. The bill also provides that the court does not have to be present in the courtroom anymore, and that the hearing may be recorded audiovisually.

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Pfitzner Legal is a specialised dispute resolution law firm in the heart of Frankfurt's Westend district. Two lawyers with decades of experience, together with a team of associates, professional support lawyers and paralegals, offer enhanced expertise in the resolution of complex commercial, corporate and professional negligence disputes through a unique blend of litigation capabilities, international arbitration experience, conflict management skills and legal informatics experience spanning a wide range of sectors, including financial services, energy, natural resources, construction, engineering, automotive, pharmaceutical, insurance and private equity. The firm, repeatedly mentioned in surveys as excelling in the quality of its services, is known for its capabilities in defending clients in collective actions as well as in handling international arbitrations.

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