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Germany

LITIGATION

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This country-specific Q&A provides an overview of litigation laws and regulations applicable in Germany.

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GERMANY
LITIGATION

1. What are the main methods of resolving disputes in your jurisdiction?

In Germany, the main methods of dispute resolution are litigation and arbitration, with about 1.2 million new cases per year in court proceedings. For commercial disputes, the path of arbitration is often chosen. In 2020, for example, there were about 160 new cases filed with the German Institution of Arbitration (DIS). Other arbitration institutions are also frequently chosen for international commercial disputes, most notably the ICC.

Alternative Dispute Resolution (ADR), such as mediation, has become more popular in recent years. Various institutions, such as the DIS, have issued mediation rules. However, especially in commercial disputes, ADR has not played a major role in German dispute resolution so far, although the civil courts are obliged to support the parties in the amicable settlement of their dispute in all procedural situations. Generally, this obligation is fulfilled by holding a conciliation hearing before the first oral hearing begins. Alternatively, the court may recommend mediation or other means of ADR to the parties.

2. What are the main procedural rules governing litigation in your jurisdiction?

The main principle that governs German civil procedural law is the idea of party autonomy: If the parties are free to enter into a contract, they must also be free to decide how to resolve disputes arising from their relationship. In accordance with this fundamental principle, the civil jurisdiction mostly understands itself as a service provider for dispute resolution mechanisms that disputing parties can make use of. The impact of this principle is reflected in a multitude of regulations in the German Code of Civil Procedure (ZPO).

For instance, it is to the disposition of the parties whether to initiate court proceedings, the scope of these proceedings and how the proceedings are to be terminated (principle of party disposition). Hence, to initiate civil proceedings, the plaintiff must file a statement of claim with the competent court – the court does not initiate proceedings itself. Furthermore, the court does not have the authority to award the party something it has not requested. Finally, the plaintiff is free to terminate the proceedings by withdrawing the application (see question 11).

It is up to the parties to produce the facts relevant to their case as the courts do not investigate (principle of production of evidence). The court will therefore only consider the facts presented by the parties and is bound by facts that are not in dispute between the parties. However, the legal opinion of the parties on certain facts – even if it is undisputed between them – does not have any binding effect on the court. It remains the task of the court to assess the facts presented by the plaintiff and the defendant from a legal point of view.

Closely related to the principle of production of evidence is the principle of oral argument. According to this principle, the court may only consider actions and arguments that are orally presented. However, it is sufficient if the parties refer to their written statements exchanged in preparation for the oral hearing (e.g. statement of claim, statement of defence, reply, rejoinder – see question 13).

3. What is the structure and organisation of local courts dealing with claims in your jurisdiction? What is the final court of appeal?

The German civil procedure law knows four different types of courts – local courts (Amtsgerichte, AG), regional courts (Landgerichte, LG), higher regional courts (Oberlandesgerichte, OLG) and the Federal Court of Justice (Bundesgerichtshof, BGH). The organisation of the judiciary and the structure of the courts are governed by the German Courts Constitution Act (GVG).

The local courts have first instance jurisdiction for disputes with an amount in dispute of up to €5,000 and

certain contentious matters listed in section 23 no. 2 GVG, irrespective of the value of the matter. The regional courts fulfil two functions. Firstly, they are courts of first instance for disputes exceeding an amount in dispute of €5,000 and for the contentious matters listed in section 71(2) GVG, regardless of the value of the matter. Secondly, the regional courts are the court of first appeal against decisions of the local courts. Higher regional courts are the appellate instance in cases where a regional court previously acted as court of first instance. The Federal Court of Justice has jurisdiction over appeals where regional courts or higher regional courts acted as courts of first appeal and is thus the final court of appeal. There are around 638 local courts, 115 regional courts and 24 higher regional courts.

In general, decisions of the courts of first instance are made by a single judge, while the courts of first appeal are organised in chambers and senates with three judges. The Federal Court of Justice as court of second appeal decides in senates with five judges.

4. How long does it typically take from commencing proceedings to get to trial in your jurisdiction?

Court proceedings are commenced by filing a statement of claim with the competent court which is served on the defendant without delay. The court decides whether it holds an advance first hearing for oral argument or preliminary procedure conducted in writing. Irrespective of this decision, the court sets a time limit of at least two weeks for the defendant to file a statement of defence. If the court decides to conduct written preliminary proceedings, it may instruct the parties to submit further documents. When the advance first hearing for oral argument has taken place or the court has collected sufficient facts through the preliminary proceedings in writing, it schedules the main oral hearing. The time periods between the individual procedural steps depend greatly on the complexity of the matter and the overall workload of the court.

As a result, between the filing of a lawsuit with the court and the first oral hearing, weeks to several months can pass. This period is actively used by the court to prepare the oral hearing to make it as efficient as possible.

The time between commencement and delivery of a judgement depends on the same factors. About half of the disputes before the regional courts are settled within 3 months of the filing of the case. As the complexity of cases usually increases when regional courts have jurisdiction (see question 3), this period is extended to about 6 months, with a further 30% of cases being settled between 6 and 12 months.

5. Are hearings held in public and are documents filed at court available to the public in your jurisdiction? Are there any exceptions?

As a rule, hearings in civil courts are public. There are exceptions in certain circumstances such as family cases and in cases with a legitimate interest in protecting a party's privacy or for security reasons. However, the judgement will always be delivered in public, but in anonymised form.

In contrast to the principle of public hearings, the documents submitted in the proceedings are not accessible to the public. Third parties may inspect the files only with the consent of all parties, or – if the parties do not consent – if they have demonstrated to the president of the court a legitimate interest in inspection.

6. What, if any, are the relevant limitation periods in your jurisdiction?

The most relevant limitation period is the standard limitation period of three years, which applies to all claims unless otherwise stated. It begins at the end of the year in which the claim arose and the plaintiff obtained knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or should have obtained such knowledge without gross negligence. 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.

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

In general, there are no mandatory pre-action conduct

requirements. However, under certain procedural conditions, the parties are obliged to seek mediation or conciliation before initiating court proceeding, or the parties may have contractually agreed to pursue means of ADR before entering court proceedings. In this case, the parties are precluded from commencing court proceedings until they have unsuccessfully pursued the agreed ADR procedure.

Nevertheless, it is standard practice to inform the other party of the intention to initiate court proceedings, by sending a warning letter, a demand for payment or a notice to the opponent or to initiate debt collection proceedings before initiating court proceedings. This can avoid possible cost disadvantages. Some pre-litigation 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 claim for interest.

8. How are proceedings commenced in your jurisdiction? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Proceedings are commenced by filing a statement of claim with the competent court. The statement of claim must contain the designation of the parties and the court, the exact information on the subject matter and the grounds for filing the claim as well as a precisely specified petition. Furthermore, it shall provide further information such as whether an attempt at mediation or any other procedure serving an alternative conflict resolution was carried out prior to the filing of the action and whether there are reasons that prevent such a procedure from being carried out.

In practice, a statement of claim usually already contains evidence and exhibits supporting the claim asserted as well as a legal assessment of the facts.

The statement of claim can be filed in written or electronic form. If the statement of claim is filed in writing, copies for each party need to be enclosed. A statement of claim filed electronically must meet certain requirements, such as a qualified electronic signature. Alternatively, it can also be filed by the party representative via their special electronic lawyer's mailbox (beA – see question 26).

The statement of claim must be served on the other party, effected by the court.

9. How does the court determine whether it has jurisdiction over a claim in your jurisdiction?

The court determines whether it has jurisdiction over a claim in accordance with the applicable rules on subject matter, international, local and functional jurisdiction.

As soon as a statement of claim has been filed with a court, the court is obliged to examine whether it has jurisdiction pursuant to section 13 GVG. If it affirms the admissibility of the legal action taken, this decision is binding on all other courts. If it does not consider itself competent, it refers the claim to the competent court

In matters with a connection to more than one jurisdiction (cross-border disputes), the court must determine its international jurisdiction. This determination is based either on EU law, in particular the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Ia Regulation) or the Lugano Convention 2007, or on the provisions on local jurisdiction contained in the ZPO.

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*).

10. How does the court determine which law governs the claims in your jurisdiction?

The applicable procedural law is determined by the principle of lex fori. The courts apply the procedural law of their own location. As a result, German courts do

always apply German civil procedural law if they have international jurisdiction (see question 9).

The applicable substantive law is determined by various rules of private international law (conflict of laws), which can be found in the Introductory Act to the German Civil Code (EGBGB) and in the Rome I and II Regulations. Pursuant to Art. 3 no. 1 EGBGB, the Rome I and II Regulations are to be given priority. The law applicable to contractual and non-contractual matters is therefore to be determined by these regulations. The regulations of the EGBGB thus only impact the determination of the applicable law in family, inheritance and property law matters.

11. In what circumstances, if any, can claims be disposed of without a full trial in your jurisdiction?

There are essentially two ways to terminate proceedings without a full trial.

Firstly, the plaintiff may withdraw their claim without the consent of the defendant before the proceedings have advanced to the oral hearing. If the proceedings have entered the stage of the oral hearing, the consent of the defendant is required. In both cases, the dispute is considered not to be pending.

Secondly, because of the general principle of party autonomy (see question 2), the parties may unanimously declare the matter terminated.

12. What, if any, are the main types of interim remedies available in your jurisdiction?

The ZPO essentially provides two main types of interim remedies – interim injunctions and attachment.

Interim injunctions aim to secure the subsequent enforcement of non-monetary claims. In addition, the applicant may also apply for an interim injunction for the provisional regulation of a legal relationship to avert considerable disadvantages for them. An application for an interim injunction has merit if the applicant can demonstrate to the satisfaction of the court that it has a claim for injunctive relief and a ground for injunction. The latter must justify the urgency of an interim injunction.

Attachment is a remedy to secure the enforcement of monetary claims by seizing the assets of the potential debtor or by arresting the debtor in person. The requirements are identical to the application for an interim injunction – demonstration of an attachment claim and a ground for attachment.

13. After a claim has been commenced, what written documents must (or can) the parties submit in your jurisdiction? What is the usual timetable?

Claims are commenced by filing a written statement of claim that usually already contains evidence, exhibits and statements of legal issues (see question 8). After the statement of claim has been served on the defendant, the defendant must notify the court within a statutory period of two weeks in writing if they intend to defend against the complaint. In addition, the defendant is given a period of at least two weeks to file a written statement of defence.

If the court deems it necessary, it may order the plaintiff to reply to the defendant's statement of defence and the defendant to file a rejoinder.

A period of at least two weeks must be allowed between the filing of the various pleadings. Depending in the complexity of the matter, these minimum requirements are usually exceeded. Moreover, the parties may request an extension of the time limits set by the court. Usually, these requests are granted. The timetable therefore highly depends on the particular matter and the capacity of the court, but also on the ability and willingness of the parties to submit the required documents in a reasonable period.

14. What, if any, are the rules for disclosure of documents in your jurisdiction? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

In contrast to many common law jurisdictions, German civil procedure law does not provide rules on mandatory disclosure of documents by the parties. Each party usually bears the burden of proof for the facts on which the party's claim or defence is based. 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.

This principle is occasionally mitigated by shifting the burden of proof, presumptions and claims for information. These exceptions serve to compensate for information deficits between the parties, especially in

the relationship between consumers and businesses.

In certain circumstances, a court may direct one of the parties or a third party to produce records or documents and other material in its possession to which one of the parties has made reference. However, German courts are very reluctant to apply this norm.

15. How is witness evidence dealt with in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

In general, the court summons a witness after a party has requested to hear the witness on the matter if it considers the disputed fact, for which witness evidence has been offered, to be relevant to the decision. Once the witness has been notified of this, they are obliged to appear in court.

Witnesses can only give oral evidence. In practice, the witness is primarily examined by the court, although the parties and their representatives may also ask questions. In the case of examination by the parties and their representatives, extensive cross-examination is usually inhibited by the court, due to the fact that the court decides on the admissibility of questions. In particular, questions that go beyond the subject matter of the examination outlined in the witness's summoning are inadmissible.

German civil procedure law does not allow depositions, as witnesses must testify orally.

16. Is expert evidence permitted in your jurisdiction? If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)?

Expert evidence is permitted by the ZPO. The role of an expert is to independently support and advise the court in matters in which the court does not have sufficient experience or knowledge. Therefore, experts are appointed by the court. The court may hear the parties before appointing the expert to propose a suitable expert. If the parties unanimously agree on an expert, the court is bound to this decision.

Unlike a normal witness, an expert witness may submit their findings orally or in writing. The decision is at the discretion of the court. If the expert is to appear in person before the court, they can be questioned by the parties like a normal witness (see question 15). The expert must prepare the expert report personally and may not pass it on to a third person.

In addition to the expert procedure, the parties may submit expert opinions commissioned by the parties themselves. However, these opinions are not considered independent expert evidence within the meaning of the ZPO, but part of the party's overall submission.

17. Can final and interim decisions be appealed in your jurisdiction? If so, to which court(s) and within what timescale?

Final decisions of local courts may be appealed to the competent regional courts. Such an appeal is admissible if the value of the subject matter of appeal is greater than €600 or the court of first instance has granted leave to appeal. Final decisions of regional courts may be appealed to the competent higher regional court under the same conditions. The court of first appeal reviews the final decision by the court of first instance in fact and law.

A final decision by the appellate instance may be appealed on points of law to the Federal Court of Justice. Such an appeal is only admissible if the court of first appeal grants leave to appeal. If the court of first appeal does not allow an appeal to the Federal Court of Justice, this refusal can be challenged before the Federal Court of Justice. Both the second appeal and the complaint against the refusal to grant leave for the second appeal are admissible only if the value of the second appeal exceeds €20,000. Complaints against the refusal to grant leave for the second appeal are usually unsuccessful.

Applications for first and second appeal must be filed within one month after service of the final judgement. The statement of grounds may be submitted within two months after service of the final judgement.

Interim decisions may be challenged by means of time-bound complaint or a complaint on points of law. The time-bound complaint is comparable to an appeal on fact and law, whereas the complaint on points of law is comparable to an appeal on points of law only. A time-bound complaint must be filed within two weeks of the interim decision with the court whose decision is challenged, or with the court hearing the complaint. A complaint on points of law must be lodged with the court hearing the complaint within a period of one month.

18. What are the rules governing enforcement of foreign judgments in your jurisdiction?

As a member state of the European Union, the recognition and enforcement of judgements from other EU member states is primarily governed by the Brussels Ia Regulation. Pursuant to Article 39 of this Regulation, a judgement given in a member state which is enforceable in that member state shall be enforceable in the other member state without the need for a declaration of enforceability. Enforcement of such a judgement may be refused only on strict and limited grounds, the most prominent being a violation of the ordre public in the member state addressed.

A judgement from a court of a state that is not a member of the Brussels Ia Regulation can be enforced according to different rules.

Firstly, the judgement may be covered by one of the many multi- or bilateral treaties between Germany and other countries. The Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial matters of 21 December 2017 (Lugano Convention) on the enforcement of judgements from Iceland, Norway and Switzerland is one of the most relevant treaties here.

Secondly, if the judgement does not originate from a member state of the EU and is not covered by an international treaty on the enforcement of foreign judgements, section 328 ZPO sets out the requirements for recognition. Pursuant to this rule, recognition is ruled out if (i) the courts of the state to which the foreign court belongs do not have jurisdiction according to German law; (ii) the defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in such time to allow him to defend himself; (iii) the judgement is incompatible with a judgement delivered in Germany, or with an earlier judgement handed down abroad that is to be recognised, or if the proceedings on which such judgement is based are incompatible with proceedings that have become pending earlier in Germany; (iv) the recognition of the judgement would lead to a result that is obviously incompatible with essential principles of German law, and in particular if the recognition is not compatible with fundamental rights; (v) reciprocity has not been granted.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side in your jurisdiction?

As a rule, the party that has not prevailed in the dispute has to bear the court costs and all costs of the litigation incurred by the prevailing party, insofar as they were necessary for the appropriate prosecution or legal defence. These include, inter alia, travel expenses of the party and their representatives, compensation for loss of time and, above all, the party's costs for instructing lawyers. However, costs for lawyers can only be reimbursed up to the rates of the Federal Lawyers' Fees Act (RVG).

Nevertheless, there are a few deviations from this rule. If the plaintiff withdraws its action (see question 11), it bears the costs of the litigation unless the court has given a binding decision on them or the costs are imposed on the defendant for any reason. If the parties unanimously declare the matter terminated (see question 11), so that no party prevails, the court shall decide on costs at its discretion, taking into account the circumstances and facts as well as the state of affairs so far. If each party has prevailed with part of its claim, the costs shall be set-off against each other or they shall be shared proportionally. Finally, the plaintiff shall bear all the costs if the defendant did not give cause for the action to be brought and the defendant immediately acknowledges the claim.

20. What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

German civil procedure law does not provide rules for class actions. In order to receive a judgement that is binding on more than one party, third parties may be joined in their proceedings (see question 21).

Only under certain and very limited circumstances can individual parties join court proceedings collectively.

One of these procedures is regulated by the Act on Model Proceedings in Capital Market Disputes (KapMuG). In cases where at least ten investors claim damages in connection with the same violations of information obligations by a company, the competent higher regional court can decide uniformly on points of law and fact. This decision is binding for the competent lower courts that decide on the individual claims of the investors against the company.

In 2018, model declaratory actions were added to the ZPO, creating a mechanism that gets closer to a

collective redress system. Under these regulations, qualified consumer entities may bring a claim against a company to determine the existence or non-existence of factual or legal prerequisites necessary for the consumers' individual claims against the company. To be admissible, the model declaratory action must be joined by least 50 consumers. To terminate the proceedings the parties can either reach a court settlement or obtain a court decision. A court settlement between the consumer entity and the company has a binding effect on the consumers, precluding them from bringing a new lawsuit on the same factual basis against the company. If the parties do not reach such a settlement, the court's decision on points of fact and law has a binding effect on the legal proceedings between a consumer who had joined the model declaratory action and the company sued. The consumer can avoid both outcomes by withdrawing from the model declaratory action, even after the parties have agreed on a settlement.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

Mechanisms for Joinder

The ZPO offers several mechanisms for joining third parties to ongoing proceedings.

Under certain circumstances, a third party may join the ongoing proceedings as plaintiff (active joinder) or defendant (passive joinder). In the case of a necessary joinder, the legal relationships between the third party and the parties to the proceedings are so intertwined that the court can only rule uniformly for all parties. A simple joinder may occur if the court considers it economically advantageous to decide on several independent lawsuits in one set of proceedings. In such a case, the parties remain independent of each other. The objective of such joinder is to avoid unnecessary efforts by combining proceedings and taking evidence. Most importantly, and in contrast to a necessary joinder, the court's decision does not have to be uniform for the different parties.

Both necessary and simple joinder of parties are admissible if the parties form a community of interests regarding the right at issue, if they are entitled or obligated for the same factual and legal cause and in the case of similar claims. Furthermore, a necessary joinder may be mandatory if it is determined by substantive law.

The ZPO also provides mechanisms that deal with involvements of a third party or the intervention of third parties.

Third-party interventions are most frequently carried out in support of a party to the dispute. Anyone who has a legitimate interest in one party prevailing over the other in a legal dispute pending between the parties may intervene in the proceedings in support of that party. The intervener may take actions in the proceedings and assert means of challenge and defense, unless such actions and proceedings conflict with or contradict the declarations or actions of the party that was joined.

Typically, a third-party intervention is the result of a third-party notice. Any party to a legal proceeding who believes it can assert a warranty or indemnity claim against a third party if the legal outcome of the pending proceedings is not in its favor may notify that third party of the pending proceedings. The notified third party may then choose to join the proceedings. If it chooses to join, it will be treated as if it had intervened in support of a party to the dispute. It can therefore support either party of the lawsuit, regardless of which party filed the notification. Regardless of the decision to join the proceedings, the court's judgement has a binding effect on the third party in any subsequent litigation by the notifying party against the notified party.

Mechanisms for Consolidation

Independent proceedings may be consolidated when multiple plaintiffs bring individual claims against one defendant or when multiple defendants are sued (subjective consolidation).

Where a plaintiff asserts several claims against the defendant in a single set of proceedings, the court may decide on these claims in one set of proceedings if the same court has jurisdiction over all claims and the claims are dealt with in the same type of proceedings (objective consolidation).

22. Are third parties allowed to fund litigation in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

In general, there are no restrictions on third-party funding in Germany. As a result, funding is provided in a variety of ways, and it is up to the individual parties to negotiate the details of their funding agreement.

Especially for private parties, legal expenses insurance is a common way of financing proceedings.

In addition, third-party funding of specific proceedings is

typically carried out in two ways.

The first way is that the funder and the party agree that the funder will receive a share of the amount awarded to the party if the party prevails in the proceedings. If the funded party does not prevail, the party is usually not obliged to reimburse the funder for its expenses.

Another means of litigation financing is the assignment of the claim to the funder. In this case, the funder brings the lawsuit in its own name. If the funder prevails in the lawsuit, it keeps part of the amount awarded. If the lawsuit was unsuccessful, the assignor incurs no additional costs. This kind of funding may be restricted by the Legal Services Act (RDG), as it may be considered a debt collection service requiring a license.

If the funder is not a party in the court proceedings, it cannot be held liable for costs incurred by the other side. Only if the funder sues for an assigned claim in its own name, it must bear the costs of the opposing party according to the general rules on costs (see question 19).

Due to the wide range of structuring options, many legal tech companies have recently entered the third-party funding market, making it more accessible to consumers.

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction?

So far, the COVID-19 pandemic has had a moderate impact on litigation in Germany.

The German legislator has not passed explicit COVID-19 related laws on civil procedure law. It considers the existing regulations sufficient to adapt to the current situation.

In the last reform of the ZPO in 2002, the German legislator added the option to conduct oral hearings by means of video and audio transmission. According to this, only the judge must be present in the courtroom, while the parties, their representatives, witnesses and experts can be at another location. That the judge must sit in the courtroom follows from the principle of publicity of the hearing, as the public is still entitled to be present at the hearing (see question 5). Until the outbreak of the COVID-19 pandemic, remote hearings hardly ever took place – inevitably, this has changed. However, the acceptance of remote hearings varies between courts and judges, but also between the parties involved and their representatives.

In addition to remote hearings, the Code of Civil Procedure allows courts to rule without a prior oral hearing and solely based on the parties' written statements and claims if the parties have agreed to this.

If a hearing is held in person, the presiding judge is obliged to maintain order at the hearing. This gives the court the power to issue and enforce orders to protect the health of all parties, including orders to wear protective face masks and to maintain the necessary social distance.

In addition, the rules on restoration of the status quo ante after missing a deadline and suspension of the limitation period in case of force majeure provide sufficient tools to respond to most delays that may arise from or in connection with a COVID-19 infection.

Due to the outlined set of rules, procedural delays in connection with the COVID-19 pandemic have remained limited.

24. What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

One could consider the fact that proceedings before German civil courts must be held in German to be the main disadvantage for international disputes. While more and more judges accept documents – especially evidence – filed in English, this is not standard practice and cannot be expected. The still frequently encountered need to submit translated documents into German increases the overall cost of the proceedings. Especially in more complex matters, where many documents need to be filed, this may become relevant for the parties. In such a case, arbitration could be considered the more attractive method of dispute resolution, as parties to arbitration can choose their preferred language of proceedings.

However, some regional courts have established chambers – mostly for commercial disputes – that can conduct proceedings on international disputes in English if the parties so agree (e.g. the regional courts of Frankfurt and Hamburg). In November 2020, Germany's first Commercial Court opened in Stuttgart and Mannheim, tailored specifically to the particularities and requirements of large-scale commercial disputes. To ensure that the entire legal dispute can be concluded quickly and to the highest standard, the Stuttgart Higher Regional Court has an appeals senate which offers the same advantages if an appeal is filed.

The prevailing advantage of conducting commercial disputes in a German court is the very high level of legal certainty and quality. This results from a well-structured court system that generally allows for appeals on multiple levels. Thus, decisions may be reviewed by different courts and different judges to ensure the correct interpretation of law and facts. Furthermore, the regional courts and higher regional courts usually provide for chambers specialised in commercial disputes.

25. What is the most likely growth area for commercial disputes in your jurisdiction for the next 5 years?

In May 2018, the EU General Data Protection Regulation (GDPR) came into force. Pursuant to Article 82(1) GDPR, any person who has suffered material or non-material damage as a result of an infringement of this regulation has the right to obtain compensation for the damage suffered from the controller or processor. In particular, the possibility of a claim for non-material damages was fundamentally new to German data protection law. As the implementation of the GDPR is still underway in many companies, further claims for damages based on a violation of the regulation are likely follow. This development is also favoured by the fact that the total volume of data collected, analysed and used by companies has steadily increased in recent years. Since a breach of data protection law regularly affects a larger number of consumers, subsequent litigation may be conducted by way of a model declaratory action. Therefore, the market for commercial dispute resolution in data protection has a high growth potential in the next five years.

Further potential for growth lies in ESG-related litigation. ESG (Ecological, Social, Governance) gives a name to the idea that companies and states need to consider environmental and social aspects (e.g., climate change, sustainability, child labour, human rights violations) when investing, implementing policies and building their supply chains. While ESG-related concessions were mere lip services in the past, new regulations and rising public awareness have led to enforceable obligations of companies. The recent German Law on Corporate Due Diligence in Supply Chains is just one of many examples of national and international legislation that may lead to an increase in ESG litigation. Moreover, not only individuals contractually associated with a company, but also third parties – namely NGOs – can file corresponding lawsuits, thus increasing the pressure on companies to comply with ESG-related regulations. The constitutional complaint against the Climate Protection Act of the Federal Republic of Germany supported by different NGOs and a lawsuit filed by the Consumer Organisation of Baden-Wurttemberg against Deka Investments are just two recent examples worth mentioning.

26. What, if any, will be the impact of technology on commercial litigation in your jurisdiction in the next 5 years?

The greatest impact of technology on commercial litigation is seen in the transformation of predominantly paper-based civil proceedings into predominantly digital proceedings.

To date, a majority of documents submitted by the parties and their representatives, as well as court orders and decisions, are filed by post or fax machine. It is expected that this will change within the next decade.

Since 2018, lawyers have been obliged to use a special electronic lawyer’s mailbox (beA) to receive, but not send, documents. This will change in January 2022, when it will become mandatory to file certain court documents in electronic form. There will be an even bigger change from January 2026, when the fully electronic case file (eAkte) will become mandatory for all courts in Germany. So far, the electronic case file has only been used on a voluntary basis.

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