

Dispute Resolution

Germany

I. INTRODUCTION TO GERMAN LAW**I.1. LEGAL SYSTEM**

As in most countries of central Europe the German legal system has its origins in the codification of the Roman Empire. Therefore, Germany with its codified system of binding statutes, is to be distinguished from the common-law countries such as England and the United States where judicial precedent mainly determines the legal system.

I.2 SOURCES OF LAW**I.2.1 Most Important Statutes**

Even though the idea of a codified system of legal rules dates back to the Roman Empire and certain principles of that era can still be found in the statutes of today, it is notable that the main areas of law are determined by statutes which date back just to the 19th and the beginning of the 20th. The most important pieces of legislation besides the “Grundgesetz” (the German constitution of 1949) are the “Bürgerliches Gesetzbuch” (civil code) from 1900, the “Zivilprozessordnung” (code of civil procedure) from 1877, “Handelsgesetzbuch” (commercial code) from 1897, the “Strafgesetzbuch” (criminal code) from 1871 and the “Strafprozessordnung” (code of criminal procedure) from 1877.

The significantly older “Bürgerlichen Gesetzbuch” and the commercial Laws were followed upon by the “Grundgesetz” in respect to liberty rights and the guarantee of principally free enterprise.

Despite the fact that these key statutes cover the main aspects of issues to be regulated by the law in a civil law jurisdiction such as Germany, there is the need to provide for additional statutes in more specific areas of law. There are for example statutes governing the law of the different types of corporations, intellectual property and insolvency, just to name some of them. All in all there are today about 2000 acts to pay regard to.

I.2.2 Secondary Sources of Law

Since the statutes consist to a large extent of words and phrases which describe the issue dealt with in an abstract way, it is very much the task of the courts to interpret these within their decisions. Although these decisions are only binding to the parties of that particular case, it is to stress that decisions (especially of the higher courts) are followed in regard to particular legal issues. Therefore it is very important in evaluating the chances and risks of a case not only to know the statutes but also the corresponding court decisions. Additionally, articles and literature mainly written by professors and lawyers are especially in the lesser known areas of practice of significant importance.

1.3 GEOGRAPHICAL SCOPE

In respect to the hierarchy of the legal system in Germany it is to point out that the most codification, the “Grundgesetz”, on the one hand sets forth the rights of the people under German jurisdiction as well as the structure of the German legal system including the basic structure of the law courts.

One level below the “Grundgesetz” are the federal laws which uniformly for all parts of Germany cover nearly all aspects of legal relationships between non- state entities and the main issues arising between the state and its citizens, whereas the state based legislation covers some specific aspects of the relationship between the state (Bundesland) and its people. The most significant result of this structure is that aside from some aspects of taxation it does not make any difference from a legal point of view where in Germany a firm or private person is located and wants to engage in business activities: The rules are everywhere the same.

1.4 INFLUENCE OF THE EU

In addition to Germany’s own laws more and more laws of the European Union are to be obeyed by its member states. This might happen on a direct basis when legal acts of the EU are directly binding to the member states and their citizens or when guidelines are set forth by the European Union and are to be transformed into national laws. Prominent examples are provisions which try to safeguard the rights of consumers in relation to enterprises.

2. ADMINISTRATION OF JUSTICE UND JUDICIAL FUNCTION

2.1 JURISDICTION

Generally spoken German courts have jurisdiction regarding all persons who are of German nationality or which stay in Germany. Therefore all actions be they of legal or factual nature, which take place in Germany, fall under German jurisdiction.

In cases, in which the conduct in questions goes along which any kind of contact to other countries the jurisdiction is governed by public international law whose specific rules are laid down in Germany in the EGBGB.

3. LEGAL PROCEEDINGS

3.1 COURT SYSTEM

As set forth by the German constitution, besides the Bundesverfassungsgericht (the federal constitutional court) there are only five federal courts permitted which are the highest courts of the particular major jurisdictions. These are:

- ordentliche Gerichtsbarkeit (ordinary jurisdiction which deals with civil and criminal cases);
- Verwaltungsgerichtsbarkeit (administrative jurisdiction);
- Arbeitsgerichtsbarkeit (employment jurisdiction);

- Sozialgerichtsbarkeit (social security jurisdiction);
- Finanzgerichtsbarkeit (tax matter jurisdiction).

In respect to the scope of the particular jurisdiction, the Ordinary Jurisdiction is the one which covers by far the most issues arising, especially if commercial activities of private persons or enterprises are concerned.

This jurisdiction contains 685 local courts (Amtsgerichte), 116 district courts (Landgerichte) as well as 24 courts of appeal (Oberlandesgerichte) and finally the supreme court (Bundesgerichtshof) in Karlsruhe.

3.2 CIVIL PROCEDURE

3.2.1 Ordinary action

Legal proceedings in civil matters with an amount in dispute up to € 5.000,00 start in general in one of the local courts – the remaining cases are to be brought before one of the district courts.

In any case regarding the recovery of debt it is possible to start with a so called “Mahnverfahren” (summary proceeding), which might bring about very quickly an enforceable title, but which on the other hand can be easily stopped and transferred to an ordinary litigation process by the defendant.

Actions to start proceedings

Legal proceedings in Germany start by filing a statement of claim addressed at the court having jurisdiction in the first instance. The statement of claim starts with identifying the parties and giving notice of their address, so that the court knows where to deliver the relevant documents to the opposite site.

Usually this is followed by short indication what the dispute is about and statement of facts which explains the setting, the actions in question as well as all additional facts which are necessary to support the aspects needed for the claim according to the statute on which basis the conviction is sought.

Additionally, the plaintiff must provide proof in support of his claims. Usual means of proof are documents (which are to be attached to the statement of claim in photocopy), witnesses (for which the plaintiff has to provide full name and address so that the court can order his appearance) and expert-witnesses (which gets selected by the court).

After the plaintiff has paid the court fees – which depend on the amount in dispute - the statement of claim, usually accompanied by a notification about the procedural orders of the court, is served to the defended.

The court has the choice to have very quick a court hearing, or to have the parties present their written arguments in depth. Either way the case is presented by the parties in at least one court hearing.

The court hearing

Having made a long term practice obligatory, in every civil case prior to the actual main hearing a court is supposed to help the parties find an amicable agreement to end the dispute brought to court. Hereby the judge usually points out the strong and weak points of the cases of both sides and makes a suggestion what kind of settlement might be appropriate. Especially in complex cases or if questions of crucial relevance can only be answered by an – usually expensive - expert witness, the question of procedural costs of several instances as well as the long duration of such proceedings will be taken into account in the end settlement.

In the actual court hearing each party has the right to make or repeat its argument even though it is very common that each party just refers to the written statements which have already been presented to the court. The intensity of the legal debate largely depends on the willingness of the judges to discuss matters in detail. A crosstalk between the parties is possible but usually focuses more on the facts than on the legal questions.

The truth and nothing but the truth

The code of civil procedure requires the parties to make no false statements and definitely not to present any incorrect documents as means of proof. Nonetheless, it is not forbidden to withhold some information and it is especially not required from one party to make statements or presents arguments which might be of help to the other side.

Therefore it is of crucial importance to evaluate, before entering a dispute, if all of the facts which are needed to win a case can be presented and proven.

Instances

Generally spoken every first decision of a German court can be brought to the next higher court for review. Notable exceptions are cases with a amount in dispute of under € 600 where the right to appeal depends on a corresponding decision of the court itself. Accordingly for a party to bring a case to the supreme court (Bundesgerichtshof) as a second-tier appeal it is either necessary to have an amount in dispute of at least € 20.000 or to have the second-tier appeal expressly admitted by the court of appeal (or have the case accepted by the supreme court).

Further more usually just the first instance deals with the facts of the particular case so that the court of appeal has the (widely used) right to refuse to take new such statements into account. Therefore it is important to introduce all relevant facts until the end of the court hearing of the first instance.

3.2.2 Interim proceedings

The German civil procedure code provides the possibility of preliminary relief if the applicant is able to persuade the court of the urgency of his motion. Means to support his case are mainly documents and affidavits. These must on the one hand show, that the applicant has a claim against the defendant and on the other hand that ordinary proceedings would endanger the enforceability of his claim due to the time taken until a title could be reached.

The result of preliminary proceedings can be reviewed in ordinary proceedings and can lead to significant claims of damages if the injunction is not upheld.

3.2.3 Proceedings based on documents

In addition to the common proceedings described above it is possible to file a suit on a documentary basis if it is possible to justify the claim solely with documents presented by the plaintiff (Urkundsverfahren). Even if an enforceable title can be the result of such proceedings very quickly and with very restricted possibilities for the defendant to support his case, it is possible to review the outcome in the further proceedings where all kinds of evidence are allowed.

3.2.4 Costs

The costs of trials under the German civil procedure contain the court fees, the lawyer fees of both sides as well as the costs of any kind of evidence such as in particular the costs of expert opinions. The costs are borne by each side in the proportion of winning and losing.

4. ARBITRATION

4.1 ARBITRATION IN GERMANY

Since the adoption of the UNCITRAL model law on International Commercial Arbitration in 1988, these provisions are the basis for domestic and international arbitration procedures taking place in Germany. As a result the attractiveness of arbitration has risen significantly even though litigation in Germany has been quite popular due to its efficient and relatively quick way of handling disputes.

4.2 NECESSITY OF AGREEMENT

The main principles of arbitration is that two or more parties agree upon having their dispute not settled by a court but by an third party. This agreement can either be made before the parties engage in certain activities or after a issue of dispute has come up. If it is not clear, if a valid agreement to have disputes settled by the way of arbitration exists, courts have to decide this question.

Of importance in respect to arbitration in Germany is the “Deutsches Institut für Schiedsgerichtsbarkeit” (German Institute of Arbitration), a registered non-profit organisation providing help and support in all issues arising in connection with arbitration.

Due to its rising popularity many organisations have also created entities to perform or at least to assist in arbitration procedures. These usually specialise in certain aspects of commercial conduct.

4.3 ADVANTAGES OF ARBITRATION

By determining which person(-s) should decide a dispute the parties can minimise the risk of having a person deal with issues he is not familiar with. Additionally the decision making process usually is much shorter than in common litigation proceedings and end regularly with an enforceable verdict accepted by German courts after it has been declared enforceable.

5. ALTERNATIVE WAYS OF DISPUTE RESOLUTION

Additionally under German law, everybody is free to agree upon ways to settle disputes. This freedom is only limited in areas where, by specific laws, certain procedures are required or if there exist overriding principles of public interest (i.e. divorce, adoption).

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