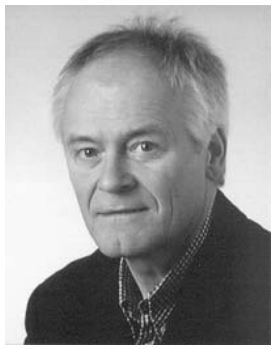
The Authors



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Also, Koch was Visiting Professor in several law schools in the US and actively participates in the staff exchange under the SOCRATES programme of the EU. He has published several books and numerous articles in the fields of Private International Law, Comparative Law, Civil Procedure, Contract and Tort, International Civil Litigation, and International Commercial Law.

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List of Abbreviations

AG	*Aktiengesellschaft* (Public Company/Stock Corporation)
All ER	The All England Law Reports
AnwBl	*Anwaltsblatt* (periodical)
ArbGG	*Arbeitsgerichtsgesetz* (Labour Courts Act) of 2 July 1979 (*BGBl*. 1979 I, 853, 1036)
BAG	*Bundesarbeitsgericht* (Federal Labour Court)
BB	*Der Betriebsberater* (periodical)
BayObLG	*Bayerisches Oberstes Landesgericht*
BerHG	*Gesetz über Rechtsberatung und Vertretung für Bürger mitgeringem Einkommen (Beratungshilfegesetz)* (Legal Advice Act) of 18 June 1980 (*BGBl*. 1980 I, 689)
BGB	*Bürgerliches Gesetzbuch* (Civil Code) of 18 August 1896 (*RGBl*. 1896, 195)
BGBl.	*Bundesgesetzblatt* (Federal Law Gazette)
BGH	*Bundesgerichtshof* (Federal Court of Justice)
BGHZ	*Entscheidungen des Bundesgerichtshofs in Zivilsachen* (Official law reports of the decisions of the Federal Court of Justice in Civil and Commercial Matters)
BR	*Bundesrat* (Federal Council)
BRAO	*Bundesrechtsanwaltsordnung* (Federal Statute on Attorneys) of 1 August 1959 (*BGBl*. 1959 I, 565)
BRAK	*Bundesrechtsanwaltskammer* (Federal Bar Chamber)
BVerfG	*Bundesverfassungsgericht* (Federal Constitutional Court)
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* (Official law reports of the Decisions of the Federal Constitutional Court)
BVerwG	*Bundesverwaltungsgericht* (Federal Administrative Court)
CMR	*Convention relative au Contrat de transport international de marchandises par route/Übereinkommen über den Beförderungsvertrag im internationalen*

List of Abbreviations

	Strassengüterverkehr of 19 May 1956 (*BGBl*. 1961 II, 1120)
Cons. L.J.	Consumer Law Journal
COTIF (Berne)	*Convention relative aux transports internationaux ferroviaires*/Conv. Concerning International Carriage by Rail
CPA	Certified Public Accountant
DRiG	*Deutsches Richtergestetz*/German Judges Act
ECHR	European Court of Human Rights/European Convention for the Protection of Human Rights
ECJ	European Court of Justice
Ed.	Edition/editor
EG	*Europäische Gemeinschaft* (European Community)
EGBGB	*Einführungsgesetz zum BGB* (*RGBl*. 1896 I, 604), consolidated version of 1 January 1986 (Introductory Act to the Civil Code)
EU	*Europäische Union* (European Union) since the Treaty of Maastricht of 7 February 1992
EuGH	*Gerichtshof der Europäischen Gemeinschaften* (European Court of Justice)
EuGVO	Verordnung (EG) Nr. 44/2001 über die gerichtliche Zuständigkeit und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (Brussels I Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters) of 22 December 2000 (O.J. EC 2001 No. L 12)
EuGVÜ	*Europäisches (Brüsseler) Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen* (Brussels Conventionon Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters) of 27 September 1968 (*BGBl*.1972 II, 773)
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht* (periodical)
EWG	*Europäische Wirtschaftsgemeinschaft*
FamRZ	*Zeitschrift für das gesamte Familienrecht* (periodical)
FGG	*Gesetz über die Angelegenheiten der Freiwilligen Gerichtsbarkeit* (Non-contentious Jurisdiction Act) of 20 May 1898
FGO	*Finanzgerichtsordnung*/Revenue Courts Act
Fn	*Fussnote* (footnote)
FS	*Festschrift* (publication in honour of)
GBO	*Grundbuchordnung* (Land Register Act) of 26 May 1994 (consolidated version, *BGBl*. 1994 I, 1114)
GDR	German Democratic Republic

GG	*Grundgesetz* ('Basic Code'/Federal Constitution) of 23 May 1949 (*BGBl.* 1949 I, 1)
GKG	*Gerichtskostengesetz* (Court Fees Act) of 15 December 1975 (*BGBl.* 1975 I, 3047)
GmbH	*Gesellschaft mit beschränkter Haftung* (Limited Liability Company)
GVG	*Gerichtsverfassungsgesetz* (Organization of the Courts Act) of 9 May 1975 (*BGBl.* 1975 I, 1077)
GWB	*Gesetz gegen Wettbewerbsbeschränkungen*/*Antitrust Act HausratVO 6th Durchführungsverordnung zum Ehegesetz* (Regulation for the Implementation of the Marriage Act) of 21 October 1944 (*RGBl.* 1944 I, 256)
HaustürWG	*Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften* (Door-To-Door Sales Act) of 16 January1986 (*BGBl.* 1986 I, 122)
HGB	*Handelsgesetzbuch* (Commercial Code) of 10 May 1897 (*RGBl.* 1897, 219)
HRC	(European) Convention for the Protection of Human Rights of 1950
IECL	International Encyclopaedia of Comparative Law
InsO	*Insolvenzordnung* (Insolvency Code) of 5 October 1994 (*BGBl.* I 1994, 2866)
IPR	Internationales Privatrecht
IPRax	*Praxis des internationalen Privat- und Verfahrensrechts* (periodical)
JA	*Juristische Arbeitsblätter* (periodical)
JZ	*Juristenzeitung* (periodical)
LG	*Landgericht* (Regional Court)
NJW	*Neue Juristische Wochenschrift* (periodical)
NJW-RR	*NJW-Rechtsprechungs-Report Zivilrecht* (periodical)
NVwZ	Neue Zeitschrift für Verwaltungsrecht
No.	Number
O.J.	Official Journal
OLG	*Oberlandesgericht* (Court of Appeal)
PatAnwO	*Patentanwaltsordnung* (Patent Attorneys' Act) of 7 September 1966 (*BGBl.* 1966 I, 557)
ProdHaftG	*Gesetz über die Haftung für fehlerhafte Produkte (Produkthaftungsgesetz)* (Product Liability Act) of 15 December 1989 (*BGBl.* 1989 I, 2198)
RPflG	*Rechtspflegergesetz* (Court Registrars Act) of 5 November 1969 (*BGBl.* 1969 I, 2065)
RGBl.	*Reichsgesetzblatt* (Law Gazette of the German Reich)
RIW	*Recht der Internationalen Wirtschaft* (periodical)
RSC	Rules of the Supreme Court (England)
RVG	*Rechtsanwaltsvergütungsgesetz* (Attorneys' Fees Act) of 5 May 2004 (*BGBl* I 2004, 718, 788)

List of Abbreviations

S.	*Sentence/Satz*
SGG	*Sozialgerichtsgesetz*/Social Courts Act
StBerG	*Steuerberatungsgesetz* (Tax Advising Act) of 4 November 1975 (*BGBl.* 1975 I, 1744)
StPO	*Strafprozessordnung* (Criminal Procedure Code) of 1 February 1877 (*RGBl.* 1877 I, 253, consolidated version of 7 April 1987 (*BGBl.* 1987 I, 1075)
UKlaG	Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößten (Actions for Injunctions Act) of 22 August 2002 (*BGBl.* I, 3422)
UmweltHG	*Umwelthaftungsgesetz* (Environmental Liability Act) of 10 December 1990 (*BGBl.* 1990 I, 2634)
UWG	*Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Code) of 7 June 1909 (*RGBl.* 1909, 499)
VerbrKrG	*Verbraucherkreditgesetz* (Consumer Credit Act) of 17 December 1990 (*BGBl.* 1990 I, 2840)
VwGO	*Verwaltungsgerichtsordnung*/Administrative Courts Act
Vol.	Volume
Warsaw Convention	International Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended at The Hague 1955 (*Warschauer Abkommen zur Vereinheitlichung von Regeln über die Beförderung im internationalen Luftverkehr vom 12. Oktober 1929, geändert in Den Haag* 1955, *BGBl.* 1958II, 291, 312 and 1964 II, 1295)
WPO	*Wirtschaftsprüferordnung* (Certified Public Accountants' Act)
ZEuP	*Zeitschrift für europäisches Privatrecht* (periodical)
ZPO	*Zivilprozessordnung* (Civil Procedure Code) of 30 January 1877, consolidated version of 12 September 1950 (*BGBl.*1950 I, 533)
ZVG	*Gesetz über die Zwangsversteigerung und die Zwangsverwaltung* (Execution and Sequestration Act) of 24 March 1897, consolidated version of 20 May 1898 (*RGBl.* 1898 I, 369,713)
ZZP	*Zeitschrift für Zivilprozeß* (periodical)

General Introduction

Chapter 1. General Background – Political and Legal System of the Federal Republic of Germany

1. The Federal Republic of (West-) Germany and the (East) German Democratic Republic were both founded in 1949 after the German '*Reich's*' defeat in World War II and after four years of occupation by the four allied powers (France, the UK, USA in the western and the Soviet Union in the eastern part).

The Federal Republic of Germany was constituted as a 'democratic and social federate State', Article 20(1) of the Federal Constitution '*Grundgesetz*' (*GG*), under the rule of law with separation of powers and constitutional guarantees. In contrast the German Democratic Republic conceived itself as a 'socialist State … under the leadership of the working class and its Marxist-Leninist Party', Article 1(1) of the GDR-Constitution of 1968/1974, i.e., without separation of powers and without judicial control of State authorities since the judiciary was not really independent, as 'a judge can only be who is truly devoted to the people and its socialist State', Article 95(1) GDR-Constitution.

2. After more than 40 years of separate political and legal life, in 1990 the first freely elected GDR-Parliament voted for 'accession' of the five newly founded East German '*Länder*' (States) to the West German Federal Republic under Article 23 *GG* (rather than for forming a new State via 'unification') on the basis of the West German political, legal and social-economic system. Thus, the GDR and its legal system nearly completely ceased to exist by 3 October 1990 (date of accession, now a national holiday) – except for some transitory rules keeping a very small number of former GDR rules/statutes in force. Most of them, however, lost their force altogether, regardless of their political bias, their age, or their quality. This is true for the law of civil procedure, too, and the administration of justice, including the Civil Procedure Code, the organization of the court system, of the bar and its rules. This nearly complete substitution of the legal system in East Germany was not only due to the political rhetoric of GDR's statutes (*see* e.g., Section 2(1) of the Civil Procedure Code of 1975: 'It is the courts' function to protect the socialist State and social order, to maintain and enforce legally guaranteed rights and interests, and to contribute to the advancement of socialist relationships in the social life of the citizens'). This, indeed, very promptly after the peaceful political change in 1989 called for changes in the legal system, too. But an initial conception of a thorough and comparative

evaluation of the respective laws with the understanding of developing a new legal order for both parts of Germany soon lost every support of the public. Then, for very practical political reasons, it was substituted by the nearly complete 'reception' of West German law in East Germany.[1]

1. A major reason for a complete reception of the West German law was the pressing time. No one wanted to invest a single Deutsche Mark in East Germany with the prospectus of facing legal uncertainty since there did neither exist any commercial nor company nor administrative law.

3. The GDR Civil Procedure code of 1976 (until then a modified version of the 1877 *Zivilprozessordnung/ZPO* of the German Reich was still in force) was characterized by two features typical for GDR legislation in civil law matters:

Firstly, the code was very short (some 200 Sections, as compared to 1048 in the *ZPO*). This was due to the fact that 'civil procedure' was pertinent only to a very limited field of private disputes. Commercial and economic disputes were administered by special tribunals. And many private conflicts like small claims and labour disputes did not go to court altogether before being screened by community and enterprise conciliation bodies.

Secondly, a very general and popular way of formulating the rules seemed to contribute to the shortness of the code.

The principles of procedure stood in sharp contrast to adversary proceedings and party responsibility, as socialist conflict resolution required a strong position of the courts in their function as State agents.

4. The German political and legal system today can be characterized by the concept of Article 20 *GG*: It is a representative democracy with the parliament consisting of the '*Bundestag*' (directly elected by the citizens under a proportional representation system) and the '*Bundesrat*' (indirectly elected chamber of the 16 *Länder* (States)). The principle of separation of powers laid down in Article 20(1), (2) *GG*, which applies at both the federal and State level is another salient feature. This results in a separation of the legislative, judicial, and executive functions (Article 20(2) *GG*). In respect to the division of authority between the federal government and State governments, the *Grundgesetz* gives priority to the constituent States. Original authority therefore lies with the States insofar as not expressly allocated to the federation (*Bund*) (Articles 30, 70(1) *GG*).

Frequently, however, a particular legal institution is a mixture of federal and State authority, e.g., the court system in civil matters with State courts at first instance and on appeal but with the federal court of justice (*Bundesgerichtshof*) for final appeals (*Revision*) in certain cases. But in fact, as regards to legislation, particularly in matters of private procedural and substantive law, federal law is dominant by virtue of the authority given to the federal government in Article 74 *GG*. In contrast, administrative functions are generally the responsibility of the States, although again the federation (*Bund*) is, according to Article 32 *GG*, in charge of foreign affairs and international treaties. Furthermore, the internal administrative and governmental structure of the States varies considerably because of different local legal traditions, the city States Bremen, Hamburg and Berlin being the most peculiar.

5. In the German legal system, statutes are the most prevalent source of law. This is not very surprising, as Germany historically belongs to the civil law-countries, deeply rooted in the Roman law-tradition, as opposed to the common law-countries.[1] Although a kind of convergence between civil and common law-traditions in the factual value of 'precedents' has been developing for many years, there is no doubt that the abstract-deductive method of the German legal tradition stands in stark contrast to the inductive thinking of the common law-method.[2]

1. *See* Zweigert/Kötz, *Introduction to Comparative Law*, 2nd ed. (transl. by Tony Weir), in German: *Einführung in die Rechtsvergleichung*, 3rd ed. 1996.
2. As to the convergence between common law and civil law from a historical point of view *see* Zimmermann, 'Historische Verbindung zwischen civil law und common law', in: *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Müller-Graff, Ed.), 1993, pp. 47 *et seq.* (both legal systems are originally rooted in the Roman law-tradition with a direct (German) in contrast to an indirect or hidden reception via ecclesiastical courts (English).

6. The German Federal Constitution, the '*Grundgesetz*', contains in its first part (Articles 1–19 *GG*) a number of classical basic rights ('*Grundrechte*'), like the guarantee of human dignity, equal protection by the law, freedom of religion, of speech, of movement and assembly, guarantee of private property, of economic and professional freedom. They are guaranteed to every citizen (some of them to German nationals only) who can challenge in court an alleged violation of these rights by public authorities,[1] even if the act is based on statutory authority: In these cases eventually an individual constitutional complaint (*Verfassungsbeschwerde*, Article 93(1) No. 4 a *GG*) lies with the Federal Constitutional Court (*Bundesverfassungsgericht*).[2]

Another important feature of the German legal system is the constitutional principle of a 'social State' (*Sozialstaat*, Article 1 *GG*) meaning the State's obligation to create and enforce a legal and economic order that protects the socially weak parts of society by arrangements of social security and labour law, landlord and tenant law, consumer law. In civil procedure this maxim requires special consideration of procedural disadvantages due to a weaker social status, e.g., through legal aid and representation.

Moreover, the independence of the judges is also laid down and guaranteed by the *Grundgesetz* (Article 97(1) *GG*) together with their obligation only to follow statutes and the law (Article 20(3) *GG*). 'The law' in the latter sense has a broad meaning and is aimed at preventing an unreflected application of statutes degrading the judicature to an uncritical follower of the legislature. The experience of the Third Reich, formally also a State governed by the rule of law, led to this explicit judicial freedom.[3]

1. So-called '*Rechtsweggarantie*' (guaranteed access to a court), Art. 19(4) *GG*.
2. As to the frequent use of this remedy in civil procedure matters *see* para. 40 *et seq.*, *infra*.
3. *See* Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 16th ed. 2004, pp. 145/146.

7. Initially, nearly all significant areas of the law (e.g., private law, commercial law, criminal law) were completely compiled in individual codes. Only enforcement procedure was frequently regulated by special laws. However, most of the great codes originated prior to 1900 (*GmbHG*: 1892, *HGB*: 1897, *BGB*: 1900) and the multitudinous changes and amendments which have been necessary since their enactment, have only been partially incorporated into the original codes. Otherwise,

they are contained in numerous special acts. As a result, the great codes are surrounded by a host of special statutes, e.g., for product liability (*ProdHaftG*) and environment liability (*UmweltHG*). Some of these special statutes have been integrated in the *BGB* recently, e.g. standard contract terms (the former *AGBG*, *now* §§ 305 *et seq. BGB*), door-to-door-sales (the former *HaustürWG*, *now* §§ 312 *et seq. BGB*), and consumer credit (the former *VerbrKrG*, *now § 491 et seq. BGB*). Awareness and understanding of these are necessary if one is to avoid false impressions about German law. In addition not only the legislature, but also the courts and legal scholars, have participated in the development of the law based upon the old codes. Their contribution has been the form of interpreting and filling in the gaps in the statutes. All in all, this development may be characterized by the attempt to achieve greater justice in an individual case.

Nevertheless, custom or usage constitute a source of legal norms only in the limited area of non-codified law which frequently occurs in commercial matters.[1] Of much greater importance is the judicial precedent (*Gerichtsgebrauch*) which results from a consistent line of court decisions. In contrast to customary law, judicial precedents are not legally binding upon the courts, not even upon those of the trial or lower appellate levels. Therefore, it has to be contrasted with common law countries where the doctrine of binding precedent (*stare decisis*) is the corner stone of the legal system. Nevertheless, as a matter of fact, it is only very infrequently that the German courts deviate intentionally from a consistent line of decisions. This is especially true as regards municipal courts (*Amtsgerichte*) and courts of first instance with extended competence (*Landgerichte*/regional courts). For this reason, judicial precedents play a very significant role in the German legal system despite their non-binding nature.

1. So-called '*lex mercatoria*' that is also very widespread in international commercial transactions. As customs and usages do not form part of the codified law the court does not apply them *ex officio* but the parties must have agreed upon them as forming expressly or implicitly part of the contract; exceptionally, such an agreement is tacitly presupposed in contracts for the international sale of goods according to Art. 9 CISG, *see* von Caemmerer/Schlechtriem-Junge, *CISG*, 2nd ed. 1995, Art. 9 Nos. 2, 3; apart from that § 346 *HGB*, a specific rule arising out of the general rule for interpreting contracts, prescribes that all contracts and acts or omissions of merchants have to be interpreted in the light of the respective trade customs and usages, *see* in detail Canaris, *Handelsrecht*, 22nd ed. 1995, pp. 239 *et seq.*

8. The legislative authority for enacting civil law norms is shared concurrently by the federation (*Bund*) and the States (Article 74 No. 1 *GG*). As the scope of this authority has been almost completely exhausted by federal legislation, State law is in fact of little significance except, e.g., in the area of agricultural law. Due to the inter-relationship of legal issues in recent legislation, a single statute often contains both private and public law norms.[1]

Last but not least, one should not forget the legislation of the EU in the form of regulations or directives that has, as in other Member States, generally priority over national German law.[2] Article 23 *GG* expressly gives the German federal government the power to participate actively in fostering the European integration through the EU. Civil procedure under the mandate of judicial cooperation in Article 65 EC-Treaty has become a field of growing European influence. It is not only in transnational litigation that European legislation supersedes domestic rules (*see infra* paras. 78 *et seq.* and 195 *et seq.*) Also, European law principles have an increasing impact on the

application of domestic procedural law as can be shown by the ECHR- and ECJ case law in various procedural areas.[3]

1. *See* e.g., the *Umwelthaftungsgesetz* ('Environmental Liability Act') or the *Strassenverkehrsgesetz* ('Road Traffic Act').
2. As to the delicate relationship between the legislation of the EU and the national law of the FRG notwithstanding *Costa* v. *ENEL*, Slg. 1964, 1251, *see BVerfGE* 37, 271 ('Solange I'); 73, 339 ('Solange II'); 89, 155, 209 *et seq.* (Maastricht-judgment).
3. *Cf.* U. Schmidt, *Europäisches Zivilprozeßrecht* (München 2004); Storme, *Rapprochement du Droit Judiciaire de l'Union Européenne – Approximation of Judiciary Law in the European Union*; Dordrecht, 1994; *id. Procedural Laws in Europe Towards Harmonisation*, Antwerpen 2003; Koch, *Einführung in das europäische Zivilprozeßrecht*, in: JuS 2003, 105.

Chapter 2. Delimitation of the Subject Matter

§ 1. Definition of the Term 'Civil Procedure'

9. The term 'civil procedure' denominates pursuant to German law all legal procedures that belong to the jurisdiction of the 'ordinary' civil courts. This excludes criminal and administrative matters.

In addition, the German law of 'civil procedure' has to be marked off in two directions:

First, there is no uniform court system and thus no uniform procedural law for all types of procedure, so that civil procedure only means litigation for private conflict resolution – although many cases also have a public interest aspect.

Secondly, the notion of civil procedure comprises two different phases: the first leading to the court's *finding* (decisions like a judgment, order, verdict) or to the parties' disposition before judgment (compromise and settlement) and the second meaning the *enforcement* of a court decision which in Germany is executed under the court's close supervision. As the vast majority of lawsuits never reach the enforcement stage, emphasis is laid on the finding phase – although the Code of Civil Procedure (*Zivilprozessordnung*, *ZPO*) in §§ 704 *et seq.* deals with the enforcement stage at great length (for some remarks on enforcement procedures *see* para. 187 *et seq., infra*).

§ 2. Distinction with Other Types of Procedure – Separate Court Systems and Rules of Procedure

10. Under German law there are six different types of procedure being followed in five separate systems of court organization: ordinary courts, labour courts, administrative courts, social security courts and tax courts.

11. (1) Traditionally, the 'ordinary courts' (*ordentliche Gerichte*) were the only ones being granted judicial independence in the sense of not being ordered to decide in a certain way by the executive ('rule of law' instead of 'cabinet justice' since the 1830s–1840s). The ordinary courts have jurisdiction in *criminal* and *civil* cases following different rules of procedure, but not necessarily being separated in personal and organizational terms. Whereas today the 'courts of ordinary jurisdiction' – although within a uniform court organization – usually are subdivided in criminal and civil divisions, not long ago at the first instance level many judges still sat as criminal court in the morning and civil court in the afternoon. Meanwhile the necessary degree of specialization leads to separate staffing in the criminal and civil divisions of the ordinary courts, – although this is not statutorily prescribed.

The distinction between a civil and a criminal case is fairly simple since the objectives of criminal law and criminal procedure law are the punishment of the wrong doer for violating the legal order without any financial benefit to the victim. Even if the wrong doer is finally ordered to pay a fine, the money does not reach the

victim but the State. Nevertheless, the code of criminal procedure (*Strafprozessordnung/StPO*) offers as an exception an ancillary procedure allowing a civil party to intervene in the criminal proceedings (*Adhäsionsverfahren*, §§ 403 *et seq. StPO*). Under this special procedure the victim can claim compensation from the wrong doer subsequent to the criminal verdict and the criminal court then has to decide a genuine private law claim. But in contrast to, e.g., France and Italy, this procedure does not play any significant role in Germany and is in practice, if exceptionally used, limited to simple claims in private law. In the great number of criminal cases, the injured party usually prefers a separate civil action in a more competent civil court of justice after the criminal court has delivered its judgment.[1]

There are two subjects dogmatically belonging to civil procedure over which special branches of the civil courts have jurisdiction and apply specific procedural rules:

(a) Family matters (*Familiensachen*), e.g., divorce and maintenance, and declaration of parenthood (*Feststellung eines Eltern-Kind-Verhältnisses*) and maintenance for minors (*Unterhaltssachen*) also belong to the jurisdiction of the civil courts. Nevertheless a specific set of rules in the 6th book of the *ZPO* (§§ 606–687 *ZPO*) applies, with the court having inquisitorial power (§ 616 *ZPO* '*Untersuchungsmaxime*').[2]
(b) Furthermore civil procedure is divided in 'contentious' and 'non-contentious jurisdiction'. The latter encompasses matters of a more administrative nature, e.g., registration of land transfers (*Grundbuchsachen*), appointment of a guardian for minors (*Vormundschaftssachen*), estates (*Nachlassachen*) or administration of the commercial register (*Handelsregister*) and the matrimonial property register (*Güterrechtsregister*). These issues are regulated in the Non-Contentious Jurisdiction Act (*Gesetz über Angelegenheiten der Freiwilligen Gerichtsbarkeit/FGG*). According to the *FGG* exclusive jurisdiction lies with the municipal courts and a more inquisitorial procedure than the strict adversary procedure under the *ZPO* applies.[3]

Within the 'normal' contentious civil procedure, the *ZPO* then distinguishes, as already briefly mentioned, between the finding procedure (*Erkenntnisverfahren*)[4] and the enforcement procedure (*Vollstreckungsverfahren*) (8th book of the *ZPO*, §§ 704–945). Parts of the enforcement procedure are special proceedings for interlocutory injunctions, either to secure the future enforcement of a judgment (*Arrest*, §§ 916–935 *ZPO*) or to regulate preliminarily endangered legal relationships (*einstweilige Verfügung*, §§ 936–945 *ZPO*).

Moreover, there are special rules for claims for a liquidated sum of money arising out of documents or bills of exchange (*Urkunden- und Wechselprozess*, 5th book of the *ZPO*, §§ 592–605a *ZPO*) to enable a very speedy trial by limiting the means for evidence and shortening the periods for summons.[5]

And, finally, collection proceedings (*Mahnverfahren*) for a liquidated sum of money are regulated separately in the 7th book of the *ZPO* (§§ 688–703d *ZPO*) with the municipal courts (§ 689(1) *ZPO*) or the labour courts (§ 46a *ArbGG*) having exclusive jurisdiction. The judicial payment order (*Mahnbescheid*) has in practice become very important since it is a fairly simple, cheap and quick collection proceeding.[6] The unique feature of such a '*Mahnbescheid*' is that it is being issued and served on the defendant by the court, i.e., prepared by the plaintiff and just

stamped by the court, without any examination of the merits of the claim (*see* § 692 I No. 2 *ZPO*).[7]

1. *See* Jauernig, *Zivilprozessrecht*, 28th ed. 2003, p. 14.
2. *See* in detail Jauernig, pp. 364 *et seq.*
3. In detail to the FGG *see* e.g., Habscheid, *Freiwillige Gerichtsbarkeit*, 7th ed. 1983.
4. Also called '*Klage*'- or '*Urteilsverfahren*'.
5. *See* Jauernig, *supra*, pp. 358 *et seq.*
6. There is an official with certain judicial powers (*Rechtspfleger*/registrar) in charge of the collection proceedings and not a judge unless the other party raises objections and the contentions proceedings are begun (§ 20 No. 1 *RPflG*), *see* Jauernig, pp. 360/361; very often collection proceedings are used before the normal court proceedings to interrupt the running of limitation periods (*see* § 204(1) No. 3 *BGB*) and to claim interest on the liquidated sum from the time of service of the order for payment (*see* §§ 286(1) S. 2, 288 *BGB*); however, if it is already visible from the beginning that the other party will contest the collection proceedings it could be quicker for getting a judgment to start normal court proceedings right away.
7. For contesting the payment order the defendant has to lodge an objection within two weeks (§ 692 I No. 3 *ZPO*), otherwise the plaintiff can apply for a writ of execution that will almost automatically be issued by the court § 699 *ZPO*). This short period of time for contesting such an officially unexamined claim causes particular problems for consumers who are often unaware of the serious results of a '*Mahnbescheid*', *see* Koch, 'Consumer Dispute Resolution – A Plea for the Improvement of Civil Procedure Rules in Germany and European Perspectives', *Consum.L.J.* [1995] 29, 32.

12. (2) Although labour law matters (*Arbeitsgerichtssachen*) are genuine private law they do not belong to the jurisdiction of the ordinary (civil) courts. Independent labour courts (*Arbeitsgerichte*) were set up in 1926 because of pressure by the unions and organized into a separate court hierarchy in 1953. These labour courts are sitting at first instance with one professional labour judge and two lay judges from the employers' and the employees' side have according to §§ 2 *et seq.* Labour Courts Act (*Arbeitsgerichtsgesetz/ArbGG*) exclusive jurisdiction over private law disputes between employers and employees in individual employment matters, or between unions or work councils (*Betriebsräte*) and employers in collective and enterprise matters (*Tarifverträge*, *Betriebsverfassungsangelegenheiten*).[1] An appeal on law and fact can be brought before the regional labour courts (*Landesarbeitsgerichte*) sitting in the same composition as the lower courts (§§ 8, 33–39, 64 *ArbGG*). On this level some form of representation is required although this could be done by a union or employers' representative (§§ 10, 11 *ArbGG*). A final appeal restricted to questions of law lies only with the Federal Labour Court (*Bundesarbeitsgericht*) in Kassel (§§ 8, 40–45, 72 *ArbGG*). The Federal Labour Court sits in senates of three professional judges and two lay judges. Only at this level must the parties be represented by attorneys.

1. *See* more in detail Jauernig, *supra*, pp. 19/20.

13. (3) Administrative courts (*Verwaltungsgerichte*), tax/revenue courts (*Finanzgerichte*) and social courts (*Sozialgerichte*) have exclusive jurisdiction in the respective areas, and their procedure is governed by separate statutes: Administrative Courts Act (*Verwaltungsgerichtsordnung*), Tax Courts Act (*Finanzgerichtsordnung*), and Social Courts Act (*Sozialgerichtsgesetz*).

The principles of these procedures are very similar as in these branches it is the administration (general, tax, or social security administration) that usually acts by

way of order and executes its actions without previous resort to the court system. So the defence initiative is left to the citizen who has to protect him- or herself by suing the administration. But access to these 'public law courts' usually requires exhaustion of preliminary (internal) administrative remedies (administrative procedure before non-judicial tribunals).[1]

Administrative courts deal with public law matters which are not purely constitutional matters and do not belong to social law or taxation (§ 40 *VwGO*). They deal with disputes between the public authorities and individuals (natural and legal persons) arising from the exercise of public authority. The first instance court for most actions is the Administrative Court (*Verwaltungsgericht*) sitting with three professional judges and two lay judge, although slight differences exist in Bavaria and Baden-Württemberg.[2] An appeal on questions of fact or law from the Administrative Court lies with the Higher Administrative Court (*Oberverwaltungsgericht*) which sits in senates of three professional judges with two lay judges in some *Länder* (§§ 46, 9 *VwGO*). A restricted appeal on questions of federal law only may be made to the Federal Administrative Court (*Bundesverwaltungsgericht*) in Leipzig.

1. *Cf.* Koch, 'Lessons from Administrative Procedures for Civil Procedure in German Law' in: Gilles (ed.), *Effiziente Rechtsverfolgung/Efficiency in the Pursuit of Justice*, Heidelberg 1987, pp. 77 *et seq.*
2. Exceptionally the Higher Administrative Court (*Oberverwaltungsgericht*) or the Federal Administrative Court (*Bundesverwaltungsgericht*) are the court of first instance, *see* §§ 45, 57, 48, 50 *VwGO*.

14. (4) The social courts (*Sozialgerichte*) are divided into specialist subject matter chambers and consist of one professional judge together with two lay judges (§§ 7–27 *SGG*). An appeal lies with the Higher Social Court (*Landessozialgericht*) sitting with three professional and two lay judges (§§ 29, 33 *SGG*). A final appeal restricted to points of law lies with the Federal Social Court (*Bundessozialgericht*) in Kassel (§ 39 *SGG*).

15. (5) Finally, tax or revenue courts (*Finanzgerichte*) deal with disputes arising out of tax, revenue, succession and customs law (§ 33 *FGO*), as regulated by the Revenue Courts Act (*Finanzgerichtsordnung/FGO*). As an exception to the otherwise three levels of courts, there are only two levels for revenue courts. A first complaint has to be filed with the relevant administrative authority which issues a decision which can then be challenged at first instance before a revenue court (§ 35 *FGO*). The revenue (finance) courts in general are composed of chambers of three professional and two lay judges (§ 5 *FGO*). Final appeals are restricted to questions of law and lie with the Federal Revenue Court (*Bundesfinanzhof*) in Munich (§ 115 *FGO*), which consists of senates with five professional judges each (§ 10 *FGO*); final appeals have to be admitted by the revenue court that decided the case beforehand or by the Federal Revenue Court (§ 115 *FGO*).

16. Although the system of five different hierarchies of courts seems to foster conflicting legal decisions and developments, this has not been the case in practice. This is inter alia due to the common chamber of the highest federal courts (*Gemeinsamer Senat*), consisting of the presidents and chairmen of the federal courts

who have to discuss and decide on points of law to avoid inconsistancy in important legal principles and also conflicting decisions (*see* Article 95(3) *GG*). Moreover, the highly specialized and decentralized court system in Germany is considered to have made justice more accessible. The highest (final) decisions are also well distributed throughout the country, thereby avoiding an overcentralization of legal affairs and one sided approaches from one school of thought.[1]

1. *See also* Foster, *German Legal System & Laws*, 2002, pp. 66/67.

Chapter 3. Sources of Civil Procedure Law

17. The German law of civil procedure has various statutory sources, thus the problem of which norms shall prevail must be solved. This is largely governed by three rules:

– first, federal law prevails over State law (Article 31 *GG*);
– second, constitutional norms take priority over ordinary statutes; and
– third, legislative enactments take precedence over regulations promulgated by administrative agencies pursuant to statutory authorizations.

The most important sources of law for ordinary civil proceedings besides the Code of Civil Procedure of 1877 (*Zivilprozessordnung/ZPO*) are the Constitution of Courts Act of 1877 (*Gerichtsverfassungsgesetz /GVG*), the Non-Contentious Jurisdiction Act of 1898 (*Gesetz über die Angelegenheiten der Freiwilligen Gerichtsbarkeit/ FGG*), the Insolvency Code of 1999 (*Insolvenzordnung/InsO*), the Federal Attorneys' Code of 1959 (*Bundesrechtsanwaltsordnung/BRAO*), the Registrars' Act of 1969 (*Rechtspflegergesetz*) and the Execution and Sequestration Act of 1898 (*Gesetz über die Zwangsversteigerung und die Zwangsverwaltung/ZVG*). These statutes have always to be applied according to the basic procedural principles and guarantees laid down by the federal constitution (e.g., *audiatur et altera pars*, Article 103(1) *GG*; equal treatment by the court, Article 3 *GG*, *see* in detail para. 40 *et seq.*).

Chapter 4. General Features of the Administration of Justice in Civil Matters

§ 1. General Characteristics of the Procedure

I. The Normal Course of Civil Proceedings

18. Civil proceedings can only be instituted by a plaintiff's complaint and never *ex officio* by a court. In the complaint, the plaintiff must allege that his or her rights have been encroached upon. Such an assertion is sufficient to support an action. The maxim '*ne eat iudex ultra petita partium*', i.e., the parties control the subject matter, applies in civil proceedings (§ 308 *ZPO*) – with the exception of an indeterminate action for non-material damages like pain and suffering, mental anguish etc.[1] The extent of judicial examination is therefore limited by the prayer for relief, i.e., the plaintiff determines by his or her complaint to what extent he or she demands legal redress. Consequently, the maintenance of the legal order in private law is substantially dependent upon the injured party vindicating his or her rights.

1. *Cf. BGH NJW* 1996, 2425: The court awarded € 25,000 although plaintiff had asked for 'reasonable damages for pain and suffering, at least € 12,800'.

19. A complaint is initiated by filing a written statement of claim (§ 253 *ZPO*) with the chosen court. Apart from designating the court, the parties, and the controversy, it must also allege the facts upon which the claims are based and indicate the supporting evidence (§§ 253, 130 Nos. 3 and 5 *ZPO*). Furthermore, the complaint must indicate the objective of, and the grounds for the claim and must also contain the specific request. The latter must, in the case of an enforceable claim (as opposed to an action for a declaration or for changing of a status), be so precisely formulated that in the event of a favourable judgment, it may be directly enforced according to the wording of the complaint.

In addition the plaintiff should qualify his or her claim in legal terms as well, i. e. identify its underlying legal principles, the statutes and rules supporting the claim. The court is not bound to the plaintiff's legal qualifications, however, since it must apply the law *ex officio* according to the still valid maxims from Roman law '*iura novit curia*' (the court knows the law) and '*da mihi factum dabo tibi ius*' (give me the facts, then I, the court, will give you the law).

Nevertheless, the court will not act until the plaintiff has paid the requisite court fees that are quite moderate and always in proportion to the amount-in-controversy. Thereafter the court has to prepare the case in order to reach a decision in one (main) hearing. The court can choose between an early first hearing (pre-trial conference, § 275 *ZPO*) or written preliminary proceedings (§ 276 *ZPO*). In either choice, it should prepare the matter in such a way that all evidence can be taken at the main hearing where all questions can be decided. The court can fix time limits, in particular for written replies, to prepare for an early first hearing (§ 275(1) *ZPO*). In the same way, the court may request the plaintiff to answer in writing the defendant's reply (§ 275(4)

ZPO). In any case, between the service of the complaint upon the defendant and the sitting of the court, the appropriate time for replying must be observed. In the courts of first instance with extended competence (*Landgerichte*/regional courts), this time limit is generally at least two weeks (§ 274(3) *ZPO*).

20. The oral and written hearing generally has to be conducted in German since this is the official language of the court (*Gerichtssprache*, § 184 *GVG*). So a time limit cannot be observed with a statement in a foreign language.[1] But the party who is not capable of speaking and/or writing in German also has the constitutional right to be heard before the court (Article 103(1) *GG*) and so the court has to give *ex officio* the advice to translate the statement. In addition a party who has missed a time limit because of language problems may apply for restoration of his or her original position (*Wiedereinsetzung in den vorigen Stand*).[2] In an oral hearing with a foreign party not capable of speaking German an official interpreter (§ 189 *GVG*) has to be present (§ 185 *GVG*). But the court is generally free to accept written documents in a foreign language without any translation.[3] In cases where the parties have to be presented by attorneys (*Anwaltsprozess*, § 78 *ZPO*) the court has the discretion to allow a foreign party statements in his or her own language (§ 187(2) *GVG*).

1. *See BGH*, *NJW* 1982, 532; Rosenberg/Schwab/Gottwald, *supra*, p. 129.
2. *See BVerfG* 40, 95, 100; *NJW* 1975, 1597; Rosenberg/Schwab/Gottwald, pp. 129/130.
3. *See BGH*, *NJW* 1989, 1432, 1433.

21. The fundamental objectives of the first instance court proceedings are that all facts relevant to the case shall be revealed and discussed, that these facts correspond to the truth, so that the dispute can be resolved in accordance with the legal order. It is not necessarily a court decision (judgment) that represents the goal of civil proceeding. The court must at any stage try to settle the case by agreement of the parties, thereby serving its function of restoring the social peace (*Befriedungsfunktion*, § 278 *ZPO*). Moreover, the predictability of the judgment and consequently legal certainty are just as important as the requirement of a speedy trial (*see* para. 32). A speedy trial was e.g., the objective of one of the most important reforms of the *ZPO*, the so-called 'acceleration-amendment' (*Beschleunigungsnovelle*) of 1976.[1] These objectives tend to find in practice partial realization in compromises of varying success.

1. As to the extent of the '*Beschleunigungsnovelle*', especially the preclusion of those allegations that were made too late *see* Jauernig, *supra*, pp. 113/114.

II. Basic Principles of Civil Proceedings

22. The procedure after the service of the complaint and the role of the parties and the court is dominated by the following basic principles or maxims:

– principle of party control (*Dispositionsmaxime*),
– principle of an adversary hearing (*Verhandlungs- or Parteimaxime*),
– duty of the parties to tell the truth (*Wahrheitspflicht*),

- principle of orality (*Mündlichkeitsgrundsatz*),
- principle of administration of justice in open court (*Öffentlichkeitsgrundsatz*),
- principle of immediacy (*Unmittelbarkeitsgrundsatz*),
- principle of the continuous hearing (*Grundsatz einer einheitlichen mündlichen Verhandlung*),
- principle of a speedy trial (*Beschleunigungsmaxime*),
- right to be heard/*audiatur et altera pars* (*Grundsatz des rechtlichen Gehörs*, *see* para. 40 *et seq.*),
- right to be tried by the 'lawful judge' (*Anspruch auf den gesetzlichen Richter*, *see* para. 45).

A. Principle of Party Control (Dispositionsmaxime)

23. As the basic rule of civil proceedings it is the parties who control the life history of a lawsuit and its subject matter. Whether at all and what kind of legal proceedings are being instituted is, under the German law of civil procedure, at the disposition of the individual. The plaintiff determines with his or her complaint the matter in controversy. However, the *ZPO* demands that the plaintiff do more than generally stating his or her claim. He or she has to specify precisely what kind of relief is being sought based on particular facts. Consequently, a complaint without a distinctive claim or petition, lacks an essential element (§ 253(2) No. 2 *ZPO*) and will be rejected by the court as incomplete and therefore inadmissible. This harsh result is due to the major advantage of a distinctive claim as it cuts down the matter in dispute and eases the role of the defendant and the court. Moreover, the court is bound by the plaintiff 's claim and may not render a judgment that goes beyond it (§ 308(1) *ZPO*: '*ne eat iudex ultra petita partium*').[1]

Furthermore, the parties do not only control the start of civil proceedings but also thereafter its future life. The court has to yield even its hearing schedule to party agreement: The plaintiff may withdraw his or her complaint entirely (*Klagrücknahme*, § 269 *ZPO*), the parties may settle their dispute (*Vergleich*),[2] the defendant may acknowledge (*Anerkenntnis*, § 307 *ZPO*) or waive the claim (*Verzicht*, § 306 *ZPO*), and the defeated party may launch an appeal (if admissible). This freedom is only exceptionally restricted when there might be clashes with the substantive law, particularly in the case of family law (matrimonial) disputes and litigation involving the legal status of a child, acknowledgement and settlement in court are then inadmissible (§§ 617, 640(1) *ZPO*).

1. *See* already *supra* note 18; the court may certainly grant the plaintiff less than claimed; in practice it is also quite common and admissible that the court gives according to § 139 *ZPO* a hint to alter the claim if it is not distinctive enough, *see* Jauernig, *supra*, p. 85.
2. The parties can either settle the dispute in or out of court. A settlement in court has the same power as a judgment and can therefore also directly be enforced (§ 794(1) No. 1 *ZPO*, *see* Zöller-Stöber, *Zivilprozessordnung*, 24th ed. 2004, § 794 *ZPO* Nos. 3 *et seq.*

B. Principle of an Adversary Hearing (Verhandlungs- or Parteimaxime)

24. As far as the responsibility for fact-finding is concerned, German civil procedure generally adheres to an adversarial system which is reflected in the *principle of party control* over allegations and proof (*Verhandlungs-/Beibringungsgrundsatz*). The opposite principle of judicial investigation (*Untersuchungsgrundsatz*), pursuant to which the judge takes the initiative *ex officio* in discovering the relevant facts, applies only exceptionally in family law (domestic) disputes or those involving the legal status of a party.[1] So the civil procedural law reflects the general constitutional principle of the autonomy and responsibility of the individual with subsidiary help in cases where the interest of the public prevails because of the need for the continuing welfare of society as a whole.[2]

1. *See* § 616(1) *ZPO* for matrimonial proceedings as an example for the exceptional inquisitorial approach: 'The court may also *ex officio* order the taking of evidence and may after having heard the spouses rely also on facts that were not alleged by them'; moreover §§ 640 *et seq. ZPO*, in detail to those proceedings Jauernig, *supra*, pp. 364 *et seq.*, 373 *et seq.*
2. *See BVerfGE* 4, 16; Jauernig, *supra*, p. 98.

25. As it is the duty of the parties to disclose all relevant facts, the court must not take facts into account in the judgment which the parties have not alleged. Moreover, only those facts need to be proved that the opponent has challenged. Thus facts which are admitted or have remained unchallenged will be taken into account in the judgment without further examination as being 'true' (§§ 288, 138(3) *ZPO*). Nevertheless, the principle of party control or adversary procedure does not permit so-called 'fishing expeditions' which are designed to discover facts which might usefully be alleged. The borderline between the two kinds of allegations is often blurred.

26. A particularly difficult problem is how far a court may, or even must, take judicial notice of facts which have *ex officio* come to its knowledge. Another problem comes up when the court believes, after checking the complaint or reply, that the relief or defence sought is not covered by the alleged facts respectively. In those cases, if the court wishes to take such facts into consideration, it is bound to advise the parties accordingly and in due time (*Richterliche Hinweispflicht*, § 139 *ZPO*) which is an exception to the adversary system. However, this duty to advise the parties is used very restrictively where the party in question is represented by an attorney.[1] It has also to be mentioned that the administration of the court's duty to advise the parties as stated in § 139 *ZPO* varies considerably from court to court. The guiding principle of the court's duty to assist the parties is to prevent new, additional litigation and to achieve a somewhat economical procedure (*Prozessökonomie*). This principle is limited by maintaining the independence of the court, i.e., it must not lead to a one-sided assistance in favour of one party.[2]

1. *See BGH*, *NJW* 1984, 310; *NJW* 1989, 171; Jauernig, *supra*, pp. 77, 82.
2. Otherwise the other party may object to the judge on grounds of interest, *BVerfGE* 52, 154.

C. *Duty of the Parties to Tell the Truth (Wahrheitspflicht)*

27. The principle of party control is limited by the duty of the parties to tell the truth and to allege all relevant facts completely (§ 138(1) *ZPO*). Although § 138(1) *ZPO* states a duty, there is no immediate sanction or means to enforce a breach of this duty. Furthermore the duty to tell the truth does not mean that a party must investigate the truth of any fact before alleging it since it is the task of the court to evaluate the factual basis after having heard the evidence (*see* § 286 *ZPO*).[1]

However, if one party alleges a fact knowing positively that it does not correspond with the truth and the court learns about it, this will be disadvantageous when the court evaluates the evidence.

Part of the duty to tell the truth is the duty to disclose completely all relevant facts (§ 138(1) *ZPO*). This duty shall prevent one party from holding back relevant facts, even if those facts are unfavourable.[2] But this duty is also limited since a party is not bound to disclose facts that might lead to a criminal prosecution, shed an unfavourable light on him or her, or may enable the opposite party to file a counter-claim.[3]

1. *See BGH*, *BB* 1964, 150; *NJW* 1971, 284 *et seq.*
2. *See BGH*, *NJW* 1961, 828.
3. *See* Jauernig, *supra*, p. 102.

D. *Principle of Orality (Mündlichkeitsgrundsatz)*

28. Another maxim of civil proceedings in Germany is the principle of orality, a maxim with many exceptions because it is not regarded as the choice between either oral or written proceedings but rather as a matter of convenience. Therefore, those parts of civil proceedings are required to be in writing and need to be readily at hand at a later stage because they determine the matter in controversy, i.e., the complaint (§ 253(5) *ZPO*), all kinds of appeal or redress (e.g., § 519 *ZPO*) and the judgment itself (§ 313 *ZPO*).

Nevertheless the hearing before the court is oral (§ 128(1) *ZPO*) and although numerous trial matters must first be put into writing, it is the oral statements delivered during the proceedings which are, in theory, only determinative. An oral argument is also essential (*notwendige mündliche Verhandlung*) since a judgment must not be delivered unless there has been an oral hearing. Notwithstanding the advantages of oral proceedings – quick clearing of the main issues with oral arguments, getting a personal impression of the parties and the evidence – the practice of many courts will sometimes deviate considerably from this principle. The parties may, with the court's permission, rely almost entirely on their preparatory written statements (§ 137(3) *ZPO*). Moreover, the court may order written proceedings in specific cases, if the parties agree (§ 128(2) *ZPO*). In addition, only the written statements form the basis for the judgment in default-proceedings (§ 331a *ZPO*)[1] and the special collection proceedings (*Mahnverfahren*, §§ 688 *et seq. ZPO*) are entirely written. As the principle

of oral proceedings is not constitutionally guaranteed the said exceptions are only regarded as an exceptional but valid break-through of the basic rule in § 128(1) *ZPO*.[2]

1. Further examples for a written civil proceeding are §§ 307(2), 331(3) *ZPO* and for a judgment based on the written statements (*Entscheidung nach Lage der Akten*) §§ 251a, 331a *ZPO*.
2. *See BVerfGE* 15, 307; Jauernig, *supra*, pp. 104/105.

E. Principle of Administration of Justice in Open Court (Öffentlichkeitsgrundsatz)

29. The principle of administration of justice in open court (§ 169 S. 2 *GVG*) allows the court only in exceptional cases to order the exclusion of the public from the trial or in part thereof in the interests of public order, especially when safety of the State may be endangered, or public morals corrupted. The public may further be excluded in an individual case if important business or industrial secrets may be disclosed and the owners prejudiced (§ 172 Nos. 1, 2 *GVG*), or if facts in family life of either the parties or the witnesses require discussion and proof (§§ 171b, 172 No. 3 *GVG*). Because of the latter reason the public is generally excluded from the hearings in family and custody matters (§ 170 *GVG*). But the public must always be admitted when the court delivers its judgment (§ 173(1) *GVG*), unless it is excluded by a special order when the reasons for judgment are given. Such special orders may be made on the same grounds as would justify the exclusion of the public during the trial (§ 173(2) *GVG*).

As the administration of justice in open court fulfils the essential purposes of controlling the judiciary and maintaining the trust of the citizens into the courts, any violation thereof is an absolute ground for appeal (*absoluter Revisionsgrund*, § 547 No. 5 *ZPO*). However, it has to be pointed out that the principle of administration of justice in open court is only known for the contentious side of civil proceedings whereas there is no such rule for the non-contentions side. Nowadays it has become questionable whether this ancient rule may also serve as a 'floodgate' for direct transmissions out of the courtroom to the public via television or radio. Despite on-going discussion about it, this modern problem is decided by § 169 S. 2 *GVG* which states that recordings during the hearing are not permitted for television or radio.[1]

Apart from that, the parties have the right to receive official information on acts and allegations of the other party and the court (open administration of justice for the parties/*Parteiöffentlichkeit*)[2] in any case. Moreover, the parties may demand access to the files of the court in their respective case (§ 299(1) *ZPO*).

1. *See* Jauernig, *supra*, pp. 105/106.
2. *See BGH*, *NJW* 1961, 363.

F. Principle of Immediacy (Unmittelbarkeitsgrundsatz)

30. The principle of immediacy means that the oral hearing has to take place before the same court that renders the judgment (§§ 128(1), 309 *ZPO*). This principle applies

in particular to the taking of evidence as only the judge who was personally present at the taking of evidence may render a judgment (§ 355 *ZPO*).

The purpose of this maxim is to make sure that the court that makes the final decision gets the chance to hear and see the parties and the evidence/witnesses (experts) *in personam*. It is widely known from experience that in doubtful or complicated questions of fact only the personal appearance and impression of a person may give the hint for the 'right' decision. The principle of direct proceedings is also a prerequisite for the court taking responsibility for the respective decision because each member of the panel has, on the end seen the 'whole picture' of the case.[1] Therefore, e.g., the taking of evidence has to be repeated if one judge of the panel becomes ill.

1. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 516.

31. Nevertheless, there are three statutorily fixed exceptions to the principle of immediacy: the commissioned judge (*beauftragter/kommissarischer Richter*), the judge requested to grant assistance (*ersuchter Richter*), and the presiding judge of a commercial court (*Vorsitzender Richter einer Kammer für Handelssachen*):

The commissioned judge is a member of the panel to whom certain official acts are transferred based upon a decision of the whole panel (§ 361 *ZPO*). This is allowed mainly for taking evidence (§§ 355, 372(2), 375, 402, 451, 479 *ZPO*), making an attempt at reconciliation (§ 278(1) and (5) *ZPO*) and conducting a hearing in marriage and parent and child cases (*Ehe- und Kindschaftssachen*, §§ 613, 640 *ZPO*). A judgment rendered by the commissioned judge exceeding his or her powers is null and void.[1]

Also, because of practical reason, it is allowed that the court asks another court under the notion of judicial assistance (*Amtshilfe*) for cooperation in taking evidence (§§ 355, 362, 365, 372(2) *ZPO*). This may be done according to § 375(1) *ZPO* where e.g., the witness is either prevented by illness to appear in front of the court or lives too far away.[2] The judge requested to grant assistance always belongs to the local court (*Amtsgericht*, *see* §§ 156 *et seq. GVG*).

Finally, the presiding judge (*Vorsitzender Richter*) of a commercial court (*Kammer für Handelssachen*) at the regional court (*Landgericht*) (§ 349(1) S. 2 *ZPO*) and the judge sitting alone (*Einzelrichter*) at the appellate court (*Berufungsinstanz*) (§ 524(2) S. 2 *ZPO*) are allowed to take evidence without the other members of the panel.

1. Jauernig, *Das fehlerhafte Zivilurteil*, 1958, p. 31.
2. It also presupposes that the requesting court can draw its conclusion from another judge's findings without being personally present, *see* Thomas/Putzo, *Zivilprozessordnung*, 26th ed. 2004, § 375 *ZPO* Nos. 3–5.

G. Principle of a Speedy Trial (Beschleunigungsmaxime)

32. A speedy trial has been one of the major goals of civil proceedings for a long time and was therefore the reason for many reforms. However, the meaning of a speedy trial is doubtful. Moreover, too much speed involves the danger of doing injustice to the parties by offering only quick and shallow solutions (judgments)

instead of searching for the well-founded 'just' settlement of a dispute. The delay or protraction of a case either by the legislative, the parties, or the courts, presents a serious problem for the administration of justice and can even violate Article 6(1) *EurCHR* which gives everyone the right to be heard in due time.[1]

The ideal picture of civil proceedings is a single date consisting of the oral argument, the taking of evidence and the rendering of the judgment. Such a concentrated procedure has been the goal of all four major reforms of the *ZPO* (1924, 1933, 1976 and 2002) so that the principle of a speedy trial adheres to the maxim of a concentrated procedure (*Konzentrationsmaxime*) found in § 272(1) *ZPO* (*Haupttermin*/principle hearing). Within the *ZPO* there are several inbuilt accelerators to transform this ideal picture into practice:

1. As to the adequate degree of a speedy trial according to Art. 6(1) *EurCHR see ECHR*, *NJW* 1984, 2749 *et seq.*; 1989, 650, 652 *et seq.*

1. Preparation of the Main Hearing by an Early Oral Hearing or Written Preliminary Proceedings

33. The judge, or in the case of a court panel, the presiding judge may according to § 272(2) *ZPO* choose in his or her discretion either an early first hearing (*früher erster Termin*) or written preliminary proceedings (*schriftliches Vorverfahren*) to prepare the proceedings for a single main (oral) hearing. Actually no preference of the courts either in favour of the early oral hearing or the written preliminary proceedings can be found in practice. To be sure the whole proceedings can already be brought to an end during the preliminary proceedings, e.g., in the case of an early first hearing by a settlement in court, a default judgment against the defendant (*Versäumnisurteil*, §§ 331(1), (2) *ZPO*) or even a final judgment.[1] In the case of written preliminary proceedings the defendant may admit the claim and the plaintiff can then apply for a judgment based on the defendant's acknowledgment (*Anerkenntnisurteil*, § 307(2) *ZPO*). The proceedings can even be ended by a default judgment without an oral hearing if the defendant does not show within two weeks after service of the complaint that he or she wishes to contest the claim (§ 331(3) *ZPO*).

1. As to a final judgment already in the early first hearing *see BGHZ* 88, 182.

2. Timely and Complete Preparation of the Main Hearing by Written Statements of the Parties

34. Even where the court does not opt for any preliminary proceedings, (§ 272(2) *ZPO*) the parties are supposed to prepare the main hearing through their written statements. In particular the defendant has to file a written reply within the time set by the court (§§ 275(1), (3), 276(1) S. 2, 277(1)–(3) *ZPO*). If the defendant fails to comply with it he or she is later barred from any additional submissions (so-called *Präklusion*, § 296(1) *ZPO*). The court can also set time limits for further submissions

of the plaintiff (§ 275(4) *ZPO*) and to solve controversial (factual) issues that have so far remained unclear (§ 273(2) No. 1 *ZPO*).

3. General Duty of the Parties to Expedite the Proceedings and Preclusions

35. The parties are obliged to bring their motions and submissions during the oral hearing as early as possible. This is determined by the standard of a diligent person in conducting and promoting a case (§ 282(1) *ZPO*). Although the former obligation of either party does not amount to a duty to submit virtually everything that could perhaps be relevant, neither party should withhold his or her submission until the very end of the oral hearing(s). If the admission of such late presentations would delay the settlement of the case and the delay was not excused sufficiently the admission can be denied (§ 296(2) *ZPO*). This rather harsh rule is justified because it does not only prevent a protraction of the case being disadvantageous for the other party but it expedites civil proceedings, thus serving the public interest.

4. Duty of the Court to Promote the Proceedings

36. From the court's duty to investigate the matter and to ask the parties accordingly (*richterliche Frage- und Aufklärungspflicht*, § 139 *ZPO*) and the specific duty to prepare for one principal hearing (§§ 273, 275(2) *ZPO*) stems the general duty of the court to promote the proceedings (*Prozessförderungspflicht des Gerichts*[1]). An important practical feature of this duty is the court's option to set time limits for the parties to amend or clarify the preliminary written statements (§ 273(2) No. 1 *ZPO*). In addition the court may according to § 273(2) No. 3 *ZPO* order the personal attendance of the parties during the oral hearing which is sensible in cases where clarification of circumstances is required.[2] In preparing the oral hearing the court has the power to order the presentation of documents by the parties at the oral hearing or to ask public authorities for information or documents by virtue of § 273 *ZPO*. This evidence enables the court, during the hearing, to switch without any interruption or delay to the taking of evidence. But the summoning of witnesses is pursuant to § 273 *ZPO* only admitted if the witnesses were named in the written statements. Moreover, if it turns out during the oral hearing that the witnesses or expert witnesses summoned by the court are not required the costs have to be borne by the party who named them (§§ 273(3), 379 *ZPO*).

1. *See* in detail *BVerfGE* 81, 270.
2. *See* e.g., *OLG* Stuttgart, *JZ* 1978, 689 *et seq*.

37. The goal of a speedy trial and achieving the above-mentioned duties depends ultimately on the sanctions to enforce them. This is achieved by precluding any submissions that have been made too late. For this purpose each hearing, in the case of more than one, is regarded as a separate entity which enables the court to reject any submission made thereafter (§ 296(2) *ZPO*). The end of the last oral hearing constitutes a complete bar on any new submissions (§ 296a *ZPO*). Nevertheless, the

extinction of the exercise of a right as a means to achieve a speedy trial has always been a controversial question:

On the one hand the danger of piling up all kinds of irrelevant submissions by the parties to prevent them from being precluded and thus the opposite effect of delaying a case; on the other hand the danger of misjudgments by precluding too readily. Since delayed submissions may only be rejected if they would delay the settlement of the case, the on-going dispute is centred around the right interpretation of the term 'delay' ('*Verzögerung*') in § 296(1), (2) *ZPO*: According to one opinion a delay already exists if the admission of the delayed submissions would lead to an extension of the lawsuit (so-called 'absolute' notion of delay[1]). In contrast another opinion only finds a delay if the lawsuit would take longer with admitting the delayed submissions than it would have taken if these submissions had been made in due time (so-called 'hypothetical or relative notion of delay'[2]). The Federal Constitutional Court (*BVerfG*) prefers the latter definition of the term 'delay' if the hypothetical process of the lawsuit could easily be determined.[3] This view is preferable not only because the delayed submissions could actually shorten the lawsuit but also due process requirements (Article 103(1) *GG*) would be sufficiently observed, too.[4]

As enabling a speedy trial is at the same time one of the court's duties, the preclusion of the exercise of a party's right is not admitted if the delay of the submissions could have been prevented by appropriate measures of the court.[5]

1. *See BGHZ* 86, 34; 202 *et seq.*
2. *See LG* Frankfurt a.M., *NJW* 1979, 2111 *et seq.*
3. *See BVerfGE* 75, 316 *et seq.*
4. *See BVerfG*, *NJW* 1992, 681; Jauernig, p. 115.
5. *See BVerfGE* 81, 273 *et seq.*; *BGH*, *NJW* 1991, 1182.

H. Principle of a Continuous Oral Hearing (Grundsatz einer einheitlichen mündlichen Verhandlung)

38. Being part of the principle of oral proceedings, the maxim of a continuous oral hearing reflects the desire to bring the proceedings to an end in a single oral hearing (§ 272(1) *ZPO*). However, in practice there are hardly any civil proceedings that can be brought to an end that way except, perhaps, for small claims or straightforward cases. This is so, not only because of factually or legally difficult cases, but also because the court may set a date for an early first hearing (§ 275(2) *ZPO*). In such a case, more than one hearing is normally required, i.e., the preliminary hearing is then followed by the main hearing (*Haupttermin*, § 278(1) *ZPO*). Nevertheless, it is not uncommon that even the main hearing is followed by additional hearings when necessary (§ 278(4) *ZPO*). But the *ZPO* regards all hearings as forming a union, thereby representing the continuous hearing mandated by § 272(1) *ZPO*. Even when the trial takes place over several days, the oral proceedings are viewed as an entity. This means that all procedural acts of the parties remain valid through the whole proceedings and need not be repeated at a later stage. All hearing dates together then form the basis for the judgment. One exception applies where during the proceedings, a change in the bench has occurred, e.g., because of illness, for a judge may only take those facts into account that were presented to him or her (§ 309

ZPO). In such cases all alleged facts and claims or motions up to the new oral hearing have to be summarized for the newly entered judge.[1]

1. As to the assessment of evidence by a judge who entered the bench not at the beginning of the oral hearings *see BGHZ* 53, 257 *et seq.*, *BGH*, *NJW* 1972, 1202.

39. In conclusion the structure of civil proceedings depends ultimately on the allocation of the functions which the court or the parties are called upon to perform and the degree to which they, respectively, must accept responsibility for the 'correctness' of the judicial decision. The claim and the defendant's objections and defences will be examined on the basis of the submissions made by the parties and the evidence which they offered.

While the parties have control over the facts they allege, they do not necessarily have control over the evidence which should be permitted to prove these facts. Obviously, the court must rely largely on the parties for information about the existence of relevant documents and potential witnesses. But it is only the witnesses that the parties have to refer to, all other evidence (experts, inspection in loco, production of documents, information by public authorities) may be called for by the court *ex officio*. Such measures also expedite the preparation for the trial insofar as they serve to clarify the factual and legal issues between the parties as they appear in the briefs (§§ 144, 273 *ZPO*). But in fact, such orders are generally only made if a defendant contests the plaintiff's claim in order to avoid unnecessary work. The court may also ask administrative authorities for documents and information, even if the parties have made no reference to such documents. In addition, the court may order the parties to present documents in their possession (§ 273 *ZPO*).

In conclusion the principles of party control and adversary procedure under the German civil procedure law are considerably weakened but civil procedure is still far away from being purely inquisitorial.[1]

1. As to the many misconceptions fraught with the referral to these principles *see* the discussion following John Langbein's appraisal of 'The German Advantage in Civil Procedure', 52 *U.Chic.L.Rev*. [1985] 823 (*see* Bibliography, *infra* 1, B).

§ 2. Fundamental Guarantees

I. Right to be Heard before the Court (*Anspruch auf rechtliches Gehör/audiatur et altera pars*, Article 103(1) GG)

40. The most important principle of the German law of civil procedure is the right to be heard before a court which is with good reason being viewed as an essential part of any proceeding in accordance with the rule of law.[1]

This basic procedural right of everyone has been part of the *ZPO* from its very beginning in 1877. In the actual version, this right can be found in §§ 118, 136, 139, 141, 278(3), 283, 285, 337, 547, No. 4 *ZPO*. The importance of this 'due process requirement' is underlined by the fact that both the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in its Article 6(1), and the *Grundgesetz* in its Article 103(1) *GG* guarantees this right to

everybody. So a person whose right to a judicial hearing has been violated may, if all other remedies in the ordinary courts are exhausted, bring a constitutional complaint according to Article 93(1) Nr. 4a *GG* before the Federal Constitutional Court (*Bundesverfassungsgericht*) or a human rights complaint before the European Court of Human Rights. Any denial of the right to be heard before a court is a procedure irregularity and gives the aggrieved party the right to continue the proceedings before the Court of First Instance, if an appeal (§ 511 *ZPO*) is not admissible under § 511 (2) *ZPO* (§ 321 a *ZPO, 'Abhilfeverfahren'*). If an appeal is admissible, the decision can be challenged via appeal. The Appellate Court then may quash the judgment and return the case to the lower court, as the violation of the right to be heard constitutes a fundamental procedure irregularity (§ 538(2) Nr. 1 *ZPO*). Nevertheless, such a denial can be solved until the final decision, even in the second instance.[2] In contrast, a remedy because of the denial or violation of the right to be heard before a court is, according to the *Bundesverfassungsgericht*, also available in cases where ordinarily no such remedy or appeal would be permitted.[3] This extension of remedies is aimed at solving the violation already within the instance or court in question, and thus easing the case-load of the *Bundesverfassungsgericht* that is heavily charged with constitutional complaints of due-process violations anyway.

1. As to the constitutional dimension of civil procedure in Germany *see* Fish, 'Recent Reforms in German Civil Procedure', *Civil Justice Quarterly* [1987] 33–51; Schwab/Gottwald, *Verfassung und Zivilprozess*, 1984; Schumann, in: 'Bundesverfassungsgericht, Grundgesetz und Zivilprozess', *ZZP* 96 (1983) 137.
2. *See BGH*, *NJW* 1975, 1652.
3. *See BVerfG BB* 1990, 859; Jauernig, *supra*, p. 103.

41. Therefore, effective service of process is a very important feature of civil procedure throughout the whole litigation. It provides proof of notification and thus guarantees the essential right to be heard before the court (due process of law).

Usually service of the process is effected *ex officio* and is based on the principle that service should be made personally on the defendant (§ 170 *ZPO*). However, the requirement, that the intended addressee be requested to make himself available for service, if he cannot be found, does not apply. Rather, if personal service appears to be impossible, substitute service is to be made upon another person who is competent to accept it (§§ 181 *et seq. ZPO*). If the residence of the person to be served upon is unknown a service by public notice (*öffentliche Zustellung*) is permitted (§ 185 *ZPO*) which could easily lead to a violation of the right to be heard before a court. Therefore, the party in question has to be heard as soon as possible afterwards. Under specific circumstances a resumption of proceedings (analogous § 579(4) No. 4 *ZPO*) can be permitted after a final judgment has been delivered without notifying a party properly.[1]

1. *See* Jauernig, *supra*, p. 331.

II. Right to Legal Recourse (*Justizanspruch*)

42. Since the Federal Constitution (*Grundgesetz*) is based on the principle that Germany shall be governed by the rule of law (*Rechtsstaatsprinzip*) and the exercise

of power lies exclusively with the State (*Gewaltmonopol*), the parties must have a right to legal recourse. This right not only comprises free access to a court, but also gives the parties the right to effective judicial remedies. Therefore, the State is under the obligation to provide for independent judges who decide the case according to the rule of law, i.e., carefully examining the legal and factual basis of the matter in dispute.[1] If a court does not act according to the rule of law and thus violates the right to legal recourse, the *Bundesverfassungsgericht* can act upon the constitutional complaint (*Verfassungsbeschwerde*) and order the court in question to adhere to the rule of law. This is because the rule of law and the right to (effective) legal recourse is at the root of the *Grundgesetz*, although scattered throughout several provisions, i.e., Articles 1(3), 19(4), 20, 28, 92 *GG*. Moreover, the right of everyone to legal recourse can also be found in Article 6(1) EurHRC.[2]

1. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 17.
2. *See* in detail Stein/Jonas-Schumann, *Zivilprozessordnung*, Vol. 1, 21st ed. 1993, Einl. Rn 206; Rosenberg/Schwab/Gottwald, *supra*, p. 17.

43. A central problem of the right to legal recourse is that a lawsuit costs money. As there is usually no contingency fee allowed for German attorneys, the attorney's costs have to be borne before legal proceedings can be instituted. An attorney would not, except under specific circumstances, make any move until the client has made an advance payment. In addition an advance has to be made towards the court costs. So the question comes up whether access to court should, as a matter of fact, only be granted to wealthier parties or to everyone. As cutting down the right to legal recourse for the poorer party would impair or even violate his or her constitutional rights[1] a solution has been found by granting legal aid to economically disadvantaged people (*Prozesskostenhilfe*, §§ 114 *et seq. ZPO*).

However, the German system of legal aid is a compromise and therefore generally just alleviates the burden of costs by granting payment by instalments. The court will only in exceptional cases, where the economical need is very grave, order the costs to be completely borne by the State. One reason for this compromise is not to indirectly encourage litigation ('open the floodgates').

Another hurdle for receiving legal aid is the prerequisite that the intended litigation must offer a reasonable prospect of success ('*hinreichende Aussicht auf Erfolg*') and must not be frivolous or wilful ('*mutwillig*') (§ 114 *ZPO*).[2] In any case the party seeking legal aid has to formally apply for it at the court having jurisdiction over the case. It is then up to the court's discretion to decide on the basis of the state of need and the chances of success. In particular, the latter aspect could serve the party in question sometimes simply as a cheap and quick test of how the court would finally decide the case. Consequently the complaint is in practice often filed with the court under the condition that legal aid will be granted first.

1. In particular Art. 3(1) *GG* and the principle of a social State based upon the rule of law, *see BVerfGE* 9, 130; 35, 354 *et seq.*; Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz*, 8th ed., 1995, Art. 3 *GG* No. 34.
2. As to the difficulties to predict the chances of success *see BVerfGE* 81, 357, *BGH*, *NJW-RR* 1989, 703.

44. A step earlier, i.e., before filing a complaint with a court, citizens who cannot afford the regular attorneys' fees may seek free legal counselling at the municipal courts according to the 'Legal Advice for People with Limited Means Act' (*Beratungshilfegesetz/BerHG*).[1] Nevertheless, one has to apply to the municipal court for receiving this free legal advice which presupposes according to § 1 *BerHG* that the economic and personal situation is being completely disclosed (§ 7 *BerHG*) and the aim for seeking legal advice is not frivolous or wilful ('*mutwillig*'). Only then the municipal court will decide upon the oral or written application (§ 4 *BerHG*) and, as the case may be, issue a certificate that enables the person to see an attorney if the municipal court does not have the necessary capacity itself (§ 6 *BerHG*).[2]

So the prerequisites are very similar to applying for legal aid and § 1(2) *BerHG* also refers directly to some of the norms granting legal aid. The free legal counselling as a whole is mainly intended to settle matters out of court if possible, thereby not only reducing the burden of cases for the courts but also serving the general function of pacification within the society.

1. *Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz)* of 18 June 1980 (*BGBl.* 1980 I, 689).
2. Any agreement as regards payment is void § 8 *BerHG*.

III. Right not to be Removed from the Lawful Judge (*Grundsatz des gesetzlichen Richters*, Articles 101(1) S. 2, 20(3), 19 GG)

45. Another procedural principle anchored in the Federal Constitution (*Grundgesetz*) is the principle that the identity of the judge qualified to render the judgment in the specific case must be fixed in advance by statute and/or standing orders (*gesetzlicher Richter*, Articles 101(1) S. 2, 20(3), 19 *GG*).[1] This is aimed at protecting the parties from being removed from the jurisdiction of his or her lawful judge, thereby eliminating arbitrary exercise of the State's authority. So the standing orders (*Geschäftsordnung*) of the courts as regards the questions who will when hear a given case have to be fixed before the case comes up. Also these standing orders and internal procedural rules may not be altered at will.

1. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 175 with further references. As to a comparative analysis *see* Koch, in: *Festschrift für Nakamura* (1996), 281.

IV. Right to a Fair and Effective Trial According to the Rule of Law (*Anspruch auf ein rechtsstaatliches, effektives und faires Verfahren)*

46. The right to a fair trial according to the rule of law is also a fundamental procedural right that stems indirectly from constitutional principles, i.e., the rule of law (*Rechtsstaatsprinzip*, Articles 20(3), 1(3) *GG*), equality before the law (*Gleichheitsgrundsatz*, Article 3 *GG*) and the right to be heard before a court (*Anspruch auf rechtliches Gehör*, Article 103(1) *GG*).[1] This is, to be sure, a very broad and underlying principle of civil procedure as such containing several different facets: the court has to proceed in a foreseeable manner,[2] it must not act contradictory,[3]

mistakes and omission by the court must not fall back on the parties,[4] the court has to grant effective legal protection in due time[5] and in the case of mistakes and omission by the parties, the court has to give them the chance to cure the deficiencies, if procedurally possible.[6]

1. *See BVerfGE* 78, 126; *BVErfG*, *NJW* 1991, 3140; 1994, 1853; Zöller-Vollkommer, *supra*, Einl. No. 102 with further references. The right to a fair trial is warranted under the European Human Rights Convention, Art. 6, as well.
2. *See BVerfG* 78, 126; *BVerfG*, *NJW* 1993, 720; *BGH*, *NJW* 1992, 243, 244; Zöller-Vollkommer, *supra*, Einl. No. 102.
3. *BVerfGE* 69, 38; 78, 126.
4. *BVerfGE* 75, 190; *BVerfG*, *NJW* 1994, 1853.
5. *BVerfG NJW* 2005, 815; *BVerfG NVwZ* 2000, 312.
6. *See BVerfG*, *NJW* 1991, 3140; 1992, 1496; *BGH*, *NJW* 1992, 439; Zöller-Vollkommer, *supra*, Einl. No. 102.

V. Right to be Treated Equally by the Court (*Gleichheitsgrundsatz*, Article 3(1) GG)

47. The constitutional principle of equality before the law (Article 3(1) *GG*) and the rule of law is also being reflected in the law of civil procedure under the notion of '*Waffengleichheit*' (equality in 'weapons').[1] Because of the guaranteed equality of the parties in respect to procedural matters, the judge has to give the parties within the framework of the fixed procedural rules the chance to present their evidence and to conduct the whole proceedings in an objective, unbiased manner.[2] In addition, the interpretation and application of procedural law could infringe directly Article 3(1) *GG* if the judge acts arbitrarily.[3] The latter case could come up where the judge under his duty to clarify the issues (§ 139 *ZPO*) has to give the parties hints as to their respective procedural or factual omissions.[4]

1. *See BVerfGE* 52, 131 *et seq.*; von Münch/Kunig (Ed.), *Grundgesetz-Kommentar*, Vol. 1, 4th ed. 1992, Art. 3 No. 46 (*Gubelt*).
2. *See BVerfGE* 52, 131, 156 *et seq.*; NJW 2001, 2531. *See also infra*, para. 174.
3. *See* Schmidt-Bleibtreu/Klein, *supra*, Art. 3 No. 34.
4. *See BVerfGE* 70, 93 *et seq.*; Schmidt-Bleibtreu/Klein, *supra*, Art. 3 No. 34.

VI. Commitment of the Courts to Follow Statutes and the Law (*Bindung des Richters an Gesetz und Recht*, Article 20(1) GG, § 1 GVG)

48. Firstly, all judges are bound by statutes ('parliamentary sovereignty') (Article 20(1) *GG*, § 1 *GVG*). The notion is that statutes embrace each and every legal norm (*see* § 12 *EGZPO*, Article 2 *EGBGB*): Federal statutes, the statutes of the States (*Länder*), the general norms of public international law (Article 25 *GG*), bi- and multilateral treaties after being ratified, EU-law, customary law (*Gewohnheitsrecht*) and orders of the executive (*Verordnungen*, based upon the authority given by statutes, Article 80 *GG*).[1] Being bound by those statutes and rules means that the judge has to apply them in the individual case irrespective of whether he or she holds a different opinion to the legislature. If a judge comes to the conclusion that a statutory norm

seems to contradict basic principles of the constitution, he or she has to suspend the proceedings and submit this question to the Federal Constitutional Court (*Bundesverfassungsgericht*) which has exclusive jurisdiction for the judicial review of the constitutionality of statutes (Article 100(1) *GG*).

The 'law', as the second limitation on judges, refers to non-statutory law that has nevertheless become binding law in Germany, e.g., customary law, or the small margin of judge-made law, or the much disputed source of 'natural law'. At the same time Article 20(3) *GG* places a lot of responsibility in the hand of the judges because they are given the power to control the legislature according to the rule of law. Therefore, judges have the constitutional competence in exceptional cases where the legislature abuses its powers to deviate from statutes without submitting the legal question to the Federal Constitutional Court. This can in particular be done through interpreting the statute strictly according to the principles laid down by the *Grundgesetz*.[2]

1. *See* Zöller-Gummer, *supra*, § 1 *GVG*, Nos. 10, 10a.
2. *See* Zöller-Vollkommer, *supra*, Einleitung Nos. 93, 98; this reflects to a certain extent the experience of the Third Reich that was also formally a country governed by the rule of law.

Selected Bibliography

1. In English

I. General/introductory

Blomeyer, Arwed, 'Types of Relief Available (Judicial Remedies)', in: *International Enyclopedia of Comparative Law IECL*, Vol. XVI, Civil Procedure, Chapter 4.

Cohn, Ernst J., 'Parties', in: *IECL*, Vol. XVI, Civil Procedure, Chapter 5.

Cohn, Ernst J., *Manual of German Law*, Vol. III, 2nd Ed. 1971, pp. 162 ff., 200 ff.

van Caenegem, R.C., 'History of European Civil Procedure', in: *IECL*, Vol. XVI, Civil Procedure, Chapter 2, (especially: pp. 87–111: 'The Era of the Modern Codes'. XVIII.–XX. Century).

Foster, Nigel, *German Legal System & Laws*, 2nd ed., London 1996.

Gottwald, Peter, 'Simplified Civil Procedure in West Germany', in: 31 *Am.J.Comp.L.* [1983] 687–701.

Kaplan, B./von Mehren, A./Schaefer, R., 'Phases of German Civil Procedure (pts. 1 & 2)', in: 71 *Harvard L.R.* [1958] 1193–1268 and 1443–1472.

Medicus, Dieter, 'Federal Republic of Germany', in: *IECL*, Vol. 1, National Reports (Knapp, Victor, Chief Ed.), E/F, 1972 (especially: p. F 21: VIII. Fundamentals of Civil Procedure and p. F 23: IX. Private International Law and International Civil Procedure).

O'Malley, Stephen/Layton, Alexander (eds.), *European Civil Practice*, Chapter 51: 'Federal Republic of Germany', London 1989.

Schima, Hans/Hoyer, Hans, Central European Systems, in Ordinary Proceedings in First Instance, pp. 101–139, in: *IECL*, Vol. XVI, Civil Procedure, (Cappelletti, Chief Ed.), Chapter 6, III.

Whelan, C.J. (ed.), *Small Claims Courts: A Comparative Study*, Oxford 1990.

II. More specific

Bernstein, Herbert L., 'Whose Advantage After All?', in: 21 *U.C.Davis.L.Rev.* (1988) 587.

Fish, William B., 'Recent Developments in West German Civil Procedure', in: 6 *Hastings Int. & Comp. L.R.* 27 (1983) 221, 236–260.

Fish, William B., 'Recent Reforms in German Civil Procedure', in: *Civil Justice Quarterly* [1987], 33 *et seq.*

Gordley, James, 'The meaning of equal access', in: 10 *Cornell International L.J.* [1977] 220–230.

Kaplan, B., 'Civil Procedure – Reflections on the Comparison of Systems', in: 9 *Buffalo L.R.* [1969] 409 *et seq.*
Koch, Harald, 'Class and Public Interest Actions in German Law', *Civil Justice Quarterly* [1986] 66–77.
Koch, Harald, 'Consumer Dispute Resolution – A Plea for the Improvement of Civil Procedure Rules in Germany and European Perspectives', 3 *Cons. L.J.* [1995] 29 *et seq.*
Langbein, John H., 'The German Advantage in Civil Procedure', in: 52 *University Chicago L.R.* [1985] 823–866.
Meador, David C. 'Appellate Subject Matter Organization: The German Designs from an American Perspective', in: 5 *Hastings Int. & Comp. L.R.* [1981] 27.
Schlesinger, R., 'The German alternative: a legal aid system of equal access to the private attorney', in: 10 *Cornell International L.J.* [1977] 213–219.

2. IN GERMAN

I. General/introductory:

Baumbach, Adolf/Lauterbach, Wolfgang/Albers, Jan/Hartmann, Peter, *Zivilprozessordnung*, 63th ed., München 2005.
Grunsky, Wolfgang, *Zivilprozessrecht*, 11th ed., München 2003.
Jauernig, Othmar, *Zivilprozessrecht*, 28th ed., München 2003.
Lüke, Wolfgang, *Zivilprozessrecht*, 8th ed., München 2003.
Münchener *Kommentar zur Zivilprozessordnung*, 2d ed. München 2000/2002.
Paulus, Christoph, *Zivilprozessrecht*, 3rd ed. Berlin 2004.
Rosenberg, Leo/Schwab, Karl-Heinz/Gottwald, Peter, *Zivilprozessrecht*, 16th ed., München 2004.
Schilken, Eberhard, *Zivilprozessrecht*, 4d ed. München 2002 Cologne/Berlin/Bonn.
Stein, Friedrich/Jonas, Martin, *Kommentar zur Zivilprozessordnung*, (by Grunsky, Leipold, Münzberg, Schlosser, Schumann), 22d ed., Tübingen 2002.
Thomas, Heinz/Putzo, Hans, *Zivilprozessordnung*, 26th ed., München 2004.
Wassermann, Rudolf (ed.), *Kommentar zur Zivilprozessordnung (Reihe Alternativ kommentare)*, Neuwied 1987.
Zöller, Richard, *Zivilprozessordnung*, 24th ed., Köln 2004.

II. More specific

Baumgärtel, Dieter, *Handbuch der Beweislast im Privatrecht*, Vol. 1, 2nd ed., Köln 1991, Vol. 3/4 1987/88, Vol. 5 1993.
Baur, Fritz/Stürner, Rolf, *Zwangsvollstreckungs-*, *Konkurs- und Vergleichsrecht*, Vol. I, 12th ed., 1995, Vol. II, 12th ed., Heidelberg 1990.
Koch, Harald, *Prozessführung im öffentlichen Interesse*, Frankfurt/M. 1983.
Koch, Harald, *Verbraucherprozessrecht. Verfahrensrechtliche Gewährleistung des Verbraucherschutzes*, Heidelberg 1990.
Reitz, John, 'Grundlegende Unterschiede zwischen dem deutschen und dem US-amerikanischen Zivilprozessrecht', *ZZP* 104 (1991), 383.
Schumann, Ekkehard, 'Bundesverfassungsgericht, Grundgesetz und Zivilprozess', *ZZP* 96 (1983) 137 *et seq.*
Schwab, Dieter/Gottwald, Peter, *Verfassung und Zivilprozess*, Köln 1984.

Selected Bibliography

3. INTERNATIONAL CIVIL PROCEDURE

Geimer, Reinhold, *Internationales Zivilprozessrecht*, 5th ed., Köln 2005.
Koch, Harald, Einführung in das Europäische Zivilprozessrecht, *JuS* 2003, 105.
Kropholler, Jan, *Europäisches Zivilprozessrecht*, 7th ed., Heidelberg 2002.
Linke, Hartmut, *Internationales Zivilprozessrecht*, 2nd ed., Köln 1995.
Nagel, Heinrich/Gottwald, Peter, *Internationales Zivilprozessrecht*, 5th ed., Münster 2002.
Schack, Haimo, *Internationales Zivilverfahrensrecht*, 3rd ed., München 2002.
Schmidt, Uwe, *Europäisches Zivilprozessrecht*, München 2004.
Szászy, Istvan *International Civil Procedure – A Comparative Study*, Leyden 1967.

Selected Bibliography

Part I. Judicial Organization

Chapter 1. The Courts and Their Members

§ 1. Structure of the Court System

49. Court organization as well as subject matter jurisdiction are governed by the Constitution of Courts Act (*Gerichtsverfassungsgesetz/GVG*). Litigation falling within the 'contentious' side of civil jurisdiction commences in two different courts of first instance:

Where the amount in controversy is up to € 5,000 (about 6,500 US-Dollar), the action for such a pecuniary claim must be commenced in the local (municipal) court (*Amtsgericht*) (§ 23 No. 1 *GVG*).[1] The local court sits with just one judge representing 'the' municipal court even if there are more than one available at the court in question (§ 22(1), (4) *GVG*). Sometimes there is not even a recording clerk so that the judge has to dictate the record of the hearing on a tape recorder.

1. As to the exceptions because of the exclusive jurisdiction of the local court regardless of the amount in controversy *see* Rosenberg/Schwab/Gottwald, *supra*, pp. 191/192.

50. The regional court (*Landgericht/LG*) has subject matter jurisdiction in pecuniary matters in the first instance, if the amount in controversy is above € 5,000 (§ 71(1) *GVG*).[1] The regional court consists of civil panels (§ 60 *GVG*) and sits, as a general rule, with three judges (§ 75 *GVG*), including the presiding judge (*Vorsitzender Richter*).[2] Although the presiding judge is just a 'primus inter pares' and has therefore formally the same power in deciding the case[3] as the other judges, he or she is in charge of the division of the cases within the panel (§ 21g *GVG*), the setting of dates for the hearings (§ 216(2) *ZPO*) and the chairmanship during the hearing (§ 136(4) *ZPO*) etc.[4] So in fact the presiding judge has several options to influence the case and can, if he wishes to, become quite powerful.

Commercial disputes are decided in the regional court upon a motion by one of the parties using a special commercial litigation panel (*Kammer für Handelssachen*/ 'commercial court'). Here, one professional judge sits as presiding judge with two lay judges who are experts in commercial practices (§§ 94 ff. *GVG*). Nevertheless there is no special procedure prescribed for commercial disputes.

1. As to the exceptions because of the exclusive jurisdiction of the regional court regardless of the amount in controversy *see* Rosenberg/Schwab/Gottwald, *supra*, pp. 193 *et seq.*

2. There are exceptions where the panel decides, e.g., to have evidence taken by a single judge sitting as the assigned judge, *see* Rosenberg/Schwab/Gottwald, *supra*, pp. 111, 112.
3. With the exception in § 320(4) *ZPO* where his vote is the decisive one.
4. *See* in detail Rosenberg/Schwab/Gottwald, *supra*, pp. 122.

51. The Court of Appeal (*Oberlandesgericht/OLG*) has, apart from a few criminal divisions, mainly civil divisions (*Zivilsenate*, § 116(1) *GVG*) consisting of three judges including the presiding judge (§ 122 *GVG*).

52. The Federal Court of Justice (*Bundesgerichtshof/BGH*) also has civil divisions (*Zivilsenate*) but these sit with five judges including the presiding judge (§ 139 *GVG*). The other judges, apart from the presiding judge, in the civil divisions of the Court of Appeal or the Federal Court of Justice are usually called reporting judges (*Berichterstatter*). Their task is to prepare independently from the panel certain cases given to them by the presiding judge, to present their suggestion to the panel and, finally, to formulate the decision and judgment of the panel in that case.[1]

1. The notion of reporting judges is only prescribed by statute in limited cases (§§ 388, 389(3) *ZPO*) but has become a common practice to divide the workload efficiently, *see* Rosenberg/Schwab/Gottwald, *supra*, p. 124.

§ 2. Administration of the Courts

53. The administration of the individual courts is based on the principle of self-administration (§§ 21a *et seq. GVG*) and is part of the independence of the judges.[1] The courts are given the power to regulate administrative matters, i.e., which judges will hear which case and which judges form the different divisions, through byelaws (*Geschäftsordnungen*). In addition the presiding judge of a division is empowered by § 21g *GVG* to administer the internal issues within the division. This includes, e.g., setting in his or her discretion the dates of the hearing or taking of evidence and to ask for materials to prepare the hearing (§§ 273(2), 275(1), 276(1) *ZPO*).

The bye-laws are issued by the presiding council of the court (*Präsidium*, § 21e *GVG*) and are thus only applicable to the municipal, regional, appeals court in question or the Federal Court of Justice. The presiding council consists of four or eight judges (depending on the size of the court) with one president (§ 21a *GVG*). The council is directly elected by the judges of the respective court § 21b *GVG*.

These bye-laws are designed to safeguard firstly an equal delivery of the workload between the single civil divisions or courts, and secondly everyone's right not to be removed from the lawful judge (Article 102(1) S. 2 *GG*). The lawful judge is therefore fixed in advance by the individual bye-law of each court and the byelaws have to be written down and open to the public (§ 21e(8) *GVG*). This functional jurisdiction is achieved by using objective aspects, e.g., by alphabetic order depending on the defendant's surname (company name) or by dividing up the court's district geographically among the divisions or by the subject matter.[2]

Any wilful violation or change of the bye-laws for an individual case violates the parties' right not to be removed from the lawful judge and gives rise to ‘ordinary’ legal redress and even to a constitutional complaint.[3]

1. *BGHZ* 46, 147, 149 and in detail Rosenberg/Schwab/Gottwald, *supra*, pp. 126 *et seq.*
2. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 126.
3. *See BGH*, *NJW* 1983, 671; *BVerwG*, *NJW* 1988, 1339. As to a comparative evaluation of the principle of a 'lawful judge' *see* Koch, in: *Festschrift für Nakamura* (Tokyo 1996), 281.

§ 3. Appointment of Judges

54. The appointment of judges is regulated by the *DRiG* and the *GG*. Pursuant to § 8 *DRiG* there are judges for lifetime (*Richter auf Lebenszeit*), for a limited period of time (*auf Zeit*), as probationary civil servant (*auf Probe*) and instructed judges (*kraft Auftrags*). A person can only become a judge if he or she is of German nationality according to Article 116 *GG*, stands firm on the basis of the free democratic structure as laid down by the *Grundgesetz* and possesses the additional qualifications in law pursuant to §§ 5–7 *DRiG* (*see* § 9 *DRiG*).

The capacity to become a judge is regulated by §§ 5–7 *DRiG*. According to these provisions a person possesses the capacity to become a lifetime judge if he or she has passed the First and the Second State Exam in law (§ 5 *DRiG*).

Moreover, a full professor of law at a German university is automatically qualified to become a judge even without the Second State Exam. Before the First exam reading law at a university for at least three and a half years is basically mandatory but can be exceptionally less if the student has passed the required performance certificates ('*Leistungsnachweise*'). But in any case two years have to be studied at a German university (§ 5a *DRiG*).

In between the First and the Second State Exam there has to be a practical training period ('*Referendariat*') of two years (§ 5b *DRiG*).[1] During this period the trainee ('*Referendar*') has the status of an employee or, as in some of the *Länder*, of a civil servant for a limited time (*Beamter auf Zeit*) and is obliged to do different stages. These stages include a civil court, a public administration, an attorney, a public prosecutor or criminal court and finally a stage at choice ('*Wahlstation*'). In the latter the trainee may also go abroad if there is an instructor functionally equivalent to a German one. The trainee has in each stage an instructor, also a fully qualified lawyer, who writes a report on the performance.

In contrast to other countries an attorney needs the same legal qualification as a judge. This is the result of a uniform legal education with the goal of producing fully qualified lawyers ('*Volljuristen*'). However, as public money becomes more and more scarce this uniform legal education has become currently under review. In particular the expensive practical training period – at the moment fully paid by the *Länder* – will presumably strongly be reformed with only a basic salary paid either by the State (for future judges) or by law firms (for future attorneys).

Judges are generally not elected by whatever constituency but appointed by the governments or the ministry of the judiciary of the respective *Länder*.[2] Only the judges of the Federal Courts (Federal Constitutional Court, Federal Court of Justice) are being elected by a committee (*Richterwahlausschuss*) (Article 95(2) *GG*) that consists of the ministers of justice of the *Länder* and an equal number of members of parliament (in percentage of the numbers of seats of the political parties). However, also 8 of the 16 *Länder* have introduced a committe for electing judges on the *Länder*-level.[3]

But a judge will not earlier be appointed for lifetime – enjoying all the benefits of a civil servant – than having served at least three years as a judge (§ 10 *DRiG*). As a report of his or her performance is being kept during the aforesaid three years the not capable jurists will be kept away from becoming a judge for lifetime which in practice is done only very exceptionally.

Once being a judge he or she is not restricted to become a member of a political party or trade union but only insofar as it does not affect the impartiality (*see* §§ 2, 39 *DRiG*). In any case a judge has to make sure that neither his or her official nor private behaviour gives rise to a suspicion of being biased since this forms a reason to challenge a judge.[4]

1. After World War II the practical training period took three and a half years but this was altered into two and a half years until 1992.
2. *See* Rosenberg/Gottwald/Schwab, *supra*, p. 144.
3. *See* Rosenberg/Gottwald /Schwab, *supra*, p. 144 with further references.
4. *See* § 42 *ZPO* and more in detail Part V. Incidents, *infra*.

Chapter 2. The Bar

§ 1. Exercise of the legal Profession

I. The Legal Profession: '*Rechtsanwälte*' and '*Notare*'

55. The German legal profession has been unified for more than a century in as far as there is no division of the bar into counselling lawyers and those pleading in court:[1] Both skills are handled by some 132,000 '*Rechtsanwälte*' (advocates/attorneys).[2] However, there are a number of legal functions reserved to another profession, to the '*Notar*' (notary-public). The '*Notar*', like in other civil law countries – is exclusively authorized to authenticate and certify legal instruments and serves as a kind of public record officer. Frequently the *Notar* is also responsible for the drafting of these instruments as an independent and neutral counsellor to the parties in matters of contracts, conveyances, corporate charters, family contracts, and wills.

1. In the 19th century and before there used to be a distinction in many of the German '*Länder*' between '*Advokat*' and '*Prokurator*', following the tradition of the Roman countries – *see* H.P. Huffmann, *Kampf um freie Advokatur* (Essen 1967); G. Hartstang, *Der deutsche Rechtsanwalt* (Heidelberg 1986), 18; Rueschemeyer, *Lawyers and their Society – A Comparative Study of the Legal Profession in Germany and in the United States* (Cambridge/MA 1973), p. 146; du Mesnil de Rochemont, 'Transnational Practice in the FRG' – in: Campbell (ed.), *Transnational Legal Practice*, Vol. I (December 1982), 127.
2. Members' statistics of the Federal Attorneys' Chamber (*Bundesrechtsanwaltskammer/BRAK*) of 2005 *(http://www.anwaltverein.de/01/depesche/2005/Depesche-10.pdf)*.

56. In some German jurisdictions, in particular in Bavaria, Baden-Württemberg, Hamburg and the new '*Länder*' (former GDR), the office of a *Notar* is separated from the role of an attorney (there are about 2,000 so called '*Nur-Notare*'), in the others it is given, by appointment, to attorneys with long experience at the bar. There are some 8,300 '*Anwaltsnotare*' (about 6.6 per cent of all '*Rechtsanwälte*'), who are allowed to perform both the function of an attorney and a notary. Access to the notary-profession, which is of high prestige (and prospective income), is difficult as the number of offices is limited and only if one leaves his or her office the respective *Land* will appoint a new *Notar* for the vacant district. In contrast, the number of *Anwaltsnotare* is not limited but because of practical and professional insurance reasons many attorneys do not wish to become also a *Notar* (*Anwaltsnotar*).

II. Sources of Law

57. There are a number of statutory provisions and professional (ethical) regulations concerning the organization of 'law firms' in Germany:

– The *Bundesrechtsanwaltsordnung* (*BRAO*, Federal Attorneys' Statute) provides for rules of access to the bar, rights and duties of an attorney, the organization of

the bar, and procedures under the Code of Ethics. Similar provisions for notaries are contained in the *Bundesnotarordnung* (*BNotO*, Federal Notaries' Statute).

– The Code of Professional Ethics (*Grundsätze des anwaltlichen Standesrechts*) was issued not by the legislature but by the bar itself, which is organized as a 'chamber' (*Rechtsanwaltskammer*), i.e., an integrated bar association, with every attorney being a compulsory member of this quasi-public body. Concerning law firms' organization, the Code provides for rules of cooperation between lawyers and between lawyers and other professions. However, in 1987, the *Bundesverfassungsgericht* (Federal Constitutional Court) ruled that after a transition period the Code of Ethics could no longer be considered as constitutional as it has in fact the authority of an act of the legislative.[1] Meanwhile a reform of the *BRAO*, a formal act of parliament,[2] provides in § 59 a *BRAO* for a more flexible approach, generally permitting attorneys to establish a partnership or another form of organization with other professions (e.g., CPAs, tax advisers).
– The European dimension of lawyers' services has also effected the German profession: The EC-Council Directive of 1977 (Nos. 77/249) for the delivery of free attorneys' services and a European Court of Justice decision of 1983[3] has obliged the Federal Republic of Germany to facilitate international activities and cooperation of lawyers by changing its national rules which restricted the freedom of movement and establishment across the borders. By the statute of 13 December 1989[4] the Federal Republic of Germany tried to meet these European requirements in providing for the settlement of foreign attorneys in Germany and of German attorneys in other EC-countries. Nevertheless the statutory and bureaucratic hurdles for attorneys from other EU-Member States to become a full attorney in Germany are rather difficult to overcome.[5] So, for the time being, real cross-boarder-practising for attorneys within the EU is still suffering from teething troubles.

1. *See BVerfG*, *NJW* 1988, 191, 194.
2. 'Statute of 2 September 1994 for a Reform of the Attorneys' and Patent Attorneys' Professional Law' (*Gesetz zur Neuordnung des Berufsrechts der Rechtsanwälte und der Patentanwälte*), *BGBl.* 1994 I, 2278, that came into force on 9 September 1994.
3. 'Directive for the Free Delivery of Services within the EEC-Member States', EG-ABl. L 1978, 17; ECJ 25 February 1988, *Commission* v. *FRG* (427/85), *NJW* 1988, 887.
4. 'Statute for the Reform of the Attorneys' and Patent-Attorneys' Professional Law' (*Gesetz zur Änderung des Berufsrechts der Rechtsanwälte und Patentanwälte*), *BGBl.* 1989 I, 2135.
5. A good survey of the prerequisites and opportunities gives Henssler, *Der europäische Anwalt Möglichkeiten der Niederlassung als integrierter Rechtsanwalt in Europa-*, *AnwBl* 1996, 353 *et seq.*

§ 2. Forms of Organization

58. The majority of German attorneys are generally sole practitioners or associates in small 'law firms' having two to ten members.[1] In metropolitan areas (like Berlin, Düsseldorf, Frankfurt, Hamburg, München, Stuttgart) one can find 'law firms' of growing size, the biggest with some 400 members (partners).[2] Depending on the intensity roughly four different forms of cooperation can be distinguished: partnership

(*Sozietät*), common use of office facilities (*Bürogemeinschaft*), the associated relationship (*Anstellungsverhältnis*), and the 'law firms'.

Another type of attorney, the so-called '*Syndikus*' (syndic-attorney), is included with considerable numbers in the lawyer statistics (estimates rank them between 1/3 and 1/4 of all attorneys in Germany).[3] However, these cannot be included because a form of cooperation as the '*Syndikus*' devotes most of its time to an employer, a business firm or an association, and conducts private practise only in his spare time for other clients. This limited independence is also reflected in § 46 *BRAO* according to which a syndic-attorney must not represent his employer as an attorney in court.

Very similar to a *Syndikus* is the position of a '*Justitiar*' (corporate counsel) who exclusively works for one employer, usually a big and/or world-wide operating company. However, a *Justitiar* is, in contrast to a *Syndikus*, no longer an independent attorney but 'just' an employed lawyer. Therefore, a *Justitiar* can represent his or her company only in the municipal court (*Amtsgericht*) where no attorney is required by law (*see* § 78 *ZPO*).

1. Cf. H. Koch, 'Lawfirms' organization – national and transnational' (in German with an English summary), in: Gilles (ed.), *Anwaltsberuf und Richterberuf/ Role and Organization of Judges and Lawyers* (German National Reports for the IXth World Conference on Procedural Law 1991), Baden-Baden 1991, pp. 153 *et seq.*
2. M. W. Huff, *Marktentwicklung der deutschen Anwaltschaft 1991 bis 2001*, in BRAK-Mitt. 1/2002, S. 4.
3. Cf. Rueschemeyer, *supra*, p. 38.

I. Partnership (*Sozietät*)

59. More than 40 per cent of the attorneys in Germany are organized in some kind of partnership (*Sozietät*).[1] The size varies considerably, but most partnerships count 2 – 25 attorneys per '*Sozietät*'.[2] This kind of partnership is characterized by three elements: the partners have a common office (subject to the localization principle, *see infra* IV.), a common contractual relationship towards the client, and a common fee creditorship.

The legal rules applicable to the '*Sozietät*' are those of a 'civil law partnership' (*Gesellschaft bürgerlichen Rechts*, §§ 705 *et seq. BGB*). Although this partnership is not a legally autonomous body, it is in many respects treated like a legal entity, particularly in respect to the above mentioned community principles. As a result, all partners are liable to the client in the case of malpractice and they can represent each other in a given case.[3] Furthermore, it is the partnership in its respective composition, not the individual attorney that is commissioned by the client which, in the case of staff fluctuation, grants continuity and certainty. Also the *Sozietät* has a common name that is the short form of all partners, usually consisting of the senior partners, e.g., Dr. Müller, Meyer, Schulze & Partner. (As to the new Partnership Code of 1995 *see infra* IV.)[4]

Other motives for forming a partnership are those applicable to many kinds of professional cooperations: overhead cost reduction, mutual representation in case of absence, specialization and providing for retirement funds for the senior partners.

1. *See* Teichmann, *AnwBl.* 1989, 369.
2. *See* M. W. Huff, supra, S. 3.
3. *See* in respect to the professional liability of the partners Jungk, 'Die Rechtsanwaltssozietät als Haftungsgemeinschaft', in: *AnwBl* 1996, 297 *et seq.*
4. If the *Sozietät* does not legally form a partnership according to the *Partnerschaftsgesetz* it has to remove the addendum '& Partner' within a transitional period until the end of 1997, *see* Karsten Schmidt, 'Die freiberufliche Partnerschaft', in: *NJW* 1995, 1 *et seq.*

II. Common Office (*Bürogemeinschaft*)

60. A common office is merely a technical cooperation. Office space, staff, library facilities, telephone etc. can be used on a joint account in order to reduce costs. However, the client relations are separated and singled. There is no common mandate to all the partners, no substitution and mutual representation, no common fee accounting, no joint liability and no common name of the office (no 'law firm'). Therefore in practice, only a few single, independent attorneys use some facilities together.

III. Associate Relationship (*Anstellungsverhältnis*)

61. Although under the Federal Attorneys' Statute (§ 1 *BRAO*) only an independent lawyer can serve as an attorney, it is generally accepted that an attorney can employ other attorneys in a permanent associate position. For an outsider it is often impossible to distinguish a partner from an associate as the attribute of an independent attorney applies to both; the associate can be subject to his employer's directions only with respect to the pay-roll, to working hours and leave of absence, presentation of drafts and documents, signature authorization, appearance in court, and solicitation of new mandates. Within such limits, the associate is free to advise and represent clients. This type of employment is the typical junior attorney's position for the first years before he is (hopefully) offered a partnership. His independence is the same as that of his employer: independence from State orders, also an independence from detailed clients instructions, and a necessary degree of independence from society in the sense that an attorney has to avoid feeling a one-sided obligation of a narrow societal or political stratum. Nevertheless, these last two marks of independence are under increasing criticism, but cannot be dealt with here[1] because they are not specific for lawyer cooperation problems. In any case, the associate relationship is not considered to be an obstacle to the essential attorneys' independence, however broadly it is defined.

1. For more details *see* Hartstang, *supra*, pp. 84, 89; Rueschemeyer, *supra*, p. 124.

IV. 'Law Firms'

62. Traditionally, lawyers as well as other self-employed professions, are not regarded as belonging to the business community. Any use of a firm name other than by listing just the individual names of the office's lawyers (partners and associates)

was not only considered unethical but could also amount to a violation of commercial register regulations or even to unfair competition. But this has changed by now: partnerships and law firms can make use of a commercial name ('Firma'). Short forms like '*CMS*' or '*KPMG*' are allowed, and even phantasy names are not generally forbidden any more.[1] But this has to be supplemented by a complete listing of all members of the 'Sozietät' on the letterhead or on the back of the front page. Thus, the short form can be used on the shingle or the name-plate and the mail box in the office, and on stamps, whereas in letters the full listing is necessary – though in different types and ranking.

Most 'Law Firms' are organized as *GbR* (partnership under the Civil Code, §§ 705 *et seq*. *BGB*) – even the big ones. Only law firms of British origin are often organized as partnerships according to British law.[2] Traditionally, lawyer's cooperatives or even corporations were not allowed. Attorneys were not regarded as performing commercial transactions, but corporations (*GmbH, AG*) were restricted to commercial activities. Now 'Law Firms' might be 'Partnerschaftsgesellschaften' (partnership companies, as to the *PartGG*)[3] or capital companies (*Kapitalgesellschaften*), i.e. *Anwalts-GmbH* (Lawyers Ltd., *see* §§ 59c-59m *BRAO*) or *Rechtsanwalts-AG* (stock corporations). The *Rechtsanwalts-AG* is approved by the judicature now, but exact legal provisions are still lacking.[4] The prerequisites of the bye-laws of such a corporation have been left unsettled and it is questionable whether and when the legislature is going to amend the respective statutes.[5]

Lawyer advertising is allowed according to § 43b *BRAO* – information on the professional work in a formal (decent) way, not aiming at alluring potential clients. Furthermore, § 5 I Unfair Competition Code/*UWG* has to be respected: this provision bans misleading advertising, i.e. advertising that will be misunderstood by the target group. Still, there is considerable development in this field, and prominent representatives of the bar vote for more liberalization.

1. *BGH, NJW* 2002, 608 *et seq.*; *BGH, NJW* 2004, 1099 *et seq.*; *K.* v. *Lewinski*, Anwaltliches Berufsrecht 2005, S. 47 *et seq.*
2. *K.* v. *Lewinski*, *supra*, S. 55 *et seq.*
3. Although the new Partnership Code of 25 July 1994 (BGBl. 1994 I, 1744) has entered into force on 1 July 1995 and established a new form of cooperation in particular for the 'free profession' it lacks the limited liability of a corporation (e.g., *GmbH*). Therefore it has not yet been widely accepted by lawyers, *see* Schmidt, *NJW* 1995, 1, 5/6; *Frankfurter Allgemeine Zeitung*, 3 February 1996, 'Die Partnerschaftsgesellschaft wird noch nicht akzeptiert', p. 14.
4. *BFH, NJW* 2004, 1974 *et seq.; BayOLG, MDR 2000, 733*.
5. *See* Casper, 'Interprofessionelle Sozietäten von Anwaltsnotaren', in: *ZIP* 1996, 1501, 1505 withfurther references.

V. Localization and Interlocal Partnerships

63. The Federal Attorney's Statute (*BRAO*) distinguishes between admission to the bar in general (§ 4) and admission to a certain local court district (§ 18). This latter restriction is important only in civil matters on a court level, i.e., *Landgericht* (regional court), *Oberlandesgericht* (Court of Appeal), *Bundesgerichtshof* (Federal Court of Justice), with mandatory attorney representation (*Anwaltszwang*, § 78 *ZPO*). So the principle of localization neither operates in criminal, administrative and labour

law matters, nor does it restrict attorneys' activities out-of-court. The local restrictions of admission in civil litigation have been criticized again and again.[1]

Now, after several court decisions, the admission to a certain local court district (§ 18 *BRAO*) is of little importance only. Since 1 August 2002 every attorney admitted to an *Amtsgericht* (district court) or a *Landgericht* (regional court) can appear in every regional court in Germany and every attorney admitted to an *Oberlandesgericht* (Court of Appeal) can appear in every German Court of Appeal.[2]

Necessary localization does not mean, that interlocal cooperation is restricted to mere informal agreements (which exist to a considerable extent). Since 1989 residential requirements as well as localization are no longer seen as an obstacle to an interlocal, formal agreement in the form of a partnership: the possibility of interlocal partnerships has been recognized.[3] As a result, a fast growing number of German lawyers have already been cooperating in the form of an interlocal partnership (*überörtliche Anwaltssozietät*).[4] Furthermore, § 29a *BRAO* expressly states that attorneys may have additional offices in foreign countries. In the latter case he or she on application will be even exempted from the requirement in § 27 *BRAO*, i.e., to have an office in Germany (§ 29a(2) *BRAO*).

1. For example Hartstang, *supra*, p. 106; Friese, *AnwBl.* 1987, 3; Prütting, *JZ* 1989, 795, Heintzen, *Die überörtliche Rechtsanwaltssozietät*, Stuttgart 1990.
2. Henssler/Prütting: Bundesrechtsanwaltsordnung, 2nd edition 2004, § 18 *BRAO*, No. 11 *BVerfG, NJW* 1990, 1033.
3. *BGH, NJW* 1989, 2890. For other proponents *see* Kewenig, *Überörtliche Anwaltssozietäten und geltendes Recht* (1989); Heintzen, *Die überörtliche Rechtsanwaltssozietät* (1990); Prütting, *JZ*1989, 795 – with further references.
4. *See also* Salger, *NJW* 1988, 186 for an overview over other EC-countries.

VI. Specialization within a Partnership

64. One of the considerations underlying the formation of a partnership is the growing need to specialize. The Federal Court of Justice recognized in a 1972 decision the attorney's right to decide which mandate he will accept and which he will refuse, thereby restricting his activities to a certain area of law.[1] As yet, the right to advertise his specialities publicly – by designating himself as an expert in certain fields (*Fachanwalt*) – has been accepted just for eight special designations: administrative law, tax law, labour law, social law, family law, criminal law, insolvency law and insurance law.[2] As of (presumably) 1 July 2005 there will be six more special designations: building and architecture law, law of succession, medical law, rental and property law, transport and conveyance law, transportation law.[3] The attorney may only use this expert indication after having presented reasonable evidence to the Attorneys' Chamber for his expertise or after having undergone an examination in the respective area of law. A growing number of attorneys take advantage of this option, approximately 17,000 (some 5,000 for each family and labor law only) out of 132,000 attorneys. (Since 1996 the number of such expert attorneys has more than tripled – whereas the total number of attorneys has not even doubled).[4] This still rather small percentage seems due to at least two factors:

First, expert indications may impede solicitation of mandates in other fields, and second, these indications share the same uncertainty in their validity as other ethical provisions because they are granted by the Federal Chamber of Attorneys according to ethical rules.[5]

1. *BGH*, 20 March 1972, EGE XII, 23.
2. For the standards and certification procedure *see* §§ 2 *et seq. Fachanwaltsordnung FAO http://www.brak.de/seiten/pdf/Berufsregeln/FAOStand01.09.03.pdf*
3. *See http://www.rak-stuttgart.de/kammermitglieder/modul1e3.asp?spr=1&inhaltID=4122*
4. Statistics from Federal Attorney's Chamber, press release of 28 April 2003; although the numbers of attorneys have increased in total numbers over the years, the percentage of attorneys with these indications of specialization is still relatively small, but growing *(BRAK, Pressemeldungen Nr. 13, 28. April 2003 http://www.brak.de/seiten/04_03_13.php)*.
5. *See BVerfG*, *NJW* 1988, 191, 194 and *supra* III.B.2.

VII. Formal Cooperation with Other Professions

65. Under § 59a *BRAO*, an attorney can only enter into a common office partnership together with patent attorneys, chartered/certified public accountants, and tax advisers (in Germany a profession separated from the CPA and also regulated by statute). These rules are supplemented by the respective statutes concerning the profession (tax advisers: *Steuerberatergesetz/StBerG*; accountants: *Wirtschaftsprüfer-ordnung/WPO*; patent attorneys: *Patentanwaltsordnung/PatAnwO*) so that each statute also provides for formal cooperation possibilities with attorneys.[1]

However, there is an incompatibility in the formal cooperation of an attorney-notary (*Anwaltsnotar*) and a CPA: after several judgments, § 59a(1) S. 3 *BRAO* now provides especially for attorney-notaries, that they may enter such a common office concerning their activities as attorney only.

Another problem arises when attorneys are serving as directors or co-directors of a tax advising enterprise organized as a company limited by shares/stock corporation. Although this engagement is accepted by the standards of legal ethics,[2] the legislation concerning the accountant and tax advising professions restricts this engagement; an attorney cannot be the only director of a tax advising or accountant company, a member of the other profession has to be at least in an equal position (§§ 50(2), (4) *StBerG*, 28(2) *WPO*).

1. It is also being argued that if a (double qualified) attorney and tax advisor can practice law as well as tax matters, there are no obstacles for a partnership between these two professions, *see* Zuck, in Lingenberg *et al.*, *supra*, § 30 Rn. 1 *et seq.*
2. *See* Casper, 'Interprofessionelle Sozietäten von Anwaltsnotaren', in: *ZIP* 1996, 1501, 1502 *et seq.*

VIII. The European Economic Interest Grouping (*Europäische Wirtschaftliche Interessenvereinigung/EWIV*)

66. The European Economic Interest Grouping (EEIG) has been introduced by an EC-regulation in 1985 as a new legal form of supra-national cooperation following the French model of a 'groupement d'intérêt économique' of 1967.[1] In the Federal

Republic of Germany, the possibility of establishing an EEIG was introduced by statute in 1988 (in force since 1 January 1989).[2] Under the statute, the EEIG is a form of organizing the economic cooperation of its members from different EC-countries. It presupposes already active members who do not simply delegate their professional practice to the grouping but rather use it as supplementary support system for their cooperation (Articles 1(2), 3(1) of the regulation). Thus, the EEIG is an appropriate form for lawyers' transborder cooperation within Europe, and is already being used by a few '*Sozietäten*' organizing legal services for a more international clientele.[3]

1. Order of 6 August 1990 in respect to § 206 (2) *BRAO*, *BGBl*. 1990 I, 1512, *see* Dörig, *NJW* 1990, 2517. DDR-order of 7 June 1990, *GBl. DDR* 1990 I, 694 *NJW* 1990, 1897, *see* Treffkom, *NJW* 1990, 2116.
2. For a short survey on other EC-countries' implementation of the EC-policy *see* Kespohl-Willemer, *JZ* 1990, 28, 30.
3. If a *Sozietät* is organized as a civil law partnership it does not form an autonomous organization; consequently, all attorneys of this *Sozietät* have to join the EEIG individually as members (*see* Article 4(1) of the regulation); a good survey of different national and international forms of cooperation among attorneys can be found in '*Nationale und internationale Kooperationsformen für Anwaltskanzleien*' (DACH-Schriftenreihe, 4), Cologne 1995.

Chapter 3. The Bailiffs

67. The bailiffs (*Gerichtsvollzieher*) play an important role in maintaining the functioning of civil procedure. One of the goals of civil procedure on the plaintiff's side, is obtaining a (favourable) judgment and to have the option to execute it with the help of the bailiff.

In respect to enforcing a judgment, they are generally in charge of executing pecuniary claims in movables (§§ 808, 831 *ZPO*) and forcing the return of property (§§ 883–885 *ZPO*), presupposing that the particular execution still belongs (exceptionally) to the court's tasks (§ 753(1) *ZPO*).[1]

Additionally, the bailiff is in charge of serving all notices and documents that fall in the parties' responsibility and are therefore not performed by the court *ex officio*.

Although the bailiff is a civil servant (§ 154 *GVG*), he not only receives a regular remuneration but is also entitled to a certain percentage of the successfully executed claims (§10(1) *GVO*).[2]

The bailiffs are personally obliged to fulfill the mandate given to them by the parties (§ 4 S. 1 *GVO*) but at the same time are free to set the time and dates for doing so. They are also responsible to check the prerequisites of the execution on their own, independently from the court.[3] Nevertheless, the contractual relationship between the bailiff and the principal is not a private but an official one.[4] Therefore, the State (*Land*) can be sued for any negligent breach of official duty owed by the bailiff to the principal (Article 34 *GG*, § 839 *BGB*), e.g. acting without the required speed in urgent matters.[5]

1. The bailiffs also have authority to arrest the defendant (obligee) either to get an affirmation in lieu of an oath (*eidesstattliche Versicherung*, §§ 909, 888(1), 890 *ZPO*) or to ensure the execution of a future judgment with an injunction (*persönlicher Arrest*, § 933 *ZPO*), *see also* Rosenberg/ Schwab/Gottwald, *supra*, p. 160.
2. As legal basis there is not only the bailiffs' rules (*Gerichtsvollzieherordnung*) but also the bailiffs' fees statute (*Gesetz über Kosten der Gerichtsvollzieher/GVKostG*) of 26 July 1957 (*BGBl.* 1957 I, 887); because of the aforesaid percentage the profession of bailiff is usually very financially rewarding.
3. *See RGZ* 140, 420; Rosenberg/Schwab/Gottwald, *supra*, p. 160.
4. *See RGZ* 156, 498; 161, 111.
5. Rosenberg/Schwab/Gottwald, *supra*, p. 161.

Part II. Jurisdiction

Chapter 1. Domestic Jurisdiction

§ 1. VENUE/LOCAL JURISDICTION (*ÖRTLICHE ZUSTÄNDIGKEIT/GERICHTSSTAND*)

68. Venue is – as a basic rule – determined by the defendant's domicile (*Wohnsitz*, §§ 12, 13 *ZPO*) in the case of individuals or place of business (*Sitz der Gesellschaft*, §§ 12, 17 *ZPO*) in the case of companies (*allgemeiner Gerichtsstand*/general local jurisdiction). Nevertheless, there are certain exceptions and these are concerned with courts having exclusive or specific jurisdiction (*ausschliessliche/besondere Zuständigkeit*):

I. Exclusive Jurisdiction/Venue (*Ausschliesslicher Gerichtsstand*)

69. In cases involving land (including encumbrances and mortgages), the local court has exclusive jurisdiction (§ 24 *ZPO*). This is also true with cases involving lease-agreements (§ 29a *ZPO*). Finally, in cases with environmental damages pursuant to the Environmental Protection Code (*Umwelthaftungsgesetz*) the local court where the damage occurred has exclusive jurisdiction (§ 32a *ZPO*).

II. Specific Jurisdiction/Venue (*Besonderer Gerichtsstand*)

70. The court has specific jurisdiction (in the sense of an alternative forum) for persons having, within that jurisdiction, just their habitual residence, e.g., students, workers etc. (*Besonderer Gerichtsstand des Aufenthaltsortes*, § 20 *ZPO*), and also for companies which have a branch or subsidiary there (*Besonderer Gerichtsstand der Niederlassung*, § 21 *ZPO*).[1]

Problems often occur with the provision in § 23 *ZPO* that gives the court specific jurisdiction in which assets of the defendant or items forming part of the controversy can be found ('exorbitant jurisdiction'). Personal jurisdiction can even be based on limited assets in the court's jurisdiction although the matter in controversy is much higher ('umbrella rule').

All matters related to heritage and succession fall in the specific jurisdiction of the court in whichever jurisdiction the deceased had his or her domicile (*Besonderer Gerichtsstand bei Erbfolge*, §§ 27, 28 *ZPO*).

Very often the rule in § 29 *ZPO* is applied giving the court specific jurisdiction if the contractual obligation under dispute has to be fulfilled within its jurisdiction (*Gerichtsstand des vertraglichen Erfüllungsortes*). The latter rule is sometimes particularly practical and economical for a plaintiff who does not want to institute proceedings at the (far off) defendant's domicile. Generally, a court having jurisdiction over the claim also has (specific) jurisdiction over a counterclaim (*Besonderer Gerichtsstand der Widerklage*, § 33 *ZPO*) resulting from the maxim of conducting proceedings in an economical and efficient manner (*Prozessökonomie*).

Finally, jurisdiction in tort cases (delict) lies pursuant to § 32 *ZPO* (*Besonderer Gerichtsstand der unerlaubten Handlung*) with the court in whose district the tort was committed (place of action) and where the damage was suffered (place of damage).[2]

In cases where the right to exercise jurisdiction (venue) is concurrent, the plaintiff may choose among the possible courts (§ 35 *ZPO*) as long as neither of them has exclusive jurisdiction (§ 40(2) S. 1 *ZPO*).

1. In cases where the members of a corporation, club or society bring a claim against the entity or are being sued the place of business gives rise to specific jurisdiction (*Besonderer Gerichtsstand der Mitgliedschaft*, § 22 *ZPO*).
2. *See* Jauernig, p. 39.

§ 2. SUBJECT MATTER JURISDICTION (*SACHLICHE ZUSTÄNDIGKEIT*)

71. Within the jurisdiction of civil courts (in civil and commercial matters, § 13 *GVG*), subject matter jurisdiction determines the allocation of first instance civil proceedings among local (municipal) courts (*Amtsgerichte*) and regional courts (*Landgerichte*). The local courts have jurisdiction in pecuniary matters where the amount in controversy is not higher than € 5,000, and the regional courts where the amount in controversy is above € 5,000 (§§ 23 No. 1, 71(1) *GVG*). Pecuniary matters embrace all claims concerning the payment of money and other rights that could be expressed in terms of money.[1] In non-pecuniary civil claims (e.g., libel, slander) it is within the discretion of the court to determine the amount in controversy and by doing this its jurisdiction. Thus, it will take the specific circumstances of the individual case (importance, property and income of the parties) into consideration (§ 12(2) *GKG*).[2] Notwithstanding the amount in controversy, the local courts have exclusive subject matter jurisdiction for disputes concerning the lease of living accommodation (§ 23 No. 2a *GVG*).[3] In the same way, the regional courts have exclusive subject matter jurisdiction for claims against the State based on breach by a civil servant of a duty owed by him to a third party by virtue of his office (*Amtspflichtverletzung*, Article 34 *GG*; § 71(2) No. 2 *GVG*).[4]

1. *See BGHZ* 14, 74; Jauernig, p. 35.
2. *See* Rosenberg/Schwab/Gottwald, *supra*, pp. 198/199; Thomas/ Putzo, § 23 *GVG* No. 8.

3. This is the only exclusive subject matter jurisdiction of the local court irrespective of the amount in controversy that is, nevertheless, in practice very important, *see* Thomas/Putzo, § 23 *GVG* No. 9.
4. *See* Jauernig, p. 36 with further references.

72. Apart from cases where the courts have exclusive jurisdiction, the parties are generally free to stipulate a specific court that should have local and/or subject matter jurisdiction over the case in question, regardless of the amount in controversy (*Prorogation*, § 38 *ZPO*). Therefore the parties could in the first instance stipulate a regional court instead of the local court having subject matter jurisdiction although the amount in controversy does not exceed € 5,000 (*see* otherwise § 23 *GVG*).[1] However, this freedom to stipulate jurisdiction is restricted:

First, the parties must not stipulate a court if another already has exclusive jurisdiction.

Second, the parties may choose a court expressly and in writing only after the dispute has arisen (§ 38(3) *ZPO*) – just merchants can enter into a choice of forum agreement in advance and also tacitly.

Third, the parties have only the choice between courts of first instance and must not stipulate an appeals court to speed up the procedure (§ 38(1) *ZPO*).[2]

1. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 218 with further references.
2. *See* Jauernig, pp. 40 *et seq.*

73. Also by party agreement any civil court looses its subject matter jurisdiction if the parties have agreed upon arbitration proceedings instead of seeking recourse in State courts (derogation, §§ 1025 *et seq. ZPO*). But if it comes to proceedings before a State court one party has to raise an objection in respect to its jurisdiction because of the arbitration agreement (*Schiedseinrede*, § 1027a *ZPO*). The State court will not *ex officio* ask for such an objection but simply assume jurisdiction because of the adversary principle.

74. A civil court has in the same manner, according to §§ 38 *et seq. ZPO*, local and subject matter jurisdiction if the parties tacitly agree upon that jurisdiction via entering into the court hearing in respect to the subject matter without raising a complaint as to its jurisdiction (*rügelose Einlassung zur Hauptsache*, § 39 *ZPO*). In cases before the local (municipal) court, such a tacit jurisdiction agreement is only valid if the court explains to the defendant beforehand that it does not have original jurisdiction and what the results of entering into the hearing will be (§§ 39 S. 2, 504 *ZPO*). This presupposes that the parties are already arguing the merits of the case and not only procedural questions. So a court can have subject matter jurisdiction if the defendant either gives a written statement to the merits of the case in written proceedings (§ 128(2), (3) *ZPO*) or makes a motion to the merits in oral proceedings, without complaining, at least at the same time, about the lack of jurisdiction of the court.[1]

1. *BGH*, *NJW* 1970, 198; the same applies to the written preliminary/preparatory proceedings (*schriftliches Vorverfahren*, §§ 272(2), 276 *ZPO*, *see* Rosenberg/Schwab/Gottwald, *supra*, pp. 220/221.

§ 3. Specific Jurisdiction Among the Courts (*Funktionelle Zuständigkeiten*)

75. Specific or functional jurisdiction refers to the rules determining whose task it is among, and within the civil courts, to deal with the case, i.e., either the court of first or of higher instance, the whole panel, the panel for commercial disputes (*Kammer für Handelssachen*, §§ 95, 100 *GVG*), the judge sitting alone (*Einzelrichter*), the commissioned judge (*beauftragter Richter*) or just the registrar (*Rechtspfleger*). It is an exclusive jurisdiction determined by the courts according to the specific factual or personal feature of the case, e.g., disputes between merchants or without the need of taking evidence, which the parties cannot alter.[1] However, the decision of a court or judge not having functional jurisdiction is valid, but voidable, via a complaint by the parties.[2] In contrast, decisions by a commissioned judge or registrar without the required functional jurisdiction are null and void.[3]

1. Rosenberg/Schwab/Gottwald, *supra*, pp. 174/175. One exception is the 'leap-frog-appeal' (*Sprungrevision*, § 566a *ZPO*) where the parties can mutually waive their right to an ordinary appeal and opt for an appeal on questions of law only.
2. Rosenberg/Schwab/Gottwald, *supra*, p. 179; OLG München, *MDR* 1978, 1027.
3. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 179.

§ 4. Resolution of Jurisdiction Conflicts

76. If a court denies its jurisdiction and dismisses the action as inadmissible (*unzulässig*) the plaintiff is not prevented from bringing the same claim before another court. Although a procedural judgment (*Prozessurteil*) does not have the same effect as a complete '*res iudicata*' it is nevertheless binding in respect to the parties, the procedural question and the court that dismissed the claim as being indadmissible (§ 322 *ZPO*).[1] The plaintiff has, in the case where his claim is inadmissible, the option to apply for an *order to transfer the action* to the competent court (*Verweisung*, § 281 *ZPO*). Such an order is binding on the ordered court regardless of whether it is correct according to the rules of substantive and local jurisdiction/venue (§ 281(2) S. 4 *ZPO*).[2] A binding order to transfer an action is also possible between the division for civil matters (*Zivilkammer*) and the commercial division (*Kammer für Handelssachen*/panel for commercial matters) of the regional court (§§ 97–102 *GVG*).

1. *See RGZ* 159, 176; *BGH*, *NJW* 1985, 2535; Rosenberg/Schwab/Gottwald, p. 1060.
2. *See* in detail Thomas/Putzo, § 281 Nos. 13/14.

77. Moreover, it has to be stressed that under the German law of civil procedure, there is no doctrine of '*forum non conveniens*' for national or for international cases.[1] This doctrine would because of its arbitrary results, infringe on the parties' right to the 'lawful judge' (Article 101(1) *GG*). So a court may not dismiss an action as inadmissible if it generally has jurisdiction, even under the broad ('umbrella') rule in § 23 *ZPO*.[2]

1. *See* Zöller-Geimer, *supra*, IZPR No. 56 with further references; in contrast to the traditional English law, *see* e.g., Order 11, rule 1(1) RSC (service of writ out of the jurisdiction), *Spiliada Maritime Corporation* v. *Cansulex Ltd*. [1986] 3 All ER 843 (H.L.); Cheshire & North, *Private International Law*, 12th ed. 1992, pp. 204 *et seq.*
2. But it has to be pointed out that there are already judgments that interpreted § 23 *ZPO* narrowly using *forum non conveniens*-principle, *see* OLG Stuttgart, *IPRax* 1991, 179; BGHZ 115, 91 *NJW* 1991, 3092.

Chapter 2. International Jurisdiction

78. In international civil procedure the jurisdiction of German civil courts to decide controversies involving foreign parties or an alien subject matter is in absence of European law and international treaties (*infra* para. 81) determined in accordance with the domestic rules governing venue. The latter is regulated, in particular, by §§ 12–38, 606a and 642 *ZPO*, i.e., the domicile of the defendant within the jurisdiction is basically decisive. So a German court having local jurisdiction/venue is in general at the same time regarded as being competent to decide an international case.

Another issue in international civil proceedings is the recognition and enforcement of foreign judgments. The judgment of a foreign, non-European court is not recognized in Germany where, for instance, the foreign court lacks jurisdiction over the controversy according to German law (§ 328 *ZPO*). This basic rule is relaxed in § 606a *ZPO* as regards marriage matters. Official execution of a foreign judgment with the help of bailiffs etc. presupposes that a German court has declared the judgment to be enforceable (*Exequatur*, §§ 722, 723 *ZPO*).

It has to be stressed that German courts in procedural matters will even in international cases only apply German procedural law (*forum regit processum*).[1] Therefore the classification is – in contrast to the more international theory in German private international law – being done according to the *lex fori* which obviously fosters a homeward-trend.[2] Nevertheless one has to bear in mind that it is already complicated enough for the courts to apply foreign substantive law. So for practical reasons the *lex fori* approach for procedural issues is rather sensible as long as it does not stretch over to international treaties which require an autonomous interpretation and international uniform application.[3]

1. *See BGH*, *WM* 1977, 793, 794; Schack, *Internationales Zivilprozessrecht*, 3rd ed. 2002, pp. 16/17 with further references.
2. *See* Schack, *supra*, p. 19.
3. *See* Schack, *supra*, p. 20 and in general in respect to the need for an autonomous interpretation of international uniform law Diedrich, 'Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation', in: Pace Int.L.R. [1996] 303 *et seq.*

79. The Federal Republic of Germany has entered into several bi- and multilateral agreements governing jurisdiction and the recognition and enforcement of foreign judgments with different foreign countries, and the EU has issued a number of regulations in these fields, too. Meanwhile, by far the most important sources of international civil procedure for EU and EFTA Member States are the European Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels-I Regulation) and its predecessor the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (Brussels Convention), and the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. These regulations/conventions only apply to civil and commercial matters; tax, customs and administrative matters are explicitly excluded (Article 1(1) Brussels I-Regulation).[1]

1. *See* Schack, *supra*, p. 39.

§ 1. European Civil Procedure and International Treaties

80. As already mentioned, a considerable area of international civil procedure is covered by European regulations and by a number of bilateral and multilateral treaties that prevail over the domestic rules.

These supra-national sources can roughly be distinguished into a) those dealing with jurisdiction and recognition and enforcement of foreign judgments, b) those concerning international legal assistance in serving documents and taking evidence abroad, c) those for parent and child matters, d) those for liability cases in transport law, and e) those giving privileges and immunity.

I. International Jurisdiction, Recognition and Enforcement of Judgments

81. Among the EU-Member States (with the exception of Denmark) it is the European Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels-I-Regulation) that succeeded the Brussels Convention of 1968 (which is still of relevance with respect to Denmark). A single European market could hardly be functioning without uniform rules of jurisdiction and without the prospect of enforcing a judgment EU-wide. The jurisdiction and recognition rules in the Regulation and Convention in their scope of application replace the respective domestic ZPO rules. A final judgment of any court in the Member States in civil and commercial matters having jurisdiction according to the Brussels Regulations will be recognized and executed in Germany under a simplified procedure. The term 'civil and commercial matters' was given a broad meaning by the ECJ and comprises also maintenance orders and maritime matters.[1] In contrast to the domestic rules in absence of a treaty the Brussels Regulation/Convention is autonomously interpreted by the ECJ that had already jurisdiction over interpretation matters by virtue of the Luxembourg Interpretation Protocol of 3 June 1971 to ensure its uniform application among the Member States (meanwhile under Art. 68, 234 EC Treaty).[2]

The Lugano Convention has virtually the same wording as the Brussels Convention but without the ECJ as the highest and binding court ruling on its interpretation. However, Article 1 of the Second Protocol on the Uniform Interpretation provides that the courts shall take the principles and methods into account that were developed in the other Contracting States. Up until now it is yet unclear how in particular the Swiss courts will deal with the judgments of the ECJ that have only persuasive authority there.[3]

In addition there are a number of bilateral conventions on the recognition and enforcement in civil and commercial matters which sometimes overlap with the Brussels Convention/Lugano Convention.[4] It also depends on the individual case and needs therefore careful consideration as to which convention shall prevail because the maxims '*lex posterior derogat leges priori*' and '*lex specialis derogat legi generali*' do not always fit but present just a rebuttable presumption.[5]

In the scope of the Brussels-I Regulation the '*lex posterior*' maxim is not conclusive since the Regulation prevails over any domestic law. In family matters the Brussels-II-Regulation No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses is in force since 2001. For 'European' cases it has widely replaced and liberalized the more burdensome German rules on international jurisdiction and particularly on recognition of foreign divorce decrees.

1. *See EuGH*, 14 October 1976–29/76 (LTU/Eurocontrol), Slg. 1976, 1541, *NJW* 1977, 489; Kropholler, *Europäisches Zivilprozessrecht*, 7th ed. 2002, Article 1, Rn. 1 *et seq.* with further references.
2. At the same time the *EuGH* has the chance to develop the Regulation/Convention further and to adopt it to changed circumstances for all Member States, *see* Schack, *supra*, p. 38.
3. As Austria, Finland and Sweden of the EFTA-States have become EU-Member States the Lugano Convention will remain important mainly in respect to Switzerland.
4. A short survey gives Schack, *supra*, pp. 26 *et seq.* In detail Bülow/Böckstiegel/Geimer/Schütze, *Der internationale Rechtsverkehr in Zivil- und Handelssachen*, 2005.
5. E.g., Article 55 Brussels Convention expressly states that it prevails over bilateral treaties between the contracting States but these bilateral treaties have notwithstanding remained in force, *see* Schack, *supra*, pp. 29/30.

II. International Judicial Assistance

82. Transborder service of process and taking evidence abroad has always required international judicial assistance. Within Europe two regulations are pertinent:

The European Regulation No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters[1] provides for simplified service by any proper way of transmission, reduces the necessity of translations to a reasonable degree and does not allow for *ordre public* control of the document to be served.[2]

Taking evidence abroad is regulated within the EU by EU Regulation No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters[3].

1. O.J. No. L 160/37 of 30 June 2000.
2. As to the German implenting Law cf. *Gesetz zur Durchführung gemeinschaftsrechtlicher Vorschriften über die Zustellung*, BGBl. 2001 I 1536.
3. O.J. No. L 174 of 27 June 2001.

83. For the non-European area, in international assistance matters the Hague Service Convention and the Hague Evidence Convention are applicable: the first, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, applies to the service abroad of judicial and extrajudicial documents in all civil and commercial matters.[1] It provides a system of channels by which courts and other competent authorities in one contracting state can request the assistance of authorities in other contracting states in serving judicial and extrajudicial documents if the address of the person to be served is known.[2] The main formal channel of transmission is for requests to carry out service to be sent by a competent authority or judicial officer in the state of origin

to the Central Authority designated by each contracting state.[3] This request must be in a prescribed form and accompanied not only by the document to be served in duplicate but also by a summary of the document to be served.[4] So the Hague 'Service' Convention sets a uniform and exclusive standard for serving legal documents among the contracting states, in particular the writ, to make sure that each party is given right to be heard and thus the chance to defend him- or herself.[5] The Central Authority may reject requests that do not conform with the requirements of the Convention and those requests that would infringe the addressed state's sovereignty or security, i.e., contrary to (international) *ordre public*.[6] As taking evidence abroad is usually time consuming and expensive, the second, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970,[7] is designed to provide a rather simple and uniform system for the obtaining of evidence according to letters of request through the judicial authorities of the contracting states and to streamline the various procedures for obtaining evidence by diplomatic and consular officials.[8] The letters of request may be issued by the judicial authorities of one contracting state and addressed to the competent authorities of another state requesting the latter to obtain evidence or perform some other judicial act (Article 1). Again, each contracting state has to designate a Central Authority for the purpose of receiving incoming letters of request and transmitting them to the authorities being competent to put them into effect.[9] Moreover, Germany – and most European countries – has made a declaration under Article 23 of the Hague 'Evidence' Convention that it will not execute letters of request for obtaining pre-trial discovery of documents as known in Common Law countries.[10]

1. The (authentic) English text of the Hague 'Service' Convention can be found in O'Malley/Layton, European Civil Practice, 1989, A2.03, pp. 1781 *et seq.*
2. *See* O'Malley/Layton, p. 98.
3. *See* Article 2 Hague Service Convention; being a federal State Germany has given the *Länder* the power to designate a Central Authority (*Zentrale Behörde*) and furthermore designated each local court as being competent to perform the service in its respective jurisdiction, *see* §§1, 4(2) *Gesetz zur Ausführung des Haager Übereinkommens vom 15. November 1965 über die Zustellung gerichtlicher und aussergerichtlicher Schriftstücke im Ausland in Zivil- oder Handelssachen und des Haager Übereinkommens vom 18. März 1970 über die Beweisaufnahmeim Ausland in Zivil- oder Handelssachen* of 22 December 1977 (*Ausführungsgesetz zu den Haager Übereinkommen*) (*BGBl.* 1977 I, 3105), the text can be found in Jayme/Hausmann, *Internationales Privat- und Verfahrensrecht*, 12th ed. 2004, No. 212a, pp. 555 *et seq.*
4. In particular, the document to be formally served has to be in German or duly translated, *see* § 3 *Ausführungsgesetz zu den Haager Übereinkommen, supra*.
5. *See* in detail Schack, *supra*, pp. 264 *et seq.*
6. *See* Article 13; this provision has caused difficulties with writs from the US involving claims for punitive damages, *see* Koch/Diedrich, 'Grundrechte als Massstab für Zustellungen nachdem Haager Zustellungsübereinkommen', in: *ZIP* 1994, 1830 and *BVerfG NJW* 2003, 2598; Zekoll, Neue Maβstäbe für Zustellung nach dem HZustÜbk? *NJW* 2003, 2885.
7. The (authentic) English text can be found in O'Malley/Layton, *supra*, A2.17, pp. 1790 *et seq.*
8. *See also* O'Malley/Layton, *supra*, p. 192.
9. In Germany it is left to the *Länder* to designate each a Central Authority, *see* § 7 of the *Ausführungsgesetz zu den Haager Übereinkommen, supra*.
10. *See* § 14(1) of the *Ausführungsgesetz zu den Haager Übereinkommen*; *supra*; as this provision does not mention pre-trial discovery of witnesses' evidence as known in the US it may be argued that this might be admissible in exceptional circumstances, *see* e.g., O'Malley/Layton, *supra*, pp. 195/196.

84. Another treaty that is designed to facilitate international civil procedure within Europe, although only rarely used in practice, is the European Convention for Obtaining Information on Foreign Law.[1] This Convention enables German courts with no additional costs (Article 15) to request information in an actual case on foreign law in a given contracting state. In contrast to an expert witness on foreign law the outcome of such a request is rather doubtful because an abstract request and an abstract answer cannot take the specific features of the individual case duly into account.[2]

1. '*Europäisches Übereinkommen betreffend Auskünfte über ausländisches Recht*' of 7 June 1968 (*BGBl.* 1974 II, 938), in force for Germany since 19 March 1975.
2. *See* Schack, *supra*, pp. 277/278 with further references.

III. Regulation and Treaties for Maintenance, Parent and Child Cases

85. Although the Brussels Regulation and Convention generally apply to the recognition and enforcement of maintenance orders (*see above* para. 80) there are in addition the Hague Convention on the Recognition and Enforcement of Decisions Relation to Maintenance Obligations of 2 October 1973[1] and the New York UN-Convention on the Enforcement of Maintenance Claims Abroad of 20 June 1956, each comprising of different contracting states but having in common to facilitate the enforcement procedure[2]. In parent and child cases also a numer of conventions have to be taken into account in respect to jurisdiction, mainly Hague Convention on the Private Law Effects of International Child Kidnapping of 25 October 1980[3] and the European Convention on the Recognition and Enforcement of Decisions on the Custody of Children and the Restoration of Custody of 20 May 1980.[4] In respect of these conventions there is also a Central Authority responsible for dealing with all related requests from other contracting states. Problems frequently occur because of the difficult equilibrium between the strict rules of these conventions, serving the best interest of the child and the (international) *ordre public*.[5]

1. 'Haager Übereinkommen über die Anerkennung und Vollstreckung von Unterhaltsentscheidungen' of 2 Oct. 1973 (*BGBl.* 1986 II, 826), *see* German translation in Jayme/Hausmann, *Internationales Privat- und Verfahrensrecht*, 12th ed. 2002, No. 181, pp. 459 *et seq.*
2. 'New Yorker UN-Übereinkommen über die Geltendmachung von Unterhaltsansprüchen im Ausland' of 20 June 1956 (*BGBl.* 1959 II, 150), *see* German translation in Jayme/Hausmann, *supra*, No. 220, pp. 563 *et seq.*
3. 'Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung' of 25 Oct. 1980 (*BGBl.* 1990 II, 207), *see* German translation in Jayme/Hausmann *supra*, No. 222, pp. 566 *et seq.*
4. 'Luxemburger Europäisches Übereinkommen über die Anerkennung und Vollstreckung in Entscheidungen um das Sorgerecht für Kinder' of 20 May 1980 (*BGBl.* 1990 II, 220), *see* German translation in Jayme/Hausman, *supra*, No. 182, pp. 468 *et seq.*
5. *See* e.g. Jayme, in: IPRax 1996, 237; Diedrich, in *FamRZ* 1996, 686.

IV. Treaties for Liability Matters in Transport Law

86. Without going too much into detail, the multinational conventions concerning the international transport of goods or persons by road, rail or air contain special

provisions in respect to specific courts having exclusive international jurisdiction for matters governed by those conventions.

So in transport law cases the prevailing rules as to international jurisdiction can be found in the International Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929 (Warsaw Convention) – together with the Guadalajara Convention,[1] the (Geneva) Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (CMR)[2] and the (Berne) Convention concerning International Carriage by Rail (COTIF) of 9 May–31 December 1980.[3] If those jurisdiction rules were not observed by a foreign court the judgment will not be recognized in Germany because of lack of competence, presupposed another court had exclusive jurisdiction and the parties did not have the power to choose tacitly a different forum.

1. Guadalajara Convention of 18 September 1961, supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, *see* German translation in Jayme/Hausmann, *supra*, No. 155, p. 329.
2. *Genfer Übereinkommen über den Beförderungsvertrag im internationalen Strassengüterverkehr* (CMR) of 19 May 1956 (*BGBl.* 1961 II, 1120) which has entered into force in respect to the Federal Republic of Germany on 5 February 1962, and is now in force in respect all European and North African countries, the Member States can be found in Jayme/Hausmann, No. 153, p. 326 footnote 1.
3. *Übereinkommen vom 09.05.1980 über den internationalen Eisenbahnverkehr* (COTIF) (*BGBl.* 1985 II, 130), in force for Germany since 1 May 1985.

87. Finally, to give a full picture of the international treaties as to international jurisdiction, there is the (fortunately) rarely used multilateral Paris Convention on the Liability for Nuclear Power in Respect to Third Parties.[1] This convention confers in general exclusive jurisdiction to the courts of that Member State in which territory the nuclear incident was suffered (Article 13(a)).

1. '*Pariser Übereinkommen über die Haftung gegenüber Dritten auf dem Gebiet der Kernenergie*' of 19 July 1960 (*BGBl.* 1976 II, 308) which has come into force in respect to the Federal Republic of Germany on 30 September 1975; the Member States can be found in Jayme/ Hausmann, *supra*, No. 156, p. 330 footnotes 1–3.

V. Treaties Giving Privileges/Immunity

88. Traditionally, jurisdiction in international civil procedure is subject to privileges and general exceptions as regards certain persons and issues. Just to mention a few there is the Brussels Convention on the Unification of certain rules concerning the Immunity of State-Owned Ships of 1926, the (Basel) European Convention on State Immunity of 16 May 1972 and the Vienna UN-Convention on Diplomatic Relationships of 18 April 1961.[1]

1. For a survey on these conventions *see* Schack, *supra*, pp. 21 *et seq.* and Jayme/Hausmann, *supra*, p. 267 footnote 1.

§ 2. Rules Applicable in Absence of a Treaty

89. In absence of a treaty the rules for determining the venue according to §§ 12, 13 *ZPO* apply to the internal (national) as well as the international jurisdiction.[1] If a German court has jurisdiction over the subject matter according to §§ 12, 13 *ZPO*, i.e., the defendant must have his or her domicile or place of business ('*Wohnsitz /Sitz*', § 17(1) *ZPO*) in Germany, it has also international jurisdiction. This is also true in respect to the exorbitant jurisdiction pursuant to § 23 *ZPO* ('umbrella rule').[2]

Whether the subject matter belongs to the administrative courts as being a public law matter or to the ordinary courts as being a civil or commercial (private law) matter, is a question of classification. As it is an issue of procedural law, the classification is being done according to the *lex fori*.[3]

In conclusion the international jurisdiction of German civil courts is in absence of a treaty or convention governed by the same rules as the national jurisdiction (§§ 12 *et seq. ZPO*) on the basis of a *lex fori* classification.

1. So-called 'double-function' of the venue-rules (*Doppelfunktionalität*), *see BGHZ* 94, 156, 157; Schack, *supra*, pp. 106/107; one of the exceptions is the environment liability where the German courts have no venue if the plant causing the damage is situated abroad (§ 32a S. 2 *ZPO*), *see* in detail Schack, *supra*, pp. 176; 223/224 *et seq.* ('necessity jurisdiction' because of denial of justice).
2. As to the national jurisdiction *see above* in detail para. 70.
3. *See BGH*, *NJW* 1985, 552, 553; Schack, *supra*, p. 19.

Part III. Actions and Claims

Chapter 1. Actions

§ 1. Definition

90. Under German law, the substantive law is distinctly separated from the procedural law. Therefore, there is no writ-system with forms of actions under which the available actions determine the substantive rights of the parties.[1]

Civil litigation can never be instituted *ex officio*. It depends on the plaintiff to initiate litigation via a complaint (*Klage*). The complaint enables the plaintiff to determine the commencement and subject matter of the litigation (party control over the subject matter/ *Dispositionsmaxime*). It is only once litigation is underway, that the plaintiff's control over his complaint becomes subject to restrictions: He or she can then no longer amend (§ 263 *ZPO*) or withdraw the complaint without the defendant's consent (§ 269 *ZPO* withdrawal/*Klagerücknahme*).

Once commenced, the course of litigation is largely determined by the court (*Amtsbetrieb*). In particular, it sets hearing dates and grants continuances. Orders, such as the fixing and extension of time limits, the allocation of dates for hearings, adjournments, permission to address the court at hearings, and its withdrawal, are merely procedural directions. They do not bind the court and may, therefore, be revoked at any time (§ 150 *ZPO*). As such orders are classified as procedural they cannot be taken on appeal.

1. One single legal relationship, e.g., a contract, can form the basis for either an action for performance (*Leistungsklage*) or an action for a declaratory judgment (*Feststellungsklage*) or an action requesting the change of a legal right or status (*Gestaltungsklage*), *see* Rosenberg/Schwab/ Gottwald, *supra*, p. 589.

§ 2. Admissibility (Standing)

91. Before a court can decide on the merits of the case, i.e., whether the claim is well founded, the admissibility of the proceeding must be established. Absolute prerequisites which the court must observe *ex officio* are partly positive conditions that must be fulfilled, and partly negative conditions that must be absent. Absolute prerequisites (*Prozessvoraussetzungen*) must be distinguished from relative prerequisites (*Prozesshindernisse*) which also preclude judgment on the merits but

need only be taken into consideration if the defendant raises an objection. Procedural prerequisites are related either to the court, to the parties, or to the subject matter in dispute. The court must be competent in a broad sense, comprising of international jurisdiction, local competence (venue) and subject matter competence. The latter prerequisite has both a broad meaning, i.e., the controversy must be a private law dispute (and not one that should be dealt with in an administrative or noncontentious civil proceeding), and a narrow meaning, i.e., the specific court must be competent, in view of its jurisdictional limitations, to try the subject matter.

The parties must have capacity to be parties (e.g., incorporated associations) and to conduct legal proceedings. If the latter capacity is lacking, the statutory representative of the party must take part in the proceedings. The parties must also have the right to plead in court. The capacity to be a party (*Parteifähigkeit*) encompasses everyone who has legal personality (§ 50 *ZPO*) and those commercial partnerships being recognized as procedural parties by statute (§§ 124 (1) 161 (2) *HGB*). In addition to this statutory capacity the *BGH* since 2001 has granted standing to sue to unincorportated legal entities as well, such as civil law partnerships (*Gesellschaft bürgerlichen Rechts, BGH* NJW 2001, 1056). The capacity to conduct proceedings (*Prozessfähigkeit*), either in person or through a representative, is co-extensive with the capacity to enter into contracts or to incur contractual liabilities (§ 52 *ZPO*).

Nevertheless, certain consumer and industrial associations have exceptionally the right to bring a kind of *class action* (*Verbandsklage*) outside the *ZPO* under special statutes (§ 8 (2) No. 2, 3 UWG/Unfair Competition Act §§ 8, 9 *UKlaG*/Actions for Injunction Act).[1] In these instances, associations are granted standing without individual griev-ance.[2] However, consumers associations can only seek injunctions to enjoin a business firm from misleading advertising or using unfair terms in their standard forms, they cannot sue for damages.[3] Although the mere numbers of '*Verbandsklagen*' brought by consumers associations are relatively small, it has become an effective means to ensure fair dealing conditions for consumers. Most of the infringements are now settled out of court.[4]

1. *See* in detail Koch, 'Consumer Dispute Resolution – A Plea for the Improvement of Civil Procedure Rules in Germany and European Perspectives', *Cons.L.J.* [1995] 29, 30.
2. As to the procedural prerequisite of a legitimate interest to take legal action *see* Rosenberg/Schwab/Gottwald, *supra*, pp. 597/598 with further references.
3. *See* Koch, *Verbraucherprozessrecht*, Heidelberg 1990, p. 40.
4. *See* Koch, *Cons.L.J.* [1995] 29, 30/31.

92. Except for the municipal (local) court (*Amtsgericht*), the parties must be represented by attorneys admitted to practice before that court, e.g., at the Landgerichte the defendant must make his reply through an attorney in writing (*Postulationsfähigkeit*, §§ 78, 273(2) Nos. 1, 275(1) *ZPO*).

93. Finally, there are certain procedural prerequisites relating to the subject matter of the suit, e.g., the claim must be enforceable in court proceedings and must not be the object of another lawsuit pending or not even be *res iudicata*: The same parties may not litigate the same claim twice at the same time, whether in the same or in any other court ('*lis alibi pendens*'). If an action is already pending, i.e., after the complaint

has been served upon the defendant (*see* § 253 *ZPO*), the institution of fresh proceedings based on the same claim is precluded by virtue of § 261(3) *ZPO* (*lis pendens, Rechtshängigkeit*). This is, therefore, a negative procedure prerequisite. Furthermore, although there is no express provision as to this, a second action based on a claim which has already been decided by a final judgment will be rejected by the court *ex officio* because the claim is barred being already '*res iudicata*' (§ 322 *ZPO*). The bar of an earlier final judgment on the same subject also applies to decisions of arbitration tribunals (§ 1040 *ZPO*).

A court does not examine such prerequisites *ex officio*, however, but only if an objection is raised, e.g., in the case of a contractual choice of forum (§ 38 *ZPO*).

94. Another objection to State court proceedings could be an *existing arbitration agreement* (§ 1032 *ZPO*) if the defendant raises this objection and does not waive it, even tacitly, by contesting the claim on the merits.

In the majority of actions, all procedural prerequisites are obviously fulfilled so that no reason for specific examination exists. Usually, they are not even mentioned during the proceedings. Nevertheless, if a procedural prerequisite is lacking, the action will be dismissed as inadmissible (*Prozessurteil*, § 280 *ZPO*). If the action is admissible, the defendant's objection will be dealt with in an interlocutory judgment (*Zwischenurteil*) if it was argued at a separate hearing; otherwise it will be disposed of in a final judgment (*Endurteil*). The rules governing the subject matter jurisdiction (*sachliche Zuständigkeit*) of the courts are mostly mandatory and the courts must take *ex officio* cognizance of them. The rules determining local competence are more flexible. Wrong venue need only be taken into account if an objection is raised at the preliminary hearing or, at the latest, before joinder of issue. Only exceptionally when the venue cannot be changed by agreement may this be taken into account on appeal. Otherwise the defendant's failure to make an objection solves the defect of wrong venue (*rügelose Einlassung*, §§ 39, 504 *ZPO*).

Chapter 2. Claims and Defences

§ 1. Claims – Definition and Distinctions

95. As a basic rule, a plaintiff can claim whatever he or she likes without any reference to any supporting statutory rule or other sources of law. This is because of the underlying maxim '*iura novit curia*' which is sometimes slightly abused in local (municipal) courts where even attorneys representing the parties do not really care about the legal basis of their case. However, the costs of an inadmissible claim or a lost suit (§ 91 *ZPO*) make it inadvisable to present an ill-prepared complaint. Therefore the plaintiff usually makes sure before instituting legal proceedings that the claims correspond with rights derived from the substantive law. Procedurally, one has to distinguish between main and ancillary claims:

The main claim represents the (financially) most important part of the complaint whereas the ancillary claims usually concern only minor matters and depend ultimately on the success of the main claims. If, for example, the defendant owes the plaintiff the price for the purchase of a car since 25 July the plaintiff will not only bring an action for the price (§ 433(2) *BGB*) but also for the interests from 25 July onwards (at least 4 per cent, § 288 *BGB*, as between merchants 5 per cent, § 352 *HGB*). Furthermore the plaintiff can even claim a higher interest rate and the costs of proceeding (unsuccessful) reminders if the defendant delayed the payment and, that the plaintiff can prove that he or she has suffered the said damage as a result thereof (§ 286 *BGB*).

The vast majority of ancillary claims consists of claims for interests. However, the ancillary claims are only brought under the procedural condition (*innerprozessuale Bedingung*) that the main claim is successful.[1] Therefore, the court does not decide the ancillary claims and they do not lead to an increase of the amount-in-controversy if the main claim fails. Sometimes the boarder-line between the main and the ancillary claim is blurred if the plaintiff chooses to bring different claims with nearly the same amount in controversy in one single complaint. In the latter case it is up to the plaintiff to set his or her own priority which claim should be the main one. Only the jurisdiction of the court is determined according to the highest amount-in-controversy, irrespective of the order of the claims given by the plaintiff.[2]

1. *See RGZ* 117, 112, 114; *BGH*, *NJW* 1968, 692, 693; *NJW* 1989, 1486.
2. *See* Zöller-Herget, *supra* § 5 *ZPO* No. 4.

96. The plaintiff may bring several claims in one action, even if they are based on different causes, provided that the same court has jurisdiction and the same procedures are admissible for all claims (*Anspruchshäufung/objektive Klagehäufung*, § 260 *ZPO*). All claims brought in one action, are then added up for purposes of competence, fees and costs, without any differentiation (§ 5 *ZPO*). Furthermore, several people can bring an action as co-plaintiffs, or sue jointly, provided that the claims, obligations and issues rests upon a similar, or basically analogous factual and legal basis (*Streitgenossenschaft*, §§ 59, 60 *ZPO*). The consolidation of claims in one action

serves to reduce the workload of the court and the burden of litigation on the parties, who can resolve several disputes in one proceeding. If the consolidation of claims appears impracticable, the court can order their separation (*Prozesstrennung*, § 145 *ZPO*). If the parties have not themselves consolidated their several claims in one action for trial and judgment, the court can join actions between the same parties or actions in which the same person faces several plaintiffs or defendants as the opposing party, particularly if the claims could have been brought in one action (*Prozessverbindung*, § 147 *ZPO*). Since joinder of actions is permitted in order to expedite the course of proceedings it is also appropriate that the court has the power to separate the actions at any State in the proceedings (§ 150 *ZPO*).

Although the plaintiff may bring several claims in one action and no forms of actions exist he or she may not bring any action at will: An action for performance (*Leistungsklage*, § 253 *ZPO*) prevails over an action for a declaratory judgment (*Feststellungsklage*, § 256(1) *ZPO*) and an action requesting a change of a legal right or status (*Gestaltungsklage*). Therefore an action for a declaratory judgment will be dismissed as inadmissible if the plaintiff is lacking a specific interest in an action for a declaratory judgment (*Feststellungsinteresse*), in particular if he or she could have brought an action for performance or used another legal redress in-stead.[1] Another option is a motion for an interlocutory judgment (*Zwischenfeststellungsklage*, § 256(2) *ZPO*) if one party wishes a decision on the existence or non-existence of a legal relationship between the parties that has become controversial during the proceedings and is at least partly decisive for the main issue, e.g., whether there is a valid contract if the plaintiff only asks for damages for personal injuries because of an alleged tort.

In addition the plaintiff may bring an action by stages (*Stufenklage*, § 254 *ZPO*) where the issues arising at various stages of action are tried separately: On the first stage the petition for rendering of accounts (*Rechnungslegung*, § 259(1) *BGB*) or submitting an inventory of property (*Vermögensverzeichnis*, § 260(1) *BGB*) or giving information (*Auskunfterteilung*, e.g., §§ 666, 675 *BGB*) or inspection of documents, especially account books (e.g., §§ 118, 166 *HGB*), on the second stage the petition for making an affirmation in lieu of an oath (*eidesstattliche Versicherung*, e.g., §§ 259(2), 260(2), 2006 *BGB*), and on the third stage the petition for payment (*Zahlung*) or return of property (*Herausgabe*).[2] An action by stages is suitable if the plaintiff without his or her own fault does not know the details (existence, extent or object) of the claim that are otherwise required for an admissible action.[3]

1. *See* Thomas/Putzo, *supra*, § 256 *ZPO* Nos. 18, 19 with further references.
2. *See* in detail Thomas/Putzo, *supra*, § 254 *ZPO* Nos. 2–4.
3. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 632.

§ 2. DEFENCES

97. The defendant may raise a number of objections against the plaintiff's claims. These defences may be qualified either by their merits, i.e., substantive exceptions, or as procedural exceptions. In each case, he or she can challenge the plaintiff's factual allegations. The latter can be done by simply denying that the plaintiff's facts have been correctly stated (‘*Klageleugnen*’) unless the facts consisted of the defendant's

own acts or perception (§ 138(4) *ZPO*). In this case simple denial is not enough. Rather the defendant has to state precisely and in detail which, or to what extent, the factual allegations of the plaintiff are incorrect (§ 138(1), (2) *ZPO*). The defendant will certainly prepare his or her statement of defence with great care as regards to the facts alleged by the plaintiff. This is because of the sanction that all facts which are not expressly denied are generally deemed to be admitted (§ 138(3) *ZPO*).

Chapter 3. Sanctions on Procedural Irregularities

98. Since the German law of civil procedure can be regarded as an offer of the State having the monopoly power to private persons to settle their dispute with the help of independent State courts, sanctions are only imposed on the parties where the principles of party control and adversary procedure could be abused and result in violations of fundamental procedural guarantees (*see above* para. 40 *et seq.*).

If *formal requirements* of the statement of claim (§ 253 *ZPO*) are not obeyed, the court's fees are not paid in advance (§§ 61, 65(1) *GKG*) or the parties are not represented by an attorney where required (§ 78 *ZPO*) the court will either dismiss the claim as inadmissible or take no notice at all of the parties' motions. But before doing so the court has to give the parties pursuant to § 139 *ZPO* the chance to rectify the formal defect.

Another sanction is in the hands of the parties, i.e., a *default judgment* according to §§ 331 *et seq. ZPO*. If one of the parties does not appear – personally or represented by an attorney – in the oral hearing although having properly received the writ of summons, the other party may make a motion for a default judgment. Nevertheless, the party having caused the default can appeal against the default judgment (*Einspruch*, § 338 *ZPO*) which brings – if admissible – the whole proceedings back to the stage before the default judgment (§ 342 *ZPO*). But even if the court in a new decision (§ 343 *ZPO*) sets aside the default judgment the party having caused the default has to pay all the costs of having missed the oral hearing including the costs of the default judgment (§ 344 *ZPO*).[1]

And finally there are *preclusions* to enable a speedy trial: The basic rule is that the party which did not perform a procedural act within the given time limits will without any further warning be precluded from making up for it at a later stage (§§ 230, 231 *ZPO*). This applies in particular to the explicitly denoted statutory deadlines (*Notfristen*), e.g., the time limits for giving notice of the intention for defence (*Frist zur Anzeige der Verteidigungsbereitschaft*, § 276(1) S. 1 *ZPO*), for making an objection (*Einlegung des Einspruchs*, § 339(1) *ZPO*), for lodging an appeal (*Einlegung der Berufung*, § 518), for lodging an appeal on questions of law (*Einlegung der Revision*, § 548 *ZPO*) and for lodging a special appeal within a short statutory period (*Einlegung der sofortigen Beschwerde*, § 569 *ZPO*).[2]

But even where these time limits were missed it is possible and in practice quite common to make within two weeks a move for a restoration to one's original position (*reinstatement in the status quo ante*) if the party without his or her fault was prevented to observe the time limit (*Wiedereinsetzung in den vorigen Stand*, §§ 233, 234 *ZPO*).[3]

Also motions of the plaintiff (attacks) or the defendant (defences) without having observed the time limits set by the court will be dismissed if taking them into account would delay the proceedings or a proper excuse is missing (§§ 296, 296a *ZPO*).

1. *See* Thomas/Putzo, *supra*, § 344 *ZPO* No. 3.
2. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 454.
3. As to the many factual questions what could still be regarded as missing a time limit without fault *see* Thomas/Putzo, *supra*, § 233 *ZPO* No. 12 *et seq.* and Rosenberg/Schwab/Gottwald, *supra*, pp. 441 *et seq.*, each with further references.

Part III, Ch. 3, Sanctions on Procedural Irregularities

Part IV. Proceedings

Chapter 1. Pre-Trial Proceedings

99. Under the German law of civil procedure there are no pre-trial proceedings with special rules as in the common law-countries, e.g., the pleading before the master (England) or the pre-trial discovery (USA). Although the court has the power to order the parties to present their respective claims and defences including the supporting evidence already in due time before the oral hearing (preparatory measures, '*vorbereitende Massnahmen*', § 273 II *ZPO*), these court orders belong also to the ordinary proceedings that were instituted by the plaintiff filing the complaint with the court.

However, the plaintiff may choose specific proceedings before commencing ordinary proceedings to safeguard his or her interests. He or she may opt for (preliminary) injunctions *in rem* or *in personam* (attachment, '*Arrest*', § 916 *et seq. ZPO*, or temporary injunctions, '*einstweilige Verfügung*', § 935 *et seq. ZPO*) without the otherwise mandatory oral hearing. Such a step is recommendable if ordinary proceedings would take too long and therefore cause the plaintiff severe detriments or would render the execution of the judgment more difficult, e.g., if the defendant is about to transfer his or her assets abroad or continues to infringe substantial rights of the plaintiff (property, housing etc.).

In addition, the plaintiff could make a motion for an independent procedure of taking evidence ('*selbständiges Beweisverfahren*', § 485 *et seq. ZPO*) if there is the actual danger that the evidence which is at the moment easily available would soon be destroyed or blurred, e.g., if the delivered goods are so defective and useless that they have to be dumped (rotten fruit).

Chapter 2. Proceedings in First Instance

100. The civil proceedings in first instance consist of different phases: Firstly, the opening phase where the plaintiff's claim is forwarded to the defendant and the judge decides on which of the possible preliminary proceedings to adopt (§§ 271– 272 *ZPO*).

Secondly, the preparation stage for the parties to collect material and evidence (documents, witnesses) for the main hearing. This phase can have different appearances depending on the complexity of the case and whether the judge calls for an early hearing (*früher erster Termin*) or orders a written preliminary procedure (*schriftliches Vorverfahren*) (§§ 275–276 *ZPO*).

Thirdly, the main (oral) hearing (*(Haupt-) Termin zur mündlichen Verhandlung*) in which the parties present their respective claims and defences. Also evidence is taken in court (§ 278 *ZPO*).

Fourthly, the consideration of the case by the court (*Überprüfungsphase*) followed by the final judgment (*Endurteil*, § 310 *et seq. ZPO*).

Fifthly, the enforcement of the judgment (*Vollstreckungsverfahren*, §§ 704 *et seq. ZPO*).

§ 1. Adversary Proceedings

I. Ordinary Proceedings

A. Introduction of the Claim

101. The action commences with the plaintiff registering his or her complaint (*Klagschrift*) together with three copies with the court (§ 253 *ZPO*). The claim has to contain the names of the parties, the claim together with the amount in controversy and the facts and evidence supporting the claim. The amount in controversy is particularly important because it determines whether the municipal court (up to € 5,000.-) or the regional court (more than € 5,000.-) has subject-matter jurisdiction pursuant to §§ 23, 71 *GVG*. If the action has to be brought before the regional court the parties have to be represented through attorneys being admitted to the respective regional court (§ 78 *ZPO*, *Anwaltsprozess*). Moreover, the plaintiff may in his or her complaint choose (§ 96 *GVG*) to bring the claim before a panel for comercial matters (*Kammer für Handelssachen*) being a section of the regional court if the dispute involves merchants or commercial partnerships or companies, or other specific commercial issues listed in § 95 *GVG*. If the claim involves such a commercial dispute but the plaintiff did choose an ordinary civil panel the defendant may make a motion for removing the case to a panel for commercial matters (§ 98 *GVG*, *Verweisung an Kammer für Handelssachen*).

102. Although the principle '*iura novit curia*' rules German civil proceedings it is neither unwise nor uncommon to support the claim also with the applicable legal

rules and in cases of legal uncertainty with scholarly writings. The court will mostly honour proper legal reasoning being presented already with the statement of claim. In addition it aggravates the defendants's task for presenting a substantive statement of defence. However, the court will not make any move if the plaintiff does not pay the court's fees in advance which can be done by buying specific fee stamps (*Gebührenmarken*) at the registrar's office.

But legal proceedings are not earlier fully instituted before the statement of claim is formally served upon the defendant. As the principle '*audiatur et altera pars*' has to be observed the rules as to how formal service (*Zustellung*) has to be perfected are rather strict: The ideal case is to serve the statement of complaint on the defendant *in personam* (§ 170 *ZPO*) or the defendants's legal representative (§ 176 *ZPO*). If this is not feasible because of the defendant's temporary absence a substitute service is permitted by serving upon another person having full capacity (not necessarily of full age) belonging to the defendant's household (§ 181 *ZPO*).[1] If there is no person present to be served upon the statement of claim may be deposited with the next municipal court's registrar, the police, the mayor's office and a post office with leaving a notice at the defendant's domicile (§ 182 *ZPO*, *Ersatzzustellung durch Niederlegung*). As the court in almost all cases will not order a bailiff to perfect the service but the postal service the substitute service is being in fact done by depositing the writ with the local post office. If the defendant is a legal person and its principal or president not present, a substituted service can be perfected by handing the statement of claim to any of the defendant's employees being present during the normal business hours (§ 184 *ZPO*, *Ersatzzustellung bei juristischen Personen*).

In addition, the formal service is legally deemed to have been perfected if the defendant does not accept the statement of claim without any legal reason (§ 186 *ZPO*, *Zustellung bei verweigerter Annahme*). The service may not be perfected during the night and on Sundays or other bank holidays with the exception by express permission of the court (§ 188 *ZPO*, *Zeit der Zustellung*). If the plaintiff has his or her domicile abroad the service may be perfected with the help of the foreign consulate (§ 199 *ZPO*, *Zustellung im Ausland*). But before taking the sometimes time-consuming way of the consular service one has to check whether the Hague Convention on the Service of Legal Documents Abroad of 15 November 1965 does apply.[2]

In any of the above mentioned cases the bailiff or postman writes down a short protocol containing the date, time, addressee and person actually being served upon or the manner of substitute service (*see* §§ 190, 191 *ZPO*). This protocol is then returned to the court.

If both parties are represented by attorneys the formal service may be substituted by simply sending the statement of claim and any other statements requiring formal service by ordinary mail to the other parties' attorney. The attorney has then only the duty to notify, e.g., via postcard, that the statement has reached him or her (§ 198 *ZPO*, *Zustellung von Anwalt zu Anwalt*).

As the ultimate deviation from the principle of serving the defendant *in personam* a public service (*öffentliche Zustellung*) is exceptionally admissible where the defendant's domicile and residence are unknown (*see* § 203 *ZPO*). In the latter case the plaintiff has to apply for a public service. Upon granting the public service the court's registrar will put a notice with a summary of the statement of claim together with the writ of summons on the court's notice board and have that notice published

in the Official Gazette of the Federal Republic (*Bundesanzeiger*) (*see* § 204 (2), (3) *ZPO*). The court may additionally order to publish that notice in another journal and even several times (*see* § 204(3) S. 2 *ZPO*).

1. *See* Thomas/Putzo, *supra*, § 181 *ZPO* Nos. 6, 7.
2. *See* the German translation of the authentic English and French text in Jayme/Hausmann, *supra*, No. 211, pp. 539 *et seq.*

103. If the statement of claim has been served upon the defendant the matter becomes legally pending (*Rechtshängigkeit*, § 261 *ZPO*) rendering fresh proceedings before another court based upon the same facts and between the same parties inadmissible (*lis alibi pendens*).

104. Once the statement of claim has become legally pending it may in general only be amended if either the defendant did agree or the court regarded the amendment as expedient (*see* § 263 *ZPO*, *Klageänderung*). But certain changes do no legally amount to an amendment and are therefore allowed (*see* § 264 *ZPO*, *keine Klageänderung*), even if the claim is substantially altered in respect to the amount in controversy.[1] Also the defendant is deemed to have accepted the amendment of the claim if he or she raises no objection but makes an appearance on the basis of the amended claim (§ 267 *ZPO*, *vermutete Einwilligung in die Klageänderung*).

1. *See* in detail Thomas/Putzo, *supra*, § 264 *ZPO* Nos. 5, 6.

105. Another feature of *lis pendens* is that both parties are free to transfer the property in the matter in controversy without loosing the status of parties to the civil proceedings (*see* § 265 *ZPO*, *Veräusserung der Streitsache*). This rule is designed to safeguard the other party which otherwise would presumably have to start new proceedings against the new owner.[1]

1. *See* Thomas/Putzo, *supra*, § 265 Nos. 1, 12.

B. Progress of Proceedings

1. Preparatory Measures

106. The court has after the filing of the statement of claim the discretion pursuant to § 272 *ZPO* to adopt two different forms of procedure:

Either a written preliminary procedure (§ 276 *ZPO*, *schriftliches Vorverfahren*) or a procedure which involves an early oral hearing (§ 275 *ZPO*, *früher erster Termin*). Usually the court makes an order accordingly and sends it to the defendant together with the writ of summons. However, in exceptional cases the court, mostly at the regional court level (*Landgericht*), does adopt neither of these two ways but simply sets a date for the main oral hearing without any time limits for a statement of defence. This is a very unusual procedure and limited to cases where the statement of claim seems to be on its face either well founded or not at all. Nevertheless by using such

a tactical manoeuvre the court may be able to bring the whole matter to an end already in a single oral hearing, perhaps even without any written statement of defence.

The court will in any case choose the procedure which brings about the quickest conclusion of the matter on the basis of the statement of claim, thereby serving the maxim of economic proceedings (*Prozessökonomie*).

107. The advantage of a written preliminary procedure is that the main oral hearing is thoroughly prepared because the parties are forced by strict time-limits to state precisely the factual and legal basis of the claim and defence respectively including evidence. The defendant is given two weeks after the service of the writ of summons to contest the action and another fortnight to submit the reasons for doing so (*see* § 276(1) S. 1 *ZPO*). If a party does not comply with the time-limits set by the court he or she will become, as a basic rule, precluded to submit new material or evidence (*see* § 296 *ZPO*, *Zurückweisung von Angriffs- und Verteidigungsmitteln*). And if the defendant fails or decides not to contest the action the court can bring – upon the plaintiff's application – the whole matter to an end already in the preliminary written procedure through a default judgment (§ 331(3) *ZPO*, *Versäumnisurteil*) or a judgment by confession (§ 307(2) *ZPO*, *Anerkenntnisurteil*).

108. In contrast, the early first hearing will be chosen by the court primarily in matters which are more easily dealt with orally, or where no further facts will be presented by the plaintiff, or where the court has to make rulings on points of law to progress the case further. As a rule of thumb, the court will also prefer an early oral hearing where the case is either straightforward in favour of one of the parties or so ambivalent to have the parties present to sort it out. For the latter purpose the court might order the personal appearance of the parties at the oral hearing (*see* §§ 273(4), 141(2), (3) *ZPO*). It is required to have at least two weeks in between the service of the writ of summons and the early oral hearing (§ 274(3) *ZPO*). The court will in its discretion either set a time-limit for the defendant to submit his or her defence in writing or just give the advice to prepare a statement of defence for the oral hearing (§ 275(1) *ZPO*). This hearing can already result in a final judgment if the issues in the cases are sufficiently clear and determined. So it is not necessarily just a preparation for the main oral hearing.

In practice the regional courts (*Landgerichte*) at first instance prefer the preliminary written procedure over an early oral hearing because the parties have to be represented by attorneys who are supposed to use written statements to cut the vast amount of facts down to the bones being the true matter in controversy to be decided. This saves the court a lot of time since the parties or their attorneys are given the task to state thoroughly the respective claims and defences together with the evidence. As indicated already earlier the courts are in addition usually very fond in complicated legal issues to receive statements which contain substantive legal reasoning.

109. As both procedures are true alternatives the preparation for the main trial follows in each case the same pattern: The court asks the defendant to inform the court in writing within two weeks after service of the writ of summons whether the action will be contested (§§ 274(3), 275(1), 276(1) *ZPO*). If it is to be contested, a

written statement of defence (*Klageerwiderung*) must be forwarded to the court within another two weeks (§§ 275(1), 276(1) in connection with § 277 *ZPO*).

If the court deems it to be necessary it will request the parties to supply further pleas, to specify the scope of the subject matter or the amount in controversy. Although the court will set time limits for submitting the requested documents (§§ 275(4), 276(3) *ZPO*) these will normally be extended upon a request of the parties with good cause.

As already stated above, the parties themselves decide which material to present to the court. The parties are therefore rather free to decide what information should be withheld or presented to the court. However, it is up to the judge to determine the relevance of evidence and to request specific items. In theory the parties are obliged by § 282(1) *ZPO* to submit all the relevant material and documents but as there is no direct sanction it is being treated very liberally. Nevertheless, documents which require a response must be submitted in good time (§ 282(2) *ZPO*) and the parties will push their luck too far as late submissions may not be accepted as delaying the trial as such (§ 296 *ZPO*).

Because of the possible verdict of foreclosure pursuant to § 296 *ZPO* the pleadings tend to be detailed and long containing all possible material thought to be relevant even if it subsequently proves not to be. Moreover, it has become common practice to support all allegations by proof as the court may decide that an allegation not supported by proof is unsubstantial (*unsubstantiiert*) and need therefore not to be taken into account. If one party presents detailed allegations it is not sufficient for the other party to simply deny it but he or she has to give good and detailed reasons for contesting it. Otherwise the allegations are deemed to correspond with the truth (*see* § 138(3) *ZPO*).

2. Determination of the Trial Date

110. The court determines, as the case proceeds, when it is time to call in the main oral hearing. There is no strict rule as to the precise time for calling in the main hearing as this is subject to the allegations and evidence submitted to the court. If the court believes that the parties have sufficiently clarified the matter to reach a decision in a single oral hearing it will set the date accordingly. This main oral hearing usually lasts no more than a day and practical experience even shows that it takes an average half an hour up to an hour at the utmost since the issues are already determined in the written statements and the parties or attorneys simply refer to them. The parties themselves do not have to appear personally in court if not expressly ordered by the court but may be represented through attorneys or other persons having full capacity. But from the regional court (*Landgericht*) level onwards the parties have to be represented through attorneys admitted to the court in question (§ 78 *ZPO*, *Anwaltsprozess*).

3. Trial/Oral Hearing

111. At the main oral hearing the court has to make sure according to § 139 *ZPO* that as well all the details of the case are fully discussed as the parties have to be aware of the relevant legal aspects. The court opens the oral hearing with a summary of the factual and legal issues and the arguments of the parties by referring to their respective written submissions (*see* § 137 *ZPO*). It has also to discuss legal points that were not raised by the parties if it wishes to base its later decision on these points (§ 139(2) *ZPO*). This procedure shall serve the parties as a means to check whether the court has understood fully and correctly their submissions to prevent surprises about the factual basis of the later judgment.

The judge is then under the obligation by § 278 *ZPO* to discuss ways of amicable settlements with the parties and their counsel before trying the case (Güteverhandlung). If it seems promising the judge can also stay the proceeding and submit the dispute to mediation or another way of settlement. This does not only serve the principle of economic procedure by reducing high costs but the overriding general procedural maxim of peaceful conflict resolution. Accordingly, a settlement in court, being thoroughly protocolled, is equal to a final judgment and may also be executed in the same manner (*see* § 794(1) No. 1 *ZPO*). Therefore it is very often accepted by the attorneys only conditionally, subject to an objection by their clients within a specified period. However, it is not uncommon that the court will quite frankly discuss the outcome of the case and sometimes strongly recommend a settlement.

If the issues turn out not to be sufficiently cleared the court will adjourn the case and set a new date for continuing the oral hearing without delay. Otherwise the court will hear the evidence. At the end of taking evidence the court is bound to discuss the outcome with the parties (§ 279(3) *ZPO*). This is followed by the closing of the hearings. The parties (attorneys) are at this point each given the opportunity to sum up their submissions which is normally done by simply referring to all the earlier pleadings in the light of the outcome of taking evidence with a final plea on behalf and in favour of the client.

Finally, at the end of the oral main hearing the court may immediately deliver a (final) judgment (*Endurteil*) which terminates the lawsuit. But in practice it is more likely that the court sets a date, usually within three weeks, for the reading of the judgment (*Verkündungstermin*).

4. No *Avocat Générale* or *Amicus Curiae*

112. As the maxim '*iura novit curia*' ('*da mihi factum, dabo tibi ius*'), rooted in the Roman law, dominates German civil proceedings there is generally no room for an opinion of a '*ministère public*' or an '*avocat générale*' which is known in the French legal system and also in the European Court of Justice.[1]

Because of the adversary procedure and the maxim of party control there is also no interference by third parties who are procedurally unaffected, e.g., by an *amicus curiae* as known in the common law countries.

1. As to exceptions *see* Koch, *Prozeßführung im öffentlichen Interesse* (1983), pp. 113, 117 *et seq.*

C. Judgment

113. As already briefly mentioned above it is one of the judges most eminent duties to seek at any stage of the proceedings an amicable solution of the case, i.e., a settlement (§ 278 *ZPO*, *gütliche Beilegung*). Hence, there are many instances where the parties dispose of the dispute other than by seeking a judgment (withdrawal, settlement, joint statement of mootnesss, e.g.). It is only in appr. 28 per cent of the cases that a judgment ends the dispute[1].

If the ease cannot be settled otherwise the court has to deliver a written judgment after the closing of the oral hearing:

1. Rosenberg/Schwab/Gottwald, *supra* p. 913.

1. Delivering the Judgment

114. The single judge may deliver the judgment upon his or her own decision but a panel of judges needs deliberation and a majority vote (*see* §§ 192 *et seq. GVG*). In addition only those judges are allowed to deliver the judgment who were present at the hearing upon which the judgment is based (§ 309 *ZPO*).[1] The judgment has then to be pronounced (§ 310(1), (2) *ZPO*) which applies also to judgments being rendered without an oral hearing pursuant to § 128(2) or (3) *ZPO*. The pronouncement is being done either at the end of the oral hearing or in a separate date within three weeks (*see* § 310(1) *ZPO*). Under exceptional circumstances serving the judgment upon the parties may substitute its pronouncement (§ 310(3) *ZPO*). If a separate date for pronouncing the judgment is being chosen by the court – which is the ordinary way in practice – the judgment has then to be there in the complete written form (§ 310(2) *ZPO*) which nevertheless amounts to a (slight) protraction of the lawsuit by the court.

Pronouncing a judgment simply means that the written operative provisions of the judgment (*Tenor*/*Urteilsformel*) has to be read aloud in open court even if the public was excluded during the oral hearings (*see* § 173 *GVG*). But the parties themselves do not have to be present at the pronouncement (§ 312(1) *ZPO*).

1. *See BGHZ* 61, 370; Jauernig, *supra*, p. 235.

115. Moreover the judgment has to be served in its complete written form (§§ 517, 548 *ZPO*) upon the parties which is being done *ex officio* by the court (§ 317(1) *ZPO*). It is only after service of the judgment that the creditor may start its execution, and an appeal against the judgment only lies within one month after service (§ 517 *ZPO*).

2. Formal Aspects of the Judgment

116. The form of a judgment is in detail prescribed by the *ZPO*:

1 The headline refers to the authority and power of the court given by the Federal Constitution (*see* § 311(1) *ZPO*, Article 20(2) *GG*). Therefore all judgments begin with '*Im Namen des Volkes!*' ('in the name of the people').

2 Then the caption (so-called '*Rubrum*' because it was originally written with red ink) lists the parties and their procedural representatives (attorneys), usually with their profession, domicile and procedural status as parties. Additionally it states the court including the names of the participating judges and the date of the last oral hearing (*see* § 313(1) Nos. 1–3 *ZPO*).

3 It follows the operative part of the judgment (*Urteilsformel/Tenor*) that contains according to § 313(1) No. 4 *ZPO* the decision on the claim, the costs of the proceedings (§§ 91 *et seq. ZPO*) and the provisional enforceability of the judgment, e.g., 'The claim is dismissed. The plaintiff has to bear the costs of the proceedings. The judgment is in respect to the costs provisionally enforceable.' or 'The defendant is ordered to pay the plaintiff the sum of € 60,000. The judgment is provisionally enforceable presupposed the plaintiff furnishes security of € 65,000 by an unconditional and irrevocable guarantee of a European bank or by deposit of the respective sum'.

The latter prerequisite of furnishing security should safeguard the defeated party in case the judgment is being appealed and the prevailing party at first instance wishes to execute the judgment not being *res iudicata*.[1] Although the plaintiff has to pay damages caused by executing the first instance judgment not being *res iudicata* under the strict liability rule pursuant to § 717(2) *ZPO* if it gets quashed on appeal, the defendant has, e.g., to be protected through the guarantee against adversary effects to his or her business and the inherent danger of the plaintiff becoming insolvent at the appeal level.[2]

4 The facts of the case (*Tatbestand*) are subsequently set out containing in short form according to § 313(1) No. 5 *ZPO* the claims and defences and all motions of the parties. The judge shall not go too much into detail but refer to the files of the court (§ 313(2) *ZPO*). The latter rule is not without danger since the parties may in complicated matters not be able to see from such 'short-judg-ments' whether the court has taken their allegations into account, thereby giving rise to an ordinary appeal or even a constitutional complaint because of violating the procedural principle of '*audiatur et altera pars*' (Article 103(1) *GG*).[3] Thus, the facts have to contain all factual details and motions forming the basis of the court decision or to put it the other way round, the court may not base its decision on facts not being mentioned in the facts written down in the judgment.

5 Finally the reasons for the decision (*Entscheidungsgründe*) give a summary of the deliberations in respect to the legal points and evidence that led to the judgment (§ 313(1) No. 6, (3) *ZPO*). The reasons tend to be very detailed and the German judges at least from the regional court upwards refer often to scholarly writings and/or earlier decisions of the respective Court of Appeal (*OLG*) or the Federal

Court of Justice (*BGH*). At the end of the reasons the participating judges have to sign the judgment (§ 315(1) *ZPO*). Only with the signature of all judges of the panel the preliminary status of the written judgment as a draft is ended giving it full power and authority.[4]

1. *See* Zöller-Herget, *supra*, § 709 *ZPO* No. 3.
2. *See* as to the recoverable damages *BGH*, *WPM* 1962, 817; Zöller-Herget, *supra*, § 717 *ZPO* No. 6 *et seq.* with further references.
3. *See* Jauernig, *supra*, p. 238.
4. *See BGH*, *NJW* 1977, 765; Jauernig, *supra*, p. 238.

3. Changes and Rectifications of the Judgment

117. Changes and rectifications of the judgment are admissible without an appeal or other formal remedy on three occasions:

118. Firstly, orthographical or calculation mistakes or other obvious inaccuracies of the judgment can be rectified by the court at any time *ex officio* (*see* § 319 *ZPO*) but also upon a hint of the parties. Such a rectification of a judgment is being done through a separate court decision without an oral hearing but the parties must be given the opportunity to be heard in court if essential parts of the judgment are concerned.[1] An immediate appeal (*sofortige Beschwerde*) lies against this rectification decision (§ 567 (1) No. 1, § 319 (3) *ZPO*). A rectification of a judgment is null and void if the prerequisites laid down in § 319 *ZPO* were not fulfilled.

1. *See BVerfGE* 34, 7 *et seq.*

119. Secondly, inaccuracies of the facts of the judgment (*Tatbestand*), e.g., omission of motions, factual allegations or offers to produce evidence, are rectified by the court also through a separate decision but only upon the application of one party and possibly after an oral hearing. This rectification decision pursuant to § 320 *ZPO* is final, i.e., unappealable. As factual allegations may be brought at the first appeal level (*Berufung* – before the regional court or Court of Appeal) only under very limited circum-stances and at the second appeal level (*Revision* – before the federal court of justice) not at all, this kind of rectification is in particular important for the parties and in practice quite often used because of the otherwise existing danger of becoming precluded with factual allegations at second instance.[1]

1. *See* e.g., *BGH*, *NJW* 1989, 2754.

120. Thirdly, the operative part of the judgment (*Urteilsformel/Tenor*) can be supplemented if it did not take all motions of the parties into account or did overlook a main or ancillary claim, e.g., interests, or lacks the decision on the costs of the proceedings. If these drawbacks of the judgment were caused negligently there is a decision gap which has to be filled.[1] According to § 321 *ZPO* the supplementing of a judgment is being done through a supplementary judgment (*Ergänzungsurteil*) upon the application of one party and presupposes an oral hearing. Such a supplementary

judgment can be appealed separately under the ordinary rules.[2] A deliberate refusal to decide a matter in the judgment must be appealed with the normal procedural remedies.[3]

1. *See BGH*, *NJW* 1980, 840 *et seq.*
2. *See BGH*, *NJW* 1980, 840; Jauernig, *supra*, pp. 239/240.
3. *See* Jauernig, *supra*, p. 239.

4. Different Kinds of Judgments

121. First of all one has to distinguish between procedural judgments (*Prozessurteile*) and judgments on the merits (*Sachurteile*):

122. Procedural judgments contain just decisions on procedural questions, e.g., dismissing the statement of claim as inadmissible or reversing and remitting or remanding a case to the lower court (*see* §§ 538, 563 *ZPO*). The procedural judgment does not have the same *res iudicata* effect as the judgment on the merits (bar, merger *see infra* para. 133, 134).

123. Then there is the distinction between contradictory and default judgments (*streitige Urteile/Versäumnisurteile*) depending on whether both parties took part in the oral hearing or just one: a default judgment cannot be appealed but only set aside upon objection of the defaulting party (§ 338 *ZPO*), *see infra* para. 151).

124. Moreover, German Law distinguishes between a judgment which obliges a party to perform or to refrain from a certain act including payment (*Leistungsurteil*), a declaratory judgment (*Feststellungsurteil*) and a judgment changing a legal right or status (*Gestaltungsurteil*). All these judgments are on the merits but differ in their respective operative part depending on the remedy sought by the claim and defence. A judgment which dismisses an action for performance is, e.g., a declaratory judgment declaring the alleged claim or right as legally not existing or enforceable.

125. More intrinsic is the distinction between final and preliminary judgments (*Endurteile/Zwischenurteile*):

126. The final judgment brings the proceedings to an end for the respective instance or even for good if it is unappealable. In this sense also a default judgment is a final judgment.

127. In contrast to that a preliminary judgment decides just an incidental procedural question and leaves the matter in controversy untouched.[1] Therefore it has not the force to bring the proceedings to an end but contains a ruling on the future proceedings in the given case. In addition a preliminary judgment is binding on the court (*see* § 318 *ZPO*) and may be appealed, usually only together with the final judgment (*see* §§ 512, 557(2) *ZPO*), exceptionally also separately (*see* e.g., §§ 280, 304 *ZPO*). In limited and expressly mentioned cases a preliminary judgment is even unappealable,

e.g., where the court decides whether an amendment of a claim (*Klagänderung*) is admissible, *see* §§ 268, 303 *ZPO*.[2]

1. With the exception of § 304 *ZPO* concerning a preliminary judgment on the merits which presupposes a claim for a liquidated sum and a dispute ready for decision about the legal foundation and the amount of that claim, *see BGHZ* 53, 17; Thomas/Putzo, *supra*, § 304 *ZPO* No. 2 *et seq.* and Jauernig, *supra*, pp. 241/242 with further references.
2. *See* Jauernig, *supra*, p. 240 and more in detail Thomas/Putzo, *supra*, § 268 *ZPO* No. 4.

128. Preliminary judgments are firstly used in the court's discretion for deciding an interlocutory dispute amongst the parties, e.g., the validity of a procedural settlement. Secondly, they decide interlocutory disputes of one party with a third party, e.g., the admissibility of an intervention of a third party in support of one party (*Nebenintervention*, §§ 71, 66 *ZPO*). And thirdly, the court may (positively) decide through preliminary judgments on the admissibility of the statement of claim as such. But if the court dismisses the claim as inadmissible it turns into a final (procedural) judgment.[1]

1. *See* Jauernig, *supra*, p. 241.

129. In addition a line has to be drawn between a full and a part judgment (*Vollurteil/Teilurteil*), both being final judgments:

A full judgment has to be delivered pursuant to § 300 *ZPO* if the matter in controversy is ready for decision which presupposes in general that the facts of the case have been clarified sufficiently. Exceptionally the court may refrain from taking all factual allegations of the parties into account if the action is barred by limitation.[1]

1. *See* Jauernig, *supra*, p. 242.

130. A part judgment (*see* § 301 *ZPO*) may be delivered only if certain prerequisites are fulfilled: firstly, just a part of the matter in controversy shall be ready for decision which presupposes that it can be divided. Secondly, the part judgment shall not be affected by the later decision on the rest of the matter in controversy. [1]

But even if these prerequisites are fulfilled the court may in its discretion refrain from delivering a part judgment (§ 301(2) *ZPO*), e.g., where the full judgment could be delivered only a little while later. As a part judgment is a final judgment it may be separately appealed and enforced.

1. *See BGH*, *NJW* 1987, 441.

131. As an exception there are finally provisional judgments (*Vorbehaltsurteile*), i.e., judgments subject to a reservation of rights on limited occasions.

Such a provisional judgment is enforceable for the plaintiff and subject to appeal like a final judgment[1] but it leaves the proceedings pending until certain issues raised by the defendant are determined. However, a provisional judgment cannot amount to *res iudicata* because it is no final decision on the alleged claims pursuant to § 322(1) *ZPO*. It is in practice commonly used in cases where the adjudicated party had pleaded set off by way of defence which has not been considered in the provisional judgment (*see* § 302 *ZPO*) keeping it provisional until the court's decision on the

set-off. Additionally in summary procedures where the plaintiff relies entirely on documentary evidence or on a bill of exchange (*Urkunden- und Wechselprozess*) the judgment is always provisional leaving the defeated party the chance to enter into ordinary proceedings (*see* § 599 *ZPO*).

1. *See BGHZ* 69, 272.

5. *Res Iudicata* and Rectification of Judgments

132. A judgment, properly delivered by the court and served upon the parties, has several legal effects:

133. Firstly, the court itself is bound by its own judgment ('intra-procedural binding force'/*innerprozessuale Bindungswirkung*, § 318 *ZPO*): So the court can neither change nor revoke its judgment even if it has discovered that the judgment is wrong ('negative binding force'/*negative Bindungswirkung*).[1] Additionally the court has to use all part and preliminary judgments in the later final judgment ('positive binding force'/*positive Bindungswirkung*).

1. As to the exceptions pursuant to §§ 319, 320 *ZPO*, i.e., obvious mistakes or inaccuracies, *see above* paras 116 *et seq.* Changes and Rectifications of the Judgment.

134. Secondly, the judgment becomes formal *res iudicata* (*formelle Rechtskraft*) and is then no longer appealable. Otherwise the proceedings would never come to end and no formal pacification could be achieved. The formal *res iudicata* is the prerequisite for the judgment becoming substantial *res iudicata* having the force of a final judgment and also for the enforceability if it was not declared preliminarily enforceable according to § 704(1) *ZPO*.

The *res iudicata* effect comes already into force with delivering the judgment, presupposed that it is non-appealable. If an appeal is admissible the judgment becomes pursuant to § 705 *ZPO* formal *res iudicata* when the time for lodging an appeal has expired, i.e., after one month (*see* §§ 517 or 548 *ZPO*), or when the parties mutually waived their right to an appeal (*see* §§ 515 or 565 *ZPO*).

A judgment being formal *res iudicata* can only be changed or reversed under very limited circumstances by extraordinary remedies, i.e., via restoration to one's original legal position (*Wiedereinsetzung in den vorigen Stand*, §§ 233 *et seq. ZPO*) and reopening of the case because of a motion (action) for a new trial (*Wiederauf nahmeklage*, § 578 *ZPO*).

135. Thirdly, the judgment becomes also substantial *res iudicata* (*materielle Rechtskraft*) at the same time when it becomes formal *res iudicata*. The concept of substantial *res iudicata* is necessary because formal *res iudicata* prevents as well the original court as a Court of Appeal to change or even reverse the delivered judgment. Nevertheless the parties could establish fresh proceedings in another competent court without having regard to the earlier judgment in the same or virtually the same matter in controversy. This would not serve one of the most important goals of civil

proceedings according to the rule of law, the principle of pacification, i.e., settling the dispute amongst the parties for good.[1]

Because of the substantial *res iudicata* the parties are precluded to present new legal or factual allegations and from furnishing new evidence in the same matter. More precisely all allegations made after the judgment has become substantial *res iudicata* are simply irrelevant and will not be taken into account by the court.[2] Moreover, the judgment being *res iudicata* forms a kind of precedent amongst the parties in respect to the matter in controversy. So a new statement of claim concerning the same matter in controversy and the same plaintiff will be dismissed as inadmissible.[3]

1. *See BVerfGE* 73, 327 *et seq.*; Jauernig, *supra*, p. 249.
2. *See BGH*, *NJW* 1989, 105.
3. *See BGH*, *NJW* 1993, 334 and in detail Jauernig, *supra*, pp. 251 *et seq.*

136. As the substantial *res iudicata* lies not only in the interest of the parties but also of the proper administration of justice and the pacification it has to be taken into account by the court *ex officio* and need not to be raised by the parties. But in practice the court cannot be expected to know of all and every judgment being delivered in Germany, in particular because there is no uniform system of publication and therefore also no reliable access to earlier judgments. So it is advisable for the parties to give in the court at least a hint as to the existence of an earlier judgment on the same matter in controversy.

It has also to be noted that the effect of substantial *res iudicata* is limited in three different directions:

1 Pursuant to § 322(1) *ZPO* a judgment can only insofar become *res iudicata* as it did decide the alleged claim. But in addition the effect of substantial *res iudicata* does also affect the opposite of the decision (so-called 'contradictory opposite'/*kontradiktorisches Gegenteil*).[1] In stating in a judgment e.g., that the plaintiff is the rightful owner of the car the court did decide at the same time that the defendant has no property rights in that particular car.[2]

2 The substantial *res iudicata* is according to § 325(1) *ZPO* only binding upon the parties. This includes legal successors of the parties such as heirs or purchasers of the matter in controversy or of one party if it is a company, presupposed the property was transferred to them.[3]

3 The judgment being substantial *res iudicata* always refers back to the state of affairs at the end of the oral hearing because all allegations made thereafter are precluded by § 296a *ZPO*. So legal or factual changes after the end of the oral hearing are not affected by the *res iudicata* and can therefore form the basis for fresh proceedings between the parties on the same matter in controversy.[4]

1. *See BGH*, *NJW* 1986, 2508.
2. *See* Jauernig, *supra*, pp. 254 *et seq.* with further examples and references.
3. *See* Jauernig, *supra*, p. 258.
4. But a change in the legal reasoning of the Federal Court of Justice does not constitute such a change, *see* Jauernig, *supra*, pp. 261 *et seq.* with further references.

137. Indisputably the concept of *res iudicata* with the judgment becoming unappealable serves the legal certainty and pacification in the individual case and so the constitutional principle of legal proceedings according the rule of law (*Rechtsstaatsprinzip*). But it would be contradictory and unjust in the long run to uphold wrong judgments at any costs just to adhere to a (formal) constitutional principle. Therefore there are two exceptions to break through the boarder of *res iudicata*:

Firstly, the motion (action) for a new trial (*Wiederaufnahmeklage*, § 578 *ZPO*). This limited remedy presupposes that the aggrieved party starts fresh proceedings with a separate action aimed at quashing the judgment being *res iudicata*. Such proceedings can in general only be instituted if there were severe irregularities in the former proceedings or even criminal offences in respect to the judgment or its basis.[1] The action to have the (final) judgment set aside (*Nichtigkeitsklage*, § 579 *ZPO*) is based upon severe procedural irregularities whereas the action for a retrial of the case (*Restitutionsklage*, § 580 *ZPO*) is based upon undue or criminal influences as to the factual basis of the judgment.

1. As to the prerequisites *see* in detail Jauernig, *supra*, pp. 321 *et seq.*

138. Secondly, the judicature has because of the limited sphere of application of the action for a new trial (*see above*) developed another way to break *res iudicata*: If a party gets a judgment to enforce a right contrary to public policy, the other party is entitled to claim damages including a reversal of the judgment on the basis of an intent to cause damage contrary to public policy (*vorsätzliche sittenwidrige Schädigung*, § 826 *BGB*).[1] This legal remedy is only admissible under very limited circumstances but has been, nevertheless, widely used by the courts to quash judgments originating out of collection proceedings, i.e., writs of execution (*Vollstreckungsbescheide*, §§ 699, 700 *ZPO*).[2] So the substantive civil law has been used to maintain justice and public policy in civil procedural law.

1. *See* already *RGZ* 61, 365; 78, 393 and later on *BGH*, *NJW* 1991, 1885 with further references.
2. *See* e.g., *BGHZ* 101, 385 and Jauernig, *supra*, pp. 265 *et seq.* with further references.

6. Non-Compliance with the Judgment

139. There is no penalty in case of non-compliance with the judgment since it is an adversary procedure initiated and dominated by the parties. Additionally there is no concept of contempt of court since civil proceedings are designed to settle private disputes and are governed by an adversary procedure. So it is even after a favourable judgment the task of the prevailing party to enforce the judgment with the court's assistance (bailiffs etc., §§ 704 *et seq. ZPO*[1]) if the defeated party does not voluntarily comply with the judgment.

1. *See* in detail as to the enforcement procedure IX.2.§ 1.

II. Provisional Proceedings

140. Basically there are no provisional proceedings under the German law of civil procedure except for provisional orders and interlocutory injunctions:

141. One major area for provisional orders are marriage matters (*einstweilige Anordnungen in Ehesachen*, § 620 *ZPO*).[1] If § 620 *ZPO* does apply it even prevails over the ordinary rules for interlocutory injunctions, i.e., § 935 (*einstweilige Verfügung*).

1. As to the prerequisites and problems *see* in detail Rosenberg/Schwab/Gottwald, *supra*, pp. 1199 *et seq.*

142. Apart from this limited sphere of application the ordinary rules for provisional proceedings can be found in the realm of interlocutory measures, either to defer the other party from infringing further on the plaintiff's rights (interlocutory injunction/*einstweilige Verfügung*, § 935 *ZPO*) or from transferring his or her assets abroad thereby putting an execution of the future judgments at risk (interlocutory injunction *in rem*, attachment/*Arrest*, §§ 916, 917 *ZPO*). Therefore these two interlocutory injunctions are excluding each other and a party may only apply for one in respect to the same matter in controversy.[1]

1. *See* Thomas/Putzo, *supra*, *Vorbem.* § 916 *ZPO* No. 8.

143. An interlocutory injunction *in rem* (attachment) presupposes a claim for a liquidated sum of money or at least a claim which can turn into money (*Arrestanspruch*, § 916 *ZPO*). So a future claim or right is not a proper ground for an interlocutory injunction.[1]

Moreover there has to be a specific reason for an attachment (*Arrestgrund*, § 917(1) *ZPO*) which can in general terms be described as the actual danger of a deterioration of the defendant's assets and/or property caused deliberately by the defendant.[2]

Another specific reason is mentioned in § 917(2) *ZPO*, i.e., the hypothetical execution of the future judgment abroad. This rule was originally designed to protect the plaintiff because of the many uncertainties, difficulties and costs to execute a German judgment in a foreign country. This has been heavily criticized since the European (Brussels) Convention on the Recognition and Enforcement of Judgment has entered into force which has made almost a free circulation of judgments among the Member States possible. That is why the ECJ ruled in 1993 that § 917 (2) ZPO cannot be pleaded in case of execution of the judgment in a EU country[3], and the provision was changed accordingly.

Only where an injunction *in rem* is under very exceptional circumstances not sufficient to safeguard the plaintiff's future execution of the judgment an interlocutory injunction *in personam* is admissible (*persönlicher Arrest*, § 918 *ZPO*).

1. *See* Thomas/Putzo, *supra*, § 916 *ZPO* No. 5.
2. *See* e.g., *OLG* Koblenz, *ZIP* 1986, 1559; *OLG* Schleswig, *MDR* 1983, 41.

3. ECJ 10 February 1994 – Mund & Fester, C-398/92 – NJW 1994, 1279.

144. The second main interlocutory injunction is designed to defer the defendant from continuing to infringe the plaintiff's rights by an according court order (*einstweilige Verfügung*, § 935 *ZPO*). The prerequisites are virtually the same because § 936 *ZPO* expressly makes the norms for interlocutory injunctions *in rem* applicable. Nevertheless the ground for this injunction (*Verfügungsgrund*) is wider and can be any right based upon private law.[1] Additionally an injunction has to be the indicated means for a provisional ruling on the matter in controversy because of the otherwise existing danger of destroying the plaintiff's rights through a change of the actual situation. It is irrelevant in that respect that the defendant may be able to pay damages later on.[2] But the court may not issue an injunction making already, as a matter of fact, final rulings in respect to the matter in controversy. An interlocutory injunction is just a provisional means to safeguard the plaintiff's rights for which ordinary proceedings would be too time-consuming but may because of its *ex parte*-character not be abused for a factually irreversible court decree.

1. *See* Thomas/Putzo, *supra*, § 935 *ZPO* No. 5.
2. *See OLG* Köln, *ZIP* 1988, 445; Thomas/Putzo, *supra*, § 935 *ZPO* Nos. 6, 7.

145. The court having jurisdiction for the main hearing (*Gericht der Hauptsache*, §§ 937, 943 *ZPO*) is also competent to hear applications for interlocutory injunctions. This basic rule shall prevent contradictory decisions. In extremely urgent cases the municipal court in whose district the matter in controversy is situated (*res sita*) has also jurisdiction to grant an injunction provided it sets a time limit for applying for an oral hearing with the court having normally jurisdiction (*see* § 942 *ZPO*).

Injunctions *in rem* or *in personam* can in contrast always be granted by either the court having jurisdiction for the main hearing or the court in whose district the thing or person to be arrested is present (*Arrestgericht*, § 919 *ZPO*).

146. In the case of unfair competition another basis for a special interlocutory injunction is given by § 12 (2) *UWG* which refers regarding the details to the *ZPO*.

147. Under ordinary circumstances the court will grant an injunction without an oral hearing (§ 921(1) *ZPO*) just upon the plaintiff 's application if it justifies the injunction taking only his or her factual and legal allegations into account. But if the court gets to know that the facts are not undisputed and/or clear, e.g., through a written statement of the debtor to the contrary (so-called '*Schutzschrift*'), it will order an oral hearing.[1]

The plaintiff or applicant has to substantiate the claim and the reason for the injunction respectively for any interlocutory injunction which is ordinarily simply being done by affidavits (*see* § 920(2) and § 294 *ZPO*). In exceptionally urgent cases the court may in its discretion even waive the otherwise required substantiation (*Glaubhaftmachung*) if the plaintiff furnishes sufficient security for the defendant's impending disadvantages (§ 921(2) S. 1 *ZPO*).

1. The '*Schutzschrift*' is meanwhile recognized and respected by all courts and has become a common practice although the *ZPO* does not provide for such a provisional defence, *see* Thomas/Putzo, § 935 *ZPO* No. 9 with further references.

148. The defendant is, however, indirectly protected by the *ZPO* as it is a typical feature of *ex parte* proceedings to violate the maxim '*audiator et altera pars*'. So the plaintiff has to pay all the damages suffered by the defendant as a result of an interlocutory injunction that at a later stage of the proceedings proves to be unjustified from the start (§ 945 *ZPO*). Thus the plaintiff will normally make sure not to apply for an unjustified interlocutory injunction.

149. The provisional character of these interlocutory measures is underlined by the remedies lying against them:

If the injunction was granted without an oral hearing the defeated party can raise an objection (*Widerspruch*, § 924 *ZPO*). Upon the objection the court can, as the case may be, either maintain or quash the injunction, either completely or partly, and/or order the furnishing of security with a final judgment (*Entscheidung auf Widerspruch*, § 925 *ZPO*).

If the injunction was exceptionally granted upon an oral hearing by a judgment the other party can lodge an ordinary first appeal (*Berufung*) as if it were an ordinary judgment.[1] But a second appeal on points of law only (*Revision*) is not allowed by virtue of § 545(2) *ZPO*.

In addition, and not only alternatively, the party against whom the injunction was granted can make a motion to order the prevailing party to establish ordinary proceedings in respect to the matter in controversy, i.e., with a proper statement of claim, with the court having jurisdiction (§ 926 *ZPO*). If the other party does not comply with this order the court will – upon application – quash the interlocutory injunction with a judgment.

1. *See* Thomas/Putzo, *supra*, § 932 *ZPO* No. 5.

150. Despite the provisional character of interlocutory injunctions they can bring the whole dispute to an end without subsequent ordinary proceedings if the parties accept the court's provisional finding and find a settlement out of court accordingly. Very often the defeated party foresees already the danger of loosing also the ordinary (main) proceedings if the injunction was granted by the same court having jurisdiction over the main hearing.

§ 2. Default Proceedings

151. If the defendant properly served upon with the statement of claim and the summons to appear in court does nevertheless fail to appear at the oral hearing, the plaintiff may apply for a default judgment against the defendant (*Versäumnisurteil gegen den Beklagten*, § 331 *ZPO*). Oral hearing in this sense (*Verhandlungstermin*, § 332 *ZPO*) includes not only the first but also every consecutive hearing date.

But a default judgment need not necessarily be in favour of the plaintiff: only the factual allegations of the plaintiff in respect to the claim are taken as admitted, i.e.,

true (§ 331(1) S. 1 *ZPO*). Accordingly, the application for a default judgment can also lead to a dismissal of the plaintiff's complaint on the merits if the demand for relief does not have a sound legal basis (§ 331(2) *ZPO*, so-called 'spurious default judgment'/'*unechtes Versäumnisurteil*').[1] But the court is obliged by §§ 139 (2), (3) *ZPO* to give a legal hint before rendering a judgment on the merits if the plaintiff could rectify the complaint.

In the same manner the defendant may apply for a default judgment against the plaintiff if he or she does not appear at the oral hearing ('*Versäumnisurteil gegen den Kläger*', § 330 *ZPO*). But in contrast to § 331(2) *ZPO* the court will not examine the merits of the defendant's case before dismissing the claim upon the defendant's application. If the plaintiff's cases lacks a good cause, however, the court will dismiss the claim upon application with an ordinary judgment on the merits. However, if the defendant does not enter an appearance on the merits, which he or she would otherwise do by applying for a default judgment, he or she may also apply for dismissing the plaintiff 's claim as inadmissible through a procedural judgment only.[2] The latter presupposes that the plaintiff was given the opportunity to be heard regarding the objections standing against the admissibility of the statement of claim.[3]

A party is also (legally) treated as not having appeared at the oral hearing if he or she does not plead before the court although he or she is in fact physically present at the trial (§ 333 *ZPO*). The same is true if it is mandatory to be presented by an attorney, i.e., in proceedings before the regional court (*Landgericht*) and upwards (§ 78 *ZPO*, so-called 'attorneys' proceedings'/*Anwaltsprozess*).[4]

According to §§ 330, 331 *ZPO* a default judgment presupposes either that one party appears at the oral hearing and the other does not appear or does not plead, the date of the oral hearing was properly set by the court, and that the absent party was properly (formal service) and timely (§ 274(3) *ZPO*) summoned (*see* § 335(1) No. 2 *ZPO*). In addition, the party having appeared must apply for a default judgment and the court has to check *ex officio* whether the general procedural prerequisites (capacity to be a party, *lis alibi pendens*, etc., *see above* para. 92 Actions) are fulfilled.

Furthermore the plaintiff can already in his or her prayer for relief apply for a default judgment if the defendant should fail to file a statement of defence in due time according to the time-limit set by the court pursuant to § 276 *ZPO*. In the latter case the court will take a decision without an oral hearing.

Alternatively one party may make a motion for a decision on the documents before the court (*Entscheidung nach Aktenlage*, § 331a *ZPO*) if the other party is in default. The prerequisites are the same as for applying for a default judgment. A decision on the documents gives the court more flexibility since all the files of the case can be taken into consideration. This could be in particular important if the oral hearing date where one party does not appear is not the first one. So the court has the power to render a final judgment on the merits, to order a taking of evidence or to adjourn the case.

1. *See BGH*, *NJW* 1961, 2207; Thomas/Putzo, *supra*, § 331 *ZPO* No. 6; Vorbem. § 330 *ZPO* No. 12.
2. This is also a 'spurious default judgment' (*unechtes Versäumnisurteil*) because it is being rendered regardless of the default, *see* Thomas/Putzo, *supra*, § 330 *ZPO* No. 3.
3. *See BGH*, *ZIP* 1986, 740.
4. *See* Jauernig, *supra*, p. 271.

152. The significant feature of a (genuine) default judgment is that a special appeal (objection) (*Einspruch*, § 338 *ZPO*) exists for the party against whom the default judgment was entered. If the defaulting party lodges this special objection in writing with pleadings and reasons (§ 340 *ZPO*) and in time (two weeks after service of the default judgment, § 339 *ZPO*) he or she may not loose the chance to plead their case. The proceedings are then treated as if there were no default judgment (§ 342 *ZPO*). This presupposes additionally that the party originally in default appears on the new hearing date (*see* § 345 *ZPO*).[1] The court will take a new decision and either uphold the default judgment or render a new judgment that also sets aside the default judgment (*see* § 343 *ZPO*). The only disadvantage for the party in default are the costs; the defaulting party bears the costs of the default even if they prevail in the final judgment (*see* § 344 *ZPO*).

1. Otherwise the court will render a so-called 'second default judgment' ('*Zweites Versäumnisurteil*', § 345 *ZPO*) with no further special appeal, *see* Jauernig, p. 276.

153. But in any case it has to be noted that in practice there is very often a common – not legally binding – understanding amongst attorneys not to apply for a default judgment before having tried to contact the defaulting party if he or she is also represented by an attorney. If the court has actual knowledge of such an understanding it will most likely – notwithstanding an application for a default judgment – adjourn the case *ex officio* (*Vertagung von Amts wegen*, § 338 *ZPO*) because the party in default is then regarded as not having appeared without fault.[1] But these understandings or agreements among attorneys may neither impede the functioning of the administration of justice nor violate the principle of commensurability.[2]

1. *See* Thomas/Putzo, *supra*, § 338 *ZPO* No. 3.
2. *See BGH*, *NJW* 1991, 42 and Thomas/Putzo, *supra*, § 338 *ZPO* No. 3 with further references.

154. Apart from that default proceedings are also often deliberately used as a means to procrastinate proceedings since the party in default does not loose an instance with lodging the special appeal (*Einspruch*, § 338 *ZPO*) in due time. Moreover, there is no real danger that a default judgment is being executed – although this is easily possible even without a provision of security (*see* § 708 No. 2, §§ 712 *et seq. ZPO*) – because the executing party faces the danger of having to pay damages if he or she looses the case later with a final judgment on the merits.[1]

1. *See* Jauernig, *supra*, p. 277.

§ 3. *EX PARTE* PROCEEDINGS

155. As the maxim '*audiatur et altera pars*' dominates not only German civil proceedings but stands in general for a fair trial according to the rule of law, *ex parte* proceedings must remain the domain of exceptional circumstances.

Genuine *ex parte* proceedings can therefore only be found in the realm of interlocutory measures (provisional proceedings) where an element of surprise is usually essential to defer the other party from infringing further on the plaintiff's rights

(interlocutory injunction/*einstweilige Verfügung*, § 935 *ZPO*) or from transferring his or her assets abroad thereby putting an execution of the future judgments against him or her at risk (interlocutory injunction *in rem*, attachment/*Arrest*, §§ 916, 917 *ZPO*).[1] So the court will, as a basic rule, grant an interlocutory injunction because of a liquidated sum of money without an oral hearing (§ 921(1) *ZPO*) just upon the plaintiff's application if it justifies such an injunction taking into account the factual and legal basis (*see* in detail para. 146, *supra*).

Because of the inherent danger of *ex parte* proceedings to do the debtor/defendant injustice, the plaintiff/creditor has to pay all the damage suffered by the defendant as a result of an interlocutory injunction that at a later stage of the proceedings proves to be unjustified from the very beginning (§ 945 *ZPO*). Thus the plaintiff will make sure not to apply for an interlocutory injunction if the legal and/or factual basis is insofar uncertain or unsound that he or she will most likely loose in the main (ordinary) proceedings.

1. Exceptionally an interlocutory injunction will even be granted *in personam* if this is necessary to safeguard the future execution into the debtor's assets (§ 918 *ZPO*).

156. Apart from that the other *sedes materiae* for *ex parte* proceedings is default proceedings: If one party does not make any appearance there has to be some kind of *ex parte* sanction because otherwise justice would be denied to the other party. So a default judgment could be rendered against the non-appearing party if the specific prerequisites are fulfilled, in particular proper service of the writ and summoning, to give the other party the chance to appear in court (§§ 330 *et seq.*, 335, *see* in detail para. 150, *supra*).

Chapter 3. Review Proceedings

§ 1. Appeal

157. Ordinary appeals at first instance (*Berufung*, § 511 *ZPO*) can be brought on fact and law, and at second instance (*Revision*, § 542 *ZPO*) on points of law only. The rules governing the review proceedings have been changed as of 1 January 2002 (*see* for transient provisions '*Übergangsvorschriften*' § 26 Nr. 5-10 *EGZPO*).[1]

1. *See* H. Koch, *Recourse against judgements – Germany*, in: Jolowicz/van Rhee (eds.), Recourse against judgments in the European Union (Civil Procedure in Europe, vol. 2), 1999, pp. 155 *et seq.* (written before the reform of the *ZPO* in 2002, however!).

I. First Appeal (*Berufung*)

158. An appeal at first instance is only admissible if the amount in controversy for the appeal (*Berufungssumme*) exceeds € 600 (§ 511(2) No. 1 *ZPO*) or if it is declared admissible in the judgment by the Court of First Instance (*Zulassungsberufung*, § 511(2) No. 2 *ZPO*). The prerequisites for such a declaration are: 1) The legal question is of fundamental importance (§ 511(4) No. 1 *ZPO*) or 2) the development of the law or the uniform application of the law requires the decision of an appellate court (§ 511(4) No. 1 *ZPO*). Thus, cases not exceeding € 600 that are of common legal importance as to the admissibility can be reviewed now. The Appellate Court is bound by the decision of the Court of First Instance (§ 511(4) S. 2 *ZPO*).

In any case the appeal has to be filed with the court competent to hear the appeal within one month starting from the time of the formal service of the first instance judgment (§§ 517, 519 *ZPO*). The complete reasoning in writing must be handed in to the competent court within two months starting from the time of the formal service of the first instance judgment (§ 520 (1), (2) *ZPO*); this period might be extended further if the other party agrees or if there are important reasons for doing so (§ 520 (2) S. 2, 3 *ZPO*). Such a first appeal allows the limited introduction of new facts and submissions if they concern an issue that has not been dealt with by the court of first instance, that has not been mentioned so far due to a defective first instance procedure or that has not been mentioned without the fault of the party (§ 520 (3) No. 4, 531 (2) *ZPO*). In contrast, motions as to the admissibility of the complaint as such are not subject to this limitation but will be generally admitted if the party excuses him- or herself sufficiently for not having brought it in due time at first instance (§ 532 *ZPO*).

The appeal court may allow or dismiss the appeal, but it may send the case back to the lower court only if the prerequisites of § 538 (2) No. 1 – 7 *ZPO* are met.

II. Second Appeal (*Revision*)

159. The rules governing the second appeal (*Revision*) have been changed fundamentally by the reform of the *ZPO* in 2002. Still, a second appeal is limited to questions of law only. But now every '*Revision*' has to be admitted. It is limited to cases that have a meaning over and above the case itself – i.e. the crucial point to grant the remedy or not will be the effect on the general public and not (only) on the individual judgment.[1]

But still it is disputed, whether the '*Revision*' continues to be an instrument to achieve individual justice or not – and even the different '*Senates*' of the *BGH* do not always share the same opinion.[2]

Every case has to be admitted either by the Court of the First Appeal (*iudex a quo*) or by the Court of the Second Appeal on complaint against non-admittance (*index ad quem*) (§ 543 *ZPO*). The former '*Wertrevision*' (i.e. cases involving an amount in controversy of more than € 30,000, § 554 b *ZPO a.F.*, that were almost always admissible, and the '*Revision*' according to § 547 *ZPO a.F.* are abolished by now.

The '*Revision*' therefore (mainly) serves the interest of the fair administration of justice as a whole by maintaining its uniformity in questions of law throughout the country.[3] This is, *inter alia*, achieved by a single court having exclusive jurisdiction over second appeal-cases, i.e., the Federal Court of Justice ('*Bundesgerichtshof*' *or* '*BGH*', *see* § 133 *GVG*) whose by-laws (*Geschäftsordnung*) direct certain questions of law to the same chamber (*Senat*).

In any case the second appeal has to be filed with the Federal Court of Justice (*BGH*) within one month starting from the time of the service of the complete judgment to the aggrieved party (§ 548 *ZPO*). This has to be done by an attorney admitted to the *BGH*.[4] The reasons for the '*Revision*' (*Revisionsbegründung*), i.e., that the judgment was based upon a wrong or non-application of a legal norm (§ 551 *ZPO*), can either be already attached to the statement of appeal or filed with the *BGH* within the following two months. The latter time limit can – upon application – even be prolonged (§ 551(1) S. 5, 6 *ZPO*).

Presupposed the 'second appeal' is admissible, i.e., within the time-limit and based upon a question of law only (new factual allegations or fresh evidence are excluded, § 559(1) S. 1 *ZPO*),[5] the *BGH* may reach different decisions:

If the *BGH* comes to the same conclusion as the challenged judgment it will dismiss the second appeal on the merits. This is also true where the judgment was based upon an infringement of a legal norm but in the end well-founded because of other reasons (§ 561 *ZPO*).

If, on the other hand, the *BGH* comes to a different conclusion it will quash the judgment (§ 562(1) *ZPO*). Generally it will then remit it to the court below where the appeal's procedures have to be continued but this time on the basis of the *BGH*'s reasoning (§ 563(1), (2) *ZPO*). The lower court is directly bound by the legal but not the factual reasoning of the BGH's judgment which therefore represents a limited form of binding precedent (§ 563(2) *ZPO*).[6] When the *BGH* agrees to the appeal and finds there is no need for a new ascertainment of facts (§ 563 (3) *ZPO*), the court itself will decide the case finally even when it quashes the lower court's decision.

When the case is 'ripe' for decision on the basis of the established facts it would amount to unnecessary delay if the *BGH* were to remit to the court below.

1. Rosenberg/Schwab/Gottwald, *supra*, p. 994; Münchener Kommentar zur ZPO, ZPO-Reform/ Aktualisierungsband, 2nd. Ed., 2002, § 543 No. 2 *et seq.*
2. *BGH, NJW 2002, 2957; 2002, 2473 et seq., NJW 2002, 3353*.
3. *See BVerfGE* 54, 289 *et seq.*
4. *See* Thomas/Putzo, *supra*, § 549 *ZPO* No. 1.
5. As to this restriction and exceptions *see BGHZ* 104, 220 *et seq.*; 100, 219; Jauernig, *supra*, p. 312.
6. As to the details of this binding force *see BGH*, *NJW-RR* 1991, 1340; *BGHZ* 60, 397 *et seq.* (common senate); Thomas/Putzo, *supra*, § 563 *ZPO* No. 3 *et seq.*

III. Complaint (*Beschwerde*)

160. A complaint (*Beschwerde*) is the ordinary remedy against certain incidental court decisions where the *ZPO* expressly provides for this form of appeal (§§ 567(1) No. 1, 574(1) No. 1 *ZPO*). The complaint always is directed at quashing or reversing a court decision only and does not affect the matter in controversy as such. After its reform as of 1 January 2002 the ZPO offers now only two different kinds of complaints: The 'immediate complaint' (*sofortige Beschwerde*, § 567 *ZPO*) and the 'complaint as to the law' (*Rechtsbeschwerde*, § 574 *ZPO*).

One can bring an 'immediate complaint' against first instance decisions of local courts (*Amtsgericht*) or regional courts (*Landgericht*), if this is expressly stated in the law, e.g. § 71, 135, 387, 402 ZPO (intermediate judgments against third parties), § 319 *ZPO* (rectification of the judgment), § 336 *ZPO* (denial of a default judgment) or § 387 *ZPO* (intermediate judgment on the right of a witness to refuse to give evidence). It has to be filed in writing within two weeks after the service of the court decision was perfected (§ 569 *ZPO*), either with the Court of First Instance (*iudex a quo*) that can correct its own decision or, if it does not then the complaint has to be submitted to the second instance court (*iudex ad quem*) which has to rule on the admissibility, it can order a new hearing with new evidence and allegations. The parties are not precluded with any new allegations by virtue of § 296 *ZPO* which is here inapplicable (§ 571(2) *ZPO*).[1] Since it is within the court's discretion whether to grant an oral hearing, it can only render a decision not a judgment. If the complaint is well-founded the court may either decide the case on the merits, i.e., reverse the original decision, or quash the decision and refer it back to the lower court for issuing the necessary orders accordingly (§ 572(3) *ZPO*).

The 'complaint as to the law' (*Rechtsbeschwerde*) might be brought against decisions of a court, if this is provided by the law (§ 574(1) No. 1 *ZPO*) or if it is admitted by the competent court (§ 574(1) No. 2 *ZPO*). Admission follows the same criteria as it does for a Second Appeal (*Revision*).[2] A 'complaint as to the law' has to be filed in writing within on month after the service of the court decision was perfected (§ 575 *ZPO*). It can be brought for legal reasons only, like a Second Appeal (*Revision*), as is stated in § 576 *ZPO*. The court will render a decision not a judgment. If the complaint is well-founded the court may either decide the case on the merits, i.e., reverse the original decision, or quash the decision and refer it back to the lower court for issuing the necessary orders accordingly (§ 577(3), (4) *ZPO*).

The judicature had developed furthermore, an exceptional complaint (*ausserordentliche Beschwerde*) against otherwise unappealable court decisions if there was an evident unlawfulness ('*greifbare Gesetzeswidrigkeit*'), i.e., cases of arbitrariness contrary to Article 3(1) *GG*.[3]

But after the new regulation of the law of complaints as of 1 January 2002, the *BGH* has decided that it may accept complaints only if they are based upon § 574(1) *ZPO*, i.e. a 'complaint as to the law' (*Rechtsbeschwerde*).[4] It will not accept exceptional complaints any more. In other cases, where a court's decision should be changed on grounds of new or overlooked facts or legal arguments and § 574(1) *ZPO* is not applicable, this might be done via '*Gegenvorstellung*' (remonstrance, § 321 a *ZPO analogous*).[5]

1. *See BVerfGE* 59, 333 *et seq.*; *BGHZ* 86, 224.
2. *See* Jauernig, *supra*, p. 319.
3. *See BGH*, *NJW* 1993, 136.
4. *See BGH NJW 2002*, *1577*; *BGH NJW 2003, 3137*.
5. *See BGH NJW 2003*, *3137*, Thomas/Putzo, *supra*, § 567 *ZPO* No. 7 *et seq.*

§ 2. Cassation

161. Apart from the ordinary appeals (*Berufung*, *Revision*) and the complaint (*Beschwerde*) which could, if successful, lead to a 'cassation' (quashing) of a judgment or court decision (*see above* § 1, *supra*), there is no special cassation under the German law of civil procedure.

§ 3. Extraordinary Appeals

162. Another exceptional appeal on the question of substantive law (not procedural matters) only, i.e., a 'second appeal' (*Revision*) is admissible from the regional court directly to the Federal Court of Justice ('Leap-Frog-Appeal'/ *Sprungrevision*, § 566 *ZPO*).[1] In practice this procedural option is only very rarely used. The miniscule risk of waiving the second instance with its limited (but existing) possibility of introducing new submissions and facts involves also a high risk for the attorney being later sued by his or her client for malpractice (professional negligence). Therefore an attorney will, on very rare occasions, recommend a leap-frog-appeal to the Federal Court of Justice. In addition the written consent of the other party is necessary (§ 566(1) No. 1 *ZPO*) and the Federal Court of Justice can dismiss the leap-frog-appeal if the case does not involve a fundamental legal issue (§ 566(4) *ZPO*).

1. It must be also a judgment which may be ordinarily appealed, i.e. with an amount in controversy of at least EUR 600, *see* § 511 *ZPO*), *see BGHZ* 69, 354.

Part V. Incidents

Chapter 1. General

163. At any stage of the proceedings the plaintiff can produce incidents, i.e., deviations from the normal course of proceedings, by withdrawing the action (*Klagerücknahme*).[1] This is the end of the legal proceedings with the result that the effect of *lis pendens* disappears retrospectively, i.e., as if the claim were never filed with the court (§ 269(3) S. 1 *ZPO*). But the plaintiff has to pay the costs of the legal proceedings and the court will upon the defendant's application even render a formal (declaratory) decision stating the aforesaid. If the defendant already made an appearance on the merits the plaintiff needs in addition the defendant's approval before withdrawing the action (§ 269(1) *ZPO*).

Both parties can also jointly declare the matter in controversy as settled (*übereinstimmende Erledigungserklärung*, § 91a *ZPO*) which ends the legal proceedings without a judgment and a judgment not yet being *res iudicata* becomes void (§ 269(3) S. 1 *ZPO* analogous). The only thing for the court left to do is to decide, in its discretion, who has to bear the costs of the proceedings. This joint declaration can be made by the parties themselves even if they would otherwise have to be presented by an attorney (§ 78(3) *ZPO*).

The plaintiff can also on his own declare the matter in controversy as settled which is regarded as a change of his or her original action. Therefore the court will deal with it according to the normal rules, i.e., dismiss the statement of claim as inadmissible or on the merits. Otherwise the court will declare the matter in controversy as settled through a judgment together with a decision on the costs of the proceedings pursuant to § 91 *ZPO*.[2]

1. *See* Jauernig, *supra*, p. 175.
2. *See* in detail *BGHZ* 83, 13 *et seq.*; Jauernig, *supra*, pp. 176/177.

164. Apart from that one-sided option regarding procedural incidents, each party can object to one or several judges of the court (chamber, senate) dealing with the case on grounds of bias or of being excluded by statute (*Ablehnung eines Richters wegen Besorgnis der Befangenheit*, § 42 *ZPO*). A judge is excluded by statute from acting as a judge pursuant to § 41 *ZPO* if he or she is directly or indirectly involved in the proceedings as a party or spouse or relative or representative of one party or first instance judge.[1] This exclusion functions per se, requiring no knowledge on the

part of the judge of the aforesaid circumstances. Apart from that an objection on grounds of bias can e.g., be based on a friendship between the judge and a party or a representative of a party (attorney), or because of subjective or uncalled-for remarks of the judge.[2]

But a party is deemed to have waived his or her right to object to a judge if he or she makes appearance without raising the objection although the grounds were known to him or her (*see* § 43 *ZPO*, *Verlust des Ablehnungsrechts*).

The party has in any case to file the objection ('*Ablehnungsgesuch*') with the court to which the judge belongs which could be done orally with the clerk of the court, i.e., without the otherwise necessary representation by an attorney (*see* § 44 and § 78(2) *ZPO*). Nevertheless, the party seeking the rejection of a judge has to substantiate the grounds for the objection (*see* § 44(2) and § 294 *ZPO*). The decision on the objection is rendered either by the court or panel to which the judge belongs, or in the case of a judge sitting alone to a small panel of the next higher court (§ 45 *ZPO*). An 'immediate complaint' (*sofortige Beschwerde*) can be made against the decision dismissing the application for rejection on grounds of bias (§ 46(2) *ZPO*):

1. *See* in detail Thomas/Putzo, *supra*, § 41 *ZPO* No. 2 *et seq.*
2. *See OLG* Hamburg, *NJW* 1992, 2036 and Thomas/Putzo, *supra*, § 42 *ZPO* No. 10 *et seq.* with further examples.

165. A judge rendering or participating in rendering a judgment despite being biased (§ 42 *ZPO*) or despite the existence of a statutory bar (§ 41 *ZPO*) is also a ground for a retrial because the judgment is void (*Nichtigkeitsklage*, § 579 *ZPO*). Moreover, it is an absolute ground for lodging a second appeal (*absoluter Revisionsgrund*, § 547 No. 3 *ZPO*).

Part VI. Legal Aid and Legal Costs

Chapter 1. Legal Aid

166. As already mentioned above,[1] everyone's constitutional right to legal recourse and to court proceedings according to the rule of law[2] would be impaired if the costs of legal proceedings were a barrier to economically disadvantaged people. On the other hand, granting legal aid should not lead to going to court for any alleged right or alleged infringement of such a right. A compromise has been found in the German system of legal aid (*Prozesskostenhilfe*) pursuant to §§ 114 *et seq. ZPO*:

The German system of legal aid tries to strike a balance between granting legal aid to any aggrieved and financially poor party and encouraging going to court without a good legal cause because it is for free. Primarily, only alleviating the burden of costs by granting payment by instalments of the court fees is the standard measure of legal aid. The court will only in exceptional cases where the economical need is very grave order the costs to be completely borne by the State.[3] In any case the party seeking legal aid has to apply for it at the court having jurisdiction over the case. It is then in the court's discretion to grant or refuse legal aid taking the state of need and the chances of success into consideration.

Considering that the potential plaintiff has to give the court detailed information on the state of his or her financial situation makes applying for legal aid less attractive.

Another hurdle to overcome is the reasonable prospect of success ('*hinreichende Aussicht auf Erfolg*') of the intended litigation which must not be frivolous or malicious ('*mutwillig*') (§ 114 *ZPO*).[4] The latter prerequisite contains also a cheap and simple means to check how the court will most likely decide the case in the end. So it is quite common that attorneys on behalf of their clients file a complaint with the court under the condition that legal aid will be granted. If this condition is not fulfilled, i.e., the court refuses legal aid, the statement of claim shall be regarded as non-existing so that it will be unnecessary to withdraw the action.

1. *See* General Introduction, para. 42 Right to Legal Recourse.
2. In particular Art. 3(1) *GG* and the principle of a social State based upon the rule of law, *see BVerfGE* 9, 130; 35, 354 *et seq.*; *BVerfG NJW* 1991, 413 *et seq.*
3. *See* Thomas/Putzo, *supra*, § 115 *ZPO* No. 1 *et seq.*
4. As to the difficulties to predict the chances of success *see BerfGE* 81, 357, *BGH*, *NJW-RR* 1989, 703.

167. Before filing a complaint with a court, citizens who cannot afford the regular attorneys' fees may seek free legal counselling at the municipal courts according to the 'Legal Advice for People with Limited Means Act' (*Beratungshilfegesetz*/*BerHG*).[1] This service is usually being provided by attorneys working for a fixed amount per 'client'. Only exceptionally the municipal court will have the necessary personal capacity itself. Nevertheless, one has to apply to the municipal court disclosing pursuant to § 1 *BerHG* completely the economic and personal situation (§ 7 *BerHG*). Moreover, the aim for seeking legal advice may neither be frivolous nor wilful. So the prerequisites are very similar to those for applying for legal aid and not surprisingly § 1(2) *BerHG* even refers directly to some legal aid norms. Upon the oral or written application (§ 4 *BerHG*) the municipal court will in its discretion issue or refuse a certificate enabling the applicant to seek the advice of an attorney or an equally qualified person at the municipal court (§ 6 *BerHG*).[2]

1. *Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen* (*Beratungshilfegesetz* / *BerHG*) of 18 June 1980 (*BGBl.* 1980 I, 689).
2. Any agreement as regards payment is void (§ 8 *BerHG*).

Chapter 2. Legal Costs

168. Legal costs have to be divided up into two categories: first court and second attorneys' fees. Both have in common that their amount is calculated depending on the amount in controversy and that the loosing party has to pick up the bill for both in the end (*see* § 91 *ZPO*).

The court fees are calculated according to the courts' fees act (*Gerichtskostengesetz/GKG*) and the attorneys' fees according to the federal attorneys' fees act (new as of May 5, 2004: *Rechtsanwaltsvergütungsgesetz/RVG*). As an example, the legal costs for an amount in controversy of € 50,000 (approx. US-$ 61,000) are € 1,368 for the court (§ 34 *GKG*) and at least € 3.079,80 for each attorney if there was an oral hearing (§§ 13 *et seq. RVG*). This sums up to a total amount of at least € 7,527.60 plus 16 per cent VAT for the loosing party.

Because of these possible high legal costs it has become quite common in Germany to have a legal costs insurance (*Rechtsschutzversicherung*). But such an insurance is not at all a 'royal charter' for leaning back and suing other persons at will. Legal costs insurances are usually excluding many risks, e.g., marriage, family and inheritance matters, and are subject to an express declaration of coverage in the individual dispute to prevent reckless and frivolous legal proceedings.[1]

1. As to detail in respect to legal costs insurances and their influence on instituting civil proceedings *see* Blankenburg/Fiedler, *Die Rechtsschutzversicherungen und der steigende Geschäftsanfall der Gerichte*, Tübingen 1981.

169. Although a party can according to § 4 *RVG* agree with an attorney in a written contract to pay higher fees than provided for by the *RVG*, these additional, unnecessary costs will not be reimbursed by the loosing party. The same is true regarding contingency fees ('*quota litis*') that are in Germany (still) generally illegal (§ 49 b (2) *BRAO*) rendering such agreements void.[1]

1. *See BGHZ* 118, 332 and as to criticism Jauernig, *supra*, p. 54 with further references.

170. In addition the loosing party has to bear the costs for witnesses's expenses, for expert witnesses ordered by the court (as forming part of the court costs) and exceptionally even for the reasonable expenses incurred by expert witnesses brought into the proceedings by the prevailing party if it was reasonable to do so.[1]

In this respect it has to be noted that foreign law is under the German law of civil procedure regarded as a quasi-fact (§ 293 *ZPO*). So the maxim '*iura novit curia*' does not apply but the court has *ex officio* the duty to find out the rules of the foreign law, irrespective of the burden of proof.[2] Therefore the court will in those cases very often order *ex officio* an expert opinion on the particular questions of foreign law unless one party did already furnish such evidence or both parties agree either that the foreign law is correctly stated or that German domestic law should be applicable (choice of law, Article 27 *EGBGB*).

1. *See* Thomas/Putzo, *supra*, § 91 *ZPO* No. 48 *et seq.*

2. *See also BGH*, *NJW* 1991, 1418 and 2212; Thomas/Putzo, *supra*, § 293 *ZPO* Nos. 4, 5.

Part VII. Evidence

Chapter 1. Burden of Proof and Evaluation

171. As a general, non-codified rule, the party who brings an action or raises an objection has to produce and prove all the facts which support its case. The norms of the substantive law, primarily the *BGB* and *HGB*, forming the basis of the respective claim or defense contain incidentally the factual prerequisites, which need to be delivered and, if contested, also be proven.

The evaluation of proof is determined by the formation of the judge's conviction: according to § 286 *ZPO* the court is in general free to evaluate all the presented evidence (principle of free evaluation of the evidence, '*Grundsatz der freien Beweiswürdigung*'). Therefore all facts are regarded as true which are either admitted by the other party or, if contested, regarded as proven (beyond a reasonable doubt) pursuant to the evaluation of the court at the end of the hearing of evidence.

One of several exceptions to the general rule of burden of proof is contained in § 280 (1) 2 BGB stating a reversal of the burden of proof in cases of duty violations: here the debtor has to show that the is without fault, which leads in practice to a strict liability, in particular in product liability-cases[1] but also to a certain extent in cases involving gross medical malpractice.[2]

1. *See BGHZ* 67, 361 *et seq.*; 104, 333; *BGH*, *NJW* 1993, 529.
2. *See* e.g., *BGHZ* 85, 212 *et seq.*; *BGH*, *NJW* 1993, 529; Jauernig, *supra*, p. 213 with further references.

Chapter 2. Admissibility of Evidence

172. The admissibility of evidence depends on the kind of procedure: In provisional proceedings, in particular with preliminary injunctions, all kinds of evidence are admissible to substantiate the alleged claim (§§ 290(2), 294(1) *ZPO*), including affidavits (*eidesstattliche Versicherungen*) and hearsay ('*Hörensagen*'), if the evidence can be actually and instantaneously presented to the court (§ 294(2) *ZPO*).[1]

In contrast to that in proceedings for the enforcement of claims arising out of commercial documents, in particular negotiable instruments but also 'ordinary' documents and cheques (§§ 592–605a *ZPO*, *Urkunden- und Wechselprozess*) only documentary evidence is admitted to substantiate the claim (§ 592 S. 1 *ZPO*). So the plaintiff is basically obliged to attach at least a copy of the documents to the statement of claim (§ 593 *ZPO*).[2] In these commercial document cases it is not only the claim itself but all evidence that has to be furnished by documents or by interrogation of a party (§§ 595(2), (3) *ZPO*, *cf.* Part VIII. Chapter 1).

In all other civil proceedings five different ('classical') means of presenting evidence are admitted, each regulated by specific norms of the *ZPO*:

1 Inspection by the court (*Augenschein*, §§ 371 *et seq. ZPO*);
2 Witnesses (*Zeugen*, §§ 373 *et seq. ZPO*);
3 Expert witnesses (*Sachverständige*, §§ 402 *et seq. ZPO*);
4 Documents (*Urkunden*, §§ 415 *et seq. ZPO*); and
5 Interrogation of a party (*Parteivernehmung*, §§ 445 *et seq. ZPO*).

In addition the court may *ex officio* ask administrative bodies for information (*behördliche Auskunft*, § 273(2) No. 2 *ZPO*).

1. *See* Thomas/Putzo, *supra*, § 294 *ZPO* No. 2.
2. But the documents could exceptionally also be produced later with the oral hearing as the ultimate date, *see* Rosenberg/Schwab/Gottwald, *supra*, pp. 1135/1136 and Part VIII. Chapter 1, *infra*.

Chapter 3. Administration of Evidence

173. Because of the – in principle – adversary procedure it is the task of the parties to introduce factual allegations and to furnish evidence accordingly. This should be done as soon as possible to allow the other party enough time for a reply (*see* § 282(1) *ZPO*).

If the evidence is present, e.g., documents or witnesses, the court will order the taking of evidence (*Anordnung der Beweisaufnahme*) by a simple decision without any formalities (*see* § 278(2) S. 1 *ZPO*). Otherwise the taking of evidence has to be formally ordered by the court (*Beweisbeschluss*, § 358 *ZPO*). The order to take evidence has to contain the facts to be proved, the evidence and the party bearing the burden of proof (§ 359 *ZPO*). In advance the court should make sure that the facts firstly need to be proved and secondly are really decisive for the claim or defence. These initial questions are often handled very loosely by the courts, in particular at the municipal courts, which is rather unfortunate since at least the defeated party has finally to pick up the bill of unnecessary hearings of evidence.

If the court does not on its own order the taking of evidence it has basically to do so if one party did explicitly apply for it,[1] except where the evidence is superfluous or inadmissible (e.g., offering a witness instead of producing the necessary document) or in the case of 'fishing expeditions' (*Ausforschungsbeweis*).[2]

1. *See BGHZ* 53, 259 *et seq.*
2. *See* in detail Jauernig, *supra*, pp. 214/215.

174. The taking of evidence is done directly before the whole court, so that only exceptionally a member of the panel can be authorized to take the evidence as a commissioned judge (§ 355(1) *ZPO*).

Although introducing the factual allegations together with the evidence into the proceedings is the parties' responsibility, the taking of evidence is done *ex officio*. So the parties have the right but not the duty to be present at the hearing of evidence (§ 357 *ZPO*). The taking of evidence will even take place if no party is present (§ 367 *ZPO*). Thus under the German law of civil procedure there is no cross-examination. It is the judge who poses the questions to the witnesses and only after that the parties are allowed to ask additional questions.

After the taking of evidence the oral hearing shall be directly continued to give the judge and the parties the chance to proceed on the basis of the fresh impressions (*see* § 379(1) *ZPO*).

A party cannot be forced to let an inspection by the court happen with the exception in questions of descent, i.e., blood-tests (*Abstammung*, § 372a *ZPO*).[1] But a denial of inspection not being to a certain degree reasonable may be used against the party in question.[2]

A witness, being properly summoned, is obliged to appear at the hearing, to make a deposition and even to make an affidavit (*Pflicht zum Erscheinen, zur Aussage und zur Eidesleistung*). If the witness does not comply with the aforesaid obligations he or she has not only to bear the costs of the taking of evidence but will be fined and

can be even put in jail (*Ordnungshaft*) (*see* § 390 *ZPO*). Just a few persons have the privilege to decline to answer questions or to refuse to give evidence at all. These persons are near relatives of a party, priests, medical doctors, notaries, attorneys and judges (*see* § 383 *ZPO*). Although the *ZPO* provides for in § 391 that the evidence should where necessary be given under oath or in an equally binding form this has in practice become a rare exception according to the discretion of the court.[3]

In the case of documentary evidence the judicature has developed a general duty of the other party to produce the documents in actual possession that are necessary as evidence for the party bearing the burden of proof.[4] If that party does not voluntarily produce the documents the court will order to do so (§§ 425, 426 *ZPO*). If even that is not sufficient the court will simply take the factual allegations of the party bearing the burden of proof as admitted (§ 427 *ZPO*). Even third parties (§§ 428, 429 *ZPO*) and public administrations (§ 432 *ZPO*) can be ordered to produce the required documents being in their possession.

If a party deliberately destroys or suppresses documents being evidence required by the other party the court will take the other party's allegations on the kind and content of the document as proved (*Beweisvereitelung*, § 444 *ZPO*).

In general documentary evidence is in practice regarded as the safest and most reliable form of evidence.[5]

1. As to the constitutionality (Art. 2(2) S. 3 *GG*) of this provision *see BVerfGE* 5, 15 *et seq.*
2. *See* Jauernig, *supra*, p. 219.
3. *See BGHZ* 43, 368 *et seq.*; Jauernig, *supra*, pp. 222 *et seq.*
4. *See* Jauernig, *supra*, pp. 227/228 with further references.
5. *See BGHZ* 65, 302.

175. In German law the parties themselves because of their bias can never be presented as witnesses. There are fundamental differences between witnesses and parties as means of evidence: the parties cannot be forced to testify; the court will draw its conclusions from a refusal, however. Also, deposition of parties is admissible only subsidiarily, i. e. if either no other evidence can be furnished, or they do not suffice to strengthen the court's conviction (§ 445 *ZPO*). In any case, the party bearing the burden of proof cannot present itself to testify unless the opponent agrees (§ 447 *ZPO*). The court, however, *ex officio* may, in its discretion, hear the parties under the above mentioned subsidiarity rule. The strict distinction between witnesses and parties as means of evidence and the latter's restrictive admissibility under German law may, however, unfairly handicap the party not having other means of evidence available. Since this would amount to an unequal treatment of the parties and hence violate constitutional as well as human rights principles (Art. 3, 102 GG; Art. 6 EHRC), the courts in such situations have made the hearing of a disadvantaged party mandatory.[1]

1. *BVerfG* NJW 2001, 2531; ECHR NJW 1995, 1413 – Dombo case.

Part VIII. Particular Proceedings

176. Under the general term ‘civil proceedings’ there are a number of special or particular proceedings based upon a specific subject matter or amount in controversy designed for enabling a speedy trial or more justice in the individual case:

Chapter 1. Summary Proceedings with Documentary Evidence (*Urkunden-, Scheck- und Wechselprozess*)

177. An accelerated procedure is provided for the enforcement of claims arising out of commercial documents, in particular negotiable instruments but also 'ordinary' documents and cheques (§§ 592–605a *ZPO*, *Urkunden- und Wechselprozess*). This summary procedure is only available for claims for a certain sum of money or quantity of goods or securities where the plaintiff is able to rely entirely on documentary evidence to substantiate his or her claim (§ 592 S. 1 *ZPO*). The plaintiff has to state in his writ that he or she wishes to bring an action under the specific procedure with documentary evidence only together with at least a copy of the documents attached (§ 593 *ZPO*). This rule is relaxed insofar as the documents could also be produced at a later stage or even at the oral hearing.[1] Furthermore all evidence must be submitted either by documents or by interrogation of a party (§ 595(2), (3) *ZPO*). In addition a counterclaim is not admitted for enabling a speedy trial (§ 595(1) *ZPO*).[2]

The specific feature of this procedure is the subsequent proceedings (*Nachverfahren*, § 600 *ZPO*): If the defendant had defended the claim on the merits the court can render only a provisional judgment (*Vorbehaltsurteil*, § 599 *ZPO*).[3] Such a provisional judgment is enforceable and subject to an appeal like a final judgment.[4] But the proceedings are left pending and the defendant may now raise objections and submit evidence in an ordinary procedure without the restrictions of the summary proceedings.

One part of the general summary procedure is the special procedure for claims arising out of a bill of exchange or a cheque (*Wechsel- und Scheckprozess*, §§ 602, 505a *ZPO*). Basically the same rules as for the summary procedure with only documentary evidence apply but some exceptions have to be mentioned:

The statement of claim must contain, at least tacitly,[5] a petition for conducting a special procedure for deciding claims arising out of a bill of exchange or cheque (§§ 604(1), 605a *ZPO*). Although the time for entering an appearance is the same as in ordinary proceedings (two weeks, § 274(3) *ZPO*), the period indicated in the summons is dramatically shorter with at least 24 hours as the lower limit (§§ 604 (2), (3) *ZPO*. As the claim is based just on the abstract bill of exchange the subsequent procedure (§ 596 *ZPO* analogous) and the pending proceedings are limited to this. If the plaintiff wishes to claim anything out of the legal relationship forming the basis for the bill of exchange he or she has to institute independently fresh (ordinary) proceedings.[6]

1. *See RGZ* 104, 37; Rosenberg/Schwab/Gottwald, *supra*, p. 1136.
2. But the time for entering an appearance (*Einlassungsfrist*) and the period indicated in the summons (*Ladungsfrist*) is the same as in normal civil proceedings; altogether the summary procedure where the plaintiff relies entirely on documentary evidence is in practice not often being used: 0.57 per cent of all civil cases at the local courts and 2.2 per cent at the regional courts (per 1989), *see* Rosenberg/Schwab/Gottwald, *supra*, p. 1132.
3. *See BGH*, *NJW* 1988, 1468; Rosenberg/Schwab/Gottwald, *supra*, p. 1138/1139.
4. *See* Thomas/Putzo, *supra*, § 599 Nos. 7, 8.
5. *See RGZ* 96, 100; Rosenberg/Schwab/Gottwald, *15th ed. 1993*, p. 991 (in the 16th ed. 2004 it is not really clear: *see* p. 1139).

6. *See OLG* Karlsruhe, *NJW* 1960, 1955; Rosenberg/Schwab/Gottwald, *16th ed. 2004*, p. 1139 with further references.

Chapter 2. Collection Proceedings (*Mahnverfahren*)

178. Another accelerated procedure is the collection proceedings for a liquidated sum (*Mahnbescheidsverfahren*, §§ 688 *et seq. ZPO*). As already briefly mentioned above (*see supra* para. 11) the collection proceedings is unique in the whole German civil proceedings because a registrar (*Rechtspfleger*, § 689(1) *ZPO*, § 20 No. 1 *RPflG*) – not a judge – issues an order for payment (*Mahnbescheid*, § 692 *ZPO*) that can finally amount to a writ of execution (*Vollstreckungsbescheid*, § 699 *ZPO*) equal to a default judgment (§§ 700(1), 794(1) No. 4 *ZPO*) without ever being officially checked on the merits.

179. It presupposes an application to the local (municipal) court at the de-fendant's domicile or seat (having exclusive local and subject matter jurisdiction, § 689(2) *ZPO*) to issue an order for payment of a debt (*Mahnbescheidsantrag*, § 690 *ZPO*). The oral or written application must state the parties, the court competent for issuing the order, the court having jurisdiction in case of contentious proceedings, the specific sum of money in German currency and in contract-based claims a declaration that no consideration is required (§ 690(1) *ZPO*). In case of an application for an order for payment of a debt resulting in a summary procedure with just documentary evidence the necessary documents have to be named but not to be produced until the beginning of contentious proceedings (*Urkunden-, Wechsel- oder Scheckmahnbescheid*, § 703a(2) No. 2 *ZPO*). The registrar checks *ex officio* the general procedural prerequisites, the specific requirements in §§ 688–690, 703c(3) *ZPO* and whether the court's fee (§ 65 *GKG*) is duly paid. Only in consumer credit cases the registrar checks roughly the conclusiveness of the claim (*see* §§ 688(2) No. 1, 690(1) No. 3, 691 No. 1 *ZPO*). If any of the prerequisites or formalities are not obeyed the registrar dismisses the application after having heard the applicant before (§ 691(1) *ZPO*). Such a dismissal does not result into any form of *res iudicata* but the application can be repeated at will or an action be brought.[1] If the registrar issues the payment order the other party (defendant) is given two weeks time from the date of service for either paying the demanded sum or lodging a written or oral objection without giving any reasons (§§ 692(1) No. 3, 694 *ZPO*).[2] A timely objection bars the issuing of a writ of execution and brings the whole collection proceedings to a halt. It is then up to the applicant/plaintiff to institute (ordinary) proceedings by applying pursuant to § 296 *ZPO* for removing the case to the named court (without paying additional court fees, § 65(1) S. 2 *GKG*). If the defendant does not lodge an objection the plaintiff can within six months after the payment order is served apply orally or in writing for a writ of execution (*Vollstreckungsbescheid*, § 699 *ZPO*). Again, the registrar will issue such a writ of execution after having just checked the formal prerequisites. The defendant then can lodge an appeal against the writ of execution (*Einspruch*, § 700 *ZPO*) without giving any reasons. This results in the immediate removal of the case to the competent court (§ 700(3) *ZPO*) and ends the collection proceedings in favour of ordinary civil proceedings being slightly relaxed in respect to giving reasons for the appeal.[3]

1. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 1145.
2. The period of time could in practice even be longer because the objection is deemed to be still in time if it reaches the local court before being issued by the registrar, *see BGHZ* 85, 361; *BGH*, *NJW* 1982, 888; Rosenberg/Schwab/Gottwald, p. 1146.
3. *See* in detail Rosenberg/Schwab/Gottwald, pp. 1152/1153.

180. In contrast to the normal collection proceedings there is also a 'fast track'-collection proceeding being based upon data-processing (§ 689(1) S. 2 *ZPO*). Originally being an exception, the collection proceedings with the assistance of computers is nowadays almost the rule with just a hallmark instead of the registrar's signature (§ 703 b(1) *ZPO*). In some local courts one can already apply for a payment order by transferring a data-carrier with the application to the court (§ 690(3) *ZPO*). Now most courts offer the possibility to apply for a payment order via online electronic data interchange.

Although the collection proceedings for a fixed amount of money is simple and quick if it remains uncontested it could become rather a waste of time if the defendant lodges an objection because then the applicant/plaintiff has to constitute ordinary (contentious) proceedings by bringing an action. Therefore collection proceedings are in practice mainly used for claiming interest and interrupting limitation periods from the date of serving the order for payment on the defendant (*see* § 691(2) *ZPO*) and for 'surprise attacks' on defendants lacking experience in court proceedings.[1]

1. In particular these surprise attacks by 'repeat players', e.g., in the mail-order or credit business, in the past lead to a number of abuses of the collection-proceedings because of the lacking check of the merits which had to be solved by the *BGH* by crushing the writ of executions being already *res iudicata* (§ 322 *ZPO*) by invoking the notion of a malicious tort contrary to public policy (*vorsätzliche sittenwidrige Schädigung*, § 826 *BGB*), *see BGHZ* 101, 380; Thomas/Putzo, *supra*, § 322 *ZPO* No. 52 and Koch, *Verbraucherprozeßrecht* (1990), pp. 108 *et seq.* with further references.

Chapter 3. Family Matters (*Familiensachen*)

181. In family matters according to § 606(1) S. 1 *ZPO*, i.e., a petition for divorce (*Ehescheidung*, §§ 1564 *et seq. BGB*), a petition for dissolution of a marriage (*Aufhebung einer Ehe*, §§ 28 *et seq. EheG*), a petition for a decree of nullity of marriage (*Nichtigerklärung einer Ehe*, §§ 16 *et seq. EheG*), a petition for a declaratory judgment on the existence or non-existence of a marriage (§ 256 *ZPO*) and a petition for the restoration of the matrimonial household including the marital obligations (§§ 1353 *et seq. BGB*),[1] different rules are applicable making it altogether a specific procedure (§§ 607–619, 622–639 *ZPO*).

The same is true in respect to 'other' family matters according to § 621(1) *ZPO*, i.e., a) parental custody for legitimate children (*elterliche Sorge über eheliche Kinder*, §§ 1671, 1672, 1696 *BGB*, § 23 b(1) No. 2 *GVG*), b) personal contact of the parents with their child (*Regelung des Umgangs der Eltern mit ihrem Kind*, §§ 1684, 1685 *BGB*, § 23b(1) No. 3 *GVG*), c) return of a child to the other spouse (*Herausgabe des Kindes an den anderen Elternteil*, § 1632(2) *BGB*; § 23b(1) No. 4 *GVG*), d) statutory maintenance obligation in respect of legitimate children (*gesetzliche Unterhaltspflicht gegenüber gesetzlichen Kindern*, §§ 1601 *et seq. BGB*, § 23(1) No. 5 *GVG*), e) statutory maintenance obligation because of the marriage (*durch Ehe begründete gesetzliche Unterhaltspflicht*, §§ 1360 *et seq.*, 1570 *et seq. BGB*, § 23b(1) No. 6 *GVG*), f) pension rights adjustment (*Versorgungsausgleich*, §§ 1587 *et seq. BGB*, § 23b(1) No. 7 *GVG*), g) legal relationships in respect of the matrimonial home and the household effects (*Rechtsverhältnisse an der Ehewohnung und am Haushalt*, *HausratVO*, § 23(1) No. 8 *GVG*), h) Proceedings according to the Law on the Prevention of Violence (*Gewaltschutzgesetz*) § 23b I No. 8 a *GVG*, i) matrimonial property regime even where third parties are involved (*eheliches Güterrecht, auch wenn Dritte beteiligt sind*, § 23b(1) No. 9 *GVG*), and finally j) proceeding pursuant to §§ 1373–1390 *BGB* (equalization of the surplus among the spouses during divorce proceedings/*Zugewinnausgleich*, § 23b(1) No. 10 *GVG*), k) §§ 5–8 SorgeRÜbkAusfG, § 23b I No. 11 *GVG*; l) Proceedings concerning parents and children (*Kindschaftssachen*) § 640 II b *ZPO*, § 23 b I No. 12 *GVG*; m) §§ 1615l, 1615m, § 23b I No. 13 *GVG*; n) Impediment to marriage (*Ehehindernisse*) § 23b I No. 14 *GVG*; o) Law as to life partners (*LebenspartnerG*) § 23b I No. 15 *GVG*.[2]

The most significant rules of this specific procedure are as follows: the local (municipal) court with a special 'family division' (*Familiengericht*) has exclusive subject matter jurisdiction (§ 23a No. 4, 23b *GVG*); exclusive venue lies in general with the local court where the spouses have their common habitual residence (§ 606(1) *ZPO*);[3] unless the European Marriage Regulation applies (*see supra* para. 80), non-exclusive international jurisdiction has also the family division if one spouse is or was of German nationality or both spouses have their habitual residence in Germany (§ 606a(1) *ZPO*);[4] the Court of Appeal (*OLG*) and not the regional court (*Landgericht*) has jurisdiction over an appeal (§ 119(1) S. 1 *GVG*); the parties have to be represented by an attorney (§ 78(2) S. 1 No. 1 *ZPO*); maxim of the unity of hearing and decision (*Grundsatz der Einheitlichkeit der Verhandlung und Entscheidung*);[5] the maxim of

an adversary procedure is for the sake of public policy partly left aside (judicial investigation, § 616 *ZPO*);[6] the parties have to appear *in personam* in court (§ 613(1) *ZPO*), and the whole procedure including the oral hearing is not open to the public (§ 170 *GVG*).

1. A judgment for the restoration of the matrimonial household is just declaratory because it cannot be executed pursuant to § 888(2) *ZPO*.
2. *See* in detail Rosenberg/Schwab/Gottwald, *supra*, pp. 1172 *et seq.*
3. If there is no common habitual residence venue lies where the spouse with minors has his or her habitual residence (§ 606(1) S. 1 *ZPO*), or where the last common habitual residence of the spouses was (§ 606(2) S. 1 *ZPO*), or where the defendant has his or her habitual residence, and lastly, where the petitioner has his or her habitual residence (§ 606(2) S. 2 *ZPO*); 'habitual residence' stands for the place where a person in fact resides permanently or for a longer period of time without having regard to his or her intentions, *see BayObLG*, *NJW* 1990, 3099; Thomas/ Putzo, *supra*, § 606 *ZPO* No. 3.
4. In addition the family division has international jurisdiction if one of the spouses has no nationality but has his or her habitual residence in Germany, or at least one of the spouses has his or her habitual residence in Germany presupposed that the future decision will evidently not be recognized in the State of which one spouse is a national, *see* § 606(1) Nos. 3, 4 and Rosenberg/ Schwab/Gottwald, *supra*, p. 1157/1158.
5. Part judgments are therefore prohibited, *see* Rosenberg/Schwab/Gottwald, *supra*, pp. 1163/1164 *et seq.*
6. *See* in detail Rosenberg/Schwab/Gottwald, *supra*, p. 1166.

Chapter 4. Cases concerning Parents and Children and Maintenance Matters (*Kindschafts- und Unterhaltssachen*)

182. Cases concerning parents and children are of public interest and therefore specific rules (§§ 640 *et seq. ZPO*) apply, basically those of matrimonial proceedings (*see* § 640(1) *ZPO*), in particular the principle of judicial investigation (*Untersuchungsgrundsatz*, § 616(1) *ZPO*). A legal definition of parents- and child-cases can be found in § 640(2) *ZPO* and comprises of the following legal disputes: a) declaration of the existence or non-existence of a parent- and child-relationship between the parties (*Feststellung des Bestehens oder Nichtbestehens eines Eltern-Kind-Verhältnisses zwischen den Parteien*, §§ 1591 *et seq.*, 1600a *et seq.*, 1719, 1741, 1600b–f *BGB*, § 640(2) No. 1 *ZPO*), b) challenging the acknowledgment of paternity (*Anfechtung der Anerkennung der Vaterschaft*, §§ 1600–1600e *BGB*, § 640(2) No. 3 *ZPO*), and c) declaration of the existence or non-existence of parental custody of one party over the other (*Feststellung des Bestehens oder Nichtbestehens der elterlichen Sorge der einen Partei über die andere*, §§ 1626, 1626a 1680, 1696 *BGB*, § 640(2) No. 3 *ZPO*).[1]

The local courts have exclusive subject matter jurisdiction (§ 23a No. 1 *GVG*) and therefore the parties do not need to be represented by an attorney. Venue lies, according to the general rules, in the court's jurisdiction where the defendant has his or her domicile.[2] The local courts also have non-exclusive international jurisdiction if either of the parties is German or has his or her habitual residence in Germany (§ 640a(2) *ZPO*).

1. *See* Rosenberg/Schwab/Gottwald, *supra*, pp. 1213/1214; Thomas/Putzo, *supra*, § 640 *ZPO* Nos. 1–3 with further references.
2. In the case where the defendant has no domicile in Germany the court has jurisdiction where one of the parties' habitual residence is or where the plaintiff has his or her domicile; in absence of the aforesaid jurisdiction the local court in Berlin-Schöneberg finally has jurisdiction (§ 640a(1) *ZPO*); *see* Rosenberg/Schwab/Gottwald, *supra*, p. 1215.

Chapter 5. Simplified Procedure in the Local (Municipal) Courts (*Vereinfachtes Verfahren vor den Amtsgerichten*)

183. In 1993 the new provision § 495a(1) *ZPO* was introduced giving just the local (municipal) court the discretion to conduct the proceedings in cases with an amount in controversy not exceeding € 600 *ex aequo et bono* (*nach billigem Ermessen*). Only if one party applies for it there will be oral proceedings (§ 495a S. 2 *ZPO*), otherwise the whole proceedings including the taking of evidence will be conducted in writing.[1] This provision was aimed at speeding up the proceedings in minor matters thereby easing the caseload of the local courts for more important cases that are also subject to an appeal, i.e., where the amount in controversy is over € 600, § 511(2) No. 1 *ZPO*. Nevertheless the attorneys in Germany are complaining heavily that some of the local courts have been abusing their discretion, e.g., by denying in fact the right of the parties to be heard or calling up witnesses by the phone without giving the parties any notice thereof, and by conducting the proceedings far away from the rule of law.[2] These accusation should not be taken lightly because the only remedy left for a party being denied the right to be heard in court because of the speedy trial pursuant to the court's discretion is a constitutional complaint to the Federal Constitutional Court (§§ 90 *et seq. BVerfGG*).[3] So the local courts would in the long run serve the judiciary worst if they were abusing the discretion given to them by § 495a *ZPO*.

1. *See* Thomas/Putzo, *supra*, § 495a *ZPO* No. 2.
2. *See* Note, 'Anwälte gegen Verfahrensvereinfachung', in: *Frankfurter Allgemeine Zeitung*, 3 May 1996, p. 4.
3. *Audiatur et altera pars* is guaranteed by Art. 103 *GG* but an appeal requires an amount in controversy of more than € 600, *see* Thomas/Putzo, *supra*, Vor§ 511 *ZPO* No. 4, 8.

Chapter 6. Arbitration Proceedings (*Schiedsgerichtsverfahren*)

184. It follows from the principle of party autonomy that parties to a (potential) dispute may waive their constitutional right of access to the state judiciary and agree on private, i. e. extra-judicial means of dispute resolution[1, 2]. Arbitration is but one of these means that has its root in a consensual process whereby the parties agree by binding contract that a third neutral entity (arbitrator/tribunal) makes a final and binding determination of their dispute.

Arbitration is a necessary mechanism of private adjudication that any modern and developed country must make provision for. In Germany, the new X. book of the *ZPO* (§§ 1025 – 1066, enacted in 1997) is based on the 1985 UNCITRAL model law on international commercial arbitration[3]. It provides for a single unified regime for both international and domestic arbitration. Although the needs of modern arbitration are most evident in the (international) commercial area, the act is not restricted to 'commercial' arbitration. Rather, the arbitrability of a controversy is only contingent on its pecuniary character, or on the parties' authority to compromise (§ 1030 (1) *ZPO*). In international arbitration agreements the prevailing opinion in Germany holds the arbitrability to be governed by the *lex fori* (of the state court controlling the award's effectiveness)[4].

Under a valid arbitration agreement the defendant/opponent can raise an objection against any action brought in a state court which would be inadmissible (§ 1032 (1) *ZPO*).

The formation of an arbitral tribunal, the appointment of arbitrators, and the course of proceedings in many cases is provided for under an institutional arrangement (like *ICC* or *DIS*) that the parties have referred to. Otherwise, in an *ad hoc* arbitration the parties either have to agree on the necessary procedural steps or §§ 1034 *et seq. ZPO* are determinative. The arbitral tribunal is granted the power to rule on its own jurisdiction, indeed ('*Kompetenz-Kompetenz*'), § 1040 (1) *ZPO*. This does not mean, however, that it is the tribunal that has the last word. Rather, the state court can be asked to control the tribunal's finding for its jurisdiction in two ways[5]: either by appealing the tribunal's preliminary ruling on jurisdiction (§ 1062 (1) No. 2 *ZPO*); or in a later action for avoidance of the award (*Aufhebungsklage*, § 1059 (2) No. 1 c *ZPO*). The arbitration proceeding has to satisfy due process standards (like equal treatment of the parties and the right to be heard, § 1042 (1) *ZPO*).

Arbitral proceedings finally may be ended in different ways: either the tribunal issues an award substituting a final state court judgment (§ 1055 *ZPO*). The award may also be issued in terms agreed upon by the parties (award by consent, § 1053 (1), 2 *ZPO*) or, absent an award, the proceeding is ended by the tribunal's decision if the claimant fails to submit a valid claim or moves for voluntary dismissal, or if the parties do not further prosecute the case (§ 1056 *ZPO*).

Before a domestic arbitral award can be executed it has to be declared enforceable by the competent Court of Appeals (*OLG*, § 1060 (1) *ZPO*). The Court of Appeal cannot review the award on the merits (no *révision au fonds*). Rather, the reasons for either rendering the arbitral award void or refusing an execution degree are the same (§ 1060 (3), § 1059 (2) *ZPO*), and they are limited to grave injustices, e.g., if a valid

arbitration agreement is missing, a party's right to be heard before the court is denied, or the arbitral award is contrary to public policy.

The recognition and enforcement of a foreign arbitral award according to express reference in § 1061 (1) *ZPO* is decided under the New York UN-Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, regardless of the original state's membership of the convention. Only if, in rare cases, another treaty easens the burden of an *exequatur* proceeding, the New York Convention may yield (principle of preferencial treatment)[6].

1. More detailed analysis *infra* Part X.
2. As to other ADR mechanisms and their importance in German Law *see supra* para. 110.
3. Whether it has been 'adopted' or truly modified in German law is a question of different evaluation, *see* Schlosser, 'Neues deutsches Recht der Schiedsgerichtsbarkeit', in: P. Gottwald (ed.), Revision des EuGVÜ – Neues Schiedsverfahrensrecht (2000), 163.
4. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, 2nd ed. 1989, no. 304; Zöller/Geimer, *supra*, § 1030 no. 26.
5. *See* BGH 13.01.05, SchiedsVZ 2005, 95.
6. Schlosser, *supra*, no. 157.

Part VIII, Ch. 6, Arbitration Proceedings (*Schiedsgerichtsverfahren*)

Part IX. Seizure for Security and Enforcement of Judgments

Chapter 1. Seizure for Security

§ 1. PROCEEDINGS

185. The only seizure proceedings is an interlocutory injunction *in rem* or *in personam* (attachment) which is designed to secure the future enforcement of a judgment (Arrest, §§ 916–935 *ZPO*).

Such an attachment presupposes a claim for a liquidated sum of money or a claim which can turn into money (*Arrestanspruch*, § 916 *ZPO*).[1] Additionally there has to be the actual danger of a deterioration of the defendant's assets or property caused deliberately by the defendant (*Arrestgrund*, § 917(1) *ZPO*).[2]

Another reason for an attachment is the execution of the future judgment abroad (§ 917(2) *ZPO*) to protect the (finally prevailing) plaintiff from the difficulties to execute a German judgment in a foreign country.[3] Under very exceptional circumstances an interlocutory injunction even *in personam* can be granted if an ordinary attachment – whose prerequisites have to be fulfilled – is not sufficient to safeguard the plaintiff's execution of the future (favourable) judgment (§ 918 *ZPO*).

1. *See* Thomas/Putzo, *supra*, § 916 *ZPO* No. 5 and in detail VI.B.1.b) Provisional Proceedings, *supra*.
2. *See* e.g., *OLG* Koblenz, *ZIP* 1986, 1559; *OLG* Schleswig, *MDR* 1983, 41.
3. *Cf. supra* para. 142.

§ 2. JUDICIAL REVIEW

186. If the attachment was granted without an oral hearing the defeated party can raise an objection (*Widerspruch*, § 924 *ZPO*). But if the injunction was exceptionally granted upon an oral hearing by a judgment the other party can lodge a first appeal (*Berufung*) according to the normal rules (§ 511 *et seq. ZPO*) as if it were an ordinary judgment.[1] But a second appeal on points of law only (*Revision*) is not permitted (§ 545(2) *ZPO*).

In addition, the preliminarily defeated party can make a motion to order the prevailing party to establish ordinary proceedings in respect to the matter in

controversy, i.e., with a proper statement of claim, with the court having jurisdiction (§ 926 *ZPO*). If the other party does not comply with this order the court will – upon application – quash the interlocutory injunction with a judgment.

The court granting the attachment has also jurisdiction over the objection and the order to establish ordinary proceedings ('*iudex a quo*'). Jurisdiction over the first appeal lies with the next higher court ('*iudex ad quem*') pursuant to the ordinary rules.[2]

1. *See* Thomas/Putzo, *supra*, § 932 *ZPO* No. 5.
2. *See* in detail para. 139 *et seq.* Provisional Proceedings, *supra*.

187. Although it is technically no seizure, a foreign plaintiff or a stateless person without a domicile in the European Union or within a the European Economic Area (EEA) have to furnish security for the costs of the proceedings upon the defendant's application (*Prozesskostensicherheit*, § 110 *ZPO*). This rule is aimed at protecting the defendant domiciled in Germany because the future execution of the prevailing defendant's right of reimbursement (§ 91 *ZPO*) abroad could cause difficulties. But to this rule there are numerous exceptions – and the one sided approach looses its strength if one looks to the exceptions: First of all international treaties prevail over this purely domestic rule by virtue of Article 25 *GG* and break through § 110 *ZPO*, e.g., Article 17 *et seq.* of the Hague Convention on Civil Proceedings of 1 March 1954.[1] Moreover, the rule in § 110 *ZPO* is inapplicable if the plaintiff is a national of one of the EU-Member States as it were otherwise a discrimination based upon the nationality which is forbidden by Article 7(1) EC-Treaty.[2] Another exception exists for nationals from countries which do not prescribe the furnishing of such a security for German nationals (principle of reciprocity). The latter rule does apply in most cases.[3]

1. *See* Jauernig, *supra*, p. 388 and the non-authentic German translation of the French text together with a list of the many contracting states at Jayme/Hausmann, *supra*, No. 210, pp. 526 *et seq.*
2. *See ECJ* C-20/92 [Hubbard] and C-323/95 [Hayes], EuZW 1997, 280.
3. *See* Thomas/Putzo, *supra*, § 110 *ZPO* No. 7.

Chapter 2. Enforcement of Judgments

§ 1. Enforcement of Domestic Judgments

I. Proceedings

188. Only the enforcement of a judgment realizes legally the prevailing party's rights. The details of the enforcement procedure are laid down in the 8th book of the *ZPO* (§§ 704–945 *ZPO*).[1] Jurisdiction for the enforcement lies with the municipal court (*Amtsgericht*) in whose district the actual enforcement should take place as the so-called enforcement court (*Vollstreckungsgericht*, § 764(1) *ZPO*). But in charge of the enforcement are the registrars (*Rechtspfleger*) at the municipal court who issue a certificate of enforcement (*Vollstreckungsklausel*) to enable the bailiffs to act upon it. In practice, the prevailing party will make an application for enforcing the judgment to the registrars of the municipal court. The costs of enforcement have to be borne by the debtor pursuant to § 788(1) *ZPO*.

1. So traditionally the provisional procedures of interlocutory injunctions belong to the realm of enforcement although dogmatically they should be placed in a separate book.

189. But before the prevailing party can really execute the favourable judgment with State assistance (bailiffs) three essential prerequisites have in any case to be fulfilled: first, he or she must hold the complete (written) final judgment (§§ 704, 794 *ZPO*) actually in his or her hands ('*Titel*');

Second, the judgment must contain an execution clause ('*Klausel*'); and

Third, the judgment with the execution clause must be served upon the defeated party ('*Zustellung*').

190. Details of the bailiff's right to seize property and money can be found in §§ 739 *et seq.* and §§ 803 *et seq. ZPO* (*Pfändung*). In addition it is possible to attach money claims of the debtor (garnishment proceedings/*Forderungspfändung beim Drittschuldner*, §§ 829 *et seq. ZPO*), claims for the recovery or delivery of movable and immovable goods (§§ 846 *et seq. ZPO*) and other property rights (§§ 857 *et seq. ZPO*).

However, as the execution of a judgment may not result in an infringement of basic rights and social welfare rules the debtor must remain in control of a minimum income which is currently € 930 per month for a single person (§ 850c *ZPO*, *unpfändbares Arbeitseinkommen*). In addition certain things necessary for the daily life and earning the living may also not be attached (*see* § 811 *ZPO*).

191. Separate rules apply for the enforcement against immovable (real) property including registered ships which can be found in §§ 864–871 *ZPO*. According to § 866 *ZPO* there are three alternative steps up to the creditor's choice.

First, a mortgage to be entered in the land register (*Grundbuch*) on application of the creditor by way of execution (*Zwangshypothek*, § 867 *ZPO*); second, a sale by

court order (*Zwangsversteigerung*, § 869 *ZPO*); and third, sequestration with an administrator appointed by the court in order to receive the rents and profits thereof (*Zwangsverwaltung*, § 869 *ZPO*). The details for the latter two forms of execution are laid down in a separate statute, the Statute on Compulsory Sale of Real Property (or Aircraft and Ships) (*Gesetz über die Zwangsversteigerung und die Zwangsverwal-tung/ZVG*).

II. Judicial Review

192. The defeated party (debtor) has basically two remedies to defend himself or herself against the execution of a judgment: first, the special appeal against the manner the execution of the judgment is being done (*Erinnerung gegen Art und Weise der Zwangsvollstreckung/Vollstreckungserinnerung*, § 766 *ZPO*) which lies to the municipal court as enforcement court.[1] This remedy is aimed at halting, altering or reversing execution measures, e.g., where the bailiff disregarded procedural rules or the parties had an agreement to enforce a judgment not at all or only against certain property.[2]

Second, the action raising an objection on fresh grounds to the judgment claim (*Vollstreckungsgegenklage/Vollstreckungsabwehrklage*, § 767 *ZPO*). Jurisdiction for this specific action has the court that rendered the judgment being already enforced (§ 767(1) *ZPO*). The matter in controversy of the action is the inadmissibility of enforcing the judgment because of fresh grounds that are contradicting the enforceable claim but did not occur earlier than the end of the first instance proceedings (§ 767(2) *ZPO*). So this is an intermediate claim in between first and second instance proceedings which is not aimed at quashing the judgment but only its enforceability.[3]

1. *See* Thomas/Putzo, *supra*, § 766 *ZPO* No. 8.
2. *See BGH*, *NJW* 1991, 2295 and Thomas/Putzo, *supra*, § 766 *ZPO* No. 25 with further examples.
3. *See BGH*, *NJW* 1992, 2160 with further references.

193. Third parties who claim a title to the attached property can bring an action in opposition to the execution of the judgment (*Drittwiderspruchsklage*, § 771 *ZPO*). This is very often the case where things got attached belonging at first sight to the defendant but have actually remained the property of a bank or a company because of a reservation of title (*Eigentumsvorbehalt*, § 449 *BGB*).

194. Apart from those remedies requiring a court decision a stay of execution is available as well on a temporary as on a final basis where the debtor has paid security in to the court or been given a respite (*Zahlungsaufschub*) by the creditor or has even fulfilled his or her obligations to the satisfaction of the creditor (*see* §§ 775, 776 *ZPO*). Such a stay of proceedings is being ordered *ex officio* if the enforcement court or the bailiffs were presented according documents.[1]

1. *See* Thomas/Putzo, *supra*, § 775 *ZPO* No. 2.

§ 2. Recognition and Enforcement of Foreign Judgments

I. European Law and International Treaties

195. As European Law and international treaties prevail over purely domestic law one has also under the German law of international civil procedure to look first of all for European sources and international treaties governing the recognition and enforcement of foreign judgments.[1,2] In this respect both, multilateral and bilateral treaties have to be taken into account. Although the multilateral treaties have as younger legislation derogated older bilateral treaties, sometimes the specific sphere of application of a bilateral treaty just governs the case in question.

1. *Cf.* the German national report for the 1987 World Congress of Civil Procedure in Utrecht (with statistical data): Koch, 'Recognition and Enforcement of Foreign Judgements and Arbitral Awards in the Fed. Rep. of Germany' in: Gilles (ed.), *Efficiency in the Pursuit of Justice* (1987), p. 161 *et seq.*
2. For a general overview on European and international sources governing recognition and enforcement of foreign judgments as part of international civil litigation *see above* Part 2 Ch. 2 (International Jurisdiction, para. 78 *et seq.*).

1. Brussels-I-Regulation

196. The most important source of law for the recognition and enforcement of foreign judgments with respect to the frequency of application by German courts is the European Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels-I Regulation (*Verordnung/EG Nr. 44/2001 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung in Zivil- und Handelssachen, EuGVO*) and its predecessor, the Brussels Convention (*see* 'International Jurisdiction' *supra* para. 81). In disputed questions of interpretation of the Regulation the national courts of last resort have to refer the matter to the ECJ for a binding ruling under Art. 234 (1) lit. b EC Treaty. The ECJ already under the 1971 Interpretation Protocol (pertaining to the Brussels Convention) has frequentely chosen an independent (autonomous) method in interpretating the Convention that follows the civil law tradition in principle but is still unique and supranational[1].

1. Kropholler, *Europäisches Zivilprozessrecht*, 7th ed., 2002, Einl. No. 41; *ECJ, Duijnstee* v. *Goderbauer* (15 November 1983 – 288/82), *Slg*. 1983, 3663 *et seq*. 3675 = C.M.L.R. 1985, 1 220.

197. In Germany it is not only the highest Federal Courts (*BGH, BFH, BAG* etc.) who are bound to refer a matter within the Brussels Regulation to the ECJ if it is unclear and, additionally, a ruling on the interpretation is necessary to enable the court to give a judgment. It is also lower courts that have to use the reference procedure if they decide the case as last instance court. In exequatur cases, however, under the Regulation decisions of the Courts of Appeal (*OLG*) are in any case open to another recourse (*Rechtsbeschwerde*, Art. 44 Brussels-I Regulation) to the *BGH* so that the *OLG* is not the court of last resort and hence cannot refer a dispute to the ECJ[1].

1. Thomas Putzo, *supra*, VorArt. 1 EuGVO Rn. 14.

198. The Regulation's substantive scope of application is broadly defined in its Article 1 with the term 'civil or commercial matters'. The ECJ has given the (identical) notion in the Brussels Conventions a wide meaning, encompassing basically all disputes whose subject matter does neither belong to the criminal nor the public law branch, i.e., matters where the State or a public authority is acting in the exercise of its governmental/official powers.[1] As the ECJ has defined 'civil or commercial' autonomously under a community concept the classification of a matter under the domestic (German) law is not decisive.[2] Moreover, maintenance matters are also within the scope of the Convention because maintenance was given a special basis of jurisdiction under Article 5(2) Brussels-I Regulation.

1. *See* ECJ, *LTU* v. *Eurocontrol* (14 October 1976–29/76), Slg. 1976, 1541; *C.M.L.R. 1977, 1, 88* (public law matter).
2. *See* e.g., ECJ, *Netherlands State* v. *Rüffer 16 Dec. 1980* – (814/79), Slg 1980, 3807, C.M.L.R. 1981, 3, 293, where the action was classified under Dutch domestic law as one in tort, whereas the ECJ decided in favour of a public (administrative) law matter.

199. The Regulation generally presupposes a final judgment or an equivalent unappealable decision of a State court in one of the Member States. Therefore a German court in its discretion will order a stay of proceedings if an appeal is still pending against the foreign judgment (Article 37 (1) Brussels Regulation).

The nature of the court or tribunal is also irrelevant according to Article 1 Brussels Regulation. It is not necessary that a civil court has rendered the judgment as in some Member States, e.g., France and Germany, a criminal court has also upon application of the victim the power in an adjunct procedure ('*Adhäsionsverfahren*', § 403 *et seq.* StPO) to give a judgment in civil matters (mostly damages). Moreover, default judgments, if properly delivered, fall also into the Brussels-I-Regulation's sphere of application and also any other court decision (Article 32).

But as an essential, additional requirement the foreign court must have jurisdiction according to Articles 2 *et seq.* Brussels Regulation. As a basic rule the defendant may only be sued where he or she is domiciled or the company has its place of business provided that this domicile or place of business lies in one of the Member States (Article 2(1) Brussels Regulation).[1] The defendant's nationality is insofar irrelevant. If the defendant has his or her domicile in one of the Member States he or she may only be sued in another Member State according to the exceptions laid down in Articles 5–24 Brussels-I-Regulation (specific/exclusive jurisdiction) or in the case of a specific (prevailing) instrument (Article 67 *et seq.* Brussels-I-Regulation).[2]

One of the most important exceptions is the exclusive jurisdiction for claims based upon property rights in respect to immovables including leases pursuant to Article 22 No. 1 Brussels-I-Regulation. In this case the courts have exclusive jurisdiction where the immovable is situated. This rule does not apply, however, if the dispute concerns holiday homes for private use, rented out for less than six months, and owner and lessee are domiciled in the same Member State. The exclusive jurisdiction extends also to defendants not being domiciled in one of the Member States and thereby prevails over § 24 *ZPO*.

If there lays no exclusive jurisdiction the parties can either expressly choose a forum (Article 23 Brussels-I-Regulation) or the defendant can submit himself or herself to the forum by appearing before its courts (Article 24 Brussels-I-Regulation). Such an agreement must generally be in writing and in favour of a court of a contracting state to confer jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship.[3]

1. *See* Kropholler, *supra*, vor Art. 2 *EuGVO* No. 9.
2. E.g., Art. 5 No. 1 specific jurisdiction where the contractual obligation in question has to be performed; Article 5 No. 3 specific jurisdiction where the damage of a tortuous act was suffered; Art. 6 No. 3 specific jurisdiction for a counter-claim; Arts. 8–12a specific jurisdiction for claims arising out of insurance contracts; Arts. 13–15 specific jurisdiction protecting consumers and giving them the right to choose the most appropriate forum.
3. *See* in detail to the exceptions as regards the form of the agreement and to the meaning of 'appearance' Cheshire & North, *Private International Law*, 12th ed. 1992, pp. 317 *et seq.*, 322 *et seq.*; Kropholler, *supra*, Art. 23 No. 30 *et seq.*, Art. 24 No. 7.

200. As the Regulation is directly applicable in the Member States (Article 249 (2) EC Treaty) unlike the Convention it does not require any national ratification or implementation into domestic law. Thus the hard-to-follow-up status of ratification of the (three different versions of the) Brussels Convention does no longer deserve notice, with the exception of Denmark having declared a reservation under Article 69 EC Treaty (*cf.* Consideration No. 21 to the Brussels-I-Regulation).

201. Nevertheless, some kinds of disputes and legal issues are explicitly excluded from the scope of the Regulation by Article 1: first of all tax, customs and administrative law matters. But in addition also matters that are genuinely civil and commercial matters are excluded if they are the principal object of the proceedings:

– The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.
– Bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.
– Social security and arbitration.

Because of these exclusions Article 70 Brussels-I-Regulation makes a reservation in favour of bi- or multilateral conventions that have a different substantive sphere of application. This is also true for conventions that are expressly repealed by virtue of Article 69 Brussels-I-Regulation as far as their respective sphere of application extends to legal issues which are not governed by the Brussels-I-Regulation.[1] Moreover, older conventions on the recognition and enforcement of judgments have remained in force as regards courts' decisions that were rendered before the Brussels Convention came into force (Article 70(2) Brussels-I-Regulation).

1. *See* in detail Kropholler, *supra*, Art. 70 *EuGVO* No. 1.

202. If a foreign judgment fulfils the above mentioned procedural prerequisites a German court has upon application to recognize and enforce it without any further

special procedure and without any examination on the merits (no *révision au fond*, Articles 33(1), 36 Brussels-I-Regulation). The application for recognizing a foreign judgment has to be filed with the presiding judge of a division of the regional court where the defendant is domiciled ('*Präsident des Landgerichts*', Article 39 Brussels-I-Regulation and Annex II).

A foreign judgment can only be denied recognition on appeal of the judgment debtor who is given the right of recourse only after the *ex-parte* exequatur decision (Article 41 Brussels-I-Regulation). An appeal under Art. 34, 35 lies if the foreign judgment would contradict German public policy (*ordre public*, No. 1), the defendant did not have the chance of defending himself or herself because he or she was not properly or not timely served upon with the writ and/or summoned (No. 2) or if the foreign judgment stands in contrast to an earlier judgment (*res iudicata*, No. 34). But it has to be noted that the term 'public policy' has been narrowly interpreted by the *BGH* in favour of a wide and unobstructed application of the Brussels Convention/Regulation.[1]

1. *See BGHZ* 75, 167; *NJW* 1980, 527; Kropholler, *supra*, Art. 34 *EuGVÜ* No. 11 *et seq.* with further references.

2. Brussels-II-Regulation

203. As mentioned above already (*supra* para. 81) recognition of foreign judgments in family matters is now covered by the Brussels-II-Regulation No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses of 2001. In its realm the enforcement procedure is very much like that of the Brussels-I-Regulation (*see* Article 21 *et seq.* Brussels-II-Regulation), and the recognition of foreign family judgments, particularly of divorce degrees has been liberalized and, replaces the more burdensome German (administrative) recognition proceeding.

3. Lugano Convention

204. The Lugano Convention was basically an 'alter ego' of the Bussels Convention (so-called 'parallel-convention'). This is also no wonder as the Lugano Convention was deliberately modelled after the Brussels Convention to achieve a uniform and fairly simple procedure for recognizing and enforcing judgments between the EFTA Contracting States and the EC Contracting States.[1] This was regarded as a necessary part of an on-going process of legal and economic cooperation between the two blocs. As the then EFTA-States (Austria, Finland, Iceland, Norway, Sweden and Switzerland) had difficulties with acceding to the Brussels Convention, in particular because of the ECJ in interpreting that convention, a parallel Convention was agreed at Lugano in 1988.[2] It has come into force 1 March 1995 in; respect to Germany[3]. After some of the EFTA-States became members of the EU the importance of the Lugano Convention today is reduced to the relations with Iceland, Norway and Switzerland.

1. *See* more in detail Kropholler, *supra*, Einl. No. 51.
2. *See* Kropholler, *supra*, Einl. No. 51; Cheshire & North, *supra*, p. 340.
3. *BGBl.* 1995 II 221.

205. The relationship between the two Conventions is being dealt with in Article 54 b) Lugano Convention: a German court is only bound to apply the Lugano Convention instead of the Brussels Convention or Regulation (Art. 68 (2) Brussels-I-Regulation) if the defendant is domiciled in an EFTA Contracting State or special jurisdiction points towards an EFTA Contracting State (immovables or choice of forum, Articles 16, 17 Lugano Convention).

206. The interpretation of the Lugano Convention is regulated by Protocol 2, annexed to the Convention, that requires courts in Contracting States to take account of any principles laid down in any relevant decision delivered by a court of any other Lugano Contracting State concerning provisions of the Convention. A specific procedure for the exchange of information concerning relevant judgments is also being provided for. In addition, the EFTA States did declare that their courts when interpreting the Lugano Convention will pay due attention to the rulings of the ECJ and of courts of the Brussels Convention Contracting States in respect of those provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention.[1] The international autonomous and uniform interpretation will be decisive for maintaining also in practice the already achieved unity on the paper.

1. *See* Kropholler, *supra*, Einl. Nos. 67 *et seq.*, Cheshire & North, *supra*, pp. 341/342.

II. Bilateral International Treaties for the Recognition and Enforcement of Foreign Judgments

207. Although the Brussels and Lugano Conventions are by far the most important international treaties for recognizing and enforcing judgments between the EFTA- and EU-Member States not only a lot of other countries are still left out but there are also specific bilateral treaties in force among those Member States. Those bilateral treaties for the recognition and enforcement of foreign judgments are the German-Swiss Treaty of 2 November 1929 (*RGBl.* 1930 II, 1065), the German-Italian Treaty of 9 March 1936 (*RGBl.* 1937 II, 145), the German-Belgian Treaty of 30 June 1958 (*BGBl.* 1959 II, 765), the German-Austrian Treaty of 6 June 1959 (*BGBl.* 1960 II, 1246), the German-British Treaty of 14 July 1960 (*BGBl.* 1961 II, 301), the German-Greek-Treaty of 4 November 1961 (*BGBl.* 1963 II, 109), the German-Dutch Treaty of 30 August 1962 (*BGBl.* 1965 II, 26), the German-Tunisian Treaty of 19 July 1966 (*BGBl.* 1969 II, 890), the German-Israeli Treaty of 20 July 1977 (*BGBl.* 1980 II, 925), the German-Norwegian Treaty of 17 June 1977 (*BGBl.* 1981 II, 342), and the German-Spanish Treaty of 14 January 1987 (*BGBl.* 1987 II, 34).[1] These treaties even within the EU are not completely replaced by the Brussels Convention/Regulation as Articles 69, 70 of the Regulation indicate: they are still in effect for matters not covered by the Regulation.

1. *See* Thomas/Putzo, *supra*, § 328 No. 37 *et seq.*

208. A special problem is created by international treaties concluded between the former GDR and countries that did not have the same or at least similar treaty concluded with the Federal Republic of Germany. However, this problem has been mostly solved by the Federal Republic of Germany by declaring to succeed the GDR's Member State status. In addition the time of ratification and thereby coming into force sometimes differs even where both, the former GDR and the Federal Republic of Germany were Member States of the same treaty, e.g., the 1958 New York UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards entered into force on 28 September 1961 in respect to the Federal Republic of Germany (*BGBl.* 1962 II, S. 102), but not earlier than 21 May 1975 in respect to the GDR (*BGBl.* 1975 II, S. 1132). Therefore it is necessary to check carefully the applicable treaties in the case of older judgments or arbitral awards if there is a legal relationship with the former GDR.

III. Autonomous German *Exequatur* Rules

209. If there is no international treaty the domestic rules in § 328 and §§ 722, 723 *ZPO* come into play that are *inter alia* based on the principle of reciprocity: the prerequisites for getting a foreign judgment recognized pursuant to § 328 *ZPO* differ in four points from the rather straightforward recognition procedure according to Article 33 *et seq.* of the Brussels-I-Regulation:

First of all it is necessary to have a foreign court decision which is already *res iudicata* (*rechtskräftige Entscheidung*, § 328 in connection with § 723(2) *ZPO*). If there is an appeal pending abroad the recognition and enforcement of the decision in Germany can become very time-consuming.

Then the foreign judgment must have been rendered by a court having international jurisdiction according to the German (!) rules for the purpose of getting recognized in Germany (*Anerkennungszuständigkeit*, § 328(1) No. 1 *ZPO*). This is an additional hurdle since it is independent from the jurisdiction of the foreign court according to its own *lex fori*.[1]

Moreover the foreign judgment must not be contrary to the German *ordre public* (§ 328(1) No. 4 *ZPO*). Although this negative prerequisite does not amount to a '*révision au fond*' (*see* § 723(1) *ZPO*) it prevents the recognition of foreign judgments that stand in gross contrast to the concepts of justice under German domestic law. Examples for judgments contrary to the public policy are to a certain extent punitive damages-judgments from US-American courts[2] and judgments based upon proceedings violating cases procedural principles such as *audiatur et altera pars*, independence of the court or fair trial.[3]

Finally it has to be guaranteed that a German judgment with the same content would be equally recognized in the foreign country from whose court the judgment shall be recognized in Germany (principle of reciprocity, *Verbürgung der Gegenseitigkeit*, § 328(1) No. 5 *ZPO*). Whether the prerequisites of recognizing a German judgment in the given foreign country are in practice (!) similar to the German ones can mostly be determined by reference to tables giving an actual survey.[4]

1. *See* Koch/Magnus/Winkler von Mohrenfels, *IPR und Rechtsvergleichung*, 3rd ed., Munich 2004, p. 274.
2. *See BGH*, *NJW* 1992, 3096, 3103 *et seq.* with a comment by Koch, *NJW* 1992, 3073 and Koch/Zekoll, *IPRax* 1993, 238.
3. *See BGH* NJW 2000, 3289; Koch/Magnus/Winkler von Mohrenfels, *supra*, p. 275; Nagel/Gottwald, *Internationales Zivilprozessrecht*, 5th ed. 2002 § 11 Nos. 160 and 173 *et seq.* with further references.
4. *See* e.g., Nagel/Gottwald, *supra* § 11, Nos. 194 *et seq.*

210. The prerequisites in § 328 *ZPO* for the recognition of a foreign judgment are incidentally taken into account when the prevailing party is seeking the enforcement of a foreign judgment in Germany which is governed by §§ 722, 723 *ZPO* in absence of a treaty (*exequatur*). The enforcement does not only presuppose that the prerequisites of § 328 *ZPO* are fulfilled but places the burden upon the prevailing party to institute fresh proceedings with a German court having jurisdiction pursuant to the ordinary domestic rules, i.e., either the municipal (seldom) or the regional court at the defeated party's domicile. The target of the new proceedings is just the enforcement of the foreign judgment. The party defeated in the original proceedings abroad can now in the German *exequatur*-proceedings only raise objections that have their ground in the period of time since the rendering of the foreign judgment (*see* § 723(1) *ZPO*).

211. The above-mentioned rules only apply to foreign judgments as the outcome of contentious and adversary proceedings. Accordingly, § 325 *ZPO* makes it clear that the *res iudicata*-effect of such a judgment does only bind the parties to the proceedings and their successors. This is not the case with judgments changing a legal right or status (*Gestaltungsurteile*) because their *res iudicata*-effect extends to everyone including third parties, e.g., in marriage matters or parent and child cases. Therefore special and more inquisitorial rules apply here with the department of justice of the Länder playing an important part in the recognition procedure of foreign judgments changing the status of a person.[1]

1. *See* in detail Koch/Magnus/Winkler von Mohrenfels, *supra*, pp. 276 *et seq.*

Part X. Arbitration

Chapter 1. Domestic Arbitration

§ 1. Enforcement of Domestic Arbitral Awards

212. The tenth book of the *ZPO* has been changed fundamentally as of 1 January 1998: now the rules in the German *ZPO* follow the UNCITRAL Model Law.[1] Thus, the New German Rules match the modern standard and will facilitate international arbitration in Germany.

After the amendment the *ZPO* is applicable if the seat of the arbitral tribunal is in Germany (§ 1025 (1) *ZPO*). An arbitral award is considered as domestic or national, if the seat of the arbitral tribunal lies within German territory (§§ 1025, 1043 *ZPO*). In contrast, an award is foreign if the seat of the arbitral tribunal is not located within German territory – even if the parties agreed on the application of German procedural law[2]. But even if the seat of the arbitral tribunal lies within German territory, the arbitrators may e.g. conduct hearings or conduct an inspection at any other place (§ 1043 (2) *ZPO*). Now the autonomous German rules in the *ZPO* provide the same rules for national and international arbitral proceedings – except with respect to the enforcement of arbitral awards (§§ 1060 *et seq. ZPO*).

1. For a brief overview *see above* Part VIII Ch. 6 (para. 183).
2. Schütze, *Schiedsgericht und Schiedsverfahren*, 3rd ed. 1999, No. 255.

213. German State courts have *ipso iure* 'original' jurisdiction over private law disputes, as everyone ('*jedermann*') in Germany has the constitutional right not to be removed from the lawful judge ('*gesetzlicher Richter*', Article 101(1) *GG*, *see above* General Introduction para. 45) and the right to legal recourse ('*Justizanspruch*', Articles 1(3), 19(4), 20, 28, 92 *GG*, *see above* General Introduction para. 42[1]. These State courts with independent professional judges are bound by statutes and 'the law' (Article 20(3) *GG*, *see above* para. 48). The German constitution, the *Grundgesetz*, states in addition that the judicature consists of federal and State courts (Article 92 *GG*) which are administering genuine State power (Article 20(2) *GG*). So it needs an additional step to invoke arbitration proceedings as a legitimate and (with the help of State powers) enforceable alternative dispute resolution method. This is only indirectly done by the *Grundgesetz* in its Articles 2, 6, 9. In particular Article 2(1) *GG* (everyone's right to a free development of his or her personality) guarantees not

only private autonomy and general freedom of contract but also the option to exclude the jurisdiction of State courts in favour of arbitration proceedings if not expressly excluded by a statute ('procedural freedom of contract', *prozessuale Vertragsfreiheit*).[2]

A valid arbitration agreement bars ordinary proceedings if the respective objection is raised by the defendant before making an appearance as to the substance of the dispute before the State court (§ 1032 (1) *ZPO*). Such an objection makes the action inadmissible and the State court will dismiss the action accordingly. Furthermore, § 1055 *ZPO* states also expressly that an arbitral award is equal to an unappealable judgment (*rechtskräftiges Urteil*) of a State court. Only under very limited, statutorily fixed circumstances (§ 1059 *ZPO*) a State court will declare a domestic arbitral award void upon an action for avoidance (*Aufhebungsklage*) by the aggrieved party (*see below* II).

1. The right to legal redress is additionally guaranteed by Art. 6(1) EurHRC and encompasses also an effective (speedy) trial, *see* Rosenberg/Schwab/Gottwald, *supra*, p. 17.
2. *See* Stober, 'Staatsgerichtsbarkeit und Schiedsgerichtsbarkeit', in: *NJW* 1979, 2001, 2005 with further references.

I. Proceedings

214. The essential prerequisite for an enforceable domestic (national) arbitral award is an arbitration agreement between the parties that is valid in respect to both form and substance. The rules regarding the formal requirements have been changed as of 1 January 1998, too: an arbitration agreement between private individuals has to be express and in writing (§§ 1029, 1031 *ZPO*). If one of the parties is a consumer in the sense of § 13 *BGB* ('Verbraucher', i.e. a person not acting within her commercial or freelance professional sphere) the arbitration agreement has to be completely contained in a document that is separated from the main contract (§ 1031(5) *ZPO*) or it has to be at least separately signed by both parties.[1]

Although even a slight mistake as to the formal requirements renders the whole agreement void, such formal mistakes could be rectified by appearing at the hearing of the arbitral tribunal without raising any objections regarding its jurisdiction (*rügelose Einlassung*, § 1031(6) *ZPO*).[2]

1. *See BGHZ* 38, 155; Thomas/Putzo, *Zivilprozessordnung*, 26th ed. 2004, § 1031 *ZPO* No. 10.
2. *See BGHZ* 48, 35; under certain circumstances even mistakes in respect to the substantial validity (agency etc.) could be rectified by applying § 1031(6) *ZPO* analogously, *see* in detail Schmidt, 'Heilung, Neuabschluss und Erklärungsbewusstsein beim Schiedsvertrag', in: *MDR* 1972, 989 *et seq.* (The new § 1031 (6) *ZPO* has the same wording as the former § 1027 (1) S. 2 *ZPO*.)

215. In contrast to that an arbitration agreement between parties that are not consumers (Verbraucher) in the sense of § 13 *BGB* – including companies – does not have to meet all the above mentioned formal requirements (*see* § 1031 *ZPO*). In that case an arbitration agreement still has to be in writing (§ 1031 (1) *ZPO*)[1], but can be concluded as an integral part of the main contract, in correspondence or via telefax or even tacitly through an undisputed commercial letter of confirmation (*kaufmännisches Bestätigungsschreiben*).[2] Moreover, an arbitration agreement can be concluded by reference to a written document including an arbitration clause (§

1031 (3) *ZPO*) or via a bill of lading ('Konnossement' §§ 642 *et seq. HGB*) that refers to an arbitration clause in the charter party[3]. Nevertheless an arbitration clause in standard forms is subject to the 'reasonableness control' pursuant to § 307 *BGB*, i.e., the arbitration clause would be invalid if it were unreasonably disadvantageous for the party being faced with the standard forms, taking into account the circumstances of the individual case.[4, 5].

1. *See* Thomas/Putzo, *supra*, § 1031 *ZPO*, No. 5.
2. *See* Thomas/Putzo, *supra*, § 1031 *ZPO*, No. 5.
3. *See* Rosenberg/Schwab/Gottwald, *supra*, pp. 1259/1260.
4. See *BGHZ* 115, 324; Raeschke-Kessler/Berger, *Recht und Praxis des Schiedsverfahrens*, 3rd ed. Heidelberg 1999, p. 68 *et seq.*
5. K. Schmidt, in: Festschrift Herber 1999, 281.

216. The parties irrespective whether merchants or private persons, can only conclude an arbitration agreement as to the matters listed in § 1030 *ZPO* (arbitrability): all patrimonial claims, and non-patrimonial claims only if the parties have the right to dispose of the respective issue. The parties must possess the capacity to enter into such an agreement, which will be determined as to the general procedural rules of procedural capacity[1].

1. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 1257.

217. Moreover the ordinary rules as prerequisites for the validity of contracts apply (mistake, fraud, duress, public policy, §§ 119 *et seq.*, 134, 138 *BGB*). But even if the main contract is void it does not necessarily follow that the arbitration agreement is also void (so-called autonomy of the arbitration agreement, *see* § 1040 (1) S. 2 *ZPO*).[1] In contrast to that an arbitration agreement is void which puts one party under undue duress, e.g., where the other party is abusing a stronger bargaining position or even monopoly to push through the arbitration clause[2].

1. *See* Zöller-Geimer, *Zivilprozessordnung*, 19th ed. 1995, § 1025 *ZPO* No. 4a.
2. *See* Thomas/Putzo, *supra*, § 1029 *ZPO* No. 10.

218. However, certain matters are explicitly excluded from arbitration proceedings because of prevailing State interests:

- family and marriage matters (*Familien- und Ehesachen*),
- maintenance matters (*Unterhaltssachen*),
- parent and child cases (*Kindschaftssachen*),
- non-contentions civil matters (*Angelegenheiten der Freiwilligen Gerichtsbarkeit*),
- disputes on the validity of a lease agreement for dwellings except disputes concerning treaties according to § 549 (2) Nr. 1 – 3 *BGB* (*Streitigkeiten über den Bestand eines Mietverhältnisses über Wohnraum*, § 1030 (2) *ZPO*),
- certain patent matters which fall into the exclusive jurisdiction of the regional court (§ 143 PatG).[1]

1. *See* in detail Schwab/Walter, *Schiedsgerichtsbarkeit*, 6th ed. 2000, pp. 39 No. 11 with further references; *see* Rosenberg/Schwab/Gottwald, *supra*, p. 1256/1257.

II. Enforcement and Judicial Review

219. Upon application a German court opens the *Exequatur* proceedings to enforce the arbitral award. German arbitral awards will be declared enforceable according to § 1060 *ZPO*, whereas foreign arbitral awards may be declared enforceable under § 1061 *ZPO*, in compliance with international treaties (*see below*, Chapter 2).

In enforcement proceedings regarding German arbitral awards their validity will be determined, too. (But the validity of German arbitral awards may also be challenged independently by the aggrieved party within three months after having received the award, § 1059 (1), (3) *ZPO*). The court will refuse to enforce a domestic arbitral award, if there is reason to avoid it, as stated in § 1059 (2) *ZPO*. The issues listed in § 1059 (2) Nr. 2 *ZPO* always have to be considered by the *Exequatur* court: whether the matters in question were explicitly excluded from arbitration proceedings (§ 1059 (2) Nr. 2 a) *ZPO*) and whether the recognition or enforcement of the arbitral award would violate public policy (§ 1059 (2) Nr. 2 b) *ZPO*).

The reasons listed in § 1059 (2) *ZPO* are exclusive. Issues mentioned in § 1059 (2) Nr. 1 *ZPO* will only be considered if one party refers to them – within the period of three months after reception of the arbitral award (§ 1059 (3) *ZPO*). Such causes for avoidance are an invalid arbitration agreement (§ 1059 (2) Nr. 1 a) *ZPO*), an unfair trial (§ 1059 (2) Nr. 1 b) *ZPO*), an arbitral award exceeding the scope of the arbitration agreement (§ 1059 (2) Nr. 1 c) *ZPO* and the incorrect formation or incorrect proceedings of the arbitral tribunal, if this has influenced the award (§ 1059 (2) Nr. 1 d) *ZPO*. Thus, the reasons to declare a domestic arbitral award void by a State court are very limited and statutorily fixed (§ 1059 *ZPO*). The jurisdiction for enforcing an arbitral award or for declaring it void is determined according to § 1062 *ZPO*: in general it is the *Oberlandesgericht* (Court of Appeal) mentioned by the parties in the arbitral agreement, or, lacking such a stipulation, it is the *Oberlandesgericht* in whose district the proceeding takes place (§ 1043 *ZPO*).

Chapter 2. International Arbitration

§ 1. Recognition and Enforcement of Foreign Arbitral Awards

220. According to Article 1(3) UNCITRAL Model Law on International Commercial Arbitration an arbitration procedure is regarded as international if (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[1,2] Now the new German law of civil procedure provides the same rules for national and international arbitral proceedings – only the recognition and enforcement of foreign arbitral awards follow special provisions.[3]

1. Cf. *Koch*, *supra* note 1 of para. 194.
2. *See* Sandrock, 'Welches Kollisionsrecht hat ein Internationales Schiedsgericht anzuwenden?', in: *RIW* 1992, 785.
3. *See* Bredow, 'Das neue 10. Buch der ZPO – ein Überblick', in: *Betriebsberater (BB), Beilage 2, 1998 S. 2*; Rosenberg/Schwab/Gottwald, *supra*, p. 1313.

221. Recognition and enforcement of foreign arbitral awards in Germany is primarily governed by treaties which prevail over purely domestic rules (§§ 1061, 1064(3) *ZPO*). An arbitral award is foreign, if the place of arbitration is in not in Germany (§ 1025 (1) *ZPO* – Theory of the Place of Arbitration ['*Sitztheorie*']; the former Theory of Proceedings ['*Verfahrenstheorie*'] has been given up now) [1]

1. *See* Rosenberg/Schwab/Gottwald, *supra*, p. 1303.

I. International Treaties

222. The treaties that have to be taken into account by a German court are the following:

- the New York UN-Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the most important one, *see* § 1061 (1)),
- The Geneva Protocol on Arbitration Clauses of 24 September 1923,
- The Geneva Convention on the Enforcement of Foreign Arbitral Awards of 26 September 1927,
- the European Convention on International Commercial Arbitration of 21 April 1961,

– the Agreement on the Application of the European Convention on International Commercial Arbitration of 17 December 1962.[1]

1. *See* Nagel/Gottwald, *supra*, § 16 Nos. 145 *et seq.*, Stein/Jonas-Schlosser, *Kommentar zur Zivilprozessordnung*, Vol. 7/2, 21st ed. 1994, Vor § 1044 *ZPO*; texts in Bülow/Böckstiegel/Geimer/Schütze, *Der Internationale Rechtsverkehr in Zivil- und Handelssachen*, 2005, Vol. III, C.I (No. 710).

223. But by far the most important treaty in practice is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards because most of the industrialized nations are Member States:

It presupposes an arbitration agreement in writing (Article 2 New York Convention). In absence of a treaty the formal validity is alternatively subject to the *lex loci* or the *lex causae* (Article 11(1) *EGBGB*).[1] The substantive validity of the arbitration agreement (conclusion of contract, capacity, etc.) is, however, not within the scope of the New York Convention but governed by the general rules of German private international law, i.e., Articles 27 *et seq. EGBGB*. So the parties are generally free to choose the applicable law (Article 27(1) *EGBGB*), and in absence of a choice of law the closest connection of the arbitration agreement with a legal system will determine the applicable substantive law (Article 28(1) *EGBGB*).[2]

The parties are also free to choose the procedural rules of international arbitration proceedings mandatory provisions notwithstanding(§ 1042(3) *ZPO*).[3] The basis for this wide party autonomy are Article 5(1) d) New York Convention and Article 4(1) b) 3) Geneva Convention which give the parties the general power to choose freely the procedural rules binding on the arbitration tribunal.

If the parties have neither expressly nor impliedly (hypothetically) chosen the applicable procedural law an international arbitration tribunal may as well as a purely national arbitration tribunal set in its discretion the applicable procedural rules.[4] In doing so it is not bound by the *lex fori* except for its *ordre public* and *ius cogens* (*zwingende Vorschriften*). Moreover the arbitral tribunal has to observe the general, internationally accepted, standards for a fair trial (*audiatur et altera pars*, impartiality, equal treatment of the parties).[5] The §§ 1025 *et seq. ZPO* are applicable to international arbitration cases only if the place of arbitration is in Germany (§ 1025 (1) *ZPO*).

As international arbitral tribunals are free to choose the actual place of the hearing, presupposed the parties did not expressly choose the place of arbitration, the applicable conflict of laws rules and subsequently the substantive law have to be determined independently from the actual *lex fori*. Under the German law of civil procedure therefore the parties' choice of the conflict of laws rules and/or the substantive law is regarded as valid and binding on the arbitral tribunal.[6] Additionally the parties may suspend the arbitral tribunal from any binding rules by giving it the power to decide *ex aequo et bono* (amiable compositeur) which may include the *lex mercatoria*.[7]

If the parties have failed to choose the conflict of laws rules and/or the substantive law the international arbitration tribunal has to determine the applicable conflict of laws rules in its discretion taking the parties' expectations into consideration.[8]

In the end an international (foreign) arbitral award will only be regarded as valid and therefore enforceable with the help of German courts if it fulfils the prerequisites

of § 1061 *ZPO* that refers to the New York UN-Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.

1. *See* in detail Schlosser, *Internationale private Schiedsgerichtsbarkeit*, 2nd ed. 1989, pp. 264, 270 *et seq.*
2. This will be most likely the *lex arbitri* if the parties have directly or indirectly chosen the place of arbitration ('*qui elegit iudicem, elegit ius*'), *see* Schlosser, *supra*, No. 244 with further references.
3. *See* Thomas/Putzo, *supra*, § 1042 *ZPO* No. 5; Schlosser, *supra* Nos. 229, 455.
4. *See* Sandrock, 'Welche Verfahrensregeln hat ein Internationales Schiedsgericht zu befolgen?', in: *Festschrift Glossner* (ed. by Plantey/Böckstiegel/Bredow), 1994, pp. 281 *et seq.*, 308.
5. As to the 'hierarchy' of procedural rules to be observed by an international arbitral tribunal *see* Sandrock, *supra*, pp. 281, 306 *et seq.*
6. *See* Böckstiegel, *in: Festschrift Beitzke*, pp. 443, 446, 448; *Veltins,* 'Umfang und Grenzen von Rechtswahlklauseln', *in:* Glossner (ed.), *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit*, Vol. 3 (1989), 1990, pp. 126, 128 with further references.
7. *See* Spickhoff, *Internationales Handelsrecht vor Schiedsgerichten und staatlichen Gerichten*, *RabelsZ* 56 (1992) 116, 134; Veltins, *supra*, pp. 126, 136; Kronke, Internationale Schiedsverfahren nach der Reform, *in: RIW* 1998, 257, 263.
8. *See BGHZ* 17, 89; 19, 110; Sandrock, 'Welches Kollisionsrecht hat ein Internationales Schiedsgericht anzuwenden?', in: *RIW* 1992, 785, 794; Veltins, *supra*, pp. 126, 128 *et seq.* and also Art. 28(2) UNCITRAL Model Law.

II. Rules Applicable in Absence of a Treaty

224. As Germany has withdrawn from the reservation clause for contracting states[1] the New York UN-Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 is applicable even to parties of non-Member States: in such cases the Convention is applicable as national law (*see* § 1061 (1) *ZPO*)[2]

The reasons for not recognizing foreign arbitral awards according to Art. V New York Convention are almost the same as the reasons mentioned in §§ 1059(2), 1060(2) S. 1 *ZPO*. Thus, national and foreign arbitral awards are treated in a similar way now. Should the *Oberlandesgericht* (Court of Appeal) refuse to declare the foreign arbitral award enforceable, it will not set aside it but only declare the foreign arbitral award not recognisable within Germany (§ 1061(2) *ZPO*).

1. Art. I (3) New York UN-Convention, BGBl. 1999 I, 7.
2. *See* Thomas/Putzo, *supra* / 1061 *ZPO* No. 5; Rosenberg/Schwab/Gottwald, *supra*, p. 1303.

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