Dispute Resolution
Around the World

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1. Legal System

Germany is a civil law jurisdiction with a codified system of law. The cornerstones of German legislation are the Constitution, the Civil Code, the Code of Civil Procedure, the Commercial Code, the Criminal Code and the Code of Criminal Procedure. In addition to these six major codes, there are many specific acts, which cover limited areas such as intellectual property, corporations or bankruptcy.

The legal concept of precedent is unknown to German law. Previous decisions of higher courts do not therefore have a general binding effect on lower courts. Judgments will bind only the parties to the respective proceedings. Nonetheless, case law plays an important role in the German legal system, since, in practice, lower courts generally do follow case law developed in higher courts.

2. Courts

Germany has both “ordinary” courts, which hear civil and criminal cases, and “specialist” courts for employment, social security, administrative and tax matters. Depending on the area of law or the circumstances of the particular case, there are two or three instances available.

There are 661 Local Courts, 116 District Courts, 24 Courts of Appeal and the Federal Supreme Court, with jurisdiction over general civil and criminal matters. The amount of the claim or the area of law determines whether the Local Court or the District Court has first instance jurisdiction.

The Local Court (Amtsgericht)

The Local Court serves as the primary court of first instance. It has jurisdiction over ordinary civil and criminal cases and is divided into civil, criminal and family courts.
The Local Court hears civil claims with a value of €5,000 or less. Civil cases before the Local Court are heard by a single judge. Representation by a lawyer is not required but is common in practice.

The District Court (Landgericht)

The District Court acts both as a court of first instance and as an appellate court. The District Court has first instance jurisdiction over civil cases falling outside the jurisdiction of the Local Court and over serious criminal matters. It generally has appellate jurisdiction over appeals against judgments of the Local Court in both civil and criminal matters.

A single judge usually presides over cases brought before the District Court. In exceptional cases, the matter will be heard by a panel of three judges. Representation by a lawyer is mandatory.

The Court of Appeal (Oberlandesgericht)

The Court of Appeal hears appeals from judgments of the District Court. In addition, it has jurisdiction over appeals from the Local Court against judgments of the family division or judgments concerning a party without a residence in Germany or involving the application of foreign law.

Representation by a lawyer is mandatory before the Court of Appeal.

The Federal Supreme Court (Bundesgerichtshof)

The Federal Supreme Court is the highest court in civil and criminal matters. It is located in Karlsruhe and is divided into 25 senates with a total of 130 judges. At present, there are only 39 attorneys-at-law admitted to appear in the Federal Supreme Court.

The Federal Supreme Court hears appeals on questions of law in civil and criminal cases.
3. Legal Profession

In Germany, the legal profession is divided into lawyers and attorneys-at-law. Attorneys-at-law are the professional representatives of their clients in all legal matters and may assist their clients in business transactions. They are admitted to the German Bar. Thus, they are also allowed to represent their clients in litigation proceedings. In contrast, lawyers are usually not admitted to the German Bar and therefore work as in-house counsel.

Foreign lawyers are usually not admitted to the German bar, although in accordance with European law, lawyers from Member States of the European Union may apply for admission to the German Bar if they meet certain criteria.

4. Litigation

Commencing Proceedings

A claimant commences legal proceedings in Germany by filing a statement of claim with the court of first instance having jurisdiction. In the statement of claim, the claimant explains the relevant facts and applies for a specific remedy. If the action is a claim for payment (e.g., purchase price, damages), the amount has to be specified. In all claims, the claimant must identify the evidence that proves those facts for which he bears the burden of proof. Sufficient copies of documents should be submitted for the court and each adverse party. The claimant has to identify the means of evidence on which he intends to rely, among others provide the full names and addresses of witnesses.

When filing the statement of claim, the claimant has to pay a court fee for the first instance proceedings. The amount of the court fee depends on the value of the matter in dispute. Once the claimant has paid the court fee, the court serves a copy of the statement of claim on the defendant.
When the statement of claim is served on the defendant, the judge usually sets a deadline for the defendant to submit his statement of defence. At this stage, the judge may also schedule a date for an initial court hearing, although he may wait until he has received the statement of defence and possibly another brief by the claimant, depending on which procedure he considers to be more efficient. If a defendant fails to serve a defence within the deadline set by the court or if a party does not appear at any scheduled hearing, the other party may apply for a default judgment.

Settlement

In accordance with the Code of Civil Procedure, the court must try to assist the parties to reach an amicable settlement throughout the proceedings. A conciliation hearing takes place prior to the main hearing in every civil case. A conciliation hearing does not have to take place if an independent conciliation authority has already unsuccessfully attempted to settle the dispute, or if a conciliation attempt is clearly pointless.

In complex cases, judges often put pressure on the parties to conclude a settlement. As a result, many cases are settled in court.

Hearings

There will be at least one court hearing, sometimes more, depending on the complexity of the case. The emphasis of German court proceedings is on written statements in which the lawyers are expected to explain all aspects of the case. Only the critical and controversial facts that the court considers relevant are discussed at hearings.

Disclosure and Burden of Proof

In civil litigation, each party has to prove the facts that support its position. If a party fails to do so, the court may decide in favour of the other party.
The German Code of Civil Procedure does not provide for disclosure. However, German courts have the power to request a party or even a third party to produce specific documents relating to certain points raised by either party regardless of the burden of proof. The courts may make such a request if the party who relies on these documents does not have possession of them or if production of such documents would further the court’s understanding of the case.

In civil proceedings, evidence usually consists of documentary evidence, witness testimonies and expert opinions. Physical inspection of property or assets and, in certain circumstances, examination of a party are also permissible evidence. Parties to court proceedings (e.g., managing directors and members of a board of directors) cannot normally be heard as witnesses on issues for which that party bears the burden of proof. The evidence is taken by the judge, not by the parties. There is no pre-trial discovery or deposition and no US-style cross-examination of witnesses.

If a claim can be based on documentary evidence alone (e.g., a cheque or a bill of exchange), a claimant may choose documentary proceedings. In these proceedings, no witness or expert evidence is admitted and a judgment that is enforceable without security can be obtained relatively easily and quickly. A defendant may request that a judgment reached in documentary proceedings be reviewed in subsequent proceedings where all means of evidence are admissible.

Litigation Costs

Litigation costs consist of court fees and court expenses (e.g., for witnesses or experts) as well as lawyers’ fees. The losing party has to bear all costs of the proceedings, including the other party’s legal fees. If a party is only successful in part, the costs will be split between the parties proportionately. The amount of legal fees that can be recovered from the losing party is limited by statute and depends both on the value of the claim and the different stages involved in resolving the dispute.
Time Frame

The duration of legal proceedings depends on the individual case and the approach taken by the judge. As a guideline, first and second instance proceedings normally each take between six months and one year, whilst proceedings at the Federal Supreme Court normally take twelve to eighteen months. In complex cases it is not unusual for each stage in the proceedings to take more than one year.

Summary Proceedings for Recovering a Debt

A claim for payment of money may be pursued through summary proceedings. The claimant files an application for a payment order with the Local Court. If the formal requirements are met, a court officer will grant the payment order. After service of the payment order, the debtor has two weeks to lodge an objection. If the debtor files an objection, either party can elect that the proceedings continue as a normal civil case. If the debtor does not object, the creditor may apply for an enforceable execution order. After service of the execution order, the debtor has an additional two weeks to file an objection. If he does so, the proceedings continue as a normal civil case, although the continuing proceedings do not suspend enforcement.

Summary proceedings should generally only be considered if the debtor is not expected to defend the claim or if the running of a limitation period needs to be suspended as a matter of urgency; otherwise, they may cause a delay of one to two months.

5. Interim Remedies

German law offers two forms of preliminary relief, which will only be granted in exceptional cases:

(a) the preliminary injunction (requiring or preventing certain action until the rights of the parties have been finally determined); and
(b) the attachment order (preventing removal or dissipation of the defendant’s assets where there is evidence of an intention to remove or hide those assets).

To obtain interim relief, the applicant must submit prima facie evidence by way of documents and detailed affidavits that he has a valid claim against the respondent and that he urgently needs protection. It is important for the applicant to explain in detail why enforcement of the final judgment would be endangered without the preliminary relief sought. In a case of urgency or where it is necessary to avoid that the other party is warned and can take action prior to service of the preliminary relief order, the court may make its decision ex parte, i.e. without notice and without giving the respondent an opportunity to be heard.

Attachment orders and preliminary injunctions are provisional in nature and should not prejudice the proceedings in the main action. If granted, the injunction or attachment order must be enforced immediately (at the latest within one month after it was granted). If the injunction or attachment order is lifted on appeal or if the main proceedings show that the applicant does not have a valid claim, the applicant will be liable to the respondent in damages and costs.

6. Appeals

The German Code of Civil Procedure recognises different types of “appeal”, namely a first appeal, a second-tier further appeal on questions of law and an objection against a default judgment. Furthermore, an “appeal” is possible against preliminary injunctions and attachment orders.

First Appeal

A party has an absolute right to a first appeal if the first instance judgment deviates from the party’s original application by more than €600. If this threshold is not reached, any appeal requires permission of the first instance court.
The general position is that the appeal court (District Court and Court of Appeal) will base its decision on the facts found by the respective lower court and reflected in its judgment, unless the factual basis of the lower court’s decision is obviously wrong. As a result, a first appeal can now generally only be brought where the lower court made an error of law or an obvious error of fact.

**Further Appeal on Questions of Law**

A second-tier appeal to the Federal Supreme Court is possible if permission is given by the court that heard the original appeal. If permission is denied, the party who wishes to lodge the second-tier appeal may file a complaint with the Federal Supreme Court. Such a complaint is only successful where the matter is of general importance or where the development of a uniform application of the law requires the decision of the Federal Supreme Court. In addition, until 31 December 2011, the value to be pursued with the second-tier appeal has to exceed €20,000. The second-tier appeal must raise questions of law only: the facts ascertained by the lower court are generally binding.

**Objection Against a Default Judgment**

The court will issue a default judgment against a party who does not appear. The party in default may file an objection against a default judgment with the court that issued the judgment. The objection does not have to state any specific reasons, but the objecting party should file further submissions of fact along with the objection.

**7. Enforcement of Judgments**

**Enforcement of Judgments for Monetary Claims**

**Moveable Assets**

The judgment creditor can ask the bailiff to seize assets, which will then be sold at public auction.
Claims

A judgment creditor can seek an order of the court requiring a third party debtor to pay to it any sums the third party debtor owes the judgment debtor.

Real Property

There are three main methods of execution against any real property owned by the judgment debtor: the judgment creditor may either enter a mortgage in the land register, effect an execution sale or apply for the administration of the property through an administrator appointed by the court in order to satisfy the claim through the rents and profits of the property.

Enforcement of Judgments for Delivery Up or for Specific Performance

Delivery Up (Surrender of Moveable Assets)

If a judgment debtor has been ordered to surrender assets, then these will be seized by the court bailiff and delivered to the judgment creditor.

Specific Performance

If the judgment requires the judgment debtor to perform a specific act that could be performed by a third party, the court may authorise the judgment creditor to have a third party perform the act at the cost of the judgment debtor. Where the relevant act (or omission) can only be performed by the judgment debtor, the court will, upon application by the judgment creditor, impose a fine of up to €255,000 – alternatively a prison term of up to six months – on the judgment debtor if he fails to fulfill his duty to perform under the judgment.
Recognition and Enforcement of Foreign Judgments

Where Council Regulation (EC) No. 44/2001 and any multilateral or bilateral conventions do not apply, recognition and enforcement of foreign judgments is governed by the Code of Civil Procedure.

Recognition

Recognition is a prerequisite for enforcement of a foreign judgment. Under the Code of Civil Procedure, foreign judgments are automatically recognised by German courts unless one of the following provisos applies:

(a) the foreign court did not have jurisdiction according to German law on international jurisdiction;

(b) the defendant did not enter an appearance and is able to show that he did not have an opportunity to defend himself due to wrongful or late service of the documents initiating the action;

(c) the judgment is inconsistent with a German judgment or an earlier recognisable foreign judgment or the underlying foreign proceedings are incompatible with earlier German proceedings;

(d) recognition of the judgment would be contrary to German public policy (e.g., the judgment conflicts with basic rights under the Constitution or awards punitive damages); or

(e) reciprocity is not guaranteed (e.g., an equivalent German judgment would not be recognised in the relevant foreign country).

Enforcement

Recognised foreign judgments are not automatically enforceable in Germany; they need to be declared enforceable by judgment of a German court. Such judgment will only be granted if the foreign
judgment is recognisable and final (e.g., it has become non-appealable under the applicable foreign law).

The EU Regulation and certain conventions provide that it is not necessary to obtain a judgment of a German court declaring a foreign judgment enforceable. In such cases, in order for a foreign judgment to be enforceable in Germany, the only requirement is for an execution clause, which can be obtained from the court in relatively easy, fast and inexpensive proceedings.

8. **Arbitration**

**Arbitration law**

Germany has adopted the UNCITRAL Model Law on International Commercial Arbitration into domestic legislation. It was the express goal of the German legislator to increase the attractiveness of Germany as a forum for international arbitration.

**The Role of Courts**

The role of German courts in arbitration is limited. If a claim is filed in a state court and the court determines that the dispute is subject to an arbitration agreement, the court must dismiss the claim. However, until an arbitral tribunal is constituted, any party may file a motion with the Court of Appeal to establish by declaratory judgment whether or not the arbitration clause or arbitration agreement is valid.

After commencement of arbitration proceedings, the arbitral tribunal has jurisdiction over the question of whether the arbitration clause or agreement is valid. If one of the parties pleads lack of jurisdiction of the arbitrator(s), the arbitral tribunal must rule on this issue. Each party is entitled, however, to apply to the Court of Appeal for a review of this ruling.
Institutional and Ad Hoc Arbitration

The German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit, “DIS”) is a non-profit registered association that promotes arbitration and provides a uniform service for all arbitration related matters across Germany. The DIS Arbitration Rules are suited to both domestic and international arbitration proceedings. Application of the DIS Rules is not limited to arbitration proceedings conducted in Germany.

There are a certain number of specialized institutions based in Germany that provide arbitration services, for example the “Waren-Verein der Hamburger Boerse” or the German Association for Information Technology and Law. Many of these institutions deal primarily with domestic disputes or highly specialized areas of practice (e.g., the Association for German Maritime Arbitration).

Alternatively, the parties may conduct their arbitration under the auspices of an international arbitration institution such as the ICC.

Ad hoc arbitrations are frequently used in Germany to settle disputes.

Enforcement of Arbitral Awards

Domestic Arbitral Awards

A German arbitral award can be enforced if it has been declared enforceable by the competent Court of Appeal. According to the Code of Civil Procedure, the Court of Appeal will only refuse to declare an arbitral award enforceable if:

(a) the arbitration agreement is invalid;

(b) a party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings;

(c) the award deals with a dispute not contemplated by or not falling within the terms on which the dispute was submitted to
arbitration or contains a decision on matters beyond the scope of these terms; or

(d) the arbitral procedure or the composition of the arbitral tribunal contravened the Code of Civil Procedure or an admissible agreement of the parties and this contravention affected the award.

In addition, the court will refuse to declare an arbitral award enforceable if it finds that:

(a) the subject matter of the dispute was not capable of resolution by arbitration under German law; or

(b) recognition or enforcement of the award would lead to a result that would conflict with public policy.

Defences based on substantive law are not admissible in proceedings to declare an arbitral award enforceable.

Foreign Arbitral Awards

It is generally accepted under German law that a foreign arbitral award will be recognized and enforced in Germany in accordance with the provisions of the New York Convention regardless of whether or not the country in which the award was made is a party to this Convention.

Power to Appeal and/or Set Aside an Award

Under German law, an arbitral award is final and - unless the parties have agreed on second instance arbitration proceedings - cannot be appealed. According to the Code of Civil Procedure, the Court of Appeal may set aside an arbitral award on any of the grounds mentioned under “Domestic Arbitral Awards” above.
9. **Alternative Dispute Resolution**

There are no statutory provisions governing alternative dispute resolution in Germany. Based upon the general legal principle of freedom of contract, any rules relating to a process of alternative dispute resolution that the parties have agreed upon will be binding on the parties. In the past, ADR procedures were rarely adopted, although the interest in alternative dispute resolution methods has increased recently.

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