WILLKIE FARR & GALLAGHER LLP

German Law Series

Introduction to German Civil Procedure 2: How Initiating a German Civil Action Works

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This series of short and to-the-point chapters is intended for international legal practitioners who have a nexus to Germany without being fully trained in German law. It is meant to provide a general overview of the structures, functioning, and general principles of German civil procedure. A new chapter will be published monthly.[1] *The previous chapter can be found here.*

After the first chapter of this series explained the fundamentals of the German court system and, more specifically, the structure of the civil branch of the German court system, this second chapter will concentrate on how to start a civil litigation in Germany.

To better understand German litigation, it helps to bear in mind three fundamental principles:

- The German civil action is tailored to professional judges who received formal legal training. There is no jury trial. A statement of claim, and any further pleading, should thus be straightforward, focus on the relevant facts and be geared towards the professional reader who knows the law.

- There is no pre-trial discovery. In German civil litigation, a party generally must bring forward the evidence that it needs to prove its claim or defense. There are some exceptions to this rule but, as a general principle, a party should not expect to obtain helpful evidence from its opponent.

- Most commercial disputes are decided without hearing witnesses or formally taking evidence. Judges decide whether there is a need to take evidence on the basis of the written pleadings. Thus, instead of filing a half-hearted statement of claim in the hope of salvaging it during the hearing, a plaintiff should focus

[1] Prior chapters will not be updated. There are exceptions and deviations to many of the rules and practices discussed in this chapter that are not individually flagged.

on putting in a robust and substantiated complaint that comes with the evidence the plaintiff has at its disposal.

A. Before Initiating a German Civil Action: Considerations on Timing and Cost

The average duration of first-instance proceedings before the German Regional Courts (*Landgerichte*), which handle the bulk of commercial disputes, is 13 months. The timing may vary depending on the complexity of the case and the individual judge's docket. It is not possible to investigate the individual judges' speediness. The 13-months' average includes one (short) hearing per litigation which is typical for a German litigation. If more hearings are necessary, i.e., to take witness or expert evidence, the litigation will likely take a few months longer. In contrast, the proceeding may end much more quickly if the defendant does not defend—either because it does not respond to the statement of claim or does not appear at the hearing. In that scenario, the plaintiff may have an enforceable judgment in hand four to six weeks after filing the statement of claim.

The victorious plaintiff can typically enforce the first-instance judgment as soon as it has been served on the defendant, but the plaintiff may have to deposit collateral with the court if it wants to start enforcing immediately. We will discuss German enforcement mechanisms in a future chapter in this series.

The costs of litigation in Germany are comparably low and predictable before the filing of the complaint. A plaintiff may ask its own lawyers for a fee estimate for their work. The (modest) court fees that a plaintiff must pre-pay are fixed by statute and usually depend on the amount in dispute. The defendant's lawyer's fees, which the plaintiff needs to reimburse if it loses, are capped at amounts fixed by statute and are also calculated based on the amount in dispute. A plaintiff thus has a quite accurate picture of the downside cost risk ahead of starting the litigation.

If the plaintiff wants to avoid the cost exposure, it may seek litigation funding. Litigation funding is available in Germany, but not as prevalent as in certain common law jurisdictions. Some funders will fund only the plaintiff's own costs while others also provide coverage for the downside scenario in which the plaintiff loses and has to reimburse the defendant for its costs. We will take a more in-depth look at litigation costs in Germany in an upcoming chapter of this series.

B. Filing a Statement of Claim

A plaintiff initiates a German civil action by submitting a statement of claim to the court.

Before submitting the statement of claim, the plaintiff has to make sure it files its claim with the right court (i.e., a court that has jurisdiction over the dispute) (1. below), that its statement of claim has the required form and content (2. below), and that—to the extent required by procedural law—the plaintiff is represented by counsel (3. below).

1. Jurisdiction

The plaintiff must file its complaint with the right court, i.e., a court that has jurisdiction to decide the case. German civil procedure distinguishes between local jurisdiction (*örtliche Zuständigkeit*) and subject-matter jurisdiction (*sachliche Zuständigkeit*). A court must have both local and subject-matter jurisdiction to be the proper court for the litigation at hand. Frequently, multiple courts have jurisdiction, in which case the plaintiff is free to choose where to file.

The German Code of Civil Procedure (*Zivilprozessordnung*, "**ZPO**") governs jurisdiction in domestic German disputes, i.e., disputes that do not involve parties or acts outside Germany. Local jurisdiction generally rests with the courts at the defendant's place of residence: in the case of a company, its registered seat. The ZPO provides for additional local jurisdiction for a number of claims, e.g., for contractual disputes at the place of performance (§ 29 ZPO) and for torts at the place where the tort was committed (§ 32 ZPO). For a limited number of special cases, the ZPO contains rules on exclusive jurisdiction; e.g., for certain disputes concerning real property, jurisdiction exists only at the location of the real property (§ 24 ZPO).

If the defendant is a resident of or has its seat in an EU member state and the dispute involves parties or acts outside Germany, the Brussels I Regulation (Regulation (EU) 1215/2015) governs the international and, in certain cases, also the local jurisdiction (e.g., in contractual matters the place of performance, Art. 7 no. 1 Brussels I Regulation; in matters relating to tort where the harmful event occurred, Art. 7 no. 2 Brussels I Regulation).

In domestic proceedings, choice-of-court agreements are permissible only among certain professional parties (i.e., merchants or companies). Availability of choice-of-court agreements with consumers is much more limited. These limitations are relevant, e.g., for MEP-structures and shareholder agreements, including private parties, i.e., consumers. They apply irrespective of how experienced, sophisticated or wealthy the private parties are. If the law provides that a particular court has exclusive jurisdiction, the parties cannot choose a different court. In cross-border settings, choice-of-court agreements are generally permissible with few exceptions for certain contracts (e.g., certain consumer contracts and employment contracts).

The court must also have subject-matter jurisdiction, which is generally determined by the amount in dispute. The Local Courts (*Amtsgerichte*) have jurisdiction over disputes with an amount of up to and including EUR 5,000. For civil actions with an amount of more than EUR 5,000, subject-matter jurisdiction rests with the Regional Courts. Exceptions from this rule exist for certain specific types of disputes; e.g., Local Courts have subject-matter jurisdiction over residential landlord-tenant disputes, irrespective of the amount in dispute. (See the first chapter of this series for more detail on the German court system).

Jurisdiction is not tied to the place of service of process. Serving a foreign defendant during his vacation in Germany will not be helpful for establishing jurisdiction in Germany.

2. Form and Content of the Statement of Claim

A statement of claim to a German court typically contains statements on all facts concerning the plaintiff's case and proffers evidence for these facts. As a rule of thumb, the statement of claim must be so complete that the court could decide the dispute based on the statement of claim alone (e.g., in a situation where the defendant does not respond). There is no U.S.-style notice pleading. Against this background, the process of litigating a civil action may be more front-loaded in Germany compared to common law jurisdictions. The plaintiff should put its best foot forward already in the complaint.

The mandatory requirements of a statement of claim are (i) the designation of the parties and the court, (ii) exact information on the subject matter and the grounds for filing the claim, and (iii) a precise prayer for relief. Technically, it would be sufficient for a plaintiff to provide the court with the facts of the case and say what the plaintiff wants. The court is expected to know the law and apply it to the facts on its own. However, it is advisable and common practice in commercial litigation that the statement of claim include full factual and legal assertions.

The precise prayer for relief is of particular significance, as the court is bound by it. The court must not exceed the prayer for relief; e.g., if a plaintiff requests that the defendant be ordered to pay EUR 100,000 where, in fact, the defendant owes him EUR 200,000, the court will, at most, order payment of EUR 100,000. If a plaintiff has a claim in principle but does not know (yet) how much it is owed, e.g., because the defendant is refusing to hand over an accounting that the plaintiff needs to calculate the claim, then the plaintiff may file a multi-step complaint. The first step is a request that the defendant turn over the missing accounting. If the court grants the request, the plaintiff can then specify its monetary claim in a second step or retract the litigation in case its claim is not worthwhile pursuing.

If any of the minimum requirements of a statement of claim are not fulfilled, the court generally will notify the plaintiff and allow it to amend its statement of claim accordingly.

German law requires the person submitting a statement of claim to sign it personally. If the statement of claim (or any document to the court) is submitted by counsel—as is mandatory for statements of claim with an amount exceeding EUR 5,000 that go to the Regional Courts—it must be sent via a particular electronic channel ("*besonderes elektronisches Anwaltspostfach*" or "*beA*"). In proceedings before the Local Courts where it is not mandatory to have legal counsel, the plaintiff may submit the statement of claim either in writing with a wet-ink signature or go to court and file the claim with the help of the court registrar.

The statement of claim is typically sent together with copies of the relevant documents underlying the plaintiff's claim, e.g., the contract giving rise to the claim, invoices, or photos of a damaged item. Written witness statements are uncommon (save for preliminary relief). Rather, the statement of claim will state the plaintiff's understanding of the facts and, for each fact, the underlying evidence: e.g., a document or the name of a witness and an address where the court can send a summons if it wishes to examine the witness. Reports by party-appointed experts are not considered evidence but party pleadings. They are oftentimes already included with the statement of claim.

3. Mandatory Representation by Counsel?

Representation by counsel is not legally required before the Local Courts but is the common practice in commercial disputes. Representation by counsel is mandatory before all other civil courts (with certain exceptions, e.g., in family law matters). A party appearing before these courts without being represented by counsel will not be able to participate in the proceedings and is considered "absent" with the risk that the court issues a default judgment.

C. Payment of the Advance on Court Fees and Service of the Statement of Claim

Once the plaintiff has submitted its statement of claim to the court, the court issues an invoice for the advance on court fees and requests payment from the plaintiff. The court fees are determined by statute based on the amount in dispute. Currently, the advance on court fees for a claim of EUR 100,000 is EUR 3,387.00; the advance for a claim of EUR 10 million is EUR 124,563.00; and the maximum advance is EUR 362,163.00 corresponding to a claim amount of EUR 30 million (or more).

Upon receipt of the advance payment, the court effects service of the statement of claim upon the defendant. Serving a defendant through the postal service is the most common means of service, but other means exist as well, e.g., service by bailiff or, if the defendant cannot be found, service by posting a public notice. Service within the EU is relatively uncomplicated under the provisions of Regulation (EU) 2020/1784. For service of a German

statement of claim in countries outside the EU, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters provides the most commonly applicable set of rules; using the postal service is the preferred means of service if the foreign state permits it.

A German civil action is not formally commenced until service of the statement of claim on the defendant is completed. However, the effect of filing a lawsuit is dated back to the day when the plaintiff filed the claim with the court. This rule is particularly relevant in the case of an expiring deadline or limitation period. In order to benefit from this rule, the plaintiff must do everything necessary and within its powers to ensure swift processing of the statement of claim—most importantly payment of the advance of costs in a timely manner. If the plaintiff properly discharges these duties, a statement of claim filed with the court at 23:30hrs on December 31 will toll a limitations period that would otherwise expire at the end of that day, irrespective of whether the actual subsequent service on the defendant happens on the 5th, 15th or 30th of January.

D. No Discovery in a German Civil Action

A key difference with other jurisdictions to consider before litigating in Germany is that there is no discovery in a German civil action. Each party has to plead and, if disputed by the opponent, prove the facts that are necessary for its claim or defense. Correspondingly, and subject to only a few exceptions, each party has to present the evidence (including naming witnesses) that supports its factual allegations. Failure to do so may result in losing the litigation. U.S.-style pre-trial discovery is generally considered an illicit "fishing expedition" or "*Ausforschungsbeweis.*" With very limited exceptions there is no duty under German civil procedural law to provide information or evidence to the opposing party or otherwise help the opposing party to build its case or defense (no depositions, no interrogatories). Parties can ask the court to order production by the opposing party or third parties of a specific document that has been relied upon in the proceedings, but these orders are infrequent.

Some German substantive laws provide for limited claims for access to information. As an example, a statutory claim for information came into force in 2016 in the context of cartel damages claims. Cartel victims now have a right to obtain documents and information from cartelists that are necessary to pursue their damages claims. However, this right to information still requires a narrow and detailed description of the documents or information sought and is subject to various limitations. German courts have been hesitant to apply these provisions.

That said, German law provides a number of mechanisms to overcome information disparities and to help parties meet their burden of substantiation. In some cases, there is a presumption under substantive law that reverses the burden of proof. In other cases, courts rely on "general experience" to relieve the plaintiff from having to provide evidence for fact patterns that are—in the court's view—common. We will cover the rules of evidence in German civil procedure in more detail in an upcoming chapter.

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Stay tuned for the next chapter, forthcoming in mid-April 2023. In the meantime, your Willkie Global Litigation & Arbitration Team is happy to provide you with further information and advice on these issues.