LITIGATING AS U.S. PARTY IN GERMANY

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It is always a special event for companies and their legal departments, but also for external counsel, when a legal dispute has to be conducted outside their own country. As between the USA and Germany, this is all the more true because Germany is a so-called "civil law" jurisdiction. This article aims to outline the most important aspects that a U.S. litigant has to deal with in civil proceedings on general commercial and company law matters before a German state court.

"THE COURT LANGUAGE IS GERMAN" VS. "COMMERCIAL COURTS"

It goes without saying that state court proceedings should always be conducted in the national language, which is German for Germany *(Section 184 GVG)*. Nevertheless, the German legislator has also recognized the need of the business community to be able to conduct court proceedings in English, at least by mutual agreement. The competition in international dispute resolution through arbitration as well as the emergence of so-called "Commercial Courts" with English as the language of proceedings in the state jurisdiction of *other countries* contributed significantly to the fact that *since 2020, for the first time "on a trial basis" in individual federal states*, and soon also nationwide with the implementation of the 2024 judicial reform, proceedings can be conducted entirely in English before German state civil courts. It is beyond the scope of this presentation to describe the legal difficulties to fully synchronize "English" proceedings with all the requirements of "German" civil procedure. However, insofar as the parties to the proceedings all agree to conduct their court proceedings in Germany in English, the statement that they can do so in Germany before a competent state civil court as a "Commercial Court" is correct and may also suffice at this point. Even if a legal dispute is based on an older agreement that contains a different jurisdiction clause, this option is available. Mutual consent then results in a new agreement on jurisdiction.

Naturally, after a dispute arises, at least one party will be reluctant to enter into a "new" agreement on jurisdiction if the jurisdiction of a particular state court has otherwise already been established. In a dispute between an U.S. and a German litigant, this reluctance will mainly be on the part of the German party. Nevertheless, it may also have significant advantages for the German

party to subsequently agree to proceedings before a German "Commercial Court" instead of traditional German-language court proceedings. *The same advantages may exist if proceedings that would otherwise be conducted in a third language jurisdiction are "relocated" to Germany from another member state of the European Union*.

Otherwise, usually the biggest linguistic problems for international court proceedings before a German court are present, if

- the essential contractual documents and/or the correspondence between the parties based on them have not been drawn up in German,
- the essential witnesses for the court proceedings cannot be heard in German,
- the party pleadings and court orders written in German must be coordinated with foreign parties to the proceedings and must be fully "understood" by them.

None of these problems are new or even unsolvable. However, to solve them, they require the labor-intensive, time-consuming, and therefore costly translation by transcription of all documents or by interpreters in the oral hearings. In "purely German" court proceedings, each party, each witness and also the court has the right not to have to be satisfied with documents that are not (also) presented in German. The agreement on the jurisdiction of a "Commercial Court" solves this problem at least in favor of the English language.

THE GERMAN CIVIL COURT SYSTEM

All proceedings before a German civil court can be conducted in at least two instances. The value-based appeal thresholds are so low that they are almost irrelevant for an international legal dispute. The first instance of appeal is normally a full appeal on facts and law. The second instance of appeal, which is only open to a limited extent, is normally an appeal only on points of law. The Federal Court of Justice is almost exclusively a second appeal instance. Full appeal means that the findings of fact can also be reviewed. The second appeal is purely a review of the correct application of the law to the correctly established facts. With the nationwide introduction of the "Commercial Courts" in Germany, proceedings may begin directly before a "higher" court, with the result that only one appeal instance remains.

THE COSTS OF GERMAN CIVIL PROCEEDINGS

A significant difference between German civil court proceedings and American court proceedings is that the "necessary" costs of the legal action must be reimbursed to the winning party by the losing party, even if there is no prior contractual agreement on the reimbursement of costs. In this respect, the reimbursement of costs is part of procedural law.

Proceedings before German civil courts incur firstly court costs and secondly legal fees on the part of the litigants themselves.

Court costs include the court fees that are incurred in every proceeding, but also the variable costs that are only incurred depending on the requirements of the individual proceedings, e.g. for court-appointed interpreters and experts. These costs must be paid to the court as an advance by the litigant who incurs the costs. The court costs are due for payment when the action is filed in the first instance and for the appeal when the notice of appeal is filed in the next instance. The court costs depend on the respective "value of the matter in dispute," which in the simplest case corresponds to the claim in an action for payment.

The statutory fees for legal representation of a litigant are also dependent on the "value of the matter in dispute." They also determine the minimum fee for legal representation in court by lawyers and the maximum amount of reimbursement of lawyers' fees to the other party in the event of losing the legal dispute.

The costs for necessary translations of documents, e.g. from English into German for use in court proceedings, are initially to be borne by each party to the proceedings for their "own" documents but are then part of the procedural reimbursement of costs at reasonable translation fees in the event of a successful claim or defence. This is also the "corrective" for reasonable behavior on the part of the litigants in the area of conflict between the fundamental right to ask for certified translations of all foreign-language documents introduced into the proceedings: if a party to the proceedings embarks on the path of obstructive behaviour by demanding translations of all and every document, it assumes the risk of having to bear the full costs of all these - possibly pointless - requests.

Objectively assessing the costs of translations that are really necessary or might be asked for in a procedurally admissible manner as part of the total costs of the litigation is an essential aspect speaking in favor of litigation before a German "Commercial Court" and may also persuade a possibly reluctant party to an upcoming court dispute to agree to its jurisdiction even when the dispute as such has already arisen.

THE OBLIGATION OF CERTAIN PARTIES TO PROVIDE SECURITY

Section 110 of the German Code of Civil Procedure (ZPO) stipulates the obligation of a plaintiff domiciled outside the European Union to provide security for legal costs for the - potentially - successful defendant. A plaintiff from the USA is subject to this obligation as long as it is not expressly exempted under one of the exceptions contained in this provision. There is no general international treaty between the USA and Germany that grants a general exemption from this provision. The German-American Treaty of Friendship, Commerce and Navigation of 29 October 1954 only helps in very special circumstances.

The security deposit covers both the court costs and the legal fees of the defending - German - side. The plaintiff must pay the court costs for the first instance to the court anyway when filing the action.

The defendant will therefore only be able to successfully demand security for legal costs for the costs of its own legal representation and all other reasonably expected court costs. In principle, the statutory provision already covers the costs of the entire conceivable legal appeals for the dispute. However, established case law regularly limits the security for costs after a lawsuit has been filed to those costs that are incurred up to the procedural phase in which the defendant, in the worst case, must actively enter in order to fully secure itself, i.e. up to the filing of the next appeal. Before the plaintiff can then continue with the appeal proceedings, the defendant could demand further security for costs.

This security for *costs can reach a considerable amount* and, even if it may be provided by a bank guarantee, can represent a significant de facto obstacle to litigation. Therefore, as soon as a plaintiff from the USA considers bringing an action before a German court, although there is much to be said for doing so in view of the existence of the new "Commercial Courts," the action should be sensibly structured in order to avoid Section 110 ZPO to the extent possible.

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