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German Law Series

Introduction to German Civil Procedure 4: How a Court Hearing in German Civil Litigation 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.*

In the third chapter of this series, we explained the basics of evidence in German civil litigation. This fourth chapter illustrates what to expect going into a hearing before a German court. The experience will be quite different for those who have previously been to a hearing in the United States or in England or grew up watching Matlock and Judge Judy.

Key takeaways on hearings in Germany litigation are as follows:

- In commercial disputes, the parties brief the court on their positions in writing ahead of the hearing. During the hearing, discussion is typically limited to specific issues that the court finds relevant. Parties should not expect to have the opportunity to present their full case during the hearing.

- The court, not the lawyers, takes the lead in structuring the hearing. The court decides which witnesses to hear and which other evidence to take, if any.

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

- The court oftentimes shares its preliminary views on the case at the outset of the hearing and identifies areas of risk for each party. Usually, this is done in an attempt to move the parties towards settlement.

- German courts decide most commercial disputes solely on the basis of the written pleadings—that is, without hearing witnesses or otherwise formally taking evidence. Only if the court thinks that evidence offered by a party is decisive to the outcome of the case will it take such evidence at the hearing.

A. Scheduling and Summons to the Hearing

As set forth in more detail in the second chapter of this series (which can be found here), the court takes the lead in structuring a German civil litigation. Accordingly, the court will schedule a hearing at a date that it deems appropriate and summon the parties to the hearing.

In smaller disputes, in particular those before the Local Courts, the judge may choose to already set the hearing date in the notice accompanying service of the statement of claim on the defendant. The court will then usually also set a date ahead of the hearing by which the defendant is to submit its statement of defense. Courts typically choose this route if they expect that the facts will remain largely uncontested or if they see good prospects for a settlement.

In larger disputes, courts will typically schedule the hearing only after receiving the first or second round of written submissions.

There is no procedural calendar fixed at the beginning of the proceedings. Rather, the deadlines are set step-by-step only for the next immediate step or steps. The court determines the time limits for the parties to file their written submissions, answer questions or provide other input to the court. Reasonable requests for extensions are usually granted. Other urgent matters on the lawyer's desk, the sheer volume of the matter at hand or school holidays are usually proper grounds for an extension. Courts are weary of repeated or overreaching requests for extensions.

Usually, there are two rounds of submissions before a hearing (but there can be more). The parties are free to submit additional written submissions at any time before the hearing, but new facts and evidence that would lead to an overall delay of the matter may be disregarded if filed after a deadline without a reasonable excuse. Oftentimes, parties file a further short submission one week before the hearing to refresh the court's recollection of the matter and reiterate their position. This comes with a potential downside: If the opponent does not have sufficient time to comment on this submission during the hearing (sometimes the latest written submission is handed over only during the hearing), the opponent may get an additional opportunity for a further submission after the hearing.

A party may request the court to change the hearing date. Such request must state a significant ground for moving the hearing, e.g., illness or a colliding court hearing, for which the court may request evidence. Hearings scheduled for July or August will be moved upon request without need for justification. It is not uncommon for lawyers to give the judge a call to discuss scheduling issues.

In the summons to the hearing, the court may include instructions to the parties, including that a party has to appear in person (otherwise, appearance of just the lawyer is sufficient) or that it has to bring a particular document, e.g., the original of a contract. Failure to follow such order may result in a court fine or be prejudicial to a party's case.

The formal taking of evidence is unusual in the first scheduled hearing; most judges prefer to hold a separate hearing for this exercise.

B. How the Actual Hearing Works

The judge (or panel of judges) decides the agenda of the hearing and leads through it.

The hearing starts with the court announcing the matter and taking attendance. This includes checking whether everyone who was ordered to appear is present. If one side does not appear, the court will typically wait for 15 minutes and sometimes attempt to reach the counsel of record by telephone before ruling on a request for a default judgment.

If all parties are present, the hearing proceeds, as a first substantive step, with a "conciliation hearing" to see whether a settlement can be reached. In practice, the conciliation hearing usually blends into the actual hearing.

In most cases, at the outset of the conciliation step of the hearing, the presiding judge presents a summary of the case and the factual and legal issues in controversy. The court may also elaborate on its preliminary legal analysis. It may even already suggest terms of a settlement based on its preliminary views. The level of clarity or definitiveness provided by the court depends on the style of the individual judge. Judges typically note that whatever preliminary comments they make is not the court's definitive view in order to avoid a bias challenge.

The court then invites the parties to comment on the court's preliminary views. Typically, the claimant gets to speak first. This is the moment when the parties—or rather: their lawyers—get to plead specific aspects of their case. The court will expect the oral statements to be responsive and tailored to the court's introductory remarks—a full pleading of the case is unusual. If a lawyer wants to speak to a point that was not raised by the court, i.e., because the court may have overlooked it, the lawyer will typically be given a chance to address that point and its relevance. If a party representative is present and has something to say, the court will typically also allow the representative to speak, albeit under careful watch to make sure that the person does not get into explaining at length that party's view of the case.

Quite frequently, the introductory remarks by the court are followed by only two to three minutes of oral arguments by the lawyers, or no arguments at all. In the latter scenarios, each side will refer to its written pleadings and the requests for relief stated therein, which the court will note for the record. The proper recording of the requests for relief is important because, e.g., the court may not exceed the requests in its judgment and the deviation between what is requested and what is adjudicated determines each side's victory/loss ratio and, hence, the allocation of costs.

If the court considers it necessary to resolve a disputed question of fact, it will formally take evidence, e.g., by examining witnesses in the same or a further hearing.

The hearing typically ends with the court setting a date on which it will issue a decision. A "decision" can be everything from a final judgment on the merits to a procedural order setting a further hearing date. If the court does not intend to take evidence, it will in principle render a written judgment within three weeks after the hearing. If the court finds that the matter is not ripe for judgment because relevant facts are still in dispute and unresolved, it will schedule a further hearing to take evidence. Occasionally, the court hands down its decision verbally at the end of the hearing. This happens more frequently in the Local Courts and rarely in larger commercial cases.

C. Examining Fact Witnesses

As a general rule, a German court will only hear witnesses if it is absolutely necessary. The taking of witness evidence is often seen as time-consuming, burdensome and unreliable. However, the court's refusal to examine a witness proffered by a party for a disputed fact that is relevant to the outcome of the case is a violation of the right to be heard and grounds for appeal.

If the court decides to examine witnesses, it issues an evidentiary order and summons the witnesses to a hearing. With the exception of emergency proceedings for temporary relief, it is not the parties' legal responsibility to ensure that the witnesses appear. However, a party that relies on an important witness to win the case is well-advised to do its best to make the witness abide by the summons. If a witness does not appear as summoned without a proper excuse, the witness has to bear the costs of the hearing and is subject to fines. If the witness repeatedly fails to appear, the court may issue an order for the bailiff to take the witness into custody and bring the witness to the courthouse.

Witnesses are under an obligation to tell the truth and the court will inform the witness of this obligation at the outset of the questioning. In contrast to other jurisdictions, witnesses in German civil proceedings are only rarely placed under oath. Consensus is that the oath does not significantly increase the likelihood that the witness will refrain from lying. Also, in Germany, any intentional false testimony in court is a crime of perjury, irrespective of whether an oath was administered.

Witnesses are typically heard one by one. The witnesses await their turn outside of the courtroom. This procedure is meant to ensure that the witnesses' accounts are kept free from influence by party pleadings and statements made by other witnesses. However, witnesses that have made contradictory statements may then be heard in a conference format to resolve the contradiction.

It is primarily the court, not the lawyers, that poses the questions. The questions are usually open-ended questions rather than yes-or-no questions. The idea is to let the witnesses tell their version of the story freely without much interruption. The judge will then usually pose follow-up questions for clarification.

After the court has completed its examination, the parties have the right to ask additional questions. In theory, the parties are required to submit their questions to the court, which will then pose them to the witness. In practice, however, the court lets the lawyers pose the questions directly. Such questions need to be open-ended and on point. Courts will typically not allow long chains of introductory questions to build up to a point. There is no jury to impress and all relevant points should already have been made by the parties in their written pleadings. Courts will not allow aggressive questioning of the witnesses, let alone harassment. Cross-examination style questioning is inadmissible.

A party may call in an expert in order to pose questions to the witness on facts relevant for a technical assessment, if appropriate.

As a matter of principle, a witness summoned by the court must testify. Refusal to testify may lead to fines and incarceration. Exceptions apply to:

- Spouses, fiancés, or other close relatives of a party who are allowed to refuse testimony;

- certain professionals (e.g., lawyers, physicians, or journalists) who are allowed to refuse testimony to the extent that they have obtained the relevant information in the context of their profession;

- anyone who would incriminate himself or herself or a close relative, or would disclose trade or business secrets.

If a witness is found to by lying, the court will report the matter to the prosecutor's office.

D. Examining Expert Witnesses

As explained in more detail in our previous third chapter of this series (which can be found here), German civil procedure distinguishes between experts retained by the parties and experts appointed by the court. Party-retained experts, if summoned to a hearing by the court, are considered witnesses and are questioned pursuant to the principles just explained above.

The court has discretion on how to examine court-appointed experts. In theory, the court could summon the expert to the hearing to orally report the results of the expert's analysis. In almost all complex matters, an oral expert report is not useful. Therefore, in practice, the court will ask the expert to prepare a written expert report ahead of the hearing. The parties are then invited to raise comments or objections by a certain deadline set by the court. Usually, the court then summons the expert to appear at a subsequent hearing to answer the questions on the written report. The examination of the expert in the courtroom largely follows the rules for the examination of witnesses explained above.

E. Remote Hearings

German civil procedure permits participation in hearings via video transmission. Prior to the COVID-19 pandemic, the courts generally lacked the required video-conferencing equipment, so remote hearings were rare. This has significantly changed now. Remote hearings have become much more common.

It is in the court's discretion whether to allow remote participation in a hearing. The judge will always be in the courthouse. There is a project to modernize the current law to allow judges to participate from other locations, but that project is in its early stages. Remote participation may be granted to the parties, their lawyers, witnesses and experts. Frequently, hearings are held in a hybrid format where some of the participants are present in the court room together with the judge while others attend remotely. The currently prevailing view is that all remote participants must be located in Germany while attending the hearing, although courts do not seem to investigate the whereabouts of the participants (beyond asking the participants about their location).

Hearings in civil matters are generally open to the public. The public can attend the hearing only in the courthouse. Hearings are not broadcast to the general public, so remote participation for members of the public is not possible.

Video recordings of the remote hearing are not permitted, just as video recordings of in-court hearings are not permitted.

F. Publicity of Lawsuits and Hearings

While hearings before German courts are generally open to the public, the court file, including party submissions, court orders, and judgments, are usually not publicly available. There is also no publicly accessible register of pending lawsuits. Thus, a search for "all currently pending litigations against company X" is not possible in

Germany. Nevertheless, there is no general confidentiality requirement, i.e., the parties are free to publish court documents or relay such documents to the press (with limited exceptions).

If business or trade secrets are involved, a party may request the court to exclude the public from the relevant parts of the hearing.

Since oral pleadings are rare and not comprehensive because the parties' positions are primarily set out in written submissions, the level of information that a public observer can glean from attending a hearing is limited. However, in high-profile cases with media coverage, the court usually gives an extended summary of the case.

Anyone can request to inspect the court file, including the parties' submissions, if the person can demonstrate a legally protected interest in the case. When considering the request, the court takes into account whether the case requires increased privacy, e.g., if business and trade secrets are involved. The court will usually ask the parties whether they object to the request for access.

Select judgments or other decisions are published in online databases in an anonymized and redacted version. This holds true for all decisions of the Federal Court of Justice and many decisions of Higher Regional Courts. Lower court judgments are published less frequently.

G. Default Judgments

If a party does not appear at the hearing (or appears without counsel where representation by counsel is mandatory), German law allows for default judgments if requested. A default judgment against the defendant can also be issued if the defendant does not file a defense notice at the outset of the proceedings.

The requirements for a default judgment differ depending on which party fails to appear. If the defendant is absent, the court will treat all facts alleged by the plaintiff as true and will issue a default judgment if, on this basis, the plaintiff's case meets the legal requirements for the asserted claim. In the obverse situation where the plaintiff is absent, the court will dismiss the case without considering the merits.

A default judgment does not mean that the case is won or lost. The defaulting party may file an objection against the default judgment within two weeks. The lawsuit will then proceed as usual. However, even if an objection is filed and the proceedings continue, the default judgment itself is not repealed until the final judgment is entered (if ever). Accordingly, the party who obtained the default judgment may start provisional enforcement proceedings based on the default judgment while the proceedings are still going on. Moreover, the party against which a default judgment was entered will have to bear the additional costs incurred as a result of the default. At the end of the proceeding, the default judgment is either affirmed or repealed (in full or in part).

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