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## **Beware of Judging a Book just by its Cover**

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*Are the German Rules of Civil Procedure, in their practical application, really as capable to facilitate a speedy and fair trial as one might think?*

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## Introduction

When reading about German Rules of Civil Procedure in American literature, one regularly comes across John H. Langbein's famous article "The German Advantage in Civil Procedure" from 1985.<sup>1</sup> Similarly, James R. Maxeiner asserts in *The Atlantic* in 2012 "What America Can Learn From Germany's Justice System".<sup>2</sup> Both paint a picture of a very efficient, consistent, predictable and equitable system of civil procedure in Germany.

But as Ronald J. Allen, Stefan Köck, Kurt Riecherberg and D. Toby Rosen have aptly pointed out, "it would be useful to know how the process actually works",<sup>3</sup> before drawing any conclusions as to a possible superiority of one system.<sup>4</sup> Similarly, Holmes remarked about a foreign legal system, "When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others.... But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books."<sup>5</sup>

Therefore, this paper is not going to be another general comparison of the German and the American system of civil procedure -- other scholars have done that comprehensively and conclusively.<sup>6</sup> Rather, I want to take a look under the cover of the *Zivilprozessordnung*, the

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<sup>1</sup> John H. Langbein, "The German Advantage in Civil Procedure", 52 University of Chicago L. Rev. 823 (1985) [hereafter cited as Langbein, *German Advantage*].

<sup>2</sup> James R. Maxeiner, "What America Can Learn From Germany's Justice System", *The Atlantic*, June 7 2012.

<sup>3</sup> Ronald J. Allen, Stefan Köck, Kurt Riecherberg, D. Toby Rosen, "The German Advantage In Civil Procedure: A Plea For More Details And Fewer Generalities In Comparative Scholarship", 82 Nw. U. L. Rev. 705, 730n118 (1988).

<sup>4</sup> *Id.* at 726.

<sup>5</sup> *Diaz v. Gonzalez*, 261 U.S. 102, 106 (1923)) (cited form Benjamin Kaplan "Civil Procedure – Reflections on the Comparison of Systems", 9 Buff. L. Rev. 409, 415 (1959-1960)).

<sup>6</sup> I will reference to those publications extensively in the footnotes throughout this paper.

German Code of Civil Procedure<sup>7</sup> and, thereby, encourage readers to reconsider some of the arguments exchanged in American literature when comparing the German and the American system of civil procedure.

I have observed that very little has been written in English on changes in the German law of civil procedure due to the last comprehensive reform of the Code of Civil Procedure which was passed in 2001 and enacted in 2002.<sup>8</sup> But some of these changes might already induce a rethinking of assumed advantages of the German system, especially with regards to appellate proceedings.

Moreover, since I am an active judge, instead of just presenting the current German Rules of Civil Procedure in theory, I intend to take a closer look at the actual practical work of German judges in civil trials, specifically at their impact on the substantive as well as the formal course of a case.

When looking at the German Rules of Civil Procedure from the outside, especially from the point of view of a jurist working in an Anglo-American legal system, it stands out that, on a variety of grounds, German courts essentially govern the course of the proceedings. A German judge “*operates* the judicial machinery of his system”, whereas the American judge “*presides* over his dominion”.<sup>9</sup> Not only are German judges the ones determining which evidence is to be taken and acting as examiner-in-chiefs in the hearing of evidence. The law also imposes an extensive duty of care on judges for the parties’ substantive conduct of the

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<sup>7</sup> Official translation by the Federal Ministry of Justice: [http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html).

<sup>8</sup> *Gesetz zur Reform des Zivilprozesses* (Bundesgesetzblatt (BGBl.) I 2001, Nr. 40, S. 1887 ff.).

<sup>9</sup> Samuel R. Gross, “*The American Advantage: The Value of Inefficient Litigation*” 85 Mich. L. Rev. 734, 752 (1987).

case before German civil courts. The most significant provision in this regard is § 139 ZPO.<sup>10</sup> It is a pivotal rule of German civil procedure and provides the court's *Hinweispflicht* (obligation to give notices and advice to the parties).<sup>11</sup> As I will explain more closely in this paper,<sup>12</sup> especially by giving common practical examples for its actual application, § 139 ZPO is of considerable relevance to the daily work of German civil judges and, as such, often a double edged sword. Granting the court such an extensive power to manage the substantive conduct of a civil case can help focus and expedite proceedings, but also imposes a large share of accountability for the outcome of a lawsuit on judges and sometimes actually hinders them in effectively resolving the case.

Compared to this extensive substantive managing power, German judges have comparatively few options to govern the formal conduct of the participants of a civil lawsuit. Albeit, judging solely from the text of the law, there are at least some rules for German judges to influence the formal demeanor of the parties during the proceedings, e.g. by sanctioning negligent and tardy conduct. They are, however, all exclusively directed at the parties of the case, never their lawyers. And taking into account the practical application of these provisions, it turns out they are, in reality, of rather limited significance in German courts.

Though I don't aim to answer the question, "What America Can Learn From Germany's Justice System" or whether the German civil procedure actually has an advantage over the American one, I rather intend to deliver an "insight into the book", i.e. the German Code of Civil Procedure. I am going to illustrate how the German procedure actually works in practice; how the practical application of the German procedural rules, especially § 139 ZPO,

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<sup>10</sup> = *Zivilprozessordnung* (Code of Civil Procedure); in German law, sections of statutes are called "paragraphs" and abbreviated as "§"; subsections are put in roman numerals behind the number of the section.

<sup>11</sup> All translations from the German in this paper are the author's.

<sup>12</sup> See *infra* Part II.

in fact sometimes contradicts the legal intention of ensuring a speedy and fair resolution of a civil lawsuit; and how the, in practice, limited application of the already rare statutory measures to influence the formal conduct of a case might not support the image of the German Code of Civil Procedure as a particularly efficient system either.

I, thereby, want to give readers the necessary insight for them to be able to reconsider, whether the German ZPO in its practical appliance actually measures up to the expectation of facilitating an efficient, consistent, predictable and equitable system of civil procedure. Because, in my option, only if one understands how the “process actually works”, one can seriously try to answer this question. Therefore, one should beware of judging a book just by its cover.

To be put in the position to really understand the spirit and purpose of the German system of civil procedure and § 139 ZPO, Part I of this paper will 1. present the general principles underlying the German Code of Civil Procedure, 2. give a swift overview of how regular civil cases are generally dealt with before a German court -- highlighting the, in practice, most important changes of the ZPO since 2002 and pointing out the most significant practical differences to the American civil system, and 3. summarize the comparison of the German and the American systems of civil procedure in previous American academic literature, particularly regarding the aspects of both systems that are generally assessed as beneficial or adverse to a well-functioning civil judiciary.

Part II will, then, focus on § 139 ZPO, the pivotal provision for the substantive managing capacity of German civil judges. I will present 1. the statute, 2. the spirit and purpose of the provision, 3. the limits to the statute’s application, 4. practical problems and questions when applying § 139 ZPO, and 5. discuss the ‘two edges of the sword’ that § 139 ZPO is.

Part III will show the different statutory measures to influence the formal conduct of the case, i.e. to sanction parties violating their duty to state the facts of the case comprehensively, truthfully (§ 138 I ZPO) and in a timely manner (§ 282 I ZPO). But it will also present the legal limitations of these regulations as well as their restricted application and therefore minor practical relevance in German civil courts.

Finally, I will conclude.



## **Part I**

### 1. Canons of German Civil Procedure

To better grasp the *Zivilprozessordnung* (ZPO -- German Code of Civil Procedure) it is helpful to understand some basic principles of German civil procedure.

#### a) *Beibringungsgrundsatz* (principle of party presentation)

Probably the most important canon of German civil procedure is the *Dispositionsmaxime* (maxim of disposition), also called *Beibringungsgrundsatz* (principle of party presentation). This principle provides that litigating parties have the right as well as the duty to bring forward the necessary information and materials on which the court must base its decision.<sup>13</sup> Thus, the plaintiff, by her<sup>14</sup> factual allegations supporting her claim, and the defendant, by her factual allegations relating to her defense, determine the scope of the litigation with respect to the facts.<sup>15</sup> It is exclusively for the parties and their lawyers to identify the facts they think will support the claim or defense, to make the appropriate factual allegations,<sup>16</sup> and to adduce the means of proof upon which each party intends to rely.<sup>17</sup> So the parties control the issues presented for the decision and they also select the evidence to be considered.

Hence, it is a general misunderstanding, if the German system of civil procedure is regularly described as an “inquisitorial” system, since German judges act as examiner-in-

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<sup>13</sup> Michael Halberstam, “*The American Advantage in Civil Procedure? An Autopsy of the Deutsche Telekom Litigation*”, Buffalo Legal Studies Research Paper Series, Paper No. 2015-021, to be published (available at: <http://ssrn.com/abstract=2576453>) 29 (2015).

<sup>14</sup> In this paper I have used to female pronoun for reasons of brevity and clarity of expression. This is, however, naturally meant to include the male counterpart, too.

<sup>15</sup> Allen, et al. (note 3), at 722.

<sup>16</sup> Hein Kötz, “*Civil Justice Systems in Europe And The United States*”, 1 Duke L. CICLOPs 1, 6 (2009).

<sup>17</sup> Allen, et al. (note 3), at 723.

chiefs in taking the evidence.<sup>18</sup> Due to the *Beibringungsgrundsatz* the German civil procedure is as much an adversarial system as the American one is, because it lies exclusively in the hands and therefore the responsibility of the parties to provide the facts of the case and the means of evidence to the court.

Judges have to respect the autonomy of the parties to determine what evidence is submitted for consideration,<sup>19</sup> since the enforcement of legal rights is left to the self-interest of those concerned.<sup>20</sup> The structure of the civil process does not allow the court to call any witness unless a litigant has expressly named her in the proceeding by identifying specific facts of which the witness is alleged to have knowledge (§ 373 ZPO).<sup>21</sup> Hence, German judges do not have an inquisitorial responsibility to determine the truth, but are required to confine their consideration to facts from those sources which have been brought forward or identified by the parties.<sup>22</sup> The duty to advance materials dictates that the parties' failure to proffer evidence necessary for their case will result in defeat.<sup>23</sup>

Facts not in dispute between the parties are beyond judicial scrutiny, nor can judges do anything about a fact alleged by one party and not *substantiiert bestritten* (specifically challenged)<sup>24</sup> by the opponent.<sup>25</sup> No formal admissions are required under German law for this principle to apply. Judges must take any unchallenged fact as established. Even if they

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<sup>18</sup> See Oscar G. Chase, "American "Exceptionalism" and Comparative Procedure", New York University School of Law, Public Law and Legal Theory Working Paper Series Research Paper No. 39 (available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=306759](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=306759)) 15 (2002).

<sup>19</sup> Halberstam (note 13), at 30.

<sup>20</sup> Arthur Taylor von Mehren, "Some Comparative Reflections On First Instance Civil Procedure: Recent Reforms In German Civil Procedure And In The Federal Rules", 63 Notre Dame L. Rev. 609, 610 (1988).

<sup>21</sup> Herbert L. Bernstein, "Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems", 21 U.C. Davis L. Rev. 587, 592 (1987-1988).

<sup>22</sup> Peter L. Murry & Rolf Stürner, "German Civil Justice", 2004, p. 158.

<sup>23</sup> Halberstam (note 13), at 29-30 -- citing HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW 22 (2007).

<sup>24</sup> See § 138 II ZPO.

<sup>25</sup> Exempt are only facts of general knowledge.

believe the facts presented by the parties to be untrue, they have no power to unearth what they think might be the truth by introducing independent evidence.<sup>26</sup> The principle applicable to uncontroverted facts in civil procedure is called *Prinzip der formellen Wahrheit* (principle of formal truth).<sup>27</sup> It is contrasted with the *Prinzip der materiellen Wahrheit* (principle of substantive truth) in German criminal procedure which enables judges to disregard any admissions and confessions.<sup>28</sup>

The *Beibringungsgrundsatz* also involves the duty to substantiate (*Substantiierungspflicht*). § 138 I ZPO requires parties to state the facts comprehensively and truthfully.<sup>29</sup> Pursuant to this requirement the court may order further proof-taking only where a party can generally describe the facts that the evidence is intended to prove. The substantiation requirement is intended to prevent parties from using the court to “probe” or “fish” for evidence of which the parties have no specific knowledge.<sup>30</sup>

German procedure does not, however, require the parties or their attorneys to say anything about the law at all. German procedure goes by the principle of “da mihi factum, dabo tibi ius”--“give me the facts and I will give you the law.”<sup>31</sup>

b) *Verhandlungsmaxime* (principle of orality)

Though much of the proceedings are actually conducted in writing, the German Code of Civil Procedure is founded on the *Mündlichkeitsprinzip* or *Verhandlungsmaxime* (principle

<sup>26</sup> Kötz (note 16), at 6.

<sup>27</sup> Bernstein (note 21), at 591-92; see also Kötz (note 16), at 7.

<sup>28</sup> Bernstein (note 21), at 591-92.

<sup>29</sup> Dr. Michael Bohlander, “*The German Advantage Revisited: An Inside View Of German Civil Procedure In The Nineties*”, 13 Tul. Eur. & Civ. L.F. 25, 33 (1998) [hereafter cited as Bohlander, *German Advantage Revisited*].

<sup>30</sup> John C. Reitz, “*Why We Probably Cannot Adopt The German Advantage In Civil Procedure*”, 75 Iowa L. Rev. 987, 1001-02 (1990).

<sup>31</sup> Bohlander, *German Advantage Revisited* (note 29), at 35; Benjamin Kaplan, Arthur T. von Mehren, Rudolf Schaefer “*Phases of German Civil Procedure I*”, 71 Harv. L. Rev. 1193, 1216/17 (1958) [hereafter cited as Kaplan, et al., *Civil Procedure I*].

of orality).<sup>32</sup> Orality means that the regular (though not the only) means of party communication with the court is supposed to be by oral statement in open court.<sup>33</sup> Strictly speaking, written pleadings, briefs, and similar exchanges between the parties are only means of preparation for the oral hearing. Yet over the years and again with the last major reform of the ZPO in 2002<sup>34</sup> the emphasis on orality has become less pronounced. It has become more common for attorneys and judges to incorporate the assertions of the pleadings and briefs into the oral discussion by reference. Under certain circumstances parties can agree to forego oral proceedings.<sup>35</sup> And, also under certain circumstances, decisions by the *Berufungsgericht* (first court of appeal) can be issued without an oral hearing in a written court order.<sup>36</sup>

c) *Konzentrationsmaxime* (principle of concentration)

Another substantial canon of German civil procedure is the *Konzentrationsmaxime*, which can be translated as the "principle of concentration", but not equated with the rule of concentrated trial in Anglo-American law. The *Konzentrationsmaxime* expresses nothing more than the general efficiency value that the court should handle the case as rapidly as possible, and, where possible, in a single hearing.<sup>37</sup> Thus, this canon correlates with the *Beschleunigungsgrundsatz* (principle of expedition).

But not only courts are obligated to expedite proceedings. Parties also have a *Prozessförderungspflicht* (duty to facilitate the lawsuit) as § 282 I ZPO requires them to submit to the court their means of challenge or defense as promptly as it corresponds to a

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<sup>32</sup> See § 128 I ZPO: The parties argue the legal issues in dispute orally before the court.

<sup>33</sup> William B. Fisch "Recent Developments in West German Civil Procedure", 6 Hastings Int'l & Comp. L. Rev. 221, 223-24 (1982-1983).

<sup>34</sup> *Gesetz zur Reform des Zivilprozesses* (BGBl. I 2001, Nr. 40, S. 1887 ff.).

<sup>35</sup> Murray/Stürner (note 22), at 185; see § 128 II ZPO.

<sup>36</sup> § 522 II ZPO; See *infra* Part I 2. f).

<sup>37</sup> § 272 I ZPO; see *infra* Part II 2. a); Langbein, *German Advantage* (note 1), at 827n9; see § 272 I ZPO.

diligent pursuit of the proceedings and serves to promote them.<sup>38</sup> The court can specify this obligation for a thorough and speedy conduct of the case by setting deadlines for motions and briefs to be entered within.<sup>39</sup>

d) *Anspruch auf rechtliches Gehör* (constitutional right to be heard)

Last but not least, for the purposes of this paper, the *Anspruch auf rechtliches Gehör* (constitutional right to be heard) needs to be mentioned and explained. It is not only founded on the German Constitution,<sup>40</sup> but also on the European Convention of Human Rights.<sup>41</sup> This right to be heard seeks to guarantee fair proceedings between the parties and, as will be shown in this paper, underlies many of the requirements of the ZPO.<sup>42</sup> However, it does not necessitate parties to actually be heard on every potential issue. It suffices if they have reasonable opportunity to take a position on the significant factual or legal propositions, either orally or in writing, before these aspects are used as basis for a judicial decision.<sup>43</sup>

The *Anspruch auf rechtliches Gehör* also requires judges to consider and address each significant contention of fact or law put forward by the parties. Otherwise their decision will be legally defective and, therefore, assailable.<sup>44</sup>

§ 139 ZPO is one of the most significant provisions embodying the right to be heard in German civil procedure. It provides the court's *Hinweispflicht* (obligation to give notices and advice) and will be explained and discussed in detail in Part II of this paper.

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<sup>38</sup> Prof. Dr. h.c. Hanns Prütting, in *Münchener Kommentar zur ZPO*, 4th ed. (2013), § 282 para. 4.

<sup>39</sup> Dr. Klaus Bacher, in *Beck'scher Online-Kommentar ZPO*, 19th ed. (2015), § 282 para. 1; see § 273 II No. 1 und §§ 275-277 ZPO.

<sup>40</sup> Art. 103 I, 20 *Grundgesetz* (GG -- German Constitution).

<sup>41</sup> Art. 6 I ECHR.

<sup>42</sup> Murray/Stürner (note 22), at 188.

<sup>43</sup> *Id.* at 188n179.

<sup>44</sup> *Id.* at 188-89.

## 2. Swift Overview of the Course of Action before a German Civil Court<sup>45</sup>

### a) Initiation

A lawsuit before a German court is commenced with a *Klageschrift* (written complaint) by the plaintiff or her lawyer<sup>46</sup>. This complaint narrates the key facts, may set forth a legal theory, and asks for a remedy in damages or specific relief.<sup>47</sup> It also specifies and confines the matter in dispute, as the court is actually bound by the plaintiff's relief sought. A final judgement may not grant more than the plaintiff has sought for in her complaint (§ 308 I 1 ZPO).<sup>48</sup>

After this petition has been filed, the competent judge has to decide how to proceed with the case. Most civil cases before German courts are decided by judges sitting alone. This is a rule that has been further expanded by the reform of civil proceedings of 2002.

All cases before *Amtsgerichten* (Local Courts) that have jurisdiction over all disputes between landlords and tenants, family law cases and general civil cases with a monetary value of up to €5,000 (§§ 23, 23a GVG)<sup>49</sup> are taken by a judge sitting alone (§ 22 I GVG). Other civil cases are tried before *Landgerichten* (Regional Courts),<sup>50</sup> where cases, as a rule, are also heard by a single judge (§ 348 I ZPO). The decision, however, lies with a *Kammer* (division consisting of three judges),<sup>51</sup> if the legal dispute is classified in certain fields of the law (§ 348 II ZPO), if it shows particular factual or legal difficulties, is of fundamental significance, or if

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<sup>45</sup> For a more comprehensive description of civil proceedings in a German court see particularly Langbein, *German Advantage* (note 1) and Giesela Rühl, "Preparing Germany for the 21st Century: The Reform of the Code of Civil Procedure", 6 German L.J. 909 (2005).

<sup>46</sup> The general principle is that only the parties to first instance disputes before the *Landgericht* (Regional Court) must be represented by an attorney (§ 78 ZPO).

<sup>47</sup> § 253 ZPO.

<sup>48</sup> Murray/Stürner (note 22), at 156-57.

<sup>49</sup> *Gerichtsverfassungsgesetz* (GVG -- Courts Constitution Act). Official translation by the Federal Ministry of Justice: [http://www.gesetze-im-internet.de/englisch\\_gvg/index.html#gl\\_p0143](http://www.gesetze-im-internet.de/englisch_gvg/index.html#gl_p0143).

<sup>50</sup> § 71 I GVG.

<sup>51</sup> § 59 I GVG.

such a decision is petitioned by the parties in congruent declarations (§ 348 III ZPO). Prior to 2002 cases were generally decided by the *Kammer* in civil cases before the Regional Court and could only be delegated to one of the three judges, if they showed no particular factual or legal difficulties and were of no fundamental significance. As shown above, this rule has been reversed as of 2002.

Following the abovementioned *Konzentrationsmaxime* (principle of concentration), § 272 I ZPO encourages the court to dispose of the case in a single hearing if circumstances permit. The provision reads: "Ordinarily, the case should be resolved in a single hearing (*Haupttermin* -- main hearing), comprehensively prepared."<sup>52</sup>

According to § 129 I ZPO, this main hearing is to be prepared by written pleadings by both parties (*vorbereitende Schriftsätze*). Each brief is to serve the purpose of informing the court as well as the opponent<sup>53</sup> to enable the latter to declare her position on all issues of fact or law and in particular to adduce the required means of proof for all disputed facts.<sup>54</sup>

The judge will review the written submissions prior to the hearing and thus be able to focus discussion on questions left unanswered by the written pleadings.<sup>55</sup> In aid of this comprehensive preparation, § 273 ZPO authorizes the court to take various steps in advance of the hearing, for example, requiring the parties to clarify positions, obtaining documents or summoning parties and witnesses to the hearing.<sup>56</sup> These measures are supposed to enable the court to dispose of the case within a single main hearing, if possible.<sup>57</sup>

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<sup>52</sup> Langbein, *German Advantage* (note 1), at 826n9.

<sup>53</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1213.

<sup>54</sup> See § 130 ZPO.

<sup>55</sup> Halberstam (note 13), at 10.

<sup>56</sup> Langbein, *German Advantage* (note 1), at 826n9.

<sup>57</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1208.

## b) No Discovery

At this point it should be emphasized that in German civil procedure there is no litigant discovery. There is no specific phase of the litigation process dedicated to the exploration or collection of evidentiary materials; nor is there a general right to obtain relevant information in connection with the proceedings.<sup>58</sup> The German system remains relatively indifferent to possibilities for pretrial exchange of information and evidence between parties.<sup>59</sup>

Until recently, German law held the idea that no party has to help her opponent in her inquiry into the facts. To make it generally mandatory for parties to give each other information or to disclose all relevant data during court proceedings has been overwhelmingly rejected by German courts and the legal academy,<sup>60</sup> on the grounds of protection of privacy and business secrets, and in order to prevent trials from becoming a means of exerting pressure.<sup>61</sup> German law does try, however, to achieve a similar effect to a real inquiry into the facts with the help of the abovementioned duty to make substantiated statements about the facts of the case (§ 138 ZPO)<sup>62</sup> or by shifting of the burden of proof.<sup>63</sup> A system of equitably

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<sup>58</sup> Halberstam (note 13), at 12.

<sup>59</sup> Fisch (note 33), at 280.

<sup>60</sup> *Bundesgerichtshof* (BGH -- Federal Supreme Court) *Neue Juristische Wochenschrift* (NJW) 128, 129 (1997); BGH *Neue Juristische Wochenschrift* (NJW) 3151 (1990). Germany, therefore, has declared that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries (see Art. 23 of the 20. CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTER and the § 7 HaagÜbkAG).

<sup>61</sup> Peter Gottwald, "Civil Procedure Reform In Germany", 45 *Am. J. Comp. L.* 753, 760 (1997); see also *Bundestagsdrucksache* (BT-Drs.) 14/6036, S. 120.

<sup>62</sup> A so-called *sekundäre Behauptungslast* (secondary duty to substantiate) is imposed on the opponent, if the primarily obligated party stands outside the respective course of events and, therefore, has no further knowledge of them, while the opponent has this knowledge and further submissions by her are just and reasonable (BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 1496, 1498-99 (2005); BGH *Neue Juristische Wochenschrift* (NJW) 2395, 2397 (2005); BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 396, 399 (2001)).

<sup>63</sup> See for example § 630h *Bürgerliches Gesetzbuch* (BGB -- German Civil Code), which provides extensive presumptions for cause and liability in medical malpractice cases; the proof of exoneration then falls to the defendant.



balanced substantive law duties to provide information, and the sanctioning of refusals to give information when made in bad faith, has been established,<sup>64</sup> though the means generally remain limited.<sup>65</sup>

The parties are thus expected to rely on their personal knowledge and any materials in their possession, including police files and records of criminal proceedings, which may contain statements of persons who are likely to be called as witnesses in the civil litigation to make out their case.<sup>66</sup> It is, in this context, especially uncommon for counsel to contact and/or talk to potential witnesses before the trial. Germans have long had a canon of professional ethics either prohibiting or discouraging out-of-court contact with nonparty witnesses.<sup>67</sup> § 6 of the *Richtlinien der Bundesrechtsanwaltskammer für die Ausübung des Anwaltsberufs* (Recommendations of German Federal Bar Association Relating to the Exercise of the Legal Profession) from 1976<sup>68</sup> specifically provided that, out of court, lawyers may indeed interrogate persons who might be called as witnesses, with respect to their knowledge, when such is necessary for a dutiful clarification of the factual situation, advice, or representation. But the provision specifically concluded with the admonition that, in every case, even the

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Official translation by the Federal Ministry of Justice: [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p2673](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2673).

<sup>64</sup> Gottwald (note 61), at 760.

<sup>65</sup> Halberstam (note 13), at 12; for more details see Prof. Dr. Peter Arens, "Zur Aufklärungspflicht der nicht beweisbelasteten Partei im Zivilprozess", *Zeitschrift für Zivilprozessrecht (ZZP)* 1 (1983).

<sup>66</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1200.

<sup>67</sup> Reitz (note 30), at 994.

<sup>68</sup> See Allen, et al. (note 3), at 721;

#### § 6 Questioning and Advising of Witnesses

(1) The lawyer may question persons out of court who might be considered witnesses, if this is necessary with a view to the obligation to provide for clarification of facts, advice or representation.

(2) The lawyer may inform these persons as regards their rights and duties as well as give advice to them.

(3) The lawyer is allowed to establish a record of such questioning and to have the person sign a declaration. Such a record may be used by the lawyer in order to confront the witness with these statements in a judicial or administrative proceeding. However, the lawyer may present the record itself only in exceptional cases to the court or the administrative agency, for example, in those cases where the witness is unable to testify in the pre-trial discovery stage or during the proceedings. [...]

(5) In any event, the appearance of undue influence is to be avoided.

appearance of undue influence is to be avoided.<sup>69</sup> Even though this rule was dropped when new provisions on professional ethics were enacted in 1996, a lawyer not willing to follow this standard still has to take into account that German judges usually consider the reliability of the testimony of witnesses, who previously have discussed the case with counsel, or who have consorted unduly with a party, very critically.<sup>70</sup>

### c) Settlement

Settlement has always been a high priority in German civil justice.<sup>71</sup> The Code of Civil Procedure has long required civil courts to “be mindful of a compromise settlement of the dispute or particular issues at all stages of the lawsuit” (§ 278 I ZPO).<sup>72</sup> The newly reformed Code of Civil Procedure even introduced the requirement of a formal *Güteverhandlung* (settlement conference) before the commencement of any oral proceedings in all civil cases unless there was a prior formal attempt to reach a settlement at an out-of-court *Gütestelle* (conciliation facility), or unless such a settlement conference “appears clearly futile” (§ 278 II ZPO).<sup>73</sup> This *Güteverhandlung* can be held as a separate meeting by the involved parties, but is commonly part of the main hearing. During this *Güteverhandlung* the court is to discuss with the parties the facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. It is not uncommon, at this stage, for judges to propose specific settlement amounts and terms to be discussed by the parties and counsel.<sup>74</sup> § 278 VI ZPO also authorizes judges to send a written settlement proposal to the parties. If both parties accept this proposal in writing, the judge can

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<sup>69</sup> von Mehren (note 20), at 619; Kaplan (note 5), at 411.

<sup>70</sup> Kötz (note 16), at 5; Kaplan, et al., *Civil Procedure I* (note 31), at 1200-01; Reitz (note 30), at 994.

<sup>71</sup> Fisch (note 33), at 257.

<sup>72</sup> Murray/Stürner (note 22), at 245, 487.

<sup>73</sup> Murray/Stürner (note 22), at 246, 487-88.

<sup>74</sup> Bohlander, *German Advantage Revisited* (note 29), at 40; Murray/Stürner (note 22), at 260.

document the resulting settlement by simple court order with the effect of an in-court settlement.<sup>75</sup>

Since July 2012<sup>76</sup> the German Code of Civil Procedure has also recognized in-court mediation as it authorizes judges to refer the parties to a *Güterichter* (conciliation judge) for the settlement conference, as well as for further attempts at resolving the dispute. *Güterichter* are appointed by the court as such and are not authorized to rule upon the given case at any time.

#### d) Main Hearing

Once the judge is reasonably familiar with the issues of a case and any “pre-trial” (or rather pre-hearing) attempts for a settlement remained unsuccessful, she will summon the lawyers and -- on a regular basis -- the parties to the main hearing. She will also summon to this session witnesses or experts indicated by the parties, if proof has to be taken on disputed facts that she deems relevant for her decision. So the court determines the scope and the means of proof-taking. Evidence is only presented and heard as far as deemed relevant by the judge.

#### (1) Sequence

The sequence of the main hearing, as specified by §§ 137, 278, 279 ZPO, can generally be described as follows:<sup>77</sup>

- (a) call of the case and identification of participants present;
- (b) introduction and statement of the case by the presiding judge;
- (c) response of the parties, if any, to that statement;
- (d) discussion of the case among court, attorneys and parties;
- (e) consideration of possible settlement options;<sup>78</sup>

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<sup>75</sup> *Id.* at 247-48.

<sup>76</sup> *Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung* (BGBl. I 2012, Nr. 35, S. 1577 ff.).

<sup>77</sup> See Fisch (note 33), at 254.

- (f) proof-taking;
- (g) further discussion and argument with reference to the results of the proof-taking and, again, consideration of settlement options;
- (h) deliberation by the court; and
- (i) announcement of the judgement, or fixing of a subsequent date for the announcement, possibly with an interim deadline for additional written statements by the parties.<sup>79</sup>

## (2) Proof-taking

Judges do not only ask the relevant questions to the parties during the main hearing. The interrogation at proof-taking is also essentially conducted by the court.

For the questioning of witnesses § 396 ZPO provides that the witness is first to be invited to tell in narrative form, without undue interruption, what she knows about the matter on which she has been called. This is to be followed by questions designed to test, clarify, and amplify her story. But when the basic facts are already before the court, questioning oftentimes begins at once. Counsel and the parties are entitled to additional questions (§ 397 ZPO),<sup>80</sup> but they are generally not prominent as examiners.<sup>81</sup> Witnesses are not prepared in advance by the court, nor by counsel, and they do not all have to testify at a single hearing. There is no set order to a German trial -- nothing similar to the American sequence of plaintiff's case-in-chief, defendant's case, plaintiff's rebuttal and so forth.<sup>82</sup>

Parties can also rely on experts' opinions to prove their case in German courts. In the German system experts are, however, not witnesses when it comes to their specific expert knowledge, but court-appointed aides of the judge in finding her decision<sup>83</sup> and therefore selected and appointed by the court (§ 404 ZPO). However, they are paid for in advance by

<sup>78</sup> This can actually take place at any point during the main hearing, but the *Güteverhandlung* has to take place at the latest before any evidence is heard in the case.

<sup>79</sup> See also Kaplan, et al., *Civil Procedure I* (note 31), at 1211-12.

<sup>80</sup> *Id.* at 1234-35; Kaplan (note 5), at 412; Kötz (note 16), at 3.

<sup>81</sup> Langbein, *German Advantage* (note 1), at 828; Reitz (note 30), at 993.

<sup>82</sup> Gross (note 9), at 735; see also Bohlander, *German Advantage Revisited* (note 29), at 43-44.

<sup>83</sup> *Id.* at 42; Kötz (note 16), at 4.

the party, whose contention she is supposed to prove according to the burden of proof,<sup>84</sup> and eventually by the losing party.<sup>85</sup> The parties only adduce the hearing of an expert on certain facts as a means of proof, but they do not present a specific expert themselves. Experts usually prepare their findings in a written report and are regularly summoned to appear in person at the following hearing,<sup>86</sup> if additional questions by the court or the parties arise. In this respect, the rules applicable for the evidence provided by witnesses apply respectively to the evidence provided by experts (§ 402 ZPO).

### (3) Record

The actual course of the hearing is to be kept in a record (§§ 159, 160 ZPO), which used to be taken by record clerks. But most judges nowadays use Dictaphones and the recordings are later transcribed into a written record of the hearing.<sup>87</sup>

Hence, the German system does not only give responsibility to the judges for determining the order of proof, providing for, calling, and carrying out the examination of witnesses and experts, but also for creating a compact -- not verbatim -- record of the witnesses' and experts' testimony by dictating summaries of that testimony into the transcript of the hearing.<sup>88</sup> If the case is appealed, these concise summaries constitute the record for the reviewing court.<sup>89</sup>

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<sup>84</sup> Bohlander, *German Advantage Revisited* (note 29), at 42.

<sup>85</sup> Kötz (note 16), at 4; see more on the allocation of costs *infra* Part I 2. g).

<sup>86</sup> Bohlander, *German Advantage Revisited* (note 29), at 42.

<sup>87</sup> *Id.* at 44.

<sup>88</sup> See § 160 ZPO; Bohlander, *German Advantage Revisited* (note 29), at 44; Bradley Bryan, "Justice And Advantage In Civil Procedure: Langbein's Conception Of Comparative Law And Procedural Justice In Question", 11 *Tulsa J. Comp. & Int'l L.* 521, 528 (2004); Kötz (note 16), at 3, 5-6; Langbein, *German Advantage* (note 1), at 828; Kaplan, et al., *Civil Procedure I* (note 31), at 1235-36.

<sup>89</sup> Langbein, *German Advantage* (note 1), at 828.

### e) Judgement

After the main hearing, judges have to evaluate the factual and legal aspects of the case to come to a final decision. In particular, they have to ascertain whether the plaintiff or the defendant have proven the facts supporting their claim/defense. In doing so, they have to take into account the prevailing standards of the burden of proof originating from the substantive civil law. The general rule is that every party must offer the evidence and eventually prove all the facts which are necessary to justify their claim or defense.<sup>90</sup> The court has to decide, whether an assertion is to be deemed true or untrue, at its discretion and conviction, and taking into account the entire content of the hearings and the results obtained by the evidence taken (§ 286 I ZPO). A fact is generally held to be proved, if the judge has reached a “degree of personal certainty that silences any reasonable doubt”;<sup>91</sup> it is not enough for judges to believe the fact to be more likely true than not.

If new aspects have arisen in the main hearing or the court deems further proof-taking necessary for its decision, it will advise the parties accordingly and have them respond to this, if necessary in writing. Alternatively, it will set a date for a subsequent hearing to which it will again summon the lawyers and, if required, the parties, witnesses and/or experts. So even though § 272 I ZPO encourages judges to dispose of a case in a single hearing, the “trial” can actually consist of a series of hearings, as many as circumstances demand.<sup>92</sup>

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<sup>90</sup> Bohlander, *German Advantage Revisited* (note 29), at 36-37; Arens (note 65), at 1.

<sup>91</sup> „Eine von allen Zweifeln freie Überzeugung setzt das Gesetz nicht voraus. Auf die eigene Überzeugung des entscheidenden Richters kommt es an, auch wenn andere zweifeln oder eine andere Auffassung erlangt haben würden. Der Richter darf und muss sich aber in tatsächlich zweifelhaften Fällen mit einem für das praktische Leben brauchbaren Grad von Gewissheit begnügen, der den Zweifeln Schweigen gebietet, ohne sie völlig auszuschließen“ (The law does not require a conviction free of any doubt. It depends on the personal conviction of the deciding judge, even if others are in doubt or would have reached another judgement. The judge, however, may and must content herself in actually questionable cases with an in reality practical degree of certainty that silences reasonable doubt without completely eliminating them) (BGH *Neue Juristische Wochenschrift* (NJW) 946 (1970)); Kaplan, et al., *Civil Procedure I* (note 31), at 1245.

<sup>92</sup> Langbein, *German Advantage* (note 1), at 826; see Gross (note 9), at 735; Kötz (note 16), at 11.

If the court finds that all relevant aspects of a case have been argued sufficiently and all necessary and/or available proof has been taken, it will render its judgement. The mandate of the judgement usually consists of three parts: (1) Sentence as to the actual relief granted; (2) Sentence as to who has to bear the court costs and the attorney's fees, and (3) Sentence as to whether the judgement shall be subject to immediate execution.<sup>93</sup> The court's ruling always has to be put in writing and state the merits of the case as well as the legal reasons on which the decision is based (§ 313 ZPO),<sup>94</sup> so that the parties may decide if they want to appeal the decision or accept it.<sup>95</sup> There cannot be a public dissenting opinion or any published opinion other than the court's as embodied in the judgement.<sup>96</sup>

#### f) Appeal

There are two levels of appeal in civil cases before German courts. At first, there is the *Berufung* (second instance appeal) to the *Landgericht* (Regional Court) or the *Oberlandesgericht* (High Court).<sup>97</sup> Then there is the *Revision* (review appeal or third instance appeal) to the *Bundesgerichtshof* (Federal Supreme Court).<sup>98</sup>

The *Revision* to the Federal Supreme Court has always been an appeal solely on law and procedure. Additionally, only cases are admissible to the Federal Supreme Court in which the legal matter is of fundamental significance, or the further development of the law or the interests in ensuring a unified legal practice require a decision to be handed down by the

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<sup>93</sup> Murray/Stürner (note 22), at 334; Rühl (note 45), at 931n134.

<sup>94</sup> Murray/Stürner (note 22), at 334; see also Kaplan, et al., *Civil Procedure I* (note 31), at 1252 for further details; also Langbein, *German Advantage* (note 1), at 829-830 and 856, who claims the thoroughness of the German judgement to be "legendary".

<sup>95</sup> Bohlander, *German Advantage Revisited* (note 29), at 45.

<sup>96</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1251.

<sup>97</sup> The jurisdiction of either the *Landgericht* or the *Oberlandesgericht* depends on whether the case was heard before the *Amtsgericht* (Local Court) or the *Landgericht* (Regional Court) in first instance; see §§ 23, 23a GVG ([http://www.gesetze-im-internet.de/englisch\\_gvg/englisch\\_gvg.html#p0132](http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0132)); see *supra* Part I 2. a).

<sup>98</sup> See Murray/Stürner (note 22), at 369; Rühl (note 45), at 920.

Federal Supreme Court, and the appellate court therefore granted leave to appeal (§ 543 ZPO).

In contrast, the *Berufung*, the first level of appeal, used to involve review de novo, in which the appellate court was supposed to form its own view of the facts, both from the record and, if appropriate, by recalling witnesses and experts or summoning new ones.<sup>99</sup> It effectively gave the parties “a second bite at the apple”.<sup>100</sup>

This is no longer valid. Since the comprehensive reform of the German civil procedure enacted in 2002<sup>101</sup> the first level of appeal also only involves a review for error.<sup>102</sup> The first appeal may now only be based on the objection that the decision has been based on a violation of the law, because a legal norm has not been applied or has not been applied properly (§ 546 ZPO), or that the facts the decision was based upon justify a different decision (§ 513 ZPO). So under the current standard of review, the first appellate court is required to accept factual findings of the first-instance court “unless specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision, and therefore indicate the necessity for a new determination of facts” (§ 529 I ZPO).<sup>103</sup> Furthermore, there are only very narrow exceptions as to when new means of challenge or defense can be admitted before the court of appeal (§ 531 ZPO). As a result of the limited reexamination of first instance fact findings as well as the restricted admission of new facts

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<sup>99</sup> As described in Benjamin Kaplan, Arthur T. von Mehren, Rudolf Schaefer, “*Phases of German Civil Procedure II*”, 71 Harv. L. Rev. 1443, 1449 (1958) [hereafter cited as Kaplan, et al., *Civil Procedure II*]; Langbein, *German Advantage* (note 1), at 857; Bohlander, *German Advantage Revisited* (note 29), at 45-46; Reitz (note 30), at 989 and 1000; Halberstam (note 13), at 42.

<sup>100</sup> Murray/Stürner (note 22), at 373; Rühl (note 45), at 921-22.

<sup>101</sup> *Gesetz zur Reform des Zivilprozesses* (BGBl. I 2001, Nr. 40, S. 1887 ff.).

<sup>102</sup> For a comprehensive account especially of the new laws on appellate remedies see Rühl (note 45), at 920 ff..

<sup>103</sup> Murray/Stürner (note 22), at 373; Rühl (note 45), at 922.



and means of proof, the parties have to strive to present all relevant facts and accessible evidence at the first instance.<sup>104</sup>

Another fundamental change in the law of appellate remedies brought by the reform effective since 2002 concerns the modality of how to dispose of an appeal. Traditionally, the appellate court was only allowed to dismiss an appeal by simple court order without oral hearing, if the appeal was not filed correctly formally, e.g. not within due time (§ 522 I ZPO).<sup>105</sup> The reform law introduced an additional opportunity, if not obligation,<sup>106</sup> in § 522 II ZPO to dispose of an appeal by way of court order, if the court unanimously finds that (1) the appeal obviously has no chance of success, (2) the case does not raise an issue of fundamental significance and (3) neither the development of the law nor the preservation of a unified legal practice require a decision of the Federal Supreme Court.<sup>107</sup> However, before issuing such a court order, the court has to advise the parties as to its intention to dismiss the appeal according to § 522 II ZPO, give its reasons for the decision and grant the appellant the opportunity to respond. This is supposed to warrant the abovementioned constitutional right to be heard, even if the *Mündlichkeitsprinzip* (principle of orality) is no longer followed.

#### g) Costs

Generally, costs of a civil lawsuit are dispensed by the loser-pays rule, § 91 I ZPO. Whoever has not prevailed in the dispute is to bear the entire costs of the lawsuit. This general rule applies to all court instances (§ 97 ZPO).<sup>108</sup> If, however, both parties win and lose in part, § 92 I 1 ZPO provides allocation among the parties according to the quota of success and

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<sup>104</sup> *Id.*

<sup>105</sup> See § 517 ZPO.

<sup>106</sup> See BT-Drs. 17/6406, S. 9; *Oberlandesgericht (OLG -- High Court) Köln Monatschrift für Deutsches Recht (MDR) 1435, 1436 (2003)*.

<sup>107</sup> Rühl (note 45), at 929.

<sup>108</sup> Bohlander, *German Advantage Revisited* (note 29), at 40-41; Fisch (note 33), at 271; Kaplan (note 5), at 414.

failure to prove one's case.<sup>109</sup> The respective shares are determined by the court in its final judgement.

The court's sentence as to who has to bear the costs of the lawsuit includes the court costs as well as any costs for witnesses or experts,<sup>110</sup> and in particular any costs incurred by the opponent. The two most important cost elements, general court fees and attorneys' fees, are fixed by statutory fee scales graduated by the value of the claim,<sup>111</sup> which has to be determined by the court, especially if the claim is nonpecuniary.<sup>112</sup> All fees are fixed by a combination of the amount in controversy and classes of procedural event (filing, hearing, settlement, and judgement).<sup>113</sup>

The responsibility to reimburse the opponent extends to the expenses necessarily incurred by the winner, generally without regard to whether the loser had plausible or even excellent reason for initiating or defending the case.<sup>114</sup> Remuneration agreements between lawyer and client are, under certain conditions, admissible (§ 3a RVG).<sup>115</sup> Even contingency fees that were prohibited in Germany until July 2008<sup>116</sup> may now be agreed upon for individual cases (§ 4a RVG). But if the party entering into this kind of agreement succeeds in

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<sup>109</sup> Bohlander, *German Advantage Revisited* (note 29), at 40-41 (1998), also for an example; Fisch (note 33), at 271.

<sup>110</sup> Payments of experts, interpreters and witnesses are regulated in the *Justizvergütungs- und -entschädigungsgesetz* (Judicial Remuneration and Compensation Act). Witnesses e.g. receive compensation for travel expenses and loss of earnings caused by their appearance before the court. Experts are compensated at fixed hourly rates.

<sup>111</sup> Kaplan, et al., *Civil Procedure II* (note 99), at 1461.

<sup>112</sup> See §§ 3-9 ZPO; Kaplan, et al., *Civil Procedure II* (note 99), at 1465.

<sup>113</sup> See Annex 1 to § 3 II and Annex 2 to § 34 I 3 *Gerichtskostengesetz* (GKG -- Statue on Court Costs) as well as Annex 1 to § 2 II and Annex 2 to § 13 I *Rechtsanwaltsvergütungsgesetz* (RVG -- Law on the Remuneration of Attorneys); Fisch (note 33), at 278.

<sup>114</sup> Kaplan, et al., *Civil Procedure II* (note 99), at 1462. The only exception is provided in § 93 ZPO: If the defendant has not given cause for an action to be brought, the plaintiff shall bear the costs of the proceedings should the defendant immediately recognize the claim.

<sup>115</sup> *Rechtsanwaltsvergütungsgesetz* (RVG -- Law on the Renumeration of Attorneys).

<sup>116</sup> *Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren* (BGBl. I 2008, Nr. 23, S. 1000 ff.).

the litigation, she will be reimbursed only according to the statutory tariff and will have to pay the remainder without reimbursement.<sup>117</sup>

For the sake of completeness it should be noted that Germany has a broad system of public legal aid. Everyone who is involved in a lawsuit, whether as plaintiff or as defendant, is entitled to state legal aid, if she is financially not able to bear the costs of the action (court costs as well as her lawyer's fees) entirely or in part, the action or defense offers sufficient prospects of success and does not seem frivolous (§ 114 ZPO).<sup>118</sup> An application for legal aid is approved or denied by the court hearing the case (§ 127 I ZPO).

### 3. Summary of American Academic Literature on the Comparison of German and American Civil Procedure

Many authors have compared the systems of German and American civil procedure and have pointed out various characteristics of both, which some of them see as virtues, others as vices. While the considerations underlying both systems are similar, the values assigned to them differ considerably.<sup>119</sup>

#### a) Judges' Role

The most obvious and at the same time most fundamental difference between both systems is the role of German and American judges hearing civil cases. Samuel R. Gross describes the German judge to “*operate(...)* the judicial machinery of his system”, whereas the American judge “*presides over his dominion*”.<sup>120</sup>

German civil procedure is a judge-driven system, and every reform of the law of civil procedure, up to the one in effect since 2002, as well as the legal practice of the higher

<sup>117</sup> Kaplan, et al., *Civil Procedure II* (note 99), at 1466.

<sup>118</sup> See §§ 114 - 127a ZPO for more details; also Murray/Stürner (note 22), at 117 ff..

<sup>119</sup> Kaplan (note 5), at 431.

<sup>120</sup> Gross (note 9), at 752.

courts<sup>121</sup> has reinforced that tendency. A number of functions which are performed principally by the lawyers or a court reporter in the United States are allocated to the judge in Germany, who “plays the central role in building the record”.<sup>122</sup> The most important of these functions are: (1) determination of the trial agenda based on the parties’ submissions,<sup>123</sup> including an order of proof, directing appearance of the parties and witnesses, and the presentation of documents; (2) examination of parties and witnesses, with lawyers performing only a secondary role; (3) production of the record of witnesses’ and experts’ testimonies, including questions and frequently rephrasing or reorganizing answers; and (4) direct communication with the parties, not only for factual assertions, but also to explore settlement possibilities. While German procedural theory continues to adhere to the *Beibringungsgrundsatz* (principle of party presentation) in civil cases, it is clear that this guarantees only judges’ ultimate dependence on the raw material which the parties present. The opportunity of judges, as fact finders, to influence the form and organization of the material on which they must base their findings, and even to stimulate production of more material,<sup>124</sup> is much greater in the German than in the American system.<sup>125</sup> § 139 ZPO which will be subject of Part II of this paper also supports the power German judges have to actively influence the substantive course of a civil case.

Benjamin Kaplan, Arthur T. von Mehren and Rudolf Schaefer even go so far as to say that -- “with some stretch of the imagination” -- one could see in the German judge “a

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<sup>121</sup> Which will be explained in more detail in Part II of this paper, using § 139 ZPO as an example.

<sup>122</sup> Halberstam (note 13), at 42.

<sup>123</sup> See *supra* Part I 1. a).

<sup>124</sup> In addition to the general judicial duty to clarify through questioning, § 142 ZPO empowers the judge to require production of documents in a party's possession to which the party has referred or which relate to the matter in dispute, § 143 ZPO, to call up documents in the possession of public officials, § 144 I ZPO, to order a judicial view or call for an expert opinion (Fisch (note 33), at 280n367).

<sup>125</sup> Fisch (note 33), at 279-80; see also Ernst C. Stiefel, James R. Maxeiner, “*Civil Justice Reform In The United States – Opportunity For Learning From ‘Civilized’ European Procedure Instead Of Continued Isolation?*”, 42 Am. J. Comp. L. 147, 157 (1994).

common image of the paterfamilias, also endowed [...] with some of the characteristics of a bureaucrat. Charged with responsibility for finding just solutions to the quarrels brought before him, having a large measure of power and considerable willingness to exercise it, the German judge sits high and exalted over the parties, dominating the courtroom scene. At the same time he is constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and adviser and as an insistent promoter of settlements”.<sup>126</sup>

The German judge acts in cooperation with counsel “of somewhat muted adversary zeal”.<sup>127</sup> In contrast, the American system exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge.<sup>128</sup> By setting judges above the fray, this adversary system is said to enhance their prestige and autonomy, and to make them more effective as guarantors of individual rights.<sup>129</sup> Each side prepares its own case for presentation to the court. The judge remains passive, there is no judicial preparation of the case, the parties' lawyers serve as principal examiners, and there are verbatim transcripts of testimony.<sup>130</sup>

#### b) Efficiency

Due to these specific features, the American system of civil procedure is oftentimes criticized as being expensive and ineffective. In 1984, the then Chief Justice of the United States, Warren Burger, warned the ABA convention that the American system was “too costly, too painful, too destructive, too inefficient for a truly civilized people”.<sup>131</sup>

But there are also various aspects argued as “advantages of inefficiency”.

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<sup>126</sup> Kaplan, et al., *Civil Procedure II* (note 99), at 1472.

<sup>127</sup> Kaplan (note 5), at 431.

<sup>128</sup> *Id.* at 431-32.

<sup>129</sup> Gross (note 9), at 746.

<sup>130</sup> Stiefel/Maxeiner (note 125), at 157.

<sup>131</sup> Address, February 13, 1984, quoted in 52 U.S. Law Week 2471 (February 28, 1984), cited from Stiefel/Maxeiner (note 125), at 148.

(1)

The Anglo-American adversarial method of litigation is defended on the ground that it is uniquely respectful of the autonomy of the individual.<sup>132</sup> Indeed, by making “legal medicine expensive and unpalatable”, “the danger that it will be overused” is reduced and, therefore, individual autonomy and privacy in contrast to “coercive state intervention in private conduct” is promoted.<sup>133</sup> In other words, inefficiency limits the effectiveness, the “penetration” of formal legal rules, and creates room for divergent results and for patterns of behavior based on non-legal norms.<sup>134</sup>

(2)

The inefficiency in a system of adjudication is also said to be an advantage, since it deters litigation and, therefore, conserves resources; fewer court cases cost less to handle.<sup>135</sup>

Others, however, counter this position and argue that the American civil justice system does not lead to a "conservation of resources" by deterring litigation. Rather than saving costs it merely externalizes them, since the American-style contract generates more costs at the drafting stage in an attempt to avoid litigation. This, obviously, increases the costs of doing business in all fairly important instances, so the business community and the consumer in general subsidize the relatively small number of transactions in which serious performance problems arise.<sup>136</sup>

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<sup>132</sup> Gross (note 9), at 745; Chase (note 18), at 15.

<sup>133</sup> Gross (note 9), at 753.

<sup>134</sup> *Id.* at 754.

<sup>135</sup> *Id.* at 752.

<sup>136</sup> Bernstein (note 21), at 596.

(3)

Furthermore, it is debatable if and to what extent the American system of civil procedure is actually inefficient, especially when it comes to the so-called “Big Cases”.

While the German system depends crucially on an efficient judicial bureaucracy, with high standards for training and performance,<sup>137</sup> the American system is rather built on specialization: each actor is trained for a single role, so each task can be performed by that set of actors who have been assigned to the appropriate role and who have received the proper training.<sup>138</sup> This might not only lead to a higher standard of quality, but the separation and specialization of tasks, and especially the outsourcing of discovery to a team of litigation attorneys for each party, can lead to a far more speedy resolution of disputes, and may even be necessary to process the large amounts of information required in “Big Cases”, e.g. to investigate wrongdoing by large organizations with tens of thousands of employees and thousands of offices and properties. Large projects require specialization and teamwork, which also renders them more efficient, whereas in complex cases a single German judge (or even a panel of three judges) may simply become overwhelmed<sup>139</sup> and unable to handle the so-called “Big Case.”<sup>140</sup>

(4)

Last but not least, it is argued that the existence of the discovery stage in the American civil procedure actually enhances the search for the actual truth, since there are the various impediments<sup>141</sup> to obtaining evidence in the German system.<sup>142</sup> Additionally, there are certain

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<sup>137</sup> Gross (note 9), at 749-50.

<sup>138</sup> *Id.* at 748-49.

<sup>139</sup> Halberstam (note 13), at 43.

<sup>140</sup> *Id.* at 41.

<sup>141</sup> See *supra* Part I 2. b).

<sup>142</sup> Allen, et al. (note 3), at 735.

risks immanent to the examination of witnesses as conducted in German courts. One might say, for example, that the technique of inviting witnesses to tell their story in narrative form and without undue interruption provides an incentive, in the interest of presenting a conclusive, logically coherent, and convincing story, to fill in gaps by half-truths or fiction. Experience also shows that witnesses aim to please, as it may be, even the court. So it has to be taken into account that witnesses might tend to try to give the answer they assume the court expects them to give. Furthermore, judges, in acting as chief-examiners of the witnesses, may sooner or later appear to favor one side over the other, which might unduly influence their line of questioning.<sup>143</sup> The former law on appellate proceedings, though, was argued to serve as a safeguard, since the prevailing review *de novo* standard gave the parties “a second bite at the apple”.<sup>144</sup> This review standard was also argued to be sustainable due to the overall economy and speed of the entire proof process at the trial court level.<sup>145</sup>

### c) Finding the Truth

#### (1)

Yet, specifically this last aspect is discussed controversially and vehemently and some see the question of ascertaining the truth as a particularly strong feature of the German system of civil procedure.

The lawyer-dominated system of civil procedure in the U.S. is criticized for its incentives to distort evidence;<sup>146</sup> partisanship is said to have potential “to pollute the sources of truth”.<sup>147</sup> The many steps of partisan interview and preparation, pretrial deposition,

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<sup>143</sup> Kötz (note 16), at 4-5.

<sup>144</sup> See Langbein, *German Advantage* (note 1), at 857; Murray/Stürner (note 22), at 373; Rühl (note 45), at 921-22.

<sup>145</sup> Langbein, *German Advantage* (note 1), at 857; Reitz (note 30), at 898; Halberstam (note 13), at 42.

<sup>146</sup> Langbein, *German Advantage* (note 1), at 823.

<sup>147</sup> *Id.* at 842, even saying that “coaching [...] disgraces our civil justice” (*Id.* at 862).



preparation for trial, and examination and cross-examination of witnesses at trial take their toll in expense and irritation<sup>148</sup> and allow too much latitude for bullying and other truth-defeating strategies.<sup>149</sup> Especially cross-examination is not only frequently truth-defeating or ineffectual, it is also described as being “tedious, repetitive, time-wasting, and insulting”.<sup>150</sup> Additionally the “battle of opposing experts”<sup>151</sup> leads to a systematic distrust and devaluation of expertise, since experts are party-selected and party-paid and therefore vulnerable to attacks on credibility and bias regardless of the merits of their testimony.<sup>152</sup>

In the German system judges rather than the parties or their attorneys take the main responsibility for gathering and sifting evidence, although the lawyers exercise a “watchful eye” over the court's work.<sup>153</sup> Supposedly, judicial control of the evidentiary process greatly reduces, if not eliminates, the attorneys' opportunities to coach witnesses prior to trial, bully or confuse them during their testimony,<sup>154</sup> which enhances the accuracy of the proof-taking.<sup>155</sup> Furthermore, since judges question the witnesses directly, they can focus the interview on the issues at stake in the lawsuit purposefully, looking to clarify unanswered questions relevant to their decision.<sup>156</sup> Additionally, following the German rules of civil procedure, witnesses are ordinarily examined only once.<sup>157</sup>

With regards to experts, the “essential insight” of German civil procedure is thought to be: “Credible expertise must be neutral expertise”.<sup>158</sup> In Germany, expert witnesses are

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<sup>148</sup> *Id.* at 829.

<sup>149</sup> *Id.* at 833.

<sup>150</sup> *Id.* at 834n31.

<sup>151</sup> *Id.* at 835.

<sup>152</sup> *Id.* at 836; Reitz (note 30), at 989.

<sup>153</sup> Langbein, *German Advantage* (note 1), at 826.

<sup>154</sup> Reitz (note 30), at 989.

<sup>155</sup> John H. Langbein, “*Trashing The German Advantage*”, 82 Nw. U. L. Rev. 763, 766 (1988).

<sup>156</sup> Halberstam (note 13), at 10.

<sup>157</sup> Langbein, *German Advantage* (note 1), at 829.

<sup>158</sup> *Id.* at 837.

neutral third parties called by the court and paid by the losing party after the trial,<sup>159</sup> so no “battle of the experts” can arise. The responsibility for selecting and informing experts is placed upon the court, although -- as with regards to the entire process of proof-taking -- with important protections for party interests.<sup>160</sup> German attorneys can protect their clients' interests by suggesting witnesses to be called, asking follow-up questions to the witnesses after the judges have finished their interrogation, objecting to the judges' summation of the witnesses' testimony, commenting on the court-appointed expert's report, and offering other experts to challenge the opinion of the court-appointed one.<sup>161</sup>

Yet, when considering the benefits of a judge-driven system of civil procedure, one also has to take into account that, making judges do most of the work, clearly imposes a greater burden on judicial resources and has to result in employing more judges.<sup>162</sup>

(2)

The German system of civil procedure is also credited with its consistency.

Following the professional and hierarchical nature of the German system -- the use of professional judges (rather than hired advocates and ad hoc juries) to gather and to evaluate evidence, the requirement of detailed written judgements, and the (former) scope of review on appeal<sup>163</sup> -- supposedly leads to a higher predictability of the outcome of a dispute.

This can add to the social value of legal judgements by reducing present and prospective litigants' uncertainty about the likely outcomes of litigation, thereby reducing the

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<sup>159</sup> Reitz (note 30), at 989.

<sup>160</sup> Langbein, *German Advantage* (note 1), at 837.

<sup>161</sup> Reitz (note 30), at 989.

<sup>162</sup> Halberstam (note 13), at 42.

<sup>163</sup> Gross (note 9), at 741.

costs associated with uncertainty, and increasing the proportion and the consistency of out-of-court settlements.<sup>164</sup>

(3)

A civil action before a German court is said to be quicker and less expensive,<sup>165</sup> especially with regards to the “average dispute”<sup>166</sup> which involves a comparatively small amount of money, raises no major issue of public policy, and is merely a dispute between private parties about private rights.<sup>167</sup>

Because there is no pretrial discovery phase, fact-gathering occurs only once, and because the court establishes the sequence of fact-gathering according to criteria of relevance<sup>168</sup> without a fixed-sequence or single-continuous-trial rule, unnecessary investigation is thought to be minimized.<sup>169</sup> “Anyone who has had to wade through the longwinded narrative of American pretrial depositions and trial transcripts (which preserve every inconsequential utterance, every false start, every stammer) would see at once the economy of the German approach to taking and preserving evidence”.<sup>170</sup> German judges dictate summaries of testimony, producing a more concise and usable record.<sup>171</sup>

On the other hand judgements of German courts are vastly more detailed than the enigmatic verdicts of common-law juries, specifying the factual findings and legal

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<sup>164</sup> *Id.*

<sup>165</sup> Bernstein (note 21), at 594.

<sup>166</sup> Fisch (note 33), at 282; see also Halberstam (note 13), at 42.

<sup>167</sup> Kötz (note 16), at 15-16.

<sup>168</sup> Contrasting markedly with the inclination of American litigators "to leave no stone unturned, provided, of course, they can charge by the stone." (Langbein, *German Advantage* (note 1), at 846).

<sup>169</sup> Langbein, *German Advantage* (note 1), at 831; see also Gross (note 9), at 736, and Halberstam (note 13), at 10.

<sup>170</sup> Langbein, *German Advantage* (note 1), at 828.

<sup>171</sup> Gross (note 9), at 736.

conclusions on which the court's action is based.<sup>172</sup> Since it can take weeks to compose such a written verdict, this aspect again counters the general assumption of speediness of German civil courts.

(4)

The German rules of civil procedure are deemed to grant a comparatively easy access to a judge for consideration of the merits at a relatively early stage in the litigation.<sup>173</sup> Following the rules of civil procedure earlier presented, German judges are involved in the organization and course of the litigation from a very early point on. They are obligated to prepare the main hearing by requiring the parties to clarify positions, obtaining documents, summoning parties and witnesses to the hearing (§ 273 ZPO) and by being “mindful of a compromise settlement of the dispute or particular issues at all stages of the lawsuit” (§ 278 I ZPO). Therefore, parties can learn about the court’s opinion on their case and its chances of success quite early.

(5)

Other authors see the “conference method”,<sup>174</sup> the discontinuous trial system in Germany, as beneficial. It lessens tension and theatrics, and it encourages settlement.<sup>175</sup> Surprise is not felt to be a substantial danger,<sup>176</sup> especially since, if new facts or relevant questions of fact arise during the main hearing or the interrogation of witnesses and experts, each party has to be given the opportunity to address the aspect further (§ 283 ZPO). Additionally, the court is not permitted to rest its decision on an aspect of fact or law that a party has overlooked or considered irrelevant, or that the court assesses differently from both

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<sup>172</sup> *Id.*

<sup>173</sup> Fisch (note 33), at 281.

<sup>174</sup> Kaplan (note 5), at 410.

<sup>175</sup> Langbein, *German Advantage* (note 1), at 831.

<sup>176</sup> Kaplan, et al., *Civil Procedure II* (note 99), at 1471.

parties, unless it has given them notice of this point and the opportunity to respond to it (§ 139 II ZPO).

But taking into account these rules that are directly relevant to the *Anspruch auf rechtliches Gehör* (constitutionally guaranteed right to be heard), one also has to concede that they can, in reality, seriously hinder the expedite resolution of a civil case before a German court.<sup>177</sup> Especially in more complex cases they regularly constitute the necessity of several, in theory even an unlimited number of hearings,<sup>178</sup> which can actually be quite time-consuming,<sup>179</sup> and has often been criticized on that ground.<sup>180</sup>

These actual problems, caused by the significance of the *Anspruch auf rechtliches Gehör* embodied especially by § 139 ZPO, the court's *Hinweispflicht* (obligation to give notices and advice), will be explained in detail in the following Part II of this paper.

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<sup>177</sup> This will be explained in more detail in Part II of this paper.

<sup>178</sup> However, means of challenge or defense submitted belatedly can be refused to be admitted, if their admittance would delay the resolution of the case and the delay is not sufficiently excused or is a result of gross negligence (see § 296 ZPO, *infra* Part III 1.).

<sup>179</sup> See von Mehren (note 20), at 614.

<sup>180</sup> Allen, et al. (note 3), at 725-26.

## **Part II**

As Ronald J. Allen, Stefan Köck, Kurt Riecherberg and D. Toby Rosen aptly pointed out, “it would be useful to know how the process actually works”,<sup>181</sup> before drawing any conclusions as to a possible superiority of one system.<sup>182</sup>

So using the example of § 139 ZPO I want to give a more practical insight into daily challenges of German judges working the German Code of Civil Procedure.<sup>183</sup>

### 1. § 139 ZPO

The provision reads:

#### **Substantive conduct of a case**

(1) If necessary the court is to discuss the relevant facts and issues in dispute from a factual and legal perspective with the parties and to put questions to them. The court is to induce the parties to declare their positions timely and exhaustively concerning all significant facts, especially to further substantiate insufficient information to the asserted facts, to designate the means of proof, and to file the relevant petitions.

(2) The court is not permitted to rest its decision on an aspect of fact or law that a party has apparently overlooked or considered insignificant, and that does not merely concern a minor accessory claim, unless it has given the parties notice of this point and

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<sup>181</sup> *Id.* at 730n118.

<sup>182</sup> *Id.* at 726.

<sup>183</sup> For a detailed overview over the court’s specific duties pursuant to § 139 ZPO see Murray/Stürner (note 22), at 166 ff..

given them the opportunity to respond to it. The same rule applies, if the court assesses an aspect of fact or law differently than both parties do.

(3) The court is to give the parties notice of any concerns it has with respect to aspects the court has to consider on its own motion.

(4) Notices according to this rule are to be given as early as possible and documented on the record. Their issuing can only be proven by the content of the record. Only the proof of forgery of the record is permissible to contradict its content.

(5) If a party is unable to promptly respond to a notice by the court, the court, on the motion of the party, shall set a time limit for further assertion by written brief.

## 2. Spirit and Purpose

§ 139 ZPO embodies the concept of courts' responsibility for the *materielle Prozessleitung* (substantive conduct of the case),<sup>184</sup> which also constitutes the courts' *Hinweispflicht* (obligation to give notices and advice). It is an important feature of German civil justice<sup>185</sup> and serves a variety of purposes.

a) *Anspruch auf rechtliches Gehör* (constitutional right to be heard)

§ 139 ZPO is a key provision in the German law of civil procedure. It is especially based on and concretizes the constitutionally guaranteed *Anspruch auf rechtliches Gehör*

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<sup>184</sup> Dr. Dirk von Selle, in *Beck'scher Online-Kommentar ZPO*, 19th ed. (2015), § 139 para. 1; "an enactment apostrophized (...) as the Magna Carta of German civil procedure" (Kaplan, et al., *Civil Procedure I* (note 31), at 1224).

<sup>185</sup> Murray/Stürner (note 22), at 166; Rühl (note 45), at 916.

(right to be heard).<sup>186</sup> It is, therefore, of considerable significance when dealing with common civil cases before a German court.

b) *Verbot von Überraschungsentscheidungen* (ban of surprise decisions)

The court is in breach of the right to be heard, if its decision comes as a surprise to either party. § 139 II ZPO is supposed to enforce the so-called *Verbot von Überraschungsentscheidungen* (ban of surprise decisions).<sup>187</sup> The court must not base its decision on an aspect of fact or law that any diligent and skillful party did not have to anticipate even when taking various judicial conceptions into account.<sup>188</sup> So the court has to advise the parties of its view of the case before ruling on it, to give the parties the opportunity to comment on that aspect and/or to align their judicial conduct with the court's view.

c) Fair Trial

Furthermore, § 139 ZPO intends to provide for a fair trial, which is also constitutionally guaranteed in Germany (Art. 2 I, 20 III GG) and even codified in Art. 6 I 1 of the European Convention of Human Rights.<sup>189</sup> § 139 ZPO, in this context, ensures that neither mistakes nor differences in skills and diligence put one party at a disadvantage, and the *Grundsatz der Waffengleichheit* (principle of equality of arms) is served.<sup>190</sup>

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<sup>186</sup> BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 937 para. 4 (2006); von Selle (note 184), § 139 para. 5; Prof. Dr. Reinhold Greger, in *Zöller, Zivilprozessordnung*, 31st ed. (2016), § 139 para. 5.

<sup>187</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1227; Dr. Hartmut Rensen, "Die Rechtsprechung des Bundesgerichtshofs zur Bedeutung gegnerischer Rügen nach der ZPO-Reform", *Monatsschrift für Deutsches Recht* (MDR) 1075, 1077 (2008).

<sup>188</sup> *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court) *Neue Juristische Wochenschrift* (NJW) 2823, 2824 (1991); BVerfG *Neue Juristische Wochenschrift* (NJW) 2305, 2307 (1997); BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 937 para. 4 (2006); von Selle (note 184), § 139 para. 6, 36.

<sup>189</sup> von Selle (note 184), § 139 para. 5.1.

<sup>190</sup> Langbein, *German Advantage* (note 1), at 843; BVerfG *Neue Juristische Wochenschrift* (NJW) 1925, 1927 (1979); Prof. Dr. Claus Wagner, in *Münchener Kommentar zur ZPO*, 4th ed. (2013), § 139 para. 1, 39; von Selle (note 184), § 139 para. 8, 8.1.



d) *Konzentrationsmaxime* (principle of concentration)

By discussing the aspects of fact and law of a case openly and giving specific notices to the parties at an early stage, § 139 ZPO imposes a duty on the courts to clarify the cause and lead the parties toward full development of their respective positions.<sup>191</sup> Thereby, the subject-matter of the proceedings is supposed to be specified and focused to avoid unnecessary conflict, effort and expenditure of time.<sup>192</sup> In this respect, § 139 ZPO also serves the *Konzentrationsmaxime* (principle of concentration). It is assumed that only if the parties can actually trust the court to fulfill its function to govern the substantive conduct of the case, they will effectively be willing to restrict the lawsuit to the aspects that are actually relevant to the case.<sup>193</sup>

e) Duty of Care

Particularly in the context of the last judicial reform in effect since 2002 the legislator emphasized the joint responsibility of the court for a “comprehensive factual and legal resolution of the matter”.<sup>194</sup> Even though the earlier explained *Beibringungsgrundsatz* (principle of party presentation) generally leaves it to the parties to determine the scope of the dispute and to provide the court with the necessary facts and means of proof for its decision, § 139 ZPO imposes an additional duty of care and responsibility on the court to provide for a fair trial that excludes arbitrariness and that is solely aimed at ascertaining the truth.<sup>195</sup> So § 139 ZPO, when applied appropriately, does not penetrate the *Beibringungsgrundsatz* by introducing an inquisitorial element, but it adds to it an aspect of assistance by the court. It

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<sup>191</sup> Kaplan (note 5), at 411.

<sup>192</sup> Greger (note 186), § 139 para. 1.

<sup>193</sup> BT-Drs. 14/4722, S. 61; von Selle (note 184), § 139 para. 4.1.

<sup>194</sup> BT-Drs. 14/4722 S. 77; Greger (note 186), § 139 para. 1.

<sup>195</sup> von Selle (note 184), § 139 para. 1; Greger (note 186), § 139 para. 1.

still remains within the discretion of the parties, whether and how to react to notices by the court.<sup>196</sup>

#### f) Dialogic Civil Trial

§ 139 ZPO is, thereby, said to be based on a “model of a communicative or dialogic civil trial”.<sup>197</sup> Both court and parties are supposed to “put their cards on the table”.<sup>198</sup> § 139 ZPO entails a concept of work-sharing between counsel and court,<sup>199</sup> which is supposed to enhance the quality of judicial products overall.<sup>200</sup>

#### g) Settlement

Though this is not the original intention of the provision, in reality, the judges’ obligation to give notices pursuant to § 139 ZPO can often provide valuable guidance and assistance to the parties in settlement negotiations.<sup>201</sup>

### 3. Limitations

As these remarks on the purpose of § 139 ZPO already indicate, the court’s duty to govern the substantive conduct of a civil case is also subject to distinct limits.

#### a) Neutrality

The judges’ obligations within § 139 ZPO are obviously limited by their statutory duty to be neutral and impartial.<sup>202</sup> The court must not give up its equidistance to both parties and

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<sup>196</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1227; Dr. Astrid Stadler, in *Musielak/Voit, ZPO*, 12th ed. (2015), § 139 para. 1.

<sup>197</sup> BT-Drs. 14/4722, S. 61 f., 77; BGH *Neue Juristische Wochenschrift* (NJW) 164 (2004); von Selle (note 184), § 139 para. 3; Stadler (note 196), § 139 para. 1; Prof. Dr. Rolf Stürner, “*Parteiherrschaft versus Richtermacht, Materielle Prozessleitung und Sachverhaltsaufklärung im Spannungsfeld zwischen Verhandlungsmaxime und Effizienz*“, *Zeitschrift für Zivilprozessrecht* (ZZP) 147, 153-54 (2010).

<sup>198</sup> *Id.* at 154.

<sup>199</sup> Dr. Hans-Jörg Birk, “*Wer führt den Zivilprozess – der Anwalt oder der Richter*“, *Neue Juristische Wochenschrift* (NJW) 1489, 1496 (1985).

<sup>200</sup> Murray/Stürner (note 22), at 170.

<sup>201</sup> *Id.* at 260.

become an advisor to only one of them.<sup>203</sup> Otherwise it runs the risk of being challenged on the grounds of bias.<sup>204</sup>

b) *Beibringungsgrundsatz* (principle of party presentation)

As already mentioned earlier, the *Beibringungsgrundsatz* (principle of party presentation) also puts a limit on the court's obligations within § 139 ZPO.<sup>205</sup> While judges are bound by coinciding factual statements of both parties,<sup>206</sup> this does not apply to legal opinions, even if they are shared by the parties. But the court has to give the parties notice and the opportunity to respond to it, if it wants to decide the case based on a different legal opinion.<sup>207</sup>

However, responding to the *Beibringungsgrundsatz* the court must not broaden the matter in dispute by giving advice to the parties pursuant to § 139 ZPO. Judges are not allowed to hint either party to any additional means of challenge or defense.<sup>208</sup> A permissible notice within § 139 ZPO requires the means of challenge or defense to, at least suggestively, already be subject of the party's pleading.<sup>209</sup>

So the court's duty to give notices following § 139 ZPO may not be confused as an expression of inquisitorial responsibility for determining the general truth of the case at hand.

<sup>202</sup> BVerfG *Neue Juristische Wochenschrift* (NJW) 1123 (1967); BVerfG *Neue Juristische Wochenschrift* (NJW) 1925, 1927 (1979); OLG Rostock *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 576 (2002); Wagner (note 190), § 139 para. 10; Greger (note 186), § 139 para. 2; Stadler (note 196), § 139 para. 5.

<sup>203</sup> BGH *Neue Juristische Wochenschrift* (NJW) 164 (2004); von Selle (note 184), § 139 para. 8.

<sup>204</sup> BGH *Neue Juristische Wochenschrift* (NJW) 164 (2004); von Selle (note 184), § 139 para. 10.

<sup>205</sup> Greger (note 186), § 139 para. 2; Stadler (note 196), § 139 para. 22; von Selle (note 184), § 139 para. 8.

<sup>206</sup> See *supra* Part I 1. a).

<sup>207</sup> Stadler (note 196), § 139 para. 22, 23; Murray/Stürner (note 22), at 170.

<sup>208</sup> BGH *Neue Juristische Wochenschrift* (NJW) 2890, 2892 (1999); BGH *Neue Juristische Wochenschrift* (NJW) 164, 165 (2004); OLG Hamm *Monatsschrift für Deutsches Recht* (MDR) 1121, 1122 (2013); von Selle (note 184), § 139 para. 9/16; Murray/Stürner (note 22), at 172.

<sup>209</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1228; BT-Drs. 14/4722, S. 77; von Selle (note 184), § 139 para. 15; Stadler (note 196), § 139 para. 5/9; Greger (note 186), § 139 para. 17.

It is more aptly characterized as requiring judges to assist and advise the parties in resolving their dispute according to law.<sup>210</sup>

#### 4. Walking the Thin Line

This short overview already shows the difficulty of where exactly to draw the line between permissible assistance and inadmissible partisanship by the court. Judges have to ‘walk a very thin line’ when applying § 139 ZPO.<sup>211</sup>

Additionally, due to the fundamental changes in the appellate law as of the judicial reform in 2002, which has not been subject to the majority of American literature on the German law of civil procedure, § 139 ZPO has been gaining even more significance.

As presented earlier in Part I of this paper, the first level of appeal no longer involves a review de novo, but may only be based on the objection that the decision has been based on a violation of the law, because a legal norm has not been applied or has not been applied properly (§ 546 ZPO), or that the facts the decision was based upon justify a different decision (§ 513 ZPO).<sup>212</sup> Additionally, new means of challenge or defense can only be raised in the second instance, if they were not asserted in the first instance proceedings due to a procedural error (§ 531 II 1, No. 2 ZPO). This specifically raises the significance of § 139 ZPO.<sup>213</sup>

The objection that the court of first instance failed to give the necessary notice under § 139 ZPO is regularly raised in an appeal, because a breach of § 139 ZPO constitutes a

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<sup>210</sup> Murray/Stürner (note 22), at 167.

<sup>211</sup> von Selle (note 184), § 139 para. 8; Stadler (note 196), § 139 para. 5; Murray/Stürner (note 22), at 176.

<sup>212</sup> See *supra* Part I 2. f).

<sup>213</sup> BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 213 (2005); BGH *Neue Juristische Wochenschrift* (NJW) 2152, 2153 (2004); von Selle (note 184), § 139 para. 57.

procedural error.<sup>214</sup> So in practice, lawyers will be keen to claim or provoke a violation of § 139 ZPO to effectuate a new factual review and to facilitate the introduction of new factual assertions in the second instance.<sup>215</sup> However, the appellant then has to present specifically what statements she would have already introduced in the first instance had the court given her the necessary notice pursuant to § 139 ZPO,<sup>216</sup> and in what way these additional facts would have changed the outcome of the case in her favor.<sup>217</sup>

This, again, explains why § 139 ZPO is of major significance in the daily life of German civil judges. To illustrate how ‘thin this line judges have to walk on every day’ actually is and how regularly judges are confronted with the decision whether to give notice pursuant to § 139 ZPO, I want to raise some very practical questions based on everyday situations and examples.

It will not come as a surprise to say that there is no right or wrong answer to any of the following questions. I would assume that the manner in which judges deal with the different situations will most likely depend on their personality, their accustomed *modus operandi* and their experience with certain kinds of cases and/or specific parties or lawyers.<sup>218</sup>

a)

At what stage of the proceedings does the court have to give the necessary notice?

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<sup>214</sup> Bohlander, *German Advantage Revisited* (note 29), at 34; Kaplan, et al., *Civil Procedure I* (note 31), at 1228n146; Dr. Michael Stöber, “*Neues Berufungsvorbringen nach erstinstanzlicher Verletzung der richterlichen Hinweispflicht*“, *Neue Juristische Wochenschrift* (NJW) 3601, 3602 (2005); von Selle (note 184), § 139 para. 54; Wagner (note 190), § 139 para. 59; Murray/Stürner (note 22), at 175-76.

<sup>215</sup> Dr. Eckart Gottschalk, „*Der Zeuge N.N.*“, *Neue Juristische Wochenschrift* (NJW) 2939, 2941 (2004); Stadler (note 196), § 139 para. 4.

<sup>216</sup> Kaplan, et al., *Civil Procedure I* (note 31), at 1228n146; BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 511, 512 (2015); von Selle (note 184), § 139 para. 54; Greger (note 186), § 139 para. 20.

<sup>217</sup> Wagner (note 190), § 139 para. 59; Murray/Stürner (note 22), at 176.

<sup>218</sup> “The extent of leading is a resultant of a number of variable forces: the judge's temperament and imagination; his judgment of the capacity and energy of counsel; the complexity or novelty of the case; its importance to the parties or the public” (Kaplan, et al., *Civil Procedure I* (note 31), at 1228).

*Example:*

The plaintiff claims in her initial written complaint that the parties have entered a valid contract which the defendant breached. The plaintiff does not give any further details as to when, where or how the parties entered said contract so the judge cannot assess on her own whether the contract is actually valid.

§ 139 IV 1 ZPO provides that notices by the court are to be given as early as possible.<sup>219</sup> The parties are to be given the opportunity to react upon the court's advice in due time before the main hearing.<sup>220</sup> Therefore, as the case may be, a notice might already have to be given before the defendant has even responded to the initial complaint.<sup>221</sup>

In the abovementioned model case, the court does not have the necessary facts to verify whether the parties have actually entered a valid contract which the plaintiff can base her claim on. But if this assertion is not contested, i.e. both parties agree on having entered a valid contract, the court does not need any more facts on this aspect to decide the case. So this raises the question: should the judge in the model case immediately give notice to the plaintiff that, if the defendant contests the statement of a valid contract, she will have to give more factual details as to when, where and how that contract was entered and maybe indicate means of proof? Or should she wait for the defendant's response to the claim and see whether the contention is actually contested or not, before deciding whether to give said notice? Judges that tend to choose the first alternative run the risk of being called 'overactive', assuming all factual assertions will be contested by the opposing party.<sup>222</sup> They might also be accused of

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<sup>219</sup> This again is a specification of the *Konzentrationsmaxime* (principle of concentration); OLG Hamm *Neue Juristische Wochenschrift* (NJW) 2543, 2544 (2003).

<sup>220</sup> BGH *Zeitschrift für Baurecht* (BauR) 246 (2010); von Selle (note 184), § 139 para. 47; Greger (note 186), § 139 para. 11; Murray/Stürner (note 22), at 171.

<sup>221</sup> Wagner (note 190), § 139 para. 55.

<sup>222</sup> See Birk (note 199), at 1490; Allen, et al. (note 3), at 726n100.

‘putting ideas into the defendant’s head’ by such an early notice, which judges must not do due to their obligation to be impartial. Such an early notice might also be said to contradict the *Konzentrationsmaxime* (principle of concentration): why give such an advice and make the plaintiff give more information and indicate means of proof, if the assertion eventually remains uncontested? On the other hand, giving said notice as soon as possible might, in the end, save time, because the plaintiff can already add to her claim, while the court waits for the defendant’s answer to the complaint.

b)

If the parties are represented by lawyers,<sup>223</sup> is the court at all obligated to give advice pursuant § 139 ZPO? Or is there, perhaps, less of an obligation?

*Example:*

The plaintiff sues the defendant for damages based on the assertion that the defendant dented her car during an incident that happened five years ago. The defendant, appearing before the court as pro se litigant, responds by denying to have dented the plaintiff’s car and by arguing for it to not be fair to be sued because of something that supposedly happened such a long time ago. She does not explicitly refer to the statute of limitation, which would apply in the given case,<sup>224</sup> but which has to be formally pled under German law.

Does anything change, if the defendant is represented by a lawyer, but still does not explicitly plead the statute of limitation?

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<sup>223</sup> Generally only before the *Landgericht* (Regional Court; § 78 ZPO); see *supra* Part I 2. a).

<sup>224</sup> The standard limitation period in German civil law is three years (§ 195 *Bürgerliches Gesetzbuch* (BGB) -- German Civil Code).

In contrast to former legal practice, it is now generally assumed that § 139 ZPO applies in the same way, whether the parties are represented by an attorney or come before the court as pro se litigants.<sup>225</sup> But the intensity or extent of the notice may be reduced,<sup>226</sup> when parties are represented by lawyers, because, naturally, the court can expect more from a legally trained person than from a lay person.<sup>227</sup> § 139 ZPO shall, however, prevail unrestrictedly, if the attorney recognizably errs or assumes to have already offered sufficient statements for her client.<sup>228</sup> It is said to be irrelevant at this point, if the lawyer acts negligently,<sup>229</sup> though it is ultimately not the job of the judge to relieve the parties of the consequences of gross and persistent negligence or lack of competence of their counsel.<sup>230</sup> At the same time the court must, by all means, not become a legal advisor to a pro se litigant.<sup>231</sup>

This application of § 139 ZPO seems to rather contradict than serve the *Grundsatz der Waffengleichheit* (principle of equality of arms) and sure enough continuously challenges judges of Local Courts that have to deal with pro se litigants on a regular basis.<sup>232</sup> But one also has to take into account that it is the free choice of any party to decide for or against legal

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<sup>225</sup> Bohlander, *German Advantage Revisited* (note 29), at 34; BGH *Neue Juristische Wochenschrift* (NJW) 3626, 3628 (2003); BGH *Neue Juristische Wochenschrift* (NJW) 3317, 3320 (2002); Dr. Egon Schneider, “*Entlastung der Gerichte – eine Sisyphusarbeit*”, *Monatsschrift für Deutsches Recht* (MDR) 865, 868 (1996); Wagner (note 190), § 139 para. 4.

<sup>226</sup> Stadler (note 196), § 139 para. 22; Greger (note 186), § 139 para. 2; Bohlander, *German Advantage Revisited* (note 29), at 34; Murray/Stürner (note 22), at 175.

<sup>227</sup> von Selle (note 184), § 139 para. 45; Stadler (note 196), § 139 para. 22.

<sup>228</sup> BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 524, 525 (2006); BGH *Neue Juristische Wochenschrift* (NJW) 3317, 3320 (2002); BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 441 (1997); Dr. Reinhard Greger, “*Richterliche Hinweispflicht im Anwaltsprozess*”, *Neue Juristische Wochenschrift* (NJW) 1182 (1987).

<sup>229</sup> Kaplan (note 5), at 411; von Selle (note 184), § 139 para. 17.

<sup>230</sup> Wagner (note 190), § 139 para. 8; Murray/Stürner (note 22), at 167-68.

<sup>231</sup> OLG München *Neue Juristische Wochenschrift* (NJW) 60 (1994); Greger (note 186), § 139 para. 19.

<sup>232</sup> Local Courts have jurisdiction over all disputes between landlords and tenants, family law cases and general civil cases with an amount in dispute of up to €5,000 (§ 23 GVG) and parties generally do not have to be represented by a lawyer before the Local Court (§ 78 ZPO).



representation or even a legal consultation, if they don't have to be represented by an attorney in court.<sup>233</sup>

Having said that, § 139 ZPO is still supposed to balance possible 'structural inferiority' of a party and ensure a dispute 'at eye level',<sup>234</sup> though this leads to an inequality at the same time. Any kind of deficient submission by a party, whether caused by negligence or not, obligates the court to act upon § 139 ZPO.<sup>235</sup> Therefore a carelessly litigating party benefits from the court's assistance and differences in diligence by counsel are evened out.<sup>236</sup>

As to the given model case, it is again difficult to give a simple right-or-wrong answer. If the defendant is represented by a lawyer, it might be difficult to argue that she obviously overlooked the necessity to explicitly plead the statute of limitation, since this is quite basic legal knowledge and there might be a specific reason for her to not plead this defense.<sup>237</sup> But one might also argue that, especially since it is such basic legal knowledge, it can only be an obvious error not to plead the statute of limitation explicitly, especially since potential negligence is irrelevant in the context of § 139 ZPO.

Regarding a pro se defendant it might easily be assumed that she just does not know that she has to plead the statute of limitation explicitly and, since she has already brought up the issue of the potential incident having happened "a long time ago", one might argue the court having to advise her respectively according to § 139 ZPO. But, again, this can be seen as being problematic with regards to the abovementioned obligation of the court to not broaden the matter in dispute by giving notice to the parties pursuant to § 139 ZPO. The court

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<sup>233</sup> This is even more significant regarding the broad system of public legal aid in Germany (§§ 114 - 127a ZPO); see *supra* Part I 2. g).

<sup>234</sup> Dr. Reinhard Gaier, "Der moderne liberale Zivilprozess", *Neue Juristische Wochenschrift* (NJW) 2871, 2872 (2013); von Selle (note 184), § 139 para. 8.1.

<sup>235</sup> Wagner (note 190), § 139 para. 6; Stadler (note 196), § 139 para. 22; Greger (note 186), § 139 para. 6.

<sup>236</sup> von Selle (note 184), § 139 para. 8.1.

<sup>237</sup> It is possible to disclaim the right to plead the statute of limitation.

is not to hint either party to any additional means of challenge or defense,<sup>238</sup> which the plea of the statute of limitation obviously is.

c)

At what point do judges have to assume their decision will come as a surprise to the parties? Does not every party have to take into account that someone else, might it be the opposing party or the court, will not share their legal opinion? Or that the court might follow the opponent's line of argument?<sup>239</sup>

It is, at least, generally agreed that the appellate court has to notify the appellee, if and why it intends to deviate from the initial decision and give sufficient time and opportunity to react to that.<sup>240</sup> In all other situations one will have to say again that the decision depends on the circumstances of the specific case and the modus operandi of the respective court.

d)

Does the court have to give a party notice with regards to an aspect the opponent has already pointed out?

*Example:*

The plaintiff sues the defendant for damages for pain and suffering due to medical malpractice. The defense argues in their response to the claim that the plaintiff has not given enough facts as to what kind of pain and suffering she supposedly

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<sup>238</sup> See *supra* Part II 3. b).

<sup>239</sup> Respectively von Selle (note 184), § 139 para. 21.

<sup>240</sup> BGH *Neue Juristische Wochenschrift* (NJW) 363, 365 (2010); BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 17 (2007); BVerfG *Neue Juristische Wochenschrift* (NJW) 2524 (2003); von Selle (note 184), § 139 para. 18, 24, 40; Wagner (note 190), § 139 para. 17; Stadler (note 196), § 139 para. 7, 14; Greger (note 186), § 139 para. 6.

sustained after the treatment; she did not satisfy her obligation to substantiate her claim sufficiently (§ 138 I ZPO).

Courts have ruled that judges can omit § 139 ZPO, if the party has been advised appropriately by the opponent, at least if that party is represented by a lawyer.<sup>241</sup> An additional notice by the court would be nothing more but a mere repetition of the opponent's information.<sup>242</sup> The court's obligation, however, is said to be revived, if the respective party evidently misinterpreted or ignored the opponent's advice.<sup>243</sup> Taking into account that § 139 ZPO applies regardless of a party's possible negligence, it is easy to imagine how difficult it can be to decide in a specific case whether the opponent's advice was already sufficient and/or whether the advised party has still apparently overlooked the aspect or considered it insignificant, especially since notices by the court are, according to experience, taken more seriously than statements by the opposing party.<sup>244</sup>

e)

What do judges have to do, if a party is obviously aware of its procedural obligation to do something – and then does not?

*Example:*

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<sup>241</sup> BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 70 (2010); BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 581, 582 (2008); BGH *Neue Juristische Wochenschrift* (NJW) 759, 761 (2007); von Selle (note 184), § 139 para. 19; Wagner (note 190), § 139 para. 18; Greger (note 186), § 139 para. 6a; Murray/Stürner (note 22), at 169-70.

<sup>242</sup> Rensen (note 187), at 1077.

<sup>243</sup> BGH *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 1247, 1248 (2004); BGH *Neue Juristische Wochenschrift* (NJW) 2548, 2550 (2001); Stöber (note 214), at 3603; von Selle (note 184), § 139 para. 19.

<sup>244</sup> Rensen (note 187), at 1077-78.

To sufficiently nominate a person as a witness, the party is required to give the court that person's name and a valid address, where she can be subpoenaed.<sup>245</sup> If the lawyer does not have the witness's name and address yet before entering the brief, it is customary for her to indicate the witness as "N.N."<sup>246</sup> But as the case proceeds the lawyer does not give that potential witness's name and address, even though her testimony is obviously relevant to the outcome of the case.

Does the court have to notify that lawyer respectively and give her (further) opportunity to nominate that witness correctly? Does § 139 ZPO really ask for such a notice?

While the Federal Supreme Court used to rather not see an obligation by the court to give notice and further opportunity to correctly indicate the witness already named as "N.N.",<sup>247</sup> it has by now changed its opinion, at least in cases in which the witness has already been "sufficiently individualized".<sup>248</sup> In legal literature, this question is still discussed highly controversially.<sup>249</sup> In practice, however, I assume that most courts actually give the respective party notice and a deadline to indicate the full name and address of said witness, be it only to 'keep the appellate door shut'.<sup>250</sup>

f)

Similar to this matter is the question, if and when the court has to potentially repeat a notice under § 139 ZPO.

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<sup>245</sup> § 373 ZPO; Dr. Michael Huber, in *Musielak/Voit, ZPO*, 12th ed. (2015), § 373 para. 10.

<sup>246</sup> = Nomen nominandum (latin for „name hitherto unknown“; meaning “to be determined”).

<sup>247</sup> BGH *Neue Juristische Wochenschrift* (NJW) 3077, 3080 (1987).

<sup>248</sup> BGH *Neue Juristische Wochenschrift* (NJW) 1926, 1927 (1993); BGH *Neue Juristische Wochenschrift* (NJW) 2368, 2369 (1998).

<sup>249</sup> Gottschalk (note 215), at 2939.

<sup>250</sup> See Dr. Michael Bohlander, "Der Richter als Störfaktor – Eine Polemik zu Egon Schneider, MDR 1996, 865 ff", *Monatsschrift für Deutsches Recht* (MDR) 1093 (1996) [hereafter cited as Bohlander, *Störfaktor*].

In principle, judges need not repeat a notice, if they have already given clear and unambiguous advice on something.<sup>251</sup> Even if, ultimately, it is not the job of the court to relieve the parties of the consequences of gross and persistent negligence or lack of competence of their counsel,<sup>252</sup> the Federal Supreme Court, nevertheless, has ruled that, if the advised party still does not react appropriately to the notice and/or misunderstands it, the court will have to give another specific notice and the opportunity to further respond to it.<sup>253</sup> The same applies, if the court changes its view on something during the proceedings.<sup>254</sup>

In practice, it will again be difficult in particular cases to determine whether a notice has not been answered sufficiently by the party, because she assumes she has already done so, because she misunderstands it, or because she is simply not able to submit anything else.

g)

This leads to another general, but in practice very relevant question that is similarly difficult to answer.

Has a party not substantiated her claim any further, because she cannot do so, because she thinks she does not have to do so or because she evidently overlooked the entire aspect altogether?

The Federal Supreme Court has ruled in one of its decisions that the court has to induce the parties to declare their positions exhaustively, if certain statements are missing that

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<sup>251</sup> BGH *Neue Juristische Wochenschrift* (NJW) 2036, 2037 (2008); von Selle (note 184), § 139 para. 46; Wagner (note 190), § 139 para. 20; Murray/Stürner (note 22), at 167.

<sup>252</sup> Wagner (note 190), § 139 para. 8; Murray/Stürner (note 22), at 167-68.

<sup>253</sup> BGH *Neue Juristische Wochenschrift* (NJW) 3317, 3320 (2002); Wagner (note 190), § 139 para. 23; Stadler (note 196), § 139 para. 7.

<sup>254</sup> BGH *Neue Juristische Wochenschrift* (NJW) 2036, 2037 (2008); BGH *Neue Juristische Wochenschrift* (NJW) 3317, 3320 (2002); Greger (note 186), § 139 para. 14d.

can generally be expected in similar cases.<sup>255</sup> Only if the claim is missing any substance at all, further advice by the court becomes superfluous.<sup>256</sup>

In particular cases it can be quite challenging to assess whether a party has overlooked an aspect or does not substantiate her claim any further simply because she cannot do so. Practical experience shows, though, that in many cases parties actually do give the court all the facts they have for a case; and, if they do not, it is just because they cannot give any more facts. This might even be more valid as of the judicial reform in 2002, since new facts can only be entered on appeal under very limited conditions.<sup>257</sup>

But it might be risky for judges to rely on that experience, because a missed notice under § 139 ZPO can ‘open the door’ for an appeal.<sup>258</sup> On the other hand, giving too many advices pursuant to § 139 ZPO obviously contradicts the aim of a speedy and focused resolution of the case.

h)

Many lawyers have come up with the habit to enter into every written brief a general request similar to this:

“If the court deems necessary any further factual or legal submissions, we kindly ask for notice pursuant to § 139 ZPO.”<sup>259</sup>

Does such a request change anything?

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<sup>255</sup> BGH *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR) 314, 317 (2010); von Selle (note 184), § 139 para. 25.

<sup>256</sup> BGH *Neue Juristische Wochenschrift* (NJW) 1708, 1710 (1982); OLG Düsseldorf *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 636 (1995); von Selle (note 184), § 139 para. 25.

<sup>257</sup> See Part I 2. f).

<sup>258</sup> See *supra* Part II 4. before a).

<sup>259</sup> Bohlander, *Störfaktor* (note 250), at 1093.

It is generally assumed that a request put in such a set phrases has no influence on the court's obligations under § 139 ZPO.<sup>260</sup> Required advice has to be given anyway, further notices do not.<sup>261</sup> So one might say such a request never makes any sense and should normally be left out of briefs.

However, in practice, such a request can sometimes actually be quite sensible. In certain cases, further submissions on specific aspects of a case are only relevant if the court takes a certain view on a legal matter. To avoid unnecessary effort and costs by everybody involved in the proceedings it can make sense to ask the court for its opinion on the specific matter before giving all the facts that might, in the end, be completely irrelevant.

i)

Last but not least, it can sometimes be challenging to ascertain at what point a general discussion of the factual and legal matters during the main hearing becomes a formal notice pursuant to § 139 ZPO.

As explained earlier,<sup>262</sup> judges are obligated to discuss the factual and legal matters of the case openly with the parties during the main hearing. This, quite regularly, prompts the party that fears to lose her case to request a notice according to § 139 ZPO and enter a motion to be given the opportunity to comment further on that matter in a written brief (§ 139 V ZPO), be it to delay the decision, be it to try to obtain more information on an aspect of the case. The court, then, has to decide whether the judicial review actually included advice under § 139 ZPO, whether such a notice was actually in order and whether the party has to be given further opportunity to comment on that aspect in a written brief. The latter will basically

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<sup>260</sup> von Selle (note 184), § 139 para. 45.

<sup>261</sup> Greger (note 186), § 139 para. 12a.

<sup>262</sup> See *supra* Part I 2. d) (1).

always be necessary, if the matter does not concern an aspect of the case which is subject to personal perception by the party attending the hearing.<sup>263</sup>

If the court grants this additional opportunity to enter a written brief, the case cannot be ruled upon at the end of that hearing, which is generally the purpose of every main hearing (see § 272 I ZPO).<sup>264</sup> If the court denies the motion, it runs the risk to be overruled on an appeal for not having applied § 139 ZPO correctly.<sup>265</sup>

## 5. Discussion

Against the background of the constitutionally guaranteed right to be heard, the principle of equality of arms and the general aim of any trial to ascertain the truth of the matter to base a decision on, § 139 ZPO makes a lot of sense. All parties, whether they choose to be represented by an attorney or not, shall have the same chances before the court. Therefore, a possible lapse of diligence by a lawyer is supposed to be evened out by the court. But that, to me, is rather the theoretical point of view.

The abovementioned various questions and examples vividly show the difficulties in the practical application of § 139 ZPO. The explanation also shows how unpredictable judges' behavior regarding notices under § 139 ZPO can be. As the examples presented afore show, though, the appellate courts in their decisions have rather extended the scope of § 139 ZPO than limited it.

Still, from a judge's point of view, it sometimes seems beneficial to be able to steer the course of a case by giving notices under § 139 ZPO early on. It enables the court as well as the parties to focus the matter on those aspects the judge actually deems necessary for her

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<sup>263</sup> von Selle (note 184), § 139 para. 48.

<sup>264</sup> See *supra* Part I 2. a).

<sup>265</sup> See *supra* Part II 4. before a).



decision and to leave out irrelevant issues. This can actually save a lot of time and effort and, thereby, expedite proceedings.

And yet, § 139 ZPO in reality puts a lot of responsibility on judges. They are not only to determine the necessary facts of the case and means of proof and, eventually, rule on the case. They are also obligated to keep track of what might come as a surprise to a party, what one party might have overlooked or deemed irrelevant to the case, what additional facts or means of proof a party might be able to give, to even out possible disparities in the representation of the parties and so forth. Accordingly, judges have to make sure to give all the necessary notices pursuant to § 139 ZPO and not give the parties a reason to appeal -- without overdoing it and thereby procrastinating the resolution of the case. Also, judges must, at all times, still respect the *Beibringungsgrundsatz* (principle of party presentation) and, most of all, always stay impartial and neutral.

This seems a lot to put on a single person.<sup>266</sup>

It weighs even more if it is taken into account that the daily practice in German courts in the past years has shown that lawyers tend to rely more and more on the court's duty to give notices under § 139 ZPO. Though some lawyers criticize the abovementioned 'overactive judges' for taking matters too much into their hands or for sometimes even appearing to find proceedings to be "hindered by the participation of lawyers",<sup>267</sup> from a judge's point of view things often appear the other way around. So if Herbert L. Bernstein writes, "The process thus should be understood and described not as court-conducted, but as a

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<sup>266</sup> Most first instance civil cases are decided by single judges in Germany (§ 22 GVG, § 348 I ZPO). Second instance cases as well as decision of specific areas of the law that come before the Regional Court (§ 348 I 2 ZPO) are generally decided by a panel of three judges. See *supra* Part I 2. a).

<sup>267</sup> Birk (note 199), at 1490.

process conducted jointly by the court on the one hand and by the parties and their attorneys on the other hand”,<sup>268</sup> from practical experience, this seems like ‘wishful thinking’.

Many judges feel that quite a lot of lawyers just present the mere basics of a case in “minimalist briefs” and then almost lean back to wait for the court to tell them, what else to do.<sup>269</sup> The reasons for such behavior can be versatile; lack of time, lack of qualification and lack of money are most likely only the most obvious ones.

Anyhow, in these cases judges are rather forced to take matters into their hands to advance and expedite proceedings. Consequently, many main hearings in civil cases rather resemble a ‘one man show’ of the judge than the intended event of a communicative or dialogic civil trial, and not only because the court acts as examiner-in-chief during the taking of evidence. This tendency has even been reinforced by the legal practice of the appellate courts to more broadly grant appeals because of an insufficient application of § 139 ZPO by lower courts.<sup>270</sup>

Not only does this raise the question of who does the lawyers’ work.<sup>271</sup> Rather, this actual development runs contrary to the very basic principle of party presentation.<sup>272</sup> It also bears the risk of, at some point, impairing the quality of decisions by civil courts. Though the judicial education of judges in Germany is certainly sophisticated, comprehensive and thorough,<sup>273</sup> judges are humans and humans make mistakes. So the thought of sharing the accountability for ascertaining the truth and finding the most just and lawful decision based on that truth seems to be a lot more convincing than putting the lion’s share of the

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<sup>268</sup> Bernstein (note 21), at 592.

<sup>269</sup> Allen, et al. (note 3), at 727; Bohlander, *German Advantage Revisited* (note 29), at 35-36; Bohlander, *Störfaktor* (note 250), at 1093.

<sup>270</sup> See also Bohlander, *German Advantage Revisited* (note 29), at 34 and 46.

<sup>271</sup> *Id.* at 34; Bohlander, *Störfaktor* (note 250), at 1093.

<sup>272</sup> *Id.*

<sup>273</sup> See Murray/Stürner (note 22), at 7-8 and 89 ff.

responsibility on a single judge or even a panel of three judges. So, from my experience as a German judge, focusing on the fair trial canon and just having judges ‘put their cards on the table’, would serve more the actual purpose of § 139 ZPO and the right to be heard, than to have the court even out possible negligence or deficiency on either side of the parties and ensure ‘equality of arms’. The latter, in my opinion, too easily crosses the line towards actually litigating the case for the parties.

Similarly, Peter L. Murray and Rolf Stürner compare the role of a German judge to that of a chess player playing against himself. “Or, more aptly, he must advise each player on the best available move. It is very hard to play this role effectively without overstepping the bounds one way or the other”.<sup>274</sup>

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<sup>274</sup> *Id.* at 176-77.

## **Part III**

As relevant as German judges' impact on the substantive conduct of a case is in practice, as irrelevant is their influence on its formal course, especially with regards to counsels' conduct.

If and when parties violate their duty to state the facts comprehensively, truthfully (§ 138 I ZPO) and in a timely manner (§ 282 I ZPO), the German Code of Civil Procedure and other laws provide several remedies to sanction such misconduct.<sup>275</sup> But these remedies are of rather limited significance to the daily work of German civil law judges. The remedies most relevant are of substantive nature; the ones concerning the bearing of costs or fees are hardly ever applied in practice.

In particular, all available remedies are solely directed at the parties of the lawsuit, never their lawyers.

### **1. Preclusion**

Though the court is authorized and obligated to set deadlines for the parties' briefs and motions to be entered,<sup>276</sup> these deadlines are, in practice, often a blunt sword.

In theory, material that has not been presented to the court within a set deadline, must be precluded unless the court is persuaded either that admission will not delay the proceedings

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<sup>275</sup> In consideration of the general topic of this paper, I am not taking criminal ramifications due to untruthful submissions in civil lawsuits into account. However, it should be mentioned that parties of a civil lawsuit before a German court -- unlike witnesses and experts -- are not under oath. Therefore, in theory, they would be allowed to lie before the court. But if they do, they can be charged for fraud before a criminal court (§ 263 *Strafgesetzbuch* (Criminal Code)).

<sup>276</sup> §§ 273 II No. 1; 275 I 1; III, IV; 276 I 2, III; 277; 139 V ZPO. See also Fisch (note 33), at 243-44 for more details.

or that the party's delay is adequately excused (§ 296 I ZPO).<sup>277</sup> Ordinary negligence or fault has been established as the standard for preclusion of material subject to a fixed deadline.<sup>278</sup> However, a violation of the parties' general duty to expedite proceedings (§ 282 ZPO) only entitles the court to preclude material, if its admission delayed proceedings and the tardiness was grossly negligent (§ 296 II ZPO).

But taking into account the constitutional right to be heard as well as the duty of care generally imposed on the court, especially by § 139 ZPO, the application of § 296 ZPO is actually quite cumbersome.

Since rules for preclusion are a direct limitation on the constitutional right to be heard,<sup>279</sup> every erroneous preclusion of relevant material presents a potential federal constitutional issue.<sup>280</sup> The *Bundesverfassungsgericht* (Federal Constitutional Court) has ruled that relevant material may only be precluded if the party had sufficient opportunity to comment on all relevant facts of the case and culpably did not use this opportunity, and if the party's negligent behavior was the only reason for the delay in the proceedings; otherwise the constitutional right to be heard is violated.<sup>281</sup> Due to the limitation of the constitutional right to be heard, the rules for preclusion are of exceptional character and have to be applied most conservatively.<sup>282</sup> So the court has to do everything in its power to avoid any delay before deciding to preclude any material. Furthermore, following § 139 ZPO, the court must first give notice to the respective party whose material it intends to preclude and the opportunity to

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<sup>277</sup> *Id.* at 246.

<sup>278</sup> Prütting (note 38), § 296 para. 133.

<sup>279</sup> *Id.*, § 296 para. 12.

<sup>280</sup> Fisch (note 33), at 251-52; BVerfG *Neue Juristische Wochenschrift* (NJW) 945, 946 (2000); BVerfG *Neue Juristische Wochenschrift* (NJW) 299 (1992); BVerfG *Neue Juristische Wochenschrift* (NJW) 2275, 2276 (1991); Huber (note 245), § 296 para. 39.

<sup>281</sup> Prütting (note 38), § 296 para. 12.

<sup>282</sup> BVerfG *Neue Juristische Wochenschrift* (NJW) 945, 946 (2000).

respond to that.<sup>283</sup> Any violation of the court's duty of care and duty to facilitate proceedings as well as any formal defect in the setting or notification of deadlines will bar preclusion of late material.<sup>284</sup>

Finally, all this does not take into account that, in practice, most deadlines are and, due to the constitutional right to be heard, have to be extended regularly on request of the parties on grounds like schedule difficulties between party and counsel, temporary absence of counsel due to vacation or sickness or an overload of work on the part of the lawyer. Therefore, there are actually only very few cases in which parties' material is permissibly precluded under § 296 ZPO.

## 2. Costs or Fees

There are few exceptions to the abovementioned loser-pays-rule for allocating the costs of a civil lawsuit for violating the duty to state the facts comprehensively, truthfully (§ 138 I ZPO) and in a timely manner (§ 282 I ZPO).

§ 95 ZPO provides that parties shall bear the costs caused by their failure to attend a hearing or to meet a deadline, or by a hearing to be deferred or a deadline to be extended due to their negligence.<sup>285</sup> However, due to the abovementioned general cost structure, such separable costs can hardly ever be determined and are, therefore, in practice, virtually never allocated pursuant § 95 ZPO.<sup>286</sup> For similar reasons, § 96 ZPO is of barely more practical significance. Under § 96 ZPO, costs of means of challenge or defense brought to no avail may

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<sup>283</sup> Huber (note 245), § 296 para. 35.

<sup>284</sup> Fisch (note 33), at 250; Prütting (note 38), § 296 para. 15; BVerfG *Neue Juristische Wochenschrift* (NJW) 945, 946 (2000).

<sup>285</sup> Mallory Völker, "Wider die Präklusion im Familienverfahren – Ein Plädoyer für § 34 GKG", *Das Juristische Büro* (JurBüro) 567, 568 (2001) [§ 38 GKG used to be § 34 GKG].

<sup>286</sup> Andreas Schulz, in *Münchener Kommentar zur ZPO*, 4th ed. (2013), § 95 para. 1; Rolf Lackmann, in *Musielak/Voit, ZPO*, 12th ed. (2015), § 95 para. 1; Völker (note 285), at 568n28.

be imposed on the pleading party, even if she has prevailed on the merits of the case. But, again, for a decision under § 96 ZPO judges have to be able to specify the costs caused by the specific means of challenge or defense and these costs must not already be borne by that party due to the general rules.<sup>287</sup>

Historically, § 278 II ZPO, in the version effective until 1977,<sup>288</sup> provided for the court to allocate the entire costs of the lawsuit or at least part of them to a party for presenting any means of challenge or defense belatedly, even though it could have presented its material at an earlier time, and thereby delaying the proceedings. Such a provision, giving the court the opportunity to allocate a share of the overall costs to a party violating its duty to state the facts comprehensively, truthfully and in a timely manner, does no longer exist in the German Code of Civil Procedure.

Under current law, however, judges can impose a particular additional fee on either party, if, due to their fault or their lawyer's fault, a hearing had to be deferred, an additional hearing became necessary or the proceedings were delayed due to the tardy presentation of means of challenge or defense, that could have been entered at an earlier time (§ 38 GKG)<sup>289, 290</sup>. The amount of this so called *Verzögerungsgebühr* (retardation fee) is determined by the court, but is, in principle, also based on the general court fees and thereby also depends

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<sup>287</sup> Lackmann (note 286), § 96 para. 2, 3.

<sup>288</sup> *Das Gericht hat, wenn durch das nachträgliche Vorbringen eines Angriffs- oder Verteidigungsmittels die Erledigung des Rechtsstreits verzögert wird, der obsiegenden Partei, die nach freier richterlicher Überzeugung imstande war, das Angriffs- oder Verteidigungsmittel zeitiger geltend zu machen, die Prozesskosten ganz oder teilweise aufzuerlegen.* Altered by the *Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren* (BGBl. I 1976, Nr. 141, S. 3281 ff).

<sup>289</sup> *Gerichtskostengesetz* (GKG -- Court Fees Act).

<sup>290</sup> Paul Trenkle, in *Oestreich/Hellstab/Trenkle, Kommentar zum GKG und FamGKG*, (2015), § 38 para. 5; Lackmann (note 286), § 95 para. 4; Völker (note 285), at 568; Dr. Peter Jürgen Schmidt, “*Verzögerungsgebühr – Verhängung durch Urteilsausspruch und ohne vorherige Anhörung des Betroffenen*“, *Monatsschrift für Deutsches Recht* (MDR) 308, 310 (2006) [§ 38 GKG used to be § 34 GKG].

on the amount in dispute.<sup>291</sup> The fee has to be paid to the court and not to the opposing party.<sup>292</sup>

The retardation fee is a true sanction and supposed to penalize culpable conduct contrary to the procedural rules.<sup>293</sup> The fee can, therefore, not be imposed, if a party's conduct, though actually delaying proceedings, stays within the rules of procedure.<sup>294</sup> Furthermore, the party's conduct alone must have caused the delay.<sup>295</sup> If the delay is in any way also caused by the court, e.g. by not giving the proper notice under § 139 ZPO in due time, the retardation fee must not be imposed due to its character as a punitive measure.<sup>296</sup> Rather, the court is obliged to exploit all options suitable to prevent the delay caused by the tardy submissions.<sup>297</sup> And, naturally, it has to give notice to the respective party and the opportunity to respond first (§ 139 ZPO) before imposing the retardation fee, to ensure the party's right to be heard.<sup>298</sup>

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<sup>291</sup> Dr. Dr. Peter Hartmann, *Kostengesetze*, 45th ed. (2015), § 38 para. 26, 27; Trenkle (note 290), § 38 para. 19, 20.

<sup>292</sup> Prof. Dr. Walter Zimmermann, in *Binz/Dörndorfer/Petzold/Zimmermann, GKG*, 3rd ed. (2014), § 38 para. 1.

<sup>293</sup> OLG Hamm *Zeitschrift für Familienrecht* (FamRZ) 1192 (2003); OLG Naumburg OLG-NL 91 (2003); OLG Düsseldorf, *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 859, 860 (1999); Zimmermann (note 292), § 38 para. 1, 5; Trenkle (note 290), § 38 para. 1.

<sup>294</sup> OLG Hamm *Zeitschrift für Familienrecht* (FamRZ) 1192 (2003); OLG Düsseldorf *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 1348 (1996); Völker (note 285), at 573; Schmidt (note 290), at 310-11.

<sup>295</sup> Völker (note 285), at 571; Schmidt (note 290), at 311.

<sup>296</sup> OLG Düsseldorf *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 859, 860 (1999); Zimmermann (note 292), § 38 para. 7; Völker (note 285), at 571; Heiner Beckmann, "Verzögerungsgebühr gemäß § 34 GKG nach Einspruch gegen ein Versäumnisurteil", *Monatsschrift für Deutsches Recht* (MDR) 430, 432 (2004) [§ 38 GKG used to be § 34 GKG]; Schmidt (note 290), at 310.

<sup>297</sup> OLG München *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 71, 72 (2001); OLG Düsseldorf *Neue Juristische Wochenschrift Rechtsprechungs-Report* (NJW-RR) 859, 860 (1999); Zimmermann (note 292), § 38 para. 13; Hartmann (note 291), § 38 para. 18; Trenkle (note 290), § 38 para. 17; Schmidt (note 290), at 311.

See for examples: Zimmermann (note 292), § 38 para. 10; Hartmann (note 291), § 38 para. 11, 17 and Schmidt (note 290), at 311.

<sup>298</sup> Schmidt (note 290), at 309; Völker (note 285), at 573; Zimmermann (note 292), § 38 para. 12; Hartmann (note 291), § 38 para. 21; Trenkle (note 290), § 38 para. 24.



Yet, § 38 GKG has virtually no relevance in the actual work of German judges.<sup>299</sup> Most judges have never applied this rule,<sup>300</sup> maybe because the requirements for its application seem too difficult to fulfill, taking the court's prior obligations into account,<sup>301</sup> maybe because it seems to be actually widely unknown.<sup>302</sup>

### 3. Lawyers' Misconduct

As initially stated the abovementioned rules concerning the allocation of specific costs or retardation fees caused by one side's procedural misconduct are all directed at the parties, not their lawyers. Though § 38 S. 3 GKG explicitly provides that any fault of the attorney is equivalent to a fault of the party,<sup>303</sup> the retardation fee can by no means be imposed on the lawyer.<sup>304</sup> If parties feel to have been misrepresented by their counsel and therefore have to pay a retardation fee or have to bear specific costs under §§ 95, 96 ZPO, they will have to claim restitution by their lawyer outside of the proceedings.<sup>305</sup>

In German procedural law, there is no rule that allows judges to impose any kind of punitive fee on counsel.<sup>306</sup> The court has no immediate power to allocate any costs at or reprimand a lawyer within the respective lawsuit for any kind of procedural misconduct. Even §§ 177, 178 GVG, which enable judges to take measures like arrests or fines for contempt of court or to maintain the necessary order in the courtroom, do not apply to lawyers involved in

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<sup>299</sup> *Id.*, § 38 para. 6; Hartmann (note 291), § 38 para. 2.

<sup>300</sup> Zimmermann (note 292), § 38 para. 20; Lackmann (note 286), § 95 para. 4; Kurt Herget, in *Zöller, Zivilprozessordnung*, 31st ed. (2016), § 95 para. 5; Schmidt (note 290), at 312.

<sup>301</sup> Völker (note 285), at 569.

<sup>302</sup> Beckmann (note 296), at 430; Völker (note 285), at 569.

<sup>303</sup> Beckmann (note 296), at 431.

<sup>304</sup> Zimmermann (note 292), § 38 para. 16; Trenkle (note 290), § 38 para. 8; Völker (note 285), at 572.

<sup>305</sup> *Id.* at 572; Beckmann (note 296), at 431.

<sup>306</sup> Zimmermann (note 292), § 38 para. 16.

the given civil lawsuit,<sup>307</sup> since they are regarded as an independent, though equally ranking *Organ der Rechtspflege* (institution of the judiciary, officer of the court).<sup>308</sup> The provision that allowed judges to also fine a lawyer for contempt of court (§ 180 GVG)<sup>309</sup> was invalidated in 1921<sup>310</sup> without replacement.<sup>311</sup> The same goes for § 102 ZPO<sup>312</sup> that used to provide for punitive fees for lawyers for grossly negligent procedural misconduct; it was eliminated in 1964.<sup>313</sup>

A possibility to impose civil sanctions on attorneys or law firms as, for example, provided in Rule 11 of the Federal Rules of Civil Procedure does not exist in German law of civil procedure. Judges also have no discretion whatsoever to impose any other sanctions that are not specifically provided by law.

#### 4. Time and Page Limits

Last but not least, for the sake of completeness, I want to note that time limits during hearings as well as page limits for written statements are entirely unknown to the German law

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<sup>307</sup> Prof. Dr. Walter Zimmermann, in *Münchener Kommentar zur ZPO*, 4th ed. (2013), § 177 GVG para. 3, § 178 GVG para. 2.

<sup>308</sup> OLG Hamm *Juristen Zeitung* (JZ) 205 (2004); Zimmermann (note 307), § 177 GVG para. 3.

<sup>309</sup> § 180 GVG

*Das Gericht kann gegen einen bei der Verhandlung beteiligten Rechtsanwalt oder Verteidiger, der sich in der Sitzung einer Ungebühr schuldig macht, vorbehaltlich der strafgerichtlichen oder disziplinarischen Verfolgung, einer Ordnungsstrafe bis zu einhundert Mark festsetzen* (Aside from criminal or disciplinary proceedings, the court may impose an administrative penalty of up to 100 Marks on an attorney or defense lawyer involved in the trial for contempt of court).

<sup>310</sup> Art. 1 Nr. 10 des Gesetzes zur Entlastung der Gerichte v. 11.03.1921 (*Reichsgesetzblatt* (RGBl.) 1921, Nr. 29, S. 229 ff.).

<sup>311</sup> OLG Köln *Neue Juristische Wochenschrift* (NJW) 307 (1968).

<sup>312</sup> § 102 ZPO *Prozessstrafe für Verschulden* (Procedural Penalty for fault)

*Urkundsbeamte der Geschäftsstelle, gesetzliche Vertreter, Rechtsanwälte und andere Bevollmächtigte sowie Gerichtsvollzieher können durch das Prozessgericht auch von Amts wegen zur Tragung der Kosten verurteilt werden, die sie durch grobes Verschulden veranlasst haben* (The trial court can, on its own motion, sentence clerks of the court, statutory agents, lawyers and other representatives as well as marshals to bear costs caused by their gross negligence).

<sup>313</sup> *Gesetz zur Änderung von Wertgrenzen und Kostenvorschriften in der Zivilgerichtsbarkeit vom 27.11.1964* (BGBl. I 1964, Nr. 60, S. 933); Völker (note 285), at 572.

of civil procedure. With regard to the often-cited, afore explained constitutional right to be heard and its outstanding impact on the German Code of Civil Procedure as well as its practical application, such regulations or restrictions are thoroughly unimaginable for German civil judges. However, looking from an outsider's point of view, I have to admit that these measures do sometimes seem appealing.

## **Conclusion**

Both American and German civil courts aim to provide a system to resolve private disputes in an overall effective, cost saving, trustworthy and equitable manner. Yet, the ways both systems go about this goal could hardly be any more different.

Certainly, the most obvious and manifest difference between both systems is the role of the judge, with a German judge “operat(ing) the judicial machinery of his system”<sup>314</sup> like “the paterfamilias”.<sup>315</sup> Though, as I have explained earlier, the German system is not “inquisitorial”, as some describe it, civil judges undeniably play a by far more active role in civil proceedings than their American counterparts. Aside from the fact that the decision of the lawsuit always lies with them, they have to determine the necessary facts of the case and means of proof, act as examiner-in-chiefs during the taking of the evidence and, last but not least, have a broad duty of care as to the substantive conduct of the case with their obligation to give notices and advice.

Due to the fundamental differences of the American and the German Rules of Civil Procedure, it is, no doubt, interesting to compare both systems’ approaches and maybe even assess which one might be better. Some American jurists, for example, seem to look enviously at German judges’ entitlement to actively take part in the determination of the necessary facts of the case. John H. Langbein has started a lively discussion on a possible advantage of the German system over the American one in 1985.<sup>316</sup> Many arguments exchanged in this debate appear compelling, when looking at the provisions of the German

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<sup>314</sup> Gross (note 9), at 752.

<sup>315</sup> Kaplan, et al., *Civil Procedure II* (note 99), at 1472.

<sup>316</sup> Langbein, *German Advantage* (note 1), at 823.

Rules of Civil Procedure. But, as shown in this paper, there are some aspects that could give reasons to reconsider several of them.

For example, with the comprehensive reform of the German rules of civil procedure in 2002 the legislator has considerably strengthened the impact and the accountability of the first instance courts for the outcome of a civil lawsuit by restricting the first appellate level from a review de novo to a review for error to condense and expedite proceedings.<sup>317</sup> This is even more remarkable when taking into consideration that most first instance civil cases before German courts are decided by single judges; a rule that has also been further expanded in the abovementioned reform to save resources of the judiciary.<sup>318</sup> So the assumption that the entire proof process is so economical and speedy at the trial court level that the German system could afford a review de novo on appeal<sup>319</sup> does not hold up any longer. Also, the idea that the system of appellate review has been designed to deter and correct abuse of the undeniable power of German judges<sup>320</sup> might need to be reconsidered.

Moreover, as shown in detail in Part II of this paper, the law imposes a broad obligation on judges to give extensive notices and advice to the parties at all stages of the proceedings. The current practical application of § 139 ZPO, the most prominent provision concerning the courts' *Hinweispflicht*, has judges 'walk a very thin line' and sometimes even goes so far that some have started to raise the question as to who does the lawyers' work.<sup>321</sup> This, again, might shed a different light on the efficiency of civil proceedings or the assessment of the predictability of judges' behavior as well as the outcome of civil lawsuits. In the end, one could even begin to ask, if and when the actual use of § 139 ZPO and the

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<sup>317</sup> BT-Drs. 14/4722 S. 1, 94.

<sup>318</sup> See *supra* Part I 2. a); BT-Drs. 14/4722 S. 1.

<sup>319</sup> Langbein, *German Advantage* (note 1), at 857; Reitz (note 30), at 989; Halberstam (note 13), at 42.

<sup>320</sup> Langbein, *German Advantage* (note 1), at 857.

<sup>321</sup> Bohlander, *German Advantage Revisited* (note 29), at 34; Bohlander, *Störfaktor* (note 250), at 1093.

broad impact and accountability of single judges for the entire case might have an effect on the quality of civil courts' decisions, again taking into account the restriction of the appellate review.

These examples show that several of the arguments exchanged in the discussion on the supposed virtues and vices of the German Rules of Civil Procedure compared to the American system of civil procedure can be challenged due to changes in the law as well as developments in the legal practice as to how certain provisions are to be applied.

Additionally, using § 139 ZPO as an example, Part II of this paper reveals that a comparison of both systems on a mere technical level by just taking into account the individual laws and the legislator's intent -- though seeming quite clear and straightforward -- easily falls short. The wording of § 139 ZPO as well as the legislator's intent when enacting it clearly aim at concentrating and expediting proceedings and ensuring a fair trial for all parties without restricting the *Beibringungsgrundsatz* (principle of party presentation) or impairing the impartiality of the court. However, the practical use of the *Hinweispflicht* -- as explained in detail -- raises doubts as to the efficiency and reasonableness of § 139 ZPO.

The significance and indispensability of taking into consideration the actual everyday use of the law is also supported by criticism offered regarding both systems. As mentioned before, Chief Justice Burger described the American system of civil procedure in 1984 as being „too costly, too painful, too destructive, too inefficient for a truly civilized people“.<sup>322</sup> Only recently a German civil lawyer similarly commented on civil trials in Germany as being

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<sup>322</sup> Address, February 13, 1984, quoted in 52 U.S. Law Week 2471 (February 28, 1984), cited from Stiefel/Maxeiner (note 125), at 148.

“time killing, expensive and often the results could just as well be left to a game of dice.”<sup>323</sup>

Those views, more than anything, make clear that an evaluation of any system’s effectiveness, success or maybe even superiority over another should require a very close look not only at the letter of the law, but -- more than that -- a detailed appraisal of the application of it.

As a German judge, I only have an insight into the practical use of the German Code of Civil Procedure in German courtrooms. I, therefore, do not see myself in a position to legitimately determine whether the American law of civil procedure is superior to the German one or vice versa. I obviously see more of the actual problems with the practical application of the German law of civil procedure, since I do not have a comparably deep insight into the American counterpart. In view of what the American law requires and allows judges to do, I can certainly imagine that some rules of the American law of civil procedure -- like for example the option to reprimand lawyers or to set time- and page limits -- would also be beneficial to solve some common problems in German civil courts and may thus be superior. But without seeing and deeply understanding how these rules are actually applied and what benefits and detriments might result from that practice, I cannot judge on the virtues those rules actually might entail if applied in Germany.

After all, one will undoubtedly have to accept that there will never be “the best” rules of civil procedure, probably just rules of procedure that are capable of providing a certain optimum for a particular society in a particular historical era.<sup>324</sup> I am certain, though, that by taking a closer look at other countries, customs and laws one can broaden one’s insight into how differently the common problems of judicial work can be approached and solved. The

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<sup>323</sup> *Der Rechtsstreit (...) ist zeitraubend, teuer und das Ergebnis lässt sich häufig genauso gut würfeln.* Luc Weinmann, “In den trägen Fängen der Justiz”, Zeit Online, 4 February 2016 (<http://www.zeit.de/gesellschaft/zeitgeschehen/2016-02/zivilrecht-reformen/komplettansicht>).

<sup>324</sup> Stürner (note 197), at 153.

full assessments and possible evaluation of alien rules of civil procedure, however, requires a deep insight far beyond the sheer letters of the law and the legislator's intent into the actual courtroom and the common, practical use of the law. Only then one can possibly understand if the system really lives up to the expectations, since theory and practice might actually look quite different.

So beware of judging a book just by its cover.



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