

CENTRAL ISSUES OF BUSINESS LITIGATION IN WEST GERMAN CIVIL COURTS

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INTRODUCTION

For many years, U.S. companies have taken the lead in advocating that it is good external relations strategy to avoid litigation wherever possible. There are times, however, when companies must litigate. For example, a company may have to assert its rights against copy-cats, collect cash for goods sold and delivered, or simply defend itself in a suit by someone who believes he has been damaged by the company's product.

When a lawsuit arises, the company must respond quickly, and occasionally may even find itself the focus of the local press. When companies are unfamiliar with local culture and practice, they push their lawyers to behave in ways which are customary in their home jurisdiction. This can cause the business to lose good will, and be seen as a powerful multinational putting pressure on the court or smaller opponents. A business also runs the risk of losing the case on formal grounds. This is still not an uncommon occurrence under German law of proceedings.

Of course it cannot be the objective of an article to introduce the entire German Civil Proceeding Law to the reader in a few pages. A general explanation of the German Code of Civil Procedure is provided by Westerholt/Lautz.¹ Whereas Westerholt/Lautz present an analysis of the whole legal system, this article will concentrate on the following matters:

1. Important issues for the foreign company as a plaintiff or defendant in a German court;
2. Areas which are less understood than others, particularly by U.S. and U.K. companies, as a result of discrepancies between their legal systems and the German system;
3. The function of lawyers and courts in day-to-day practice, including unwritten rules of decorum; and

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1. See *BUSINESS TRANSACTIONS IN GERMANY* (B. Rüster ed. 1985).

4. Advice on crucial points of business litigation.

For example, one area of litigation in which practices differ is in the preparation of witnesses. It may be indispensable in the United States to train witnesses for the courtroom. A West German judge, however, would regard it as close to a criminal offense² if a lawyer phoned a witness to give instructions on what to say or what not to say in court. The discovery of such practices would provoke serious objections in a German court and would probably lead the judge to mistrust the witness's testimony.

Another significant peculiarity is that, today, many of the growing number of German outside lawyers acting as corporate counsel no longer practice in court on a regular basis. This is mainly because the widely known and largely-used city law firms advising most of the major clients believe it is fashionable not to be seen in court too often. Although this may be good professional conduct in general terms, it causes many younger attorneys to become highly educated specialists in only one field of law, which can sometimes create a dangerous shortage of lawyers familiar with the day-to-day court routine known to the older practitioners. Situations may arise in which one of the "old dogs" of the profession joins in with a judge he has known for decades, in order to expedite his unfinished cases. Things can quickly become difficult for the highly educated specialist, who can easily make mistakes even though he is otherwise at the top of his profession.

It is well-recognized in many countries that business litigation can only be learned in every day court practice. The existence of litigation partners in major law firms outside Germany, particularly the United States and the United Kingdom, illustrates this point. Unfortunately, in Germany there is only a limited number of experienced trial lawyers in the large firms for reasons discussed above. It is common that those advising the client do not litigate, and that those who do litigate lack the international reputation of those who advise. Therefore, clients and attorneys alike need to be aware of the most important aspects of litigating in Germany.³

2. It can be considered a criminal offense to coach a witness if damages occur. STRAFGESETZBUCH [StGB] § 263. See A. BAUMBACH, W. LAUTERBACH, J. ALBERS & P. HARTMANN, ZIVILPROZESSORDNUNG § 138/I.H. (46th ed. 1988) [hereinafter A. BAUMBACH]; § 65 Anm. 8 (14th ed. (1986)); W. ZEISS, ZIVILPROZESSRECHT 75 (6th ed. 1985).

3. This article does not seek to enable clients to act without legal advice, nor to transfer their own know-how of litigation from one country to another without accounting for the differences between legal systems.

I. COURTS

A. Jurisdiction

As a general rule, jurisdictional questions are determined by the value of the dispute and the geographical location of the defendant.⁴ Choosing the right court location is usually simple. Nevertheless, in a few less well-known parts of the ZPO (Code of Civil Procedure) there are rules of exclusive jurisdiction.⁵ These provisions can sometimes be overlooked because the general rules are so easy to apply. Generally, mistakes made at this stage are not damaging to the case but can still be costly in terms of unnecessary legal and court fees.⁶

B. Commercial Courts

For business litigation, a *Landgericht*, or provincial court, will usually be the court of first instance rather than an *Amtsgericht*, or local court, since the latter can only adjudicate civil disputes up to 5000 DM.⁷ Every *Landgericht* can form what is known as a commercial court, which consists of one fully educated judge and two local businessmen.⁸

The parties to a case decide whether or not their case is brought before a commercial court.⁹ The application to transfer the case to a commercial court must be made before discussion of the case begins in court.¹⁰ Commercial courts usually have the advantage of being more familiar with business needs than the “ordinary” civil chambers. Civil chambers, on the other hand, provide the advan-

4. The principle criteria are explained in BUSINESS TRANSACTIONS IN GERMANY, *supra* note 1, at § 5.01. International jurisdiction is established as soon as there is local jurisdiction. A. BAUMBACH, *supra* note 2, at § ÜB 12, 1, c. A court gains jurisdiction if the parties do not object against the case being brought before a German court. *Id.* at § 39 Anm. 1; H. THOMAS & H. PUTZO, ZIVILPROZESSORDNUNG § 39 Anm. 1 (15th ed. 1987); Bundesgerichtshof Neue Juristische Wochenschrift (BGH NJW) 1104 (1979).

5. A. BAUMBACH, *supra* note 2, at § 24 Anm. 2B. *See, e.g.*, ZIVILPROZESSORDNUNG [ZPO] § 24. This rule requires the release of securities on real estate at the court of the location of the real estate alone.

6. The author knows of one case where the fees reached 150,000 Deutschmarks just for the transfer of the case from one court to another.

7. *See* GERICHTSVERFASSUNGSGESETZ [GVG] § 23 Nr. 1.

8. *See* ZPO § 349; GVG § 95. A. BAUMBACH, *supra* note 2, at § 349. ZPO explains the role of the commercial court's presiding judge.

9. *See* GVG § 98. If the plaintiff has sued the defendant at the *Landgericht*, the defendant can apply for relegation to the commercial court. The defendant will do so if possible, because commercial courts are usually more familiar with commercial issues. The law itself does not offer a choice, but the procedure described above demonstrates that, in fact, a choice can be created.

10. *See* GVG § 101 I; K. SCHELLHAMMER, ZIVILPROZESS Nr. 1191 (1987).

tage of having three fully trained judges¹¹ on the bench.¹²

In order to fully understand the disadvantage of having only one fully trained legal professional present, one needs to know that at least some of the Federal States of Germany (Bundeslaender) have established the conduct of “rotating” their judges and civil servants within the legal section. This means that the chairman of the commercial court could be a former public defender, a former government official in the Ministry of Justice, or an *Amtsgericht* judge who heard criminal cases for fifteen years. Judges are reassigned without any additional training. The result can be that the legal professional on the commercial court may have absolutely no business know-how. This can undermine the purpose of applying to the court for its business expertise.

Such circumstances must be considered and investigated with the local lawyer acting in the case. It may occasionally make sense for both sides to leave the case at the *Landgericht* rather than transfer to the commercial court. If the *Landgericht* is preferred, the plaintiff should file the action there and obtain assurances from the defense attorney that he will not apply for a transfer to the commercial court.¹³

C. Court Chambers and Judges

In cases which are not heard by a commercial court, parties will be confronted with three (or more, on appeal) fully trained judges. The university and graduate education of a judge takes from seven to ten years and is virtually identical to the training for lawyers and high-ranking civil servants. Thus, law students are qualified to become judges in Germany right after finishing their legal training. All lawyers undergo the same legal training as judges, and are therefore familiar with the judges’ work. The opposite is not always true.

One of the three judges is appointed as “reporter” for each case by internal court procedures. The reporter does the preparatory work and, if necessary, renders the judgment by writing the declar-

11. An exception exists in the *Amtsgericht* where there is only one judge in charge of the case.

12. Generally, the prevailing opinion is that it is advantageous to apply to the commercial court. See BUSINESS TRANSACTIONS IN GERMANY, *supra* note 1, at § 5.02 (3).

13. This is a legitimate legal tactic because the *Landgericht* can only refer the case to the commercial court on application. GVG § 98. See A. BAUMBACH, *supra* note 2, at § 98 Anm. 11; K. SCHELLHAMMER, *supra* note 10, at Nr. 1191; B. WIECZOREK, ZIVILPROZESSORDNUNG UND NEBENGESETZE § 98 GVG Nr.A. (2d ed. 1980).

atory holding needed for appeal. Lawyers and parties should find out which judge is assigned as reporter and listen to his or her arguments at the oral hearing very carefully. According to the law, all three judges are equal. In practice, however, the reporter often determines the course of the proceedings.¹⁴

One way to learn more about the reporter's opinion of the case is to simply phone the court's secretary, find out who has been appointed and talk to that person. This is a common procedure in Germany, even though it is not considered good professional practice under all circumstances. Lawyers, however, must develop judgment on when and where this is appropriate. Provided there are valid legal points in question, and the law firm has an outstanding professional reputation, this can be an advisable procedure.

Occasionally, judges will phone one of the law firms to discuss single points in the action, if they are confident about the law firm's reputation. In interim injunction proceedings, these "oral hearings" on the telephone are held frequently, usually without the other party even knowing about it.¹⁵ Again, this is a common procedure, and is not a means of by-passing the other side, or of putting some sort of pressure upon the court.

II. RULES OF PROCEDURE

A. *The Principle of Party Presentation: No Discovery Proceedings*

As a general rule, the court's decision will be based only upon material supplied by the parties.¹⁶ This applies even to cases concerning matters as sensitive as products liability. There are no U.S.-type discovery proceedings in civil cases. It is the parties who choose what materials they bring to court. There are few exceptions to this general rule for persons involved in a lawsuit who are entitled to diplomatic protection,¹⁷ and in cases where foreign law is

14. This can go so far that the reporter prepares a *Referat* (presentation) to the court chamber on the actual case. This has become common practice at courts of appeal. The *Referat* in fact is a complete draft judgment which is handed to the other members of the bench even before the oral hearing has started.

15. The law itself doesn't mention these contacts nor does the legal literature, but this should not lead to the conclusion that they do not exist or are unimportant.

16. This is one of the basic principles of German civil proceedings law and differs from the rules governing criminal as well as administrative proceedings. See O. JAUERNIG, ZIVIL-PROZESSRECHT § 64 (21st ed. 1985); L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 78II.

17. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 78IV.

relevant.¹⁸

After a claim is presented to the court, there are various ways to proceed. On occasion, judges will indicate to the parties, orally or in writing, what they consider to be the weaknesses or strengths of the claims made.¹⁹ These comments may suggest that there are judicial doubts about whether a statement is true, a set of documents is complete, or certain commercial usages are accurately presented.

There are also rules governing the burden of proof, based on the principle that each side has to provide proof of facts favoring its case. This proof need only be provided if particular facts are both denied by the other side and considered decisive by the court.²⁰ No proof is required in a case where one party has exclusive access to a document but refuses to present it. The contents of this document can be assumed to entail what the other side claims it entails.²¹ The court will not investigate the factual background on its own.²² Once acceptable judicial evidence establishing decisive facts is offered to the court, the judge is bound to admit the evidence.²³

If there is evidence of a criminal offense, files can be handed over to the public prosecutor, and civil proceedings are suspended until the criminal investigation is complete.²⁴ But even then, the civil court is free to deviate from the criminal court's findings.²⁵ In practice, however, this rarely occurs.

It is important to remember that the required proof, be it expert

18. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 781V, § 116.

19. Both parties have a legal right to be informed by the court about crucial areas when the court believes writs are incomplete, facts need to be stated more clearly, or the formal applications are worded incorrectly. ZPO § 139; BGH NJW 2576 (1984); BGH NJW 474 (1976); Stürner, in VERFAHRUNGSGRUNDSÄTZE DES ZIVILPROZESSES UND VERFASSUNG 647, 657 (Festschrift für Baur 1985); R. STÜRNER, DIE RICHTERLICHE AUFLÄRUNG IM ZIVILPROZESS (1982); K. SCHELLHAMMER, *supra* note 10, at Nr. 472.

20. This again is one of the general principles governing the whole system of civil proceedings. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 78V; *see also* ZPO §§ 138III, 288.

21. *See* ZPO § 427; A. BAUMBACH, *supra* note 2, at § 427 Anm. 1A; H. THOMAS & H. PUTZO, *supra* note 4, at § Anm. 2.

22. H. THOMAS & H. PUTZO, *supra* note 4, at § 425 gives an exemption. The court is entitled to ask for presentation of some documents mentioned in ZPO §§ 142, 143, 425, but this rarely happens. Further, if the party in question does not present these papers, there are no penalties. H. THOMAS & H. PUTZO, *supra* note 4, at § 427 Anm. The court can, however, draw the conclusions mentioned in the text.

23. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 114; Schneider, *Die Ablehnung von Beweisunterlagen unter besonderer Berücksichtigung höchstrichterlicher Rechtsprechung*, in ZEITSCHRIFT FÜR ZIVILPROZESS 137 (1975). An exception exists for experts when the court is confident their testimony is unnecessary on grounds of its own competence. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 699.

24. ZPO § 149; A. BAUMBACH, *supra* note 2, at § 149 Anm. 2A.

25. *See* § 14 II 1 EGZPO; B. WIECZOREK, *supra* note 13, at § 14 II 1 EGZPO Nr. B.

advice or other types of evidence, can be difficult and time-consuming to locate. For this reason, plaintiffs are well advised to consult attorneys early, before irreversible decisions are made. As sound as it may be, such advice is rarely heeded and this remains one of the most common mistakes made by business litigants.

B. Proceedings in Written Form

Foreign attorneys are not the only ones who are frequently disappointed after attending an oral hearing in a German civil court. Procedurally, the only important thing to happen in court is that the attorneys read their formal proposals, which consist of the suggested operative part of the judgment.²⁶ Although nothing else is required, usually the court will informally discuss the case with both sides at the hearing.²⁷ This is a habit which has developed in daily practice without being described anywhere in the ZPO. Apart from the above, there is no formal pleading, no jury, and clients frequently do not attend the hearing in person.

The ZPO, however, clearly states that parties will plead in court, and written proceedings will only be the exception.²⁸ But in practice, most cases have already been decided when attorneys appear for the oral hearing.²⁹ Civil litigation in German court practice essentially takes place in writing.³⁰ Therefore, parties have to think about their tactics and arguments when preparing their written briefs. They should not try to leave arguments for the oral hearing which are complicated, hard to explain, or based on a legal theory which might not be immediately understood by the judges.³¹ A judge's legal education trains him to compare the arguments in the written briefs to determine the few crucial points which need evi-

26. In practice this may be done by referring to the date of the delivery of a judgment, if it is not issued right away. Although it is possible a judgment will be issued immediately, it does not occur too often.

27. A complete guide to the ZPO following the steps of the proceedings is given in B. SCHELLHAMMER, *supra* note 10; PUKALL, *DER ZIVILPROZESS IN DER GERICHTLICHEN PRAXIS* (3d ed. 1987) (dealing more fully with all possible formalities).

28. A. BAUMBACH, *supra* note 2, at § 128 Anm. 2; H. THOMAS & H. PUTZO, *supra* note 4 at § 128 Anm. I. This statement does not refer to formal written proceedings.

29. In courts of appeal, judges often hold a draft judgement in their hands when entering the court room. *See supra* note 14.

30. This point is not completely clear in § 5.05 of BUSINESS TRANSACTIONS IN GERMANY. *See BUSINESS TRANSACTIONS IN GERMANY, supra* note 1, at § 5.05. In this section it is stated that "for the preparation of the hearing, the court may request the submission of documents."

31. Although this seems to be a matter of common sense rather than legal theory, it deserves to be said since mistakes are frequent.

dence or proof.³² The result of this highly developed and sophisticated way of analyzing written briefs is that frequently, the case can be over before the oral hearing has even started.

It is essential to bear this in mind when preparing written briefs. The court's opinion will often be near final by the time of the oral hearing, and the attorneys will have a difficult time trying to change the judge's mind. Judges may not like to reveal that they have changed their opinion on the law at such an advanced stage of the proceeding merely because of a lawyer's oral argument. Attorneys are well advised to try to win their case through their briefs, where the judge has time to consider a written legal argument privately and in great detail. As a psychological tactic, a good trial lawyer can try to keep something in reserve for the oral hearing. Despite the warnings above, sometimes the new and surprising argument will win. However, facts presented at the oral hearing which were not announced to the court in advance can be excluded by the court unless they have arisen only recently.³³ The new argument presented at the hearing must therefore be easily explainable, striking, and, if it concerns evidence, very recent.

For example, if the case involves a complicated technical process, an attorney will submit an equally complicated and technical written explanation of the process to the court prior to the hearing. This can be supported by bringing part of the device to the oral hearing and putting it on the judges' bench. If it helps demonstrate an important technical aspect, it may well persuade the judges.

In most cases there may be only one hearing, which often lasts less than one hour and rarely more than half a day. Therefore, whatever can be said in writing should be said in writing, and submitted to the court well in advance of the hearing.³⁴

C. No Class Actions Or Triple Damages

Class actions, as known in U.S. courts, do not exist under German law. There are provisions in German law allowing trade or consumer associations to act on their own behalf to protect interests they have to look after under their own statutes.³⁵ These actions,

32. The system is described in PUKALL, *supra* note 27, at Nr. 503; K. SCHELLHAMMER, DIE ARBEITSMETHODE DES ZIVILRICHTERS 198 (1984). The preparation of writs is discussed *infra* notes 58-67 and accompanying text.

33. ZPO §§ 282, 296, 527, 528.

34. There are a few exceptions, e.g., when a possible defense would be preempted. See *infra* text accompanying note 43.

35. See AGBG § 13, UWG § 13.

however, are rare, and most plaintiffs act solely on their own behalf in court.³⁶

Additionally, triple damages or similar excess damages do not exist. A party suffering damages from another party's conduct needs to outline and prove in detail what damages have occurred, and what amount is needed for a concrete remedy. When there is no dispute about the infringing act itself, and liability is clear, leaving the amount of damages as the only issue in dispute can turn out to be a considerable difficulty, e.g., when nonphysical damages, like loss of business, have to be marked with numbers.³⁷

III. ATTORNEYS

A. Structure of German Law Firms

Various reasons have prevented German law firms from growing at the rate at which American, British, and even Dutch law firms have grown. Professional rules in Germany prevent virtually any form of advertising by the legal profession. The rules also require, at least as a general principle, that the name of a law firm be changed every time a partner who is named in the firm's title leaves the firm or dies. In the past this prevented firms from establishing a well-known name. The restrictions on advertising also prevent lawyers and firms who specialize in particular fields of law from publicizing their specialty, except in a very few cases.

Until a very recent decision by the European Court, foreign law firms were virtually barred from admission to the local bar.³⁸ Foreign firms that established a branch in Germany could not use their internationally recognized names. Instead, they were required to "hide" behind local attorneys and their firms.³⁹ Even in major cities, law firms with only ten partners are regarded as "big," and there are hardly more than ten firms of twenty partners or more throughout the country. To the best of the author's knowledge, there is no law firm in Germany with over thirty partners. The

36. There are exceptions when identical or near identical facts are concerned. ZPO §§ 59, 60.

37. ZPO § 254 tries to help in these situations by allowing the grounds of the case to be handled first, and the specific amount of money is dealt with at a later stage in the proceedings. See A. BAUMBACH, *supra* note 2, at § 254 Anm. 1.

38. See *infra* notes 41-45 and accompanying text. The European Court on February 26, 1988 decided that the Federal Republic of Germany has violated the EEC Treaty by those provisions. See NJW 887 (1988).

39. There are firms which use different letterheads for their national and foreign clients as a result of this peculiar legal requirement.

number of associated lawyers in large firms is usually lower than, or equal to, that of the number of partners. This gives a rough idea of what to expect from most of the legal profession in terms of size of firms and specialization.

Not all of the firms regarded as large specialize in litigation outside the particular areas of unfair competition⁴⁰ and antitrust law. Court cases in commercial matters are often handled by smaller firms well known to the courts and local clients. These firms, however, are often not very experienced in dealing with international business and foreign clients.

B. Principle of Local Admission to the Bar and “Correspondence-Lawyers” Practice

All German lawyers have to be admitted⁴¹ to the *Landgericht* (local court) to act in civil cases. Their court practice is restricted to the geographical borders of the particular *Landgericht*.⁴² It is therefore theoretically impossible for a Hamburg lawyer to act in a Munich court case. Practice differs from theory though, mainly because business often demands more flexibility, and law firms are reluctant to pass their clients on to others.

Many companies prefer to use their own counsel as their trial lawyer, because they are familiar with the business. This has led to the practice in which the company’s non-resident law firm prepares the writs for the court on “neutral” paper, or paper which does not show the law firm’s name on the letterhead. The resident “correspondent” lawyer receives the papers from the non-resident firm, usually with a few written instructions. The correspondent stamps the front page with his own firm’s letterhead, signs the documents, and submits them to the local court. The firms usually share fees. The total cost of the action will be increased by this procedure, and in the event of success, the cost increase will most likely not be reimbursed by the losing party. Nevertheless, this is seen as an ideal way of combining the resident lawyer’s knowledge of the local court and judges with the business know-how of the non-resident law firm who regularly advises the client. And, the use of correspondence lawyers is perfectly legal and acceptable.

40. See *infra* notes 46-47 and accompanying text; *infra* notes 98-101 and accompanying text.

41. ZPO § 78I.

42. As a general rule, a lawyer is only admitted to one *Landgericht*. BUNDESRECHT-SANWALTSORDNUNG (Law on the Legal Profession) §§ 18, 24.

There are disadvantages, however. The practice is well known to the courts. Any half-experienced judge will recognize a “stamped” submission right away. Both local attorneys and judges will then know that a non-resident law firm, which may not even be disclosed to all parties concerned, in fact bears full responsibility for the contents of submissions to the court. The main risk for the client is the acting lawyer’s lack of knowledge about the background of the case. The parties before the court have a shared understanding that some other lawyer’s reputation is really at stake.

This sometimes leads to a situation where the local firm’s youngest associate presents the papers to the court and hopes there are no questions. If there are any, he can only declare himself unable to explain what the court seeks because his own knowledge is confined to the same papers which the court received.

For these reasons, a few general and practical rules should be kept in mind by counsel and outside advisers in cases in which “correspondence” lawyers are involved:

a) all written briefs (writs) need to be highly detailed, and attempt to preempt possible defenses without raising them prematurely;⁴³

b) the writs must be self-explanatory and not dependent upon anything that may or may not happen at the oral hearing;⁴⁴

c) the client and the non-resident law firm should not rely heavily upon the local lawyer’s abilities at the oral hearing;

d) the non-resident attorney who prepared the writs should be present at the oral hearing, even though he is not admitted to the local court;

e) if the case is complicated, or the non-resident lawyer cannot be present at the hearing, it is helpful if the non-resident law firm informs the court of its interests in order to at least be available by phone for the judge preparing the case.⁴⁵

Usually, judges do not really care whether the lawyer who explains background information has been admitted to the local court or not, as long as there is a local attorney involved to comply with formalities. Quite the contrary, judges often appreciate the attendance of both law firms working on the case, as this can help provide necessary information. The attendance of the lawyer who is in

43. It is understood that this is difficult to achieve, but it is also exactly what good German litigation lawyers really get paid for.

44. See *supra* notes 28-34 and accompanying text.

45. See *supra* note 15 and accompanying text.

charge of company's regular affairs makes it much easier for the judge to reach a settlement and thereby close the case. Settlement is facilitated because the residential lawyer alone will (hopefully!) never agree to an unconditional settlement proposed by the court at the oral hearing without first contacting the non-resident attorney. This naturally requires time and effort which can be saved if the lawyer who has set up the action or defense is present. From the judge's point of view, the presence of the non-resident attorney increases the chances for a fast and satisfactory end to proceedings.

C. *Unfair Competition and Trademark Practice*

Unfair competition law⁴⁶ in Germany appears to many foreign lawyers to be a highly sophisticated work of legalistic art. Common law lawyers often regard this field of law as unintelligible, but it is enjoyed and strongly defended by the German specialists who know how to deal with it. This may be an overstatement, but it reflects the feelings of lawyers who work in this area of law.

Unfair competition proceedings are quite different from "ordinary" civil cases. The law itself is mainly case-law and it is extremely complicated.⁴⁷ Unfair competition law is a field dominated by an exclusive group of specialists who are well known to the courts. This group is as "exclusive" as the small group of anti-trust experts. The court proceedings followed will almost always be "interim-injunction" proceedings.⁴⁸

Trademarks in Germany have traditionally been handled by patent attorneys or lawyers associated with patent firms. To appear in a civil court for trademark litigation, the attorney in charge has to be a member of the bar⁴⁹ and needs to be admitted to practice before the particular court. In unfair competition law cases where brand-name goods have been imitated by copy-cats, plaintiffs may base their arguments on trademark infringement as well as on unfair competition. In these cases, a client should be represented at the oral hearing by both a general business lawyer and a patent specialist.

Trademark law is not part of a judge's regular training at Ger-

46. See also *infra* notes 98-101 and accompanying text.

47. For an excellent overview, see Schmeding, in *BUSINESS TRANSACTIONS IN GERMANY*, *supra* note 1, at chap. 37.

48. See *infra* notes 98-116 and accompanying text.

49. Exemptions exist in the *Amtsgericht* (lower instance court) where parties do not need attorney representation at all.

man law schools, and the lack of understanding can be enormous. For this reason, written briefs to the court should outline the trademark argument in a fairly detailed manner. A patent attorney should utilize his expertise in explaining the more technical aspects of trademark registration, both in writing and at the hearing.

D. Costs⁵⁰

In the German commercial court system, attorneys' fees are regulated by federal law, as outlined in the Law on Attorneys' Fees (BRAGO). Generally speaking, fees are determined according to:

- A) the value of the matter in dispute;
- B) what stage of the proceedings the case has reached.

The various stages include:

- a) the commencement of an action;⁵¹
- b) the formal reading of the parties' applications, or discussion of the case at the oral hearing;⁵²
- c) the court's judgment or the parties' settlement.⁵³

There are lengthy legal commentaries⁵⁴ available to aid in determining the accurate amount in dispute and answer other questions which arise. Basically, the attorney either determines the amount in dispute on his own, or he asks for the relevant determination by court decision. He is then entitled to what is called "one full attorney's fee" for every step of the proceedings described above. Since the total amount of the "full attorney's fee" increases with the value in dispute, fees can be very high or low depending on the law firm's or judge's opinion of the amount in dispute.

If there are important questions at stake and the attorney achieves an early settlement, it can be very expensive for the client, while the law firm expends little effort. On the other hand, if the disputed amount is lower, but important problems of a more fundamental interest are under scrutiny, the legal fees may not even cover the law firm's administrative costs.

50. For details on litigation costs, see BUSINESS TRANSACTIONS IN GERMANY, *supra* note 1, at § 5.04. Approximate figures are quoted in § 5 app. 4B, C. For the sake of brevity, this article is confined to a few basic remarks on what in fact has become a highly complicated area of law.

51. LAW ON ATTORNEY'S FEES [BRAGO] § 31 I 1.

52. BRAGO § 31 I 2, 4.

53. BRAGO § 23.

54. See, e.g., HILLACH-ROHS, HANDBUCH DES STREITWERTS, (7th ed. 1988); E. SCHNEIDER, STREITWERT-KOMMENTAR (7th ed. 1986); A. BAUMBACH, *supra* note 2, at § 3 Anm.; STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 3 Rdn 6 (20th ed. 1984); B. WIECZOREK, *supra* note 13, at § 3 Nr. A.

For these reasons, the entire system has been found to be unsatisfactory for a long time, particularly by foreign clients. Companies prefer an accurate estimate of what the lawyers' fees might be. Many of the major law firms have, in principle, adopted the American method of calculation, which bases fees on the hours spent on the case. Despite some unresolved questions regarding Germany's professional law,⁵⁵ this seems to be a much better way to find a fair remuneration for the law firm. The law requires a written contract⁵⁶ to validate such per-hour fee arrangements. When the client is a multinational corporation, the law firm often does not ask for such agreements, since the client will be familiar with the calculation method, and there is no thought of suing a permanent client for fees outstanding.

Companies may find law firms somewhat reluctant to go into detail on the amount of the total fee per hour. It is also uncommon for the firm to distinguish between fees charged for the attorney's time and the legal assistant's time.

IV. GENERAL REMARKS ON PRACTICAL ASPECTS OF PROCEEDINGS

A. Atmosphere and Professional Conduct in Court

It has already been pointed out that most oral hearings will be brief. Busy courts in major cities may hear ten or twenty minor cases in one day. The atmosphere in commercial courts is dominated by the accuracy and the friendliness of the business community.

Commercial court judges⁵⁷ like to be seen as knowledgeable in business matters. Many of them value and appreciate what can be called *gute Kaufmannschaft*, or good and fair commercial conduct. They usually get to know companies under their jurisdiction after a short period of time and know the background of the problems that may arise.

The judges also like parties and their attorneys to understand they are in a civil court, not a criminal investigation, and to act

55. Fees based on success or *quota litis* are still not tolerated. STANDESRICHTLINIEN (Professional Code) § 52; LINGENBERG & HUMMEL, KOMMENTAR ZU DEN GRUNDSÄTZEN DES ANWALTlichen STANDESRECHTS § 52 1.

56. BRAGO § 3.

57. The panel usually consists of one trained legal professional and two local business people. See *supra* notes 7-13 and accompanying text.

accordingly. There will be no jury, no formal pleas, and no attorneys shouting in the courtroom, asking God's help to obtain justice for the misunderstood innocent client. This kind of inappropriate drama does occasionally arise when trial lawyers, more experienced in criminal courts, appear at the commercial court. Lawyers whose clients are accustomed to other judicial systems may find it desirable to argue in a way designed to please the client rather than the court. Nevertheless, everyone in the court must understand that what happens there is a business event and not a murder case.

B. Preparation of Writs

The quality of writs submitted to the court is crucial. It determines success or failure. The most important role attorneys play in a civil case is preparing these papers. Although it would be difficult to describe in detail how writs should be organized at all possible stages of the proceedings, a few general remarks are appropriate.

1. Conclusiveness of Writs

Writs to the court are obviously submitted by the plaintiff first. The defendants will answer, the plaintiff will reply, and so on. There is no strict limitation on the number of writs that each side can prepare. All submissions must be legally conclusive.⁵⁸ This means that, assuming the facts claimed are decisive to the case and can be proved, the party submitting the writ would succeed under the law.

Conclusiveness is one of the key words used throughout civil proceedings. Only when a party's writ is conclusive will the judge allow the party to substantiate the evidence, e.g., with testimony or an expert's opinion. If a party's submission is found to be inconclusive and if no remedy can be offered by lawyers, the court can, and often will, decide the case without further discussion. In the worst case for the plaintiff, the judges will find the writ inconclusive immediately after delivery, which can result in dismissal before the other side has formed a defense.⁵⁹ It is important to know how the theory works in order to understand proceedings, especially because

58. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 98, Anm. II 2; O. JAUERNIG, *supra* note 16, at Nr. 25 V, 38 II 4, 66 III 2, IV 3; K. SCHELLHAMMER, *supra* note 10 at Nr. 147; W. ZEISS, *supra* note 2, at 27 III, 52 II 1, 57 I; BGH NJW 2210 (1967); BGH VersR 959 (1976).

59. The court needs to point out the inconclusiveness to the party concerned. ZPO § 139; BGH NJW 2576 (1984); BGH NJW 474 (1976).

a judge is trained to compare the conclusiveness of writs.

2. *Tactical Questions*

For the reasons given above, writs need to be as thorough as possible. Each party must carefully consider its desire to avoid revealing facts to the court which could be harmful to their legal or factual position. It can be a criminal offense to mislead the court with false statements if someone suffers damages from the inaccuracy. Nevertheless, neither party is urged to say things which may harm their position.

For the sake of credibility, and the law firm's reputation, writs must give an accurate picture of the case, within certain limits. This can be achieved by carefully wording what needs to be said in a way which does not emphasize the weak points. The crucial consideration is not to provoke a defense prematurely, and at the same time avoid making statements that would be regarded as false. If one party suddenly presents documents that the other side has been told do not exist, the credibility of the first party is irreparably damaged.

There may be occasions in which stressing a weakness can help a case, and the attorney may want to be first to do so, if it is foreseeable that the problem will come up in due course anyway.

3. *Length and Style of Briefs*

This will vary depending on personal preference and local pattern. Some lawyers seem to believe that the higher the value in dispute (and therefore, the higher the legal fees), the longer the writs should be. Judges may in fact be impressed by the sheer amount of paper they find on their desks, even if they are confused by the contents. It is disputable, however, whether this is truly in the parties' best interest. A well-educated judge will sift through the writs' contents to arrive at the conclusive arguments anyway.⁶⁰

4. *Evidence and Proof*

Whenever one party wants to deny a fact essential to the other party's case, it must be brought to the court's attention immediately. The denial must be presented formally, in a writ, or during

60. The author suggests that briefs should be clear and to the point. The weight of the legal argument does not increase with the number of pages. A lawyer will not gain a good reputation by writing long-winded, yet unconvincing briefs.

the oral hearing. If voiced during the hearing, it is essential that the denial be recorded. Otherwise the original fact is assumed to be true.

It is not appropriate practice to flatly object to everything the other side says. Necessary objections must be recorded on the record by the court's clerk. Most of what is said will be relevant only if it is contained in the record afterwards. In the event that disputes over relevant facts are held informally, the attorneys will not know which facts the court will regard as true until the court order is complete.⁶¹

It is self-evident that facts in dispute must be proved⁶² or supported with evidence⁶³ in interim injunction proceedings. The party furnishing proof must provide it by suitable and receivable means in their writs. This, again, requires time and effort if mistakes are to be avoided.

5. *Delivery of Writs at the Oral Hearing*

It is common practice in civil courts for writs to be presented by the parties at the oral hearing. This practice denies the court and the opponent the chance to examine the contents of the writs in advance. It is recommended that parties avoid this practice for the following reasons:

a. Legally, writs which are not presented on time can be excluded from consideration.⁶⁴ In practice, however, appeals court decisions will allow late submissions,⁶⁵ so no one should rely on another's argument being excluded for lateness. Most lower-instance courts do not get upset by delays.

b. When briefs are late, judges are forced to prepare their posi-

61. Generally, the court is obliged to alert the parties when an action is found inconclusive, but these hints can be very general. Sometimes the court decides only at the last minute, when it is too late to respond to its comments.

62. Full proof is required in all proceedings, except interim injunctions proceedings, and can be established through the use of witnesses, direct inspection, documents, and expert witnesses. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 113 IV.

63. See ZPO §§ 920, 936, 294; A. BAUMBACH, *supra* note 2, at § 294 Anm. 1. The practical difference between providing proof or evidence is that evidence can be provided by affidavits, which can even be signed by corporate directors. A. BAUMBACH, *supra* note 2, at § 294 Anm. 2; OLG Kln FamRZ 83, 711. In addition, all evidence must be immediately available. ZPO § 294 II.

64. ZPO §§ 296, 615; A. BAUMBACH, *supra* note 2, at § 296 Anm. 1B; H. THOMAS & H. PUTZO, *supra* note 4, at § 296 Anm. 2.

65. A detailed overview on the substantial number of higher court and Supreme Court decisions is given in Deubner, *Die Zurückweisung verspäteten Vorbringens als Rechtsmissbrauch*, NJW 465 (1987); BGH NJW 502 (1987).

tions without considering the contents of the writ presented at the oral hearing. A quick glance over the contents is unlikely to convince them to change a carefully prepared opinion.

c. When a previously undisclosed writ is presented at the oral hearing, the other side gains the opportunity to comment in writing on that writ, within a time limit set by the court.⁶⁶ Frequently this reply brief will contain far more than just comments on the newly submitted writ. Although presentation of new issues is technically not allowed, the introduction of new and extensive legal interpretation cannot be prevented. The last writ submitted to the court can be of considerable tactical importance, because it cannot be properly addressed by the other side. The party who is able to give these final comments should take advantage of the opportunity whenever possible.

Delivering writs at the oral hearing should be avoided wherever possible. If an opponent presents a writ at the hearing, a lawyer should avoid commenting in court. Time is generally too short to make an appropriate statement, and the lawyer should apply for a judicial grant of time to prepare a response. If the opponent presents numerous new claims, the attorney should request the hearing be terminated and postponed until a later date.

If time is short, an alternative is to request a brief interruption of the hearing already underway. Clients and attorneys must remember that if no formal response is given to the new writ, all factual statements it contains will be assumed true by the court.

It is usually deemed professional negligence if neither a judicial time grant nor a brief interruption is requested. It is certainly a serious mistake, and may in fact cause irreparable damage for procedural reasons.

An objection should always be made to undue delay created by the party presenting a writ at the hearing. In practice such objections rarely succeed, even though the law appears to support them.⁶⁷ But occasionally they will succeed, and the attempt should always be made, if only to maintain court decorum.

66. ZPO § 283; H. THOMAS & H. PUTZO, *supra* note 4, at § 283 Anm.1.

67. The reasons for this unfortunate development are outlined in Deubner, *Zurückweisung verspäteten Vorbringens als Rechtsmissbrauch*, NJW 465, 466 (1987).

C. *Length of Procedure*

Oral hearings for interim injunction proceedings are usually scheduled within a few days or weeks. In normal civil cases, it will be a few months before the oral hearing takes place, and usually a few more weeks before the court presents its decision. Appeals can take years. These time limits are rough estimates of what to expect. In practice, the duration of proceedings will vary considerably from court to court.

D. *Judicial Deadlines and Indications*

Civil litigation is governed by the principle of party prosecution. In civil cases, court guidance during proceedings is limited to issuing judicial deadlines, holding the oral hearing, and offering occasional hints to concerned parties in writing or over the phone.⁶⁸

The whole procedure is dominated by court deadlines. As soon as the complaint is served on the defendant, the judge will set a deadline for the answer, usually two or three weeks. When the defendant's response arrives, a new deadline is set, and so on. When necessary, the judge will grant an extension, particularly when foreign parties are involved.

If a party fails to answer within the time limit given, they risk losing the case. If briefs are even a few days late, their factual statements may be disregarded. In practice, however, penalties are usually limited to frosty remarks from the judge.

Nevertheless, a judge will take note of a law firm that regularly misses deadlines. A good firm will either honor the deadlines, or at least request an extension. If an explanation is offered, a judge will be more understanding, and usually grant an extension whenever possible.

V. STAGES OF PROCEEDINGS

A. *In-Court and Out-of-Court Settlements*

1. *Judicial Attitudes*

Settlements are the amicable way of ending a case. They are favored by judges because they do not have to render a judgment and

68. The normal development of a civil case and all its formalities is described in PUKALL, *supra* note 27, at Nr. 1; L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 71; K. SCHELLHAMMER, *supra* note 10, at Nr. 115. Basic principles of proceedings are presented in a concise format by W. ZEISS, *supra* note 2, at 63.

give detailed written reasons for granting or dismissing the action.

A judge's career depends, among other things, on the number of judgments that are reversed on appeal. The president of the trial court is usually the first one to see decisions handed back by an appeals court, and will take note of each reversal. This problem is avoided by settlement, as there are no appeals on settlements.

Lawyers receive nearly the same fee for settlements as for trial proceedings.⁶⁹ At the oral hearing, the judge often begins by asking whether there is a chance for an amicable settlement.⁷⁰ Judges often propose detailed settlements themselves, pointing out that by the end of the day the judgment may look quite similar. Frustrated lawyers are all too familiar with incidents where a judge turns to the plaintiffs to explain why they might lose, and then explains to the defendants why their chances for success are also poor. After that, the judge proposes the settlement which, in his opinion, would be the likely outcome of the proceedings anyway.

2. *Private Settlements Between the Parties*

There are occasions when the two parties settle privately without the assistance of their lawyers or the court. This is usually done to save court and lawyers' fees. These settlements are not legally enforceable on their own, as are in-court settlements.⁷¹ A party claiming violation of a private settlement must bring a new action and start all over again. This practice is, therefore, not advisable, despite the slight cost advantage.

3. *Conditional Settlements*

For tactical reasons, a lawyer should not always resist the judge's settlement proposal. At the very least, the lawyer should demonstrate good business conduct by considering an amicable solution. Of course, clients may urgently need time to talk with third parties relevant to the case, or lawyers may want to discuss the situation with their clients, or a party may need more time to prepare evidence.

In situations like this, it may be advisable for a lawyer to propose

69. BRAGO § 23 I.

70. ZPO § 137 states that the oral hearing begins with the reading of both applications. The reality is well described in PUKALL, *supra* note 27, at Nr. 113. The ZPO states that judges should attempt to achieve an amicable settlement. ZPO § 279I 1.

71. The reason for this is that ZPO § 794 I 1 only mentions the in-court settlement as a basis for an execution of the case. A. BAUMBACH, *supra* note 2, at § 794 Anm. 2.

a so-called "conditional settlement."⁷² This refers to a formal court settlement which becomes final within an agreed period of time (normally a few weeks), unless one side formally objects in writing to the court's notice. The right of objection may be granted to both parties, or reserved for only one. Foreign parties can usually obtain a longer period of time to consider the conditional settlement.

It is not uncommon for lawyers to present an objection to the settlement a few weeks later. Courts are accustomed to this, and in many cases will not even inquire why the party objects.

It is absolutely crucial to observe the deadline given in a conditional settlement. It becomes final if the objection fails to reach the court on time, for whatever reason. In almost every other procedural stage there is recourse available when deadlines are missed for reasons of force majeure, or when no one in particular is responsible for the failure.⁷³ It is a peculiar aspect of German procedural law that there is no possibility of reinstatement when the objection to a conditional settlement is late.⁷⁴

B. Securities to be Furnished by Non-Resident Plaintiffs

Under ZPO section 110, non-German plaintiffs have to furnish security for the cost of proceedings in Germany.⁷⁵ This requirement, however, does not apply to foreign plaintiffs who are nationals of countries where German firms and citizens are not required to provide securities for legal proceedings.⁷⁶ It also does not apply when an international treaty provides an exemption.⁷⁷ The need to provide security can create considerable difficulty and delay if the plaintiff is a company with no bank account in Germany, or if the bank used by the company does not have a branch in Germany.

Plaintiffs from the People's Republic of China, South Korea, Panama, and many smaller countries need to furnish securities.⁷⁸ In

72. L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 132 III 2i.

73. The usual action is re-establishment of the deadline *Wiedereinsetzung in den vorigen Stand*. ZPO § 233. A. BAUMBACH, *supra* note 2, at §§ 230 Anm. 1, 233.

74. This has been criticized by Säcker, NJW 708 (1968), but remains firm under the jurisdiction of the BGH and other appeals courts. BGH 61, 395; NJW 1752 (1980); BAG 87, 1876.

75. A. BAUMBACH, *supra* note 2, at § 110 Anm. 2; H. THOMAS & H. PUTZO, *supra* note 4, at § 110 Anm. 2; B. WIECZOREK, *supra* note 13, at § 110 Nr. a. I.

76. ZPO § 119 II 1.

77. The most important example is the Hague Convention. A. BAUMBACH, *supra* note 2, at Anh. § 110 Anm. 2.

78. A complete list is found in A. BAUMBACH, *supra* note 2, at Anh. 110/3; B. WIECZOREK, *supra* note 13, at § 110 Nr. D; W. DANIELZIK, *SICHERHEITSLISTUNG FÜR DIE PROZESSKOSTEN* (1976).

general, no security is required from plaintiffs in EEC and European countries, Canada, or Singapore (with restrictions). As far as U.S. companies are concerned, there is no general rule as to who must provide securities. Therefore, the situation differs from one U.S. state to another.⁷⁹ The law of the U.S. state in which the company is based may dictate otherwise. No security is needed if the plaintiff is living in, or has a business branch in, Germany.⁸⁰

C. *Default of Appearance Proceedings*

If one side fails to attend the oral hearing without any excuse, the court may render a decision against this party. This will occur as soon as the attending party requests the decision, provided its briefs are conclusive.⁸¹

The absent party can object to the decision within two weeks without giving any explicit reason.⁸² Proceedings will begin again where they ended. Apart from marginal financial costs, the judgment in default is not permanently damaging for the unattending party. If the same party fails to appear twice in successive hearings, leading to two successive default decisions, the right of objection is lost.⁸³ An appeal can only be granted if the party can show that the court's interpretation of the party's failure to attend is technically inappropriate.⁸⁴ This will certainly be a difficult task.

The rules of professional conduct⁸⁵ prevent a lawyer from applying for a default judgment when the other side is represented by a lawyer admitted to the court in question, and this lawyer fails to

79. Schütze, *Zur Verbürgung der Gegenseitigkeit bei der Ausländer - Sicherheit*, JZ 386 (1983). Generally, there is no requirement to provide security as long as mutuality is seen to be granted between the U.S. state and the Federal Republic of Germany, A. BAUMBACH, *supra* note 2, at § 110 Anm. 3. The legal positions of all the American states are discussed in detail in B. WIECZOREK, *supra* note 13, at § 110D. Claims that are assigned to a German company without financial means are discussed in BGH IPRax 221 (1985).

80. BGH DB 802 (1982), does not require a security from a New York company, provided there is a branch or other domiciliary in Germany, or the company owns real estate in Germany.

81. ZPO §§ 330, 331. Default judgments can be rendered at different stages of the proceedings which cannot be detailed here. BUSINESS TRANSACTIONS IN GERMANY § 5.05 is extremely brief on this subject, therefore the principles are outlined here. See BUSINESS TRANSACTIONS IN GERMANY, *supra* note 1, at § 5.05.

82. ZPO §§ 338, 339. The formalities required are outlined in ZPO § 340.

83. ZPO §§ 340, 345; HAYER, *DAS TECHNISCH ZWEITE VERSÄUMNISURTEIL* (1980).

84. ZPO § 513 II; H. THOMAS & H. PUTZO, *supra* note 4, at 513 Amn.2; V. ROSENBERG & K. SCHWAB, *supra* note 2, at § g.136.

85. STANDESRICHTLINIEN (Professional Code) § 23. The rules apply only if both attorneys are admitted to the same court. In business litigation this ordinarily is the case, since both sides are required to appoint a local lawyer.

appear in court.⁸⁶ The application for default must be made by a party. An exception exists when a lawyer, expecting the absence of the opponent's representative, gives a written warning to that attorney in advance.⁸⁷ In many communities, lawyers who stand in disfavor among their local colleagues receive this warning letter as a routine matter.

In some situations, it may be in the client's interest for his lawyer to miss the hearing, requiring a so-called "first" decision in default, where an objection is still permissible. For example, if the client's local defense counsel receives the documents needed for the defense only a short time before the hearing, or not at all, it would be unwise for him to attend the hearing. Under these circumstances, the local counsel should indicate to the court that he will not attend the hearing. At the same time, the law firm should inform the court in writing that they will act in defense of the case. The opposition's lawyer then can not apply for a default decision on the grounds of professional misconduct.

This strategy should be reserved for real emergencies. All parties, including the court, need to be informed that a lawyer will not attend so they are not kept waiting. Given proper notice, the judge is more likely to respond with understanding and issue a date for a second oral hearing on relatively short notice.

An alternative strategy in the event of insufficient preparation is to attend, but not contribute to the hearing. This is done by formally declining to read the party's application to the court. This will eventually lead to the same results described above, and a new hearing will be scheduled. Such behavior, however, may be legitimately objected to by the court and the opposition as it is not explicitly provided for in the law and is not always just and fair. If this practice is to be tolerated, it must be used sparingly, with careful explanations being delivered to all sides. If done properly, all sides will usually agree to a new court session.

Another tactic to gain time is simply to keep quiet until the day the oral hearing comes. By deliberately failing to appear, the firm having difficulties will most likely prompt the opposition to apply for a default judgment. Immediately afterward, the law firm can object to the decision, and request proceedings to start all over again. The only disadvantage of this alternative is its cost. The ad-

86. For details on this complex legal position, see LINGENBERG & HUMMEL, KOMMENTAR ZU DEN GRUNDZÜGEN DES ANWALTlichen STANDESRECHTS, 23 RdNr.1.

87. STANDESRICHTLINIEN § 23 I.

vantage is that the lawyer in charge avoids the embarrassment of being caught unprepared.

Forcing a default judgment can also be advantageous because an attorney can learn if the court finds the other side's argument conclusive. If the court fails to find it conclusive, the case fails without any cost or effort invested in preparing the case. Yet, some judges will render a default judgment without considering the conclusiveness of the plaintiff's argument. This is the main risk of this strategy. Once a judge grants a default decision, he implicitly indicates the action is conclusive, whether he has expressly considered it or not. It will be difficult for the other side to change this opinion.

One last alternative available to a defendant's attorney to gain time is to plead for a three-month suspension of proceedings if there has already been an oral hearing in the same case.⁸⁸ This is not a well known technique, but if used, it can obtain a substantial delay. It does involve a risk, that the court could decide the case "as it lies." This situation almost never happens,⁸⁹ as most parties never request the suspension. If the parties simply fail to act in their cases, the judge will usually send the files to the filing room and the case is terminated.

D. Statement of Termination by Intervening Facts

The plaintiff, or plaintiff and defendant jointly, can present a declaration of termination by intervening facts of action which will terminate the case. This occurs, for example, when the defendant pays the amount in dispute or agrees to undertake a mutually suitable settlement. The plaintiff's statement ends the case, and the court will now only have jurisdiction to decide who will bear the cost of litigation.⁹⁰

A statement of termination of the case should not be filed until the plaintiff has received the funds, and all checks have cleared. With the dramatic increase of lawyers in Germany, professional

88. ZPO §§ 251 a III, 251; STANDESRICHTLINIEN § 23; A. BAUMBACH, *supra* note 2, at § 251 a Anm. 4; LINGENBERG & HUMMEL, *supra* note 86, at § 23/5. This rarely ever occurs in practice.

89. ZPO § 251 a. This type of decision is final, and the only possible objection is by way of appeal. A. BAUMBACH, *supra* note 2, at § 251 a Anm. 2B. Thus this decision is much more serious than allowing a default judgment and can be requested even if there is a firm representing the other side. LINGENBERG & HUMMEL, *supra* note 86, at § 23 Anm. 5.

90. The ZPO does not contain a provision governing the termination by intervening facts but only deals with cost in these cases. ZPO § 91a; K. SCHELLHAMMER, *supra* note 10, at Nr. 1416 - 1422. Costs are allocated according to who would have won at the point in time when the intervening event occurred. A. BAUMBACH, *supra* note 2, at § 91a Anm. 1.

ethics are not always what they ought to be. If the defendant's lawyer does not honor his promise of payment, the lawsuit has to start all over again. This is important to keep in mind, especially since judges tend to urge plaintiffs to render a statement of termination at the very first sign of a settlement. A practice of commercial courts of major cities is to ask the attorney to prepare a declaration that his firm undertakes liability for the amount he claims his client has paid.

E. Withdrawal of Action

Withdrawal of action differs from termination of the case. When a plaintiff withdraws, the defendant can apply to have the plaintiff bear all the court costs and lawyers' fees.⁹¹ If the withdrawal results from an amicable settlement, the plaintiff should get the defendant to agree he will not apply for a court decision on cost.⁹²

*F. Hearing of Evidence*⁹³

The judge is the first to question all witnesses and experts.⁹⁴ After the court finishes its inquiries, the lawyers are allowed to ask questions. Objections can be made by either side, usually on the grounds that the question has already been answered; the witness would violate the law by answering; the question is irrelevant to the case; or the question is "suggestive."⁹⁵ Since the judge has already asked all the questions he finds relevant, these objections are occasionally granted.

These procedures are quite different from what lawyers may find in other legal systems. The atmosphere tends to be polite and business-like. There are virtually no cross-examinations (not even in criminal proceedings) and certainly nothing to match the kind of cross-examinations known in civil courts in other countries, such as the United States.⁹⁶

91. ZPO § 269 III 2; A. BAUMBACH, *supra* note 2, at § 269 Anm. 4B a.

92. This is perfectly legal and widely accepted. A. BAUMBACH, *supra* note 2, at § 269 4B.

93. General principles are explained in BUSINESS TRANSACTIONS IN GERMANY, *supra* note 1, at § 5.05 (9). Evidence can be provided by witnesses, expert witnesses, inspection by the court, testimony by the parties, and documents.

94. A. BAUMBACH, *supra* note 2, *supra* note 2, at § 397 Anm. 1; H. THOMAS & H. PUTZO, *supra* note 4, at § 397 Anm. 1; K. SCHELLHAMMER, *supra* note 10, at Nr. 615.

95. H. THOMAS & H. PUTZO, *supra* note 4, at § 397 Anm. 2. There is no remedy against the judge's decision to forbid certain questions.

96. ZPO § 397 clearly states that questions may be asked by the parties alone and there will be no interrogation.

G. Fixing of Costs

Court and legal fees are calculated by judicial clerks⁹⁷ in a fairly technical and bureaucratic process which starts after the proceedings end. There can be long disputes about whether photocopy costs or foreign attorneys' fees are legitimate. A law firm's secretarial staff usually handles these matters. Yet, a lawyer needs to be aware of the fees charged, since they may need to be explained to the client when receipts, bills, etc., need to be passed on to the court's taxing officer.

VI. INTERIM INJUNCTION PROCEEDINGS

A. General Remarks

In Germany, the law on unfair competition,⁹⁸ except for that part which deals with antitrust,⁹⁹ is almost exclusively enforced by the business competitors in a particular market only.¹⁰⁰ If a company can demonstrate that a competitor's misconduct has unfairly put it at a commercial disadvantage, it can apply for an interim injunction proceeding against the competitor. Generally, members of industry and trade prefer this legal proceeding because it allows self-control by the business community, which is preferable to state-control.¹⁰¹

Interim injunction proceedings are sought for unfair competition violations because applicants cannot wait for months or longer for the main proceedings, when damages would be extensive if not irreparable. Interim injunction proceedings are designed as a preliminary stage of the case, which goes into main proceedings later. In practice, this rarely happens. Parties regularly accept the interim injunction proceedings as final, for the reasons explained below.

Usually the injured party begins by sending a warning letter to the other side. This letter will ask for an immediate termination of

97. ZPO § 103; K. SCHELLHAMMER, *supra* note 10, at Nr. 1681.

98. UWG (Law on Unfair Competition and Advertising). See Schmeding, in BUSINESS TRANSACTIONS IN GERMANY chap. 3 (B. Rüster ed. 1985). This chapter gives a detailed overview of the law itself whereas the present article will concentrate on procedural questions only.

99. GWB (Antitrust Law). See Heidenhain, in BUSINESS TRANSACTIONS IN GERMANY chap. 38 (B. Rüster ed. 1985). Antitrust law is sometimes viewed as covered by the broader term of the law on unfair competition.

100. Peculiarities of these proceedings are explained by Schmeding, *supra* note 98, at § 37.10.

101. State control dominates antitrust law, which is enforced by the *Bundeskartellamt* (Federal Cartel Office).

the allegedly unfair practice, and urge the other side to sign a cease and desist declaration. Such a declaration is enforceable by a contractual penalty.¹⁰² If the other party refuses or simply fails to respond, the injured party can apply for an injunction without an oral hearing.¹⁰³ It is hard to change a judge's opinion on the legal theory of the case once an injunction is granted, unless considerable new evidence is presented in the main proceedings.

In legal practice, the interim injunction proceedings are somewhat different from what they were originally designed to be. As mentioned above, cases usually do not enter main proceedings, and therefore the whole procedure takes only a few days. The party requesting an injunction risks paying damages if the injunction issued by the court is later overruled.¹⁰⁴ Since proceedings usually end after an interim injunction is issued, this penalty is rarely imposed. Even where recovery of damages is sought, the proof of damages that the courts require is extremely stringent.

It is common practice for unfair competition cases to be discussed between the applicant's lawyers and the judges a few days after the application is handed to the court. If the judge indicates a decision cannot be reached without an oral hearing, the applicant may withdraw the case.¹⁰⁵ This usually occurs when it appears the action will be unsuccessful, and prevents the other side from learning of the application. Thus the defendant may never learn that the action was taken.

Although it is possible to discreetly apply for an injunction without the knowledge or participation of the other side, there is always the risk that they will learn about the application. For instance, the clerk at the court's taxation office may send out a bill to the other side, inadvertently revealing the action.

102. O. VON GAMM, GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB § 1 RdNr. 198 (2d ed. 1981); H. WETTBEWERBSRECHT § 1 Anm. 33, (2d ed. 1974); A. BAUMBACH & W. HEFERMEHL, WETTBEWERBSRECHT, Einl. UWG, Rdn. 456 (15th ed. 1988); see also Schmeding, *supra* note 98, at § 37.10 (2) (for more details on the contents).

103. This is an exception to ZPO § 128, and is allowed under ZPO §§ 921, 922. A. BAUMBACH, *supra* note 2, at § 921 Anm. IA.

104. ZPO § 945; A. BAUMBACH *supra* note 2, at § 945 Anm. 4.

105. An oral hearing will be needed when major issues are at stake, or large damages are involved, or the applicant's legal arguments are weak. A. BAUMBACH *supra* note 2, at § 921 Anm. 1. The judge has the discretion to require an oral hearing. Whatever his decision, there is no remedy against the court order to hold or not to hold the oral hearing. *Id.* at § 921 Anm. 1B.

B. Urgency

As a general rule interim injunctions are only granted if the case is considered “urgent”¹⁰⁶ by the court. The views of what is “urgent” differ, since the term itself is not defined anywhere in the law.¹⁰⁷ Some courts feel that the case loses its “urgency” four to six weeks after the potential applicant learns of the violation; others allow a few months to pass.¹⁰⁸ In any case, time is limited, and fast action is required.

A court’s view on “urgency” will significantly influence the decision of where to file geographically for an interim injunction proceeding. There is often a choice among various courts known to be more or less generous in granting interim injunctions. Local counsel should know what position a court will take on a particular case. When an interim injunction is denied, it can be perfectly legal to try again¹⁰⁹ at a different court. The defendant, however, can inform all eligible courts of the first attempt by submitting a “protection brief” to each.¹¹⁰ This also helps limit the possibilities of “forum shopping.”

C. Service of Interim Injunctions

Interim injunctions have to be served within one month after they are issued by the court, or they become unenforceable.¹¹¹ Due to the requirement of “urgency,” a second injunction application is usually not possible, even though the violation continues and slower main proceedings have to be started.¹¹²

The parties often use the one month before the interim injunction must be served to negotiate. For a multinational corporation who is more concerned with success in the market place than on forming a

106. H. VON GODIN, *supra* note 102, at § 25 RdNr. 5; A. BAUMBACH & W. HEFERMEHL, *supra* note 102, at § 25 RdNr. 7.

107. The law assumes urgency in UWG § 25 for all unfair competition cases, but urgency ceases to exist after a certain time. A. BAUMBACH & W. HEFERMEHL, *supra* note 102, at § 25 RdNr. 7.

108. For an overview of court decisions regarding “urgency” see Schmeding, *supra* note 98, at § 37.10 (3). Schmeding states that Hamburg courts assume urgency in cases where public interests are violated, for example by misleading statements, even years after the violation occurs.

109. UWG § 24. “Forum shopping,” and situations when it is legally justified (§ 24 UWG) are described by Schmeding, *supra* note 98, at § 37.10a (1).

110. See *infra* text accompanying note 114.

111. ZPO § 929 II. This is a strict rule, OLG Düsseldorf GRUR 385 (1984), which leads to the cancellation of the injunction.

112. In principle, a second injunction would be possible. KG NJW 707 (1950); A. BAUMBACH, *supra* note 2, at § 929 Anm. 2 Cc.

reputation for successful litigation, it makes sense to wait to serve the injunction until it can talk to the other party. If the talks fail, the injured party can indicate that the local court shares its views, and threaten service of the injunction as a means of persuading the other side. This tactic has proven quite successful and is therefore recommended.

Any agreement reached by the parties should include provisions on the geographical extension of the obligations, the time-span permitted to use up the product in stock, the contractual penalties in case of infringements, and the cost of proceedings. In many cases the time allotted to use up the stock is important to both parties. No time would be granted if the interim injunction were simply enforced, and damages could be enormous. For the infringing party, a settlement is preferable in order to avoid such commercial losses by seeking to extend the time allotted to use up stock, or even permit alteration of the offensive product. The party seeking the injunction should cooperate in minimizing the infringing party's losses, or he will bear those losses if the interim injunction is overruled in a main proceeding.¹¹³

D. Protection Briefs

Interim injunctions are granted without an oral hearing in many unfair competition cases. The defendant often receives only a warning letter, and may not even receive this if the party who applies for the interim injunction is prepared to bear the risk of paying all costs. This would occur if the defendant gives in immediately after the action had been brought and no warning had been given.¹¹⁴

In order to provoke an oral hearing and enable a party to defend against an interim injunction, the legal profession has developed "protection briefs." These briefs are not described in the law and even leading commentaries on civil proceedings spend just a few words on them.¹¹⁵ Nevertheless, they are of overwhelming importance to the unfair competition practitioner. These briefs are the only means to avoid an interim injunction, or at least obtain an oral

113. In this case, damages can be proved more easily than otherwise.

114. If a defendant gives in immediately after an action is brought, and no warning has been given, the applicant will bear all costs.

115. Only recently has legal literature covered this widely used defense. *See generally* MAY, *DIE SCHUTZSCHRIFT IM ARREST UND EINSTWEILIGEN VERFÜGUNGSVERFAHREN*, Koeln (1983); Leipold, *Die Schutzschrift zur Abwehr von einstweiligen Verfügungsverfahren gegen Streiks*, RdA 164 (1983); OLG Düss FamRZ 229 (1985); Teplitzky, *Die Schutzschrift als vorbeugendes Verteidigungsmittel gegen einstweilige Verfügungen*, NJW 1667 (1980).

hearing.

The protection brief is a statement prepared by the defendant at the earliest stage possible, usually after receiving a warning letter. This statement should confront all the legal and factual issues that may be raised in the application for an interim injunction. The protection brief is then copied and sent to all civil courts where the applicant might bring the action. Usually this includes ten to twenty-five courts throughout Germany.

At one time it was possible for the applicant to find out whether a protection brief had been filed at a particular court before applying to that court for the injunction. This has changed for reasons of internal court security, which now focuses on avoiding such “leaks.”

After the potential defendant feels reasonably safe that no application for an interim injunction could qualify as “urgent,” the protection briefs are retrieved from the courts. The potential applicant may never learn the protection briefs were filed.

E. Evidence

Evidence must be provided for all facts stated in an application for an interim injunction. Only evidence which is “present” will be allowed. In general, the evidence is furnished by affidavits. If there is an oral hearing, each party is responsible for bringing their own witnesses to court. Witness subpoenas are not issued.¹¹⁶

Affidavits must be prepared carefully. It is a criminal offense for the signator as well as the lawyer to knowingly state untrue facts. This must be very clear to those signing the papers, particularly when the signatories are the parties to the case.¹¹⁷

The evidence available can also influence the decision whether to continue the interim injunction proceedings into the main proceedings. It is important to bear in mind that the same court will deal with both proceedings. Therefore, it is only sensible to proceed if:

1. there are legitimate questions of law and the commercial threat is serious, warranting an appeal if relief is denied;
2. or there are factual assertions that can be rebutted only by presenting full proof in the main proceedings;

116. ZPO §§ 920 II, 936, 294 II; L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 113 III; K. SCHELLHAMMER, *supra* note 10, at Nr. 574.

117. H. THOMAS & H. PUTZO, *supra* note 4, at § 294 Anm. 1. Generally, in civil proceedings, the parties to a case cannot themselves serve as proof or evidence to the court, but in interim injunction cases they can sign the affidavits.

3. or the affidavits provided by the other side can be shown to be false.

VII. SPECIAL TYPES OF PROCEEDINGS

A. *Summary Proceedings For Recovery of Debts*

In debt cases where no critical legal questions are expected, but the debtor appears unwilling or even unable to pay, an application for a default summons can be filed.¹¹⁸ If the debtor does not raise any objections, the applicant can receive a court decision in a very short period of time. The defendant may choose not to object in order to save costs. If there are objections, the court will begin the main proceedings, as in an ordinary law suit.

All proceedings will start with an application for a court order called *Mahnbescheid*. The court will, upon further application, grant a *Vollstreckungsbescheid* based upon the *Mahnbescheid*. This has the same legal effect as a court decision against a defendant in default of appearance.¹¹⁹ If there are no objections, the *Vollstreckungsbescheid* becomes final. The proceedings follow strict rules and various formalities, including the compulsory use of printed standard forms.¹²⁰

There is no point in applying for a *Mahnbescheid* if objections are expected, because the application process will only delay the main proceedings which will be needed anyway. In most cases it is not advisable to start summary proceedings if the opposition's lawyers have already prepared a detailed analysis of their case.

B. *Check and Bill of Exchange Proceedings*

A holder of a check or a bill of exchange can quickly obtain a court order by a special action.¹²¹ Such action can also be combined with the above summary proceedings.¹²²

The main advantage of the check and bill of exchange proceedings lies in the type of objections which can be raised by the de-

118. An overview is provided by L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 21; O. JAUERNIG, *supra* note 16, at Nr. 281; W. ZEISS, *supra* note 2, at 266; K. SCHELLHAMMER, *supra* note 10, at Nr. 772; BUSINESS TRANSACTIONS IN GERMANY, *supra* note 1, at § 5.05 (8).

119. ZPO § 700 I.

120. ZPO § 690; A. BAUMBACH, *supra* note 2, at § 690 Anm. 4.

121. An overview is given in L. ROSENBERG & K. SCHWAB, *supra* note 2, at § 164; K. SCHELLHAMMER, *supra* note 10, at Nr. 1558; O. JAUERNIG, *supra* note 16, at 279.

122. ZPO § 598; A. BAUMBACH, *supra* note 2, at § 598 Anm. 2.

fendant. Any objections must have a legal basis in the document itself (the check or bill of exchange).¹²³ Any objections based on the business relationship that led to signing the document must wait until the main proceedings.¹²⁴ At that point, however, the applicant will already hold an enforceable court order against the other side.

Again, if the plaintiff expects major legal objections in the proceedings, then the only advantage will be the additional time gained. Nonetheless, this advantage is essential if the debtor's liquid resources are uncertain and it is important to be the first to claim them.

C. Labor Courts

All disputes involving employers, employees, or work councils must be brought to a labor court.¹²⁵ Currently, labor courts have a reputation for being biased in favor of the employees, and for being slow and sometimes inefficient. Proceedings can take a long time and often the only result is a court proposal for a settlement which the parties could have agreed to out of court. The standard compensation for unlawful termination used to be half a month's salary per year of employment, but this may vary locally.¹²⁶ Unlike other proceedings, each party bears the cost of the proceedings on their own.¹²⁷ Judges sometimes point out to both sides that it may take years before a judgment is granted, and the parties are encouraged to agree to an amicable settlement.

Generally, companies are advised to be generous when granting a settlement payment, as it is better to stay out of the court system. This can also save management money, because the cost of disruptions in the working environment may be much higher than the settlement payment. If no settlement is reached, the parties will likely face a long and unpleasant court battle, and the final compensation may only be a small amount higher or lower than what the court originally suggested. For the employee, in most cases the job will be lost, regardless of the outcome of litigation.¹²⁸ For the

123. ZPO § 598; A. BAUMBACH, *supra* note 2, at § 598 Anm. 2.

124. The rights have to be resolved in the first judgment. ZPO § 599; A. BAUMBACH, *supra* note 2, at § 599 Anm. 1A, 2.

125. ARBEITSGERICHTSGESETZ (Law on Labor Courts) § 2; GRUNSKY, ARBEITSGERICHTSGESETZ § 2A (4th ed. 1981).

126. SCHAUB, HANDBUCH DES ARBEITSRECHTS 748 (6th ed. 1987).

127. ArbGG § 12a.

128. For exemptions see SCHAUB, *supra* note 125, at 661.

employer, the management costs for litigating a court case regularly exceeds any overpayment they may make to settle the case.

CONCLUSION

Companies involved in foreign business litigation need to be familiar with the culture and legal practice of the country where they are litigating. West German business litigation takes place in a forum that is sensitive to the interests and concerns of corporations. Specialized commercial courts are comprised of panels of one trained judge and two businessmen. Discovery is minimal because the parties are responsible for providing their own materials to support their allegations. Court cases are won primarily on the quality of the written briefs. All these factors help facilitate an efficient and expeditious legal system. Foreign attorneys and corporations will benefit from an understanding of both the codified laws on legal proceedings, and the practical everyday aspects of court procedure. Once the attorney gains an overview of the system, it is indispensable to work with a local German law firm to proceed through the litigation process.*

* Copies of all materials cited in this article are available at the offices of the California Western International Law Journal.

