

Written Materials for

**Commercial and Employment Litigation in the
United States and Germany**

COMMERCIAL AND EMPLOYMENT LITIGATION IN THE UNITED STATES AND GERMANY

Wednesday, April 3, 2024

9:30 a.m. – 11:00 a.m.

Timed Agenda

Panelists: Daniel C. Fleming, Linda Wong, Jens Kindt, Felix Geulen

Part A. UNITED STATES

I. COURT STRUCTURE (4 minutes)

The Federal Court System	The State Court System
Article III of the U.S. Constitution creates judicial power in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts.	The Constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts.
Congress used its power to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.	States also usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; and family court. Some state courts also create specialties in commercial disputes and/or complex litigation.
Parties dissatisfied with a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International	Parties dissatisfied with the decision of the trial court may take their case to the intermediate court of appeals.

Trade may appeal to a U.S. Court of Appeals.	
A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so. The U.S. Supreme Court is the final arbiter of federal constitutional questions.	Parties have the option to ask the highest state court to hear the case.
	Only certain cases are eligible for review by the U.S. Supreme Court.

II. SELECTION OF JUDGES (3 minutes)

The Federal Court System	The State Court System
<p>The Constitution states that federal judges are nominated by the President and confirmed by the Senate.</p> <p>They hold office for life. Through Congressional impeachment proceedings, federal judges may be removed from office for misbehavior.</p>	<p>State court judges are selected in a variety of ways, including</p> <ul style="list-style-type: none"> • election, • appointment for a given number of years, • appointment for life, and • combinations of these methods, e.g., appointment followed by election.

III. TYPES OF CASES HEARD (3 minutes)

The Federal Court System	The State Court System
<p>The federal courts are courts of limited jurisdiction. They will only hear cases:</p> <ul style="list-style-type: none"> • that deal with the constitutionality of a law; 	<p>Unlike the federal courts, state courts are generally courts of unlimited jurisdiction and they will hear any case, but their power in fashioning a remedy is confined to their particular state. They will hear:</p> <ul style="list-style-type: none"> • Most criminal cases, probate (involving wills and estates)

<ul style="list-style-type: none"> • involving the laws and treaties of the U.S.; • involving ambassadors and public ministers; • relating to disputes between two or more states; • relating to disputes between citizens of different states; • admiralty law; • bankruptcy; and • habeas corpus issues. 	<ul style="list-style-type: none"> • Wide range of contract cases, employment cases, tort cases (personal injuries), products liability family law (marriages, divorces, adoptions), etc. <p>State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.</p>
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IV. ENFORCEMENT OF JUDGMENTS (3 minutes)

<p>The Federal Court System</p>	<p>The State Court System</p>
<p>A judgment entered in a federal district court can easily be transferred and registered as a judgment in any other federal district court.</p>	<p>A judgment entered in a state court can only be enforced within the territorial boundaries of that state. However, pursuant to the full faith and credit clause of Article IV, Section I of the US Constitution, a party can “domesticate” its judgment in any other state in the United States.</p>

V. JURY TRIALS (4 minutes)

<p>The Federal Court System</p>	<p>The State Court System</p>
<p>The Seventh Amendment guarantees the right to a jury trial in civil cases seeking monetary damages in federal court. However, jury trials can be waived easily. A party must request a jury trial in a written demand served on the other parties no later than 14 days after service of the last pleading “directed to the issue” for which a jury trial is sought and properly files the written demand. Otherwise, the right to a jury trial is automatically waived.</p>	<p>Unlike the Sixth Amendment, States are not required to guarantee civil trials under the Seventh Amendment. For most States, however, the right to a jury trial in civil cases is preserved.</p> <p>Trial by jury is generally available for actions at law (seeking money damages) but not actions in equity. If a Plaintiff’s Complaint seeks equitable relief (such as an injunction or decree), there usually will not be a right to a trial by jury. The right to a trial by jury is also limited to cases where the amount in controversy exceeds a certain threshold, which amount varies by jurisdiction.</p>

<p>The vast majority of civil cases are bench trials, with one reason being that some types of civil law can be difficult to explain to a jury.</p>	
<p>A Jury Trial can be avoided when:</p> <ul style="list-style-type: none"> • There is a valid pre-dispute jury waiver; • No party properly demanded a jury trial; • A proper demand was made but the parties consent to a bench trial in writing or on the record; or • The court finds that no federal right to a jury trial exists on some or all of the issues for which a demand was made. 	<p>Like in federal courts, a right to a trial by jury can be waived in State courts. However, the process and circumstances of waiving a jury trial varies by state.</p> <p>Parties may contractually agree to waive a jury trial before any dispute arises. Pre-dispute jury waivers are valid in federal court and most jurisdictions, but are invalid under California and Georgia law unless authorized by statute.</p>

VI. COMMERCIAL DISPUTES (4 minutes)

The Federal Court System	The State Court System
<p>Can only be heard in the Federal Court system if:</p> <ul style="list-style-type: none"> • The issue is a federal question which involves the violation of federal laws. • Generally, this applies to cases that involve: <ul style="list-style-type: none"> ○ U.S. Government; ○ U.S. Constitution ○ Federal laws and treaties ○ Controversies between states and foreign governments <p>OR</p>	<p>Generally state courts have the authority to hear any case,</p> <p>Exceptions: Where federal courts have exclusive jurisdiction, such as in matters involving:</p> <ul style="list-style-type: none"> • Admiralty; • Bankruptcy; • Patent infringement; • Federal tax claims; and • Copyright violations.

<ul style="list-style-type: none"> • There is complete diversity of citizenship between the parties according to the Judiciary Act and Article III, section 2 of the US Constitution AND • The matter in controversy exceeds the sum of \$75,000 exclusive of interest and costs. <p>Class Action Fairness Act of 2005 (CAFA) (28 U.S.C. §§ 1332(d), 1453, and 1711-1715: federal courts may have original jurisdiction over class actions in which the aggregate amount in controversy exceeds \$5 million and there is only minimal diversity:</p> <ul style="list-style-type: none"> • meaning that at least one plaintiff and one defendant must be from different states 	
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VII. EMPLOYMENT ACTIONS (3 minutes)

The Federal Court System	The State Court System
<p>All federal employment actions are based on the US Constitution and/or the laws created by Congress, such as:</p> <ul style="list-style-type: none"> • The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §2601 et seq. • The Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq. • Federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623 et seq. • Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000(e) et seq. 	<p>All state employment actions are similarly based on a state’s constitution (which can create broader rights than those found in the US Constitution) or by the laws created by the state’s legislature, such as:</p> <ul style="list-style-type: none"> • New Jersey Law Against Discrimination (LAD), N.J.S.A. §10:5-1 • New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. §34:19-1 et seq. • New Jersey Family Leave Act (FLA), N.J.S.A. 34:11B-1 et seq. • New Jersey Wage and Hour Law (NJWHL), N.J.S.A. 34:11-56a et seq.

<ul style="list-style-type: none"> Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. § 201 et seq. 	<ul style="list-style-type: none"> New York State Human Rights Act, Exec. Law §290 et seq.
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VIII. DISCOVERY: A FISHING EXPEDITION (3 minutes)

The Federal Court System	The State Court System
Pretrial depositions	Pretrial depositions
Pretrial document production	Pretrial document production
Pretrial written interrogatories	Pretrial written interrogatories
Pretrial requests for admission	Pretrial requests for admission
Experts and their reports	Experts and their reports

IX. AWARD OF ATTORNEYS' FEES: THE "AMERICAN RULE" (3 minutes)

The Federal Court System	The State Court System
Parties responsible for their own attorneys' fees, unless a contract or statute provides otherwise.	Parties responsible for their own attorneys' fees, unless a contract or statute provides otherwise.
Costs paid to prevailing party under F.R.C.P. 54 (d)(1) and 28 U.S.C. 1920.	Prevailing party obtains costs under state court rules but can be limited.
Frivolous litigation can shift fees under F.R.C.P. 11 by giving advance notice of frivolous nature of the pleading filed.	State equivalent of federal statute such as N.J. Rule 1:4-8 and N.J.S.A. 2A:15-59.
Fee shifting statutes such as the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. Generally, such statutes make the losing defendant responsible for plaintiff's fees.	State equivalent fee shifting statutes such as the NJ Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

X. Q&A DISCUSSION – UNITED STATES (15 minutes)

Part B. GERMANY

XI. COURT STRUCTURE/TYPES OF CASES HEARD (3 minutes)

- Uniform Structure in all 16 federal states (so called Länder)
- The primary legislation concerning court organization is the Courts Constitution Act (Gerichtsverfassungsgesetz, or GVG). The courts are characterized by being specialist, regional, and hierarchically integrated at the federal level.[3] There are five basic types of courts, plus the Federal Constitutional Court and the Länder's constitutional courts:[3]

XII. ORDINARY COURTS (3 minutes)

- Ordinary Courts hear **matters** relating to civil, criminal, family and marriage laws. (Local Courts also take care of company registrations and other administrative matters.)
- There are four tiers of Ordinary Courts.
- Local Courts (Amtsgerichte), can have a single professional judge or up to two professional judges and two lay judges.
- The next level is the Regional Court (Landgericht) where up to three professional and two lay judges hear cases.
- After that comes the Higher Regional Courts (Oberlandesgerichte) that seat three to five professional judges.
- The highest Ordinary Court is the Federal Court of Justice (Bundesgerichtshof). It has five professional judges that hear cases.
- Criminal cases can be assigned to any of the first three Courts.
- Civil matters are normally assigned to the first two Courts. Appeals can be made to two higher courts.

XIII. SPECIALIZED COURTS (4 minutes)

- The special Administrative law courts (Verwaltungsgerichte) have three levels and hear cases regarding government regulations and actions.
- Labor law courts (Arbeitsgerichte) also have three levels and hear cases regarding employment issues, working conditions and collective bargaining agreements.
- Social law courts (Sozialgerichte) have three levels and work with cases involving the various social benefits. These include unemployment payments, workers compensation claims and social security payments.
- Financial Courts (Finanzgerichte) have two levels and only adjudicate cases involving tax issues.

- Any Constitutional law issues are heard by the Federal Constitutional Court (Bundesverfassungsgericht). The main difference between the Federal Constitutional Court and the Federal Court is that the Federal Constitutional Court may only be called if a constitutional matter within a case is in question (e.g., a possible violation of human rights in a criminal trial), while the Federal Court of Justice may be called in any case. Only the Constitutional Court can declare an Act of Parliament invalid.

XIV. ENFORCEMENT OF JUDGMENTS (4 minutes)

- Compulsory enforcement (Zwangsvollstreckung) is the procedure used to enforce a private-law claim by public compulsion. The power to enforce lies with the State, which operates through its representatives by virtue of its sovereign authority.
- Various measures are available for enforcement of the creditor's claim:
 - Attachment (Pfändung) of goods
 - Attachment of claims and other assets held by the debtor (in particular, the attachment of bank accounts or the attachment of earnings)
 - Statement of assets by the debtor (Vermögensauskunft)
 - Coercive measures (Zwangmaßnahmen) to ensure that goods are surrendered or to ensure that actions are taken or refrained from
 - Registration of a mortgage to secure a claim (Sicherheitshypothek)
 - Forced sale (Zwangversteigerung)
 - Receivership (Zwangverwaltung).
- Compulsory enforcement in Germany is regulated mainly by §§ 704 et seqq. of the Code of Civil Procedure (Zivilprozessordnung – ZPO) and by the Act on Forced Sales and Receivership (Gesetz über die Zwangsversteigerung und Zwangsverwaltung – ZVG).
- §§ 946 et seqq. ZPO contain provisions relating to Regulation (EU) No 655/2014, which regulates the cross-border enforcement of claims between EU Member States.

XV. COMMERCIAL DISPUTES (4 minutes)

- Germany is a civil law jurisdiction. Civil proceedings are primarily governed by the German Code of Civil Procedure (Zivilprozessordnung – ZPO). In addition, the German Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (FamFG) applies to certain corporate law, family law and other matters.
- First-instance and appeal proceedings are handled by local courts (Amtsgericht), regional courts (Landgericht) and higher regional courts (Oberlandesgericht).
- The regional court is usually the first-instance court in commercial matters.
- Regional courts usually have specialised chambers for particular matters, e.g., chambers for financial or construction disputes.
- There are special chambers at the regional courts for commercial matters. The chamber consists of one professional judge and two lay judges. Lay judges are drawn from the business community (usually senior managers) and are appointed by the competent ministry

of justice. With the consent of the parties to the proceeding, which is commonly granted, the case may also be heard in the Commercial Chamber without the lay judges.

- Local courts have jurisdiction to hear lower-value disputes (up to EUR 5,000) and certain types of cases (e.g., residential landlord–tenant disputes), irrespective of value.
- First-instance decisions can be appealed before the next higher court. Higher regional courts have special first-instance jurisdiction on select matters, e.g., concerning arbitration proceedings. The highest civil court is the German Federal Court of Justice (Bundesgerichtshof – BGH) which hears appeals on points of law.
- Only hearings are possible, but not very common.

XVI. EMPLOYMENT ACTIONS (4 minutes)

- **Only one court system**
 - All employment actions are based on federal or (rarer) state laws
 - German constitutional rights are only applied indirectly via statutory regulations
 - Law of the European union is mostly only taken into account in the interpretation of German laws but has strong influence
- **Labor Court**
 - First instance for all labor law disputes
 - Conciliation hearing before standard court hearing
 - Lay judges decide with professional judge
- **State Labor Court**
 - Appeal instance
 - Lay judges decide with professional judge
- **Federal Labor Court**
 - Appeal instance against decision of the State Labor Court
 - No court of fact
- **Settlements**
 - All labor courts aim for settlements, very common
- **Collective proceedings**
 - All courts have also jurisdiction in collective proceedings between Employers and Trade unions and Works Councils

XVII. EVIDENCE RULES (NO DISCOVERY) (4 minutes)

- In general, it is upon the parties to present to the court the facts that they wish to rely on to substantiate their claims and defences.

- Courts will not consider facts not submitted. As a general rule, courts do not engage in fact-finding *ex officio* and do not investigate the facts of the case.
- Courts will not call into question undisputed facts. As a consequence, the parties need not offer or adduce evidence in support of undisputed facts. Only to the extent the facts presented by the parties contradict each other will the court take evidence – if such facts are relevant to the court’s assessment of the case and, hence, the outcome of the proceeding.
- The general rule pursuant to which the parties have the sole power to shape the factual scope of the proceeding is compromised in some respects: Courts have a procedural duty to guide the parties’ pleadings toward an efficient and just procedure, which is why the courts have to point the parties to a need to amend their pleadings. Furthermore, courts shall consider obvious facts, even if not submitted.
- Certain typical situations are subject to evidence based on first impression (so-called *prima facie* evidence).
- It happens quite frequently that a plaintiff needs to prove facts to win its case but is unable to do so for lack (without the plaintiff’s fault) of the required information. At the same time, the opposing party possesses such information and can reasonably be expected to disclose it.
- A German court may order a party to the litigation or a third party to disclose documents. However, these disclosure orders are very rare in practice, narrow in scope, and subject to strict requirements. The requesting party must specify the requested document in detail.
- Pursuant to the governing concept of free evaluation of evidence by the judge (*Prinzip der freien richterlichen Beweiswürdigung*), the judge has the sole authority to decide which evidence is suitable to prove facts relevant to the outcome of the case.

XVIII. AWARD OF ATTORNEY’S FEES (4 minutes)

- In Germany, lawyers’ fees are charged either in accordance with the Lawyers’ Remuneration Act [*Rechtsanwaltsvergütungsgesetz*] (RVG) or on the basis of fee agreements. In principle, fee agreements are always possible as an alternative to the statutory charges.
- The remuneration schedule attached to the RVG (Annex 1 to the RVG) prescribes either fixed fees or fee ranges applicable to individual activities. The fee level is normally determined by reference to the value of the claim.
- The courts on the award of attorney’s fees as part of the judgement.
- The losing party must bear all statutory costs of the litigation in civil and commercial matters, including the costs incurred by the opponent, sec. 91 (1) ZPO (“loser pays” rule and indemnity principle). If each party is successful in part and fails in part, costs are mutually cancelled or proportionally divided, sec. 92 (1) ZPO.
- Only the necessary costs of the litigation are recoverable, sec. 91 (1) ZPO. The term necessary – where applicable – refers to the statutory costs. Consequently, a winning party that agreed to pay more fees to its attorney than provided for by the Attorneys Remuneration Act (RVG), gets only a reimbursement of the legally fixed fees, not of the additional agreed costs. This limitation renders the system fairly calculable and shall thus reduce the financial

risk of civil litigation. Especially the losing party is protected by limiting the recovery to necessary costs.

- There is a wide ranging exception for some family proceedings and non-contentious proceedings, sec. 81 FamFG.

XIX. Q&A DISCUSSION – GERMANY (15 minutes)



WONG FLEMING
ATTORNEYS AT LAW

Commercial and Employment Litigation in the United States

Daniel C. Fleming

Partner of Wong Fleming

Linda Wong

Partner of Wong Fleming

Court Structure

In the U.S.

The Federal Court System	The State Court System
<p>Article III of the U.S. Constitution creates judicial power in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts.</p>	<p>The Constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts.</p>
<p>Congress used its power to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.</p>	<p>States also usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; and family court. Some state courts also create specialties in commercial disputes and/or complex litigation.</p>

Court Structure

In the U.S.

The Federal Court System	The State Court System
<p>Parties dissatisfied with a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade may appeal to a U.S. Court of Appeals.</p>	<p>Parties dissatisfied with the decision of the trial court may take their case to the intermediate court of appeals.</p>
<p>A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so. The U.S. Supreme Court is the final arbiter of federal constitutional questions.</p>	<p>Parties have the option to ask the highest state court to hear the case.</p>
	<p>Only certain cases are eligible for review by the U.S. Supreme Court.</p>

Selection of Judges

In the U.S.

The Federal Court System	The State Court System
<p>The Constitution states that federal judges are nominated by the President and confirmed by the Senate.</p> <p>They hold office for life. Through Congressional impeachment proceedings, federal judges may be removed from office for misbehavior.</p>	<p>State court judges are selected in a variety of ways, including</p> <ul style="list-style-type: none">• election,• appointment for a given number of years,• appointment for life, and• combinations of these methods, e.g., appointment followed by election.

Types of Cases Heard

In the U.S.

The Federal Court System	The State Court System
<p>The federal courts are courts of limited jurisdiction. They will only hear cases:</p> <ul style="list-style-type: none">• that deal with the constitutionality of a law;• involving the laws and treaties of the U.S.;• involving ambassadors and public ministers;• relating to disputes between two or more states;• relating to disputes between citizens of different states;• admiralty law;• bankruptcy; and• habeas corpus issues.	<p>Unlike the federal courts, state courts are generally courts of unlimited jurisdiction and they will hear any case, but their power in fashioning a remedy is confined to their particular state. They will hear:</p> <ul style="list-style-type: none">• Most criminal cases, probate (involving wills and estates)• Wide range of contract cases, employment cases, tort cases (personal injuries), products liability, family law (marriages, divorces, adoptions), etc. <p>State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.</p>

Enforcement of Judgments

In the U.S.

The Federal Court System	The State Court System
<p>A judgment entered in a federal district court can easily be transferred and registered as a judgment in any other federal district court.</p>	<p>A judgment entered in a state court can only be enforced within the territorial boundaries of that state. However, pursuant to the full faith and credit clause of Article IV, Section I of the US Constitution, a party can “domesticate” its judgment in any other state in the United States.</p>

Jury Trials

In the U.S.

The Federal Court System	The State Court System
<p>The Seventh Amendment guarantees the right to a jury trial in civil cases seeking monetary damages in federal court. However, jury trials can be waived easily. A party must request a jury trial in a written demand served on the other parties no later than 14 days after service of the last pleading “directed to the issue” for which a jury trial is sought and properly files the written demand. Otherwise, the right to a jury trial is automatically waived.</p> <p>The vast majority of civil cases are bench trials, with one reason being that some types of civil law can be difficult to explain to a jury.</p>	<p>Unlike the Sixth Amendment, States are not required to guarantee civil trials under the Seventh Amendment. For most States, however, the right to a jury trial in civil cases is preserved.</p> <p>Trial by jury is generally available for actions at law (seeking money damages) but not actions in equity. If a Plaintiff’s Complaint seeks equitable relief (such as an injunction or decree), there usually will not be a right to a trial by jury. The right to a trial by jury is also limited to cases where the amount in controversy exceeds a certain threshold, which amount varies by jurisdiction.</p>
<p>A Jury Trial can be avoided when:</p> <ul style="list-style-type: none">• There is a valid pre-dispute jury waiver;• No party properly demanded a jury trial;• A proper demand was made but the parties consent to a bench trial in writing or on the record; or• The court finds that no federal right to a jury trial exists on some or all of the issues for which a demand was made.	<p>Like in federal courts, a right to a trial by jury can be waived in State courts. However, the process and circumstances of waiving a jury trial varies by state.</p> <p>Parties may contractually agree to waive a jury trial before any dispute arises. Pre-dispute jury waivers are valid in federal court and most jurisdictions, but are invalid under California and Georgia law unless authorized by statute.</p>

Commercial Disputes

In the U.S.

The Federal Court System

Can only be heard in the Federal Court system if:

- The issue is a federal question which involves the violation of federal laws.
- Generally, this applies to cases that involve:
 - U.S. Government;
 - U.S. Constitution
 - Federal laws and treatises
 - Controversies between states and foreign governments

OR

- There is complete diversity of citizenship between the parties according to the Judiciary Act and Article III, section 2 of the US Constitution AND
- The matter in controversy exceeds the sum of \$75,000 exclusive of interest and costs.

Class Action Fairness Act of 2005 (CAFA) (28 U.S.C. §§ 1332(d), 1453, and 1711-1715: federal courts may have original jurisdiction over class actions in which the aggregate amount in controversy exceeds \$5 million and there is only minimal diversity:

- meaning that at least one plaintiff and one defendant must be from different states

The State Court System

Generally state courts have the authority to hear any case, Exceptions: Where federal courts have exclusive jurisdiction, such as in matters involving:

- Admiralty;
- Bankruptcy;
- Patent infringement;
- Federal tax claims; and
- Copyright violations.

Employment Actions

In the U.S.

The Federal Court System	The State Court System
<p>All federal employment actions are based on the US Constitution and/or the laws created by Congress, such as:</p> <ul style="list-style-type: none">• The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §2601 et seq.• The Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq.• Federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623 et seq.• Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000(e) et seq.• Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. § 201 et seq.	<p>All state employment actions are similarly based on a state's constitution (which can create broader rights than those found in the US Constitution) or by the laws created by the state's legislature, such as:</p> <ul style="list-style-type: none">• New Jersey Law Against Discrimination (LAD), N.J.S.A. §10:5-1• New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. §34:19-1 et seq.• New Jersey Family Leave Act (FLA), N.J.S.A. 34:11B-1 et seq.• New Jersey Wage and Hour Law (NJWHL), N.J.S.A. 34:11-56a et seq.• New York State Human Rights Act, Exec. Law §290 et seq.

Discovery: A Fishing Expedition In the U.S.

The Federal Court System	The State Court System
Pretrial depositions Pretrial document production Pretrial written interrogatories Pretrial requests for admission	Pretrial depositions Pretrial document production Pretrial written interrogatories Pretrial requests for admission
Experts and their reports	Experts and their reports

Award of Attorneys' Fees – The “American Rule”

In the U.S.

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<p>Parties responsible for their own attorneys' fees, unless a contract or statute provides otherwise.</p> <p>Costs paid to prevailing party under F.R.C.P. 54 (d)(1) and 28 U.S.C. 1920.</p> <p>Frivolous litigation can shift fees under F.R.C.P. 11 by giving advance notice of frivolous nature of the pleading filed.</p> <p>Fee shifting statutes such as the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. Generally, such statutes make the losing defendant responsible for plaintiff's fees.</p>	<p>Parties responsible for their own attorneys' fees, unless a contract or statute provides otherwise.</p> <p>Prevailing party obtains costs under state court rules but can be limited.</p> <p>State equivalent of federal statute such as N.J. Rule 1:4-8 and N.J.S.A. 2A:15-59.</p> <p>State equivalent fee shifting statutes such as the NJ Law Against Discrimination, N.J.S.A. 10:5-1 et seq.</p>

Q&A

Commercial and Employment Litigation in Germany



Jens Kindt

Rechtsanwalt · Partner

Felix Geulen

Rechtsanwalt · Partner

Agenda

- 1. Court Structure/Types of cases heard**
- 2. Enforcement of Judgments**
- 3. Commercial Disputes**
- 4. Employment Actions**
- 5. Evidence Rules**
- 6. Award of Attorney's and Court Fees**

1. Court Structure/Types of cases heard I

- Uniform Structure in all 16 federal states (so called Länder)
- Courts are characterized by being specialist, regional, and hierarchically integrated at the federal level.
- Five basic types of courts, plus the Federal Constitutional Court and the Länder's constitutional courts:
 - Ordinary Courts
 - Administrative law courts (Verwaltungsgerichte)
 - Labor law courts (Arbeitsgerichte)
 - Social law courts (Sozialgerichte)
 - Financial Courts (Finanzgerichte)

1. Court Structure/Types of cases heard II – Ordinary Courts

- Ordinary Courts hear matters relating to civil, criminal, family and marriage laws.
- There are four tiers of Ordinary Courts.
- Local Courts (Amtsgerichte), can have a single professional judge or up to two professional judges and two lay judges.
- The next level is the Regional Court (Landgericht) where up to three professional and two lay judges hear cases.
- After that comes the Higher Regional Courts (Oberlandesgerichte) that seat three to five professional judges.
- The highest Ordinary Court is the Federal Court of Justice (Bundesgerichtshof). It has five professional judges that hear cases.
- Criminal cases can be assigned to any of the first three Courts.
- Civil matters are normally assigned to the first two Courts. Appeals can be made to two higher courts.

1. Court Structure/Types of cases heard III – Specialized Courts

- Administrative law courts (Verwaltungsgerichte) have three levels and hear cases regarding government regulations and actions.
- Labor law courts (Arbeitsgerichte) also have three levels and hear cases regarding employment issues, working conditions and collective bargaining agreements.
- Social law courts (Sozialgerichte) have three levels and work with cases involving the various social benefits. These include unemployment payments, workers compensation claims and social security payments.
- Financial Courts (Finanzgerichte) have two levels and only adjudicate cases involving tax issues.
- Any Constitutional law issues are heard by the Federal Constitutional Court (Bundesverfassungsgericht). The main difference between the Federal Constitutional Court and the Federal Court is that the Federal Constitutional Court may only be called if a constitutional matter within a case is in question (e.g., a possible violation of human rights in a criminal trial), while the Federal Court of Justice may be called in any case. Only the Constitutional Court can declare an Act of Parliament invalid.

2. Enforcement of Judgments

- Compulsory enforcement is regulated mainly by §§ 704 et seqq. of the Code of Civil Procedure (Zivilprozessordnung – ZPO) and by the Act on Forced Sales and Receivership (Gesetz über die Zwangsversteigerung und Zwangsverwaltung – ZVG).
- Various measures are available for enforcement of the creditor's claim:
- Attachment (Pfändung) of goods
- Attachment of claims and other assets held by the debtor (in particular, the attachment of bank accounts or the attachment of earnings)
- Statement of assets by the debtor (Vermögensauskunft)
- Coercive measures (Zwangsmaßnahmen) to ensure that goods are surrendered or to ensure that actions are taken or refrained from
- Registration of a mortgage to secure a claim (Sicherheitshypothek)
- Forced sale (Zwangsversteigerung)
- Receivership (Zwangsverwaltung).
- Regulation (EU) No 655/2014 regulates cross-border enforcement of claims between EU Member States.

3. Commercial Disputes I

- Germany is a civil law jurisdiction. Civil proceedings are primarily governed by the Code of Civil Procedure (Zivilprozessordnung – ZPO).
- First-instance and appeal proceedings are handled by local courts (Amtsgericht), regional courts (Landgericht) and higher regional courts (Oberlandesgericht).
- Regional court is usually the first-instance court in commercial matters.
- Regional courts usually have specialized chambers for particular matters, e.g., chambers for financial or construction disputes.
- Special chambers at the regional courts for commercial matters. The chamber consists of one professional judge and two lay judges. Lay judges are drawn from the business community (usually senior managers) and are appointed by the competent ministry of justice. With the consent of the parties to the proceeding, which is commonly granted, the case may also be heard in the Commercial Chamber without the lay judges.

3. Commercial Disputes II

- Local courts have jurisdiction to hear lower-value disputes (up to EUR 5,000) and certain types of cases (e.g., residential landlord–tenant disputes), irrespective of value.
- First-instance decisions can be appealed before the next higher court. Higher regional courts have special first-instance jurisdiction on select matters, e.g., concerning arbitration proceedings. The highest civil court is the German Federal Court of Justice (Bundesgerichtshof – BGH) which hears appeals on points of law.
- Online hearings are possible, but not very common.

4. Employment Actions I

- All employment actions are based on federal or (rarer) state laws
- German constitutional rights are only applied indirectly via statutory regulations
- Law of the European union is mostly only taken into account in the interpretation of German laws but has strong influence
- Labor Court:
 - First instance for all labor law disputes
 - Conciliation hearing before standard court hearing
 - Lay judges decide with professional judge
- State Labor Court:
 - Appeal instance
 - Lay judges decide with professional judge
- Federal Labor Court:
 - Appeal instance against decision of the State Labor Court
 - No court of fact

4. Employment Actions II

- Settlements: All labor courts aim for settlements, very common
- Collective proceedings: All courts have also jurisdiction in collective proceedings between Employers and Trade unions and Works Councils

5. Evidence Rules I

- In general, it is upon the parties to present to the court the facts that they wish to rely on to substantiate their claims and defences.
- No Discovery.
- Courts will not consider facts not submitted. As a general rule, courts do not engage in fact-finding ex officio and do not investigate the facts of the case.
- Courts will not call into question undisputed facts. As a consequence, the parties need not offer or adduce evidence in support of undisputed facts. Only to the extent the facts presented by the parties contradict each other will the court take evidence – if such facts are relevant to the court’s assessment of the case and, hence, the outcome of the proceeding.
- The general rule pursuant to which the parties have the sole power to shape the factual scope of the proceeding is compromised in some respects: Courts have a procedural duty to guide the parties’ pleadings toward an efficient and just procedure, which is why the courts have to point the parties to a need to amend their pleadings. Furthermore, courts shall consider obvious facts, even if not submitted.

5. Evidence Rules II

- Certain typical situations are subject to evidence based on first impression (so-called prima facie evidence).
- It happens quite frequently that a plaintiff needs to prove facts to win its case but is unable to do so for lack (without the plaintiff's fault) of the required information. At the same time, the opposing party possesses such information and can reasonably be expected to disclose it.
- A German court may order a party to the litigation or a third party to disclose documents. However, these disclosure orders are very rare in practice, narrow in scope, and subject to strict requirements. The requesting party must specify the requested document in detail.
- Pursuant to the governing concept of free evaluation of evidence by the judge (*Prinzip der freien richterlichen Beweiswürdigung*), the judge has the sole authority to decide which evidence is suitable to prove facts relevant to the outcome of the case.

6. Award of Attorney's and Court Fees I

- Lawyers' fees are charged either in accordance with the Lawyers' Remuneration Act [Rechtsanwaltsvergütungsgesetz] (RVG) or on the basis of fee agreements. In principle, fee agreements are always possible as an alternative to the statutory charges.
- The remuneration schedule attached to the RVG (Annex 1 to the RVG) prescribes either fixed fees or fee ranges applicable to individual activities. The fee level is normally determined by reference to the value of the claim.
- The courts on the award of attorney's and court fees as part of the judgement.
- The losing party must bear all statutory costs of the litigation in civil and commercial matters, including the costs incurred by the opponent, sec. 91 (1) ZPO ("loser pays" rule¹ and indemnity principle). If each party is successful in part and fails in part, costs are mutually cancelled or proportionally divided, sec. 92 (1) ZPO.

6. Award of Attorney's and Court Fees II

- Only the necessary costs of the litigation are recoverable, sec. 91 (1) ZPO. The term necessary – where applicable – refers to the statutory costs. Consequently, a winning party that agreed to pay more fees to its attorney than provided for by the Attorneys Remuneration Act (RVG), gets only a reimbursement of the legally fixed fees, not of the additional agreed costs. This limitation renders the system fairly calculable and shall thus reduce the financial risk of civil litigation. Especially the losing party is protected by limiting the recovery to necessary costs.
- There is a wide range of exceptions for some family proceedings and non-contentious proceedings, § 81 FamFG.

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Wirtschaftsprüfer

Deichstraße 1

20459 Hamburg



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