

Appeals

Contributing editors

Mark A Perry and Perlette Michèle Jura



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GETTING THE
DEAL THROUGH 

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Appeals 2017

Contributing editors

Mark A Perry and Perlette Michèle Jura
Gibson, Dunn & Crutcher LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

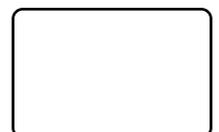


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Germany

Andreas Klein and Federico Parise Kuhnle

White & Case LLP

1 Outline and explain the general structure of your country's court system as it relates to the commercial appellate process.

In Germany, commercial matters are generally handled by civil courts. There are only a few types of commercial disputes that are handled by administrative or fiscal courts, for example, certain matters related to the economic activities of public authorities or tax-related matters. All other commercial cases go to civil courts.

There are several different types of appellate remedies available under German civil procedure law.

The most relevant categories by far are the two levels of appeals. First appeals, which deal with both the facts and the law of the case, are heard before the regional court or the higher regional court if filed against a trial judgment issued by either a local or a regional court. Second appeals against first appeal judgments, which concern only points of law, are heard by the Federal Court of Justice. Moreover, it is also possible to request an immediate second appeal after the trial judgment has been rendered. However, this is a particularly risky type of appeal for an appellant, as it does not allow presenting the facts of the case. Consequently, appellants will only opt for an immediate second appeal if the facts of the case are not in dispute between the parties.

Appeals are admissible against:

- final court judgments;
- interim judgments on jurisdiction;
- interlocutory judgments as to the merits of a claim;
- default judgments against which no objection can be lodged; and
- provisional judgments subject to a reservation of rights.

Apart from first and second appeals, the category of appellate remedies that is most relevant in practice comprises different types of complaint as follows: (i) minor court decisions by a local or regional court can be appealed by filing an immediate complaint; (ii) minor court decisions by the higher regional court, as well as (iii) immediate complaints can be appealed by filing a legal complaint before the Federal Court of Justice. Finally, (iv) parties may file a complaint against the decision to deny a second appeal released by the first appeal court.

Both appeals and, with some restrictions, complaints have a suspensory and a transferring effect, ie, these appellate remedies will suspend the effect of the judgment, court order or decision for the duration of the appellate remedy proceedings and the appellate court will be seized of the matter instead of the trial court.

Besides those major appellate remedies, there are further minor remedies against other types of court decisions, such as:

- objection against default summons and default judgments;
- due process reprimand; and
- several types of reminder:
 - against decisions taken by the delegated or requested judge;
 - against decisions taken by the court's records clerk;
 - against decisions taken by a judicial officer;
 - against the issuance of the court certificate of enforceability;
 - against the nature and manner of compulsory enforcement; or
 - in the event sufficient security has been provided to the creditor requesting enforcement.

In addition to that, the parties may – under very strict conditions – request a reopening of the proceedings after the court decision has become legally binding on the parties.

Finally, although strictly speaking they are not proper appellate remedies, commercial parties can also submit a constitutional complaint for fundamental rights abuse to the German Federal Constitutional Court, a complaint for violation of European law to the European Court of Justice or a complaint for human rights abuse to the European Court of Human Rights. However, because of their very strict admissibility conditions both with regard to jurisdiction and merits, these special appeals generally only have very limited prospects of success. Thus, it comes as no surprise that they are very rare in practice.

As described in more detail in question 5, there is no alternative federal and state court system comparable to that in the United States. There is one single system that is a combination of various state courts (local courts, regional courts and higher regional courts) dealing with the trial and first appellate remedies and a single federal court, ie, the Federal Court of Justice, having nationwide jurisdiction. The Federal Court of Justice is the highest ordinary judicial body. One step below, there are the higher regional courts (each German Federal State has at least one higher regional court). Each higher regional court has its own district with regional courts, which in turn also have districts with several local courts.

This geographical subdivision is also reflected in the recourse to courts from trial to second appeal: trial court decisions need to be appealed before a first appeal court in whose district the trial court is located. Subsequently, second-level appeals will all be heard by the Federal Court of Justice, which is located in Karlsruhe, Baden-Wurtemberg.

2 Are there appellate courts that hear only civil matters?

Within the judiciary branch of ordinary courts (the other branches are labour courts, administrative courts, fiscal courts and social courts), there are divisions for civil and criminal matters. Each division only hears either civil or criminal matters. Regional courts have civil chambers with three professional judges (except for commercial chambers, which have one presiding professional judge and two lay judges) and higher regional courts have civil panels with three professional judges hearing civil cases. For second appeals, the Federal Court of Justice currently has 12 civil panels, consisting of five professional judges, which will only hear civil matters.

Each appellate court has chambers (regional courts) or panels (higher regional courts, Federal Court of Justice) that are functionally competent for certain types of matters (eg, for copyright or sales matters). As already indicated, some larger regional courts also have chambers for commercial matters consisting of one presiding professional judge and two lay judges. These chambers for commercial matters can also hear first appeal cases.

At the beginning of each year, the president of the court distributes the functional competences to each chamber or panel in accordance with a business distribution plan. At the Federal Court of Justice, for example, the following panels typically deal with commercial matters: the first panel (copyright and trademark matters, shipping matters), the second panel (corporate matters), the third panel (service agreement matters), the fifth panel (real estate matters), the eighth panel (sales matters), the ninth panel (bankruptcy matters), the 10th panel (patent and public procurement matters) and the 11th panel (banking matters).

3 Are appeals from administrative tribunals handled in the same way as appeals from trial courts?

Appeals from administrative tribunals are different from those from civil tribunals in two main aspects.

First, both first and second appeals against administrative decisions are only admitted under narrow circumstances at the administrative trial or first appeal court's discretion (as opposed to civil matters, where first appeals are generally admitted).

Second, while before civil courts the principle of party presentation as regards the facts of the case applies, in administrative matters the principle of official investigation by the court applies. This means that the administrative court will have to investigate the facts of the case and cannot rely on the parties' submissions.

4 Is there a separate appellate bar or other requirement for attorneys to be admitted before appellate courts?

There are no special requirements for an attorney to be admitted before any regional court or higher regional court in Germany. Former restrictions were abolished in 2007.

As regards appellate remedies before the Federal Court of Justice in civil matters, only attorneys approved by the Federal Ministry of Justice are admitted (except in patent invalidation cases). Admission is highly selective: only attorneys who are 35 or older and have been practising uninterruptedly for at least five years are eligible to be Federal Court of Justice attorneys. Besides these formal requirements, the candidates must prove exceptional legal skills and have a strong record of successful civil cases. Moreover, most of the current Federal Court of Justice attorneys are considerably older than the required minimum age to reflect the necessary years of practical experience.

Attorneys admitted to the Federal Court of Justice are compulsory members of the Federal Court of Justice Bar and cannot appear before any other court in Germany. At the moment, only 43 attorneys are admitted before the Federal Court of Justice.

5 If separate jurisdictions exist for particular territorial subdivisions or subject matters, explain their main differences as to commercial appeals.

To determine which first appeal court will hear a given case, the German civil court system provides for a two-step jurisdiction test. Accordingly, a German first appeal court needs to verify both its own substantive jurisdiction and local jurisdiction.

Regional courts have substantive jurisdiction over appeals from local court trial judgments (substantive jurisdiction) within their territorial district (local jurisdiction).

Higher regional courts have substantive jurisdiction over appeals from regional court trial judgments within their territorial district.

The Federal Court of Justice will then hear second-level appeals from all first-level appeal decisions.

As described in question 2, each appeal court will have chambers or panels handling specific types of matters.

6 What are the deadlines for filing an appeal in a commercial matter?

The deadline for filing an appeal is one month from the date on which the judgment of the lower instance was served on the appellant. In the rare cases in which the court of the lower instance fails to produce a written judgment with grounds, the deadline begins to run at the latest upon the expiry of five months following pronouncement of the judgment.

7 What are the key steps a litigant must take to commence an appeal?

The litigant has to prepare a notice of appeal, which can only be submitted to the appeal court within the deadline mentioned above. The notice of appeal has to mention the file number and designation of the judgment that is appealed and the declaration that an appeal is being filed against the said judgment. The appellant does not have to serve the notice of appeal on the appellee, since this will be done by the court.

Furthermore, the appellant has to submit grounds for his or her appeal within two months after the judgment of the lower instance was served on the appellant (however, at the latest upon the expiry of five months following pronouncement of the judgment). Usually, the

two-month deadline for filing grounds for the appeal is extended by one month on application.

In all appeal matters, the appellant has to be represented by an admitted attorney.

8 How is the documentation for appeals prepared?

There are no requirements for the preparation of the documentation. The court of first instance will on request of the appellate court forward the court file to the appellate court. The parties are not involved in that procedure.

9 In commercial matters, may litigants appeal by right or is appellate review discretionary?

Litigants have a right to a first appeal if the value of the subject matter of the appeal is greater than €600.

If a party is adversely affected by the trial court's judgment in terms of an amount that is lower than or equal to €600, the first appeal requires an admission by the court of first instance. This court has to admit the appeal if the matter is of fundamental significance or if the further development of the law or the interest in ensuring uniform adjudication requires a decision of the court of appeal.

Litigants have a right to file a second appeal if permitted by the first appeal court (see question 16). If a second appeal is denied, the appellant has the right to file a complaint against the denial of leave to appeal if the value of the subject matter of the second appeal is greater than €20,000.

10 Can litigants appeal any ruling from a trial court, or are they limited to appealing only final judgments?

Any trial court judgment can be appealed by litigants (under the requirements described in question 9), not only final judgments. Also, therefore, most of the interim judgments (deciding on certain aspects of the admissibility of an action), interlocutory judgments (decisions on the merits) and all provisional judgments can be appealed.

Court decisions other than judgments, typically issued without prior oral hearing, are subject to a complaint. There are immediate complaints that must be filed within a period of 14 days, and there are legal complaints that must be filed within a period of one month. Both deadlines commence to run upon service of the decision. Complaints have to be explicitly permitted in German procedural law.

11 In a typical commercial dispute, must a litigant post a bond or provide security to appeal a trial court decision?

There is no general requirement for security to be posted by the appellant. However, the appellant will have to pay an advance on the appellate court's fee on the court's request. These fees depend on the amount in dispute; for example, for a first appeal, if the amount in dispute is €100,000 the fees are €4,104, and if the amount in dispute is €600,000 they are €15,584.

Indigent persons are entitled to legal aid. Depending on their financial situation, they are either completely exempted from their obligation to pay court fees or have the right to pay the court fees in instalments.

Furthermore, appellants having been in the claimant's role in the first instance who do not have their main residence in a member state of the European Union, or in a signatory state of the Agreement on the European Economic Area, have to provide security for the costs of the proceedings on the defendant's demand. This security has to cover the court fees and the opposing attorney's fees (calculated on the basis of the German Attorney Remuneration Act) for the appeal instance and, if admissible, a second appeal.

12 Are there special provisions for interlocutory appeals?

No. If an interlocutory judgment or a provisional judgment can be appealed (see question 10), the general rules on appeals apply. However, the appellate court may (on application of one of the parties) on a first appeal decide to refer the matter pertaining to an interlocutory judgment back to the court of first instance, whereas usually the appellate court has to decide the matter itself.

13 Are there special rules relating to injunctions or stays, whether entered in the trial court or on appeal?

Preliminary injunctions and attachments may be granted as decisions without prior oral hearing. The defendant has the right to file an opposition to such a decision. There is no deadline for such an opposition. If an opposition has been filed, the matter remains at the same instance. The court will have to conduct an oral hearing and then decide by judgment.

Such judgments are subject to an appeal based on the general rules. However, there is no second appeal available against judgments in preliminary injunction and attachment proceedings.

If the court orders a stay of the proceedings (eg, in the event of the death of a party or a loss of a legal representative), the other party may file an immediate complaint against such decision.

14 If a litigant files an appeal in a commercial dispute, does it stay enforcement of the trial court judgment?

No, an appeal does not automatically stay enforcement of the trial court decision. However, if a trial court decision (pertaining to an amount in dispute of more than €1,250) is appealed, it is declared enforceable only against provision of security by the creditor, which must usually be equal to 110 per cent of the amount in dispute.

An appellant who appeals an enforceable judgment may file an application for stay of execution. The appellate court can then decide that enforcement will be stayed, either against or without provision of security by the appellant, or that enforcement may be continued only against the provision of security by the opposing party. In order to make such a decision the court has to consider various circumstances, among them the prospects of success of the appeal and the financial situation of the parties. In case of doubt, the interests of the creditor (ie, the successful party of the appealed judgment) prevail.

15 On an appeal from a commercial dispute, may the first-level appellate court consider the facts and law anew, or is its power to review limited?

As a general principle, the appeal court is bound by the factual findings of the trial court, unless these findings are erroneous. In that case, the first appeal court can consider both the facts and the law of the case again pursuant to section 529 of the German Civil Procedural Code (GCPC).

From a legal point of view, the limitation is rather on the side of the appellant, which can only restrictively plead new facts and introduce new evidence pursuant to section 531 GCPC. Since the first appeal court needs to restrict its review of the judgment to the appellant's requests and submissions on the facts of the case, the appellant's pleadings restrictions will also limit the court's scope of review. When re-evaluating the facts, the first appeal court needs to distinguish between means of factual challenge and defence that had been rejected in the trial proceedings on the one hand, and new means of factual challenge and defence on the other.

Means of factual challenge or defence that had been rejected by the trial court are generally inadmissible in first appeal proceedings, unless the rejection was wrong.

New means of factual challenge or defence are admissible, if they have not been introduced in the trial proceedings before the end of the oral hearing without negligence of the party invoking them or because of the trial court's negligence. Moreover, new means of factual challenge or defence that arose after the end of the oral hearing in the trial judgment may also be introduced in the appeal proceedings without being subject to the restrictions of section 531 GCPC.

Undisputed new facts are always admissible in first appeal proceedings.

In practice, even under these formal legal restrictions, first appeal courts will mostly allow new facts to be introduced in first appeal proceedings.

16 If a party is dissatisfied with the outcome of the first-level appeal, is further appeal possible?

If a party is dissatisfied with the outcome of the first-level appeal, a second appeal is possible, provided that the party appealing is adversely affected by the first-appeal judgment.

That being said, there are some restrictions as regards the admissibility of second appeals. In fact, second appeals need to be explicitly

admitted by the first appeal court in the first-appeal judgment. A second appeal is admissible if the legal matter is of fundamental significance, or the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the Federal Court of Justice.

The Federal Court of Justice is bound to the admission of the appeal by the court of first appeal. Conversely, if such admission is not granted, the appellant may file a complaint with the Federal Court of Justice against denial of leave to appeal if the value of the subject matter of the second appeal is greater than €20,000. The decision on the complaint itself is then binding on the parties and not appealable. Statistics show that such complaints against denial of leave to appeal are generally not successful. However, in case such a complaint is granted, the prospects of success of the second appeal may also increase, as it is likely that the Federal Court of Justice will find errors in law in the first-appeal judgment.

The Federal Court of Justice only performs a review on issues of law and is generally bound by the factual findings of the first appeal court. However, it may base its decision on facts that have been omitted by the first appeal court, if the latter made a procedural error in not considering facts contained in the case record.

If the appellant is still not satisfied with the second appeal, he or she may only file for a special remedy such as a constitutional complaint for fundamental rights abuse with the German Federal Constitutional Court, a complaint for violation of European law with the European Court of Justice or a complaint for human rights abuse with the European Court of Human Rights. However, as explained in question 1, the prospects of success of such special remedies are very limited.

17 How long do appeals typically take from application to appeal to a final decision?

First appeals generally take between 6.5 and 9.5 months before regional courts and between 9.2 and 12.4 before higher regional courts. Second appeals before the Federal Court of Justice will generally take up to 24 months in addition, including the time for a complaint against denial of leave to appeal, if necessary.

However, these numbers are based on general statistics and do not necessarily reflect the reality of commercial cases. Especially in complex commercial litigation cases, where the parties will introduce a large number of evidentiary documents, witnesses, expert reports and further pieces of evidence, the duration of the appeal proceedings can be considerably longer.

18 What is the briefing and argument process like in a typical commercial appeal?

The briefing process in a commercial appeal is basically the same for first and second appeals.

In both cases, the appellant will first need to notify the competent appeal court within a month from service of the appealed judgment by filing a notice of appeal.

After filing the notice of appeal, the appellant will need to file a statement of grounds for the appeal within two months after service of the full version of the appealed judgment on the appellant. This time limit can be extended by the court once up to one month, any further extensions of this time limit requires the consent of the opposing party. As opposed to the notice of appeal, the statement of grounds for the appeal needs to contain precise requests for relief and describe the reasons why the judgment is erroneous and the relevance of the errors for the judgment under appeal.

After the notice of appeal and the statement of grounds for the appeal are served on the opposing party, the latter may file a statement of defence. The appellant may then file a reply to the statement of defence.

While further brief exchange is not mandatory, the court may order the parties to submit additional briefs or the parties themselves can decide to submit further brief. Especially in high-stake commercial cases, the filing of additional submissions is not unusual.

19 Are appeals limited to the evidentiary record that was before the trial court, or can new evidence be introduced on appeal?

As indicated in question 15, there is a limited possibility for the parties to introduce new evidence to the case. New evidence may be considered if it relates to aspects the trial court clearly overlooked or erroneously

regarded as irrelevant. It may also be admitted if it relates to aspects that were not considered by the lower court as a result of a defect in the proceedings or if it was not asserted in the first instance without this resulting from the appellant's negligence. Moreover, new evidence that emerged after the end of the oral hearing in the trial judgment may also be introduced in the appeal proceedings.

20 If litigants uncover new evidence of wrongdoing that they believe altered the outcome of a trial court judgment, can they introduce this evidence on appeal?

Yes. In such a case, the appellant can introduce the new evidence in the appellate proceedings. The wrongdoing will generally constitute a violation of the law and permit an appeal. In case a party uncovers certain types of wrongdoing (such as wrong testimony under oath, falsification of documents or other criminal offences) after the judgment has become final and binding on the parties, it can request a reopening of the proceedings based on an action for retrial of the case. In case of success, the main action will be heard once again. At the same time, the party that has uncovered the wrongdoing should file a petition for defence against the title based on the wrongfully released judgment, pursuant to section 826 of the German Civil Code, to avoid enforcement based on this judgment.

21 May parties raise new legal arguments on appeal?

Yes, the parties may introduce legal arguments at all times in both trial and appellate proceedings. In fact, the parties are only supposed to present the facts of the case, because German civil procedure law follows the principle of *iura novit curia*, namely, that the court knows the law applicable to the dispute. Consequently, the parties are free to submit legal arguments at all times in the proceedings.

22 What are the rules regarding attorneys' fees and costs on appeal?

The statutory attorneys' fees and cost rules set out in the German Attorney Remuneration Act and German Court Fees Act also apply to appeals. However, it is common in commercial practice to negotiate attorney fees. Such fees will be based on hourly rates, since German law does generally not allow for contingency fees. Under extraordinary circumstances only (especially the financial situation of the appellant), contingency fees are admitted, but not very common.

Both the statutory attorney and court fees are calculated on the basis of the amount in dispute. The latter is based on the financial interest of the claimant in connection with his or her complaint. In case of motions for monetary claims, this financial interest will generally correspond to the amount sought by the complaint. In case of declaratory motions, the amount in dispute will be based on an estimate by the court based on statutory provisions and an extensive body of judiciary precedents. Also, both statutory attorney and court fees will increase with each level of appeal. Moreover, both the attorneys and the court will also charge their expenses relating to the proceedings.

As regards the duty to bear the costs of the proceedings, the unsuccessful party must pay the court costs and reimburse its opponent's statutory attorney fees. In case the opponent agreed on negotiated fees with its attorney, it will generally only be able to recover the amount equivalent to statutory fees from the unsuccessful party.

23 Can parties enter into a settlement agreement to vacate the trial court judgment after an appeal has been taken?

The parties may at all times settle their dispute amicably, even during enforcement proceedings. Consequently, there is no restriction as to the parties' ability to settle during appellate proceedings to vacate the trial court judgment.

24 Are there any limits on settlement once an appeal has been taken?

No. Since German civil procedure law explicitly fosters settlements (eg, by providing attorneys with bonus fees for settlement), the parties can settle without any restrictions. Moreover, the court has to indicate to the parties of the proceedings at all times the possibility of a settlement.

25 May third parties fund appeals?

Yes. Typically this is done by the insurance company providing the liability insurance, which otherwise would have to pay the amount in dispute, an insurance company providing the legal expenses insurance or litigation financing companies. Also, any other third party may fund an appeal. However, the attorney representing the appellant may neither fund the appeal, nor will he or she usually agree on a contingency fee with the appellant.

26 If litigation funding is permitted in an appeal, must funding sources be disclosed to the court or other parties to the litigation?

No. However, it is sometimes disclosed for tactical reasons to impress the other party.

27 Must appellate courts in your country write decisions explaining their rulings? Can the courts designate the precedential effect of their decisions?

Generally, appellate courts have to give grounds for their decisions in writing. Exceptions apply if the parties waive their right to be provided grounds for the decision and in cases of default judgments, judgments based on an acknowledgment by the defendant and judgments based on a waiver declared by the defendant. As a counter-exception, appellate courts also have to give grounds for their decisions in these cases if the judgment is to be enforced abroad.

Courts cannot designate the precedential effect of their decisions. In Germany, appellate court decisions are not binding on lower instances in similar cases. It is, nevertheless, common practice that the courts of the lower instances follow the appellate courts' decisions, although the judges are free in their decisions.

WHITE & CASE

Andreas Klein
Federico Parise Kuhnle

aklein@whitecase.com
fparisekuhnle@whitecase.com

Bockenheimer Landstraße 20
60323 Frankfurt am Main
Germany

Tel: +49 69 29994 0
www.whitecase.com

28 Will the appellate courts in your country consider submissions from non-parties?

No. The German civil procedural system does not provide for such submissions and they are also uncommon in practice. As opposed to non-parties, intervenors, that is, third parties that are directly or indirectly involved with the dispute, may file submissions in the proceedings to protect their rights.

29 What are the ordinary forms of relief that can be rendered by an appellate court in a civil dispute?

The appellate court may either annul the appealed decision and decide itself or refer the matter back to the lower instance.

On the first appeal, the appellate court generally has to take any evidence required and decide the matter on its own. It may refer the matter back to a court of lower instance only if one of the parties

applied for that and special circumstances enumerated in the GCCP are given, eg, if the proceedings before the court of first instance are subject to a material irregularity and it will be necessary to take evidence in a comprehensive scope. If the appealed judgment is a partial judgment delivered contrary to its legal prerequisites, the appellate court may refer this matter back without any application of the parties.

On the second appeal, the appellate court (ie, the Federal Court of Justice) has to decide the matter on its own only if the appealed judgment is annulled because of a violation of law, and the matter is ready for a final decision without further taking of evidence. Otherwise, the appellate court has to refer the matter back to the lower instance court that has to hear the matter again and decide on it. In its decision, the lower instance court must follow the legal assessment (by the Federal Court of Justice given in the grounds for its decision) on which its judgment was annulled.

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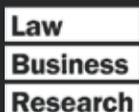
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