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ACCESS TO THE FEDERAL COURT OF JUSTICE IN GERMANY

The goal of this paper is to explain the role of the Supreme Court in Germany in the civil justice system. Specialised jurisdiction for labour cases, administrative law or criminal law will not be dealt with. After a brief overview of the institutional aspects, the main part of the paper is devoted to issues of access to the Federal Court of Justice as well as the scope of judicial control on appeal.

I. THE ROLE OF THE FEDERAL COURT OF JUSTICE IN THE COURT SYSTEM

1. BRIEF HISTORICAL SKETCH

The Federal Court of Justice (*Bundesgerichtshof*) is the highest court of ordinary jurisdiction; it is competent to hear both civil and criminal matters. It was founded in 1950, its seat being in Karlsruhe. When taking into account the long history of Supreme Courts in Germany, the Federal Court of Justice can look back on a tradition of more than 500 years of administration of justice.

Its predecessor, the *Reichsgericht*, existed from 1879 to 1945, its seat being in Leipzig. Its main function was to bring legal coherence to the German Empire (founded in 1871), more specifically to ensure uniform application of a series of new acts, such as the code of civil procedure (*Zivilprozessordnung* – ZPO), and, later on, the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) and the Commercial Code (*Handelsgesetzbuch* – HGB), which entered into force on 1 January 1900.

From 1495 to 1806 the Imperial Chamber Court (*Reichskammergericht*) was the highest Court of Justice in the Holy Roman Empire, its seat being in Wetzlar (from 1689). It mainly dealt with appeals against civil judgments of inferior courts.[1] However, as the competence of the *Reichskammergericht* posed

[1] See amply J. Weitzel, *Der Kampf um die Appellation ans Reichskammergericht*, 1976.

a threat to the power of the imperial princes, they did what they could to undermine the possibility to appeal against the judgments of the local courts within their territory. Consequently, most of them obtained (in exchange for an adequate counterperformance) a *privilegium de non appellando* which banned appeals to the *Reichskammergericht*, severely limiting the practical influence of that court.

2. INSTITUTIONAL SETTING

2.1. JUDICIAL HIERARCHY

The German civil court system consists of four levels: In the first instance, Local Courts (*Amtsgerichte*) or Regional Courts (*Landgerichte*) are competent to hear civil cases, depending on the value of the claim: Local Courts hear cases with an amount in controversy of up to € 5000. For all other cases the Regional Courts are competent.[2] The latter are also competent to hear appeals against decisions of Local Courts. Higher Regional Courts (*Oberlandesgerichte*) mainly have appellate jurisdiction over decisions by Regional Courts.[3] Finally, the Federal Court of Justice (*Bundesgerichtshof*) is the final court of appeal in civil (and criminal) matters.[4]

2.2. ORGANISATION OF FEDERAL COURT OF JUSTICE

The civil division of the Federal Court of Justice is divided into 12 Senates sitting in panels of five judges,[5] each having pre-defined competences and specialisations. The First Senate, for instance, deals with intellectual property and copyright law, the Second Senate deals with company law, the Eleventh Senate with banking and capital markets law, etc.[6] Pursuant to Article 101 (1) Basic Law, "[n]o one may be removed from the jurisdiction of his lawful judge". As opposed to many other jurisdictions, in Germany the lawful judge must be determined in an abstract manner to avoid that cases may be conferred *ad hoc* on certain judges for political (or other) reasons. Certainly the degree of specialisation also helps increase the quality of decisions. To ensure uniformity within the 12 Senates of the Federal Court of Justice a Grand Chamber (*Großer Senat für Zivilsa-*

[2] See sec. 23, 71 Judicature Act (*Gerichtsverfassungsgesetz* – GVG).

[3] See sec. 119 Judicature Act (*Gerichtsverfassungsgesetz* – GVG).

[4] See sec. 133, 135 Judicature Act (*Gerichtsverfassungsgesetz* – GVG).

[5] There are 129 judges working at the Federal Court of Justice (civil and criminal division). See the data provided by the Federal Office of Justice (*Bundesamt für Justiz*), available at: https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?__blob=publicationFile&v=5 (accessed: 13 June 2014).

[6] See the detailed organisational plan (*Geschäftsverteilungsplan*), available at: http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/DerBGH/GeschaeftsvertPDF/2014/geschaefts-verteilung2014.pdf?__blob=publicationFile.

chen) will convene to decide on the request of one Senate wishing to deviate from the jurisprudence of other Senates.[7]

2.3. OTHER FEDERAL SUPREME COURTS

There are five more Federal Supreme Courts: the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court as supreme courts of administrative, financial, labour and social jurisdiction. The existence of these Courts is enshrined in Article 95 (1) Basic Law (*Grundgesetz*). Moreover, a Federal Patents Court has been set up (Article 96 (1) Basic Law).[8]

As a consequence of such a multitude of Federal Supreme Courts a Common Senate of the Federal Supreme Courts (*Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes*) has been created (Article 95 (3) Basic Law).[9] That Common Senate deals with overarching legal issues to maintain uniformity. It convenes only very rarely. One of the cases decided concerned the admissibility of claim forms filed by way of computer fax.[10]

2.4. FEDERAL CONSTITUTIONAL COURT

For constitutional matters, the Federal Constitutional Court (*Bundesverfassungsgericht*) has been set up (Article 93 (1) Basic Law). It deals with civil cases only exceptionally, namely if, on a constitutional complaint, an individual alleges that one of his or her basic rights (Articles 1 to 20 Basic Law) or other rights as set out in the constitution have been infringed by a court (or, indeed, any other public authority).[11] The Federal Constitutional Court has shown considerable interest in civil law cases, and was therefore dubbed "super appeal court" ("*Superrevisionsinstanz*").[12] The jurisprudence of the Court was quite influen-

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[7] Sec. 132 Judicature Act (*Gerichtsverfassungsgesetz* – GVG).

[8] In total, there are 429 Federal Judges, see the reference provided above in note 350.

[9] The legal basis is the *Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes vom 19. Juni 1968*, BGBl. I S. 661. See generally M. Schulte, *Rechtsprechungseinheit als Verfassungsauftrag: Dargestellt am Beispiel des Gemeinsamen Senats der obersten Gerichtshöfe des Bundes*, 1986.

[10] Gemeinsamer Senat der obersten Gerichtshöfe des Bundes, Beschluss vom 5.4.2000, Az. GmS-OGB 1/98 – *Computerfax*, BGHZ 144, 160.

[11] Between 1991 and 2013, 113,735 constitutional complaints were filed with the Constitutional Court, out of which 45,349 were against judgments in civil cases. The overall success rate, however, is only about 2.5%. Cf. http://www.bundesverfassungsgericht.de/organisation/statistik_2013.html.

[12] The term has been used by the Constitutional Court itself; cf. BVerfGE 7, 198, at para 31: "So wenig das Bundesverfassungsgericht berufen ist, als Revisions- oder gar 'Superrevisions'-Instanz gegenüber den Zivilgerichten tätig zu werden, sowenig darf es von der Nachprüfung solcher Urteile allgemein absehen und an einer in ihnen etwa zutage tretenden Verkennung grundrechtlicher Normen und Maßstäbe vorübergehen." See F. Krauß, *Der Umfang der Prüfung von Zivilurteilen durch das Bundesverfassungsgericht*, Diss. Erlangen 1987 (§ 6); G. Hager, *Von der*

tial on the development of private law. In the famous *Lüth* case it has endorsed the doctrine of indirect effect of fundamental rights on private law (*Drittwirkung der Grundrechte*)[13] and, through that, considerably changed private law thinking. Other landmark cases include judgments on the validity of post-contractual non-competition clauses without compensation in commercial agency,[14] the validity of oppressive suretyships,[15] and contractual freedom in marriage contracts.[16]

However, as the catalogue of rights includes procedural guarantees such as the right to be heard, quite frequently the constitutional complaint is used by the aggrieved party as a last resort. In order to prevent the constitutional complaint from becoming an extraordinary appeal, the plenary Constitutional Court held in a landmark case that the legislator should enable the ordinary courts to provide redress in cases of violations of the right to be heard.[17] As a consequence, sec. 321a was inserted in the Code of Civil Procedure which gives the aggrieved party the right to object to the *judex ad quem*.[18]

3. THE CIVIL APPELLATE SYSTEM

The German Code of Civil Procedure (*Zivilprozessordnung* – ZPO) establishes three regular types of appeal:[19] the ordinary appeal (*Berufung*, sec. 511 *et seq*. ZPO), the appeal on points of law (*Revision*, sec. 542 *et seq*. ZPO) and the complaint (*Beschwerde*, sec. 567 *et seq*. ZPO).[20] In 2001 a major reform of civil procedure was enacted.[21] It entered into force on 1 January 2002, introducing important changes to the appellate system.

Konstitutionalisierung des Zivilrechts zur Zivilisierung der Konstitutionalisierung, "Juristische Schulung" 2006, 769, at 773 *et seq.*

[13] BVerfGE 7, 198 (*Lüth*).

[14] BVerfGE 81, 242 (*Handelsvertreter*).

[15] BVerfGE 89, 214 (*Bürgschaftsfall*).

[16] BVerfGE 103, 89 (*Ehevertrag*).

[17] BVerfGE 107, 395 (*Rechtsschutz gegen den Richter*).

[18] Sec. 321a (1) ZPO reads: "Redress granted in the event a party's right to be given an effective and fair legal hearing has been violated. (1) Upon an objection having been filed by the party adversely affected by the decision, the proceedings are to be continued if:

1. no appellate remedy or any other legal remedy is available against the decision, and
2. the court has violated the entitlement of this party to be given an effective and fair legal hearing and this has significantly affected the decision.

No objection may be filed against any decision preceding the final decision."

[19] For a brief history of the law of appeals in Germany as well as for further references see M. Stürner, *Die Anfechtung von Zivilurteilen*, 2002, pp. 7 *et seq.*

[20] Furthermore, proceedings may be reopened under very limited conditions, see sec. 578 *et seq.* ZPO.

[21] Gesetz zur Reform des Zivilprozesses vom 27.7.2001, BGBl I, Nr. 40, p. 1887.

According to the (still) predominant opinion in the legal literature, the German constitution does not guarantee a right of appeal.[22] From the very beginning the Constitutional Court has shared this view.[23] While it is true that there is no explicit provision in the Basic Law conferring a right to a further instance, the constitution does guarantee judicial protection against any act of the public authority (Article 19 (4) Basic Law). Quite clearly, courts of law are part of the public authority.[24] It follows from this, at least in the view of a number of authors, that in principle an appeal must lie against any decision of a court.[25] However, as this would lead to an infinite chain of appeals, it is up to the legislator to set up limits, taking into account other constitutional values such as the principle of finality. Restrictions on access to the appellate court must be designed following the principle of proportionality.[26]

While denying such a concept in principle, the Constitutional Court did accept in a plenary decision that the rule of law requires a legal remedy against the violation of the right to be heard.[27] However, the Court held that such remedy may be designed in a way that it could be dealt with by the *judex a quo*, thus leaving unchanged the position taken in earlier decisions.[28]

3.1. APPEAL (*BERUFUNG*)

An appeal lies against the final judgments delivered by the court of first instance (sec. 511 (1) ZPO).[29] In case the court of first instance was a Local Court, the appeal will be heard by the Regional Courts. In case the Regional Court was the court of first instance, the appeal will be heard by the Higher Regional Courts.

[22] See e.g. Maunz/Dürig/*Schmidt-Aßmann*, Grundgesetz, 42. Ed. 2003, Art. 19 (4) note 96 *et seq.*; BeckOK-GG/*Enders*, 20. Ed. 2014, Art. 19 GG note 57; both with further references.

[23] See e.g. BVerfGE 1, 433, 437.

[24] The (presumably still) predominant opinion, however, takes the rather narrow view that Article 19 (4) Basic Law guarantees a legal remedy *by* the judge, not *against* him ("Rechtsschutz *durch*, nicht *gegen* den Richter", see BVerfGE 15, 275, 280; BVerfGE 49, 329, 340; BVerfGE 65, 76, 90). That maxim has been coined by *Günter Dürig*, see Maunz/Dürig, Erstkommentierung, 1958, Article 19 (4) at note 17.

[25] See A. Voßkuhle, *Rechtsschutz gegen den Richter. Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 IV GG*, München 1993; A. Voßkuhle, *Bruch mit einem Dogma – Die Verfassung garantiert Rechtsschutz gegen den Richter*, "Neue Juristische Wochenschrift" 2003, p. 2193; M. Stürner, *Die Anfechtung…*, pp. 66 *et seq.*

[26] For that rationale see M. Stürner, *Die Anfechtung…*, pp. 79 *et seq.*

[27] BVerfGE 107, 395: "Es verstößt gegen das Rechtsstaatsprinzip in Verbindung mit Artikel 103 Absatz 1 des Grundgesetzes, wenn eine Verfahrensordnung keine fachgerichtliche Abhilfemöglichkeit für den Fall vorsieht, dass ein Gericht in entscheidungserheblicher Weise den Anspruch auf rechtliches Gehör verletzt." That has been reiterated in BVerfGE 108, 341, 347.

[28] See the reference in note 368. The legislator reacted soon after the decision inserting sec. 321a ZPO, see note 363.

[29] For a comparative Anglo-German perspective see M. Stürner, *Die Anfechtung…*, 2002, pp. 106 *et seq.*

Generally, almost every case will be suitable for appellate review. Pursuant to sec. 511 (2) ZPO, an appeal shall be admissible if the value of the subject matter of the appeal is greater than € 600. Even for cases below that threshold, the court of first instance may grant leave to appeal, namely if the "legal matter is of fundamental significance or wherever the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the court of appeal" (sec. 511 (4) ZPO).

The appeal has a double focus. First, it may be based on the allegation that the decision handed down was wrongly decided from a legal point of view. Second, the appellant may claim that the factual basis of the decision was wrong (sec. 513 (1) ZPO). However, there is only limited scope of review of fact-finding. As a matter of principle, the appellate court is bound by the facts established by the court of first instance. It is only unless "specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision" that a new fact-finding process will be permissible (sec. 529 (1) No. 1 ZPO).[30] Moreover, new facts and circumstances may be introduced under limited conditions (sec. 529 (1) No. 2, 531 ZPO).[31]

As parties made ample use of their right to challenge court decisions, the appellate courts were flooded with unmeritorious appeals.[32] Consequently, the reform of 2001 introduced a doorkeeper: pursuant to sec. 522 (2) ZPO, the appellate court may strike out such appeals if it is satisfied that

"1. the appeal manifestly has no chance of success;

2. the legal matter is not of any fundamental significance;

3. the further development of the law or the interests in ensuring uniform adjudication do not require a decision to be handed down by the court of appeal; and that

4. no hearing for oral argument is mandated."

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[30] See S. Arnold, *Zur Überprüfung tatrichterlicher Ermessensspielräume im Zivilprozess*, "Zeitschrift für Zivilprozess" 2013, 126, p. 63.

[31] Sec. 531 (2) ZPO reads: "(2) New means of challenge or defence are to be admitted only if they: 1. concern an aspect that the court of first instance has recognisably failed to see or has held to be insignificant; 2. were not asserted in the proceedings before the court of first instance due to a defect in the proceedings; or 3. were not asserted in the proceedings before the court of first instance, without this being due to the negligence of the party."

[32] Germany was sometimes seen as a "*Rechtsmittelstaat*" (the term plays with the central notion of *Rechtsstaat*, i.e. a state governed by the rule of law; *Rechtsmittel* means appeal): see e.g. *Justizministerium Baden-Württemberg* (ed.), Rechtsstaat – Rechtsmittelstaat?, 1999; some commentators ironically referred to the German "*Instanzenseeligkeit*", cf. W. Zeidler, *Rechtsstaat '83*, "Deutsche Richterzeitung" 1983, pp. 249, 253; H. Sendler, *Zum Instanzenzug in der Verwaltungsgerichtsbarkeit*, "Deutsches Verwaltungsblatt" 1982, pp. 157, 164.

The parties will be informed of the intention of the court to strike out the appeal, and the appellant will get the opportunity to submit his or her position within a period of time to be set (sec. 522 (3) ZPO).[33]

Immediately after the reform introducing the possibility to strike out unmeritorious appeals the situation was quite unsatisfactory as court practice varied considerably: Some courts struck out almost 60% of appeals, others only 20% or so.[34] There was no way to attack the decision of the court. Recently the legislator has introduced an important change.[35] Pursuant to the new sec. 522 (3) ZPO the unsuccessful appellant may attack the decision striking out the appeal with an appeal on points of law under the same conditions as if a full judgment were handed down by the appellate court.

3.2. APPEAL ON POINTS OF LAW (*REVISION*)

Pursuant to sec. 542 (1) ZPO, "an appeal on points of law may be filed against the final judgments delivered by the appellate instance on fact and law". Such appeals on points of law will be heard by the Federal Court of Justice (*Bundesgerichtshof*). The goal of the appellate proceedings is revision, not cassation. That means that in case of a successful appeal the judgment of the lower court will not just be quashed. The Federal Court of Justice may hand down a decision on the merits, provided that "the judgment is reversed only due to a violation of the law, in application of the law to the situation of fact as established, and if in light of said situation the matter is ready for the final decision to be taken" (sec. 563 (3) ZPO). Pursuant to sec. 566 (1) ZPO, a so-called leapfrog appeal (*Sprungrevision*) may be brought against final judgments of first instance courts provided that the defendant consents and the appellate court allows the appeal.

Some statistics:[36] 4348 appeals were lodged in 2013. In 715 cases (16.4%) leave was given by the lower court (*Revisionszulassung*);[37] all the others were complaints against denial of leave (*Nichtzulassungsbeschwerden*).[38] At the beginning

[33] See M. Weller, *Rechtsfindung und Rechtsmittel: Zur Reform der zivilprozessualen Zurückweisung der Berufung durch Beschluss*, „Zeitschrift für Zivilprozess" 2011, 124, p. 343.

[34] Cf. R. Greger, *Die ZPO-Reform – 1000 Tage danach*, "Juristen Zeitung" 2004, pp. 805, 813.

[35] Gesetz zur Änderung des § 522 der Zivilprozessordnung, BGBl. I Nr. 53 vom 26. Oktober 2011, p. 2082, in force since 27 October 2011.

[36] See the Annual Report (*Jahresstatistik*) 2013, available at: http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/DerBGH/StatistikZivil/jahresstatistikZivilsenate2013.pdf?__blob=publicationFile.

[37] When also counting appeals on the basis of special legislation, such as appeals (*Berufungen*) in patent law or complaints on points of law (*Rechtsbeschwerden*), in energy law and in competition law the number of incoming cases amounts to a total of 6743.

[38] Taking into account complaints pursuant to sec. 544 (1) ZPO as well as sec. 522 (3) ZPO; also considering applications for leapgfrog appeal pursuant to sec. 566 (1) ZPO.

of the same year, 4023 cases were pending.[39] 4228 cases were disposed of; 700 of which by way of final judgment (16.6%); in only 275 cases (or 8%) the complaint against denial of leave (*Nichtzulassungsbeschwerde*) was successful. 1106 appeals (26.2%) were inadmissible (*unzulässig*) or were withdrawn; 62 appeals (1.5%) were struck out for obviously being unmeritorious (sec. 552a ZPO).[40]

It is difficult to provide an average duration of the proceedings before the Federal Court of Justice. The official statistics indicate that slightly more than 50% of all appeals are disposed of in less than 12 months.[41]

3.3. COMPLAINT (*BESCHWERDE*) AND COMPLAINT ON POINTS OF LAW (*RECHTSBESCHWERDE*)

The Code of Civil Procedure sets up a third type of remedy: the so-called complaint. It may be filed against the decisions delivered by the Local Courts (*Amtsgerichte*) and Regional Courts (*Landgerichte*) in proceedings before them as courts of first instance provided that those decisions did not require an oral hearing and dismissed a petition concerning the proceedings (sec. 567 ZPO). It will be dealt with in this paper only insofar as it concerns access to the Federal Court of Justice, namely in the form of complaint against denial of leave to appeal (sec. 544 ZPO: *Nichtzulassungsbeschwerde*) and the complaint on points of law (sec. 574 ZPO: *Rechtsbeschwerde*).

II. RESTRICTING ACCESS TO THE FEDERAL COURT OF JUSTICE

Quite clearly, access to the highest instance has to be restricted in order to enable the court to concentrate on those cases which merit closer attention because they raise important legal issues for society at large. One model confers the power to choose those cases on the Supreme Court (example: USA[42]). Other models mainly entrust the appellate courts with that responsibility (example: Germany[43]). A third model combines both approaches (example: UK[44]).

[39] A total of 5127 considering cases outside the scope of application of the Code of Civil Procedure (*ZPO*), see note 382.

[40] See below at II. 3.

[41] Annual Report (note 381), at p. 32 et seq.

[42] 28 USC § 1254 (1), § 1257 (a). See H. Schack, *Einführung in das US-amerikanische Zivilprozessrecht*, 4. Aufl. 2011, Rn. 7 with references.

[43] Note, however, that there is a complaint against denial of leave to appeal (sec. 544 ZPO: *Nichtzulassungsbeschwerde*). See below, at 2 b).

[44] N. Andrews, *On Civil Procedure*, Vol. I, 2013, Ch. 15. See Article 40 Constitutional Reform Act 2005, available at: http://www.legislation.gov.uk/ukpga/2005/4/section/40.

1. THE OLD SYSTEM

The major reform of civil procedure of 2001 mainly concerned the (ordinary) appeal (*Berufung*), but also brought about some changes to the appeal on points of law. Before that reform access to the Federal Court of Justice was possible in two different constellations:[45] (1) In cases where the value of the claim was below DM 60,000 (or € 30,000), leave had to be granted by the appellate court (*Zulassungsrevision*). (2) Where the value of the claim was above that sum, appeal was possible without leave of the court (*Wertrevision*). However, the Federal Court of Justice had the power to dismiss such appeals with a majority of 2/3 of the members of the senate, provided that the case did not raise any legal matters of fundamental significance[46] and was obviously unmeritorious.[47] That provision was criticised as about 80% of all cases did not qualify for an appeal on points of law.[48] The functions of the Federal Court of Justice to clarify and develop the law were not properly served.

2. ADMISSION TO APPEAL[49]

2.1. ADMISSION BY LOWER COURT

The basic assumption is that the appellate court (*judex a quo*) has the best knowledge of the case and, consequently, is in a position to evaluate the case's suitability for appellate review. Thus, sec. 543 (1) No. 1 ZPO provides that an appeal on points of law may be lodged only if it is admitted by the appellate court. As a matter of law, not discretion, an appeal on points of law is to be admitted if: (1) the legal matter is of fundamental significance, or (2) the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the court hearing the appeal on points of law (sec. 543 (2) ZPO). The court hearing the appeal on points of law is bound by the decision of the lower court. Those reasons for admittance reiterate the model of the ordinary appeal (sec. 511 (4) ZPO[50]). They ensure that the public interest in uniform adjudication and clarification of the law will be duly served.[51]

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[45] Sec. 546 *ZPO* as of 2001. See amply H. Prütting, *Die Zulassung der Revision*, 1977.

[46] *Nichtannahmebeschluss*, sec. 554b *ZPO* as of 2001.

[47] Cf. BVerfGE 54, 277.

[48] See Bericht zur Rechtsmittelreform in Zivilsachen, C.1.1.1.2. The Report can be downloaded at: http://gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/Zivilprozessreformgesetz/b_rechtsmittelr_zs-index.htm.

[49] Cf. P. Althammer, *Die Zukunft des Rechtsmittelrechts*, (in:) A. Bruns, J. Münch, A. Stadler (eds.), *Die Zukunft des Zivilprozesses*, 2014, p. 87, 98 *et seq.*

[50] See above at I 2 a).

[51] Cf. BGHZ 152, 182.

2.2. APPEAL AGAINST DENIAL OF ADMISSION (*NICHTZULASSUNGSBESCHWERDE*)

The decision of the appellate court is not final. In cases where leave to appeal is denied by the *judex a quo*, the aggrieved party may lodge a complaint against the denial of leave to appeal pursuant to sec. 544 ZPO. The complainant must set out the grounds on which leave to file an appeal should be granted (sec. 544 (2) (3) ZPO) – these are identical to those set out in sec. 543 (2) ZPO.

Consequently, the mere fact that the decision by the appeal court was wrong does not justify the complaint. Even blatantly wrong decisions or violations of fundamental procedural rights will not fulfil the criterion of ensuring uniform adjudication. There will only be fundamental legal significance if the case was decided arbitrarily and a constitutional complaint would be manifestly well-founded.[52] The individual interest in receiving a correct judgment ranks lower than the public interest in clarifying and developing the law.

The Code of Civil Procedure does not contain any monetary threshold. The old system was done away with in 2001 as the legislator acknowledges that the fundamental importance of a case is in no way determined by the value of the claim.[53] However, the old system was somehow conserved by the back door: The transitional provision hidden in sec. 26 No. 8 of the Introductory Act to the Code of Civil Procedure (*Einführungsgesetz zur Zivilprozessordnung* – EGZPO) provides that the value of the claim (*Wert der Beschwer*) must be above € 20,000. Otherwise no complaint will be possible against a denial by the appellate court to grant leave to appeal. That regime applies until 31 December 2014.[54]

3. STRIKING OUT REVISIONS

Similar to the ordinary appeal, the Federal Court of Justice may strike out unmeritorious appeals on points of law: Pursuant to sec. 552a ZPO the court shall dismiss by unanimous decision the appeal on points of law admitted by the court of appeal if the court hearing the appeal on points of law is convinced that the prerequisites for admitting the appeal on points of law have not been met and that the appeal on points of law has no chance of success.

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[52] Cf. BGHZ 152, 182.

[53] Referentenentwurf eines Gesetzes zur Reform des Zivilprozesses vom 23.12.1999, p. 83 *et seq.* The full text can be downloaded at: http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/Zivilprozessreformgesetz/RefE.pdf.

[54] The “2. Justizmodernisierungsgesetz” (BT-Drs. 16/3038, S. 25) extended the sunset clause from 2006 until 2011; the Gesetz zur Änderung des § 522 ZPO vom 21.10.2011, BGBl. I, S. 2082 brought about a further extention from 2011 until 2014. A further extension seems possible. The provision was held to be constitutional, see BGH NJW-RR 2003, 645.

4. REPRESENTATION BY COUNSEL

Pursuant to sec. 78 (1) (3) ZPO, in proceedings before the Federal Court of Justice, the parties to the dispute must be represented by an attorney admitted to practice before said court. There are currently only 43 attorneys admitted to the Federal Court of Justice.[55] Those attorneys may not plead before lower courts (sec. 172 Federal Lawyers' Act – *Bundesrechtsanwaltsordnung*, BRAO). These restrictions were set up to maintain a high standard of legal arguments before the Federal Court of Justice.

III. ISSUES ON APPEAL (*REVISIONSGRÜNDE*)

1. BASICS

As opposed to the ordinary appeal, the appeal on points of law is restricted to legal issues.

1.1. VIOLATION OF THE LAW

Pursuant to sec. 545 (1) ZPO, "an appeal on points of law may only be based on the reason that the contested decision is based on a violation of the law". Sec. 546 ZPO defines a violation of the law as an instance where "a legal norm has not been applied, or has not been applied properly". Such mistakes can be wrong applications of substantive provisions, such as a misguided interpretation of the notion of "intention" in the delictual responsibility pursuant to sec. 823 of the civil code (BGB)[56] or a wrong inference from the facts, e.g. the lower court's factual findings do not justify the assumption that the defendant has acted intentionally.[57] Besides, procedural mistakes are under review. A violation of the rules of evidence (e.g. the principle of evaluation of evidence at the court's discretion pursuant to sec. 286 ZPO) could justify the appeal.

There has to be a causal link between the violation of the law and the judgment of the lower court. It may happen that the Federal Court of Justice finds a violation of the law, but nevertheless upholds the judgment appealed against as the outcome, e.g. denial of the claim, is justified. However, sec. 547 ZPO defines cases in which the decision of the appellate court is always to be regarded as unlawful ("absolute" reasons for an appeal on points of law). Such mistakes are

[55] Source: http://www.bundesgerichtshof.de/DE/BGH/Rechtsanwaelte/rechtsanwaelte_node.html.

[56] The German terminology is "*Interpretationsfehler*".

[57] The German terminology is "*Subsumtionsfehler*".

considered to be so grave that leaving them unsanctioned may distort public confidence in the administration of justice. That concerns the following mistakes:

"(1) the composition of the court of decision was not compliant with the relevant provisions;

(2) a judge was involved in the decision who, by law, was prohibited from holding judicial office, unless this impediment has been asserted by a motion to recuse a judge without meeting with success;

(3) a judge was involved in the decision although he had been recused for fear of bias and the motion to so recuse him had been declared justified;

(4) a party to the proceedings had not been represented in accordance with the stipulations of the law, unless it had expressly or tacitly approved the litigation;

(5) the decision has been given based on a hearing for oral argument in which the rules regarding the admission of the public to the proceedings were violated;

(6) contrary to the provisions of the present Code, the decision does not set out the reasons for the judgment."

1.2. FACTUAL BASIS

As to the relevant facts, there are, of course, important restrictions. The factual basis of the appellate control consists in the findings of the lower court that "are apparent from the appellate judgment or the record of the session of the court" (sec. 559 (1) ZPO). The Federal Court of Justice does not embark on a new assessment of factual allegations, it does not elicit evidence. The parties may not introduce new factual allegations, even though they may have come into existence after the appellate proceedings before the lower court.[58] The findings of the lower court with regard to factual allegations being true or untrue will be binding for the purposes of the appeal on points of law. The only exception to that rule concerns the situation in which the appellant has challenged the fact-finding process of the lower court by an admissible and justified petition, sec. 559 (2) ZPO.

2. FOREIGN LAW ON APPEAL

As set out in the previous section, an appeal on points of law has to be based on a violation of the law. What if the lower court had to apply foreign law and got it wrong?

2.1. FOREIGN LEGAL PROVISIONS AS LAW, NOT FACT

In German law, like in many other countries, foreign law is not seen as a matter of fact, but as a matter of law. Consequently, the maxim *iura novit curia*

[58] For exceptions see Thomas/Putzo/Reichold, ZPO, 35. Auflage 2014, § 559 notes 8 *et seq.*

applies.[59] The court has to apply foreign law *ex officio*. However, *iura novit curia* reaches its limits where the application of foreign law is concerned. The court can be expected to know German law only. Foreign law is outside the scope of the presumed knowledge of the judge.

Even though foreign law is not seen as a question of fact, when it comes to ascertaining its contents, the court is given the necessary power to establish the relevant rules of the applicable law. The relevant statutory provision is sec. 293 ZPO:

"Foreign law; customary law; statutes

The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use."

According to that provision, the court has a fairly large discretion as to how the content of the foreign law is established.[60] The approach towards foreign law is even more flexible as compared to the power the court has when establishing the facts of the case. The court is not necessarily bound by the strict law of evidence applying to the proof of facts.

First, the court can take advantage of its own knowledge about the relevant foreign law.[61] The court can use any source of information, e.g. manuals,[62] databases[63], internet sites,[64] etc. A further valuable source of information could be the European Judicial Network in civil and commercial matters.[65] Such sources, however, will only rarely completely solve every issue and will only help in straightforward cases.

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[59] See E. Schilken, *Zur Rechtsnatur der Ermittlung ausländischen Rechts nach § 293 ZPO*, (in:) *Festschrift für Ekkehard Schumann*, 2001, pp. 373–388.

[60] Cf. BGHZ 118, 151 (so-called *Freibeweis* as opposed to the more formal *Strengbeweis*).

[61] See W. F. Lindacher, *Zur Mitwirkung der Parteien bei der Ermittlung ausländischen Rechts*, (in:) *Festschrift für Ekkehard Schumann*, 2001, p. 283; T. Pfeiffer, *Methoden der Ermittlung ausländischen Rechts*, (in:) *Festschrift für Leipold*, 2009, pp. 283, 286.

[62] There is good deal of excellent manuals on foreign law in German language, see e.g. *Basedow*, *Coester-Waltjen* and *Mansel* (eds.), IPG – Gutachten zum Internationalen und Ausländischen Privat- und Verfahrensrecht (collection of experts' reports on foreign law prepared at the request of German courts); *Bergmann/Ferid/Henrich* (eds.), Internationales Ehe- und Kindschaftsrecht (Family Law), *Ferid/Firsching/Dörner/Hausmann*, Internationales Erbrecht (Law of Successions). An excellent source of information can be found in Ch. von Bar, *Ausländisches Privat- und Privatverfahrensrecht in deutscher Sprache. Systematische Nachweise aus Schrifttum, Rechtsprechung und Gutachten*, 9th ed., 2013.

[63] The manual edited by Ch. von Bar (previous note) is also available as a database at sellier.elp.

[64] Sometimes unreliable and not properly organised.

[65] See http://ec.europa.eu/civiljustice/index_en.htm. That site mainly contains information on procedural issues, and not on substantive law.

Second, the court can (and often will) ask parties to provide information on foreign law:[66] The parties are under a duty to assist the court in fulfilling its task to ascertain the relevant content of the applicable law.[67]

If the court is unable to get satisfactory access to the relevant foreign law it will have to look at external sources. One possibility is to ask for judicial assistance which is available e.g. through the European Convention of 7 June 1968 on Information on Foreign Law (the "London Convention") set up under the auspices of the Council of Europe.[68] According to Article 3 of the Convention, a judicial authority may make a request for information concerning the law of another Contracting Party.

In complex cases German courts mostly appoint a court expert (sec. 402 ZPO).[69] That court expert gets the complete picture of the case as he is normally provided with the entire file of the case. The expert draws up an expert statement about the foreign law aspects of the whole case. Foreign law experts are usually law professors or specialists at large institutes such as the Max Planck Institute of Foreign and Comparative Law in Hamburg.

2.2. THE APPEAL COURT'S POWER OF REVIEW

Before the reform of 2001 things were fairly clear. The former wording of sec. 545 ZPO restricted the scope of the appellate procedure mainly on violations of federal law (*Bundesrecht*).[70] The reform did away with that restriction as sec. 545 ZPO only refers to violations of the law. Consequently, the question arose whether or not the wrong application of foreign law could be an issue before the Federal Court of Justice.

The legal literature was (and still is) profoundly divided on the issue. Those arguing in favour of a full review of foreign law underline the fact that the need for a uniform application also comprises foreign law.[71] Foreign law plays a vital role for instance in the field of company law, where the advent of more and more foreign corporations (e.g. Limited Companies incorporated in the UK) entails

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[66] See W. F. Lindacher, *Zur Mitwirkung der Parteien…*, pp. 283–294.

[67] See BGH NJW 1976, 1581, 1583.

[68] Ratification in Germany: BGBl. 1974 II, 938, 1975 II, 300. See S. D. Jastrow, *Zur Ermittlung ausländischen Rechts: Was leistet das Londoner Auskunftsübereinkommen in der Praxis?*, "Praxis des Internationalen Privat- und Verfahrensrechts" 2004, No. 5, pp. 402–405.

[69] See T. Pfeiffer, *Methoden der Ermittlung…*, pp. 283, 294 *et seq.*

[70] Legal norms below the federal level are under review only in case such norms are in force in more than one judicial district of a Higher Regional Court (OLG), see B. Hess, R. Hübner, *Die Revisibilität ausländischen Rechts nach der Neufassung des § 545 ZPO*, "Neue Juristische Wochenschrift" 2009, p. 3132.

[71] P. Gottwald, *Auf dem Weg zur Neuordnung des internationalen Verfahrensrechts*, „Zeitschrift für Zivilprozess" 95 (1982), pp. 3, 8 with references; M. Aden, *Revisibilität des kollisionsrechtlich berufenen Rechts*, "Recht der Internationalen Wirtschaft" 2009, pp. 475, 477.

the need for an application of the law of incorporation of those companies.[72] The Federal Court of Justice has excellent access to information on foreign law.[73] That point of view is confirmed by the practice of the Federal Labour Court where review of foreign law is accepted.[74]

As opposed to that, those advocating the non-revisability of foreign law maintain that the review of foreign law cannot be seen as a goal of the Federal Court of Justice as the court's task – the development of the law and the uniform adjudication – inherently refers to national law only.[75] Moreover, when changing the wording of sec. 545 ZPO, the legislator had no intention of enabling the Federal Court of Justice to review foreign law.[76] The court might be flooded with new cases which would impede its proper functioning.[77] Finally, judgments of the Federal Court of Justice on foreign law might be considered "ridiculous" by foreign courts which could result in an unnecessary loss of reputation.[78]

That latter point of view has been endorsed by the Federal Court of Justice in two recent judgments.[79]

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[72] G. Mäsch, *Die Rolle des BGH im Wettbewerb der Rechtsordnungen oder: Neue Nahrung für den Ruf nach der Revisibilität ausländischen Rechts*, "Europäische Zeitschrift für Wirtschaftsrecht" 2004, 321.

[73] P. Gottwald, *Auf dem Weg zur Neuordnung des internationalen Verfahrensrechts*, "Zeitschrift für Zivilprozess" 1982, 95, pp. 3, 8.

[74] T. Riehm, *Vom Gesetz, das klüger ist als seine Verfasser – Zur Revisibilität ausländischen Rechts*, "Juristen Zeitung" 2014, pp. 73, 75; M. Aden, *Revisibilität…*, pp. 475, 476. But see other procedural rules: sec. 72 (1) FamFG has the same wording as the ZPO. Some commentators even claim that the result of a non-revisability of foreign law could amount to a violation of the principle of non-discrimination (Article 18 TFEU), see A. Flessner, *Diskriminierung von grenzübergreifenden Rechtsverhältnissen im europäischen Zivilprozess*, "Zeitschrift für Europäisches Privatrecht" 2006, Vol. 14, pp. 737, 738; B. Hess, R. Hübner, *Die Revisibilität…*, pp. 3132, 3133; *Mankowski/Hölscher/Gerhardt*, (in:) Rengeling/Middeke/Gellermann (eds.), *Handbuch des Rechtsschutzes der Europäischen Union*, 3. Auflage 2014, § 38 Rn. 89 ("indirect discrimination").

[75] H. Roth, *Die Revisibilität ausländischen Rechts und die Klugheit des Gesetzes*, "Neue Juristische Wochenschrift" 2014, pp. 1224, 1226.

[76] W. Ball, (in:) H.-J. Musielak (ed.), ZPO, 11. Auflage 2014, § 545 Rn. 7 m.w.N; H. Roth, *Die Revisibilität ausländischen…*, pp. 1224, 1225; T. Riehm, *Vom Gesetz…*, pp. 73, 75 (noting that such statement was issued outside the legislatory process). Moreover, sec. 560 ZPO would become redundant (because every statute could be an issue on appeal now), cf. Ch. Thole, *Anwendung und Revisibilität ausländischen Gesellschaftsrechts in Verfahren vor deutschen Gerichten*, "Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht" 2012, 176, pp. 15, 59; Lorenz, (in:) BeckOK BGB, Stand: 1.2.2014, Einl. IPR at note 87.

[77] F. Sturm, *Wegen Verletzung fremden Rechts sind weder Revision noch Rechtsbeschwerde zulässig*, "Juristen Zeitung" 2011, pp. 74, 77; in a similar sense already E. Steindorff, *Das Offenlassen der Rechtswahl im IPR und die Nachprüfung ausländischen Rechts durch das Revisionsgericht*, "Juristen Zeitung" 1963, pp. 200, 203

[78] F. Sturm, *Wegen Verletzung…*, pp. 74, 77; contra Ch. Thole, *Anwendung und Revisibilität…*, pp. 15, 62.

[79] BGHZ 198, 14; BGH NJW 2014, 1244 (on the latter decision see F. Krauß, *Anforderungen an die tatrichterliche Ermittlung ausländischen Rechts in Zivilverfahren*, GPR 2014, p. 175).

2.3. REVIEW OF FOREIGN LAW "BY THE BACK DOOR"

However, the Federal Court of Justice may review procedural mistakes in connection with the ascertaining of foreign law, e.g. violations of sec. 293 ZPO such as a misuse of the lower court's discretion.[80] As it is difficult to draw a sharp line between such procedural errors and errors concerning the application of foreign law one may view this as a review of foreign law by the back door.[81]

3. PARTY AUTONOMY VS. DEVELOPMENT OF THE LAW

It has been mentioned that the development of the law and the uniformity of adjudication are paramount goals of the Federal Court of Justice. Those goals, however, conflict with an important overarching principle of civil procedure, namely party autonomy. Relevant legal problems may escape the judiciary because the parties settle the case before judgment can be handed down. Certain areas of law, such as insurance law, are particularly concerned: To avoid unwanted precedents, insurers mostly tend to settle a case or withdraw the appeal as soon as they realize that they are likely to lose.[82] As there is no attorney general for civil cases in Germany, the Federal Court of justice is not in a position to provide guidance in such cases.

Until very recently, the appellant was in a position to withdraw the appeal without the respondent's consent until judgment is pronounced, sec. 565, 516 (1) ZPO.[83] The legislator has changed that with effect of 1 January 2014.[84] From now on a withdrawal of the appeal without the respondent's consent is only possible until the beginning of the oral hearing (sec. 565 (2) ZPO).

IV. THE SUCCESSFUL APPEAL ON POINTS OF LAW

Pursuant to sec. 562 (1) ZPO, to the extent the appeal on points of law is deemed justified, the contested judgment is to be reversed. That includes also

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[80] BGHZ 118, 151; see K. Kerameus, *Revisibilität ausländischen Rechts*, "Zeitschrift für Zivilprozess" 1986, 99, pp. 166, 172 *et seq.*; H. Dölle, *Bemerkungen zu § 293 ZPO*, (in:) *Festschrift für Nikisch*, 1958, pp. 185, 193.

[81] Ch. Thole, *Anwendung und Revisibilität*..., pp. 15, 56.

[82] G. Hirsch, *Revision im Interesse der Partei oder des Rechts?*, "Versicherungsrecht" 2012, p. 929; Ch. Fuchs, *Einschränkungen der Dispositionsmaxime in der Revisionsinstanz: Werden alle Ziele erreicht?*, "Juristen Zeitung" 2013, pp. 990, 992.

[83] P. Althammer, *Die Zukunft des Rechtsmittelsystems*, (in:) A. Bruns, J. Münch, A. Stadler (eds.), *Die Zukunft des Zivilprozesses*, 2014, pp. 87, 100 *et seq.*

[84] See Gesetz zur Förderung des elektronischen Rechtsverkehrs mit den Gerichten vom 10.10.2013, BGBl. I, p. 3786. On the reform cf. Ch. Fuchs, *Einschränkungen der Dispositionsmaxime*..., p. 990.

factual findings of the lower court, provided that those findings were based on procedural errors. There are two possible ways to go forward:

(1) The matter may be remanded to the appellate court, which is to hear it once again and is to decide on it. The appellate court is to base its decision on the legal assessment on which the reversal of the judgment was based (sec. 563 (1) and (2) ZPO)[85] – a rare instance where German law adheres to the doctrine of binding precedent.[86] That would be the model of cassation.

(2) The powers of the Federal Court of Justice go beyond that: in case the judgment is reversed only due to a violation of the law, the Court may decide on the merits in application of the law to the situation of fact as established, and if in light of said situation the matter is ready for the final decision to be taken (sec. 563 (3) ZPO).

V. CONCLUSION

The Federal Court of Justice is widely being acclaimed for doing good legal work. The main problem consists in finding the right balance between the goal of doing justice in the individual case and the overarching aim of every Supreme Court to clarify and develop the law. The history of reforms of access to the Federal Court of Justice can be seen as a constant attempt to find the equilibrium; sometimes one aspect is given too much weight, sometimes the other. In Germany, traditionally, much weight has been placed on the goal of individual justice. However, in the last decade, the collective aspects of the revision were strengthened. The mere fact that a decision rendered by the appellate court is wrong does not suffice to open revision. The Federal Court of Justice has reserved only a small loophole for cases which are so wrongly decided that they border on arbitrariness.

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[85] Example: BGH NJW 2004, p. 2736: referral to court of appeal which does not want to follow; judgment is again attacked; see BGH NJW 2007, p. 1227. On the point see generally K. Bartels, *Grenzen der Bindungswirkung rückverweisender Revisionsentscheidungen*, "Zeitschrift für Zivilprozess" 2009, 122, pp. 449–464; S. Madaus, *Die Bindungswirkung zurückverweisender Revisionsurteile*, „Zeitschrift für Zivilprozess" 2013, 126, pp. 269–294.

[86] The other concerning decisions of the Constitutional Court which are binding on all lower courts pursuant to sec. 31 Act on the Constitutional Court (*Bundesverfassungsgerichtsgesetz* – BVerfGG).

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ACCESS TO THE FEDERAL COURT OF JUSTICE IN GERMANY

Summary

The text explains the role of the Supreme Court in the civil justice system in Germany with reference to a major reform of civil procedure that was enacted in 2001. The reform of access to the Federal Court of Justice aimed at striking a balance between individual justice and public interest. The author discusses the requirements of admissibility of ordinary appeal and appeal on points of law, which may be filed to the Federal Court of Justice. The German legislator has notably renounced the *ratione valoris* criterion (monetary threshold) and adopted the requirement of the leave to appeal. The power to restrict access to the Supreme Court was conferred on appellate courts. As a consequence, an appeal on points of law may be lodged only if it is admitted by *judex a quo*. Although the denial of admission is subject to appeal, the text argues that the reasons for admittance

ensure that the public interest in uniform adjudication and clarification of law will be duly served.

KEYWORDS

Federal Court of Justice, appellate courts, ordinary appeal, appeal on points of law

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Federalny Trybunał Sprawiedliwości, sądownictwo apelacyjne, apelacja zwykła, apelacja co do prawa