

BASIC KEY PRINCIPLES OF CASE MANAGEMENT ACCORDING TO THE GERMAN CODE OF CIVIL PROCEDURE

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EXECUTIVE SUMMARY

Cases are the business of courts and their prompt and just resolution is the basic purpose for which courts exist. Case management is the control of the pace of preparation and the pace of the trial of cases. For the most part the control of the pace of cases in Jordanian courts resides with the attorneys. The fundamental principal of improving case management is to transfer control from attorneys to the judge.

In 2001 the Ministry of Justice created the concept of Civil Case Management Departments (CMD) within First Instance (general jurisdiction) courts. The goal of the CMD was to introduce a more proactive approach to preparing cases for trial and judgment. All new civil cases were routed to the CMD where judges who would not preside over the substantive hearings of the case attempted to notify all parties, gather and organize all pleadings, prepare a complete case file ready for hearing, and determine the points of agreement and disagreement. From 2004 to present USAID funded Rule of Law programs have assisted the Ministry replicate CMDs in all First Instance courts, develop CMD practice guides and best practices, develop and conduct training programs for case management judges and trial judges, and conduct closed case surveys to assess the impact of the CMDs.

The current practice of case management within the context of Case Management Departments is not effective. The current authorization and definition of case management under Article 59 bis of the Civil Procedure Law does not provide sufficient authority necessary to support a proactive judge.

To encourage the Ministry of Justice to consider Judicial Case Management (trial judges' case managers) as an alternative or concurrent strategy to transfer control of the pace of cases from attorneys to the court the Rule of Law Program (ROLP) sought a European civil law system model as proof of concept. The German civil courts successfully practice Judicial Case Management. This report is an explanation of the German model and its supporting legal framework.

Judicial Case Management is early, continuous control of the process of defining the issues, facts, and laws related to a dispute and the process of presentation of facts and evidence to arrive at a judgment according to a schedule defined based on the specific needs of the case.

This is a process that has been proven to be effective in both common law and civil law systems elsewhere in the world.

The basic tenets of Judicial Case Management are that the case must be subject to:

1. Early judicial control
2. Continuous judicial control
3. Short-scheduling
4. Reasonable accommodation of lawyers
5. Expectation that hearings will accomplish what they are scheduled for.

Effective Judicial Case Management requires that the judge:

1. Identify at the time of filing of a complaint and answer the legal and factual issues related to the case.
2. Conduct an early first hearing to attempt to resolve the case amicably; if no settlement agreement can be achieved, the judge will.
3. Define what, if any, experts and witnesses will be heard and what the witnesses may testify to.
4. Set schedule for oral presentation of facts and evidence; actively manage postponements so that no party may delay the process by non-appearance or unreasonable requests for postponements; judges must have rules of procedure that permit them to dismiss, default or otherwise sanction a party who does not participate in their processes.

The efficiency of case management according to the German Code of Civil Procedure has been proven. The average time for resolving civil cases is 4.8 months in civil proceedings before local courts and 8.2 months in civil proceedings before regional courts.

I. BASIC KEY PRINCIPLES OF CASE MANAGEMENT ACCORDING TO THE GERMAN CODE OF CIVIL PROCEDURE

As is the case with substantive law, German procedural law is also systematically and clearly structured in the form of codes. The **Code of Civil Procedure** (Zivilprozessordnung – abbreviated as ZPO) governs civil proceedings and therefore provides the foundation for the work of both judges and lawyers.

Case Management is the centerpiece of the German civil trial system and assigned to the trial judge upon filing of action up to passing the decision or judgment. The judge actively steers the proceedings. Therefore, case management (to be addressed more precisely as “handling cases”) is an integral part of the education of judges). This facilitates the efficient conduct of the proceedings, while maintaining a focus on decisive issues.

The court (judge assisted by the clerk office as a representative of the Court Administrator’s Office) is responsible for the structure and organization of the proceedings, including the service of the statement of claim, written pleadings and court decisions. The notification as well as the service of summons (witness or expert witness) is executed by the administrator (clerk) at the order of the judge. If and when required, the court can enforce the attendance of witnesses by subpoena. Compared to other jurisdictions where counsels of the parties are required to perform all the costly and time-consuming organizational tasks, the German approach significantly accelerates court proceedings.

In accordance with the statutes as set out in the Code of Civil Procedure, civil procedure law is meant to be understood and interpreted in the light of federal constitutional law, as it takes precedence over statutory Law. Owing to various effects of Basic Law, the German civil court procedure is influenced by the following principles:

Principle of the Right to a Fair Hearing: This principle states that the rights of a person may not be affected by court measures without first allowing that person the opportunity to defend himself. Exceptions to the basic right to a fair hearing exist if the aim of the decision would be jeopardized, e. g. in the event of attachment and interim injunctions.

Principle of Party Disposition: The parties are exclusively entitled to decide the beginning, continuation and end of civil proceedings.

Principle of Party Presentation: As civil cases are only concerned with the enforcement of private interests it follows that the parties are responsible for presenting facts which are favorable to them. If they do not do so, only they themselves are responsible for the disadvantages arising from the negative outcome of the court case. Conversely, the court may only base its decisions on those facts which have been submitted by the parties. Facts which have not been submitted by either party are not to be taken into account. Although the parties determine the course of the proceedings, the court of the first instance should stimulate the parties to present all facts that are relevant. In contrast, the court of second instance (court of appeal) should merely scrutinize the decision of the court of the first instance. Therefore, the court of second instance should not be presented with facts that could already have been presented during the proceedings of the first instance. The parties must be eager not to miss any bit of information that may be relevant to the case as otherwise the failure party may risk the exclusion with further pleadings.

Principle of Verbal Participation: Such principle states that the parties must negotiate verbally before the relevant court; only evidence which has been presented verbally before the court may form the basis of the latter decision of the court.

Principle of Directness: This principle states that the verbal negotiation and recording of evidence must in principle take place before the relevant judge (i. e. before the judge who will later also make the decision in that case; thus a transfer of judge may afford the reiteration of taking of evidence).

Principle of Public Hearing: All civil court proceedings must (in principle) be conducted in public, i. e. the public must have access to them.

Principle of Expedition: As stipulated in Article 279 ZPO the legal dispute is handled in one hearing (main hearing) if at all possible. In order to meet the requirement by law, the judge is obliged to expedite the proceedings by taking preliminary actions (e. g. noting the parties about deficiencies in their pleadings, advising them about relevant issues, pointing the parties to obvious omissions in order to avoid a so-called surprise judgment; the judge may order from the transfer of records or documents from public authorities or the summons of a witness etc.).

Moreover, either party has the statutory obligation to declare himself to the relevant factual issues; if not, the presenting fact will be treated as agreed in favor of the other party (see Article 138 ZPO).

By means of judicial control German courts work very efficiently. As per report of the Federal Ministry of Justice fifty per cent of all proceedings before the local courts (Amtsgerichte), who have authority to hear matters having a value in dispute not exceeding 5,000 euros, are concluded in one main hearing during three months. Every third case brought before regional courts (Landgerichte), which are authorized to adjudge cases having a value in dispute of over 5,000 euros, is concluded within one main hearing within three months, with a further 25 per cent being finalized within six months. The German court of first instance (regional court) has 3 hearings the average case.

II. INITIATING AND RESPONDING TO PROCEEDINGS

1. Steps Required before Proceedings can be initiated

The commencement of proceedings is generally not dependent on the observance of any formalities prior to initiation of the case, such as prior notification of the opposing party. The obligation on the alleged owner of the claim to file a claim with the courts is the result of the principle of party disposition (see “Principle of party disposition”). However, it should be noted that under certain circumstances the plaintiff may suffer certain disadvantages if he has filed the claim without informing the defendant prior thereto. In such cases the ZPO provides that the plaintiff has to bear the costs of the legal dispute if the conduct of the defendant did not give cause for the claim to be filed and if the defendant also immediately acknowledged the claim made.

2. Formalities

The nature of the formal requirements for written statements to be handed in to the courts depends on which court is responsible for the decisions in the legal dispute in question. If the dispute is conducted before a local court, no special formalities are to be observed; each party may hand in written statements to the court its own name and appear before the court. A representation by lawyers is not required.

However, there is a requirement for legal counsel to appear before all other civil courts (i. e. statements delivered before the courts and associated acts may only be delivered and accepted by a legal counsel entitled to appear before and address the courts). In such cases a proper written power of attorney from the client shall be provided authorizing the lawyer to act for the party in court. The judge will verify the existence of a power of attorney only if the opposing party objects.

3. Beginning Proceedings

Civil proceedings are generally commenced by handing in a statement of claim (Klageschrift) to the court. Once the statement of claim has been received by the court the claim is pending (anhängig), once it has been served on and received by the defendant the claim is then sub judice (rechtshängig). However, the notification on the defendant will only be ordered by the judge if the plaintiff has paid the court fees in advance.

The ZPO sets out particular requirements for the statement of claim (see Articles 253 and 130). A statement of claim must contain the description of the parties involved, their names, an address for service, and the name of the court where the claim has been filed. It must also state the subject of the dispute and grounds therefore. The particulars pleaded by the plaintiff must state the key facts which form the basis for a justifiable claim and should set forth a legal theory. The claim must also be phrased as precisely as possible (i. e. the plaintiff has to specify the nature and extent of the legal remedy it seeks). Moreover the document proposes means of proof for its main factual contentions (note that a description of the evidence is included within the pleadings). The major documents in the plaintiff's possession that support his claim are scheduled and often appended; other documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified. The final prerequisite for a due and proper filing a claim is the observance of written form (i. e. the document must be signed by the party or its lawyer issuing it in its own name). Faxes or electronic documents are regarded as admissible written form.

Once the statement of claim has been received by the court and has been transferred from the Court Post Office to the Clerks' Office, the file and the court record will be opened, the statistic forms will be filled. If the court fees have been paid, the record will be transferred to the assigned judge.

The judge will check the court panel's competence (local and functional) as well as the fulfillment of the statutory prerequisites of the statement of claim. If no deficiencies will be observed the judge orders the service of the statement of claim on the defendant. His order will be accompanied by selection of court procedure (either scheduling an early court hearing or ordering a preliminary preparation of the case by written statements). The defendant is granted a time period of at least two weeks to answer on the statement of claim. However, the time period will be amended to a reasonable time schedule upon the defendant's request that the time period is not sufficient.

The clerk's office (court office) is responsible for execution and service (note: the court office – administrator – acts as a complete support system for the judicial work where the substance of the case is not involved). Though the service will be performed by the court it has to be noted that it is the plaintiff's obligation to provide the court with the defendant's proper address. In case the defendant's address proves to be incorrect the court will inform the plaintiff thereabout and request him to provide the court with the defendant's accurate address. It is not the court's assignment to investigate the accurate address of the defendant and/or of witnesses whom the parties have called for evidence. If the obliged party will not provide the court with the accurate address the case will not be promoted by the court. The disadvantages thereof has to be carried by the party who is obliged to provide the accurate address (e. g. the plaintiff may be faced with the dismissal of the claim by administrative order).

A period of at least two weeks must elapse between service on the defendant and any hearing. In his response the defendant will follow the pattern of pleadings as stated in the plaintiff's statement of claim. As stated above, the defendant as well as the plaintiff must present all relevant facts and legal arguments during the proceedings of the first instance. The defendant should raise all suitable defenses against the admissibility of the complaint as well as the objection of lack of jurisdiction. He shall respond to any of the factual issues as stated in the plaintiff's statement of claim in order to avoid that the plaintiff's presented factual issues will be considered undisputed. In this respect, strategic considerations to hold back relevant facts or legal arguments during proceedings of the first instance and to provide these facts or arguments only during proceedings of the second instance before the court of appeal should be avoided since there is a very large risk that the appeal court of the second instance ignores facts and arguments that were not presented during first instance proceedings.

III. PRE-TRIAL PRACTICE

1. Administrative Rulings Including Scheduling Orders

The ZPO proceeds from the concept that a legal dispute should be handled in one (main) hearing ("Principle of expedition"). In order to achieve this aim, detailed preparation is required by the judge.

During this phase of preparing the case the judge to whom the case is entrusted examines the pleadings and appended documents. He routinely sends for relevant public records. These materials form the

beginnings of the official dossier (court file). All subsequent submissions of counsel, and all subsequent evidence-gathering, will be entered in the court file, which is open to counsel's inspection continuously.

When the judge develops a first sense of the dispute from these materials, he will decide between two opportunities to evaluate the materials or to collect more information. The judge will either schedule for a preliminary hearing and the submission of written statements and pleadings by the parties for preparing the main court hearing.

a) Preliminary (First Early) Court Hearing

In preparation of such hearing the judge examines the pleadings as soon as they are filed, notes deficiencies in the pleadings and writes to the parties providing time to correct the deficiency. He reviews the plaintiff's statement (e.g. "Is the statement of facts of the plaintiff conclusive? If not, he provides comments on the defects). The defendant is requested to present his statement of defense within a time period of two weeks. The date of the hearing is fixed (usually within 1 month); the litigants are summoned by an official court order.

Upon submission of the statement of defense the judge studies the pleadings and reviews it ("Is the denial of facts of the defendant substantial? If not, a judicial notice will be served on the defendant to remedy the defect).

In case of disputed facts, the judge is entitled to issue orders. He may request for presentation of official documents from governmental institutes and summon the parties to attend the hearing. If the pleadings have identified witnesses whose testimony seems central, the judge may summon them to the initial hearing as well. Furthermore the parties will be informed about the schedule of hearing.

b) Sequence of Events First Oral Hearing

Pursuant to Article 139 ZPO the judge takes over an active role in driving the parties to exploit all possible avenues to reach settlement. This is accompanied by the implementation of "conciliation proceedings" (Güteverhandlung) as set forth in Article 278 ZPO. This provision requires the court to initiate a session in which the parties are encouraged to reach a peaceful court settlement. The court is permitted to refrain from such action only if an earlier attempt to reach an agreement has failed or if the prospects for an agreement are obviously non-existent. However, frequently the judge will be able to

resolve the case by discussing the circumstances of the case with the lawyers and parties and suggesting avenues of compromise.

If conciliation proceedings fail the judge will continue the proceedings in the ordinary legal hearing. During the preliminary hearing, the collection of material takes place in the context of a negotiation meeting, usually scheduled at short notice, in which the material and legal situation of the parties is determined. Therefore the aim of the preliminary proceedings can serve the clarification what further measures are required for preparation and for the oral proceedings that are to take place later. To ensure effective legal protection, the judge must make sure that the parties explain themselves fully in relation to all relevant facts of the case, that they complete sufficient statements in relation to the asserted facts of the case and that they indicate and present the evidence insofar as possible. Beyond this, the judge should make the parties aware of any objections and give directions for pleadings. The obligation exists namely when the judge recognizes that a party has not given a full statement regarding a point which is important for the decision, for instance because it has completely overlooked an angle, misjudged the legal meaning or incorrectly assumed it has given a full statement. Despite this obligation of the judge to clarify, the courts must always remain impartial, which means they must avoid helping a party win its case.

If the case remains contentious and witness testimony needs to be taken, the judge will have learned enough about the case to determine a sequence for examining witnesses.

c) Preliminary Proceedings by Written Pleadings

Some cases however require a detailed preparation of the main hearing by exchange of written pleadings prior to any scheduled hearing. Pursuant to Articles 276 and 277 ZPO the judge may order that the parties should prepare the main court hearing by submission of written statements and pleadings stating all relevant facts and evidence. Such proceedings should be ruled in so-called complex cases as well as in cases of bad payment.

Complex cases are identified as cases whose subject matter consists of a variety of factual and/or legal issues and which require evidence hearing such as cases concerning disputes out of a contract for work. However, legal issues may not identify a case to be a complex case.

Upon service of the plaintiff's statement of claim on the defendant the latter is granted a time period of **2 weeks** to give notice to the court that he wishes to defend the claim. Such announcement has to be

submitted to the court by the defendant's lawyer who has to present his power of attorney within this time period. Moreover, the defendant has been advised by written court order that in case of missing the time limit of announcement and upon the application of the plaintiff, a **default judgment** can be given against him without a prior oral hearing.

Within a time period of further **2 weeks** (at least) the defendant has to present his defense to the court. Upon receipt of such statement the judge grants the plaintiff a time period of at least 2 weeks to transmit his response thereto. Thereafter the judge is actively evaluating the pleadings to discover the relevant issues on factual and legal aspects and advising the parties as to what he believes the issues to be. Since a description of the evidence is included with the pleadings, the court is able to come to tentative conclusions about which proofs will be necessary to resolve the case. By either oral or written exchanges the proofs necessary are prescribed by the judge and a main hearing is set to take the evidences the judge has decided are needed.

d) Conclusions

As the judge provides guidance as to the issues that he considers relevant, the parties are enabled to adapt their litigation strategies, saving both time and money. As a party to a case in Germany he is – in contrast to many other jurisdictions – largely protected from any unpleasant surprises.

To ensure that cases are decided by judges who are experts in the subject area, the German courts of civil jurisdiction include divisions that specialize in particular fields of law, such as building law, industrial property law, company law or banking law.

However, even though the court ensures the efficient conduct of the proceedings, the plaintiff remains “master of the proceedings” every step of the way, in that the party and its lawyer alone determine the subject matter of the case via the petitions and the motions filed.

2. Attendance at a Court Hearing

Under the provisions of German civil procedure law the party who fails to appear at a hearing or to obey a trial order, the court may issue on motion a default judgment or preclude the party from further pleadings. The basis of a default judgment is merely the circumstance that the party did not appear at the hearing.

Such judgment can be enforced by the party in whose favor it has been issued. Therefore, any strategy in delaying the procedure has a negative impact on such party.

3. Motions and Other Applications and Submissions

In civil proceedings the parties can only obtain procedural directives if they fulfill the requirements for the corresponding procedural actions. The German Code of Civil Procedure differentiates between means of prosecution and defense, applications and procedural declarations. Means of prosecution and defense relate to the entire statements of the parties, which serve the assertion or the defense of the claim (e. g. the alleging or the denial of the facts). With regard to applications, the German Code of Civil Procedure differentiates between actions for relief (e. g. statement of claim), procedural declarations (e. g. the ending of proceedings following the withdrawal of a claim). All procedural steps must be undertaken in written form before the court and their content must be sufficiently definite so that the court can understand the intention of the person making the application.

Non-Conclusory Motions. There are some motions which initiate proceedings and some which relate to existing proceedings, with the intention to influence the proceedings or their course. For example, the examination of a particular witness can be requested or a judge can be challenged for prejudice through such motion. Also various procedural options (e. g., an application to courts to have a decision in written proceedings, to postpone a hearing fixed by the court or to extend a deadline) can be applied for in this way.

Conclusory Motions. The principle of obligatory oral proceedings is the result of the right to a fair hearing founded in the German Constitution. For this reason, there are limited grounds on which pending proceedings can be concluded without a prior oral hearing. The ZPO sets out the following possibilities:

Withdrawal of the Action. The plaintiff is generally allowed to withdraw pending proceedings. From a timing point of view, the plaintiff is limited to an extent, in that he can only withdraw the claim without agreement of the defendant up until the defendant has acted in the oral proceedings in the matter. Thereafter, the defendant's agreement is required. Where a claim is withdrawn, a decision is not made in the matter. The plaintiff is obliged to assume the costs of the proceedings, unless the reason for the claim has elapsed prior to the pendency of the case and the defendant has caused the action. In this case the court may rule the costing on the defendant. However, the plaintiff may file the case before the court again at any time.

Waiver of the Action. Where the plaintiff waives the action, he no longer demands the relief sought; and he admits not being legally entitled to the claim. This waiver of the action must be explicitly indicated to the court. On motion, the defendant receives a judgment of waiver without further examination.

Acceptance of the Claim. As a mirror image to the waiver of the action, it is always open to the defendant to accept the claim made by the plaintiff. Also in this situation, on application to the court by the plaintiff, a judgment of acceptance will be given without further examination.

Disposal of the Main Issue: Occasionally the action which is being made is only fulfilled after the action has been served on the defendant. As through this fulfillment there is then no longer a requirement for a decision of the court, the parties can declare that the main issue has been disposed of. If they are in agreement of this, the court needs only to decide who has to carry the costs of the proceedings. This does not apply if the defendant contradicts the declaration of the plaintiff that the main issue has been disposed of. Such a decree will be granted only if the action was initially admissible and well-founded and became undisputed after commencement of the case.

Delay of the Defendant: If the defendant does not give notice to the court within the time limit that he wishes to defend the claim, upon application of the plaintiff, a default judgment can be given against the defendant without a prior oral hearing. The basis of this default judgment is merely the circumstance that the defendant did not react in time.

4. Law of Evidence - Gathering Evidence

a) *Efficiency through intelligent rules of evidence*

Disputes in courts not only center on legal questions but, first and foremost, on questions of fact. The manner in which a legal system organizes and regulates the taking of evidence is of critical importance to the cost and duration of cases. German law proves to be particularly efficient and predictable in this regard.

In steering the proceedings, the court first of all ensures that the parties state their case in full, specifying the evidence they intend to present. "Fishing Expeditions" (Ausforschungsbeweis) by a party merely in order to get access to further evidence are not allowed. However, the provisions of the German Code of Civil Procedure strengthen the joint responsibility of the courts for handing down materially just decisions and for obtaining the facts and evidence necessary to do so. To the extent necessary, therefore, the courts can raise evidence and pursue their own inquiries into matters, other than the examination of witnesses.

The way for the actual taking the evidence is prepared by orders to take evidence regarding those facts requiring clarification. The court will conduct a hearing of the evidence. However, the only facts that must be proven are those facts that:

- (i) are important for deciding the legal dispute
- (ii) are in dispute between the parties, and
- (iii) are not already proven in another way.

Of particular importance in this context is the legal fiction whereby facts are not contested by the other party are deemed to be admitted (Article 138 par. 3 ZPO).

Carefully balanced rules of evidence distribute the onus of proof between the parties. As a rule, each party is required to prove any facts that are advantageous to its claim or position. In Germany, even the taking of highly complex evidence rarely lasts longer than one day. Evidentiary hearings lasting several weeks, as is common place in other jurisdictions, are virtually unheard of in German civil proceedings. No pre-trial discovery prior to the commencement of the actual trial is provided for under German law. The parties are therefore not required to enter into a comprehensive exchange of nay and all documents and records that may have a bearing on the proceedings. Thanks to its sophisticated rules of evidence, German law is able to dispense with all such preliminary proceedings without compromising the legal process. This saves both time and money.

The evaluation of evidence takes place on the basis of the principle of free evaluation of evidence, i. e. the court conducts a free and independent review of the facts presented by the parties an decides whether they should be viewed as true or false. In doing so, the court must consider the entire content of the discussions and the result of any hearing of evidence as summarized in the minutes of the hearing. If the assertions are not proven to the satisfaction of the court, the party bearing the burden of proof loses the case.

b) Hearings – Evidentiary Issues

The principle of strict evidence requires that evidence can only be submitted through the procedure as prescribed in the ZPO and according to the definitive list of means of proof contained therein. The following means of proof are available: examination of witnesses, interrogation of a party, opinions of experts, evidence of inspection and presentation of documents.

In practice, the most important means of proof is **witness testimony**. As it is a citizen's duty to appear in court as a witness and to make a truthful statement, any person can be named as a witness who has observed relevant facts. Exceptions to this principle are: The parties to the case are excluded as witness. Various relations of the parties have the right to refuse to be a witness (e. g. spouses, fiancé, or any closely related person to the parties).

The examination of witness takes place only within the court and will be conducted by the judge. On application, the judge shall allow the lawyers of the parties to directly question the witness. If the parties themselves request permission to question a witness, the court has discretion to grant such request. The German Code of Civil Procedure does not provide for the cross-examination of witnesses.

Natural persons, who are the parties or the legal representatives of the parties, cannot be witnesses but they may be examined under certain circumstances (**interrogation of the parties**).

The ability to furnish **documentary evidence** increases the efficiency of the taking of evidence. As with all other continental European jurisdictions, German law also recognizes documentary evidence in addition to evidence by witness testimony. In fact, documentary evidence carries a particular weight and is actually more compelling than evidence given by witnesses.

Taking evidence through an **expert's opinion** the court selects and instructs the expert. The German law allows the court to request nominations from the parties. However, in general the court takes the initiative in nominating and selecting the expert. The court that selects the expert instructs him, in the sense of propounding the facts that he is to assume or to investigate, and in framing the questions that the court wishes the expert to address. The expert is ordinarily instructed to prepare a written opinion. This opinion is by court order circulated to the parties. The litigants commonly file written comments, to which the expert is asked to reply. The court on its own motion or on motion of one party may request the expert to amplify his views either in a written report or during an oral hearing for interrogation.

When the court is closing the hearing of evidence each party has the right to present his final comments which the judge has to consider before issuing his judgment.

IV. JUDGEMENT

Upon closing the oral proceedings the judgment has to be issued. Occasionally, a judgment will be handed down immediately after the oral proceedings have been heard (“chair judgment”). This will happen when a judgment takes the form of a default judgment or a judgment of waiver or a judgment by consent. Generally, the court states at the end of the last oral proceedings the date on which it will announce its judgment. In principle, the judgment should be given within three weeks of the last day of the oral proceedings (see Article 31o ZPO).

V. MEDIATION IN AND OUT OF COURT

The Code of Civil Procedure requires German judges to always aim for an amicable resolution of a dispute at any stage of the proceedings (see Article 278 Par. 1 ZPO). Therefore, elements of **mediation** and **conciliation** form an integral part of German civil proceedings. In suitable cases, the court will propose that the parties enter into out-of-court mediation. However, in practice out-of-court mediation will be usually performed prior to litigation by professional mediators such as lawyers. If litigation starts the procedure of out-of-court mediation has failed and the parties call for a decision of the judge.

In German civil courts special court mediation is offered during a judicial proceeding, with the agreement of the parties. The trial judge will transfer the case to a mediator judge who will invite the parties for mediation. However, the trial judge will propose the initiation of court mediation and transfer of the case to the mediator judge if he is convinced that the parties’ dispute could be successfully resolved through mediation. Moreover, the mediation procedure should not cause any delay to the proceedings. Therefore, mediation should take place between two procedural stages in court.

The mediator judge will not be assigned to decide the case. He offers the parties private and confidential assistance to help find a way to resolve their differences, but does not impose a solution. Confidentiality remains even if the parties cannot resolve their dispute through mediation and the case will be retransferred to the trial judge. Apart from the parties involved and the mediator, no one else knows the facts of the dispute, how the meetings are conducted, and the outcome of the mediation, even if mediation does not resolve the dispute. The trial judge will therefore not be informed about the facts and opinions of either party which they have exchanged during the mediation. However, if the parties can resolve the dispute during mediation and if they want to sign a settlement agreement the case should not be

retransferred to the trial judge. The parties can agree on the mediator judge as the trial judge just for recording the agreement into the judicial minutes of meeting. The mediator judge becomes the trial judge. He will open the court hearing and upon parties' waiver of granted time period for notification the judge will record the agreement in the record proceedings. Hereby, an enforceable court decision has been produced.

Judges who will act as mediator have undergone additional training and are well experienced.

Mediation may include two important elements: joint meetings and individual meetings.

During the **joint meetings**, both parties attend, along with the mediator, to present their version of facts and explore various means for settling the dispute.

During individual meetings, each party in turn meets with the mediator alone (i) to discuss their perception of the dispute, (ii) to examine, confidentially, specific elements in the dispute, (iii) consider a proposal made by the other party.

Since the parties retain control over the mediation process, the mediator restricts himself to focus constantly on balance and equity and to make sure that the parties understood the consequences of the agreement reached and the rights each party retains. Moreover, the mediator is responsible for establishing a positive climate that will encourage fruitful and constructive dialogue.

Court fees will not be requested for Court mediation; the parties have only to pay an additional fee to their lawyers if court mediation leads to an amicable agreement.

VI. CONCLUSIONS

The German Code of Civil Procedure requires from the judge an active role. The judge takes over an active early identification of the issues and thus has a greater responsibility for fact-gathering. Therefore, it is possible to schedule the taking of evidence for speedy and fair disposition. There is no distinction between pretrial and trial, between discovering evidence and presenting it.

A firmly structured procedure is provided, including a close coordination of work between the judge and the clerk.

Most cases are settled in one main hearing; one hearing in advance may occur. There will be no series of hearings, even if evidence has to be taken.

Judges practice case management from the beginning of the case and keep monitoring it up to the date of issuing the judgment. Therefore, they get familiar with the case before the hearing by actively evaluating the pleadings to discover the issues and advising the parties as to what they believe the issues to be (on disputed and undisputed facts; legal aspects and validity of presented evidence).

Parties are informed by early notification either prior to the court hearing or during the hearing. There will be no surprise during the hearing.

Hearings are accurately scheduled; the circumstances of the case dictate the course of the hearing so that mere accumulation of facts and evidence will take place unless they are relevant for the decision.

A first hearing is conducted to resolve the case amicably. If no settlement agreement can be achieved, the judge will (i) identify the legal and factual issues related to the case, (ii) define what, if any, experts and witnesses will be heard and what the witnesses may testify to, (iii) set schedule for oral presentation of facts and evidence.

No party may delay the procedure by non-appearance. In particular the judges have rules of procedure that permit them to dismiss, default or otherwise sanction a party who does not participate in their processes.

As a matter of fact, German courts work very effectively, thoroughly and very quickly. Fifty per cent of all proceedings before the local courts are concluded in one hearing within three months. Every third case brought before the regional courts is concluded in one hearing within three months, with a further 25 per cent being finalized within six months.

The efficiency of case management according to the German Code of Civil Procedure has been proven with the unification of Germany when the procedural law has been implemented in the new states of Germany. The average time for resolving civil cases comes to

- 4.8 months in civil proceedings before local courts and
- 8.2 months in civil proceedings before regional courts.

Moreover, the appellate courts support the approach of concentrated proceedings in civil cases and expect such a procedure by the court of first instance as stipulated in the German Code of Civil Procedure.