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Commercial Courts – helping to strengthen Germany as a centre for law

Specialised civil panels of judges were set up in the form of Commercial Courts in Baden-Wuerttemberg in November 2020. They are an innovative option for companies engaged in commercial disputes. They combine the advantages of a state court with those of private arbitration proceedings.

The judiciary in Germany is not often considered a driver of innovation. However, this traditional perception is no longer accurate. For example, the judiciary is at the forefront in terms of introducing electronic records. Baden-Wuerttemberg is now taking on another innovative project: the creation of specialised Commercial Courts as a new resolution service for large-scale commercial disputes.

The international competition between judiciaries

Especially in multinational contractual relationships, the parties regularly agree on the applicable law and the place of international jurisdiction. Unfortunately, the contractual partners often do not look to German courts. Other jurisdictions with specialised courts such as the London Commercial Court or courts of arbitration have long been the obvious choice.

The reasons for this are complex.¹ In courts of arbitration, easier enforcement due to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards – which has currently been signed by 166 nations – as well as the special confidentiality of proceedings are often cited as advantages.² The German judiciary has been able to gain ground with regard to the latter two points, however. Judgements can be enforced without difficulty within the European Union in any case.³ Confidentiality interests can be taken into account pursuant to Section 172 no. 2 of the German Courts Constitution Act (GVG) and the public can be excluded in order to protect trade and company secrets. This situation is unsatisfactory for the legal state as there is a lack of binding landmark decisions by courts of arbitration due to the lack of stages of appeal. Besides

confirming correctness in individual cases, decisions by higher courts serve to maintain legal certainty. Many disputes are not taken all the way to court if the legal situation has been made sufficiently clear. The parties can focus on this when they formulate the contract. As such, the legal state cannot simply do nothing when economically significant disputes are increasingly taken away from state courts. And some arbitrators even complain privately that not much legal precedent exists in some subject areas such as corporate acquisitions as arbitral verdicts are not normally published.

Initiatives for Germany as a centre for law

A variety of ideas have been discussed in recent years in order to keep Germany attractive as a centre for law. One worthy of particular note is the commendable initiative

‘Law – Made in Germany’.⁴ In fact, the German judiciary also has an outstanding reputation on an international level.⁵ German judges are considered highly qualified and incorruptible, something which, it seems, sadly cannot be taken for granted in every country. The lengths of proceedings are presentable⁶ and are impressive compared to courts of arbitration.⁷ However, in the competition between judiciaries, it is not enough to simply underline the strengths of our existing system. The success of commercial courts in other countries, as well as the courts of arbitration, is largely due to the specialisation and prior experience of the judges there. Additionally, the parties involved in proceedings expect sufficient language skills

to be able to conduct negotiations in English. Ultimately, the goal is to achieve greater flexibility for proceedings than the standardised procedure provided for under the German Code of Civil Procedure (ZPO). As such, the establishment of English-speaking commercial divisions at some regional courts is a key first step. At the same time, however, this only addresses some of the requirements identified above. The proposal of a state working group to pave the way for the establishment of specialised commercial courts in the higher regional courts goes even further.⁸ However, federal legislators have not yet acted on this idea.

This is regrettable as the opportunity to improve the position of the German judiciary as an actor in international commercial disputes is exceptionally advantageous. Due to Brexit, many proceedings which have so far been conducted in London could now be expected to

1) Knott/Winkler, ZIP 2020, 1219, 1221f.

2) Version dated: 01/01/2021, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

3) Under Article 39 of Regulation (EU) No 1215/2012, a judgement in a civil or commercial matter given in a Member State shall be enforceable in the other Member States without any declaration of enforceability being required. The 2007 Lugano Convention between the EU and Norway, Iceland and Switzerland governs the recognition and enforcement of judgements in the European Economic Area and Switzerland.

4) The advantages of Germany as a centre for law are set out clearly in the brochure for the ‘Law Made in Germany’ initiative at <https://www.lawmadeingermany.de/>.

5) MüKoZPO/Rauscher, 2020, introd. marg. no. 233; Köhler/Hudetz BB 2020, 2179.

6) See the 2020 EU Justice Scoreboard at https://ec.europa.eu/info/sites/info/files/2020_eu_justice_scoreboard_factsheet.pdf.

7) According to the ICC in Paris, the average length of time it took for proceedings to reach an arbitral verdict in 2019 was 26 months.

8) BT-Drs. 19/1717; see also the decision of the Justice Ministers’ Conference of 26/11/2020 regarding TOP I. 25.

move to within the EU.⁹ In light of this competition, new commercial courts have also been established in other countries such as the Netherlands.¹⁰ The German judiciary must make similar offers to the parties.

Commercial Courts in Baden-Wuerttemberg

Therefore, in November 2020, specialised civil divisions and divisions for commercial matters which have jurisdiction to hear disputes arising from corporate acquisitions (M&A litigation) and commercial disputes with a value in dispute of over € 2 million were established at the Regional Courts of Mannheim and Stuttgart.¹¹ Furthermore, the parties have the option of conducting most of the proceedings in English.¹²

The Commercial Courts at the Regional Courts are backed up by newly established panels at the Higher Regional Courts of Stuttgart and Karlsruhe which serve as Commercial Courts of Appeal in order to ensure a degree of specialisation in the appeal stages.

When the presidiums assigned judges to the new courts, the most important thing was to find judges with strong language skills, useful professional experience and a particular interest in economic disputes. Fortunately, more and more members of the judiciary have previously worked in (international) law firms

and companies. Likewise, experience with English legal terminology and foreign law degrees are no longer as rare as they once were.¹³

Conducting proceedings at the Commercial Court

However, the prior experience of the judges is just one of the reasons why the Commercial Courts are actually seen as a real alternative to courts of arbitration or international services by lawyers and companies.

The goal is for parties to agree on the competence of the new courts in Mannheim and Stuttgart pursuant to Section 39 ZPO, be it in the form of a clause in the original exchange agreements or at a later date when disputes become more serious. Besides technical specialisation, the fact that cases are heard by three regular judges is designed to increase the quality of the Commercial Courts.

It is an open secret that although many other civil divisions would like to handle cases within the division itself, this can only be done on a limited basis due to the availability of human resources. Fortunately, the judiciary in Baden-Wuerttemberg has, to some extent, received additional positions so there are enough personnel for the Commercial Courts to transfer a case to the division in cases of doubt.

Last but not least, this is complemented by the highest standard of rooms

and equipment. The Commercial Court in Stuttgart has modern rooms with visualisation and videoconference equipment. Consultation rooms for the lawyers and Wi-Fi access create a professional working environment. As these rooms are exclusively available to the courts, even proceedings lasting multiple days can be handled at the same time, which should accommodate parties from abroad in particular. An atmosphere of negotiation such as this encourages parties to settle disputes amicably. Proceedings are conducted with the needs of the parties in mind. For this reason, the stages of the procedure should be coordinated with the parties' representatives as early on as possible. A case management conference is standard practice in arbitration proceedings.¹⁴ Its purpose is to bring the parties into alignment on how to structure the proceedings efficiently and reach a binding agreement.

In this regard, the Code of Civil Procedure also provides numerous ways to structure agreements between parties.¹⁵ For example, parties can agree on the evidence that is to be produced or on a binding schedule, perhaps concerning written submissions.¹⁶ The parties are only obliged to adhere to mandatory procedural rules under state law.¹⁷ Admittedly, this all requires parties who are willing to cooperate. The Commercial Courts share this fate with the courts of arbitration. However, the Code of Civil Procedure

provides state courts with a multitude of tried-and-tested instruments to push even highly confrontational proceedings forwards towards a conclusion. Courts of arbitration are forced to seek state support here

Even German courts cannot stop internationalisation.



9) Sturm/Schulz ZRP 2019, 71.

10) Köhler/Hudetz BB 2020, 2179.

11) More details about the allocation of court business are available at <https://www.commercial-court.de/standorte>.

12) Zöller/Lückemann, ZPO, 2020, Section 185 GVG marginal no. 4.

13) Melin BB 2020, 2702, 2703 and the judges' profiles at <https://www.commercial-court.de/en/judges>.

14) Podszun/Rohner ZRP 2019, 190; Pfeiffer IWRZ 2020, 51, 53.

15) BGH NJW-RR 1989, 1048, 1049; BGH NJW- RR 2006, 632, 634.

16) BGHZ 109, 19, 28f. = NJW 1990, 441

17) BGHZ 38, 258 = NJW 1963, 243; BGH NJW 1982, 207.

as they themselves do not have the authority to force proceedings onward.

Summary

The new Commercial Courts are a new way for parties involved in major commercial disputes to combine the advantages of state courts and arbitration proceedings and benefit from the best of both worlds. The conditions are ideal for this to happen in Mannheim and Stuttgart. All there is left to do now is hope that enough lawyers and parties opt for this new concept that Germany is further strengthened as a centre for law.



The Commercial Court in Stuttgart has modern rooms with visualisation and videoconference equipment.

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About the author

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