

April 7, 2020

## COVID-19: CIVIL LITIGATION IN GERMANY

To Our Clients and Friends:

The current COVID-19 crisis affects many aspects of life, and does not spare the civil justice system.

While we have not yet heard of any court that has entirely shut down,<sup>[1]</sup> we note that many have reduced oral hearings to an absolute minimum.<sup>[2]</sup> It cannot yet be predicted when a normal state of affairs will come back.

There are, however, ways to tackle some of the obstacles brought about by COVID-19, at least to a certain extent:

### I. Filing and Formal Service of Lawsuits and other Pleadings

#### A. Filings with the Court

Documents can still be filed with the courts through the usual channels – by mail/courier in the original, by telefax and with the fairly new electronic mail system *beA* which every attorney admitted to a German bar is obliged under the applicable ethics regime to have access to.

While we observed some technical difficulties with both *beA* and telefax over the first days of the German slow down (it appears, the court registries had not found time to equip the telefax machines with enough paper), these difficulties now generally seem to have been solved.

As many court registries (like the judges) work from home, the process between the court's receiving a newly filed document and the subsequent steps seems to have slowed down significantly.

#### B. Service *ex officio* by court

Regarding formal service (*Zustellung*), the general rule is that documents have to be served *ex officio* by the court, unless the law exceptionally stipulates something else (sec. 166 para. 2 of the German Code of Civil Procedure - *ZPO*).

In particular, lawsuits and judgments have to be served by the court *ex officio*. This sort of service depends on the functioning of the court registry, and is not under control of the plaintiff. Yet, we observe that lawsuits are currently still being served on defendants these days, although in many cases it takes longer than originally.

With particular regard to suspending limitation by bringing a lawsuit, sec. 167 *ZPO* contains a clause favorable to the plaintiff stipulating that suspension becomes effective with the receipt by court if service

is carried out “in the near future”. As to the term “in the near future”, the courts have decided many times that this is being interpreted that even longer periods between receipt by the court and service do not harm provided plaintiff has done what plaintiff could to allow service, so that delays caused by the court or the defendant do not hinder suspension.[3]

## **C. Service at the Instigation of the Parties**

Service at the instigation of the parties, above all service from attorney to attorney (sec. 195 Civil Procedure Code), can easily be done by using the *beA*.

## **II. Deadlines**

If litigation is already pending, deadlines might be under way. In this regard, German law distinguishes between deadlines set by the law, and such set by the court.

### **A. Deadlines set by law**

Some deadlines are directly set by the law, such as the two-week-timeframe after service for the defendant to declare whether he/she wishes to defend against the lawsuit (sec. 276 para. 1 ZPO), or the time limit of one month to file an appeal after service of the trial judgment. This sort of deadline cannot be extended, not even due to COVID-19 (sec. 224 para. 2 ZPO).

However, pursuant to sec. 233 ZPO, “reinstatement” is available if missing the deadline is not due to fault. The COVID-19 crisis might encourage courts to be more “generous” when considering the fault element, but traditionally “not due to fault” is being interpreted very narrowly, so that a motion for reinstatement must always remain *ultima ratio*, and never been taken into account as an option.

### **B. Judicially set deadlines**

Deadlines set by the court can be extended upon application if sufficient grounds for doing so have been demonstrated in a convincing fashion (sec. 224 para. 2 ZPO). Importantly, the deadline to respond to a lawsuit is of such nature.

Missing this form of deadline can have severe consequences, e.g., factual allegations or offering evidence might become inadmissible (see sec. 296, 282 ZPO).

Interestingly, some courts have announced these days that judicial time limits would automatically be extended if state governments adopt further protective measures to fight the Coronavirus.[4] In a similar vein, some arbitral tribunals automatically grant motions for extending time limits if such motion is expressly made based on the COVID-19 pandemic.

### **III. Trial and evidence**

While civil litigation in Germany to a large extent takes place in (written) motion practice, its formal core is an oral hearing. However, there appear to be useful alternatives especially suitable for these days of crisis to avoid litigation to be brought to a halt.

#### **A. Oral hearing**

To begin with, conducting court hearings is still conceivable, albeit not really proper, these days. While some State Ministries of Justice recommend courts to only schedule urgent oral hearings (see above), the ultimate decision to actually hold a hearing lies in the full discretion of the judges.

#### **B. Alternatives**

Arguably, the better practice these days is to find an alternative to an oral hearing. The law in this respect is surprisingly progressive:

##### **1. Proceedings conducted in writing**

If both parties agree<sup>[5]</sup>, the court may render a judgment without hearing oral argument (sec. 128 para. 2 ZPO). In that case the court determines a deadline for written pleadings to be submitted. The most important advantage of this alternative to an oral hearing is that it allows for a decision rather quickly. The procedure appears furthermore quite suitable for cases in which witness, expert or party evidence does not need to be taken.

##### **2. Video transmission**

Pursuant to sec. 128a ZPO, the court may permit the parties and their attorneys to stay at another location than the courtroom and to take procedural actions from there through video. The single judge or the chamber, however, need to stay in the courtroom which is also open to the public.<sup>[6]</sup> Witnesses, experts or the parties can also be examined at another location. Evidence-taking through documents and visual inspection however needs to be undertaken in the courtroom.

This alternative to a “real” oral hearing does not require consent of the parties but can unilaterally be ordered by the court. The parties may, however, still appear at the courtroom. Reversely, the parties cannot compel the court to conduct the hearing through video.

In practice however, at least before the Corona crisis, courts have not made use of sec. 128a ZPO frequently, because it requires the court and the parties to have the necessary video conference equipment available. As an exception to this general trend, the Local Court of Frankfurt am Main, the city in which Germany’s biggest airport is located, has been using it since December 2019 for the large number of flight right cases it has to deal with. During the course of the current crisis, some courts such as the Regional Court of Duesseldorf have however announced that they would now draw on this procedural tool.

### 3. Change of date for scheduled hearings?

If an oral hearing is already scheduled, the court may adjourn a hearing if substantial grounds so require (sec. 227 para. 1 ZPO). Whether the COVID-19 crisis is a sufficient reason in the legal sense cannot yet be stated with sufficient certainty. While some Bar Associations appear to be of such view, the available case law seems to be quite strict, e.g. in relation to the concrete illness of the party or its lawyer.

#### IV. Useful sources

- Federal Ministry of Justice – [https://www.bmju.de/DE/Startseite/Startseite\\_node.html](https://www.bmju.de/DE/Startseite/Startseite_node.html)
- Bavarian Ministry of Justice – <https://www.justiz.bayern.de/>
- Federal Bar Association (*Bundesrechtsanwaltskammer*) – <https://brak.de/>
- Gibson Dunn & Crutcher LLP – <https://www.gibsondunn.com/>

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[1] For such a case, sec. 245 of the German Code of Civil Procedure stipulates that the proceedings would be stayed by operation of law for the duration of that situation.

[2] See e.g. the recommendation by the Bavarian Ministry of Justice to courts, [https://www.justiz.bayern.de/service/corona/Umgang\\_Justiz.php](https://www.justiz.bayern.de/service/corona/Umgang_Justiz.php) (last visited April 7, 2020).

[3] *Roth*, in: Stein Jonas (eds.), *Kommentar zur Zivilprozessordnung*, 23. Ed. 2016, § 167 ZPO para. 10.

[4] See in this regard, <https://www.gibsondunn.com/covid-19-german-infectious-diseases-protection-act-what-makes-you-stay-at-home/> (last visited April 7, 2020).

[5] Consent may only be revoked in the event of a material change of litigation circumstances.

[6] We have heard of a recent initiative by the presidents of the Federal Labor Court and of several Regional Labor Courts who allegedly have put forward to introduce oral hearings by way of a video conference that does not any more require the judge to be in a courtroom. The judge would not only be permitted to work from home but he/she may also compel the parties to use the tool of video conference. This law, if enacted, would however be limited to Labor courts and might only be used to prevent and fight infectious diseases.



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*Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in Germany.*

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