

A fencer in a white uniform and blue gloves is shown from the waist down, holding a foil. The background is white with large, dark blue geometric shapes (triangles and lines) overlaid. The text is positioned in the lower-left area.

CIVIL LITIGATION IN GERMANY

A Short Guide for UK Businesses
and their Lawyers

Graf | Partners
GERMAN LAWYERS

You Need to Win a Lawsuit in Germany? Our Litigation Team is Ready!

Since Brexit, less German businesses are willing to accept English law to govern their relationships with UK partners. As a consequence, if things go sour, UK businesses may find themselves in a German legal dispute. In this situation, many British directors make the same mistake: They assume that a German civil lawsuit will be “somehow similar” to what they know from the UK. Wrong!

Don't be late to the Party.

Litigating in a German court of law could hardly be any more different from what UK lawyers are used to. And the first culture shock usually comes early on, because English directors and their solicitors will wait for a formal Pre-Action Protocol letter from the German opponent. Well, they can wait until the cows come home, since there is no such Pre-Action Protocol requirement under German Civil Procedure Rules (CPR). Instead, civil proceedings can be - and often are - issued within just a few days if the claimant feels like it. If this happens, the UK defendant has immediately fallen behind and everything becomes extremely hectic because court deadlines must now be met.

German Litigators for British Clients

Bernhard Schmeilz
Rechtsanwalt (German Lawyer) &
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Disclosure? Not in Germany!

Another main practical difference is the concept of disclosure, which simply does not exist under German CPR. It is the rare exception that a party is obligated to actively disclose information to the opponent. Many German lawsuits, which would have merit, are lost because the claimant was unable to prove their case due to lack of documents. The burden of proof issue is thus of much higher importance in a German court of law.

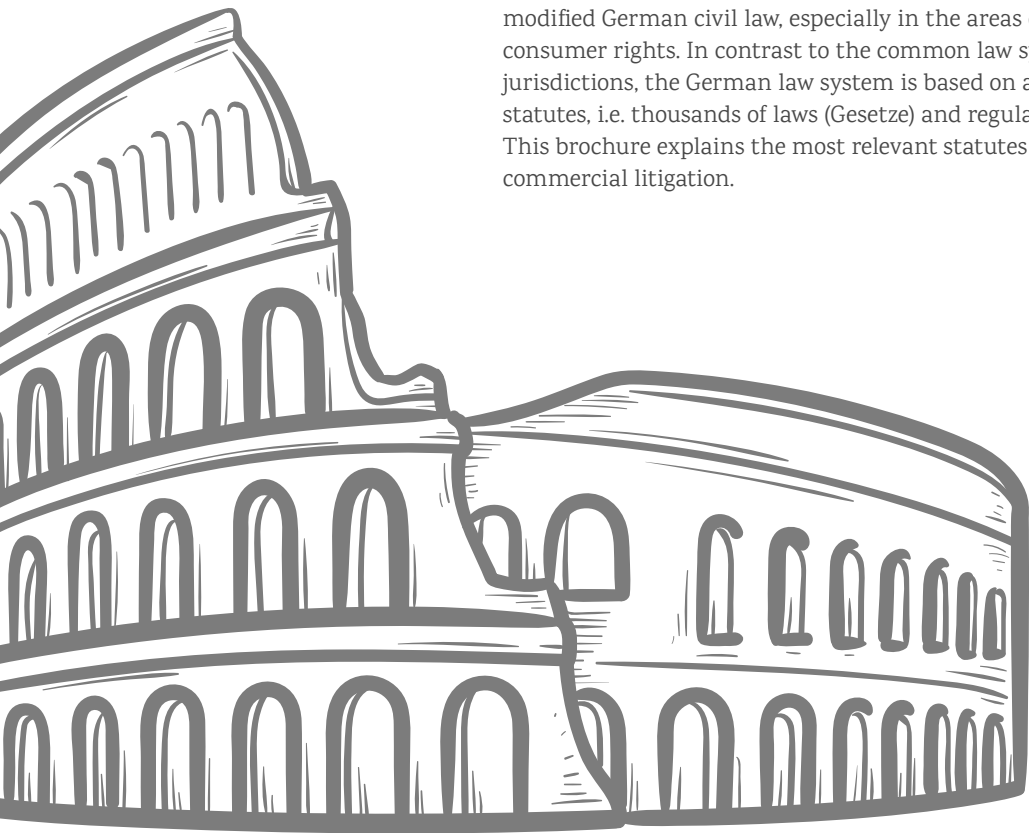
Know the Rules. Adapt Your Litigation Strategy.

These were just two examples. The full list of differences is much longer. Thus, if you or your client are faced with a civil lawsuit in Germany, you better be prepared for an entirely different set of rules as well as litigation strategy. This short guide explains the basics of German CPR. Learn how to prepare for and how to win German lawsuits. Much more information on German litigation is available on our blog www.GermanCivilProcedure.com



The German Civil Law System

German law is a traditional civil law system based on Roman law principles (more precisely, on the eastern Roman Emperor Justinian's Code) and is also heavily influenced by the Napoleonic Code. In modern times, however, European Union Law has modified German civil law, especially in the areas of contract law, business law and consumer rights. In contrast to the common law systems of Anglo-American jurisdictions, the German law system is based on a comprehensive compendium of statutes, i.e. thousands of laws (Gesetze) and regulations (Verordnungen). This brochure explains the most relevant statutes concerning German civil and commercial litigation.



The German Judicial System

Although, strictly speaking, German judges are not bound by the judgments of other courts (precedent), not even by the rulings of the Bundesgerichtshof (BGH), i.e. Germany's Federal Court of Justice, the judgements of the German higher courts (Oberlandesgerichte and BGH) are usually followed by German judges in the lower courts. Thus, where the facts of a case are similar to a case which was already decided by an Oberlandesgericht or even the Bundesgerichtshof, a judge will rarely depart from the views of these courts.

In which Court do you file a Civil or Commercial Lawsuit in Germany?

To litigate in Germany, you first need to know your way around the German Civil Courts system (ordentliche Gerichte). The **chart on pages 10 – 11** provides a snapshot of which civil court has jurisdiction, i.e., in which court you need to file your claim against a German defendant, how many judges will hear your case, whether you must have a German lawyer to represent you in court or whether you are permitted to represent yourself (which is hardly ever a good idea), and – finally – your options to appeal if the action is unsuccessful at first instance.

Specialised Courts

Finding the right German court or tribunal for your specific case can be tricky, because Germany has installed various specialised courts for certain areas of law, inter alia:

Arbeitsgerichte (Labour Courts), dealing with all employment related disputes in Germany. For more information see the official website of the Bundesarbeitsgericht (German Federal Labour Court)

www.bundesarbeitsgericht.de



Verwaltungsgerichte (Administrative Courts), which have jurisdiction over matters of public and administrative law, such as construction permits, planning permissions, municipal law etc. For more information see the official website of the Bundesverwaltungsgericht (German Federal Administrative Court)

www.bverwg.de



Finanzgerichte (Fiscal Courts), which determine German tax issues, in particular objections by citizens against German tax bills issued by the Finanzamt (German tax office). For more information see the official website of the Bundesfinanzhof (Federal Fiscal Court of Germany)

www.bundesfinanzhof.de



It is, however, more likely that your case will not be heard by any of the **specialized German courts** listed above. This is because you will probably want to pursue a civil or commercial claim against a German defendant.

The Ordinary Courts

Or you may be involved in German probate matters (be it a contentious probate case or merely an application for a German grant of probate) or a German family law case (divorce, child custody, alimony, or child support etc).

In all these matters, the so called “Ordentliche Gerichtsbarkeit” (ordinary courts of law) have jurisdiction.

The ordinary German courts of law consist of a four-tier structure, but you will most likely only have to deal with one or two of those tiers. Depending on the area of law and the value of your claim, the court of first instance will either be the Amtsgericht (Local or County Court, of which there are 638 throughout Germany) or the Landgericht (High Court, of which there are 115).

At the Amtsgericht level, the parties are allowed to represent themselves if they wish to do so. Although, and please take my word on this, acting in person or as your own counsel is hardly ever advisable, even less so in a foreign country. Before all other German civil courts (Landgericht, Oberlandesgericht,

Bundesgerichtshof), the parties must instruct a lawyer, because section 78 German Code of Civil Procedure states that beyond the German County Court level, each party must be duly represented by a counsel who is licensed to practice as a German trial lawyer (Rechtsanwalt).

At the Bundesgerichtshof (Federal Court of Justice), special rules apply with regard to legal counsel. At the Landgericht level, the cases are usually heard by a panel of 3 judges. Nowadays, however, mainly due to low staffing of courts, the 3-judge panel (Kammer) sometimes rules that cases shall be heard and decided by a single judge (Einzelrichter). This transfer of a civil case from the full judicial panel to a single judge is expressly permitted by s. 348 German Code of Civil Procedure. Until the 1990s, this transfer to a single judge was the exception rather than the rule, but nowadays it is the standard approach, especially in larger German cities. In other words, if you - as the claimant - prefer your case to be heard and decided by the full judicial panel, you will need to give cogent reasons why this is necessary. Whether you should make such application is an important strategic decision, because if you do, you may be unpopular with the court from the outset, as you are causing them additional work.

Special Judicial Panels for Commercial Disputes

Commercial and corporate disputes at the Landgericht level are usually decided by the so called Kammer für Handelssachen (Judicial Panel for Commercial Disputes), s. 93 GVG. The main characteristic of the Kammer für Handelssachen is that two lay judges (Laienrichter) are added to the judicial panel of three professional judges. These lay judges are business owners or company directors, which must be recommended for this position by the local chamber of commerce. The policy behind this statute is that the lay judges provide the professional judges with practical knowledge about business life, commercial practices and customs.

For details see the websites of the Bundesgerichtshof (Federal Court of Justice): <http://www.bundesgerichtshof.de/EN/TheCourt/Bar> and of the Rechtsanwaltskammer beim BGH (The Bar at the Federal Court of Justice): <https://www.rak-bgh.de>



The Proceedings and Main Stages of Civil Litigation in Germany

Filing a Civil Claim

In order to initiate a civil lawsuit (Zivilprozess) in Germany, the claimant (Kläger) files a complaint with the competent German court. This complaint is called "Klage" or "Klageschrift", which means "statement of claim".

After due registration by the court and a very preliminary check regarding compliance with the formal requirements set out by the German Civil Procedure Rules, the complaint is then served on the defendant. In most cases, the court itself effects the service of the proceedings, but only after the claimant has either paid the court fees (Gerichtskosten) or has been granted legal aid by the court, which requires the claimant to demonstrate a reasonable chance of success.

Personal service of civil litigation documents is normally not required in Germany and – as long as there is a valid address of the defendant in Germany – the claimant does not have to be concerned at all with any matters regarding service. For details on how to serve legal documents in Germany visit www.GermanCivilProcedure.com.

In addition to the Klageschrift (complaint) itself, the court will serve to the defendant a letter setting a deadline for the defendant to inform the court whether they dispute the claim. This deadline is usually 2 weeks if the defendant is resident in Germany, but it can be significantly longer if the defendant resides outside Germany. The court documents will contain detailed explanatory notes on the rights and obligations of the defendant. If the defendant misses this deadline, the German court will issue a default judgment (Versäumnisurteil).

For details on default judgments and the consequences visit our blog www.GermanCivilProcedure.com

Structure and Content of a Klageschrift

Part I: Zulässigkeit

In the Klageschrift (civil complaint), the claimant or their lawyer will first need to explain why this specific German court has jurisdiction (Zuständigkeit) and demonstrate that all other formal requirements are satisfied. For example, that the claimant is represented by a lawyer licensed in Germany, which is required from the High Court level upwards (Postulationsfähigkeit, i.e. "right of audience"), that the case is not already pending elsewhere (anderweitige Rechtshängigkeit), and that the lawsuit is not frivolous (Rechtsschutzbedürfnis). This first part of the written complaint is called "**Zulässigkeit der Klage**" (admissibility of the complaint).

Part II: Begründetheit

The second, more important and more challenging part of the German statement of claim, is the so called "**Begründetheit der Klage**" (justification of the claim). This section deals with the actual legal merits of the claim. In this part of the civil complaint, the German claimant's lawyer describes the nature of the loss and damages and sets out how the defendant caused the harm.

The actual "application for relief" (Klageantrag) is usually stated at the beginning of the complaint (i.e. on page 1 or 2). However, old school German litigation lawyers state the demand for relief at the end of the civil complaint. In this Klageantrag, the claimant may seek a wide variety of remedies, inter alia the payment of a specific sum to compensate for damages (Zahlungsanspruch), or an injunction to stop the defendant engaging in a specific conduct (Unterlassungsanspruch). In addition, a German civil court may order many other types of relief. For details see the post: www.germancivilprocedure.com/equitable-relief-in-germany/

Overview of the German Civil Court System


Which German trial court to approach

5 **Bundesgerichtshof (BGH)**
Federal Court of Justice



Revision
Appeal restricted exclusively on points of law and only possible if admitted

3 **Landgericht (LG)**
High Court as Appellate Court, s. 72 GVG



115 LGs throughout Germany

Berufung
Appeal

1 **Amtsgericht (AG)**
County Court (with various Divisions)



638 AGs throughout Germany

Court of First Instance for:
Civil claims up to a value of €5,000 (s. 23 GVG)

Specific legal matters regardless of the amount in dispute, e.g. family law issues, residential housing matters, condominium disputes, tourism related claims, non-contentious probate, guardianship etc. (s. 23a GVG)

Start here & decide

YOU AND YOUR CLAIM



5 **Bundesgerichtshof (BGH)**
Federal Court of Justice



Revision
Appeal restricted exclusively on points of law and only possible if admitted


3 **Oberlandesgericht (OLG)**
Higher Court of Appeal s. 119 GVG



24 OLGs throughout Germany

Berufung
Appeal

3 **Landgericht (LG)**
High Court as Court of First Instance







115 LGs throughout Germany

Court of First Instance for:
Civil claims above €5,000 (s. 71 GVG)

Commercial and corporate disputes are decided by a special judicial panel of 3 professional judges and 2 lay judges, the „Kammer für Handelssachen“ (s. 95 GVG)

Explanations:

- GVG** Gerichtsverfassungsgesetz
German Courts Constitution Act
-  Parties must be represented by a trial lawyer (Rechtsanwalt) licensed in Germany
-  Single judge decides the case (Einzelrichter)

-  Judicial panel of 3 judges (Kammer) decides the case; unless court rules that a single judge is sufficient
-  Judicial panel of 5 judges (Senat) decides the case



Taking Action

Preparation of a Civil Case

There is neither any disclosure procedure under German civil procedure rules, nor are there any depositions or written witness statements. There is also no jury and no cross-examination of witnesses.

German civil cases are much more centred around the judge (or panel of judges). German judges do not appreciate “showboat” lawyers trying to create a spectacle (to impress their client). Instead, they want to be presented the relevant facts, calmly and without aggressively attacking witnesses or experts. In fact, nowadays approximately 50% of German high court judges are female. They are usually not too keen on too much lawyer testosterone in the courtroom. Also, since there is no jury and the professional German judges are already well aware of the facts of the case from the submitted briefs, there are usually no closing arguments. Once the relevant witnesses have been heard (questions are asked by the judge!), the judge gives the parties an opportunity to discuss the case, particularly to consider a late-stage settlement. If this fails, the oral hearing is usually ended rather abruptly, and the court adjourns.

This German style of a rather “mellow approach to civil litigation” often creates considerable frustration for English clients and their English lawyers, let alone US lawyers who are used to addressing a jury, because

the British or American litigators sometimes feel that their side of the case is not being presented as it should be. And, indeed, a reasonable dose of UK / USA style aggressiveness in a German courtroom can work wonders. We frequently use these “shock and awe” tactics for our international clients. However, overdoing this in a German courtroom can be counterproductive. German trial lawyers who represent US or UK clients must explain the options and openly discuss their strategy. All this leads to a very different preparation of a civil lawsuit compared to the USA or the UK. In general, the actual oral hearings are much less dramatic and also less significant for the outcome of the lawsuit. The lawyer’s briefs (Schriftsätze), together with the reports of expert witnesses (Sachverständige), who are selected, instructed and questioned by the court – not by the parties, are generally what decides the case.

Settling a German Lawsuit

To avoid the stress, delay and expense which come with a formal trial, German civil procedure rules encourage litigants to attempt to reach an amicable resolution of the legal dispute. Thus, it is not only permitted but highly recommended and expressly encouraged by German civil litigation judges to settle a lawsuit – at any stage. The German system of statutory legal fees (both court and lawyer fees) also incentivises settlements.

Oral Hearings

As explained above, there is no jury. The judge knows the case from the legal briefs submitted by the parties. It is therefore not unusual for oral hearings to be rather short. If there is no need to hear witnesses or experts, and if the parties are unwilling to discuss a settlement, the hearing can be over in 15 minutes. There are no verbatim records or transcripts of what is said in the German oral hearings, much less are there any video cameras or live broadcast.

For details on oral hearings and the hearing of evidence in a German civil procedure see these articles:
www.germancivilprocedure.com/the-requirement-of-an-oral-hearing-in-german-civil-procedure
www.germancivilprocedure.com/testimony-and-evidence-in-german-civil-litigation

German lawyers earn more fees if they can get their clients to settle. More on this in the post:
www.germancivilprocedure.com/how-to-settle-a-lawsuit-in-germany.



Are German Court Hearings open to the Public?

Pursuant to section 169 of the German Courts Constitution Act, the court hearings themselves are in principle open to the public, except for family law cases, non-contentious probate proceedings and other sensitive matters. Audio and television recordings or transmissions during court hearings are, however, strictly prohibited in Germany. When you see TV coverage relating to a German trial (be it a civil trial or a criminal court), the footage you may see on TV is made before the judge opens the proceedings. Once the German court is in session, no recordings must be made, and no photographs must be taken.

How are Judgments issued by German Civil Courts?

Once all evidence is presented, expert reports have been obtained and there has been at least one oral hearing, the court decides whether there is the need for another oral hearing, or whether the court is willing to allow the parties to submit one final statement within a specific deadline (Schriftsatzfrist). If the court is satisfied that all relevant aspects have been dealt with and both parties have had sufficient opportunity to state their arguments and to present their evidence, the court informs the parties of the date on which the judgment will be handed down (Verkündungstermin).

Again, since there is no jury, this is a rather undramatic event. In the vast majority of cases, neither party even attends the handing down of the judgment (Urteilsverkündung), because this will be over in two minutes, since the judge only reads the operative provisions (Urteilstenor), i.e., who has won the lawsuit. In practice, both parties' lawyers have a paralegal call the court on the day of the Urteilsverkündung and ask the court clerk to fax or email an advance copy of the judgment. The official copy of the German judgment will then be sent by post within a few days. Usually, the judgment

is served on the parties' lawyers, who will then evaluate the reasons given by the court. Based on this evaluation, they will then advise their clients on whether it is opportune to officially appeal the judgment.



Court Records

German Civil Court Case Files are not Public Record

American and British lawyers naturally assume that court files are public record and can be easily accessed and inspected by anyone. Not in Germany! Germany is rather secretive when it comes to legal documents. Under German law, there is no general right to access court records in order to inspect and copy them. Instead, the written documents in a German civil lawsuit (lawyer's statements, witness statements, expert opinions etc.) are considered to be a private and confidential, which is called "vertraulich" in German.

Pleadings and Submissions are not available to Third Parties

While the hearing itself is public, the written statements submitted by the parties and/or their lawyers (in German referred to as "Schriftsatz") are not. Neither are witness statements or expert reports. This is codified in section 299 para (2) German Code of Civil Procedure:

Inspection of Court Files

(2) Without the consent of the parties to a legal proceeding, the (...) court (...) may allow third parties to inspect the files only if these third parties have demonstrated a legitimate interest to see the court file.

Such "legitimate interest" (in German "berechtigtes Interesse") is defined rather narrowly by German courts. The fact that a U.S. law firm represents a client who considers suing the same defendant does not per se constitute a legitimate interest to see the German court file. This means that a potential claimant (or their lawyers) cannot simply find out by accessing court records what the legal counsel of another claimant has already argued in a certain case. The only option is to contact the legal counsel of a party and ask them whether they are willing to disclose their material, which obviously also requires their client's consent.

Are Judgments Public Record?

Final judgments by German civil courts are available to third parties and the media without having to demonstrate a legitimate interest. However, even these judgments are not public record in the sense that they are freely accessible online. Instead, one must write to the court and ask for a copy of the specific judgment (against payment of a court fee and reimbursement of costs). This judgment will then be sent to the applicant, but only in an anonymized version, i.e. all names and addresses of the parties, their legal counsel and the witnesses will have been redacted. The same is true when German judgments are published in German legal literature (juristische Fachzeitschriften). Even if everyone knows who the parties in the case were, the names and addresses are not cited.

Pursuant to s. 299 para (4) German Civil Procedure Code, the court will never disclose the following parts of a German case file: drafts of judgments, orders and rulings; the work supplied in preparing them; as well as the documents concerning the court's coordination with others (e.g. experts).



Again, German civil law is a codified system. This means that pretty much everything you can think of as being relevant for a client-lawyer relationship is regulated by statutory law anyway.

How to Instruct a German Litigation Lawyer

Thus, if you need a German lawyer (their official German title is Rechtsanwalt) quickly, you can just hire him or her by email, fax or even over the telephone.

In Germany, there is no complicated and tedious “know your client” onboarding procedure. Anti-money laundering precautions are usually only taken if the specific circumstances of the case call for such measures.

The Merits of Codification

In Germany, there is no need for written letters of engagement or long client care letters, or extensive “know your client” onboarding paperwork. Why? Because the obligations of a German lawyer towards their client are clearly laid down in various federal statutes of German law. The most important ones being:

- **Bürgerliches Gesetzbuch (BGB) / German Civil Code**

This central code of German civil law stipulates how agreements (including client lawyer contracts) are entered into, the general contractual rights and obligations between the parties (here between the client and his/her German lawyer) and what remedies are available if the client does not pay or if the lawyer performance is poor or he/she is negligent, or violates the obligations of a German legal counsel towards the client.

- **Bundesrechtsanwaltsordnung (BRAO) / Federal German Regulation on Lawyers:**

This Federal German Lawyers Act regulates: (i) how to become a licensed lawyer (Rechtsanwalt) in Germany and (ii) sets out the core obligations of any German licensed lawyer towards his/her client, from confidentiality obligations and conflict of interest, to handling of client funds and mandatory malpractice insurance. If a German lawyer violates any of these statutory obligations towards his or her client, the German Bar Association will reprimand the lawyer and – if the breach is severe enough – it will revoke the license to practise as a lawyer in Germany.

Thus, as a client of a German lawyer (Rechtsanwalt), you are fully protected even if you do not enter into a written agreement.

- **Rechtsanwaltsvergütungsgesetz (RVG) / Federal Act on Lawyers' Fees**

The RVG determines the minimum remuneration a German legal counsel may (and actually must) charge his or her client. The basic principle behind the fee structure contained in the RVG, as well as the German Act on Court Fees, is that the actual fees due are linked to the amount in dispute, i.e. the monetary value of the case.

German lawyers are, however, entitled to agree fees which exceed the statutory RVG fee table. Well established law firms and experienced lawyers usually do charge significantly more than the base RVG fees and its fee tables (Kostentabellen). Hourly rates of qualified German law firms range between EUR 200 net for young associates to about EUR 800 net for very senior partners.

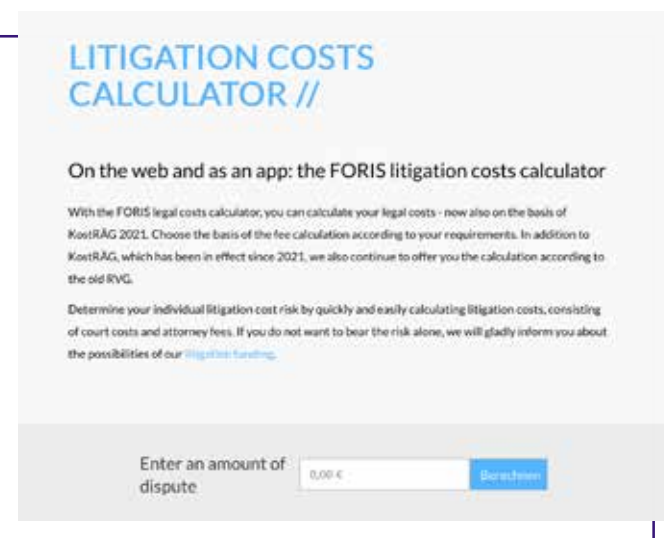


- **Berufsordnung für Rechtsanwälte (BORA) / Rules of Professional Conduct for Lawyers**

The federal statutes of the BRAO (above) are complemented on a more granular level by the Rules of Professional Conduct for German Lawyers, which are binding on every German licensed lawyer (Rechtsanwalt). These rules are constantly being amended and supervised by the Bundesrechtsanwaltskammer (BRAK) / Federal German Bar Association of Lawyers. In relation to all legal proceedings (as opposed to out of court legal advice), the rights and duties of a German litigator are of course also regulated in the German Code of Civil Procedure or specific procedure codes for other legal areas (e.g. German Labour Court Procedure Rules, German Criminal Procedure Rules, German Administrative Court Procedure Rules).

Legal Costs

For an indication of the basic costs of a German lawsuit (excluding costs for witnesses and experts), visit one of various online cost calculators, for example the FORIS Litigation Costs Calculator, which is available in an English language version: www.foris.com/en/litigation-costs-calculator

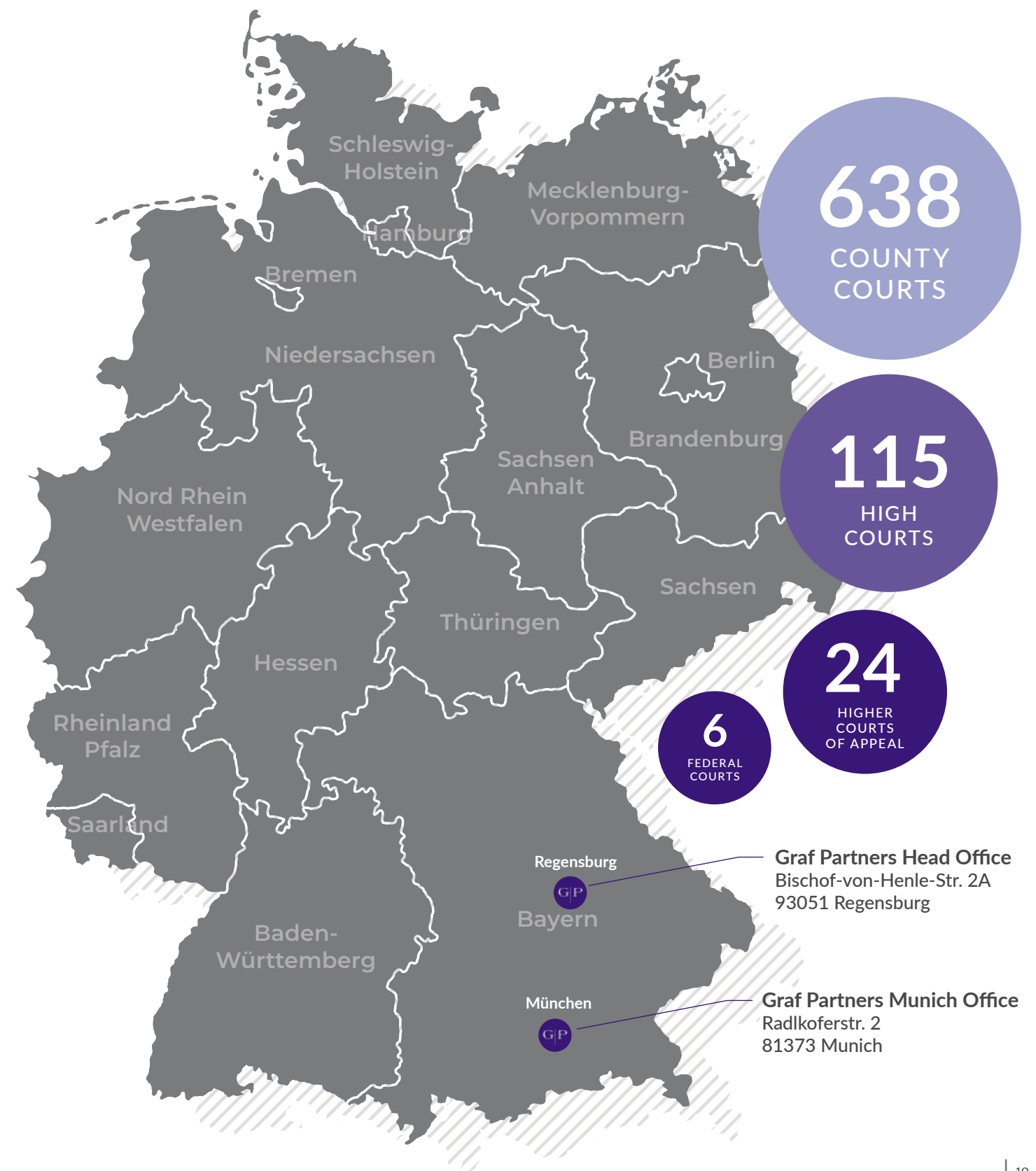


More on legal costs in Germany in the post: www.crosschannellawyers.co.uk/how-expensive-is-a-lawsuit-in-germany

Fee Agreement and Power of Attorney

In the light of all these statutory laws, detailed letters of engagement are quite redundant and therefore uncommon in Germany. German lawyers are usually instructed informally. However, potential clients are usually asked to sign a fee agreement (**Honorarvereinbarung**), especially in international cases. These German style fee agreements are significantly shorter (mostly just one page) compared to what a British or U.S. lawyer would ask the client to sign. What clients are also usually asked to sign is a power of attorney or letter of authorization (**Vollmacht**), because it is customary – and sometimes even legally required (s. 174 German Civil Code) – for a German lawyer to provide written evidence of having been instructed as legal counsel. The other party's lawyer or the court sometimes demands to see such formal power of attorney. Until such a Vollmacht is presented by the lawyer, the other party or the court may refuse to discuss the matter or to disclose any confidential information.

We represent clients in all civil and commercial courts throughout Germany. Our offices are located in Munich and Regensburg.



For more on Litigation in Germany visit our Blog
www.germancivilprocedure.com



*„I can't do any literary work for the rest of this year
because I'm meditating another lawsuit and looking
around for a defendant.“*

– Mark Twain

A stylized, handwritten signature of Mark Twain in black ink, positioned below the quote.

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