Securities Litigation 2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Germany

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GENERAL FRAMEWORK

General climate

1 Describe the nature and extent of securities litigation in your jurisdiction.

Securities litigation in Germany has become ubiquitous, particularly since around 17,000 investors filed lawsuits against Deutsche Telekom AG based on allegedly false statements in its prospectus for a public offering in 2000. To help the court cope with the resulting caseload, the legislature enacted Germany's first collective litigation scheme, the Capital Investors Model Proceedings Act (KapMuG), in 2005.

Apart from the *Deutsche Telekom* case – which, 20 years after the filing of the first action is still pending – relatively few model proceedings with wide recognition have been initiated, and even fewer have been completed. This is mostly because the drafters of the KapMuG carefully avoided affording model plaintiffs the extra leverage that, for example, US class actions provide. However, the diesel emissions issue recently inspired KapMuG cases against Volkswagen and Porsche with much higher amounts in dispute than the *Deutsche Telekom* case. At the end of 2019, a similar model case was filed against Daimler in connection with the car manufacturer's alleged involvement in diesel emissions manipulations. Apart from that, a small number of large individual securities actions brought by litigation special purpose vehicles and individual investors in connection with the attempted takeover of Volkswagen by Porsche SE around 2008 was recast as a KapMuG case with several billion euros in dispute. In addition, innumerable individual actions filed by investors are keeping the courts busy.

The 2012 KapMuG reform somewhat increased the popularity of model proceedings, as the legislature introduced an unbureaucratic method of registering additional claims in these proceedings, suspending the statute of limitations and creating de facto precedents for the benefit of the claimants. While on average there were around 30 applications for model proceedings per year under the old regime, this figure has since risen to more than 50 applications per year.

Recent developments indicate that institutional investors have identified model proceedings as a weapon in their arsenal, potentially combining the KapMuG with other securities litigation trends, such as assigning numerous securities claims to litigation vehicles to benefit from various economies of scale. Institutional investors use these litigation vehicles to pool collective claims of, for example, €1 billion or more in a single action. These vehicles also have the advantage that litigation funders may cover de facto contingency fees or purchase claims at variable prices. In addition, domestic vehicles may be exempt from having to provide security for costs and are more likely to be able to avoid cost reimbursement claims from opposing parties. If the litigation vehicle ultimately loses the action, it may avoid having to compensate the defendant's substantial statutory cost reimbursement claims simply by filing for insolvency.

The German plaintiffs' bar, which has firmly established itself in the wake of the *Deutsche Telekom* model proceedings, has also taken to bringing thousands of parallel cases in almost identical 'copy and paste' complaints. These cases are often directed at the initiators of investment funds, for example.

Moreover, parallel securities claims against initiators of investment funds or issuers are often supplemented by mis-selling claims against brokers and dealers, a trend that has been fuelled by a series of Federal Supreme Court judgments holding that a bank's failure to disclose sales commissions received behind customers' backs constitutes mis-selling and gives rise to a damages claim to unwind the tainted transaction. Until 2012, mis-selling claims were excluded from model proceedings, probably also contributing to the KapMuG's initial lack of popularity.

The KapMuG's lifetime was recently extended until 31 December 2023.

In 2018, the German legislature introduced a new model action allowing certain consumer protection bodies to file declaratory actions to have courts determine the liability claims of consumers against commercial parties. This legislation was inspired by the claims of thousands of diesel car owners against the Volkswagen Group in connection with the diesel emissions issue. The new legislation combines elements of the KapMuG with those of the German implementation of the EU Injunctions Directive. While aimed at consumer claims in general, the new legislation may also allow the assertion of securities claims. The first model action was filed on 1 November 2018 and up to 470,000 consumers registered their individual claims with the Federal Justice Office before the first hearing in autumn 2019. In the meantime, the case was settled for over €800 million. Over 60,000 parallel individual actions are due to be settled in the wake of the model action's settlement. Few other model actions have been filed since, mostly dealing with interest calculations in personal savings plans.

In late 2020, the EU enacted a directive on Representative Actions which concern violations of certain EU legislation aimed at the protection of consumers. Its member states are required to implement the directive by the end of 2022. The directive may, among other things, allow authorised consumer protection bodies to prosecute violations of the prospectus directive.

Courts and time frames

2 What experience do the courts in your jurisdiction have with securities litigation? Are there specialist courts for securities disputes? What is the typical time frame for securities litigation in your jurisdiction?

Over the past 25 years, German courts have built a large amount of experience with securities or investors' claims. Large scale securities litigation, however, remains a relatively rare phenomenon. The vast majority of investment claims concerns closed-end funds (real estate, media funds, and shipping), where no securities are involved. Listed

securities, due to the relatively small number of public offerings in Germany, are seldomly the subject matter of securities litigation in its proper meaning.

Most metropolitan District Courts assign securities and investment claims to certain chambers specialising in banking and investment law. KapMuG actions are exclusively entertained by the Higher Regional Courts at the seat of the issuer.

The time frame for a securities litigation greatly varies as a result of the type of proceeding chosen, as well as the number of plaintiffs involved. Individual securities actions may be decided by the District Courts within 12 to 18 months, while KapMuG proceedings can extend over a long time. The initial *Telekom* case started with thousands of individual actions in 2001. It was transformed into a KapMuG proceeding in 2005/2006. The case still is not finally resolved.

Government regulation and enforcement

3 | What is the relationship between private securities litigation and government regulation and enforcement in your jurisdiction?

In principle, private securities litigation and government regulation and enforcement are independent of each other. However, in the absence of pretrial discovery, private claimants systematically attempt to obtain access to investigation files of the prosecutors or supervisory authorities to expand their fact-finding. Public authorities take no role in private securities actions.

CLAIMS AND DEFENCES

Available claims

4 | What types of securities claim are available to investors?

Three basic types of securities claims are available in Germany:

- specific statutory securities claims, for example, for false or misleading material statements in securities prospectuses (statutory prospectus liability), under the German Securities Prospectus Act, the Capital Investment Code and the Capital Investment Act, or for an issuer's failure to disclose inside information to market participants in a timely and accurate manner (ad hoc liability) under the Securities Trading Act;
- specific common law securities claims similar to statutory claims, for example, for false or misleading statements in securities prospectuses or other sales materials (civil prospectus liability); and
- general civil claims, such as tort or contractual liability, applied to securities transactions, for example, implied contractual liability for mis-selling by brokers and dealers or counterparties in private securities offerings.

Offerings versus secondary-market purchases

5 | How do claims (or defences to claims) arising out of securities offerings differ from those based on secondary-market purchases of securities?

In some respects, claims arising out of securities offerings do not differ at all from those based on secondary-market purchases of securities because, for example, the liability for securities offerings on securities exchanges extends to all secondary-market transactions of indistinguishable securities for six months after the securities offering. Moreover, the liability for damages arising out of secondary-market transactions in listed securities is, in practice, dominated by ad hoc liability under the Securities Trading Act. Secondary-market transactions in unlisted securities, however, are less well protected because securities claims under general tort law often require intent.

Public versus private securities

6 | Are there differences in the claims or defences available for publicly traded securities and for privately issued securities?

Yes. Many statutory securities claims are aimed at protecting investors against incorrect public statements and are therefore not applicable to privately issued securities. However, courts have, to some extent, levelled the playing field by assuming contractual causes of action in relation to individual securities transactions that achieve substantially similar results to private securities offerings. By contrast, secondary-market transactions outside regulated markets are only subject to general tort liability, which often requires intent on the part of the tortfeasor.

Primary elements of claim

7 | What are the elements of the main types of securities claim?

Statutory prospectus liability generally requires:

- a prospectus (or in some cases only a summary thereof) containing incorrect or incomplete information that is material for the assessment of the securities;
- a purchase of the securities in reliance on the prospectus;
- intent or gross negligence of the person responsible for the prospectus;
- causation; and
- damage:
  - if the securities are listed on a stock exchange:
    - a negative impact of the misrepresented facts on the stock prices; and
    - the stocks must have been purchased within six months of a public offering of indistinguishable securities; and
  - if the securities are not investment funds under the Capital Investment Code or certain other securities:
    - a negative impact of the misrepresented facts on the purchase price of the securities; and
    - the securities must have been purchased during and within two years of the beginning of the offering period.

Civil prospectus liability is largely similar to statutory prospectus liability. However, it not only applies to statutory or substantially similar prospectuses but also any written marketing materials for securities.

Ad hoc liability requires:

- an issuer's failure to disclose inside information directly related to the issuer in a timely manner, and:
  - a purchase of the securities after the issuer's failure to disclose the inside information and ongoing ownership of the securities when the inside information becomes public; or
  - a purchase of the securities before the inside information comes into existence and a sale of the securities after the issuer's failure to disclose it;
- an issuer's disclosure of untrue inside information directly related to the issuer, and:
  - reliance on the untrue inside information; or
  - a purchase of the securities after the disclosure of untrue inside information, and:
    - ongoing ownership of the securities when the inaccuracy of the disclosed inside information becomes public; or
    - a sale of the securities before the inaccuracy of the disclosed information becomes public;
- intent or gross negligence of the issuer;
- causation; and
- damage.

Adviser liability requires:

- the implied (or, less common, express) conclusion of an advisory agreement;
- its breach through a failure to advise about:
  - all relevant aspects of the potential investment; and
  - the investment's suitability for the prospective investor;
- causation;
- damage; and
- at the least, negligence of the adviser.

Primary defences

8 What are the most commonly asserted defences? Which are typically successful?

Defendants will typically argue a lack of (gross) negligence or lack of intent due to lack of knowledge or lack of deemed knowledge of the critical facts, as well as a lack of causation and, finally, contest the damage calculation method. Fact patterns underlying large securities cases usually are neither black nor white. Price relevant information often only emerges as a result of a sequence of incremental events, or from a combination of pieces of information residing in different parts of a complex organisational structure, that may not be obviously material when considered individually.

Materiality

9 What is the standard for determining whether the misstated or omitted information is of sufficient importance to be actionable?

A prospectus is incorrect if it contains misstatements about material facts and is incomplete if facts were omitted that would have been material to the investor's assessment of the securities at the time of publication. The incorrect or omitted information must be material for the assessment of the value of the securities. The prospectus must generally be comprehensible from the perspective of an average reasonable investor who is able to understand the information contained in the prospectus if he or she has carefully read the prospectus and is able to comprehend financial statements, but who has no further special knowledge or education. Higher documentation standards apply if the securities are specifically marketed to a particular group of less sophisticated investors.

Scienter

10 What is the standard for determining whether a defendant has a culpable state of mind to support liability? What types of allegation or evidence are typically advanced to support or defeat state-of-mind requirements?

Statutory prospectus and ad hoc liability require intent or gross negligence (ie, a violation of obvious standards of care), whereas adviser liability only requires negligence (ie, a violation of ordinary standards of care).

Reliance

11 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

For statutory prospectus liability, reliance on the prospectus is presumed by operation of law. The presumption is rebuttable, however, if it can be proved that, on the purchase date, the prospectus no longer influenced buying decisions (eg, owing to the later publication of negative financial statements or a significant drop in the securities' price).

With respect to ad hoc liability, a presumption of reliance is disputed. While some commentators argue that there should be a presumption of reliance comparable to the fraud on the market theory under US law, the German Federal Supreme Court has repeatedly rejected this argument.

Causation

12 Is proof of causation required? How is causation established? How is causation rebutted?

German law generally requires the breach of duty to have been a proximate cause for the damages claimed by the plaintiff.

Other elements of claim

13 What elements or defences present special issues in the securities litigation context?

Where no presumption of reliance exists, such as for ad hoc and adviser liability, issues of causation arise. Moreover, the amount of damage caused by inaccurate information is often difficult to establish, but may be estimated by the courts.

Limitation period

14 What is the relevant period of limitation or repose? When does it begin to run? Can it be extended or shortened?

The general limitation period runs for three years starting at the end of the year in which both the claim has arisen and the claimant has, or, but for gross negligence, should have gained, knowledge of the facts underlying his or her claim, including the identity of the defendant.

REMEDIES, PLEADING AND EVIDENCE

Remedies

15 What remedies are available? Do any defences present special issues in the context of securities litigation? What is the measure of damages and how are damages proven?

In securities litigation, the main remedy is the payment of damages. Other relevant remedies are rescission of the investment contract and restitution of unjust enrichment.

Prospectus liability

The claimant who still owns the securities can demand the reimbursement of the purchase price (including incidental expenses) in return for the securities. The reimbursement is limited to the issue price of the securities. If the claimant is no longer in possession of the securities, his or her damages are calculated based on the difference between the purchase price and the sale price.

Ad hoc liability

The Federal Supreme Court recently held that investors can claim not only damages but also rescission. However, the Court limited this remedy to cases of reliance. Thus, ordinarily, damages will be awarded and calculated based on the difference between the purchase price paid and the hypothetical purchase price had the issuer complied with its disclosure obligations.

Pleading requirements

16 | What is required to plead the claim adequately and proceed past the initial pleading?

German civil procedure does not provide for notice pleading but generally requires substantiated pleading of all elements of a claim. The burden of pleading is, however, often reversed for information originating from the opposing party's sphere, such as internal information. Regarding this information, the claimant's burden of pleading is eased and the defendant cannot simply dispute the allegations but needs to submit a substantiated account of the facts. Failure to do so will be treated as an admission of the facts submitted by the opposing party. The extent of the shifting of the burden of pleading depends largely on the circumstances and the discretion of the court. Depending on the circumstances, the reversal of the burden of pleading can have similar effects on the defendant to discovery and disclosure in common law, but without the associated level of expenses.

Procedural defence mechanisms

17 | What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

There is no formal mechanism in the Code of Civil Procedure to dispose of claims at an early stage of the proceedings. Courts can, however, dismiss cases for failure to state a claim before hearings progress to the evidentiary phase.

Evidence

18 | How is evidence collected and submitted to the court to support securities claims and defences in your jurisdiction? What rules and common practices apply to the introduction of expert evidence and how receptive are courts to such evidence?

Plaintiffs have the primary burden to establish all relevant facts constituting a breach of law, and the causation of a damage as well as the quantum. Defendants have the burden of proof to show that they did not act (grossly) negligently or intentionally. While there is no pretrial discovery under German law, courts have developed a secondary burden of pleading which forces defendants to effectively disclose a great deal of internal information otherwise inaccessible for plaintiffs. Attempts at cutting corners on such secondary burden may typically expose defendants to the risk that courts might draw adverse inferences against them. Moreover, plaintiffs will try to obtain access to public prosecutors' and regulatory authorities' files if available.

Parties' may introduce reports prepared by parties' experts. However, where relevant, the court will appoint its own experts to assess critical facts. However, courts will not investigate facts on their own. Court-appointed experts will be limited to verify facts pleaded by the parties only.

LIABILITY

Primary liability

19 | Who may be primarily liable for securities law violations in your jurisdiction?

The primary liability for breaches of securities laws is on the issuer of the security.

Secondary liability

20 | Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

'Controlling person' liability exists primarily in the form of prospectus liability. With respect to prospectus liability, not only those who expressly assume responsibility for the prospectus may be liable, but also those who are in fact responsible for it (ie, those who are in factual control of the issuer or the offering and who have an economic interest in the offering).

Claims against directors

21 | What are the special issues in your jurisdiction with respect to securities claims against directors?

The Federal Supreme Court has found directors liable for aiding and abetting members of the management board in respect of the managers' intentional infliction of damage on investors in a manner contrary to public policy, although these are rather extreme and unusual cases. Liability can, for instance, arise from the intentional release of incorrect ad hoc announcements to manipulate the market in a way that will benefit the director. However, the exact criteria for this liability are controversial because, to date, very little case law exists.

Claims against underwriters

22 | What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Underwriter liability is a relatively rare phenomenon in Germany. Only one Federal Supreme Court opinion from 1998 mentions in an obiter dictum the underwriter's liability for the information contained or omitted in the prospectus. However, there are two judgments from the Frankfurt Higher Regional Court from 1994 and 1999 in which the court held underwriters liable for incorrect or incomplete statements in the prospectus.

Owing to this dearth of case law, the standard of care for underwriters is still controversial. It is argued in legal commentaries that, based on their respective level of involvement and access to information, the standard of care required of the lead underwriter should be lower than that of the issuer, whereas the standard of care required of junior banks should be even lower than of the lead underwriter. To date, no court has passed a judgment on the issue.

Claims against auditors

23 | What are the special issues in your jurisdiction with respect to securities claims against auditors?

The liability of auditors in connection with prospectuses is controversial in many respects. While prospectus liability often does not apply, the courts have occasionally resorted to assuming a protective effect of the audit contract for the benefit of a limited class of investors. However, auditors will generally not be liable to the investing public at large. Exceptions may apply in cases of intentional infliction of damage on investors in a manner that is contrary to public policy. The Wirecard scandal of 2020 has led to a number of actions being filed against that company's long-time auditors.

COLLECTIVE PROCEEDINGS

Availability

24 In what circumstances does your jurisdiction allow collective proceedings?

The Capital Investors Model Proceedings Act (KapMuG) enables investors to have specific elements of pending securities actions adjudicated collectively. The KapMuG came into force in 2005 and sought to address the German courts' difficulties with processing large numbers of similar securities actions, in particular over 17,000 individual actions brought against Deutsche Telekom. It introduced a unique procedure permitting claimants to collectively litigate common issues of law or fact that arise in their individual securities actions before a single higher court. In 2012, the German legislature amended the KapMuG, simplifying and streamlining model proceedings, and including a new collective-settlement mechanism on an opt-out basis. The amended KapMuG also gives investors the opportunity to benefit indirectly from model proceedings by simply registering their claims with the court in charge of the model proceedings.

Originally, the KapMuG only applied to damages claims directly based on public information concerning securities and claims for specific performance under the German Securities Acquisition and Takeover Act. However, the 2012 amendment extended the scope of the KapMuG to include mis-selling claims in which false or misleading public information concerning securities is an element of a claim against a broker or dealer in financial products. Thus, not only can the parties responsible for prospectuses and ad hoc notices be defendants in model proceedings, but the brokers and dealers.

Reliance, causation and damages

25 Can reliance, causation and damages be determined on a class-wide basis, or must they be assessed individually?

Reliance and causation can only determined on a class-wide basis where the applicable statute so provides. Damages must always be assessed individually.

Court involvement and procedure

26 What is the involvement of the court in collective proceedings and what procedures must be followed to achieve collective treatment of claims? What is the procedure for settling collective proceedings and what is the extent of the court's involvement in settlement?

Courts examine the quorum of motions for model proceedings as well as the commonality of the facts and issues. If the requirements are met, the District Court will submit the common questions of fact and of law to the Higher Regional Court. The Higher Regional Court is bound by the Regional Court's submission. The Higher Regional Court may accept amendments and supplements as requested by the parties of the model proceeding.

The Higher Regional Court may review the appropriateness of a settlement proposal negotiated by the parties. Individual plaintiffs may opt out within one month if up to 30 per cent of the registered plaintiffs reject the settlement. In such cases, they may continue their individual actions.

Opt-in/opt-out

27 In collective proceedings, are claims opt-in or opt-out?

The KapMuG combines elements of opt-in and opt-out procedures. If a claimant applies for model proceedings, his or her application is published in an internet-based register and the underlying action is automatically stayed. If nine similar applications are filed within six months, the first court to receive an application for model proceedings will submit the common issues of fact or law to the higher regional court for adjudication. At this point, all actions affected by the common issues of fact or law are stayed. The model ruling binds all claimants – including those who have not applied for model proceedings – and does not allow them to continue their individual actions. Affected claimants are only granted the right to withdraw and thereby essentially waive their claims within one month of their actions having been stayed. Once the common issues have been decided, the individual actions are resumed to adjudicate the remaining individual issues of fact or law.

Regulator and third-party involvement

28 What role do regulators, professional bodies and other third parties play in collective proceedings?

Under the KapMuG, applications for model proceedings can only be brought by investors that are permitted to bring securities actions (ie, individuals and institutional investors, as well as defendants in these actions). The KapMuG does not grant regulators, professional bodies or other third parties the right to participate. These parties play no role in model proceedings.

FUNDING AND COSTS

Claim funding

29 What options are available for plaintiffs to obtain funding for their claims? What are the pros and cons of each option, including any ethical issues relating to litigation funding?

A common form of funding claim is private litigation insurance. Although for a couple of years insurers tried to exclude prospectus liability claims, the Federal Supreme Court found these clauses to be invalid. Therefore, private litigation insurance will probably be an increasing source of funding in securities litigation in the retail investment area.

Another funding option is contingency fee arrangements, although these are still rare in Germany because they are, as a general rule, contrary to lawyers' standards of professional conduct and, until recently, were categorically prohibited. However, the prohibition was slightly relaxed in 2008 after a ruling of the Federal Constitutional Court, and German law now provides that a contingency fee may be agreed upon in individual cases, but only if the client, because of his or her economic situation, would otherwise, from a reasonable point of view, refrain from pursuing claims. This includes cases of insufficient funds and cases involving high-cost risks that might prove ruinous.

In addition, third-party funding of claims is available and becoming increasingly popular. In Germany, this generally means that a private or commercial third party advances the funds required for court or arbitral proceedings and bears the risk of an adverse cost award in exchange for a share of any judgment or settlement. The *Volkswagen* and *Porsche* securities actions in connection with the diesel emissions issue are largely supported by litigation funders.

Finally, legal aid is available to indigent parties. If granted, legal aid covers the court fees and the applicant's own statutory lawyers' fees but does not cover the costs expended by the opponent, which an unsuccessful applicant must bear in accordance with the Code of Civil Procedure.

Costs

30 | Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

Under German law, the successful party can recover the costs that were required to bring an appropriate action or to appropriately defend against an action brought by others. These generally include statutory lawyers' fees and incidental expenses, such as court fees. When each of the parties has partially prevailed, the costs are shared proportionally.

Foreign plaintiffs from outside the European Union or European Economic Area and non-signatory states to the Hague Civil Procedure Convention may have to provide security for the cost of defending claims.

Privilege

31 | What types of legal privilege exist between litigation funders and litigants?

German civil law does not provide for an equivalent of the common law concept of legal privilege, as there is no pretrial discovery or a general duty of disclosure. Litigants and litigation funders can share information without restrictions. Such information will be protected by the general concept of privacy.

INVESTMENT FUNDS AND STRUCTURED FINANCE

Interests in investment funds

32 | Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

For a long time, no statutory prospectus liability existed for the offering of securities in investment funds. This regulatory gap motivated courts to create civil prospectus liability that is similar to the statutory rules. Today, however, a statutory prospectus liability regime for investment funds is provided in the Capital Investment Code. The liability regime is very similar to the previously existing prospectus liability rules for listed stocks. Unlike the issuer of stocks, however, the investment fund itself (as a non-incorporated combination of assets) is usually not liable for incorrect prospectuses.

Structured finance vehicles

33 | Are there special issues in your country in the structured finance context?

In 2011, the Federal Supreme Court ruled that banks have particular advisory duties regarding swap transactions. Banks are obligated to ensure that the investor has the same level of information regarding the swap as the bank itself. In particular, the bank must inform the investor if the swap initially has a negative market value from the investor's perspective, because the court sees this advisory duty towards investors as taking precedence over the bank's own interests. The court's opinion is, however, vague and contradictory. It has therefore spawned a lot of follow-on litigation with no end in sight.

In 2015, the Federal Supreme Court issued two further judgments on swap agreements, specifying that the initial negative market value generally only has to be disclosed by the bank that is a party to the swap agreement, not by third-party investment advisers. This is because, in the court's view, the initial negative market value gives rise to a conflict of interest for the swap party that stands to benefit from it, while under a duty to advise the investor objectively. On the other hand, the investment adviser who does not enter into the swap agreement is not subject to this conflict of interests. Therefore, the investment adviser probably only has a duty to disclose the initial negative market value if it is so material that the investor's chance of a return on investment is significantly impaired. Furthermore, the court held that the duty to disclose the initial negative market value does not exist if the customer enters into the swap agreement to reduce risks inherent in a loan agreement subject to a variable interest rate.

CROSS-BORDER ISSUES

Foreign claimants and securities

34 | What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

Residents of other jurisdictions are not restricted in bringing actions in Germany, but German statutory prospectus liability does not necessarily apply to securities purchased in other jurisdictions. Outside applicable treaty law, foreign plaintiffs may be required to furnish security to cover statutory cost reimbursement claims of the opponent.

Foreign defendants and issuers

35 | What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

For a successful claim against foreign defendants, German courts must first have jurisdiction over the case. Two different jurisdictional regimes exist: European law for foreign defendants from European Union member states and Lugano Convention member states, and domestic law for all others. The jurisdictional regime for non-European defendants is particularly far-reaching. For example, it gives German courts jurisdiction over all defendants who own assets in Germany, with very limited exceptions.

While controversial, under the applicable European conflicts-of-law principles, the fact that securities are traded on a foreign exchange is irrelevant for the issue of which law applies. Therefore, German courts are likely to apply German law if German residents incur damages from transactions abroad. However, German statutory prospectus liability only applies to foreign issuers whose securities are also listed abroad if a jurisdictional link to Germany exists (ie, if the securities were bought in Germany or some of the services in connection with their purchase were rendered in Germany).

Multiple cross-border claims

36 | How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

German law applies the lis pendens rule and courts will accordingly only assume jurisdiction if the claim is not pending in any other jurisdiction.

Enforcement of foreign judgments

37 | What are the requirements in your jurisdiction to enforce foreign court judgments relating to securities transactions?

Foreign judgments will be enforced in Germany if:

- the foreign court had jurisdiction of the case in accordance with German jurisdictional principles;
- the document commencing the proceedings was duly served and made known to the defendant in a timely manner to allow for an adequate defence or, in case of non-compliance with this requirement, the defendant does not invoke this non-compliance or has nevertheless appeared in the proceedings;

- the judgment is not contrary to any prior judgment that became res judicata rendered by a German court or any prior judgment that became res judicata rendered by a foreign court, which is to be recognised in Germany, and the procedure leading to the respective judgment does not contradict any such prior judgment or a proceeding previously commenced and still pending in Germany;
- the effects of its recognition will not be in conflict with fundamental principles of German law, including, without limitation, fundamental rights under the German Constitution;
- the reciprocity of the enforcement of judgments is guaranteed; and
- the judgment has become res judicata under the law of the place where it was pronounced.

Particularly relevant in the securities litigation context is the non-recognition of a judgment if the foreign court did not have jurisdiction according to German law. In connection with the Capital Investors Model Proceedings Act, the German legislature introduced a statutory provision regarding the exclusive jurisdiction of courts at the seat of the issuer for securities actions, which was intended to operate as a blocking statute. Some commentators have, erroneously, construed this provision as barring the enforcement of all foreign securities judgments against German issuers, creating unnecessary legal uncertainty for German companies intending to issue securities abroad.

ALTERNATIVE DISPUTE RESOLUTION

Options, advantages and disadvantages

38 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

In Germany, parties are free to agree on alternative methods of dispute resolution. The most common method of alternative dispute resolution is arbitration.

In 1998, Germany essentially adopted and incorporated the United Nations Commission on International Trade Law (UNCRITAL) Model Law on International Commercial Arbitration in its entirety, with minor qualifications and clarifications. Its provisions can be found in the German Code of Civil Procedure. The provisions on arbitration in the Code of Civil Procedure apply equally to international and commercial arbitration, as well as to domestic and non-commercial arbitration. Under German law, arbitration agreements must be in writing. German courts have no discretion to stay the proceedings but must reject the action as inadmissible if they find an arbitration agreement to be valid.

Parties seeking enforcement of an arbitral award must obtain exequatur from a German court before the award, whether domestic or foreign, can be enforced. Germany is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

German law distinguishes between court-annexed and private mediation. Because German courts, at all stages of the proceedings, are to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue, the Code of Civil Procedure requires that any hearing shall be preceded by a conciliation hearing, unless efforts to come to an agreement have already been made before an alternative dispute resolution entity, or the conciliation hearing obviously has no prospects of success. For the conciliation hearing, and for further attempts at resolving the dispute, the court may refer the parties to a judge delegated for this purpose, who is not authorised to make a decision (conciliation judge). Conciliation judges may avail themselves of all methods of conflict resolution, including mediation. Additionally, German courts may suggest at any point in the proceedings that the parties pursue these procedures. Should the parties decide to pursue mediation or other alternative conflict resolution procedures, the court will order the proceedings stayed.

In Germany, there is not simply one office of the ombudsperson. Instead, there are several offices of ombudspersons dealing with complaints against members of specific industries (eg, investment funds, banks, building societies, utility companies, insurance companies and public transport companies) or against individuals (eg, lawyers).

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UPDATE AND TRENDS

Key developments of the past year

39 What are the most significant recent legal developments in securities litigation in your jurisdiction? What are the current issues of note and trends relating to securities litigation in your jurisdiction? What issues do you foresee arising in the next few years?

Germany has introduced a new model action, the Model Declaratory Proceeding. Cartel damages lawsuits are another potential field for collective redress mechanisms in the near future. There has been a steep rise in cartel damages follow-on litigation in Germany over the past few years. They could also be enforced by way of a model action. Current cartel damages actions have been asserted by litigation special purpose vehicles that allow the claims of commercial parties to be combined.

In addition, the European Commission pushed another initiative aimed at introducing collective redress mechanisms across EU member states. The new Directive on Representative Actions, which was adopted at the end of 2020, allows for an authorised consumer protection association to be provided with the exclusive right to sue. The consumer association may also assert damages and payment claims, which go beyond the German model action in that it only allows a determination of liability or of facts. EU member states are required to implement the directive within 24 months.

The arrival of US plaintiff firms in Germany, alongside corresponding litigation funders, continues to play an increasingly important role in the future development of securities litigation and other types of collective redress.

Coronavirus

40 What emergency legislation, relief programmes and other initiatives specific to your practice area has your jurisdiction implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The coronavirus pandemic has caused a wide variety of legislative actions and government relief programmes to mitigate the hardships caused by lockdowns and other restrictions on economic and social activities. These measures do not have any direct relevance to securities litigation. The parliament has authorised a moratorium on insolvency filings which has been prolongated several times. Moreover, a moratorium on rental payments was issued. Massive funds have been made available to businesses and individuals to overcome the effect of shutdowns. Short-time work has been liberalised in order to reduce the need for mass layoffs. The complexity of the measures implemented would exceed the scope of this publication.

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