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The International Comparative Legal Guide to:

Class & Group Actions 2018

10th Edition

A practical cross-border insight into class and group actions work

Published by Global Legal Group, in association with CDR, with contributions from:

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Published by
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
October 2017

ISBN 978-1-911367-78-9
ISSN 1757-2797

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Class & Group Actions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of class and group actions.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting class & group actions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in class and group actions in 18 jurisdictions.

All chapters are written by leading class and group actions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Ian Dodds-Smith and Alison Brown of Arnold & Porter Kaye Scholer LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Under German law, there is no specific procedure for handling a series or group of related claims applicable under all circumstances. While the general rules of civil procedure permit groups of claimants to aggregate their claims into a single action, no specific procedures exist for handling these aggregated claims. Courts even have, and often use, discretion to split aggregate actions by multiple claimants into separate individual proceedings.

In Germany, claimants also normally only have standing to bring their own claims in litigation. Thus, series or groups of related claims generally cannot be brought by individuals or institutions in a representative capacity. However, the principle of individual standing is softened *de jure* by procedures that provide for representative or collective actions in selected areas of law, and *de facto* by private efforts to replicate collective procedures, by assigning numerous related claims to litigation vehicles established by plaintiffs' law firms, often supported by commercial third party funding.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The German Capital Investors Model Proceedings Act (*Kapitalanleger-Musterverfahrensgesetz*, *KapMuG*) enables investors to have elements of pending securities actions adjudicated collectively.

The Act came into force in 2005, seeking to address the German courts' difficulties with administering large numbers of similar securities actions, in particular over 13,000 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 Act, including various revisions aimed at simplifying and streamlining model proceedings, as well as new provisions for a collective-settlement mechanism on an opt-out basis. The 2012 Model Proceedings Act also gives investors the opportunity to benefit indirectly from model proceedings by simply registering their claims with the court.

Originally, the law 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 (*Wertpapiererwerbs- und Übernahmegesetz*, *WpÜG*). Yet, the 2012 amendment has broadened the scope of the Act 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 parties responsible for prospectuses and *ad hoc* notices be defendants in model proceedings, but also brokers and dealers.

The basic procedures of the Act, however, remain unchanged. In essence, the law permits claimants to apply in their pending lawsuits for a collective action regarding common factual and legal issues before a Higher Regional Court. If a sufficient number of claimants apply within a certain time frame, the first trial court to receive an application will aggregate the applications and submit them to a Higher Regional Court. The Higher Regional Court will then select a lead claimant to represent all other claimants in the model proceedings while all individual actions are stayed. Nevertheless, all other claimants may still file briefs in the model proceedings, but are not allowed to contradict the lead claimant's submissions. In practice, however, most ordinary claimants in model proceedings remain passive. Based on the lead claimant's and the defendant(s)' submissions, the Higher Regional Court will rule on the common issues of fact or law raised in the aggregated applications. Hence, the model proceedings resemble a class action led by one claimant on behalf of all similarly situated claimants who have brought a lawsuit. The model ruling will bind trial courts in all individual actions affected by the common issues of law or fact – irrespective of whether a party in these proceedings was an applicant for the model proceedings.

Under the revised Act, instead of bringing a lawsuit, investors are alternatively able to register their claims with the Higher Regional Court handling the model proceedings. These investors do not become parties to the model proceedings and are barred from pursuing their individual claims while the model proceedings are pending. *De jure*, the registered claimants only enjoy a tolling of the statute of limitations for the duration of the model proceedings. Yet, one can expect registered claimants to benefit from the *de facto* precedential value of model proceedings in practice.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

The Model Proceedings Act resembles a class action insofar as the model ruling automatically creates a binding precedent not only for

the lead claimant but for all similarly situated claimants of pending lawsuits. However, the model rulings do not adjudicate entire claims but only issues of fact or law common to a class of securities litigants. Yet, the 2012 amendments to the Model Proceedings Act introduce class settlements that may settle entire claims.

1.4 Is the procedure 'opt-in' or 'opt-out'?

The Model Proceedings Act 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 (*Klageregister*) 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. All claimants who lack the ability to continue their individual actions – including those who have not applied for model proceedings – are bound by the model ruling. Affected claimants are only granted the right to withdraw, and thereby essentially waive their claims, within one month of the stay of their actions. Once the common issues have been decided, the individual actions are resumed to adjudicate the remaining individual issues of fact or law.

The revised Model Proceedings Act also enables the lead claimant in model proceedings to negotiate a settlement with the defendant(s) (see question 5.6 for details), which is, after approval by the Higher Regional Court, binding on all parties, provided that no more than 30 per cent of the claimants opt out.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

A trial court can only submit cases to the Higher Regional Court for a model ruling if, after publication of a first application for model proceedings, at least nine further applications regarding common issues of fact or law are registered within six months.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The applicant needs to show that the issues of fact or law proposed for model proceedings may have significance beyond its own case in "similarly situated disputes" (*gleichgelagerte Rechtsstreitigkeiten*). Due to the vagueness of the "similarly situated disputes" requirement, considerable uncertainty remains in practice. Recent court judgments have found similarly situated disputes, particularly in situations where all claims have a common factual situation at their core.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Under the Model Proceedings Act, applications for model proceedings can be brought by capital investors who have standing to bring securities actions, i.e. individuals and institutional investors as well as defendants in such actions. The Act does not give groups or representative bodies standing to apply for a model proceeding.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Applications for model proceedings are published in an internet-based litigation register to invite other claimants to file similar applications. Moreover, if enough applications have been filed and submitted to the Higher Regional Court, the court will also publish information about the initiated model proceedings, inviting other claimants to join the proceedings by filing additional lawsuits or to toll applicable statutes of limitation by registering their claims with the court. The Model Proceedings Act does not provide for or restrict other forms of publication or advertisement.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Only a relatively small number of model proceedings have been registered since the inception of the Model Proceedings Act in 2005, and so far less than a handful of them have led to decisions on the merits. Yet, the 2012 extension of the scope of the Model Proceedings Act has increased the number of model proceedings – and probably will do so in the future. A recent rise in the number of entries in the model proceedings register seems to point in this direction. While in all of 2015, the register received 17 entries, in the first half of 2016, the number of new entries had already doubled to 34.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

Model proceedings do not deal with remedies, but only decide common issues of law or fact. The remedies available in individual actions depend on the substantive rights upon which claimants decide to base their claims. Securities actions under the Model Proceedings Act usually allege various forms of statutory causes of action, e.g. prospectus liability, breach of advisory contracts, or sound in tort – for all of which pecuniary damages are the principal remedy (see question 5.1 for details).

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Collective interests are enforceable through representative actions in a number of legal areas. In particular, consumer protection, competition and environmental laws give certain non-profit organisations a right to sue.

a) **Consumer protection law**. The German Injunctions Act (*Unterlassungsklagengesetz*, *UKlaG*) of 2001 grants, *inter alia*, authorised consumer associations the right to enjoin

defendants from using or recommending "unfair" standard terms, and seek injunctions against violations of consumer protection laws relating to business-to-consumer contracts.

b) **Competition law**. Violations of consumer protection laws may simultaneously constitute violations of the German Unfair Competition Act (*Unlauterer-Wettbewerb-Gesetz*, *UWG*), which also allows associations entrusted with the observance of German competition law to seek injunctions against anti-competitive behaviour. The Act also enables such associations to seek injunctions where a business's action unduly compromises competitors' interests as well as in cases of unfair marketing behaviour.

c) **Environmental law**. Representative actions are provided for in the recently amended Environmental Damage Act (*Umweltschadensgesetz*, *USchadG*) and the Environmental Judicial Review Act (*Umwelt-Rechtsbehelfsgesetz*, *UmwRG*). The former Act covers the powers of public authorities to combat environmental damage and grants authorised environmental associations the right to seek judicial review of any such action or omission. The details of environmental associations' right to sue are set out in the Environmental Judicial Review Act, which transposed Council Directive 2004/35/EC into national law. To succeed in a judicial review claim, associations need to establish: firstly, that there has been a violation of laws aimed at environmental protection; and secondly, that this violation runs counter to the environmental protection goals spelled out in the association's constitution. The association loses its standing to sue if the public authority had consulted the association before reaching a decision and the association failed to assert its concerns at this consultation stage.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Injunctive actions in all areas outlined under question 2.1 can only be brought by non-profit organisations approved by the government. To have standing for an injunction action against "unfair" standard terms, the organisation must either be a registered consumer association approved by national or EU authorities or a Chamber of Commerce regulated under national law. Registered consumer groups only have standing if business-to-consumer contracts are at issue. If an association does not fall under these limbs, it must demonstrate for approval that it is a non-profit organisation pursuing commercial interests and representing a significant number of businesses from the same or similar sector, as well as that the injunction action it pursues aims at protecting its members' interest in due market competition. These requirements also apply to organisations alleging business-to-business competition law infringements which are not related to the use of "unfair" standard terms. Environmental associations seeking judicial review must likewise be registered. To be registered, they must demonstrate: firstly, that according to its charter the organisation's principal aim is environmental protection; secondly, that it has been active in this respect for at least three years; thirdly, that its purpose is "charitable" under national law; and fourthly, that its interior structures are democratic, particularly that any interested person can join and exercise membership rights.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Representative actions can only be brought in the areas of consumer, competition and environmental law (see above question 2.1).

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

In consumer protection and competition actions, only injunctive relief is available. Yet, injunctions against the use of "unfair" standard terms also have *res judicata* effects that inure to the benefit of consumers affected by the use of "unfair" standard terms, providing a potential basis for contractual remedies including monetary compensation. Judicial reviews initiated by environmental protection groups are ordinarily directed at quashing a public authority's decision and only exceptionally lead to a damages award.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In Germany, trials are generally conducted by professional judges, albeit that in some areas of law, lay judges join them on the bench.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

There are no courts in Germany that deal specifically with class or group actions. There are, however, specialist panels, in particular at Higher Regional Courts, which deal with model proceedings. Regional courts as well as Higher Regional Courts generally allocate cases to particular panels or chambers according to the area of law to which the dispute is related.

A significant change in the 2012 Model Proceedings Act is the extension of the Higher Regional Court's responsibility for managing model proceedings. The Court is now responsible for deciding whether and to what extent the model proceedings should include any additional issues to be covered by its ruling.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

Providing that common issues of fact or law underlying parallel cases are identified, the issues are bundled and sent for determination to the Higher Regional Court under the Model Proceedings Act. Hence, certification of the class is not made on the basis of a particular group of claimants, but with reference to substantially comparable issues of law or fact underlying a number of cases.

Courts cannot impose a cut-off date for joining model proceedings by filing a lawsuit involving the common issues of law or fact to be adjudicated. Yet, registration of similarly situated claims for purposes of tolling the statute of limitations is only possible within six months of the publication of the Higher Regional Court's notice regarding the initiation of the model proceedings.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Under the Model Proceedings Act, the Higher Regional Court only rules on the issues of law or fact raised in applications for a model ruling that have been aggregated by the first trial court to grant an application. Thus, the Model Proceedings Act provides for the determination of generic or preliminary issues of law or fact with respect to the affected securities actions. However, in all areas of law, litigants may agree on litigating only "test" or "model" cases (*Musterklage*) while staying all others. Such "test" or "model" cases will only lead to persuasive precedents.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Courts in mass litigation cases are often willing to coordinate the management of numerous parallel cases with the litigants and informally agree, for example, on filing deadlines and scheduling as well as bifurcating common dispositive issues. Increasingly, courts accept the coordination of mass proceedings through less formal communication channels such as emails, focusing on representative sample briefs for all parallel cases. However, paper copies still need to be filed in each and every case of the mass proceedings.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

There are two kinds of experts in the German judicial system: court-appointed experts whose reports may be used as evidence; and private experts who are selected by the parties and whose reports are considered particularly reliable party submissions of fact. Hence, a party submitting expert reports will raise the opposing party's bar for proper factual pleadings in response. Moreover, private expert opinions can also be used to challenge opinions of court-appointed experts.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Pre-trial depositions do not exist in Germany. There is no rule that witness statements or expert reports must be exchanged prior to trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In Germany, parties are generally not required to disclose evidence. While a few statutory provisions allow courts to order the production of evidence, they are often interpreted narrowly and rarely used in practice. However, pleading rules, in particular the truthful pleading rule and the shifting of the burden of pleading may, under certain circumstances, lead to some degree of disclosure of information by the defendant. Yet, the reversal of the burden of pleading does not compel defendants to disclose documents.

3.9 How long does it normally take to get to trial?

German civil trials, particularly in complex cases, are usually extensively prepared by written submissions of the parties. Hence, a first trial hearing can on average be expected after six to 12 months. However, the scheduling of hearings also depends on the workload of the court and varies a lot between courts. In proceedings under the Model Proceedings Act, a hearing of the Higher Regional Court may only occur after a considerably longer period of time.

3.10 What appeal options are available?

There are generally two appeal options available in Germany: an appeal on points of law and fact; and a subsequent appeal on points of law only.

As regards model proceedings under the Model Proceedings Act, the model ruling of the Higher Regional Court may be appealed to the Federal Supreme Court.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, there are.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The standard limitation period for bringing court proceedings is three years. Longer limitation periods of 10 years exist, for example, for interests in real property, or of 30 years, for example, for personal injury claims as well as adjudicated claims.

The standard limitation period commences at the end of the year in which the claim arose and the plaintiff had knowledge of the circumstances giving rise to the claim, or would have obtained such knowledge if he had not shown gross negligence. Irrespective of knowledge, claims to which the standard limitation period applies become time-barred 10 years after they arise.

Under the Model Proceedings Act, investors who have not filed an action may register their claims with the Higher Regional Court responsible for the model proceedings within a period of six months from the model proceedings' public announcement.

Environmental protection groups seeking judicial review of public authorities' decisions must usually file their claim within one month after the authority's decision has been made public. The limit extends to one year if the authority's decision has not yet been made public, or the authority fails to comply with its respective duties.

The age or condition of the claimant does not affect the calculation of any time limits. Courts also do not have discretion in the application of time limits. Under certain circumstances, however, the limitation is suspended, e.g. in cases of *force majeure* that occur within the last six months of the limitation period.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Neither issues of concealment, nor those of fraud, directly affect the running of time limits, but both may be relevant for the claimant's knowledge of the facts underlying the claim and therefore the running of the statute of limitations. Moreover, in certain cases, concealment and fraud may give rise to new claims and, therefore, new limitation periods.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The provisions on damages are contained in the "General Part of the Law of Obligations" in the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) and generally apply to damages arising out of contract, tort and other statutory actions. Generally, damages are fault-based, i.e. they are only recoverable if the wrongful act or omission was either intentional or negligent. Yet, apart from the Civil Code, many specialised statutes provide for compensation for damage caused irrespective of fault (for instance, in the field of product liability).

Furthermore, damages are generally only compensatory. According to the provisions of the Civil Code, natural restitution, usually by means of specific performance, is the norm of compensation, stipulating that the person liable has to perform those acts which will make good the loss suffered by the party entitled to compensation. Pecuniary damages are only available if natural restitution is impossible or insufficient for just compensation, and always in cases of bodily harm or damage to property. Yet, given the broad scope of these exceptions, in practice, pecuniary damages are the principal remedy available in German courts.

Lost profits and consequential losses are generally recoverable through pecuniary damages. In tort claims, pure economic loss is only recoverable if the claimant can demonstrate that the wrongdoer has acted in breach of a law designed to protect the claimant, or, in the absence of such a law, if the claimant can establish that the wrongdoer's action was intentional and in violation of public policy.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Costs of medical monitoring are potentially recoverable under German law. However, this issue is highly fact-sensitive and requires meticulous scrutiny of all the circumstances in the individual case at hand.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Under German law, non-pecuniary losses are only recoverable for bodily harm, illegal restraint and violation of sexual autonomy. Yet, recently the notion of non-pecuniary damages has been taken to include "satisfaction" for the victim for what has been done to him or her, and the German Supreme Court has also emphasised the "deterrent" function of non-pecuniary damages in mass media cases involving the invasion of privacy of celebrities. Likewise, the Federal Constitutional Court (*Bundesverfassungsgericht*) has held in response to the European Court of Human Rights' *Caroline of Monaco (No 1)* judgment that claimants seeking redress for infringements of their constitutionally protected right to privacy must have effective remedies available. In those limited cases, therefore, the German notion of damages comes close to the concept of punitive damages. In practice, however, the amounts recoverable under this theory are a far cry from those awarded in certain other jurisdictions, particularly in the United States. The concept of "*damage per se*" is not recognised under German law.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

Under the general concept of damages under German law, damages must always be compensatory and generally provide redress for all losses. Specific statutes, however, set limits on recoverable damages (for instance, the German Product Liability Act (*Produkthaftungsgesetz*, *ProdHaftG*) limits liability arising from one defective product to EUR 85 million). If there is more than one tortfeasor, the claimant can bring an action against any one of them and invoke the principle of "joint and several liability" to recover full damages. The defendant sued can then claim contribution from the other tortfeasors, proportionate to the degree of fault and causal connection between breach and harm.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The German Civil Code stipulates that he or she who is liable for damages has to restore the state of things that would exist if the fact making him or her liable had not occurred. Accordingly, damages are calculated by comparing the claimant's position with and without the defendant's act causing the damage. This approach flows from the general approach that damages under German law are compensatory in nature.

Model proceedings only adjudicate issues of law or fact common to all similarly situated claimants and therefore do not rule on individual issues such as damages.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

German law normally permits the settlement of claims between the parties without court approval. Settlements reached while litigation is pending and recorded by the judge terminate the proceedings and are enforceable *in lieu* of a judgment.

The revised Model Proceedings Act has implemented the option of a "collective settlement" (*Kollektivvergleich*), making it easier to reach a settlement in model proceedings. Before the amendment of the Act, every claimant in a particular set of model proceedings was required to give his or her express consent to any settlement. However, unanimous consent is difficult to obtain in model proceedings with numerous claimants. Since the amendment, it is now possible for lead claimants to negotiate a settlement with the defendants which will – after approval by the Higher Regional Court – be binding on all parties, unless at least 30 per cent of the claimants choose to opt out.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Under German law, the successful party can recover those costs of the legal dispute that were required in order to bring an appropriate action or to appropriately defend against an action brought by others. These costs generally include, but are not limited to, lawyers' fees in the amount of the statutory lawyers' fees, and incidental expenses such as court fees, expert witnesses' statutory fees, and expenses for any necessary travel or for the time the successful party has lost having been required to make an appearance at hearings.

Where each of the parties has partially prevailed, the costs are either cancelled against each other, or shared proportionally. The court may further impose the entire costs of the proceedings on one of the parties if the amount the other party claimed in excess of the award was relatively small, or has resulted in only slightly higher costs, or if the amount of the claim brought by the other party depended on the judge's discretion, on expert assessments, or on the parties settling their reciprocal claims.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In the event of an unsuccessful appeal of the Higher Regional Court's model ruling to the Federal Court of Justice, the costs of the model proceedings are shared *pro rata* by all claimants who have filed their claim, in proportion to the value of each party's alleged claim.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Claimants affected by model proceedings can withdraw their claims within one month of their individual proceedings being stayed to avoid having to bear their *pro rata* share of the costs of the model proceedings.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

German law limits the amount of litigation costs that are recoverable. Only costs that are deemed necessary in order to bring an appropriate action, or to appropriately defend against an action brought by others, are recoverable. Necessary costs, in general, are costs that have been incurred or expended by the parties in direct connection with the litigation in question. Lawyers' fees are only considered necessary in so far as they do not exceed the statutory fee schedule for lawyer services. Litigation costs are generally awarded in the judgment as a matter of procedural law. In appropriate circumstances, additional reasonably necessary pre-litigation costs may be claimed as damages. Hence, courts do not directly manage litigation costs incurred by the parties, but German law essentially caps costs awards at what it considers a reasonable level.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Yes, it is. Public funding is available in the form of legal aid. Legal aid, if granted, covers the court fees and the applicant's own lawyer's fees, but it does not cover the costs expended by the opponent, which the applicant must bear in accordance with § 91 of the German Code of Civil Procedure (*Zivilprozessordnung*, *ZPO*), if he or she loses. Legal aid, in general, is available for domestic as well as for cross-border disputes within the EU.

7.2 If so, are there any restrictions on the availability of public funding?

Legal aid is available to parties who, due to their personal and economic circumstances, are unable to pay the costs of litigation, or are only able to pay them in part or in instalments. Upon filing a corresponding application, parties receive legal aid – provided that the action they intend to bring, or the defence against an action that has been brought against them, has sufficient prospects of success and does not seem frivolous. These rules apply equally to legal and natural persons irrespective of their nationality, citizenship or residence.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

In Germany, contingency fee arrangements are generally contrary to lawyers' standards of professional conduct and, until recently, were flatly prohibited. A contingency fee arrangement exists if the amount of the remuneration depends on the outcome of the case or on the lawyer's success, or if the lawyer receives a percentage of the sum recovered from the opposing party as a fee. The prohibition was eased in 2008 after a ruling of the German Federal Constitutional Court which declared a flat prohibition of contingency fee arrangements unconstitutional because it unduly restricted the professional freedom of lawyers (*BVerfG*, Judgment of 12 December 2006, 1 BvR 2576/04).

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 reasonably refrain from pursuing his or her claim. This includes cases of insufficient funds as well as cases involving high cost risks that might prove ruinous.

Nevertheless, contingency fee arrangements are still rare in Germany.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding of claims is permitted in Germany. Third party funding, as the term is generally understood in Germany, 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 fixed percentage of any judgment or settlement.

In Germany, the claimant and the funder usually enter into a financing contract which forms the basis of their legal relationship, i.e. typically an undisclosed or "silent" partnership under the German Civil Code with the purpose of bringing the claimant's case before the court or arbitral tribunal (*Prozessfinanzierungsvertrag*). It is only the claimant, however, who, under the financing contract,

is entitled to represent the partnership *vis-à-vis* third parties. The funder's role in the silent partnership is restricted to funding its partner's costs of court or arbitral proceedings, to bearing the risk of an adverse cost award, and to partially reaping the benefits of any judgment or settlement in favour of the claimant.

A specific characteristic of this silent partnership is that the claimant assigns the asserted claim against the defendant to the funder by way of security. It is a particularity of such a silent security assignment under German law that the assignor, with the authorisation of the assignee (here: the funder), continues to be entitled to assert the claim in his own name before the court or arbitral tribunal without being legally obliged to disclose the security assignment to the court or arbitral tribunal (*Einzugsermächtigung des gewillkürten Prozessstandschafters bei stiller Sicherungszession*).

In Germany, the role of third party funders is more restricted in theory than in practice. Third party funders are neither allowed to direct their customers to certain lawyers, nor do they, according to market practice, have any direct control over the lawyer's actions. Only the claimant and the funder are parties to the financing contract. That means that the lawyer has no legal obligation to the funder. Typically, however, the claimant, according to the financing contract, waives the attorney-client privilege and promises that both he and his lawyer will keep the funder informed at all times. In practice, all correspondence between the court and the parties to the lawsuit has to be forwarded to the third party funder. If the claimant fails to keep the funder informed, the latter may, depending on the gravity of the infringement, terminate the contract. Typically, the claimant is further obliged under the financing contract not to agree to a settlement or any other comparable act of disposal of the claim without the funder's prior approval. It is this latter provision of a financing contract that enables the funder to exert considerable influence on the claimant, and indirectly also on the lawyer.

Third party funding can be distinguished from other litigation funding options in Germany such as legal aid and before-the-event legal expense insurance. Legal aid, if granted, covers the court fees and the applicant's own lawyer's fees, but it does not cover the costs expended by the opponent, which the applicant must bear in accordance with § 91 of the German Code of Civil Procedure (*Zivilprozessordnung*, *ZPO*), if he or she loses. Before-the-event legal expense insurance, on the other hand, covers court fees, the insured person's own lawyer's fees, and also the costs of the other party to the lawsuit, if the insured person loses the case. In Germany, before-the-event legal expense insurance is especially designed for private citizens and is not open to commercial disputes.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes, consumers' claims may be assigned to and enforced by consumer associations. In addition, consumer associations may, if the law does not mandate the representation by an attorney and if bringing consumers' claims is within the associations' scope of responsibilities, represent consumers in court. In both instances, consumer associations are enabled to aggregate claims under the ordinary rules of civil procedure and initiate quasi-group actions if authorised by the claimants. Consumer group actions as defined in this paragraph thus differ from actions brought by consumer associations pursuant to the German Injunction Act or the German Unfair Competition Act.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Consumers' claims can be brought by a professional commercial claimant who purchases the rights to individual claims in return for a share of the proceeds of the action. Typically, litigation SPVs are employed to acquire and enforce assigned claims. It should be noted, however, that contingent claims purchases may not be used to circumvent permit requirements for collection agencies or by lawyers to circumvent the general prohibition of contingency fees for lawyers in Germany (see question 7.3).

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

In Germany, victims can pursue civil damages in criminal proceedings only on behalf of themselves, however, not on behalf of a group or class. Members of a group of victims of a particular crime would thus have to file individual applications for civil damages with the criminal court. Theoretically, the criminal court could then use group or mass claims techniques to deal with the group members' individual applications. The latter scenario, however, is unlikely to occur in practice as criminal courts are reluctant to accept applications for civil damages in the first place.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Yes, they are. In Germany, parties are free to agree on alternative methods of dispute resolution. The German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*, *DIS*), for example, provides sample procedural rules for various alternative dispute resolution mechanisms such as arbitration, conflict management, conciliation, mediation, expert determination, and adjudication, which the parties may choose to incorporate by reference into their ADR agreement. The following paragraphs highlight the German rules on arbitration and court-connected conciliation, before commenting on circumstances under which matters can be referred to an ombudsperson.

a) **Arbitration**. In 1998, Germany adopted the UNCITRAL Model Law on International Commercial Arbitration in its entirety, with minor qualifications and clarifications for avoidance of doubt. Its provisions can be found in the German Code of Civil Procedure. The provisions on arbitration in the German 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 first 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 ("New York Convention").

b) **Conciliation**. German law distinguishes between court-annexed and private conciliation. Because German courts, in all circumstances 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 German

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 unless the conciliation hearing obviously does not have any prospects of success. In the conciliation hearing, the court is to discuss with the parties the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. The parties appearing are to be heard in person on these aspects. The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to make a decision (conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation. Additionally, German courts may suggest throughout the proceedings that the parties pursue mediation or other alternative conflict-resolution procedures. Should the parties decide to pursue mediation or other alternative conflict-resolution procedures, the court shall order the proceedings stayed.

c) **Ombudsperson**. In Germany, there is no single Office of the Ombudsperson. Instead, there are several offices of ombudspersons dealing with complaints against members of specific industries (e.g. investment funds, banks, building societies, utilities companies, insurances, companies of the public transport sector) or against individuals (e.g. lawyers).

8.5 Are statutory compensation schemes available e.g. for small claims?

There are a few statutory compensation schemes available, e.g. the German Private Commercial Banks' Statutory Deposit Guarantee and Investor Compensation Scheme, which *inter alia* secures all private individuals' deposits at each member bank up to a limit of EUR 100,000 and 90 per cent of liabilities arising from securities transactions, limited to the equivalent of EUR 20,000. There is, for example, also a compensation scheme for the victims of accidents with uninsured or unidentified motor vehicles.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Statutory compensation schemes, as their name suggests, only offer monetary compensation. Arbitral tribunals, on the other hand, may grant monetary and non-monetary relief, including injunctive and declaratory relief. Other alternative dispute resolution mechanisms may, depending on the parties' agreement, offer injunctive and declaratory relief and monetary compensation as well, albeit any such amicable settlement may not be as easily enforceable as an arbitral award. Amicable settlements, for example, are only enforceable if concluded before an attorney, a notary or a dispute-resolution entity established or recognised by one of the German States' Departments of Justice.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Residents of other jurisdictions are not restricted from bringing actions in Germany. Germany, however, tries to limit "forum shopping" by concentrating securities actions in a single forum. The issuer's place of incorporation is the exclusive venue for all damages claims against domestic issuers, their board members and their underwriters. In the case of a takeover bid, the venue is the place of incorporation of the domestic target. A seller or distributor of financial products may be sued at his or her place of business as long as the action does not name the issuer as a defendant. Foreign issuers may be sued in German courts under the Model Proceedings Act. However, in such cases, jurisdiction is governed by EU Council Regulation No 44/2001 or – in the case of defendants outside the EU – the general German rules on jurisdiction. For representative actions, the normal rules of jurisdiction apply.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

The 2012 Model Proceedings Act contains a sunset clause of 1 November 2020. However, it seems likely that model proceedings will remain a permanent feature of the German litigation landscape. While not generating a lot of efficiencies, model proceedings appear to have increasing appeal to the plaintiffs' Bar, which seems to appreciate the nuisance value such proceedings create at the defendants' expense. Moreover, the Model Proceedings Act grants a quasi-monopoly to the lead plaintiff's lawyer by barring any parallel model proceedings and stopping all parallel litigation, enhancing the lead plaintiff's lawyer's position in the market. Furthermore, mass litigation around the globe against a German car manufacturer has highlighted the present limits of model proceedings in Germany, leading to renewed and more numerous calls for an extension of the law to consumer tort actions in all areas of law. According to internal sources, the German Federal Ministry of Justice and Consumer Protection is currently working on a bill that covers all types of mass damages claims and which, reportedly, also envisages their prosecution by consumer organisations.

On 29 January 2016, the German legislature passed a bill amending the German Injunctions Act (*Unterlassungsklagengesetz*, *UKlaG*). The law now provides for additional causes of action relating to violations of privacy and data protection standards outside the context of standard contract terms. The bill also adds new remedies to the Act. Consumer organisations are no longer only able to sue for injunctions to prevent future violations of consumer protection standards, but now may also sue for specific remedies aimed at counteracting the effects of existing or past violations. An example might be an order to publicly inform about statutory violations enabling affected persons to sue for damages. Damages claims themselves will, however, remain reserved to individual plaintiffs.

The German Federal Ministry of Justice and Consumer Protection has been working on a bill seeking to include a new collective redress mechanism in the German Civil Procedure Code. While such bill has not materialised due to reported resistance by Conservative Party ministers in the Federal Cabinet, a revised version has been published as a draft for discussion purposes by the Federal Minister of Justice and Consumer Protection in summer 2017. The success of this project will depend on the outcome of the Federal Parliament Election in September 2017. The revised draft combines elements of the Model Proceedings Act and the German Injunctions Act and would only allow registered non-profit consumer protection associations to enforce consumer claims against commercial defendants. The revised draft does not permit the enforcement of claims on behalf of unknown parties and can therefore not be compared to US-style class actions.

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