

Translating The Plan For English-Language German Courts

By Jan Schaefer and Rüdiger Morbach (March 3, 2023, 10:47 AM EST)

The language spoken in court has a major influence on the way parties argue and judges consider. Ideally, the language of the law and of the court is the same.

Otherwise, multilingual judges or interpreters are needed. But even the best translation always carries the risk of misunderstandings, some legal words are plainly untranslatable. In the worst case, this leads to a considerable mess.

English has established itself as the language of choice for international transactions over the decades. The prominence of U.K. and U.S. law firms on the global stage, the popularity of English law as the governing law of contracts and the general favorable view of the English courts has seen London become a preferred destination for high-value global disputes.

It is fair to say many countries have been looking enviously at London and have tried to allow for English-language proceedings to make their courts more attractive.

In January, as part of the latest push, the United Arab Emirates announced plans to allow English-language proceedings while the German Federal Ministry of Justice unveiled yet another proposal to create an all-English-language court.

Sprechen sie Englisch? Nein

Under the current German system, there is limited scope for English-language disputes before the local courts. While many judges understand English and the courts can provide an interpreter, any brief must be filed in German and the court's decision must be issued in German as well.

Some courts in Germany have established English-language chambers in recent years, which are, however, rarely used. This is due to several factors:

- Parties cannot safely opt into English-language proceedings. A jurisdiction agreement in favor of an English-speaking chamber is not permissible under German law. The court itself can be agreed upon, but not the English-speaking chamber. The competent chamber is determined according to the statutes of the court, which the parties cannot influence. For example, the Mannheim Commercial Court is only competent if the amount in dispute exceeds €2 million (\$2.12 million), the parties cannot agree otherwise.



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- Both parties have to play along if a dispute is to be submitted to an English-language chamber. For the chambers in Cologne, Bonn, Berlin, Hamburg and Frankfurt the parties must agree in the statement of claim and the statement of defense that the hearing is to be conducted in English and that both parties waive their right to an interpreter. The parties are not bound by earlier declarations, so even if the parties agree on an English-speaking chamber in a jurisdictional agreement, the parties are not bound by this once a dispute comes up. This again is laid down in the statutes of the courts and cannot be influenced by the parties.
- English-language proceedings are only available for the first instance (except for one exception, the Higher Regional Court of Stuttgart). All final appeals eventually go to the German Federal Court, which does not have an English-speaking chamber.

For these reasons English-language chambers have failed to take off.

The Full English

This lack of a full English-language option throughout the instances is seen as hindrance in making Germany a seat of choice for commercial disputes. Indeed, German courts tend to lose large and therefore attractive disputes to international arbitration, which has hampered the development of the law through case law in some branches of the law.

Enter the current German government and its Ministry of Justice, which wants German courts "to compete with recognized foreign commercial courts and arbitral tribunals, such in London, Singapore, Paris and Amsterdam."

The ministry's proposal wants to do away with the mistakes of the past and overhaul the German civil procedure in order to accommodate English-language disputes. The following key proposals are made:

- Selected district courts should be able to provide that certain commercial disputes can be conducted entirely in English, if the parties agree and there is an objective reason for it. If this is the case, the English-language will govern the entire proceedings, including immediate appeals on procedural grounds and appeals on the merits.
- For appeals, English-language chambers, to be called, in English, commercial courts, should be introduced at the higher regional courts. Outside of appeals, the commercial courts should also handle larger disputes — the ministry suggests a threshold amount in dispute of €1 million (\$1.06 million) — as a first instance, if the parties so agree. For this purpose, specialized judges with sufficient proficiency in English should be assigned to the commercial courts, the technical equipment should be upgraded.
- Decisions of the commercial courts would be subject to appeal on points of law to the German Federal Court, where the proceedings should also be in the English language.
- Court decisions of all English-language courts should be published in both English and German.
- The protection of trade secrets in trial should be improved, the Trade Secret Protection Act is to apply to the entire proceedings from the statement of claim onward.
- Virtual hearings, already used in German courts, should be made easier.

Theory and Practice

The proposals of the Ministry of Justice go beyond earlier initiatives, insofar as they try to holistically integrate English-language proceedings into German civil procedure, from the statement of claim in the first instance all the way to a final decision of the German Federal Court. If the proposals of the ministry were implemented, parties to German court proceedings would be able to choose English as a governing language for their entire dispute, which until now was only an option if they chose arbitration.

By this means, the most important shortcomings of the status quo of English-language chambers would be eliminated and the parties would be, for the first time, provided with an alternative to arbitration. At least in theory.

The success of English-language proceedings in German courts will depend very much on factors that the proposal does not address.

First, the proposals require a certain number of language-proficient judges. Given that German legal education has traditionally not put a focus on foreign language skills, only few of the senior jurists have the necessary language proficiency to conduct all-English proceedings.

Most of these jurists are, until now, more likely to be found at law firms. The same applies for court clerks, who would also need to speak good English in order to be able to work on all-English files.

Second, the German justice system has been very slow to accommodate change. Most courts still keep paper files. While lawyers have to file all briefs electronically, the courts print out the briefs and put them in the paper file.

If not for COVID-19, videoconferencing capabilities at German courts would still be poor. In this context, the idea of having a fully operative English-language branch at German courts at any point in the near future appears for the time being almost utopistic.

Third, and perhaps most importantly, it is far from clear that the ambitious plan of snatching back big disputes from arbitration will work anyway. Parties do not just choose arbitration because of the language, but for a multitude of reasons.

In arbitration, they can choose their own judges, can schedule their own proceedings and can then enforce the award in 172 different countries. None of these advantages come with the proposed English-language proceedings.

The proposed changes will not make German court proceedings flexible and speedy overnight. They may improve them, nonetheless. Better protection for business secrets, as proposed by the ministry, is a long-standing wish of the German legal community.

If it is implemented for the English-language courts, it could sooner or later also find its way into German-language proceedings.

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