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Munich Theses on the Civil Procedure of the Future

(unofficial translation)

Munich Theses on the Civil Procedure of the Future

The presidents of the Higher Regional Courts[1] and the Federal Court of Justice agree with the legal profession and academia: German civil procedure law needs to change in order to be prepared for the future. They welcome the decision of the federal and state ministers of justice to convene a reform commission involving the judicial practice.

Trust in the rule of law and in the ability of courts to offer solutions that are not only of high quality and efficient, but also fast are the foundation of the independent judiciary in a democratic state under the rule of law. This trust cannot be taken for granted in the general population. Rather, it is our job to maintain and strengthen it. To do this, the judiciary must face the social, economic and technical challenges of a globalised world. This applies particularly to the central functions of the rule of law: Access to justice and the possibility to assert claims in an orderly and also efficient procedure – the civil procedure – and to enforce these claims by means of high-quality decisions and conflict resolutions that are in line with the interests of the parties.

To achieve this, the traditional system of German civil procedure law must be fundamentally transformed and must not shut itself off from the new realities of life in society as a whole. Digital progress, highly automated and optimised structures in specialised law and legal tech firms in a changing legal services market as well as the phenomenon of mass proceedings have shown the weaknesses of civil procedure law in Germany and give reason to look beyond the organisation of the courts and to consider their communication with the parties.

At the same time, there has been a significant decline in the number of civil court cases. Between 1997 and 2017, the number of new cases filed fell by more than 40 % at local courts and by around 30 % at regional courts. According to the final report presented in April 2023 as the result of a research project commissioned by the Federal Ministry of Justice on the causes of this development, the reasons for this decline are complex. The report mentions the costs, the duration of the proceedings and the unpredictable success rate as well as the inadequate digitalisation of the judiciary, which has not kept up with developments in the economy and society in recent years. According to a study

[1] Oberlandesgerichte, Kammergericht Berlin, Bayerisches Oberstes Landesgericht.

by the Boston Consulting Group, the Bucerius Law School and the Legal Tech Association Germany entitled “The Future of Digital Justice”, the digitalisation of the German judiciary is lagging about 10-15 years behind the leading nations.

A high quality of the judiciary and its independence remain the main objectives of civil procedure law. But we also need efficient civil proceedings, especially to adapt to a changing business world and economic reality. An essential component of the rule of law is an efficient civil procedure that is accessible to all citizens with effective proceedings, good communication and transparent decisions. In order to reduce access barriers, access to the law and to the courts in particular must be made easier, more open and be improved.

On this basis, it is necessary to come up with an overall concept for a civil judiciary in the digital age. On the one hand, legislative reforms are needed that will have to go well beyond current plans and efforts. On the other hand, the transformation is an interdisciplinary task, and the judiciary itself must take the necessary steps to change its self-image and organisation if it wants to fulfil the demands placed on it in the future with regard to user-oriented and efficient procedures, high-quality decisions and conflict resolutions in line with the interests of the parties.

Comprehensive digitalisation of civil procedure offers the opportunity to take account of the increased complexity of the procedural requirements and to completely rethink the rules of civil procedure. Thus, the differentiated development of the law requires a high degree of legal specialisation, especially in commercial law matters, while, on the other hand, mass proceedings primarily need a uniform, reliable and expeditious settlement. In addition, civil procedure law must offer practicable solutions for the enforcement of consumer rights and for the handling of large-scale proceedings. A corresponding diversity exists among those seeking justice: While a consumer who is unfamiliar with business matters and who represents himself in court often needs explanations of the proceedings, a party doing business in an international context expects specialised judges on an equal footing.

On this basis, which also reflects the results of the kick-off event on “The Civil Procedure of the Future” in Düsseldorf[2] on March 2, 2024, the requirements for the civil procedure of the future are to be defined:

A.

A cornerstone of an independent judiciary in a democratic state under the rule of law is access to a state-run dispute resolution service for private individuals and companies. This

Access to justice

must be made simpler, more open and be improved in the future in order to reduce access barriers. In doing so, it is necessary to take full advantage of the possibilities of digitalisation. However, digitalisation is not an end in itself. The following theses and proposals for digital solutions should therefore be seen as an extension of the existing range of instruments, not as a replacement for the ‘analogue approach’.

Thesis A.1

The current **system of digital transmission of written submissions** and the digital case file **will be replaced** by a modern and intuitive – cloud-based and fail-safe – **nationwide standardised communication platform** that offers interfaces for lawyer software and e-file systems. The parties involved in the proceedings (court, lawyers, expert witnesses, natural parties etc.) can access the uniformly stored case data via user-specific interfaces and according to their individual access authorisations, i.e. to upload, view and edit documents or to electronically submit (suitable) evidence. In the future, the service of documents is to be replaced by posting them on the platform and informing the addressee by simple electronic means.

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[2] Kick-off workshop hosted by the President of the Higher Regional Court of Celle and the President of the Higher Regional Court of Düsseldorf, whose (preliminary) results will be further developed in working groups in cooperation with the Presidents of the Higher Regional Courts and the Federal Court of Justice, and whose overall result will be presented in a final workshop at the Higher Regional Court of Celle at the end of the year.

In this respect, an active and passive usage obligation should (initially) apply to professional submitters. It is to be discussed to what extent the requirement of an electronic acknowledgment of receipt (“Elektronisches Empfangsbekenntnis”) can be eliminated.

Citizens, on the other hand, should be free to decide whether they want to communicate with the judiciary via the nationwide standardised communication platform or by other means. Transparency can help to create the necessary acceptance among citizens for such a communication platform, which is already common in the private sector and thus can facilitate access to justice. To promote this, all citizens need a digital identity and a digital mailbox so that they can communicate via a general digital communication medium (such as “BundID” or “eBO”) and be addressed in a legally secure manner.

The communication platform shall be modular so that it can be expanded gradually with additional components, for example on the basis of legislative experimental clauses. At the same time, with the help of open and transparently documented interfaces, third-party providers should be enabled to develop modules for lawyers, experts or other parties to the proceedings, to provide an uncomplicated access to the platform.

Thesis A.2

The judicial systems will be legally and technically enabled to query and process structured data sets (such as master data, meta data, but also data concerning the facts of the case factual data) of the respective proceedings, going beyond the basis of the model of “XJustiz. The parties to the proceedings transmit these in addition to the individual arguments relating to the case.

For professional users this requires the development of an interface for structured data exchange and an obligation to use it, possibly also a fee-based incentive system for the transfer of structured data typically already available on the lawyer's side (proposal for a “data extraction fee” if the data has to be manually transferred from PDF files into the legal systems by the judiciary).

Thesis A.3

As a (further) offer for access to conflict resolution, a **uniform nationwide justice portal** is being created. It will serve as a central online starting point for citizens, combining the digital services of the justice system (e.g. information brochures, abstract legal information [no legal advice!] or digital legal application offices) in a uniform manner and thus representing the "face of justice in the digital space". The structure is modular; the portal should be gradually expanded to include modules such as mediation, arbitration or the filing of lawsuits, based on the model of the Civil Resolution Tribunal in British Columbia (Canada). In a first step, general or repetitive situations are effectively recorded and basic information is given in a low-threshold manner by using modern technologies, for example chat bots ("low hanging fruits"). This will strengthen the access to justice; at the same time, it conserves the resources of the judiciary, which are then available to resolve complex cases.

Thesis A.4

A special online procedure is being developed as a purely digital "fast-track procedure" that offers low-threshold access to justice. The guiding principle for such an online procedure are mass proceedings, such as passenger rights cases. The transition to a regular procedure under the Code of Civil Procedure is possible at any time. The online procedure generally ends with an enforceable title. It remains to be discussed to what extent such a procedure should also have a form-based user interface for the filing of a lawsuit by natural parties or if that interface should be reserved primarily for professional users.

Thesis A.5

In contrast to this, no automated preliminary ruling procedure (so-called "instance zero") – as a kind of extended order for payment procedure ("Mahnverfahren") – **should be developed**, in which a rule-based and enforceable interim decision on the likely prospects of success is issued fast for certain standardised cases on the basis of a plausibility check and in a contradictory procedure. Such a *judicial* preliminary ruling procedure contradicts the central offer of the state and the judiciary to resolve conflicts through (human!) judges according to the rule of law.

Thesis A.6

Finally, **access to justice and to the courts must be facilitated and simplified even beyond digital solutions**. Digitalisation is not an end in itself, but is based on the premise of offering every citizen a customised access to justice. In addition to the factual exclusion of parts of the population from access via digital channels, the barrier of an outdated analogue access to justice for (other) parts of the population must also be taken into account. A people-oriented justice system must therefore offer different ways of access in order to reach everyone.

B.

Even in the digital age, the focus of civil procedure is still the aim of the judiciary to ensure

quality and efficiency of the judiciary.

For the civil procedure of the future, this means that it must be efficient and transparent, ensure a high standard of quality and at the same time preserve judicial independence. A modern, contemporary procedure will also result in a high level of acceptance of the procedure among users. To achieve this goal, the procedural principles should be reviewed and, if necessary, readjusted. Technical tools – including artificial intelligence (AI) – must be used sensibly so that they can fulfil their supportive effect and do not become an end in themselves.

Thesis B.1

In order to increase the efficiency of civil procedure law, the **unnecessary complexity** of various procedural rules must **be reduced**. Complex decisions about the costs of a proceeding and the provisional enforceability of a verdict ("Nebenentscheidungen") and the legal remedies available against these decisions should also be simplified, as should the rules on provisional enforceability. Likewise, appeals and legal remedies as well as the thresholds for jurisdiction of certain courts should be reviewed.

Thesis B.2

In order to optimise the procedures between the court and the parties to the proceedings, **a more structured communication** is established. For this purpose, the parties to the proceedings submit structural data to the court in the form of participant data and, if applicable, standardised content. To this end, the parties' submissions regularly require a clear structure, ideally with the facts and legal arguments presented separately. At the same time, there must be the possibility of limiting the scope of the submissions, also supported by cost incentives. This requires the court to take procedural measures at an early stage of the proceedings. Especially for complex proceedings, the implementation of an early court hearing to structure the proceedings is useful, during which the court can give initial information and agree on a procedural plan with the parties. In this context, experimental legislative clauses are also desirable, as they allow deviations and can thus enable a further development of the standard procedure.

Thesis B.3

The past decade has clearly demonstrated the special significance of **mass proceedings**. They require legal regulation that makes **collective redress obligatory**. **Otherwise,** – if individual lawsuits are permitted – **legal orientation should be made possible at an early stage**. That means in detail: Attractive and effective collective redress is created that is based wherever possible on an opt-out model and that ensures the representation of non-participants. In the case of similar individual lawsuits, it is guaranteed that the Federal Court of Justice can deal with them quickly – within the framework of pilot proceedings. At the same time, it should be possible to suspend similar proceedings even without the consent of the parties. All following proceedings that are conducted after the clarification of the relevant factual and legal issues have to be streamlined. AI-based processes seem to be fundamentally important for sorting the cases and structuring the proceedings, in order to reduce the time-consuming individual processing of mass proceedings.

Thesis B.4

The civil procedure is characterised by the demand for **high quality** and, at the same time, **high transparency**. The guarantee of an appropriate standard **of the civil procedure** will be achieved by strengthening the courts’ chamber principle and specialisation. A longer stay in a specialised court chamber must not have a negative impact on a judge's career prospects. In order to make sure that there are sufficient number of cases in the various fields of law and to make use of specialised knowledge, special jurisdictions across courts are being pushed ahead. Options of making the allocation of cases more flexible are being considered. The qualitative processing of the cases is ensured by intervision and by regular and obligatory further training, which are also held in co-operation with the academia and lawyers. Knowledge management is given a high priority through personnel continuity and structured knowledge transfer. In addition, the transparency of the civil procedure also includes the further development of the digital court publicity that is particularly evident in the increased obligation to publish decisions.

C.

In particular,

commercial law disputes

require a new approach.

The high decline in proceedings in the area of the traditional commercial chamber, in connection with an increasingly noticeable reluctance of companies to take legal action, have a negative impact on the maintenance of the right to legal redress. In this context, effective legal protection with a modern court system is essential for a functioning market economy; legal certainty is a location factor here.

It is necessary to have a sufficient number of cases and decisions so that court decisions can shape the economic order with their function of developing and

interpreting the law. This is the only way to ensure that the courts maintain the necessary expertise in this sector.

Thesis C.1

Companies have specific requests for fast, efficient and transparent proceedings with high-quality and convincing decisions. The government's draft of the Act to Strengthen Germany as a Judicial Location ("Justizstandort-Stärkungsgesetz") contains important suggestions for modernising commercial law proceedings. These include confidentiality and protection of business secrets, an early organisational meeting and the preparation of a verbatim protocol at the request of the parties. Successful implementation requires investments in personnel and modern equipment (buildings and technology), the centralisation of responsibilities and the creation of a profile of the courts.

Thesis C.2

Regardless of the declining number of incoming cases the **traditional commercial chamber must be maintained and strengthened**. This requires a more precise integration of commercial judicial expertise; therefore, the possibilities for appointing commercial lay judges by means of matching or pooling procedures, depending on the field of law or branch of industry, should be expanded. The proven chamber principle can be made fruitful again for commercial law cases by increasing the number of professional judges ("large bench") and strengthening quality by peer review and the multiple-eye principle. Especially in this context, it is necessary to build a court profile by means of concentrations across districts and specialisations with a corresponding external representation.

Thesis C.3

Commercial proceedings generally require a **strengthening of the chamber principle and a higher degree of specialisation of the judiciary**. Especially complex commercial proceedings with specialised subject matter need courts trained for this purpose; this goal must be taken into account in the context of long-term personnel development. This includes longer stays in the court chamber and sufficient personnel

resources. Selective and continuous training and education on the basic principles of business administration, in the specialised field of commercial law and fluent business English provide the basis for acting on an equal footing and increasing the attractiveness of the state courts.

Thesis C.4

But the focus should also be on **building a profile for international commercial proceedings**. The German judiciary should have the self-image to be able to handle cross-border commercial proceedings. In addition to the possibility of a court hearing in English, judgments and orders should be published in English. Furthermore, an official translation for all essential German laws is required. Where the substantive law with regard to the law on general terms and conditions (in particular for corporate acquisition agreements) is unattractive for companies, there is a need for reform. The international legal framework also needs to be simplified: In particular, it must be possible to hear the parties and witnesses by video conference without any problems.