

Draft Government Bill Aims to Strengthen Germany as a Seat for Litigation

September 18, 2023

On August 16, 2023, the German Federal Government (“**Government**”) passed a draft bill that aims to strengthen Germany as a seat for litigation by establishing “Commercial Courts” and introducing English as a language of the court in civil proceedings (*Justizstandort-Stärkungsgesetz*, “**Draft**”).¹ The Draft is intended to make German civil courts more attractive for major commercial disputes and thereby strengthen Germany as a forum for litigation and business. Its objective is to prevent the migration of economically significant proceedings to other, primarily English-speaking legal systems and to arbitration, as well as to enable the German courts to further develop the law.

The Draft, which still has to be passed by the German Federal Council (*Bundesrat*) and Federal Parliament (*Bundestag*), is part of a number of initiatives with which the Government is currently seeking to modernize the German judicial system. In this vein, it has already addressed the current increase in mass proceedings and the associated high burden on civil courts with several legislative proposals.² At the same time, it has accelerated the use of videoconferencing technology in courts and initiated steps to modernize German arbitration law.³

This Alert Memorandum summarizes the key legislative changes proposed in the Draft.

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¹ Draft, only available in German [here](#).

² Draft government bill on the introduction of a preliminary ruling procedure at the Federal Court of Justice, available in German [here](#); draft government bill on the implementation of EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (BT-Drucks. 20/6520), available in German [here](#); and an Alert Memorandum on this topic, available in German [here](#).

³ White paper of the Federal Ministry of Justice on the modernization of German arbitration law dated April 18, 2023, available in German [here](#); draft government bill on the promotion of the use of videoconferencing technology in civil and specialized courts dated May 24, 2023, available in German [here](#).



1. Introduction and key points of the Draft

Marco Buschmann, Federal Minister of Justice and author of the Draft, commented on the Draft's objectives as follows: "*With fast and efficient legal proceedings that are oriented around the needs of the parties, we will compete with recognized foreign commercial and arbitration courts.*"⁴ The Draft has now been submitted to the Federal Council, which has six weeks to present its opinion and will subsequently be formally introduced to the Federal Parliament.⁵

The Draft is structured around the following key points:

(1) Establishment of Commercial Courts and Commercial Chambers

The Draft authorizes federal state governments (*Landesregierungen*) to establish new divisions at higher regional courts (*Oberlandesgerichte*), named **Commercial Courts**. These are to have first-instance jurisdiction in most⁶ civil litigation between companies and in litigation relating to corporate acquisitions, provided the amount in dispute reaches or exceeds €1 million. In order to be able to bring a case before the Commercial Court, the parties must expressly or implicitly agree to its jurisdiction.

In cases where the amount in dispute meets the corresponding threshold, the establishment of Commercial Courts enables companies to bypass (lower) regional courts (*Landgerichte*), which would otherwise be competent to hear the case in the first instance based on the amount in dispute. The advantages of the competence of the higher regional courts can be summarized as follows: The judges typically have a higher level of experience and specialization, there is a smaller number of cases, which allows a stronger concentration on individual proceedings, and staff turnover is lower.

With regard to procedure, the Draft refers to the general provisions for first-instance proceedings before regional courts. However, the following special features are provided for: Commercial Courts are to be required to structure proceedings in

consultation with the parties within the framework of a prior *organizational meeting*, comparable to case management conferences in arbitration proceedings. In addition, the parties are entitled to a *verbatim record* of the oral hearings that can be read during the proceedings.

Appeals against the first-instance decisions of the Commercial Courts may be lodged with the German Federal Court of Justice (*Bundesgerichtshof*) without the need for prior admission.

Pursuant to the Draft, federal state governments are to be authorized not only to establish new divisions at the higher regional courts, but also at the regional courts (so-called **Commercial Chambers**). These Commercial Chambers have jurisdiction for litigation that would fall within the jurisdiction of the Commercial Courts in terms of subject matter but does not reach the threshold of €1 million with regard to the amount in dispute.

(2) Proceedings conducted in English

The novelty at the core of the Draft is that proceedings before the Commercial Courts and Commercial Chambers may be conducted not only in German but also *entirely and exclusively in English*. Accordingly, it will not only be possible to hold oral hearings in English, but also to make submissions and provide evidence in English without the need for translation. The decisions of the Commercial Courts and Commercial Chambers may also be issued in English.

Consequently, it will also be possible to continue proceedings in English before the divisions of the higher regional courts that are competent to hear appeals and complaints against English decisions issued by the Commercial Chambers.

In contrast, proceedings before the Federal Court of Justice that were conducted in English in the lower instance may only be continued in English if an application to this effect is granted.

⁴ Press release of August 16, 2023, available in German [here](#) [translation by the author].

⁵ See BR-Drucks. 374/23, available in German [here](#).

⁶ Excluded from this is litigation in the special field of intellectual property, copyright law and on the basis of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*).

(3) Protective measures offered by the Act on the Protection of Trade Secrets

Furthermore, the Draft provides for the extension of the protective procedural provisions under the Act on the Protection of Trade Secrets (*Geschäftsgeheimnischutzgesetz*) to all civil proceedings. The Draft proposes that all judicial bodies are to be able to classify trade secrets as confidential upon request, thus addressing a problem that arises time and again in practice and for which there have been only inadequate provisions in place to date. The classification as confidential trade secrets triggers a general obligation to keep these secrets confidential and not to use or disclose them outside the judicial process. Violations can be punished with a fine of up to €100,000.

Such a classification also entails the possibility to exclude the public from oral hearings. This ensures the confidentiality of the proceedings, which has often previously been cited by companies as a major advantage of arbitration.

2. Assessment of the Draft

It is to be welcomed that Germany wants to modernize itself as a seat for litigation and raise its attractiveness for national and international economic players.

The possibility of conducting proceedings exclusively in English is an important course of action and a significant departure from existing initiatives at the state level with a similar direction of impact. The latter are limited in scope for reasons of legislative competence.⁷ The civil chambers established by state law may, to some extent, conduct hearings and examine witnesses in English. However, pleadings must be submitted in German, for example, and the court's decisions are also issued in German. The introduction of the English language is an appropriate and welcome step and should further include the possibility of being able to continue appeal proceedings against English decisions of the

Commercial Courts before the Federal Court of Justice in English as a rule.

It remains to be seen whether the choice of a €1 million threshold for the amount in dispute will prove to be appropriate. In determining this threshold, the Government had to strike a balance. The threshold had to be low enough to attract a sufficient number of cases in order to allow the courts in question to build their expertise and reputation. At the same time, the threshold had to be high enough so as to avoid the establishment of an excessively large number of Commercial Courts, which would be to the detriment of their specialization.⁸

3. Practical implications and outlook

It is difficult to predict whether the Commercial Courts made possible by the Draft will prove successful in practice. However, the increasing number of similar initiatives at state level in recent years confirms the practical need. A recent report on English-speaking judicial bodies for commercial litigation at a regional court and a higher regional court, which were established in 2020 on the basis of a state law, stated that 150 of their pending cases concern corporate acquisitions or matters between companies with an amount in dispute over €1 million.⁹ This gives reason to believe that the 21 cases per year predicted by the Draft¹⁰ could be exceeded.

If the Draft is enacted into law, German federal states that decide to establish Commercial Courts should bear in mind that their success is also likely to depend on whether an attractive environment for handling such disputes in practice (modern technical equipment, meeting rooms, etc.) is created.

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⁷ For example, the chambers of the Regional Court of Düsseldorf, which have jurisdiction for litigation arising from transactions in the corporate sector (mergers & acquisitions) for the state of North Rhine-Westphalia since January 1, 2022; for further information in German, see [here](#). Further examples in the Draft, p. 17; see [here](#).

⁸ Cf. the statement of the German Arbitration Institute, p. 3, available in German [here](#), which suggests abandoning the threshold for the amount in dispute

altogether; and the statement of the German Federal Bar, p. 5, available in German [here](#), which considers a lower threshold for the amount in dispute to be appropriate.

⁹ Press release of May 9, 2023, available in German [here](#).

¹⁰ Draft, p. 21, citing figures from the Netherlands Commercial Court in Amsterdam, which offers hearings in English only; for more information, see [here](#).