ARTICLES

Preparing Germany for the 21st Century: The Reform of the Code of Civil Procedure

By Giesela Rühl[*]

A. Introduction

One of the most important dates in German legal history is 1 October 1879. On this day the four Imperial Judiciary Laws (*Reichsjustizgesetze*) became effective: the Code of Civil Procedure (*Zivilprozessordnung*), the Code of Criminal Procedure (*Strafprozessordnung*), the Law on the Organization of Courts (*Gerichtsverfassungsgesetz*) and the Bankruptcy Code (*Konkursordnung*). They replaced a large number of different organizational and procedural provisions in the existing German states and effectively established legal uniformity in civil and criminal procedure in the German Empire. More specifically, the Court Organization Law created a national system of courts for civil and criminal matters consisting of Local Courts (*Amtsgericht*)[1], District Courts (*Landgericht*), Appeals Courts (*Oberlandesgericht*) and the Imperial Court of Justice (*Reichsgericht*)[2]. The Code of Civil Procedure, the Code of Criminal Procedure and the Bankruptcy Code provided the procedural framework for all these courts thereby bringing procedural unity to the German Empire for the first time.

Today, the four original codes enacted 126 years ago still form the procedural basis of the German legal system[3]. In particular, civil proceedings are still governed by the Code of Civil Procedure. Its provisions remain the cornerstones of the modern German system of civil justice although various amendments have been made since 1879: the adoption of the German Civil Code (*Bürgerliches Gesetzbuch*) and the Ger-

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[1] German legal terms and names of German legal institutions are translated in accordance with PETER L. MURRAY/ROLF STÜRNER, GERMAN CIVIL JUSTICE (2004), the leading treatise on the German system of civil justice in the English language.

[2] In 1950, after the establishment of the Federal Republic of Germany, the Imperial Court of Justice was replaced by the Federal Court of Justice (*Bundesgerichtshof*).

[3] In 1999 the Bankruptcy Code was eventually replaced by the Insolvency Code (*Insolvenzordnung*).

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man Commercial Code (*Handelsgesetzbuch*) in 1898, for example, entailed a number of changes to harmonize procedure with the new substantive law. The establishment of the Federal Republic of Germany (*Bundesrepublik Deutschland*) in 1949 required changes to account for the newly created federal structure. In addition, the needs of a modern society and the challenge to provide for an efficient judiciary with limited financial and personnel resources resulted in reform laws in 1976[4] and 1990[5] designed to expedite and simplify the procedure under the Code. To the same end, the German legislator has passed several laws since 2001 that changed important rules governing the substance of civil proceedings.

The number and diversity of the recently passed legislation have resulted in some confusion about what the state of German civil procedure is today. In the following article, I will, therefore, give an overview of the most important changes. This overview, however, is limited and far from being comprehensive. Numerous laws that are not considered here have required changes of the Code of Civil Procedure during the last years, notably the Law on Civil Unions of 16 February 2001[6], the Law for the Improvement of Protection From Domestic Violence in Civil Proceedings of 17 February 2001[7], the Law for the Restructuring, Simplification and Reform of Tenancy Law of 19 June 2001[8], the Reform of Service of Process in Court Proceedings Law of 25 June 2001[9], the Law for the Adjustment of Formal Requirements in Private Law to Modern Legal Relations of 13 July 2001[10], the Law for the Modernization of the Law of Obligations of 26 November 2001[11], the 7th Law for the Ad-

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[4] *Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren*, BUNDESGESETZBLATT (BGBL.) I 1976, 2181.

[5] *Gesetz zur Vereinfachung der Rechtspflege*, BUNDESGESETZBLATT (BGBL.) I 1990, 2847.

[6] *Gesetz über die Eingetragene Lebenspartnerschaft*, BUNDESGESETZBLATT (BGBL.) 2001, 266 See also Peter Hartmann, *Zivilprozess 2001/2002: Hunderte wichtiger Änderungen*, 54 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2577, 2585 (2001).

[7] *Gesetz zur Verbesserung des zivilgerichtlichen Schutzes bei Gewalttaten und Nachstellungen sowie zur Erleichterung der Überlassung der Ehewohnung bei Trennung*, BUNDESGESETZBLATT (BGBL.) I 2001, 3513. See also Hartmann (note 6), 2577, 2585.

[8] *Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts*, BUNDESGESETZBLATT (BGBL.) I 2001, 1149

[9] *Gesetz zur Reform des Verfahrens bei Zustellungen im gerichtlichen Verfahren,* BUNDESGESETZBLATT (BGBL.) I 2001, 1206.

[10] *Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr*, BUNDESGESETZBLATT (BGBL.) I 2001, 1542

[11] *Gesetz zur Modernisierung des Schuldrechts*, BUNDESGESETZBLATT (BGBL.) I 2001, 3138

justment of the Limit of Exemption from Execution of 13 December 2001[12]. However, as these laws have brought about only rather technical changes leaving the basic principles untouched, I will focus on the reform that has changed the system of German civil justice in a more fundamental and far-reaching way: the Law on the Reform of Civil Procedure of 27 July 2001[13]. In doing so, I will also account for the changes that have been made to the Code of Civil Procedure more recently through the Law on the Modernization of Justice of 1 July 2004 and the Law on the Remedies for Violations of the Right to be Heard of 2004 of 9 December 2004.

B. The Law on the Reform of Civil Procedure

The Law on the Reform of Civil Procedure was adopted on 27 July 2001 and became effective – for the most part – on 1 January 2002. Designed to prepare the German judiciary for the 21st century against the background of scarce financial and personnel means, the overall goal of the reform law was to enhance efficiency and transparency by reducing the duration of civil proceedings while at the same time maintaining the high level of legal protection traditionally offered by German courts[14]. The law set out for a major overhaul of the Code of Civil Procedure concentrating on four main issues: (1) strengthening the first instance, (2) limiting the second instance appeal of law and facts (*Berufung*), (3) limiting the review appeal on law and procedure (*Revision*), and (4) simplifying the miscellaneous appeal (*Beschwerde*)[15]. In the following, I will first deal with the changes made to the proceedings at first instance[16] before turning to the modifications that have affected the appellate level[17].

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[12] *7. Gesetz zur Änderung der Pfändungsfreigrenzen*, BUNDESGESETZBLATT (BGBL.) I 2001, 3638

[13] *Gesetz zur Reform des Zivilprozesses*, BUNDESGESETZBLATT (BGBL.) I 2001, 1887. See for a detailed discussion Christoph Althammer und Martin Löhnig, *ZPO-Reform und Meistbegünstigungsgrundsatz*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1567-1569 (2004); Thomas Doms, *Neue ZPO – Umsetzung in der anwaltlichen Praxis*, 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 777-780 (2002); Franz Schnauder, *Berufung und Beschwerde nach dem Zivilprozessreformgesetz (ZPO-RG)*, 42 JURISTISCHE SCHULUNG (JuS) 68-75 and 162-169 (2002); Egon Schneider, *Die missglückte ZPO-Reform*, 53 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3756-3758 (2001).

[14] See DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 58 (2001). The DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES are available online at http://dip.bundestag.de/parfors/parmain.htm. See also Hertha Däubler-Gmelin, *Reform des Zivilprozesses*, 33 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 33-38 (2000).

[15] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 58 (2001). See also Däubler-Gmelin (note 14), 33-38.

[16] See *infra* I.

[17] See *infra* II.

I. Proceedings at First Instance

With the reform law of 2001 the proceedings at first instance have been changed in several respects[18]: to begin with, the role of the first instance in general has been enlarged by limiting the standard of review at second instance[19]. Additionally, the provisions dealing with the proceedings at first instance have been revised to ensure a more efficient disposition of cases. More specifically, the legislator has extended the competency of single judges[20], improved the framework for settlement of cases[21], increased the obligations of courts in the oral hearing[22], extended the rights of courts in the taking of evidence[23], and eased the withdrawal of claims[24]. Finally, in order to avoid a curtailing of legal protection and party satisfaction the legislator has also improved the remedies against violations of the right to be heard[25].

1. Competency of Single Judges

Under the German law of civil procedure, Local Courts or District Courts have subject matter jurisdiction to decide a case at first instance[26]. At the Local Courts the cases are traditionally dealt with by single judges, whereas at the District Courts

[18] See for a detailed discussion Heinz Georg Bamberger, *Die Reform der Zivilprozessordnung – Eine Wirkungskontrolle*, 37 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 137, 138-139 (2004); Manfred Dauster, *Eckpunkte einer Justizreform*, 33 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 338, 342-343 (2000); Kurt Schellhammer, *Zivilprozessreform und erste Instanz*, 55 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 1081-1085 (2001).

[19] See *infra* II 1.

[20] See *infra* 1.

[21] See *infra* 2.

[22] See *infra* 3.

[23] See *infra* 4.

[24] See *infra* 5.

[25] See *infra* 6.

[26] The allocation of jurisdiction between Local Courts and District Courts in a specific case depends on a number of factors, the most important one being the value of the controversy (*Streitgegenstand*): if it exceeds € 5,000.00 the case will go to the District Court, if not the Local Courts will hear the case. See for a detailed account of subject matter jurisdiction under German civil procedure MURRAY/STÜRNER (note 1), 130-136.

prior to 2002 a panel of three judges (*Zivilkammer*) decided the case[27]. With the reform law of 2001 this has been changed in order to use scarce personnel resources more efficiently[28]. Now, ZPO § 348 (1) Sentence 1 provides that cases pending at the District Court will always be decided by a single judge (*Originärer Einzelrichter*). According to ZPO § 348 (1) Sentence 2 Nos. 1 and 2 a panel of three judges will hear the case only (1) if the single judge is a probationary judge (*Richter auf Probe*) who does not have at least one year of experience in civil cases[29], and (2) if the case belongs to one of the categories enumerated in ZPO § 348 (1) Sentence 2 No. 2 a) to k)[30]. However, even in these two cases ZPO § 348a (1) allows for decision by a single judge (*Obligatorischer Einzelrichter*) provided that the case neither raises factual nor legal difficulties nor an issue of fundamental significance[31]. As a result, the reform law has led to more first instance decisions by single judges[32]. Due to the fact that most cases pending at the District Court as trial court can be considered routine cases this is to be welcomed. At large, there is no need for discussion and decision by a panel of three judges[33]. If, however, in exceptional cases a panel of three judges seems necessary for an adequate treatment of the dispute, the new rules are flexible enough to allow the single judge to recommit the case to the panel[34]: according to ZPO §§ 348 (3), 348a (3) a case that has been assigned to the

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[27] In practice, however, the case was actually very often handled by a single judge. More specifically, the old version of ZPO § 348 provided that a case was to be assigned to a single judge if it neither raised factual or legal difficulties nor an issue of fundamental significance.

[28] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 63 (2001). See also Kurt Herget/Reinhard Greger, in RICHARD ZÖLLER, ZIVILPROZESSORDNUNG, annotations before § 348 (2005).

[29] At the beginning of their career, judges are appointed a probationary judge for a period not exceeding five years. Following successful service as a probationary judge the judge will be appointed for life (*Richter auf Lebenszeit*). See for a detailed description of the education, training, appointment and position of judges in Germany MURRAY/STÜRNER (note 1), 68-72.

[30] Such categories are *e.g.* bank and finance cases, construction caess, commercial cases, medical malpractice cases, insurance case, copyright cases. See for a discussion of these categories MURRAY/STÜRNER (note 1), 211; Egon Schneider, *Der katalogisierte Einzelrichter*, 57 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 555, 555-556 (2003).

[31] The decision to refer the case to the single judge is mandatory if the requirements of ZPO § 348a (1) are met. Karl Günther Deubner, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, AKTUALISIERUNGSBAND ZPO-REFORM, § 348a para. 3 (GERHARD LÜKE/PETER WAX EDS., 2002); Hartmann (note 6), 2577, 2579.

[32] See for a critical account of the extended use of single judges Dauster (note 18), 338, 340; Schellhammer (note 18), 1081, 1083-1084; Schneider (note 30), 555-557. See also Herget/Greger (note 28), annotations before § 348 para. 1.

[33] See also Bamberger (note 18), 137, 138.

[34] See also Bamberger (note 18), 137, 139.

single judge can be recommitted to the panel of three judges if it later turns out to involve factual or legal difficulties or to raise an issue of fundamental significance.

2. Settlement of Cases

The amicable settlement of disputes has always been a guiding principle of civil proceedings in Germany. Now, with the coming into force of the 2001 reform the German legislator has promoted this principle even further. ZPO § 278 (1) for example underlines the obligation of the court to work towards an amicable disposition of the case at any stage of the lawsuit. The most prominent change, however, has been the introduction of a mandatory settlement conference (*Güteverhandlung*), which is designed to encourage disposition of cases at an early stage of the lawsuit[35]. Although the effectiveness of such a mandatory conference can be questioned – usually voluntariness is the key to an amicable settlement[36] –, ZPO § 278 (2) does not leave room for much discretion: a mandatory settlement conference is to be held in all civil cases unless settlement attempts have no reasonable chance of success[37] or have previously failed[38]. The settlement conference takes place before the beginning of any oral hearing, whether preliminary or plenary[39] and may either be scheduled for the same day or, less frequently, for a separate day if this is likely to increase the chances of a settlement[40].

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[35] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 62 (2001). See also Bamberger (note 18), 137; Reinhard Greger, in RICHARD ZÖLLER, ZIVILPROZESSORDNUNG, § 278 para. 1 (2005); Hanns Prütting, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, AKTUALISIERUNGSBAND ZPO-REFORM, § 278 para. 6 (GERHARD LÜKE/PETER WAX EDS., 2002).

[36] Prütting (note 35), § 278 para. 29; Schellhammer (note 18), 1081, 1082.

[37] Whether a settlement conference has reasonable chances of success is a question of fact and is to be determined by the court according to its best judgment. See Hartmann (note 6), 2577, 2581; Peter Hartmann, in ADOLF BAUMBACH/WOLFGANG LAUTERBACH/JAN ALBERS/PETER HARTMANN, ZIVILPROZESSORDNUNG, § 278 para. 14 (2005); Prütting (note 35), § 278 para. 18.

[38] According to § 15a of the Introductory Law to the Code of Civil Procedure (*Einführungsgesetz zur Zivilprozessordnung*) the state legislation may provide that an action may only be brought if the parties have tried to settle the dispute out of court before a settlement board organised or recognized by the state.

[39] Greger (note 35), § 278 para. 12; Hartmann (note 37), § 278 para. 12; MURRAY/STÜRNER (note 1), 246; Klaus Reichold, in HEINZ THOMAS/HANS PUTZO, ZIVILPROZESSORDNUNG, § 278 para. 3 (2004).

[40] Hartmann (note 37), § 278 para. 8; MURRAY/STÜRNER (note 1), 246.

At the settlement conference, ZPO 278 (3) Sentence 3 requires the court to discuss the legal and factual issues of the case with the parties[41] and, if necessary, to ask questions. According to ZPO § 278 (3) Sentence 4, the parties of the dispute shall be heard[42]. If, at the end of the settlement conference, the parties reach an agreement it can be recorded in writing thereby turning it into an in-court settlement (*Gerichtlicher Vergleich*), which has the advantage of being a title for execution (*Vollstreckungstitel*)[43]. If the parties do not reach an agreement, ZPO § 275 (6)[44] allows the court to make a written settlement proposal which, – if accepted by the parties in writing and documented by court through simple court order (*Beschluss*) – also has the effect of an in-court settlement[45]. If the dispute cannot be settled the court records the result in writing and closes the conference. In this case, according to ZPO § 279 (1) the oral hearing shall either follow immediately or be scheduled for the next possible day.

3. Obligations of Courts

Traditionally, the court plays a much larger role in German civil proceedings than in many other legal systems. Although it is within the parties' responsibility to determine the scope of the lawsuit by presenting the claims for relief as well as the means of factual proof to be adduced, it is essentially the court that controls and structures the proceedings, that determines whether the case will be prepared by a preliminary hearing or by written proceedings and that decides how and in which

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[41] ZPO § 278 (3) encourages the court to summon the parties to participate in the settlement conference thereby favoring personal attendance over representation by lawyers. According to ZPO § 141 (3) failure to follow the summoning may result in a fine as well as in a default judgment (*Versäumnisurteil*) if the settlement conference is to be immediately followed by the oral hearing. Failure of both parties to appear in court will result in the staying of the proceedings in accordance with ZPO § 278 (4). See for a more detailed discussion of the consequences to attend the settlement conference Greger (note 35), § 278 paras. 20-21; Hartmann (note 37), § 278 paras. 27-33; Prütting (note 35), § 278 para. 23.

[42] For a more detailed description of the procedure see MURRAY/STÜRNER (note 1), 247.

[43] For a detailed discription of the German execution proceedings see MURRAY/STÜRNER (note 1), 445-469.

[44] ZPO § 276 (6) has recently been amended by the Law on the Modernization of Justice. See for a account of the new provision Christoph Knauer/Christian Wolf, *Zivilprozessuale und strafprozessuale Änderungen durch das Erste Justizmodernisierungsgesetz – Teil 1: Änderungen der ZPO*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2857, 2858-2859 (2004).

[45] The main reason for introducing this possibility of reaching an in-court settlement was not to facilitate settlements at the settlement conference. Rather it was designed to allow the parties to conclude an in-court settlment in writing at any stage of the lawsuit. Prior to the change parties were required to appear in court to agree on a in-court settlement. See Greger (note 35), § 278 para. 24.

order legal and factual issues will be addressed (*Materielle Prozessleitungspflicht*)[46]. The obligations of the court are reflected in more detail in a number of provisions in the Code of Civil Procedure, the most important one being ZPO § 139[47]. With the objective of facilitating an early settlement of disputes ZPO § 139 (1) essentially requires the court (1) to engage in a discussion with the parties about the legal and factual issues at stake, (2) to raise questions to clarify the situation, and (3) to encourage the parties to explain their position as to law and facts in a complete and timely manner, and (4) to designate the means of proof and to set forth their claims based on the facts asserted[48]. In this respect the reform of 2001 has not produced any changes. However, in order to promote the overall goals of the reform – increasing efficiency and transparency of proceedings – it has extended the court's information and recording duties[49]. According to ZPO § 139 (2) the court is now required to inform the parties about (1) its intention to base the decision on a point of fact or law that a party has apparently overlooked or considered insignificant, and (2) its understanding of a point of law or fact that differs from the understanding of the parties[50]. The court is also required to give the parties the opportunity to comment on the point of fact or law that has been overlooked, considered insignificant or understood differently. ZPO § 139 (4) establishes the court's additional duties to give instructions and feedback to the parties as early as possible and record instructions and feedback in writing[51].

All in all, the new version of ZPO § 139 sets forth and bundles the key elements of the court's obligations in civil proceedings[52]. Compared to the state of law prior to 2002, however, there is agreement that the amendment and restructuring of ZPO

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[46] See for a more detailed description of the role of the judge MURRAY/STÜRNER (note 1), 164-177.

[47] ZPO § 139 does not only apply to first instance proceedings but also to proceedings on the appellate level. However, the changes made are usually discussed in the context of the first instance because this is where they gain the most importance.

[48] See for a more detailed account Greger (note 35), § 139 paras. 3-4; MURRAY/STÜRNER (note 1), 169-170; Reichold (note 39), § 139 paras. 3-14.

[49] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 60, 61, 62 (2001). See also Greger (note 35), § 139 para. 1.

[50] For a more detailed description of this duty see Greger (note 35), § 139 paras. 5-8; Hartmann (note 5), 2577, 2582-2583; MURRAY/STÜRNER (note 1), 170-171; Reichold (note 39), § 139 paras. 15-24.

[51] For a more detailed description of this duty including the consequences of a failure to provide sufficient hints and feedback see Greger (note 35), § 139 paras. 10-14a; Hartmann (note 6), 2577, 2582-2583; MURRAY/STÜRNER (note 1), 171-176; Reichold (note 39), § 139 paras. 24-33.

[52] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 77 (2001). See also Bamberger (note 18), 137, 138; Reichold (note 39), § 139 para. 1.

§ 139 has had little actual impact[53]. Except for the fact that instructions and feedback now have to be recorded in writing to a larger extent the court's obligation to control and structure the proceedings was well defined before the reform law of 2001 by case law[54]. In this sense the statutory change probably has been more a matter of convenience and refinement than a creation of new obligations[55].

4. Taking of Evidence

When it comes to the taking of evidence the ZPO §§ 371 to 455 provide for five exclusive means of proof: (1) proof by observation and examination of persons and things (*Beweis durch Augenschein*), (2) proof by witness testimony (*Beweis durch Zeugen*), (3) proof by expert testimony (*Beweis durch Sachverständige*), (4) proof by production and inspection of documents (*Beweis durch Urkunden*), and (5) proof by party testimony (*Beweis durch Parteivernehmung*)[56]. In this respect the reform law of 2001 has brought about no change. However, it has answered one question, German courts had been facing for a very long time: in how far may third parties be ordered to participate in the taking of evidence? Prior to 2002 the state of the law was uncertain in this regard as a clear-cut provision was missing[57]. Now, ZPO § 142 (1)[58] explicitly allows the court to order a third party to produce documents[59]. Similarly, ZPO § 143 (1) Sentences 2 and 3 provide that the court may order a third party to produce objects in her possession for inspection or to tolerate the inspection of objects by the court. Pursuant to ZPO §§ 142 (2), 143 (2) the third party may refuse production of documents or inspection of objects only if it amounts to an

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[53] Bamberger (note 18), 137, 138; Greger (note 35), § 139 para. 1; MURRAY/STÜRNER (note 1), 169; Egbert Peters, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, AKTUALISIERUNGSBAND ZPO-REFORM, § 139 para. 1 (GERHARD LÜKE/PETER WAX EDS., 2002); For a critical account of the new provisions see Schellhammer (note 18), 1081, 1084.

[54] Bamberger (note 18), 137, 138; MURRAY/STÜRNER (note 1), 169.

[55] Bamberger (note 18), 137, 138; MURRAY/STÜRNER (note 1), 169.

[56] See for a detailed description of the procedure relating to the taking of evidence and the different means of proof MURRAY/STÜRNER (note 1), 261-306.

[57] See MURRAY/STÜRNER (note 1), 277-278; Peters (note 53), § 142 para. 2.

[58] ZPO §§ 142, 143 do not only apply to first instance proceedings but also to proceedings on the appellate level. However, the changes made are usually discussed in the context of the first instance because this is where they gain the most importance.

[59] However, the authority to order the production of a document by third parties requires that one party has argued the relevance of these documents for the proof of a specific fact that this party has asserted. Therefore, it cannot be compared with the American pre-trial discovery. See Greger (note 35), § 142 para. 1.

unacceptable burden or if she is entitled to refuse testimony in accordance with ZPO §§ 383, 384, 385. However, as this limitation affects only a limited number of cases the reform of 2001 has effectively increased the powers of courts in the taking of evidence[60].

5. Withdrawal of Claims

As a result of the principle of party control over the initiation, the scope and the termination of a lawsuit (*Dispositionsgrundsatz*)[61], the plaintiff may withdraw her claim basically at any stage of the lawsuit[62]. However, after the defendant has begun to argue her case at the oral hearing ZPO § 269 (1) requires her consent for the withdrawal to be effective. Prior to 2002 the consent had to be declared either explicitly or implicitly through conduct. This resulted in considerable uncertainty if the defendant simply did not react at all. The reform law of 2001 has, therefore, introduced a presumption of consent. Now, according to ZPO § 269 (2) Sentence 2 the defendant is deemed to approve of the withdrawal if she does not object within a statutory period of two weeks from service of the withdrawal of the claim. In the three years after the coming into force of the reform law, the provision has significantly increased legal certainty while at the same time streamlining the proceedings[63].

6. Protection of the Right to be Heard

The right to be heard (*Recht auf rechtliches Gehör*) is and has always been one of the fundamental principles of German civil procedural law. Since 1949 it ranks as a constitutional right and enjoys the protection of the Federal Constitutional Court (*Bundesverfassungsgericht*) by way of Constitutional Appeal (*Verfassungsbeschwerde*)[64]. However, a Constitutional Appeal may be lodged only after all other judi-

[60] See also MURRAY/STÜRNER (note 1), 271, 277-278; Peters (note 53), § 142 para. 4. For a critical account of the new provisions see Schellhammer (note 18), 1081, 1084.

[61] See for a detailed description of the principles guiding German civil procedure MURRAY/STÜRNER (note 1), 151-190.

[62] It follows from ZPO § 269 (2) that withdrawal is permissible even after a judgment has been rendered. See for the details MURRAY/STÜRNER (note 1), 324-326.

[63] Hartmann (note 6), 2577, 2584; Schellhammer (note 18), 1081, 1085.

[64] See for a detailed description of the right to be heard MURRAY/STÜRNER (note 1), 188-190, and for the possibility of lodging a Constitutional Appeal to the Constitutional Court MURRAY/STÜRNER (note 1), 408-417.

cial remedies have been exhausted (*Erschöpfung des Rechtswegs*)[65]. Prior to 2002 this meant, that a party who claimed a violation of the right to be heard in civil proceedings had to file a second instance appeal of law and facts as well as a review appeal before going to the Federal Constitutional Court. However, due to the rules on admissibility of appeals it also meant that in cases in which no appeal was admissible, the Constitutional Appeal was the only remedy available which effectively resulted in the flooding of the Federal Constitutional Court with a large number of Constitutional Appeals in rather small cases[66]. As different strategies of the highest German court did not lead to a satisfactory reduction of the number of cases[67], the reform legislator decided to make two important changes to the Code of Civil Procedure[68]: first, it modified the rules on the availability of a second instance appeal of law and fact to increase the number of cases in which the filing of an appeal is admissible[69]. Second and more importantly, it introduced an additional remedy for violation of the right to be heard in which the requirements for filing an appeal or other remedies are not met. Now, according to ZPO § 321a (1) an aggrieved party is allowed and required to remonstrate to the lower court (1) if a judgment of that court is not subject to a second instance appeal of law and fact in accordance with ZPO § 511 (2), and (2) the lower court has violated the aggrieved party's right to be heard. If a remonstration has been filed within the statutory period set by ZPO § 321a (2) – two weeks from knowing of the violation of the right to be heard – the lower court that has rendered the judgment must review the case. If it finds that there has been a violation of the right to be heard the court continues the proceedings in accordance with ZPO § 321a (5)[70].

The introduction of a new remedy for violations of the right to be heard has generally been welcomed. However, since the coming into force of the reform law it has

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[65] § 90 (2) of the Law on the Federal Constitutional Court (*Gesetz über das Bundesverfassungsgericht*). See MURRAY/STÜRNER (note 1), 409.

[66] According to the old version of ZPO § 511 (1) a second instance appeal of law and facts was only admissible if the amount in controversy exceeded DM 1,500.00 (€ 766.94).

[67] See MURRAY/STÜRNER (note 1), 411-412; Hans-Joachim Musielak, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG. AKTUALISIERUNGSBAND ZPO-REFORM, § 321a para. 1 (GERHARD LÜKE/PETER WAX EDS., 2002).

[68] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 63 (2001). See also Hartmann (note 37), § 321a para. 1.

[69] See *infra* II. 1. b).

[70] For a more detailed description see Hartmann (note 37), § 321a paras. 4-56; Hartmann (note 6), 2577, 2587-2588; Musielak (note 67), § 321a paras. 2-11; Reichold (note 39), § 321a paras. 1-18; Schellhammer (note 18), 1081, 1083; Max Vollkommer, in RICHARD ZÖLLER, ZIVILPROZESSORDNUNG, § 321a paras. 2-18 (2005).

become obvious that ZPO § 321 has not only solved problems, but also triggered new ones: is the right to remonstrate restricted to violations at first instance? Is it restricted to judgments or does it also apply to other decisions such as simple court orders? In answering these questions, German courts essentially had to balance the clear-cut wording of ZPO § 321a and the constitutional requirement to provide for effective protection of the right to be heard. And whereas some courts preferred a literal reading of the newly introduced provision thereby limiting its application to first instance judgments[71], others favored a more extensive interpretation[72]. Eventually, in 2003 the Federal Constitutional Court clarified the situation. It held that the wording of ZPO § 321 did not leave room for a broad interpretation and that, therefore, the provision did not satisfy the constitutional requirements for protection of the right to be heard[73]. The Court ordered the legislator to broaden of the scope of ZPO § 321a until 1 January 2005 which the legislator has done by adopting the Law on the Remedies for Violation of the Right to be Heard[74]. Now, the right to remonstrate is no longer limited to judgments rendered at first instance. Rather, ZPO § 321a applies to all decisions of a court that are not subject to an appeal or other remedy, no matter at what stage of a lawsuit they have been rendered[75].

II. Appellate Remedies

Traditionally, the German Code of Civil Procedure offers three different categories of appellate remedies: the second instance appeal of facts and law (*Berufung*), the review appeal on law and procedure only (*Revision*), and the miscellaneous appeal (*Beschwerde*). All three remedies have been completely redesigned and reshaped by the reform law of 2001.

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[71] See OLG Rostock, 9 April 2003, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2105 (2003); OLG Oldenburg, 14 October 2002, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 149, 150 (2003).

[72] See OLG Celle, 4 December 2002, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 906 (2003); OLG Frankfurt, 5 November 2003, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 165 (2004); OLG Jena, 23 July 2003, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3495, 3496 (2003). See also Musielak (note 67), § 321a para. 1.

[73] *Bundesverfassungsgericht* (BVerfG), 30 April 2003, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1924, 1928 (2003). See also Wendt Nassall, *Anhörungsrügengesetz – Nach der Reform ist vor der Reform*, 37 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 164, 166-167 (2004); Vollkommer (note 70), § 321a para. 1.

[74] *Gesetz über die Rechtsbehelfe bei Verletzung des Anspruchs auf rechtliches Gehör*, BUNDESGESETZBLATT (BGBL.), 3220. (2004). See for a detailed discussion Nassall (note 73), 154-170; Jürgen Treber, *Neuerungen durch das Anhörungsrügengesetz*, 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 97-101 (2005); Vollkommer (note 70), § 321a para. 1.

[75] However, it has been doubted, whether the Law on the Remedies for Violation of the Right to be Heard satisfies the requirements of the Constitutional Court. See Vollkommer (note 70), § 321a para. 1.

1. Second Instance Appeal of Facts and Law

The most dramatic changes in the field of appellate remedies have affected the second instance appeal of facts and law[76]. To begin with, the standard of review has been reduced from complete reexamination of the case to correction of errors made at the first instance[77]. Additionally, the provisions on the proceedings at second instance have essentially been streamlined. More specifically, the legislator has adjusted the availability of an appeal[78], modified the requirements for filing and support of an appeal[79], increased the requirements for filing a cross appeal[80], extended the competency of single judges[81], enlarged the possibilities to dismiss an appeal[82], restricted the cases for remand of an appeal to the lower court[83], and eased the requirements for withdrawal of an appeal[84].

a) Standard of Review

Prior to 2002, the second instance appeal amounted to an appellate remedy that provided the aggrieved party with a complete new instance. More specifically, the second instance appeal offered the possibility to have the case completely reexamined and reconsidered in view of both facts and law. While assuming the continuation of the argumentation made in the proceedings at the first instance, it allowed the submission of new evidence in support of claim or defense thereby effectively

[76] See for a detailed discussion Reinhard Gaier, *Der Prozessstoff des Berufungsverfahrens*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 110-113 (2004); Reinhard Gaier, *Das neue Berufungsverfahren in der Rechtsprechung des BGH*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2041-2046 (2004); Peter Hartmann (note 6), 2577, 2590-2593; Bettina Heiderhoff, *Die Tatsachenbindung des Berufungsgerichts nach der ZPO-Reform*, 58 JURISTENZEITUNG (JZ) 490-497 (2003); Roland Rixecker, *Fehlerquellen am Weg der Fehlerkontrolle. Rechtsprobleme des reformierten Berufungsrechts in Verkehrs- und Versicherungssachen*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 705-710 (2004); Michael Schultz, *Rechtsmittelbegründungsfrist und Prozesskostenhilfe*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2329-2334 (2004); Schnauder (note 13), 68-75 and 162-179; Nikolaus Stackmann, *Die Neugestaltung des Berufungs- und Beschwerdeverfahrens in Zivilsachen durch das Zivilprozessreformgesetz*, 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 781-789 (2002).

[77] See *infra* a).

[78] See *infra* b).

[79] See *infra* c).

[80] See *infra* d).

[81] See *infra* e).

[82] See *infra* f).

[83] See *infra* g).

[84] See *infra* h).

giving the parties "a second bite at the apple"[85]. With the reform law of 2001 this has been changed[86]. Under the much more limited standard of review reflected in ZPO § 513 (1) the appellate court may examine only whether (1) the judgment is based on a violation of the law, or (2) the facts that have to be considered according to ZPO § 529 require a different finding. There is no completely new examination of the case and no completely new determination of facts. Instead the appellate court looks out for errors of the lower court only[87]. This limited standard of review becomes even more obvious when looking at ZPO § 529. According to ZPO § 529 (1) No. 1 the appellate court is required to accept factual findings of the court of first instance, unless clear indications give reason to doubt the correctness or completeness of the fact determination material and therefore indicate the necessity for a new determination of facts. Additionally, ZPO § 529 (1) No. 2, 531 provides that means of proof in support of the claim or the defense (*Angriffs- und Verteidigungsmittel*) that were properly dismissed at first instance – for example because they were raised after the statutory period or a period set by the court had expired – may not be considered. Means of proof in support of the claim or the defense that were not raised earlier may only be admitted if they (1) address a point that was patently overlooked or erroneously considered insignificant by the court of first instance, (2) were not brought up at first instance because of a defect in procedure, or (3) were omitted at first instance without neglect by the party asserting them on appeal[88]. As a result of the limited reexamination of first instance fact findings as well as the restricted admission of new means of proof the parties have to present all relevant facts and accessible evidence at the first instance. They cannot rely on a "second shot" at second instance. The new law, therefore, sets the right incentives

[85] MURRAY/STÜRNER (note 1), 373.

[86] Dauster (note 18), 338, 340-344; Gaier (note 76), 110, 112-113; Heiderhoff (note 76), 490, 490-491; Gerhard Lüke, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, AKTUALISIERUNGSBAND ZPO-REFORM, Einl. para. 3 (GERHARD LÜKE/PETER WAX EDS., 2002); Schnauder (note 13), 68, 72; Stackmann (note 76), 781; MURRAY/STÜRNER (note 1), 373-374. For a comprehensive account of the second instance appeal of facts and law see MURRAY/STÜRNER (note 1), 373-393.

[87] Doms (note 13), 777, 778-779; Gaier (note 76), 110, 112-113; Gaier (note 76), 2041, 2041-2042; Peter Gummer/Hans-Joachim Heßler, in RICHARD ZÖLLER, ZIVILPROZESSORDNUNG, annotations before § 511 para. 1 (2005); Hartmann (note 6), 2577, 2590-2591; Heiderhoff (note 76), 490, 490-491; Reichold (note 39), § 513 para. 1; Bruno Rimmelspacher, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, AKTUALISIERUNGSBAND ZPO-REFORM 2002, annotations before § 511 para. 4 (GERHARD LÜKE/PETER WAX EDS., 2002); Rixecker (note 76), 705, 705; Schnauder (note 13), 68, 73-74; Schneider (note 13), 3756, 3757. However, according to ZPO § 513 (2) the appellate court does not look out for errors concerning venue and subject matter jurisdiction.

[88] See for a more detailed account of the standard of review Gaier (note 76), 110, 110-112; Gaier (note 76), 2041, 2043-2045; Hartmann (note 6), 2577, 2590-2591; Heiderhoff (note 76), 490, 491-496; Rixecker (note 76), 705, 705-710; Schnauder (note 13), 68, 73-75 and 162, 163; Stackmann (note 76), 781, 785-787.

for disposition of cases at an early stage of the lawsuit while at the same time streamlining the proceedings[89].

b) Availability of an Appeal

Before the coming into force of the reform law 2001 the aggrieved party was allowed to file an appeal only if the amount in controversy (*Beschwerdegegenstand*)[90] exceeded DM 1,500.00 (€ 766.94)[91]. In contrast, the revised version of ZPO § 511 (1) No. 1 and 2 provides that the aggrieved party may file an appeal if the amount in controversy exceeds € 600.00 (*Wertberufung*)[92] or if the lower court has given permission for an appeal (*Zulassungsberufung*). According to ZPO § 511 (4), the lower court is expected to grant such a permission if (1) the case raises an issue of fundamental significance or (2) the development of the law or the preservation of a unified legal practice requires an appellate decision. By decreasing the required amount in controversy and adding the possibility of admission through the lower court, the reform law has essentially extended the possibility for filing a second instance appeal of law and facts. It has thereby avoided a curtailing of legal protection which otherwise might have occurred as a result of the limited standard of review at the appellate level[93].

c) Filing and Support of an Appeal

aa) Statutory Periods

According to ZPO § 517 the aggrieved party has to file the appeal within one month from service of the complete judgment, but not later than five months from rendi-

[89] Bamberger (note 18), 137, 139-140; Rimmelspacher (note 87), annotations before § 511 para. 4. See for a critical account of the new provisions Heiderhoff (note 76), 490-497; MURRAY/STÜRNER (note 1), 382-383; Kurt Schellhammer, *Zivilprozessreform und Berufung*, 55 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 1141-1147 (2001); Schneider (note 13), 3756-3568.

[90] The amount in controversy designs the amount in which the filing party is actually aggrieved. It may be different for plaintiff and defendant. If the plaintiff, for example, has originially brought an action for payment of the sum of € 750.00 and the court has granted a judgment for payment of € 650 only, the plaintiff is aggrieved in the amount of € 100.00. According to ZPO § 511 (1) she is, therefore, not entitled to file an appeal unless the court has granted permission to do so. The defendant, in contrast, is aggrieved in the amount of € 650.00. Her appeal, therefore, is admissble according to ZPO § 511 (1) No. 2 without permission of the lower court.

[91] See the old version of ZPO § 511 (1).

[92] See for a critical account of the € 600 limit Stackmann (note 76), 781, 781-782.

[93] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 65 and 93 (2001). See also Dauster (note 18), 338, 342-343; Schnauder (note 13), 68, 72; Stackmann (note 76), 781, 782.

tion of the judgment (*Urteilsverkündung*). In this respect the reform of 2001 has not made any changes[94]. Also, the formal requirements for filing the appeal have essentially remained the same[95]. What has been modified, however, is the statutory period for filing the brief supporting the appeal (*Berufungsbegründung*), which is required under German civil procedure law in view of most appellate remedies. The statutory period for supporting the appeal used to be one month from the filing of the appeal[96]. It has now been extended to two months. However, pursuant to ZPO § 520 (1) Sentence 1 the period does not run from the filing of the appeal anymore but begins with the service of the complete judgment. This change was designed to provide for more certainty in the calculation of the statutory period[97], but has caused tremendous problems in practice if the appellant needs to apply for financial aid[98] before filing the appeal[99]. Due to the fact that the procedure on financial aid applications is time-consuming the appellant will usually exceed both the statutory period for filing the appeal and the statutory period for supporting the appeal[100]. As far as the filing period is concerned the expiration does not matter very much: in accordance with ZPO §§ 233, 234 (1) and (2) the appellant may apply for *restitutio in integrum* (*Wiedereinsetzung in den vorigen Stand*) within two weeks from the approval of financial aid and file the appeal[101]. However, in view of the statutory period for supporting the appeal the situation is different. Although *restitutio in integrum* will also be granted in view of this period upon application of the appellant, it will not help her a lot: according to ZPO § 236 (2) Sentence 2 she does not

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[94] However, prior to the reform the provision was to be found in ZPO § 516.

[95] However, they have been slightly changed following the enactment of the Law for the Adjustment of Formal Requirements in Private Law to Modern Legal Relations (note 10), which has introduced ZPO § 130a. According to ZPO § 130a (1) the parties may submit documents as electronic files if they contain a qualified electronic signature in accordance with the Law on the Framework for Electronic Signatures (*Gesetz über Rahmenbedingungen für elektronische Signaturen,* BUNDESGESETZBLATT (BGBL.) I 2001, 876). According to ZPO §§ 519 (4), 130 No. 6, 130a (1) an appeal, therefore, may be filed electronically using a qualified electronic signature.

[96] See the old version of ZPO § 516.

[97] Stackmann (note 76), 782-783.

[98] According to ZPO §§ 114-127a a party, whose personal and economic circumstances are such that she cannot in whole or in part afford the costs of conducting litigation can apply for financial aid (*Prozesskostenhilfe*). See for a detailed discussion of the requirements and procedure MURRAY/STÜRNER (note 1), 117-123.

[99] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 64 (2001). See Gaier (note 76), 2041, 2042; Knauer/Wolf (note 44), 2857, 2862-2863; Schultz (note 76), 2329-2334.

[100] Schultz (note 76), 2329, 2330.

[101] According to ZPO § 236 the appellant also needs to file the appeal within the statutory period of two weeks.

only have to apply for *restitutio in integrum* in two weeks from approval of financial aid. She also has to file the brief supporting the appeal within that time, which seems difficult – if not impossible – given that supporting an appeal is more complex and therefore more time-consuming than just the filing of the appeal. Unless the appellant has prepared the supporting file before approval of financial aid, which does not seem reasonable she will usually exceed the statutory period provided for by ZPO § 234. And even worse: the appellant who fails to adhere to the two week period for supporting the appeal cannot apply for *restitutio in integrum* in view of the statutory period set by ZPO § 234 because *restitutio in integrum* can only be granted in view of specific periods (*Notfristen*)[102].

In the three years following the coming into force of the reform law, courts and academics have been struggling with the – unintended – impact of the change in the provisions dealing with the statutory period for filing the support of the appeal[103]. Numerous proposals for both revision and reasonable interpretation have been made[104]. However, as none of them seemed to be satisfactory and – worse – not in line with the clear-cut wording of the law, the legislator has stepped in and changed ZPO §§ 233, 234[105]. In cases of expiration of the statutory period for supporting an appeal, the appellant may now apply for *restitutio in integrum* within a time limit of one month instead of two weeks. Additionally, she may apply for *restitutio* if that time has elapsed[106].

bb) Substantive Requirements

Apart from the statutory period for supporting the appeal, the reform law of 2001 has changed the substantive requirements for doing so. Now, in the interest of accelerating the proceedings, the necessary content of the supporting brief is set out in much greater detail than before. Whereas under the old regime the appellant only had to point to new facts and sources of proof as well as any objections raised

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[102] Schultz (note 76), 2330.

[103] See *Bundesgerichtshof* (BGH), 9 July 2003, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3275, 3276-3278 (2003). See also BGH, 25 September 2003, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3782-3783 (2003). For a discussion of these decisions see Gaier (note 76), 2041, 2042; Schultz (note 76), 2329, 2331-2332.

[104] See for an overview Gaier (note 76), 2041, 2042; Schultz (note 76), 2329, 2330-2334.

[105] *Gesetz zur Modernisierung der Justiz*, BUNDESGESETZBLATT (BGBL.) I 2004, 2198. See for a discussion of the new provisions Knauer/Wolf (note 44), 2857, 2862-2863.

[106] See for a critical account of the new provisions Knauer/Wolf (note 44), 2857, 2862; Schultz (note 76), 2329, 2334.

against such proof[107], ZPO § 520 (3) Sentence 2 No. 2 requires the appellant to designate circumstances, which constitute a violation of law as well as the materiality of that violation for the attacked judgment. ZPO § 520 (3) Sentence 2 No. 3 furthermore asks the appellant to point out circumstances which justify doubt of the correctness or completeness of the fact findings in the judgment appealed and which therefore indicate the need for renewed fact findings[108]. According to ZPO § 520 (3) Sentence 2 No. 4 the appellant must also indicate the new means of proof in support of the claim or the defense as well as the facts which justify admission of the new means of proof in accordance with ZPO § 531 (2)[109].

Due to the fact that an appeal can be based either on a violation of the law or on defective fact finding[110] the brief supporting the appeal need not comment on all three substantive requirements set out in ZPO § 520 (3) Nos. 2-4. If the appeal is based on a violation of the law only the supporting brief may be limited to the requirements stated in ZPO § 520 (3) No. 1, *i.e.* the designation of the circumstances which prove the violation as well as the materiality of that violation for the attacked judgment. However, even if the appeal is based on both a violation of the law and defective fact finding, it will do to elaborate on either on ZPO § 520 (3) No. 1 or ZPO § 520 (3) No. 2. This is because supporting the appeal is a requirement for the admissibility of the appeal only (*Zulässigkeit*) not limiting the examination of the appeal in view of the merits (*Begründetheit*)[111]. The only risk in not giving enough support for the appeal lies in the newly introduced ZPO § 522 (2): according to this provision the appellate court may dismiss the case by court order without plenary hearing if it considers the appeal to be unfounded due to insufficient support[112]. Therefore, the appellant is recommended to provide a comprehensive brief in support of her appeal. This also holds true because according to ZPO §§ 530, 296 (1)

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[107] See the old version of ZPO § 519 (3) No. 2.

[108] See for a detailed discussion of the requirements Jan Albers, in ADOLF BAUMBACH/WOLFGANG LAUTERBACH/JAN ALBERS/PETER HARTMANN, ZIVILPROZESSORDNUNG, § 520 paras. 17-34 (2005); Gummer/Heßler (note87), § 520 paras. 27-37a; Reichold (note 39), § 520 paras. 17-34; Rimmelspacher (note 87), § 520 paras. 48-62.

[109] According to ZPO § 520 (3) Sentence 2 No. 1 the appellant is also required to set forth to which extent the judgment is attacked and the precise changes sought by the appeal. Insofar, however, the law has not changed. See old version of ZPO § 519 (3) No. 1.

[110] See *supra* a).

[111] Gummer/Heßler (note 87), § 520 para. 27; Hartmann (note 6), 2577, 2590; Reichold (note 39), § 520 para. 1; Rimmelspacher (note 87), § 520 para. 5.

[112] Hartmann (note 6), 2577, 2590. See for a more detailed discussion of the possibilities to dismiss an appeal *infra* f).

adding new reasons later on is only admissible if it does not cause any delay in the proceedings or the lateness in giving the additional reasons can be sufficiently excused, which is hard to prove though.

d) Filing and Concept of a Cross Appeal

In the context of cross appeals (*Anschlussberufung*) the reform law of 2001 has brought about essentially two important modifications. To begin with, the legislator has changed the entire concept of cross appeals by making its effectiveness dependent on the appeal. Prior to 2002 a cross appeal did not depend on the appeal if it had been filed within the statutory period, *i.e.* it was effective even if the appeal was withdrawn or dismissed later on[113]. It was independent except for the fact that an appeal had to be pending at the point the cross appeal was filed. Now, according to ZPO § 524 (4) the cross appeal is without effect if the appeal is withdrawn, dismissed or rejected[114]. It, therefore, does not only depend on the appeal at the time of filing but during the entire proceedings.

Apart from changing the concept of cross appeal, the legislator has introduced a statutory period for its filing. The corresponding provision, however, had to be changed shortly after the coming into force of the reform law 2001 in order to avoid a logic flaw: according to ZPO § 524 (2) Sentence 2 as it became effective on 1 January 2002 the cross appeal had to be submitted within one month from service of the brief supporting the appeal[115]. This led to the puzzling result that the cross appeal

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[113] See old version of ZPO § 522 (2). However, the cross appeal was dependent on the appeal if it had not been filed within the statutory period for filing an appeal, *i.e.* it became ineffective if the appeal was dismissed or withdrawn. See old version of ZPO § 522 (1). For a detailed account of the old law Wolfgang Grunsky, in FRIEDRICH STEIN/MARTIN JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG, Vol. 5, § 522 paras. 1-12 (1994).

[114] This does not hold true if the appeal was filed as an independent appeal in accordance with ZPO § 511 rather than a real cross appeal. See for details on the distinction between independent appeal and cross appeal Bettina Heiderhoff, *Zur Abschaffung der Anschlusberufung,* 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1402-1403 (2002); Eberhard von Olshausen, *Wer zu spät kommt, den belohnt die neue ZPO – jedenfals manchmal*, 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 802-804 (2002). See for a critical account of the new concept of cross appeals Doms (note 13), 189, 190-191; Florian Jacoby, *Das Anschlussrechtsmittel und seine Kosten nach dem Zivilprozessreformgesetz*, 115 ZEITSCHRIFT FÜR ZIVILPROZEß (ZZP) 185, 198-200 (2002).

[115] See for a more detailed account of the changes Doms (note 13), 777, 780; Thomas Doms, *Die Anschlussberufung – ein stumpfes Schwert*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 189, 190-191 (2004); Jacoby (note 114), 185, 186-201; Patrick Liesching, *Die Verlängerung der Berufungserwiderungsfrist im Zivilprozess – Fristverlängerung ohne Wert?*, 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1224-1225 (2003); Gerhard Pape, *Kostenrisiko des Anschlussberufungsklägers bei einstimmer Zurückweisung der Berufung*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2003, 1150-1053; Heinz-Werner Ludwig, *Kosten der Anschlussberufung bei Zurückweisung der Berufung gem. § 522 Abs. 2 ZPO n.F.*, 57 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 670 (2003); Heiderhoff (note 114), 1402-1403; von Olshausen (note 114), 802-804.

usually had to be filed within a shorter period than the brief in response to the appeal (*Berufungserwiderung*)[116]: whereas the statutory period for filing the cross appeal was one month from the service of the brief supporting the appeal, the period for filing the brief in response to the appeal was to be flexibly set by the appellate court in accordance with ZPO § 521 (2). To remedy this lapse the legislator had to change ZPO § 524 (2). Now, the statutory period for filing the cross appeal expires at the same time as the period for filing the brief in response to the appeal[117]. If no period for filing the response is set by the appellate court the cross appeal may be submitted until the end of the oral plenary proceedings. If it is extended, the period for filing the cross appeal is also extended[118].

e) Competency of Single Judges

The reform law 2001 has not only significantly enlarged the role of single judges at first instance. It has also done so in view of the appellate level: prior to 2002 all second instance appeals of law and fact were heard and decided by a panel of three judges unless the parties agreed upon decision by a single judge. Now, according to ZPO § 526 (1) the appellate court can refer a second instance appeal to a single judge for further consideration and decision if (1) the judgment attacked by the appeal was rendered by a single judge, (2) the case does not present special difficulties of a factual or legal nature, (3) the case does not raise issues of fundamental significance, and (4) oral argument on the merits has not yet been held before the panel of three judges. In practice, most disputes pending at the appellate level meet these requirements because they can be classified as routine cases[119]. As a result, single judges are usually in charge not only at first instance but also at second instance which ensures efficient use of scarce personnel resources[120]. A curtailing of party interests is avoided by ZPO § 526 (2) Nos. 1 and 2 which allows the single judge to recommit the case to the panel of three judges if (1) the circumstances have changed such that the case now either raises an issue of fundamental significance or

[116] Doms (note 115), 189, 190; Liesching (note 115), 1224, 1124-1125.

[117] See *Gesetz zur Modernisierung der Justiz*, BUNDESGESETZBLATT (BGBL.) I 2004, 2198. See also Albers (note 108), § 524 para. 13; Gummer/Heßler (note 87), § 524 para. 10. See for a discussion of the new provisions Knauer/Wolf (note 44), 2857, 2863.

[118] See for a brief overview of the new provisions Gummer/Heßler (note 87), § 524 para. 10.

[119] See Bamberger (note 18), 137,140.

[120] See Bamberger (note 18), 137,140.

presents special factual or legal difficulties, or (2) the parties unanimously apply for recommitment[121].

f) Dismissal of an Appeal

If an appeal has been filed, ZPO § 522 (1) Sentence 1 requires the appellate courts to examine whether or not the appeal has been filed properly. If one of the above described requirements is not met, *e.g.* the appeal or the brief supporting the appeal have not been filed within due time, ZPO § 522 (1) Sentence 2 provides that the court may dismiss the appeal by simple court order without oral plenary hearing (*Beschluss*)[122]. Insofar the law has not changed. However, the reform law of 2001 has introduced an additional opportunity, if not obligation[123], to dispose of an appeal: according to the new ZPO § 522 (2) the court dismisses an appeal by way of court order if (1) it has no chance of success, (2) the case does not raise an issue of fundamental significance and (3) the development of the law or the preservation of a unified legal practice do not require a decision of the appellate court. Although the decision to dispose of the appeal must be taken unanimously, ZPO § 522 (2) provides for an easy way to dispose of cases that have no chance of success and lack fundamental or other significance. This is generally to be welcomed because it streamlines the proceedings without curtailing party interests[124]. However, due to the fact that ZPO § 522 (3) excludes any appeal against the decision ZPO § 522 (2) must be handled with care. More specifically, it must be restricted to extreme and exceptional cases that indeed meet the above-mentioned requirements.

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[121] See for a more detailed description of the new rules Gummer/Heßler (note 87), § 526 paras. 1-14; Reichold (note 39), § 526 paras. 1-15; Rimmelspacher (note 87), § 526 paras. 4-30; Schnauder (note 13), 163, 164-165.

[122] See for an account of the dismissal of appeals in general Gummer/Heßler (note 87), § 522 paras. 29-39; MURRAY/STÜRNER (note 1), 378-379; Reichold (note 39), § 522 paras. 13-22; Schnauder (note 13), 163, 164-165.

[123] According to Albers (note 108), § 522 para. 20 and Gummer/Heßler (note 87), § 522 para. 31 it is in the discretion of the court to dismiss an appeal on the basis of ZPO § 522 (2). According to Rimmelspacher (note 87), § 522 para. 27 and Reichold (note 39), § 522 para. 13 the court has to dismiss if the requirements of ZPO § 522 (2) are met. To this date, only two courts, the OLG Koblenz and the OLG Köln, have dealt with the issue. Whereas the OLG Koblenz, 20 February 2003, 56 NJW 2100, 2101 (2003), assumed a discretionary nature of the dismissal, the OLG Köln, 11 November 2003, MDR 1435, 1436 (2003), qualified it as mandatory. Therefore, the question whether the court must or just may dismiss the appeal if the requirements of ZPO § 522 (2) are met remains open.

[124] See also Bamberger (note 18), 137, 139 and Stackmann (note 76), 781, 784. See for a critical account Bernd Hirtz, *Reform des Zivilprozesses – Einführung der Beschlussverwerfung*, 55 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 2001, 1265, 1267-1268; Schneider (note 13), 3756, 3757. See also Schnauder (note 13), 162, 163.

g) Remand of an Appeal

After examination of the case the appellate court has basically three options how to proceed depending on the outcome of the review. If the court takes the view that the judgment of first instance is correct according to the standard of ZPO § 513 (1) it simply affirms the judgment. If, however, the court is of the opinion that the judgment is erroneous either in view of law or of facts it may either vacate the decision and remand the case to the court below to correct the error or it may render its own judgment. Prior to 2002, the law required the appellate court to decide the case itself and to remand only in some exceptional case[125]. This, in principle, has not changed: according to ZPO § 538 (1) the appellate court still has to render its own judgment. However, in order to accelerate proceedings and to promote quicker rendition of a final judgment the reasons for remanding the case have been cut back[126]. Now, remand to the court of first instance for correction of the error is only admissible in the few explicitly enumerated cases set out in ZPO § 538 (2) Nos. 1 to 7 which have in common that the court of first instance has not or not comprehensively, considered the case on the merits[127]. Additionally, for remand to take place, ZPO § 538 (2) requires a request by one of the parties– thereby virtually excluding remanding *ex officio*[128]. Both restrictions have dramatically limited the number of cases in which remand is admissible thereby encouraging disposition of cases at the appellate level and accelerating proceedings.

h) Withdrawal of an Appeal

Changes have also been made in the context of withdrawal of an appeal. So far the appellant was allowed to withdraw an appeal at any stage of the appeal up to rendition of the judgment (*Urteilserkündung*)[129]. However, after the beginning of the

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[125] See old versions of ZPO §§ 538, 539, 540.

[126] See DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 61 and 102 (2001). See also Hartmann (note 6), 2577, 2591; Rimmelspacher (note 87), § 538 para. 2.

[127] Reichold (note 39), § 538 para. 4. For example, according to ZPO § 538 (2) No. 6 the case may be remanded if the judgment attacked is a default judgment (*Versäumnisurteil*). See for a more detailed description of the cases in which remanding is admissible Albers (note 108), § 539 paras. 4-20; MURRAY/STÜRNER (note 1), 385; Reichold (note 39), § 538 paras. 7-25; Rimmelspacher (note 87), § 538 paras. 23-65.

[128] Only in the rare case of ZPO § 538 (2) No. 7 – appeal against a partial judgment (*Teilurteil*) that does not meet the requirements of ZPO § 301 – remand *ex officio* is allowed.

[129] Judgments have to be formally rendered to become effective. According to ZPO § 311 (2) rendition requires the full reading of the mandate of the judgment (*Urteilstenor*). ZPO § 310 (1) provides that rendition takes place either after the conclusion of the plenary proceedings or at a special court session called

oral plenary proceedings before the appellate court it required the consent of the non-appealing party[130]. Now, according to ZPO § 516 (1) the appellant may withdraw the appeal any time before rendition of the judgment without the consent of the non-appealing party. As long as the judgment has not yet been formally rendered, she may even withdraw the appeal after the oral plenary proceedings has been closed[131] or after the appellate court has finished consultation[132]. It seems to be unclear, however, how long exactly the appellant can wait before she withdraws the appeal[133]. More specifically, what exactly does "rendition of the judgment" mean in the context of ZPO § 516? Full reading of the mandate of the judgment (*Urteilstenor*)[134]? Beginning of the reading? Reading of a substantial part of the mandate such as the sentence as to the actual relief granted? At least one academic seems to favor the interpretation that "rendition of the judgment" means the *full* reading of the mandate – including the sentence as to the actual relief granted, the sentence as to the costs and the sentence as to immediate execution[135]. For his view – that effectively allows the withdrawal of an appeal after the appellant has learned of the actual outcome – the author draws on the fact that (1) rendition of a judgment requires the complete reading of the mandate[136], and (2) that exercising a legal right cannot be considered as being abusive[137]. However, the majority of academics including the leading commentaries dismiss this interpretation of ZPO § 516[138]. Instead they understand "rendition of the judgment" as meaning the beginning of

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for that purpose (*Verkündungstermin*). See for a more detailed account MURRAY/STÜRNER (note 1), 335-336.

[130] See the old version of ZPO § 515 (1).

[131] Doms (note 13), 777, 780; Hartmann (note 6), 2577, 2591.

[132] Doms (note 13), 777, 780; Hartmann (note 6), 2577, 2591.

[133] The question is important because the costs incurred will decrease dramatically once the appeal is withdrawn.

[134] Under German civil procedure the mandate of the judgment usually consists of three parts: (1) Sentence as to the actual relief granted (2) Sentence as to who has to bear the court costs and the attorney's fees, and (3) Sentence as to wether the judgment shall be subject to immediate execution. For a more detailed description of the content of German judgments see MURRAY/STÜRNER (note 1), 333-334.

[135] Hartmann (note 6), 2577, 2591. See for the content of a judgment *supra*, note 134.

[136] Hartmann (note 6), 2577, 2591. See for a discussion of the requirements for rendition of a judgment ZPO § 311 (2) and *supra*, note 129.

[137] Hartmann (note 6), 2577, 2591.

[138] Albers (note 108), § 516 para. 3; Nicolai von Cube, *Berufungsrücknahme per Zwischenruf?*, 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 40 (2002); Gummer/Heßler (note 87), § 516 para. 2; Rimmelspacher (note 87), § 516 para. 10; Stackmann (note 76), 781, 788, note 56.

the reading of the mandate thereby forcing the appellant to accept the judgment or to withdraw the appeal before she learns of the outcome. In support of their view, they refer to the explanatory statement to the 2001 reform law which describes the goal of the new ZPO § 516 as being the facilitation of withdrawals after the end of the oral plenary hearing on the basis of the opinions expressed by the court during the hearing[139]. However, as no cases dealing with the issue have been decided by the German courts, the state of law in this respect is unclear.

2. Review Appeal of Law and Procedure

Apart from the second instance appeal of law and facts the reform law of 2001 has also restructured the review appeal of law and procedure[140]. First of all, the legislator has changed the availability of the review appeal[141] with the result that the appeal now amounts to a rather discretionary remedy for issues of law and procedure[142]. Second, the legislator has modified the requirements for the filing and support of a review appeal[143], for the filing of a direct review appeal[144], and for withdrawal of an appeal[145].

a) Availability of Review Appeal

Prior to 2002 a review appeal of law and procedure was available either if (1) the amount in controversy exceeded DM 60,000.00 (*Wertrevision*) or (2) if the appeal was permitted by the appellate court in the attacked judgment (*Zulassungsrevision*)[146]. Now, according to ZPO § 543 (1) filing of a review appeal is admissible only if permission has been granted by the appellate court in the judgment attacked. ZPO § 543 (2) provides that the appellate court is supposed to give such permission

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[139] SeeDRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 94 (2001).

[140] See for a detailed discussion Hermann Büttner, *Begründung der Revision vor ihrer Zulassung durch das Revisionsgericht?* 57 NJW 3524-3527 (2004); Markus Gehrlein, *Erste Erfahrungen mit der reformierten ZPO – Revision und Beschwerde*, 57 MDR 547-554 (2003); Hartmann (note 6), 2577, 2594-2595.

[141] See *infra* a).

[142] SeeDRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 66 (2001). See Heiderhoff (note 76), 490, 491; MURRAY/STÜRNER (note 1), 387.

[143] See *infra* c).

[144] See *infra* d).

[145] See *infra* e).

[146] See old version of ZPO § 546 (1) Sentence 1. See for a brief description Peter Gummer, in RICHARD ZÖLLER, ZIVILPROZESSORDNUNG, § 542 para. 3 (2005).

if (1) the case raises an issue of fundamental significance, or (2) the development of the law or the preservation of a unified legal practice requires a review decision. If the appellate court refuses to give permission for a review appeal of law and procedure, ZPO § 544 allows the aggrieved party to lodge a miscellaneous appeal against denial of permission (*Nichtzulassungsbeschwerde*)[147] with the Federal Court of Justice[148]. If the Federal Court of Justice refuses to grant permission filing of a review appeal is definitively not admissible. In particular, it may not be based on the amount of controversy anymore as the corresponding provision has been repealed. As a result, the review appeal of law and procedure has significantly changed in character: whereas it was a remedy primarily designed to provide for justice in individual cases prior to 2002, it is now rather a remedy designed to unify and rationalize German law in civil cases[149].

The changes in the context of the availabilty of the review appeal – that were adopted to reduce the workload of the Federal Court of Justice which was flooded by review appeals based on the amount of controversy without having fundamental significance[150] – have met with severe criticism, especially from lawyers[151]. The new provisions, they argue, placed the significance of the issues involved over individual justice and therefore sacrificed justice in individual cases. Some critics even suggest that denying review appeals in cases lacking fundamental significance violated the constitutionally guaranteed right to be heard. A decision of the Federal Constitutional Court eventually clarified the situation. It held that the new character of the review appeal was in line with the constitutional requirements of due process[152]. However, it underlined that this assessment was subject to the Federal Court of Justice granting relief in individual cases that lacked fundamental significance on the basis of preserving a unified legal practice[153].

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147 See for more details on this newly introduced appeal *infra* b).

148 According to § 133 of the Law on the Organization of Courts (*Gerichtsverfassungsgesetz*) the Federal Court of Justice decides on all review appeals. See for a description of the composition and the competences of the Federal Court of Justice, MURRAY/STÜRNER (note 1), 60-62.

149 MURRAY/STÜRNER (note 1), 386-387; Reichold (note 39), annotations before § 542 para. 1; Schnauder (note 13), 68, 69; Joachim Wenzel, MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, AKTUALISIERUNGSBAND ZPO-REFORM, § 543 para. 2 (GERHARD LÜKE/PETER WAX EDS., 2002). See also Gummer (note 146), § 542 para. 1.

150 DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 65 (2001).

151 Hermann Büttner, *Revisionsverfahren – Änderungen durch das Zivilprozessreformgesetz*, 55 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 1201, 1202-1204 (2001). See also Gummer (note 146), § 542 para. 5.

152 BVerfG, 8 January 2004, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1371, 1372 (2004).

153 BVerfG (note 152), 1371, 1372.

b) Appeal Against Denial of Permission for Filing a Review Appeal

As mentioned above[154], ZPO § 544 allows for the filing of a miscellaneous appeal if the appellate court refuses to give permission for a review appeal of law and procedure. This appeal against denial of permission for filing a review appeal (*Nichtzulassungsbeschwerde*)[155] has been introduced by the law reform 2001 in order to compensate the more restricted availability of review appeals and in order to ensure that the Federal Court Justice can actually carry out its duty to guarantee both a unified legal practice and individual justice[156]. According to ZPO § 544 (1) Sentence 2 the appeal must be filed with the Federal Court of Justice within one month from service of the written judgment of the appeals court, but no later than six months from rendition. With respect to the brief supporting the appeal ZPO § 544 (2) Sentence 1 provides for a statutory period of two months from service of the judgment while at the same time setting an absolute limit of seven months from rendition of the judgment. ZPO § 544 (2) Sentence 2 requires the filing party to substantiate the grounds for a review appeal in terms of ZPO § 432 (2), *i.e.* by explaining that (1) the cases raises an issue of fundamental significance, or (2) the development of the law or the preservation of a unified legal practice requires a review decision[157]. The Federal Court of Justice then allows the other party to comment on the appeal before it decides on the merits. If the appeal is sustained – which is done by substantiated court order – ZPO § 544 (6) provides that the filing of the appeal counts as filing of the review appeal with the effect that the case proceeds as a review appeal[158].

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[154] See *supra* a).

[155] Until 31 December 2006 the scope of application of the appeal is somewhat restricted. According to § 26 No. 8 of the Introductory Law on the Code of Procedure (*Einführungsgesetz zur Zivilprozessordnung*) an appeal against denial of permission for filing a review appeal may only be filed if the amount in controversy exceeds € 20,000.00. See also Cornelie von Gierke/Frank Seiler, *Die Nichtzulassungsbeschwerde nach § 544 ZPO in der Rechtsprechung des BGH*, 58 Juristen Zeitung (JZ) 403, 404 (2003).

[156] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 67 (2001). Gummer (note 146), § 544 para. 2; Hartmann (note 6), 2577, 2594; Wenzel (note 149), § 544 para. 1. See also von Gierke/Seiler (note 155), 403-410.

[157] See for a more detailed account on the grounds of the appeal von Gierke/Seiler (note 155), 403, 407-410.

[158] See for a more detailed description of the procedure Albers (note 108), § 544 paras. 6-12; Gummer (note 146), § 544 paras. 6-18; Hartmann (note 6), 2577, 2594; MURRAY/STÜRNER (note 1), 388-389; von Gierke/Seiler (note 155), 403-410; Wenzel (note 149), § 544 paras. 2-18.

c) Filing and Support of a Review Appeal

The provisions on the filing and the support of a review appeal have been modified in the same way as the provisions on the filing and the support of a second instance appeal of law and facts. Therefore, according to ZPO § 551 (2) the brief supporting the review appeal must be filed within two months from the service of the complete judgment, which has caused the same problems as in the context of the second instance appeal of law[159]. The situation has similarly been clarified by the legislative change of ZPO §§ 233, 234[160].

d) Filing of a Direct Review Appeal

Before filing a review appeal the aggrieved party must usually file a second instance appeal of law of facts. This is because ZPO § 542 (1) provides that the review appeal is admissible only against judgments rendered by an appellate court. However, in cases in which just the law, but not the facts are in dispute the Code of Civil Procedure allows the aggrieved party to file a direct review appeal without having filed a second instance appeal of law and facts (*Sprungrevision*)[161]. With the coming into force of the reform law 2001 both the requirements and the procedure of the direct review appeals have been modified in two respects primarily designed to harmonize the law on direct review appeals with the law on review appeals in general[162]. First, the category of judgments, which are eligible for direct appeal has been broadened: under the old law a direct review appeal was admissible only against first instance judgments rendered by the District Courts. This excluded first instance judgments rendered by Local Courts[163]. Now, according to ZPO § 566a (1) the aggrieved party may file a direct appeal against first instance judgments as long as they subject to a second instance appeal of law and facts without permission. Therefore, it does not matter anymore which court renders the judgment at first instance theoretically allowing the direct review appeal to the Federal Court of Justice against judgments rendered by a Local Court involving a claim that hardly exceeds € 600.00. Second, the reform law of 2001 has modified the requirements for filing a direct appeal: prior to 2002 a direct appeal was admissible if the other party

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[159] See for a detailed discussion *supra* 1. c) aa).

[160] See for a detailed discussion *supra* 1. c) aa).

[161] For a more detailed account of the rationale of the direct review appeal see Gummer (note 146), § 566 para. 1; MURRAY/STÜRNER (note 1), 398-399; Wenzel (note 149), § 566 para. 1.

[162] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 109 (2001). See also Wenzel (note 149), § 566 para. 1.

[163] See old version of ZPO § 566a (1).

agreed to skip the second instance appeal of law and facts[164]. Now, ZPO § 566 (1) requires permission by the Federal Court of Justice. According to ZPO § 566 (4) permission has to be granted if (1) the case raises an issue of fundamental significance, or (2) the development of the law or the preservation of a unified legal practice requires a review decision[165].

e) Withdrawal of a Review Appeal

In the context of withdrawal of a review appeal the reform law of 2001 has not resulted in any direct changes. ZPO § 565 still refers to the provisions about the second instance appeal of law and facts and allows for withdrawal of a review appeal if a second instance appeal may be withdrawn. However, due to the changes the reform law of 2001 has made to ZPO § 516 the requirements for withdrawal of a review appeal have been changed indirectly. Now, ZPO §§ 565, 516 allows for withdrawal of a review appeal at any stage of the lawsuit up to rendition of the judgment. Consent of the other party is no longer required[166].

3. Miscellaneous Appeals

In addition to restructuring the second instance appeal and the review appeal, the reform legislator has also redesigned the provisions on miscellaneous appeals against simple court orders or dispositions other than judgments. Under the regime in force prior to 2002 there were two different miscellaneous appeals: the simple miscellaneous appeal (*Einfache Beschwerde*)[167] and the immediate miscellaneous appeal (*Sofortige Beschwerde*)[168] the difference being that the immediate miscellaneous appeal had to be lodged within a statutory period of two weeks. Moreover, the law provided for an additional miscellaneous appeal (*Weitere Beschwerde*)[169] as an appellate remedy against the decisions on immediate miscellaneous appeals. With the reform law of 2001 the legislator has abolished the simple miscellaneous appeal and redesigned the immediate miscellaneous appeal. Furthermore, the additional miscellaneous appeal has been replaced by the miscellaneous appeals of law to the

[164] See old version of ZPO § 566a (2).

[165] Under the the old version of ZPO § 566a (4) the Federal Court of Justice had a right to refuse acceptance of a direct appeal if the appeal did not involve an issue of fundamental significance.

[166] See for a more detailed description of the resulting problems *supra* 1. h).

[167] See the old version of ZPO § 567.

[168] See the old version of ZPO § 577.

[169] See the old version of ZPO § 568a.

Federal Court of Justice (*Rechtsbeschwerde*). Both changes were primarily inspired by the need to accelerate and simplify the procedure on miscellaneous appeals that had become more and more complicated and unclear[170]. However, by introducing a comprehensive system of three instances, notably by providing general access to the Federal Court of Justice, the legislator also intended to improve legal protection against simple court orders and to adjust the procedure on miscellaneous appeals to the procedure on second instance appeals and the review appeals[171].

a) Immediate Miscellaneous Appeal

The new immediate miscellaneous appeal has replaced the simple miscellaneous appeal. Therefore, it constitutes the only available remedy against court decisions other than judgments[172]. However, the legislator has not simply extended the scope of application of the old immediate miscellaneous appeal to cover the cases formerly covered by simple miscellaneous appeal. Rather it has created a new appellate remedy that is to be seen as a blend of both the old simple miscellaneous appeal and the old immediate miscellaneous appeal[173]. The most noteworthy features of this new appeal as compared to the old miscellaneous appeals revolve around the general statutory period for filing[174], the general requirement for supporting the appeal[175], the general review procedure at the court of first instance[176], and the extended use of single judges[177].

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[170] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 68 (2001). See also Schnauder (note 13), 162,166-167.

[171] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 68 (2001). See also Schnauder (note 13), 162, 166-167.

[172] According to ZPO § 567 (1) Nos. 1 and 2 the new immediate miscellaneous appeal is available against court decisions rendered at first instance which are not judgments if (1) its application is authoritzed by statute, or (2) a decision is concerned that does not require an oral hearing and denies a party's request concerning the proceedings. As a result, the new immediate miscellaneous appeal is admissible in those cases in which previously the simple miscellaneous appeal was allowed. See the old version of ZPO § 567 (1).

[173] Gummer (note 146), annotations before § 567 para. 2; Hartmann (note 6), 2577, 2595; Volker Lipp, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, AKTUALISIERUNGSBAND ZPO-REFORM, § 567 para. 5 (GERHARD LÜKE/PETER WAX EDS., 2002).

[174] See *infra* aa).

[175] See *infra* aa).

[176] See *infra* bb).

[177] See *infra* cc).

aa) Filing and Support of an Immediate Miscellaneous Appeal

According to ZPO § 569 (1) the new immediate miscellaneous appeal must be lodged within a statutory period of two weeks from service of the attacked court order or disposition. In contrast to the state of law prior to 2002 – which allowed the filing of a simple miscellaneous appeal without any time limitation – there is no exception to the rule that timely filing is required. Therefore, the legislator has effectively extended the existing statutory period relating to immediate miscellaneous appeals to the cases formerly covered by the simple miscellaneous appeal. What is new, however, is that according to ZPO § 569 (1) the appeal will be time barred if it has not been filed within five months from rendition of the attacked court order or disposition.

Apart from providing for a general statutory filing period, the legislator has also introduced a general requirement to substantiate the appeal. Now, in the interest of acceleration of the appeals proceedings, ZPO § 571 (1) asks the aggrieved party to file a brief supporting the miscellaneous appeal[178]. In doing so, she is not confined to the record before the court below. According to ZPO § 572 (2) she is allowed to adduce additional legal and factual support for her respective assertations. The new immediate miscellaneous appeal, therefore, amounts to a complete second instance both in view of law and facts as previously did both the simple and the immediate miscellaneous appeal. By keeping this design – that significantly deviates from the new design for the second instance appeal of law and facts[179] – the legislator has outweighed the different treatment of questions concerning procedure and questions concerning the merits of the case at first instance: whereas the latter are usually subject to the oral hearing, the latter are routinely exempt from a comprehensive discussion[180]. Designing the appeals proceedings as a complete second instance was, therefore, necessary to provide sufficient legal protection[181].

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[178] In contrast to the provisions dealing with the support of the second instance appeal and the, ZPO § 571 (1) provides that the aggrieved party *shall* support the appeal. It has therefore been said, that the requirement to file a supporting brief does not amount to a strict legal requirement to do so. See Hartmann (note 6), 2577, 2595.

[179] See *supra* 1. a).

[180] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 69 (2001).

[181] According to ZPO § 571 (3) the court, however, may set a time for the production of factual assertions and designations of proof. See for a more detailed account Albers (note 108), § 571 para. 4; Gummer (note 146), § 571 paras. 3-7; Lipp (note 173), § 571 paras. 12-14; Reichold (note 39), § 571 paras. 2-5; Schnauder (note 13), 162, 167.

bb) Review Procedure at the Court of First Instance

After an appeal has been filed ZPO § 572 (1) requires the court of first instance to review the case to see whether it may remedy the alleged violations of law (*Abhilfeverfahren*). By providing for a mandatory review procedure the court of first instance now has effectively a chance to correct its own decision – a chance that previously existed only after a simple miscellaneous appeal had been filed[182]. If the court takes the view that the appeal is well founded it is under a duty to grant relief by rescinding or amending the order or disposition appealed. Otherwise it must transmit the appeal immediately to the appellate court thereby allowing the real appeals proceedings to begin. Unfortunately, there is no statutory period in which the court is required to transmit the case. Therefore, the review procedure – that was introduced as a general requirement with the aim of streamlining appeals proceedings by introducing an element of self-control[183] – may well turn out to significantly delay it.

cc) Competency of Single Judges

Finally, the reform law of 2001 has changed the composition of the appellate court deciding about the new immediate miscellaneous appeals. Under the old regime both the simple and the immediate miscellaneous appeal were handled by a panel of three judges. Now, according to ZPO § 568 a single judge decides about the redesigned immediate miscellaneous appeal as a rule if the decision attacked was rendered by a single judge (*Originärer Einzelrichter*) or a court magistrate (*Rechtspfleger*). Even though the case may be recommitted to a panel of three judges if the case (1) presents special factual or legal difficulties, or (2) raises an issue of fundamental significance, the legislator has significantly reduced the number of judges working on miscellaneous appeals thereby further promoting efficient use of scarce personnel resources[184].

b) Miscellaneous Appeal of Law

Except for introducing a unified miscellaneous appeals for the first instance, the law reform of 2001 has also brought about a new appellate remedy against decisions on miscellaneous appeals. Prior to 2002 the Code of Civil Procedure only provided for the additional miscellaneous appeal (*Weitere Beschwerde*), which was lim-

[182] See the old version of ZPO § 571.

[183] See DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 69 (2001).

[184] See DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 69 (2001).

ited to a small number of cases and allowed for a complete revision of the attacked decision in view of both law and fact[185]. Now, ZPO § 574 grants a miscellaneous appeals of law (*Rechtsbeschwerde*) to the Federal Court of Justice which is designed as a general appellate remedy against decisions that may be appealed neither with the second instance appeal of law and fact nor with the review appeal on law and procedure. In contrast to the additional miscellaneous appeal existing under the old regime, it does not aim at a complete revision of the attacked decision in view of law and fact. Rather it is limited to reexamination of the decision in view of law and procedure only. Also, it strives for the development of the law and the preservation of a unified legal practice in areas where previously – due to the limited scope of application of the additional miscellaneous appeal and the resulting limited number of cases decided by the Federal Court of Justice – uniformity was not attainable[186]. As a consequence, the scope of application of the new miscellaneous appeals of law is much broader than that of the old additional miscellaneous appeal[187].

aa) Availability of a Miscellaneous Appeals of Law

The miscellaneous appeals of law is designed as a general appellate remedy against decisions other than judgments. Accordingly, ZPO § 574 (1) No. 2 allows filing of a miscellaneous appeals of law if filing has been permitted by (1) the appellate court in decisions on miscellaneous appeals, (2) the appellate court in decisions other than judgments entered during the course of a second instance appeal, or (3) the Appeals Courts in decisions other than judgments in the exercise of first instance jurisdiction[188]. Additionally, ZPO § 574 (1) No. 1 allows a miscellaneous appeals if it is authorized by statute. However, in these cases ZPO § 574 (2) additionally requires that (1) the case raises an issue of fundamental significance, or (2) an appellate decision is necessary for the development of the law or the preservation of a unified legal doctrine[189].

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[185] See Lipp (note 173), annotations before § 574 para. 4.

[186] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 68 (2001). Lipp (note 173), annotations before § 574 para. 1. Reichold (note 39), annotations before § 574 para. 2; Schnauder (note 13), 162, 168; Frank Seiler/Lutz Wunsch, *Statthaftigkeit und Zulässigkeit der Rechtsbeschwerde*, 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1840 (2003).

[187] Albers (note 108), annotations before § 574 paras. 1-3. See also Schnauder (note 13), 162, 168.

[188] In contrast to the provisions on review appeals, there is no appeal against the denial of permission to file a miscellaneous appeal of law.

[189] See for a more detailed account on the availability of an appeal Albers (note 108), § 574 paras. 1-3; Gummer (note 146), § 574 paras. 2-18; Lipp (note 173), § 574 paras. 4-11; MURRAY/STÜRNER (note 1), 403-404; Reichold (note 39), § 574 paras. 1-10. See also Schnauder (note 13), 162, 168; Seiler/Wunsch (note 186), 1840-1845.

bb) Filing and Support of a Miscellaneous Appeal of Law

The rules on the filing and support of a miscellaneous appeal of law are similar to that on review appeal. According to ZPO § 575 (1) the appeal needs to be filed within one month from service of the attacked decision. Pursuant to ZPO § 575 (2) it has to be supported within a statutory period of one month from the filing of the appeal. As to the remaining procedure, the standard of review and the decision the provisions are closely modeled on the provisions on review appeals of law and procedure only[190].

C. Summary and Conclusion

The reform law of 2001 was designed to prepare the German civil judiciary for the 21st century by increasing efficiency and transparency. Against the background of scarce financial and personnel resources it was meant to accelerate civil proceedings while at the same time maintaining and even improving legal protection offered by German Courts. In order to reach these goals the legislator has essentially redesigned civil proceedings. More specifically, it has (1) extended the use of single judges (2) increased the obligations of the courts towards the parties, (3) relaxed the requirements for the taking of evidence, and (4) eased the withdrawal of claims and appeals. In the context of the first instance the reform has additionally (1) introduced a mandatory settlement conference and (2) simplified the conclusion of in-court settlements. In view of the second instance the reform has (1) limited the standard of review, (2) relaxed the requirements for dismissal of an appeal and (3) limited the possibilities to remand the case to the court of first instance. The third instance has experienced changes by (1) limiting the review to cases of fundamental or otherwise general significance (2) requiring the appellate court to grant permission for filing a review appeal, and (3) introducing a new appeal against the denial of such permission.

Whether these changes have resulted in the desired increase of efficiency and transparency is subject of a vigorous debate. So far the appraisal of academics, judges and lawyers has been very mixed. Some have welcomed the changes, in particular the strengthening of the first instance and the new design of the second

[190] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-DRS.), No. 14/4722, 68 (2001). Albers (note 108), annotations before § 574 para. 3; Lipp (note 173), annotations before § 574 para. 3; MURRAY/STÜRNER (note 1), 404; Reichold (note 39), annotations before § 574 para. 2; Seiler/Wunsch (note 186), 1840. See for a more detailed discussion of the procedure, the standard of review and the decisions MURRAY/STÜRNER (note 1), 404-405; Schnauder (note 13), 162,168-169.

instance. Others have condemned the reform as unsuccessful, misguided and inconsistent by mainly pointing to the reduction of legal protection at the second instance as well as the large number of problems the new provisions have created. All in all, however, it seems that both aspects of the critique provide only superficial attraction. In view of the reduction of legal protection it must be kept in mind that in reforming the Code of Civil Procedure the German legislator set out to balance two different, if not opposing goals, namely increasing efficiency and transparency on the one hand, and maintaining, if not improving, the level of legal protection on the other hand. It is obvious that both goals were bound to come into conflict with each other and that the legislator had to strike a fair balance between the two. By increasing the obligations of the courts at first instance while at the same time broadening the access to the second instance it seems that the legislator has made up for the reduced standard of review at the appellate level and thereby managed to effect an acceptable compromise. In view of the allegedly large number of problems the reform has created, it should be sufficient to note that the emergence of problems is a natural thing to happen with any reform that sets out for major conceptual changes. As the German courts have managed to clarify many questions since 2002, there are no indications to the effect that the reform of 2001 has actually created more problems than any other reform of the same magnitude. To the contrary, due to the fact that the reform has effectively managed to streamline and accelerate proceedings it seems that it indeed has helped to adjust the German system of civil justice to the challenges of the modern age. At least it can be said that the reform did not end in the disaster many critics predicted. The German system of civil justice is still working. And there are good reasons to believe that it is working better than before.