Book Review – Peter L. Murray/Rolf Stürner, *German Civil Justice* (2004)

Peter L. Murray and Rolf Stürner, *German Civil Justice*, Carolina Academic Press, Durham, North Carolina 2004, ISBN 1-59460-003-1, pp. 670, Price $65.00

By Giesela Rühl*

The modern German system of civil justice is one of the most respected in the world. It has a reputation for being efficient and relatively successful. For these reasons it has been described and analyzed in numerous treatises, commentaries, texts and articles. However, as almost all of these works are written and published in German, they are not accessible to persons who are unfamiliar with the German language. In *German Civil Justice*, Peter L. Murray and Rolf Stürner address this perceived drawback by presenting a comprehensive description of the German system of civil justice in the English language.

The authors are perfectly prepared for the task. They have both studied and taught civil procedure for many years – Murray in the United States (Harvard Law School) and Stürner in Germany (University of Freiburg). In addition, they have both published numerous books and articles dealing with various topics related to the themes in *German Civil Justice*, and both have conducted comparative legal research and studied the civil justice systems of other countries. However, what distinguishes Murray and Stürner from most scholars in their field is that they have long lasting practical experience in their respective civil justice systems – Murray as a litigator and Stürner as a judge. It is the combination of scholastic and practical perspective that makes *German Civil Justice* a remarkable treatise about the theory of German civil procedure law and the realities of litigation in modern Germany.

German Civil Justice is divided into 13 Chapters, which can be structured into five parts. The first part comprises Chapters 1 through 4 and is introductory in character. Murray and Stürner begin with a short overview of the German civil justice

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system and a brief summary of the history and development of German civil procedure. They continue with a description of the organization and structure of the German judicial system followed by an overview of the institutional framework of civil justice in Germany, including education of lawyers and judges, structure and regulation of the German bar, lawyers' organizations, fees and compensation, legal aid and access to justice.

The second part consists of Chapters 5 and 6 and is preparatory in nature. It lays the foundation for the upcoming detailed description of German court proceedings by addressing subject matter jurisdiction and venue in civil cases as well as other fundamental issues of German civil justice, notably the nature and purpose of a civil lawsuit, the role of the parties and the counsels and the role of the judge. Careful attention is also paid to a number of abstract principles, which underlie the more specific statutory rules without being expressly stated and which are intended to implement fundamental rights and values. Out of these numerous principles the authors focus in some detail on the principle of party control over the initiation, the scope and the termination of a claim (*Dispositionsgrundsatz*), the principle of party control over the specification of facts and the means of proof (*Verhandlungsgrundsatz*), the principle of oral presentation of factual assertions and legal arguments (*Mündlichkeitsgrundsatz*), and finally, the principle of open access of the public to plenary proceedings (*Öffentlichkeitsgrundsatz*).

The third part of *German Civil Justice* extends from Chapters 7 through 10 and concentrates on what the authors call the core of the book: the description and analysis of German civil proceedings in their various instances. Murray and Stürner distinguish three main phases of a civil lawsuit – namely, the initial preparatory phase, the oral plenary phase, and the appellate phase – and address each of them in chronological order. Accordingly they start with a portrayal of the preparatory phase of a lawsuit, specifically covering initiation of a complaint, service of process, service of responsive pleadings and preparation of the oral plenary proceedings. They point out that the various steps that have to be taken at this stage of a lawsuit may lead to protraction of the proceedings, and that in practice, however, courts shorten the preparatory phase by setting strict limits and enforcing evidentiary and issue preclusions. They also note that although the focus of the preparatory phase is – as the name suggests – the preparation of the case for plenary disposition, in practice many cases are disposed of during this phase by procedural dismissal or settlement.

Following these remarks regarding the first phase of a lawsuit, Murray and Stürner focus on the second phase, the so called plenary and evidentiary proceedings (*Hauptverhandlung*); the heart of German civil lawsuits during which the court and the parties discuss the issues of law as well as disputed facts. Heavily relying on

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their practical experience, they explain the purpose and scope of the plenary hearing, its conceptual structure as well as the gathering and evaluation of evidence by the court. In doing so they specifically focus on the means of proof, which are statutorily limited to observation and inspection of person and things (*Augenschein*), documents (*Urkunden*), witness testimony (*Zeugen*), expert testimony (*Sachverständige*), and party testimony (*Parteivernehmung*). The authors terminate their description of the second phase by looking to different types of judgments, their necessary content and their *res adjudicata* effect. Emphasis is placed on so-called uncontested judgments such as default judgments (*Versäumnisurteile*), judgments by which the defendant voluntarily recognizes the validity of the claim (*Anerkenntnisurteile*), and judgments by which the plaintiff waives the claim (*Verzichtsurteile*).

With these remarks on judgments, the stage is set for the discussion of the appellate phase of a civil lawsuit. Murray and Stürner begin with a brief description of the purpose of appellate justice in Germany, pointing to three different functions: reexamination of the facts relevant to the underlying dispute, correction of errors in the interpretation and application of the law, maintenance and enforcement of correct procedure. Against this background Murray and Stürner give a brief overview of the large number of appellate remedies designed to serve these functions. However, in the following detailed description they confine themselves to the three most important ones: the second instance appeal of facts and law (*Berufung*), the review appeal of law and procedure (*Revision*) and the miscellaneous appeal (*Beschwerde*). They outline the requirements for the initiation of an appeal, the scope of review, the procedure and the judgment following an appeal. In doing so Murray and Stürner take into account the most recent structural changes of German civil procedure that became effective on 1 January 2002 and that restrict the review of first instance fact finding. They also account for the ongoing debate about cutting back the number and the scope of appellate remedies.

The fourth part of *German Civil Justice* comprises Chapters 11 and 12 and is best seen as an annex to Chapters 7 through 10. It covers various special proceedings, which serve different purposes, beginning with modified forms of first instance proceedings and moving to so called civil warning proceedings for collecting claims likely to remain uncontested (*Mahnverfahren*), security proceedings for obtaining prejudgment attachments (*Arrest*) or provisional measures (*Einstweilige Verfügungen*), non-contentious proceedings for dealing with more or less non-adversarial matters such as guardianship, probate and registration of real estate (*Freiwillige Gerichtsbarkeit*), proceedings for the execution of judgments (*Zwangsvollstreckung*), bankruptcy proceedings (*Insolvenzverfahren*), arbitration proceedings (*Schiedsverfahren*), and finally, proceedings for case settlements and alternative dispute resolution. The fourth part also addresses international matters, notably international jurisdiction, recognition and enforcement of foreign judgments, service of

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foreign process, provisional measures to secure claims in foreign courts and taking of evidence for use in foreign proceedings. However, due to the complexity of the subject the authors do not go into much depth and concentrate on the most important doctrines governing German international civil procedure.

The last part of *German Civil Justice*, consisting only of Chapter 13, is devoted to a comparison and evaluation of the German and Anglo-American civil justice system and can be seen as the real core of the work. Along the lines of seven main functions of civil litigation Murray and Stürner contrast purposes of civil justice in Germany and the United States, institutional independence and credibility, quality of fact finding and application of law, cost of litigation, duration of proceedings, access to justice as well as confidence of the public in the system of civil justice. They conclude that, despite persisting differences, signs of convergence can be observed between Germany and the civil law world on the one hand and the United States and the common law world on the other hand.

All in all, this book is an outstanding treatise on the German system of civil justice. It fills a long-lasting gap in the judicial literature market because it is the first book in the English language to give a detailed description of the historical, cultural, institutional, and legal framework of civil litigation in Germany, and is the first book in the English language to give a comprehensive overview of the German law of civil procedure. However, the truly remarkable feature of *German Civil Justice* is that Murray and Stürner go beyond a mere description of the development and the current state of German law. They compare the German and the Anglo-American civil justice system against the background of cultural, economic, historical and social differences and thereby enhance the mutual understanding of law and legal institutions in both countries. By evaluating both systems they also contribute to the ongoing global debate about efficiency of legal systems.

On a technical level one might add that the book is exceptionally well written and structured in a way that is easily understandable for English-speaking lawyers, especially for those with a common law background. Furthermore, the large number of references to source materials, commentaries, treatises, and articles throughout the text, as well as the bibliography at the very end allow for further research into specific areas. The only thing that curtails the practical use of the book is the index, which is too short for a work of more than 600 pages and therefore does not facilitate systematic research. However, despite this rather small drawback, *German Civil Justice* can only be highly recommended to everybody with an interest in German civil procedure.

Two concluding remarks need to be made. First, Murray and Stürner do not cover some aspects – such as administrative proceedings, labor proceedings, social wel-

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fare proceedings and tax proceedings – that American lawyers would usually expect to be included in a comprehensive book on civil justice. As the authors point out tackling these issues would have gone beyond the scope of the book and would have required cutbacks in the description of other, more fundamental issues of German law. One might add that according to the narrow notion of civil procedure usually applied in Germany the above-mentioned proceedings do not even belong to civil procedure. Therefore, from a German perspective the authors indeed provide a comprehensive guide to German civil justice.

Second, although Murray and Stürner take into account all law reforms and changes effective by the time of publication they were not able to keep up with the pace of the German legislature. On 1 September 2004 the Modernization of Justice Law (*Justizmodernisierungsgesetz*) of 1 July 2004 became effective. Enacted with the aim of making German civil proceedings more efficient, the most important changes affect the requirements for disposition of cases other than through judgment, the requirements for recusing judges and the consideration of written expert testimony. Additionally, on 1 July 2004 the Modernization of Costs Law (*Kostenrechtsmodernisierungsgesetz*) of 5 May 2004 came into effect. It has replaced the Federal Attorneys Fee Law (*Bundesgebührenordnung für Rechtsanwälte*) by the Attorneys Compensation Law (*Rechtsanwaltsvergütungsgesetz*) and restructured the Court Costs Law (*Gerichtskostengesetz*). However, neither the Modernization of Justice Law nor the Modernization of Costs Law touches on the basic principles of the German system of civil litigation. They certainly do not impair the significance of *German Civil Justice* and its usefulness for the English-speaking world.

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