The responsibility of business enterprises for human rights violations: Access to justice and the courts
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Child labour, exploitation and devastating work and safety conditions in factories and mines - many human rights abuses are not as distant from us as we might sometimes think. Supply and value chains are global, and corporate business relationships are widely intertwined. In view of this, the question arises: Who actually has to answer for human rights violations and where can victims enforce their rights?

The United Nations has addressed these and many other important issues, and has established the UN Guiding Principles for Business and Human Rights. They contain the basic standards and procedures respecting human rights. They thus mark a milestone on the road to responsible business conduct. The Federal Government has implemented the UN Guiding Principles with the National Action Plan for Business and Human Rights.

This brochure takes up one of the main pillars of the UN Guiding Principles for Business and Human Rights: access to remedy. To ensure that the Guiding Principles do not remain tooth-less tigers, victims of human rights violations must be able to assert their rights in various ways. Of course, the judiciary has a special role to play here. Therefore, we have created this brochure to inform you about when and how affected persons can turn to German courts to actually hold companies accountable.
When does a German court have jurisdiction? What conditions determine whether a claim for damages exists? What has to be considered in court proceedings? How does the enforcement of a court decision work? Are there alternatives to court proceedings? You will find all these answers in this brochure, illustrated by some practical case studies. Please bear in mind, however, that the brochure can only serve as orientation and assistance, not as a substitute for legal advice in individual cases.

I wish you interesting and helpful reading!

Christine Lambrecht
Federal Minister of Justice and Consumer Protection
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Introduction

Business operations or business relations of companies operating internationally may positively or negatively affect the exercise of human rights at home and abroad. This applies both to the production of goods or the provision of services and to the supply and value chains of these companies. The opportunity to influence international commerce must go hand in hand with a human due diligence (obligation) on the part of companies. The *Guiding Principles on Business and Human Rights* of the United Nations (UN), which were adopted by the UN Human Rights Council in 2011, build on that due diligence obligation. The guiding principles are based on three pillars:

I. the state duty to protect human rights,

II. corporate responsibility to respect human rights and

III. access to remedy.

UN Guiding Principle No 25 reads as follows with regard to the third pillar, access to remedy:

“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”

Germany is committed to the *UN Guiding Principles on Business and Human Rights*. In order to implement them in practice, the German Government has developed the *National Action*
Plan Business and Human Rights

This brochure is intended to implement part of the National Action Plan in relation to an important part of the third pillar “access to remedy”, by explaining legal remedies under German civil law to injured or affected parties.

Germany’s judiciary works independently and efficiently. This is ensured by the German constitution (the Basic Law) and German legislation. Anyone who considers that his or her rights have been infringed in Germany by the actions of an enterprise can assert claims for compensation before the German civil courts. Moreover, anyone who considers that his or her rights have been infringed abroad by the actions of a German enterprise can bring an action in Germany, normally at the court with local jurisdiction for the registered office of the enterprise. This is guaranteed by German international civil procedural law. This also contains additional provisions that facilitate access to the courts, cover cross-border proceedings and provide for the recognition and declaration of enforceability of judgments handed down by foreign courts.

However, injured parties affected by human rights violations for which German companies are responsible are only able to avail themselves effectively of existing legal remedies if they are aware of them. This brochure is therefore aimed at providing an overview of the legal remedies under German civil procedure law. Whether an action before the German civil courts has a good prospect of success crucially depends on the law that is applicable to the facts of the case. That is why this brochure will also provide a general outline of provisions which, from a German point of view, govern which law is to be applied by the court (conflict-of-law rules).

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2 Hereinafter referred to as “injured parties” or “injured persons”.

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most cases, the applicable conflict-of-law rules will stipulate that foreign substantive law is applicable, namely the law of the State in which the damage in question has occurred. In addition to this, in the exceptional case that German substantive law is applicable, this brochure discusses possible causes of action under German law.

The brochure is intended as a first introduction; on no account does it replace individual legal advice or, in cases of doubt, advice provided by an attorney in a particular case.
When can a person injured through a human rights violation assert claims against a company before the German civil courts?
There are many different situations conceivable, where human rights are being violated abroad. If companies are responsible for these human rights violations, legal action against such companies may also be instituted in Germany.

In order for a compensation claim for a violation of human rights to be asserted before a German civil court, two key requirements must be met:

- The court applied to must have jurisdiction.
- The injured person must have a claim pursuant to the substantive law applicable in each case.

First, it needs to be determined under which circumstances German courts have jurisdiction for human rights violations for which companies are responsible.

### 1.1 In which cases do German courts have jurisdiction?

As a rule, injured parties may commence legal action before the courts of the foreign State in which the company has committed a human rights violation. But German courts, too, may deal with such cases substantively. For this to apply, they must first have international jurisdiction. If this is the case it needs to be determined which specific German court shall handle the case. → for further details on this, please refer to 1.1.2
The question injured parties must ask themselves, i.e. “with which court should I lodge my claim?”, entails several sub-questions in order to identify the court with jurisdiction. Please refer to the following diagram for purposes of illustration:

1.1.1 INTERNATIONAL JURISDICTION OF GERMAN COURTS

The question whether a court has international jurisdiction for a claim involving a human rights violation is governed by international treaties, the law of the European Union (EU) and German international civil procedural law. Which specific provisions are to be applied depends first on the location of the registered office of the company against which a claim is being brought.

1.1.1.1 The registered office of the company is in an EU Member State or in Switzerland, Norway or Iceland

If the company that is to be sued has its registered office in an EU Member State, the question of whether German courts have international jurisdiction is governed primarily by the Brussels

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3 While the Brussels Ibis Regulation does not apply to Denmark, Denmark has declared that the Regulation shall be applicable to the relations between the EU and Denmark on the basis of an agreement entered into between the European Community and Denmark.
Ibis Regulation. The Brussels Ibis Regulation is a European regulation that is directly applicable in Germany and that contains rules on jurisdiction of the courts and on the recognition and enforcement of judgments in civil and commercial matters in the EU. It contains extensive rules regarding international jurisdiction of the courts of the Member States. Courts with primary international jurisdiction for civil actions are the courts of the Member State in which the defendant is domiciled (article 4(1) Brussels Ibis Regulation). However, companies do not have a domicile like humans do. Article 63 Brussels Ibis Regulation therefore defines the domicile of a company as: its statutory seat, the place of its central administration or its principal place of business. If one of those places is in Germany, a company may be sued in Germany for a human rights violation for which it is responsible.

Besides these, there are what are known as “specific forums”, e.g. jurisdiction in tort cases.

The substantive law of torts (also known as the law of delicts) in Germany is governed, inter alia, by sections 823 et seq. of the German Civil Code (Bürgerliches Gesetzbuch, BGB). Human rights violations may constitute a tort.

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4 Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351 of 20 December 2012, p. 1; OJ L 264 of 30 September 2016, p. 43). Given that this is European law, only the Court of Justice of the European Union (CJEU) is authorised to issue binding interpretations of the Regulation. If questions as to the interpretation of the Brussels Ibis Regulation arise, German courts may apply to the CJEU for a preliminary ruling on this question of interpretation.
A tort claim can, for instance, be lodged at the court of place where the harmful event occurred, provided that the location in question is in an EU Member State (article 7(2) Brussels Ibis Regulation). This includes both the location at which the harmful event has occurred and the location where the perpetrator has acted. Those locations need not be the same. If a court is found to have international jurisdiction under article 7(2) Brussels Ibis Regulation, this means that the local jurisdiction of the specific court has been determined at the same time. If courts in different States have international jurisdiction, the injured person has the right to choose at which legal venue to bring proceedings.

Case 1
The dilapidated oil pipeline

Oil company O with seat in EU Member State E operates an oil pipeline on the territory of the neighbouring EU Member State N, immediately on the border with Germany. O has not maintained the oil pipeline properly which leads to oil spilling onto German territory and the environment being polluted there. As a result, local residents have suffered ill health and injuries. The harmful act, i.e. the poor maintenance of the pipeline, occurred in country N, while the damage occurred in Germany. Given that the oil company has its seat in an EU Member State outside of Germany, the Brussels Ibis Regulation is applicable. In Germany, the court at the location where the oil spillage occurred has jurisdiction. Besides the German courts, the courts in country N where the poor maintenance occurred also have jurisdiction. The injured person can therefore decide whether to lodge their claim before a court in Germany or in country N.
If the company that is to be sued has its seat in Switzerland, in Norway or in Iceland, the Lugano Convention\(^5\) governs the question of international jurisdiction of German courts. The Lugano Convention is an international treaty entered into between the EU, Switzerland, Norway and Iceland, which governs jurisdiction as well as the recognition and enforcement of judgments in civil and commercial matters and which contains essentially the same rules as the Brussels Ibis Regulation.

### 1.1.1.2 The company’s seat is outside of the EU, Switzerland, Norway and Iceland

If the company that is to be sued does not have its seat in the EU, Switzerland, Norway or Iceland and no special rules apply\(^6\), German civil procedural law and particularly the German Code of Civil Procedure (Zivilprozessordnung, ZPO) governs the question of whether German courts have international jurisdiction. While the ZPO contains no express provision stipulating the international jurisdiction of German courts, the provisions regarding local jurisdiction (sections 12 et seq. ZPO) do, however, also cover international jurisdiction. That means that if a court has local jurisdiction in accordance with the ZPO, the same will usually apply in relation to international jurisdiction.

**Jurisdiction in tort cases (section 32 ZPO):**

Claims for a tort committed outside of Germany by a company which has its seat outside of one of the EU Member States, Switzerland, Norway and Iceland may be asserted before German civil courts if the tort was also committed in Germany.

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\(^6\) The Brussels Ibis Regulation contains special rules, for instance, for the benefit of consumers and employees, rules on choice of forum agreements, as well as rules according to which the courts of an EU Member States have exclusive jurisdiction. These special rules are not discussed in this brochure, which is only intended to provide an overview.
Under this provision, an act is deemed to have been committed both at the location where the perpetrator has acted and where the infringement of the legally protected right of the person injured as a consequence took place.

**Variation of case 1**

**The dilapidated oil pipeline**

Oil company O has its seat outside of the EU, Switzerland, Norway and Iceland and operates an oil pipeline in one of Germany’s neighbouring countries. The pipeline is being poorly maintained there, which results in oil spilling onto German territory. For purposes of section 32 ZPO, the tort has been committed both in Germany’s neighbouring country where the pipeline was poorly maintained, and in Germany where the pollution of the environment occurred which resulted in ill health and injuries on the part of residents in Germany. The German courts at the location where the pollution occurred therefore have jurisdiction.

**Special case: several participants**

A person injured abroad may sue all those involved in the commission of a tort within the meaning of section 32 ZPO in Germany if at least parts of the tort were committed in Germany. Participants also include accomplices of the tort or persons who were involved in or instigated it.

While – in the event that more than one company is involved in the tort – the international jurisdiction of German courts is determined for each of the participants separately, given the legal connection of the tortious acts each participant must allow the location of the acts committed by the other participants to be attributed to them. Pursuant to section 32 ZPO, the foreign subsidiary or its foreign supplier or customer in Germany can therefore be sued in Germany if, for instance, the parent company in Germany has aided the harmful
act committed by the subsidiary or the foreign supplier or customer outside of Germany or it has instigated such act.

2 Case 2 The factory fire

The leather company, Wild Leather, has its seat in Germany. It has a subsidiary which has its seat outside of the EU, Switzerland, Norway and Iceland, and which operates a factory in country A. The German management instructs the subsidiary to replace defective machines only if the defect leads to the machine becoming non-operational. Due to this instruction, a faulty machine continued to be operated, which led to a fire in the factory in country A. The location of the tortious act committed by the German parent company which was involved in the tort is attributed in accordance with section 32 ZPO, meaning that the foreign subsidiary can be sued in Germany even though it does not have its seat in Germany.

As a general rule, however, these principles of attribution do not apply in the scope of application of the Brussels Ibis Regulation, i.e. if the defendant has its seat in an EU Member State.

Jurisdiction on grounds of the location of assets (section 23 ZPO):
If a claim that is principally aimed at the payment of money is to be asserted against persons or companies who do not have a domicile or seat in Germany, a German court may have international jurisdiction if a sufficiently valuable asset belonging to this person or company is located in Germany (section 23 ZPO), which might be seized following a court judgment. In addition, the legal dispute must be sufficiently connected to Germany. This requires a case-by-case assessment by the court. Criteria for the assessment whether a legal dispute is sufficiently connected to Germany include, for instance:
The claimant’s residence, business domicile or habitual abode is in Germany,

- the claimant is a German national,
- German law applies to the legal relationship,
- the injury is related to a contractual obligation that needs to be met in Germany or
- there is a special proximity of German courts in terms of law or evidence

2 Variation of case 2
The factory fire

The leather company, Wild Leather, which now operates the factory in country A itself, has its seat in a country outside of the EU, Switzerland, Norway and Iceland but is the owner of several pieces of real estate in Germany. A fire occurs in the factory in country A, in which the journalist Mr Müller, who is domiciled in Germany, is injured while visiting the factory in A on the day of the fire. Pursuant to section 23 ZPO, German courts may have international jurisdiction to hear a claim against the leather company.

Forum necessitatis
In order to ensure an effective provision of justice, German civil procedural law knows another type of jurisdiction – forum necessitatis, which has not been expressly codified – for cases in which, for legal or actual reasons, the claimant is unable to assert his or her claim before any foreign court that is considered to have jurisdiction from a German point of view. Same as with jurisdiction on grounds of location of assets (section 23 ZPO) in this case, too, the legal dispute must be connected to Germany.
International jurisdiction – summary
German courts have international jurisdiction, inter alia, if
- the defendant company has its seat in Germany or
- the harmful act or the damage sustained due to a tort is located in Germany.

1.1.1.3 Decision-making options available to the court
If the German court to which the claimant has applied has international jurisdiction, it will, once it has examined the admissibility of the claim, examine the substantive merits of the claim. In particular, the court may not refuse to decide on the claim on the grounds that it would be more sensible for a court in a State with a closer connection to decide on the claim.\(^7\)

If a case is brought before a German court even though German courts do not have international jurisdiction, the court will normally reject the claim as inadmissible. The court is not able to refer the claim to a foreign court. The defendant is, however, able to have the German court deal with the dispute by entering a defence on the merits despite the court’s lack of jurisdiction. This may be more advantageous for the party than defending itself before a foreign court in a foreign language and without specific legal expertise.

1.1.2 Determination of the German court with local and subject-matter jurisdiction
If German courts have international jurisdiction, a single specific court has to be called upon to deal with the dispute. This court must have local and subject-matter jurisdiction. In many cases local jurisdiction follows from the same legal norm which governs

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\(^7\) In Anglo-American law, this is known as the doctrine of “forum non conveniens”.
international jurisdiction. **Subject-matter jurisdiction** of the courts of first instance is usually determined by the value of the claim. *Amtsgerichte* (local courts) will usually have subject-matter jurisdiction if the claim has a value of up to EUR 5,000. If the value of the claim is higher, *Landgerichte* (regional courts) will usually have subject-matter jurisdiction.

Value of the claim
The value of the claim is determined by the court and depends on the importance of the contested matter. If the claim is for payment of a sum of money, the value of the claim is equivalent to the amount of money claimed.

For every dispute there is at least one court with jurisdiction. It is also possible, however, for more than one German court to have jurisdiction. In this case, the claimant may choose a court at which to bring the claim. If the claim is filed at a German court without subject-matter or local jurisdiction, the claimant may apply for the court to refer the dispute to the appropriate German court.

1.2 **Is there a claim for damages?**

If a German court has jurisdiction to hear a case brought against a company to claim damages for a human rights violation, the next question that arises is whether the injured person has a claim against the company under the applicable substantive law. To answer this question, one must first determine which law is applicable: German law or the law of a foreign State. Next, one must determine which causes of action the applicable law contains and whether the respective requirements have been met.
1.2.1 HOW TO DETERMINE THE APPLICABLE LAW
The first question is: which law applies? This question is governed by private international law.

**Private international law**
Unlike the name suggests, private international law is principally part of national law. Within the EU (with the exception of Denmark), however, private international law is largely harmonised. Foreign courts will apply the respective provisions of private international law of their countries.

With regard to tort claims, the law to be applied by German courts is governed by the EU’s Rome II Regulation.\(^8\) This applies regardless of whether the company being sued in Germany has its seat in the EU or not.\(^9\)

The Rome II Regulation provides that tort claims are generally subject to the law of the country in which the damage occurs (article 4(1) Rome II Regulation). The location where the tortious act was committed, however, is not relevant in this regard. That is why, in most cases in which damage occurs outside of Germany, foreign law will be applicable to the case and not German tort law.

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9 Please consider that, once again, only the CJEU is authorised to issue binding interpretations of the Rome II Regulation. Same as with regard to the Brussels Ibis Regulation, in the event that there are questions of interpretation regarding the Rome II Regulation, the German court may apply to the CJEU for a preliminary ruling.
Variation of case 2
The factory fire

If people are injured in the fire in the factory of Wild Leather, located in country A, the damage does not occur in Germany but in country A, i.e. the country in which the factory is being operated. If the parties injured by the factory fire assert claims for damages in tort before a German court, the law of country A will generally be applicable. When deciding on the merits, German courts would therefore have to apply the law of country A.

There are exceptions to this principle:

- If, at the time the damage is sustained, the injured person and the company as the perpetrator have their habitual residence in the same country, the law of this country applies (article 4(2) Rome II Regulation). The habitual residence of a company is at the place of the central administration of the company (article 23(1) Rome II Regulation).

- Where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country, article 4(3) Rome II Regulation stipulates that the law of the other country shall apply. A manifestly closer connection with another country might be based, for instance, on a pre-existing relationship between the injured person/claimant and the company/defendant (article 4(3) sentence 2 Rome II Regulation).
**Variation of case 2**

**The factory fire**

A service provider commissioned by Wild Leather, in country A is injured in the factory fire. Wild Leather and its service provider have agreed that their service agreement shall be governed by German law. Besides contractual claims for damages, tort claims asserted by the service provider against the company can also be subject to German law.

- While, in principle, in cases where environmental damage results in personal injury or property damage the liability of the company responsible is subject to the law of the place where the event occurred, the injured person may choose to instead base his or her claims on the law of the country in which the event giving rise to the damage occurred (article 7 Rome II Regulation). In that case it is not the place where the damage is sustained that is relevant when determining the applicable law, but the place where the harmful act occurred. Pursuant to article 46a of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche, EGBGB*), the injured person who lodges a claim with a German court may exercise this right to choose only within a certain time limit.

**Variation of case 1**

**The dilapidated oil pipeline**

Oil company O poorly maintains an oil pipeline in country L which results in oil spilling into country K and polluting the environment. In principle, the law of country K is applicable in this case. The injured person/claimant may also choose the law of the country where the event which gave rise to the damage occurred, i.e. the law of country L where the poor maintenance occurred.
German tort law may be applicable if the injured person and the company as the perpetrator either expressly agree a choice of law in favour of German law or if such choice is demonstrated with reasonable certainty under the circumstances of the case (article 14 Rome II Regulation). This is usually only possible after the event giving rise to the damage has occurred.

Variation of case 2
The factory fire

*In the course of the factory fire in A, a random passer-by suffers injuries. He wants to bring a court claim in Germany against German-based leather company, Wild Leather. The passer-by and Wild Leather may agree after the fire that German law shall be applicable to the damages claims for the injury caused by the fire.*

- The injured person and the company as the perpetrator may also choose the law of a country that has no relation to the case. Despite this choice, the mandatory provisions of a country to which all elements of the case relate (place where the damage is sustained, place where the harmful act occurred and place where the company/perpetrator and the injured person have their habitual residence) shall be applicable. Mandatory provisions for these purposes shall be statutory provisions or case law, which must not be deviated from even by agreement.

Variation of case 2
The factory fire

*If Wild Leather and its service provider both have their habitual residence or seat in country A, where the factory is located too, and if the service agreement entered into between them is subject to the law of country A and if there are no other references to any other country than country A, German courts would apply mandatory provisions of coun-

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try A even though the service provider and Wild Leather have agreed on German law. This may, for instance, involve provisions regarding the option of limiting liability.

- The same applies if the case only has links to one or several EU Member States. If, despite the above, the law of a third country is chosen, the mandatory provisions of EU law must nonetheless be applied.

Special provisions for safety and conduct rules:
Even if German tort law is applicable to the liability for a tort committed outside of Germany, in assessing the conduct of the company/perpetrator, account shall be taken – insofar as is appropriate – of the rules of safety and conduct which were in force at the place and time at which the company has committed the harmful act (cf. article 17 Rome II Regulation). This applies, for instance, to road traffic rules but also to provisions in other fields (e.g. occupational health and safety, building regulations law, fire safety provisions in buildings).

Applicable law – summary
German law is primarily applicable if the damage has occurred in Germany. In certain cases, in special situations (e.g. a close connection to the German legal regime, choice of law) German tort law may be applicable even if the damage has occurred abroad. In the cases discussed here, however, foreign law will typically be applicable.
If an injured person wishes to assert contractual claims against a company, the applicable law will be determined in accordance with the rules of private international law for contractual claims. In the case of courts within the European Union, these can be found in the Rome I Regulation.¹⁰

1.2.2 LIABILITY CLAIMS IN THE EVENT THAT GERMAN CIVIL LAW IS APPLICABLE

If damage occurs within a company’s sphere of responsibility outside of Germany, German civil law is only applicable in exceptional cases. In the event that it is applicable, it must be ascertained whether the law affords the injured person any damages claims. Possible claims in particular include non-contractual claims and in some cases also contractual claims. Under German law non-contractual claims are governed in particular by sections 823 et seq. BGB. Non-contractual liability law is also referred to as the law of delicts (law of torts).

1.2.2.1 Law of torts

The German law of torts includes, in particular, the following causes of action:

Pursuant to section 823(1) BGB “a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another person is liable to make compensation to the other party for the damage arising from this.” This provision offers civil-law protection of legal interests and rights that are also protected by international human rights treaties. If one of the above-mentioned legal interests and rights is violated, the person liable on the one hand is the person who directly causes the injury and, on the other, the person who

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has created a source of danger without taking necessary and reasonable precautions to prevent damage being suffered by third parties (known as the legal duty to maintain safety). An example of a violation of the legal duty to maintain safety would be if a German company uses materials which, when processed, produce vapours that form a health hazard, without the representatives of the governing bodies or the representatives of the company ensuring the necessary and reasonable protection of service providers in the broadest sense who carry out work in the company.

Pursuant to section 253(2) BGB in the event of an injury to body, health, freedom or sexual self-determination, a person may claim compensation for any pecuniary loss as well as reasonable monetary compensation for any pain suffered (known as damages for pain and suffering).

Variation of case 2

The factory fire

There was a fire in the factory of the German leather company, Wild Leather, in country A, during the course of which the journalist Mr Müller, who was visiting the factory in country A on the day of the fire, was injured. After the injury was suffered, he and Wild Leather agree that German law shall be applicable. If the damage to health was sustained due to an intentional or negligent act of a representative of a management body or representative of Wild Leather, the company is liable for it. The company must compensate Mr Müller not only for the pecuniary loss suffered but it must also pay him damages for pain and suffering to compensate him for the pain suffered (section 823(1) BGB in conjunction with section 31 BGB, applied by analogy).
Pursuant to section 823(2) BGB a person who commits a breach of a statute that is intended to protect another person is liable for damages. This includes many provisions of German criminal law, in particular provisions that are intended to protect life, body, health, freedom and sexual autonomy. In addition, certain provisions under public law fall within the protected laws covered, provided they also protect subjective rights of individuals and not just the general public. An example for such a provision is section 3a of the German Workplace Ordinance (Arbeitsstättenverordnung). In section 3a(1) sentence 1 it stipulates that the employer is responsible for ensuring that workplaces are equipped and operated in a way that ensures that any security and health hazards for employees are prevented where possible and any remaining hazards are kept as small as possible.

The application of section 823(2) BGB in conjunction with a law with protective effect requires that the law with protective effect is a legal norm that has direct legal effect vis-à-vis members of the public in Germany, for example a German federal law. By contrast, section 823(2) BGB does not apply if a foreign criminal law has been violated – the claim needs to involve a violation of German criminal law.

When applying a German law with protective effect in a case with an international dimension, additional care must be taken to make sure that the scope of application of the law with protective effect also extends to the international matter. A case has an international dimension, for instance, if the events in question have taken place abroad. When investigating a violation of a German criminal law it must be assessed whether German criminal law is applicable to the case pursuant to sections 3 et seq. of the German Criminal Code (Strafgesetzbuch).

11 This depends on the provisions governing the application of the respective law.
Pursuant to **section 825 BGB** “a person who induces another person to undertake or acquiesce in sexual acts by cunning, duress or abuse of a dependency relationship” is also liable for damages.

Moreover, pursuant to **section 826 BGB** a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable for damages.

**Section 831(1) BGB** stipulates a liability for certain vicarious agents (*Verrichtungsgehilfen*). These are persons who are subject to instructions provided by another person – the principal – who act under their influence and who are to a certain degree dependent upon them. Independent suppliers are therefore usually not vicarious agents; they lack the typical dependence and are not required to comply with instructions issued by the company who has commissioned their services, i.e. the principal.

Pursuant to section 831(1) BGB, the principal is liable for the damage that such vicarious agents unlawfully inflicts on a third party when carrying out the tasks assigned to them. The principal is not liable, however, if he has duly selected and supervised the person deployed.

**Variation of case 2**  
**The factory fire**

*The leather company, Wild Leather, has its seat in Germany and purchases goods from a supplier whose factory is in Germany. In the course of a fire in the supplier’s factory people are killed and injured. The fire was caused by the grossly negligent actions of a member of one of the supplier’s management bodies. Given that neither the member of the supplier’s management body nor the supplier itself was a “vicarious agent” of Wild Leather, the company is not liable pursuant to section 831(1) BGB for the damage suffered.*
1.2.2.2 Contract law

In certain cases, claims for damages may arise under German contract law. This requires that the company domiciled in Germany and the injured party have entered into a contractual relationship, e.g. a contract for services. A claim for damages under contract law can arise, for instance, if the secondary obligations under the contract for services – i.e. respect of the legal interests of the other party to the contract – include human rights guarantees and if these are violated in a way that they must be regarded as human rights violations. Where German law is applicable in cases with an international dimension, damages claims pursuant to section 280(1) and section 241(2) BGB, in particular, may arise.

Pursuant to section 280(1) BGB, anyone who breaches a duty arising from a legal obligation and in particular a contract is liable to pay damages. This may also concern the violation of obligations to protect third-party rights in accordance with section 241(2) BGB.

If there is no contractual relationship between the injured person and the company domiciled in Germany, contractual claims against the company can only be based on the German legal doctrines of a contract for the benefit of third parties (Vertrag zugunsten Dritter) or a contract with a protective effect for the benefit of third parties (Vertrag mit Schutzwirkung zugunsten Dritter), provided the strict requirements are met. The injured party would need to be considered to be a protected third party.

Claims under a contract for the benefit of third parties can only exist if it follows from a contract entered into between a company and another person, for example a supplier domiciled outside of Germany, that the injured party was specifically intended to benefit under the contract (section 328 BGB).

Claims under a contract with a protective effect for the benefit of third parties may only be asserted against the company domiciled
in Germany if the unwritten, strict requirements developed by case law have been met. These include a specific proximity between the injured person and the contractual obligation agreed between the company and another legal entity as well as a special need for protection. The latter is typically not assumed to exist, among other reasons, if the injured person has an identical contractual claim against the contracting party against whom he or she is not asserting a claim, for instance against one of the company’s suppliers or against a different legal entity.

1.2.2.3 Extent of the claim for damages
Under German law, a person who has caused the loss or damage must restore the position that would exist if the circumstance obliging him or her to pay damages had not occurred (section 249(1) BGB); i.e. he or she must, to the extent possible, restore the position that would exist had the event causing the loss or damage not occurred.

Where damages are payable for injury to a person or damage to an object, the injured person may demand the required monetary amount in lieu of restoration (section 249(2) BGB). In the event of personal injury, damages payable may include the following in addition to the cost of medical treatment:

- disadvantages regarding livelihood (e.g. loss of earnings) or advancement (e.g. own professional advancement, section 842 BGB) as well as

- disadvantages due to increased needs (e.g. increased costs of carers, section 843 BGB) or lost services (section 845 BGB).

In the case of death, funeral costs, loss of maintenance (section 844(1) and (2) BGB) and lost services (section 845 BGB) may also be claimed for.
German law provides for damages for pain and suffering in specific cases only, e.g. in the event of an injury to body, health, freedom or sexual self-determination (section 253(2) BGB).

German law does not, however, provide for punitive damages. This means that the amount of damages is not extended beyond the actual loss or damage suffered for reasons of “deterrence”, but is limited to compensation for the loss or damage suffered.

Lastly, we would like to refer to the German Act Introducing Surviving Dependants’ Benefits (Gesetz zur Einführung eines Anspruchs auf Hinterbliebenengeld) which entered into force on 22 July 2017. In the event of death caused by another, surviving dependants who had a special close relationship with the deceased person, now have a claim for reasonably monetary damages for the emotional distress suffered. The damages are payable by the person responsible for the death, provided that he or she is liable for the death pursuant to a legal provision. Psychological detriments such as the grief and loss felt by close relatives do not need to be medically proven.
What to consider when bringing legal action in Germany and the help available prior to bringing a court claim and during court proceedings
In this section, we would like to explain individual aspects of German civil proceedings, which are of particular relevance to claims brought by injured parties not domiciled in Germany.

2.1 Legal capacity and capacity to be a party to legal proceedings

German law widely permits foreign nationals to bring legal actions in Germany for human rights violations. It also allows the party bringing the action to take any procedural measures itself or through an attorney representing them.

Foreign natural and legal persons (i.e. bodies of persons who may hold rights or be subjects to obligations) may sue or be sued in legal proceedings if they have legal capacity in accordance with their laws. The foreign person must also have the right to be a party to legal proceedings. Foreign nationals have the right to be a party to legal proceedings in Germany if they have such right either under the laws of their domestic law or under German law. Under German law a person usually has the right to be a party to legal proceedings if it has capacity to enter into legal transactions.

2.2 Legal representation in court proceedings

Injured parties are entitled to be represented in legal proceedings by a German-qualified attorney (Rechtsanwalt). They provide comprehensive advice on all legal issues and, as a general rule, are authorised to represent clients before all courts and public authorities. In certain courts (Landgerichte [regional courts] and Oberlandesgerichte [higher regional courts]) the parties to legal proceedings are required to be represented by a German-qualified attorney.
attorney. This is not a requirement before the Amtsgericht (local court), however.

Many German attorneys specialise in certain legal fields in order to provide more in-depth advice to their clients in those fields. Attorneys who can show that they have passed specific exams in a specific field of law are entitled to call themselves specialised attorneys. This makes it easier to find a suitable legal representative for each specific case based on objective criteria.

Important points of contact regarding legal advice by attorneys can be found in the service section.

2.3 Collective remedies

In German civil proceedings several injured parties are able to bring joint legal actions as part of a joinder of parties. The requirements for such joinder are set out in section 59 et seq. German Code of Civil Procedure (Zivilprozessordnung, ZPO). The parties may jointly sue if they form a community of interest with regard to the disputed right, or if they are entitled under the same factual or legal cause. An entitlement under the same factual or legal cause may, for instance, arise in the case of a legal action under a joint contractual relationship or in the event of legal action for damages claims arising from the same accident. The claims of the joint parties – including any foreign parties – are heard and decided in joint proceedings. Joint parties may be represented by the same attorney. Moreover, they may submit joint pleadings. In addition, evidence is heard jointly within the proceedings.

Several injured foreign persons may also assign their claims, for instance, to another person or an association domiciled or headquartered in Germany in order to be asserted independently.
This person or association may assert the collective claims in its own name in court proceedings.

Consumers may also be victims of human rights violations. This may be the case if legal interests are violated which are also protected by international human rights treaties. Possible fields are product liability or dispersed, low-value damage. Finally, in damages cases that affect at least 50 consumers and provided certain requirements are met, specially qualified consumer organisations may bring a model declaratory action against a company in order to obtain a single court ruling which clarifies the main factual and legal issues of a case for all affected consumers (sections 606 et seq. ZPO). As a general rule, this may also affect claims of foreign consumers; in this case similar principles apply as with regard to individual proceedings. A condition for bringing a model declaratory action is that one of the consumer organisations which is entitled to bring legal action is prepared to bear the costs and risks of doing so.

In its judgment in the model declaratory action the court may, in particular, draw basic conclusions regarding the liability of the company in question. If the judicial conclusions are to also apply to individual consumers, they must register their claims in the register set up by the Federal Office of Justice (Bundesamt für Justiz) regarding the model declaratory action within a certain time limit. Consumers do not incur any charges for the model declaratory action. Moreover, they do not require any legal representation. In addition, the limitation period regarding their claims will be suspended from the date at which the action is brought. The judgment in the model declaratory action is binding both on the defendant company and on the registered consumers and serves as the basis of the later assertion of their individual claims. If the company fails to pay voluntarily, consumers are entitled to apply to an arbitration board, apply for an order to pay or, where necessary, seek judicial redress.
2.4 Cost of proceedings

Compared to other countries the German cost and fee system in civil proceedings, which also plays a role when considering proceedings, is reasonable and can be readily estimated in advance. It is comprehensively regulated by statute. The German Bar Association (Deutscher Anwaltverein) offers a cost calculator (see the service section in this regard).

The German Court Fees Act (Gesetzkostengesetz) governs the court costs that arise for a legal dispute. The court fees depend on the value of the matter being litigated and are capped at a certain claim value.

As a general rule, the claimant has to pay the fees arising for the legal dispute to the court in advance. Which party must ultimately bear the costs, however, depends on the outcome of proceedings. If the claimant prevails in court, it may claim reimbursement of the prepaid court fees from the defendant.

The fees payable to attorneys is governed by the German Attorney Fees Act (Rechtsanwaltsvergütungsgesetz). Initially, the person instructing the attorney is liable to pay them. Statutory fees are based on the value of the matter. In civil proceedings the unsuccessful party is obliged to reimburse the winning party for its attorney costs. This reimbursement claim, however, is usually limited to the fee payable under the German Attorney Fees Act. If the winning party has agreed a higher fee with its attorney, this is only reimbursable up to the amount of the fee provided for by statute.
2.5 Legal aid

In civil proceedings a party may apply for legal aid if it is unable to pay the costs of litigation (which include court fees and attorney’s fees) or is only able to pay part of those costs. Foreign natural person may also apply for legal aid in Germany; foreign legal persons must meet the requirements set out in section 116 sentence 1 no. 2 ZPO to be able to apply for legal aid.

The general requirements for the granting of legal aid are set out in section 114 ZPO. This provision seeks to duly take into account both the interest of all the parties involved in the litigation and those of the State.

If an injured party wishes to apply for legal aid for a legal action for a human rights violation for which a company is responsible, the legal action needs to have an adequate prospect of success. The competent court will review the prospect of success in each specific case. Moreover, the litigation must not be in bad faith. Litigation is deemed to have been commenced in bad faith if, in due consideration of all pertinent circumstances, a fictitious claimant, who would have to pay for the proceedings out of his or her own funds, would not have commenced litigation despite the claim having an adequate prospect of success. In addition, the claimant must lack sufficient funds and, given his or her economic circumstances, must be unable to pay the costs of litigation either at all, in part or only in instalments. In order to receive legal aid, the prospect of success of the legal action and the facts at issue must be set out and evidence needs to be adduced. In addition, the personal and economic circumstances must be described and appropriate evidence must be included. This must be done using a form that is available from all German courts as well as online. Information sheets with instructions on how to complete the form are also available from these sources in various languages (see the service section in this regard).
If legal aid is granted, the claimant either does not need to pay any court fees at all or will at least be able to pay them at a later time and in instalments. Costs for the claimant’s own attorney will also be paid for by the public purse in whole or in part. This is of particular importance for proceedings before the regional courts (with a claim value in excess of EUR 5,000) which require representation by an attorney. The claimant is generally entitled to choose his or her attorney. If the claimant cannot find an attorney who is prepared to represent them, the claimant can apply for the court to appoint an attorney.

The grant of legal aid also covers the costs for translating foreign documents and mutual assistance protocols into German if the court considers a translation to be necessary.

The grant of legal aid does not, however mean that the public purse will pay the claimant’s litigation costs in their entirety and finally. This is because, in civil litigation, the unsuccessful party not only has to bear its own costs but also those incurred by the other party. If the claimant loses in court, he or she must typically bear the defendant’s costs (in particular its attorney’s fees). The details of the court’s decision on costs are governed by sections 91 to 107 ZPO.

The claimant may, at the time of applying for legal aid, bring proceedings only in the event that the application for legal aid is successful. This allows the claimant to avoid his or her claim becoming statute-barred while the application for legal aid is still being considered. At the same time, it avoids the risk of claimants bringing a claim and not being able to withdraw it without incurring costs (section 269(3) ZPO) in the event that legal aid is not granted and the claimant does not wish to bring a claim without legal aid.
For further details, including the grant of aid to persons in need of financial help in order to assert their rights outside of judicial proceedings, please refer to the brochure on legal aid “Beratungshilfe und Prozesskostenhilfe – Informationen zu dem Beratungshilfegesetz und zu den Regelungen der Zivilprozessordnung über die Prozesskostenhilfe” published by the German Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz). This brochure is available in various different languages (see service section).

2.6 Third-party litigation funding

When conducting proceedings in Germany, injured parties may be supported not only by legal aid but, provided certain requirements are met, may also rely on third-party litigation funding. Such third parties are primarily legal expenses insurance providers and other risk insurance providers as well as companies which are specialised on providing support of this kind.

Third-party litigation funding can have the biggest effect if it is combined with an assignment of claims of the injured party to a strong pressure group, e.g. in the field of human rights protection.

2.7 Furnishing security for costs

Claimants from countries that do not belong to the EU or the European Economic Area can expect to be required to furnish security for costs of legal proceedings pursuant to sections 110 and 112 ZPO if the defendant so requests. In these cases the court will determine the costs of legal proceedings that the defendant is likely to have to pay and requires the claimant to furnish security in that amount. This is intended to protect defendants against claimants asserting arbitrary claims.
An important exception from this obligation to furnish security for costs is, however, included in section 122(1) no. 2 ZPO. If a claimant was granted legal aid, he or she is always also exempt from the obligation to furnish security. Section 110(2) ZPO contains further possible exemptions. Claimants from signatory states of the Hague Convention of 1 March 1954 on Civil Procedure, for instance, are also exempt from furnishing security.

In the event that a claim is assigned before legal action is commenced, the obligation to furnish security falls on the new creditor. Such obligation lapses, however, if claims of foreign claimants have been assigned to German natural or legal persons in order to be independently asserted in court. This is because the case no longer involves a foreign claimant.

2.8 Language of proceedings

For proceedings instigated before German courts, the language of proceedings is usually German. All pleadings (including the statement of claim) must be submitted in German. An interpreter is used for the oral hearing, if one of the parties involved in the proceedings does not speak German and is not represented by an attorney either. Provided certain requirements are met, an interpretation can be dispensed with and proceedings may be held in a different language if the parties involved and the court agree and all parties involved speak this language.

2.9 Evidence in court proceedings

Evidence located in Germany can readily be adduced before a German court. The fact that evidence is located outside of Germany does not, generally speaking, prevent evidence being taken before a German court but it may delay or hamper it. This applies both to claimants from Germany and to those from abroad. Evidence can generally be taken only if the State in which the evidence is located participates in the process on the basis of EU law, treaties under international law or despite the absence of any treaties.

In EU Member States the EU Evidence Regulation\(^\text{13}\) applies. This allows both the taking of evidence by a non-German court providing mutual judicial assistance and directly by the court where the proceedings are being conducted – including in the form of a video conference.

The procurement of evidence from States that are not members of the EU is primarily governed by the Hague Evidence Convention of 1970 (HEC).\(^\text{14}\) To date, the HEC has 62 contracting parties. The convention allows the taking of evidence by foreign courts providing mutual judicial assistance. In order to better assess the credibility of witnesses, for example, the German court may take part in taking evidence abroad. In addition, the HEC allows representatives of the State in which the court proceedings are taking place to directly take evidence; this constitutes a special form of taking evidence directly.


Germany has entered into bilateral agreements with a number of States which have structured mutual judicial assistance in similar ways (e.g. with Morocco, Tunisia and Israel).

Finally, even between States with which Germany has not contractually agreed mutual judicial assistance, such assistance is given in certain cases – often based on the principle of reciprocity. The requirements for mutual judicial assistance and the provision of such assistance are often based on the HEC system. Details of mutual judicial assistance in relation to other States can be found in the German Rechtshilfeordnung für Zivilsachen (ZRHO) – Länderteil (Ordinance on mutual judicial assistance in civil matters – special section), which contains detailed country-specific sections for the individual States.\(^{15}\)

Simplified procedures also apply for foreign parties with regard to the process of verifying the authenticity of documents. In the case of foreign public documents, German courts must exercise their discretion in determining the authenticity of documents in accordance with the circumstances of the case (section 438(1) ZPO). The exercise of such discretion is, however, supported by the Hague Apostille Convention of 1961\(^{16}\) as well as bilateral agreements entered into between Germany and individual States, which lay down simple requirements for the presumption of authenticity and reduce judicial discretion. In addition, there is a practice in several other States whereby the authenticity of documents is confirmed by German consular officers, which suffices as proof of authenticity (section 438(2) ZPO).

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15 The Rechtshilfeordnung für Zivilsachen (ZRHO) – Länderteil – BT can be accessed via the website of the Federal Office of Justice.

Enforcement of civil judgments in Germany and abroad
German judgments are enforceable in Germany provided that the requirements laid down in the ZPO in that regard have been met. Foreign nationals may also bring enforcement proceedings. Compulsory enforcement proceedings regarding movable and immovable property and rights are possible if the property or the right, i.e. the object of enforcement, is located in Germany.

If compulsory enforcement of German judgments against foreign companies is not possible within Germany, for instance because the foreign company does not hold any property in Germany, the judgment may be enforced abroad.

German judgments may be enforced abroad if the foreign State allows such enforcement on its territory. Such “extension of effect” takes place in a special recognition and exequatur procedure. Within the EU, however, such interim step has been dispensed with some time ago; enforcement within the EU takes place immediately.

Conversely, foreign judgments findings against German companies or against companies with assets in Germany may be enforced in Germany, provided their effect has first been extended to Germany.

The recognition and enforcement of judgments is governed by EU law, agreements under international law or in the national laws of each State.
Within the EU, the Brussels Ibis Regulation \(^{17}\) governs, within the scope of its application \(^{18}\), the requirements under which civil judgments can be enforced across borders. According to the Regulation, a judgment handed down in a Member State which is generally enforceable in that Member State is enforceable in any other EU Member State (article 39 Brussels Ibis Regulation). To do so, the creditor needs a copy of the judgment to be enforced as well as a certificate issued pursuant to article 53 of the Brussels Ibis Regulation confirming that the judgment is enforceable. This certificate is issued by the court which has handed down the judgment.

In relations between the EU and Island, Norway and Switzerland, the Lugano Convention applies \(^{19}\). Unlike the Brussels Ibis Regulation, the Lugano Convention requires the State in which the judgment is to be enforced to issue a declaration of enforceability (article 38 of the Lugano Convention).

Both under the Brussels Ibis Regulation and under the Lugano Convention a judgment handed down in the other State may not be reviewed as to its substance. The enforcement of the decision or declaration of enforceability may only be refused if there are specific grounds for refusal. Such ground for refusal exists, for instance, if the judgement that is to be enforced is manifestly contrary to the public order (ordre public) of the State in which enforcement was sought.

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\(^{18}\) While the Regulation does not apply to Denmark, Denmark has declared that the Brussels Ibis Regulation shall be applicable to the relations between the EU and Denmark on the basis of an agreement entered into between the European Community and Denmark.

As a result, it is therefore possible without incurring major legal issues to have German civil judgments that award damages in tort to the injured party enforced within the EU and in Island, Norway and Switzerland.

In order to further facilitate the recognition and declaration of enforceability of judgments, Germany has also entered into agreements under international law with some States (e.g. Israel, Tunisia), which govern the mutual recognition of judgments in civil and commercial matters in various areas of law.

In relation to other States with which Germany has not entered into any agreements under international law regarding recognition and enforcement, sections 328, 722 and 723 ZPO govern the recognition and declaration of enforceability of foreign judgments. The provisions of the ZPO ensure a fair balance between the interests of a foreign creditor to be able to enforce judgments in Germany and the interests of German debtors. They are recognition-friendly, i.e. recognition and declaration of enforceability may only be prevented for certain, clearly stated reasons; for instance, if the foreign courts did not have jurisdiction from a German point of view, if the defendant has not been granted the right to be heard, or if the recognition would lead to a result which is manifestly incompatible with the fundamental principles of German law. Again, the foreign judgment will not be reviewed as to its merits.

Many foreign States have corresponding provisions in relation to the recognition and declaration of enforceability of German judgments.
Alternative ways to bring a complaint
In Germany there are a variety of ways of asserting claims out of court. Out-of-court dispute settlement procedures include, for instance, mediation, (consumer) dispute resolution as well as arbitration proceedings.\textsuperscript{20} The body of particular relevance for the topic of human rights violations, as discussed in this brochure, is the German National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises.

Every member of the Organization for Economic Cooperation and Development is obliged to set up a National Contact Point (NCP). Its responsibilities include, in particular, the provision of a neutral forum for dispute resolution between the parties in the event of complaints about possible violations by companies of the OECD guidelines. The German NCP is located in the Federal Ministry for Economic Affairs and Energy.

In principle, every person or organisation may submit a complaint to the relevant NCP concerning an alleged violation by a company of the OECD guidelines. As a rule, the relevant NCP is the NCP of the State where the possible violation took place. If there is no NCP in that State, the complainant may approach the NCP in the State in which the company in question is headquartered.

If the complaint is admissible, the NCP will offer the parties support in finding a mutually agreeable solution. The NCP offers a forum in order to mediate between the parties in discussions in different formats (conciliation or mediation procedures) and to work together to develop a mutually satisfactory solution. Where necessary, besides statements made both by the complainant and the opposing party, information provided by the relevant authorities, experts, trade unions, industry associations and non-
governmental organisations as well as, where required, the NCP of another State will be taken into account.

Upon a successful mediation between the parties involved in the dispute, the NCP will publish a joint final statement of the parties regarding the progress and the outcome of the discussions. If, however, no agreement was reached, the NCP will prepare and publish its own, one-page final report regarding the facts presented and the progress of the discussions, which may also contain recommendations for action for the improved implementation of the OECD guidelines.

For further information regarding the procedure, please refer to the procedural guide issued by the German NCP.\(^1\)

Proceedings before the NCP do not constitute judicial proceedings. Given the non-legally binding character of the OECD guidelines, the content of a final declaration cannot be judicially enforced either.

Going forward, arbitration proceedings are also intended to be afforded higher importance in cases of human rights violations. The “Draft Hague Rules on Business and Human Rights Arbitration”, for instance, are currently being discussed on an international level.

\(^{21}\) Available at https://www.bmwi.de/Redaktion/EN/Textsammlungen/Foreign-Trade/national-contact-point-ncp.html.
Service section
FURTHER INFORMATION

National Action Plan: Implementation of the UN Guiding Principles on Business on Business and Human Rights
https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf

UN Guiding Principles on Business on Business and Human Rights

European legislation

German laws
www.gesetze-im-internet.de/index.html

English translations of German laws
https://www.gesetze-im-internet.de/Teilliste_translations.html

Brochure “Beratungshilfe und Prozesskostenhilfe” (legal aid)
http://www.bmjv.de/SharedDocs/Publikationen/DE/Beratungs_PKH_engl.pdf?__blob=publicationFile&v=6
can be ordered in different languages

Brochure “Internationales Privatrecht” (private international law)

Cost calculator for costs of litigation
https://anwaltverein.de/de/service/prozesskostenrechner

Information provided by the justice portal of the German federal government and the German Länder
https://justiz.de/index.php
POINTS OF CONTACT

*Bundesrechtsanwaltskammer (German Federal Chamber of Lawyers)*
www.brak.de/fuer-verbraucher/

*Deutscher Anwaltverein (German lawyer’s association)*
https://anwaltauskunft.de/magazin

*National points of contact for the OECD guidelines*
https://www.bmwi.de/Redaktion/EN/Textsammlungen/Foreign-Trade/national-contact-point-ncp.html
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