# GERMANY

## LEGAL BASIS

**1. Has your State signed and/or ratified the European Convention on State Immunity (1972) and/or the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)? Do the authorities of your State consider the provisions of these treaties on service of process as a codification of customary international law? Does your State apply any other international legal instrument (apart from bilateral agreements)?**

Germany signed the European Convention on State Immunity (1972) on 16 March 1972 and ratified it on 15 March 1990 (“European Convention”). However, Germany is no State Party to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) (“United Nations Convention”).

In general, Germany does not comment on the customary international law character of a convention as a whole.

Germany applies the Vienna Convention on Diplomatic Relations of 18 April 1961 (“VCDR”) whose Article 41(2) stipulates that
*“[a]ll official business with the receiving State entrusted to the [diplomatic] mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed”.*
This fundamental provision allows, *inter alia*, for transmissions of documents instituting proceedings against a foreign State or other documents giving legal notice in the course of such proceedings through diplomatic channels.

In addition to the VCDR, the following two international legal instruments, which are well-established in the field of legal assistance in civil matters, may also be applied to the service of judicial and extrajudicial documents in civil proceedings to a foreign State.

- Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) (“EU Service Regulation”). In this case the request is sent via the Central Body of the requested state as service on a foreign State is seen as an extraordinary circumstance; and

- Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 (“Hague Service Convention”).

Contrary to the European Convention, these instruments do not explicitly deal with service of documents instituting proceedings against a foreign State or of other documents giving legal notice in the course of such proceedings. However, all of these instruments may allow for service of such documents in the course of civil action against a foreign State.

As for the EU Service Regulation, its Article 1(1) determines the scope of application as follows:
*“This Regulation applies to the cross-border service of judicial and extrajudicial documents in civil or commercial matters. It does not apply, in particular, to revenue, customs or administrative matters or to the liability of a Member State for actions or omissions in the exercise of state authority (acta iure imperii).”*
From the existence of this provision it may be derived by means of an *argumentum e contrario* that the EU Service Regulation does not rule out service of documents in proceedings against a foreign State. Rather, it would follow that its application is restricted to cases in which a State may not claim immunity before foreign courts, i.e. those cases that concern actions or

omissions of a State in businesses other than the exercise of State authority (*acta iure gestionis*). The same conclusion may be drawn from the existence of Article 10(3) of the EU Service Regulation which stipulates, *inter alia*, that
*"Where the request for service is manifestly outside the scope of this Regulation [as set out in Article 1] […], the request and the documents transmitted shall be returned to the transmitting agency upon receipt, without undue delay, together with a notice of return, using form F in Annex I".*
Accordingly, form F in Annex I of the EU Service Regulation lists amongst the reasons for return of the request and the documents transmitted that "the matter is not civil or commercial" (see item 1.1.2).
Germany considers requests for service on Member States under the EU Service Regulation to be exceptional cases. In these cases, the request for service is not to be addressed to the usual receiving agency pursuant to Article 3(2) of the EU Service Regulation, but to the Central Body of the Member State according to Article 4(1)(c) of the EU Service Regulation.

As far as the Hague Service Convention is concerned, it contains a savings clause according to which service of documents may be refused by the State addressed if it deems that such service would infringe its sovereignty or security (see Article 13(1) of the Hague Service Convention). The existence of this savings clause may lead to the conclusion, again by means of an *argumentum e contrario*, that the Hague Service Convention may, as a matter of principle, also govern service of documents in proceedings against a foreign State.
Ultimately, however, this question can remain open from a German perspective. This is because Germany also considers requests for service on Contracting States under the Hague Service Convention to be exceptional cases under the Hague Service Convention in which at least diplomatic transmission is required. Indeed, Article 9(2) of the Hague Service Convention provides that documents may be transmitted through diplomatic channels for the purpose of service "if exceptional circumstances so require". In these cases, it is upon the defendant State to decide whether the request is handed to the Central Authority for execution or the respective Ministry of Foreign Affairs confirms acceptance of service by verbal note.

**2. Please provide information on:**

**a. National legislation (in particular its title, source and content; if available, please provide official translations and/or references to internet sources).**

Provisions relevant to the issue of service of process on foreign States are contained in the following national statutes and regulations (see the Annex for the provisions concerned):

Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*)
- Promulgated on 23 May 1949, last amended on 19 December 2022.
- Published in the Federal Law Gazette (*Bundesgesetzblatt*): BGBl. 1949 III p. 1, BGBl. 2022 I p. 2478.
- Legal source: federal constitutional law.
- A translation authorised by the Federal Ministry of Justice is available at: http://www.gesetze-im-internet.de/englisch_gg

Code of Civil Procedure (*Zivilprozessordnung*)
- Promulgated on 5 December 2005; last amended on 22 December 2023
- Published in the Federal Law Gazette: BGBl. 2005 I p. 3202, BGBl. 2006 I p. 431, BGBl. 2007 I p. 1781, BGBl. 2023 I No 411.
- Legal source: federal law.

The translation authorised by the Federal Ministry of Justice which is available at: www.gesetze-im-internet.de/englisch_zpo is not up to date.

Ordinance on Legal Assistance in Civil Matters (*Rechtshilfeordnung für Zivilsachen*)

- Promulgated on 19 October 1956, last amended on 16 April 2018.[1]
- Legal source: Administrative regulations promulgated by the Federation and the *Länder*.
- Content: Administrative regulation on the execution of legal assistance in civil matters. The Ordinance concerns both legal assistance under the international instruments which Germany applies, and legal assistance provided by Germany in the absence of any Treaty.

**b. Case-law and practice, specifying whether your national courts and tribunals review the lawfulness of the service of process by operation of law.**

While the courts in Germany review the lawfulness of the service of process by operation of law, so far there is no case-law and practice of the German courts concerning service of process on foreign States.

**PROCEDURE**

**3. Please describe the procedure(s) applicable to service of process on a foreign State, specifying the hierarchy between the different methods for serving process. In particular, please provide information on when the service is deemed to be effected, time-limits, the grounds to refuse service of process and the consequences of the unlawfulness of the service.**

Where documents instituting proceedings in Germany against a foreign State are to be served, as a general rule, Germany applies the following procedure:

Unless rules of the European Union apply (see Section 183(1) Code of Civil Procedure), the documents to be served are transmitted through the German embassy in the defendant State to that State's Ministry of Foreign Affairs, that is through diplomatic channels (see Section 183(4) No 2 Code of Civil Procedure). The documents will be accompanied by a translation and an aide-memoire briefly explaining the case (see Section 54(2) Ordinance on Legal Assistance in Civil Matters). The documents will be handed over along with a verbal note requesting a written confirmation once process has been served upon the competent authority. Where this confirmation is given by the defendant State's Ministry of Foreign Affairs or where it is the defendant State's practice to deem service to be effected upon receipt by its Ministry of Foreign Affairs, the German embassy will issue a certificate of service for presentation to the court. Where service of process is expressly refused, the embassy will, instead, issue a certificate confirming that service has failed. Where the defendant State does not respond, the embassy will repeat its request for service, usually several times. As a last resort, the embassy will inform the defendant State that service may be effected by publication in accordance with the national laws of Germany (see Section 185 No 3 Code of Civil Procedure). The Federal Foreign Office will then inform the court hearing the case that service abroad could not be effected. The court hearing the case may at this (or even at an earlier) stage independently decide on service to be effected by publication. Therefore, a foreign State is not protected against the institution of proceedings, judgments in default and, as the case may be, coercive enforcement by continuously ignoring requests by Germany for service of process.

Where process is to be served on a foreign State, time-limits depend on the conditions for service in the State in question and on the deadlines set by the court hearing the case in Germany. In both the plaintiff's and the court's interest and in light of the difficulties faced with the enforcement of judgments against foreign States, the Federal Foreign Office seeks to obtain a written confirmation from the defendant State's Ministry of Foreign Affairs establishing

[1] Currently under revision; for the version currently still in force please refer to: https://www.bundesjustizamt.de/DE/Themen/InternationaleZusammenarbeit/Zivilsachen/RechtshilfeordnungfuerZivilsachen/RechtshilfeordnungfuerZivilsachen_node.html

the date on which service of process has been effected. Service of process may be refused by a foreign State where it deems that such service would infringe its sovereignty because the proceedings concern sovereign acts of that State (*acta iure imperii*). Thereafter, it is for the court hearing the case to decide whether such refusal may be deemed justified. Apart from that, before the documents to be served are transmitted to the embassy for onward service to the defendant State's Ministry of Foreign Affairs, the Federal Foreign Office may decline the court's request for service abroad in the first place with regard to foreign-policy considerations (see, in this respect, Article 32(1) Basic Law and Section 54(2) Ordinance on Legal Assistance in Civil Matters).

Where process is to be served on Germany, it is for the Federal Foreign Office (together with other ministries potentially concerned) to examine whether service in the given case may infringe Germany's sovereignty because the proceedings concern sovereign acts of Germany (*acta iure imperii*) and whether therefore acceptance of service may be refused. In case deadlines have been set for service of process, any inappropriate deadline will be rejected for lack of definite rules in international law governing deadlines for service of process on foreign States. However, in practice such deadlines will generally be met since requests for service of process in proceedings against Germany are dealt with as priorities. As a matter of principle, service of process may not be deemed effected unless confirmed in writing by the Federal Foreign Office. Where a foreign State deems service of process to be effected already upon receipt by the Federal Foreign Office such an understanding will be rejected by Germany, unless process is served under Article 16 of the European Convention.

**a. How are the terms "diplomatic channels" (Article 16(2) of the European Convention and Article 22(1)(c)(i) of the United Nations Convention) interpreted by your national authorities? Please indicate whether these terms include a notification to the embassy of the State concerned in the State of forum.**

Where service of process in proceedings against a foreign State is concerned, the term "through diplomatic channels" is interpreted by Germany as referring to transmissions of documents by the competent authorities of the forum State to the Ministry of Foreign Affairs of the defendant State through the forum State's diplomatic or consular mission in the defendant State. If agreed by the States in question, documents may also be served upon a ministry (or other authority) in the defendant State other than the Ministry of Foreign Affairs. It is for the defendant State's Ministry of Foreign Affairs or, as the case may be, the other ministry (or authority) then, to forward the documents received to the competent national authorities.

This understanding of the term "through diplomatic channels" is based on Article 41(2) VCDR which stipulates that
*"[a]ll official business with the receiving State entrusted to the [diplomatic] mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed".*
Moreover, there is no (multilateral) international legal instrument which establishes a different definition or rests on an understanding of the term "through diplomatic channels" which differs from that employed by Germany.

Under the interpretation employed by Germany, notification to the embassy or another mission of the defendant State does not fall within the meaning of the term "through diplomatic channels". This is reflected in Section 54 of the Ordinance on Legal Assistance in Civil Matters under which documents may not be served directly by the court to the diplomatic or consular mission of a foreign State. Foreign missions in Germany are not considered to be authorised to receive such documents on behalf of the sending State and due to its coercive character, even the attempt to serve administrative or judicial documents on a foreign mission constitutes a violation of Article 22 VCDR / Article 31 of the Vienna Convention on Consular Relations of 24 April 1963. Rather, the documents to be served ought to be transmitted through diplomatic channels at the instigation of the Federal Foreign Office via the competent German embassy.

**b. How are the terms "if necessary" (Article 16(2) of the European Convention and Article 22(3) of the United Nations Conventions) interpreted by your national authorities?**

In Germany's view, the terms "if necessary" within the meaning of Article 16(2) of the European Convention must be interpreted as requiring, as a matter of principle, a translation of the documents to be served where such documents are not written in the official language of the defendant State or, if the defendant State has more than one official language, in one of those languages. However, in Germany's view, a limitation may apply to the translation requirement where annexes are to be served with a document. For the purposes of Article 16 of the European Convention, this will concern, first and foremost, annexes to documents instituting proceedings against a State. Where the document to be served is written in or translated into the official language or, where appropriate, one of the official languages of the defendant State, annexes to this document not written in that language will not, in Germany's view, require translation if and to the extent that the document is sufficiently comprehensible on its own terms and thus provides adequate information for the defendant State with regard to the proceedings. Finally, any State is free to accept service of documents not written in or translated into its official language or one of its official languages.

It should be noted that, under the laws of Germany, documents to be transmitted to the authorities of a foreign State for onward service in that State must be accompanied by a translation, unless service is to be effected only by way of informal delivery. This is particularly true where documents are to be served on a foreign State.

Where the national authorities of Germany are requested to formally serve documents, the laws of Germany stipulate that, as a matter of principle, the documents must be written in or translated into the German language, unless service is to be effected under the provisions of the EU Service Regulation (see Article 9(1) and Article 12 of the EU Service Regulation).

**4. Where your State is the defendant in the proceedings, what is accepted as an adequate service of process? Please specify whether your State accepts the service to its embassy in the State of forum.**

Where documents instituting proceedings against Germany in a foreign State or other documents giving legal notice in such proceedings are to be served, as a general rule, Germany accepts only transmission to the Federal Foreign Office as an adequate service of process, i.e. service through diplomatic channels. This is also true where documents instituting proceedings or judgments given by default against Germany are to be served under the European Convention in accordance with Article 16(2) of the Convention. An exception to diplomatic channels applies only if service is effected via the German Central Body, which in that case is the Federal Office of Justice, in accordance with the EU Service Regulation.

Germany considers serving documents giving legal notice in proceedings against Germany upon its embassy in the State of forum a violation of international law. It does not, in Germany's view, effect service of process. A German embassy will consequently refuse acceptance of such service of documents.

Germany considers service of process a sovereign act. In Germany's view, taking sovereign acts vis-à-vis a diplomatic or consular mission of a foreign State interferes with the inviolability of the premises of the missions, either under Article 22 VCDR where a diplomatic mission is concerned or Article 31 of the Vienna Convention on Consular Relations of 24 April 1963 where a consular mission is concerned. It should be noted that, in Germany's view, service of process upon an embassy constitutes a violation of international law not only where process is served by public officials. Rather, where the laws of the receiving State allow process to be served by private persons and give legal effect to such service, service of process also interferes with international law when carried out vis-à-vis a German embassy.

Where documents instituting proceedings against Germany are served upon a German embassy in the forum State and the embassy refuses acceptance of such service, entering an appearance in the proceedings does not, to Germany's understanding of the law and without prejudice to the provision in Art. 16(6) of the European Convention, constitute a waiver of its objections to the inadequacy of service of process. While the refusal of acceptance of such service is based on the inviolability of the premises of diplomatic and consular missions or that of diplomatic agents and consular officers, there is no legal but merely a factual connection to any appearance in court. Entering an appearance serves only the purpose of presenting substantial legal arguments on the merits of the case in the proceedings in case the court does not sustain Germany's objection to the adequacy of service of process.

**ANNEX**

**National legislation relevant to the issue of service of process on a foreign State[2]**

**1. Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*)**

*Article 32*
*[Foreign relations]*

(1) Relations with foreign states shall be conducted by the Federation.
(2) […].
(3) […].

**2. Code of Civil Procedure (*Zivilprozessordnung*)**

*Section 183*
*Service abroad*

*„(4) Folgende Zustellungen in den Fällen der Absätze 2 und 3 erfolgen auf Ersuchen des Vorsitzenden des Prozessgerichts durch die zuständige deutsche Auslandsvertretung:*

1. […]

*2. Zustellungen an ausländische Staaten sowie*

3. […]."

[***Non-authorised** translation:*

*"(4) The following services of documents in the cases of subsections 2 and 3 shall be made at the request of the presiding judge of the court hearing the case by the competent German diplomatic or consular mission:*

1. […]

*2. Services of documents to foreign states*

3. […]." ]

*Section 185*

[2] Some of the quoted national legislation is not yet available in an Englishtranslation authorised by the Federal Ministry of Justice. Such translation will however be made available at https://www.gesetze-im-internet.de/Teilliste_translations.html in the near future.

*Service by publication*

The documents may be served by publishing a notice (service by publication) wherever:
1. […]
2. […]
3. It is not possible to serve documents abroad, or if such services do[es] not hold out any prospect of success […]
4. […].

*Section 233*
*Restoration of the status quo ante*

Where a party was prevented, through no fault of its own, from complying with a statutory period or the deadline set for submitting the particulars of its appeal, the grounds for filing the appeal on points of law, the complaint against denial of leave to appeal, or the complaint on points of law, or where a party was prevented from adhering to the period stipulated in section 234 (1), that party is to be granted the restoration of the status quo ante upon a corresponding petition being filed. It will be presumed that the party was not at fault if no instruction on available legal remedies was provided, or if it was deficient.

*Section 274*
*Summons of the parties; time for entering an appearance*

(1) […].
(2) The summons is to be served on the defendant together with the statement of claim if the court has determined an advance first hearing.
(3) A period of at least two (2) weeks must lapse from the time at which the statement of claim is served and the date of the hearing (time for entering an appearance). *Ist die Zustellung im Ausland vorzunehmen, so beträgt die Einlassungsfrist einen Monat. Der Vorsitzende kann auch eine längere Frist bestimmen.*

*[**Non-authorised** translation: "Where service is to be effected abroad, the time for entering an appearance shall amount to one month. The presiding judge may specify a longer period."]*

*Section 339*
*Period within which a protest may be entered*

(1) The period within which protest may be entered shall amount to two (2) weeks; it is a statutory period and shall begin upon the default judgment having been served.

*(2) Muss die Zustellung im Ausland erfolgen, so beträgt die Einspruchsfrist einen Monat. Das Gericht kann im Versäumnisurteil auch eine längere Frist bestimmen.*

*(3) Muss die Zustellung durch öffentliche Bekanntmachung erfolgen, so hat das Gericht die Einspruchsfrist im Versäumnisurteil oder nachträglich durch besonderen Beschluss zu bestimmen.*

*[**Non-authorised** translation:*

*"(2) Where service is to be effected abroad, the period within which protest may be entered shall amount to one month. The court may specify a longer period in the default judgment.*

*(3) Where service is to be effected by publishing a notice, the court is to determine, in the default judgment or subsequently by separate order, the period within which protest may be entered."]*