

REVIEW APPEAL TO THE GERMAN FEDERAL SUPREME COURT

AFTER THE REFORM OF 2001

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I. THE CHANGE IN THE SYSTEM IN 2001

The Federal Republic of Germany has five different federal courts of final appeal. The access to the Federal Labour Court, the Federal Administrative Court, the Federal Social Court and the Federal Fiscal Court were restricted since the sixties by the general rule that only cases of real public importance should be brought before those courts. When the case load of the Federal Supreme Court (for civil cases) also raised in the seventies the first idea was to extend this system to the Federal Supreme Court, too. In the last minute there was however a serious political opposition against this draft.¹ Politicians felt that at least important commercial claims should be reviewed by the Supreme Court without any restriction. Accordingly, in 1995 a mixed system was adopted.² Till a value in dispute of 40.000 German Marks (roughly 19.000 €) (after 1991 of 60.000 German marks or 28.000 €) a review appeal to the Federal Supreme Court (*Revision*) should only be permissive after leave by the regional court of appeal. In cases of a higher value in dispute any party should be free to appeal to the Federal Supreme Court without further requirement. The Federal Supreme Court should, however, have the power not to accept the final appeal for a further definite control, if the case did not have general public importance (§ 545b CCP). This system was substantially modified in 1980 by a plenary decision of the Federal Constitutional Court. It held, that the Federal Supreme Court had to accept a final appeal if there was an individual mistake in the judgement appealed from.³

This kind of permission procedure was rather unsatisfactory. The regional courts of appeal gave permission for final appeal only in about 200 cases a year.⁴ But parties appealed to the Federal Supreme Court at that time in over 3.000 cases a year and more than 50 % of these cases were not accepted for final decision by the court without any reasons, just referring to § 545b CCP, that the case did not have any general public importance and that therefore the Federal Supreme Court did not accept the case for a review.⁵

¹ Vgl. Rechtsausschuss des Deutschen Bundestages, BT-Drucks. 7 / 3596 (v. 5.5.1973).

² Vgl. H. PRÜTTING, *Die Zulassung der Revision*, Köln, 1977.

³ BVerfGE 54, 277, 285 f. = *NJW* 1981, 39.

⁴ In 2001 the Regional Courts of Appeal permitted the final appeal only in 117 from 20.143 cases; cf. H. BÜTTNER, *Die Reform der ZPO – eine Wirkungskontrolle. Das neue Revisionsrecht*, *Verh. d. 64. DJT*, München, 2004, Vol. I, A 89, 91.

⁵ Cf. P. GOTTWALD, *Civil Procedure in Germany after the Reform Act of 2001*, *C. J. Q.* 23 (2004), 338, 348 f.

After a extraordinary vivid, politically highly controversial debate,⁶ with a majority of advocates and judges opposing, the legislator introduced a new system of appeal to the court of final appeal in civil cases by statute of 27 July 2001. And it cannot surprise that he introduced the general final appeal after permission only.

What was even more revolutionary, that at the same time he installed a new miscellaneous appeal of law against court orders of all courts of first appeal (so called Rechtsbeschwerde) to be decided by the Federal Supreme Court. This broke with an old tradition according to which the competence to decide such miscellaneous appeals lay with regional courts of appeal and not with the Federal Court of Justice.⁷

The new system contains a real political decision to establish equal access to the Federal Supreme Court. Commercial cases of a high value in dispute can now no longer be brought to the third instance if their substance is without any general question of public importance, whereas quite opposite economically small disputes can now be brought to the Federal Supreme Court if they raise problems of fundamental significance.⁸ Many areas of law with highly divergent decisions by the regional courts of appeal which were finally competent till then could now be improved and stabilized by a new homogeneous case law. This is in particular true with regard to law of private landlord / tenant – relations⁹ and with all aspects of insolvency law and the law of enforcement of judgements.

Within the first years this change of the system made troubles for parties and their lawyers at the Federal Supreme Court, but caused also some debate among the judges of the Federal Supreme Court on the correct interpretation of the new law. However, after a short time most of the crucial points could be clarified¹⁰ and the judges were successful in stabilizing the access to the Federal Supreme Court and reducing the case load at least slightly.

II. THE REQUIREMENT OF PERMISSION TO FINAL APPEAL

⁶ Cf. the proposals by P. GOTTWALD, Empfehlen sich im Interesse eines effektiven Rechtsschutzes Maßnahmen zur Vereinfachung, Vereinheitlichung und Beschränkung der Rechtsmittel, *Gutachten A für den 61. DJT*, München, 1996, A 75 ff.; H. DÄUBLER-GMELIN, Aktuelles Forum Justizreform, *Verh. d. 63. DJT*, München, 2000, Bd. II/1, P 23; crit. H. BÜTTNER, Referat, *Verh. d. 63. DJT*, Bd. II/ 1, München, 2000, P 73.

⁷ F. SCHNAUDER, Berufung und Beschwerde nach dem Zivilprozessreformgesetz, *JuS* 2002, 68, 69 u. 162, 168; W. BALL, Die Reform der ZPO – eine Wirkungskontrolle. Das neue Revisionsrecht, *Verh. d. 65. DJT*, München, 2004, Vol. I, A 69, 71.

⁸ J. WENZEL, Das neue zivilprozessuale Revisionszulassungsrecht in der Bewährung, *NJW* 2002, 3353; P. GOTTWALD, Die Reform der ZPO aus der Sicht der Wissenschaft, *Verh. d. 65. DJT*, München, 2004, Vol. I, A 107, 119.

⁹ Cf. BGH *NJW* 2008, 218 (prohibition of domestic animals in lodgings); W. BALL, Die Reform der ZPO – eine Wirkungskontrolle. Das neue Revisionsrecht, *Verh. d. 65. DJT*, München, 2004, Vol. I, A 69. Other questions have been the right of revocation in e-bay-business, or duty to pay incidental expenses by tenants (cf. press notice by the Federal Ministry of Justice of 5 June 2007: Über vier Jahre “neue ZPO” – eine Reform hat gewirkt).

¹⁰ Cf. G. HIRSCH, Verfassungsrechtliches Bestimmtheitsgebot und gerichtliche Auslegung am Beispiel der neuen Zugangsvoraussetzungen zur dritten Instanz, *Festschrift für Wenzel*, Köln, 2005, p. 39.

Even according to the system which was valid till 2001 the regional courts of appeal could grant permission to final appeal due to general public importance of the case. This term involved for a long time a certain discretion of the court to present some open questions of law to Federal Supreme Court, respectively some discretion of the Federal Supreme Court to accept or not accept such cases for review on appeal. Within the debate on the bill of 2001 however the opinions increased that such a rule was too vague and that the court should be bound by a more precise rule. § 543 subsec. 2 s. 1 CCP now contains three reasons for permission:

1. the general public importance of the case,
2. the improvement of the law, and
3. the securing of a homogenous case law.

1. The general public importance

According to the case law of the Federal Supreme Court a case has general public importance, if it raises a relevant legal question requiring clarification which may arise in an indefinite number of cases wherefore the general public is interested in an homogeneous development and practice.¹¹ In addition, a case is qualified as such a leading case, if its consequences touch the interests of the general public in an exceptional way, thus requiring for a decision of the Federal Supreme Court, or if it may call for a request to the European Court of Justice to give a preliminary ruling.¹² The general importance is missing in contrast, if the case is dealing (1) with old law,¹³ (2) with a special application of undisputed rules and (3) if the conclusion is mainly based on factual findings.¹⁴

2. Improvement of the law

If a case requires for the improvement or the development of the law it is very likely that it is a case of general public importance.¹⁵ Usually these cases are those, where typical or at least such circumstances of case which are capable to be generalized are not precisely regulated by the law and that therefore the single case gave raise to develop principles for the interpretation of the law or to close gaps in the law. Development of the law by interpretation is in particular imposed in such areas where there are insufficient statutes which do not completely reflect the steadily developing reality of life.

3. Securing a homogeneous case law

Within the practice of the Federal Supreme Court this ground to permit the access to final appeal has gained the most practical relevance. As soon as the Federal Supreme Court has decided some cases of general public importance or of fundamental significance and there is no change in the real life which would cause a need for the

¹¹ BGHZ 151, 22, 223 = NJW 2002, 3029; BGHZ 154, 288, 291 = NJW 2003, 1943, 1944.

¹² J. WENZEL in: *Münchener Kommentar zur ZPO*, 3rd ed., München, 2007, § 543 marg. note 6.

¹³ BGHZ 154, 288 = NJW 2003. 1943 = JZ 2003, 794.

¹⁴ J. WENZEL, NJW 2002, 3353, 3354.

¹⁵ E. SCHILKEN, *Zivilprozessrecht*, 5th ed., Köln, 2006, marg. note 925; J. WENZEL, NJW 2002, 3353. 3355.

development or improvement of the law there is, however, some need to defend this settled case law against tendencies of lower courts to distinguish, irrespective whether they protest against these general principles consciously or unconsciously. A securing of homogeneous case law is required if a new decision wilfully deviates from a valid leading case. In earlier times such cases were more simply qualified as cases of general public importance.

It is more difficult to judge whether serious mistakes in applying the law require a correction by the Federal Supreme Court. After some early differences the civil divisions of the Federal Supreme Court developed the opinion that mere obvious mistakes in applying the substantive law do not require an intervention of the Federal Supreme Court.¹⁶

4. Relevant case law

A) According to the Federal Supreme Court it is not sufficient, that a mistake is evident or very serious; leave to appeal can only be granted if the mistake has either led to a violation of the constitution or has raised the danger that the court would repeat this “symptomatic mistake” with the danger that other courts would follow.¹⁷ It is irrelevant whether there is a likelihood that this kind of repetition would happen in a great number of cases; it is sufficient that there is a latent structural danger of repetition because the court of appeal started from a misunderstanding of the law which could be generalized.

B) Violation of procedural principles laid down in the constitution must end in a permission to final appeal for securing a homogeneous case law, because such a violation impairs of the confidence of the general public in an efficient court system.¹⁸ Such permission is possible not only in cases of violation of fair hearing, but also in cases of violation of other constitutional procedural rights, like the prohibition of arbitrate decisions with regard to a violation of the principle of equality or a violation against the guarantee of a competent judge. In the end, final appeal must be permitted, if there is a violation of the basic law to receive effective legal protection (derived from the principle or the rule of law) because the court of appeal has aggravated the legal protection in an improperly way.¹⁹

C) Within the discussion of former years a crucial point was the reaction to an evident violation of substantial law in a single case.²⁰ It is true that the Federal Supreme Court has stuck to his view that an obvious error in a single case does not justify the permission to final appeal, but in a practical effect he has viewed such cases as violation of the constitutional prohibition of arbitrary decisions²¹ or subsumed it to the ground of

¹⁶ J. WENZEL, *NJW* 2002, 3353, 3355 f; confirmed by Fed. Const. Court *NJW* 2005, 3345, 3346.

¹⁷ J. WENZEL, *NJW* 2002, 3353, 3356.

¹⁸ W. BALL, *Verh. d. 65. DJT*, 2004, Vol. I, A 69, 77.

¹⁹ J. WENZEL in: *Münchener Kommentar zur ZPO*, § 543 marg. note 25; cf. P. BAUKELMANN, Sicherung einer einheitlichen Rechtsprechung (§ 543 Abs. 2 Nr. 2 Fall 2 ZPO) und Verfahrensmangel, *Festschrift für Erdmann*, Köln, 2002, p. 767.

²⁰ Cf. A. PIEKENBROCK, Der Zugang zum BGH als Verfassungsproblem, *Anwaltsblatt* 2004, 329.

permission for *abstract* (no longer a real) danger of repetition and imitation²² with the effect that most cases which cry for correction can be settled under the new system of final appeal and that there remains no case of hardship which could not be corrected.

D) For a long time it was also open to debate how to react to a case where there was a so called absolute ground for revision according to § 547 CCP. This rule says that if there is such a ground the final appeal must be successful in any case. By decision of 2007 the Federal Supreme Court held, that in such a case the Federal Supreme Court must permit the final appeal by miscellaneous appeal from denial of permission to secure a homogenous case law because otherwise the confidence in an efficient court system would be shaken.²³

III. THE PERMISSION OF FINAL APPEAL

Since 2002 a final appeal may be filed only after permission.

1. Express permission by the Court of Appeal

Final appeal is admissible if the court of first appeal has permitted it explicitly in its judgement. For that end the leave must not be granted within the tenor but within the reasons of the judgement in an unmistakably way. A mere implied permission or a subsequent leave after rendering the judgement is void.²⁴ The permission may be restricted to a separable part of the matter in dispute.²⁵

After the reform, the permission may be granted by any court of first appeal, not only by the Regional Court of Appeal, but also by the District Court acting as Court of Appeal against decisions of the local courts.²⁶ The Federal Supreme Court may have thus to decide upon final appeals against judgements of local courts. This is in particular relevant for landlord / tenant – cases and for specific fields of consumer protection.

The number of cases which are admitted to final appeal by the courts of first appeal is steadily growing. In 2006 696 cases were admitted, in 2007 the number rose

²¹ BGHZ 152, 182, 193 f. = *NJW* 2003, 65, 68; BGHZ 154, 288, 296 = *NJW* 2003, 1943; cf. J. HAGER, Die Zulassung der Revision im Lichte des allgemeinen Justizgewährleistungsanspruchs, 2. Hannoveraner ZPO-Symposium, 20.9.2003, *NJW-Sonderheft*, S. 23, 26; W. BALL, *Verh. d. 65. DJT*, München, 2004, Vol. I, A 69, 83.

²² Cf. BGHZ 159, 135, 139 f. = *NJW* 2004, 2222; W. BALL, *Verh. d. 65. DJT*, 2004, Vol. I, A 69, 81; crit. H. BAMBERGER, Die Reform der Zivilprozessordnung – Eine Wirkungskontrolle, *ZRP* 2004, 137, 141; for a wide interpretation to cover all cases of evident mistakes: W. BALL, Zulassung der Revision wegen offensichtlicher Unrichtigkeit des Berufungsurteils und wegen Verletzung von Verfahrensgrundrechten, *Festschrift für Musielak*, München, 2004, p. 27; M. SCHULTZ, Revisionsverfahren – Verfahrensgrundrechte und Wiederholungsgefahr, *MDR* 2003, 1392.

²³ BGHZ 172, 250 = *NJW* 2007, 2702.

²⁴ J. WENZEL in: *Münchener Kommentar*, § 543 marg. Note 31; cf. V. VOLLAND, Die Nichtzulassung der Revision im Berufungsurteil, *MDR* 2004, 377.

²⁵ Cf. BGH *NJW-RR* 2003, 1192; *NJW* 2003, 2529; *NJW* 2004, 3264.

²⁶ Critically H. BÜTTNER, Die Reform der ZPO – eine Wirkungskontrolle, *Verh. d. 65. DJT*, München, 2004, A 89, 97 (not proper, but plague).

to 790. There of 559 cases were admitted by the Regional Courts of Appeal and 231 by the District Courts.²⁷

In any case the Federal Supreme Court is bound by the permission of the inferior instance and has to decide upon the final appeal (§ 543 subsec. 2 s. 2 CCP).

2. Leave by the Supreme Court on miscellaneous appeal from denial of permission

If the court of first appeal did not permit the final appeal any party may appeal to the Federal Supreme Court to revise this decision and grant leave (§ 544 CCP). For the time being the gravamen of the party who wants to appeal finally must exceed 20.000 € (§ 26 No. 8 EGZPO).²⁸ In family cases this miscellaneous appeal is completely excluded (§ 26 No. 9 EGZPO).

The reasons for allowing the miscellaneous appeal are identic with those for granting the final appeal itself (§ 544 subsec. 2 s. 3 CCP).²⁹

In 2007 the Federal Supreme Court handled 2479 miscellaneous appeals against non-admission. 329 cases, i. e. 18,4 % of such appeals, were successful, resp. had the effect of permitting final appeal. 2150 appeals remained unsuccessful, 1457 of these cases because the Federal Supreme Court denied the alleged reason for granting leave. The rest, 693 appeal proceedings were terminated by withdrawal or by dismissal for procedural reasons. Functionally, this kind of miscellaneous appeal is a substitute for the former final appeal accepted by the Federal Supreme Court.³⁰

The miscellaneous appeal from denial of permission must be filed within one month with Federal Supreme Court and justified by good grounds within two months after the service of the complete judgement. The grounds must correspond with the reasons for permission to final appeal.³¹ Filing this miscellaneous appeal suspends *res judicata*. The Federal Supreme Court examines only whether the reasons presented by the appellant justify a permission for final appeal; it does not consider other reasons even if they might be evident.³²

If the miscellaneous appeal is dismissed (with short reasons) the proceedings are finally terminated.³³ If the miscellaneous appeal is sustained the proceeding before the Federal Supreme Court is continued as a final appeal. The filing of the miscellaneous

²⁷ The complete statistical data are available under http://www.bundesgerichtshof.de/bgh/stat_zivilsenate.

²⁸ Cf. BGHZ 166, 327 = *NJW-RR* 2006, 717; M. GEHRLEIN, Erste Erfahrungen mit der reformierten ZPO – Revision und Beschwerde, *MDR* 2003, 547.

²⁹ Cf. R. GAIER, Die Nichtzulassungsbeschwerde in der Rechtsprechung des BGH, 2. Hannoveraner ZPO-Symposium, 20.9.2003, *NJW-Sonderheft*, S. 18; C. V. GIERKE/ F. SEILER, Die Nichtzulassungsbeschwerde nach § 544 ZPO in der Rechtsprechung des BGH, *JZ* 2003, 403; V. VORWERK, Die Nichtzulassungsbeschwerde im Licht des Gemeinschaftsrechts, *Festschrift für Thode*, München, 2005, p. 645.

³⁰ H. BÜTTNER, *Verh. d. 65. DJT*, München, 2004, Vol. I, A 89, 99.

³¹ J. WENZEL, *NJW* 2002, 3353, 3358.

³² BGH *JZ* 2002, 1116; C. V. GIERKE/ F. SEILER, *JZ* 2003, 403, 405.

³³ Cf. BGHZ 164, 347, 351 = *NJW* 2005, 3724.

appeal is equated with the filing of the final appeal. Within one month after the service of the sustaining court order the final appeal must be justified by good reasons. This special brief is obligatory even if practically all arguments have already been presented within the miscellaneous appeal from denial of permission, but may then be confined to an express reference to the previous pleading (§ 551 subs. 3 s. 2 CCP).³⁴ If the miscellaneous appeal is successful because a court of first appeal has violated the right to be heard the Federal Supreme Court may just quash the judgement of the court of first appeal and remand a new decision by this court (§ 544 subsec. 7 CCP).

3. Leapfrog appeal

The reform of 2001 did not touch the possibility to appeal from a judgement of first instance directly to the Federal Supreme Court (leaving aside the first appeal). This direct review appeal may be filed (1) if the judgement would be subject to a first appeal without leave (i. e. gravamen over 600 €), (2) the opponent has consented, and (3) the Federal Supreme Court itself has permitted the direct appeal. For these reasons direct appeals only happen in rare cases where parties are just interested in the quick settling of legal questions of general importance.

IV. THE SCOPE OF REVIEW BY THE FEDERAL SUPREME COURT

1. Violation of federal law

A) The Reform Act of 2001 did not touch the scope of review by the Federal Supreme Court. Consequently, the Federal Supreme Court examines within the motions of the appellant whether the court of first appeal has applied federal law properly. Law of the European Community and treaties, ratified by Germany are reviewed like federal law. State law and standard contract terms valid, respectively used beyond a single district of a Regional Court of Appeal, are also completely reviewed.³⁵

B) The correct application of foreign law is not reviewed. An incorrect application of German rules of conflict of laws or an insufficient investigation of foreign law is, however, a possible violation of federal law.³⁶

C) The interpretation of individual contracts is only subject to a limited review whether (1) the inferior court has violated legal rules of construction (e. g. §§ 133, 157 Civil Code), (2) the interpretation by the inferior court is based on a false reasoning or is inconsistent with experience of life,³⁷ (3) is inline with the wording and the meaning of established circumstances.³⁸ In addition, the Federal Supreme Court itself does interpret an individual contract if the inferior court has omitted such interpretation but has

³⁴ BGH *NJW* 2008, 588 = *MDR* 2008, 329; cf. H. BÜTTNER, Begründung der Revision vor ihrer Zulassung durch das Revisionsgericht?, *NJW* 2004, 3524.

³⁵ Cf. P. MURRAY/ R. STÜRNER, *German Civil Justice*, Durham NC, 2004, pp. 390 et seq.

³⁶ BGHZ 48, 216 = *NJW* 1967, 2399; ROSENBERG/ SCHWAB/ GOTTWALD, *Zivilprozessrecht*, 16th ed. München, 2004, § 141 marg. note 15 f.

³⁷ Cf. H. GRAVE/ H.-J. MÜHLE, Denkgesetze und Erfahrungssätze als Prüfungsmaßstab im Revisionsverfahren, *MDR* 1975, 274.

³⁸ Cf. B. SCHÄFER, Die Revisibilität der Vertragsauslegung nach der ZPO-Reform, *NJW* 2007, 3463; H. MESSER, Die revisionsrichterliche Nachprüfung der Vertragsauslegung, *Festschrift für Odersky*, Berlin, 1996, p. 605.

established the necessary findings. The same is true for a supplementary contractual interpretation.

D) Procedural acts, judicial decisions, arbitral awards, orders of public authorities and the resp. findings of the inferior court are subject to a complete review.³⁹

E) On the contrary, articles of association and bylaws are subject to factual findings and, consequently, the Federal Supreme Court controls only the correct application of interpretation rules and compliance with experience of life.⁴⁰

2. Breach of procedural rules in second instance

After the reform the final appeal may still be based upon the reprimand that the court of first appeal has violated procedural rules (§ 551 subsec. 3 No. 2b CCP). In such a case the appellant must prove the concrete relevancy of the procedural error for the decision subject to appeal. In addition, the procedural mistake must meet with the general reasons for permitting a final appeal. Practically, a correction may be necessary if the error is symptomatic or if it is necessary to secure a homogeneous case law.

If the appellant claims that the court of first appeal wrongfully rejected the first appeal the final appeal is not longer open, but the appellant may file a miscellaneous appeal of law to correct the error (§ 522 subsec. 1 s. 4 CCP).

V. PROCEDURE ON FINAL APPEAL

1. Procedure after permission by the Lower Court

A) It is true that permission to final appeal is only granted for public interests, but once the permission is granted the procedure on final appeal is executed according to the general rules of an appeal in the interest of the parties. Consequently, the review by the Federal Supreme Court is limited by the motion of the appellant (§ 557 subsec. 1 CCP), thus prohibiting a more severe judgement of appeal, unless the opponent has cross-appealed (§ 554 CCP). The review of the Federal Supreme Court is, however, not restricted to the points reprimanded by the appellant but may take up and correct all possible substantial legal mistakes *ex officio* (§ 557 subsec. 3 s. 1 CCP). If the judgement of the inferior court contains a mistake but flows into a correct conclusion the final appeal is dismissed (§ 561 CCP).

B) If the Federal Supreme Court finds a mistake which would lead to a different conclusion it is regularly impossible to decide finally upon the case due to missing factual findings. Then, the appealed judgement is just set aside and the case remanded to the court of appeal for a new hearing and decision (§ 563 subsec. 1 CCP). In deciding the case anew the court of first appeal is bound to the legal opinion of the Federal Supreme Court (§ 563 subsec. 2 CCP). If the correct findings permit a final judgement or if further findings are impossible the Federal Supreme Court itself renders the final judgement (§ 563 subsec. 3 CCP).

C) If the final appeal was filed or substantiated incorrectly or belated it is dismissed without oral hearing by court order (§ 552 CCP).

D) If the court of first appeal has permitted the final appeal the Federal Supreme Court must decide upon this appeal. The Federal Supreme Court may, however, have a different opinion about the justification of this permission. If it finds in addition that

³⁹ ROSENBERG/ SCHWAB/ GOTTWALD, § 141 marg. note 10.

⁴⁰ ROSENBERG/ SCHWAB/ GOTTWALD, § 141 marg. note 11.

there is no violation of individual rights of the appellant an oral hearing would be rather senseless. To enable the Federal Supreme Court to dispose of such cases efficiently the Law to Modernize Justice of 24 August 2004⁴¹ has authorized the Federal Supreme Court to dismiss such final appeals without oral hearing by unanimous court order after giving the appellant the opportunity to improve his arguments with regard to the ground for the permission of final appeal of for the individual violation of right (§ 552a CCP).

E) All other cases may be decided only after an oral hearing. The final appeal may, however, be withdrawn (after a comment by the reporter) (§ 565 CCP) and even at this stage of the proceedings the claim itself may be withdrawn with the consent of the opponent (§§ 269, 555 CCP).

F) The final appeal cannot be based on new alleged facts (§ 559 subsec. 1 s. 1 CCP); consequently, the Federal Supreme Court is bound to the findings of the inferior court (§ 559 subsec. 2 CCP), unless and insofar the appellant could prove a procedural error (§ 559 subsec. 1 s. 2 CCP).⁴²

Beyond the wording of the law the Federal Supreme Court considers new facts if they are undisputed between the parties and facilitate a final decision.⁴³ Finally, the Supreme Court applies new law if a new statute is to be applied to pending cases.⁴⁴

VI. MISCELLANEOUS APPEAL OF LAW TO THE FEDERAL SUPREME COURT

1. New conception

The Act to Reform Civil Procedure of 2001 introduced not only the general final appeal by leave but also the general miscellaneous appeal of law to the Federal Supreme Court (§ 574 CCP). In the years before so called further miscellaneous appeals against court orders of the district court acting as court of appeal could be filed with the Regional Courts of Appeal only in extraordinary cases. In general there was no possibility to appeal. Even if this further appeal was provided for it was a complaint against the decision of the court of appeal and could only be based on a new violation of law or procedure by the court of appeal (§ 568 subsec. 2 CCP version before 2002).

The new law abolished this construction and introduced the general miscellaneous appeal of law to the Federal Supreme Court against court orders in second instance.⁴⁵ Under the old law a court order of a regional court of appeal was regularly not subject to any further appeal. This situation was changed. Any court order dismissing a first appeal is now subject to the new miscellaneous appeal of law (§ 522 subsec. 1 s. 4 CCP).⁴⁶ In addition, all other court orders of second instance and (special) court orders of the Regional Court of Appeal acting as a first instance, e. g. when deciding upon the exequatur of an arbitral award (§ 1065 CCP), are now subject to the new miscellaneous appeal of law.

⁴¹ *Bundesgesetzblatt*, Part. I, p. 2198.

⁴² Cf. W. BALL, *Der für das Revisionsgericht maßgebliche Tatsachenvortrag der Parteien*, *Festschrift für K. Geiss*, Köln, 2000, p. 3.

⁴³ ROSENBERG/ SCHWAB/ GOTTWALD, § 143 marg. note 13 to 15.

⁴⁴ ROSENBERG/ SCHWAB/ GOTTWALD, § 141 marg. note 56.

⁴⁵ P. MURRAY/ R. STÜRNER, *German Civil Justice*, 2004, p. 403.

⁴⁶ Cf. BGH NZV 2006, 533; BGH NJW 2008, 1670.

The new miscellaneous appeal should broaden the influence of the Federal Supreme Court in establishing a homogeneous law in fields of law where till then appellate remedies ended at the Regional Courts of Appeal. Consequently, the new miscellaneous appeal led to a heavy extra burden of the Federal Supreme Court.⁴⁷ But within just two or three years many important controversies, in particular in the field of costs, enforcement and insolvency,⁴⁸ could be settled. The number of miscellaneous appeal of law is remarkable. In 2003 1.419 of such appeals were filed, 2004 1.340, 2006 1.325 and 2007 1.267. With regard to these figures there is reason to believe that the number shall continue to decline.

The new law distinguishes two types of miscellaneous appeals of law, such being authorized by statute⁴⁹ and those permitted by the court which issued the decision. A permission of this court is binding for the Federal Supreme Court (§ 574 subsec. 3 s. 2 CCP). If the miscellaneous appeal is, however, authorized by law the Federal Supreme Court has the power to control whether the miscellaneous appeal is of fundamental importance or necessary to secure a homogeneous case law.⁵⁰ If this is not the case the Federal Supreme Court dismisses the miscellaneous appeal (§ 574 subsec. 2 CCP). In 2007 there were still 81 cases dismissed for this reason.

2. Procedure on Miscellaneous Appeals

The miscellaneous appeal of law is initiated by filing a notice of appeal with the Federal Supreme Court within a period of one month after service of the court order appealed from. In addition, the appellant must be represented by an advocate admitted to practice before the Federal Supreme Court. If the miscellaneous appeal is filed without a legal justification a brief in support of the appeal must be filed, also within a month of the service of decision appealed from (§ 575 subsec. 2 s. 1 CCP). As the matter regularly is less complex the time-limit is reduced in comparison with the final appeal of law against a judgement. The Federal Supreme Court may, however, grant an extension (§§ 574 subsec. 2 s. 3, 551 subsec. 2 s. 5, 6 CCP) of two months on motion.

If the miscellaneous appeal is admissible the Federal Supreme Court examines all possible legal mistakes ex officio but within the motion of the appellant (§ 577 subsec. 2 s. 1, 2 CCP).

The miscellaneous appeal is dismissed if the Federal Supreme Court finds no error or just an error that did not affect the decision appealed from (§ 577 subsec. 3 CCP). If the court finds a legal error with a causal effect, the miscellaneous appeal is justified. The court vacates the decision appealed from and remands the case to the lower court, as the case may be even to the court of first instance (§ 577 subsec. 4 s. 1 CCP). The lower court is bound to the legal analysis which led to the vacation of decision (§ 577 subsec. 4 s. 4 CCP). As on ordinary final appeal the Federal Supreme Court may decide the matter itself, if no additional findings are necessary or appropriate to reach a final decision (§ 577 subsec. 5 CCP).

⁴⁷ For enforcement and insolvency matters there was even need to establish a new auxiliary civil division in 2003.

⁴⁸ Cf. BGH *NZI* 2008, 391.

⁴⁹ B. KÜNKEL, Die zugelassene Rechtsbeschwerde, *MDR* 2006, 486.

⁵⁰ Cf. BGH *Recht und Schaden (r+s)* 2003, 86.

The Federal Supreme Court decides upon the miscellaneous appeal by court order, regularly without an oral hearing (§ 128 subsec. 4 CCP). So far the Federal Supreme Court cannot ascertain procedural errors claimed by the appellant it must not give reasons. Even in all other cases the Federal Supreme Court may refrain from giving reasons if they would not improve the grounds for permitting the miscellaneous appeal of law (§ 577 subsec. 6 CCP).

VII. CONSTITUTIONAL APPEALS AGAINST DECISION OF FEDERAL SUPREME COURT

1. The constitutional appeal

According to Article 94 sec. 1 no. 4a German Basic Law any final court decision in a civil case may be appealed to the Federal Supreme Court claiming that the decision is violating fundamental rights of the appellant guaranteed by the Basic Law, i. e. the German Constitution.

Such constitutional appeal may be lodged even against judgements or court orders of the Federal Supreme Court as there is no further procedural remedy.⁵¹

2. The new formal remonstrance of violations of the right to be heard

Most frequently, the appellant invoked that the court did violate his right to be heard under Article 103 sec. 1 Basic Law. To ease the case load of the Federal Constitutional Court in this respect the German legislator enacted in 2001 a new § 321a CCP providing a right to remonstrate to the court which rendered the decision to correct the violation of the right to be heard itself.⁵² This remonstrance must be lodged within two weeks after having knowledge of the decision and the violation of the right to be heard (§ 321a subsec. 2 CCP).

If the court finds that there was a violation of the right to be heard, the case is reopened, heard anew and redecided like upon a demurrer against a default judgement (§ 321a subsec. 5 CCP). If the court cannot find such a violation the remonstrance is dismissed (§ 321a subsec. 4 s. 3, 4 CCP).

Only then the litigant may lodge the constitutional appeal with the Federal Constitutional Court.⁵³

3. The remaining importance of the constitutional appeal

In German practice the constitutional appeal still is of high importance since it gives the Constitutional Court the opportunity to correct the standards of access of justice developed by the Federal Supreme Court. In this respect the constitutional appeal is indeed a device in favour of the citizens. Judges of the Federal Supreme Court are career judges and therefore adhere more to traditions than the judges of the Federal

⁵¹ Cf. P. MURRAY/ R. STÜRNER, *German Civil Justice*, pp. 408 et seq.; ROSENBERG/SCHWAB/GOTTWALD, § 17 marg. note 13 to 27.

⁵² Cf. M. BLOCHING/ A. KETTINGER, Das Anhörungsrügensgesetz in der zivilprozessualen Praxis, *JR* 2005, 441; A. KETTINGER, Die Statthaftigkeit der Anhörungsrüge (§ 321a ZPO), *JURA* 2007, 161; M. VOLLKOMMER, Erste praktische Erfahrungen mit der neuen Gehörsrüge gemäß § 321a ZPO, *Festschrift für Musielak*, München, 2004, p. 619.

⁵³ Cf. M. DESENS, Die subsidiäre Verfassungsbeschwerde und ihr Verhältnis zu fachgerichtlichen Anhörungsrügen, *NJW* 2006, 1243.

Constitutional Court who are appointed from all legal professions and after a political selection.

VIII. EXTRAORDINARY MISCELLANEOUS APPEALS?

Previous to the reform of 2001 German courts had developed so-called extraordinary miscellaneous appeal against evident violations of law if the court decision appealed from was by law not subject to any appeal. This kind of appeal was justified by the need to correct gross injustice.

As the reform of 2001 established a general miscellaneous appeal against court orders, a general miscellaneous appeal of law against the decision of the court of first appeal and in addition the remonstrance in case of a violation of the right to be heard nearly all courts hold now that there is no longer any extraordinary miscellaneous appeal not provided for in the Code of Civil Procedure.⁵⁴

If the court has the power to change its decision a litigant may, however, still remonstrate with the deciding court and request it to review its decision. In the meantime many courts are, however, only willing to accept such a remonstrance if it is lodged in the same way and within the same time-limit as the remonstrance of a violation of the right to be heard.⁵⁵

IX. FINAL EVALUATION

The new law of appellate proceedings before the Federal Supreme Court broke with the old tradition that litigants of high pecuniary value could always submit their case to the Federal Supreme Court. There is, therefore, no doubt that many people mourn the old law. Yet, the new law meets the principle of equality of access to justice better than the old one.⁵⁶ This is not only true for the final appeal against judgements of second instance. This final appeal is now open even against judgements of district courts acting as appellate instance and this possibility is used quite often. Furthermore, the access to the Federal Supreme Court is considerably improved by the new miscellaneous appeal of law against all kind of court orders rendered by the courts of appeal. As a result the Federal Supreme Court can provide for an unanimous interpretation of statutes and for the corresponding case law in nearly all branches of civil law.

Acting to secure an unanimous case law the Federal Supreme Court may practically revise any earnest legal mistake of the previous instance. To reach this goal

⁵⁴ Cf. BGHZ 150, 133 = *NJW* 2002, 1577; BGH *FamRZ* 2003, 1550; V. LIPP, Beschwerden wegen „greifbarer Gesetzeswidrigkeit“ nach der ZPO-Reform, *NJW* 2002, 1700; crit. E. SCHNEIDER, Gehörsrüge des § 321a ZPO – Anhörungsrüge, Ausnahmeberufung, Ausnahmebeschwerde, Willkürverbot, *MDR* 2006, 969, 974 f; M. VOLLKOMMER, Beschwerden wegen „greifbarer Gesetzeswidrigkeit“ nach neuem Recht, *NJW-Sonderheft BayObLG Abschied zum Ende eines Gerichts*, 2005, p. 64.

⁵⁵ Cf. ROSENBERG/ SCHWAB/ GOTTWALD, *Zivilprozessrecht*, § 145 marg. Note 12.

⁵⁶ P. GOTTWALD, Die Reform der ZPO aus der Sicht der Wissenschaft, *Verh. d. 65. DJT*, München, 2004, Vol. I, A 107, 126.

the Federal Supreme Court may presume that such a mistake would be imitated and threaten legal uniformity.⁵⁷

The first investigation on the real effects of this law reform of 2004 already showed that the position of the Federal Supreme Court as court of final appeal was strengthened.⁵⁸ When the new law became effective the Federal Supreme Court could promptly decide a lot of legal questions which were disputed between the Regional Courts of Appeal for a long time. By this way the Federal Supreme Court could establish legal certainty in branches of law, which fell outside of its competence till then, like the law of private tenancy contracts, parts of the law of enforcement and of insolvency law. Since important decisions has been rendered in these areas the number of appeals and miscellaneous appeals and consequently the workload of the civil divisions is decreasing (the Federal Supreme Court itself suspects that its a workload will stabilize on the level of 2007).

Contrary to some conservative critics⁵⁹ the new law has not only strengthened the position of the Federal Supreme Court, but has also improved the individual legal protection. This conclusion derives from the fact that in Germany legal uniformity is not a mere abstract goal when the Federal Supreme Court would only decide upon a few highly political or structurally important cases. On the contrary, the civil divisions of the Federal Supreme Court comprise about 100 judges delivering each year between 4.000 to 5.000 decisions, thus providing for a very close-meshed net of (uniform) case law and of effective legal protection.

⁵⁷ Cf. H.-J. MUSIELAK, *Der Zugang zur Revisionsinstanz im Zivilprozess, Festschrift für Walter Gerhardt*, Köln, 2004, S. 653, 680.

⁵⁸ Cf. CHRISTOPH HOMMERICH/ HANNS PRÜTTING/ THOMAS EBERS/ SONJA LANG/ LUDGER TRAUT, *Rechtstatsächliche Untersuchung zu den Auswirkungen der Form des Zivilprozessrechts auf die gerichtliche Praxis*, Köln, 2006, pp. 267 et. seq., 283.

⁵⁹ Cf. H. RAESCHKE-KESSLER, *Die Rechtsmittelreform im Zivilprozess von 2001 – ein Fortschritt?*, *Anwaltsblatt* 2004, 321, 325 ff.