

## The Effect of the Hague Convention on Service of US Actions in Germany

This article has been broken up and published in three separate parts: (1) The Effect of the Hague Convention on Service of US Actions in Germany, (2) The Effect of the Transatlantic Legal Conflict On Serving Parties in Germany, and (3) A Review of Recognition and Enforcement of US Rulings in Germany.

### Introduction

Compared to the German system of service of judicial documents, US law seems rather liberal. In the US, once a lawsuit has been initiated, it is the initiating party which takes care of service on the defendant. The usual US practice is to hire a process server who delivers a complaint and summons to the business address or domicile of the defendant. Even in cross border-cases, e.g. if the defendant is not a US entity and/or has no direct address in the US, under very special circumstances service can still be effected within the US - for instance on a foreign defendant's US subsidiary<sup>1</sup> if the daughter corporation is a mere instrumentality or *alter ego* of the foreign defendant or, vice versa, on a foreign defendant's US parent entity.<sup>2</sup> In case of "tag" or "gotcha jurisdiction" the mere physical presence of a defendant or defendant's representative is sufficient not only to effect service but also to assume jurisdiction.<sup>3</sup>

However, service becomes more formal once the defendant has no address or representative in the US. In such cases, service requires support of the authorities of the foreign country where the defendant is domiciled or at least has a business address. Such support to effect service abroad is governed by the rules and procedures of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965 (the "Hague Convention - HC") to which the Federal Rules of Civil Procedure refer.<sup>4</sup> However, in light of substantial differences in the system of civil litigation in the US and in Germany, such service abroad in Germany can become a highly problematic issue.

### The Hague Convention

In the US, the Hague Convention came into force on February 2, 1969 and in Germany ten years later on June 26, 1979.<sup>5</sup> According to Art. 1 para. 1 HC, the Hague Convention is applicable "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad". Such documents need to be sent to a Central Authority which each Contracting State has to designate. For service abroad in the US, such authority is the US Department of Justice. For service abroad in Germany, each of the German states has appointed its own authority. In some states like Bavaria, North Rhine-Westphalia or Saxony, a specific court was appointed. In other states like Lower

<sup>1</sup> *Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

<sup>2</sup> Accepted in *John Scott, Inc. v. Manford, Inc.*, S. D. Fla. 1987; not accepted in *Lewis v. Vollmer of Am.*, W. D. Pa. October 25, 2006.

<sup>3</sup> *Burnham v. Superior Court of California*, 495 U.S. 604, 608 et seq. (1990).

<sup>4</sup> F.R.C.P. 4(f)(1).

<sup>5</sup> Schack, *Ein unnötiger transatlantischer Justizkonflikt: die internationale Zustellung und das Bundesverfassungsgericht*, AG (2006), 823-832 (827 n.34); see also [http://www.hcch.net/index\\_en.php?act=conventions.statusprint&cid=17](http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=17) for all Contracting States of the Hague Convention.

Saxony, Brandenburg, Rhineland-Palatinate and the State of Hesse, the individual states' Ministry of Justice was appointed.<sup>6</sup> As a consequence, the first thing a US plaintiff initiating a lawsuit against a German entity or individual has to do is to identify the defendant's proper German address to locate which state and authority is in charge to effect service abroad.

Once the plaintiff has delivered all documents to the competent authority, that authority forwards the request to the *Amtsgericht* (Local Court) where the recipient of service is located.<sup>7</sup>

Whilst Art. 3 para. 1 HC states that the request for service abroad shall be forwarded by the "authority or judicial officer competent under the law of the State in which the documents originate," Germany has accepted that a service request can be filed by a US attorney, which in practice means the US counsel representing the plaintiff in the US court action. The use of a local German counsel to physically forward the request to and to further correspond with the German authority is helpful but not necessary.

The documents the applicant has to file with the respective German authority are of course the original of the document to be served, the service request and a duplicate of each.<sup>8</sup> The German authorities also require a German translation of every document which shall be served<sup>9</sup> - irrespective of the nationality, native language or language skills of the recipient. If the translation is incomplete or appears improper, the service request can be rejected.

Once service has been effected, the applicant is granted a service certificate stating the method (bailiff, postal mail etc.), the place and the date of service and the person to whom the document was actually delivered.<sup>10</sup>

Beyond the procedure as set out above, it is not possible to effect any service abroad in Germany within the scope of the Hague Convention.<sup>11</sup> Germany has explicitly declared that it is opposed to direct service through diplomatic or consular agents<sup>12</sup> and has also objected to the sending of judicial documents abroad by postal channels or to effecting service directly through judicial officers etc. by demand of judicial officers of the state of origin or any other interested person.<sup>13</sup>

In practice and average the Hague Convention works well between Germany and the US. On an annual basis approximately 2,000 applications for service abroad in the US and approximately 1,000 applications

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<sup>6</sup> See complete list at [http://www.hcch.net/upload/auth14\\_de.pdf](http://www.hcch.net/upload/auth14_de.pdf).

<sup>7</sup> § 4 para. 2 *Gesetz zur Ausführung des Haager Übereinkommens vom 15. November 1965 (AVHZÜ - German Law Executing the Hague Convention of November 15, 1965)*.

<sup>8</sup> Art. 3 para. 2 HC.

<sup>9</sup> Art. 5 para. 3 HC; see Jayme/Hausmann, *Internationales Privat- und Verfahrensrecht*, 14th ed. (2009), *Haager Übereinkommen über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke im Ausland in Zivil- oder Handelssachen - HZÜ*, Art. 5 HZÜ n.6.

<sup>10</sup> Art. 6 para. 1 and 2 HC.

<sup>11</sup> The only exception is service on a member of the state of origin; in this case, service through diplomatic or consular agents is permitted, § 6, 1st sentence AVHZÜ.

<sup>12</sup> Art. 8 para. 2 HC; see Jayme/Hausmann (n.9, above), Art. 8 HZÜ n.7; exception see n.11, above.

<sup>13</sup> Art. 10 HC; see Jayme/Hausmann (n.9, above), Art. 10 HZÜ n.8.

for service abroad in Germany are handled by the respective authorities.<sup>14</sup> However, it seems that the vast majority of unproblematic service abroad in Germany concerns rather “non-political” matters such as commercial disputes related to the delivery of goods and services, bilateral investments, probate proceedings and inheritance recovery actions, and actions for maintenance raised by spouses or (legitimate or illegitimate) children.<sup>15</sup>

*About the Author: Dr. Klaus Eyber is a Partner in the Frankfurt office. His practice is focused on mergers and acquisitions, corporate and commercial law, as well as litigation, arbitration and various types of dispute resolution. Klaus has handled IPOs and mergers and acquisitions for major international corporations. On the litigation side, Klaus is particularly experienced in damage compensation and forensic services, and concentrates in advising entities that have suffered substantial damage caused by fraud, tort, negligence, mismanagement or breach of contract. Klaus has been ranked in Chambers Europe: Europe’s Leading Lawyers for Business during five consecutive years. He is also ranked in Chambers Global: The World’s Leading Lawyers for Business (2012) same as Kaye Scholer’s entire German Litigation Team. For more, visit our [website](#).*

**Chicago**  
+1.312.583.2300

**Los Angeles**  
+1.310.788.1000

**Shanghai**  
+86.21.2208.3600

**Frankfurt**  
+49.69.25494.0

**New York**  
+1.212.836.8000

**Washington, DC**  
+1.202.682.3500

**London**  
+44.20.7105.0500

**Palo Alto**  
+1.650.319.4500

**West Palm Beach**  
+1.561.802.3230

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<sup>14</sup> See detailed schedule for the years 1999 to 2004 at Schwung, *Transatlantische Justizkonflikte aus Unternehmenssicht*, AG (2006), 818-823 (822) with further reference.

<sup>15</sup> Hess, *Aktuelle Brennpunkte des transatlantischen Justizkonflikts*, AG (2005), 897-906 (898); Hess, *Transatlantische Justizkonflikte*, AG (2006), 809-818 (809).