# The Effect of the Transatlantic Legal Conflict on Serving Parties 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[1] 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.[2] 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.[3]

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.[4] 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.

## Transatlantic Legal Conflicts

There are concepts, procedures and rules in US litigation which are not only completely unknown to German litigation but clearly contradict or oppose established structures and principles of German law. Most of these concepts have their source in the US rules of proceedings rather than in the substantive US civil, commercial or tort law. The clash of the different legal cultures is best highlighted by the topics pre-trial discovery, jury trial, American rule of costs and contingency fees, punitive damages, treble damages and class actions. Except of class actions (until most recently), all of these have nothing comparable in German law and - moreover - are as far away from basic legal principles in Germany as the Earth is from the moon. This is why since the 70s and 80s of the last century every once in a while a legal conflict showed up which was later named the "transatlantic legal conflict" since not only Germany but also other

1 *Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

2 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.

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

4 F.R.C.P. 4(f)(1).

European countries[5] had difficulties coping with US litigation once its impact was located outside the United States. Such conflict calmed down during the last years but still left open issues which are closely related to the future development of US law especially with respect to class actions and punitive/treble damages.

## No Recognition of Punitive Damages

The first landmark was reached in 1992 when the IXth senate of the *Bundesgerichtshof* (*BGH* - Federal Supreme Court) ruled that a judgment by the Superior Court of the State of California in and for the County of San Joaquin could not be recognized to the extent that plaintiff and applicant was awarded punitive damages which - in this case - exceeded more than twice the awarded damages under the US judgment including damages for anxiety, pain, suffering and general damages of that nature.[6] Although the *BGH* correctly assumed that punitive damages are not a criminal charge but are rooted in US civil law, it denied recognition and enforcement of the US judgment insofar due to a violation of the German *ordre public* as governed in §§ 723 para. 2, 2nd sentence, 328 para. 1 no. 4 of the German *Zivilprozessordnung* (*ZPO* - German Code of Civil Procedure). The idea of punitive damages lies in punishment and deterrence in the interest of the public and such concept contradicts the German model of civil compensation. The case which led to the US judgment was certainly not a commercial dispute but the ruling that there is no recognition of punitive damages in Germany - and as a consequence neither of treble damages - remained.

## Consequences on Service Abroad in Germany

The principle of *ordre public* is also known to the Hague Convention. According to Art. 13 para. 1 HC, a state may refuse to comply with a request for service if it deems that compliance would infringe its sovereignty or security. As a consequence, the argument was used that a lawsuit aiming at a judgment which could not be recognized and enforced in Germany could also not be served on defendants in Germany. In the first move, such argument failed. In 1994, the German *Bundesverfassungsgericht* (*BVerfG* - Federal Constitutional Court) which is the highest court in Germany ruled that there is no violation of the German constitution if a US lawsuit aiming at punitive and exemplary damages is served on a German company under the Hague Convention.[7]

Said ruling of the *BVerfG* established and confirmed the practice of serving class actions in Germany[8], lawsuits aimed at punitive damages[9] and even RICO-claims with treble damages.[10] In all cases, the basic

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5 With respect to France, *see Kriegk*, *Gazette du Palais* of April 5, 2005, p. 844; conflicts with Switzerland, Japan and China are mentioned at *Hess*, AG (2006), 809 n.2, n.9 (n.15, above).

6 *BGH* of June 6, 1992, file-no. IX ZR 149/91, BGHZ 118, 312-351 = WM 1992, 1451-1465 = ZIP 1992, 1256-1271 = NJW 1992, 3096-3106 = MDR 1992, 1181-1184.

7 *BVerfG* of December 7, 1994, file-no. 1 BvR 1279/94, BVerfGE 91, 335-345 = ZIP 1995, 70-73 = WM 1995, 216-219 = NJW 1995, 649-651. Interestingly, *BVerfG* had ceased the service of the lawsuit before by a preliminary order of August 3, 1994, BVerGE 91, 140-146 = ZIP 1994, 1353-1355 = NJW 1994, 3281, which was then overruled. The final decision of the *BVerfG* was partly criticized since U.S. rules allow other procedures of service abroad beyond the Hague Convention - such as ordinary service by mail. It was therefore questioned why service under the Hague Convention needed protection under the German constitution; see *Heidenberger*, *Zustellung amerikanischer Punitive-damages-Klagen weiterhin ein Problem*, RIW (1995), 705-708.

8 *Oberlandesgericht* (*OLG* - Higher District Court) *Frankfurt am Main* of March 21, 1991, file-no. 20 VA 2/91, RIW 1991, 417-419.

argument was that service as such did not limit or restrict the (German) defendants' position or rights. By effecting service, the defendant merely becomes aware of the foreign lawsuit, is fully informed about it and has the best position to exercise his rights and remedies in the foreign litigation. If the defendant fails with respect to punitive damages etc., he is protected under the earlier *BGH*-ruling according to which no recognition will be granted. This was considered sufficient to protect the national defendants in a US or foreign lawsuit.[11]

### The Bertelsmann/Napster Case etc.

The discussion - and the transatlantic legal conflict - came back to life in the years 2003 and 2005.

By granting injunctive relief, the *BVerfG* stopped service of a US class action against the German multimedia-enterprise *Bertelsmann AG* at *Bertelsmann's* German headquarters located in *Guetersloh*. In 2002, *Bertelsmann* had granted several loans to and placed a "strategic investment" in the file sharing network *Napster*, which was later accused of several copyright infringements especially by music producers. This resulted in a class action against *Bertelsmann* alleging that *Bertelsmann's* "strategic investment" was an illegal act of assistance to *Napster*. The claim sought damages in the amount of $ 17 billion simply by adding the individual damages for each illegal download. *Bertelsmann* argued that such amount was more than ten times the entire turnover of the US music industry, obviously exceeded *Bertelsmann's* equity and was a clear and present threat to *Bertelsmann's* existence as such. *Bertelsmann* unsuccessfully objected against the decision of the *OLG Duesseldorf* as the competent authority to order the *Amtsgericht* (Local Court) *Guetersloh* to serve the lawsuit and therefore *Bertelsmann* had no other option but to address the *BVerfG* - the German Federal Constitutional Court - with a constitutional complaint[12].

Indeed, the *BVerfG* followed *Bertelsmann's* arguments andset aside the service for an initial period of six months.[13] However, the violation of *Bertelsmann's* constitutional rights was not grounded on the nature of the US lawsuit as a class action. It was, rather, assumed that the US action was used to threaten *Bertelsmann* and to force it to enter into a settlement agreement it would normally refuse. If there was such "abuse" of legal opportunities, the German constitution prohibits any cooperation. Furthermore, the *BVerfG* pointed out that the mere service of the lawsuit as such could already trigger disadvantages to *Bertelsmann* simply by being involved in the US litigation. Even if a recognition of the US judgment would be denied later on in Germany, such ruling would only protect *Bertelsmann's* property located in Germany but of course not its property located in the US.

It is obvious that such ruling was clearly dissenting to *BVerfG's* earlier decision in 1994.[14] For German litigation scenarios the *Bertelsmann/Napster* case was certainly something spectacular - and something

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9 *BVerfG* of December 7, 1994, (n.18, above); *OLG Duesseldorf* of February 19, 1992, file-no. 3 VA 1/91, NJW 1992, 3110.

10 *OLG Celle* of June 14, 1996, file-no. 16 VA 2/96 (*Lopez*-case; not published).

11 *Hess*, AG (2005), 902 (n.15, above).

12 In Germany, any individual or entity alleging a violation of constitutional rights may only address the *BVerfG* if there are no other competent courts, no further appeals and no other remedies; see § 90 para. 2 *Gesetz über das Bundesverfassungsgericht* (*BVerfGG* - Law on the Federal Constitutional Court).

13 *BVerfG* of July 25, 2003, file-no. 2 BvR 1198/03, BVerfGE 108, 238-250 = WM 2003, 1583-1587 = ZIP 2003, 1625-1628 = NJW 2003, 2598-2600 = RIW 2003, 874-877.

14 *BVerfG* of December 7, 1994 (n.18, above).

strange. However, it marked the point that German courts and German law are not so much concerned about the unique principles of US litigation as set out above but rather whether these concepts - and the individual US litigation as such - are indeed used "in good faith." It is therefore no surprise that the *BVerfG's* ruling in the *Bertelsmann/Napster* case had its followers[15] but was also heavily criticized.[16]

In 2005, the *OLG Koblenz* stopped service of another US class action against - among others - the German defendant *Boehringer Ingelheim* and referred the case to the *BGH* for further clarification according to § 29 para. 2 of the German *Einführungsgesetz zum Gerichtsverfassungsgesetz* (*EGGVG* - Introductory Code to the Law on the Judiciary Structure).[17] The case was again quite unusual. *Boehringer Ingelheim* is a big pharma enterprise in Germany and of course also distributes its products in the US. In the US, there is no price regulation for pharmaceutical products on the one hand while on the other hand, the US prohibits a re-import of pharmaceutical products. One of the plaintiffs in the US class action was a company which organized bus tours from the US to Canada to enable its customers to purchase pharmaceutical products in Canada at much lower prices than in the US. The plaintiff's argument was that the defendants - the pharmaceutical enterprises - exercised an influence on the US government to stop such local frontier traffic and were planning to limit their exports to Canada to the extent the pharmaceutical products were necessary to satisfy the needs of the Canadian market only. Therefore, the plaintiffs assumed a "conspiracy" and based their class action on a violation of the Sherman Antitrust Act[18] in connection with the Clayton Act[19] and were seeking treble damages.

The *OLG Koblenz* examined several previous decisions by German courts granting service abroad of US actions in Germany and came to the conclusion that it would not accept service in this case. In its well-grounded and rather voluminous merits, the *OLG Koblenz* explained its first concern that it was highly questionable whether a violation of antitrust law triggering class action claims of an indefinite number of claimants should be considered as a "civil or commercial matter" within the meaning of Art. 1 para. 1 HC. The court's second concern was the well-known aspect of *ordre public* according to Art. 13 para. 1 HC if the US action appears as an abuse of the law to force the German defendant to agree to a settlement simply by avoiding the time and costs of US litigation and thus getting rid of the threat of an outrageous damage compensation.[20]

It is not much of a miracle that the discussion of how to handle service of US actions in Germany started again. Unfortunately neither the *BVerfG* had to render a final decision in the *Bertelsmann/Napster* case nor did the *BGH* decide on the *Boehringer Ingelheim* case.

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15 *See for instance*, *Schwung*, AG (2006), 819 (n.14, above); *Hess*, AG (2005), 902 n.70 with further reference (n.15, above).

16 *Schack*, AG (2006), 823-832 (n.5, above).

17 The referral of the case to the *BGH* was necessary and justified since the decision of the *OLG Koblenz* to refuse service of the U.S. action would have been final and unappealable, § 29 para.1, 1st sentence *EGGVG*. That law was later abolished with effect as of September 1, 2009. Under the present law, the decision of any *OLG* can be appealed to the *BGH*.

18 15 U.S.C. §§ 1-7.

19 15 U.S.C. §§ 12-27.

20 *OLG Koblenz* of June 27, 2005, file-no. 12 VA 2/04, IPRax 2006, 25-38 = IPRspr. 2005, no. 144, 367-390.

The *Bertelsmann/Napster* case, to begin with, ended because the US action was served on a board member of *Bertelsmann* during his stay in New York - which was sufficient according to US rules.[21] As a consequence, the US litigation went on irrespective of any service procedure abroad in Germany and this is why *Bertelsmann* - after some extensions of the *BVerfG's* injunctive relief for six months each - finally withdraw its constitutional complaint.[22]

The case which was prepared so ambitiously by the *OLG Koblenz* had the same fortune. The US action was served otherwise in accordance with US rules and the US litigation went on. Therefore, the parties in the German litigation declared the case as finished and no court decision was required.[23]

However, the way both cases ended demonstrated that service of US actions on foreign defendants does not exclusively depend on the Hague Convention. Indeed, US rules allow service to be effected "by other means not prohibited by international agreement as may be directed by the court."[24] As a consequence, German defendants had to learn that they could not stop any US litigation against them even if they were able to argue that service abroad in Germany falls under the *ordre public* according to Art. 13 para. 1 HC.[25]

## Further Developments

Although the injunction of the *BVerfG* in 2003[26] and the merits of the decision of the *OLG Koblenz* in 2005[27] left open issues, other courts did not change their practice to grant service abroad in Germany of US actions under the Hague Convention. Even if the US action aimed at punitive damages, treble damages or had the shape and nature of a class action, it was qualified as a "civil or commercial matter" and the Hague Convention applied.[28] All court decisions were aware especially of the decision of the

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21 F.R.C.P. 4(h)(1), (e)(1).

22 *Schack*, AG (2006), 827 (n.5, above); *von Hein*, *BVerfG gestattet Zustellung einer US-amerikanischen Klage auf Punitive Damages*, RIW (2007), 249-255 (250); *Brand*, *US-Sammelklagen und kollektiver Rechtsschutz in der EU*, NJW (2012), 1116-1121 (1117).

23 *Brand*, NJW (2012), 1117 (n.33, above).

24 F.R.C.P. 4(f)(3). This also plays a role with respect to taking of evidence, especially the conduct of pre-trial discovery outside the US While in general, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 should govern this issue, the US Supreme Court ruled in 1987 that said Convention does not exclude the direct application of F.R.C.P. 26 et. seq.; *see Societe Nationale Industrielle Aerospatiale et al v. US District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). Indeed, for US courts the proper conduct of discovery is more relevant than any conflict with foreign laws; *see Quack v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F. 3d 11 (1st Cir. 2004); *Hess*, AG 2006, 903; *Brand*, NJW 2012, 1119 with further reference.

25 *Schack*, AG (2006), 828 (n.5, above).

26 *BVerfG* of July 25, 2003 (n.24, above).

27 *OLG Koblenz* of June 27, 2005 (n.31, above).

28 *OLG Frankfurt am Main* of March 6, 2006, file-no. 20 VA 2/05, OLGR Frankfurt 2006, 972 (service of a class action aiming at punitive damages before the Superior Court of Justice of Ontario, Canada); *OLG Frankfurt am Main* of March 15, 2006, file-no. 20 VA 7/05 (not published) (service of a class action aiming at treble damages before the US District Court for the District of New Jersey); *OLG Duesseldorf* of April 21, 2006, file-no. I-3 VA 12/05, RIW 2006, 629-633 = NJW-RR 2007, 640-642 (US action aiming at punitve damages); *OLG Munich* of June 7, 2006, file-no. 9 VA 3/04, OLGR Muenchen 2006, 801-803 (US

(continued...)

*OLG Koblenz* but denied that their cases had to be referred to the *BGH* for final clearance - either because the respective court (unlike *OLG Koblenz*) did not intend to differ from the previous rulings of other courts[29] or the respective court did not see an obvious abuse of rights or blackmail-scenario[30] or it assumed that the case decided by the *OLG Koblenz* was much different to the case at hand.[31]

Such case law was confirmed with respect to its accordance with the German constitution after the *BVerfG* decided not to accept several constitutional complaints against service of US lawsuits since it assumed that there was obviously no violation of constitutional rights. In its first decision of 2007, an individual brought a lawsuit against the subsidiary of a German company in a Puerto Rico-court alleging that he was ignored for a higher management position due to discrimination of age; the claim was aiming at punitive damages in the amount of $ 11,114,500.00. The plaintiff did not only sue the Puerto Rico-entity which was the plaintiff's employer but also the German parent company and its subsidiaries in the US and in Mexico. After service was effected by the German authorities and an objection to the *OLG Frankfurt am Main* failed, the German defendant filed a constitutional complaint which was also unsuccessful. The *BVerfG* did not see an impact on the defendant's constitutional rights. Although the concepts of pre-trial discovery, American rule of costs and punitive damages are not known in German law, the disadvantages resulting thereof do not infringe basic and constitutional principles in German law.[32] In two further decisions of 2007 and 2008, such ruling was extended to US class actions in antitrust cases.[33] The risk resulting thereof including the risk of denial of any cost compensation for legal counsel which can be significant in the US should be acceptable for any individual or entity doing cross-border business in the US[34]

## Conclusions

In the end, German defendants, German authorities, German courts - and the German public - had to learn that US actions aiming at punitive or even treble damages and especially US class actions are subject to service abroad in Germany under the Hague Convention. However, this does not mean that a German defendant should simply accept service and beyond that remain silent in Germany independent from organizing its defense in the US lawsuit.

After all, the most problematic and "political" cases remain if (i) the US action must be understood as a blackmail-initiative to force defendant to a settlement which indeed could be qualified as an abuse of

class action aiming at treble damages); *OLG Celle* of July 20, 2006, file-no. 16 VA 4/05, IPRspr. 2006, no. 170, 382-387 = OLGR Celle 2006, 686-689 = NdsRpfl 2006, 275-277 (class action aiming at treble damages before the Superior Court of San Francisco).

29 *OLG Celle* of July 20, 2006 (n.39, above).

30 *OLG Duesseldorf* of April 21, 2006; *OLG Munich* of June 7, 2006 (n.39, above).

31 *OLG Frankfurt am Main* of March 6, 2006 and of March 15, 2006 (n.39, above).

32 *BVerfG* of January 24, 2007, file-no. 2 BvR 1133/04, WM 2007, 374-376 = RIW 2007, 211-213 = IPRspr. 2007, no. 186, 517-519.

33 *BVerfG* of June 14, 2007, file-no. 2 BvR 2247/06, 2 BvR 2248/06 and 2 BvR 2249/06, WM 2007, 1392-1395 = NJW 2007, 3709-3711 = IPRspr. 2007, no. 189, 527-532; *BVerfG* of September 4, 2008, file-no. 2 BvR 1739/06 and 2 BvR 1811/06, WM 2008, 2033-2035 = IPRspr. 2008, no. 167, 537-540.

34 *BVerfG* of January 24, 2007 (n.43, above).

rights[35] and (ii) from the first assessment of the case it is indeed questionable why such case was brought to an US court since the case shows little or no relation to the US at all.[36] Apparently, both scenarios can apply cumulatively. While the first scenario is rather a question of the merits of the case, the second touches upon the sensitive question of US jurisdiction. In both cases, the general recommendation is to challenge service abroad in Germany, thus opening another legal battlefield. This makes sense for two reasons: Firstly, it is a clear signal to the plaintiff(s) that the defendant will use any defense and any remedy at hand.[37] When doing so, the plaintiff often has to hire outside - German - counsel and has to face the fact that things will not go forward as quickly as expected and will be more costly than expected.[38] Especially in certain class action-cases such strategy can be sensible.

The second reason is to collect a German court's opinion on the case even if it will finally grant service abroad. When deciding on service, the German court quite often has to examine the same issues - yet, at a very preliminary level - which will also play a role in the original US litigation. It is not that unusual that the merits of the German court's decision are considered by the US court when examining US jurisdiction. Clearly, the assumption of US jurisdiction is a matter of US law. But in many fields the individual US judge has a large discretion[39] and there are also legal concepts such as the *forum non conveniens*-doctrine which give room to challenge jurisdiction in a way that plaintiff(s) might not have

35 For instance, *In re Deutsche Telekom AG Securities Litigation*, 229 F. Supp. 2d 277 (S.D.N.Y. 2002) ended with a $ 90 mio. settlement while a similar action brought by 17,000 investors against defendant *Telekom* in Germany remained without any success. *Telekom* explained that the case in the US was „totally different".

36 *Ungaro-Benages v. Dresdner Bank AG*, 379 F. 3d 1227 (11th Cir. 2004); *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Shawne Fielding v. Hubert Burda Media*, 2005 USA., LEXIS 13111, January 30, 2005; *In re Ski Train Fire in Kaprun, Austria, on November 11, 2000*, 198 F. Supp. 2d 420 (S.D.N.Y. 2003); *Baumann v. DaimlerChrysler*, 2005 WL 315 7472 (N.D. Cal.).

37 *Hess*, AG (2005), 901 (n.15, above).

38 Under the "German rule of costs" the party winning a lawsuit has a cost compensation claim against the losing party. However, the compensation of attorney's fees is limited to the fees as calculated according to the German *Rechtsanwaltsvergütungsgesetz* (*RVG* - Statutory Fee Schedule for Attorneys) which is a law. The fees according to *RVG* depend on the amount in litigation and in disputes about foreign service such amount does not equal the amount the original litigation is about. Furthermore, if a service is challenged at the *BVerfG*, the opponent in such proceedings is not the foreign plaintiff but the state of Germany. So, if the motion to *BVerfG* is not successful, the cost compensation is with the state of Germany. There still might be a cost compensation claim with the foreign plaintiff if he joins the proceedings at the *BVerfG* but such compensation can be quite moderate. As a result, the additional legal fees resulting from a German action can be threatening especially to frivolous actions brought by a self-financing plaintiff or plaintiff's counsel.

39 *Hess*, AG (2005), 900 n.47 (n.15, above).

foreseen.[40] Here, the merits of the ruling of a foreign court being involved at an early state of the US litigation might be helpful.[41]

[40] However, when applying the forum non conveniens-doctrine, US courts tend to compare the different procedural systems rather than questioning whether the US is the proper forum to find out whether the „remedy provided by the alternative [country] is so clearly inadequate or unsatisfactory that it is no remedy at all"; see ***In re Automotive Refinishing Paint Antitrust Litigation***, 358 F. 3d 288, 301 (3rd Cir. 2004); ***In re Train Fire in Kaprun, Austria***, 230 F. Supp. 2d 392, 403 (S.D.N.Y. 2002); ***Buettner, et al. v. Bertelsmann AG, Bertelsmann Inc. et al.***, No. 0103825 (Sup. Ct. Cal., Dec. 11, 2003) ; ***Hammerstein v. The Conference on Jewish Material Claims***, No. 114355/98 (Sup. Ct. N.Y. County, Aug. 6, 1999).

[41] *Hess*, AG (2005), 901 (n.15, above); *Hess*, AG (2006), 816 (n.15, above); *Schwung*, AG (2006), 823 (n.14, above); *Brand*, NJW 2012, 1120 (n.33, above); dissenting *Schack*, AG 2006, 828 („delay of service has no effect") (n.5, above); *von Hein*, RIW 2007, 255 („chances to challenge jurisdiction are zero") (n.33, above).

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