Recognition and Enforcement of US Rulings 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.

The Conflict

While service abroad is an issue at the very beginning of a lawsuit, the recognition of a US judgment in Germany stands at the very end of a litigation life-circle. So, to complete the picture, the general procedure of such recognition in Germany shall be explained in a nutshell as follows:

The recognition of a foreign judgment in Germany, except a judgment coming from any other member state of the European Union,[5] is governed by §§ 328, 722, 723 *ZPO*. Not any court decision can be recognized but only "true" judgments which have settled a legal dispute in civil (not criminal) matters. Injunctions or court orders which only accompany the proceedings (even Contempt of Court-Orders) do not fall under this category. The US judgment must be final and unappealable. This means that the US court's decision cannot be appealed anymore in the course of ordinary proceedings. "Extraordinary"

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1 *Volkswagen Aktiengesellschaft v. Schlunk*, 486 US 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 US 604, 608 et seq. (1990).

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

5 The recognition of judgments from other EU-countries is governed by the Council Regulation (EC) No. 44/2011.

appeals or remedies - such as discretionary reliefs by rehearing or *en banc* or a petition to the US Supreme Court do not fall under this category. In general, a decision by a US Court of Appeals (if the case was brought to a federal court) is final.

There is no "automatic" recognition. When applying for recognition, the applicant (i.e., the former plaintiff in the US proceedings) has to initiate recognition proceedings in the German court where the defendant has either its seat or domicile or - at least - property.[6] Of course, the court language is German. The plaintiff has to submit the original or a certified copy of the foreign judgment including a certified translation. The writ of application including all annexes etc. has to be served on defendant and - if defendant has no address in Germany (but only property, for instance) - service has to be executed abroad. Under the German system, only the court will arrange for service even if service is effected under the Hague Convention. Depending on the place and state where service is executed, such procedure can take quite some time.

When recognition proceedings are initiated - that means along with the submission of the application for recognition - the "German rule of costs" applies. Whenever a lawsuit is filed with a German court, the plaintiff or applicant has to pay all court fees for the first instance in advance. If the German litigation does not end by a judgment but by settlement or if the lawsuit is later withdrawn, the court refunds two third of the court fees. If there is a judgment, the party losing the case has to pay all court fees including the German attorneys' fees of the other, the winning party.[7] However, whether such cost compensation claim will be satisfied or can successfully be enforced depends on the financial strength, shape and willingness of the debtor party. The court will not refund the pre-payment and then collect the court fees from the losing party. As a consequence, any litigation in Germany - and that includes recognition proceedings - requires a certain investment by the plaintiff.[8]

The amount of the court fees for the first instance depends on the amount the recognition is about (*Streitwert* = amount in litigation). If, for instance, a US judgment shall be recognized in the amount of € 500,000.00, the court fees and the respective pre-payment amount to € 8,868.00. If the amount in litigation alters, the court fees amount as follows:

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6 Jurisdiction for recognition in Germany does not require that the underlying case had or has any connection with or „links" to Germany; *see BGH* of October 28, 1996, file-no. X ARZ 1071/96, NJW 1997, 325-327 = WM 1996, 2351-2353 = ZIP 1997, 159-161 = RIW 1997, 238-240 = MDR 1997, 496; *Solomon, Internationale Zuständigkeit zur Vollstreckbarerklärung ausländischer Entscheidungen*, AG (2006), 832-841 (834, 839). Same applies for recognition proceedings in the US, *see Lenchyshyn v. Pelko Electric, Inc.*, 723 N.Y.S. 2d 285, 289-292 (N.Y. App. Div. 2001).

7 The compensation of attorneys' fees is limited to the fees as calculated according to the German *RVG* (n.49, above). The fees according to *RVG* also depend on the amount in litigation but are calculated slightly different than the court fees.

8 This is why a German defendant in an US lawsuit may fail in arguing that the forum non conveniens-doctrine should apply since German courts would be the more appropriate forum, see ***Buettner, et al. v. Bertelsmann AG, Bertelsmann Inc. et al.,*** No. 0103825 (Sup. Ct. Cal., Dec. 11, 2003). However, in ***Hammerstein v. The Conference on Jewish Material Claims***, No. 114355/98, (Sup. Ct. N.Y. County, Aug. 6, 1999) defendant's argument was successful and the court assumed that a German forum was more appropriate.

amount in litigation	court fees/pre-payment
€ 1 million	€ 13,368.00
€ 2 million	€ 22,368.00
€ 5 million	€ 49,368.00
€ 10 million	€ 94,368.00
€ 20 million	€ 184,368.00
€ 30 million and more ("cap")	€ 274,368.00

Upon service, defendant is granted a certain deadline (which may be extended) to present to the court its arguments why the US judgment shall not be recognized in Germany. The plaintiff may respond to that argument and the court will decide on recognition after at least one oral hearing. However, arguments to avoid recognition are limited. Under no means will the whole US case be once more "fully litigated" (even if German parties or German law were involved) as the underlying idea of recognition is that a foreign nation's court decisions are respected. Therefore, the test of whether a foreign judgment can be recognized or not follows "negative" criteria.

If one of the following conditions is met, a US judgment will **not** be recognized:

(i) The US court which rendered the judgment which is subject to recognition had no jurisdiction or venue if German law on jurisdiction was applicable. This means that the German court examines whether the US court had jurisdiction under a reciprocal application of the German rules on civil proceedings.[9] However, since German rules on jurisdiction are very broad, this is usually no problem.

(ii) The initiating summons and complaint in the US proceedings were not duly served on the defendant or the defendant had no chance for a timely defense due to improper or delayed service. However, if a case was litigated in various court hearings etc. with both parties participating, any previous default in service has no more relevance.[10]

(iii) The US judgment is incompatible with or contrary to an earlier judgment. Such earlier judgment could be either a German judgment or a (and any) foreign judgment which has to be recognized in Germany.

(iv) The US judgment is not in line with basic principles of German law which usually means no compliance with German *ordre public* and/or German constitutional rules. Initially, such *ordre public* addresses rather "banana republic-styled" court decisions. However, said principle may also apply to US

[9] To assume such reciprocal jurisdiction, it is sufficient if there is only one court having jurisdiction in the US under the German rules; it is not required that it is the court which actually rendered the judgment which is subject to recognition; *BGH* of April 29, 1999, file-no. IX ZR 263/97, BGHZ 141, 286-307 = ZIP 1999, 1216-1232 = NJW 1999, 3198-3203 = WM 1999, 1381-1388 = RIW 1999, 698-703 = IPRax 2001, 230-236 = MDR 1999, 1084.

[10] If a German court has to arrange for service abroad according to the Hague Convention and if there is a lack of formal requirements when service is effected, such default is cured according to § 189 *ZPO* if the documents have reached the recipient - even if the law of the jurisdiction where service is effected does not provide for such curing, *see BGH* of September 14, 2011, file-no. XII ZR 168/09, BGHZ 191, 59-71 = NJW 2011, 3581-3584 = ZIP 2011, 2380 = MDR 2011, 1374-1376.

judgments since Germany does not recognize judgments granting punitive and treble damages.[11] Therefore, such judgments may only be recognized to the extent the defendant has to pay "ordinary" damages or satisfy other payment claims; a "partial" recognition of a US judgment is possible.[12]

(v) Recognition will be denied if there is no reciprocity, e.g. if a German judgment would not be recognized in the jurisdiction where the US judgment comes from. To locate such jurisdiction, it does not matter whether the US judgment was issued by a federal court or by a state court[13] since with respect to diversity cases, a federal court has to apply the law of the state where the federal court has its seat[14]. Since the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany of October 29, 1954 does not govern general recognition of German/US judgments in each of the countries, each US state has to be examined separately. However, meanwhile most of the US states have accepted reciprocity either by adopting the Uniform Foreign Money-Judgments Recognition Act[15] or by applying the doctrine of comity which is sufficient for a German court to assume reciprocity[16]. Therefore, at present recognition of US judgments from the courts of the following US states is possible: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts; Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dacota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dacota, Tennessee, Texas Utah, Vermont, Virginia, US Virgin-Islands, Washington, West Virginia, Wisconsin and Wyoming.[17]

While this is not yet commonly known, if recognition of a US judgment is required in more than one member state of the European Union, it is not necessary to run through separate recognition proceedings in each of the respective European states. Once the US judgment is recognized in only one EU member state, such recognition judgment can be recognized in any other EU member state under much easier

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11 *See* III.A., above.

12 This is why even RICO-judgments are recognized in Germany, *see Stiefel/Bungert, Anerkennungsfähigkeit und Vollstreckbarkeit US-amerikanischer RICO-Urteile in der Bundesrepublik Deutschland*, ZIP (1994), 1905-1918. There are also well-reasoned arguments why US class action-judgments should be recognized in Germany; *see Halfmeier/Wimalasena, Rechtsstaatliche Anforderungen an Opt-out-Sammelverfahren: Anerkennung ausländischer Titel und rechtspolitischer Gestaltungsspielraum*, JZ (2012), 649-658.

13 With respect to class actions, recognition will most likely concern judgments from US state courts because a nationwide class will ususally lack the uniform applicable law and thus fail the pre-dominance of issues and law for a federal class action; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *see Hess*, AG (2006), 814 (n.15, above).

14 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), *see Stiefel/Bungert*, ZIP (1994), 1908 (n.60, above).

15 C.R.S. 13-62-101 to 109.

16 *OLG Hamm* of June 4, 1997, file-no. 1 U 2/96, RIW 1997, 1039-1041 = IPRax 1998, 474-477.

17 *Zoeller/Geimer, ZPO*, 29th ed. (2012), Annex V „Vereinigte Staaten von Amerika"; *Baumbach/Lauterbach/Albers/Hartmann, ZPO*, 70th ed. (2012), Annex to § 328 *ZPO* n.22 with further reference.

procedures governed under the Council Regulation (EC) No. 44/2001. Compared to the proceedings explained above, the proceedings are quite different and much more dangerous to defendant because

(i) the foreign EU court's decision does not need to be final or unappealable;

(ii) even foreign EU injunctions or preliminary court orders such as a Mareva-injunction can be recognized as long as such injunctions or orders had been granted after a hearing of defendant[18];

(iii) if the case appears clear, e.g. the German court does not see any reason why recognition should be denied, the writ of application is not served on defendant. In other words: recognition is usually granted *ex parte*;

(iv) the defendant can of course object against recognition once it was granted but the plaintiff may already initiate enforcement of the US judgment in Germany. The defendant then has to apply to the German court to cease enforcement which the court will usually only grant against a security (bank bond etc.) and if there is at least some indication why recognition has to be denied.

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[18] *OLG Hamm* of December 28, 1993, file-no. 20 W 19/93, NJW-RR 1995, 189-191; *OLG Frankfurt am Main* of December 2, 1998, file-no. 13 U 175/98, OLGR Frankfurt 1999, 74-76; *OLG Karlsruhe* of March 14, 2001, file-no. 9 W 79/00, FamRZ 2001, 1623/1624 = IPRspr. 2001, no. 189, 409/410.