

Responding to Differing Procedural Concepts in U.S.–German Cross-Border Disputes

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I. Introduction

At the last Annual Meeting of the New York State Bar Association, one of the topics discussed during the session of the International Section was U.S.-style discovery in Europe, with a focus on document production. The discussion made it very clear that procedural cross-border issues between the U.S. and Europe are as relevant and critical as ever: Differing procedural concepts may affect the chances to succeed on the merits and, thus, must be considered and responded to—not only when litigating in a foreign court but also in cases pending in the U.S. that involve a foreign party.

This article gives an overview of the major cross-border issues arising in a German-American context, including jurisdictional issues, service of process, questions of evidence, recognition and enforcement proceedings of a U.S. judgment in Germany, and—last but not least—handling differing costs schemes.

II. The Various Cross-Border Issues

A. Jurisdiction

Even though a U.S. court may assume jurisdiction over a dispute involving an American and a German party, the German party may nevertheless file a *forum non conveniens* motion, attempting to transfer the case to a German forum. Both federal and state courts in the U.S. have regularly held that, despite all differences between the U.S. and German legal and judicial systems, including in regard to procedural rules, the available remedies, the role (and powers) of the parties and their legal counsel vis-à-vis the judge, Germany provides for an independent judicial system based on the rule of law and containing constitutional due process guarantees without bias in favor of German governmental agencies or against foreign parties. Consequently, a German court is considered to be an appropriate alternative forum and, provided that the German forum is more convenient based on applicable criteria, a lawsuit pending before a federal or state court in the U.S. against a German defendant may very well be dismissed for reasons of *forum non conveniens*.

In Germany, however, the concept of *forum non conveniens* is unknown. Thus, in the reverse case, a U.S. defendant in a proceeding before a competent German court would not be able to have the case dismissed in favor of a more convenient American forum. Any attempt to bring such case before an American court would likely face the issue of *lis pendens* or trigger an anti-suit injunction.

B. Service of Process

Another issue which becomes relevant in a cross-border context is service of process. Even though one may observe a tendency toward direct postal service in domestic cases in Germany, in a German-American context, Germany will still request that the service formalities of the Hague Service Convention be respected. Consequently, service must be effected via the German central authorities, since Germany has objected to the direct service by postal channels provided for in the Hague Service Convention.

In addition, as the latest decision rendered by the German courts in the *Bertelsmann-Napster* case shows, the competent German authorities in charge of effecting service upon a German defendant do have some discretion in scrutinizing the complaint to be served as to whether the relief sought may be violative of German principles of public policy. As a result, service may be denied in certain cases, such as where there are claims for punitive damages, which are unknown in German law.

Even if the American court, despite the lack of proper service in Germany under the Hague Service Convention, proceeds with the case (on the ground that service has otherwise been validly effected under the Federal Rules of Civil Procedure or applicable state law), it is unlikely that a default judgment rendered against a German party who does not make an appearance in court will be recognized in Germany.

C. Obtaining Evidence

German procedural law provides for a limited number of means of collecting or presenting evidence: (i) witnesses; (ii) documents; (iii) expert witnesses; (iv) interrogation of the parties; and (v) inspection by the court. In the previous issue of the *International Law Practicum* it was pointed out that discovery (in particular with respect to witnesses) is quite difficult to obtain in Germany.¹ This results, in part, from the fact that the issues to be proven in a German court proceeding have to be brought forward in full detail in the parties' pleadings. A party relying on a piece of evidence has to specify in detail which allegation it wants to prove by it. To use evidence for the mere instigation of an investigation for information would be considered a non-admissible "fishing expedition." On the other hand, information and documents containing evidence are more easily admitted into evidence in German judicial proceedings than under American rules on evidence, and German courts have broad discretion in that

respect. For every disputed fact a party alleges, that party is requested to offer evidence in its pleadings, whereupon the court will order which evidence it will hear.

As far as document production as part of U.S.-style discovery is concerned, the issue of data protection comes into play not only in Germany but in many other European jurisdictions—as was pointed out by the International Section’s session during the 2010 NYSBA Annual Meeting. A European party to a U.S. judicial proceeding who may be ordered to disclose a vast variety of documents as a result of a discovery order may inevitably have to disclose information with regard to third parties, such as personal data of customers, which is subject to German or other European data protection laws. Data protection laws in Germany are very restrictive when it comes to disclosure of information. It is, therefore, practically impossible for a German party to comply with a discovery order issued by a U.S. court without running afoul of data protection constraints in Germany. However, a German party, aware of the risk that its noncompliance with the discovery order may lead to a detrimental outcome of the pending proceeding in the U.S., may nonetheless be willing to provide such information under the condition that the other party will bear any risk of potential claims of third parties for violation of data protection laws resulting from such disclosure. In practice, however, this risk is rarely assumed by the other party.

D. Recognition and Enforcement of U.S. Judgments

When it comes to recognition and enforcement of U.S. judgments in Germany, an *exequatur* proceeding will be required to render the judgment enforceable. In that context German courts will *ex officio* look as to whether the court in the U.S. rendering the judgment had jurisdiction, and will verify whether the judgment, either procedurally or in its substance, violates German principles of public policy. As mentioned above, German courts will regularly not recognize awards for punitive damages, since penal damages or damages of a deterrent nature are unknown to the German legal system.

Problems arise when the damage award is not distinguishable into a compensatory part (which will be recognized) and a punitive part (which violates German public policy and will likely not be recognized). As a result, the German court may recognize less than the amount that serves compensatory purposes. Therefore, one may have to consider, when suing a German party in an American court and intending to enforce the judgment in Germany, whether the relief sought should be limited to, or at least specify the portion of, actual, consequential and/or liquidated damages. Alternatively, the claimant could look for assets of the German defendant in the U.S. or another jurisdiction recognizing punitive damages.

E. Costs

Costs may become an issue in a cross-border setting when the U.S. court calls upon a German court to assist it in obtaining certain evidence, e.g., in hearing witnesses. The general rule in Germany is that the costs for such judicial assistance are to be borne by the state, which is seeking such judicial assistance, and not by the parties. However, the U.S. court may request that one of the parties be ordered by the German court to bear the costs.

Even more relevant is the cost issue arising in connection with recognition and enforcement proceedings commenced in Germany. In such cases, court costs and lawyers’ fees may have to be paid in advance. These costs may be quite substantial, since in Germany both court costs and attorneys’ fees are calculated in relation to the amount in controversy, according to statutory law. The good news for the American party seeking enforcement is that, under German law, costs are to be borne by the losing party: The so-called “American Rule”—that each party bears its own cost, no matter who prevails—does not apply in Germany.

Therefore, if recognition or enforcement of a U.S. judgment is granted by the German courts, the enforcing party will be entitled to have the court costs and lawyers’ fees (up to the statutory amount) reimbursed by the other party. However, if recognition and enforcement are denied, the defendant will be able to recover any costs of the enforcement proceeding, including lawyers’ fees up to the statutory amount, from the U.S. plaintiff. Consequently, the U.S. plaintiff should carefully investigate in advance whether and to what extent an award will be recognized for enforcement in Germany.

In this context, it may also be of interest that, with only a few exceptions, contingency fees are generally not permitted under German law. The cost risk can, however, otherwise be avoided or substantially reduced under German law. First, German law provides for financial aid for both court fees and attorneys’ fees at all stages and in regard to all forms of judicial proceedings.

Furthermore, as mentioned above, costs are calculated in relation to the amount in controversy. A claimant may, thus, “test the waters” by bringing a claim for only a small fraction of the damages at low cost. German rules of *res judicata* will not bar the claimant from amending its claim later or from filing a subsequent action for the remaining amount. To this end, under German law, and provided that the claim for damages can be divided into separate parts, it is not the entire “claim” that merges in the judgment; rather, *res judicata* attaches only to such part of the claim that was the actual subject matter of the proceeding, as defined by the claimant’s pleading.

F. Arbitration

In the event that the parties have agreed to dispute resolution by arbitration and the place of arbitration is located in the U.S., with American arbitrators or arbitrators from other common law jurisdictions, the issues regarding obtaining evidence from a German party by means of pre-trial discovery, as well as recognition and enforcement of the arbitral award in Germany, will be the same as outlined above. Even though arbitration, with its flexible procedural rules and accordingly broader possibilities for handling an evidentiary dispute, is much less regulated than civil procedure in judicial proceedings, parties usually experience the same conflicts as exist between U.S. and German rules of civil procedure, because such conflicts are founded on the differences between common law and civil law jurisdictions. As a result, most arbitrators still tend to rely on the procedural tools and concepts they are familiar with under their respective legal systems.

III. Conclusion

As a result, it is clear that various problems may arise in a cross-border context involving an American and a German party, which should be carefully reviewed by legal counsel in order to be reasonably accommodated. Basic knowledge of different foreign concepts—or at least an awareness of their existence—is necessary to best serve the interests of the client.

Endnote

1. See Gebhardt, *Practical Aspects of U.S.-Style Discovery Within Germany*, 22 INT'L L. PRACTICUM 42 (2009).

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