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## Recognition and Enforcement of U.S. Money Judgments in Germany

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# Recognition and Enforcement of U.S. Money Judgments in Germany

By  
Wolfgang Wurmnest\*

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## INTRODUCTION

In many countries around the globe, litigation in the United States is perceived as a “nightmare” due to long-arm jurisdiction statutes, pre-trial discovery proceedings, and the availability of punitive damages—legal instruments often unknown in other jurisdictions.<sup>1</sup> German commentators have coined the phrase

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1. See, e.g., Hanns Prütting, *Ein neues Kapitel im Justizkonflikt USA-Deutschland*, in 1 Festschrift für Erik Jayme 709 (Heinz-Peter Mansel et al. eds., 2003) (noting that foreign defendants in the United States often regard litigation as a “horrorvision and nightmare”); ROLF A. SCHÜTZE, *DIE ALLZUSTÄNDIGKEIT AMERIKANISCHER GERICHTE* 21 (2003) (emphasizing that the U.S. litigation

"jurisdiction conflicts" to describe legal clashes resulting from the application of U.S. law to transnational proceedings in which a foreign defendant is sued before U.S. courts.<sup>2</sup> This general mistrust of U.S. litigation makes the enforcement of U.S. judgments abroad a highly sensitive issue. In Germany, the extent to which U.S. money judgments may be recognized and enforced is far from settled.<sup>3</sup> Like other states, Germany is eager to protect its citizens from judgments considered incompatible with the fundamental standards of its domestic law. Yet the steady growth of cross-border transactions and an ever-increasing rate of direct exports by German entities without a corporate presence in the United States have substantially enhanced the practical relevance of enforcing U.S. judgments in Germany.<sup>4</sup>

Despite a recent spate of relatively U.S.-friendly rulings from the German Federal Court of Justice (*Bundesgerichtshof*),<sup>5</sup> the highest court for civil and criminal matters, some scholars favor greater barriers to prevent the enforcement of U.S. court rulings. Recently, it was suggested that German courts should regard U.S. judgments as *prima facie* violative of German public policy.<sup>6</sup> It was

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system is often used as a basis for "legalized blackmailing"). See also Yasuhei Taniguchi, *The Japanese in American Litigations—Problems of Procedural Conflict*, in *THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA* 93, 95 (Walther J. Habscheid ed., 1986) (explaining that Japanese businessmen and lawyers struggle with the U.S. litigation system due to a wholly different Japanese mentality of conducting litigation).

2. See, e.g., PETER SCHLOSSER, *DER JUSTIZKONFLIKT ZWISCHEN DEN USA UND EUROPA* 43 (1985) (arguing that the cause of U.S.-German jurisdiction conflicts is a different understanding of the concept "due process of law"); Rolf Stürner, *Der Justizkonflikt zwischen U.S.A. und Europa*, in *THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA*, *supra* note 1, at 5, 35 (concluding that the extraterritorial application of U.S. procedural law creates a U.S. "legal hegemony"); Rolf A. Schütze, *Zum Stand des deutsch-amerikanischen Justizkonfliktes*, 2004 *Recht der Internationalen Wirtschaft* [RIW] 162 (emphasizing that jurisdiction conflicts between Germany and the United States often arise because of liberal U.S. standards for serving foreign defendants, the extraterritorial application of U.S. discovery rules, and the assumption of jurisdiction based on long-arm statutes).

3. The literature regarding the enforceability of punitive, multiple, and treble damages awards alone is extensive. See, e.g., DIRK BROCKMEIER, *PUNITIVE DAMAGES, MULTIPLE DAMAGES UND DEUTSCHER ORDRE PUBLIC* 207 (1999) (arguing that treble damages violate the German public order and are not enforceable); JULIANA MÖRS DORF-SCHULTE, *FUNKTION UND DOGMATIK US-AMERIKANISCHER PUNITIVE DAMAGES* 298-99 (1999) (concluding that actions for punitive damages may not be served on German defendants because they violate German public policy); JOACHIM ROSENGARTEN, *PUNITIVE DAMAGES UND IHRE ANERKENNUNG UND VOLLSTRECKUNG IN DER BUNDESREPUBLIK DEUTSCHLAND* 207-08 (1994) (arguing that punitive damage awards generally should be enforceable); Ernst C. Stiefel et al., *The Enforceability of Excessive U.S. Punitive Damage Awards in Germany*, 39 *AM. J. COMP. L.* 779, 802 (1991) (explaining that punitive damages awards are only recoverable "under German law as far as they really compensate non-physical damages"); PETER MÜLLER, *PUNITIVE DAMAGES UND DEUTSCHES SCHADENSERSATZRECHT* 363-65 (2000) (stating that punitive damages awards are enforceable in Germany if they do not exceed the maximum sum that would be awarded by German courts); STEPHAN LÜKE, *PUNITIVE DAMAGES IN DER SCHIEDSGERICHTSBARKEIT* 306-07 (2003) (analyzing the enforceability of punitive damages arbitral awards).

4. Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 *COLUM. J. TRANSNAT'L L.* 641, 641-42 (1992).

5. See, e.g., *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 118, 312 (F.R.G.) (upholding a U.S. award in most respects despite differences between U.S. and German law).

6. Rolf A. Schütze, *Überlegungen zur Anerkennung und Vollstreckbarerklärung US-amerikanischer Zivilurteile in Deutschland—Zur Kumulierung von Ordre public Verstößen*, in *EINHEIT*

argued that while the differences between German and U.S. civil procedure may not alone be cause for concern in all cases, the accumulation of differences renders U.S. judgments inherently incompatible with German standards of justice.<sup>7</sup> According to this rather drastic point of view, a U.S. creditor would bear the burden of proving that, in each particular case, the enforcement of a U.S. judgment in the creditor's favor would not violate German public policy standards.<sup>8</sup> Additionally, the German Federal Constitutional Court (*Bundesverfassungsgericht*), the judicial body with the highest authority to interpret the German Constitution (*Grundgesetz* or GG),<sup>9</sup> recently revived the discussion of jurisdiction conflicts by issuing an interlocutory injunction halting service of a U.S. class action suit seeking punitive damages against a German defendant.<sup>10</sup> The court explained that the plaintiff's claim for \$17 billion, coupled with the media pressure initiated by the plaintiff against the defendant, could violate the defendant's constitutional rights.<sup>11</sup>

The cautious enforcement of U.S. judgments abroad is certainly influenced by the fact that the United States is currently not a party to any bilateral treaty or multinational convention concerning the recognition and enforcement of foreign judgments.<sup>12</sup> To overcome this obstacle, the United States strongly supported a worldwide convention on the matter under the auspices of the Hague Conference on Private International Law.<sup>13</sup> While many were optimistic at the start of negotiations in 1992, by 2003 it became apparent that the project was bound to

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UND VIELFALT DES RECHTS: FESTSCHRIFT FÜR REINHOLD GEIMER ZUM 65. GEBURTSTAG 1025, 1041 (Rolf A. Schütze ed., 2002) [hereinafter EINHEIT UND VIELFALT].

7. *Id.* at 1040.

8. *Id.* at 1041.

9. The *Grundgesetz* is commonly translated as the "Basic Law." This title was intended to emphasize the provisional nature of the West German constitution prior to unification of the two German states. See Eckart Klein, *The Concept of the Basic Law*, in MAIN PRINCIPLES OF THE GERMAN BASIC LAW 25-26 (Christian Starck ed., 1983). However, the name was not altered after reunification.

10. Bundesverfassungsgericht [BVerfG], *Juristenzeitung* [JZ], 58 (2003), 956 (F.R.G.).

11. *Id.* at (956-58).

12. Zekoll, *supra* note 4, at 642. In 1976, the United States tried but failed to conclude a bilateral agreement with the United Kingdom on the reciprocal recognition and enforcement of judgments in civil matters. See Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Oct. 26, 1976, U.S.-U.K., 16 I.L.M. 71 (1977). For a general overview of this failed agreement, see Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977); Peter Hay & Robert J. Walker, *The Proposed U.S.-U.K. Recognition-of-Judgments Convention: Another Perspective*, 18 VA. J. INT'L L. 753, 767 (1978) (stating that the convention represents "a long overdue step towards a federal role in the recognition and enforcement of foreign nation judgments, both because it unifies American practice and because it will secure broader recognition of U.S. judgments abroad").

13. For a detailed analysis of the convention, which would only have concerned judgments in civil and commercial matters, see generally Hélène Gaudemet-Tallon, *De quelques raisons de la difficulté d'une entente au niveau mondial sur les règles de compétence judiciaire internationale directe*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 55 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002) [hereinafter *LAW & JUSTICE*]; SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS* (2003).

fail.<sup>14</sup> Designed as a “convention mixte,” addressing both jurisdiction and enforcement proceedings, the Hague Conference sought to establish three sets of rules for jurisdiction.<sup>15</sup> Judgments relying on the first set of internationally recognized bases of jurisdiction would have to be enforced by the courts of all member states to the convention, while enforcement of judgments based on a second set of blacklisted jurisdictions would be denied.<sup>16</sup> The Convention would also establish a third category of “grey” jurisdictions under which a member state to the Convention would be permitted to exercise jurisdiction without obliging other member states to enforce judgments based on those rules of jurisdiction.<sup>17</sup> However, a rift between European nations (including Germany) and the United States precluded agreement on the crucial categorization of blacklisted jurisdictions.<sup>18</sup> In April 2004, the drafting committee released the first draft of a downscaled successor to the convention, covering nothing but exclusive choice of court agreements in business-to-business contracts.<sup>19</sup> It is doubt-

14. Members of the Hague Conference did not adopt either the preliminary draft of 1999 or the amended version of 2001. Linda J. Silberman & Andreas F. Lowenfeld, *The Hague Judgments Convention—And Perhaps Beyond*, in LAW AND JUSTICE, *supra* note 13, at 121, 122-24. For a discussion of U.S. criticisms of the preliminary draft convention, see Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 192 (2001).

15. Silberman & Lowenfeld, *supra* note 14, at 123. For background on the history of the Hague Conference, see generally Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998); Russel J. Weintraub, *How Substantial Is Our Need For A Judgments-Recognition Convention and What Should We Bargain Away To Get It?*, 24 BROOK. J. INT'L L. 167 (1998); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203 (2001). For a critique of using a multinational convention to reach agreement on these issues, see Antonio F. Perez, *The International Recognition of Judgments: The Debate between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44 (2001) (arguing that the World Trade Organization should be the venue in which to negotiate such an agreement).

16. Silberman & Lowenfeld, *supra* note 14, at 123.

17. *Id.*; Arthur T. von Mehren, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, 61 Rabels Zeitschrift für ausländisches und internationales Privatrecht [RABELSZ] 86, 88-89 (1997).

18. For example, the European states generally considered jurisdiction based solely on doing business in a particular state as exorbitant, whereas the United States rejected special protective jurisdiction rules for consumers or employees. For a detailed analysis of the controversial transatlantic differences in jurisdiction rules, see generally, Peter Nygh, *Arthur's Baby: The Hague Negotiations for a World-wide Judgments Convention*, in LAW AND JUSTICE, *supra* note 13, at 151; Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319 (2002).

19. *Draft on Exclusive Choice of Court Agreements*, Hague Conference on Private International Law [HCPIIL] Working Document No. 110 E, Revised, at [http://hcch.e-vision.nl/upload/wop/jdgm\\_wd110\\_e.pdf](http://hcch.e-vision.nl/upload/wop/jdgm_wd110_e.pdf) (May 2004). See also Masato Dogauchi & Trevor C. Hartley, *Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report*, HCPIIL Preliminary Document No. 25, at [http://hcch.e-vision.nl/upload/wop/jdgm\\_pd25e.pdf](http://hcch.e-vision.nl/upload/wop/jdgm_pd25e.pdf) (March 2004) (commenting on the draft convention). For an overview of the new proposal, see Jason Webb Yackee, *A Matter of Good Form: The (Downsized) Hague Judgments Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements*, 53 DUKE L.J. 1179 (2003); Ronald A. Brand, *A Global Convention of Choice of Court Agreements*, 10 ILSA J. INT'L & COMP. L. 345 (2004).

ful whether this convention, if it is ever ratified, will substantially facilitate transatlantic judgment enforcement.

Thus, without any obligations derived from international law, each sovereign state possesses the power to decide under which circumstances it will recognize and enforce judgments rendered by U.S. courts. U.S. creditors face the difficult task of carefully considering a multitude of foreign laws when assessing their chances of enforcing a favorable judgment abroad. This article highlights the extent to which U.S. money judgments can be enforced in Germany, a major trading partner of the United States. Part I provides a summary of the general principles governing German enforcement of foreign judgments as well as the relevant provisions of German law. Parts II and III outline in further detail the conditions under which German courts will recognize and enforce U.S. money judgments. Part II highlights those factors found in the German Code of Civil Procedure that generally do not hinder the enforcement of U.S. judgments. Part III provides an in-depth analysis of those factors that can prevent the recognition of U.S. judgments. While the recognition of a foreign judgment is granted automatically, *ipso iure*, its enforcement by German courts is contingent on a formal proceeding. Thus, Part IV provides a basic overview of the German legal proceedings that are necessary to obtain a declaration of enforceability. This declaration gives U.S. creditors some recourse to the various execution procedures available in Germany, a topic addressed briefly in Part V.

## I.

### STATUTORY FRAMEWORK

#### A. *The Broader Picture*

U.S. judgments are recognized and enforced in accordance with the German Code of Civil Procedure (*Zivilprozessordnung* or ZPO).<sup>20</sup> The main prerequisites for recognition and enforcement of foreign judgments are enumerated in sections 328 and 723 of the ZPO. However, Germany has also concluded various bilateral and multilateral recognition and enforcement treaties over the years, and recently the European Community (EC) enacted its own rules in this field.<sup>21</sup> Thus, there are various bodies of law governing the recognition and enforcement of foreign judgments, depending on where the foreign judgment was rendered.

EC regulations direct the enforcement of judgments delivered by courts seated in EC Member States, reflecting the EC's strong tradition of facilitating the Europe-wide enforcement of court rulings. In the past, these efforts were undertaken through multilateral conventions (most notably the Brussels Conven-

20. The ZPO has recently been reformed. Gesetz zur Reform des Zivilprozesses (Zivilprozessreformgesetz—ZPO-RG), v. 27.7.2001 (BGBl. I S.1887) (F.R.G.). For an outline of the reforms, see Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 HASTINGS INT'L & COMP. L. REV. 55 (2003).

21. With regard to the history and provisions of the various European conventions and regulations, see generally, JAN KROPHOLLER, *Einleitung to EUROPÄISCHES ZIVILPROZESSRECHT*, ¶¶ 6-160 (7th ed. 2002).

tion of 1968)<sup>22</sup> because the EC did not have legislative power over civil procedure until the enactment of the Treaty of Amsterdam in 1997.<sup>23</sup> Article 65 of this treaty granted the EC the authority to enact measures of judicial cooperation in civil matters with cross-border implications, including the improvement and simplification of the rules regarding recognition and enforcement of judgments in both civil and commercial cases. Pursuant to the treaty, the EC has enacted various regulations<sup>24</sup> including the Brussels I Regulation,<sup>25</sup> which replaced the Brussels Convention of 1968.<sup>26</sup> Under the Brussels I Regulation, judgments rendered and enforceable in one EC Member State must automatically be recognized and enforced in all other Member States.<sup>27</sup> Thus, courts in the enforcing state must issue a grant of enforceability (*exequatur*) without special review proceedings, such as to re-examine whether the court that rendered the judgment had proper jurisdiction.

Judgments rendered by courts outside the EC are often enforceable according to a multilateral convention or a bilateral treaty. Unlike the United States, Germany is a party to several such treaties and conventions.<sup>28</sup> These agree-

22. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1998 O.J. (C 27) 1 (consolidated version).

23. KROPHOLLER, *supra* note 21, ¶ 15. For a consolidated version of the EC Treaty currently in force, see 2002 O.J. (C 325) 1.

24. For excellent descriptions of these laws, see generally I CHRISTIAN V. BAR & PETER MAKOWSKI, INTERNATIONALES PRIVATRECHT § 5, ¶¶ 6-11 (2003); JANNET A. PONTIER & EDWIGE BURG, EU PRINCIPLES ON JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (2004). In addition to the Brussels I Regulation, *infra* note 25, the EC also enacted Council Regulation 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial and Parental Matters, 2003 O.J. (L 338) 1 (the Brussels II Regulation, repealing Council Regulation 1347/2000, 2000 O.J. (L 160) 19), and Council Regulation 805/2004, 2004 O.J. (L 143) 15, which accelerated proceedings for uncontested claims by creating a European Enforcement Order to replace the grant of enforceability. Further Brussels regulations are expected in the future, relating to family law matters of succession and other issues. See David Hodson, *So That was Brussels II: Now Stand by for Brussels III*, IAML NEWSLETTER (INT'L ACAD. MATRIMONIAL LAWYERS, London), Apr. 2002, at 10-11.

25. Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I regulation]. For a general overview of this regulation, see HÉLÈNE GAUDEMET-TALLON, COMPÉTENCE ET EXÉCUTION DES JUGEMENTS EN EUROPE: RÈGLEMENT NO 44/2001 CONVENTIONS DE BRUXELLES ET DE LUGANO 18-20 (3d ed. 2002); Peter E. Herzog, *Rules on the International Recognition of Judgments (and on International Jurisdiction) by Enactments of an International Organization: European Community Regulations 1347/2000 and 44/2001*, in LAW AND JUSTICE, *supra* note 13, at 83; Rui Manuel Moura Ramos, *The New EC Rules on Jurisdiction and the Recognition and Enforcement of Judgments*, in LAW AND JUSTICE, *supra* note 13, at 199; Wendy A. Kennett, *The Brussels I Regulation*, 50 INT'L & COMP. L.Q. 725 (2001); KROPHOLLER, *supra* note 21, ¶¶ 15-17; REINHOLD GEIMER & ROLF A. SCHÜTZE, *Einleitung* to EUROPÄISCHES ZIVILVERFAHRENSRECHT A1 (2d ed. 2004).

26. Denmark, despite its EC membership, pleaded against the Europeanization of the Brussels Convention and is therefore not bound by the Brussels I Regulation. Kennett, *supra* note 25, at 725. Hence, with regard to Denmark, the provisions of the Brussels Convention continue to apply.

27. Brussels I Regulation, *supra* note 25, art. 33(1), 2001 O.J. (L 12) at 10.

28. For an overview of the conventions and treaties to which Germany is a party, see generally HEINRICH NAGEL & PETER GOTTWALD, INTERNATIONALES ZIVILPROZESSRECHT § 13 (5th ed. 2002); DIETER MARTINY, 3/2 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 111-212 (1984); HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 21 (3d ed. 2002); 1 ARTHUR BÜLOW ET AL., DER INTERNATIONALE RECHTSVERKEHR IN ZIVIL- UND HANDELSSACHEN ¶¶ 540-605 (2004); 2 ARTHUR BÜLOW ET AL., DER INTERNATIONALE RECHTSVERKEHR IN ZIVIL- UND HANDELSSACHEN ¶¶ 606-708 (2004).

ments encompass judgments handed down in other contracting states and are recognized and enforced in accordance with the procedural safeguards designated within them.<sup>29</sup> For judgments rendered in states that have not concluded recognition and enforcement treaties with Germany, the rules of the ZPO apply.

### B. *The Rules of the German Code of Civil Procedure*

Section 328 of the ZPO sets forth the necessary conditions for the recognition of foreign judgments, whereas sections 722 and 723 of the ZPO govern enforcement proceedings. In practice, recognition and enforcement are closely connected because a German judge only reviews the prerequisites for recognition when hearing a motion for a grant of enforceability. As questions of law, however, recognition and enforcement should be distinguished. Recognition involves the general effects of the foreign judgment, while enforcement gives effect to and denotes the execution of the judgment by German courts or other enforcement organs.<sup>30</sup> According to section 722 of the ZPO, a judgment rendered by a foreign court shall only be executed if its admissibility is declared in an enforceable judgment granted by a German court. The courts can only award this grant of enforceability (*Vollstreckbarerklärung*), which opens the way for enforcement of the decision, if the conditions for recognition of the foreign judgment listed in section 328 of the ZPO are met.

The ZPO does not define recognition. The majority view is that recognition gives a foreign judgment the same authority and effect in the recognizing state as in the rendering state (*Wirkungserstreckung*).<sup>31</sup> However, since the effects of a foreign judgment may be much broader than the relatively limited effects of judgments in Germany,<sup>32</sup> some restrictions are desirable. For this reason, it is undisputed that any effect that would be alien under German law cannot be enforced.<sup>33</sup> Some scholars thus favor the theory of accumulation (*Kumulationstheorie*), which provides that a foreign judgment should be en-

29. It should be noted that many bilateral agreements were made with states that are now EC Members. Since EC law generally has priority over national law, these treaties cannot be applied to cases that fall within the scope of EC regulations on the recognition and enforcement of foreign judgments.

30. Dieter Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 35 AM. J. COMP. L. 721, 728 (1987) [hereinafter Martiny, *Recognition and Enforcement*].

31. See Peter Gottwald, *Grundfragen der Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivilsachen*, 103 Zeitschrift für Zivilprozess [ZZP] 257, 261 (1990); GERHARD KEGEL & KLAUS SCHURIG, *INTERNATIONALES PRIVATRECHT* § 22(V)(1)(a) (8th ed. 2000); JAN KROPHOLLER, *INTERNATIONALES PRIVATRECHT* § 60(V)(1)(b) (4th ed. 2001); DIETER MARTINY, 3/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS ¶ 364 (1984). Some scholars have argued, however, that the foreign judgment should be given the same effects as a German judgment (*Gleichstellungswirkung*). See, e.g., FRITZ REU, *ANWENDUNG FREMDEN RECHTS: EINE EINFÜHRUNG* 86 (1938).

32. Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, the Convention on Jurisdiction and the Enforcement of Judgments in Civil And Commercial Matters, and the Protocol on Its Interpretation by the Court of Justice, 1979 O.J. (C 59) 71, ¶ 191.

33. See KROPHOLLER, *supra* note 31, § 60(V)(1)(b).



forced as it would be in the rendering state, except insofar as its effects exceed those that German law allows for German judgments.<sup>34</sup>

Unlike in many other countries, no judicial or administrative proceeding is required for the recognition of a foreign decision in Germany. Recognition is granted *ipso iure*. An exception applies to decisions regarding matrimonial matters, which, in particular, call for legal certainty. Article 7, section 1, of the Family Law Amendment Act (*Familienrechtsänderungsgesetz* or FamRÄG) requires an administrative proceeding for all decisions affecting the matrimonial status of German citizens.<sup>35</sup> Thus, foreign decisions regarding the divorce or annulment of a marriage involving a German citizen cannot take effect in Germany until one spouse commences a recognition proceeding. If the foreign decision meets all of the German prerequisites, it will be recognized as binding on all German courts and authorities, thus giving the foreign judgment an *erga omnes* effect, the same as it would have in the rendering jurisdiction.<sup>36</sup>

## II.

### PREREQUISITES WHICH GENERALLY DO NOT HINDER THE RECOGNITION OF U.S. MONEY JUDGMENTS

According to section 328 of the ZPO, a foreign judgment that is barred from re-litigation by *res judicata* must be recognized, provided that the rendering court had international jurisdiction, the defendant was duly served, the ruling did not conflict with either a prior judgment or with a judgment rendered in Germany, and the judgment does not violate German public policy. In addition, reciprocity with the rendering state must be assured. Below, I highlight those requirements that generally do not pose a threat to the recognition and enforcement of U.S. money judgments.

#### A. *Decisions Entitled to Recognition*

##### 1. *Judgments of Foreign Courts*

Under section 328 of the ZPO, the term “court” is interpreted in a broad sense and includes any public body that is empowered under the law of the rendering state to resolve disputes.<sup>37</sup> Thus, recognition is not limited to decisions of civil and commercial courts, but extends also to those of various administrative bodies, as long as they render judgments in civil law matters.<sup>38</sup> Also, criminal court decisions may be regarded as judgments in civil law if they order

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34. SCHACK, *supra* note 28, at 346-47.

35. It is sufficient that one spouse has German nationality or multiple nationalities including Germany. Cf. Bayerisches Oberstes Landesgericht [BayObLG] [Court of Appeals for Selected Matters in Bavaria], *Zeitschrift für das gesamte Familienrecht* [FAMRZ], 8 (1990), 897 (898) (F.R.G.).

36. SCHACK, *supra* note 28, at 382.

37. Martiny, *Recognition and Enforcement*, *supra* note 30, at 730; JULIUS VON STAUDINGER ET AL., J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, § 328 ZPO, ¶ 217 (Ulrich Spellenberg ed., 13th ed. 1997).

38. MARTINY, *supra* note 31, ¶¶ 519-21; SCHACK, *supra* note 28, at 352; FRIEDRICH STEIN ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 328, ¶ 69 (Herbert Roth ed., 21st ed. 1998).

the criminal to pay damages to the injured party.<sup>39</sup> These payments are categorized as civil law matters because they are functionally equivalent to a civil court ordering a tortfeasor to indemnify his victim.<sup>40</sup> However, judgments ordering a criminal to pay a fine to the state fall within the realm of criminal law, and therefore cannot be enforced under section 328 of the ZPO.<sup>41</sup>

The term “judgment” is also broadly defined to cover all decisions resolving disputes between parties.<sup>42</sup> Thus, section 328 of the ZPO covers money judgments, family law decisions, decrees of specific performance, and declaratory judgments.<sup>43</sup> Foreign default judgments can also be recognized, provided that the defendant was given proper notice.<sup>44</sup> However, a foreign settlement or enforceable deed cannot be recognized and enforced in Germany unless it is subject to court approval.<sup>45</sup> Thus, a consent judgment that is rendered by a court on the basis of a settlement between the parties—as is common in U.S. class actions—is enforceable in Germany.<sup>46</sup>

In turn, *exequatur* judgments, that is, judgments of a foreign court declaring a judgment rendered in a third jurisdiction enforceable in its territory, are not enforceable.<sup>47</sup> The same holds true with regard to foreign execution acts such as garnishment orders.<sup>48</sup> Neither type of decisions can be regarded as a judgment since they do not settle disputes between parties, but merely enforce prior judgments. The *exequatur* decision declares a judgment enforceable within a certain territorial area while an execution act forms part of the execution proceeding. The creditor, however, remains free to enforce in Germany the original judgment that formed the basis for the *exequatur* judgment or execution act.

## 2. *Res Judicata*

Only final judgments—judgments that are barred from re-litigation and appeal under the procedural laws of the rendering court—are entitled to recognition in Germany. Subsequent reopening of the case to alter a final judgment does not bar these decisions from being recognized.<sup>49</sup> Such proceedings are commonplace for maintenance orders, which are often adapted if circumstances

39. Martiny, *Recognition and Enforcement*, *supra* note 30, at 730.

40. MARTINY, *supra* note 31, ¶ 504; SCHACK, *supra* note 28, at 353-54.

41. MARTINY, *supra* note 31, ¶¶ 505-06.

42. Martiny, *Recognition and Enforcement*, *supra* note 30, at 731; STEIN, *supra* note 38, § 328, ¶ 62; RICHARD ZÖLLER ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 328, ¶ 68 (Reinhold Geimer ed., 24th ed. 2004).

43. Dieter Martiny, Federal Republic of Germany, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 179, 182 (Charles Platto & William G. Horton eds., 1993).

44. *Id.*

45. REINHOLD GEIMER, ANERKENNUNG AUSLÄNDISCHER ENTSCHEIDUNGEN IN DEUTSCHLAND 99 (1995); GERHARD LÜKE ET AL., MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 328, ¶ 41 (Peter Gottwald ed., 2d ed. 2000).

46. Burkhard Heb, *Die Anerkennung eines Class Action Settlement in Deutschland*, 2000 JZ 373 (377).

47. MARTINY, *supra* note 31, ¶ 372; SCHACK, *supra* note 28, at 399; STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 214.

48. SCHACK, *supra* note 28, at 351.

49. Martiny, *supra* note 43, at 182.

change.<sup>50</sup> Foreign judgments that are only preliminarily enforceable cannot be recognized because they lack finality.<sup>51</sup> Preliminarily enforceable judgments give a creditor the possibility of enforcing the judgment although the defendant has lodged an appeal. As security, the creditor will have to deposit collateral which would go to the debtor in case the judgment is reversed on appeal.<sup>52</sup> Similarly, interlocutory injunctions cannot be recognized or enforced in Germany since they order measures of a provisional nature.<sup>53</sup> An exception applies to the enforcement of injunctions that either de facto end the litigation or are not subject to appeal during their period of validity.<sup>54</sup> Such interlocutory injunctions are regarded as final and may be recognized and enforced under German law.<sup>55</sup>

### 3. *Arbitral Awards*

Foreign arbitral awards generally are not enforceable under section 328 of the ZPO because they are rendered by arbitral tribunals, which do not have public authority. Instead, foreign arbitral awards are recognized and enforced according to section 1061 of the ZPO and a multitude of conventions. The most important of these is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention"),<sup>56</sup> to which Germany is a party. In 1998, Germany abolished its prior two-track system, which allowed for enforcement of foreign arbitral awards under either the New York Convention or the former sections 1042 and 1044 of the ZPO.<sup>57</sup> Today, section 1061(1) of the ZPO states that the New York Convention generally governs recognition and enforcement of such awards, but that they can also be recognized and enforced by reference to other international treaties to which Germany is a signatory. These treaties include the European Convention on International Commercial Arbitration,<sup>58</sup> as well as several investment protection treaties.<sup>59</sup>

Recently, the German Federal Court of Justice has held that foreign arbitral awards can be made enforceable under section 328 of the ZPO if, upon request of one of the parties to the arbitration, a foreign court confirms the arbitral

50. *Id.* Also, certain multilateral conventions allow for the recognition and enforcement of interim measures, especially in the field of family law. See, e.g., Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, art. 4(2), 1021 U.N.T.S. 209, 219.

51. STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 225.

52. § 709 ZPO (F.R.G.).

53. STEIN, *supra* note 38, § 328, ¶ 63; SCHACK, *supra* note 28, at 355.

54. REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT, ¶ 2857 (4th ed. 2001); ZÖLLER, *supra* note 42, § 328, ¶ 70.

55. SCHACK, *supra* note 28, at 356; STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 226.

56. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

57. See Stefan M. Kröll, *Recognition and Enforcement of Foreign Arbitral Awards in Germany*, 5 INT'L ARBITRATION L. REV. 160 (2002).

58. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364.

59. See generally ADOLF BAUMBACH ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG app. at 2549-2637 (Jan Albers & Peter Hartmann eds., 58th ed. 2000) (providing an overview of the treaties in force).

award by merging it with the judgment.<sup>60</sup> This applies, for example, to judgments rendered in confirmation proceedings in accordance with the U.S. Federal Arbitration Act.<sup>61</sup> Yet commentators have criticized the federal court of justice's holding, arguing that the court's reasoning gives successful U.S. plaintiffs the choice between enforcing the arbitral award under either section 1061 of the ZPO or the merged *exequatur* judgment under sections 328, 722 and 723 of the ZPO.<sup>62</sup> The existence of two enforceable decisions thus carries the risk of both being enforced against the debtor.<sup>63</sup>

### B. *Conflicting Judgments and Lis Pendens*

Conflicting judgments on the same matter between the same parties rendered by different courts present the problem of choosing which judgment to recognize and enforce. There are several possible solutions. In the United States, the later judgment is enforced on the assumption that it was decided on "better," or more recent facts.<sup>64</sup> In contrast, under section 328(1) No. 3 of the ZPO, the judgment rendered first prevails in Germany. The underlying assumption of the "first-in-time" rule is that in parallel proceedings, priority should be given to the first judgment to eliminate any incentive for the plaintiff to initiate a second proceeding in another state. However, this rule is not absolute and an exception applies with regard to judgments rendered by German courts. A foreign judgment cannot be recognized if it is incompatible with the decision of a German court in an action between the same parties, regardless of whether it was rendered first or last.<sup>65</sup> This rule protects the effect of *res judicata* bestowed on German judgments against conflicting foreign decisions.

In domestic German cases, *lis pendens*, the pending before another court of an action on the same matter between the same parties, bars adjudication by the second court.<sup>66</sup> Section 328(1) No. 3 of the ZPO extends this rule to the recognition of foreign judgments. Thus, where a foreign court has disregarded *lis*

60. BGH [*Bundesgerichtshof*, Senate] [ordinary panels of the highest court], 30 RIW 557 (1984) (F.R.G.).

61. 9 U.S.C. § 9 (2004) (for domestic arbitral awards); 9 U.S.C. § 207 (2004) (for foreign arbitral awards). See also GARY A. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 704-14 (2d ed. 2001).

62. See SCHACK, *supra* note 28, at 400. But see Peter Schlosser, *Doppellexequatur zu Schiedssprüchen und ausländischen Gerichtsentscheidungen?*, 1985 *Praxis des Internationalen Privat- und Verfahrensrechts* [IPRax] 141 (arguing that the prevailing party should have the choice whether to enforce the award or the confirming *exequatur* judgment, as long as the *exequatur* judgment was issued by a court of the state in which the arbitral award was rendered).

63. See SCHACK, *supra* note 28, at 400. But see GEORG BORGES, *DAS DOPPELLEXEQUATUR VON SCHIEDSSPRÜCHEN: DIE ANERKENNUNG AUSLÄNDISCHER SCHIEDSSPRÜCHE UND EXEQUATURENTSCHEIDUNGEN* 222 (1997) (arguing that there is no danger a debtor will pay twice since German procedural law provides sufficient defenses in the second execution proceeding).

64. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

65. HEINZ THOMAS & HANS PUTZO, *KOMMENTAR ZUR ZIVILPROZESSORDNUNG*, § 328, ¶ 13 (Rainer Hübtege ed., 26th ed. 2004); SCHACK, *supra* note 28, at 367; STEIN, *supra* note 38, § 328, ¶ 117; Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 25-26 (1988).

66. § 261(3) Nr. 1 ZPO (F.R.G.).

*pendens* proceedings pending before a German court, its judgment will not be recognized or enforced in Germany.

### C. Reciprocity

Some states will only enforce foreign judgments if reciprocity exists between the two nations. Reciprocity exists when two nations enforce the judgments of each other's courts under essentially the same conditions. In the United States, there is no federal reciprocity requirement. In 1938, when the United States Supreme Court held in *Erie Railroad Co. v. Tompkins*<sup>67</sup> that there is no federal common law, it effectively eliminated the federal reciprocity requirement established in *Hilton v. Guyot*.<sup>68</sup> Thus, federal courts faced with diversity jurisdiction must follow the substantive law of the state in which the case arose.<sup>69</sup> Few states require reciprocity.<sup>70</sup>

Conversely, in Germany, reciprocity is firmly established as a prerequisite for the recognition of foreign money judgments.<sup>71</sup> This requirement has blocked the enforcement of U.S. judgments in Germany for a long time. In 1907, the German Imperial Court decided that because reciprocity was not assured with California, it could not enforce default judgments obtained from California courts by parties damaged in the 1906 San Francisco earthquake.<sup>72</sup> The court found that the California statute in force at that time granted California courts broader review powers than German courts possessed.<sup>73</sup> However, even

67. 304 U.S. 64, 78 (1938).

68. 159 U.S. 113, 227-28 (1895).

69. 304 U.S. at 78.

70. 32 states have adopted the Uniform Foreign-Money Judgments Recognition Act, 13 U.L.A. 263 (Supp. 2003), which does not require reciprocity. Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L LAW 239, 253 n.65 (2004). Nine states, however, wrote the reciprocity requirement back into the Act when enacting it: Florida, Ohio, Maine, North Carolina, Idaho, and Texas list reciprocity as a discretionary ground for denying recognition; Massachusetts and Georgia require reciprocity as a precondition to recognition; and New Hampshire only requires reciprocity from Canada. *Id.*

71. § 328(1) Nr. 5 ZPO (F.R.G.). There are, however, exceptions to the principle of reciprocity, including one in the ZPO, several statutes on non-monetary judgments, and certain decrees in the field of family law. According to section 328(2) of the ZPO, reciprocity is not required if the judgment refers to (a) a claim without German jurisdiction that is not of a monetary nature; or (b) a child claim (*Kindschaftssache*), such as for ascertainment of paternity or rescission of fatherhood, as defined in section 640(2) of the ZPO; or (c) a registered partnership claim, such as for the abrogation of, or a declaratory judgment on the existence or non-existence of, a registered partnership, as defined in section 661(1) Nos. 1 and 2 of the ZPO. Further, article 7, section 1, of the FamRAG provides that reciprocity is not required in matters relating to the status of children, annulment, or termination of marriage.

72. See *Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] [Imperial Court]* 70, 434 (435) (F.R.G.).

73. California amended its Code of Civil Procedure after the earthquake to allow for recognition and enforcement of foreign judgments. See CAL. CIV. PROC. CODE § 1915 (West 1907) ("A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state."). The provision was repealed in 1974 because it was "largely ignored by the courts" and "failed to achieve its basic historical purpose when in 1909 the Imperial Court of Germany refused to permit the execution of

at that time, commentators criticized the court's narrow view because the court overstretched the reciprocity requirement by tacitly demanding that foreign enforcement procedures be identical to, and not merely mostly the same as, their German counterparts.<sup>74</sup>

The call for abolition of the reciprocity requirement became stronger over the years. Many academics argue that disregarding the binding effect of a foreign court decision is a drastic measure with which to vindicate sovereignty concerns, and that it ultimately only punishes private litigants.<sup>75</sup> The reciprocity requirement may even harm German citizens: since there is no distinction between national and alien plaintiffs under German law, even a German plaintiff who has obtained a judgment in a foreign court against a German defendant may only enforce it in Germany if the reciprocity prerequisite is met.<sup>76</sup> Despite these criticisms, the German legislature continues to require reciprocity.<sup>77</sup>

In reaction to this scholarly criticism, German courts have softened the reciprocity requirement's rough edges by interpreting the notion of reciprocity more broadly, thus silently correcting the Imperial Court's ruling. Today, courts may assume reciprocity without demanding a special guarantee that the rendering state will enforce German judgments, nor must the state have already recognized a German decision.<sup>78</sup> Furthermore, German courts have changed course since the 1907 decision of the Imperial Court, and no longer require that the rendering state enforce German judgments under the same conditions required by German law, so long as the approach is generally similar.<sup>79</sup> Finally, reciprocity may be determined solely within a particular field of law or based on the

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California judgments rendered by default against German insurance companies." CAL. CIV. PROC. CODE § 1915 (West 2004) (comment of the Law Revision Commission regarding the 1974 repeal).

74. For sound critiques of the reciprocity requirement, see H. Wittmaack, *Kann ein Vollstreckungsurteil nach §§ 722 und 723 ZPO auf Grund eines nordamerikanischen, insbesondere kalifornischen Urteils erlassen werden?*, 22 *Zeitschrift für Internationales Recht* 1, 61-121 (1912); Ernest G. Lorenzen, *The Enforcement of American Judgments Abroad*, 29 *YALE L.J.* 188, 202-07 (1919).

75. See, e.g., Jürgen Basedow, *Internationales Verfahrensrecht*, in *REFORM DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS* 91, 101 (Peter Dopff et al. eds., 1980) (stating that "scholars have long agreed that the original purpose of the reciprocity requirement, to encourage foreign nations to conclude enforcement agreements with Germany, has not been fulfilled"); Martiny, *Recognition and Enforcement*, *supra* note 30, at 749 (arguing that "the reciprocity requirement . . . should be struck from the statute book"); Schack, *supra* note 28, at 377 (indicating that the reciprocity requirement is unfair); Friedrich K. Juenger, *Private International Law and the German Legislature*, in *THE INTERNATIONAL LAWYER: FREUNDGABE FÜR WULF H. DÖSER* 623, 625 (Friedrich Kübler et al. eds., 1999) ("It appears blatantly unfair to make private parties the whipping boys for perceived inadequacies of foreign legal systems."). But see Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 *J.L. & COM.* 211, 222 (1994) (asserting that "no country should be blamed for continuing to adhere to the reciprocity requirement, although it should eventually be discarded").

76. STEIN, *supra* note 38, § 328, ¶ 144. See Hans-Jürgen Puttfarken, *Zur Anerkennung und Vollstreckung ausländischer Urteile deutscher Kläger—verfassungswidrige Gegenseitigkeit*, 1976 *RIW* 149, 151 (arguing that this effect of the reciprocity requirement is unconstitutional).

77. In 1986, the German Parliament concluded that the abolition of the principle of reciprocity would be premature. Bundestagsdrucksache 10/504, at 88 (F.R.G.).

78. BGHZ 42, 194 (F.R.G.). See also STEIN, *supra* note 38, § 328, ¶ 156 (describing a willingness to recognize German judgments as sufficient).

79. See, e.g., BGHZ 42, 194 (196) (F.R.G.) (reciprocity assumed with South Africa); BGHZ 59, 116 (121) (F.R.G.) (reciprocity assumed with France).

type of judgment at issue. For example, if the rendering state recognizes German judgments based on certain rules of jurisdiction (such as territorial jurisdiction) or types of judgments (such as final judgments rendered in adversarial proceedings), partial reciprocity is assured for foreign judgments based on similar jurisdiction rules or types of judgments.<sup>80</sup>

Therefore, the reciprocity requirement no longer poses a real threat to U.S. creditors. In the absence of U.S. federal law on recognition and enforcement, reciprocity need only exist with regard to the state in which the rendering court sits.<sup>81</sup> Today, reciprocity is widely assumed with all U.S. states, and there are no recent decisions in German courts denying the enforcement of U.S. money judgments for lack of reciprocity.<sup>82</sup> In past years, commentators had raised objections to the assumption that reciprocity existed with regard to Mississippi and Montana.<sup>83</sup> These commentators argued that Montana state law provided for review on the merits (*révision au fond*) of foreign in personam judgments.<sup>84</sup> However, this was prior to Montana's enactment of the Uniform Money-Judgments Recognition Act, which prohibits review on the merits.<sup>85</sup> Thus, this argument is no longer valid. The observations regarding Mississippi are also outdated. Again, commentators argued that reciprocity was not assured because Mississippi law seemed to allow review on the merits.<sup>86</sup> However, the offending section of the Mississippi Code has since been repealed<sup>87</sup> and the Supreme Court of Mississippi has embraced the principles of the Restatement (Second) of Conflicts of Laws, allowing enforcement of foreign judgments without review on the merits.<sup>88</sup> Therefore, reciprocity with the State of Mississippi should also be assured.

80. See, e.g., BGHZ 141, 286 (300-301) (F.R.G.) (assuming partial reciprocity despite the rendering state's refusal to recognize asset-based jurisdiction).

81. See, e.g., BGHZ 141, 286 (299) (F.R.G.); ROLF A. SCHÜTZE, DEUTSCH-AMERIKANISCHE URTEILSANERKENNUNG 8 (1992); FRITZ WEINSCHENK, DIE ANERKENNUNG UND VOLLSTRECKUNG BUNDESDEUTSCHER URTEILE IN DEN VEREINIGTEN STAATEN UNTER DEN "FOREIGN MONEY JUDGMENT RECOGNITION ACTS" 37-38 (1988).

82. See, e.g., Behr, *supra* note 76, at 222-23; MARTINY, *supra* note 31, ¶ 1513-71.

83. Despite some earlier uncertainty among commentators, the Higher Regional Court (*Oberlandesgericht* or OLG) of Hamm has held that reciprocity with Florida is assured. OLG Hamm, 1995 Neue Juristische Wochenschrift-Rechtsprechungsreport [NJW-RR] 510 (511) (F.R.G.).

84. SCHÜTZE, *supra* note 81, at 92-93. See § 723(1) ZPO (F.R.G.).

85. See MONT. CODE ANN. §§ 25-9-601 to -609 (2003).

86. See MARTINY, *supra* note 31, ¶ 1543; SCHÜTZE, *supra* note 72, at 89-90 (noting that a foreign creditor could prove the existence of his claims by relying on a foreign judgment as evidence pursuant to the old Mississippi Code section 13-1-101).

87. MISS. CODE ANN. §§ 13-1-83 to -117 (1990), *repealed* by Laws ch. 573, § 141 (1991).

88. See *Laskosky v. Laskosky*, 504 So. 2d 726, 729 (Miss. 1987) ("Enforcement of foreign nation judgments in our courts is governed by the principle of comity. *Restatement*, 2nd, Conflicts of Laws, § 98 (1986 Rev.). The principle of comity is similar to full faith and credit except that it is not governed by Federal statutes and that its application rests in the discretion of the trial judge."); *Dep't. of Human Servs. v. Shelnut*, 772 So. 2d 1041, 1044 (Miss. 2000) (same). For an overview of the Mississippi law governing the recognition and enforcement of foreign judgments, see Michael H. Hoffheimer, *Mississippi Conflict of Laws*, 67 Miss. L. J. 175, 190-195 (1997).

III.  
PRINCIPAL OBSTACLES TO RECOGNITION OF U.S.  
MONEY JUDGMENTS

A. *Jurisdiction*

As is common in many jurisdictions, Germany exercises review of the rendering court's jurisdiction.<sup>89</sup> Such review is deemed necessary to protect a defendant from being sued in an inappropriate forum, which might impair the defendant's defense. Pursuant to section 328(1) No. 1 of the ZPO, a German judge must verify that the courts of the rendering state had proper jurisdiction in the international sense over the dispute. Since the ZPO does not provide specific rules for determining jurisdiction in international cases, German courts have applied the "mirror-image principle", projecting Germany's own rules of jurisdiction on the foreign court and approving jurisdiction if, in the reverse situation, a German court would have jurisdiction to hear the case.<sup>90</sup> In other words, German courts extend the rules of domestic jurisdiction to international cases.<sup>91</sup> This ensures that judgments based on what Germany considers exorbitant jurisdiction will not be enforced in Germany.

Nonetheless, German law does not go so far as to demand that the exact court rendering the foreign judgment had jurisdiction in the international sense; it suffices that *any* court in the rendering state had jurisdiction pursuant to the mirror-image rule.<sup>92</sup> Thus, if a U.S. state court renders a judgment, it is sufficient if any court in that state had proper jurisdiction over the dispute. As to judgments handed down by U.S. federal courts, international jurisdiction exists if any court in the United States had jurisdiction.<sup>93</sup> However, there is no rule under German law to prevent the plaintiff from forum shopping. Hence, if there is concurrent jurisdiction, the plaintiff may choose which court to bring the case in. On the other hand, if a German court has exclusive jurisdiction over a matter under German law, as is for instance the case with disputes arising from tenancy contracts and residential property,<sup>94</sup> foreign courts may not have jurisdiction in the international sense.

In general, German law provides for a wide range of grounds for jurisdiction.<sup>95</sup> The principal rule is that a suit can be brought before a court where the

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89. See Juenger, *supra* note 65, at 13-19 (providing a comparative overview of the review standards applied in various legal systems).

90. For an overview of the history of this rule, see MARTIN FRICKE, *DIE AUTONOME ANERKENNUNG SZÜSTÄNDIGKEITSREGEL IM DEUTSCHEN RECHT DES 19. JAHRHUNDERTS* 14 (1993). However, the rather inflexible mirror-image principle is not undisputed among legal scholars. Some argue for acceptance of international jurisdiction if the rendering state had a sufficiently close connection to the dispute. See, e.g., Jürgen Basedow, *Variationen über die spiegelbildliche Anwendung deutschen Zuständigkeitsrechts*, 1994 IPRax 183, 186.

91. Martiny, *Recognition and Enforcement*, *supra* note 30 at 734; Juenger, *supra* note 755, at 624-25; Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 306 (1989).

92. Zekoll, *supra* note 91, at 306.

93. BGHZ 141, 286 (289) (F.R.G.).

94. § 29 ZPO (F.R.G.).

95. See, e.g., LEO ROSENBERG ET AL., *ZIVILPROZESSRECHT* 172-73 (15th ed. 1993).



defendant resides (*actor sequitur forum rei*),<sup>96</sup> or where a legal entity is incorporated.<sup>97</sup> Special jurisdiction exists, *inter alia*, at the site of an agency or other establishment of the defendant.<sup>98</sup> In contract cases, a court has jurisdiction at the location where the contract was to be performed.<sup>99</sup> Tort claims can be brought before courts either at the place where the tort was committed or where the damage occurred.<sup>100</sup> Moreover, German law broadly allows for choice of forum clauses in commercial transactions,<sup>101</sup> and courts can hear a case absent in personam jurisdiction if the defendant pleads to the charge without contesting the court's jurisdiction.<sup>102</sup> Finally, pursuant to section 23 of the ZPO, a German court may exercise jurisdiction over any nonresident defendant who owns assets in Germany, irrespective of whether those assets are valuable enough to satisfy the plaintiff's claim.<sup>103</sup>

Because Germany allows for jurisdiction in so many cases, jurisdictional review only hinders the enforcement of U.S. judgments when they are based on jurisdiction rules that Germany finds exorbitant.<sup>104</sup> For example, transient or tag jurisdiction based on purported service of process on a person only transiently present in a state's territory, permissible in the United States,<sup>105</sup> violates notions of due process in Germany.<sup>106</sup> Further, if a U.S. court assumes jurisdic-

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96. §§ 12, 13, 16 ZPO (F.R.G.).

97. § 17 ZPO (F.R.G.).

98. § 21 ZPO (F.R.G.).

99. § 29 ZPO (F.R.G.).

100. § 32 ZPO (F.R.G.).

101. § 38 ZPO (F.R.G.).

102. § 39 ZPO (F.R.G.).

103. § 23 ZPO (F.R.G.). Asset-based jurisdiction under section 23 of the ZPO has sometimes led to untenable results. For example, the Higher Regional Court of Karlsruhe asserted jurisdiction in one case simply because the defendant left behind some journals worth only a few dollars. *See* OLG Karlsruhe, reported by JAN KROPHOLLER, *DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS IM JAHRE 1973* (IP-Rechtsprechung 1973), 373-74 (1975) (F.R.G.). The unlimited application of section 23 of the ZPO has long been criticized. *See, e.g.,* JAN KROPHOLLER, 1 *HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS* ¶¶ 334-35 (1982); *see also* THOMAS PFEIFFER, *INTERNATIONALE ZUSTÄNDIGKEIT UND PROZESSUALE GERECHTIGKEIT* 525-31 (1995) (providing an overview of the history of section 23 of the ZPO). Because of extreme cases like this, it did not come as a surprise when the German Federal Supreme Court of Justice considerably restricted the application of asset-based jurisdiction in 1991. *See* BGHZ 115, 90 (97-99) (F.R.G.). The court observed that the legislature had intended to protect German creditors from foreign defendants without any traceable domicile or site in Germany, and had not intended to open the doors of German courthouses to all foreign litigants with minimal connections to the country. BGHZ 115, 90 (94-95) (F.R.G.). Therefore, asset jurisdiction under section 23 of the ZPO can only be asserted if the case has a sufficient connection to Germany. BGHZ 115, 90 (97-99) (F.R.G.). A sufficient connection is commonly assumed, for example, when the plaintiff is domiciled in Germany. *See, e.g.,* LÜKE, *supra* note 45, § 23, ¶ 15.

104. Views on what constitutes an exorbitant basis of jurisdiction differ considerably in the international arena. These conflicting views were highlighted when they derailed negotiations for a worldwide convention on judgments. *See supra* text accompanying note 18.

105. *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990). For a general critique of the transient rule, see Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth And Forum Conveniens*, 65 *YALE L.J.* 289 (1956).

106. SCHACK, *supra* note 28, at 182. *See also* PFEIFFER, *supra* note 99, at 570-77; JOCHEN SCHRÖDER, *Internationale Zuständigkeit* 171 (1988) (stating that transient jurisdiction is "superfluous and harmful"); GEIMER, *supra* note 54, ¶ 1585 (concluding that transient jurisdiction "rests on medieval conceptions of law"). *But see* Axel Halfmeier, *Menschenrechte und internationales Privatrecht*.

tion merely because a defendant conducts operations otherwise unrelated to the lawsuit in the forum state, it will in most cases violate German jurisdiction standards.<sup>107</sup>

### B. Service of Process

According to section 328(1) No. 2 of the ZPO, a foreign judgment will not be recognized if the defendant was not duly served with the written pleadings and with sufficient time to prepare a defense. This provision safeguards the rights of the defendant to receive notice and to be heard.<sup>108</sup>

“Duly served” means that service was given in accordance with the rendering state’s rules of procedural law<sup>109</sup> and any international agreements to which the state is a party. Such agreements might include, for example, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.<sup>110</sup> Furthermore, Article 103(1) of the German Constitution, which guarantees the right to be heard, establishes minimum standards for sufficient trial preparation. Thus, German courts essentially look first at whether the foreign law regarding service was respected, and then whether the defendant was given a reasonable amount of time to prepare a defense.<sup>111</sup> The determination whether a particular amount of time is reasonable is case-specific.<sup>112</sup> As a basic rule, a defendant should have at least two weeks to prepare for trial, just as German law requires.<sup>113</sup> However, interlocutory proceedings

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*trecht im Kontext der Globalisierung*, 68 RABELSZ 653, 657 (2004) (noting that tag jurisdiction should not be unilaterally condemned since many continental “European states have jurisdictional concepts comparable to the transient rule”). The United Kingdom also allows service on anyone present within the country, regardless of how temporary that presence may be. 1 DICEY & MORRIS ON THE CONFLICT OF LAWS ¶ 11-082 (Lawrence Collins ed., 13th ed. 2000); H.R.H. Maharane Seethadevi Gaekwar of Baroda v. Wildenstein, 2 Q.B. 283, 292 (Eng. C.A. 1972) (holding that tag jurisdiction is possible if the issue at least has “something of an international character” and if the service of process in the United Kingdom is bona fide and not for the purpose of harassing the defendant).

107. See SCHACK, *supra* note 28, at 182; HAIMO SCHACK, JURISDICTIONAL MINIMUM CONTACTS SCRUTINIZED 37-40 (1983) (criticizing an expansive view of “doing business”); Zekoll, *supra* note 91, at 308-10; Peter Gottwald, *Internationale Zuständigkeit kraft “business activities” im geplanten Haager Übereinkommen über Zuständigkeit und ausländische Urteile in Zivil- und Handelssachen in EINHEIT UND VIELFALT*, *supra* note 6, at 231 (discussing U.S. grounds for jurisdiction within the context of the Hague Judgment Convention).

108. BAUMBACH, *supra* note 59, § 328, ¶ 20; ZÖLLER, *supra* note 42, § 328, ¶ 134.

109. For example, in transatlantic litigation, U.S. plaintiffs often try to serve the foreign defendant on U.S. territory; if they are successful, and if the service complies with U.S. law, German courts may not deny recognition of a later judgment. Under U.S. law, U.S. courts have jurisdiction over a foreign parent company if the company has an established U.S. subsidiary considered a “mere department” or an “alter ego” of it. See, e.g., Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120-22 (2d Cir. 1984). Therefore, a U.S. court will normally have jurisdiction over a foreign company if a U.S. plaintiff serves a U.S. subsidiary of that company. In such a case, German courts will recongize the judgment.

110. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

111. STAUDINGER, *supra* note 37, § 328 ZPO, ¶¶ 443-44.

112. *Id.* § 328 ZPO, ¶ 443.

113. § 274(3) ZPO (F.R.G.).

might require less time given their speedy nature. Conversely, international cases might require more time for translation and procurement of local counsel.<sup>114</sup> Regardless, a defendant who pled to a charge before a foreign court cannot rely on section 328(1) No. 2 of the ZPO even if service was not given in accordance with the foreign state's law. In general, German courts interpret the concept of pleading to a charge broadly to include any action by the defendant showing knowledge of the pending hostile action.<sup>115</sup>

When a party is served abroad in a foreign country that is a signatory to the Hague Service Convention, compliance with the procedures laid down in the Convention is mandatory.<sup>116</sup> Under the Convention, to which both Germany and the United States are parties, each state must designate a central authority to receive requests for service of process.<sup>117</sup> German courts thus have held that service is improper when a U.S. plaintiff mails the complaint directly to a German defendant.<sup>118</sup>

In July 2003, an interlocutory injunction issued by the German Federal Constitutional Court in the *Napster* case dealt a major blow to the Hague Service Convention's goal of providing fast and efficient mechanisms for service abroad.<sup>119</sup> The case concerned a class action claiming \$17 billion in punitive

114. SCHACK, *supra* note 28, at ¶ 365.

115. MARTINY, *supra* note 31, ¶ 852; STAUDINGER, *supra* note 37, § 328 ZPO, ¶¶ 442-43.

116. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1998) ("By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies.").

117. Hague Service Convention, *supra* note 110, art. 2, 20 U.S.T. at 362, 658 U.N.T.S. at 165, 167. The Hague Service Convention also provides for several alternative methods of service, but allows signatory countries to object to these methods. *Id.* arts. 8-10, 20 U.S.T. at 363, 658 U.N.T.S. at 169, 171. Because Germany has exercised this right, plaintiffs who sue defendants in Germany must request the designated central authority to execute service of process. See HAGUE CONF. ON PRIVATE INT'L L., STATUS TABLE: 14: CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=17](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17) (Jan. 18, 2005).

118. See, e.g., BGHZ 120, 305 (309) (F.R.G.).

119. BVerfG, JZ, 58 (2003), 956 (956-58) (F.R.G.). For a critical discussion of the case, see Joachim Zekoll, *Neue Maßstäbe für Zustellungen nach dem Haager Zustellungsübereinkommen?*, 2003 NJW 2885, 2887 (arguing that domestic public policy considerations should not come into play where service of process is concerned); Bettina Friedrich, *Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages Suit*, 4 GERMAN L.J. 1233, 1239 (2003), available at <http://www.germanlawjournal.com/article.php?id=341> (last visited Dec. 29, 2004) (pointing out that "[t]he practical effect of the Federal Constitutional Court's Order for the case at stake is not very clear."); KLAUS J. HOPT ET AL., *DIE ZUSTELLUNG EINER US-AMERIKANISCHEN CLASS ACTION IN DEUTSCHLAND* (forthcoming 2005) (arguing from a comparative perspective that article 13 of the Hague Service Convention must be construed narrowly and does not allow the halting of service for domestic public policy reasons); Peter Huber, *Playing the Same Old Song—German Courts, the "Napster" Case and the International Law of Service of Process*, in FEST-SCHRIFT FÜR ERIK JAYME, *supra* note 1, at 361, 70 ("The law of service of process is not the right forum to argue over the appropriateness of a foreign legal system's rules on civil procedure and private law"). For a defense of the standpoint taken by the German Federal Constitutional Court, see Prütting, *supra* note 1, at 718 (arguing that the court should speak out against the "abuse of judicial institutions by insubstantial damages claims initiated before U.S. courts"); Burkhard Heß, *Transatlantischer Rechtsverkehr heute: Von der Kooperation zum Konflikt?*, 2003 JZ 923, 926 (arguing that only "severe infringements of human rights" should entitle German authorities to halt service); Rolf A. Schütze, *Zur Zustellung US-amerikanischer Klagen in Deutschland*, in RUSSIA IN THE INTERNATIONAL CONTEXT: PRIVATE INTERNATIONAL LAW, CULTURAL HERITAGE, INTELLECTUAL PROP-

damages from the German media and entertainment company Bertelsmann.<sup>120</sup> The plaintiffs alleged that Bertelsmann's decision to provide funding to Napster prolonged the life of the company's Internet file-sharing service and thus the copyright infringement Napster has become renowned for.<sup>121</sup> The U.S. plaintiffs applied for service of the lawsuit on Bertelsmann in Germany in accordance with the Hague Service Convention.<sup>122</sup> When the proper German court granted the service order,<sup>123</sup> Bertelsmann sought an interlocutory injunction before the German Federal Constitutional Court, arguing that service must be denied because it would violate Bertelsmann's fundamental rights as defined by the German Constitution and various international conventions to which Germany is a party.<sup>124</sup> The court agreed and invoked the "public order" clause of Article 13, section 1, of the Hague Service Convention<sup>125</sup> to provisionally halt service.<sup>126</sup> The court reasoned that it would violate German public policy to allow a defendant to be served in Germany under the Hague Service Convention when the plaintiffs were obviously misusing the lawsuit to bend the defendant's will through media pressure and the threat of an unfavorable court order.<sup>127</sup> Accordingly, international judicial cooperation remains constrained by the rights found in the German Constitution. Yet the court's decision came as a surprise because in 1995 it had narrowly construed the same clause to hold that service of a U.S. action for punitive damages on a German defendant did not violate German public policy.<sup>128</sup>

It should be reiterated that the court's 2003 decision only related to a motion for preliminary injunctive relief and was not a decision on the merits.<sup>129</sup> If the injunction in the *Napster* case is upheld, the court will have opened a Pandora's box by creating a new defense against service proceedings initiated by

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ERTY, HARMONIZATION OF LAWS 325, 336 (Alexander Trunk et al. eds., 2004) (stating that "service of punitive damages actions can be denied because of their penal character," and because they "infringe German public policy" as they "are particularly prone to pressure from an emotionalized general public").

120. BVerfG, JZ, 58 (2003), 956 (956) (F.R.G.).

121. *Id.*

122. *Id.*

123. *Id.* See OLG Düsseldorf, 2003 WERTPAPIER-MITTEILUNGEN [WM] 1587 (1587-89) (F.R.G.).

124. BVerfG, JZ, 58 (2003), 956 (956) (F.R.G.). See, e.g., HANNO MERKT, ABWEHR DER ZUSTELLUNG VON "PUNITIVE DAMAGES"-KLAGEN: DAS HAAGER ZUSTELLÜBEREINKOMMEN UND US-AMERIKANISCHE KLAGEN AUF "PUNITIVE DAMAGES," "TREBLE DAMAGES," UND "RICO TREBLE DAMAGES" 147-186 (1995) (arguing that such damages violate the public order). For a critique of this view, see Friedrich K. Juenger & Mathias Reimann, *Zustellung von Klagen auf punitive damages nach dem Haager Zustellungsübereinkommen*, 1994 NJW 3274.

125. Article 13 states: "Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security." Hague Service Convention, *supra* note 110, art. 13, 20 U.S.T. at 364, 658 U.N.T.S. at 171.

126. BVerfG, JZ, 58 (2003), 956 (956-58) (F.R.G.).

127. *Id.*

128. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 91, 335 (F.R.G.). The court had earlier issued a preliminary injunction halting service. BVerfG, 1994 NJW 3281 (F.R.G.). Once a decision was made on the merits, the plaintiff was finally allowed to serve his punitive damages action on the German defendant.

129. A decision on the merits is expected in spring 2005.

U.S. plaintiffs under the Hague Service Convention. The public order defense would not only hamper transatlantic service of process by being repeatedly invoked, it would also increase the workload of German courts, which in literally each case would have to carefully consider whether the service at issue should be regarded as an abuse of process. Such review would be difficult to conduct, since written pleadings rarely provide sufficient information for a thorough assessment. Moreover, the court's 2003 decision jeopardizes the Hague Service Convention's aim of providing efficient methods for service abroad without even truly protecting German defendants: U.S. plaintiffs can still rely on domestic service procedures, such as service on a U.S. subsidiary considered a "mere department" or an "alter ego" of the German defendant.

Fortunately, it seems that the German Federal Constitutional Court has realized the grave consequences of its July 2003 decision. In June 2004, it refused to issue an interlocutory injunction against service of a U.S. civil rights action involving \$11 million in punitive damages.<sup>130</sup> Citing its 1995 decision narrowly construing the public order clause,<sup>131</sup> the court reasoned that only circumstances of substantial weight may justify a delay of international service proceedings.<sup>132</sup> Reviewing the claims at stake, the court found that the defendant was not at risk of ruinous litigation and that the service would not cause significant damage to his reputation.<sup>133</sup> Therefore, the court held that halting service was unjustified.<sup>134</sup>

The influence of the *Napster* injunction on the enforcement of future judgments remains to be seen. So far, German courts have applied very liberal standards. They have accepted that service on German-based defendants may be effected within the rendering state, as long as foreign domestic law allows for such service. However, if the German Federal Constitutional Court upholds its 2003 *Napster* decision, courts might begin to review every foreign judgment to determine whether the service in the case violates the Convention's public order clause. If that happens, courts could deny enforcement in numerous cases on grounds of improper service.

### C. Public Policy

Pursuant to section 328(1) No. 4 of the ZPO, foreign judgments that violate German public policy cannot be recognized or enforced in Germany, just as foreign judgments violating U.S. public policy cannot be enforced in the United States.<sup>135</sup> German public policy is violated when recognition or enforcement of the foreign judgment would produce a result manifestly irreconcilable with fun-

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130. BVerfG, 2004 WM 1402 (1402-03) (F.R.G.).

131. See BVerfGE 91, 335 (340) (F.R.G.).

132. BVerfG, 2004 WM 1402 (1403) (F.R.G.).

133. *Id.*

134. *Id.*

135. See, e.g., *Hilton*, 159 U.S. at 204-05; UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3), 13 U.L.A. at 265.

damental principles of German law, such as basic constitutional rights.<sup>136</sup> Generally speaking, courts have applied rather liberal review standards. Only judgments that are repugnant to Germany's fundamental conceptions of justice and that appear utterly intolerable given the facts are likely to be denied recognition.<sup>137</sup>

### 1. Violations of German Substantive Law

Most judgments found to violate German public policy are manifestly contrary to German substantive, as opposed to procedural, law. German judges do not examine whether the foreign court applied foreign law correctly; that is, there is no review on the merits (*révision au fond*).<sup>138</sup> However, German courts do compare the outcome of the foreign judgment with the decision that German law would have generated.<sup>139</sup>

Minor differences between foreign and German law will not bar recognition and enforcement of the foreign judgment. Thus, it does not matter that U.S. juries generally award higher damages in tort cases than German courts, especially with regard to damages for pain and suffering,<sup>140</sup> or that U.S. courts sometimes calculate damages differently.<sup>141</sup> Similarly, an award of contingency fees, which are illegal under German law,<sup>142</sup> does not violate German public policy standards since German public policy is not usually concerned with foreign rules for the remuneration of professionals.<sup>143</sup> Only when there is clear evidence that a foreign judgment overcompensates the plaintiff for attorney's fees will German courts refuse, at least in part, to enforce the judgment.<sup>144</sup>

When assessing the extent to which a foreign judgment must deviate from German standards to render it unenforceable, the Federal Court of Justice con-

136. Martiny, *Recognition and Enforcement*, *supra* note 30, at 745; BAUMBACH, *supra* note 59, § 328, ¶ 31; STAUDINGER, *supra* note 37, § 328 ZPO, ¶ 502; ZÖLLER, *supra* note 42, § 328, ¶ 70.

137. BGHZ 118, 312 (347-48) (F.R.G.); Martiny, *Recognition and Enforcement*, *supra* note 30, at 745.

138. BGHZ 118, 312 (348) (F.R.G.).

139. *Id.*

140. See, e.g., BGHZ 118, 312 (326-32) (F.R.G.). Interestingly, there is evidence that the amounts awarded by German courts are increasing. Recently, the Higher Regional Court of Hamm awarded a plaintiff \_ 500,000—the highest compensation for pain and suffering ever awarded in Germany—against a doctor who was held liable for medical malpractice where his conduct during the plaintiff's birth resulted in severe mental and physical disabilities. See OLG Hamm, 2002 Zeitschrift für Versicherungsrecht (VersR) 1163 (F.R.G.); Jörg Fedtke, *Germany*, in TORT AND INSURANCE LAW YEARBOOK: EUROPEAN TORT LAW 2002, 206, 214 (Helmut Koziol & Barbara C. Steininger eds., 2003).

141. See Zekoll, *supra* note 4, at 650-51; Gerfried Fischer, *Recognition and Enforcement of American Tort Judgments in Germany*, 68 ST. JOHN'S L. REV. 199, 213-14 (1994).

142. § 49b(2) Bundesrechtsanwaltsordnung (BRAO) (F.R.G.).

143. BGHZ 118, 312 (332-34) (F.R.G.). In this case, the German Federal Court of Justice held that a contingency fee of 40% was not excessive since the plaintiff's lawyer had worked for several years without payment. *Id.* However, if the attorneys are located in Germany and render their services there, a U.S. judgment awarding contingency fees to those attorneys would not be enforceable. See Burkhard Heb, *Inländische Rechtsbesorgung gegen Erfolgshonorar?*, 1999 NJW 2485, 2486.

144. BGHZ 118, 312 (334) (F.R.G.).

siders the connection the case has to Germany.<sup>145</sup> The stronger the connection to a German forum, the smaller the deviation needs to be to violate German public policy.<sup>146</sup> For example, the Federal Court of Justice recently held that a case has a very remote connection with Germany when the only connecting factors are the defendant's German citizenship and the fact that he moved back to Germany after committing a tort in the U.S. while he was domiciled there.<sup>147</sup>

Regardless of how closely connected a case is to Germany, it is well established that U.S. judgments awarding punitive damages will generally violate the public policy clause. German law permits awards for compensatory damages, thus effectively allowing aggrieved parties to seek compensation for losses suffered as a direct result of a tortfeasor's action.<sup>148</sup> Unlike U.S. law, however, German law does not provide for punitive, exemplary, or multiple damages, the goals of which are to punish the wrongdoer for his behavior, especially if it was willful or malicious, and to deter other potential wrongdoers from acting similarly.<sup>149</sup> In Germany, the legislature has made it clear that such considerations generally fall within the scope of criminal law and that such damages may not be awarded to punish tortfeasors.<sup>150</sup> Thus, as a basic principle, German civil law provides a remedy for the victim's losses but leaves the question of whether and to what extent the tortfeasor should be punished in the hands of public prosecutors.<sup>151</sup> Given these considerations, German courts will not enforce foreign judgments to the extent that they award punitive, exemplary, or multiple damages.<sup>152</sup>

In dicta, however, the German Federal Court of Justice has established one exception to the general ban on enforcing punitive damages awards: the court

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145. *Id.* at (348).

146. *Id.*

147. *Id.* at (348-49).

148. See HERMANN LANGE & GOTTFRIED SCHIEMANN, *SCHADENSERSATZ* 12-13 (3d ed. 2003). For example, the German Federal Court of Justice tends to grant compensatory damages when assessing damages for violations of personality rights by the media. See BGH, 1995 NJW 861 (865) (F.R.G.) (considering the magazine defendants' profits when assessing damages in a case of outrageous defamation). For a general overview of punitive elements in German private law, see Carsten Schäfer, *Strafe und Prävention im Bürgerlichen Recht*, 202 Archiv für die civilistische Praxis [AcP] 397 (2002); INA EBERT, *PÖNALE ELEMENTE IM DEUTSCHEN PRIVATRECHT* (2004).

149. See *Smith v. Wade*, 461 U.S. 30, 54 (1983) ("Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future.") (punctuation omitted). For a general overview of other justifications for punitive damages, see John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 395-96 (2004).

150. See 2 MOTIVE ZU DEM ENTWURF EINES BÜRGERLICHEN GESETZBUCHES FÜR DAS DEUTSCHE REICH 17-18 (2d ed. 1896) (stating that recourse to "moral or penal considerations" is not appropriate when assessing damages in civil cases).

151. LANGE & SCHIEMANN, *supra* note 148, at 12-13. For more narrow exceptions to this rule, see *supra* note 148. For a general overview of the delimitation of tort and criminal law in Europe, see 1 CHRISTIAN VON BAR, *THE COMMON EUROPEAN LAW OF TORTS* ¶¶ 618-23 (1998).

152. BGHZ 118, 312 (334-35) (F.R.G.). For a discussion of this landmark decision, see Zekoll, *supra* note 4, at 655-57; Gerhard Wegen & James Sherer, *Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages*, 32 I.L.M. 1320, 1322 (1993); Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 746 (1992).

stated that it would allow enforcement of punitive or exemplary damages if the award would serve a compensatory purpose.<sup>153</sup> For example, punitive damages may occasionally serve as compensation for non-pecuniary losses that are difficult to prove, or costs and expenses not covered by other types of damages. Nonetheless, it is doubtful that this exception will ever avail a U.S. plaintiff because the court limited its application to cases in which the compensatory objective of a punitive damage award is plainly stated in the foreign court's decision,<sup>154</sup> something that rarely happens in the United States.

The U.S. Supreme Court recently reined in the size of punitive damages awards in *BMW of N. Am., Inc. v. Gore*<sup>155</sup> and *State Farm Mut. Auto. Ins. Co. v. Campbell*,<sup>156</sup> holding that excessive awards violate the Due Process Clause of the U.S. Constitution. In *BMW*, the purchaser of a new vehicle sued the car distributor for damages because the distributor fraudulently failed to disclose that the car had been repainted.<sup>157</sup> The Alabama Supreme Court awarded \$4,000 in compensatory damages and \$2 million in punitive damages (a ratio of 500:1).<sup>158</sup> The U.S. Supreme Court reversed, holding that the Fourteenth Amendment's Due Process Clause prohibits states from imposing such grossly excessive punishments on tortfeasors.<sup>159</sup> Similarly, in *State Farm*, the Court held that a punitive damages award of \$145 million, when compared to compensatory damages of only \$1 million, was excessive.<sup>160</sup> However, it is doubtful that the Supreme Court's recent restrictions will change German opposition to punitive damages. While the Court essentially limited the amount of punitive damages that can be awarded, German courts reject them not only because of their excessiveness, but also because of the underlying "penal" rationale behind them, which German courts fear may give plaintiffs a purely commercial incentive to file lawsuits.<sup>161</sup>

## 2. Violation of German Procedural Standards

A manifest deviation from German procedural standards can also trigger the application of the public policy clause.<sup>162</sup> German courts have shown deference for foreign procedures and recognize foreign judgments even if the procedure followed abroad was not identical with German procedure. It is only when

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153. BGHZ 118, 312 (334-35) (F.R.G.).

154. *Id.* at (341-42).

155. 517 U.S. 559 (1996).

156. 538 U.S. 408 (2003).

157. 517 U.S. at 563.

158. *Id.* at 565, 567.

159. *Id.* at 562.

160. 538 U.S. at 412, 429.

161. *But see* Volker Behr, *Punitive Damages in American and German Law-Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 161 (2003) (concluding that the shrinking gap between German and U.S. damages awards may lead to the future enforceability of U.S. money judgments).

162. GEIMER, *supra* note 45, at 135; MARTINY, *supra* note 31, ¶¶ 1016, 1021; NAGEL & GOTTWALD, *supra* note 28, §11, ¶ 177; STEIN, *supra* note 38, § 328, ¶ 132.



there is a grave deviation from German procedural standards that recognition is denied.

For example, the Federal Court of Justice has firmly rejected the claim that U.S. discovery rules violate German public policy.<sup>163</sup> Undeniably, U.S. discovery grants litigants more access to evidence held by their opponents and third parties than German procedure, which is based on a tightly controlled judicial fact-finding system. However, the court reasoned that a comparison of U.S. and German discovery methods should not be limited to Germany's rather narrow discovery procedures, but must also take into account the duty of disclosure under German substantive law, which, in practice, may be functionally equivalent to adversarial discovery proceedings in the United States.<sup>164</sup> Differences in how litigation costs are allocated also do not bar the enforcement of U.S. judgments.<sup>165</sup> Thus, the U.S. rule that each side must bear its own litigation costs has not been regarded as violative of German public policy,<sup>166</sup> even though under German law the victorious party is entitled to recoup from its opponent court fees and attorney's fees.<sup>167</sup> From this discussion it becomes clear that differences in substantive law generally bar enforcement of U.S. judgments in Germany far more often than differences between U.S. and German civil procedure.

#### IV.

##### ENFORCEMENT AND EXECUTION

The enforcement of a foreign judgment by German courts and other enforcement organs is contingent on a formal court proceeding. The standard of review depends on the applicable rules. Enforcement under the Brussels Regulations allows for a simplified proceeding,<sup>168</sup> while German domestic law sets stricter standards. Pursuant to sections 722 and 723 of the ZPO, a foreign judgment may only be enforced if a German court renders a judgment of enforcement after determining that all the requirements for recognition set out in section 328 of the ZPO have been met. The action for a declaration of enforceability is an adversarial proceeding and the general rules of jurisdiction apply. The proper

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163. BGHZ 118, 312 (323-25) (F.R.G.). Many commentators have argued that the court erred. See, e.g., Rolf A. Schütze, *Die Anerkennung und Vollstreckbarerklärung US-amerikanischer Schadenersatzurteile in Produkthaftungssachen in der Bundesrepublik Deutschland*, in *BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT: FESTSCHRIFT FÜR HEINRICH NAGEL ZUM 75. GEBURTSTAG* 392, 401 (Walther J. Habscheid & Karl Heinz Schwab eds., 1987).

164. BGHZ 118, 312 (324) (F.R.G.).

165. *Id.* at (325).

166. *Id.* at (326).

167. § 91(1) ZPO (F.R.G.). The recovery of attorney's fees is, however, restricted to the recoupment of statutory fees as established in the Attorney Compensation Act (*Rechtsanwaltssvergütungsgesetz* or RVG). Those fees are calculated in relation to the value of the claim in dispute.

168. See *supra* notes 24-25. Germany also enjoys simplified proceedings with other nations through other bilateral and multilateral enforcement treaties. For more information, see NAGEL & GOTTWALD, *supra* note 28, § 13, ¶¶ 300-559.

venue to file the motion is determined primarily by the defendant's domicile<sup>169</sup> or the location of the assets that are to be seized.<sup>170</sup> The action must be filed before the local court (*Amtsgericht*) if the enforceable amount is \_ 5,000 or less;<sup>171</sup> otherwise the regional court (*Landgericht*) has jurisdiction. Either way, the court assesses whether the conditions for recognition set forth in section 328 of the ZPO have been met without reviewing the judgment on its merits.<sup>172</sup> However, the defendant is entitled to raise defenses based on events that occurred after the foreign judgment was rendered.<sup>173</sup> For instance, if a defendant can demonstrate that the judgment has already been paid, the creditor is barred from further pursuing the judgment's execution.<sup>174</sup>

Once the grant of enforceability is rendered, the creditor can apply for an enforceable copy of the judgment, which may be executed in accordance with the German laws of execution (*Zwangsvollstreckung*).<sup>175</sup> While the ZPO provides for a wide range of enforcement mechanisms, only the most important can be named here.<sup>176</sup> Generally speaking, because German and U.S. enforcement procedures are similar, U.S. plaintiffs who have reached the enforcement stage do not encounter more difficulties in Germany than they would if they were trying to collect their awards in the United States.

Money judgments may be enforced by different means, depending on the debtor's assets. A creditor can enforce execution against the assets of the debtor by sending a bailiff to confiscate valuable assets and auction them in a forced sale.<sup>177</sup> In general, to force execution on real estate owned by the debtor, the creditor must choose between a compulsory mortgage of the property (*Zwangshypothek*) as set forth in section 867 of the ZPO, or foreclosure (*Zwangsversteigerung*) or sequestration (*Zwangsverwaltung*) pursuant to section 869 of the ZPO and the provisions of the Foreclosure and Sequestration Act (*Zwangsversteigerungs- und Verwaltungsgesetz* or ZVG).

The plaintiff may also file a motion for a garnishment order with the court that has jurisdiction over enforcement (*Vollstreckungsgericht*). In cases where the debtor does not reside or is not located in Germany, the local court where the debtor's assets are located is the appropriate venue to file such a motion.<sup>178</sup> The *Rechtspfleger*, a court administrator with specialized legal training, will issue the order, which garnishes the debtor's claim against a third party and transfers that

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169. § 12 ZPO (F.R.G.).

170. § 23 ZPO (F.R.G.).

171. § 23(1) GERICHTSVERFASSUNGSGESETZ [GVG] [Court organizational statute] (F.R.G.).

172. § 723(1) ZPO (F.R.G.).

173. § 767(2) ZPO (F.R.G.).

174. See BORGES, *supra* note 63, at 222.

175. §§ 704-802 ZPO (F.R.G.).

176. For an introduction to the German law of execution, see generally ROLF LACKMANN, *ZWANGSVOLLSTRECKUNGSRECHT: MIT GRUNDZÜGEN DES INSOLVENZRECHTS* (6th ed. 2003); HANNS PRÜTTING & BARBARA STICKELBROCK, *ZWANGSVOLLSTRECKUNGSRECHT* (2002); LEO ROSENBERG ET AL., *ZWANGSVOLLSTRECKUNGSRECHT* (11th ed. 1997); HANS BROX & WOLF-D. WALKER, *ZWANGSVOLLSTRECKUNGSRECHT* (7th ed. 2003).

177. §§ 808-27 ZPO (F.R.G.).

178. § 828(2) ZPO (F.R.G.).

claim to the creditor for collection. The court serves this order on all three parties: the creditor, the debtor, and the third party. However, German law provides some protection for debtors by restricting garnishment and seizure in certain situations. For example, items that are necessary for personal use or work are exempt from seizure.<sup>179</sup> Further, to prevent the debtor from becoming dependent on public assistance, there is a set minimum wage below which no amount may be seized or garnished.<sup>180</sup> Finally, the heavy emphasis on privacy and confidentiality in German law significantly limits access to information about a debtor's assets outside the debtor's own statement of assets.<sup>181</sup>

#### CONCLUSION

The laws of recognition and enforcement strongly reflect the level of confidence German law and German judges place in the adjudication proceedings of foreign states. German courts recognize and enforce U.S. money judgments quite liberally. Thus, with regard to judgment enforcement, the phrase "jurisdiction conflicts" does not adequately describe daily court practice. Only in certain situations are creditors prevented from enforcing U.S. money judgments in Germany. These are usually cases where a U.S. court awarded punitive damages, or asserted in personam jurisdiction on grounds of jurisdiction regarded as exorbitant in Germany. It remains to be seen whether the recent *Napster* injunction issued by the German Federal Constitutional Court will affect the relatively liberal approach German courts have taken thus far.

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179. § 811 ZPO (F.R.G.).

180. § 850(a)-850(k) ZPO (F.R.G.).

181. WENDY KENNETT, *THE ENFORCEMENT OF JUDGMENTS IN EUROPE* 83 (2000).