

GERMAN ENFORCEMENT OF U.S. JUDGMENTS BASED ON A CLASS ACTION

By Rechtsanwalt Dr. jur.
Roger Mann *

The following discussion introduces German legal principles applicable to judgments originating in the United States and submitted to a German court for recognition and enforcement. In 1992, the highest German civil court established clear guidelines for some types of U.S. legal features that are inimical to Germany's legal system but it did not address class action suits. The author explores the potential reaction of German courts to judgments resulting, under Rule 23 of the U.S. Federal Rules of Civil Procedure, from such suits. The editor.

I. Approach

There are no bilateral or international treaties between Germany and the United States governing the enforcement of US-judgments in Germany and vice versa. The general rules for the enforcement of foreign judgments in Germany in §§ 722, 723 and 328 of the German Civil Procedure Code (Zivilprozessordnung, ZPO) must, therefore, be applied.

The relevant ZPO passages read as follows:

§ 722 (Enforceability of Foreign Judgments) (1) A foreign judgment is enforceable only if it is admitted by a judgment for enforcement.

§ 723 (Judgment for the Enforcement of Foreign Judgments) (1) The judgment for enforcement must be made without examination of the lawfulness of the decision [*revision au fond; auth.*].

(2) [The judgment for enforcement] shall not be made if the recognition of the judgment is excluded under § 328.

§ 328 (Recognition of Foreign Judgments) (1) The recognition of a judgment of a foreign court is excluded if

1. the courts of the state to which the foreign court belongs have no jurisdiction under the German laws;
2. the defendant, who did not enter an appearance and invokes this defense, received no proper service of the document initiating the proceedings, so that he could not properly defend himself;
3. the judgment is incompatible with a judgment made here [in Germany] or a prior foreign judgment which must be recognized, or if the proceedings on which the foreign judgment is based are incompatible with prior proceedings pending [in Germany];
4. the recognition of the judgment leads to a result obviously incompatible

with basic rules of German law, especially if the recognition is incompatible with the human rights [as laid down in Art. 1-19 of the German Constitution]; or
5. if reciprocity is not guaranteed.

According to § 722 sub. 1 ZPO, a foreign judgment is enforceable in Germany if its enforceability is certified by a special judgment. According to § 723 ZPO, the court may not examine whether the decision of the foreign court is lawful or not (so called *revision au fond*). It may consider only whether the judgment is to be recognized under § 328 ZPO.

There are several requirements which must be met for the recognition:

- international jurisdiction of the court under German law;

- proper service of the complaint and adequate opportunity for a proper defense by the defendant;

- no res judicata effect relative to another German or prior foreign judgment; and

- no violation of the German *ordre public*, i.e. constitutional rights and reciprocity.

The problems of a class action revolve around the fourth requirement—no violation of the German *ordre public*.

II. Violation of the *ordre public*

In cases of doubt, it is extremely difficult to determine what violates the German *ordre public* and what is compatible with it. In 1992 the relevant ninth civil senate of the German Federal Supreme Court (Bundesgerichtshof, BGH) took the opportunity to comment on several problems which arise in connection with the recognition of U.S. judgments in Germany (BGH NJW 1992, 3096).

In its decision the Court specifically mentioned pre-trial discovery, contingency fees and punitive damages. These are characteristics of U.S. procedural law unknown to the German law. The court did not mention, however, a U.S. judgment based on a class action.

At the beginning of its decision, the BGH pointed out that a violation of German procedural law results in a violation of the German *ordre public* only if the foreign judgment is based on a procedure which differs so much from the basic rules of German procedural law that it cannot be recognized as constitutional or in accord with the rule of law.

Pretrial Discovery

From this starting point, the Court ruled that a pre-trial discovery—even if the investigative means are not permitted in German Civil

Procedure Law—does not automatically violate the German *ordre public*. The Court requires an examination of whether the pre-trial discovery lead to an unacceptable result in an individual case.

In the case before the Court, the facts were already known from earlier criminal proceedings which may be used in German civil litigation as a source of information. The examination having been properly performed, the Court found no violation of the German *ordre public*.

Contingency Fees

With respect to possible contingency fees, the Court ruled that each legal system is essentially free to form its own code of conduct for the legal profession.

The Court declared that the mere fact that contingency fees for lawyers are considered unethical in Germany does not mean that such fees might not be in accordance with the rule of law. In fact, the Court explicitly noted the advantages of contingency fees for clients, including the fact that such lawyers assume the risk of losing the lawsuit.

Punitive Damages

The Court had more difficulties with the recognition of punitive damages.

The German legal system strictly distinguishes bet-

ween civil and criminal proceedings. The Criminal Procedure Code confers upon the state a monopoly on punishment. A punishment is justified only if it is the result of a criminal trial according to the special rules of criminal procedure.

Consequently, there are no penalties in the civil law beyond contractual ones. The nature of damages is merely compensatory, with one major exception—damages for pain and suffering under § 847 of the German Civil Code. Yet even these damages have no punitive character—they only serve to provide satisfaction.

As a result, the Court ruled that a judgment may not be recognized insofar as the plaintiff is awarded punitive damages.

III. German *ordre public* and Class Action

Since the specific U.S. judgment before the BGH was not based on a class action, the Court did not say whether a class action judgment would be barred from recognition.

While German law does not recognize the doctrine of *stare decisis*, a BGH decision is in fact honored by lower courts. But so far there is no published decision by a higher court which mentions the recognition of a U.S. judgment based on a class action.

There are only two recently published articles by Ger-

man lawyers that address the issue: Mann, *Die Anerkennungsfähigkeit von US-amerikanischen "Class Action"-Urteilen*, NJW 1994, 1187; Mark, *Amerikanische Class Action und deutsches Zivilprozeßrecht*, EuZW 1994, 238.

In my opinion, class action suits violate two basic principles of German procedural law:

- the principle of party disposition or *Dispositionsmaxime*, and
- the prohibition against collective litigation, or *Verbot der Popularklage*.

Applied to the problem at hand, these general principles operate as described in the following paragraphs.

The Principle of Party Disposition

Class representatives sue individually and on behalf of all other similarly situated. As a consequence, there are member of the class who become plaintiffs without their consent and, in the worst case, without their knowledge.

The requirement to inform all members "who can be identified through reasonable effort" (FED. R. CIV. P. 23(c)(2)), usually satisfied with a newspaper notice, and the possibility to opt-out (FED. R. CIV. P. 23(c)(2)(A)) cannot prevent some of the injured parties from becoming members of the class without their knowledge and consent.

This would constitute a violation of the fundamental procedural principle known as the *Dispositionsmaxime* (principle of party disposition) (see Zoller/Stephan, ZPO, Vorb. §128, margin note 9). The possibility of persons becoming class members without knowledge and consent violates the right of the injured persons to decide for themselves whether to take legal action or not. There might, for example, be a special relationship between the injured person and the defendant which prevents the injured person from suing. The right to independently decide whether to litigate or not is also guaranteed in Article 2 para. 1 of the German Constitution.

The Prohibition Against Collective Action

The fact that class representatives not only claim their own damages, but also those of the other class members violates another fundamental procedural principle, the *Verbot der Popularklage* (prohibition of collective litigation).

It is essential for an action under German law that the plaintiff purport to pursue a legal right of his own. With very few exceptions—such as a *Verbandsklage*, which is a legal action by a consumer association expressly authorized by the Federal Statute on General Business Terms—nobody may make third part claims.

Res Judicata Effect

Additionally, a judgment resulting from class action has res judicata effect not only for the class representatives but to all members of the class who did not opt out explicitly (FED. R. CIV. P. 23(c)(2),(3)).

Consequently, the res judicata effect renders unenforceable individual claims of class members who may not even have had knowledge of the class action. The requirement that “the representative will fairly and adequately protect the interest of the class” and the possibility that the other class member may satisfy their claims from the settlement fund built up from the paid damages does not outweigh the disadvantages for those classmembers who had no knowledge of the lawsuit and therefore no possibility to influence the proceedings, but must now live with the res-judicata effect of the judgment.

IV. Consequences

As a result of the violation of Germany's *ordre public*, judgments based on a class action may well not be recognized in Germany under § 328 (4) ZPO.

Such judgments would thus not be enforceable in Germany under §§ 722, 723 ZPO.

A U.S. judgment based on a class action will not have any res judicata effect in

Germany. A potential German class member will still be able to sue the defendant in Germany individually (see Schack, Internationales Zivilverfahrensrecht, 1991, margin note 754).

In the United States there are consequences for the certification of a class action. According to FED. R. CIV. P. 23(b)(3), plaintiffs have to prove “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

U.S. courts have referred to this rule several times when refusing to certify a class action if the acceptance of their decision in the home countries of the parties was not guaranteed. (*Bersch v. Drexel Firestone Inc.*, 519 F. 2d 974 (2d Cir. N.Y. 1975), cert. denied sub. nom. *Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975); *CL-Alexanders Laing & Cruickshank v. Bertha Goldfeld, Laura Katz, Arthur Andersen & Co.*, 127 F.R.D. 454 (S.D. N.Y. 1989), summ. judgment granted, 729 F. Supp. 158 (S.D. N.Y. 1990).

Notes

* The author is an associate with the Frankfurt am Main office of Gaedertz Vieregge Quack Kreile.