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Recent Development

Service of U.S. Punitive Damages Complaint Passes Constitutional Muster in Germany

Ingrid L. Lenhardt*

ABSTRACT

In today's global market, disputes between U.S. and foreign parties have become a common occurrence. Courts in the United States, as well as other nations, frequently face new and complex international litigation problems. A common problem for many courts centers on the practical, mechanical requirements of bringing a lawsuit.

In this Article, the author examines the service of process of U.S. complaints for punitive damages to residents of Germany. In particular, Ms. Lenhardt analyzes the recent German Constitutional Court's ruling on international service of process. In addition, the author reviews the requirements of the Hague Convention on Service Abroad and the procedures that must be followed by foreign plaintiffs wishing to serve process to German residents. Finally, Ms. Lenhardt summarizes the German Constitutional Court's decision on the treatment of punitive damages claims and the relation and impact these claims have on the requirements for service of process.

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On December 7, 1994, the first panel of the German Federal Constitutional Court (Constitutional Court),¹ in a sixteen-page opinion, held that providing judicial assistance by serving a U.S. complaint for punitive damages² does not violate the "general freedom of action"³ in connection with the "constitutional state principle"⁴ as reflected in the German Basic Law of 1949.⁵ Service of a complaint in connection with a case filed in a U.S. court, in which the complainant seeks punitive damages, is effective when served on a German company in Germany, even though punitive damages awards are not recognized or enforceable under German law. As a result, German parent companies may now be increasingly involved in U.S. legal proceedings, especially in the area of products liability.⁶ This Article reviews the Constitutional Court's decision and analyzes its reasoning.

1. The German translation is *Bundesverfassungsgericht* or *BVerfG*.

2. The German translation is *Strafschadensersatz*.

3. The German translation is *allgemeine Handlungsfreiheit*. The general freedom of action is extensively guaranteed. It includes a person's inner as well as outer development, private and social sphere, cultural and economic activity, acts and omissions, and exposure to and withdrawal from communal living. CARL CREIFELDS, *RECHTSWÖRTERBUCH* 418 (8th ed. 1986).

4. The German translation is *Rechtsstaatsprinzip*. The constitutional state principle means not only that, in a procedural sense, the state must establish and guarantee a legal system, but also means, in a substantive sense, the guarantee of certain historically developed "constitutional state" rules, which are in part also expressly included in the constitution. *Id.* at 915.

5. Judgment of Dec. 7, 1994, 91 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 335 (F.R.G.), 10 *NEUE JURISTISCHE WOCHENSCHRIFT* [N.J.W.] 649 (1994) [hereinafter Judgment of Dec. 7, 1994]. The German Basic Law is called the *Grundgesetz*.

6. *Frankfurter Allgemeine Zeitung*, Dec. 22, 1994, at 12.

I. FACTS AND BACKGROUND

The U.S. subsidiary of the appellant, a German limited liability company⁷ domiciled in Berlin, entered into a distribution agreement for pharmaceutical products with Traditional Medicinals, Inc. (Traditional). When a dispute arose in relation to the distribution agreement, Traditional filed a complaint against the German appellant and its U.S. subsidiary in a Pennsylvania court.⁸ The complaint contained a demand not only for actual damages in the amount of at least \$2,000,000, but also for punitive and exemplary damages in an unspecified amount.⁹

The U.S. subsidiary was served, but service of process on the German appellant in the United States failed. In response to this failure, the U.S. counsel for Traditional sent the complaint to the State Ministry of Justice in Berlin,¹⁰ requesting service on the appellant pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention on Service Abroad or Convention).¹¹ The Berlin State Ministry of Justice granted the request for judicial assistance and directed the complaint to the Berlin-Wedding Local Court¹² for further handling.¹³ The appellant then filed a motion with the Berlin Higher Regional Court¹⁴ to overrule the order of the Berlin State Ministry of Justice.¹⁵ The Higher Regional Court denied this motion and the appellant then challenged the decision on constitutional grounds.¹⁶

7. The German translation is *Gesellschaft mit beschränkter Haftung* or *GmbH*.

8. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 649.

9. *Id.*

10. The German translation is *Senatsverwaltung der Justiz*.

11. Hague Convention on Service Abroad, Nov. 15, 1965, art. 2, 20 U.S.T. 361, 362, 658 U.N.T.S. 163, 165. Art. 2(1) [hereinafter Hague Convention on Service Abroad]. Both the United States and Germany are contracting states of the Hague Convention on Service Abroad. If a contracting state receives documents for service from another member state, a designated central authority must bring about the service of the documents to the intended recipient. *Id.* art. 2. In Germany, this central authority is usually the State Ministry of Justice (*Landesjustizministerium*) and it either serves the document itself by mail, or requests the competent local court to do so.

12. The German translation is *Amtsgericht*.

13. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 649.

14. The German translation is *Kammergericht*.

15. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 649.

16. Judgment of July 5, 1994, 1 VA 4/94. The appeal to the Constitutional Court is called the *Verfassungsbeschwerde*.

The German Constitutional Court granted a provisional order¹⁷ prohibiting the Berlin State Ministry of Justice from providing or requesting judicial assistance until a decision on the merits was made.¹⁸ The Constitutional Court stressed that it was important to clarify whether a state bound by the German Basic Law must decline to render judicial assistance for the service of a complaint if the domestic enforcement of a decision in the case might be incompatible with the constitutional state principle.¹⁹ This led to concern that the Court, in its decision on the merits, might rule that punitive damages complaints could not be served in Germany.²⁰ In contrast, several higher regional courts,²¹ as well as legal commentators,²² have favored allowing the service of such complaints. They preferred to postpone the determination of whether U.S. punitive damages awards were compatible with German law until the recognition and enforcement proceeding.²³

II. THE HAGUE CONVENTION ON SERVICE ABROAD

A prerequisite for the application of the Hague Convention on Service Abroad is that the subject matter of the document to be served is civil or commercial.²⁴ Some German legal commentators argue that punitive damages complaints involve criminal matters.²⁵ Nevertheless, the Federal High Court of Justice²⁶ has held that punitive damages are a special sort of damages between private persons, left up to an individual to assert and enforce, and usually only allocatable to the

17. The German translation is *etnswellige Anordnung*.

18. Judgment of Aug. 3, 1994, 91 BVerfGE 140, 50 N.J.W. 3281 (1994).

19. *Id.*

20. See, e.g., Friedrich K. Juenger & Mathias Reiman, *Zustellung von Klagen auf punitive damages nach dem Haager Zustellungsübereinkommen*, 50 N.J.W. 3274 (1994).

21. Judgment of May 9, 1989, Oberlandesgericht [OLG] München, 48 N.J.W. 3102 (1989); Judgment of Mar. 21, 1991, OLG Frankfurt a.M., 5 RECHT DER INTERNATIONALEN WIRTSCHAFT [R.I.W.] 417 (1991); Judgment of Feb. 19, 1992, OLG Düsseldorf, 48 N.J.W. 3110 (1992); Judgment of July 15, 1992, OLG München, 48 N.J.W. 3113 (1992).

22. HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT ¶ 605 (1991); REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT ¶ 605 (2d ed. 1993).

23. See *supra* notes 21 and 22.

24. Hague Convention on Service Abroad, *supra* note 11, art. 1(a), 70 U.S.T. at 362, 658 U.N.T.S. at 165.

25. Hermann H. Hollmann, *Auslandszustellung in US-amerikanischen Zivil- und Verwaltungssachen*, 11 R.I.W. 784, 786 (1982); Christoph Wölkl, *Das Haager Zustellungsabkommen und die USA*, 7 R.I.W. 530, 533 (1985).

26. The German translation is *Bundesgerichtshof* or *BGH*.

individual.²⁷ Other courts note that punitive damages are not a criminal penalty because the adjudged party is not considered to be a person with a criminal record nor is the award entered in the central register.²⁸

A state party to the Hague Convention can decline to carry out the service of process of civil and commercial documents only if its sovereignty or security is threatened.²⁹ This reservation refers to the so-called international *ordre public*³⁰—it was not intended to apply to the domestic *ordre public*. Thus, a request for service may not be declined because the law of the requested state either provides for the exclusive jurisdiction of its courts over the matter or does not provide for a corresponding proceeding.³¹ For example, the fact that the German Civil Procedure Code³² excludes the recognition of a foreign court decision if the issuing court lacks jurisdiction under German law does not excuse the German government from compliance with the Hague Convention.³³

III. RULING OF THE CONSTITUTIONAL COURT

A. No Violation of the Principle of Proportionality

Since U.S. punitive damages complaints must be served in Germany under the Hague Convention on Service Abroad, judicial assistance can only be declined pursuant to a higher authoritative

27. Judgment of June 14, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 312 (F.R.G.), 48 N.J.W. 3096 (1992).

28. Judgment of May 9, 1989, OLG München, 48 N.J.W. 3102 (1989). According to the Federal Central Register Code (*Bundeszentralregistergesetz* or BZRG), all criminal convictions must be entered in a central register located in Berlin. See BZRG § 4 (F.R.G.).

29. Hague Convention on Service Abroad, *supra* note 11, art. 13, 20 U.S.T. at 364, 658 U.N.T.S. at 171.

30. See CHRISTA PFEIL-KAMMERER, DEUTSCH-AMERIKANISCHE RECHTS-HILFEVERKEHR IN ZIVILSACHEN 62 (1987). Under the principle of *ordre public*, or the "saving clause," the application of a foreign law is excluded if this would be contrary to *bonos mores* or to the purpose of a German statute. CREIFELDS, *supra* note 3, at 591.

31. Hague Convention on Service Abroad, *supra* note 11, art. 13, 20 U.S.T. at 364, 658 U.N.T.S. at 171.

32. The German translation is *Zivilprozessordnung* or ZPO.

33. ZIVILPROZESSORDNUNG [ZPO] § 328(1) (F.R.G.), translated in SIMON GOREN, THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY 84 (1990).

source of law, such as the German Basic Law.³⁴ A "general freedom of action" is guaranteed under Article 2.1 of the Basic Law, which says: "Each person has the right to the free development of his or her personality, to the extent he or she does not injure the rights of others and does not violate the constitutional order or *bonos mores*."³⁵

This general freedom of action may not be restricted by legislators who might prefer to use a broad interpretation of "the constitutional order," thereby stripping Article 2.1 of any meaning.³⁶ Federal and state laws, police ordinances, and all other rules of law that meet the procedural and substantive requirements of the constitution are considered part of the constitutional order.³⁷ In other words, any rule of law, including the Hague Convention on Service Abroad, could limit Article 2.1 if it is properly enacted and does not contradict a constitutional provision, especially the "constitutional state principle" found in Article 20.1, which says: "The Federal Republic of Germany is a democratic and social federal state."³⁸

Nevertheless, in order to ensure that Article 2.1 retains its meaning, the grounds for each restriction of an Article 2.1 right are reviewed for their justification, and particularly for their compliance with the principle of proportionality.³⁹

The Constitutional Court found that the constitutional requirements for an invasion of rights under Article 2.1 were met.⁴⁰ According to the Court, service of process is an act of state sovereignty that advances a foreign court proceeding.⁴¹ Although the recipient is neither forced to undertake a certain act nor prohibited from certain conduct, the Court noted that the recipient must be subjected to the foreign proceeding when the recipient might suffer legal disadvantages that could have been defrayed by active participation in the proceeding.⁴² In addition, the Court stated that the recipient is subject to the risk that a judgment might be enforced against property located abroad, where a German public authority cannot offer protection.⁴³

The Constitutional Court, however, ruled that any invasion of rights under Article 2.1 was considered justified and that, in any

34. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 649.

35. GRUNDGESETZ [GG] art. 2.1 (F.R.G.).

36. Judgment of Oct. 9, 1968, 24 BVerfGE 235 (F.R.G.).

37. Judgment of May 23, 1980, 54 BVerfGE 143 (F.R.G.).

38. GRUNDGESETZ [GG] art. 20.1 (F.R.G.).

39. The principle of proportionality is derived from the constitutional state principle. Judgment of May 3, 1966, 20 BVerfGE 45 (F.R.G.).

40. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 649.

41. *Id.*

42. *Id.*

43. *Id.*

event, the state has no duty to further protect those rights.⁴⁴ The Constitutional Court noted that the legal basis for the service is the Hague Convention on Service Abroad, the constitutionality of which is sound.⁴⁵ The preamble of the Hague Convention states that foreign service of judicial and extrajudicial documents is to be made in a timely fashion, and that judicial assistance is to be improved between the contracting states so that the technical course of service is simplified and accelerated.⁴⁶ The Constitutional Court decided that this preamble advances important matters of public interest, which justify an invasion of the general freedom of action.⁴⁷

The Constitutional Court also held that the Hague Convention on Service Abroad does not violate the principle of proportionality because service may not be denied due to the incompatibility of the prayer for relief with the domestic *ordre public*—service may be denied only if the requested state believes that service may threaten its sovereignty or security.⁴⁸ This limitation of the power to review is justified by the goals of the Hague Convention.⁴⁹ The Constitutional Court reasoned that if the fundamental rights of the domestic legal order are a criterion for service, international judicial assistance would be significantly hindered.⁵⁰ Such review would lead to long delays in service, require countries to apply their domestic legal concepts abroad, and would run counter to the goal of allowing a foreign plaintiff to conduct a proceeding against a German defendant abroad. These risks are particularly serious because the outcome of the proceeding is completely open at the time of service. In addition, the Constitutional Court pointed out that the Hague Convention on Service Abroad decisively improves the legal positions of parties domiciled in Germany because, under the Convention, such parties cannot be subjected to a civil proceeding abroad of which they have no knowledge.⁵¹

The Constitutional Court noted that contracting states of the Hague Convention on Service Abroad were expected to remove the possibility that domestic service might be made on foreigners

44. *Id.*

45. *Id.*

46. Hague Convention on Service Abroad, *supra* note 11, pmbli., 20 U.S.T. at 362, 658 U.N.T.S. 165.

47. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 649.

48. *Id.*

49. Hague Convention on Service Abroad, *supra* note 11, pmbli., 20 U.S.T. at 362, 658 U.N.T.S. 165.

50. Judgment of December 7, 1994, at 649.

51. *Id.*

under their domestic laws still in effect, including service by publication (*e.g.*, an advertisement in a designated newspaper) and other forms of service not foreseen by the Convention (*e.g.*, sending a complaint by registered mail, which is permissible under U.S. law).⁵² In the past, Germany was unable to prevent U.S. courts from treating such service as effective, resulting in judgments entered against German parties so served.⁵³ The Court also noted that service under the Hague Convention on Service Abroad provides better assurance that a German party can effectively defend itself against a complaint.⁵⁴ Furthermore, service must be in a form that the law of the requested state prescribes for the service of documents on persons in its area of sovereignty.⁵⁵ For example, in Germany the document must be drafted in or translated into the German language.⁵⁶

The Constitutional Court further observed that Articles 15 and 16 of the Hague Convention on Service Abroad are meant to improve the legal position of the domestic party in a foreign proceeding.⁵⁷ Articles 15 and 16 are particularly important if the foreign law does not link the effectiveness of the service to the actual receipt of the document, but rather to other circumstances, such as mailing the document to the central authority for the purpose of service.⁵⁸ Under Article 15 of the Convention, if the commencement of a court proceeding requires a summons pursuant to the Convention for the purpose of service abroad, and if the defendant has not appeared in the proceeding, then the judge must stay the proceeding until (1) the judge determines that the document is in the proper form, or (2) that either the defendant has been handed the document or it has been delivered to the defendant's home pursuant to the procedure set forth in the Convention.⁵⁹ Both options are mechanisms that enable the defendant to make a timely defense. Under Article 16, if the commencement of a court proceeding requires a summons pursuant to the Convention for the purpose of service abroad, and if judgment was entered upon the defendant's failure to appear, then the judge may reinstate the previous status with respect to the period for filing an appeal.⁶⁰ This rule only applies, however,

52. *Id.* at 649-50.

53. *Id.* at 650.

54. *Id.*

55. Hague Convention on Service Abroad, *supra* note 11, art. 5(a), 20 U.S.T. at 362, 658 U.N.T.S. 167.

56. ZPO § 208 (F.R.G.), *translated in GOREN, supra* note 33, at 52.

57. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 650.

58. *Id.*

59. Hague Convention on Service Abroad, *supra* note 11, art. 15(a), (b), 20 U.S.T. at 364, 658 U.N.T.S. 173.

60. *Id.* art. 16.

when (1) the defendant was not at fault for failing to secure timely notice either of the document, in order to defend the suit, or the judgment, in order to appeal against it, and (2) the defendant's defense had merit.⁶¹

Finally, the Constitutional Court observed that, while Article 15 of the Hague Convention on Service Abroad leaves open the possibility that a legal dispute could be decided without certification of the service, such a decision will not occur unless (1) documents were transmitted according to a procedure set forth in the Convention, (2) a specified time limit—at least six months—has passed since the posting of the document that the judge deems reasonable under the circumstances of the case, and (3) that, although unsuccessful, all reasonably expected steps to obtain the certification were taken by the competent authorities of the requested state.⁶²

B. *Service of Punitive Damages Complaint Not Unreasonable*

The Constitutional Court also addressed the appellant's arguments that the Berlin Higher Regional Court did not discuss whether punitive damages violate the principle of proportionality and the state monopoly on punishment, and whether German public authorities may refuse to support participation in a court proceeding that has the declared goal of issuing a judgment that will violate the constitutional state principle.⁶³ The Court stated that those issues did not require basic clarification and ruled that service of an otherwise valid complaint that also asserts punitive or exemplary damages under U.S. law is, in any event, not unreasonable.⁶⁴

The Court found that punitive damages under U.S. law are alien to the German civil sanctions law.⁶⁵ The Court discussed the purposes that are served by recognizing punitive damages: punishment and deterrence.⁶⁶ Punishing reckless conduct is thought to dissuade acts of revenge by the victims by providing a legal means of retribution. In addition, punitive damages are considered necessary to deter defendants from future socially

61. *Id.*

62. *Id.* art. 15(a), (b), (c); Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 650.

63. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 650.

64. *Id.*

65. Under U.S. law, punitive damages are granted if the defendant both fulfills general elements of a rule of liability and is guilty of intentional, malicious, or reckless conduct. *Id.*

66. *Id.*

damaging behavior, at least to the extent that the duty to offset the actual damages does not sufficiently ensure the control of behavior. Another rationale for awarding punitive damages is that the injured parties should be rewarded for bringing the defendant to justice, which rests upon their own initiation. In addition, the victim should obtain a supplement for damages considered insufficient. The lack of social security coverage of the injured party can, *inter alia*, have a negative impact as well. Furthermore, a defendant's refusal to settle may suggest that the injured party deserves additional compensation. Finally, since U.S. law governing costs of litigation provides for the reimbursement of the prevailing party's legal costs only in exceptional cases, these costs are often covered by awarding punitive damages.

The Constitutional Court stated that an open question remains on the issue of whether, from a constitutional law point of view, it should follow the Federal High Court of Justice's opinion⁶⁷ that punitive damages dealing with a sanction fall under the punishment monopoly of the state.⁶⁸ The Court pointed out that the Federal High Court of Justice recognizes that punitive damages partially serve goals that are compatible with the legal order of Germany.⁶⁹ In particular, the Court stressed that, consistent with German remedies law, nonpecuniary damages can be compensated with punitive damages, and that the compensation for litigation costs likewise does not violate the German *ordre public*.⁷⁰

The Constitutional Court held that unrenounceable principles of the free constitutional state are not infringed by the possibility of imposing punitive damages.⁷¹ At most, the service of process poses a threat to the financial interests of the defendant—it becomes a party to litigation, and whether it actually will also be ordered to pay punitive damages cannot be seen until the conclusion of the proceeding and the delivery of the judgment.⁷² Inclusion in a foreign proceeding via the service of process is all the more reasonably expected, noted the Court, because it can

67. Judgment of June 4, 1992, 118 BGHZ 312, 340, 344 (F.R.G.). In 1992, the Federal High Court of Justice postulated that a partial recognition of punitive damages could come into consideration "to the extent" punitive damages are meant to compensate for nonpecuniary damages or economic disadvantages not specifically covered or difficult to prove, or to remove profits derived from the tortious conduct. *Id.* For this, however, the first state judgment must contain fixed points of reference for such differentiation.

68. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 650.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

prevent a foreign creditor from attaching the defendant's domestic property under the prerequisites of Section 328 (1) of the German Civil Procedure Code.⁷³

The Constitutional Court noted that, if Germany refuses to carry out the service, an improvement in the legal position of the German defendant cannot be ensured.⁷⁴ The domestic defendant would not be protected from being pulled into the proceeding by the U.S. plaintiff, because the foreign proceeding can also be carried out, without proof of the service of process, according to the measures of Article 15.2 of the Hague Convention on Service Abroad.⁷⁵ Moreover, under U.S. law, service to a U.S. subsidiary of a German parent company is made simultaneously and effectively against the latter.⁷⁶ In addition, the Hague Convention on Service Abroad does not exclude the possibility of judicial assistance to serve a complaint in Germany for only compensatory damages and, if the German defendant engages an attorney in the United States to defend against this suit, the Convention does not exclude the possibility of effectively serving an amended complaint for punitive damages.⁷⁷

IV. CONCLUSION

Court decisions involving punitive damages are always certain to generate controversy in Germany. The Constitutional Court has conclusively ruled that providing judicial assistance under the Hague Convention on Service Abroad by serving a complaint for punitive damages under U.S. law does not violate the principle of proportionality and is not unreasonable.⁷⁸ While this ruling has somewhat settled the controversy on the issue of service; it should not be confused with the issue of recognition and enforcement. Service of a U.S. punitive damages complaint does not mean that a subsequent judgment will be recognized and enforced by a German court. On the contrary, recognition and enforcement is unlikely if the punitive damages award appears

73. *Id.*

74. *Id.*

75. *Id.* at 651.

76. *Id.* See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (holding that service of process to a U.S. subsidiary of a foreign corporation in the United States is governed by U.S. law and gives proper notice to the foreign corporation).

77. *Cf.* Judgment of Mar. 21, 1991, OLG Frankfurt a.M., 5 R.I.W. 417, 418 (1991); Judgment of Feb. 19, 1992, OLG Düsseldorf, 45 N.J.W. 3110, 3112 (1992).

78. Judgment of Dec. 7, 1994, *supra* note 5, 10 N.J.W. at 651.

arbitrary, although enforcement may be more likely if the award is allocated to matters compensable under German law, such as pain and suffering or legal costs.⁷⁹ Thus, a U.S. plaintiff should think twice about filing a complaint for punitive damages against a German defendant company that does not own enough property outside Germany (particularly in the United States) to satisfy a potential judgment.

79. Patrick J. Nettesheim & Henning Stahl, *Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award*, 28 TEX. INT'L L.J. 415, 425 (1993).