

**Second Study Commission
Civil Law and Procedure**

2011 QUESTIONNAIRE

German Report

**“Cross-border issues in the face of increasing globalization –
as reflected in a series of individual fact scenarios”.**

A. Recognition and Enforcement of a Foreign Judgment

(A). General Questions:

- 1) *What laws exist in your country regarding the recognition and enforcement of a foreign judgment?*

The recognition and enforcement of a foreign judgment is regulated by Art 328 Code for Civil procedure/ZPO (recognition) and Art 722 ZPO (enforcement). The recognition is an incidental decision ex lege. Only decisions which can be recognized qualify for the declaration of enforceability by a court - Exequatur.

As in all member states of the European Union, the enforcement of judgments in civil and commercial matters from Courts inside the Union is regulated by Council Regulation 44/2001 -Art 38ff, with reference to national law and, for undisputed claims, by Council regulation 805/2004.

With a number of states outside the European Union Germany has signed treaties for the recognition and enforcement of judgments.

- 2) *What is the difference in the operative result in your country between the recognition of a foreign judgment and the enforcement of a foreign judgment?*

Recognition does not open the way to enforcement, which is only possible with the Exequatur.

What conditions are required in the court of your country in order to declare a foreign judgment as enforceable?

The foreign judgment must be recognizable under German law and must contain a decision which can be and is precise enough to be enforced under German law.

A foreign judgment can be recognized under German law if the foreign court delivering it was competent to do so from the point of view of German law, the necessary documents to open the procedure have been served to the defender in time, when no case of *res judicata* or *lis pendens* is given and when the decision is not contrary to public policy and when reciprocity is guaranteed.

- 3) *In order to enforce a foreign judgment, does your country require reciprocity with the country which gave the judgment?*

Yes

- 4) *Under what circumstances does the court in your country not enforce a foreign judgment?*

see answer under 2)

- 5) *Can your country impose temporary orders issued by a foreign court, such as alimony?*

Only if International Conventions and EU-Regulations stipulate it.

- 6) *What are the conditions necessary for recognition of a foreign judgment in your country? Can your court recognize a foreign judgment incidentally?*

see under 2). The recognition of a foreign judgment is usually incidental.

- 7) *Is it possible to enforce a foreign arbitration award in your country?*

German law follows the Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1962, as long as the European Convention on International Commercial Arbitration from 1962, the Geneva protocol about arbitration- clauses from 1923 or bilateral treaties do not apply. Under Art 5 of the Convention, arbitration awards are to be declared enforceable if no special ground for refusal applies.

(B). Cases

- 1) *Humpty and Dumpty are a business partners in Wonderland. Humpty violated the partnership agreement signed between them. The partnership agreement stated that the partnership will be the representative in your country, of an investment company from Wonderland, and will market its services in your country. Humpty argued that Dumpty established a competing investment company in your country. Wonderland Court ruled that the Dumpty violated his duty of good faith and fair dealing and ruled against him to pay Humpty damages of 5.5 million dollars. A sum of one and a half million dollars as punitive damages and the rest as compensatory damages for harm caused. Humpty asks the court in your country to enforce the Wonderland court ruling, Dumpty opposed, his main claim being that part of the damages is punitive and therefore is not enforceable.*

What is the law in your country?

The recognition and enforcement under German law might fail due to the fact that 1.5 million dollars are awarded as punitive damages and therefore the enforcement might be regarded as against public policy.

However, German Law accepts the enforcement of parts of a decision which do not infringe public policy (Teilanerkennung) and therefore would accept the enforcement of 4 million dollars without much difficulties.

The recognition of punitive damages is only regarded as against public policy if it is in violation of fundamental principles of German law and basic rights. In recent judgments (e.g. Court of appeal of Stuttgart v. 27. 7. 2009, 5 U 39/09) punitive damages as such - if not exorbitant- are not automatically regarded as unacceptable, but are looked at individually. The case gives too little information to anticipate a final decision.

- 2) *A British businessman got into debt in the amount of 100-200 million pounds sterling and a bankruptcy order was issued against him by the High Court of Justice in London, with the appointment of estate trustees. Following this ruling, the trustee submitted to the court in your country a request to enforce*

the order and to appoint an official receiver for the realization of the debtor's assets located in your country.

- a. Will the court in your country enforce the court order obtained in England?*

Yes, as in all member states of the European Union, following Art 16 sec. of Council Regulation (EC) 1346/2000 of 29. May 2000 on Insolvency Proceedings.

- b. The question was asked to address the fact that the English ruling does not include a personal operative remedy; in this case can your court enforce the ruling or rather give recognition?*

Yes, it can.

- c. Can it be a direct recognition? If not, can it be an incidental recognition?*

It can be a direct recognition see A 2.

- d. What are the different effects of the three variations: enforcement, direct recognition and incidental recognition?*

The decisions in the insolvency procedure have to be recognized and can be enforced.

- 3) *Sarah and Judy have been lifetime partners for 7 years and are citizens of your country. Their permanent residence is the State of Neverland. Sarah bore a son after she had been impregnated with a donor sperm. The son was adopted by Judy with Sarah's consent. The adoption order was issued in Neverland and Judy was registered in the birth certificate as an additional parent. Sarah and Judy would like to return to your country for the purpose of studying there for two years. They have notified the registration official that Judy has adopted the child, relying on the birth certificate and the ruling of the State of Neverland which issued the decree of adoption. The Registration official refused to accept the registry on the grounds that the existence of two biological parents of the same gender is not possible and he is not obliged to accept the registration at its face value. Sara and Judy apply to the court in your country to recognize the adoption.*

- a. What will be your ruling?*

As Sarah is the biological mother of the child, the adoption would be allowed under German law.

- b. *Does it depend on the question of the law in your country allowing an adoption by a couple of the same sex?*

Following Art 24 of the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption of 1993, the recognition of the adoption can only be refused if the adoption would be contrary to public policy.

- c. *If so, what will be the ruling if it is not allowed?*

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B. Cross border issues in the conduct of trials:

Factual Scenario #1

Company “Head Co.” is the parent company of an international group of companies. It carries on business in its country of incorporation, country A. It also carries on business in country B through a subsidiary (“Subsidiary”) which is incorporated in country B.

“Director” is a director of Head Co. and Subsidiary. He is also a resident of country B.

Head Co. and Subsidiary claim that Director has breached statutory, fiduciary and contractual duties that he owed to each of them, arising out of his position as director of both Head Co. and Subsidiary. The companies allege that he misappropriated funds of Head Co. and Subsidiary. They rely on substantially the same acts and events to support their respective claims.

Head Co. and Subsidiary have commenced two sets of proceedings against Director: one in country A and the other in country B, both actions seeking relief against Director arising out of substantially the same facts.

Assume you are a Court in country A. Director has applied to your Court for an order to stay the proceedings against him in your country.

Questions:

- 1) *What test would your Court apply or what factors would your Court take into account when determining Director's application?*

The test of lis pendens, Art 27 Council regulation 44/2001 if B is a member state of the European Union or § 261 Abs. 3 s. 1 analog ZPO if B is not. Under European or German law, if a proceeding is pending in the court of another jurisdiction and if its judgment would have to be recognized under German law a waiver has to take place. The law however is still not completely settled.

Lis pendens requires the parties do be identical. Here, the facts are not clear if Head Co and Subsidiary have started proceedings together in A and B or Head Co in A and Subsidiary in B.

- 2) *Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention on jurisdiction?*

see A1)

- 3) *If your country is a signatory to such a convention how would this influence the decision making process?*

If a convention applies and includes provisions about lis pendens it would have to be applied.

- 4) *Would it make any difference if there was a choice of jurisdiction provision in the contractual arrangements between the companies and Director providing that the parties submitted to the exclusive jurisdiction of country B?*

No.

- 5) *Would your Court take into account considerations of international comity? In*

other words, grant a stay to give recognition to the jurisdiction of country B to determine the dispute?

No. The question is settled by international conventions, European Union law or internal law. International comity would not allow a German court to refuse access to justice.

- 6) *Would it make any difference if country B was not a signatory to the convention?*

Domestic law would apply- see 1)

- 7) *If your country is a signatory to such a convention, what is your Court's experience of the convention in resolving issues of jurisdiction and does the convention assist to reduce disputes on jurisdiction?*

The lis pendens provisions in Arts 27 -30 of Council Regulation 44/2001 is an important factor to reduce disputes of jurisdiction.

Additional facts:

Assume that Head Co. argues that your Court should not stay the proceedings in country A because the laws of country B do not recognise all of the claims that have been made under the laws of country A.

- 8) *Would this be a relevant consideration to take into account in determining whether to stay the proceedings?*

No- lis pendens is a question of procedure, not of material law.

- 9) *How would your Court determine whether the relevant claim formed any part of the laws of country B?*

It is irrelevant for the question of waiver – the court would only compare the claims to see if they are identical.

Additional facts:

Assume that Director's employment contract with Head Co. and Subsidiary contained a choice of law clause, nominating the law of country B as the applicable law in the event of a dispute.

10) How would the choice of law clause influence your decision in the above scenario?

I would have to apply the law of B.

11) In what circumstances would your Court decline to stay proceedings, despite the clause?

The clause is irrelevant for the decision to waive jurisdiction.

12) Is your country a signatory to a convention for the recognition of exclusive choice of court agreements? If so, how does this influence the decision-making process? Is it your Court's experience that such a convention reduces disputes about the law to be applied?

Yes, as the European Union has signed the Hague Convention of 2005 on Choice of Court Agreements in 2009. The obligations under Art 6 of the Convention to suspend proceedings for a court not chosen will have to be applied.

13) Does your Court recognise any limit of jurisdiction based on principles of international comity – that is, that a court should decline jurisdiction in recognition of the foreign court's jurisdiction?

As already stated, international comity is not accepted as sound reasoning for a court to refuse jurisdiction.

Additional facts:

Assume that both courts are the appropriate forum for the dispute. Assume also that Director makes an urgent application for a stay of both proceedings in both country A and country B. You are the Court in country A and would find it helpful to speak with the judge in country B to ascertain what stage the proceeding has reached in country

B and its likely hearing date. You consider that this may be helpful in deciding whether to stay the proceedings.

14) Is there any structured way in your system that enables judges of different courts to communicate? If so, what is the structure and how effective is it?

Only within the European Network in civil and commercial matters- EJC

Additional facts:

Assume your Court does not grant a stay and the matter proceeds in country A, applying the laws of country B.

15) How would your Court receive evidence in relation to foreign law? For example in most common law countries, the content of foreign law is a question of fact which is proven by expert evidence.

Foreign law has to be applied ex officio. Besides the possibility within the EJC, the court can ask for expert advice which is usually given by an academic of the Max-Planck-Institute.

16) Is your country a signatory to any convention for determining foreign law? For instance, the New South Wales Supreme Court in Australia and the Singapore Supreme Court have entered into a Memorandum of Understanding (MOU) to work closely on issues of foreign law. Under the MOU, when an issue of foreign law arises in a case before either of the courts, they will be able to direct parties to take steps to have any contested issue of foreign law determined by the court of the governing law.

Germany is a signatory of the European Convention on Foreign law.

17) If your country has similar arrangements with foreign courts, what is your Court's experience? Has it reduced the complexities and difficulties in ascertaining the content of the foreign law?

No such arrangement exists.

Additional facts:

Assume that Director applies to have evidence taken in country B?

18) What factors would your Court take into account when determining the Director's application?

If it is necessary for the Court to take the evidence in Court or admissible to have it taken outside Court hearing by a foreign authority.

19) Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention for the collection of evidence? If so, how successful is the co-operation in taking evidence in a foreign state and how efficiently and expeditiously can evidence be taken?

I would be guided by either bilateral treaties, the Hague Convention o Civil Procedure of 1954 or Council Regulation 1206/2001.

Additional question:

If your country is a signatory to conventions in civil proceedings, is it your Court's experience that civil procedure for commercial cases as between signatory countries have become more harmonised?

No.

Factual Scenario #2

The plaintiff company commenced civil proceedings in country "X" against the defendant, who was resident and living in England. The plaintiff alleged the defendant had been involved in the misappropriation of \$US21m by one of its employees, and applied to the Court for a worldwide injunction "freezing" the defendant's assets, in aid of the proceedings in country "X", together with an ancillary disclosure order relating to the defendant's assets worldwide.

Questions:

1) Would the court in your country have jurisdiction to hear this matter? If so, on what basis? For instance, in some common law countries exceptional

circumstances would permit the making of an order on a particular issue, even where the court otherwise did not have jurisdiction to hear the matter. One such exceptional circumstance might be where the court hearing the substantive dispute could not make the freezing order of a person's assets, so the making of the freezing order by another court would assist the main proceedings.

Only if the defendant has assets in Germany (Art 23 ZPO) and - to avoid forum shopping - if the dispute is sufficiently closely connected with Germany.

- 2) *What provisions (statutory, procedural or otherwise) exist to enable a court to make a worldwide order freezing an individual's assets? What about disclosure orders?*

If a German Court has international jurisdiction, it can make a freezing order which could be enforced worldwide.

In a procedure for an injunction a disclose order - which might be possible under a two-tiered procedure- would be rather unusual.

- 3) *How would an order for disclosure and/or an order for the freezing of assets be enforced? Would enforceability of the order influence the decision as to whether or not to make the order in the first place? (If it was likely that the order could not be enforced, do you think the court would still make the order?)*

The order would be enforced by sequestration or injunction, following internal law.

Enforceability is not required for the order to be made.

- 4) *Are there any provisions the defendant can rely on, to resist the disclosure order? (for instance, the privilege against self-incrimination)*

He can contest the pursuer's claim for reasons of law. If he succeeds, it will not be necessary for him to disclose evidence he would not like to produce.

However, the privilege against self- incrimination does not apply in civil procedure.

