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THE EXECUTION OF FOREIGN JUDGMENTS IN GERMANY \*

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There was a time when the study of governmental functions of foreign countries was confined to a few whose love of the abstract was their only incentive. The revolutionary changes wrought by the World War and its aftermath have not only drawn the United States into closer relationship with foreign countries, but have inextricably involved it in their destinies. Subjects which heretofore had for us but an academic interest are now of vital significance and compelling importance. Of course, Germany is the country with which the world and especially the United States, is today most nearly concerned. Contractual and other relations are constantly being formed. Financial transactions running into fabulous sums are matters of history, rivaled only by the unprecedented magnitude of the commercial dealings between Germans and Americans; the one spurred on by a crying need for a favorable trade balance, the other intensely motivated by a somewhat belated realization of the fact that its production capacity has far exceeded the ability of the home market to absorb. As an inevitable result, legal questions and disputes have arisen, and they will as inevitably continue to arise in increasing volume. Litigation will as surely follow, and satisfaction of one kind or another will, as a matter of course, be the objective. This satisfaction can be had only by virtue of the laws which give effect to the decrees and judgments of the courts. It is, therefore, of interest to inquire into the provisions Germany has made to give effect to the decrees of foreign courts.

The general rule of the German law is that execution on the judgments of foreign courts may issue in Germany only by virtue of an executory

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decree of a German court;<sup>1</sup> further, that this executory decree may not issue if the foreign judgment violates any one of five certain provisions of the Code of Civil Procedure.<sup>2</sup>

This general rule is not, however, without exceptions. These exceptions, from the standpoint of the American practitioner, are, however, of very limited application, and will therefore be but briefly referred to. By the terms of the Treaty of Versailles<sup>3</sup> the judgments of the courts of the Allied and Associated Powers "in all cases which, under the present Treaty, they are competent to decide" shall be recognized in Germany without the necessity of an executory decree.<sup>4</sup> At least four groups or classes of cases are affected by this exception,<sup>5</sup> but only one of them<sup>6</sup> is of any practical interest to the American lawyer. This group embraces judgments based on contracts "concluded before the coming into force" of the Treaty of Versailles. The French law<sup>7</sup> gives to its courts an extraordinarily broad competency in matters of litigation between its own nationals and those of other countries, and only in the light of this competency can one understand why some of these exceptions were imposed.

By the terms of the Treaty of Berlin<sup>8</sup> the United States adopted, *inter alia*, Articles 302 and 304 of Part Ten of the Treaty of Versailles. Very likely, therefore, the limitation of time for the conclusion of contracts as contained in Article 304 of the Treaty of Versailles is extended, as to its nationals, to the time of the coming into force of its Treaty with Germany, *i. e.*, November 11th, 1921.

The question has arisen whether the Mixed Claims Commission is to be regarded as a Mixed Arbitral Tribunal within the meaning of Article 304 of the Treaty of Versailles. I think not. The primary purpose of the charter<sup>9</sup> of the Mixed Claims Commission is to determine the liability of Germany as a government, not that of her nationals as individuals, even though in the process the rights of individuals may incidentally become adjudicated. One German Court<sup>10</sup> apparently inclined to the affirmative, but the contrary view is not without support, and once the question is squarely raised, the weight of opinion will probably be found to favor the negative.

<sup>1</sup> ZIVILPROZESSORDNUNG, or CODE OF CIVIL PROCEDURE (ZPO), pars. 722-23.

<sup>2</sup> ZPO, par. 328.

<sup>3</sup> TREATIES, CONVENTIONS, ETC., BETWEEN THE UNITED STATES AND OTHER POWERS, Vol. III, 3329.

<sup>4</sup> TREATY OF VERSAILLES, art. 302, § 1.

<sup>5</sup> *Id.*, art. 296, annex par. 16; art. 300 b; art. 304 b; art. 310.

<sup>6</sup> *Id.*, art. 304 b, § 2.

<sup>7</sup> Art. 14, CODE CIVIL.

<sup>8</sup> *Op. cit. supra* note 3, ratified Nov. 11, 1921.

<sup>9</sup> Agreement of Aug. 10, 1922.

<sup>10</sup> Ct. of App. at Frankfurt a/M (June 4, 1924) *Juristische Wochenschrift* 1925, p. 1304; see also RG. (German Federal Supreme Court), (Jan. 6, 1925) Vol. 109, 387.

All judgments coming within the exception are executed through one court, that of Landgericht I of Berlin, as provided by a German law passed on October 10, 1920. This enabling act was passed more than a year prior to the ratification of the Treaty of Berlin; whether its effect would be construed to extend to the provisions of that later Treaty remains to be decided.

There is but one other group of judgments to be considered as a possible exception to the general rule. It is said that judgments merely declaratory in their nature, judgments in divorce, presented to correct a marriage record, judgments pleaded in bar as *res judicata*, and the like, require no decree of execution.<sup>11</sup> The available data on this phase of the German law touching our subject favor the conclusion that these are not really exceptions, but merely call for a slightly different treatment in putting them into effect. It is true that they do not require execution in the broader and generally accepted understanding of that term, but one may hardly assume that a foreign judgment pleaded in bar, or a foreign decree in divorce offered to deprive the German spouse of his or her marital rights, would escape the scrutiny that is provided by the law of Germany in the case of an application for execution on a foreign judgment against property in Germany.

We will now proceed to a consideration of the main subject under discussion.

It has already been pointed out that the issuance of an executory decree is governed by the provisions of the German Code of Civil Procedure, five in number. While only three of them are of major importance to the American lawyer, it will nevertheless be well to take up each of the five in the order in which they appear in the Code.

It is important to note that the Code does not provide that foreign judgments, to be recognized, must comply with these five provisions, but that if a foreign judgment violates any of them, an executory decree may not issue.

## I

The first of the five provisions stipulates that execution may not issue if the courts of the country to which the foreign court belongs are not competent according to German law.

It will be noted by the language of this provision that it is immaterial whether the particular court out of which the judgment issued was competent or not according to its own or to German law, but that it is sufficient for compliance with this provision if any court in that foreign state would, according to German law, have been competent if the case had been before it.

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<sup>11</sup> STEIN-JONAS, *DIE ZIVILPROZESSORDNUNG FUER DAS DEUTSCHE REICH* (14th ed. 1928), notes 1-2 after par. 722; *id.* par. 328, note iv; RG. (March 21, 1902) Vol. 51, 135.

Generally speaking, the rules of competency<sup>12</sup> of the courts under German law are much broader than those in our own jurisdictions, and therefore in the vast majority of cases it will be found that, if the court out of which the judgment issued had jurisdiction according to the laws of its own state, the jurisdictional provision of the German law now under consideration has not been violated; *i. e.*, it will survive this first test.

In passing, it may be well to call attention to one striking exception which seems to be rigidly adhered to in the German law. This involves the cases concerning real estate. In these cases the principle "*lex rei sitae*" governs and the court of the district wherein the land is situate has exclusive jurisdiction. It may therefore be concluded that the German courts will not, for instance, recognize the judgment of a foreign court in a matter involving real property situate in Germany, or situate in any country other than the country or state of the court out of which the judgment issued. It is to be noted, on the other hand, that the situs of personal property of the defendant or of the thing sued for, confers jurisdiction in cases of pecuniary claims even though the defendant be absent.

Except in cases involving exclusive jurisdiction, a particular forum may, in certain cases, be established or excluded by agreement.<sup>13</sup>

Another peculiar development of the interpretation of this provision of the Code appears to be that even though a foreign court has wrongfully assumed jurisdiction as shown by the record, evidence may be introduced in the proceedings on execution to show that some other court of that foreign country would have had jurisdiction according to German law, or it may be possible that, even though the judgment as it stands is bad for reasons of incompetency, some rule of German law supporting the local competency of the foreign court or of the courts of that foreign country in general, unknown to our law, may be found. Indeed, it would seem that the test of competency may be made as of the date of the hearing on the application for executory decree.<sup>14</sup> A few cases will serve to illustrate the point.

In an early case<sup>15</sup> a Vienna merchant had sold goods to a German. The invoice contained the clause "Payable and Suable at Vienna." The Austrian obtained judgment before an Austrian court on the basis of this clause. On an application for execution before a German court the defense was that the mere acceptance of the invoice did not constitute an agreement

<sup>12</sup> See pars. 13-40 of ZPO for a summation of the German rules of competency of courts, etc.

<sup>13</sup> Pars. 38-40 ZPO, RG. (Jan. 7, 1914) *Leipziger Zeitschrift*, 1914, p. 774. See STEIN-JONAS, *op. cit. supra* note II, note iv, footnote 37, par. 328 ZPO and citations there found. See also Adolf Baumbach, ZPO—Berlin (6th ed. 1931) par. 328, note 4.

<sup>14</sup> RG. (March 21, 1902) Vol. 51, 135. See also RG. (July 25, 1908) *Warneyer Ergänzungsband*, 1908, p. 550, No. 678.

<sup>15</sup> *Supra* note 14.

fixing the forum. Apparently this defense appealed to the German court, for the Austrian plaintiff introduced evidence to show that the German defendant had personal property within the jurisdiction of the Austrian court. The German court on this showing sustained the competency of the Austrian court. Judging from the language of this court, it would appear that even if at the time suit was brought the German defendant had had no property in Austria, if he had it there at the time of the application for executory decree, it will serve to sustain the competency of the foreign court. This may appear to us to be going rather far afield, but I think we will find that the last of the five provisions we are going to consider effectually counteracts any damage that might result therefrom, for as we shall see, unless the foreign jurisdiction goes to the same lengths, it may not benefit by it. In other words, the question of reciprocity bars the way.

As an extension of this principle may be cited the case of the undenied allegation of jurisdictional facts, hence established by default.<sup>16</sup> If, however, the competency does not follow directly from the facts alleged, but does appear otherwise, but not in connection with the legal basis of the suit; in other words, where defendant's silence does not admit them as true, then their mere assertion by plaintiff is not sufficient; he must offer affirmative proof thereof if he would avoid dismissal for lack of jurisdiction in the foreign court.

The policy of the German law under this head may best be summarized by a quotation from a decision of the German Supreme Court.<sup>17</sup>

“The tendency of that provision apparently is to protect the German citizens against being subjected to the jurisdiction of a foreign court according to legal principles other than those in force within the German Empire.”

## II

The second provision of the German Code concerns the service of process. Unless process has been served on the German defendant in person through the proper agency, or if he has not voluntarily made himself a party, excepting, of course, cases of exclusive jurisdiction, such as the situs of real property, and those wherein competency is provided for other reason, the foreign judgment will not be recognized.

Following are some of the German rules of service, which must be complied with to avoid conflict with the second requirement of the Code. When the plaintiff's habitation is in the district in which suit is brought, service must be on him, his personal representative, or his general attorney; if his habitation is in Germany, then service must be made through estab-

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<sup>16</sup> RG. (Jan. 19, 1911) Vol. 75, 147.

<sup>17</sup> RG. (Feb. 20, 1913) *Juristische Wochenschrift*, 1913, p. 552, No. 20.

lished judicial channels, particularly in the absence of treaty provisions;<sup>18</sup> if in a foreign country, then service must be made on the defendant through German consular agency or a consular court.<sup>19</sup> There has not come to my notice any decision of the higher courts of Germany under this head, and I therefore assume it requires no extended discussion. Service by publication is not helpful to the recognition of a foreign judgment.<sup>20</sup> A defendant makes himself a party by much the same process as prevails here, with at least one notable exception. German courts have held that an appearance to test the jurisdiction of the court, or appearance *de bene esse*, is a voluntary act within the meaning of this provision.<sup>21</sup>

### III

The third provision of the code concerns matters not likely to interfere greatly with the average American judgment. Indeed, the absence of any decisions of the higher courts construing the numerous points provided for under this head would indicate their relative unimportance. The subjects<sup>22</sup> involved include the law governing marriage, form of marriage, divorce, which is governed by nationality of husband unless the wife has retained her German nationality, legitimacy of children, also their legitimation and adoption, remarriage where husband, a foreigner, has been declared legally dead, etc. If the foreign judgment contravenes any of the provisions of the law relating to these subjects, to the detriment of a German party, it will be denied recognition by the German courts.

### IV

With the fourth provision of the Code we return to more familiar ground and considerable more clarity. Here we find that the recognition of a foreign judgment is prohibited if such recognition would be (a) immoral or (b) against "the purpose" of a German law.

(a) The question of what is to be considered as "immoral" within the meaning of this provision has been the subject of numerous court decisions construing the German term of legal immorality. Legal immorality, in substance, has been construed to be whatever is contrary to the general opinion and the actual custom of the people concerning what is morally required and permitted. The recognition of a foreign judgment would be considered immoral, for instance, "if fraud were involved on the part of the winning party in obtaining the judgment", or "if the execution of the

<sup>18</sup> Dist. Ct. Nuernberg (April 21, 1890). Busch's Zeitschrift, Vol. 15, p. 520.

<sup>19</sup> See STEIN-JONAS, *op. cit. supra* note 11, note V after par. 328 ZPO.

<sup>20</sup> RG. (June 23, 1890) Vol. 26, 130.

<sup>21</sup> RG. (April 21, 1891) Juristische Wochenschrift, 1891, p. 272, No. 8.

<sup>22</sup> Art. 13, subpars. 1 & 3; art. 17; art. 18; art. 22; art. 27 as it relates to art. 13, subpar. 1; art. 13, subpar. 2 as it relates to art. 9, subpar. 3. Introductory Law to German Civil Code.

judgment would involve an action by the losing party which would be contrary to the standard of morals in Germany."<sup>23</sup>

(b) A foreign judgment cannot be enforced in Germany if its recognition would be contrary to the fundamental purpose of a German law, that is, one which purports to sustain certain public, social or economic conditions underlying the public and economic life of Germany.<sup>24</sup>

This provision does not mean that the German court is supposed to enter into a "*revision au fond*" of the foreign judgment. The German court has to consider the judgment as it stands. It cannot retry the case on an opened judgment, nor is it permissible for the plaintiff to establish new facts in order to show that the foreign judge has failed to notice a violation of good morals.<sup>25</sup> The construction of this provision by the German courts shows a tendency "to decline the recognition of foreign judgments on this ground only in cases of striking and fundamental discrepancies between German and foreign law."

The Supreme Court<sup>26</sup> has held that an irrevocable power of attorney is not contrary to the policy of a German law (under which a power of attorney cannot be made irrevocable) as it did not involve the legal or economic independence of the individual:

"The legal dignity attributed to a free person is no doubt recognized today under American law just as well as under German law. . . . This has to do with the independence of the person as little as the recognition of the irrevocability of the *mandatum in rem suam* in the course of the development of Roman law."

In another case the Supreme Court<sup>27</sup> held that the provision of paragraph 25, subparagraph 1 of the German Commercial Code does not constitute an indispensable provision of German law. The substance of this provision is that the successor in a business enterprise using the same firm name as his predecessor is liable for the debts of his predecessor contracted under that firm name. According to English law, the successor was not so liable unless he undertakes such liabilities by specific stipulation. Said the Court:

"The provision of Par. 25, subpar. 1 of the German Commercial Code is only a matter of practicability suited to the usages of commerce in Germany, and, did not have such economic importance that it would demand the exclusion of the application of English law."

<sup>23</sup> See notes to par. 138 German Civil Code.

<sup>24</sup> RG. (Oct. 24, 1892) Vol. 30, 122; RG. (March 21, 1905) Vol. 60, 299; RG. (May 27, 1910) Vol. 73, 366; RG. (June 28, 1918) Vol. 93, 182; RG. (June 25, 1926) Vol. 114, 171; RG. (Dec. 14, 1927) Vol. 119, 263; RG. (March 5, 1931) Vol. 132, 193.

<sup>25</sup> RG. (Oct. 25, 1909) Vol. 72, 126.

<sup>26</sup> RG. (Oct. 24, 1892) Vol. 30, 122.

<sup>27</sup> RG. (March 21, 1905) Vol. 60, 296.

A similar question was decided by the Supreme Court.<sup>28</sup> A German firm had brought suit against a Dutch corporation which had a branch office at Berlin, but its seat in Holland, with the request that the Dutch corporation should be forced to furnish bail for an outstanding debt on account of a reduction of the capital stock, as required of a German firm under German law. It was found that this provision was unknown in Dutch law. It was held that the Dutch law was to be applied, and that article 30 of the introductory law to the German Civil Code prohibiting the application of foreign law, if contradictory to fundamental principles of German law, did not apply in this case since paragraph 289, subparagraph 3 of the German Commercial Code (the paragraph in question in the case cited) is only a provision of practicability and not fundamental.

On the other hand, in a decision of June 28, 1918,<sup>29</sup> the Supreme Court held that the purpose of the British Trading with the Enemy Act of 1914 was contrary to fundamental principles of German law. I quote from the decisions:

"Now the purpose of the British Trading with the Enemy Act of 1914 is to hit the trade of the enemy and to inflict economic damage not only upon the enemy nationals but also indirectly upon the enemy state. This purpose contravenes materially the principle of German law that the war is carried on only against the enemy state and its military and naval power and not also against its nationals (Vol. 85, page 376)—a principle which is not abrogated through the existence of reprisals which became necessary. It contradicts, furthermore, the inherent purpose of German law to further the well-being of the German Empire. The application of such law would therefore affect the fundamentals of German economic life. It is consequently excluded by Art. 30 of the introductory law of the German Civil Code."

In a decision of December 19, 1922,<sup>30</sup> (Vol. 106, page 82) the Supreme Court held it to be a fundamental principle of German law that any debt is subject to the prescription of time, and that a judgment of a foreign court ignoring this principle cannot be recognized.

"It is based upon the conviction that the institution of prescription of time does not merely operate to the advantage of the single debtor but to the public benefit; it is designed to benefit legal peace and legal security by rendering it impossible for the creditor to reappear after a long period of inactivity with claims theretofore unmentioned and thereby to complicate the defense for the debtor at a time when his counter-evidence is obscured."

I have quoted at some length from decisions because I deemed the ones referred to of practical application and characteristically illustrative of the point involved.

<sup>28</sup> RG. (May 27, 1910) Vol. 73, 366.

<sup>29</sup> RG. (June 28, 1918) Vol. 93, 182.

<sup>30</sup> RG. (Dec. 19, 1922) Vol. 106, 82.

The question may arise, whether the foreign plaintiff has any recourse in case execution is denied. Theoretically, it would require a new suit, but perhaps this might be avoided by combining the application for an executory judgment with an alternative count based on the facts, with a request that the court render an interlocutory judgment on the first alternative so that the plaintiff may have an opportunity to develop the merits of his case in the course of the same action and before the same court, provided that this court is competent to pass on the subject matter as such.

## V

We now come to the last, and by far the most important, of the five provisions of the Code. In effect it provides that the recognition of a foreign judgment in Germany is prohibited if reciprocity is not assured (except, perhaps, in some cases where the judgments do not involve a pecuniary claim such as was considered under the head of the second exception to the general rule at the beginning of the discussion; or where no court in Germany was competent according to German laws).

This is an international rule having to do with the comity of nations, on which the recognition of foreign judgments is based. It is known as well in America<sup>31</sup> as it is in Germany. However, its interpretation by the German courts seems to be narrower than its construction by the American courts. The attitude of the German courts is being criticized by prominent German textbook writers<sup>32</sup> and commentators, who advocate a more liberal view.

Generally speaking, the present status of the German law regarding reciprocity may in part be summarized as follows:

1. "The foreign state must recognize German judgments in general at least approximately to the same extent as foreign judgments are recognized in Germany, certainly their execution should not be more difficult." The policy of *prima facie* recognition as announced in *Hilton v. Guyot*<sup>33</sup> alone would seem to effectually bar reciprocity.

2. An examination of the merits of the decision must be excluded. A revision *au fond* must not be permitted.<sup>34</sup>

3. The conditions under which German judgments are recognized in the foreign country in question must be based in substance on the same principles which apply in Germany.<sup>35</sup> In other words, the conditions under

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<sup>31</sup> *Hilton, et al. v. Guyot, et al.*, 159 U. S. 113, 176, 16 Sup. Ct. 139, 148 (1895).

<sup>32</sup> STEIN-JONAS, *op. cit. supra* note 11, note VIII-A to par. 328 ZPO, criticizing RG. (March 26, 1909) Vol. 70, 435; and RG. (Feb. 8, 1924) Vol. 107, 311.

<sup>33</sup> *Supra* note 31.

<sup>34</sup> RG. (May 19, 1882) Vol. 7, 409.

<sup>35</sup> RG. (Feb. 15, 1901) Vol. 48, 378; RG. (March 26, 1909) Vol. 70, 438.

which the particular foreign country recognizes German judgments must not be narrower than the conditions applied in Germany, according to the first four provisions of paragraph 328 of the *Zivilprozessordnung*.

If, for instance, the condition for the recognition of a foreign judgment is the actual competency of the German court out of which the judgment issued and that the foreign courts will not recognize the German judgment if it was not competent although some other German court would have been, then the German courts hold that reciprocity is not assured.<sup>36</sup> Furthermore, the German Supreme Court has ruled that reciprocity is not assured if the foreign courts permit German judgments to be attacked on grounds other than those upon which the case can be reopened in Germany, as provided for in Paragraph 580 *et seq.* of the German *ZPO*.<sup>37</sup>

4. Reciprocity must be ascertained to exist as an actual matter of fact sustained by consistent practice.<sup>38</sup>

As to reciprocity in general, it would seem that in the absence of a treaty, or of a law in the foreign country, consistently adhered to, or well established practices of the courts of that country<sup>39</sup> or district recognizing German judgments with a liberality agreeable to the German courts, the judgments emanating from that country will find little favor in Germany.

Although some German legal writers and practitioners have assumed that reciprocity was assured between Germany and the United States, the only decision of the German Federal Supreme Court on the question of reciprocity in America to which my attention has been directed is the California case referred to, in which it was held that reciprocity was not assured because

(a) the California judge would inquire, in a case of a German judgment, whether the particular German court which rendered the judgment was competent and because he therefore would not be satisfied with a finding that another court in Germany would have been competent to pass on the subject-matter; and

(b) the requirements under which a case can be reopened in California after final judgment has been rendered are broader than the pertinent requirements of the German Code of Procedure, so that a German judgment

<sup>36</sup> RG. (March 29, 1909) Vol. 70, 435; RG. (Feb. 8, 1924) Vol. 107, 308.

<sup>37</sup> RG. (March 26, 1909) Vol. 70, 435.

<sup>38</sup> See the "Florida case"—RG. (March 26, 1909) Vol. 70, 435; RG. (Feb. 8, 1924) Vol. 107, 308; but see RG. (Dec. 10, 1926) Vol. 115, 103. In this case the Supreme Court held that the findings of the court below on the question, whether or not reciprocity had been established, is no longer final, but is subject to review by the Supreme Court. In that case the RG. conducted a searching inquiry into the customs in a Swiss canton regarding recognitions of German judgments. By the same token a similar procedure undoubtedly would now be followed as to a judgment emanating from a court in the United States. Therefore, to this extent, the above cited "California Case" may be said to have been modified.

<sup>39</sup> STEIN-JONAS, *op. cit. supra* note 11, par. 328, note VIII; Wittmaack, *Recht* 1911, 393; Boehm's *Zeitschrift* XXII, 1; WOOD, *LEGAL RELATIONS OF FORMER ENEMIES AFTER THE TREATY OF BERLIN*. See also RG. (Dec. 10, 1926) Vol. 115, 103.

would not receive the same credit in California as would a California judgment in Germany.

*Hilton v. Guyot* certainly does not serve to dispel this view.

The Supreme Appellate Court at Berlin, however, has dealt with this question of reciprocity concerning New York State decrees in divorce,<sup>40</sup> holding that the required reciprocity must be proven to exist in fact, going so far as to contend that reciprocity, as a matter of fact, exists only in regard to such powers which were parties to The Hague Agreement of June 12, 1902.

From the foregoing consideration of the provisions of the *ZPO* and the decisions of the German courts, it would appear that the recognition of foreign judgments in Germany depends to a very large extent on international agreements, treaties, or long sustained and consistently maintained practices of the courts.

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<sup>40</sup> Record of Decisions of Sup. Ct. of Appeals (Feb. 16, 1909) Vol. 19, 106.