The conceptual differences between the American and German laws of civil procedure have led to considerable tensions during the last decade. At least two American authors note an increasing collision course. The most highly-regarded body engaged in the study of international civil procedure has chosen the judicial conflict between the United States and Europe as its agenda for a special meeting. Both “pre-trial discovery” and the awarding of punitive damages have led to irritations in the Federal Republic of Germany (Federal Republic) and may influence the recognition of American civil judgments in the Federal Republic.

* The author thanks Dr. Fritz Weinschenk, Attorney at Law, New York. Without his cooperation, assistance and encouragement, this article would never have been published.

** PROFESSOR, UNIVERSITY OF TÜBINGEN, ATTORNEY AT LAW IN STUTTGART.


3 See, e.g., P. Schlosser, DER JUSTIZKONFLIKT ZWISCHEN DES USA UND EUROPÄ (1985).


5 The pretrial discovery explosion is causing problems in countries outside of Europe as well. See Taniguchi, The Japanese in American Litigations - Problems of Procedural Conflict, in Habscheid, supra note 4, at 93 (“probably this is the greatest source of complaint on the part of Japanese defendants about American litigation”).
1. THE RECOGNITION AND ENFORCEMENT OF FOREIGN CIVIL JUDGMENTS IN THE FEDERAL REPUBLIC OF GERMANY

The recognition and enforcement of foreign civil judgments are largely governed by treaties. The most important multilateral treaty on the subject is the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (EuGVUe), dated September 27, 1968, which presently assures unlimited recognition of judgments between the Federal Republic, Belgium, Luxembourg, Holland, France, Italy, the United Kingdom (including Northern Ireland), and Denmark. For the conventions on recognition and enforcement of foreign judgments, see W. Jellinek, DIE ZWEISETZTEN STAATSVERTRÄGE ÜBER ANERKENNUNG AUSLÄNDISCHER ZIVILURTEILE (1953); Martiny, Anerkennung nach multilateralen Staatsverträgen, in III/2 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 11 (1984); Verbeek, Die Staatsverträge über die Vollstreckung ausländischer Zivilurteile, 45 ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT [NIEMEYERSZ] 1 (1931); Waehler, Anerkennung ausländischer Entscheidungen aufgrund bilateraler Staatsverträge, in III/2 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 213 (1984).

This treaty is presently in force in the version of the Conventions on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and Greece to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, dated October 9, 1978. 21 O.J. EUR. COMM. (No. L 304) 1 (1978).

For the German point of view, see A. Bülow, K. Böckstiegel, H. Linke, G. Müller & D. Schlafen, DER INTERNATIONALE RECHTSPROZESS IN ZIVIL- UND HANDELSSACHEN 606 (2d ed. 1977); R. Geimer & R. Schütze, INTERNATIONALE URTEILSANERKENNUNG 1 (1984); J. Kropholler, EUROPÄISCHES ZIVILPROZEFSRECHT (2d ed. 1987).

For the Belgian point of view, see G. Droz, COMPÉTENCE JUDICIAIRE ET EFFETS DES JUGEMENTS DANS LE MARCHÉ COMMUN (Bibliothèque de droit international privé v. XIII, 1972); M. Weser, CONVENTION COMMUNAUTAIRE SUR LA COMPÉTENCE JUDICIAIRE ET L'EXÉCUTION DES DÉCISIONS (1975).

For the French point of view, see P. Gothot & D. Holleaux, LA CONVENTION DE BRUXELLES DU 27 SEPTEMBRE 1968 (1985).

Ireland), Denmark, Ireland and Greece. The Federal Republic has concluded bilateral agreements concerning this subject with Switzerland, Italy, Belgium, Great Britain, Holland, Tunisia, Norway, Israel, and Spain. No agreement currently exists with the United States. The German-American Treaty of Friendship, Commerce and Shipping, dated October 29, 1954, does not provide for the recognition and enforcement of civil judgments. Moreover, the Federal Republic has regulated this subject by statute. Zivilprozeßordnung (ZPO) section 328 governs recognition, and sections 722 and 723 govern the enforcement of foreign civil judgments. These prescriptions, in Martiny's translation, state:

ZPO § 328 [Recognition of Foreign Judgments]

(1) The recognition of the judgment of a foreign court is excluded:

1. where the courts of the State to which the foreign court belongs have no jurisdiction under German law;

2. where the defendant, who has not appeared in the proceedings and relies on that fact, was not duly served with the document instituting the proceedings or was not served within sufficient time to enable him to arrange for his defense;

3. where the judgment is irreconcilable with a judgment rendered here, or with an earlier foreign judgment which is entitled to recognition, or where the proceeding which gave rise to the foreign judgment is irreconcilable with a proceeding instituted earlier here;

4. where the recognition of the judgment would produce a result which would be manifestly irreconcilable with fundamental principles of German law, especially where the recognition is irreconcilable with basic constitutional rights;

5. where reciprocity is not guaranteed.


14 For the history of the rule, see Graupner, Zur Entstehungsgeschichte des § 328 ZPO, in Festschrift für Murad Ferid 183 (A. Heldrich ed. 1978).


16 See Martiny, Recognition and Enforcement, supra note 6, at 759. The author thanks Mr. Martiny for the kind authorization to use his translation.
(2) The provision contained in sub-paragraph 5 shall not prevent recognition of the judgment where that judgment relates to a non-pecuniary claim and the German courts had no jurisdiction under German law, or where a matter concerning the status of children (§ 640) is at issue.

ZPO § 722 [Enforceability of Foreign Judgments]

(1) The judgment of a foreign court may be enforced only where this has been authorized by a judgment for enforcement.

(2) Jurisdiction in an action for the rendering of such a judgment shall be exercised by the Local or Regional Court (Amtsgericht oder Landgericht) having general jurisdiction over the debtor, or otherwise the Local or Regional Court before which an action may be brought against the debtor under § 23.

ZPO § 723 [Judgment for Enforcement of Foreign Judgments]

(1) The judgment for enforcement shall be rendered without examination of the lawfulness of the decision.

(2) The judgment for enforcement may be rendered only after the judgment of the foreign court has become res judicata under the law applicable to that court. It shall not be rendered where recognition of the judgment is excluded under § 328.

Note that ZPO section 328, subdivision 1 expresses the requirements of recognition only in bare essence.

1.1. Judgment of a National Court

The decision of a foreign court must be rendered by a tribunal endowed with the plenary powers of a court of record in order to procure recognition by the Federal Republic. Therefore, the decisions of private tribunals, such as boards of organizations,17 are excluded from the scope of ZPO section 328. It is immaterial whether or not the originating jurisdiction is internationally recognized.18 Judgments from non-recognized nations, such as the Homelands of South Africa, are capable of recognition.19 The sole measure of the competence of a court is its permanent exercise of judicial functions within a territory.

17 French law contains an interesting case where a court refused formal enforcement of a decision of a "Russian Consular Court" which was instituted by Russian emigrés in Istanbul after the Revolution. See Judgment of 1935, Tribunal de la Seine, Trib. pr. inst., Fr., 51 Journal Clunet 106. Under German law, the result would not have differed.


19 See SCHÜTZE, INTERNATIONALES ZIVILPROZESRECHT, supra note 15, at 136.
1.2. Foreign Judgment

Pursuant to ZPO section 328, whether a judgment is domestic or foreign must be determined. If foreign, it must be ascertained from which state the decision emanated. These determinations must be made solely on the jurisdictional basis that the originating state purported to exercise, whether the result might differ upon application of national or international law.20

1.3. Civil Matter as a Cause of Action

The decision of the foreign court must arise from either a civil or commercial matter in order to be recognized by the Federal Republic.21 The determination of whether the cause of action is based on a civil or commercial claim22 is made according to the law of both the originating and the recognizing states. Therefore, a double qualification is required. The nature of the cause of action, not the venue of the originating court, exclusively determines whether a civil or commercial matter is involved.23 Judgments containing levies (taxes, assessments, quotas) or penalties24 do not fall within the scope of ZPO section 328, and thus are not recognized.

1.4. Res Judicata

Case law25 and doctrine26 limit the subject-matter application of

---

20 See Schütze, Zur Anerkennung, supra note 18, at 636.
21 See Zivilprozeßordnung [ZPO] § 328 (R. Zöller & R. Geimer 15th ed. 1987). It is not a requirement that the foreign decision be a money judgment. Other types of relief requiring performance of an act, such as attachments, injunctions, declaratory judgments, or status judgments, are also subject to these provisions.
22 For the concept of a civil matter see Luther, Zur Anerkennung und Vollstreckung von Urteilen und Schiedssprüchen in Handelssachen im deutsch-italienischen Rechtverkehr, 127 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 145 (1964).
23 Additionally, the nature of the action underlying judgments of criminal courts which award damages to the victim of a crime are capable of recognition. See E. Rießer, Internationales Zivilprozeßrecht: und Prozeßuales Fremdenrecht 530 (1949) (hereinafter Rießer); Schütze, Internationales Zivilprozeßrecht, supra note 15, at 138; Kleinfeller, Die Vollstreckung ausländischer Urteile, ILA-Report 375, 379 (1923); Kohlrausch, Kann ein in Abwesenheit des Angeklagten ergangenes Adhäsionsurteil des Zürcherischen Schwurgerichtshofes in Deutschland für vollstreckbar erklärt werden? 12 Rheinische Zeitschrift für Zivil- und Prozeßrecht 129 (1923); Martiny, Handbuch, supra note 15, at 123.
24 From the German point of view, the specific problem of punitive damages is that punitive damages contain elements of a penalty. See infra text accompanying notes 94-109.
26 See ZPO § 328, at n.1B (A. Baumbach, W. Lauterbach, J. Albers & P. Hart-
ZPO section 328 to final judgments having res judicata effects, although the statute requires such finality only for enforcement.

1.5. Judicial Power of the Originating State

An unwritten requirement for recognition is the jurisdiction of the originating state when it ordered the judgment. If the originating court transcends the limits of its judicial sovereignty authorized by international law, recognition must be denied. This principle applies in cases where the recognizing state itself had jurisdiction, as well as in those cases where the decision purports to exercise jurisdiction to the detriment of the judicial sovereignty of a third state. For example, if a court in Kentucky renders a judgment against the State of Venezuela in violation of Venezuelan immunity, that judgment would not be recognized in the Federal Republic of Germany because it violates international law. The Federal Republic would itself violate international law if it did recognize such a judgment.

1.6. International Jurisdiction

The originating court must have international jurisdiction. ZPO section 328, subdivision 1, number 1 requires an examination of the international jurisdiction of the rendering court for purposes of recognition. This analysis is performed in accordance with German law, hypothetically applying autonomous German jurisdictional rules to the original proceeding. Throughout this determination, it is fictitiously assumed that the German code of civil procedure was applied in the trial state. The trial court's jurisdiction under its own national law is not examined. If the foreign court has violated its own jurisdictional


rules when passing judgement, the decision remains capable of German recognition, if, upon hypothetical application of German jurisdictional rules, any court of the originating state - not necessarily the trial court - would have jurisdiction. Therefore, if a Virginia court assumes jurisdiction on the basis of personal service, which is unknown to German law, the judgment is still capable of being recognized if the jurisdiction in Virginia can be established on a basis that is valid under German law. For example, recognition will occur when a defendant has assets in Virginia, despite that such basis may be unknown to American law.

The requirement of proper service is intended to secure due process of law. In this respect, German law does not extend as far as other legal systems which refuse recognition of default-judgments as a basic premise; rather, it merely secures the due process rights of the defendant. In the context of German-American legal relations, the Hague Service Convention must be considered.

---

29 Therefore, if a Virginia court assumes jurisdiction on the basis of personal service, which is unknown to German law, the judgment is still capable of being recognized if the jurisdiction in Virginia can be established on a basis that is valid under German law. For example, recognition will occur when a defendant has assets in Virginia, despite that such basis may be unknown to American law.


33 This situation occurs under Spanish law. LEY DE ENJUICIANIENTO CIVIL art. 954(2) (Spain). See A. Brotons, Ejecución de sentencias extranjeras en España 212 (1974) (discussing the restrictive interpretation of article 954(2)). In the recent literature, see Bombard, Die Vollstreckung deutscher Zivilurteile in Spanien, 1986 RvW/AWD 960.


35 Upon ratification of the Hague Service Convention, service of process abroad was still handled between the parties. This practice quickly ceased after a directive was issued by the German Federal Ministry of Justice to all German attorneys which pro-
1.8. No Collision of Judgments

The foreign judgment must not collide with a German judgment or a valid earlier foreign judgment in the same case. This rule also applies if the underlying proceeding is incompatible with a prior proceeding pending in the Federal Republic. It is perhaps questionable whether this requirement of ZPO section 328, subdivision 1, number 3 is a form of public policy restriction or emanates from the res judicata effect of foreign titles.

1.9. Public Policy Clause

The foreign decision must not violate German public policy as prescribed in ZPO section 328, subdivision 1, number 4. This concept is equally difficult to define in international procedural law as it is in private international law. At any rate, the public policy reservation must be strictly construed. In the German system, the prohibition of a reexamination of the merits of the foreign judgment (revision au fond) is inherent in the concept of recognition, thus judgments containing errors of substantive law or violations of procedure are nevertheless acceptable. Conclusive effect is only denied to a foreign decision in cases

12 BRAK-Mitteilungen 25 (1981). Insofar as service of American complaints in the Federal Republic is concerned, service of process will, as a rule, be conformed to the provisions of the Hague Service Convention. However, problems are encountered when process is served on an "involuntary agent," a concept unknown to German law. Moreover, now that the United States Supreme Court has approved this type of intra-American service as being consistent with the Convention, new tensions are bound to arise. See Volkswagenwerk v. Schunk, 486 U.S. 694 (1988). The judgment in Schunk will not be given comity in Germany because it violates ZPO section 328, subdivision 1, number 2 - provided the defendant Volkswagenwerk does not enter a general appearance in the American litigation. See Heidenberger, US-Supreme Court befaßt sich mit dem Haager Zustellungsübereinkommen, 1988 RlW/AWD 90; Heidenberger, U.S. Supreme Court lehnt ausschließliche Anwendung von Zustellungübereinkommen ab, 1988 RlW/AWD 567.


For details, see Roth, supra note 36, at 108; Martiny, Handbuch, supra note 15, at 433.

Geimer states that erroneous foreign judgments must be enforced to the same extent as erroneous domestic judgments because foreign courts should not be held to a higher standard of accuracy. ZPO § 328, at n.151 (R. Zöller & R. Geimer, 15th ed. 1987). See also Schütze, Internationales Zivilprozeßrecht, supra note 15, at 453; Martiny, Handbuch, supra note 15, at 149.
where the result would become intolerable to the German judicial system. Two types of public policy violations must be distinguished. A violation may exist if the tenor of the foreign judgment attempts to dispose of matters which, in light of the governing principles of the German legal order, may not properly be judicially mandated, e.g., where it attempts to judicially enforce a prohibited legal relationship in violation of substantive public policy. An example of this type of violation is the enforcement of a gambling debt. The denial of recognition on the grounds of a violation of substantive public policy is significant with respect to the conclusiveness of American judgments, especially those awarding excessive damages\(^{40}\) and damages arising from stock exchange futures.\(^{41}\)

A violation of public policy may also result from the foreign decision’s procedural defect, notwithstanding the justness and substantive correctness of the decision.\(^{42}\) Therefore, denial of constitutionally guaranteed due process in a foreign proceeding would constitute a public policy violation. Consequently, the American system of pre-trial discovery, upon which American judgments are based and which is unknown to German law, poses a problem in cases where a violation of German procedural public policy could result.\(^{43}\)

1.10. Reciprocity

Reciprocity must be guaranteed pursuant to ZPO section 328, subdivision 1, number 5.\(^{44}\) Doctrinal or theoretical reciprocity does not

---

\(^{40}\) See infra text accompanying notes 110-17.

\(^{41}\) In a 1975 decision, the Bundesgerichtshof denied recognition of an American judgment on public policy grounds because it involved the enforcement of the obligations of a commodity futures contract. See Judgment of June 4, 1975, Bundesgerichtshof, GRSZ, W. Ger., 29 WERTPMITT 676. See also Haüser & Welter, Nationale Gestaltungsschranken bei ausländischen Börsentermingeschäften, 39 WERTPMITT 8 (1985). But see Mann, Börsentermingeschäfte und internationales Privatrecht, in Festschrift für Ernst von Caemmerer 737 (H. Ficker ed. 1978).

\(^{42}\) For the procedural public order, see Baur, Einige Bemerkungen zum verfahrensrechtlichen ordre public, in Festschrift für Max Guldener 1 (H. Walder ed. 1973); Geimer, Zur Nichtanerkennung ausländischer Urteile wegen nichtgehöriger Ladung zum Erstprozeß, 26 NJW 2138 (1973); Geimer, Zur Nichtanerkennung ausländischer Urteile wegen nicht ordnungsgemäßer erststaatlichen Verfahrens, 24 JZ 12 (1969).

\(^{43}\) See infra text accompanying notes 67-91.

\(^{44}\) See R. Geimer & R. Schütze, Internationale Urteilsanerkennung 1749 (1984); Fragistas, Der Begriff der Gegenseitigkeit bei der Anerkennung der ausländischen Urteile, in Festschrift für Walter Schätzlel 149 (1960) [hereinafter Fragistas]; Martiny, Handbuch, supra note 15, at 526; Schütze, Die Rechtsprechung des BGH zur Verbürgung der Gegenseitigkeit (§ 328 Abs. 1 Nr. 5 ZPO), 21 NJW 293 (1968); Süss, Die Anerkennung ausländischer Urteile, in Festschrift für Leo Rosenberg 289 (1949); von Wedt, Zur Auffassung des § 328 Nr. 5 ZPO, 5 JUDICIOUM
suffice. The test is the factual guaranty of reciprocity. In this respect, the German legal order must be compared to the foreign trial-state in both its procedural and substantive aspects.

Within limits, advantages may neutralize hindrances. A partial grant of reciprocity does suffice and primarily applies to certain categories of judgments. If the foreign state recognizes German judgments in general but excludes default-judgments (which occur in many jurisdictions), a partial denial of reciprocity for default-judgments would exist. A partial grant of reciprocity, however, is also possible where the foreign and German requirements for conclusiveness cover each other in individual cases. For example, this situation exists when a foreign system prescribes a time limitation within which a petition for the recognition of a foreign judgment must be brought. Since the German system does not acknowledge such limitations, reciprocity would be extended only to those judgments seeking German recognition which were submitted to the German judicial system within the statutorily prescribed time limitation of the emanating jurisdiction.

For money judgments, present German literature confirms the grant of reciprocity to all states of the United States with the exceptions of Mississippi and Montana.

77 (1933).

Rightly or wrongly, the German Reichsgericht (Supreme Court prior to 1945) declined to find reciprocity with California for that reason. However, a California statute which was introduced shortly before the case provided for statutory equality of reciprocity requirements. See Judgment of Mar. 26, 1909, Reichsgericht, RG, W. Ger., 70 RGZ 343 (1909), commented by Kisskalt, Die Vollstreckbarkeit kalifornischer Urteile in Deutschland 689 (1907); Wittmaack, Kann ein Vollstreckungsurteil nach §§ 722 and 723 ZPO auf Grund eines nordamerikanischen, insbesondere kalifornischen Urteils erlassen werden?, 22 Niemeyers Z 1 (1912).


According to German law, an action on a foreign judgment is possible until the prescription of the judgment obligations, usually thirty years.

For this reason, reciprocity between the Federal Republic and Arizona is only granted for a period of four years after finality, since the law of Arizona permits an action upon a foreign judgment only within that time limit. See Schütze, Die Anerkennung und Vollstreckbarerklärung ausländischer Zivilurteile in Arizona, 1987 Juristische Rundschau [JR] 185.

Recognition is not bound to any formalities. Any court or public agency can collaterally determine recognition whenever the effects of a foreign decision become relevant to a matter pending before it. Exceptions are made for decisions in matrimonial matters, particularly divorces, which require formal recognition. In contrast, the enforcement of foreign judgments requires a formal proceeding which is governed by ZPO section 722. A revision au fond is not permitted.

2. General Problems in the Recognition and Enforcement of American Civil Judgments

The distinctions between the procedural system in the Federal Republic and that in various states of the United States, as well as the differing practice in effectuating international agreements concerning mutual legal assistance, present two specific problems for the recognition and enforcement of American civil judgments in the Federal Republic: international jurisdiction and public policy.

2.1. International Jurisdiction

Under German law, pursuant to ZPO section 328, subdivision 1, number 1, the recognition of a foreign decision by the Federal Republic depends upon whether the foreign court had jurisdiction to decide the case, as determined by the hypothetical application of German jurisdictional rules. Therefore, the German code of procedure is figuratively superimposed on the foreign proceeding. If the application of this test

Montana].


See supra text accompanying note 16.


See Bernstein, Prozessuale Risiken im Handel mit den USA (Ausgewählte Fragen zu § 328 ZPO), in Festschrift für Murad Ferid 75 (A. Heldrich ed. 1978); Schütze, Die Anerkennung und Vollstreckbarerklärung ausländischer, insbesondere deutscher Zivilurteile in den USA, 1986 JR 177; Schütze, Probleme der Anerkennung US-amerikanischer Zivilurteile in der Bundesrepublik Deutschland, 33
results in a finding of lack of jurisdiction, then recognition is denied. The American jurisdictional rules provide for numerous jurisdictional bases unknown to the German law, which - in the German view - appear undesirable and exorbitant. Four bases of jurisdiction are involved: (1) transient jurisdiction; (2) long arm statutes; (3) piercing the corporate veil; and (4) third party complaints.

2.1.1. Transient jurisdiction

German law does not recognize service of process as a basis for jurisdiction. The place of service of a summons is irrelevant for the jurisdiction of the courts. A rule corresponding to the Restatement second of Conflict of Laws section 28 is unknown.

2.1.2. Long arm statutes

Business activity of a person within a state qualifies as a basis of jurisdiction according to the long arm statutes adopted by most American states. Under German law, business activity within a jurisdiction does not by itself suffice to subject a defendant to the power of a court. From the German viewpoint, the very liberal interpretation of 'doing business' by some American courts has led to severe irritations, especially in product liability cases.

2.1.3. Piercing the corporate veil

Capital investment by a foreign enterprise in a company active within the court's jurisdiction is not a proper basis for international jurisdiction under German law. Cases such as Shaffer v. Heitner or International Shoe Co. v. Washington would not pose a problem for German courts since jurisdiction clearly would not have existed in either situation.

58 See R. Schütze, RECHTSVERFOLGUNG IM AUSLAND 106 (1986); Schütze, Konzeptionelle, supra note 1, at 1078.
55 Section 28 provides, "A state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." RESTATEMENT (SECOND) CONFLICT OF LAWS § 28 (1971).
2.1.4. Third-party complaints

Unlike American third party practice, German law does not provide for jurisdiction based on joinder of necessary parties.\textsuperscript{65}

2.1.5. Alternative Bases for Jurisdiction Under German Law

If an American decision is grounded on one of the aforementioned undesirable jurisdictional bases,\textsuperscript{64} the decision is not necessarily denied comity by reason of lack of international jurisdiction. If the jurisdiction of the foreign (American) court can be derived from any other jurisdictional basis, even if that basis is unknown to the American law, the German jurisdictional requirement is satisfied. Thus, the American plaintiff is unwillingly benefitted by a German jurisdictional base. According to ZPO section 23, any property of a non-domiciled defendant located within the adjudicating jurisdiction is sufficient to constitute a jurisdictional base there. The value of such property need not equal, nor exceed, the amount for which the party has sued.\textsuperscript{65} Under German law, a bank account balance of one hundred dollars maintained by a German-domiciled defendant in a New York bank would suffice to constitute a jurisdictional basis for the New York courts in an action for ten million dollars. This German jurisdictional rule\textsuperscript{66} often renders recognizable judgments based on transient jurisdiction or some other undesirable base, since German defendants in product liability cases frequently possess assets in the United States.


\textsuperscript{64} See supra text accompanying notes 56-62.


2.2. Public Policy clause

The German jurisdiction statute's public policy clause, under ZPO section 328, subdivision 1, number 4, can defeat the recognition and enforcement of an American civil judgment rendered after extensive disclosure proceedings\(^67\) directed against the opponent in the underlying action.\(^68\) Pre-trial discovery is not objectionable *per se*, even under German procedural aspects. German courts have not objected to the disclosure practices of other legal systems such as the British civil action\(^69\) and British, Commonwealth systems.\(^70\) The Germans have found pre-trial discovery in the U.S. during the last two decades to be excessive, and thus unacceptable.\(^71\) In the process of using pre-trial discovery as a means to start the parties off equally, it has become an institution where one party - especially the plaintiff - gathers facts necessary to initiate an action. This is particularly true with respect to product liability cases, where the plaintiff frequently possesses no knowledge of the underlying facts and only acquires supporting information during the course of pre-trial discovery.\(^72\) This pre-trial discovery enables the plaintiff to discover inadmissible evidence which, in turn, leads to the


discovery of admissible evidence, in effect allowing a party to "investi-
gate" the opponent.\textsuperscript{73}

A fundamental principle of German procedure is that no party is
obliged to furnish an opponent with information which may be em-
ployed against it. The Ausforschungsbeweis,\textsuperscript{74} the partial or complete
proof of one's own case through the oral testimony - or documents - of
the opponent, is prohibited by German law. Case law\textsuperscript{75} and literature\textsuperscript{76}
concur on this point, although the supporting reasoning varies.\textsuperscript{77} A
party's right against self-incrimination in a criminal proceeding corre-
ponds to the prohibition of the "Ausforschungsbeweis" in a civil pro-
ceeding. This right is not curtailed by the duty of candor imposed by
ZPO section 138. The prohibition of "Ausforschungsbeweis" is essential
to the German civil litigative process and must be regarded as one of
the pillars of procedural public policy.\textsuperscript{78} Consequently, it poses an ob-
stacle to the conclusiveness of non-complying civil judgments. In addi-
tion, all American judgments rendered on the basis of pre-trial discov-
ery from recognition are barred. The discovery proceeding itself is not
objectionable, but its use in subjecting the opposing party to impermis-
sible disclosure creates a problem. Therefore, delineating the border be-
tween objectionable and allowable discovery sources is necessary. An
American court's use of pre-trial discovery will bar an American judg-
ment from recognition in the following instances: (1) disclosure by the
opponent; (2) causality; and (3) absence of consent by the party sub-
jected to disclosure.

\textbf{2.2.1. Disclosure by the Opponent}

A German Court will only find an investigation of the facts objec-
tionable when it is aimed directly at the opposing party. Mere deposi-

\textsuperscript{73} See C. Wright & A. Miller, Federal Practice and Procedure § 2001

\textsuperscript{74} See E. Peters, Der Ausforschungsbeweis im Zivilprozeßrecht (1966);
Peters, Die Verwertbarkeit rechtswidrig erlangter Beweise und Beweismittel im Zivil-
prozeß, 76 ZFP 145 (1983); G. Esser, Der Ausforschungsbeweis (1969) (unpublished
dissertation); E. Knichel, Der Ausforschungsbeweis im deutschen Zivilprozeß (1959)
(unpublished dissertation).

\textsuperscript{75} See Judgment of Mar. 14, 1968, Bundesgerichtshof, GRZS, W. Ger., 21 NJW
1233; Judgment of May 4, 1964, Bundesgerichtshof, GRZS, W. Ger., 17 NJW 1414.

\textsuperscript{76} See ZPO § 284, at n.6 (A. Baumbach, W. Lauterbach, J. Albers & P. Hart-
mann 46th ed. 1988); ZPO § 284, at n.5 (R. Zöller & D. Stephan 15th ed. 1987); A.
Lüderitz, Ausforschungsbeweis und Auskunftsanspruch bei Verfolgung privatuer Rechte (1966);
R. Stürner, Die Aufklärungspflicht der Parteien im Zivilprozeß 112 (1976); Arens, Zur Aufklä-
rungspflicht der nicht beweisbelasteten Partei im Zivilprozeß, 96 ZZP 1 (1983).

\textsuperscript{77} See D. Coester-Waltjen, Internationales Beweisrecht 234 (1983).

\textsuperscript{78} See Schütze, Anerkennung und Vollstreckbarerklärung, supra note 68, at 703.
tions of witnesses or experts do not constitute a prohibited opponent discovery. The discovery of documents presents a more difficult problem, as illustrated by the pre-trial discovery in *In re Paris Air Crash of Mar. 3, 1974.*\(^9\) The defendants, McDonnell Douglas and General Aviation, were compelled to surrender thousands of documents which furnished the plaintiffs with evidence in support of their claims.\(^8\)

In general, when considering the conclusiveness of foreign judgments, one must remember that differences between German and foreign civil practice exist\(^8\) and that the *lex fori* determines the parameters of the inquiry into the facts.\(^2\)

### 2.2.2. Causality

For a German court to deny recognition of an American judgment due to the opponent’s discovery, that discovery must have been determinative in arriving at the decision.\(^8\) Hence, if the disclosure had led to a result favorable to the party against whom the discovery was directed, a German court would recognize the decision.

### 2.2.3. No Consent of the Party Subjected to Disclosure

If a party voluntarily furnishes trial evidence to its opponent, prohibited disclosure does not occur. The mere compliance with an evidentiary device possessing disclosure characteristics, however, does not by itself constitute a voluntary surrender of the desired evidentiary material. If the pre-trial discovery is proper according to U.S. procedure, the party obligated to make disclosure can argue that a defense against the disclosure device would be spurious and that by complying, it will avoid the severe sanctions for non-compliance. However, voluntariness requires more. For example, an agreement between parties to exchange certain information if litigation arises and to comply with certain measures of pre-trial discovery is deemed to be voluntary disclosure. The mere stipulation of American jurisdiction, however, does not mean that the parties simultaneously agree to voluntarily comply with all of the discovery devices provided by that jurisdiction.

In contrast, submission by a party subject to discovery to an unau-

---


\(^8\) *See* § 328 ZPO, at n.162 (R. Zöller & R. Geimer 15th ed. 1987).

\(^8\) *See* SCHÜTZE, INTERNATIONALES ZIVILPROZEßRECHT, *supra* note 15, at 81.

*See* Schütze, *Anwesenung und Vollstreckbarerklärung, supra* note 68, at 703.
Authorized fishing expedition or failure to assert a testimonial privilege constitutes voluntary compliance. Of course, a party cannot make frivolous applications for protective orders merely to avoid the appearance of voluntary compliance.

Implementation of pre-trial discovery in violation of the Hague Evidence Convention of March 18, 1970 (Convention) poses a special problem. German courts grant this treaty absolute precedence. The treaty conclusively regulates "disclosure beyond the border." However, present American practice indicates that the Convention does not preempt all other methods, but merely constitutes another among several possibilities of obtaining proof abroad. Nevertheless, this analysis is reflected in the holdings of In re Anschuetz & Co. GmbH and Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa. Therefore, the Convention does not prevent the application of autonomous American law to the implementation of disclosure devices abroad.

In contrast, the German view is that the Convention intends not only to facilitate the "taking of proof beyond the border," but also to establish firm rules and protect parties against impermissible disclosure devices. The treaty-reservation of the Federal Republic prohibiting certain disclosure procedures would be meaningless if the lex fori tolerated American practices. Hence, evidence disclosure proceedings in violation of the Convention results in non-recognition of the American

67 754 F.2d 602, 604 (5th Cir. 1985). For the German point of view, see Heidenberger, Fall Anschütz an Prozeßgericht zurückwiesen, 1988 RiW/AWD 310 and Heidenberger, Haager Beweisübereinkommen und Urkundenvorlage deutscher Parteien in den USA, 1985 RiW/AWD 437.
69 The Federal Republic intends to cope with the problems of taking evidence during pre-trial discovery in a U.S. litigation by implementing a specific ordinance. See Koch & Kirchner, Probleme einer Urkundenvorlage-Verordnung nach dem Ausführungsgesetz zum Haager Beweisübereinkommen, 1988 Aktiengesellschaft 127.
70 The Federal Republic has made reservations about the pre-trial discovery of documents in accordance with Article 29 of the Convention.
judicial decision on account of a violation of procedural public policy. The resulting non-recognition occurs regardless of whether proper or improper disclosure existed.91

3. PROBLEMS OF RECOGNITION AND ENFORCEMENT OF PUNITIVE DAMAGE JUDGMENTS

The problems involved in recognizing judgments that contain punitive damage awards are increasingly being discussed in the Federal Republic.92 However, no recorded court decision93 has yet addressed this issue. A Swiss Court has already refused to recognize a Texas court judgment awarding the plaintiffs treble damages on grounds of a violation of public policy.94 Both the legal nature of punitive damages awards and public policy pose problems under German law.

3.1. The Legal Nature of Punitive Damages

A German court will only recognize decisions based upon a civil claim.95 Thus, if punitive damages are not civil in nature, statutes awarding them cannot be recognized. The difficulty in determining the legal nature of punitive damages exists because the German law which must also be considered lacks an appropriate legal equivalent. Therefore, it is necessary to inquire into the purpose of punitive damages and analogize by way of functional comparison.96 The term "punitive damages" imputes some form of punishment.97 Consequently, von Hülsen

91 See Schütze, Anerkennung und Vollstreckbarerklärung, supra note 68, at 705; Schütze, Verteidigung, supra note 68, at 636.
93 The judgment of the Landgericht Berlin of June 13, 1990 RfW/AWD 988 refusing recognition for a product liability judgment of a Massachusetts Co. does not deal with the aspect of punitive damages.
95 See supra text accompanying notes 21-24.
96 As early as 1991 Kohler recommended the functional approach to comparative law. See J. KOHLER, ÜBER DIE METHODE DER RECHTSVERGLEICHUNG: ZEITSCHRIFT FÜR DAS PRIVAT- UND ÖFFENTLICHE RECHT DER GEGENWART XXVIII 273 (1901); 3 E. RABEL, AUFGABE UND NOTWENDIGKEIT DER RECHTSVERGLEICHUNG, GESAMMETE AUFSÄTZE 1 (1967) (following Kohler in stating that law cannot be considered independently from its causes and effects).
97 In German literature, this term is therefore occasionally translated as "punitive
speaks about "penal damages." Grossfeld categorizes punitive damages into the class of private penalties. Although general agreement that punitive damages have several functions exists, the main purpose, in the American view, seems to be "punishment and deterrence," referring to both specific deterrence as well as general deterrence. Historically, punitive damages have also existed to provide exemplary damages. However, since compensation for exemplary damages is presently available through "compensatory damages" and tort damages to the right of privacy have been recognized by case law, the "exemplary damages" function of punitive damages has largely lost its significance.

Another function of punitive damages which emanates from American procedure is the recoupment of litigation expenses. The allowance of expense recoupment stems from a strong socially-oriented policy. American practice does not provide for reimbursement of the full costs of litigation by the losing party, except in some special situations. Therefore, punitive damages are therefore partly intended to reimburse the plaintiff's attorney for his litigation expenses, so that the plaintiff's total loss is, in fact, fully compensated by the relief awarded. The German view is that such punitive damage awards result in the successful plaintiff incurring no litigation expenses while a successful defendant still must bear his own expenses, an unjust and undesirable outcome.

The recoupment of non-compensable losses and the reimbursement of litigation costs in the United States have presently taken a back seat.


99 See von Hülsen, supra note 96, at 633.
100 See Grossfeld, supra note 96, at 49.
102 Specific deterrence refers to the guidance of the tortfeasor toward acceptable conduct in the future.
103 General deterrence refers to the prevention of socially detrimental behavior by all potential offenders.
104 See Grossfeld, supra note 96, at 51.
105 See Juenger, supra note 79, at 709.
107 See Stiefel & Stürner, supra note 92, at 836.
108 See von Hülsen, supra note 92, at 396.
to the function of punitive damages as a vehicle for retribution and
deterrence. This explains the unusually high awards of punitive dam-
ages in product liability cases, particularly against automobile manu-
facturers. Obviously, the jury in the Ford Pinto case\textsuperscript{108} was primarily
motivated by ideas of general precaution and prevention when arriving
at its verdict.

It follows from the above that, although punitive damages have
several functions, its primary aim is prevention of accidents due to de-
fective products. The desire to improve product safety is to be achieved
through the Sword of Damocles of penal damage awards. Conse-
quently, punitive damages primarily have penal characteristics\textsuperscript{109} and
statutes which award punitive damages are not judgments in civil cases.
Accordingly, a German Court should exclude them from the class of
laws capable of recognition.\textsuperscript{110}

\subsection*{3.2. Public policy clause}

If, however, punitive damages are characterized as “civil” in na-
ture and judgments granting such remedies are accepted into the class
of statutes recognizable under ZPO section 328, then the problem of
reconciling such punitive damage awards with German public policy
still will remain.

German law stems from the basic premise that the injured party
should be made whole for the damages suffered but should not gain
additional advantages from the damaging event. To that end, section
249 of the German Civil Code\textsuperscript{111} provides for the restoration of status
quo ante. This principle is so fundamental that the legislature has in-
corporated it as a subdivision of the public policy clause of article 38 of
the Introductory law to the German Civil Code\textsuperscript{112} (Introductory Law).

\textsuperscript{108} On Ford's motion for a new trial, the plaintiff was required to remit all but
\$3.5 million of the punitive award as a condition of the court's denial of the motion.
The appellate court affirmed the conditional denial of the motion. Grimshaw v. Ford
tion of the jury's decision, see Amerikanisches Gericht verhängt 125 Mio. $ Straf-

\textsuperscript{109} Martiny, \textit{Handbuch}, supra note 15, at 236 (despite his reticence in classify-
ing punitive damages among the non-civil causes of action, Martiny nevertheless real-
izes that in relation to ZPO section 328, the prevalence of general preventive purposes
undermines its characterization as a “civil” claim).

\textsuperscript{110} See HOECHST, supra note 72, at 122; Hoehst, \textit{Zur Versicherbarkeit von pu-
nitive damages}, 1983 VERSR 53 [hereinafter Hoechst, \textit{Versicherbarkeit}]; Schütze,
Produkthaftungssachen, supra note 92, at 397 (the exclusion should also occur par-
tially because of public policy); von Hülsen, \textit{Produkthaftspflicht USA 1981}, 1982
RiW/AWD 1.

\textsuperscript{111} \textit{Bürgerliches Gesetzbuch} [BGB] § 249 (W. Ger.).

\textsuperscript{112} \textit{Einführungsgesetz zum Bürgerliches Gesetzbuch} [EGBGB] art. 38.
Article 38 of the Introductory Law provides that a tort committed abroad against a German cannot serve as a basis for claims which exceed the maximum damages allowed under German law. Moreover, article 38 of the Introductory Law not only bars a German judge from applying foreign rules of damages which exceed the German measure of damages against a German tort-feasor, but also prevents the recognition of a judgment based on such barred foreign rules.

One commentator argues that "there is nothing intolerable about placing a higher value on life and limb elsewhere than in our country." This argument may generally be true, but article 38 of the Introductory Law circumscribes it. Yet, this article applies only to German defendants. Article 38 of the Introductory Law limits compensation of damages to those which were actually incurred. Conversely, punitive damages bestow benefits for which no commensurate damage exists. The damaged party is the beneficiary of preventative measures.

This kind of benefit to a plaintiff is incompatible with German public policy - apart from and beyond article 38 of the Introductory Law. Nonetheless, this caveat does not bar the entire judgment. If a judgment in a product liability case awards both compensatory and punitive damages, the compensatory part of the judgment can be recognized and enforced. However, a division of punitive damages into those having penal and those having non-penal characteristics (e.g., awards of costs) is impossible. Such a separation would require a test of the jury's motives when fixing the punitive damages - an obviously impossible task.

(W. Ger.).


See Martiny, Handbuch, supra note 15, at 471.

See W. Gloy & R. Schütze, Handbuch des Wettbewerbsrechts 1181 (1986); Gleiss, Die Gefahren des US-Unternehmens, 1969 AWD 499 (discussing treble damages); Hoechst, Versicherbarkeit, supra note 109, at 53; Schütze, Produkthaftungssachen, supra note 92, at 400.


See Martiny, Handbuch, supra note 15, at 236.
4. SUMMARY

Although German jurisprudence with respect to American money judgments is marked by a liberal trend toward recognition, and, in the presently prevailing view, reciprocity is presumed to exist with almost all of the fifty American States, punitive damages still pose problems in several respects:

(1) Insofar as recognition was founded on a jurisdictional basis unknown to German law, and where, upon hypothetical application of German law, no curative basis can be found to exist in the originating jurisdiction, recognition must be denied for lack of international jurisdiction alone. This principle especially applies to judgments based on transient jurisdiction.

(2) Insofar as the relief granted by a judgment includes punitive damages, these punitive damages cannot be recognized. Recognition is not allowed because the punitive damages are not deemed to be relief in a civil matter pursuant to German law.\(^{119}\) Moreover, such judgments violate German substantive public policy.\(^ {120}\)

(3) Insofar as one of the parties to the action was itself subjected to pre-trial discovery in the course of the proceeding, German procedural public policy\(^ {121}\) poses an obstacle to the recognition of the resulting judgment. If the disclosure conducted in the case disregards the prescriptions of the Hague Evidence Convention, preclusion from recognition results automatically.

Hopefully, these problems, which recently have led to collisions in German-American legal relations, can be resolved by a treaty. The time for such a treaty has arrived.

\(^{120}\) Id. at No. 4.
\(^{121}\) Id.