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# The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany

## I. Introduction

Along with the growth of international trade and travel and the increase in commercial operations by businessmen and corporations in foreign countries, has come an awareness of certain legal problems international in scope. Among these, the recognition and enforcement of foreign money judgments, has proven to be one of the most nettlesome.

For example: assume A has obtained a money judgment in an American court against B and B has insufficient property in the United States to satisfy the judgment. Assume further, judgment creditor B has property in the Federal Republic of Germany.<sup>1</sup> Now it becomes important to know whether the plaintiff can enforce his American money judgment in Germany, and if so, how, and under what conditions.

Due to the practice of the majority of countries not to recognize foreign judgments absent a treaty other than on the basis of comity,<sup>2</sup> there is currently no internationally acknowledged customary rule of public international law requiring recognition and enforcement of foreign judgments.<sup>3</sup> A number of countries, Germany and the United Kingdom, for instance, have been active in establishing bilateral treaties calling for the mutual recognition and enforcement of their respective judgments. In addition, the member countries of the European Community entered in 1968 a multilateral agreement on Jurisdiction and Enforce-

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<sup>1</sup>Hereafter referred to as Germany.

<sup>2</sup>R. Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 INT'L & COMP. L. Q. 367, 374 (1963); Golomb, *Recognition of Foreign Money Judgments: A Goal Oriented Approach*, 43 ST. JOHN'S L. REV. 604, 610 (1969).

<sup>3</sup>See *Hilton v. Guyat*, 159 U.S. 113, 16 S. Ct. 139 (1895) and its progeny.

ment of Foreign Money Judgments,<sup>4</sup> which became effective on February 1, 1973.<sup>5</sup>

In Germany every final decision concerning private claims<sup>6</sup> rendered by a foreign "civil" court is susceptible of recognition, including default judgments, judgments by confession, divorce and support decrees, and even certificates of costs.<sup>7</sup> The scope of this comment is limited to the recognition and enforcement of foreign money judgments in Germany and confines itself to surveying the principal aspects of current practice in this area.

## II. Prerequisites for and Defenses to Recognition and Enforcement

In the Federal Republic of Germany foreign judgments will normally be recognized in accordance with a bilateral<sup>8</sup> or multilateral<sup>9</sup> treaty providing for mutual recognition and enforcement. In the absence of an international agreement, a foreign judgment will be recognized and enforced unless it violates any one of five provisions of section 328 I of the Code of Civil Procedure ("ZPO").<sup>10</sup> International agreements providing for mutual recognition of judgments after transformation into German federal law generally are *leges speciales* to section 328 I ZPO. However, the provisions of treaties shall not in any case prevent the recognition and enforcement of a judgment rendered by a court of a contracting country if that judgment would be recognizable or enforceable in accordance with the internal law applicable, i.e., section 328 ZPO.<sup>11</sup>

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<sup>4</sup>Convention Relating to the Jurisdiction of Courts and the Enforcement of Judgments in Civil and Commercial Matters, translated in 2 CCH COMM. MKT. REP. No. 6003 (1968). See B. Carl, *The Common Market Judgments Convention—Its Threat and Challenge to Americans*, 8 INT'L LAW. 446 (1974); and Hoffman, *Das EWG-Ubereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen*, RIW/AWD 1973 p. 57.

<sup>5</sup>As of now the Convention applies to the six original member states of the Common Market: Belgium, France, Germany, Italy, Luxemburg, and the Netherlands. The three new member states, Denmark, Ireland, and the United Kingdom are committed to accede to the Convention in compliance with Article 220 of the Treaty of Rome and pursuant to Article 3(1) of the Act concerning the conditions of Accession and Adjustments to the Treaties, which was concluded in 1972; 2 CCH COMM. MKT. REP. No. 7035; 11 I.L.M. 397 (1972). See also Carl, *supra* note 4, at 450.

<sup>6</sup>Judgments of labor courts and decisions over commercial claims are included; Zoller, ZPO, Kommentar, 1. Aufl., 19, (hereafter referred to as Zoller) no. 36 on § 328.

<sup>7</sup>Schumann/Leipold in Stein-Jonas-Pohle, *Kommentar zur Zivilprozessordnung*, 19. AUFL., ZWEITER BAND, 1972, no. III (1) on § 328 (hereafter referred to as Schumann/Leipold). Consent judgments (Prozessvergleiche), provisional judgments (Vorbehaltsurteile), and non-monetary temporary injunctions (Arrest and Einstweilige Verfügung) will not be recognized. See Thomas/Putzo, *Kommentar zur Zivilprozessordnung*, 8. AUFL., 1974, § 328, no. 1(a).

<sup>8</sup>Bilateral treaties were concluded with Belgium (1958; BGBI 59 II 765; 60 II 2048; 59 I 425), Greece (1961; BGBI 63 II 109; 63 I 120), the United Kingdom (1960; BGBI II 61 301; 61 I 301), Italy (1936; RGBI 37 II 145; 37 II 143; BGBI 52 II 986), the Netherlands (1962; BGBI 65 II 27; 65 I 17), Austria (1959; BGBI 60 II 1246; 60 I 169), Switzerland (1929; RGBI 30 II 1066; 30 II 1209), and Tunisia (1966; BGBI 69 II 890; 69 I 333).

<sup>9</sup>See *supra* notes 4 and 5.

<sup>10</sup>Hereafter referred to as ZPO (Zivilprozessordnung).

<sup>11</sup>See, for instance, Art. II (3) of the German-English Recognition-of-Judgments treaty which

While the Treaty of Friendship, Commerce and Navigation between the United States and Germany<sup>12</sup> expressly provides for the reciprocal recognition and enforcement of arbitration agreements and awards between nationals of the two nations,<sup>13</sup> the United States is not a party to any international agreement concerning the recognition and enforcement of foreign country money judgments.<sup>14</sup> Therefore, American money judgments will only be recognized in Germany if the prerequisites of section 328 ZPO are fulfilled.

Before turning to these prerequisites or grounds for refusal, one major difference between the recognition and enforcement of foreign judgments in the United States on the one hand, and Germany on the other should be underscored. In the United States the recognition of foreign country judgments usually is governed by the various state laws.<sup>15</sup> In Germany there is only one federal law which, in the absence of an international agreement which as *lex specialis* would supersede the federal ZPO with respect to judgments rendered in countries that are parties to the agreement, explicitly and finally governs the recognition and enforcement of foreign judgments. Thus, it makes no difference whether the American judgment will be enforced in Munich, Hamburg, or any other place in West Germany.<sup>16</sup>

The prerequisites for and defenses to the recognition of a foreign judgment are laid down in section 328 ZPO. The meaning of recognition is not defined in section 328 ZPO. However, recognition may be described as granting a foreign judgment the same conclusive effect that it has in the country of rendition with respect to the persons, the subject matter of the action and the issues involved.<sup>17</sup>

In Germany, the simple recognition of a foreign judgment does not require

provides that German (English) courts may continue to recognize English (German) judgments on grounds other than those specified in the Treaty. Of course, all judgments that qualify under the Convention must be recognized.

<sup>12</sup>Concluded on October 29, 1954.

<sup>13</sup>Article VI (2).

<sup>14</sup>However, the United States and 42 other nations are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which entered into force for the United States on December 29, 1970; 21 U.S.T. 2517; Treaties in Force 292, 1974. Furthermore, the United States Department of State since fall 1973 has been negotiating with the United Kingdom for a bilateral treaty on the reciprocal recognition and enforcement of judgments. The conclusion of a convention is expected in fall 1977. See generally on the Convention, P. Hay and R. Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*. 11 TEX. INT'L L.J. (1976).

<sup>15</sup>*Cowans v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N.Y.S. 284 (1927); see generally *R. v. Mehren & M. Patterson, Enforcement of Foreign Country Judgments*, PRACTISING LAW INSTITUTE, 1974, p. 17 (hereafter referred to as *R. v. Mehren & M. Patterson*).

<sup>16</sup>P. Heidenberger, *Similarities and Differences in the Enforcement of Foreign Decrees and Judgments in the Federal Republic of Germany and the United States*, 33 D.C. BAR J. 433, 436 (1966).

<sup>17</sup>*R. v. Mehren and M. Patterson, supra* note 15, at 16; *Schumann/Leipold, supra* note 7, at no. 1 (1) on § 328.

any German proceeding.<sup>18</sup> If enforcement of a foreign judgment is desired, a special proceeding is required to validate that judgment.<sup>19</sup> A so called judgment of execution (*Vollstreckungsurteil*), which accords enforceability to the foreign judgment, is a prerequisite.<sup>20</sup> A foreign judgment is deemed enforced when its beneficiary is accorded the relief to which he is entitled by the judgment.<sup>21</sup>

The five grounds for refusal of recognition of foreign judgments as set forth in section 328 ZPO are as follows:

1. If the courts of a state, to which the foreign court belongs, do not have jurisdiction under German law;
2. If the unsuccessful defendant is a German and he did not appear in the proceeding, in so far as the summons or order initiating the proceedings was not served upon him personally in the state of the trial court or through German judicial assistance;
3. . . . .
4. If recognition of the judgment would be contrary to good morals or the purpose of a German law;
5. If reciprocity is not accorded.<sup>22</sup>

The first of the five grounds for refusal of recognition of foreign judgments stipulates that recognition will be withheld if the courts of the country to which the foreign court belongs are not competent according to German law to hear or to decide the case. Stated conversely, German courts will enforce foreign judgments if it is established that the German court would have taken jurisdiction under similar circumstances regardless of the jurisdictional basis used by the foreign court.<sup>23</sup>

For the requirement of jurisdiction in the international sense it is immaterial whether the *particular* court of rendition was competent or not according to its own or to German law. It is sufficient for compliance with section 328 I no. 1 ZPO if *any* court in that foreign country would according to German law have been competent if the case had been before it.<sup>24</sup> Two exceptions to this rather broad concept may be noted. First, in Germany the principle "lex rei sitae" governs cases concerning real property and provides that the court of the district

<sup>18</sup>Schumann/Leipold, *supra* note 7, no. I (3) c on § 328; R. Geimer, *Die Vollstreckbarerklärung ausländischer Urteile*, NJW 1965, 1413, note 1. *See also* H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS*, 1976, p. 804 (hereafter referred to as STEINER/VAGTS).

<sup>19</sup>STEINER/VAGTS, *supra* note 18, at 804.

<sup>20</sup>U. DROBNIG, *AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW*, PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, 1972, p. 352 (hereafter referred to as DROBNIG); Heidenberger, *supra* note 16, at 433-434.

<sup>21</sup>*R. v. Mehren and M. Patterson*, *supra* note 15, at 16; *Zoller*, *supra* note 6, no. 1 on § 722 ZPO.

<sup>22</sup>Translation of § 328 ZPO by STEINER & VAGTS, *supra* note 18, at 804. Note: The provision of item 5 does not prevent recognition of a judgment if a judgment concerns a non-pecuniary claim and under German law domestic jurisdiction did not exist.

<sup>23</sup>R. Nicholas, *Reciprocal Enforcement of U.S. and Foreign Judgments*, 1 TEX. INT'L L. FOR. 75, 94 (1966).

<sup>24</sup>A. Mowitz, *The Execution of Foreign Judgments in Germany*, 81 U. OF PA. L. REV. 795, 797 (1933); Schumann/Leipold, *supra* note 7, no. IV (1) on § 328 ZPO.

wherein the land is situated has exclusive jurisdiction in respect to all matters concerning title to such property.<sup>25</sup> Therefore, German courts will not recognize foreign judgments in matters involving title to real property situated in Germany or in any country other than the country of the court of rendition.<sup>26</sup>

Second, German courts are inclined to uphold contractual clauses conferring exclusive jurisdiction upon a foreign court. If a foreign court disregards a choice of forum clause ousting such court of its jurisdiction and proceeds to decide the case, the resulting foreign judgment will neither be recognized nor enforced.<sup>27</sup> Thus a New York judgment was not enforced in Germany because the American buyer had, contrary to express contractual stipulation, raised a counterclaim to an action by the German seller in New York instead of in Germany.<sup>28</sup>

Pursuant to the law of the Federal Republic of Germany, a foreign court may exercise jurisdiction if "there is a reasonable connection with the persons or the subject matter of the litigation, which means more than mere service of process on a transient."<sup>29</sup> Therefore, it seems certain that American judgments obtained under so-called long-arm jurisdiction will usually be recognized since a "minimum contract" or other "significant relationships" must have been established to take proper jurisdiction.<sup>30</sup>

Foreign default judgments are recognized in Germany if rendered against the plaintiff or a non-German defendant.<sup>31</sup> If the foreign default judgment is rendered against a German defendant who has not voluntarily made himself a party to the foreign judicial proceeding,<sup>32</sup> it will be recognized and enforced only if the process has been served on the German defendant *in person* in the country wherein judgment was rendered or in another country through German judicial assistance.<sup>33</sup> It follows that constructive service—for instance, upon the Secretary of State as the defendant's statutory agent—would not be sufficient.<sup>34</sup>

<sup>25</sup>Section 24 ZPO.

<sup>26</sup>Schumann/Leipold, *supra* note 7, no. IV on § 328 ZPO; Mowitz, *supra* note 24, at 798; Hartmann in Baumbach/Lauterbach, ZPO, Kommentar, 34th ed., 1975, no. 2 A on § 328 ZPO.

<sup>27</sup>DROBNIG, *supra* note 20, at 351.

<sup>28</sup>BGH 26 Mar. 1969, BGHZ 50, 30. German courts are, apparently, less concerned with avoiding multiplicity of actions than are courts in the United States.

<sup>29</sup>DROBNIG, *supra* note 20, at 350.

<sup>30</sup>International Shoe v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945); McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199 (1957).

<sup>31</sup>Hartmann, *supra* note 26, no. 3 A on § 328.

<sup>32</sup>A special appearance is deemed to be sufficient. See DROBNIG, *supra* note 20, at 351; Schumann/Leipold, *supra* note 7, no. V (2) on § 328; Hartmann, *supra* note 26, no. 3 A on § 328.

<sup>33</sup>R. Geimer, *Nichtanerkennung ausländischer Urteile wegen nichtgehoriger Ladung zum Erstprozess*, NJW 1973, p. 2138-39.

<sup>34</sup>See, e.g., the Texas Long-Arm-Statute Art. 2031b(1) which provides that it shall be conclusively presumed that non-resident natural persons (who failed to designate an agent) have designated the Secretary of State of Texas as their attorney upon whom service of process may be made.

Correct service of process on German defendants pursuant to the German rules of service is essential to the enforceability of a foreign judgment in Germany. If the defendant is an inhabitant of Germany, service must be made through established judicial channels.<sup>35</sup> When the defendant resides in the district in which suit is brought, personal service must be on him, his general agent, personal representative, statutory agent, or his general attorney.<sup>36</sup> Constructive service or service by publication would not suffice.<sup>37</sup> When the German defendant is a resident of a foreign country, service must be made on him through a German consular agency.<sup>38</sup> The German Supreme Court<sup>39</sup> has refused to recognize an Ohio divorce decree because a certified copy of the summons was mailed by an Ohio court to the local German consulate (in Ohio) which in turn passed it on informally to the defendant German spouse at her residence in Germany. The Court held that this procedure was not proper service through German judicial assistance, i.e., a request to a German court would have been required.<sup>40</sup>

Since section 328 I Nr. 2 ZPO was established exclusively for the protection of German defendants,<sup>41</sup> such defendants must invoke it expressly.<sup>42</sup> A foreign judgment will also be denied recognition if it is found to be "immoral" or contrary to the "purpose" of a German law.<sup>43</sup> From a legal standpoint, German courts have construed "immorality" to be "whatever is contrary to the general opinion and the actual custom of the people concerning that which is morally required and permitted."<sup>44</sup> For instance, a foreign judgment ordering the defendant to pay a gambling debt is not enforceable in Germany;<sup>45</sup> in such case the content of the judgment is deemed to be immoral.<sup>46</sup> Similarly, a foreign

<sup>35</sup>Mowitz, *supra* note 24, at 799-800.

<sup>36</sup>Zoller, *supra* note 6, no. 5C on § 328; Schumann/Leipold, *supra* note 7, no. V (3)a on § 328.

<sup>37</sup>Geimer, *supra* note 33, at 2139; Schumann/Leipold, *supra* note 7, No. V(3)a on § 328.

<sup>38</sup>Schumann/Leipold, *supra* note 7, No. V(3)b on § 328.

<sup>39</sup>Bundesgerichtshof (BGH). Before 1945: Reichsgericht (RG).

<sup>40</sup>DROBNIG, *supra* note 20, at 351-352.

<sup>41</sup>Geimer, *supra* note 33, at 2142; Hartmann, *supra* note 26, No. 3C on § 328; Schumann/Leipold, *supra* note 7, No. V on § 328.

<sup>42</sup>DROBNIG, *supra* note 20, at 352; Geimer, *supra* note 33, at 2142. Section 328 I Nr. 3 ZPO provides that a foreign judgment will be denied recognition if it contravenes, to the detriment of the German party, and of the statutory conflicts rules listed in § 328 I Nr. 3 ZPO. The subjects involved are related to the personal status of a German and include the law governing the validity and form of a marriage (Art. 31 I, III Introductory Act to the German Civil Code (EGBGB), divorce (Art 17 EGBGB), legitimacy of children (Art. 18 EGBGB), also their legitimation and adoption (Art. 22 EGBGB) etc. Hence, for the recognition of foreign money judgments this provision is not important.

<sup>43</sup>The term "moral" has the same meaning as construed in §§ 138,826 of the GERMAN CIVIL CODE (BCB).

<sup>44</sup>Mowitz, *supra* note 24, at 800.

<sup>45</sup>This follows from § 762 I 1 BGB which states that gambling contracts do not create an enforceable obligation.

<sup>46</sup>Hartmann, *supra* note 25, No. 5 B on § 328 ZPO: This result may follow notwithstanding the fact that such damages do not fall within the definition of "penal" generally accepted as falling within

judgment obtained by fraud will not be recognized. It is unclear whether American antitrust judgments granting treble damages will be accorded recognition. It is conceivable that the "penal" character of such judgments may be construed as against public policy.<sup>47</sup> Of course, a foreign judgment will not be enforced in Germany if its recognition would be contrary to a fundamental purpose of a German law, i.e., "one which purports to sustain certain public, social or economic conditions underlying the public and economic life of Germany."<sup>48</sup>

The mere fact that a foreign judgment disregards or misapplies compulsory German law is not sufficient to deny recognition in accordance with section 328 I Nr. 4 ZPO.<sup>49</sup> The violated German law must reflect important public policy considerations and be of substantial relevance within the German legal system. At the same time, such law must expressly require application and enforcement of its rules. Thus, a foreign decision disregarding the German rules on foreign exchange and posing a threat to the German foreign exchange market,<sup>50</sup> or a judgment violating other basic statutory or constitutional regulations<sup>51</sup> would not qualify for recognition.

Recently the German Federal Supreme Court refused recognition to a New York money judgment that contravened the German Stock Exchange Act.<sup>52</sup> In this case the German defendant had opened an account with a New York broker who on behalf of the defendant concluded commodity futures. The defendant suffered substantial losses which at the closing of the account amounted to \$73,421.71. The judgment rendered in New York for the plaintiff broker was denied recognition and enforcement in Germany because the German defendant under the German Stock Exchange Law lacked competence to conclude such a commodity contract.<sup>53</sup>

the fundamental maxim of international law: "The courts of no country execute the penal laws of another." *The Antelope*, 10 WHEAT 66, 123. "The question whether a statute of one State which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends on the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act," *Huntington v. Attrill*, 146 U.S. 657, 13 S. Ct. 224 (1892). The treble damages provisions of the United States Antitrust laws are clearly the latter.

<sup>47</sup>A. Gleiss, *Die Gefahren des US Antitrustrechts für europäische Unternehmen*, AWD/RIW 1969, p. 499, 502.

<sup>48</sup>Mowitz, *supra* note 24, at 801.

<sup>49</sup>Zoller, *supra* note 6, No. 5e on § 328 ZPO.

<sup>50</sup>BGH 11 Oct. 1956, BGHZ 22, 24, 29-31. Cf. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

<sup>51</sup>Lack of due process qualifies for non-recognition of the foreign judgment, *see* BGH NJW, p. 354; BOBBL NJW 1974, p. 418; Thomas-Putzo, *supra* note 7, No. 4 on § 328 ZPO.

<sup>52</sup>BGH 4 Jun. 1975, RIW/AWD 1975, p. 500 *See* J. SAMTLEBEN, COMMENT ON THE BGH DECISION, RIW/AWD 1975, p. 501.

<sup>53</sup>German residents have the capacity to enter into future commodity or stock exchange transactions *only* if they (a) are merchants listed in the commercial registry (Handelsregister) and their business dealings exceed that of a small business (§ 53 I Bors G), or (b) at the time of the agreement



Section 328 I Nr. 5 ZPO makes "reciprocity" a condition for recognition. The reciprocity requirement is actually "the largest single obstacle to the recognition of foreign judgments."<sup>54</sup> It is dispensed with for *non-pecuniary* cases under certain circumstances.<sup>55</sup>

The determination of existence or non-existence of reciprocity is left to the courts.<sup>56</sup> Until recently German courts have interpreted the reciprocity requirement in a very narrow manner. This may be demonstrated by an early German case involving claims against a German fire insurance company that had sold insurance policies in California and refused to pay claims resulting from the San Francisco earthquake. In the *Rhein and Mosel* case<sup>57</sup> a judgment against the German fire insurance company issued from a California court. The California judgment was denied recognition and enforcement in Germany by the trial court on the grounds of lack of reciprocity. The German Supreme Court affirmed, although Section 1915 of the California Code of Civil Procedure provided<sup>58</sup> that a final judgment of a court of a foreign country, having jurisdiction according to the laws of such country, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in California. The German Supreme Court held that reciprocity as required by section 328 I Nr. 5 ZPO was not assured because a California judge could inquire into the competency of the German court rendering such judgment and because such judge may not be satisfied that the German court, notwithstanding its own findings and conclusions of law, would have been competent to pass on the subject matter.<sup>59</sup> In addition to the jurisdictional argument, the German Supreme Court stated that the defense of fraud as allowed under California law goes farther than the corresponding defense admitted by German law. Finally, recognition was denied on the ground that there exist in California equitable defenses to the enforcement of final judgments which are not found in German law.<sup>60</sup> From the *Rhein and Mosel* case it was inferred that in the

or prior thereto they have professionally transacted future contracts or banking transactions or were permanently admitted to security tradings. This reasoning is reminiscent of *Lilienthal v. Kaufman*, 239 Pr. 1, 395 P.2d 543 (1964).

<sup>54</sup>DROBNIG, *supra* note 20, at 351.

<sup>55</sup>Section 328 II ZPO, *supra* at p. 4.

<sup>56</sup>K. Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About it*, 42 IOWA L. REV. 236, 250, 253 (1957).

<sup>57</sup>RG 26 Mar. 1909, RGHZ 70,434.

<sup>58</sup>CAL. CODE CIV. PROC. § 1915, as amended Cal. Stats. 1907. This provision was quickly enacted after the San Francisco earthquake. At the time of the earthquake § 1915 provided merely that foreign judgments shall be presumptive evidence of a right as between the parties and that they can only be repelled by evidence of want of jurisdiction, want of notice, collusion, fraud or clear mistake of law or fact. See Nadelmann, *supra* note 56, at 252. CAL. CODE CIV. PROC. § 1915 was repealed as no longer serving a useful purpose since California in 1967 adopted the Uniform Foreign Money-Judgments Recognition Act. See STEINER & VAGTS, *supra* note 18, at 794.

<sup>59</sup>Mowitz, *supra* note 24, at 804.

<sup>60</sup>Nadelmann, *supra* note 56, at 253.

absence of treaty, German courts would generally deny recognition and enforcement to foreign money judgments.<sup>61</sup>

Recent decisions of the German Federal Supreme Court, however, have been considerably more liberal in interpreting the reciprocity provision.<sup>62</sup> Currently the existence of reciprocity will be assumed by German courts where recognition and enforcement of German judgments abroad encounter difficulties essentially no greater than the obstacles that would conversely be imposed by Germany.<sup>63</sup> Partial reciprocity, i.e., reciprocity for the particular class of judgment at issue, is held to be sufficient. It is also settled that the foreign rules need not be identical with the German provisions, but that the rules as a whole must be essentially equivalent.<sup>64</sup> In determining the availability of reciprocity, no "formal and narrow" measure of value should be applied, and a negative factor in one respect may be compensated for by a positive factor in another.<sup>65</sup>

The liberalization of these rules suffered a slight setback in a recent judgment concerning the recognition of a South African decision. In that case, the German Supreme Court denied reciprocity to a South African judgment rendered *in personam* on the basis of assets owned by the defendant in that country. The court determined that South Africa would not recognize the establishment by a foreign court of *in personam* jurisdiction over non-residents on the basis of assets owned by said non-residents in the foreign country,<sup>66</sup> and therefore, that South African courts would not enforce a German money judgment if the German court had taken personal jurisdiction over a South African national on the basis of such national's assets in Germany.

Despite this limitation, it may be expected that German courts will liberally construe the reciprocity clause. In this regard, the attitude of foreign courts as shown in their practice with respect to reciprocity is essential.<sup>67</sup> If there exists no practice in the state of rendition, the German court will look at the foreign law.<sup>68</sup> It is needless to say that lack of statutory enactments, coupled with a

<sup>61</sup>Nadelmann, *supra* note 56, at 255; Mowitz, *supra* note 24, at 805.

<sup>62</sup>DROBNIG, *supra* note 20, at 351.

<sup>63</sup>*Id.* at 353. This more liberal view has first been taken in 1964, when the Federal Supreme Court decided that reciprocity as construed in § 328 I Nr. 5 ZPO does exist between Germany and South Africa; BGH 30 Sep. 1964, BGHZ 42, 194, 196-97. *See also* BGHZ 49, 50, 53 (reciprocity guaranteed between Syria and Germany); BGHZ 50, 100, 103 (reciprocity acknowledged between France and Germany).

<sup>64</sup>Schumann/Leipold, *supra* note 7, No. VIII B1 on § 328 ZPO; Zoller, *supra* note 6, No. 5f on § 328; DROBNIG, *supra* note 20, at 353.

<sup>65</sup>*Id.*

<sup>66</sup>BGHZ 9 July 1969, BGHZ 52, 251, 258. *See also* Geimer, (comment on the reciprocity clause) NJW 1969, p. 2090. Under § 23 ZPO, German courts are vested with jurisdiction over non-residents who have assets, regardless how trifling its value, in that country. *See generally* B. Carl, *supra* note 4, and K. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967).

<sup>67</sup>*Cf.* Zschernig v. Miller, 389 U.S. 426, 88 S. Ct. 664 (1968).

<sup>68</sup>Hartmann, *supra* note 26, No. 6 on § 328; BGHZ 49, 50, 52.

paucity of case law with respect to recognition and enforcement of foreign money judgments in the United States, renders the research for the German court incomparably more difficult.

No determination can be made as to whether reciprocity exists between the United States generally and Germany. Since the recognition of foreign country judgments in the United States is not governed by federal statutory law and the United States Supreme Court has held that no federal common law exists,<sup>69</sup> each American jurisdiction must be regarded separately.<sup>70</sup>

An excellent analysis comparing the Uniform Foreign Money-Judgments Recognition Act and the German provisions governing recognition and enforcement of foreign judgments has been provided by Mr. Drobnig.<sup>71</sup> His study established the existence of almost complete equivalence between the Recognition Act and the corresponding German rules on the basis of which he concluded that for money judgments, reciprocity exists with those American states that have adopted the Act. To date, eight states have adopted the Uniform Foreign Money-Judgments Recognition Act: Alaska,<sup>72</sup> California,<sup>73</sup> Illinois,<sup>74</sup> Maryland,<sup>75</sup> Massachusetts,<sup>76</sup> Michigan,<sup>77</sup> New York,<sup>78</sup> and Oklahoma.<sup>79</sup> Reciprocity is not excluded by the fact that, to enforce the German money judgment in most states of the United States, a new action on the German judgment must be brought since this formal procedural difference does not make the execution more difficult.

A stark contrast to the practice under the Act can be found in the Oregon statutes which provide that foreign *in personam* judgments create "a disputable presumption of a right as between the parties, their representatives and their successors in interest by title subsequent, and can only be overcome by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact."<sup>80</sup> An almost identical provision is found in the Montana

<sup>69</sup>Tompkins v. Erie Railroad, 304 U.S. 63, 82 L. Ed. 1188 (1938).

<sup>70</sup>P. Heidenberger, *Vollstreckung deutscher Urteile in den Vereinigten Staaten*, NJW 1958, p. 1117; E. v.Hippel, *Schadensersatzklagen gegen deutsche Produzenten in den Vereinigten Staaten*, AWD/RIW 1971, p. 61, 64; A. Homburger, *Recognition and Enforcement of Foreign Judgments*, 18 AM. J. COMP. L. 367 (1970); DROBNIG, *supra* note 20, at 353.

<sup>71</sup>DROBNIG *supra* note 20, at 354-357.

<sup>72</sup>AS 09.30.100 to 09.30.180.

<sup>73</sup>WEST'S ANN. CODE CIV. PROC. §§ 1713 to 1713.8.

<sup>74</sup>S.H.A. ch. 77, §§ 121 to 129.

<sup>75</sup>Code 1957, art. 35, §§ 53-A to 53-I.

<sup>76</sup>M.G.L.A. c. 235, § 23 A. Massachusetts has added a reciprocity requirement. In subsection (b) of § 4 of the Recognition Act a paragraph is added which reads: "(7) judgments of this state are not recognized in the courts of the foreign state." This reciprocity requirement does not prevent the assumption of reciprocity by Germany if the conditions of § 328 I ZPO are fulfilled. DROBNIG, *supra* note 20, at 357; BGHZ 49, 50, 51.

<sup>77</sup>M.C.L.A. §§ 691.1151 to 691.1159.

<sup>78</sup>McKinney's CPLR 5301 to 5309.

<sup>79</sup>12 OKL. ST. ANN. §§ 710 to 718.

<sup>80</sup>ORS § 43.190 (2).

statutes.<sup>81</sup> Thus, by excluding automatic reciprocity in cases of personal jurisdiction and implying reexamination of the merits, the specific statutory provisions of Montana and Oregon are incompatible with section 328 I Nr. 5 ZPO. As a consequence, reciprocity in any case based upon personal jurisdiction is excluded, and neither Oregon nor Montana money judgments will be recognized or enforced in Germany.<sup>82</sup>

Due to the lack of statutes and the scarcity of the relevant case law, it is much more difficult to determine whether reciprocity exists with other American jurisdictions. In Connecticut foreign country judgments are usually given the force and effect to which they are entitled in the jurisdiction wherein they were rendered.<sup>83</sup> It may be presumed that Connecticut follows common law requirements, i.e., jurisdiction proper notice, opportunity to be heard, absence of fraud, finality and nonviolation of the public policy of the forum, all of which are similar to the conditions of section 328 I ZPO and that, therefore, reciprocity with Germany exists.

Indiana lacks any legislative provision on the recognition of foreign country money judgments. In one unreported case,<sup>84</sup> however, an Indiana court found that a German judgment was final, that the German court had jurisdiction, that the defendant had a full and fair trial, and that the German judgment was entitled to recognition<sup>85</sup> and it thus may be assumed that reciprocity would exist.

In New Hampshire the Revised Statutes Annotated contain no general rule for the recognition of foreign country judgments but do contain a special rule<sup>86</sup> providing for reciprocal recognition and enforcement of Canadian judgments. As Steiner and Vagts point out, "the New Hampshire statute obviously reflects practices in the Canadian provinces, particularly in Quebec which has denied conclusive effect to foreign judgments."<sup>87</sup> It seems probable that foreign country money judgments will be recognized in the absence of fraud or lack of jurisdiction provided reciprocity is guaranteed.

There is no statute in New Jersey dealing explicitly with the recognition of foreign judgments.<sup>88</sup> Generally foreign country judgments are recognized and enforceable in New Jersey under the principle of comity.<sup>89</sup> New Jersey courts have refused recognition on the grounds of fraud, lack of personal jurisdiction, inadequate notice, absence of due process, and violation of public policy. In

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<sup>81</sup>REV. CODES OF MONTANA, § 93-1001-27 (2).

<sup>82</sup>DROBNIG, *supra* note 20, at 358.

<sup>83</sup>Adamsen v. Adamsen, 195 A.2d 418, 419 (1963).

<sup>84</sup>Powell v. Hand (N.D. Ind., Ft. Wayne Div., 1965, Civ. No. 1527).

<sup>85</sup>See DROBNIG, *supra* note 20, at 359.

<sup>86</sup>N.H.RSA 524:11.

<sup>87</sup>*Supra* note 18, at 794.

<sup>88</sup>Ernster, *Recognition and Enforcement of Foreign Money Judgments* 22 RUTGERS L. REV. 327, 332 (1968).

<sup>89</sup>Zanzonico v. Neeld, 111 A.2d 772 (S.Ct. N.J. 1955).

addition they have denied recognition when a prior action was pending in New Jersey and the six year statute for ordinary contract obligations had run.<sup>90</sup> It follows from this that reciprocity with New Jersey exists temporarily—for six years after adjudication.<sup>91</sup>

Pennsylvania, which has no statutory provision on the recognition of foreign judgments, recognizes foreign country judgments under the comity doctrine. In the absence of fraud or collusion, foreign nation judgments are entitled to recognition. It may be presumed that Pennsylvania follows the common law requirements<sup>92</sup> and that German money judgments will be enforced if these conditions are fulfilled.

In Texas, foreign nation judgments are given the same effect as sister state judgments.<sup>93</sup> Whether reciprocity is required in Texas is not clear. However, it seems certain that German money judgments will generally be enforced in Texas if the common law requirements are met.

In Washington foreign country money judgments generally will be recognized as long as the foreign procedure comports with the due process requirements. Therefore, reciprocity between Germany and Washington may be assumed.

In the District of Columbia foreign nation money judgments will be recognized and enforced when the foreign court had personal jurisdiction over the defendant and "other conditions, such as notice and opportunity to be heard, were satisfied. . . ."<sup>94</sup> Since the D.C. courts follow the common law rules and the Federal Supreme Court has expressly affirmed reciprocity with South Africa, whose jurisdictional rules are also based on the common law, it is reasonable to conclude that reciprocity would exist with the District of Columbia.

Be this as it may, it cannot be assumed that German courts will generally recognize and enforce American money judgments solely because they are based on the jurisdictional rules of the common law. Clearly an American judgment rendered on the basis of defendant's assets in American jurisdiction will not be enforced in Germany, because a corresponding German judgment also would not be recognized, since American courts do not recognize the location of assets within the forum as an adequate basis on which to establish *in personam* jurisdiction.<sup>95</sup> Similarly, it is conceivable that the German Supreme Court may, as it did in the second South African decision,<sup>96</sup> restrict its liberal interpretation of the reciprocity clause. This might be the case where the state rendering the

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<sup>90</sup>Ernster, *supra* note 88, at 339-40.

<sup>91</sup>DROBNIG, *supra* note 20, at 359.

<sup>92</sup>*Id.*

<sup>93</sup>Spann v. Compania Mexicana Radio Difusora Fronteriza (1942) 131 F.2d 609; Heidenberger, *supra* note 70, at 1118.

<sup>94</sup>Cherun v. Frishman, 236 F. Supp. 292, 294 (D.D.C. 1964).

<sup>95</sup>See *supra* note 67, and DROBNIG, *supra* note 20, at 355.

<sup>96</sup>*Supra* p. 11.

U.S. money judgment lacks any statutory provision and case law with respect to the recognition and enforcement of foreign *country* money judgments. In such case, the existence of reciprocity could not be shown. Additionally, some uncertainty stems from the existence in the several states of "long-arm" statutes, whose impact on the rules concerning recognition and enforcement of foreign money judgments is as yet unknown.<sup>97</sup>

### III. The Effects of the Foreign Judgment in Germany

A recognized foreign money judgment is granted the same effect as a domestic judgment,<sup>98</sup> except that a foreign judgment needs a "Vollstreckungsurteil" for its execution.<sup>99</sup> Every German court, public office or administrative agency must respect the foreign judgment and, of course, there must be no *revision au fond*, i.e., any examination of the merits of the decision is excluded.<sup>100</sup> In so far as the foreign judgment does not exceed the effects of a comparable German judgment, the effects will be governed by the foreign law.<sup>101</sup> It would be considered unjust to grant the foreign judgment a greater effect in Germany only because domestic decisions have a greater effect.<sup>102</sup> The converse would also appear to be true; that when the scope and effect of the foreign country's judgments would be greater, then the extent of recognition to be afforded a foreign judgment will usually be determined by the foreign law.<sup>103</sup> According to a leading German commentary, the existence of a final foreign judgment will make a new action before a German court inadmissible.<sup>104</sup> In at least one case, however, the German Supreme Court has held that in the case of a subsequent suit in Germany between the same parties in respect of the same subject matter, the existence of a final judgment would not lead to inadmissibility of the new suit; but that a new German judgment identical with the foreign judgment would be rendered on the merits.<sup>105</sup>

If a foreign judgment were denied recognition in Germany, the judgment creditor may sue in Germany on the original cause of action, but not on the foreign judgment. The foreign judgment may be introduced as evidence. The German Supreme Court ruled in 1930 that the nonrecognition of a Norwegian

<sup>97</sup>DROBNIG, *supra* note 20, at 357.

<sup>98</sup>Hartmann, *supra* note 26, No. 1 on § 328.

<sup>99</sup>Sections 722, 723 ZPO.

<sup>100</sup>Schumann/Leipold, *supra* note 7, No. I 2a on § 328. *See also* Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139 (1895).

<sup>101</sup>Zoller, *supra* note 6, No. 2 on § 328.

<sup>102</sup>Schumann/Leipold, *supra* note 7, No. I 1a on § 328.

<sup>103</sup>*Id.* However, Art. 12 EGBGB limits damages to the maximum amount allowable under German Law: "From an unlawful act committed in a foreign country, no other claims can be asserted against a German than are justified according to German laws."

<sup>104</sup>Schumann/Leipold, *supra* note 7, No. I 2a on § 328 ZPO.

<sup>105</sup>BGH NJW 1964, 1626.

money judgment<sup>106</sup> did not prevent the German court from recognizing the Norwegian findings of the case as competent evidence that the defendant had committed torts and was liable for damages according to Norwegian law.<sup>107</sup>

A non-recognized foreign judgment has no effect on the German period of prescription (akin to a statute of limitations, but suspending only the remedy, not extinguishing the right); only a recognized foreign judgment can suspend the period of prescription,<sup>108</sup> at least when German law governs. If foreign law governs, "and that law attributes an interruptive effect to the bringing of an action or the rendering of a judgment, then the foreign action or judgment, even if not recognized in Germany, will still serve to interrupt the running of the German statute of limitations."<sup>109</sup>

#### IV. Enforcement of Foreign Money Judgments

As in the United States, foreign country judgments cannot be executed directly in Germany. A specific execution judgment is necessary to enforce the foreign judgment. In the United States, a new judgment on the foreign judgment will be rendered. The German execution judgment ("Vollstreckungsurteil") will incorporate the foreign judgment and provides as follows:

Execution of the judgment of the U.S. District Court for the ..... in Law Matter No. .... A (plaintiff), v. B (defendant), ordering defendant to pay to plaintiff the sum of \$....., is permitted.<sup>110</sup>

Hence, the foreign judgment may be executed to the extent permitted by the execution judgment.<sup>111</sup>

The judgment of execution must be rendered without examination into the legality (merits) of the foreign decision.<sup>112</sup> The defendant may, however, raise defenses against the original claim which arose subsequent to the foreign proceeding.<sup>113</sup> If defenses against the original claim arise after the German execution judgment has been rendered, a separate action pursuant to section 767 ZPO can be brought to prevent execution of the German judgment. According to section 723 II 1 ZPO, execution judgment can not be rendered until the foreign judgment has become *res judicata* under the foreign law. Although money judgments may be enforced in the United States if they are "final and

<sup>106</sup>Reciprocity was denied due to lack of reciprocity.

<sup>107</sup>RG 8 July 1930, RGHZ 129, 387; Schumann/Leipold, *supra* note 7, No. I 40m § 328 ZPO; P. MERCIER, EFFETS INTERNATIONAUX DES JUGEMENTS DANS LES ETATS DU MARCHE COMMUN, 1965, p. 90.

<sup>108</sup>Schumann/Leipold, *supra* note 7, No. I 4 and I 2d note 19 on § 328 ZPO.

<sup>109</sup>DROBNIG, *supra* note 19, at 362.

<sup>110</sup>Heidenberger, *supra* note 16, at 434. In Germany, execution judgments in foreign currencies will not be converted into DM. See Zoller, *supra* note 6 No. 4d on § 722 ZPO.

<sup>111</sup>Section 722 I ZPO.

<sup>112</sup>Section 723 I ZPO.

<sup>113</sup>DROBNIG, *supra* note 20, at 352-53.

conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal,"<sup>114</sup> foreign judgments can be enforced in Germany *only* if they are no longer subject to appeal<sup>115</sup> and their recognition is not excluded by the provisions of section 328 I ZPO.<sup>116</sup>

The procedure for obtaining a German execution judgment is set forth principally in section 722 I, II ZPO. A new action must be brought on the foreign judgment with the pleas that the German court permit execution of the foreign judgment.<sup>117</sup> For the suit, venue is usually determined by the defendant's residence.<sup>118</sup> Failing such residence in Germany, venue is determined to be the place where the defendant holds assets of any nature regardless how trifling their value.<sup>119</sup> Suit must be brought before the proper "Amtsgericht"<sup>120</sup> when the foreign judgment orders the defendant to pay an amount of DM 1500.-<sup>121</sup> or less. In all other cases the proper "Landgericht"<sup>122</sup> has exclusive jurisdiction.<sup>123</sup> If the court finds that it has no jurisdiction or venue it may, and sometimes must, refer the case to the proper court.<sup>124</sup> Finally, each copy of the writ of execution must have a certificate of execution, the so-called "Vollstreckungsklausel" (clause of execution).<sup>125</sup> The result is that the foreign judgment in connection with the execution title and the clause of execution is enforceable.

Unfortunately, this procedure is expensive and takes considerable time, making successful relief for the creditor often not possible. Further, preliminary injunctions, even against bonds to secure the execution, are not available.<sup>126</sup> More expeditious procedures of enforcement are afforded only to judgments rendered in countries that have concluded treaties with Germany on the mutual recognition and enforcement of judgments,<sup>127</sup> and, therefore, are not relevant here.

## V. Summary and Conclusion

Since 1879, the recognition and enforcement of foreign money judgments have been governed in Germany by the Code of Civil Procedure, section 328,

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<sup>114</sup>Section 2 Uniform Foreign Money-Judgments Recognition Act.

<sup>115</sup>DROBNIG, *supra* note 20, at 351.

<sup>116</sup>Section 723 II 2 ZPO.

<sup>117</sup>Section 722 I ZPO.

<sup>118</sup>Sections 722 II 2, 12-19 ZPO.

<sup>119</sup>Sections 722 II, 23 ZPO. See R. MUELLER, E. STIEFEL AND H. BRUCHER, *DOING BUSINESS IN GERMANY*, 6th ed., 1971, p. 16.

<sup>120</sup>"Administrative Tribunal" or "Court."

<sup>121</sup>1 DM is approximately 0.38 U.S. Dollar.

<sup>122</sup>"State" or "Provincial (law) Court."

<sup>123</sup>Zoller, *supra* note 6, No. 4c on § 722 ZPO.

<sup>124</sup>MUELLER, STIEFEL, BRUCHER, *supra* note 119, at 17.

<sup>125</sup>Sections 724, 725 ZPO. See Heidenberger, *supra* note 16, at 434.

<sup>126</sup>Zoller, *supra* note 6, No. 4b on § 722 ZPO.

<sup>127</sup>See Geimer, *Die Vollstreckbarerklärung ausländischer Urteile*, NJW 1965, 1413. These pro-



722, 723 ZPO. The five conditions for recognition are laid down in section 328 I ZPO. Its language with respect to "reciprocity" is not clear and leaves it to the discretion of the courts to decide whether reciprocity exists. Since 1964 the German Supreme Court has been considerably more liberal in interpreting the reciprocity clause. Today German courts will assume the existence of reciprocity where recognition and enforcement of German judgments abroad do not meet with difficulties essentially greater than the obstacles imposed by Germany in the converse situation. According to one leading German commentary, reciprocity exists with 33 countries.<sup>128</sup> With regard to the United States, reciprocity clearly exists with those eight states that have adopted the Uniform Foreign Country Money-Judgments Recognition Act, i.e., Alaska, California, Illinois, Maryland, Massachusetts, Michigan, New York and Oklahoma. There is an apparent lack of reciprocity with Montana and Oregon. As to the remaining jurisdictions no conclusions can currently be drawn. Nevertheless, since the German Supreme Court has expressly affirmed reciprocity with South Africa, whose jurisdictional rules are also based on the common law, reciprocity should, by way of extrapolation, exist with those American states that follow the common law requirements for recognition and enforcement. While Germany has established treaties calling for the mutual recognition and enforcement of judgments with several countries, the United States, to date, has not yet concluded such a convention. It seems probable that the United Kingdom and the United States, after years of negotiations, may finally conclude a bilateral Recognition-of-Judgments treaty this fall. It may be the case that a similar convention between the United States and Germany will follow. Without such convention no solution can be proffered for the uncertainties which currently exist with regard to reciprocity and thus enforcement of judgments between the Federal Republic of Germany and the majority of states of the United States.

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cedures are: (a) "Fakultatives Beschlussverfahren," §§ 1042a I, 1042b,c,d ZPO are applicable and (b) "Obligatorisches Schlussverfahren," similar to a summary proceeding. See Zoller, *supra* note 6, No. 4b,cc on § 722.

<sup>128</sup>Reciprocity exists with: Egypt, Belgium, Betchuana, Brazil, Burundi, Chile, Costa Rica, Cuba, Denmark, Ecuador, France, Greece, Ireland, Iceland, Italy, Yemen, Yugoslavia, Libya, Monaco, New Zealand, the Netherlands, Nicaragua, Upper Volta, Austria, Rwanda, Switzerland, Somalia, Spain, South Africa, Syria, the United Kingdom, Tunisia, Vatican. Reciprocity also exists to the province of Saskatchewan, while with the rest of Canada there is no reciprocity. See Schumann/Leipold, *supra* note 7, No. VIII D on § 328 ZPO.