



## Enforcement of US Judgments in Germany

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If a plaintiff has a judgment from a US court which he hopes to enforce in Germany, the plaintiff has to go through a many-step analysis.

The plaintiff first must file his judgment against the debtor in a German court. The jurisdiction of the German court goes by the standard rules, and is usually the civil court sitting where the defendant can be found.

The German court will check to see whether the US judgment fulfills certain criteria and will then issue its own judgment, which is then enforceable by German authorities.

The scope of what the German court reviews regarding the underlying US judgment is controlled by ZPO (German Civil Procedure Law) Section 328. There are five factors.

(i) The US court must have had jurisdiction over the defendant, but not from the US court's own perspective, but rather from what the *German* court deems as the proper jurisdiction.

The question of jurisdiction is decided on a case-to-case basis. As a general rule, the German court determines whether, in a similar situation, it would have had jurisdiction over the foreign defendant. This can be the case if the defendant (a) has a permanent residence in the US, (b) owns real property there or (c) engages in business there. Being a shareholder in a US corporation by itself is not enough.

(ii) The German court then determines whether the suit papers were properly served on the defendant. This must be in accordance with the Hague Convention. The documents must be translated into German and then the plaintiff must address these to the appropriate administrative offices in Germany, namely the Landesjustizministerium, which then relays the documents to the defendant. This process can be difficult for the plaintiff and take quite some time. Even small errors in serving process can prevent the judgment from being enforceable in Germany.

The defendant should be careful if he thinks that a plaintiff is about to file a lawsuit against him. If the defendant is in the United States, the documents can be served on him in person, without the necessity of following the strict rules of the Hague Convention. Service can, for example, be had at a hotel or even the airport the moment the defendant sets foot in the US, so he should be advised not to travel to the States, or at least keep this secret from possible plaintiffs. Leaving the papers at the hotel would not, however, be enough.

It is important to note that the defendant can challenge the service of process during the German trial stage only if the US court issued a default judgment. If the defendant chose to defend himself in the US, the German court assumes that the serving process was accomplished properly, since the defendant obviously knew about the lawsuit and could have brought up the incorrect service of process in that trial.

(iii) The German court will also determine if the US judgment is in conflict with a prior German court judgment. This presents the possibility that the defendant might deny the enforcement in Germany without having to take part in the US trial:

If the defendant is certain that the plaintiff will sue him in the US, the defendant can try to sue the plaintiff himself before a German court. The defendant can file for a “negative Feststellungsklage”, a negative declaratory judgment. In this trial, the roles of the parties would be reversed, so the party in the US would be the defendant. The operative provision of such a judgment would be that the court decides that the US plaintiff has no right to demand anything from the defendant.

This type of action requires certain conditions to be fulfilled. First, there must be *jurisdiction* over the (original) plaintiff before the German court. This is probably the hardest challenge to overcome for the defendant. The foreign plaintiff (now defendant) would for example need to be engaged in business activities in Germany or own real property in Germany. Simply having assets in Germany is not enough by itself to create jurisdiction.

The other requirement (apart from the standard requirements for a trial) is a special *need for legal relief*. In order to prevent people from mass-filing claims that they don't owe money to somebody else, this kind of trial requires a reason. The defendant (the party in the US) needs to have claimed a certain right for himself. This can happen for example by publicly announcing that he has this right against the other party or by threatening to file a lawsuit.

The German court would then rule that the defendant owes nothing to the plaintiff. While this will not prevent the plaintiff from filing a lawsuit in the US, the judgment cannot then be acknowledged in Germany because it would contradict the German judgment. The US judgment would still give the plaintiff access to the defendant's assets in the US, though.

(iv) The judgment will be honored only if the US court acted consistently with the German “*ordre public*” (public policy), the principle of fair trial.

What the German court does **not** do is review the overall decision of the US court. Instead, the German court checks only if the basic rules of a fair trial were adhered to and if the judgment grants the plaintiff no rights that are unknown under German law, such as punitive damages. If the judgment contains a claim for punitive damages, the various claims can be separated and only some acknowledged, i.e. the unenforceable part does not make the other parts invalid.

Even if the US-judgment was wrongfully issued, the defendant usually has no opportunity to plead this before the German court. As long as the US-judgment is in effect, the German law will honor this fact,

except to the extent it does not comply with German public policy. The defendant would instead have to appeal the judgment in a US court. The only exception to this rule is when the plaintiff used fraudulent means to obtain the judgment. But even then, the defendant might face serious problems in a German trial because he would have the burden of proving the alleged fraudulent behavior, which is quite difficult.

(v) The final aspect that is checked is the reciprocity of enforcement. Germany acknowledges foreign judgments only if the issuing state would likewise acknowledge a German judgment. So enforcement in Germany depends on the rules of the issuing US state - if the US state also allows German judgments to be enforced. In the US this is determined on a state-by-state basis. Most states – including New York - have a procedure for acknowledging foreign judgments. The requirement of reciprocity would thus be fulfilled in case of a New York judgment.

When the German court issues the acknowledgement of the US judgment, the plaintiff can then take the next step of enforcement in Germany against the debtor's assets. The defendant could then still sue to block the enforcement, but because of ZPO Section 767, Clause 2 he can raise only grounds that arose after the judgment was issued.

Although the acknowledgement of a US judgment in Germany can be a difficult and long process - depending on the solvency of the German debtor - it can still be worth the effort. But, if a judgment might have to be enforced in Germany, the plaintiff should consider all the factors mentioned above even before starting a trial in the US. It would be a waste of time and money to sue in a US court if then the plaintiff discovers that the judgment cannot be enforced in Germany and thus is worthless.

## § 328

### Anerkennung ausländischer Urteile

(1) Die Anerkennung des Urteils eines ausländischen Gerichts ist ausgeschlossen:

1. wenn die Gerichte des Staates, dem das ausländische Gericht angehört, nach den deutschen Gesetzen nicht zuständig sind;  
wenn dem Beklagten, der sich auf das Verfahren nicht eingelassen hat und sich hierauf beruft, das
2. verfahrenseinleitende Dokument nicht ordnungsmäßig oder nicht so rechtzeitig zugestellt worden ist, dass er sich verteidigen konnte;  
wenn das Urteil mit einem hier erlassenen oder einem anzuerkennenden früheren ausländischen
3. Urteil oder wenn das ihm zugrunde liegende Verfahren mit einem früher hier rechtshängig gewordenen Verfahren unvereinbar ist;
4. wenn die Anerkennung des Urteils zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist, insbesondere wenn die Anerkennung mit den Grundrechten unvereinbar ist;
5. wenn die Gegenseitigkeit nicht verbürgt ist.

(2) Die Vorschrift der Nummer 5 steht der Anerkennung des Urteils nicht entgegen, wenn das Urteil einen nichtvermögensrechtlichen Anspruch betrifft und nach den deutschen Gesetzen ein Gerichtsstand im Inland nicht begründet war.

## **§ 767**

### **Vollstreckungsabwehrklage**

(1) Einwendungen, die den durch das Urteil festgestellten Anspruch selbst betreffen, sind von dem Schuldner im Wege der Klage bei dem Prozessgericht des ersten Rechtszuges geltend zu machen.

(2) Sie sind nur insoweit zulässig, als die Gründe, auf denen sie beruhen, erst nach dem Schluss der mündlichen Verhandlung, in der Einwendungen nach den Vorschriften dieses Gesetzes spätestens hätten geltend gemacht werden müssen, entstanden sind und durch Einspruch nicht mehr geltend gemacht werden können.

(3) Der Schuldner muss in der von ihm zu erhebenden Klage alle Einwendungen geltend machen, die er zur Zeit der Erhebung der Klage geltend zu machen imstande war.