

Problems Encountered with Recognition and Enforcement of German Executory Titles in the U.S.A., as well as of American Executory Titles in the Federal Republic of Germany

FORM FOR INTERNATIONAL SERVICE

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In view of the ongoing cross-the-border links between Germany and the U.S.A. and increased instances of contact with foreign countries, this contribution aims at assisting in overcoming problems concerning recognition and enforcement of executory titles - focusing on family law - and at serving as a working tool. In addition, it intends to give fair weight to practical needs by setting forth ways and means to enforce American executory titles in Germany and vice versa and to provide relevant questionnaires to work with. Rather than dealing in scientific arguments involving differing opinions, it aims at providing German and U.S. lawyers with problem-solving tools.

I. INTRODUCTION

In order to answer the question as to where and how to enforce executory titles regarding disputes involving international relationships, one can hardly fall back on auxiliary tools used in formulating treaties.

As far as the contractual parties are concerned, the issues to be resolved pertain strictly to the conditions under which someone may be held liable or which law is to be applied by which forum, and the choice between ordinary and arbitration courts.

Therefore, we must rely on the current statutory provisions of the executing country and forum, as well as mutual agreements and treaties currently in effect.

Alas, relations between the U.S.A. and FRG rarely involve applications of bi- or multilateral agreements; therefore, for the main part, autonomous state law will apply, based in part on case law - - in part on national law.

However, in the area of family law multilateral agreements play a role in individual instances; thus an interaction of different standards may result in a confusing overall picture. The following discussion is aimed at overcoming this problem.

II. INTERNATIONAL JURISDICTION

At this point, the determination of international jurisdiction deserves closer scrutiny than is usually the case, as justified by the fact that, pursuant to Section 328, § 1, # 1, ZPO [=German] Code of Civil Procedure], section 16 a, # 1, FGG [=provisions governing matters of voluntary jurisdiction] in Germany, as well as pursuant to the comity rules applicable in the United States (to be explained below in more detail), international jurisdiction, within the scope of recognition and enforcement of executory titles, occupies a special position insofar as recognition of a ruling passed by a foreign country will be excluded if, according to domestic law, the courts of the country to which the foreign court belongs, had no jurisdiction.

1. Foreign Relations

International jurisdiction must be determined whenever the facts of the case point to a foreign country, however slightly, i.e. if any point of contact with a foreign country exists, legally insignificant as it may seem at first glance, e.g. an individual's foreign citizenship, residence or stay abroad, situs of a case or a foreign law abroad, or venue where a legal matter is conducted abroad.¹

1 cf. Rausch in NJW (=German] New Legal Weekly), p. 2120

2. Applicable Law

a) International Jurisdiction According to International Treaties

In principle, the conflict-of-laws issue with respect to international jurisdiction may be determined based on international treaties, statutory or unwritten rules. For Germany and the U.S.A., the Hague Convention concerning the Jurisdiction of Authorities and the Law applicable in Respect to the Protection of Minors, dated October 5, 1961² / (hereafter described as Hague Convention on the Protection of Minors {CPM}), contains rules to be observed as a matter of priority.³

While, unlike Germany, the U.S.A. did not join the Convention, applicability of the Hague Convention on the Protection of Minors is not contingent upon reciprocity. With Germany not having explained the proviso under Article 13, § III, CPM, this Convention applies to all minors, provided they habitually reside in one of the contracting countries. Whether or not their country of origin is itself a CPM member, is irrelevant. CPM encompasses all principal rules related to determining international jurisdiction with respect to court decisions on parental custody and care.

Article 1 determines its material, Article 12, CPM, its private; and Article 13 I, CPM, its physical applicability.

Under the provisions of Article 1, CPM, international jurisdiction exists principally at a minor's habitual abode unless jurisdiction is limited by Article 3 or 4,5, III, CPM. Furthermore, international jurisdiction concerning court rulings on parental custody and care may follow Clause 4 or Clause 8 or Clause 9, CPM. In cases relating to Article 1, CPM, national law applies, pursuant to Clause 2, CPM; in cases of Clause 4, CPM, *lex patriae* applies; and in cases of Clauses 8 & 9, CPM, *lex fori* applies.⁴

b) International Jurisdiction under Autonomous Provisions of the Federal Republic of Germany

Whenever applicability of the Hague Convention Concerning Protection of Minors has not been established, the autonomous provisions of the FRG and/or U.S.A. must be reverted to. Please note that in Germany, unlike in private law, there exist no self-contained codified provisions concerning international procedural law but only selective provisions among a variety of national procedural rules . I

In the absence of any ruling on certain conflict-of-law issues laid out either in an international treaty or a codified autonomous provision, customary law will apply.

In the absence of any general statutory ruling on international jurisdiction in the German Code of Civil Procedures with respect to civil law 8 , one resorts to the round rule established by legal precedence and literature, which states:

> Local jurisdiction indicates international jurisdiction<. ⁶

Accordingly, a German court exercises international jurisdiction over a legal dispute which falls under its local jurisdiction.

There are exceptions to this rule, established mainly within the fields of family law by ZPO [=German Code of Civil Procedure and German voluntary jurisdiction (FGG), as set forth below.

² BGBl [=German Civil Code I] 1971 II, p. 219 ³ If there exists a State Treaty regarding a certain area, it will displace autonomous regulations to the extent that its sphere of application has been established.

⁴ Cf. Palandt / Heinrich, 54th Edition, 1995, Article 24, Introductory Law of the [German] Civil Code, addendum, 13th rev.

⁵ These are the [German] Civil Code (ZPO) and German Ex Parte Jurisdiction Act

⁶ cf. Thomas/Putzo, ZPO, 18, 1993 edition, preamble to section 1, #6

- - Matrimonial Causes, Section 606 a, § I ZPO -

The issue of conflict of laws regarding international jurisdiction over matrimonial causes (e.g. divorce proceedings) is ruled upon in section 606 a, para. I, ZPO, apart from local jurisdiction, where international jurisdiction under section 606 a, §.I # 1-3, ZPO. Numbers 2, 3, as well as 4, is easily deduced from its statutory language⁷. # 2 & 3, as well as #4 are geared to the spouses' habitual domicile, defining it as the center of existence, i.e. the main focus of an attachment, in particular with respect to family and occupation, rather than a place of a mere temporary residence. ⁸

More difficult are cases falling under section 606 a, § 1 # 4, ZPO, which provide international jurisdiction in marital cases, even though both spouses are foreign nationals with only one of them having his/her domicile on domestic territory, unless the ruling to be passed be not recognized under the laws of any of the countries to which either spouse belongs. In this case the recognition right of the secondary country would have to be reviewed. The provisions of section 606 a, § 1, # 4, ZPO constitutes an omnibus rule to be considered only if none of the cases addressed in # 1-3 applies, as it aims at avoiding "limping divorces and therefore limping issues of matrimonial law " ⁹.

Depending upon which court exercises international jurisdiction over a ruling, procedural issues are determined in each case commensurate with procedural law of the recognizing court.¹⁰

- Ancillary Divorce Issues, Sections 623, § I in Conjunction with 621, § II, p. 1, in Conjunction with 606 a, ZPO -

International jurisdiction relating to ancillary divorce issues ¹¹, as defined in section 623, § 1, ZPO, is assessed by the provisions of section 621, § II, in conjunction with section 608 a, § 1, ZPO.

Section 621, § II, p. 1, ZPO, viewed in itself, defines only local jurisdiction; however, according to a consensus of opinion ¹², it may be deduced from the provisions of sections 623 ff ZPO regarding divorce cases and ancillary divorce issues, that international jurisdiction over matrimonial matters entails jurisdiction over ancillary divorce issues as well. This holds true, even in isolated proceedings regarding ancillary issues, due to the material linkage between ancillary divorce matters and the divorce itself,

However, as set forth above, the Hague Convention on the Protection of Minors, i.e. courts exercising international jurisdiction, has priority in determining child custody rulings.

The Hague Convention on the Civil Aspects of International Child Abduction.

In this context it must be borne in mind that power of disposal lying with a court having jurisdiction over child custody rulings in reaching its decision based on the Hague Convention on the Civil Aspects of International Child Abduction (hereafter called 'Hague Convention) of October 25, 1980 ¹³, joined by the United States as well as Germany, may be temporarily suspended.

The Hague Convention constitutes an agreement on judicial assistance aimed at ensuring that the original relationships and circumstances - e.g. abduction of a child into the country/state of its habitual domicile - be restored expeditiously and with a minimum of formality. An application for repatriation of a child pursuant to the Hague Convention must be filed with the authorities appointed pursuant to domestic law to handle such cases (in Germany the Federal Attorney General of the Federal Court) not later than one year following the abduction. A ruling on repatriation will assist the custody right in force in obtaining de facto effectiveness.

While repatriation proceedings based on the Hague Convention, are pending, any court in the country where the children were taken or are being held unlawfully within the meaning of the Hague Convention, under the provisions of Article 16 of said Convention, meaning of the Hague Convention, is temporarily barred from issuing a new ruling on custody rights, provided that the petitioned country/state has been notified about the abduction or retaining of a child against the law. Aim and object of this provision is to avoid contradictory rulings

⁷ See Appendix, under "I. Legal Texts"

⁸ See [German] Federal Court, New Judicial Weekly 1975, 1068

9 cf. BT-Do. 10/5832, p. 47, Reiner Hüßle, Private International Law, 2nd edition, 1995, p. 45
10 [German] Federal Court, New Judicial Weekly 1985/ p. 552 = Monthly Journal of German Law 1985/ p. 215

11 These include, e.g., custody rulings, pension adjustments

12 Decisions of the Federal Court in Civil Matters 75, 241 = NJW 1980, 47

13 [German] Civil Code I, 1990, II p. 207

on the location of a child's legal residence, by allowing the Hague Convention to take precedence commensurate with its stated purposes.

-- Parent(s) and Child Cases, Section 640 a, § II, ZPO -

Section 640 a, § II ZPO provides specific international jurisdiction, with alternative applicability of facts and circumstances, as stated.

-- Guardianship and Family Cases under the Provisions of Noncontentious Jurisdiction, Sections 621 a, § I, p. 1, ZPO, in conjunction with 64, German Ex Parte Jurisdiction Act -

Section 35 b of the German Voluntary Jurisdiction Act, in conjunction with section 43 contains a specific international jurisdiction clause on guardianship and family cases adhering to proceedings under the German Voluntary Jurisdiction Act, provided application of the Hague Convention Concerning the Protection of Minors has not been established. Declarations of legitimacy are defined in section 43, § I of the German Voluntary Jurisdiction Act and child adoptions - in section 43, § I of the same Act.

Petition to Modify Judgment

According to German law, German courts exercise concurrent jurisdiction for the amendment of decisions handed down in Germany, regardless as to whether or not domestic international jurisdiction exists. Also, amendments of foreign judgments are admitted in the Federal Republic of Germany, provided international jurisdiction exists therefor.¹⁵ In addition, German courts provide for a domestic emergency jurisdiction reserved for cases where, according to its autonomous national rules, none of the courts in the various countries has international jurisdiction.

c) Choices of Forum Agreement/ No Objection to Appearance - Sections 38, 39, ZPO

Under the provisions of section 38, ZPO, international jurisdiction of German courts may also be established by forum agreements, provided the parties are included in the group of individuals described therein. As a choice-of forum agreement constitutes an agreement relating to substantive law, concerning itself with matters of procedural law (the so-called dual nature of choices of forum agreement), the proper law of the contract¹⁶ governs the establishment of such an agreement, and lex fori determines its procedural admissibility.

If respondent participates in a court hearing regarding the issue at hand without having taken issue with the court's lack of international jurisdiction (a so-called uncontested appearance), in spite of being advised of this circumstance, the court's international jurisdiction is thereby deemed to be substantiated.

d) International Jurisdiction According to the Autonomous Rules of the United States

Seen from the German point of view, procedural rules of law governing individual federal states in the U.S.A. include essentially four types of vitally important jurisdictions.¹⁷

First, Longarm Statutes establish jurisdiction based on business transactions in the U.S.-federal state at issue. The concept of business transaction must be construed in a broader sense and may be justified by nothing more than a shipment into the U.S.A. .

14 All of these are family matters set forth in section 621 a, § 1, p. 1 ZPO - see Appendix, "Legal Texts"
15 [German] Civil Code, Judicial Weekly 1983/S. 1976

16 See Rush in NJW, 1994/ p. 2120H
17 Cf. WM 1983, p. 1078 ff (1081 f.)

Secondly, the service of a complaint, i.e. transient jurisdiction, establishes international jurisdiction.

In the area of litigation against corporations, an "enforcement of jurisdiction" substantiates international jurisdiction, due to interlocking capital interests with a certain enterprise, usually a subsidiary corporation seated in the venue of litigation.

Finally, international jurisdiction of U.S.-American courts is established by so-called impleaders - from the German point of view a less desirable jurisdiction - in which the respondent in a lawsuit may file a complaint against his potential party liable to recourse at the venue of litigation proceedings.

However, autonomous jurisdictional rules of the FRG covering a broader basis than those of the U.S., there arise no tensions, let alone any problems. One may assume international jurisdiction on the part of German or American courts, even under U.S. law, provided it exists under German provisions.

III. RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN FAMILY MATTERS

RECOGNITION OF AMERICAN JUDGMENTS IN GERMANY

1. Preamble

Basically, the effects of acts of state on the original country/state are limited (so-called territorial principle). However, sometimes actual circumstances and relationships with foreign countries preclude the possibility of enforcing executory titles in the original country/state, making it necessary, instead, to assert them abroad. The legal institutions of recognition and writ of execution with respect to foreign executory titles are intended to override the "limited usability" of domestic judiciary titles.

The screening of an executory title is limited to the verification of its compatibility with elementary tenets of the domestic legal system. This aspect is also treated under the key -phrase, "prohibited screening of legality".

Recognition of an executory title substantially extends preclusive, declaratory, constitutive, and various third-party effects resulting from the substantive *res judicata* to the domestic realm of a foreign country.
18

Also acceptable for recognition, in addition to substantive decisions, are decisions regarding the dismissal of an action, such as would disallow the substantive claim. Whether this involves a judgment on the merits of the case depends upon *lex fori*.

As a rule, recognition of a judgment proceeds automatically, i.e. without any special Act of Recognition, with the ruling taking effect in the original country.

By contrast, in most instances the writ of execution regarding an executory title requires a new formal proceeding, with the enforcement effect being sought by the enforcing country according to *lex fori* of the decreeing country in this case.

18. See Geimer in Geimer/Schütze, vol. 1/2, section 1901

2. Applicable Law

a) International Treaties In principle, in these cases international treaties take precedence over autonomous/national law as well. However, the provisions of international treaties aim at facilitating the enforcement of executory titles abroad. Therefore, the principle of advantage must be applied, according to which recognition-friendly rules take precedence to the extent that treaty in itself is not deemed to constitute a conclusive ruling. 19

With respect to the relationship between the U.S.A. and Germany, a simplified recognition process covers only the field of custodial rights decisions commensurate with the Hague Convention on the Protection of Minors,

In the absence of a universal international recognition mandate, one must revert to the domestic legal system.

b) Autonomous Provisions of the FRG Governing Recognition of Divorce Decrees Pronounced in the U.S.

As an exception to the rule, under the autonomous provisions in Germany a formal recognition process is provided by article 7, section 1, [German] Family Law Alteration Act 20, for the recognition of divorce decrees. It contains a declaratory monopoly, including a legal commitment to the recognition of a foreign decree within the sphere of applied provisions in Germany. This process aims at meeting the need for a generally binding, uniform determination of status.

Those competent to make decisions are the Land Administrative Agencies of Justice where a spouse has his/her habitual residence 21 - - alternatively the Land Administration of Justice in Berlin. Recognition Application forms which contain instructions about the necessary documents to be submitted, must be specifically ordered from the Land Administrative Agencies of Justice. A sample copy is included with the Appendix to this contribution.

The decision handed down by a Land Administration of Justice may be appealed as an administrative judicial act, pursuant to section 23, Introduction to the [German] Judicature Act 22. Those qualified to act on such appeals are the higher regional courts.

Recognition of a foreign divorce decree is established with *res judicata* of the final ruling.

During the course of recognition proceedings before the Land Administration of Justice, the recognition criteria based on the provisions of section 328, ZPO, i.e., the field of the German Voluntary Jurisdiction Act of Section 16 a FGG (which, formulated after section 328, ZPO, is nearly identical with it), are verified. In this respect, it does not differ from the recognition criteria applied to all remaining executory titles, even though no formal recognition process may be provided.

19 Federal Supreme Court of Justice, 03/18/1987, Private International Law, 1969, 104,106

20 dated 08/11/1961 / [German] Civil Code I, 1221 - see Appendix, "Law Texts"

21 "Habitual domicile" ist to be determined by the principles set forth in section 606 a, § 12 PO

22 Dated 01/27/1877 / Reich Law Gazette I [now: Federal Law Gazette], p. 77

As an exception, divorce decrees will be recognized automatically, i.e., without formal proceedings, provided both spouses were merely citizens of the country whose court decreed the divorce.

General recognition criteria include that: the subject-matter at issue be of a civil-procedural nature; the foreign court's quality be guaranteed; the ruling be *res judicata*; and reciprocity be guaranteed. 23

In addition, none of the following obstacles may interfere with recognition.

- Obstacles to Recognition under the Provisions of Sections 328, ZPO / 16 a, # 2, FGG -

The provisions of sections 328, ZPO 16 a, # 2, FGG, contain recognition criteria compiled in a negative-catalog manner, to be verified *ex officio*.

The provisions of section 328, § 1, #1, ZPO, and section 16 a, #1, FGG, exclude recognition of a foreign decision, if the courts of the country to which the foreign court belongs, are not competent under German law. Therefore, investigation into whether, from the German viewpoint, the U.S. court had jurisdiction over the decision, is in order, 24 because international jurisdiction on the part of the original country must exist, according to the jurisdictional system of the secondary country.

Another obstacle standing in the way of recognition under the provisions of section 328, § 1, #2, ZPO and/or section 16 a, #2, FGG, would be the exclusion of recognition in cases where the unsuccessful defendant refused to appear at the trial, on grounds that the subpoena or order initiating such proceedings failed to be served on time or in due form, thereby aggravating the defense. The Hague Convention on the Service Abroad of Judicial and Non-Judicial Documents in Civil or Commercial Matters assists in conducting service abroad. Both Germany and the U.S.A. are members of the Convention.

In addition, section 328, §1, #3, ZPO and/or section 16 a, #3, FGG, discusses priorities in cases of several conflicting rulings.

Under the provisions of section 328, §1, #4, ZPO and/or section 16 a, #4, FGG, a ruling abroad may not violate public policy, i.e., recognition may not yield any result which would obviously prove incompatible with essential principles of German law -- specifically, its constitutional rights. The provision to be applied was reformulated by the Private International Law Reform Act of 1986, whenever recognition of a foreign decision were to fundamentally interfere with the domestic judicial system or were to simply constitute an unacceptable deviation from fundamental ideas of value and justice. 26

Finally, section 328, §1, #5, ZPO, unlike section 16 a, FGG, requires guaranteed reciprocity for the recognition of foreign judgments. This provision was interpreted restrictively by German adjudication to the extent that only partial reciprocity must be guaranteed.

23 For further details, see Law of Civil Procedure, volumes 1/2, section 193 VII, by Geimer/Schütze
24 More about "Spiegeltheorie [= Mirror Theory]" by Thomas/Putzo,, Commentary to the Code of Civil Procedure, 18th edition, 1993, section 328, line 8.

25 dated 11/15/1965/ Federal Law Gazette 1977 II, p. 1453

26 Re this problem see essay on Stiefel / Stümer, rev.version of 1987, which discusses ordre public reservations about the execution of US judgments

c) Autonomous Provisions of the FRG for Recognizing other US-American Executory Titles Relating to Family Law

The criteria set forth above apply to the recognition of U.S. American executory titles relating to the field of family law. Only formal proceedings under the provisions of Article 7, § 1, Family Law Alteration Act, are exempt in these circumstances. Also, the recognition proceedings do not automatically result in recognizing all of the ancillary issues beyond the divorce decree.

ENFORCEABILITY IN GERMANY OF JUDGMENTS PASSED BY A COURT IN THE U.S.A.

1. Preamble

As mentioned previously, enforcement proceedings aim at generating a domestic judgment which will effect a judicially enforceable instrument. However, in order to obtain such a domestic judgment, a proceeding must be conducted for the purpose of awarding enforceability of a foreign judgment to the domestic realm.²⁷

2. Applicable Law

With international treaties between USA and Germany not being asserted with respect to these issues, one must revert to sections 722 and 723 of ZPO [German Civil Procedure] and section 33 of IPR [lex fori].

The initial criterion for enforcement proceedings is always the acceptability of a certain ruling, supplemented by a specific feature characterizing temporary or final enforceability in the original country . In addition, the general enforcement criteria of lex fori must be present. Please note at this point that Germany, unlike USA, refuses to recognize a foreign judgment, as long as there remains a recourse to appeal.

As long as an enforcement proceeding is possible, one cannot revert to a domestic second proceeding. Instead, as a matter of priority, the judgment creditor must file a petition for a judgment of execution, in accordance with sections 722, 723, ZPO.

3. ZPO-Proceedings

Sections 722 and 723, ZPO, do not provide for specific enforcement proceedings of foreign judgments., so that the ordinary costly & time-consuming course of litigation course, must be pursued. The relief prayed for must be oriented toward enforcement proceedings retarding the foreign ruling. This involves an action for a change of legal relationship, resulting in a new judicial title. The enforcement itself will then proceed under only one enforceable title -- that of the domestic enforcement court, which will be the only one granted the writ of execution under the provisions of sections 724 ff ZPO.²⁸

Any claim for execution as defined by section 722, ZPO, must be filed within 30 years following the effective date of res judicata of the foreign judgment.

The criteria for admissibility may be assessed based on general rules; nor will the course of a proceeding yield any specifics.

Money judgments are enforced in foreign currency, thus eliminating the need for currency exchanges. The judicially enforceable instrument expressed in foreign currency will be executed under the provisions of sections 803 ff, ZPO.

4. Voluntary-Jurisdiction Proceedings

27 Federal Court, dated 11/06/1985, RIW 1986, p. 554

28 Federal Court, NJW 1986, p. 1440

c) Within the purview of German Voluntary Jurisdiction, foreign enforceable instruments will be executed, provided the criteria for recognition exist. There are no specific enforcement criteria; instead, recognition of a foreign ruling constitutes a preliminary question to be scrutinized under the provisions of section 33, FGG [= German Voluntary Jurisdiction], and there is no need for an independent judicial dictum. Section 722, ZPO is not applicable in this case.

5. Action Opposing Execution, Section 767, § II, ZPO Furthermore, a foreign judgment is unenforceable if respondent raises objections, as defined in section 767, ZPO.

6. Special Features Regarding Custody Orders Respondent may counteract enforcement of a foreign custody instrument if he/she causes a new final custody order to be issued, to the extent that the applicability of MSA30 [=Hague Convention Concerning the Protection of Minor] has been established, because under the provisions of MSA a foreign custody order is not opposed to a new decision on its merits by a German court, as long as the minor children habitually reside in Germany (Article 13 I, MSA).

Under the provisions of article 1, MSA, courts located in the venue of the minor children's residence are competent to take appropriate measures for the protection of the individual. Within this meaning, protective measures constitute custody rulings as well.

Decisions on the merits are not opposed by the fact that a foreign court passed a ruling in the same matter. If the ruling is to be recognized, it merely follows that a passed, which agrees in its contents. 31

Custody matters have no room for argument on grounds of final and conclusive rulings. The welfare of a child always takes precedence over the conclusiveness of a previous ruling.

Therefore, custody matters do not fall under the purview of substantive res judicata.³²

RECOGNITION AND WRIT OF EXECUTION REGARDING GERMAN JUDICIAL TITLES IN THE USA

1. Preamble

Again, in the absence of applicable bilateral treaties one must revert to autonomous national law.

Unlike in Germany, there exists no federal law regarding these issues, nor does federal law contain any isolated individual standards.

Instead, in the United States recognition and enforcement are based on Common law developed by judges.

29 Federal Supreme Court, New Judicial Weekly 1977, p. 150

30 See above

31 Federal Court, NJW 1973, p. 950; Senate, NJW 1986, p. 2193

Also, there is no express ruling on the part of the Supreme Court as to whether the principles of Common Law are to be regarded as an issue of federal law or an issue of individual states.

In fact, federal courts overwhelmingly agree that in the absence of a federal law the effect attributed to foreign judgements belongs within the jurisdictional sphere of individual federal states, rather than the sphere of federal law.

However, the law governing individual federal states may be restricted by federal legislation, e.g. sovereign immunity.

Although Common Law principles may be the starting point of each judicial assessment relating to the enforceability of foreign judgments in the United States, several federal states followed two different avenues of implementation, the majority opting for application of Common Law, without laying out specific provisions.³³

Sixteen states legislated 34 versions of the Uniform Money Judgments Recognition Act (hereafter called Uniform Act)³⁵ - founded at the time on the general principles of Common Law. The Uniform Act was ratified by the National Conference of Commissioners on Uniform State Laws and the American Bar Association.³⁶

Incidentally, On principle, U.S. courts will not pass money judgments in foreign currency. Unless the amount owed is expressed in dollars, US courts will convert it accordingly.³⁷

2. Principles of Recognition and Execution Applicable in all Federal States

On principle, in the ruling in the case of *Hilton vs. Guyot*, all federal states followed the statement issued by the Supreme Court, pursuant to which foreign judgments are to be recognized and executed, as long this shows comity toward the foreign nation on one hand and does not sacrifice substantial interests on part of the executing forum, on the other..

Principles of Comity

The ruling on *Hilton versus Guyot* shows that the principle of comity originally caused the US courts to recognize and execute foreign court judgments.

Substantially, comity principles include the following provisions for the recognition and execution of foreign judgments:

In order to be qualified for recognition and execution of foreign judgments

1. - court proceedings abroad must have been conducted in a fair manner by a competent court with international jurisdiction having been determined commensurate with foreign law;

2. - court proceedings were conducted based on customary procedural principles, commensurate with procedural law governing the country which issued the ruling;

3. - respondent was duly summoned or appeared at the proceeding on his/her own accord; 4. - proceedings were conducted under a legal system which guarantees a nonpartisan application of law on behalf of its own citizens as well as citizens of other countries;

33 including, among others, North Dakota, Arizona, Arkansas, Louisiana, Pennsylvania, South Carolina and Idaho

34 Alaska, California, Colorado, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York Ohio, Oklahoma, Oregon, Texas, and Washington

35 Uniform Foreign Money Judgments Recognition Act, sections 1-11, 13 U.L.A. 261 (1986)

36 Schütze in JR 1988, p. 229

37 Re problems caused by fluctuating exchange rates, see Chrozziel / Westin in conjunction w/ Jurisprudence 87 (1988) p. 166

5. - The principles of res judicata must be upheld, i.e. the foreign judgment must have conclusive and binding between the parties. 38 Whether or not this is the case will be determined by the law governing the foreign country.

Principles of Interest

A judgment debtor may object to the execution of a judgment in the USA on grounds that the judgment was obtained by surreptitious means, basing his argument specifically on:

1. errors committed when a complaint was served 39 (here, too, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters must be observed);
2. appearance in court not possible;
3. the ruling court has no personal jurisdiction;
4. prejudice or unfairness on the part of the foreign legal system;
5. the fact that judgment was obtained by fraudulent means.40

For a long time the requirement for reciprocity used to be problematic in several federal states. In the meantime, reciprocity, as defined by section 328, § 1, # 5, ZPO, is generally guaranteed, overall. 41

Several federal states (e.g. Louisiana) even fail to mention any reciprocity requirement.

Others (e.g. Virginia) require it in the field of support law. In these cases - insofar as applicable in individual federal states - application of the support law in order to assert claims for support in traffic with foreign countries (cf. Reciprocal Enforcement of Support Act -- AUG) dated 12/19/1986, makes a reciprocal guaranty possible. Under the provisions of section 2, § 2, AUG, the Attorney General constitutes the competent central authority.

In the absence of applicability of AUG, one must revert to the above-described general principles regarding recognition and execution.

Beyond that, the principles of public policy in the USA and individual federal states must be observed. 42

Added to the above-named principles of execution and recognition, was the universal principle regarding the finality of court decisions.

38 Compare e.g. Uniform Act, section 2 (1986): This act applies only to foreign judgments which are "final and conclusive and enforceable in the decreeing country"; Restatement (Second) of Conflict of Law, sections 92, 98 (1971 and 186 revisions); in order to render a foreign judgment enforceable, it must be final in the decreeing country. However, the fact that a foreign judgment has been appealed does not preclude its being regarded as final by the USA, for purposes of execution, even though the U.S. court may delay the act of execution.

39 Re Hollmann, Service Abroad in U.S. Civil and Administrative Matters, RIW / AWD 1985, p.764 ff
40 re Chroczel / Westin compared to RWiss 87 (1988), p. 163 ff.
41 cf. Geimer / Schütze, International Recognition of Judgment, vol. 1, 2, 1984, p. 1921;
42 in continuation thereof - Chroziel / Westin, compare with RWiss

3. Proceedings in Individual Federal States

Proceedings in individual federal states are governed either by general principles of Common Law or by amendments to the Uniform Act.

Common Law will be reverted to only if a ruling on a certain subject matter is absent from the Uniform Act.

a) Common Law Principles 43

As is the case in Germany, recognition of foreign judgments is an informal act.

However, execution of a recognized judicial instrument requires a new formal proceeding, i.e. a complaint must be filed with a competent U.S. court, based on the foreign judicial title. Within the scope of the summary proceedings, respondent's means of a defense are limited. by his inability to present the material cause underlying the judgment anew for disposition by the court. 44

In the states of North Dakota, Arkansas, Louisiana, Pennsylvania , South Carolina, and Idaho, the principles of the 2nd Restatement, Conflict of Law take precedence over the principles of Common Law.

In Pennsylvania, South Carolina, and Idaho, the principles of the 3rd Statement - Foreign Relations - are applied in addition.

Divorce decrees are not governed by any specifics. Support orders, too, are recognized and executed principally in accordance with Common Law principles. However, special provisions apply in the federal states of Pennsylvania, New Hampshire, South Caroline, and Idaho, which adopted the Uniform Reciprocal Enforcement of Support Act (RURESA) into their intra-state law, thereby creating a basis for declarations of reciprocity via the General Disposition Act (AVG).

In addition, with respect to court rulings on parental custody and care, Pennsylvania, Mississippi, and New Hampshire, transformed the Uniform Custody Jurisdiction Act (UCCJA) into intra-state law.

Both acts include provisions governing jurisdiction and recognition.

b) Uniform Foreign Money Judgments Recognition Act 45

Twelve states⁴⁶ , having adopted the Uniform Act in its version into intra-state law, provide for the writ of execution to be implemented by simply recording the foreign judgment with the competent authorities of the respective state.

Illinois and Missouri legislated the Uniform Act version of the year 1948, pursuant to which foreign judgments, like those of other federal states, are merely filed with the court, to be recorded.

43 The majority of US federal states adopted Common Law principles

44 re summary proceedings, see Schurbmann vs. Walter, American Civil Procedure, 1978, p. 54 f.

45 Alaska, California, Colorado, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Texas, and Washington

46 Alabama, Colorado, Georgia, Illinois, Missouri, Minnesota, New York, Ohio, Oklahoma, Oregon, Texas, and Washington

The remaining 10 federal states legislated the 1964 version of the Uniform Act, which provides that, like judicial titles of other federal states, foreign judicial titles be enforceable as well by merely filing it with a competent official of the trial court, to be entered into the record.

A special provision to be noted regarding the federal state of New York requires that for the writ of execution pertaining to money judgments a new claim must be filed with the jurisdictional court of the federal state of

New York, regardless of the Uniform Act.

In the absence of any provisions for the implementation of the Uniform Act of California, Maryland, Massachusetts, and Michigan, regarding the filing and recording of foreign judgments, it must be assumed that these states require a new claim for a writ of execution, as well.

Regarding custody orders, the states of Massachusetts and Minnesota transformed the Uniform Child Custody Jurisdiction Act (UCCJA) into intra-state law.

In addition, the Uniform Act provides an opening clause for custody orders, thus assessing a recognition on the according to the comity doctrine.

The Uniform Reciprocal Enforcement of Support Act (RURESA) was implemented only in Minnesota.

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

With recognition and execution proceedings of judicial titles involving a time-consuming but also costly process in most cases because of the absence of a treaty in Germany as well the USA that would simplify such proceedings, arbitration should be used in areas having access thereto, seeking a contractual settlement in the preliminary stages.

For U.S. American and German arbitral awards there exists a multinational treaty applicable to both countries, i.e., the New York Convention on the Recognition and Enforcement of Arbitral Awards (UN Convention). 47

In essence, this Convention stipulates that each contractual country/state must execute arbitral awards of other contractual countries/states, unless exceptions listed in the conclusion of Article V of this Convention apply.

Included in the criteria for recognition and enforcement is:

1. Under to the provisions of the Convention (Article V (1) a), the arbitration clause may not be invalid, regardless of any reason underlying invalidity; e.g. the parties may lack the capacity for executing agreements, or the law applicable to arbitration agreements renders the latter invalid.
2. The party subject to enforcement must be allowed sufficient opportunity to defend itself against a claim (Article V (1) b). This applies to the requirement for service as well as to the principle of a fair hearing.
3. The arbitral award may not exist outside the sphere of the arbitration clause (Article V (1) c), which would be the case, if the aforementioned issues were to lie neither within the scope of settlement set forth in the arbitral agreement nor within its boundaries.
4. The arbitrators must adhere to the arbitration clause (Article V (1) d), as regards the procedural course and the formation of an arbitration court. In the absence of such an agreement, one must revert to the law of the country/state were the proceedings were conducted.

13 a

5. The arbitral award must have become binding for the parties (Article V (1) e). A writ of execution must be possible.

6. The legal dispute must constitute the subject of the arbitration proceedings under the law of the country which is to implement enforcement (Article V (2) a).

7. The arbitral award must not be at variance with public policy of the enforcing country (Article V (2) b).

47 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated 06/10/1958, Federal Law Gazette 1961 II, p. 122

Situation in the USA

The USA incorporated the Convention in sections 201 to 208 of U.S. Code Title 9 of its legal code. However the writ of execution may be carried out only within 3 years following the delivery of the arbitral award. In conclusion, the US court exercising jurisdiction will issue a Confirmation Order.

Upon confirmation of the arbitral award, it will become a court judgment and enforceable thereby pursuant to the provisions customary in the USA.

Situation in Germany

The UN Convention became applicable for Germany by German Federal Act. In addition, section 1044, ZPO, provides a statutory ruling. In general, section 1044, ZPO, rules that foreign arbitral awards be declared enforceable pursuant to the same proceeding as domestic arbitral awards. Under the provisions of sections 1042 ff ZPO, an application for a writ of execution must be filed during court-order proceedings or proceedings leading to a judgment, accompanied by the required copies of the arbitral award. Based on the principle of most favored nation treatment, either the procedural provisions of the UN-Convention or of sections 1042 ff, [German] Civil Code apply, there being no big differences either in cost or quality.

Section 1044 (2), ZPO, presents the following grounds for rejecting a writ of execution:

- * 1. Legal ineffectiveness of arbitral award
- * 2. Violation of German ordre public
- * 3. No and no ex post facto approved proper representation form during arbitration proceedings
- * 4. Denial of right to a fair hearing

IV. CONCLUSION

In the field of commercial law, it would be advisable to reflect upon an arbitration clause even while preparing an agreement, thereby avoiding two lengthy proceedings and additional expense.

As for family matters, the customary procedural course cannot be avoided. Only the Protection of Minors Act will facilitate matters within the scope of its application.

48 See Schwab, Arbitral Jurisdiction, 3rd edition 1979, p. 416 ff

49 The USA made use of the proviso set forth in Article I (3) clause 2, by limiting the scope of application of the law to arbitral awards in commercial cases. In addition, the United States made use of the second proviso in Article I (3), limiting the scope of applicability of the Convention to those arbitral awards issued in sovereign territory of another member country

50 An application form sample is listed in APPENDIX under 'blank forms'

51 In effect since 09/28/1961; no indication of proviso as defined by Article I (3), clause #2.

APPENDIX:

I. TEXTS OF THE LAW

The complete text of the Hague Convention Concerning the Protection of Minors exists in both German- and English-language versions.

The complete text of the Hague Convention on the Civil Aspects of International Child Abduction exists in both German- and English-language versions.

The complete text of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters exists in both German- and English-language versions.

Excerpt from the Hague Convention Concerning the Jurisdiction of Authorities and the Law Applicable in Respect to the Protection of Minors (of October 5, 1961: Federal Law Gazette 1971 II, p. 219)

Article I. [International Jurisdiction]. Subject to the provisions of Articles 3, 4, and 5, § 3, the authorities, be it a court or administrative agency of the country/state where a minor has his/her habitual domicile, are responsible for taking the appropriate measures for the protection of the minor individuals and their assets.

Article 2. [Application of Right to Residence] (1) It is incumbent upon the authorities having jurisdiction according to Article 1, to take such measures, as are provided by their own intra-state law.

(2) Said law will determine the criteria for the amendment or curtailment of these measures. It will also determine their effect with respect to the relationship between the minor and other individuals or institutions, to which the minor has been entrusted, as well as to the minor's relationship to third parties.

Article 7. [Recognition of Measures - enforcement is not ipso jure] The measures taken by the competent authorities in compliance with the foregoing articles must be recognized by all countries which are parties to the treaty. However, if these measures require enforcement procedures in a country different from the one where they originated, their recognition and enforcement will be determined by the intra-state law of the country where enforcement is applied for or by interstate agreements.

Article 8. [Sphere of Application] (1) This agreement applies to all minors having their habitual domicile in a country which is a party to the treaty..

(2) However, jurisdiction belonging to the authorities of the country to which a minor belongs under this agreement, remain reserved by the countries which are parties to the treaty.

(3) Each country which is a party to the treaty has the right to limit application of this agreement to those minors who belong to one of the countries which are parties to the treaty.

Excerpt from the Hague Convention on the Civil Aspects of International Child Abduction (of October 25, 1980 : Federal Law Gazette 1990 II, p. 207)

Chapter III - Return of Children

Article 16. If the courts or administrative authorities of the country, party to the treaty, to which the child was abducted or in which it is being held against the law, were informed of the child's abduction or its being held, as defined in Article 3, they may not rule on the merits of child custody until it is based on this agreement, that the child will not be returned or if no request was filed under this agreement within a reasonable deadline.

Excerpt from the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (EüGVÜ) (of September 27, 1968, version of 3rd Treaty of Accession of May 1989 : Federal Law Gazette 1994 II, p. 519)

Article 1. (1) This treaty will be applied in civil and commercial matters, regardless of the type of jurisdiction. Specifically, it does not include tax or customs matters or matters of administrative law.

(2) It does not apply to:

1. Marital status, legal capacity or the capacity to act or legal representation of individuals, marital property, the field of law of succession including Probate Law;
2. bankruptcy-, and settlement proceedings or similar matters;
3. Social Security;
4. arbitration

Excerpts from the [German] Code of Civil Procedure of September 12, 1950 - ZPO (Federal Law Gazette, p. 533)

Section 38, ZPO [Admissible Choice of forum] (1) A court of 1st instance which normally would have no jurisdiction, will obtain jurisdiction by express or tacit agreement between the parties, if the contractual parties are merchants not listed in section 4 of the Commercial Code as persons engaged in a trade of business or legal entities under public law or separate assets under public law.

(2) Furthermore, jurisdiction of a court of the 1st instance may be agreed on, if at least one contractual partner lacks a general domestic venue. The agreement must be entered into in writing or, if entered into verbally, must be confirmed in writing. If one of the parties has a general domestic venue, the only choice will be a court where said party has its general jurisdictional venue or if there are grounds for choosing a particular venue.

(3) Incidentally, agreements on the choice of jurisdictional venues will be admitted only if they are expressly entered into in written form

1. after a legal dispute has developed or
2. if, having entered into the agreement, the party claimed against moves its residence or habitual domicile outside the area in which this law is in force or if at the time the complaint was filed the party's residence or habitual domicile was unknown.

Section 39, ZPO [Jurisdiction on Grounds of Uncontested Proceedings] Furthermore, the jurisdiction of a court of the 1st instance is justified if respondent, without objecting to its want of jurisdiction, verbally considers the case on its merits. This will not apply in cases where instructions under section 504 were not given.

Section 323, ZPO [Petition to Modify a Judgment] (1) If, following a court judgment ordering future payments on a recurrent basis, the financial circumstances which at the time the judgment was passed being the decisive factor in regard to payments, assessment of payable amounts, or term of payments, undergo a drastic change, each party has the right to demand an appropriate modification of judgment by filing action.

(2) Said action is admissible only if its underlying reasons developed after conclusion of the hearing during which, at the latest, the claim of the action should have been extended or objections raised, and no longer could be asserted by appeal.

(3) A judgment can be modified only after a claim has been filed.

(4) The aforementioned provisions are to be applied accordingly to the executory titles of section 641 p, section 642 c, section 642 d, in conjunction with section 642 c and section 794, § 1 #1 and 5, insofar as payments, as defined in § 1, have been assumed.

(5) Instruments of indebtedness on support payments, whose amendment is permitted in a simplified proceeding (sections 1 to 641 l to 641 t), may be amended under the aforementioned provisions only, if an adjustment in a simplified proceeding were to result in a support amount substantially deviating from the amount that would take into account the development of special circumstances surrounding the parties.

Section 328, ZPO [Recognition of Foreign Judgments] (1) Recognition of a judgment passed by a foreign court is excluded:

1. if, according to German law, the court belonging to a foreign country, has no jurisdiction;
2. if respondent, having refused to enter an appearance, claims that the main document to the proceeding was served him in undue form or not on time;
3. if the judgment is incompatible with a judgment passed in the domestic realm or a former foreign judgment awaiting recognition or his underlying proceeding with a former, currently pending, domestic proceeding.
4. if recognition of the judgment yields a result that is obviously incompatible with fundamental principles of the [German] Constitution;
5. if there exists no guaranteed reciprocity.

(2) The provision of #5 is not opposed to recognizing a judgment, as long as the judgment does not pertain to a proprietary claim or does not hold up in a domestic court under German law or if it regards a parent and child case (section 640).

Section 606 a, ZPO [International Jurisdiction] (1) German courts have jurisdiction over marital causes,

1. if one spouse is a German citizen or was a German citizen at the time the marriage took place;
2. if both spouses habitually reside in Germany;
3. if either spouse is stateless but habitually resides in Germany, unless the ruling to be passed would not be passed under the law of the country to which one spouse belongs.

This jurisdiction is not exclusive.

(2) There is no objection to recognizing a foreign ruling under § 1, subparagraph , #4, or under # 1 to 3, provided the ruling is recognized by those countries to which the spouses belong.

Section 621, ZPO [Jurisdiction of Family Courts; Referral or Assignment to a Court with Matrimonial Jurisdiction] (1) In family matters regarding:

1. Ruling on parental custody over a child born in wedlock, insofar as the family court has jurisdiction under the provisions of the [German] Civil Code;
2. Right of access to the child;
3. Surrender of the child to the other spouse,
4. Statutory liability to the support of a legitimate child;
5. Liability to support on grounds of marriage;
6. Pension rights adjustment;

7. Ruling on proprietary rights to the matrimonial home and household goods (Ordinance regarding the handling of marital home and household goods - Sixth Implementing Regulation to Marital Law, dated October 21, 1944, Imperial Legal Gazette I, p. 256);

8. Agreements regarding marital proprietary rights, although a third party may be part of the proceeding.

9. Proceedings conducted under the provisions of sections 1382 and 1383 of the [German] Civil Code are subject to the exclusive jurisdiction of family courts.

(2) During pendente lite of a matrimonial cause, exclusive jurisdiction belongs to the court of first instance where the marital cause is pending. In the absence of pendente lite, local jurisdiction will be subject to general provisions.

(3) If a matrimonial cause becomes right-handed[*], while a family matter of the nature as defined in § 1 is pending in another court of first instance, it must be officially referred or transferred to a court with matrimonial jurisdiction. Section 281, § 2,3, # 1 applies accordingly. [* Handelt es sich bei "rechtshändig" eventuell um einen Tippfehler - habe den Ausdruck zuvor nie gehört oder gelesen.]

Section 621 a, ZPO [Applicable Procedural Provisions] (1) In family matters subject to section 621, § 1, # 1 through 3,6,7,9, proceedings follow the provisions of the law regarding ex matters of voluntary jurisdiction and the regulations included in the ordinance regarding the handling of a marital home and household goods, if not determined otherwise by this law or the Judicature Act. The provisions applicable in civil-procedural proceedings will replace sections 2 to 6; sections 8 to 11, 13, 16, § 2, 3; and section 17 of the law regarding matters of voluntary jurisdiction.

(2) If in a legal dispute involving a claim for proprietary pension adjustments a petition is filed according to the provisions of section 1382, § 5 or section 1383, § 3 of the [German] Civil Code is filed, a uniform ruling will be passed by judgment, with section 629, § 2 being applicable, accordingly.

Section 623, ZPO [Combining Divorce and Ancillary Matters] (1) To the extent that in family matters under section 621, § 2, a ruling is to be passed in view of an anticipated divorce, petitioned by a spouse in due time, this will be heard, together with the divorce matter (i.e., ancillary matters). If in a family matter under section 621, § 1, #4, 5, 8, a third party takes part in the proceeding, this family matter will be treated separately.

(2) The proceeding must remain pendente lite until the hearing of first instance in the divorce matter is concluded. § 1 will apply accordingly, if the divorce matter under section 629 b is remanded to the court of first instance.

(3) No petition is required for a ruling on parental care for a child in common or for implementation of pension adjustments in cases under section 1587 of the [German Civil Code. In general, a ruling on access to the child will be passed only if suggested by a spouse.

(4) The aforementioned provisions also apply to those proceedings which have been transferred to the court of marital matters, to the extent that a ruling in view of an anticipated divorce is to be expected.

Section 640 a [Jurisdiction] (1) If respondent has no general domestic jurisdictional venue, the local court, in whose district one of the parties or the claimant has his/her habitual residence, will exercise jurisdiction. In the absence of a jurisdictional venue even for him/her, the local district court in Berlin Schöneberg will exercise jurisdiction.

(2) German courts have jurisdiction if one of the parties 1. is a German citizen or 2. has his habitual residence in Germany. This jurisdiction is not exclusive

Section 722, ZPO [Enforceability of Foreign Judgments] (1) Enforcement of a judgment pronounced by a foreign court may be implemented only, if its jurisdiction has been stated by a judgment authorizing execution of a judgment.

(2) Regarding a claim for the pronouncement of a judgment, the local regional court located within debtor's general jurisdictional venue will exercise jurisdiction - alternatively, jurisdiction belongs to a local or regional court with whom a complaint was filed against the debtor under the provisions of section 23.

Section 723, ZPO [Judgment Authorizing Execution of Foreign Judgments] (1) A judgment authorizing execution of a foreign judgment will be pronounced without verifying the lawfulness of the ruling.

(2) A judgment authorizing execution will be pronounced only after the foreign judgment has obtained res judicata under the law in effect for this court. It will not be pronounced, if section 328 precludes recognition of the judgment.

Section 767, ZPO [Action Raising Objection to the Judgment Claim] (1) Debtor may plead on an objection to the claim established by the court by filing a complaint with the trial court of first instance.

(2) Objections are admissible to the extent that their underlying reasons evolved only after the conclusion of the hearing in which, under the provisions of the law, they should have been pleaded at the latest but now can no longer be asserted by appeal.

(3) In his forthcoming complaint, debtor must plead any objection he would have been able to raise at the time of filing the complaint.

Excerpts from the German Ex Parte Jurisdiction Act of May 17, 1898 (RGBl. [Reich Law Gazette], p. 771)

Section 16 a of the German Voluntary Jurisdiction Act [FGG] [Recognition of Foreign Rulings] excludes recognition of foreign rulings if:

1. under German law, the court of the other country is not competent;
2. one of the parties, not having made a statement to the main issue, pleads that the leading procedural document was not duly served him or not served on time, thus preventing him from exercising his rights;
3. the ruling is incompatible with a locally pronounced judgment or with a previous foreign ruling expected to be recognized, or with the proceeding underlying the former, locally pending, action.
4. recognition of the ruling would yield a result that would obviously be incompatible with fundamental principles of German law, especially if recognition is incompatible with the Constitution.

Section 33, § 1, FGG [Coercive Penalty Payment; Direct Coercion]

(1) If a court order imposes an obligation upon someone, to carry out a certain act exclusively on his own volition, or to refrain from a certain act, or to tolerate an act being carried out, the court may, unless provided otherwise by law, urge him/her to follow its order by assessing a coercive penalty payment. If an individual is to be surrendered, the court may, notwithstanding its assessment of a coercive penalty payment, threaten coercive detention. At the time of assessing the coercive penalty payment, the costs of the proceeding will simultaneously be imposed upon the party.

Section 35 b [Competing Jurisdiction Between Home and Residence] (1) Matters regarding guardianship, foster care, or legal counsel, are subject to the jurisdiction of German courts, provided the ward, foster child, or child

1. -- is a German citizen or
2. -- habitually resides in Germany

(2) Furthermore, the German courts have jurisdiction to the extent that the ward, foster child, or child is in need of assistance from a German court.

(3) Under §§ 1 and 2 this jurisdiction is not exclusive.

Section 43 a, § 1 [Declaration of Legitimacy] (1) Rulings regarding a declaration of legitimacy are subject to German court jurisdiction, as long as the father or the child 1. - is a German citizen or 2. - habitually resides in Germany. This jurisdiction is not exclusive.

Section 43 b, § 1 [Adoption of a Child] (1) Matters regarding adoption of a child are subject to German court jurisdiction, as long as the adopting party, one adopting parent, or the child 1. - is a German citizen, or 2. - habitually resides in Germany. This jurisdiction is not exclusive.

Section 64 FGG [Family Law Cases] (1) Procedures incumbent upon family courts are subject to the jurisdiction of local courts.

(2) In case a marital cause is pendente lite, the family court where the cause - as defined by its nature in section 621, § 1, #1 to 3, 9, Code of Civil Procedure - is pending in first instance will officially assign it to the matrimonial court. Section 281, §§ 2, 3, sentence #1, Code of Civil Procedure, applies accordingly.

(3) Cases to be handled by the family court re subject to the provisions of the second and third §§ of the sixth volume of the Code of Civil Procedure, as well as section 119, § 1, # 1, 2, and section 133, #2 of the Judicature Act. To the extent that section 621 a of the Code of Civil Procedure provides for the application of the provisions of the Voluntary Jurisdiction Act, the family court will replace the guardianship law. Accordingly, section 57, § 2 of this law applies to complaints under the provisions of sections 621 e, 629 a, § 2, Code of Civil Procedure, however, it is not opposed to the right of the Youth Welfare Department to file a complaint. In cases falling under section 57, § 1, # 1 and 3, only a ward's or foster person's spouse is entitled to file a complaint.

Excerpt from the Family Law Alteration Act of August 11, 1961 (Federal Law Gazette I, p. 122)

Article 7. Recognition of Foreign Rulings Regarding Marital Causes

Section 1. Recognition of Foreign Rulings Regarding Marital Causes .

1) A ruling declaring a marriage null and void, dissolved, the bonds of marriage broken or maintained or by which the existence or nonexistence of a marriage between partners is determined, may be recognized only, if the Regional Administration of Justice finds that the criteria for recognition exist. The Reciprocity Act constitutes criterion for recognition. If such a ruling is passed by a court in the country to which both spouses belong at the time of said ruling, ruling, the recognition is not contingent upon the determination by the Regional Administration of Justice.

2) The Regional Administration of Justice exercising jurisdiction is the one where either spouse maintains his habitual domicile. If neither spouse has his/her habitual domicile in Germany, the Regional Administration of Justice in the country where remarriage will take place has jurisdiction. The Regional Administration of Justice may demand proof that public notice of intended marriage has either been requested or a request for release from such notice has been submitted. If no jurisdiction is indicated, it will be exercised by the Regional Administration of Justice in Berlin.

(3) A decision will be pronounced based on an application. Anyone able to substantiate a legal interest in recognition by prima facie evidence, may file an application.

(4) If the Regional Administration of Justice rejects the application, applicant may apply for a decision from the Regional Appeals Court.

(5) If the Regional Administration of Justice determines, that the criteria for recognition exist, the spouse who did not file an application may apply for a decision by the Regional Appeals Court. The Decision made by the Regional Administration of Justice will take effect upon notification of the applicant. However, the Regional Administration of Justice may rule for the decision to take effect only after a certain period of time.

(6) The Regional Appeals Court makes its determination in proceedings regarding Voluntary Jurisdiction. Jurisdiction is exercised by the Regional Appeals Court in whose district the Regional Administration of

justice has its seat. The petition for a determination by a court has no suspensive effect. Section 21, § 2; sections 23, 24, § 3; sections 25, 28, § 2,3; section 30, § 1, sentence #1; and section 199, § 1, of the law regarding matters of voluntary jurisdiction will apply mutatis mutandis.

(7) The aforementioned provisions will be applied mutatis mutandis, if there is a request for verification that the criteria for recognition are nonexistent.

(8) The findings regarding the existence or nonexistence of the criteria for recognition is binding for both the courts and regional administrations of justice.

Excerpt from the Introductory Law to the Judicature Act of January 27, 1877 (Imperial Law Gazette, p. 77)

Section 23 [Legal Process Regarding Judicial Administrative Acts] (1) Upon request, courts of record will meet their decision with respect to the legality of orders, rulings, or other measures pronounced by judicial authorities for the settlement of individual cases in the field of civil rights, including commercial law, civil proceedings, voluntary jurisdiction, and criminal justice. The same provisions apply in the case of orders, rulings, or other measures taken by enforcement authorities in executing a young offender sentence, detention of juvenile delinquents, and pretrial detention, as well as imprisonment and measures taken for the sake of correction and security, such as are implemented outside judicial enforcement.

(2) A petition for a court ruling may include a request for commitment on the part of judicial and enforcement authorities to issuing a decree regarding a rejected or omitted administrative act.

(3) Insofar as courts of record may already be called upon on grounds of other provisions, the matter rests.

Magistrate's Office

Date:

Telephone:

Application for the Recognition of a Foreign Ruling in Marital Causes Pursuant Article 7 of the Family Law Alteration Act

Applicant: Last Name; birth name, if applicable; first name; part of name, if applicable; academic degree, if applicable; occupation, city & address where residing; personal I.D.

Marriage date and location; magistrate registration #

Husband: Family name; birth name, if applicable; first name(s)

Wife: Family name; birth name, if applicable; first name(s)

Court decision regarding annulment or dissolution of marriage; file reference; date of res judicata/ miscellaneous grounds

I hereby request determination to the effect that this foreign decision meets the required legal criteria. Following are my answers to questions stated below:

1. Nationality; how obtained; eligibility for asylum or status, according to the Geneva Convention Regarding Refugees

a) at the time of marriage

b) at the time the foreign ruling was passed

c) Currently

2. Birth date and -location

3 .Current name (first & family name)

4. Information about habitual residence (i.e., location considered to be the center of existence) (Mailing address & telephone #)

e.g. by birth, legitimation, marriage, naturalization, declarations at the time of marriage. Persons with multiple nationalities must list all of them; persons who were granted asylum or refugees must state the dates of recognition as such; in the absence of proof of these data, describe on a separate sheet each reason which is important for the assessment. [UNLESERLICH] from the former USSR , former Yugoslavia, as well as former Czechoslovakia must state all countries of their successive residence.

b) Habitual residence at the time of proceeding abroad

c) Spouses' last common residence prior to court ruling .

5. Did either spouse remarry? If so - when and where? Submit proof. .

6. Did either spouse pass away? If so - when and where? Submit proof

7. Does the copy containing the ruling show an entry of res judicata? If so, please state date of res judicata.

8. Is there any other proof about the inadmissibility of further appeals? (e.g. certificate from a court; proof of entry in a foreign book of vital statistics w/translation attached.) Divorce decrees in countries like Belgium, Italy, the Netherlands, must be entered into a book of vital statistics in order for the divorce to become effective, i.e. a record entry could be proven. Re: the former USSR and its successor states: Was the marriage dissolved before the Magistrate by mutual agreement, or was the record entry preceded by a court action?

9.

a) When did the spouses first separate?

b) Actual circumstances leading to the marriage breakdown.

10.

a) Did the husband, against whom the foreign proceeding was initiated, make any statement regarding his spouse's petition?

b) If the spouse made no statement, When and how did he learn about the foreign court proceeding? (by service of the complaint. Please state the method of service; see above)

11. [erste Zeile abgeschnitten] If not, state reason.

12. Was recognition of the foreign ruling previously applied for with a different authority? If so, where?

13. Was a petition for divorce or annulment of marriage filed with German or other foreign court (authority) filed. If so, when and with which court? (Please attach decree or, if case is still pending, file reference number.)

14. Purpose of this application for foreign recognition? When and where will the intended remarriage take place?

15.

a) Applicant's income and financial circumstances ; if there are neither income nor assets, please state source(s) of subsistence. (Please attach documentary proof, e.g. statement of earnings)

Monthly net income: DM

Assets: DM

b) Applicant's obligation to provide support (e.g. to their children)

Person(s) entitled to support:

Monthly payments: DM

The aforementioned information is given voluntarily and merely serves to assess the chargeable fee. The fee will be contingent upon applicant's the financial circumstances. You will describe any special circumstances which may impair your economic capacity on a separate sheet. In the absence of any information, the maximum fee may be charged.

I am aware of the fact that I will be charged a fee from DM 20 to DM 800. It may be reduced or waived solely out of consideration for my circumstances. A fee may be charged, even if my application is rejected or withdrawn.

I hereby certify that I provided the above information to the best of my knowledge and belief.

I have been advised that any recognition ruling passed by the Regional Administration of Justice will cover only the decree regarding dissolution or annulment of marriage and does not extend to decisions, e.g. support payments, parental custody over children from the marriage , or use of name.

// Marriage Certificate referring to the dissolved or annulled marriage (as a substitute, spouses' birth certificates)

// Notarized copy of -- excerpt from Family Register regarding the dissolved or annulled marriage

// Marriage Certificate of my former spouse's new marriage; if applicable, my former husband's death certificate

// Complete counterpart of the foreign ruling, including note of res judicata and possibly a statement of facts referring to reasons for the divorce

// Proof of record entries from countries which require a record entry in order for the ruling to take effect.

// Complaint underlying the foreign proceeding or any other proof regarding the grounds for ruling, insofar as they, are not set forth under the law governing the country to whom the acknowledging court belongs.

// Translations of all foreign-language documents, prepared by a (recognized) translator.

// Power of attorney in writing (if this application) is completed by an authorized person)

// Applicant's income certificate

// Proof of Citizenship

//

Read out loud, approved, and signed

Applicant

For the Magistrate's Office

Original submitted, including _____ attachments:

Location, date

For the Magistrate's Office

Article 7, section 1, §§ 2 & 2 a, of the Family Law Alteration Act determine jurisdiction:

The Administration of Justice of the country where either spouse maintains his/her habitual residence, exercises jurisdiction. Regional governments may rule to assign jurisdiction belonging to the Regional Administration of Justice under this law, to one or more Presidents of Regional Appeals Courts. Regional governments may assign authority to Regional Administrations of Justice.

If neither spouse habitually resides in Germany, jurisdiction will belong to the Administration of Justice where another marriage is tentatively planned. Administration of Justice may demand proof of the marriage having been filed. In the absence of any jurisdiction, the Administration of Justice in Berlin will exercise jurisdiction.

Gemäß § 183 Abs. 1 Nr. 1 ZPO kann die Zustellung nach Amerika durch Einschreiben gegen Rückschein erfolgen.“

Es weist darauf hin, daß das Bundesministerium der Justiz davon ausgeht, daß die Übersetzung von Schriftstücken, die gemäß § 183 Abs. 1 Nr. 1 ZPO postalisch in die USA zugestellt werden, grundsätzlich entbehrlich ist. „Dies entspricht dem Haager Zustellungsübereinkommen, welches keine zwingende Übersetzung vorschreibt und ist in § 25 Abs. 2, S. 1 ZRHO niedergelegt.“

Soweit das Arbeitsgericht.