DEVELOPMENTS

Book Review – Hopt, Kulms and von Hein's *Rechtshilfe und Rechtsstaat. Die Zustellung einer US-amerikanischen class action in Deutschland* (2006)

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[Book Review: Klaus J. Hopt/Rainer Kulms/Jan von Hein, *Rechtshilfe und Rechtsstaat. Die Zustellung einer US-amerikanischen class action in Deutschland*, Mohr Siebeck, Tübingen 2006, ISBN 3-16-148456-8, pp. 199, € 49,00]

The somewhat pompous main title of this book, "Judicial Assistance and the Rule of Law", indicates that its actual subject – the service of process in Germany of a United States class action – has moved beyond the technicalities of procedural law into the realm of politics and more specifically, examines a clash of legal cultures. Within some German legal circles, there is currently a widespread opinion that American courts are basically out of their minds and that therefore every possible effort has to be made to reduce the reach of their power.[1] In this climate, this book is refreshing, in that it presents a solid legal analysis of the problems in transnational litigation rather than having a discussion based on stereotypes and prejudices. This academic diligence is no surprise, as the authors work at Germany's most prominent research institution in this field, the Max Planck Institute for Comparative and International Private Law in Hamburg.

The book is a welcome by-product of the *Napster* litigation, which was brought before the *Bundesverfassungsgericht* (Federal Constitutional Court) in 2003. In these proceedings, the Court asked the Max Planck Institute for a legal opinion which led to the present book. The case revolved around the German publishing house Bertelsmann AG that had decided to expand its activities to global markets, including the U.S. market. Bertelsmann, headquartered in the German provincial town of

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[1] *See, e. g.*, SCHÜTZE, DIE ALLZUSTÄNDIGKEIT AMERIKANISCHER GERICHTE (2003).

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Gütersloh, had grown from selling more or less sophisticated books through a 'book club' distribution scheme into a major player in the German media market. During the internet bubble era in 2000, Bertelsmann tried to enter the world market in music downloads through investing heavily in the "Napster" file-sharing platform. An unintended consequence of this investment was that a group of plaintiffs, including music publishers and songwriters, launched a billion-dollar class action against Bertelsmann AG in the U.S. District Court for the Southern District of New York.

Service of process regarding this action was initiated according to the Hague Service Convention.[2] Since the Bertelsmann employees in Gütersloh refused to accept the service of process, litigation started before German courts with regard to the legality of the service of process. Bertelsmann argued that service of process should be rejected on the basis of Art. 13 of the Hague Service Convention which allows the state addressed for service to reject such service if it is found to infringe upon the state's "sovereignty or security". In 2003, the Federal Constitutional Court found this argument to be not without merit and granted an interim order against the service of process.[3] A final decision was never made, since Bertelsmann withdrew its application after the case continued before U.S. courts with service of process effected in the United States. Later, the case was settled with a payment by Bertelsmann of approximately sixty million dollars (USD).[4]

What remains is an ongoing discussion – and the present book. In its first part, it describes the legal and empirical reality of American class actions. Although this has been done before in several German studies,[5] these 70 pages are a very useful "class actions in a nutshell" for German readers. They also serve as a reliable up-

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[2] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 15 November 1965, UST 361, 1969 WL 97765.

[3] *Bundesverfassunsgericht* (BVerfG) (Federal Constitutional Court), 25 July 2003, 108 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVERFGE) 238; 58 JURISTENZEITUNG (JZ) 956 (2003); 56 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2598 (2003); 24 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1625 (2003). For a comment, *see* Bettina Friedrich, *Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages Suit*, 4 GERMAN LAW JOURNAL (GLJ) 1233 (2003).

[4] For an English language account of the developments leading to the settlement as well as the pertinent German case law, s*ee* Jan von Hein, *Recent German Jurisprudence on Cooperation with the U.S. in Civil and Commercial Matters: A Defense of Sovereignty or Judicial Protectionism? in* CONFLICT OF LAWS IN A GLOBALIZED WORLD – ESSAYS IN MEMORY OF ARTHUR TAYLOR VON MEHREN (Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein eds., *forthcoming* 2007).

[5] *See*, *e.g.*, HILKA SCHNEIDER, CLASS ACTIONS – RECHTSPOLITISCHE FRAGEN IN DEN USA UND ANERKENNUNG IN DEUTSCHLAND (1999); STEPHANIE EICHHOLTZ, DIE US-AMERIKANISCHE CLASS ACTION UND IHRE DEUTSCHEN FUNKTIONSÄQUIVALENTE (2002).

date to prior studies in the German language since they include the 2003 reform of the Federal Rules of Civil Procedure (FRCP), most importantly the revised version of rule 23, the 2005 Class Action Fairness Act[6] and the development of the case law on punitive damages since *State Farm v. Campbell*.[7]

One of the questions which the Federal Constitutional Court asked the Max Planck Institute was a socio-legal one: Is there a "class action industry" in the sense that these procedures are used and abused to blackmail corporate defendants? In the book, the authors survey the relevant U.S. discussion and conclude that although there is potential for abuse, there are also legal instruments in place in American law which can be used to protect defendants from being blackmailed. The authors stress that the American class action and practice of punitive damages can only be adequately understood in the context of the American idea of "regulation through litigation". The subjective interests of the plaintiff and his attorney are used as a tool to enforce the objective legal rules. While this concept may seem alien to a modern-style bureaucratic European state, it should be added to the authors' analysis that the roots of this concept can be found at the core of European legal tradition, namely in the *actio popularis* of classical Roman law. Although this was an individual action and not a representation of a certain group, it also included punitive and non-compensatory damages. It entrusted the enforcement of important legal rules in the hands of every citizen. Therefore, "regulation through litigation" can be seen to be not a Yankee invention but an ancient European legal tradition.[8]

In the main part of the book, the authors examine the interpretation of Art. 13 of the Hague Service Convention and its consequences on American and German procedural law. With convincing arguments, they reject the proposition that in a possibly abusive class action, the mere service of process on the defendant could constitute an infringement of "sovereignty or security" of the defendant's home country. Instead, they interpret the term "sovereignty" mainly as "judicial sovereignty" which may be in danger only in narrow circumstances. According to the authors, examples could include a damages action against a judge of the country in which service is sought which is based on the judge's judicial activities. Another example provided is an anti-suit injunction directed against proceedings in the country addressed for service.

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[6] Class Action Fairness Act (CAFA) of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

[7] *State Farm Mutual Auto Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).

[8] For a detailed account *see* AXEL HALFMEIER, POPULARKLAGEN IM PRIVATRECHT (2006).

The other relevant term in Art. 13, the state's "security", is also narrowly construed by the authors. Security could be at stake if the content of the document which is to be served would undermine local security. The authors point to a 19th century discussion at the Hague Conference regarding the service of documents containing "anarchist writings", but these have become rare nowadays. However, the authors also look at the current worldwide reality and propose to deny service of process in cases where it is obvious that the proceedings to be initiated will not conform to minimum fair trial standards as they are codified in Art. 6 of the European Human Rights Convention[9] and in Art. 14 of the International Covenant on Civil and Political Rights.[10] According to the authors, service of process should also be denied if the substantive goal of the proceedings violates internationally accepted human rights, for example in an action to enforce slavery. This is a sensible proposal which would synchronize the Hague Service Convention with *ius cogens* principles that are generally accepted in the international community. With regard to the Bertelsmann case, the authors concede that a fair trial can in general be expected before American courts, especially after the awarding of punitive damages has been regulated and possibly restricted in *State Farm v. Campbell*.[11]

Therefore, service of process for an American class action including punitive damages must be effected in Germany and Art. 13 of the Hague Service Convention is not applicable. It is important to point out that this does not mean that a verdict in such a case may be enforced in Germany without problems. On the contrary: One of the main arguments the authors make is that Art. 13 of the Hague Service Convention sets a much narrower standard than the general *ordre public* which must be respected when it comes to the recognition and enforcement of foreign judgments. This *ordre public* is concerned with the results of the foreign litigation which then are tested against core principles of the country in which recognition or enforcement is sought. At the stage of service of process, such results simply do not yet exist. If one were to apply the *ordre public* standard at this stage, the court in the country where service is sought would have to determine – or guess – the outcome of the intended litigation in the foreign court. Such a pre-trial on the merits before service of process is effectuated cannot be in the interest of transnational legal cooperation. It is also a contradiction to the internal German law of civil procedure where a *Klageschrift* (statement of claim) is served on the defendant without any checks on its merits.

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[9] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 312 UNTS 221.

[10] United Nations International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

[11] *See*, *supra*, note 7.

In the *Napster* case, Bertelsmann AG indeed did not have to fear the enforcement of an American billion-dollar punitive damages verdict on German territory. This is because the Federal Court of Justice (*Bundesgerichtshof*) had decided in 1992 that a U.S. damage award can be enforced in Germany only insofar as the damages are of compensatory nature – albeit including compensation for pain and suffering and for lawyers' costs and fees.[12] While this may seem inconsequential in view of the same court's later decisions which apply punitive elements especially in German tort law on invasions of privacy, the 1992 decision on the non-enforcement of punitive damages is still good law in Germany. As a result, Bertelsmann's lawyers did not argue that their client feared enforcement of a U.S. punitive damages judgment in Germany, but explained in their application to the Federal Constitutional Court that their client actually feared enforcement of a possible judgment against its substantive assets in the United States. Thus, Bertelsmann tried to conquer the U.S. market in music downloads, but at the same time did not want such activities to be judged by U.S. courts nor to endanger its U.S. assets. Or, as we say in Germany: Wash my fur but please don't get me wet.

A similar strategy has been used by other German companies, such as the pharmaceutical giant Boehringer Ingelheim GmbH & Co. KG, whose lawyers recently managed to convince the *Oberlandesgericht* (Appeals Court) in Koblenz that Boehringer should not be served with process regarding a U.S. class action for treble damages in antitrust matters.[13] The Koblenz court did in fact equate Art. 13 of the Hague Service Convention with the recognition *ordre public* and went on to speculate about the merits of the case, such as whether certain actions of the defendant were legal under U.S. competition law. Without asking for any expert advice on foreign law, the Koblenz judges came to the conclusion that Boehringer's activities in North America were perfectly legal and therefore a trial in the United States could only be abusive.[14]

The Koblenz court also raised another argument regarding the applicability of the Hague Service Convention. The court held that a class action for treble damages was a criminal or public law case, and not a case "in civil and commercial matters" as required by the Convention. Unfortunately, Hopt, Kulms and von Hein do not deal extensively with this argument which had already been raised before by some

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[12] *See Bundesgerichtshof* (BGH) (Federal Court of Justice), June 4, 1992, 118 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN (BGHZ) 312, at 334.

[13] *Oberlandesgericht* (OLG) (Appeals Court) Koblenz, June 27, 2005, 26 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 25 (2006).

[14] OLG Koblenz, *supra*, note 13.

German academics.[15] Sticking to good scientific practice, the authors do not answer questions which they were not asked. However, if one follows their line of argument, the decision of the Koblenz court seems clearly wrong. "Civil and commercial matters" are those in which private parties dispute about their private law rights against each other and not about their rights as citizens vis-à-vis the government. The fact that public interest considerations shape the content of the applicable law is inherent in all positive law and becomes only more visible in the concept of regulation through (private) litigation. The mere fact that the public interest – as specified by the legislator or the Common Law judge – is relevant in the law of damages does not turn every American tort process into criminal or administrative proceedings. In the *Boehringer* case, the plaintiffs have appealed to the Federal Court of Justice where the case is still pending.[16]

The battles fought by Bertelsmann and Boehringer in the area of service of process are also battles about the adequate regulation of globalized economic activity. Instead of regulation through litigation, these global economic actors aim for globalization without regulation. For the legal actors, in the absence of global legal institutions, there is no choice but to accept litigation before national courts, even if such local litigation may have global consequences. In this sense, the book's far-reaching title is indeed justified: The authors make a valuable contribution to uphold the rule of law in the face of almost unregulated economic globalization.

[15] HANNO MERKT, ABWEHR DER ZUSTELLUNG VON "PUNITIVE DAMAGES"-KLAGEN (1995); JULIANA MÖRSDORF-SCHULTE, FUNKTION UND DOGMATIK US-AMERIKANISCHER PUNITIVE DAMAGES (1999).

[16] No. IV AR (VZ) 3/05, referred to the Federal Court of Justice by the OLG Koblenz, *supra*, note 13. For an account of the *Boeringer* case and the decision of the OLG Koblenz, *see* von Hein, *supra*, note 4.