TRANSLATION OF BUNDESGERICHTHOF[1] DECISION OF 2 DEC. 1992

11. No cure for service of process defects under Hague Service Treaty[2]

ZPO §§328 I Nr. 2, 187; HZÜ Art, 10

1. Where the foreign court was bound by the rules of the Hague Service Treaty[3], defective service of process on the German defendant cannot be viewed as cured when process was actually received (here: by certified mail without translation).

2. The ground for denying recognition as contained in §328 I Nr. 2 ZPO[4] is not made inapplicable when the defendant, after gaining knowledge of the foreign decision, did not seek a legal remedy in the country issuing the decision.

BGH, Ruling of 2.12.1992 -XII 64/91 (Frankfurt)

Background: The parties, both having German citizenship, were married on 27.04.1971 in Germany. In 1975 one child was born of the marriage. They lived in South Carolina/USA until the wife, either in 1985 or 1987 came to Germany, while the husband stayed in the US. In 1987 the husband obtained the divorce from a court of the State of South Carolina. The complaint together with a summons was sent by mail (registered) to the wife on or before 24.06.1987 in Germany. She did not appear there for a oral hearing on 9.11.1987 and was also not represented. She also otherwise ignored the lawsuit under the assumption that she could not be divorced in her absence. The South Carolina court recognized in a decision dated 10.11.1987, among other things, the divorce. In March 1989, the wife obtained through a German court the divorce. In January of 1990, the husband applied for, pursuant to Article 7, para. 1 of the FamRÄndG[5], with the [German] judicial authorities the recognition of the divorce per the decision of 10.11.1987. In a decision from the Justice Ministry of Hessen, the application was denied because service of process to the wife was allegedly defective (§328 I Nr. 2 ZPO). The husband then applied pursuant to Art. 7 §1 IV FamRÄndG for a judicial decision, with which he pursued his recognition effort.

The OLG[6] Frankfurt [appeals court below] shared the view of the judicial authorities that the decision of the foreign court, due to §328 I Nr. 2 ZPO, could not be recognized. The court viewed itself though as constrained not to deny the husband‘s application due to a decision by the BayObLG [Bavarian high appeals court] from 29.11.1974, (cite omitted), in which the view is taken that a defect in service of process is cured where the German defendant actually receives the document [complaint]. The court [OLG Frankfurt] therefore transferred the matter pursuant to Art. 7 §1 VI 4 FamRÄndG in conjunction with §28 II FGG to the BGH for a decision. The BGH is, as was the court below, of the view that recognition of the American divorce decision is to be denied.

From the Rationale: II. 1. The ruling shows that the OLG would have reached another decision if it had followed the precedent, which the BayObLG in a recognition proceeding under Article 7 §1 FamRÄndG followed, and upon which [the precedent] the decision is based. The court‘s view of the legal issue in question is binding.

2. The validity of the transfer is not affected by the fact that the obligation to transfer under Art. 7 §1 VI 4 FamRÄndG was first enacted on 01.07.1977, while the case, which the OLG does not want to follow, was issued before that time (cites omitted). The same applies to the circumstance that §328 I Nr. 2 ZPO, was amended effective 01.09.1986 (cites omitted). By applying both the old and new version of the regulation, the transfer question is presented in the same manner, so that as before the need for a higher instance clarification exists.

3. The legal question at issue has not been previously decided by the BGH. The transfer order of the BGH of 26.01.1988 (cite omitted), which concerned the same question, led to no decision, because the court order of 27.06.90 (cites omitted) did not need to address it. Concerning the scope of Art. 27 Nr. 2 EuGVÜ[7], with which §328 I Nr. 2 ZPO comports, the BGH had already decided after the predecessor transfer to the EuGH [Court of Justice of the European Communities] that the cure possibility for defective service of process is to be decided pursuant to the law of the state from which the decision was issued, including its relevant international treaties. (Cite omitted) There, the court stated inter alia that in the "Convention On The Taking Of Evidence Abroad In Civil Or Commercial Matters" of 15.11.65 (HZÜ, BGB1 II 1977,1452) a cure possibility was not provided for. That, however, does not make the decision concerning the transfer question for the scope of §328 I 2 ZPO superfluous.

III. This court which per the valid transfer concerning the husband's application for a judicial opinion has to make a decision (cites omitted), reaches in conformity with the judicial authorities and the OLG [Frankfurt] the result that the divorce decree in the judgment of 10.11.1987 is not to be recognized.

1. Absent a higher international rule, the recognition prerequisites are decided according to §328 ZPO, in the version in force since 01.09.1986, which was already in effect at the time of the foreign proceeding. Under para. 1, number 2 of the regulation, recognition is inter alia precluded when the defendant does not participate in the proceeding and argues that the document that commences the proceeding was not properly served or not timely served, so that he could defend himself.

a) As relevantly described in the transfer order, the wife did not participate in the divorce proceeding before the South Carolina court. She purposively avoided making any reaction to the court, because she wished in that way to block a divorce. Also the attorney hired by her to put in order the financial matters with her husband did not appear before the court. Accordingly, there was no appearance (cites omitted).

b) In the recognition proceeding the wife affirmatively argued that she had not entered an appearance in the foreign divorce proceeding. She would like to obtain a divorce under German law, which she views as advantageous. That in March 1989 she applied for a divorce before a German court cannot be interpreted as a waiver of the protection afforded under §328 ZPO.

c) The document starting a proceeding, here the complaint and summons, was not properly served upon the wife. This question [or proper service] is to be decided in the recognition proceeding without effect upon the opinion of the foreign court. Defects

exist in two regards: Both the United States and the Federal Republic of Germany entered the Hague Treaty, the first in 1969, the latter in 1979 (cite omitted). So far as the court of South Carolina, which the husband called upon, caused delivery[8] of the complaint and summons to the wife living in Germany, it must abide by the rules of this treaty. (cites omitted) Here, it [the treaty] does not allow the documents to be sent directly by mail. The possibility of sending court papers directly by mail to persons located abroad, as contemplated in the treaty (Art. 10, letter a, HÜZ), exists as defined in the regulation, only "where the designated state does not declare objection." The Federal Republic of Germany has properly objected (number 4, page 3 of the Notice from 21.06.1979 in the Federal Law Register1 II, 779), which is why it expressly states in the treaty's implementing law of 22.12.1977 (cite omitted) in §6, page 2 that: "Delivery under Art 10. of the treaty shall not take place."

It also concerns here a formal delivery within the meaning of Art 5I HZÜ [the treaty]. The Federal Republic of Germany declared in number 1 of the referenced notice of 21.06.1979 that such a delivery is only permissible when the document to be delivered is in German or translated into this language. According to the credible statements of the wife, which the husband did not contradict, the documents at issue were delivered to her only in the language of the court [English]. Therein is also a defect, which makes service invalid. (Cites omitted)

d) The question as to whether the wife had knowledge of the complaint within sufficient time to defend herself is not relevant, since service was already defective. Recognition requires both proper service of process and timely delivery of the complaint. For the similarly worded Article 27 Nr. 2 EuGVÜ, the EuGH has already decided with decision from 03.07.1990. (Cites omitted) '328 I Nr. 2 ZPO can be interpreted much like Art 27 Nr. 2 EuGVÜ (cites omitted).

2. Whether a service of process defect can be cured when the addressee receives the document, is interpreted variously under §328 I Nr. ZPO. In addition to the BayObLG the following courts support such an interpretation of §187 S. 1 ZPO[9]: (Cites omitted)

This court shares the interpretation of the court below.

The decision of the BayObLG, which gave rise to this transfer, was issued before the Federal Republic of Germany entered the Hague Service Treaty. To the extent it is argued that the legal practice in the United States holds official delivery to other countries as generally unnecessary, that argument is according to latest reports no longer accurate; the supremacy of the treaty is accepted in relation to the contracting countries, although numerous procedural rights of the individual countries allow a plaintiff to send the complaint directly with certified mail. (Cites omitted) The view that the validity of service in Germany is to be interpreted under German procedural law as the lex fori [law of forum] (and also under §187 sentence 1 ZPO) has been overtaken. Service of the complaint is more a part of the foreign court proceeding, so that the question of its validity and of a possible cure is to be judged according to its procedural law, including relevant international treaties. This view has been persuasively represented by the EuGH in the referenced cased from 03.07.1990 (cites omitted); so that it can be adopted without reservation.

Many advocates of a cure through actual receipt see in §187 S. 1 ZPO a general legal principle of procedural law, which holds that service defects should be considered cured as soon as the addressee actually receives the document. This court does not see a sufficient basis for this view, when in transactions between countries, as here, binding declarations in international law prevent this. (Cites omitted) In such cases national cure principles cannot be followed. The Federal Republic of Germany has through the referenced objections contained in the public notice to the Hague Service Treaty established that official service on the German defendant via mail and without translation into the German language is not permissible. At issue is the concern for orderly international legal transactions, which goes beyond safeguarding the defendant's, who is located in Germany, right to be heard. (Cites omitted) These concerns do not have less weight than the cases, including domestic ones, in which a cure is barred, namely be setting an emergency deadline, (cite omitted) or an absolute deadline (cites omitted). To force the defendant, if necessary, to obtain a translation of the complaint (cite omitted), could lead to an erosion of the protection, which the Federal Republic of Germany via its declaration on this point intended. What also does not favor permitting a cure is that a violation of significant formalities of international legal transactions would go without sanction, if service reaches the defendant in any way. This contravenes the desirable goal of having uniform application of the treaty in the contracting countries.

It is only of consequence in the present case whether and to what extent the binding procedural law of the adjudicating South Carolina court permits a cure for service of process defects. It is not relevant in this respect if the law for service of process to foreigners within the territory of the United States or to unknown residences contains a rule corresponding to that found in §187 S. 1 ZPO. Because process was served to the wife living in Germany, who has a known address, the Hague treaty applied, not only concerning the formalities, but also for the question of a cure for jurisdictional defects. (Cites omitted) The BGH has already decided that this treaty, especially Article 15 thereof, does not foresee a cure for service of process defects. (Cites omitted) We share this view. Accordingly, the question of whether there is a cure via receipt is to answered negatively; the question is to be answered according to the supremacy of the treaty in all contracting countries independent of domestic law.

3. The view is also advanced that the basis for denial of §328 I Nr. ZPO is inapplicable when the defendant, among other things, had the opportunity with respect to the improperly served complaint to file an appeal against the decision in the country where the decision was issued. (Cites omitted) An express embodiment of this view is contained in the German-Dutch Service Treaty from 30.08.1962 in Article 2, letter c Nr. 2.2 (BGB1 II 1065, 27). Therein the objection of the untimely or defective service is not relevant, when the plaintiff shows that the defendant did not seek legal redress against the decision, although the defendant had knowledge of the decision. Whether this represented a general principle of international recognition of judgments (cites omitted), was the subject of a transfer from the BGH to the EuGH. (Cites omitted) In this transfer the 9th panel [of the BGH] in agreement with prevailing opinion made it known that such a legal principle would not be accepted. (Cites omitted) The EuGH also ruled upon the transfer in its decision of 12.11.1992 (cite omitted) in the same sense concerning the scope of Art.27Nr. 2 EuGVÜ. There the court reasoned that the

requirement of valid and timely service is determinative as of the time the proceeding commences. The possibility of subsequently being able to seek legal redress against the decision is not the same, from a procedural standpoint, as doing so prior to issuance of the decision. Therefore, recognition is to denied when service of process, irrespective of the circumstance that the defendant who did not appear in the lawsuit had knowledge of the lawsuit and undertook no legal redress. This court shares this view for the scope of §328 I Nr. 2 ZPO. The ground for denying recognition is still applicable because of the circumstance that the wife, after gaining knowledge of the divorce judgment of 10.11.1987, did not undertake legal redress per the procedural law of the judgment state.

Endnotes:

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1. ABundesgerichtshof@, means the Federal High Court of Justice, and is abbreviated as ABGH@.

2. This heading was written by the official reporter of the decision. The reporter is called “Neue Juristische Woche” and the case is cited as NJW 1993,598.

3. The German title of the treaty is AHaager Übereinkommen über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke im Ausland in Zivil-oder Handelssachen@ and abbreviated in this decision as AHZÜ.@ The English version of the title is the AConvention On The Service Abroad of Judicial And Extrajudicial Documents In Civil Or Commercial Matters@, as adopted at The Hague on February 10, 1969, and entered into force in the United States of America on February 10, 1969.

4. This provision of German law entitled ARecognition of Foreign Judgments@ states as follows:

(1) Recognition of a foreign court judgment is precluded:

2. if the defendant, who did not make an appearance and objects on that ground, could not defend himself because either he did not receive the document that commenced the proceedings in a proper manner, or because he was not served in time.

5. This abbreviation stands for AFamilienrechtsänderungsgesetz.@ In English, this means Family Alteration Act.

6. AOLG@ stands for the Oberlandesgereicht, which translates as Regional Appeals Court.

7. AEuGVÜ@ stands for AÜbereinkommen der Europäischen Gemeinschaft über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen@, which means the Treaty of the European Community on

the Judicial Jurisdiction and the Enforcement of Judicial Decisions in Civil and Commercial Cases.

8. In Germany, service of the complaint is undertaken by the court. The BGH seems to be presuming here that American practice is the same.

9. This abbreviation refers to the code of civil procedure, known in German as Zivilprozeßordnung. Paragraph 187 provides for the possibility of a cure where the addressee actually receives the document.

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