

**COMPARATIVE STUDY OF "RESIDUAL JURISDICTION"
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:**

GERMANY

PREPARED BY:

**MICHAEL MOLITORIS & AMELIE ABT
NOERR STIEFENHOFER LUTZ
BRIENNER STRASSE, 28
80333 MÜNCHEN – GERMANY**

(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

The main legal source of the Rules of Jurisdiction in Germany in civil and commercial matters, apart from the Brussels I Regulation and Brussels/Lugano Conventions, is the German Code of Civil Procedure [Zivilprozessrecht, ZPO]. The governing provisions on local jurisdiction are set out in §§ 12 – 40 ZPO. Throughout the Code there are other provisions which in many cases establish exclusive jurisdiction (§§ 64, 603, 606, 764 ZPO), the same applies to numerous other laws.

2. Specific Rules (or Not) for Transnational Disputes

In general, there are no jurisdictional rules specific to transnational disputes. Rather, international jurisdiction of German courts is based generally on the provisions of the ZPO on local jurisdiction so that on principle a German court which has local jurisdiction will also have international jurisdiction. Only in exceptional cases is international jurisdiction explicitly regulated, e.g. in family law (§§ 606a, 640a ZPO). Nor does German procedural law distinguish between national and foreign plaintiffs (*Rauscher/Mankowski*, EuZPR, Art. 4 Brüssel I-VO, note 7). Consequently, a plaintiff with his/her domicile outside the EU is able to avail him/herself of the extensive jurisdiction options under the ZPO.

3. Specific Rules (or Not) for Article 4(1) Jurisdiction

The general rules mentioned in para. 2 above apply here as well (*Hüßtege*, in: Thomas/Putzo, ZPO, 27th ed. 2005, Art. 4, Brussels I Regulation).

4. Influence of EU Law

The application or interpretation of national jurisdiction rules is generally not influenced by the Brussels I Regulation or case law of the European Court of Justice. Rather, the interpretation adopted is that a choice is made with regard to local jurisdiction since the same legal provisions are concerned.

5. Impact of Other Sources of Law

As regards the provisions on international and local jurisdiction, the principle of interpretation in accordance with the German Constitution applies. This means that every legal provision has to be interpreted such that its outcome does not conflict with the Constitution, and with the fundamental rights in particular. However, this principle does not play a significant role in the ZPO since the majority of its provisions do not affect fundamental rights.

German law is highly consistent with international law. General provisions of international law constitute part of German federal law according to Art. 25 of the German Constitution

[Grundgesetz, GG]. According to common opinion, international law does not permit a country to claim international jurisdiction for all legal disputes. A minimal connection with the country has to exist in order to establish the jurisdiction of that country. A "recognized genuine link" is required (*Geimer*, Internationales Zivilprozeßrecht, 2nd ed. 1993, note 126 et seq.) However, the requirements made of such a link are not overly high so that as a rule they do not play a major role since usually such a "genuine link" will be found to exist.

6. Other Specific Features

The connecting factor for international jurisdiction is the principle of dual functionality, according to which local indicates international jurisdiction, i.e. where both local and international jurisdiction are regulated in the ZPO.

International jurisdiction may also be established by a plea made by the defendant to which no objections are raised, § 39 ZPO. However, failure to raise objections only establishes jurisdiction provided there is no conflicting exclusive international jurisdiction.

International jurisdiction is reviewed ex officio. In the event of dually relevant facts, i.e. facts which establish jurisdiction while at the same time concerning the substantive claim as such, a conclusive statement by the plaintiff will suffice to obtain international jurisdiction.

The prerequisites for international jurisdiction have to exist at the time of the last hearing in the trial court.

If a German court has international jurisdiction, it also has unrestricted jurisdiction for preliminary questions; however, the prerequisite for taking into account a set-off within proceedings is that Germany has international jurisdiction for the counter-claim made in court.

International jurisdiction of German courts extends beyond the written provisions in a number of cases. For example, in a number of cases emergency jurisdiction is recognized so as to avoid a denial of justice to the detriment of the plaintiff. Likewise, jurisdiction is recognized in cases where the judgment of the court having jurisdiction from the German point of view would not be recognized or where the foreign court declines jurisdiction.

International jurisdiction may also be rejected in certain cases, e.g. where jurisdiction is obtained surreptitiously or where there is an inherent lack of jurisdiction (see *infra*).

The case law on international procedural law follows the interpretation methods that are generally recognized in Germany.

7. Reform

The discussion of international jurisdiction in Germany at the present time only concerns European regulations. There is hardly any discussion on considerations to amend national law as such.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

State treaties regulating international jurisdiction in certain areas and covered by EU Regulation No. 44/2001 (Brussels I Regulation) are the following:

- Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. Applies in relations with contracting states of the Convention which are not EU Member States (Iceland, Norway, Switzerland);
- Treaty between Germany and Israel on the Mutual Recognition and Enforcement of Judgements in Civil and Commercial Matters of 20 July 1977;
- Treaty between Germany and Norway on the Mutual Recognition and Enforcement of Judgments and other Awards in Civil and Commercial Matters dated 17 June 1977 (application is subject to restrictions according to Art. 55, 56 of the Lugano Convention);
- Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations of 2 October 1973;
- European Convention on Jurisdiction and Enforcement of Decisions in Civil and Commercial Matters dated 27 September 1968. Applies only in relations with Denmark pursuant to Art 1(3), Brussels I Regulation;
- Treaty between Germany and Tunisia on Legal Protection and Legal Assistance, the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Commercial Arbitration dated 19 July 1966;
- Hague Agreement on the Jurisdiction of Authorities and the Law applicable in respect of the Protection of Minors dated 5 October 1961;
- Paris Convention on Third Party Liability in the Field of Nuclear Energy dated 29 July 1960;
- Geneva Convention on the Contract for the International Carriage of Goods by Road, 19 May 1956;

- Warsaw Convention on the Unification of certain Rules relating to International Carriage by air dated 12 October 1929 and Supplementary Convention of Guadalajara of 18 September 1961;
- Treaty between Germany and Switzerland on the Mutual Recognition and Enforcement of Court Decisions and Arbitration Awards in Civil and Commercial Matters dated 2 November 1929 (applies subject to restrictions according to Art. 55 and Art. 56 of the Lugano Convention).

9. Practical Impact of international conventions with third states

Depending on the matter being regulated, the significance of the conventions varies greatly. However, if a case falls within their respective scope of application, they will be applied. In some cases the treaties are also very specific as regards the territorial scope of their application, e.g. the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960, the Geneva Convention on Contracts for the International Carriage of Goods on Roads of 1956 and the Warsaw Convention with the Supplementary Convention of Guadalajara of 18 September 1961 mentioned above. These treaties all contain specific provisions on the jurisdiction of the courts.

(C)Applicable National Rules Pursuant to Article 4 of Brussels I Regulation

10. Structure

The governing provisions on local jurisdiction are set out in § 12 to § 40 ZPO, divided into general venue (domicile, registered office), specific venue (e.g. place of habitual abode, place of establishment, place where property is located, place of performance) and exclusive venue (e.g. *forum rei sitae*). The general venue of the domicile of the defendant does not apply to complaints filed against natural or legal persons whose domicile is outside the EU. Therefore, only specific or exclusive venues apply in cases against such persons. In this respect, the specific venue based on the location of property or the subject-matter of the case pursuant to § 23 ZPO, plays an important role (cf. para. 11 below). The other venues generally depend on the nature of the claim filed.

11. General Jurisdiction

A general rule of jurisdiction is the aforementioned particular venue on grounds of location of assets pursuant to § 23 ZPO. Where lawsuits concerning property claims are filed against persons without a domicile in Germany, § 23 ZPO, provides for international jurisdiction of German courts if the person has property located in Germany. No connection is required between the matter in dispute and the extent of the defendant's property coming into question for enforcement within Germany. In addition, the question whether the assets within Germany will suffice to satisfy the plaintiff should he win the case, is also irrelevant.

Due to its very broad scope of application, § 23 ZPO has to be narrowly interpreted (BGHZ 115, 93 et seq. = NJW 91, 3093 with further references). As a matter of principle, tangible assets, claims and other property rights can be deemed assets (*Schumann*, in: Stein/Jonas, ZPO, 22nd ed. 2003, § 23 note 11). Admittedly, the primary aim of § 23 ZPO, is that property within Germany can be used for judicial enforcement, however, through the broad wording the legislature accepted that any minimal property, even property accidentally left behind, can establish jurisdiction in Germany (*Hahn*, Die gesamten Materialien zur CPO, Vol. 2 Part 1, p. 154 on § 24 CPO). For this reason, § 23 ZPO has to be restricted on the basis of the case law of the German Federal Court of Justice [Bundesgerichtshof, BGH] (BGHZ 115, 90, 95), such that the dispute has to have a sufficient national connection. The Court did not specify what criteria will determine this national connection. A number of indications have emerged in the literature. In some cases the matter depends on the registered office of the parties, on the proximity of evidence in German courts, on participation in business in Germany, or on the lack of enforcement possibilities against domestic property where foreign judgments are concerned (see *Mark/Ziegenhain*, NJW 1992, 3062, 3065). A national connection will definitely be denied if the focus of the legal relationship in dispute is clearly and evidently located in a foreign country.

According to case law so far, any item of even small value can be deemed an asset, no matter whether it is adequate to satisfy the creditor or is proportionate to the value in dispute. In contrast, in the literature the term property is to be narrowly interpreted (*Roth* in Stein/Jonas, ZPO, 22nd ed. 2003, § 23 note 13 et seq.). Items that are unattachable or of little value, which do not permit an expectation of a surplus above the costs of judicial enforcement, should not establish a venue under § 23 ZPO. Nor may the value of the item be disproportionately lower than the value of the matter in dispute (*Vollkommer* in: Zöller, Zivilprozessordnung, 25th ed. 2005, § 23 note 7-8).

In its decision of 02 July 1991 (BGHZ 115, 90 et seq.), the German Federal Court of Justice [BGH] left undecided the question whether it concurs with this opinion in the literature. In its decision of 29 October 1998 the Higher Regional Court [OLG] Celle concurred with the opinion in the literature and declined jurisdiction under § 23 ZPO, if the value of the property establishing jurisdiction is low and does not permit the expectation of a surplus higher than the costs of judicial enforcement. A decision handed down by the Higher Regional Court [OLG] of Hamburg is in the same vein (NJW RR 1996, 703).

The term "assets" in the sense of § 23 ZPO also includes items of the defendant which are subject to enforcement, i.e. enforcement of the judgment rendered against the property establishing jurisdiction has to be possible (BGH NJW 93, 2684, OLG München, NJW RR 1993, 701 ff).

Surreptitious establishment of jurisdiction is prevented by the objection of fraudulent conduct under § 242 BGB, in analogy to invocation of the venue; this applies to all venues under the ZPO. The principle of good faith set forth in § 242 BGB applies under civil procedural law as well. A recognized case constellation for application of this principle is the ban on fraudulently creating certain procedural legal situations. In individual cases a breach of good faith can limit the substantive scope of application of a provision on jurisdiction, namely where the plaintiff improperly exploits a constellation under procedural law which is in his favour (OLG Hamm, NJW 1987, 138 re. § 13 ZPO).

12. Specific Rules of Jurisdiction

Specific rules of jurisdiction against defendants domiciled in non-EU states:

a) Contract

The grounds of jurisdiction applicable in contract are the following:

The general venue according to §§ 12, 13 ZPO, is on principle the venue at the defendant's place of domicile. The defendant's nationality is not decisive so that the venue also applies to foreigners living in Germany. The general venue of legal persons is determined under § 17 ZPO, by their registered office. As a rule this is the registered office of the party as determined in the articles, or the location of the administrative headquarters (§ 17 (1), second sentence, ZPO). The general venue does not come into question for defendants without a domicile in Germany.

If a person has no domicile in Germany or abroad, the general venue under § 16 ZPO, is determined by the most recent place of residence or by the most recent domicile, in each case in Germany.

The specific venue of the place of performance also comes into question. According to § 29 ZPO, in disputes arising from contractual relations the court at the place where the disputed obligation has to be fulfilled will have jurisdiction.

The meaning of „disputes arising from contractual relations“ is broad. It includes all contracts for the performance of an obligation (*Hüßtege*, in: Thomas/Putzo, ZPO, 27th ed. 2005, § 29 note 3), the rescission of void agreements and complaints concerning a breach of pre-contractual duties to provide information (*Roth*, in: Stein/Jonas, ZPO, 22nd ed. 2003, § 29 note 5 - 8).

The place of performance is determined by the applicable substantive law, whether German or foreign law. Place of performance is not qualified *lege fori* under German law as the law applicable to the place of jurisdiction, but, rather, *lege causae*, i.e. according to the legal system applicable to the liability under German international private law (BGH NJW 1981, 2642, 2643; Geimer, Internationales Zivilprozessrecht, 5th ed. 2001, note 2005). This means that within the context of examining international jurisdiction the proper law of the contract has to be determined.

b) Tort

The grounds of jurisdiction applicable in tort are the following:

The above considerations apply to general jurisdiction at the place of domicile.

As regards lawsuits based on a tort, according to § 32 ZPO, the court in the place where the tort took place has jurisdiction. This is understood to mean the place where the tort was committed as well as the place where the results arise. However, not included is the place where the injured party sustains damage, e.g. where he is deprived of his profit.

The same applies in cases of liability for road accidents pursuant to § 20 Road Traffic Act [Strassenverkehrsgesetz, StVG].

There is no verification within the context of the examination of jurisdiction whether there was in fact a tort. Jurisdiction will be affirmed if the plaintiff presents conclusive arguments indicating such a tort (BGHZ 124, 241; Roth, in: Stein/Jonas, ZPO, 22nd ed. 2003, § 32 note 15). It is only within the context of examining the merits of the case that evidence in this respect will be obtained.

c) Criminal Proceedings

The grounds of jurisdiction applicable in actions regarding civil claims or restitution which are based on an act giving rise to criminal proceedings are the following:

Art. 403 et seq. of the German Code of Criminal Procedure [Strafprozessordnung, StPO] enables a victim of a criminal offense to claim his/her civil law damages claims within the criminal proceedings. According to § 404 StPO, the claimant may file a corresponding motion up to the end of the hearing. However, the court may refuse to decide on such a claim if examination of it would delay the proceedings (§ 405 StPO). In practice it is unusual for claims to be asserted by this route. Due to the differences in the procedural provisions in force in civil and criminal proceedings respectively, it is not beneficial for a plaintiff to pursue claims in criminal proceedings.

d) Secondary Establishment

The grounds of jurisdiction applicable in actions regarding civil claims against a defendant domiciled in a non-EU State on the basis that such defendant has an establishment, branch or agency in Germany are the following:

According to § 21 (1) ZPO, lawsuits against a person who has a place of business for the operation of a factory or a trade from where business can be directly undertaken, can be filed at the court of the place of business. A place of business is the focus of business activities which functions as a field office of the headquarters on a long-term basis. In this respect, a place of business to all appearances will suffice (*Roth*, in: Stein/Jonas, ZPO, 22nd ed. 2003, § 21 note 11).

However, lawsuits may only be filed at the place of business if they relate to the business conducted there. This means all contracts concluded or performed there (*Hüßtege*, in: Thomas/Putzo, ZPO, 27th ed. 2005, § 21 note 4).

e) Trust

As regards specific grounds of jurisdiction for trusts in actions brought against defendants domiciled in non-EU States, the following applies:

There is no legal institution of trusts under German law. Consequently, there are no specific provisions on jurisdiction in that area, rather, the general provisions apply.

For certain cases in which there would be a trust under Anglo-American law, there are specific provisions on jurisdiction. For example, according to § 19a ZPO, the general venue of an administrator in insolvency depends on the insolvency court which has jurisdiction. § 27 and § 28 ZPO, apply to lawsuits relating to a decedent's estate, according to which the court in the place of the decedent's general venue at the time of his/her death will have jurisdiction. Complaints filed by and against the executor of the estate may be filed at that venue.

f) Arrest and/or location of Property

The grounds of jurisdiction based on the arrest of property in Germany are the following:

As regards the arrest of property within the context of provisional legal protection in order to ensure judicial enforcement, according to § 919 ZPO, the court hearing the main case and the Local Court [Amtsgericht] within whose district the property to be arrested is located have jurisdiction. Due to § 23 ZPO, no differences arise, i.e. the jurisdiction of German courts arises if the property of the defendant or the property claimed in the lawsuit is located within Germany.

The following particularities apply in the area of judicial enforcement: The venues under the law on judicial enforcement are exclusive venues in the sense of § 802 ZPO, the reason being that judicial enforcement measures are acts of state so that the country of enforcement alone can decide on their admissibility.

As regards a lawsuit to prevent enforcement pursuant to § 767 ZPO, through which the plaintiff submits objections against the claim awarded in the judgment, the court of first instance has jurisdiction. For this reason, § 767 (1) ZPO establishes annex jurisdiction for German awards made.

As regards foreign judgments, on principle the foreign court will be the court of proceedings. The court which rendered the judgment enforceable is also entitled to reverse the enforceability. It is for this reason that the country which declares a foreign judgment enforceable also has jurisdiction for the *actus contrarius*, i.e. for the withdrawal of enforceability. Jurisdiction of German courts for the order of enforcement of foreign judgments is regulated in § 722(2) ZPO. For this reason the jurisdiction for complaints in order to prevent enforcement is based on § 722 (1) ZPO (*Schack*, Internationales Zivilverfahrensrecht, 4th ed. 2006, note 990). Therefore, objections against an order of enforcement can be raised before the German court pursuant to § 767 ZPO.

As regards an action brought by a third party in opposition to enforcement of a judgment, the connecting factor for jurisdiction is likewise judicial enforcement within Germany. It is of no relevance for the question of international jurisdiction where the judgment creditor or judgment debtor lives or habitually resides (*Geimer*, op. cit., note 1237 ZPO).

13. Protective Rules of Jurisdiction

Protective rules of jurisdiction that apply in actions against defendants domiciled in non-EU states for certain particular types of disputes where one of the parties appears to deserve a jurisdictional protection are the following:

a) Consumer Contracts

Consumer protection in substantive law is only partly reflected in the provisions on the jurisdiction of the courts. In German law there is no general procedural rule on jurisdiction in consumer contracts.

- (i) Consequently, a consumer may sue a businessperson in Germany if a doorstep transaction that is subject to revocation was concluded (§ 29c (1) ZPO). According to § 26 Act on Correspondence Courses [Fernunterrichtsschutzgesetz, FernUSG], there is exclusive jurisdiction at the domicile of a participant in distance learning. Where investments are made in foreign funds or securities, § 6 (2) Act on Foreign Investments [Auslandsinvestmentgesetz, AuslInvestmG] provides the investor with an additional venue at the domicile of the representative of the investment or sales company. In contrast, there is no provision regulating jurisdiction in Germany for a lawsuit filed by a consumer engaged in internet shopping, unless the venue is already established by the jurisdiction of the contract under § 29 ZPO.
- (ii) As regards lawsuits filed by businesses against consumers without a domicile in Germany, there are hardly any specific provisions. As regards doorstep transactions subject to revocation, § 29c ZPO, provides that a consumer may only be sued at his/her domicile or otherwise at the place of his/her habitual abode. The same applies under § 26 FernUSG in relations with participants of distance learning.

b) Individual Employment Contracts

Under German law there is no independent regulation of disputes arising from employment contracts. § 29 (1) ZPO, applies, meaning that a complaint is to be filed by the employer or the employee at the place of performance of the employment contract, irrespective of their respective domiciles. Insofar as German law applies, the uniform place of performance of the employment contract is deemed to be the place of work (BAG, NZA 2003, 339). This means that if the employee works in Germany, German courts will have international jurisdiction, if the employee works abroad, Germany courts will not have jurisdiction.

c) Insurance Contracts

As regards the grounds of jurisdiction that apply in insurance matters the following applies:

- (i) According to § 48 Act on Insurance Contracts [Versicherungsvertragsgesetz, VVG], an insured person may sue the insurance company not only at the latter's registered office, but also at the registered office of the agent who brokered the insurance. This will usually be in Germany. However, there is no comparable provision governing the conclusion of a contract directly with the insurer or via the internet. In that case the place of performance as claimed will apply. § 48 VVG applies to all lawsuits arising from the insurance relationship, no matter who files the suit.
- (ii) The insurance company may only sue an insured person without a domicile in Germany, in Germany if the place of performance as sought lies in Germany according to the proper law of the contract (§ 29 ZPO). Where payment is sought this is not the case as a rule, at least under German law.

d) Distribution Contracts

No special provisions on international jurisdiction are provided for distribution transactions.

e) Protective Rules in Other Matters

The objective of the alternative jurisdiction under § 23a ZPO, is to protect minors in proceedings concerning child maintenance. According to the provision, in cases concerning child maintenance against a person who has no place of jurisdiction within Germany, the court with jurisdiction is the plaintiff's court of general jurisdiction in Germany. However, the provision in § 23a will be superseded if maintenance for a couple's own child is claimed as a result of a divorce, in which case the jurisdiction will be based on §§ 621 (2), sentence 1, no. 4, 606 a ZPO (see section G below on § 606 a ZPO).

14. Rules for the Consolidation of Claims

As regards rules of jurisdiction that allow to consolidate related claims before the same court, the following applies:

a) Co-Defendants

With the exception of the cases of §§ 35 a, 603 (2), 605 a ZPO, § 56 Air Traffic Act [Luftverkehrsgesetz, LuftverkG], international joinders of parties are not permitted under German law.

According to § 32a ZPO, a child suing both parents for maintenance payments can choose to file the lawsuit before the court of jurisdiction for the father or the mother. In case of a joint lawsuit against several persons with obligations, under § 603 (2) ZPO, the court where one of the defendants has his/her place of general jurisdiction will have jurisdiction. According to § 605a ZPO, § 603 (2) ZPO applies accordingly where in proceedings based on documentary evidence alone claims based on cheques in the sense of the Cheques Act [Scheckgesetz] are made.

§ 36 (3) ZPO, does not establish international jurisdiction. The provision provides that the superior court may determine a joint venue if several persons have their general place of jurisdiction at different courts, both are to be sued in joinder and no particular joint court of jurisdiction exists for the case. However, this is only possible if the German courts have international jurisdiction for the lawsuit against both parties (BGH, NJW 1971, 196; Roth, in: Stein/Jonas, ZPO, 22nd ed. 2003, § 36 note 25). A person without a domicile in Germany cannot be sued here simply because another person is already conducting proceedings here.

In exceptional cases international jurisdiction can be recognized in case of a necessary joinder of parties (*Geimer*, op. cit., note 1162 et seq. with further references). Hence, in case of an authentic necessary passive joinder of parties (e.g. a joint lawsuit against co-heirs in the event of § 2059 (2) BGB), there will be international jurisdiction if it exists for at least one of the defendants. So far no practical case of corresponding jurisdiction based on an authentic necessary joinder of parties is relevant.

b) Third Party Proceedings

An action on a warranty or guarantee is unknown in German law, which instead has the institute of third party notice. According to this, a third party may be involved in proceedings if one has a recourse claim against that party in the event that one loses the case (§ 72 ZPO). This is also possible if no German courts have jurisdiction for a law suit against the third party (*Geimer*, NJW 1970, 388; *Schack*, Internationales Zivilverfahrensrecht, 2nd ed. 1996, note 367) The third party does not have to join the proceedings, however, it has to accept that the outcome of the proceedings will apply

against it in subsequent proceedings before a German court, pursuant to §§ 74 (3), 68 ZPO. The question whether this binding force will be accepted by a foreign court depends on the procedural law of that country.

c) Counter-Claims

§ 33 ZPO establishes the jurisdiction of a court for cross-complaints. International jurisdiction of German courts can arise from this provision. According to § 33 ZPO, a cross-complaint may be filed at the court of the complaint if the cross-claim is connected with the claim made in the complaint or with the means of defence submitted against that claim. However, there will be no jurisdiction for a cross-complaint if, from the German viewpoint, there is exclusive international jurisdiction in a foreign country.

However, according to § 33 ZPO, this is jurisdiction by choice. The cross-claimant may file his cross-complaint also at the place of general or specific jurisdiction.

If a complaint has been filed abroad, a complaint aimed at the absolute opposite may be prevented by the fact that the matter in dispute is pending pursuant to § 261 (3) no. 1 ZPO. In this respect, the court will make a prognosis as to whether the judgment of the foreign court will be recognized in Germany pursuant to § 328 ZPO (decision of the German Federal Court of Justice [BGH], NJW 1987, at 3083). If one may assume that the judgment will be recognized, the complaint will be dismissed as being inadmissible. If, in contrast, the prognosis indicates that the foreign judgment will not be recognized, the fact that the complaint is pending abroad will not prevent a new lawsuit. This will then be admissible. Whether or not a complaint has become pending in a foreign country is determined by the procedural law of that country.

d) Related Claims

There is no other rule other than the ones set forth above allowing a defendant domiciled in a non-EU state to be sued before German courts on the ground that the claim is connected with another claim pending before a German court.

e) Any Problems Pertaining to Lack of Harmonisation

The lack of a place of general jurisdiction for the aforementioned cases is problematic. There is a need to obtain a uniform and non-conflicting decision on matters that belong together. Particular problems arise where several parties are to be sued together who do not have the same place of general jurisdiction, or where in ongoing proceedings one of the parties files a complaint against a third party or joins the proceedings against it.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

The jurisdictional rules listed in Annex 1 of the Brussels I regulation are applied in practice by the courts as follows:

a) The rules listed in annex I

The only German provision mentioned in the Annex to the Brussels I Regulation is § 23 ZPO, which was discussed in further detail above, in para. 11.

b) Practical use of the rules listed in Annex I

The main significance of the provision is in complaints against foreigners outside the area of application of the Brussels I Regulation.

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

According to Art. 4 (2) Brussels I Regulation, places of jurisdiction which only apply to the nationals of the relevant country in which the court is situated shall be opened for foreigners and stateless persons who reside in the country in which the court is located. Such persons are entitled to invoke this provision in their position as plaintiffs like a national of that country. Under German law there are no such provisions creating jurisdiction privileges for one's own nationals. For this reason, the provision in Art. 4 (2) Brussels I Regulation is without significance in Germany since here no difference is made between national and foreign plaintiffs (*Kropholler*, *Europäisches Zivilprozessrecht*, 8th ed. 2005, Art.4 note 4). There is therefore no case in which a German court has based its jurisdiction on Art. 4 (2) Brussels I Regulation.

16. Forum *necessitatis*

Emergency jurisdiction of German courts arises in only very few exceptional cases. A denial of justice cannot be permitted to arise. For this reason such emergency jurisdiction is assumed if the foreign court with jurisdiction is unable to hand down a decision based on the circumstances, e.g. the chaos of war. However, in such cases the matter has to have a sufficient connection to the Federal Republic of Germany. Emergency jurisdiction is also assumed in case of a negative conflict of competence, i.e. where from the German point of view a judgment rendered by a foreign court with exclusive jurisdiction will not be recognized in Germany. In that case it is possible to file a lawsuit in Germany, since otherwise recourse cannot be had to the assets located here (*Schack*, *IZVR*, 2nd ed. 1996, note 237; *LG Bonn*, *NJW* 1974, 427).

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

If German courts have, under German law, exclusive jurisdiction in a particular case, they will not recognise a judgment from another jurisdiction. According to § 328 (1) no. 1 ZPO, recognition of a foreign judgment is excluded if the foreign court would not have had jurisdiction under German law. This is always the case if German courts have exclusive jurisdiction.

Exclusive international jurisdiction does not, however, arise from exclusive local jurisdiction but has to be examined for each court location. Exclusive international jurisdiction may be a basis for exclusive local jurisdiction only if direct state interests are the grounds for the provision setting forth the exclusivity. When exclusive German jurisdiction arises remains mostly unclarified.

Exclusive jurisdiction of German courts may arise in the following cases:

- § 24 ZPO: claims of ownership, burdens *in rem* or freedom from same, boundary disputes, division or possession, if immovable property in Germany is concerned (RGZ 102, 253; BGH ZEV 1995, 298)
- § 29 a ZPO: claims for rights under leases of premises in Germany,
- § 29c ZPO: claims of an entrepreneur against a consumer arising from revocation of doorstep sales, if the consumer is resident in Germany,
- § 32a ZPO: exclusive local jurisdiction of environmental effects, if the plant is located in Germany,
- Claims under German cartel law,
- German patents and other industrial property rights granted by Germany,
- Agreed exclusive jurisdiction.

§ 802 ZPO applies generally only to local jurisdiction, not to international jurisdiction, i.e. jurisdiction under the law on execution does not provide a basis for exclusive international jurisdiction (not decided by BGH NJW 1997, 2245, cf. for opinions).

International jurisdiction can also arise from international treaties, e.g. the Hague Convention of 05 October 1961 (Hague Convention on the protection of minors, cf. OLG Hamm, NJW 1996, 2079).

Under § 328 (1) no. 1 ZPO, there is also no jurisdiction to recognise a foreign judgment if, while German exclusive local jurisdiction is established, a third state would, under German law, have exclusive jurisdiction.

(E) Declining Jurisdiction

18. Forum Non Conveniens

There is no provision like the *forum non conveniens* (Roth, in: Stein/Jonas, ZPO, 22nd ed. 2003, note 52 before § 12). The court may not, therefore, refuse jurisdiction on the grounds that for the claim concerned, particularly in view of the closeness to the matter and the evidence, a foreign court would clearly be more appropriate. Only in some few cases, mainly in the area of voluntary jurisdiction, German courts have availed of the *forum non conveniens* instrument (Schack, Internationales Zivilverfahrensrecht, 4th ed. 2006, note 500). For example, in one case, the court removed the decision on the right of custody from the joined divorce proceedings because the child was in Greece and uncontactable, and could not therefore be personally heard in accordance with § 50b Act on Jurisdiction of Non-Contentious Matters [Gesetz über die freiwillige Gerichtsbarkeit, FGG] (OLG Frankfurt/M IPRax 1983, 294).

The court which would have had international jurisdiction according to §§ 12 et seq. ZPO can refuse jurisdiction if the plaintiff has surreptitiously obtained jurisdiction in bad faith. It must, however, be reviewed in advance whether this bad faith already leads to the rejection of local jurisdiction and therefore also loss of international jurisdiction. Bad faith is presumed if the plaintiff has established the jurisdictional connection by deceit (Roth, in Stein/Jonas, ZPO, 22nd ed. 2003, note 42 before § 12). Establishing jurisdiction by bad faith (which seldom results in rejection, e.g. BGH NJW 1977, 1590) is to be distinguished from simulation of the grounds for jurisdiction.

An "immanent" lack of jurisdiction does not exist, i.e. international jurisdiction, which is present in principle, cannot be refused due to the inherent nature of the matter in dispute (Schack, op. cit., note 504 et seq.). The difficulties in applying a foreign law do not relieve the court of its international jurisdiction. German procedural law must be adjusted to the law to be applied, if necessary. Jurisdiction fails only in the cases in which the judicial intervention sought is completely incompatible with German procedural law, so that even an adjustment must be excluded.

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

When a defendant is domiciled in a non-EU State and the jurisdiction is based on domestic law pursuant to Art. 4 of the Brussels I Regulation, the courts can decline jurisdiction or stay their proceedings in favour of a non-EU court in the following circumstances:

(a) Non-EU Jurisdiction Agreements

By mutual agreement on exclusive jurisdiction of a court of another state, jurisdiction of a German court can be excluded. Whether an agreement on the jurisdiction of the foreign court must be exclusive, is a matter of interpretation as the case may be. The admissibility of such a derogation is determined solely under German law (*Geimer*, op. cit., note 1676; *Hüßtege*, in *Thomas/Putzo*, ZPO, 27th ed., § 38 note 7). Whether, on the other hand, a prorogation is valid is determined solely according to the law applicable according to German private international law (*Hüßtege*, in *Thomas/Putzo*, op. cit., § 38 note 6). But the German court must review whether the foreign court will accept jurisdiction (*Bork*, in: *Stein/Jonas*, ZPO, 22nd ed. 2003, § 38 note 22), because the derogation is connected to the implied condition that the prorogation is also valid. Even in the case that the proceedings are stayed at the prorogued court or it is obvious and not open to doubt that a proper judgment on the case at the *forum prorogatum* in accordance with the elementary rule of law guarantees is not ensured, the derogation is invalid (*Geimer*, op. cit., note 1764). On the other hand, it is irrelevant for the validity of the derogation that there may be no assets against which to execute in the state where the judgment is issued or that the judgment is not intended to be recognised domestically (*Schack*, op. cit., note 449).

The admissibility and validity of international court jurisdiction agreements are governed by §§ 38 et seq. ZPO, unless special provisions apply.

According to § 38 (2) ZPO, the jurisdiction of a court of first instance can be agreed, if at least one of the parties has no general place of jurisdiction in Germany (§§ 12 et seq. ZPO). Whether a special German court of jurisdiction exists is irrelevant. It is disputed whether the general place of court jurisdiction in Germany must be lacking at the time of the agreement on derogation or whether the time at which the claim is filed is decisive (*Bork*, in *Stein/Jonas*, ZPO, 22nd ed. 2003, § 38 note 24). According to German case-law, the agreement on a foreign court of jurisdiction is only valid if, at the time of the filing of the claim, at least one of the parties has no general place of jurisdiction in Germany (OLGR Düsseldorf, 1995, 241).

According to § 38 (2) sentence 2 ZPO, it is a condition for a valid derogation that the agreement is concluded in writing or that an oral agreement is confirmed in writing. In the case of the use of standard terms and conditions it should be noted that the written form requirement is satisfied only if the signed text of the agreement makes clear reference to the application of standard terms and conditions.

For merchants, § 38 (2) ZPO is superseded by § 38 (1) ZPO, according to which the agreement can be made by implication. The status of merchant is according to §§ 1 et seq. of the German Commercial Code [*Handelsgesetzbuch*, HGB], primarily attributable to natural persons who carry on a business in accordance with § 1 (2) HGB and trading partnerships, § 6 HGB.

The derogation of the German court having jurisdiction can also come about by appearance, without objection, in main proceedings before the foreign court which has no

jurisdiction § 39 ZPO. Hearing of the main proceedings in the meaning of § 39 ZPO refers to stating a position on the subject matter in dispute.

Derogation of the German court is excluded in the cases mentioned in § 40 (2) ZPO, i.e. disputes on claims without financial implications and the existence of an exclusive jurisdiction. An example of court jurisdiction from which no derogation is possible is found in § 48 Act on Insurance Contracts [VVG]. For tort claims, derogation is not admissible prior to the happening of the damage, unless the tort simultaneously constitutes a breach of contract.

The German Federal Court of Justice [BGH] assumes exclusive jurisdiction of the Federal Republic of Germany if there is a danger that German law, which according to German law is internationally mandatorily applicable, would not be observed by the prorogued court (BGH NJW 84, 2037, see *Geimer*, op. cit., note 1770).

The Federal Labour Court [Bundesarbeitsgericht, BAG] ignores derogation of the international jurisdiction of the Federal Republic of Germany if, in the particular case, protection of the employee indicates that the case should be heard before a German court (BAG NJW 1970, 2180).

Agreements on court jurisdiction are also subject to review for compliance with the ordre public (Art. 6 Introductory Act to the German Civil Code [EGBGB]), according to which the agreement is invalid if the German party would, because of the private international law applicable at the prorogued court, be deprived of the protection of German substantive law.

(b) Parallel Proceedings in a non-EU court

If the matter is pending before a foreign court, the claim is inadmissible before a German court according to § 261 (3) no. 1 ZPO. This applies, however, only if it is anticipated that the judgment of the foreign court will be recognised.

It is a condition that both cases cover the same subject matter and that the parties are identical, but not that they occupy the same roles as parties. The objection that the case is pending before a foreign court requires that the case was already pending abroad when the proceedings in Germany were begun. When the case "begins", is decided according to the procedural law of the foreign court.

It is also required that the judgment is expected to be recognised in Germany, i.e. the judge must make a finding on the likelihood of recognition. In order to do so, he will review the jurisdiction of the foreign court and the guarantee of reciprocity of recognition of judgments by the relevant state.

An exception to the staying of proceedings because proceedings are pending elsewhere arises if the stay would lead to an unreasonable interference with legal protection in

Germany. Extremely long duration of proceedings before the foreign court is adequate if this seriously reduces the efficiency of the provision of legal protection.

(c) "Exclusive" Jurisdiction in a non-EU State

It is discussed whether in certain cases jurisdiction which applies in principle should be excluded because of the special nature of the subject matter. These cases are:

- disputes about foreign property
- foreign industrial property rights
- foreign public law claims
- "rights alien to German law" i.e. legal institutes completely unknown to German law.

According to the prevailing opinion, the *lex situ* applies in any event, according to § 24 ZPO, to disputes about foreign property (*Schack*, op. cit. note 509).

In the case of disputes about foreign industrial property rights, there is agreement that there is no restriction of international jurisdiction concerning infringements. In this context, the existence of the rights can be clarified as a preliminary issue. The only dispute is whether the question of their existence can be decided before domestic courts, although ultimately, jurisdiction must be affirmed (*Schack*, op. cit., note 509).

German international jurisdiction is excluded in foreign public law claims such as tax, fees or public law repayment claims, because the state has no interest in providing legal protection to a foreign state.

The fact that a certain legal institute is alien to German law does not suffice for rejection of international jurisdiction, but rather a complete difference in nature and incomparability with similar German legal institutes must exist. For example, the German Federal Supreme Court [BGH] did not reject separation of married persons from bed and board while retaining the marriage bond according to Italian law, although this institute is unknown to German law (BGHZ 47, 325).

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

When the defendant is domiciled in an EU State and the jurisdiction is based on the uniform rules of the Brussels I Regulation, the courts can decline jurisdiction or stay the proceedings in favour of a non-EU court in the following circumstances:

(a) Non-EU Jurisdiction Agreements

The parties could agree the jurisdiction of courts of a non-member state even within the scope of application of Brussels I. According to German case-law, the validity of the derogation of the German court thereby falls under §§ 38 et seq. ZPO, because Art. 23 (1) Brussels I Regulation, is not, according to its wording, applicable to these cases (BGH NJW 1986, 1438; *Kropholler*, *Europäisches Zivilprozessrecht*, 8th ed., at 287). According to a differing opinion in the literature, Art. 23 Brussels I Regulation should apply here (*Geimer/Schütze*, *Europäisches Zivilverfahrensrecht*, 1st ed. 1997, at 311), and a further opinion is that Art. 23 Brussels I Regulation should apply if the agreement is intended to exclude jurisdiction which exists in at least two contracting states (*Schack*, *IZVR*, 2nd ed. 1996, note 467).

(b) Parallel Proceedings in a non-EU court

If treaties with non-member states which provide that cases pending before courts of such states must be considered, the German courts can, in spite of jurisdiction existing according to the Brussels I Regulation, reject the jurisdiction of the courts of non-member states, if a parallel proceeding is pending there.

However, even outside the scope of application of treaties, cases pending before foreign courts are to be taken into account if it can be anticipated that the foreign judgment will be recognised in Germany.

When the case is no longer pending, the obligation of the contractual state with jurisdiction according to the Brussels I Regulation is revived if the judgment issued in the third state cannot be recognised or if the proceedings in the third state do not end with a legally enforceable decision.

(c) "Exclusive" Jurisdiction in a non-EU State

It is disputed whether the court with jurisdiction according to the Brussels I Regulation can be declared not to have jurisdiction because of the exclusive international jurisdiction of a third state.

According to one opinion, the exclusive jurisdiction of a third state does not affect the obligation of the member state with jurisdiction according to the Brussels I Regulation, to provide recourse to justice (*Geimer/Schütze*, *Europäisches Zivilverfahrensrecht*, 1st ed. 1997, Art. 16 note 13)

According to another opinion, the member state with jurisdiction may refer to exclusive jurisdiction of a third state, mirrored in Art. 22 Brussels I Regulation, if the third state recognises in its law an exclusive jurisdiction corresponding to Art. 22 Brussels I Regulation and the judgment of the third state could be executed in the state of residence (*Kropholler*, *Europäisches Zivilprozessrecht*, 8th ed., Art. 22 note 7; *Schack op. cit.*, note 316).

(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

Emergency jurisdiction of German courts arises in the event of a negative conflict of jurisdiction, i.e. if the courts of several states refuse jurisdiction in each case according to their procedural law and the claimant is therefore unable to find a forum. A negative conflict of jurisdiction can also arise because of suspension of the administration of justice or war in the state with international jurisdiction. This emergency jurisdiction is aimed at avoidance of threatened lack of recourse to justice.

A negative conflict of jurisdiction also arises if foreign judgments are not recognised and no domestic jurisdiction can be established.

Emergency jurisdiction can, however, only be relied upon if an adequately close connection of the subject matter to Germany is established.

Art. 6 (1) of the European Convention on Human Rights provides for affirmation of the international jurisdiction of the Federal Republic of Germany if the non-acceptance of the claim is equivalent to a refusal of recourse to justice, in particular, if recourse to the foreign court with international jurisdiction according to German international procedural law is not *de facto* possible or reasonable.

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

German courts have found not to have jurisdiction or have declined jurisdiction to hear a claim brought by an EU domiciliary for example in the following situation:

(a) Claims from EU Consumers against non-EU defendants

As regards a claim by a Consumer against a professional domiciled in a non-EU state:

In its decision of 21 January 1992 (NJW-RR 1993, 701) the Higher Regional Court [OLG] Munich declined international jurisdiction pursuant to Art. 14 (1) in conjunction with Art. 13 (2) European Convention on Jurisdiction and Enforcement of Decisions in Civil Matters because both the domicile of the consumer filing the suit and the business establishment were located in the same contracting state (Germany). It was held that the provisions of the European Convention on Jurisdiction and Enforcement of Decisions in Civil Matters were not applicable to such cases within one and the same state. In purely domestic relations the provision on international jurisdiction did not make sense, it was held. The Higher Regional Court of Munich stated as follows:

"Art 13 (2) European Convention on Jurisdiction and Enforcement of Decisions in Civil Matters does not extend German international jurisdiction in consumer matters (Art. 14 European Convention on Jurisdiction and Enforcement of Decisions in Civil Matters) against a contracting partner situated outside the EU Member States (in this case the USA), which operates a business establishment within an EU Member State (in the broad sense of Art 5 (5), Art 13 (2), European Convention on Jurisdiction and Enforcement of Decisions in Civil Matters), if both the business establishment and the domicile of the consumer filing the lawsuit are situated within one and the same Member State (Germany). The provisions of the European Convention on Jurisdiction and Enforcement of Decisions in Civil Matters are not applicable to such instances of a conflict within one and the same state."

(b) Claims from EU Employees against non-EU Employers

As regards a claim by an Employee against an Employer domiciled in a non-EU State:

So far there has not been a case in which a court has rejected a complaint filed by an employee domiciled in an EU State against an employer domiciled outside the EU. On principle, the established case law of the Federal Labour Court [BAG] assumes that agreements on a choice of law are admissible under labour law so that in the above constellation a court would be permitted to refuse jurisdiction with reference to the choice-of-law clause. However, foreign jurisdiction may only be agreed if it is not necessary in an individual case for the case to be decided by German courts in order to protect the employee (BAG AP § 38 No. 4, 8, 12).

In one case (BAG AP § 38, no. 21), the Federal Labour Court remanded the case to the previous instance, where an employee who was a US national resident in Germany filed a complaint against his employer domiciled in the USA. The Federal Labour Court took the view that the international jurisdiction of the Federal Republic of Germany required further clarification. It is necessary to clarify in that case whether jurisdiction is established pursuant to § 29 ZPO, i.e. whether the place of performance is the Federal Republic of Germany.

(c) Claims from EU Plaintiffs in Community Regulated Matters

As regards a claim brought by a Plaintiff domiciled in the EU in Community regulated matters:

In its decision of 27 May 2003 (NZI 2003, 545), the German Federal Court of Justice rejected international jurisdiction for complaints filed by an administrator in insolvency against a defendant domiciled in Thailand. The reasons presented by the court were that § 19a ZPO, established neither local nor international jurisdiction in Germany for complaints filed by the administrator in insolvency at the registered office of the insolvency court, it was held that § 19a ZPO, was not applicable to active proceedings.

In the case decided on 15 February 1990 (GRUR 1990, 677), the Higher Regional Court [OLG] Munich, in a case concerning a copyright infringement, refused to hear the complaint due to a lack of international jurisdiction of the Federal Republic of Germany. The plaintiff domiciled in Germany asked that the distribution of a poster by the Swiss defendant be banned since the poster infringed his copyright to photos used on it. The complaint was dismissed on the ground that the infringement had taken place solely in Switzerland so that the jurisdiction under § 32 ZPO, i.e. jurisdiction based on tort, was not possible. The poster had been produced in Switzerland which was therefore the place of infringement. It was not considered sufficient that the poster reproduced in Switzerland was then subsequently to be delivered to Germany.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

In the following case a national of Germany has not been able to invoke the protection of Community legislation because the person involved was no longer domiciled in the EU at the time the proceeding was instituted:

In its decision of 24 February 2005 (case no. I-2 U 64/03) the Higher Regional Court [OLG] Düsseldorf held that the court of first instance had wrongly assumed international jurisdiction since at the time the complaint was filed the defendant had his domicile not in Germany, but in Asia. The case concerned a fee claim of a patent attorney domiciled in Germany. At the time the payment order issued by the court was filed, the defendant no longer lived in Germany, for that reason there was no longer international jurisdiction.

24. The Risk that EU Rules and Principles be Put in Jeopardy Because of the Application of National Jurisdictional Rules

There are no other known cases or circumstances where the application of domestic jurisdictional rules have led in practice or are likely to lead to jeopardize the application of mandatory Community legislation or the proper functioning of the internal market or the adequate judicial protection of EU national and domiciliaries.

Insofar as provisions of European law which have priority supersede national law, there is no risk to those legal provisions through the application of national law. In particular, the autonomous interpretation under community law guarantees a uniform application of the law as set out in its provisions.

However, exclusive jurisdiction pursuant to the Brussels I Regulation only has to be observed in the main proceedings. In case the relevant legal issue is decided on incidently (indirectly) in the judgment, the courts are not bound by the provisions on jurisdiction set out in Brussels I.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

If there is no jurisdiction pursuant to the Brussels II Regulation, then the Hague Agreement on the protection of minors applies in proceedings for the regulation of parental care, visiting rights and surrender of a child. Since Brussels II Regulation has priority over the Hague Agreement pursuant to para. 31 of the preamble of the former, the Hague Agreement on the protection of minors applies only with regard to Switzerland and Turkey, since all other contracting states are members of the European Union.

The Hague Agreement applies where a child has his/her habitual abode within a contracting state, Art 13 Hague Agreement. According to the Hague Agreement, the court in the contracting state in which the minor has his/her place of habitual abode, Art. 1 Hague Agreement, has international jurisdiction unless a legal guardian or similar person has been appointed for the minor under the law of his/her home country, Art. 3 Hague Agreement. According to Art. 8 Hague Agreement, this relationship of power in the sense of Art. 3 may be interfered with if children are in severe danger. In all urgent cases the courts of each contracting state in which the minor is located are authorized to order protective measures, Art. 9 Hague Agreement.

Otherwise international jurisdiction for proceedings concerning parental responsibilities depends on § 621 ZPO.

In this respect it is important to distinguish whether matrimonial proceedings are pending within Germany or not.

If matrimonial proceedings are pending within Germany, the family court also has jurisdiction to regulate parental responsibility, § 621 (2) sentence 1, nos. 1 to 4, ZPO, provided the child is the couple's own child. Where the dispute concerns the surrender of a child, the jurisdiction of the family court is limited to proceedings in which the mother seeks the surrender of a child from its father, or vice versa.

International jurisdiction for matrimonial cases is based on § 606a ZPO, according to which German courts have jurisdiction for such cases if

- one of the spouses is or was a German national at the time the marriage was contracted,
- both spouses have their habitual abode within Germany,
- if one of the spouses is stateless with his or her habitual abode within Germany,
or

- if one of the spouses has his/her habitual abode within Germany unless the decision to be made would clearly not be recognized under the law of either of the states of which one of the spouses is a national.

Since the Regulation also applies if the proceedings have no connection with another Member State (disputed, see *Geimer in Zöller*, ZPO Annex II, Chapter 1, note 14), the scope of application for § 606a ZPO, is restricted to jurisdiction for nationality issues in by-national marriages where neither of the spouses has his or her habitual abode within the area of application of Brussels II Regulation, for in contrast to Brussels II, German nationality of one of the spouses will suffice in order to obtain the jurisdiction of German courts. Furthermore, jurisdiction is also established by the fact that one of the spouses was a German national at the time the marriage was contracted. This jurisdiction is not exclusive.

If a matrimonial matter is not pending, international jurisdiction follows on local jurisdiction, i.e. §§ 43, 35b Act on Jurisdiction of Non-Contentious Matters [FGG]. According to § 35b (1) FGG, German courts will have jurisdiction if the minor is a German or has his/her place of habitual abode within Germany. German courts also have jurisdiction if a minor requires the care of a German court, § 35b (2) FGG. The aforementioned jurisdiction is not exclusive.

SUPPLEMENTAL REPORT FOR:

GERMANY

PREPARED BY:

**MICHAEL MOLITORIS & AMELIE ABT
NOERR STIEFENHOFER LUTZ
BRIENNER STRASSE, 28
80333 MÜNCHEN – GERMANY**

26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?

List of conventions concluded between Germany and non-EU countries that include rules of jurisdiction in matters of parental responsibility:

- Hague Convention of 5th October 1961 concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20th May 1980

Please note that the Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children has been signed by Germany but has not entered into force yet.

28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these "exclusive" rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

There is no "exclusive" international jurisdiction of German courts in these matters according to Sec. 606a (I) (2) ZPO. Therefore, there is no denial of recognition or enforcement of foreign judgements based on an "exclusive" jurisdiction of German courts. The German rules on international jurisdiction matter according to the general rule of Sec. 328 (I) (1) ZPO: Foreign judgements are not recognized if the court of that foreign state would not be competent according to the German rules on international jurisdiction (the so called "mirror image theory").

*
* *