BEWARE WHERE TO SUE: THE EXCLUSIVE FORUM MAY CATCH YOU AGAIN AND AGAIN

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U.S. International Litigation Alert

Choosing the right forum is one of the most difficult tasks in cross-border business and can trigger liability when paired with a choice of law clause electing such forum's substantive laws. A U.S.-based plaintiff had to learn this lesson twice, when its lawsuit in the United States was dismissed due to the lack of jurisdiction, and courts in Germany held it liable for the costs that the defendant incurred for the defense in the U.S. court.

Announced via press release with the full decision forthcoming on October 17, 2019 (docket no. III ZR 42/19), the German Federal High Court ("Bundesgerichtshof" - "BGH") rendered a judgment according to which, under German substantive law, a contracting party may be entitled to compensation for costs incurred by that party because it had been sued before a U.S. court contrary to the agreement of an exclusive choice of forum/place of jurisdiction in Germany.

FACTUAL BACKGROUND

The parties are telecommunications companies. The defendant is domiciled in Bonn, Germany, the plaintiff is domiciled in Washington D.C. They entered into an "Internet Peering Agreement" according to which they are mutually obliged to receive the data traffic of the other party at so-called peering points, to transport the data in their network to end customers, and to provide the necessary transmission capacity at the peering points within their networks. The agreement contains a provision according to which the agreement is governed by German law, and the choice of forum/place of jurisdiction ("Gerichtsstand") is Bonn.

In 2016, after the plaintiff's efforts to achieve a (free) increase in transmission capacity had failed, the plaintiff filed a lawsuit before a U.S. District Court, requesting the creation of additional capacity. The U.S. District Court dismissed the claim on the ground that it lacked jurisdiction due to the jurisdiction clause in the agreement. Under the applicable U.S. procedural law, there was no reimbursement of costs, and the U.S. District Court did not order such reimbursement either.

The plaintiff then filed a lawsuit with the Regional Court ("Landgericht") of Bonn, again requesting the creation of additional capacity. The defendant filed a counterclaim for reimbursement of the costs for its defense in the U.S. lawsuit in the amount of US$196,118.03.

The Regional Court dismissed the plaintiff's lawsuit and granted the defendant's counterclaim. The plaintiff appealed against the Regional Court's judgment (only) in regard to the counterclaim. Upon the plaintiff's appeal, the Higher Regional Court ("Oberlandesgericht") of Cologne dismissed the defendant's counterclaim.

THE BGH'S DECISION

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The BGH reversed the judgment of the Higher Regional Court of Cologne upon the defendant's appeal and referred the case back to the Higher Regional Court of Cologne (only) to establish the quantum of damages.

According to the BGH, the agreement in regard to the place of jurisdiction in Bonn and the application of German law is to be interpreted in the sense that a party may file a lawsuit under the agreement only before that court. If a party fails to comply with such jurisdiction clause, the other party may claim damages in the amount of appropriate ("zweckentsprechend") costs for legal defense. In this respect, the BGH held that this applies "at least" if the "foreign" court, such as the U.S. District Court, recognizes that it lacks jurisdiction.

The BGH held that by such agreement, the parties have expressed their interest in making legal disputes plannable from both a substantive and a procedural point of view. This, in particular, applies to international legal transactions in which the parties want to create legal certainty, and make litigation risks calculable. By specifying a place of jurisdiction, they aim to select a specific venue for possible disputes and, in particular, to prevent subsequent forum shopping by a contracting party. According to the BGH, the purpose to avoid disputes about jurisdiction and thus also unnecessary costs for appealing to a court with no jurisdiction can only be achieved if it is supported by a compensation claim for reimbursement of costs. Agreeing that German substantive law shall apply, the parties recognized the general principles of Sec. 280 (1) of the German Civil Code ("Bürgerliches Gesetzbuch" - "BGB"). Under this provision, a contracting party may claim compensation of damages incurred by a breach of the other party's obligations.

The BGH held that recourse to a court in contradiction to a jurisdiction clause may be a breach within the meaning of Sec. 280 (1) BGB. In regard to the quantum of damages, the BGH referred to the principles under Sec. 91 of the German Code of Civil Procedure ("Zivilprozessordnung" – "ZPO") according to which appropriate ("zweckentsprechende") costs for legal representation are reimbursable in German domestic litigations. As neither the Regional Court of Bonn nor the Higher Regional Court of Cologne had established whether the costs in the amount of US$196,118.03 had been appropriate, the BGH referred the case back to the Higher Regional Court of Cologne.

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