

BGH Rules That Violation of a Jurisdiction Agreement May Result in Liability for Counsel Fees

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On October 17, 2019,¹ the German Federal Court of Justice (the *Bundesgerichtshof*, “**BGH**”) rendered a landmark decision, ruling that a party may seek compensation for attorney fees incurred in defending against litigation initiated by its counterparty in a forum outside and in violation of the parties’ agreed place of jurisdiction.

In making this ruling, the BGH quashed a decision by the Higher Regional Court of Cologne (the *Oberlandesgericht Köln*, “**OLG**”)² which had rejected liability for damages arising from a violation of the parties’ agreement on jurisdiction – an issue on which German case law previously provided no guidance. Practitioners within and outside Germany should take note of the BGH’s decision since ignoring a forum selection clause can prove not only to be unsuccessful with respect to enforcing claims in an improper jurisdiction, but also may expose a party to damages, not necessarily limited to attorneys’ fees. The BGH’s decision will also be of great significance to practitioners in the drafting of contractual provisions on jurisdiction – in particular with regard to (non-)exclusivity of the selected forum –, choice-of-law, and the exclusion of liability.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

FRANKFURT

Main Tower, Neue Mainzer Str. 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

Richard Kreindler

+49 69 97103 160
rkreindler@cgsh.com

Harry Nettlau

+49 69 97103 117
hnettlau@cgsh.com

Matthias Schrader

+49 69 97103 237
mschrader@cgsh.com

Johannes Schmidt

+49 69 97103 275
joschmidt@cgsh.com

COLOGNE

Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

Rüdiger Harms

+49 221 80040 125
rharms@cgsh.com

Elisabeth Macher

+49 221 80040 156
emacher@cgsh.com

Patrick Gerardy

+49 221 80040 135
pgerardy@cgsh.com



The Dispute and Litigation Leading to the BGH's Decision

The dispute underlying the BGH's decision involved two telecommunications companies: a US entity seated in Washington D.C. ("**Plaintiff**") and a German entity seated in Bonn ("**Defendant**"). In 2003, Plaintiff and the legal predecessor of Defendant entered into an internet peering agreement (the "**Contract**") which obligated each party to carry traffic from the other party's customers in its network. The Contract contained, *inter alia*, the following provision:

"This Agreement shall be subject to the law of the Federal Republic of Germany. Bonn shall be the place of jurisdiction."

In subsequent years, Plaintiff fed a greater data volume into Defendant's network than *vice versa*. Plaintiff repeatedly requested that Defendant increase its capacity, but the parties were unable to reach any agreement. Plaintiff also attempted – without success – to improve the conditions of its arrangement with Defendant by means of an application to the German Federal Network Agency (*Bundesnetzagentur*) and by filing allegations of anti-competitive conduct against Defendant with the European Commission.

Plaintiff then sought to resolve its disagreement with Defendant in litigation and filed a complaint against Defendant in a US Federal District Court (the "**US Court**") in 2016. In its complaint, Plaintiff did not explicitly rely on the Contract. However, the US Court dismissed Plaintiff's complaint for lack of jurisdiction after Defendant filed a jurisdictional objection referring to the forum selection clause in the Contract. Following the "American Rule" on costs, the US Court did not order Plaintiff to compensate counsel fees of Defendant as the prevailing party. Rather, each party bore its own costs.

In 2017, Plaintiff initiated litigation at Defendant's seat in Germany before the Regional Court of Bonn (the *Landgericht Bonn*, "**LG**") again seeking to secure additional capacity in Defendant's network. Defendant filed a counterclaim requesting that Plaintiff pay damages in an amount of USD 196,118.03 plus interest to Defendant as compensation for the US counsel fees that Defendant incurred by defending itself against Plaintiff's

complaint before the US Court. The LG rejected Plaintiff's claim and granted Defendant's counterclaim.³

Plaintiff lodged an appeal against the LG's decision before the OLG with regard to Defendant's counterclaim only. The OLG rejected Defendant's counterclaim. In its reasoning, the OLG agreed in principle with the lower court that the Contract contained a valid agreement providing for the exclusive jurisdiction of the courts of Bonn, Germany, and that Plaintiff had violated this agreement by initiating litigation before the US Court. However, the OLG held that an agreement on jurisdiction constituted a procedural contract which, as a matter of basic principle, did not have any substantive legal effects and thus could not serve as a valid basis for claiming damages. In its reasoning, the OLG noted that was no prior German case law on point with regard to this issue and that the scholarly views expressed in legal commentaries were split.

Defendant sought reversal of the OLG's decision before the BGH.

The BGH's Decision Granting a Claim for Damages Based on the Violation of an Agreement on Jurisdiction

The BGH reversed the OLG's decision, ruling that Defendant had a claim for damages against Plaintiff for violating the agreement on jurisdiction contained in the Contract. The BGH remanded the case to the OLG to resolve a remaining open issue concerning the scope of damages. The following summary highlights noteworthy aspects of the BGH's decision.

The BGH's Determination that a Cause of Action Existed under German Law

The BGH held that if a party violates an agreement on jurisdiction by initiating litigation in a different forum than agreed, the other party may claim damages for legal fees incurred in seeking a dismissal of claim in the inappropriate forum if that forum does not already provide for compensation of such costs. Since the BGH found a breach of contract through a violation of the forum selection clause, it did not comment on Defendant's additional assertions of liability under German tort law.

In assessing Defendant's counterclaim, the BGH applied German substantive law based on the parties' choice of law in their Contract. Disagreeing with the OLG, the BGH held that the parties' agreement on jurisdiction created a substantive contractual obligation to submit all disputes to the courts of Bonn. The BGH reasoned that pursuant to its established case law, an agreement on (international) jurisdiction constitutes a substantive law contract governing procedural law relationships.

The BGH's Interpretation of the Jurisdiction Clause in the Parties' Contract

The BGH then examined the specific agreement on jurisdiction in the Contract, applying German law principles of contractual interpretation, and considering in particular the interests of the parties and the purpose of an agreement on jurisdiction. The BGH concluded that Plaintiff and the Defendant's predecessor intended to undertake an obligation to refrain from initiating a lawsuit in any jurisdiction other than Bonn.

In considering the interpretation of the parties' jurisdictional agreement ("*Bonn shall be the place of jurisdiction*"), the BGH noted the following:

1. The fact that the agreement on jurisdiction did not expressly stipulate liability for damages did not foreclose an interpretation that the parties intended such a remedy in the event of a breach.
2. Even though the provision did not use the term "exclusive" for the place of jurisdiction, it must nonetheless be understood as setting forth an exclusive place of jurisdiction in order to ensure certainty.
3. The English word "shall" is used as an unconditional command, and – as Plaintiff contended – in a way that might indicate non-exclusivity.

The BGH further noted that the result of interpreting this clause would be the same regardless of whether it constituted an individually negotiated agreement or a "standard business term" which would otherwise be subject to a special regime under German civil law.

The BGH's Finding of Attributable Negligence of US Counsel

Having found a violation of an obligation, the BGH next turned to the prerequisite of culpability, *i.e.*, whether the violation was carried out with negligence or intent. If the violation of an obligation is established, German contract law presumes culpability. Thus, Plaintiff bore the burden of proving that it had not acted culpably when filing its complaint in the US Court. In its defense, Plaintiff asserted that its US counsel had assumed that the Contract did not apply with regard to the additional network capacity that Plaintiff sought from Defendant. Furthermore, Plaintiff contended that its US counsel reasonably believed that US law would apply due to a nexus of the dispute to the US.

Ultimately, the BGH concluded that Plaintiff had failed to prove its lack of culpability. Absent any other legal relationships between the parties other than the Contract, the BGH held that any entitlement of Plaintiff to additional capacity could arise only under the Contract. The BGH decision specifically noted that it did not see any reason why this would not have been apparent to Plaintiff. Therefore, the BGH found that Plaintiff – through its counsel – acted at a minimum with negligence. In this regard, the BGH concluded that the culpability of Plaintiff's US counsel was attributable to Plaintiff.

The BGH's Rejection of a Contractual Exclusion of Liability

The BGH also took into account a provision of the Contract concerning an exclusion of liability, but held that such provision did not exclude Plaintiff's liability for violating the agreement on jurisdiction. The text of this provision – as quoted in the BGH's decision – was:

"Any liability of the Parties shall be excluded to the greatest extent possible; in particular, neither Party guarantees to the other Party or the customers thereof the error-free and uninterrupted use of the respective back-bone network. Otherwise, the Parties shall only be liable within the framework of the due care that they apply in their own affairs. This shall be without prejudice of the obligations under §§ 9 and 11 of this Agreement."

The BGH considered the wording of this provision to be ambiguous. It then concluded that the exclusion of liability contemplated specifically concerned the parties' use of each other's networks, but that there was no link to the agreement on jurisdiction which the Contract addressed separately under "*Final Provisions*." Moreover, the BGH held that an exclusion of liability with regard to the agreement on jurisdiction would run counter to the parties' mutual interest in its validity.

Remand to the OLG to Decide on the Scope of Damages

While the BGH held that Defendant was entitled to damages from Plaintiff, it determined that the matter was not yet ripe for a final decision. Since Plaintiff's objection to the scope of damages remained an open issue, the case was remanded to the OLG for further examination. The open issue is the following:

Before the US Court, Defendant had not only objected to jurisdiction, but out of precaution also filed pleadings on the merits of Plaintiff's complaint. Plaintiff objected that such pleadings on the merits had not been necessary and thus the corresponding counsel fees could not be claimed as damages. A key question identified by the BGH in this regard was whether Defendant's US counsel, under the applicable US law, was under an obligation to pursue the "safest path" in order to fulfill the interest of its

client and, therefore, had to plead on the merits as a precaution, notwithstanding the pendency of its procedural objection to jurisdiction.

Closing Remarks and Outlook

This landmark decision of the BGH illustrates that ignoring a forum selection clause can prove not only to be unsuccessful with respect to enforcing claims in an improper jurisdiction, but also may expose a party to damages, not necessarily limited to attorneys' fees. However, as the considerations of the BGH rest on the specific circumstances of the case at hand, the decision leaves open the matter of how a German court would rule in a different situation, *e.g.*, if the inappropriately seized foreign court were located in a EU Member State.

In addition, the decision makes clear that a German court may find a valid agreement on the exclusive jurisdiction of a certain court even when such exclusivity is not provided for explicitly. Hence, irrespective of whether the contracting parties wish to agree on the exclusive or the non-exclusive jurisdiction of a certain venue, they should in any event say so explicitly.

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¹ German Federal Court of Justice, Judgment, Case III ZR 42/19 (Oct. 17, 2019).

² Higher Regional Court of Cologne, Judgment, Case 3 U 159/17.

³ Regional Court of Bonn, Judgment, Case 16 O 41/16 (Nov. 8, 2017).