German Federal Constitutional Court on the Service of Statements of Claim in American Class Actions

With order of 14 June 2007 the **German Federal Constitutional Court** (*Bundesverfassungsgericht*) decided not to admit constitutional complaints concerning the **service of statements of claim** in **American class actions** pursuant to the **Hague Service Convention**.

The facts of the case are as follows:

Against the complainant, an automobile manufacturer with its registered office in Germany, lawsuits were brought on the basis of the allegation that they had made agreements in violation of competition law preventing the import of motor vehicles from Canada to the US in order to keep the price level in the US market high. Based on the alleged violations of competition law, several class-action lawsuits were filed in the US. In three of these actions, the plaintiffs requested the President of the competent German court as the central authority pursuant to Art. 2 Hague Service Convention to serve the statements of claim on the complainant according to Art. 5 Hague Service Convention.

After the orders for service had been made, the complainant asserted that the service of the statements of claim should not have been ordered because the objectives of the class actions violated the essential principles of a free state governed by the rule of law. Consequently, service should have been refused according to Art.13 (1) Hague Service Convention (para. 5). After legal remedies had failed before the Higher Regional Court (*Oberlandesgericht*) and the Federal Supreme Court (*Bundesgerichtshof*), the complainant filed constitutional complaints (that were consolidated for joint adjudication) alleging a violation of Art. 2 (1) Basic Law (*Grundgesetz*) in conjunction with the rule of law based on the assertion that the subject-matter of the domestic service are statements of claims in actions which were brought before the American courts without any basis and only for non-legal purposes. Thus, the service of such statements of claim should be rejected on the basis of Art. 13 Hague Service Convention for constitutional reasons. Further, the complainant asserts a violation of Art. 14

Basic Law (guarantee of property) since the service of a statement of claim was an encroachment on the asset base of the company due to the burden of costs associated with proceedings. In addition, a violation of Art. 12 (1) Basic Law (occupational freedom) is alleged since also the complainant's gainful activity were affected. Finally, the complainant argues that also its right to a hearing in court (Art. 103 (1) Basic Law) had been violated

The Federal Constitutional Court **did not admit** the constitutional claims for decision and held that

> *[t]he decisions of German state bodies which effectuate domestic service of foreign statements of claim may violate Article 2.1 of the Basic Law in conjunction with the rule of law principle if the objective pursued by the statement of claims violates essential principles of a free state governed by the rule of law. However, the class actions in this case do not satisfy this requirement. (para.13)*

The Court went on by stating that service may only be refused on the basis of Art. 13 Hague Service Convention under narrow circumstances.

> *According to the case-law of the Federal Constitutional Court, a limit might be reached where the objective pursued by the action "obviously violates essential principles of a free state governed by the rule of law" (BVerfGE 91, 335 (343); 108, 238 (247)). It is true that the First Senate of the Federal Constitutional Court has decided that the mere possibility of imposing punitive damages does not amount to a violation of essential rule of law principles (BVerfGE 91, 335 (343-344)). If, however, damages claims appear from the outset to violate the abuse of law principle, the possibility that the service of a statement of claim may be incompatible with the essential principles of a free state governed by the rule of law is no longer excluded. In such a case, it is possible that a German state body could through its application and interpretation of the reservation clause in Article 13.1 of the Hague Service Convention fundamentally misjudge and disproportionately limit the rights of a complainant. The standard which applies in this case is Article 2.1 of the Basic Law in conjunction with the rule of law. However, the Federal Constitutional Court has not yet conclusively determined whether the responsible state body may for constitutional reasons refuse service of a statement of claim whose*

> *purpose conflicts with essential principles of a free state governed by the rule of law (see BVerfGE 91, 335 (343); 108, 238 (248-249)). (para. 19)*

The Court held that in the present case this question had not to be answered since there was no violation of essential principles of a free state governed by the rule of law.

> *It is indeed true from the point of view of the German legal system that a defendant is subject to added burdens in an American class-action lawsuit. If, however, from the German perspective a plaintiff exploits the weaker position of a defendant to enforce his or her own rights, this alone will not be sufficient to substantiate an allegation that the plaintiff has committed an abuse of law; instead the objective and the specific circumstances of the legal action must indicate that there has been an obvious abuse of law – this is missing in the present case. (para. 20).*

The order of the First Chamber of the Second Senate (2 BvR 2247-2249/06) is available in English at the website of the Federal Constitutional Court.

(Many thanks to Prof. Jan von Hein (Trier) for the tip-off.)