

German Supreme Court refuses to enforce Polish judgment for violation of the German ordre public

It doesn't happen too often that a Member State refuses enforcement of a judgment rendered in another Member State for violation of the ordre public. But in a decision published yesterday exactly this happened: The German Supreme Court (Bundesgerichtshof - BGH) refused to recognize and enforce a Polish judgment under the Brussels I Regulation (before the recast) arguing that enforcement would violate the German public policy, notable freedom of speech and freedom of the press as embodied in the German Constitution. With this decision, the highest German court adds to the already difficult debate about atrocities committed by Germans in Poland during WW II.

The facts of the case were as follows:

In 2013, the ZDF (Zweites Deutsches Fernsehen), one of Germany's main public-service television broadcaster, announced the broadcasting of a documentary about the liberation of the concentration camps Ohrdruf, Buchenwald and Dachau. In the announcement, the camps Majdanek and Auschwitz were described as "Polish extermination camps". Following a complaint by the Embassy of the Republic of Poland in Berlin, the ZDF changed the text of the announcement to "German extermination camps on Polish territory". At the same time, the applicant, a Polish citizen and former prisoner of the Auschwitz-Birkenau and Flossenbürg concentration camps, complained to the ZDF claiming that his personal rights had been violated and demanded, among other things, the publication of an apology.

In 2013, the ZDF apologized to the applicant in two letters and expressed its regret. In spring 2016 it also published a correction message expressing its regret for the "careless, false and erroneous wording" and apologising to all people whose feelings had been hurt as a result. At the end of 2016, on the basis of an action he had brought in Poland in 2014, the applicant obtained a second instance

judgment of the Cracow Court of Appeal requiring the ZDF to publish an apology on the home page of its website (not just anywhere on the website) for a period of one month expressing its regrets that the announcement from 2013 contained “incorrect wording distorting the history of the Polish people”. The ZDF published the text of the judgment on its home page from December 2016 to January 2017, however, only via a link. The applicant considered this publication to be inadequate and, therefore, sought to have the Polish judgment enforced in Germany.

The Regional Court Mainz as well as the Court of Appeal Koblenz declared the judgment enforceable under the Brussels I Regulation (Reg. 44/2001). The German Federal Supreme Court, however, disagreed. Referring to Article 45 Brussels I Regulation, the Court held that enforcement of the judgment would result in a violation of the German *ordre public* because the exercise of state power to publish the text of the judgment prepared by the Cracow Court of Appeal would clearly violate the defendant’s right to freedom of speech and freedom of press as embodied in Article 5(1) of the German Constitution (Grundgesetz – GG) as well as the constitutional principle of proportionality.

The Court clarified that the dispute at hand did not concern the defendant’s original announcement – which was incorrect and, therefore, did not enjoy the protection of Article 5(1) GG – but only the requested publication of pre-formulated text. This text – which the ZDF, according to the Cracow court, had to make as its own statement – represented an expression of opinion. It required the ZDF to regret the use of “incorrect wording distorting the history of the Polish people” and to apologize to the applicant for the violation of his personal rights, in particular his national identity (sense of belonging to the Polish people) and his national dignity. To require the ZDF to publish a text drafted by someone else as its own opinion would, therefore, violate the ZDF’s fundamental rights under Article 5(1) GG. In addition, it would violate the constitutional principle of proportionality. The defendant had corrected the disputed wording “Polish concentration camps”, which had been available for four days, on the day of the objection by the Embassy of the Republic of Poland. Even before the decision of the Court of Appeal, the ZDF had personally asked the applicant for an apology in two letters and also published an explanatory correction message with a request for apology addressed to all those concerned.

The official press release is available [here](#). The full German decision can be

downloaded here.