German Federal Supreme Court awards damages for violation of a choice of court agreement

With judgment of 17 October 2019 (III ZR 42/19) the German Federal Supreme Court held that a contracting party may be entitled to compensation for the costs incurred through the violation of a choice of court agreement. The basic facts and the main reasoning of the Court are summarized below. The full press release (in German) is available here.

Facts of the case:

The parties involved in the litigation were telecommunications companies. The defendant was domiciled in Bonn (Germany) and the plaintiff was domiciled in Washington, D.C. (United States). They were linked through an "Internet Peering Agreement" according to which they were mutually required to receive the data traffic of the other party at so-called peering points, to transport it on their network to the customers connected via the network and to provide the necessary transmission capacity at the peering points within their networks. The contract provided for application of German law and jurisdiction in Bonn (Germany).

In 2016, after the plaintiff's efforts to achieve the (free) increase in transmission capacity had failed, it filed a lawsuit in a District Court in the United States. requesting the creation of additional capacity. The District Court dismissed the claim for lack of jurisdiction pointing to the choice of forum clause in the contract. The plaintiff, therefore, filed a lawsuit with the Bonn Regional Court whereas the defendant filed a counterclaim demanding reimbursement of the costs it incurred through the proceedings in the United States.

The Bonn Regional Court dismissed the main lawsuit, but granted the counterclaim which, however, was rejected upon appeal of the plaintiff by the Court of Appeal. The Federal Supreme Court with its judgement of 17 October 2019 reversed the Court of Appeal judgment and held that the defendant is, in fact, entitled to reimbursement of its costs.

Legal reasoning:

The Federal Supreme Court argues that the parties' agreement, notably the choice of court and the choice of law clause, is to be interpreted as meaning that the parties are required to bring actions only in Bonn and failing that – at least to the extent that the court seized, such as the District Court, recognizes the lack of jurisdiction – to reimburse the other party for the costs incurred thereby. The parties, through the choice of court and choice of law clause, expressed their interest in making legal disputes foreseeable both from a substantive and a procedural point of view. It was the parties' aim to create legal certainty and to make the (economic) risk associated with litigation calculable. By specifying a place of jurisdiction, they aimed to prevent forum shopping and to avoid costly disputes about jurisdiction. This goal the Federal Supreme Court argues, can only be achieved if the aggrieved party is entitled to reimbursement of its costs.