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International Law, National Tribunals and the Rights of Aliens: The West European Experience

Peter E. Herzog*

The local remedies rule is usually considered a device to accommodate the legitimate desire of states to preserve their own sovereignty with the equally legitimate desire of states to protect their nationals who have suffered injury abroad. It is obvious that the adequacy of the rule in serving the second of these ends will depend on the nature and quality of the local remedies available. In turn, the effectiveness of local remedies in protecting the rights of aliens will depend on a variety of factors. Most importantly, there is the adequacy of the substantive legal rights in the fields of public and private law.¹ Another consideration is the practice and custom of courts in areas in which there are no hard and fast rules of law. Thus, it is a well-known fact that even in situations in which damage awards are not limited by law, European courts are much less generous in granting awards for pain and suffering than courts in the United States.² Finally, since rights which cannot be enforced are no rights at all, the nature of judicial and administrative remedies, the fairness and speed of procedures,³ and the general integrity of the judicial and administrative processes are of great importance.

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1. For surveys in English of the substantive law in the three countries concerned, *i.e.*, Austria, France and Germany, *see, e.g.*, M. AMOS & F. WALTON, *INTRODUCTION TO FRENCH LAW* (3d ed. 1967); E. COHN, *MANUAL OF GERMAN LAW* (2d ed. 1968); B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* (1954).

2. For a survey of numerous damage awards rendered by French courts, *see* M. LE ROY, *L'ÉVALUATION DU PRÉJUDICE CORPOREL* (4th ed. 1966). For a similar survey of Austrian awards, *see* K. JAROSCH, O. MUELLER & J. PIEGLER, *DAS SCHMERZENGELD IN MEDIZINISCHER UND JURISTISCHER SICHT* (2d ed. 1962). As to the position of aliens hurt in Austria, *see id.* at 82, 83. In cases in which liability is not based on fault, maximum damages in personal injury cases in actions against railroads are Aust. Schilling 600.000 (about \$24,000) and Aust. Schilling 200.000 (about \$8,000) in automobile actions. *Eisenbahn- und Kraftfahrzeughaftpflichtgesetz* (Law on the Liability of Railroads and Automobile Owners), Jan. 21, 1959, [1959] BGBl. 473, § 15. Maximum liability to airplane passengers under Austrian law is Aust. Schilling 215.000 (about \$8,600) unless the Warsaw Convention is applicable. German rules are quite similar.

3. In Austria rarely more than two years will elapse between the time a civil action is begun and its final determination after appeal to the Austrian Supreme Court. In

It is obvious, however, that such broad topics cannot be covered well as part of one research project, especially in the case of an area having as large a mass of legal materials as does Western Europe. For this reason, the present inquiry is limited to one topic only: the extent to which the fact of alienage creates procedural obstacles for the enforcement of rights—in particular, through the requirement of security for costs, denial of the right to sue in forma pauperis, non-recognition of foreign judgments, and denial of the right to sue the government. Furthermore, this study has been restricted to three countries, Austria, France, and Germany. In view of the numerous treaties which affect the rights of aliens in these countries, there is a final limitation upon the scope of this paper: generally speaking, the rights of United States nationals, rather than those of aliens in general, will be considered.

I. THE CAPACITY OF ALIENS TO SUE

The right of United States nationals to sue in Austria, France, and Germany, considered merely in the abstract, does not give rise to any particular problems.⁴ While both the Austrian and French Civil Codes contain broad clauses making the exercise of any rights by aliens dependent upon reciprocity, these clauses have only a very limited practical effect today.⁵ Furthermore, the right to sue in all kinds of courts is guaranteed to American nationals by the various treaties of friendship in force with these countries.⁶ It is only when

France, calendars of courts of first instance are reasonably current, except in a few metropolitan areas where there is moderate delay; more delay is encountered in the highest French court for regular cases, the Cour de Cassation, and in the highest administrative court, the Conseil d'Etat.

4. See generally 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 406-09 (1967).

5. ALLEGEMEINES BÜRGERLICHES GESETZBUCH (Austrian General Civil Code) § 33 (Manz ed. 1967) makes the granting of rights to aliens dependent upon reciprocity. Reciprocity within the meaning of § 33 implies national treatment. Austrian authors speak of "formal" reciprocity, as opposed to "material" reciprocity, which implies rules similar to those prevailing in Austria. The existence of this "formal" reciprocity is ordinarily assumed. See I. SEIDL-HOHENVELDERN, AMERICAN-AUSTRIAN PRIVATE INTERNATIONAL LAW 38 (1963); H. KOEHLER, INTERNATIONALES PRIVATRECHT 29 (3d ed. 1966). Occasionally, however, courts have examined the existence of reciprocity in connection with the right to sue of aliens. See Judgment of Oct. 25, 1961, 5 Ob 310/61, 34 S.Z. 433. In France, Code Civile art. 11 is analogous, providing for grant of "civil" rights to foreigners only in case of reciprocity. But art. 11 has been deprived of substantially all its meaning by a very restrictive interpretation of what constitutes "civil" as opposed to "human" rights. See *Lefait v. Société Galeries St. Denis*, July 27, 1948, [1948] D. Jur. 535 (Cass. civ.) (holding that aliens may exercise all rights in France not specifically denied them by a statute).

6. Treaty of Friendship, Commerce and Consular Rights with Austria, June 19, 1928, art. 1, 47 Stat. 1876, T.S. No. 838; Convention of Establishment with France, Nov. 25, 1959, art. III, [1960] 2 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Friendship,

the practical implementation of the right to sue is involved that problems may arise.

II. SECURITY FOR COSTS

Except in matrimonial matters, actions on negotiable instruments, and some other proceedings of lesser importance,⁷ aliens bringing civil actions in Austria must give security for costs. The amount must be sufficient to compensate the defendant for his expected expenses, in particular his attorney's fees.⁸ Although these are regulated by an official fee schedule, the amount of security can be fairly substantial.⁹ The need for posting security is even more burdensome because security must usually be posted in the form of a deposit of cash or domestic securities approved for investments by guardians; other securities are usable only in the court's discretion. The use of sureties is permissible only if other forms of security are not practicable, and in fact their use is quite rare. The posting of security is unnecessary, however, if plaintiff has sufficient real property in Austria or rights secured by such property.¹⁰ No security is due in proceedings before the administrative court (*Verwaltungsgerichtshof*).¹¹

No security is needed if there is reciprocity. The determination whether reciprocity exists may be made by the court only if the matter

Commerce and Navigation with Germany, Oct. 29, 1954, art. IV, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593.

7. *E.g.*, in the case of claims brought under the Atomhaftpflichtgesetz (Atomic Liability Law), April 29, 1964, [1964] BGBl. 758 § 32 and in situations in which there are no real opposing parties; see Judgment of April 11, 1958, 6 Ob 5/58, 80 JURISTISCHE BLÄTTER 474 (Aust. Sup. Ct.).

8. ZIVILPROZESSORDNUNG (Austrian Code of Civil Procedure) §§ 57, 60 (12th ed. Manz 1960) [hereinafter cited Austr. ZPO]. The term aliens includes all persons not having Austrian nationality (except refugees domiciled in Austria). In the case of companies no security is required if they have their seat (actual headquarters) in Austria; the nationality of stockholders is immaterial. 2 H. FASCHING, KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN 386, 387 (1962). The nationality of the defendant is not material. An American national can demand security from another American national suing him in Austria. Judgment of Feb. 9, 1949, 22 S.Z. 49 (Aust. Sup. Ct.).

9. In a case involving the relatively small sum of Aust. Schilling 8,508 (about \$260), security was imposed in the amount of Aust. Schilling 1,300 (about \$52). Judgment of February 9, 1949, 1 Ob 32, 4 OESTERREICHISCHE JURISTENZEITUNG 448. In somewhat more substantial cases, a security of Aust. Schilling 10,000 (about \$400) would not be unusual.

10. Austr. ZPO, *supra* note 8, §§ 56, 57. Foreign securities apparently are not acceptable, but foreign currency, if convertible, is all right, unless exchange control rules present an obstacle. See 2 FASCHING, *supra* note 8, at 384-86. In Austria, as elsewhere in Europe, there are usually no surety companies which make it a business to act as professional sureties in court cases; however, banks are sometimes willing to perform such a function.

11. The Verwaltungsgerichtshofgesetz (Law concerning the Administrative Court) of 1965, Nov. 17, 1964, [1965] BGBl. 289 contains no requirement for the posting of security.

is clear. Otherwise, the court must address an inquiry to the Ministry of Justice and is bound by its answer.¹² The nature of this declaration and its constitutionality under separation of powers principles has puzzled Austrian authors.¹³ It is not considered as an administrative "decision" in the true sense of the word, and hence is not reviewable judicially.¹⁴

When requests for information are addressed to the Austrian Ministry of Justice, they are answered on the basis of information available to it, either in its fairly extensive library or in its files. If that proves impractical, an inquiry is addressed to the pertinent Austrian embassy or consulate, unless the country in question is willing to supply this information.¹⁵ From time to time, the Ministry of Justice publishes notices in its official bulletin about reciprocity.¹⁶ Since such declarations do not refer to a particular case, they do not seem binding on the court,¹⁷ although they obviously are intended to obviate the need for an individual inquiry.

The 1931 Treaty of Friendship, Commerce and Consular Rights between Austria and the United States¹⁸ does not cover security for costs. An American plaintiff once argued that no security was required of Austrian plaintiffs in the State of New York, since security in New York covered only a relatively small sum for court costs not including attorney's fees, and hence no security should be required of New York residents in Austria. However, the Austrian Supreme Court decided that foreign nationals could be required to post security whenever Austrians had to post security in the country in question, regardless of the amount.¹⁹ As to New York residents in particular, the Austrian

12. Austr. ZPO, *supra* note 8, § 57.

13. For an opinion that such declarations are not constitutional, see R. WALTER, VERFASSUNG UND GERICHTSBARKEIT 72-75 (1960). On the other hand, it has been argued that these declarations are merely statements of facts, and hence not unconstitutional exercises of judicial power by an administrative authority. 2 FASCHING, *supra* note 8, at 394 and authorities cited.

14. See judgment of Feb. 24, 1958, 13 OESTERREICHISCHE JURISTENZEITUNG 668 (Aust. Adm. Ct.).

15. The author wishes to express his thanks at this point to Sektionschef Dr. V. Hoyer and Ministerialrat Dr. R. Loewe, of the Austrian Ministry of Justice, who kindly supplied the author with much factual information. Any errors are exclusively the author's.

16. See, e.g., as to security for costs in New York, a notice published in 1948 JUSTIZAMTSBLATT 92. The JUSTIZAMTSBLATT, the official bulletin of the Ministry of Justice destined mainly for employees of the Ministry and of the courts, should not be confused with the Official Gazette (Bundesgesetzblatt) in which all new laws and regulations must be published before they go into effect. See also Rechtshilfeerlass fuer buergerliche Rechtssachen (regulation concerning international judicial cooperation in civil cases), Nov. 15, 1951, [1951] JUSTIZAMTSBLATT 73, app. B at 97.

17. Judgment of Oct. 25, 1961, 5 Ob 310/61, 34 S.Z. 433 (Aust. Sup. Ct.).

18. Note 6 *supra*.

19. Judgment of Feb. 23, 1955, 11 OESTERREICHISCHE JURISTENZEITUNG 129 (Aust.

Ministry of Justice has taken the position that since security is required in New York of non-domiciliaries, New York citizens suing in Austria must post security unless they are residents of that country.²⁰ Obviously, the same rule will apply in the case of most other United States citizens.

The impact of these rules is reduced by a number of factors. In the first place, the posting of security can be avoided by assigning the claim to an Austrian national.²¹ Secondly, the defendant must demand security *in limine litis*; if he fails to do so, he has waived his right to demand security.²² Finally, the plaintiff need not give security if he swears an oath either before the court in which his suit is pending, or before a court at his domicil or residence, that he is financially unable to post security.²³ The Austrian Supreme Court held in the case of an American national domiciled in New York that an affidavit sworn to before a notary public, to which a county clerk's certificate was annexed, amounted to substantial compliance with this rule.²⁴

In France, alien plaintiffs must likewise post security (*cautio judicatum solvi*) in actions before the regular civil and commercial courts, though not before the administrative courts.²⁵ However, the basis for computing the amount of security is different. Security must include the defendant's taxable costs, but these are relatively minor—the fees of the *avoué*, who acts as agent for litigation, the clerk's fees, and taxes due for the judgment. The much more substantial fees of the *avocat*, who handles the oral phases of law suits, are not reimbursable and hence not to be taken into consideration in computing the amount of security. On the other hand, French defendants frequently bring counterclaims based on the alleged abusive nature of plaintiff's law suit. Such counterclaims are rarely successful, but security must include a provision intended to cover a favorable judgment on such a

Sup. Ct.). See also Judgment of Feb. 9, 1949, 1 Ob 32, 4 OESTERREICHISCHE JURISTENZEITUNG 448.

20. See note 17 *supra*.

21. Judgment of March 11, 1936, 13 Evidenzblatt der Rechtsmittelentscheidungen 132 No. 377 (Oberlandesgericht Vienna) (reasoning that the assignee becomes personally liable for costs).

22. Austr. ZPO, *supra* note 8, § 59. It is immaterial that defendant did not request security in time because he was unaware plaintiff was an alien. Judgment of March 19, 1952, 1 Ob 223, 7 OESTERREICHISCHE JURISTENZEITUNG 299 (Aust. Sup. Ct.). But an increase in security may be demanded during suit. Austr. ZPO, *supra* note 8, § 62.

23. Austr. ZPO, *supra* note 8, § 60. If a person is granted legal aid, posting of security becomes likewise unnecessary. *Id.* § 64.

24. Judgment of Sept. 2, 1953, 2 Ob 262/53, 26 S.Z. 580 (Aust. Sup. Ct.). Reciprocity is immaterial. Judgment of Feb. 20, 1952, 1 Ob 131/52, 25 S.Z. 114 (Aust. Sup. Ct.).

25. C. Civ. art. 16 (64e ed. Petits Codes Dalloz 1965); C. Proc. Civ. art. 166 (58e ed. Petits Codes Dalloz 1962). As to administrative proceedings, the rule stated

counterclaim, although all other kinds of counterclaims are not to be taken into consideration.²⁶ Since the value of the counterclaim is difficult to assess, security is usually fixed in an arbitrary amount, such as 500 francs or 1,000 francs.²⁷

Security is due in all matters,²⁸ but only defendants who are French nationals may claim it.²⁹ Reciprocity is immaterial unless guaranteed by treaty. Unfortunately, the Convention of Establishment with France of 1959 provides specifically that its clause granting easy access to courts does not amount to an exemption from the requirement of security.³⁰ Since in France the granting of legal aid does not exempt one from the duty to post security, the Convention clause concerning legal aid is also of no assistance in that matter.³¹

In France, as elsewhere, security is waived unless it is requested at the outset of the suit, before any other issue is raised.³² Further proceedings are stayed pending a decision on security. As a consequence, defendants occasionally request security more because they wish to delay plaintiff's action than out of any fear that plaintiff may be unable to pay a judgment against him.³³

During the tenure of Professor Jean Foyer as Minister of Justice, a commission examined the various French rules dealing with international litigation, including security for costs. Some members of the commission seem to have felt that security for costs did not serve a very useful function and could be dispensed with altogether, but in the end, abolition of security was proposed only for resident aliens.³⁴

is absolutely correct only as to the *Conseil d'Etat*. There are a few cases in which security was demanded by administrative tribunals. See AUBY & DRAGO TRAITÉ DE CONTENTIEUX ADMINISTRATIF at No. 154 (1962).

26. C. PRO. CIV. art. 166 (58e ed. Petits Codes Dalloz 1962); P. HERZOG, CIVIL PROCEDURE IN FRANCE 243-44, 270-71 (1967); P. BELLET, LE DROIT D'ESTER EN JUSTICE 15-17 (1967) (multilithed record of lecture given before Centre Européen Universitaire Nancy). The present author is indebted to Judge Bellet for his kindness in making available to him this publication, which contains numerous references to actual French practice in cases with international implications which are not otherwise reported.

27. P. BELLET, *supra* note 26, at 16.

28. Originally, C. PRO. CIV. art. 423 made an exception for commercial matters, but was abrogated by the Law of March 5, 1895, [1895] D.P. IV. 36. By way of exception, no security must be posted when provisional relief is requested under the so-called *référé* procedure, e.g., *Thalia v. Vve. Schlusnus*, [1955] D. Jur. 492 (Cour d'appel, Paris).

29. See, e.g., an 1893 case at D.P. II. 583 (Cour d'appel, Bordeaux) (subject, however, to an exception for "privileged" aliens). Security is not due if the plaintiff owns sufficient real property in France. C. PRO. CIV. art. 167 (58e ed. Petits Codes Dalloz 1962).

30. Convention of Establishment with France, *supra* note 6, Protocol No. 3.

31. *Barker Bros. v. Bussoz*, [1961] D.J. 499 (Tribunal de Grande Instance de la Seine).

32. C. PRO. CIV. arts. 168, 192 (58e ed. Petits Codes Dalloz 1962).

33. P. BELLET, *supra* note 26, at 14-15.

34. *Id.* at 17.

Nothing further was done on this proposal after Professor Foyer left the Ministry of Justice.

In Germany, basic rules concerning security for costs are quite similar to those prevailing in Austria. Unless reciprocity exists, security must be posted for the defendant's anticipated expenses in the first instance and, in the court's discretion, in a possible appeal.³⁵ These include essentially the defendant's attorney's fees, which are subject to an official schedule. Ordinarily, three times the so-called "basic" fee will be granted as security. According to the schedule, for a law suit involving an amount of \$12,500, security is likely to be about \$550.

A Protocol to the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany provides that security need not be posted by individuals having their residence or a commercial establishment where the action is brought.³⁶ Unfortunately, the English and German texts of the Treaty, officially of equal authenticity, are somewhat divergent on this point. According to the German text, the plaintiff must have his residence within the district of the court, which is likely to be a relatively small area, especially in Germany. According to the English text, however, the plaintiff's residence must be within the territory of the opposing party. A leading German authority feels that it is enough if, in the case of an action brought in Germany, the plaintiff has his residence somewhere in Germany, while in the case of an action in a state court in the United States, the plaintiff's residence must be in that particular state, though a residence anywhere in the United States is sufficient for an action brought in federal court.³⁷ The Status of Forces Agreement originally protected United States military personnel stationed in Germany, and they did not have to post security when suing in German courts. Now they are covered by the Treaty of Friendship.³⁸

35. ZIVILPROZESSORDNUNG (German Code of Civil Procedure) §§ 110, 112 (C.H. Beck 1966) [hereinafter cited German ZPO]. Under § 110 no security need be given in suits arising out of rights entered in the public land records, in so-called "documentary" suits, and in suits based on bills of exchange. Counterclaims are immaterial. As in Austria, so-called "material" reciprocity, *i.e.*, similarity of substantive laws and not mere national treatment, is required to justify a finding of reciprocity. There is no provision for binding declarations as to reciprocity by administrative bodies; this must be determined by the courts, although they can obtain guidance on foreign law from the administrative authorities. *Cf.* 1 B. WIECZOREK, ZIVILPROZESSORDNUNG UND NEBENGESETZE 845-79 (1957).

36. Treaty of Friendship, Commerce and Navigation with Germany, *supra* note 6, Protocol No. 6.

37. A. BULOW & H. ARNOLD, DER INTERNATIONALE RECHTSVERKEHR IN ZIVIL UND HANDELSACHEN 391-95 n.16 (1954); M. DOMKE, GERMAN-AMERICAN PRIVATE LAW RELATIONS CASES 1945-1955, at 84 (1956).

38. Supplementary Agreement to the NATO Status of Forces Agreement with Regard to Forces Stationed in the German Federal Republic, Aug. 3, 1959, art. 31, [1963] 1 U.S.T. 531, T.I.A.S. No. 5351.

III. LEGAL AID

In Europe, legal aid (*Armenrecht, assistance judiciaire*) is rather far-reaching. A person granted legal aid by the appropriate authorities is not only freed from the duty of paying filing fees and other court costs such as the ubiquitous stamp taxes, but also becomes entitled to the free services of counsel (including, in France, an *avocat* as well as an *avoué* if the action is brought before a court where both are needed).³⁹ In all three countries mentioned, aliens cannot claim this right, however, unless reciprocity is insured.

In Austria the situation as to legal aid is quite similar to that prevailing in the case of security for costs. As to United States citizens the matter is not covered by treaty. Whenever there is doubt as to the existence of reciprocity, an inquiry must be addressed to the Ministry of Justice, whose decision is binding.⁴⁰ The general view seems to be that the less extensive character of the American legal aid system⁴¹ would not prevent the existence of reciprocity, and that in New York and many other states, legal aid would be granted to Austrian nationals, but only to the extent they reside there.⁴² Hence, generally speaking, American nationals not residing in Austria are unlikely to obtain legal aid.

The position of United States citizens in France is much more favorable. The 1959 Convention of Establishment grants national treatment as to legal aid.⁴³ Unfortunately, the Treaty of Friendship between Germany and the United States does not go as far. Since the United States was unwilling, for political as well as constitutional reasons, to agree to a provision giving German nationals the right to legal aid in state as well as federal courts, and Germany was unwilling to make unilateral concessions,⁴⁴ the Treaty provides that in

39. For a general survey, see Schweinburg, *Legal Assistance Abroad*, 17 U. CHI. L. REV. 270 (1949).

40. Austr. ZPO, *supra* note 8, §§ 63, 64.

41. Under Austr. ZPO, *supra* note 8, § 64 an individual who has been granted legal aid is freed temporarily from stamp and similar taxes, need not post security for costs, becomes entitled to the free services of a lawyer if these are required, and is also freed from interpreter's and witness's fees. Furthermore, such a person need not pay consular fees, a matter of some significance in international litigation. See *Konsulargebuehrgesetz* (Law on Consular Fees), July 18, 1952, [1952] BGBl. 508. The same rules prevail before the Administrative Court (which hears proceedings to review administrative action). *Verwaltungsgerichtshofgesetz* (Law Concerning the Administrative Court), Nov. 17, 1964, [1965] BGBl. 289, § 61. The same is true of proceedings before the Constitutional Court. See L. WERNER & H. KLECATSKY, *DAS OESTERREICHISCHE BUNDESVERFASSUNGSRECHT* 729 (1961).

42. 2 H. FASCHING, *supra* note 8, at 523-24.

43. Convention of Establishment with France, *supra* note 6. The basic law concerning legal aid in France is the Law of January 22, 1851, 2 [1851] D.P. IV. 25 (since amended several times). For more details, see P. HERZOG, *supra* note 26, at 545-50.

44. Cf. A. BULOW & H. ARNOLD, *supra* note 37, at 991-92 n.16. The scope of legal

the United States, German nationals are entitled to legal aid in the federal courts, while United States nationals suing in German courts must be granted legal aid in those instances in which their action, if brought in the United States, could, or would have to, be brought in a federal court.⁴⁵ This provision would seem to make legal aid available very widely, since diversity of citizenship will usually be present. It is unfortunate, however, that in matters involving relatively small sums, as well as various domestic relations problems, legal aid will not be available pursuant to the Treaty. To the extent reciprocity can be shown to exist in fact, it can, of course, be granted even in cases not provided for in the Treaty. As in the case of security for costs, the question whether there is reciprocity must be determined by the court or other authority concerned. While information on foreign law may be requested from the Federal Ministry of Justice, the latter does not issue any binding declarations.⁴⁶

In all three countries discussed, the rules concerning legal aid apply also before the administrative courts, and in Germany and Austria before the Constitutional Court as well.⁴⁷

IV. ENFORCEMENT OF FOREIGN JUDGMENTS

The expanding scope of jurisdictional concepts in the United States makes it more likely that United States citizens will obtain judgments against foreign nationals or companies in the United States. Unfortunately, the chances for enforcing such judgments abroad are frequently not good.⁴⁸ In all countries concerned, a distinction must be drawn in this connection between matrimonial judgments and other matters.

In Austria a foreign judgment may be enforced or recognized in

aid in Germany is rather similar to that of Austrian legal aid, though in Austria the law requires the granting of legal aid only if the costs of litigation would deprive the party of essential support, while the German legislation speaks in terms of adequate support. Furthermore, as noted before, in Germany there are no binding administrative findings of reciprocity, although reciprocity is required. German ZPO, *supra* note 35, § 114.

45. Treaty of Friendship, Commerce and Navigation with Germany, *supra* note 6, Protocol No. 7. Under the new Status of Forces Agreement, art. 31, *supra* note 38, U.S. military personnel are covered by the Treaty of Friendship. For the earlier Treaty, see A. BULOW & H. ARNOLD, *supra* note 37, at 991-92 n.17. For some other exceptions to the reciprocity requirement, see I WIECZOREK, *supra* note 35, at 898. Cf. DOMKE, *supra* note 37, at 85.

46. Note 44 *supra*.

47. As to Austria, see note 41 *supra*. As to France, see Law of January 22, 1851, art. 1, *supra* note 43. As to Germany, see Verwaltungsgerichtsordnung (Law Concerning the Administrative Court), [1960] BGBl. I 17, § 166; Finanzgerichtsordnung (Tax Court Law), [1965] BGBl. I 1477, § 142.

48. See generally Nadelmann, note 73 *infra*.

non-matrimonial matters only if reciprocity is insured by treaty or by an official declaration of the Austrian government published in the Austrian Official Gazette.⁴⁹ This declaration should not be confused with the information given in a specific case by the Ministry of Justice. The declaration in question here is more akin to an administrative regulation. In fact, very few such declarations have ever been issued.⁵⁰ Since the United States has no treaty with Austria concerning the enforcement of judgments, and since no declaration on reciprocity has been issued by the Austrian government, United States judgments in non-matrimonial matters are of no effect in Austria. It might be added that problems would remain even if the obstacle of reciprocity could be removed, since Austria requires, as additional conditions for recognition and enforcement, that the foreign court have had jurisdiction under Austrian concepts of jurisdiction and that the defendant has been served in person in the foreign country, in Austria, or elsewhere through official judicial cooperation. Moreover, there are some additional requirements.⁵¹ A judgment not entitled to recognition or enforcement, however, sometimes can be given some effect as a fact.⁵²

The recognition of divorce and other matrimonial judgments in Austria still is governed by German legislation, the so-called Fourth Implementing Decree Concerning the Marriage Law.⁵³ Under it, judgments rendered by the national court of both spouses are entitled to recognition without further proceedings.⁵⁴ In the case of United States citizens, this recognition presumably would apply only to decisions by courts of the state in which both spouses are domiciled. In all other cases, the foreign judgment is of no effect until it has

49. Executionsordnung (Law Concerning Execution) §§ 79, 84 (10th ed. Manz 1961). The law deals directly only with the enforcement of foreign judgments but is also applied to recognition. 2 R. POLLAK, SYSTEM DES OESTERREICHISCHEN ZIVILPROZESSRECHTES MIT EINSCHLUSS DES EXECUTIONSRECHTES 543 (1931); Judgment of Dec. 14, 1949, 2 Ob 223/49, 22 S.Z. 454 (Aust. Sup. Ct.).

50. One has been issued as to Bosnia-Herzegowina. See Judgment of Oct. 18, 1927, Ob II/1015, 46 ZENTRALBLATT FUER DIE JURISTISCHE PRAXIS 149 (Aust. Sup. Ct.). Others were issued as to Hungary, Germany, Italy and Roumania. For a general discussion, see Hoyer, *Bemerkungen zur Geschichte de Vollstreckung auslaendischer Entscheidungen in Oesterreich im 19. Jahrhundert*, 5 ZEITSCHRIFT FUR RECHTSVERGLEICHUNG 94, 102 (1964). At the present time, informal discussions seem to be in progress concerning the issuance of such declarations as to one or more Canadian provinces; this would be an informal method of insuring reciprocity, particularly in connection with support orders.

51. Executionsordnung, *supra* note 49, §§ 80, 81. Additional conditions are: the defendant must have had a chance to participate in the proceedings, and there may be no violation of Austrian public policy.

52. 3 FASCHING, *supra* note 8, at 745-46. See also *id.* at 748-79 for a list of treaties between Austria and various foreign countries (not including the United States) concerning execution of judgments.

53. Law of October 25, 1941, [1941] RGBL. I 654. This law is no longer in effect in Germany. See text accompanying note 77 *infra*.

54. *Id.* § 24(4).

been recognized by a decision of the Austrian Ministry of Justice. Such a decision is required not only as a precondition of a judicial recognition of the judgment, but also as a precondition for any remarriage in Austria. The decision of the Ministry of Justice is binding on all courts and administrative authorities.⁵⁵ While it is reviewable by the Administrative Court,⁵⁶ the number of cases in which judicial review actually is sought is extremely small.⁵⁷ Proceedings are quite expeditious and inexpensive.⁵⁸ In instances in which it is unlikely that the other spouse will *not* object to recognition, that spouse sometimes is not even summoned.⁵⁹

In determining whether recognition should be granted a foreign divorce, the Austrian Ministry of Justice must determine whether there has been compliance with the conditions of section 328 of the German Code of Civil Procedure. That section requires in particular that the foreign court have jurisdiction according to the jurisdictional concepts of the court where the judgment is drawn into question; thus Austrian law must be used. Under the pertinent Austrian statute, Austrian courts have exclusive jurisdiction if the husband is an Austrian national and has resided in Austria during the entire period covered by the suit.⁶⁰ Furthermore, if the defendant is an Austrian national who has not appeared, the summons must have been served upon him in person in the foreign country, or elsewhere by international judicial cooperation. There is also a public policy exception.⁶¹ Reciprocity could be required, but never is. In actual practice, effect seems to be denied rather routinely to Mexican *ex parte* divorces.⁶²

55. *Id.* § 24. If an issue as to the validity of a divorce arises in an action pending in Austria, the court should refer the issue to the Ministry of Justice on its own motion. Judgment of Nov. 4, 1959, 6 Ob 250/39, 32 S.Z. 396 (Aust. Sup. Ct.).

56. H. KOEHLER, *INTERNATIONALES PRIVATRECHT* 68 (3d ed. 1966).

57. Approximately 500 such applications for recognition are made each year; this would amount to a total of about 10,000 since the independence of Austria was reestablished in 1945. Not many more than 10 decisions have been reviewed by the Administrative Court, however.

58. According to the *Gerichts-und Justizverwaltungsgebuehrengesetz 1962* (Law on Court and Administrative Fees), May 22, 1963, [1963] BGBl. 628 § 39, item 18(a)(3), the fee is to be between Aust. Schilling 20 and 2000 (about \$.80-\$80), the amount to be determined in the discretion of the administrative authorities. In practice, the Ministry of Justice seems to charge about one per cent of the applicant's monthly income if he has no dependents, less if he has, but always remaining within the statutory limits mentioned.

59. The feeling seems to be that although this procedure may be somewhat unorthodox, failure to summon the other spouse is justified in the interest of speed and saving of expenses whenever it is unlikely that objections will be raised.

60. Jurisdictionsnorm (Law on Jurisdiction), August 1, 1895, [1895] Aust. RGBI. No. 111, § 76.

61. German ZPO, *supra* note 35, § 328.

62. *See, e.g.*, Judgment of July 9, 1959, 82 JURISTISCHE BLAETTER 397 (Aust. Admin. Ct.) (affirming decision of non-recognition by Ministry of Justice).

The requirements for the recognition of foreign judgments in France have been described in some detail in a number of American publications and therefore can be discussed here briefly.⁶³ A distinction once again is drawn between matrimonial and other judgments. In neither case, however, is reciprocity required. Non-matrimonial judgments can be neither enforced nor given a *res judicata* effect in France unless they are subjected to a so-called *exequatur* procedure which, in practice, is similar to a regular civil action. The rules concerning the granting of *exequatur* are basically judge-made. One of these rules, in particular, makes it difficult for United States nationals to enforce American judgments in France against French nationals: in the French view, foreign judgments cannot be granted *exequatur* unless the foreign court had jurisdiction in accordance with French rules. Under articles 14 and 15 of the French Civil Code, however, French courts can always deal with cases involving at least one French party. As a corollary, foreign courts are said to lack jurisdiction in actions involving a French national unless the French national waives the requirement that the foreign court have jurisdiction in accordance with French rules. An express written waiver before the action is brought will be given effect, but participation in the foreign action is not necessarily considered as a waiver. Other less important obstacles to recognition are: rules conditioning the grant of *exequatur* on the use of choice of law rules leading to the application of the law applicable under French choice of law rules, observation of minimum rules of procedural fairness, and an absence of fraud on the law and violations of public policy. Presently, the French courts exercise a fair amount of restraint in the use of the public policy exception. Until a few years ago, although a judgment fulfilled all the conditions mentioned, it was not automatically entitled to *exequatur*.⁶⁴ French courts sometimes asserted a right to review foreign judgments on the merits and to deny recognition to judgments considered ill-founded in law or fact. In a 1964 case involving a judgment of a court in New York, the *Cour de Cassation*, France's highest court, abandoned that right.⁶⁵

Divorce and other matrimonial judgments have a *res judicata* effect in France without *exequatur*, though *exequatur* is still necessary whenever such a judgment is to be the basis for a constraint upon person

63. E.g., P. HERZOG, *supra* note 26, at 587; Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 AM. J. COMP. L. 72 (1964); Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967) and authorities there cited.

64. P. HERZOG, *supra* note 26, at 595-96 and authorities there cited.

65. *Munzer v. Dame Jacoby-Munzer*, [1964] J.C.P. II. 13590 (Cass. civ. Ire).

or property in France. In a situation where *exequatur* is required the same rules apply as in the case of other judgments. *Exequatur* may be useful in other instances too. Though no *exequatur* is required to confer a *res judicata* effect on foreign divorce judgments, the rules used in connection with *exequatur* must be used to determine the validity of a foreign matrimonial judgment if its effectiveness is drawn into question in a judicial proceeding.⁶⁶ On the basis of these requirements, American and Mexican migratory divorces have repeatedly been denied effect in France, even in instances in which, because of the bilateral nature of the divorce proceedings, they were likely to receive recognition in the parties' American domicil.⁶⁷

The recent review of French rules concerning international litigation also involved the jurisdictional rules of articles 14 and 15 of the Civil Code. No practical changes resulted. However, pursuant to article 220 of the Treaty creating the European Common Market,⁶⁸ a group of experts have drafted a proposed treaty which would, within the confines of the European Economic Community, abolish articles 14 and 15. The proposed treaty would not benefit United States citizens or others not nationals of European Economic Community countries.⁶⁹

The distinction between the effectiveness of foreign divorce judgments and other foreign judgments exists in Germany as well. Outside the sphere of divorce and other matrimonial action foreign judgments are not effective in Germany unless they comply with the requirements of section 328 of the German *Zivilprozessordnung*.⁷⁰ To be entitled to recognition, the foreign judgment first of all must have been rendered in a jurisdiction which grants reciprocity to German judgments, unless the foreign judgment does not involve money matters and under German rules no German court would have been competent to deal with the matter. Unlike the situation in Austria, reciprocity does not depend on an official governmental declaration. Whether there is reciprocity must be determined by the court, al-

66. P. HERZOG, *supra* note 26, at 597-98 and authorities cited.

67. Freed, *Recognition of Mexican Divorces—France*, 1 INT'L LAWYER 55 (1966).

68. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11.

69. The text of the draft has been reprinted in English translation at 1 CCH COM. MKT. REP. ¶ 6003. For comments, see Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: the Common Market Draft*, 67 COLUM. L. REV. 995 (1967); Weser, *Some Reflections on the Draft Treaty on the Execution of Judgments in the EEC*, [1965] U. ILL. L.F. 771; Bellet, *L'élaboration d'une convention sur la reconnaissance des jugements dans le cadre du Marché Commun*, 92 JOURNAL DU DROIT INTERNATIONAL 833 (1965).

70. German ZPO, *supra* note 35, §§ 722, 723. Although the use of a special enforcement procedure is required only for enforcement purposes, during this procedure the court must check whether the conditions of ZPO § 328 have been complied with.

though the court may request the executive branch to supply information on points of foreign law. Unfortunately, the question of reciprocity as to American judgments is somewhat confused. The commentators are divided on the issue, though the more recent view seems to be that there is reciprocity, at least as to some states.⁷¹

Unfortunately, a leading decision of the German Supreme Court denies the existence of reciprocity. Its continued significance may be subject to some doubt, however, since it was rendered under peculiar conditions. After the great San Francisco earthquake, litigation arose between many residents of that city and certain German insurance companies authorized to do business in California. To facilitate the enforcement of the resulting judgments in Germany, the California legislature enacted an amendment to the California Code of Civil Procedure, providing that foreign country judgments should be entitled to the same effect in California as California judgments.⁷² In a proceeding by several California residents to enforce judgments obtained by them in California against a German insurance company, the Oberlandesgericht (intermediate appellate court) in Colmar found as a fact that California courts examined not only whether foreign courts had jurisdiction in the international sense—the only matter examined by German courts in connection with foreign judgment—but also whether the foreign courts were competent under their own law, something which amounted to a reexamination of the merits. Furthermore, the German court found that in equity both foreign and domestic judgments were subject to a possible reexamination, for instance, if fraud was alleged. For both of these reasons it denied the existence of reciprocity. The German Supreme Court affirmed. It held that as to the issue of California law, it was bound by the findings of the Colmar court. On that basis, however, there was no reciprocity since reciprocity meant that the foreign country had to treat German judgments approximately in the same manner as Germany treated foreign judgments, not that foreign and domestic judgments were treated alike.⁷³ The decision has been criticized as

71. Denying reciprocity on the ground that American courts will reexamine the merits, at least to a limited extent, see 1 F. STEIN & M. JONAS, KOMMENTAR ZUR ZPO 17 (8th ed. 1953); somewhat doubtful, but assuming reciprocity at least as to New York and federal courts, 2 B. WIECZOREK, *supra* note 35, at 770-71. But the 1963 supplement of that work assumes reciprocity much more positively. See 7 B. WIECZOREK, *supra* note 35, at 156 (1963).

72. CAL. LAWS 1907, ch. 178 (now CAL. CODE CIV. PRO. § 1915 (West Supp. 1967)).

73. *C. v. Rh. & M. Feuerversicherungsaktiengesellschaft*, March 26, 1909, 70 RGZ 434. For a comment see Nadelmann, *Nonrecognition of American Money Judgments Abroad and What to Do About It*, 42 IOWA L. REV. 236, 252 (1957). Cf. L. RAAPE, *INTERNATIONALES PRIVATRECHT* 137 (5th ed. 1961).

resting on a misconception of American law.⁷⁴ An unexpressed reason for the decision may have been the fear of the German courts that the California statute providing for reciprocity had been enacted merely to secure enforcement of the earthquake judgments and would be abrogated immediately after that had been accomplished, a fear which has proved to be quite groundless. The German Supreme Court does not seem to have had another occasion to rule on the question of reciprocity. Lower courts generally, but not universally, have followed the Supreme Court.⁷⁵

An additional obstacle to the enforcement of American judgments exists in the case of default judgments. Section 328 of the German Code of Civil Procedure permits the recognition of foreign default judgments rendered against German nationals only in case of personal service on the German defendant within the jurisdiction of the rendering court, or in case of service in Germany through formal judicial cooperation. While German authorities have been ready to effectuate so-called informal service on behalf of American plaintiffs, there can be no formal service in the absence of a treaty arrangement to that effect. It is not clear to what extent this situation will be modified when the recent Hague Convention on the service of documents, already ratified by the United States,⁷⁶ comes into effect as far as Germany is concerned. American judgments also can be denied recognition if they, broadly speaking, violate German public policy, or if, in matters involving personal status, substantive rules have been used which are less favorable to the German party than those indicated by German choice of law rules. This fact may be important especially as to divorce and to the formal requirements for marriages celebrated in Germany. Finally, a foreign judgment cannot be recognized in Germany in cases in which, under German law, a German court has exclusive jurisdiction. Outside the divorce area, the last three rules mentioned do not seem to have created particular problems as to American judgments.

As to divorce and other matrimonial judgments, the rules discussed in connection with Austrian law are more or less applicable in Germany too. Although the so-called Fourth Implementing Decree Concerning the Marriage Law was abrogated in Germany in 1961, the

74. Felber, *Die Vollstreckbarkeit von Urteilen Amerikanischer Gerichte in Deutschland*, 60 JURISTISCHE WOCHENSCHRIFT 112 (1931).

75. For a list of cases denying reciprocity, *see id.* at 113 n.25. Asserting reciprocity, at least as to Illinois, *see* Judgment of May 3, 1935, 64 JURISTISCHE WOCHENSCHRIFT 2750 (Kammergericht Berlin).

76. *See* Amram, *The United States Ratification of the Hague Convention on Service of Documents Abroad*, 61 AM. J. INT'L L. 1019 (1967). The Convention, in addition, has been ratified by the United Kingdom. Bevens, *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L L. 472, 478-80 (1968).

law which has replaced it retains the principle of administrative recognition.⁷⁷ Application must be made in the first instance to the Department of Justice of the appropriate province (Land).⁷⁸ The procedure seems to be largely a matter within the discretion of the administrative agency,⁷⁹ and the decision of the administrative authorities is subject to review by the competent Oberlandesgericht (intermediate appellate tribunal).⁸⁰ The new law states specifically that reciprocity is not a requirement for recognition of matrimonial judgments.⁸¹ Unlike the earlier decree, however, it does not refer to the German Code of Civil Procedure for the substantive conditions for recognition. It is clear, though, that these rules are still relevant, since no substantive rules are contained in the new law.⁸² Problems in divorce cases may arise because of the rule making recognition dependent upon the observance of German concepts of international jurisdiction. In particular, a foreign divorce rendered in a case in which one of the parties is a German national will not be entitled to recognition unless the defendant had a foreign (non-German) nationality, or had his ordinary residence outside Germany where the judgment was rendered, or the spouses had their last common residence there, or recognition is sought by the defendant in the divorce action.⁸³ No recourse to administrative authorities is needed in case of divorces granted by the country of which both spouses are nationals.⁸⁴

V. CLAIMS AGAINST THE GOVERNMENT

In France, no restrictions prevent aliens from suing the French Republic or its administrative subdivisions in accordance with appropriate rules of substantive law. These actions must ordinarily be brought in the administrative courts, although in some instances such as automobile accidents, the action must be brought in the regular courts.⁸⁵

In Austria, the rather far-reaching law concerning governmental liability is probably of little help to American plaintiffs. Section 7 of

77. Familienrechtsaenderungsgesetz (Law Modifying Rules of Family Law), August 11, 1961, [1961] BGBl. I. 1227, art. 7.

78. *Id.* § 1(1)-(2). The application must be made in the province where either spouse has a residence; if no spouse has a residence in Germany, then in the province where the new marriage is to be celebrated. It is also possible to petition for non-recognition of a foreign decree. Familienrechtsaenderungsgesetz, *supra* note 77, art. 7, § 1(7).

79. 7 B. WIECZOREK, *supra* note 35, at 160.

80. Familienrechtsaenderungsgesetz, *supra* note 77, §§ 1(4)-(6). No further review is possible.

81. *Id.* § 1(1).

82. 7 B. WIECZOREK, *supra* note 35, at 161.

83. German ZPO, *supra* note 35, § 606(a); L. RAAPE, *supra* note 73, at 308.

84. Familienrechtsaenderungsgesetz, *supra* note 77, art. 7, § 1(1).

85. *E.g.*, P. HERZOG, *supra* note 26, at 115-16.

that law provides that aliens may sue under its provisions only if there is reciprocity.⁸⁶ Reciprocity must be shown by a declaration on that issue from the Federal Chancery (*Bundeskanzleramt*), the office charged with the conduct of Austria's foreign affairs. This declaration is not subject to judicial review.⁸⁷ As in the case of the analogous declarations required in the case of security for costs and legal aid, it is binding on the court where the action is pending. The Federal Chancery seems to take the position that reciprocity is insured only if the foreign country grants rights which are substantially similar to those available in Austria; that Austrian citizens receive national treatment in connection with claims against the government is not considered sufficient. As a result only one declaration of reciprocity, which related to the Netherlands, seems to have been issued so far.⁸⁸

However, the law concerning governmental liability regulates only what one might call liability for "governmental" functions. The central government and its subdivisions have always been responsible for acts done in what one might call a "proprietary" capacity. This liability is governed by general rules of private law.⁸⁹ Aliens are not disadvantaged beyond what has already been indicated in connection with security for costs and legal aid when they sue the government in such a case. As one might expect, the distinction between "proprietary" and "governmental" functions is not always easy to make.⁹⁰

In Germany there are a number of laws concerning the liability of the central government and of the various provinces. Most of these laws were enacted before the start of the first World War. Generally, they provide that liability towards aliens depends on reciprocity.⁹¹ The Bonn Constitution of 1949, however, contains a very broad pro-

86. *Amtshaftungsgesetz* (Law on Official Liability), Dec. 8, 1948, [1949] BGBl. 49.

87. Judgment of Feb. 24, 1958, 13 OESTERREICHISCHE JURISTENZEITUNG 668 (Aust. Adm. Ct.) (which, in fact, involved governmental liability, rather than security for costs). As to the constitutional problems involved, see text at note 13 *supra* and authorities cited.

88. It would appear that the Austrian Ministry of Justice does not quite share the strict interpretation of the reciprocity requirement espoused by the Federal Chancery.

89. I ADAMOVICH, *HANDBUCH DES OESTERREICHESCHEN VERWALTUNGSRECHTES* 8-12, 285 n.1 (5th ed. 1954); E. LOEBENSTEIN & G. KANIAK, *KOMMENTAR ZUM AMTSHAFTUNGSGESETZ* 44-47 (1951).

90. Thus the operation of a customs warehouse is a proprietary function, Judgment of Nov. 22, 1961, 1 Ob 458/61, 34 S.Z. 468 (Aust. Sup. Ct.), and so is the treatment of patients in a government-owned hospital. E. LOEBENSTEIN & G. KANIAK, *supra* note 89 (Supp. 1957), at 13. But vaccination under the compulsory vaccination laws is a governmental function. E. LOEBENSTEIN & G. KANIAK, *supra* note 89, at 46. As to the maintenance of streets, the authorities are split. See *id.* at 46 & 1957 Supp. at 13.

91. As to the German central government, see Law on the Liability of the Reich for its Employees, May 22, 1910 [1910] RGBl. 798 (amended by Law of June 30, 1933, [1933] RGBl. I 433, § 7). For the provincial legislation, see Frowein, *Staatshaftung gegenueber Auslaendern*, 19 JURISTENZEITUNG 358-60 (1964).

vision concerning governmental liability.⁹² As a result, it has been argued that existing restrictions on the right of aliens to sue governmental units in Germany are unconstitutional. Unfortunately, this argument has been rejected by the German Supreme Court.⁹³ Thus, United States citizens cannot take advantage of such laws even if they make a strong showing that in their home state there are broad provisions for governmental liability. The statute as to the liability of the German Federal Government requires—as do most provincial statutes—that reciprocity must be shown by a governmental declaration published in the official Law Gazette in the same way as a statute or regulation. Unlike the situation prevailing in Austria, a request for such a declaration cannot be made at the time suit is brought. Declarations as to reciprocity have been made as to a number of countries, but not as to the United States. As a matter of fact, existing restrictions on governmental liability in the United States make it unlikely that such a declaration will be issued in the near future.⁹⁴

In Germany, as in Austria, governments are liable for acts performed in their proprietary capacity in the same manner as private individuals. Reciprocity rules are immaterial in this connection.⁹⁵

VI. CONCLUSION

This brief review of obstacles encountered by American parties wishing to pursue remedies in certain European countries should not lead to the conclusion that their lot is necessarily worse than that of European plaintiffs in the United States. Certain procedural obstacles which are common in the United States—such as the rule that executors, administrators, and other court-appointed parties cannot sue outside the jurisdiction in which they have been appointed—generally are not known on the Continent. American executors, administrators, and

92. Grundgesetz art. 34 (1949) (W. Ger.), providing that, if any person violates his official duties in the exercise of an official function, the government or public body who employs him is, as a matter of principle, liable, but retains a claim over against the employee in case of intentional or grossly negligent conduct.

93. Judgments of May 10, 1954, 13 BGHZ 241; Oct. 1, 1956, 9 NEUE JURISTISCHE WOCHENSCHRIFT 1836; July 13, 1961, 17 JURISTENZEITUNG 100. The Court seems to feel that minor deviations from the rule of general liability are not unconstitutional.

94. See generally Frowein, *supra* note 91.

95. The distinction, once again, is not easy to make. A rock in a waterway, for instance, entails proprietary, not governmental, liability. Judgment of April 30, 1953, 9 BGHZ 373. The decision presumably is applicable in cases of defects in highways as well. Acts of teachers, social welfare workers, or public health doctors will generally involve governmental liability, as will acts of post office employees, except perhaps when transporting passengers on the postal bus lines; however, acts of the (government-owned) railroad employees, or employees of municipal gas, water or electric plants are proprietary in nature. See BGB § 839, Kommentar. 2c (Palandt 1965).

the like can usually sue there without any form of ancillary appointment.⁹⁶ On the other hand, the mere fact of distance, quite apart from nationality, can create problems in the enforcement of rights. They have recently been discussed in considerable detail, hence there is no need to repeat the discussion here.⁹⁷

In summary, one might say that obstacles encountered by American plaintiffs in Western Europe certainly do not warrant the conclusion that the local remedies rule should be abandoned. Rather, it is suggested that an attempt be made to solve some of the problems indicated by treaty. In the much more touchy area of expropriation, there are treaty provisions, and sometimes, at least, quite effective ones.⁹⁸ Therefore, it should not be too difficult to negotiate reforms as to technical legal rules which are frequently viewed quite critically in all the countries concerned. United States ratification of the Hague Convention on the service of documents⁹⁹ seems to be a first step in the right direction.¹⁰⁰

96. As to Austria, see H. KOEHLER, *supra* note 5, at 141-42 (at least in the case of decedents not resident in Austria); as to France, see, e.g., *Leffert Holz v. Union des Juifs pour la résistance et l'entraide*, 85 JOURNAL DU DROIT INTERNATIONAL 134 (1958) (New York Superintendent of Insurance authorized to sue in France in his capacity as liquidator of insurance company without ancillary appointment); as to Germany, see, e.g., L. RAAPE, *supra* note 73, at 453.

97. See INTERNATIONAL COOPERATION IN LITIGATION—EUROPE (Smit ed. 1965).

98. Thus a German court held that a law which provided for compensation in an amount less than full market value in the case of expropriation for the purpose of the reconstruction of war-damaged cities did not violate art. 14(3) of the German GRUNDGESETZ (Constitution) which requires "adequate" compensation for expropriated property. However, under art. V of the Treaty of Friendship, Commerce and Navigation with the German Federal Republic, *supra* note 6, an American citizen whose property has been expropriated under these circumstances is entitled to full value. Judgment of Dec. 19, 1957, 26 BGHZ 200.

99. See note 76 *supra*.

100. Problems, especially in the reciprocity area, also arise due to misunderstandings as to American law. See, e.g., for a German decision, *C. v. Rh. & M. Feuerversicherungsgesellschaft*, March 26, 1909, 70 RGZ 434 (mistaken assumption about scope of *res judicata*), and for an Austrian decision, *supra* note 19 (mistaken assumption about jurisdiction of federal courts). Hence increased efforts to make American law known abroad, beyond what already is done, also would be helpful. Cf. Nadelmann, *supra* note 73, at 257-62.