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The German Federal High Court's Facebook Decision and Its Lesser Known Cross-Border Lessons

On July 12, 2018, the German Federal High Court (BGH) handed down its closely followed judgment against Facebook.¹

The Case

The parents of an underage teenager who had been tragically killed in 2012 in Berlin under undetermined circumstances by a subway train sued Facebook for access to their daughter's account, wanting to know more about her frame of mind before her death. Was this a case of suicide or not? Facebook tenaciously denied the parents access, citing

everything from the German constitution to its own terms of service.

The facts of the case are eerily similar to those of a case decided in 2012 by the courts of the Northern District of California,² in which surviving family members of a young fashion model who had died in 2008 after falling from the 12th floor of an apartment in Manchester, England, sought access to her Facebook account. The applicants in the case before the California court did not believe that the deceased had committed suicide and sought access to her Facebook account in search of evidence of her state of mind in the days before her death.

The facts may have been very close, but the outcomes couldn't have been more different. While the family lost before the California court, the parents won in Germany.

Jurisdiction

Considering that Facebook is a global phenomenon, halting at virtually no borders, it is not surprising that the tragic cases against Facebook occurred in different parts of the world. And considering that Facebook is headquartered in Menlo Park, California, it's equally unsurprising that the courts of the Northern District of California came to decide the Manchester case. But how did the Berlin case manage to stay in the grasp of the German courts, especially since Facebook's "Statement of Rights and Responsibilities" in most of the world at the time provided that the choice of forum for "all disputes is exclusively in a state or federal court located in Santa Clara County," California? Given the

home court advantage, one can imagine that the defendant did not relinquish the case to the German courts willingly.

Under the European Union (EU) harmonized civil procedure conflict of laws rules (which override German national conflicts rules in certain cross-border cases) in effect when the Berlin case was brought,³ the competence of the German courts was based on whether the defendant had a legal presence in an EU Member State. Since Facebook operated an affiliate in Ireland (and still does), the BGH held that the lower courts had correctly asserted jurisdiction; and the defendant was ultimately forced to relent and submit to the German courts.

Since then, the underlying EU regulation has been recast.⁴ In cross-border matters German courts now look to EU civil procedure conflicts rules, which lean even further in favor of consumers.⁵ Even the mighty social media giant has been forced to accept that the courts of the targeted user's domicile will have jurisdiction when it comes to Germany (and the EU).⁶

Lesson learned: all providers who, by whatever means, are commercially targeting consumers domiciled in Germany know that the German courts will have jurisdiction regardless of what their terms of service may provide.

Classification of the Question

The next step in a cross-border dispute is that of classification. What is the legal category into which the question falls? For the German courts, the Facebook case was a matter of contract and not of the German constitution or the German Telecommunications Law as argued by



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the defendant. It was found that neither of these “domestic overriding mandatory norms”⁷ (referred to as public policy doctrine under U.S. conflicts principles) applied to the case. The BGH dismissed the idea that the deceased’s post-mortem constitutional right to preservation of her personal dignity prevented Facebook from disclosing the contents of her account to her parents, much as diaries and letters, unless stipulated otherwise by the deceased, are not prevented by the German constitution from becoming a part of the estate. And it held that the German Telecommunications Law,⁸ pursuant to which a communications provider is prohibited from disclosing content to “third parties,” did not prevent access from being given to the parents of the deceased (as the court of appeal had held). As heirs, they were not “third parties” within the statutory definition.

Connecting Factor

German conflicts rules (as well as EU principles⁹) generally acknowledge the principle of freedom of contract, meaning that the parties can choose the applicable law. This explains why the California court not only heard the Manchester case, but applied California law.

The German market, however, had already become an exception in the Facebook world. Its “terms of use,” as they were called in the German language version, made an exception to the choice of California law by explicitly replacing it with the provision: “This Statement is subject to German law.” In other words, Facebook had “unilaterally” submitted to German law, and the courts readily

accepted this. The BGH noted obiter dicta that German law would have applied regardless, pursuant to the EU conflicts rule,¹⁰ which provides that in “a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional ... by any means, directs such activities to that country ... and the contract falls within the scope of such activities.”

A second lesson learned: all providers who, by whatever means, are commercially targeting consumers habitually residing in Germany know that German law will apply regardless of what their terms of service may provide.

German Contract Law

The final question put to the BGH was whether the account had become a part of the estate. Although the general heritability of contracts can be restricted or excluded by the parties under German law, the court held that this had not been the case. Facebook’s provisions on the “memorialization” of an account were not found in the body of the “Statement,” but rather obscured in the “Help” section. But even so, any of a provider’s general terms and conditions, which materially restrict its services are subject to the scrutiny of the German courts.¹¹ Closing the door to the heirs to a deceased’s account was found to be such a material, and, thus, invalid post-contractual restriction of Facebook’s services. Although the BGH

went to great lengths to deny all defenses brought forth by the defendant, at the core of its reasoning lies the fierce determination of the German courts to defend the German consumer.

A third lesson learned: all providers targeting consumers in the German market know that their general terms and conditions will be subject to intense scrutiny by the German courts.

Adjudicating this case as a matter of contracts law (and not as one of heritability of digital assets) provided the BGH with the tools it needed to get the result it wanted, which was to override the memorialization of Facebook accounts. **P**

1 BGH, Urt. v. 12.7.2018 – III ZR 183/7.

2 *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, Case No C 12-80171 LHK (PSG) (N.D. California, 20 September 2012).

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

4 That is, for causes of action occurring after January 10, 2015. Too late to apply therefore to the Berlin case. The results of the case, however, would have remained the same, even under this EU regulation.

5 Articles 17 and 18 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

6 Query, how the clause will read for U.K. users post-Brexit.

7 Article 9 subsection 2 of the Regulation (EC) No 593 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Convention).

8 § 88 subsection 3 *Telekommunikationsgesetz*.

9 Articles 3 subsection 1 and 6 subsection 2 of the Rome I Convention.

10 Article 6 subsection 1 of the Rome I Convention.

11 Pursuant to Section 307 of the German Civil Code.