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Enforcement of Judgments 2021

Germany

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GERMANY

Law and Practice

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1. IDENTIFYING ASSETS IN THE JURISDICTION

1.1 Options to Identify Another Party's Asset Position

In Germany, enforcement is the responsibility of the creditor.

No state authority, eg, such as the debt collection office in Switzerland, which acts on its own initiative and carries out enforcement autonomously, exists in Germany.

However, in pursuing enforcement, the creditor must make use of the state enforcement bodies and is not allowed to enforce its rights arbitrarily. On the one hand, enforcement is carried out via the enforcement courts at the local courts and, for the enforcement of real estate, via the land registry office. On the other hand, the bailiffs are active to enforce the interests of the creditor for enforcement in tangible assets.

Publicly available information is provided in the registers, but these often only offer basic information.

Publicly Available Information

Germany provides a number of public registers. These registers can either be inspected by qualified lawyers or notaries; alternatively information from these registers can be obtained by private institutions. Public authorities take care of these registers and the information provided is regarded to be true. With regard to enforcement, the most important registers are the Commercial Register and Business Register (*Handelsregister* and *Unternehmensregister*) and the Land Register (*Grundbuch*).

When trying to identify assets of the other party, the first step for the creditor would be to check the registers, even though they mostly provide only basic information and at least some indica-

tion for possible assets is needed as there is no random search function provided.

The Company Register provides information about the history of a company, its seat, its managing directors, etc. The Business Register contains the annual reports of registered companies. The information in these registers gives a general overview on the status of a company and needed formal details. Nonetheless, such information often remains superficial, and with regard to the annual reports, these are often not able to reflect the actual situation at the time of enforcement. Excerpts from both registers can be obtained without a special interest either directly or via private providers.

The Land Register provides information about the ownership of property and encumbrance by mortgage, etc. Authorised persons can inspect the Land Register only when demonstrating a justified interest and once again a basic indication for available property is needed as there is no random search possible. Information from the Land Register is trustworthy and due to the specific character of property, which can only be transferred by notarised acts, lack of actuality of ownership and encumbrance is not an issue.

Once again it has to be mentioned that the prior identification of assets or an indication of such assets of the other party lies within the responsibility of the creditor. Once having such basic knowledge, registers can be pretty helpful.

Other Means of Obtaining Information

Besides the registers there are also private providers offering information, so-called private credit agencies; in particular for example CRIF Bügel or Creditreform. These agencies can provide information about the current financial situation of businesses as well as the credit rating.

In order to track down single assets of the debtor further investigation by the creditor is required. Especially if assets are deliberately concealed by the debtor to prevent the enforcement of judgments, it is within reasonable means for the creditor to hire private detective agencies to track these down.

Asset Disclosure in Germany

The tool of real asset disclosure as a means of discovery does not exist in Germany in itself; it does exist as a reflex for example in the case of third-party debtor information to be given as a result of attachment orders.

Freezing Orders

German law allows for freezing orders in the attachment procedure (*Arrestverfahren*). The attachment procedure itself is an urgent court procedure, which serves to provisionally secure the claim of a creditor who currently is not yet in the possession of an enforceable title.

When a court renders a freezing order in attachment proceedings, the debtor is immediately prohibited from disposing of their assets. The freezing order itself does not allow the creditor to seize the assets of the debtor. In a follow-up ex parte proceeding the creditor has to demonstrate in court which specific assets of the debtor, which are to be specified by the creditor, shall be seized. The seizure itself can then be executed by means of separate seizure orders.

German procedural law also allows for interim injunctions with which a debtor is ordered to perform or refrain from performing a certain act on a preliminary basis (*Einstweilige Verfügung*). The injunction itself can be significant as a means of securing enforcement measures.

2. DOMESTIC JUDGMENTS

2.1 Types of Domestic Judgments

Types of Domestic Judgments

German courts have two means by which they can decide: court orders and judgments.

Court orders

Courts can render a court order without the need for an oral hearing to be conducted. Court orders of importance are especially injunctions and attachment orders, which both allow a provisional security for the enforcement. Further court orders are for example orders fixing the costs of a court proceeding; these cost-fixing orders are enforceable titles, so that the enforcement can be initiated from them immediately.

Court judgments

Unlike court orders, court judgments are only rendered after an oral hearing has taken place. German civil procedure only provides for the enforcement of performance judgments. These judgments may contain a performance order relating to the performance of a payment or the performance of a defensible or indefensible act. Enforcement and the requirements for it depend on the performance that is to be enforced.

In contrast to that, declaratory judgments themselves cannot be enforced under German civil procedure law; however, the decision on the costs of such a declaratory judgment can be enforced once a cost order has been issued by the court.

Other Enforceable Titles

An enforceable title can also be created in the summary proceedings for a payment order (*Mahnverfahren*) pursuant to Section 688 et seq of the Code of Civil Procedure (ZPO). However, the creditor can only opt for such a procedure if the debtor owes them a sum of money in euros

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and no consideration is owed in reverse, cf Section 688 of ZPO.

The procedure for a payment order is standardised and inexpensive, and can swiftly lead to an enforceable title. For this purpose, the creditor is required to fill out a pre-prepared online application, which is sent to the central default action court (*zentrales Mahngericht*). There is no review of the substance but a merely formal review takes place. The debtor is then served with a payment order by the enforcement court.

If the debtor does not file an objection within two weeks against this payment order, a writ of execution is issued at the creditor's request, which already constitutes an enforceable title under Section 794 (1) No 4 of the Code of Civil Procedure. If the debtor does not appeal against this within a further two weeks, the writ of execution becomes final.

In addition to court orders and court judgments, court settlements between the parties are also enforceable.

Besides that there are a number of other documents, eg, notarial deeds, which are valid as enforceable documents. A list of documents which the German civil procedure classifies as enforceable titles can be found in Section 794 of the ZPO.

2.2 Enforcement of Domestic Judgments

The German Code of Civil Procedure sets out different requirements that must be met for enforcement to take place. These requirements are divided into general as well as special enforcement requirements. The special enforcement requirements differ according to the property on which the enforcement is to be carried out.

General Requirements

Enforcement of a payment judgment first requires that the creditor obtains an enforceable copy of the judgment. For this, a court certificate of enforceability has to be added to the title, cf Sections 724 and 725 of the ZPO. The creditor can obtain this court certificate from the court that has rendered the decision after the debtor has not complied with the judgment within the performance period and no further appeal is possible, so that the title therefore has become final and binding between the parties.

This enforceable title must then be brought to the debtor's attention, cf Section 750 of the ZPO. Whether the creditor has to arrange for service himself or herself or whether this is arranged ex officio depends on the nature of the previous proceedings. If the creditor is responsible for service, he or she must contact the competent body for this purpose or can arrange for service by a lawyer if the other party is represented by a lawyer.

The asset on which enforcement is to be carried out determines the competent body for the following enforcement proceedings.

Enforcement in Tangible Assets

In the case of enforcement on the debtor's tangible assets the competent body is the bailiff at the local court in whose district the debtor has his or her domicile or, in the absence of this, his or her place of residence at the time the assignment is issued, cf Section 802 of the ZPO. The creditor can assign the service of the enforceable award as well as the execution of the enforcement itself to the local bailiff.

Attachment of Claims

If the payment order is to be enforced by attachment of claims and other property rights of the debtor (such rights can be shares of a company, bank accounts, wages, etc), the competent body

for this purpose is the enforcement court (*Vollstreckungsgericht*) cf Section 828 of the ZPO. Enforcement court in this sense is the local court with which the debtor has his or her general place of jurisdiction in Germany. Otherwise, the local court in whose district the debtor's property or the object claimed in the proceedings is located shall have competence.

The local court as the enforcement court will issue an attachment and transfer order (*Pfändungs- und Überweisungsbeschluss*) to attach a monetary claim. The attachment and transfer order consists of two parts: the attachment order seizes the debtor's claim against a third party; the debtor may no longer dispose of the seized claim. The transfer order prohibits the third-party debtor from making the payment to the debtor - the payment is instead made to the creditor.

Additionally, at the request of the creditor, the third-party debtor must submit a third-party debtor declaration. The creditor thus has a right to information on the existence and value of the garnished claim.

Forced Security Mortgage and Foreclosure Sale

If the creditor wants to enforce the title in the debtor's property, he or she can have a forced security mortgage registered in his or her name in the land register. This requires an application to the land registry office in which the debtor's property is located. As soon as this forced security mortgage has been listed in the land register, the creditor can apply for a forced sale in the next step.

The application for the foreclosure sale must also be submitted to local court in whose district the debtor's property to be auctioned is located, cf Section 15 of the Enforced Auction Law (ZVG).

Enforcement and Insolvency Proceedings

If enforcement does not produce any effect and the debtor is unable to meet his or her payment requirements, an application to open insolvency proceedings for the assets of the debtor can be made. As a result of insolvency proceedings all single enforcement is suspended and claims have to be noted at the insolvency administrator, which might lead to a quota upon closure of the proceedings. The threat of an application for insolvency, which ruins the debtor's reputation, can be used as a strategic weapon.

2.3 Costs and Time Taken to Enforce Domestic Judgments

In general, costs for the enforcement of titles in Germany are very low and the enforcement proceedings are concluded in a time-efficient manner.

The time efficiency of the enforcement itself depends on the measure the creditor chooses to pursue. While the attachment and transfer of claims takes place relatively swiftly, the registration of a forced security mortgage and the subsequent foreclosure sale will require some time.

Unlike in court proceedings, the costs are not calculated based on the amount in dispute, but the court or the competent enforcement authorities charge lump-sum costs. The lawyer's fees in enforcement proceedings are modest, but here the fees are calculated on the amount in dispute on the basis of the statutory tariff. Compared to the lawyer's fees in court proceedings, the costs in enforcement proceedings are significantly lower. All costs can be pursued in enforcement proceedings from the debtor and can be enforced at the same time.

However, a prerequisite for efficient proceedings is always that the creditor has information about the debtor's assets and the place where they

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are located, so that the competent enforcement authorities can act upon assignment.

The bailiff in whose jurisdiction the property is located is responsible for the enforcement in intangible property. This means of enforcement regularly takes place relatively quickly, as the bailiff can act immediately after being instructed and can even carry out necessary service at the same time of enforcement. The efficiency of the procedure depends in part on the degree of cooperation of the debtor, whereby the loss of the debtor's image through the appearance of the bailiff acts as a threat.

As described in the introduction, the enforcement of titles by means of attachment and transfer order is very effective as it is an almost automated procedure. The creditor submits a pre-prepared standard form to the competent enforcement court, which then only carries out a formal review.

The third-party debtor information is also very effective, as it provides the creditor with information about the existence and value of the attached claim in a relatively straightforward manner.

On the other hand, enforcement in intangible assets or real estate is very time-consuming, so that the creditor should expect the proceedings to take up to a year or more when it comes to foreclosure sale. In addition, the costs incurred are higher compared to the other types of enforcement, as in some cases costs for expert opinions must first be advanced by the creditor. The debtor can defend himself or herself during the enforcement proceedings and thus delay the entire proceedings to the detriment of the creditor. On the other hand, enforcement in immovable property is a highly effective means of applying pressure to the debtor, as it is capa-

ble of jeopardising the debtor's creditworthiness (eg, with a financing bank).

2.4 Post-judgment Procedures for Determining Defendants' Assets

There are no post-judgment procedures in Germany to determine which assets the debtor owns and where they are located. Clarification is a matter for the creditor, and obtaining information in advance is the cornerstone of the enforcement procedure. The means of obtaining the required information are described under **1.1 Options to Identify Another Party's Asset Position**.

2.5 Challenging Enforcement of Domestic Judgments

According to the German Code of Civil Procedure (ZPO), first instance judgments are in principle only provisionally enforceable and the debtor can partially avert enforcement by providing a security deposit. However, this protection against enforcement by providing a security deposit can be undermined by the creditor if he or she also deposits a security. This serves to secure and compensate for damages incurred by the debtor due to the enforcement in the event of a reversal of the judgment in the second instance.

The unsuccessful debtor in the court proceedings may be entitled to appeal against the judgment, but such an appeal does not have a suspensory effect. Enforcement can therefore be initiated by the creditor despite the filing of the appeal and continue provisionally. The debtor has to file an appeal within a period of one month after the judgment has been delivered to the parties – if no appeal is filed within that period, the judgment becomes final and binding upon the parties and the enforcement is then no longer pursued provisionally.

If the debtor appeals against the judgment, Section 719 of the Code of Civil Procedure provides that the court may, upon request of the debtor, *inter alia*, order that enforcement be temporarily suspended with or without the provision of security. The decision is at the discretion of the court; if the court orders the suspension of enforcement, in most cases the suspension is only granted subject to the provision of security by the debtor.

Legal remedies against the execution itself are limited and restricted to those provided for in Sections 766, 767 and 771 of the Code of Civil Procedure. Each individual remedy is limited to a specific, legally standardised constellation. These are as follows.

- Proceedings under Section 766 of the Code of Civil Procedure (*Vollstreckungserinnerung*) can be initiated by the creditor and the debtor as well as by a third party. This remedy allows the parties to assert procedural errors of the enforcement body and are reduced to formal aspects.
- Only the debtor can initiate the proceedings under Section 767 of the Code of Civil Procedure (*Vollstreckungsabwehrklage*). The purpose of this procedure is to eliminate the enforceability of the title due to changed substantive grounds. With the enforcement defence action the debtor can assert a legal objection that destroys or inhibits the right to the claim titled in the judgment if that objection arose after the conclusion of the oral proceedings.
- The procedure under Section 771 of the Code of Civil Procedure (*Drittwiderspruchsklage*) allows a person not previously involved in the court proceedings (a third party) to object to the enforcement with the argument that the attached property does not belong to the debtor but to him or her (the third party).

2.6 Unenforceable Domestic Judgments

According to the rules of the German Code of Civil Procedure the enforcement of a declaratory judgment in Germany is not possible.

2.7 Register of Domestic Judgments

There is no central register of judgments in Germany; however, many judgments are available online in anonymised form. These are judgments from all instances and cover all areas of law. All the judgments and court orders of the highest courts can be reviewed online free of charge, also in anonymised form.

On the other hand, there is a debtors' register pursuant to Section 882b of the Code of Civil Procedure (ZPO); this is kept at the Central Enforcement Court (*zentrales Vollstreckungsgericht*) of each federal state.

The prerequisite for entries within the context of enforcement is that one of the following circumstances applies:

- the debtor has not fulfilled his or her obligation to submit a list of assets, cf Section 802c of the ZPO;
- the debtor lacks income and assets according to the submitted list of assets and for this reason enforcement is not likely to prove successful;
- the debtor has not satisfied the creditor's claim in its entirety within one month of submitting the list of assets and has not concluded an agreement on instalment payments under Section 802b of the Code of Civil Procedure.

Pursuant to Section 882b Subsections 2 and 3 of the ZPO, the debtor's list contains the following information:

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- personal data of the debtor: in the case of natural persons surname, first name, date of birth, place of birth, place of residence; in the case of legal persons the company name, registered office and the register sheet in the commercial register;
- the legal grounds of the outstanding claims, the file number, and in the case of civil enforcement the court, in the case of administrative enforcement the enforcement authority;
- the date of the entry and the grounds on which the entry was made.

The debtors' register is accessible to a creditor in enforcement proceedings. Pursuant to Section 882f of the ZPO, anyone who demonstrates that he or she requires the information for one of the permissible purposes regulated in Section 882f may request information from the register. Some of this information is also open to rating agencies and has a direct impact on the debtor's creditworthiness.

3. FOREIGN JUDGMENTS

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

German courts are experienced in the enforcement of titles from other countries and are well acquainted with the procedure. Therefore, the enforcement of such a foreign title does not cause any particular difficulties for the German courts. The enforcement of foreign titles can be categorised into three groups: titles from EU states, titles from states of the Lugano Convention and titles from all other countries.

Titles from the EU

Titles from the EU are recognised without the need for a special procedure and can therefore be enforced. A re-examination of the decision on the merits by a German court does not occur.

This applies to titles under Regulation 805/2004 as well as to titles in civil and commercial matters under Regulation 1215/2012. European Payment Orders are treated as domestic titles.

In order to enforce a judgment from another EU member state that has been declared at least provisionally enforceable, the creditor must submit a copy of the judgment and a certificate issued in the country of origin to the competent authority in Germany. The enforcement process itself is then carried out directly based on the EU title and does not require a decision or judgment by a German court.

The enforcement of such titles is governed by the same enforcement rules that would apply to a German title. The sole remaining difference is that the certificate has to be served prior to or at least at the same time as the first enforcement measure.

Titles from Lugano Member States

Titles from member states of the Lugano Convention (Norway, Switzerland, Iceland) can be declared enforceable in a simplified exequatur procedure. For this purpose, a German court renders an order, which is then enforced. In contrast to the enforcement of an EU title, the title from a Lugano member state is not enforceable itself, but instead the order of the German court is the basis for enforcement.

Within the scope of the exequatur procedure, only a minor formal review of the foreign title is conducted. A substantive review of the decision is not conducted and not allowed as a result of the prohibition or revision au fond.

The enforcement of the decision is again governed by the rules that would also apply directly to such a German title.

Titles from the United Kingdom

After the United Kingdom having left the European Union, judgments from UK courts are neither to be seen as EU nor as Lugano titles. Fortunately, the UK joined the Hague Convention on Choice of Court Agreements (2005) in January 2021. Accordingly, titles from the UK profit from a simplified exequatur procedure based on a different legal basis from the Lugano Convention but nearly identical with the same effect as laid out before.

Titles from All Other Countries

Titles from states other than EU and Lugano states cannot be enforced in Germany without further formal court proceedings. Enforcement of such titles is subject to mandatory declaration of enforceability by judgment in a procedure pursuant to Sections 722 and 732 of the German Code of Civil Procedure (ZPO).

Such proceedings only take place if an international treaty between Germany and the third country secures the reciprocity (of the recognition of judicial titles) or if at least this reciprocity is established. If no such agreement exists, the foreign title cannot be enforced in Germany by any means (countries that titles cannot be enforced from for this reason are even unexpected "candidates" like Liechtenstein, Abu Dhabi, South Africa, Uganda, etc.).

The scope of review in the proceedings is determined by Section 328 of the Code of Civil Procedure. While no review of the foreign title on the merits is conducted within this recognition procedure, both the procedural standard in the original proceeding as well as the conformity of the decision with German ordre public are assessed. Enforcement of such a title can be immensely time-consuming due to the potentially extensive duration of the proceedings.

If this judicial procedure has been completed, enforcement takes place based on the judgment of the German court. The foreign judgment itself is therefore technically not enforced as it has been converted to a German judgment.

3.2 Variations in Approach to Enforcement of Foreign Judgments

There is no special approach on particular types of foreign judgment. However, the same as with domestic titles, only performance judgments can be enforced in Germany. As already described under **2.6 Unenforceable Domestic Judgments**, there is no enforcement procedure for declaratory judgments in Germany and the same applies to such foreign titles.

3.3 Categories of Foreign Judgments Not Enforced

As described in **3.1 Legal Issues Concerning Enforcement of Foreign Judgments**, judgments from states that have not concluded an international treaty on the recognition of foreign judgments with the Federal Republic of Germany or for which reciprocity is not established cannot be enforced in Germany.

Furthermore, judgments that violate Section 328 of the Code of Civil Procedure are not recognised.

Contrary to the wording of Section 328 of the Code of Civil Procedure, not only "judgments" are eligible for recognition, but also foreign decisions like court orders, provided that it is a final decision on a subject matter of a civil dispute according to German law (cf Section 13 of the Judicial Systems Act (*Gerichtsverfassungsgesetz*)).

However, not eligible for recognition under Section 328 of the Code of Civil Procedure are judgments in court or other decisions that relate exclusively to procedural issues.

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Decisions issued in the context of interim relief when issued only in ex parte proceedings (temporary injunction, arrest, freezing order, etc) are generally not recognised either. This also applies to reserved judgments due to their lack of a final character.

3.4 Process of Enforcing Foreign Judgments

Judgments from EU states accompanying a certificate issued in the country of origin can be enforced in Germany like a German title. The only special requirement is that, in addition to the judgment to be enforced, the certificate must also be provided to the debtor before or at the same time as the first enforcement measure initiated.

As already described in **3.1 Legal Issues Concerning Enforcement of Foreign Judgments**, judgments from member states of the Lugano Convention must first be declared enforceable in Germany by a court order. This order is then enforced like any other order of a German court. The same applies, albeit on other legal grounds, for titles from the UK.

Judgments from third countries must first go through a thorough procedure in order to be recognised in Germany. This initially requires that the foreign judgement be translated. Then a court procedure – with an oral hearing – takes place in which the prerequisites for recognition under Section 328 of the ZPO are examined.

3.5 Costs and Time Taken to Enforce Foreign Judgments

The German enforcement authorities are used to the enforcement of titles from the EU or member states of the Lugano Convention, so that enforcement can be carried out in a timely manner and without complications.

Enforcement of EU Titles

In the case of EU titles, the creditor bears no costs for presenting the copy of the decision and the certificate issued in the country of origin to the competent enforcement authority. The costs for the enforcement itself also apply to the enforcement of a German title. The enforcement of titles from the EU is thus not subject to any additional costs, and only in very special cases, translations might be required by a court.

Titles from Lugano States

For the enforcement of titles from states of the Lugano Convention, a fixed fee is incurred by the court called upon. In addition, only those costs are incurred which would also arise in enforcing a German title. They therefore depend on the specific enforcement measure chosen by the creditor.

UK Titles

The same as for Lugano applies to UK titles.

Other Titles

For titles from third countries, considerable time and costs should be expected. For the recognition of such a title, an independent judicial proceeding in Germany, ie, a proceeding after the original proceeding, is required. This will incur the typical lawyer's fees as well as court costs. In addition, costs are incurred for the translation of the judgment and further documentation in a foreign language. Depending on the court addressed, the recognition procedure will regularly require at least one year's time.

3.6 Challenging Enforcement of Foreign Judgments

EU and Lugano titles have to be challenged in the country of origin. For other foreign titles, the following applies.

A provision on the recognition of foreign judgments is contained in Section 328 of the Code of Civil Procedure (ZPO).

Section 328 stipulates the automatic recognition of such judgments, unless one of the grounds for refusal listed in Section 328 is met.

The German Code of Civil Procedure does not provide for any further requirements for recognition beyond those listed in that section. In particular, the foreign judgment is not subjected to any further substantive review; the prohibition of *révision au fond* applies.

Pursuant to Section 328 of the Code of Civil Procedure, a foreign judgment cannot be recognised in Germany if:

- the courts of origin did not have jurisdiction when hypothetically applying the German rules of the ZPO to determine the jurisdiction;
- the defendant, who has not participated in the proceedings and relies on this fact, was not properly or in sufficient time served with the document initiating the proceedings to enable him or her to prepare a defence;
- the judgment is incompatible with an earlier judgment rendered in Germany or with an earlier foreign judgment on which recognition is sought, or if the proceedings on which it is based are incompatible with proceedings which are pending in Germany;
- the recognition of the judgment leads to a result that is evidently incompatible with essential principles of German law, in particular if the recognition is incompatible with fundamental rights (*ordre public*).

Overall, the Federal Supreme Court applies a generous international standard in determining the *ordre public*. It is necessary for a violation of the German *ordre public* that the recognition and enforcement of the foreign judgment leads

to a result that is evidently contrary to the principles of German law. The German courts are therefore very reluctant to refuse the recognition of a foreign judgment because of a violation of *ordre public*.

4. ARBITRAL AWARDS

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

German arbitration law is regulated in the tenth section of the German Code of Civil Procedure (ZPO).

The regulations contained therein are an almost verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration. Deviations from the Model Law result, *inter alia*, from the fact that German arbitration law partially grants the parties greater party autonomy.

The procedure for the enforcement of foreign arbitral awards was adopted into German law without deviations from the UNCITRAL Model Law.

Furthermore, Germany has ratified the New York Convention. Article 1061 of the German Code of Civil Procedure, which regulates the recognition and enforcement of foreign arbitral awards, refers, *inter alia*, directly to the New York Convention. Foreign arbitral awards from countries that have equally ratified the Convention are enforceable in Germany even in the absence of the guaranteed reciprocity.

The judicial procedure for the recognition of foreign arbitral awards in Germany is limited to a maximum of two instances. Furthermore, the scope of review is severely limited (see **4.4 Process of Enforcing Arbitral Awards** in this guide). The Higher Regional Courts (*Oberlandesgericht*) are the competent courts of first instance for

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recognition. Pursuant to Section 1065 (1) of the Code of Civil Procedure, an appeal on a point of law (*Rechtsbeschwerde*) against the decision of the Higher Regional Court can be submitted to the Federal Supreme Court (*Bundesgerichtshof*) as the court of last instance.

4.2 Variations in Approach to Enforcement of Arbitral Awards

The procedure standardised in the ZPO regulates the recognition and enforcement of foreign arbitral awards from an abstract point of view. There is no differentiation according to the type of arbitral award as long as it has a ruling that is in line with enforceable titles in Germany.

4.3 Categories of Arbitral Awards Not Enforced

Both declaratory awards and awards from states that have not signed the New York Convention (eg, Angola, Iraq, Tajikistan) can by no means be enforced in Germany.

4.4 Process of Enforcing Arbitral Awards

The procedure for recognition and enforcement of a foreign arbitral award is governed by Section 1061 of the Code of Civil Procedure (ZPO).

The basic prerequisite for successful recognition and enforceability proceedings is that the arbitral award has become final according to the rules of the country of origin.

The procedure for recognition and enforceability is initiated by an application to the competent Higher Regional Court. The formal requirements for the application under the ZPO are not as strict as those of Article IV(1) (a) and (b) as set out in the New York Convention. It is necessary that the original (or a certified copy) of the arbitral award is submitted to the Higher Regional Court; however, there is no obligation for a German translation to be attached. Likewise, there is no

requirement that the arbitration agreement has to be submitted. However, the court may order the submission of the arbitration agreement or a translation of the award. If the applicant seeks for a faster decision, attaching a translation when initiating the proceeding can shorten the proceedings.

The standard of review by the German courts is limited and is determined by Article 5 of the New York Convention. The courts neither review the substance of the foreign arbitral award nor the question of the enforceability of the decision.

If the application is admissible but there is a ground for refusal under Article 5 of the New York Convention or if any other prerequisite for recognition and enforcement is missing, the Higher Regional Court will declare the non-recognition of the award in Germany under Section 1061 (2) of the ZPO.

An appeal on a point of law (*Rechtsbeschwerde*) against this court order is admissible to the Federal Supreme Court under Section 1065 of the ZPO.

Otherwise, the Higher Regional Court shall declare the award enforceable in Germany by court order. This declaration of enforceability constitutes a title according to Section 794 (1) No 4a of the ZPO, which can be used by the applicant for enforcement.

The enforcement of this court order is then again governed by the general rules of the ZPO on compulsory enforcement.

The opposing party to the application may oppose the declaration of enforceability by the Higher Regional Court by way of an appeal on a point of law (*Rechtsbeschwerde*) pursuant to Section 1065 of the Code of Civil Procedure as well as by way of an enforcement counter-

claim pursuant to Section 767 (1) (*Vollstreckungsabwehrklage*) of the Code of Civil Procedure.

4.5 Costs and Time Taken to Enforce Arbitral Awards

The proceedings for the recognition and enforcement of a foreign arbitral award are on average shorter than ordinary court proceedings.

The court costs for such proceedings amount to approximately $\frac{1}{3}$ of the usual court costs. If no agreement on remuneration was concluded, the lawyer's fees are based on the German Lawyers' Fees Act (*Rechtsanwaltsvergütungsgesetz*) and are therefore dependent on the value of the dispute. The costs accruing are the same as in court proceedings at first instance.

4.6 Challenging Enforcement of Arbitral Awards

General Rule: No Appeal Possible

Under German arbitration law, an appeal against an arbitral award that has already been rendered is not possible. However, the parties are free to include such an appeal in their arbitration agreement.

Setting Aside of the Award

However, the German Code of Civil Procedure provides that under certain circumstances an arbitral award that has already been rendered may be set aside.

In order to obtain such a repeal, a party may file an application under Section 1059(1) of the ZPO. The application must be filed with the competent Higher Regional Court no later than three months after receipt of the arbitral award.

The scope of review of a German court on an application for annulment is restricted. A review of the decision on the merits does not take place; rather, the grounds for setting aside are defined

by law in Section 1059 (2) of the ZPO and have thus been taken over from the UNCITRAL Model Law. The grounds for setting aside can be divided into two categories: grounds for setting aside to be raised by the applicant, and grounds which are to be examined ex officio by the court before which the application is brought.

Reasons for Setting Aside

Pursuant to Section 1059 (2) of the Code of Civil Procedure, the applicant must establish grounds and circumstances for a successful setting aside demonstrating that either:

- at least one of the parties could not validly enter into the arbitration agreement or that the arbitration agreement itself is ineffective;
- the claimant was not informed prior to the appointment of an arbitrator or that he or she was unable to raise a defence for some other reason;
- the arbitration agreement does not cover the facts affected by the award, the facts are not covered by the provisions of the arbitration clause, or the award contains decisions which exceed the limits of the arbitration agreement; or
- the constitution of the arbitral tribunal or the arbitral proceedings did not comply with a provision of Book Ten of the Code of Civil Procedure or with an admissible agreement of the parties and this is likely to have had an effect on the award.

Furthermore, the Higher Regional Court must examine ex officio whether:

- the subject matter of the dispute is not arbitrable under German law; or
- the recognition or enforcement of the award would lead to a result contrary to public policy (*ordre public*).

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The grounds on which an award can be set aside are exclusive and cannot be broadened even by party agreement as that would contravene the principle of the limited scope of examination.

The setting aside retroactively annuls the arbitral award and, unless otherwise agreed by the parties, revives the arbitration agreement.

Again an appeal on a point of law (*Rechtsbeschwerde*) against the decision of the Higher Regional Court is admissible to the Federal Supreme Court pursuant to Section 1065 (1) of the ZPO.

Heuking Kühn Lüer Wojtek has more than 400 lawyers, tax advisers and notaries providing legal services across eight offices in Germany as well as an office in Zurich, and is one of the major commercial law firms in Germany. Founded 50 years ago, Heuking Kühn Lüer Wojtek is one of Germany's top ten law firms in terms of annual revenues according to industry analyst JUVE. The 88 members of its Litigation/Arbitration Practice Group (Dispute Resolution) have many years of experience in the field of litigation before state courts, arbitration and alterna-

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