



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Enforcement of Judgments 2022

Germany: Law & Practice

Dr Christian Strasser, Dr Thomas Wambach and
Yannick Greimann

HEUKING KÜHN LÜER WOJTEK

Law and Practice

Contributed by:

*Dr Christian Strasser, Dr Thomas Wambach and
Yannick Greimann*

HEUKING KÜHN LÜER WOJTEK see p.16



CONTENTS

1. Identifying Assets in the Jurisdiction	p.3	4. Arbitral Awards	p.12
1.1 Options to Identify Another Party's Asset Position	p.3	4.1 Legal Issues Concerning Enforcement of Arbitral Awards	p.12
2. Domestic Judgments	p.4	4.2 Variations in Approach to Enforcement of Arbitral Awards	p.13
2.1 Types of Domestic Judgments	p.4	4.3 Categories of Arbitral Awards Not Enforced	p.13
2.2 Enforcement of Domestic Judgments	p.5	4.4 Process of Enforcing Arbitral Awards	p.13
2.3 Costs and Time Taken to Enforce Domestic Judgments	p.6	4.5 Costs and Time Taken to Enforce Arbitral Awards	p.14
2.4 Post-judgment Procedures for Determining Defendants' Assets	p.7	4.6 Challenging Enforcement of Arbitral Awards	p.14
2.5 Challenging Enforcement of Domestic Judgments	p.7		
2.6 Unenforceable Domestic Judgments	p.8		
2.7 Register of Domestic Judgments	p.8		
3. Foreign Judgments	p.9		
3.1 Legal Issues Concerning Enforcement of Foreign Judgments	p.9		
3.2 Variations in Approach to Enforcement of Foreign Judgments	p.10		
3.3 Categories of Foreign Judgments Not Enforced	p.10		
3.4 Process of Enforcing Foreign Judgments	p.11		
3.5 Costs and Time Taken to Enforce Foreign Judgments	p.11		
3.6 Challenging Enforcement of Foreign Judgments	p.11		

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 exists in Germany, such as the debt collection office in Switzerland, which acts on its own initiative and carries out enforcement autonomously.

However, in pursuing enforcement, the creditor must use the state enforcement bodies and cannot enforce its rights arbitrarily. Enforcement is carried out via the enforcement courts at the local courts and, for the enforcement of real estate, via the land registry office. Furthermore, the bailiffs are active in enforcing the interests of the creditor for the enforcement of tangible assets.

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

Publicly Available Information

Germany provides a number of public registers available for inspection by qualified lawyers or notaries and information from these registers can also be obtained by private institutions. Public authorities take care of these registers, and the information provided is regarded as reflecting the facts of the situation. 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 the other party's assets, the creditor's first step would be to check the registers, even though they mainly provide only basic information and some indication of possi-

ble assets. 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 provides an overview of the status of a company and formal details. However, such information is often superficial, and with regard to the annual reports, these often do not reflect the actual situation at the time of enforcement. Excerpts from both registers can be obtained without a special interest directly or via private providers.

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

Once again, it must 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. With such basic knowledge, registers can be helpful.

Other Means of Obtaining Information

Besides the registers, private providers also offer information, so-called private credit agencies; in particular, eg, *CRIF Bürgel* or *Creditreform*. These agencies can provide information about the current financial situation of businesses and their credit rating.

In order to track down single assets of the debtor, further investigation by the creditor is required,

particularly if the debtor deliberately conceals assets to prevent the enforcement of judgments. It is reasonable for the creditor to hire private detective agencies in these circumstances.

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, eg, 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 is an urgent court procedure that provisionally secures the claim of a creditor who does not yet possess 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 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 assets of the debtor specified by the creditor shall be seized. The seizure can then be executed using 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 action 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 of making decisions: 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 provisional security for the enforcement. Further, court orders are, eg, 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. An oral hearing will also occur if the defendant has not indicated a defence or fails to appear at the oral hearing. Unless an appeal is filed in time, the judgment rendered upon such default of the defendant constitutes an enforceable final judgment.

Generally, 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 a defensible or indefensible act. Enforcement and its requirements depend on the performance that is to be enforced.

In contrast, declaratory judgments 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 and no consideration is owed in reverse, cf Section 688 of ZPO.

*Contributed by: Dr Christian Strasser, Dr Thomas Wambach and Yannick Greimann,
HEUKING KÜHN LÜER WOJTEK*

The procedure for a payment order is standardised and inexpensive and can swiftly lead to an enforceable title. For this purpose, the creditor must fill out a pre-prepared online application to send to the central default action court (*zentrales Mahngericht*). There is no review of the substance, but a purely 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 the German payment order, the European payment order can be a cost-effective and relatively quick way to obtain an enforceable title. Just like the summary proceedings for a (German) payment order, the creditor is required to fill out a pre-prepared online application. The district court Wedding - as the court with exclusive jurisdiction for the European payment order within Germany - will issue the European payment order within 30 days after the submission of a complete application and then serve it upon the defendant. The defendant consequently has the option to file a statement of opposition within 30 days. If an objection is filed, the proceedings may - upon the discretion of the creditor - continue before the competent court in accordance with the national rules of ordinary civil proceedings. If the defendant does not object, the European payment order automatically becomes enforceable. If the order is enforced in Germany, enforcement is governed by the general rules.

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

In addition, there are a number of other documents, eg, notarial deeds, 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 for enforcement. These requirements are divided into general and 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 requires the creditor to obtain an enforceable copy of the judgment. For this, a court certificate of enforceability must be added to the title, cf Sections 724 and 725 of the ZPO. The creditor can obtain this court certificate from the court that 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 becomes final and binding between the parties.

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

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 their domicile or, in the absence of this, their 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 and 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. The enforcement court, in this sense, is the local court with which the debtor has their 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.

As the enforcement court, the local 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 on the debtor's property, they can have a forced security mortgage registered in their name in the Land Register. This requires an application to the Land Registry office where the debtor's property is located. As soon as this forced security mortgage is listed in the Land Register, the creditor can apply for a forced sale in the next step.

The application for the foreclosure sale must be submitted to the local court where 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 cannot meet their payment requirements, an application to open insolvency proceedings for the debtor's assets can be made. As a result of insolvency proceedings, all single enforcement is suspended, and claims have to be noted by 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 take place relatively swiftly, the registration of a forced security mortgage and the subsequent foreclosure sale will require some time.

*Contributed by: Dr Christian Strasser, Dr Thomas Wambach and Yannick Greimann,
HEUKING KÜHN LÜER WOJTEK*

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 enforced at the same time.

However, a prerequisite for efficient proceedings is always that the creditor has information about the debtor's assets and where they are located so that the competent enforcement authorities can act upon the assignment.

The bailiff in whose jurisdiction the property is located is responsible for enforcing intangible property. This means of enforcement regularly takes place relatively quickly, as the bailiff can act immediately after being instructed and even carry out necessary service at the same time as enforcement. Efficiency depends partly on the degree of co-operation by 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 the creditor should expect the proceedings to take up to a year or more when it comes to the foreclosure sale. In addition, the costs incurred are higher than other types of enforcement, as in some cases, costs for expert opinions must first be advanced by the creditor. The debtors can defend themselves during the enforcement proceedings and thus delay the entire proceedings to the detriment of the creditor. On the other hand, enforcement of immovable property is a highly effective means of applying pressure to the debtor, as it can jeopardise the debtor's creditworthiness (eg, with a financing bank).

2.4 Post-judgment Procedures for Determining Defendants' Assets

Germany has no post-judgment procedures 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 they also deposit 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 sus-

pensory 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 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 is 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, it is only granted subject to the provision of security by the debtor.

Legal remedies against the execution are limited and restricted to those provided for in Sections 766, 767 and 771 of the Code of Civil Procedure. Each 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, the debtor, and a third party. This remedy allows the parties to assert procedural errors of the enforcement body and is reduced to formal aspects.

Only the debtor can initiate the proceedings under Section 767 of the Code of Civil Procedure (*Vollstreckungsabwehrklage*). This procedure aims 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 them (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 judgments and court orders of the highest courts can be reviewed online free of charge and 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 their 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 agreed

upon 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:

- personal data of the debtor:
 - (a) in the case of natural persons, surname, first name, date of birth, place of birth, place of residence;
 - (b) 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 debtor's register is accessible to a creditor in enforcement proceedings. Pursuant to Section 882f of the ZPO, anyone who demonstrates that they require 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 directly impacts 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 and 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 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 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 remaining difference is that the certificate must be served before 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 or allowed due to the prohibition or revision au fond.

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

Titles from the United Kingdom

After the UK left the EU, judgments from UK courts were not seen as EU or 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 a mandatory declaration of enforceability by judgment in a procedure under 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 and the conformity of

the decision with the 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 is complete, enforcement takes place based on the judgment of the German court. Therefore, the foreign judgment is 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 to particular types of foreign judgments. However, as with domestic titles, only performance judgments can be enforced in Germany. As 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*)).

*Contributed by: Dr Christian Strasser, Dr Thomas Wambach and Yannick Greimann,
HEUKING KÜHN LÜER WOJTEK*

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

Decisions issued in the context of interim relief 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 be provided to the debtor before or at the same time as the first enforcement measure was 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, to titles from the UK.

Judgments from third countries must go through a thorough procedure to be recognised in Germany. This initially requires that the foreign judgment be translated. Then a court procedure – with an oral hearing – takes place where 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 might translations 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. In addition, only those costs are incurred that would 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, there are costs for translating the judgment and further documentation in a foreign language. Depending on the court addressed, the recognition procedure will usually require at least one year.

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 subject 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 served with the document without sufficient time to initiate proceedings 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 pending in Germany; and
- the recognition of the judgment leads to a result incompatible with the essential principles of German law, particularly if the recognition is incompatible with fundamental rights (*ordre public*).

The Federal Supreme Court applies a generous international standard in determining the *ordre public*. For a violation of the German *ordre public*, the recognition and enforcement of the foreign judgment must lead to a result contrary

to the principles of German law. The German courts are 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 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 enforcing 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 without guaranteed reciprocity.

The judicial procedure for recognising 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 recognition. Pursuant to Section 1065 (1) of the Code of Civil Procedure, an appeal on a point of law

*Contributed by: Dr Christian Strasser, Dr Thomas Wambach and Yannick Greimann,
HEUKING KÜHN LÜER WOJTEK*

(*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 in line with enforceable titles in Germany.

4.3 Categories of Arbitral Awards Not Enforced

Declaratory awards and awards from states that have not signed the New York Convention (eg, Angola, Iraq, Tajikistan) cannot 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. The original (or a certified copy) of the arbitral award must be 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 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 question the decision's enforceability.

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 that the applicant can use 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 counterclaim under Section 767 (1) (*Vollstreckungsabwehrklage*) of the Code of Civil Procedure.

4.5 Costs and Time Taken to Enforce Arbitral Awards

The proceedings for recognising and enforcing a foreign arbitral award are, on average, shorter than ordinary court proceedings.

The court costs for such proceedings amount to approximately two-thirds 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 an arbitral award that has already been rendered may be set aside under certain circumstances.

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 receiving 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 thus taken 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 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 they were 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 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*).

*Contributed by: Dr Christian Strasser, Dr Thomas Wambach and Yannick Greimann,
HEUKING KÜHN LÜER WOJTEK*

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 the 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, the firm 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 before state courts, arbitration and

alternative dispute resolution. The firm advises German and foreign clients comprehensively, beginning with the gathering of complex economic and technical facts through to developing efficient dispute resolution strategies and enforcing interests in and out of court. In contract negotiations, its experts support selecting the appropriate dispute resolution procedure and drafting customised dispute resolution clauses. When it comes to enforcement, the firm sees it as a passion to achieve the best for its clients.

AUTHORS



Dr Christian Strasser is a partner of Heuking Kühn Lüer Wojtek, based in Munich. He co-heads the firm's dispute resolution practice group and focuses on litigation. He is

specialised in cross-border conflicts, acting as a party representative in international litigation and arbitration proceedings for commercial cases. Christian has a strong practical focus on cross-border enforcement and injunctive proceedings involving parties in different jurisdictions.



Dr Thomas Wambach is a partner at Heuking Kühn Lüer Wojtek in the Hamburg office. He is co-head of the firm's dispute resolution practice group and has expertise in

litigation, dispute resolution, white-collar crime, private construction law, commercial law and civil litigation. Thomas has an outstanding reputation for defending clients in mass litigation proceedings.



Yannick Greimann is an associate of Heuking Kühn Lüer Wojtek in Munich. He is a German-qualified lawyer and obtained a Bachelor of Laws from the University of London.

Besides his experience in arbitration and litigation, Yannick has a particular interest in domestic enforcement.

*Contributed by: Dr Christian Strasser, Dr Thomas Wambach and Yannick Greimann,
HEUKING KÜHN LÜER WOJTEK*

Heuking Kühn Lüer Wojtek

Georg-Glock-Straße 4
40474
Düsseldorf
Germany

Tel: +49 211 600 55 00
Fax: +49 211 600 55 050
Email: duesseldorf@heuking.de
Web: www.heuking.de





Chambers Global Practice Guides

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com

practiceguides.chambers.com