

Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between July and August 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2012
Eleventh edition
ISBN 978-1-83862-655-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Enforcement of Foreign Judgments 2022

Contributing editors

Oliver Browne, Tom Watret and Georgie Blears
Latham & Watkins LLP

Lexology Getting The Deal Through is delighted to publish the eleventh edition of *Enforcement of Foreign Judgments*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Cyprus and Germany.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Oliver Browne, Tom Watret and Georgie Blears of Latham & Watkins LLP for their assistance with this volume.



London
September 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	3	Ireland	60
Oliver Browne, Tom Watret and Georgie Blears Latham & Watkins LLP		Julie Murphy O'Connor Matheson	
Austria	4	Japan	70
Katharina Kitzberger and Stefan Weber Weber & Co		Masanobu Hara and Misa Takahashi TMI Associates	
Bahamas	11	Jordan	75
Oscar N Johnson Jr, Tara A Archer-Glasgow, Audley D Hanna Jr and David J Hanna Higgs & Johnson Counsel & Attorneys at Law		Tariq Hammouri, Omar Sawadha, Yotta Pantoula-Bulmer, Khalid Mousa, Ruba Madi and Rahaf AlShneikat Hammouri & Partners	
Bermuda	15	Luxembourg	82
Delroy Duncan QC Trott & Duncan		Eric Perru and Emmanuelle Ost Wildgen	
Brazil	20	Nigeria	89
Gabriela M Ruiz, Scott Nielson and Carolina Leung Kobre & Kim LLP Mariana Tumbiolo ZELA Consulting		Etigwe Uwa, Adeyinka Aderemi and Chinasa Unaegbunam Streamsowers & Köhn	
Cyprus	26	Philippines	95
Kyriakos Karatsis and Antonia Argyrou N Pirioides & Associates LLC		Ricardo Ma PG Ongkiko, Ramon I Rocha IV and Christopher A Capulong SyCip Salazar Hernandez & Gatmaitan	
Denmark	32	Switzerland	102
Henrik Nedergaard Thomsen, Sigrid Majlund Kjærulff and Amelie Brofeldt Poul Schmith/Kammeradvokaten		Dieter Hofmann and Oliver M Kunz Walder Wyss Ltd	
Germany	39	Turkey	108
Matthias Schrader, Johannes Schmidt and Marc Dietrich Willkie Farr & Gallagher LLP		Beril Yayla Sapan and Asena Aytuğ Keser Gün + Partners	
Greece	46	United Kingdom	113
Konstantinos Papadiamantis, Catherine Androulaki and Konstantina Panagopoulou Perez PotamitisVekris		Oliver Browne, Tom Watret and Georgie Blears Latham & Watkins LLP	
Hong Kong	52	United States	124
Evelyn Chan and Yandy Lam Gall		Elliot Friedman, David Livshiz and Christian Vandergeest Freshfields Bruckhaus Deringer	

Germany

Matthias Schrader, Johannes Schmidt and Marc Dietrich

Willkie Farr & Gallagher LLP

LEGISLATION

Treaties

1 | Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties, and what, if any, amendments or reservations has your country made to such treaties?

Recognition and enforcement of foreign judgments in Germany are regulated to a large degree by legal instruments of the European Union. Moreover, Germany is a party to several multilateral and bilateral treaties.

Germany is a party to the following EU and European legal instruments:

- The Brussels I Regulation recast (Regulation (EU) No. 1215/2015) applies to civil and commercial matters concerning other EU member states. It supersedes all other EU instruments or treaties as well as domestic law of the member states concerning judgments that fall within its scope. Regulation (EU) No. 1215/2015 has been applicable since 2015. Its predecessors were the 1968 Brussels Convention and the Brussels I Regulation (Regulation (EC) No. 44/2001). Most significantly, under Regulation (EU) No. 1215/2015, judgments of EU member states are automatically enforceable in other member states without requiring a specific recognition and enforcement procedure.
- The Lugano convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (the Lugano Convention) regulates recognition and enforcement of judgments from Denmark, Iceland, Norway and Switzerland in civil and commercial matters. Its contents are in large part similar to the former Regulation (EC) No. 44/2001. However, it does not reflect the changes contained in Regulation (EU) No. 1215/2015.
- The EU Enforcement Order Regulation (Regulation (EC) No. 805/2004) applies to uncontested claims in civil and commercial matters that have been certified in a European Enforcement Order by a court of an EU member state (excluding Denmark). No further recognition and enforcement proceedings are necessary for European Enforcement Orders; such Orders can be directly enforced in all EU member states.
- The Small Claims Procedure Regulation (Regulation (EC) No. 861/2007) applies to civil and commercial matters for claims not exceeding €5,000. Judgments in Small Claims Procedures are automatically recognised and directly enforceable in the other EU member states (excluding Denmark) without the need for any further recognition and enforcement proceedings.
- The Regulation (EC) No. 1896/2006 creating a European order for payment procedure applies to the recognition and enforcement of titles issued in the European order for payment procedure for

pecuniary claims in cross-border cases. A European order for payment will be recognised and enforced in the other EU member states without the need for a declaration of enforceability and without any possibility of opposing its recognition.

- The Insolvency Regulation (Regulation (EU) No. 2015/848; its predecessor, Regulation (EC) No. 1346/2000), specifies that judgments opening insolvency proceedings as well as all other judgments concerning insolvency proceedings shall be recognised and have direct effect in all EU member states.
- Within the European Union there is also a multitude of regulations applying to the recognition and enforcement of judgments in family and inheritance matters, among others:
 - the Brussels IIa Regulation (Regulation (EC) No. 2201/2003) for matrimonial matters and matters of parental responsibility;
 - the Maintenance Regulation (Regulation (EC) No. 4/2009);
 - the Succession Regulation (Regulation (EU) No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession);
 - the Matrimonial Property Regulation (Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes); and
 - Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

Multilateral treaties

Germany is a party to multiple Hague Conventions containing rules on the recognition and enforcement of judgments:

- As part of the European Union, Germany is a party to the Hague Choice of Court Convention of 30 June 2005 that establishes a regime for the recognition and enforcement of judgments in cases governed by an exclusive choice-of-court agreement conferring jurisdiction to the courts of a contracting state. The Convention specifies that the rules for recognition and enforcement of the state in which recognition and enforcement are sought apply. However, refusal of recognition and enforcement may only be based on the grounds specifically listed within the Convention. The Convention applies to Denmark, Mexico, Montenegro, Singapore, and – since its departure from the European Union – the United Kingdom.
- Germany is also a party to various conventions regarding family matters such as:
 - the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;

- the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children;
 - the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and
 - the Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956.
- Germany is a party to treaties for transport law that contain rules on the recognition and enforcement of judgments, inter alia:
- the Convention concerning International Carriage by Rail of 9 May 1980; and
 - the Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956.

Bilateral treaties

Most of the existing bilateral treaties have been superseded by EU legislation, especially in cases where the bilateral treaty was with an EU member state. Bilateral treaties now primarily have relevance in connection to states that are not members of the European Union.

A bilateral treaty with the United Kingdom exists (the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between Germany and the United Kingdom of 14 July 1960); however, its current status following Brexit is unclear and a 2021 decision by the German Federal Court of Justice suggests that the treaty is not deemed in effect from the German perspective.

Intra-state variations

- 2 | Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

The recognition and enforcement of foreign judgments are uniformly regulated within Germany.

Sources of law

- 3 | What are the sources of law regarding the enforcement of foreign judgments?

The rules on recognition and enforcement are primarily set out in legislation, which is subject to interpretation by the German and EU courts.

There are essentially three different regimes, depending on the origin of the foreign judgment, namely:

- EU regulations such as Regulation (EU) No. 1215/2015;
- the EU Enforcement Order Regulation; and
- the Small Claims Procedure Regulation are directly applicable.

Those EU regulations supersede German national law.

If recognition and enforcement are governed by an international treaty, German courts will primarily apply the treaty rules. For the Lugano Convention, the Hague Choice of Court Convention and some bilateral treaties, additional rules may be found in the Recognition and Enforcement Execution Act (AVAG), which provides for an expedited proceeding.

In case neither EU law nor international treaties apply (or if they leave room for the application of domestic law), German courts will apply German domestic law to the recognition and enforcement of a foreign judgment. The recognition of foreign judgments is governed by section 328 of the Code of Civil Procedure (ZPO). Enforcement is governed by sections 722 and 723 of the ZPO. German courts will consider case law when interpreting these statutory provisions and other legislation.

Hague Convention requirements

- 4 | To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Germany is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

BRINGING A CLAIM FOR ENFORCEMENT

Limitation periods

- 5 | What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

There is no special limitation period for initiating recognition and enforcement proceedings. Some commentators suggest German courts should apply the statutory 30-year limitation period that applies to final and binding judgments rendered by German courts. There is, however, no case law on this issue.

Foreign limitation periods, ie, those relating to the enforcement of judgments, may be raised in the enforcement proceedings.

Types of enforceable order

- 6 | Which remedies ordered by a foreign court are enforceable in your jurisdiction?

As a matter of principle, any type of judgment entered into in the European Union is enforceable in all other EU member states under the rules of the Brussels I Regulation recast (Regulation (EU) No. 1215/2015). According to article 2(a) of the Regulation, judgments are defined as comprising all decisions by courts of the EU member states irrespective of their labelling under the law of the EU member state from which the decision originates, including default judgments and decisions on costs or expenses. Judgments that are not yet final and only provisionally enforceable are also enforceable under the Regulation. Provisional or protective measures rendered by a court having jurisdiction under the rules of Regulation (EU) No. 1215/2015 are enforceable, as long as they were rendered in proceedings in which the defendant had the opportunity to participate. Court settlements and 'authentic instruments' (such as notarial deeds) are also enforceable.

Under German domestic law, which governs the recognition and enforcement of judgments from most non-EU states, only final judgments that contain a decision on the merits of the case are enforceable. Generally, all civil judgments irrespective of their labelling are recognisable and enforceable as long as the matter would be considered a 'civil matter' under German law. Decisions based solely on procedural grounds and not on the merits of the case are not recognisable and enforceable. Neither are anti-suit injunctions and other provisional measures that do not contain a final decision on the matter.

Competent courts

- 7 | Must cases seeking enforcement of foreign judgments be brought in a particular court?

For judgments within the scope of Regulation (EU) No. 1215/2015 the Regulation states that such judgments are ipso jure recognised in all EU member states, and are enforceable in Germany without requiring a separate declaration of enforceability by a German court. Accordingly, the rules governing the jurisdiction of the enforcement

authorities under German law apply, and jurisdiction depends on the type of enforcement that is sought and the location of the relevant (third-party) debtor or asset.

Other judgments must be declared enforceable by the court at the debtor's place of residence or the debtor's seat. If the debtor has no seat or place of residence within Germany, jurisdiction can be established at the location of the debtor's assets.

If the enforcement proceedings are governed by the Lugano convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (the Lugano Convention) or the Hague Choice of Court Convention, regional courts have jurisdiction. In all other cases, German regional courts have jurisdiction if the amount exceeds €5,000 whereas German local courts are competent for the declaration of enforceability if the amount in dispute does not exceed the sum of €5,000.

German family courts have jurisdiction in cases where the claim would have to be asserted before a family court under German law.

Separation of recognition and enforcement

8 | To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Concerning judgments from EU member states, according to articles 36(1) and 39 of Regulation (EU) No. 1215/2015, neither an act of recognition nor a declaration of enforceability is required. Similarly, under the Enforcement Order Regulation and the Small Claims Procedure Regulation, declarations of recognition and enforcement are not required.

Under the prior Brussels I Regulation, the Lugano Convention and several bilateral treaties, a declaration of recognition is not required. However, the foreign judgment must be declared enforceable to be enforced in Germany, which occurs in an expedited proceeding.

Concerning non-EU judgments and in the absence of bilateral agreements or treaties, recognition and enforcement are separate proceedings in principle. They may be pursued jointly or individually before the competent German court. The (formal) recognition of a foreign judgment is not a requirement for its being declared enforceable in Germany. A decision declaring a foreign judgment enforceable includes the recognition of the effects of the judgment as long as the requirements for the recognition and enforcement are identical (which is almost always the case).

OPPOSITION

Defences

9 | Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Both EU and German law provide for a general prohibition of a *révision au fond* (ie, a court will generally not review the foreign judgment on the grounds of whether it was materially correct nor will it consider defences on the merits of the case). The prohibition of the *révision au fond* includes defences regarding the fact-finding process and the application of the law.

A review of the merits is limited to the narrow ground of a violation of the German public policy. A German court will consider the outcome (not the reasoning) of the foreign judgment to determine whether it violates the German public policy. The German court is bound by the findings of fact of the foreign court except when these findings themselves or the procedure employed in the fact-finding

process violate German (procedural) public policy, which includes the basic notions of a fair trial and the right to be heard. If new facts and circumstances have emerged since the foreign judgment was entered, the new facts may be presented to the German court to show that the recognition and enforcement of a judgment would now violate the German public policy.

Injunctive relief

10 | May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Concerning judgments from EU member states, under the Brussels I Regulation recast (Regulation (EU) No. 1215/2015), temporary injunctive relief is available. Under article 44 of Regulation (EU) No. 1215/2015, the judgment debtor may apply for protective measures against the enforcement of the foreign judgment if an application for the refusal of recognition of a foreign judgment has been lodged. The court, in its discretion, may then provisionally suspend the enforcement, order security, or limit the enforcement to certain protective measures.

If the (non-EU) foreign judgment is enforced under domestic law, in particular the Recognition and Enforcement Execution Act (AVAG) (which is largely an ex parte proceeding), the enforcement is generally limited to protective measures until the deadline for the debtor to lodge an appeal has expired or the court has ruled on the appeal. Upon application, the courts may extend this limitation of the enforcement for the duration of a second appeal (if any).

Since the recognition and enforcement of non-EU judgments under the default rules in German law is a contentious proceeding, a preliminary injunctive relief proceeding protecting the debtor is not necessary. If the debtor plans to appeal a decision declaring a foreign judgment enforceable, the debtor may file an application for a temporary stay of enforcement if the (provisional) enforcement of the foreign judgment following the German first-instance decision would lead to undue hardship.

REQUIREMENTS FOR RECOGNITION

Basic requirements for recognition

11 | What are the basic mandatory requirements for recognition of a foreign judgment?

Under the Brussels I Regulation recast (Regulation (EU) No. 1215/2015), judgments in civil and commercial matters rendered in an EU member state are automatically recognised in all EU member states (irrespective of whether the judgment is final and binding). The grounds for refusal outlined in article 45 of the Regulation will not be applied ex officio, but only upon application of an interested party. According to article 45 of Regulation (EU) No. 1215/2015, grounds for refusal are:

- a violation of the enforcing state's public policy (article 45(1)(a));
- if the decision was entered in default of appearance and the defendant was not properly served in due time and in a way that enabled the defendant to defend itself, except if the defendant failed to appeal this decision although the defendant could have so appealed (article 45(1)(b));
- if the decision conflicts with a decision entered between the same parties in the enforcing state (article 45(1)(c));
- if the decision conflicts with an earlier decision in another EU member state or a third state, and that earlier decision fulfils the requirements for recognition and enforcement (article 45(1)(d));
- if the decision violates the special rules for international jurisdiction in insurance, consumer, or employment cases as contained in Regulation (EU) No. 1215/2015 (article 45(1)(e)(i)); or

- if the decision violates the rules for exclusive international jurisdiction as contained in Regulation (EU) No. 1215/2015 (article 45(1)(e)(ii)).

If the basic requirements for recognition (or refusal of recognition) are governed by an international treaty (eg, the Lugano convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007, the Hague Choice of Court Convention), German courts will apply those requirements.

In all other cases, the foreign judgment must be final and binding. Under section 328 of the Code of Civil Procedure (ZPO) a foreign judgment will be recognised in Germany if no grounds for refusal of recognition apply. These grounds for refusal are outlined in section 328(1) of the ZPO and will be reviewed ex officio (except for the ground in section 328(1) No. 2 of the ZPO). The party seeking recognition bears the burden of proof that the elements required for recognition are present. A court must refuse recognition and enforcement if:

- the courts of the state from which the decision originates have no (international) jurisdiction according to German law (section 328(1) No. 1 of the ZPO). The German court will not review whether the foreign court had jurisdiction according to its own domestic law;
- the defendant did not appear in the foreign proceedings, and was not properly served with the document initiating the proceedings, or did not have proper time between being served and the proceedings to defend itself, and takes recourse to this fact (section 328(1) No. 2 of the ZPO);
- the foreign decision is incompatible with a previous foreign decision, or with a German decision, or if the proceedings which led to the decisions were initiated after proceedings in Germany in the same matter have already been pending (section 328(1) No. 3 of the ZPO);
- the recognition would violate the German public policy (section 328(1) No. 4 of the ZPO); and
- there is no reciprocity (section 328(1) No. 5 of the ZPO).

Other factors

12 | May other non-mandatory factors for recognition of a foreign judgment be considered and, if so, what factors?

Both under German law and Regulation (EU) No. 1215/2015, the only factors on which recognition and enforcement may be refused are listed in the respective provisions. Besides these, there are no other factors to be considered. The absence of reciprocity is a ground that justifies the refusal of recognition and enforcement under German law (section 328(1) No. 5 of the ZPO).

Procedural equivalence

13 | Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction and, if so, how is that requirement evaluated?

German courts will consider due process only as part of the procedural public policy. Differences in procedure will only lead to a refusal of recognition if the procedure leading up to the foreign judgment conflicts with fundamental principles of German civil procedure. German courts will not evaluate whether the respective foreign procedure, in general, conforms with German procedural principles but rather whether fundamental principles were violated in the specific case at hand.

Fundamental principles of German civil procedure include the right to be heard and the right to an impartial judge.

Objections against procedural violations must be raised in the original procedure (if possible). If a party fails to do so it will not be allowed to raise the same objection to oppose recognition and enforcement in Germany.

JURISDICTION OF THE FOREIGN COURT

Personal jurisdiction

14 | Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant and, if so, how is that requirement met?

The concept of personal jurisdiction as it is understood in countries with a common law background is alien to Germany and EU rules. Generally speaking, courts will assume jurisdiction if jurisdiction is provided for by statute.

Under the Brussels I Regulation recast (Regulation (EU) No. 1215/2015), as a general rule, a German court will not check whether the originating court in another EU member state had jurisdiction. There are exceptions regarding insurance, consumer and employment disputes, and the rules for exclusive international jurisdiction of article 24 of Regulation (EU) No. 1215/2015.

Outside the scope of Regulation (EU) No. 1215/2015 or international treaties, German courts recognising and enforcing a foreign judgment must establish ex officio that the foreign court had international jurisdiction based on the German rules on international jurisdiction (section 328(1) No. 1 of the Code of Civil Procedure). The German court thus assesses whether the foreign court could have hypothetically assumed jurisdiction if it had applied German law.

Subject-matter jurisdiction

15 | Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy and, if so, how is that requirement met?

An examination of subject matter jurisdiction is neither required under the rules of Regulation (EU) No. 1215/2015 nor under German domestic law. German courts will not engage in an analysis of jurisdictional rules of the decision state. Accordingly, German courts will consider neither subject matter jurisdiction nor local jurisdiction.

Service

16 | Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Proper service of process is considered part of the right to be heard. Accordingly, both under German law and under Regulation (EU) No. 1215/2015, failure to properly serve the defendant is a ground for refusal of recognition if the following requirements are met:

- the defendant was not served properly or not served in sufficient time;
- consequently, the defendant was unable to effectively defend itself; and
- the defendant did not participate in the proceedings.

If the defendant failed to raise this objection in the original proceedings, ie, on appeal, although this would have been possible to the defendant, the defendant is precluded from raising the issue of deficient service in the recognition and enforcement proceedings.

The German court will determine the question of whether notice of the original action was properly served based on the applicable foreign law (or, if applicable, under the Hague Service Convention). This includes the question of whether actual notice suffices or whether notice must be provided in a specific form (eg, together with a translation).

Under the Hague Service Convention, German courts regularly require formal notice whereas mere actual notice is usually deemed

insufficient. Since Germany has objected to direct service via postal services, any such service in Germany will not be deemed proper.

Fairness of foreign jurisdiction

- 17 | Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

German and EU law do not consider the concept of *forum non conveniens* in recognition and enforcement proceedings. In fact, in a 2005 decision, the European Court of Justice declared the *forum non conveniens* doctrine incompatible with the 1968 Brussels Convention for international jurisdiction within the European Union.

EXAMINATION OF THE FOREIGN JUDGMENT

Vitiating by fraud

- 18 | Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Allegations of fraud may be raised as violations of German procedural or substantive public policy. German courts have held that the consideration of, for example, fraudulent evidence and witness statements may constitute a violation of the German public policy.

Public policy

- 19 | Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Both under German domestic law (section 328(1) No. 4 of the Code of Civil Procedure (ZPO)) and article 45(1)(a) of the Brussels I Regulation recast (Regulation (EU) No. 1215/2015), public policy violations constitute grounds for refusal of recognition and enforcement of a foreign judgment. Under German law, a court will consider possible public policy violations *ex officio* whereas under Regulation (EU) No. 1215/2015 such violations have to be raised by the party objecting to the recognition and enforcement of the foreign judgment.

The bar for a refusal of recognition and enforcement of a foreign judgment in Germany on public policy grounds is generally high. A mere violation of German law – even fundamental rights contained in the German Basic Law (ie, the Constitution) – does not automatically constitute a violation of the public policy. Rather, the violation must be so grave that recognising and enforcing the foreign judgment would impair fundamental elements and guarantees constituting the very core of the German legal system and fundamental values. German courts focus their analyses on the effect of the foreign judgment, not its reasoning.

Conflicting decisions

- 20 | What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Under German law (section 328(1) No. 3 of the ZPO) and EU law (article 45(1)(c) and (d) of Regulation (EU) No. 1215/2015) conflicting decisions must be considered by the German court deciding on recognition and enforcement, in principle:

- if the foreign judgment conflicts with an earlier foreign judgment between the parties (that could be recognised in Germany), the court will refuse recognition and enforcement of the later judgment; and
- if the foreign judgment conflicts with an earlier domestic judgment between the parties, the court will refuse recognition and

enforcement of the foreign judgment. This also applies if the domestic judgment was rendered in violation of foreign *lis pendens* or *res judicata* rules.

Additionally, under German law (but not under Regulation (EU) No. 1215/2015), recognition and enforcement will be refused if the foreign court violated German *lis pendens* rules (ie, if the foreign judgment was rendered even though a proceeding in the same matter was pending in Germany before the foreign proceeding became pending).

Enforcement against third parties

- 21 | Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Generally, there is no enforcement against third parties if the third party is not bound by the judgment pursuant to the applicable foreign law.

Alternative dispute resolution

- 22 | What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

Concerning the recognition and enforcement of non-EU judgments under German law, German courts will refuse recognition and enforcement if the foreign court did not have international jurisdiction to decide the dispute (applying the German rules). This includes the scenario in which the parties validly derogated the jurisdiction of state courts by entering into an arbitration agreement. It is not settled whether this also applies if the defendant did not object to the jurisdiction of the foreign court (ie, if the defendant did not invoke the arbitration clause in the foreign court proceedings).

Under Regulation (EU) No. 1215/2015, a German court will usually not review the jurisdiction of the court in another EU member state. However, an argument could be made that the arbitration defence is governed by domestic law, which would allow the German court to refuse recognition. This issue is not yet settled.

Favourably treated jurisdictions

- 23 | Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

German courts do not give greater deference to courts in one country over another. German courts do consider whether reciprocity concerning the recognition and enforcement of German judgments exists with the foreign country.

Due to Regulation (EU) No. 1215/2015, decisions originating from other EU member states are *de facto* easier to enforce because separate recognition and enforcement proceedings are not required. To a degree, this also applies to recognition and enforcement proceedings under the Lugano convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 and the Hague Choice of Court Convention as a result of the streamlined enforcement proceedings.

Alteration of awards

- 24 | Will a court ever recognise only part of a judgment, or alter or limit the damage award?

German courts have in the past been liberal in enforcing only parts of a foreign judgment if the judgment can be divided and only a part of the judgment is recognisable and enforceable in Germany. In particular,

German courts have reduced the quantum of damage awards (eg, because punitive damages were considered contrary to the German public policy and only a portion of the award that was considered compensatory damages was declared enforceable in Germany).

AWARDS AND SECURITY FOR APPEALS

Currency, interest, costs

25 | In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

A German court will not convert currencies but may specify in its enforcement-declaring judgment the decisive point of time concerning the conversion rate if the debtor chooses to pay in euros. The conversion will be carried out by the bailiff responsible for the actual enforcement after the judgment has been declared enforceable for all cases where the bailiff carries out the actual enforcement.

Interest claims are also subject to recognition and enforcement in Germany. A German court will only allow interest if it was already contained in the foreign judgment. A German court will not by itself award interest.

Security

26 | Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Under the Brussels I Regulation recast (Regulation (EU) No. 1215/2015), the decision on the application for refusal of enforcement may be appealed by either party (article 49 Regulation (EU) No. 1215/2015).

Under German law, recognition and enforcement proceedings are regular court proceedings and, as such, subject to appeal. The first-instance judgment is provisionally enforceable, which allows the plaintiff to provisionally enforce the judgment against the provision of security. Under certain circumstances, notably hardship, the defendant may petition the court to declare that the first-instance judgment is not provisionally enforceable.

A judgment creditor seeking to enforce a judgment in Germany (under both German and EU rules) may apply for a preliminary seizure of assets in an expedited proceeding if the creditor can show that without such seizure of assets the enforcement against the debtor would be frustrated or significantly more difficult.

ENFORCEMENT AND PITFALLS

Enforcement process

27 | Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

If recognition and enforcement are governed by the Brussels I Regulation recast (Regulation (EU) No. 1215/2015), there is no preliminary judicial proceeding to declare the foreign judgment enforceable. A judgment creditor may simply apply to the German enforcement authorities and request the enforcement of the foreign judgment. Enforcement will then follow the same rules as enforcement of a domestic German judgment.

Within the scope of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 and the Hague Choice of Court Convention, the judgment creditor must obtain a declaration of enforceability in an expedited proceeding.

WILLKIE

WILLKIE FARR & GALLAGHER LLP

Matthias Schrader
mschrader@willkie.com

Johannes Schmidt
jschmidt@willkie.com

Marc Dietrich
mdietrich@willkie.com

An der Welle 4
60322 Frankfurt am Main
Germany
Tel: +49 69 79302 0
Fax: +49 69 79302 222
www.willkie.com

In all other cases, the judgment creditor must first obtain a judgment declaring the enforceability of the foreign judgment under sections 722 and 723 of the German Code of Civil Procedure. The judgment so obtained is a regular German judgment that can be enforced according to the general rules for enforcing German judgments. The available enforcement measures are determined by German law.

The actual enforcement in Germany is carried out by a bailiff (eg, for enforcement against movable property), or by the local courts (eg, for enforcement against real property or by attachment of monetary claims).

Pitfalls

28 | What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

German rules on civil procedure require that the operative part of the judgment is sufficiently precise to enable enforcement without further legal or factual analysis by the enforcement authorities. When seeking enforcement of a foreign judgment, a pitfall may be that the foreign judgment does not comply with these requirements (eg, problems may occur if the foreign judgment does not contain a specific interest rate but merely points to the interest legally allowed under the laws of the foreign country). German courts in the past have, to a certain degree, considered foreign statutes and other official documents when interpreting foreign judgments. The courts may also require the party seeking enforcement to render assistance. However, if the court cannot sufficiently specify the legal remedy without engaging in an analysis of the legal reasoning on the merits, the foreign judgment will not be enforceable because such an analysis would violate the prohibition of a *révision au fond*.

A second pitfall is the enforcement of judgments rendered in countries that take a broader approach to jurisdiction. German courts will refuse recognition and enforcement if the foreign court did not have international jurisdiction from a German law perspective. Hence, if the foreign court assumed jurisdiction based on a doctrine that the German court finds exorbitant, the German court may refuse recognition and enforcement. This may, for example, be the case if the foreign state's courts assumed jurisdiction solely because a party is a national of the foreign state.

UPDATE AND TRENDS**Hot topics****29 | Are there any emerging trends or hot topics in foreign judgment enforcement in your jurisdiction?**

After the end of the transition period on 31 December 2020, EU legal instruments containing rules on recognition and enforcement of judgments are no longer applicable concerning the United Kingdom. Accordingly, recognition and enforcement of UK judgments in EU member states and vice versa is subject to significant uncertainties.

A bilateral treaty with the United Kingdom exists for certain monetary judgments (the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between Germany and the United Kingdom of 14 July 1960); however, its current status is unclear.

The United Kingdom acceded to the Hague Choice of Court Convention for exclusive choice-of-forum clauses that helps enforcement in proceedings based on an exclusive choice-of-forum clause. However, recognition and enforcement in all other areas are still mostly uncertain and subject to debate. Recently, the European Commission voiced its objection to the United Kingdom's acceding to the Lugano convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007. Accordingly, it currently seems unlikely that the United Kingdom will become a party to that Convention.

Coronavirus**30 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?**

The recognition and enforcement of foreign judgments were not impeded by the covid-19 pandemic. German courts have operated as usual, albeit sometimes with certain delays. On the other hand, the increased use of virtual hearings that was almost non-existent before the pandemic has, in certain cases, contributed to more efficient and streamlined proceedings.

Other titles available in this series

Acquisition Finance	Dispute Resolution	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Distribution & Agency	Islamic Finance & Markets	Public Procurement
Agribusiness	Domains & Domain Names	Joint Ventures	Public-Private Partnerships
Air Transport	Dominance	Labour & Employment	Rail Transport
Anti-Corruption Regulation	Drone Regulation	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Digital Business			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)