



ICLG

The International Comparative Legal Guide to:

Enforcement of Foreign Judgments 2018

3rd Edition

A practical cross-border insight into the enforcement of foreign judgments

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EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Enforcement of Foreign Judgments*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations relating to the enforcement of foreign judgments.

It is divided into two main sections:

Two general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting the enforcement of foreign judgments, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in the enforcement of foreign judgments in 36 jurisdictions.

All chapters are written by leading lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Louise Freeman and Chiz Nwokonkor of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Country Finder

1.1 Please set out the various regimes applicable to recognising and enforcing judgments in your jurisdiction and the names of the countries to which such special regimes apply.

In this article, the authors will mainly address commercial and civil matters. Germany has entered into a number of multilateral and bilateral treaties. The treaties listed under Section 1 are mentioned by way of example and the list is not exhaustive.

| Applicable Law/ Statutory Regime | Relevant Jurisdiction(s) | Corresponding Section Below |
|--|---|--------------------------------|
| Multilateral Conventions | | |
| Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (“Lugano Convention”). | EU Member States and Norway, Iceland and Switzerland. | Section 3. |
| Hague Convention on Civil Procedure of 1 March 1954 (“Hague Convention on Civil Procedure”). | Countries signatory to the Convention. | Section 3. |
| Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (“CMR”). | Albania, Armenia, Austria, Belarus, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iran (Islamic Republic of), Ireland, Italy, Jordan, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Republic of Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Turkmenistan, United Kingdom of Great Britain and Northern Ireland, Uzbekistan. | Section 3. |

| Applicable Law/ Statutory Regime | Relevant Jurisdiction(s) | Corresponding Section Below |
|---|--|--------------------------------|
| Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 2 October 1973 (“Hague Convention on Maintenance Obligations”). | Countries signatory to the Convention. | Section 3. |
| Bilateral Treaties | | |
| Treaty between the Federal Republic of Germany and the State of Israel on the Mutual Recognition and Enforcement of Judicial Decisions in Civil and Commercial Matters (“Treaty between Germany and Israel”). | Israel. | Section 3. |
| The Treaty of 19 July 1966 between Germany and Tunisia on Legal Protection, Legal Assistance, and the Recognition and Enforcement of Foreign Judicial Decisions in Civil and Commercial Matters and on Commercial Arbitration (“Treaty between Germany and Tunisia”). | Tunisia. | Section 3. |
| Domestic Law | | |
| Code of Civil Procedure. | All countries to which none of the aforementioned treaties applies or no bilateral treaty exists. | Section 2. |
| Insolvency Act. | All countries to which none of the aforementioned treaties applies or no specific bilateral treaty exists. | Section 2. |
| Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction. | All countries to which none of the aforementioned treaties applies or no specific bilateral treaty exists. | Section 2. |

2 General Regime

2.1 Absent any applicable special regime, what is the legal framework under which a foreign judgment would be recognised and enforced in your jurisdiction?

Under German law, the recognition of foreign judgments is governed in particular by sect. 328 German Code of Civil Procedure (*Zivilprozessordnung* (“ZPO”)) and the enforcement by sect. 722, 723 ZPO.

2.2 What constitutes a ‘judgment’ capable of recognition and enforcement in your jurisdiction?

The term “decision” in sect. 328 I ZPO is defined as any type of final binding decision issued by a foreign court in civil matters which may include commercial, labour and employment as well as competition law matters. In order to classify a foreign judgment as a decision in civil matters, a German court assesses the subject matter of the foreign judgment. German courts base this assessment on the German *lex fori*, and therefore on the legal notion of the subject matter in dispute (*Streitgegenstandslehre*). The name, function or type attributed to a foreign body under its own laws is not relevant for this assessment.

Judgments in family matters are not decisions in civil matters and are not within the scope of sect. 328 ZPO. These judgments are recognised and enforced according to the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (“FamFG”)), sect. 107 *et seqq.* FamFG.

Judgments must be, in principle, distinguished from court settlements and enforceable public deeds (*Urkunden*). The latter two generally do not constitute decisions for the purposes of sect. 328 ZPO unless the foreign court reviews and controls the legality of such acts.

Further, interim measures and court orders on the taking or securing of evidence are not final binding decisions either.

2.3 What requirements (in form and substance) must a foreign judgment satisfy in order to be recognised and enforceable in your jurisdiction?

According to sect. 723 II ZPO in connection with sect. 328 I ZPO a foreign judgment is recognised and enforced unless the following substantive requirements are *not* met: (i) the foreign courts must have been internationally competent to decide the dispute (sect. 328 I No. 1 ZPO). The plaintiff in enforcement proceedings has the burden of proof that the foreign court had international jurisdiction. This requirement is fulfilled if the foreign court would have had jurisdiction to hear the matter if it had applied German procedural law. The German courts have to ascertain this requirement *ex officio*; (ii) the defendant in the enforcement proceedings must have been duly and timely notified of the foreign court proceedings brought against him as to enable him to properly defend his case (sect. 328 I No. 2 ZPO). The defendant is precluded from invoking procedural mistakes of the foreign court proceedings in the enforcement proceedings if the defendant has not raised respective objections in the foreign court proceedings; (iii) according to sect. 328 I No. 3 ZPO, a foreign judgment may be denied recognition and enforcement if it is irreconcilable with a German judgment between

the same parties dealing with the same subject matter in dispute (sect. 13 Court Constitution Act, (*Gerichtsverfassungsgesetz* “GVG”)). Likewise: German proceedings that have become pending prior to, and are irreconcilable with foreign proceedings, take precedence; (iv) foreign judgments are denied recognition and enforcement if their enforcement violates public policy (sect. 328 I No. 4 ZPO); and (v) lastly, foreign judgments are denied recognition and enforcement if reciprocity is not granted by the state in which the foreign judgment was rendered. A German court has to assess the actual recognition and enforcement practice of the state *vis-à-vis* judgments issued in Germany under similar circumstances (sect. 328 I No. 5 ZPO).

The grounds for refusal listed in sect. 328 I No. 5 ZPO are exhaustive.

2.4 What (if any) connection to the jurisdiction is required for your courts to accept jurisdiction for recognition and enforcement of a foreign judgment?

German courts assume the local and subject matter jurisdiction if the following requirements are met:

- According to sect. 722 II ZPO, the foreign judgment creditor has to sue at the place where the defendant is located in Germany. Alternatively, the lawsuit may be brought in the district of the court where the defendant’s assets lie.
- The subject matter jurisdiction is assessed on the basis of the amount in dispute in the enforcement proceedings. The district courts (*Amtsgericht*) are competent (sect. 23 No. 1 GVG) unless the amount in dispute exceeds EUR 5,000.00. In the latter case, the regional court (*Landgericht*) has subject matter jurisdiction (sect. 23 No. 1, 71 I GVG).

2.5 Is there a difference between recognition and enforcement of judgments? If so, what are the legal effects of recognition and enforcement respectively?

German law distinguishes between recognition (sect. 328 ZPO) and enforcement (sect. 722, 723 ZPO).

Recognition

Recognition of a foreign judgment is granted automatically, thus *ipso iure*. The exact scope of the legal effects of recognition in Germany is in dispute. The majority of scholars argue that a foreign judgment will have the same legal effects as in the foreign jurisdiction. Therefore, every public authority, notary or court in Germany has to respect and act according to the effects of the foreign judgment without any prior procedure of recognition. However, a foreign judgment cannot have more effects than German judgments in Germany.

Enforcement

Enforcement means the compulsory execution of a decision by means of German enforcement measures. The enforcement of a foreign judgment in Germany is only admissible if a German court has issued an enforcement judgment in favour of the foreign judgment creditor (exequatur proceedings). This enforcement judgment will serve as a basis for the compulsory execution in Germany if the foreign judgment debtor does not fulfil the judgment.

2.6 Briefly explain the procedure for recognising and enforcing a foreign judgment in your jurisdiction.

As recognition of a foreign judgment is granted *ipso iure* (see above at question 2.5), the ZPO does not stipulate any recognition procedure. Any party may file a positive or negative declaratory action (*Feststellungsklage*) (sect. 256 I ZPO) with the competent

court and request it to declare that the foreign judgment meets (or does not meet) the requirements set out in sect. 328 I ZPO.

The ZPO does not stipulate a specific enforcement procedure either. The general procedural rules of the ZPO apply. The foreign judgment creditor has to bring a lawsuit against the foreign judgment debtor before the competent German courts (sect. 253 *et seqq.* ZPO). After the court has notified the judgment debtor of the lawsuit followed by potentially one or two rounds of submissions, the court may hold an oral hearing (sect. 128 I ZPO). The verdict declaring the foreign judgment enforceable is rendered according to the general rules of the ZPO applicable to all other verdicts (sect. 300 I ZPO).

The requirements, which the plaintiff has to fulfil in order to have his foreign judgment declared enforceable, are stipulated in sect. 722, 723 ZPO (see above at question 2.3).

When filing its application, the plaintiff has to supply a duly certified copy of the foreign judgment. Additionally, a German court may request to supply an authentication of the foreign judgment by a consular officer as a foreign judgment – contrary to German judgments – is not deemed to be authentic (sect. 438 I ZPO). If the country where the foreign judgment was rendered is a contractual party to the Hague Convention on Abolishing the Requirement of Legislation for Foreign Public Documents of 1961, the plaintiff has to request the respective foreign competent authority to issue an apostille and supply the German court therewith.

German courts can also order the plaintiff to supply a certified translation of the judgment. Therefore, it is advisable that the plaintiff submits a translation – at least of the operative part of the judgment – with the application of enforcement.

The defendant can initiate an appeal on fact and legal issues against an enforcement judgment (*Berufung*; sect. 511 *et seqq.* ZPO) before the higher regional court (*Oberlandesgericht* (“OLG”). Further, the defendant can file an appeal on points of law (Revision, sect. 542 *et seqq.* ZPO) before the German federal supreme court (*Bundesgerichtshof* (“BGH”).

2.7 On what grounds can recognition/enforcement of a judgment be challenged? When can such a challenge be made?

Grounds to challenge a foreign judgment are narrow and exhaustively stipulated in sect. 328 I ZPO (see above at question 2.3). Sect. 328 I ZPO stipulates several procedural and one substantive ground: the violation of public policy. Such a violation requires that the enforcement of a judgment is obviously irreconcilable with fundamental principles of German law, especially with fundamental rights. However, the prohibition of *révision au fond* applies: German courts cannot re-examine the merits of the case. Further, German courts interpret violations of public policy restrictively. Examples of violations of public policy are: (i) punitive damages if the amount of damages awarded in a foreign judgment excessively outweighs the compensating function which damages have under German law; or (ii) judgments obtained by fraud. Contrary thereto, pre-trial discovery – a non-existing feature in German court proceedings – and the absence of written grounds in a judgment or a party’s exclusion from proceedings due to a contempt of court are not necessarily violations of public policy.

Further, the defendant can invoke substantive grounds in enforcement proceedings if these grounds have arisen after the foreign judgment was rendered. Such grounds may include the defendant’s compliance with the judgment (e.g. payment) or the plaintiff’s assignment of the claim – underlying the foreign judgment – to a third party.

2.8 What, if any, is the relevant legal framework applicable to recognising and enforcing foreign judgments relating to specific subject matters?

For insolvency matters, the German Insolvency Act (*Insolvenzordnung* (“InsO”)) applies: sect. 343 I InsO stipulates that foreign insolvency proceedings are recognised in Germany unless the foreign court does not have jurisdiction according to German procedural law or the recognition would violate public policy. Furthermore, according to sect. 353 I InsO in connection with sects. 722, 723 ZPO enforcement of a judgment in insolvency matters will be granted if the requirements of sect. 328 I ZPO are complied with (see above at question 2.3). Contrary to the enforcement of judgments in civil matters, the term “decision” in insolvency matters also encompasses decisions by an administrative authority if the latter is the competent authority to hear insolvency matters in that country.

As set out above, recognition and enforcement of decisions in family matters are governed by sects. 107–110 FamFG and not by the ZPO. Family matters covered by the FamFG include, *inter alia*, matrimonial and parental matters, guardianship, adoption and inheritance. As regards the recognition of foreign judgments in family matters, the FamFG draws the following distinction: foreign decisions in matrimonial matters (divorce, legal separation, annulment of marriage, etc.) are not recognised *ipso iure*. They are only recognised if the competent authority (*Landesjustizverwaltung*) determines that the requirements of recognition are fulfilled (sect. 107 FamFG). Other foreign judgments in family matters are recognised *ipso iure* (sect. 108 FamFG) unless the requirements set out in sect. 109 I, IV FamFG are met. These requirements are largely identical to those set out in sect. 328 I ZPO (see above at question 2.3). Likewise, enforcement of a foreign judgment can be denied if these requirements are met (sect. 110 I FamFG).

2.9 What is your court’s approach to recognition and enforcement of a foreign judgment when there is: (a) a conflicting local judgment between the parties relating to the same issue; or (b) local proceedings pending between the parties?

- A local judgment always takes absolute priority over a foreign judgment dealing with the same matter in dispute and given between the same parties regardless of whether the foreign judgment was issued prior to the local judgment (see above at question 2.3).
- Likewise, local proceedings which have become pending prior to a foreign judgment take precedent over that foreign judgment (see above at question 2.3).

2.10 What is your court’s approach to recognition and enforcement of a foreign judgment when there is a conflicting local law or prior judgment on the same or a similar issue, but between different parties?

There is no *révision au fond* of a foreign judgment (sect. 723 I ZPO). Only in cases in which the enforcement of a foreign judgment would violate a conflicting local law which qualifies as *ordre public*, enforcement would be denied.

Similarly, a prior local judgment between different parties and being contrary to the judgment sought to be enforced is not a ground to refuse enforcement as the requirements of sect. 328 I No. 2 are not fulfilled (identity of the parties of the foreign and the local judgment). Furthermore, contrary to common law systems, the principle of *stare decisis* does not exist in Germany.

2.11 What is your court's approach to recognition and enforcement of a foreign judgment that purports to apply the law of your country?

As stated under question 2.7, there is no *révision au fond*. Except for violations of public policy, a German court does not assess whether a foreign court applies German substantive law correctly.

2.12 Are there any differences in the rules and procedure of recognition and enforcement between the various states/regions/provinces in your country? Please explain.

The ZPO and GVG apply in all 16 German states. The states do not have any regulatory power to pass laws that would deviate from federal procedural law and thus the ZPO.

2.13 What is the relevant limitation period to recognise and enforce a foreign judgment?

German law does not provide for a statute of limitations period to initiate legal actions to obtain an enforcement judgment. However, sect. 197 I No. 3 German Civil Code (*Bürgerliches Gesetzbuch* ("BGB")) stipulates that claims which have been declared final by way of judgment, court settlement or arbitral award become time-barred after 30 years.

3 Special Enforcement Regimes Applicable to Judgments from Certain Countries

3.1 With reference to each of the specific regimes set out in question 1.1, what requirements (in form and substance) must the judgment satisfy in order to be recognised and enforceable under the respective regime?

Multilateral Conventions

Lugano Convention

The rules of recognition and enforcement of foreign judgments under the Lugano Convention apply (i) in civil and commercial matters, and (ii) if a German court has to enforce a foreign judgment issued in one of the EFTA states (Iceland, Switzerland and Norway).

The Lugano Convention is aligned with the Brussels I Regulation of 2001 (Council Regulation (EC) No. 44/2001 of 22 December 2000). Accordingly, foreign judgments are *ipso iure*, and thus automatically recognised without any special procedure required (Art. 33 I).

The enforcement procedure itself under the Lugano Convention is different from the one under the ZPO (see above at question 2.6) as it comprises two stages: in the first stage, the foreign judgment creditor has to apply to the competent court for the judgment to be declared enforceable. Upon completion of certain formalities stipulated in the Lugano Convention (Arts. 53, 54 and 55), the court has to declare the judgment enforceable (Art. 41). In this first stage of the enforcement proceedings – and contrary to the German ZPO – the court will not assess whether any grounds to refuse enforcement (Arts. 34 and 35) are fulfilled and the foreign judgment debtor will not be heard (Art. 41). The debtor will only be informed that the judgment was declared enforceable.

Only in the second stage can the foreign judgment debtor appeal the decision of enforceability within one month and invoke the grounds to refuse enforcement listed in Arts. 34 and 35 (Art. 45 I). The

grounds to refuse enforcement are comparable to those listed in sect. 328 I ZPO. Also, the prohibition of the *révision au fond* applies (Art. 45 II).

Hague Convention on Civil Procedure

Orders for court costs and expenses shall be declared enforceable without a hearing (Art. 19 I). The party seeking enforcement must provide (i) a copy of the judgment fulfilling the conditions required for its authenticity, (ii) proof of the force of *res judicata* of the underlying judgment, and (iii) a certified copy of the operative part of the judgment in the language of the authority where enforcement is sought, or in any other language agreed between the states, or a translation in one of the languages certified by a consular officer or sworn translator.

Hague Convention on Maintenance Obligations

To the extent applicable, a judgment is recognised or enforced in another contracting state if the judgment has force of *res judicata* and was rendered by an authority having jurisdiction (Art. 4 in connection with Art. 7 and 8).

A party seeking recognition or enforcement of a judgment shall furnish the following documents (Art. 17): (i) a complete and true copy of the judgment; (ii) any document necessary to prove that the decision is no longer subject to ordinary forms of review in the state of origin; and (iii) a certified translation of the aforementioned documents. Furthermore, recognition and enforcement of a judgment rendered by default may only be recognised or enforced if the defaulting party was notified of the institution of the court proceedings (Art. 6).

CMR

A specific procedure regarding recognition does not exist.

An enforceable judgment rendered under the CMR is also enforceable in any other contracting state, if the formal requirements for enforcement set out by the enforcement country are met (Art. 31 III). As a corollary, a judgment rendered under the CMR may be enforced in Germany if the requirements of sects. 722, 723 ZPO are fulfilled.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("NYC")

It is by far the most important multilateral agreement regarding the recognition and enforcement of foreign awards in Germany. State court judgments are not within the scope of the NYC (Art. 1 II).

Bilateral Conventions

Treaty between Germany and Israel

Final decisions in civil and commercial matters rendered in Israel are automatically recognised in Germany (Arts. 3 and 9 I). The Treaty between Germany and Israel stipulates various grounds based on which recognition may be refused. These grounds are, among others, set out in Art. 5, which largely resemble the grounds in sect. 328 I ZPO.

Decisions are enforceable in Germany if they are enforceable in Israel and recognisable in Germany (Art. 10).

Treaty between Germany and Tunisia

Judgments in all civil matters, excluding matters mentioned in Art. 28 (e.g. matrimonial, maintenance matters, insolvency), are recognised automatically if they are final and binding (Art. 27). Recognition may only be denied based on one of the grounds listed in Art. 29 I, II (Art. 33).

Likewise, a foreign judgment has to be declared enforceable by a court of the country where enforcement is sought (Art. 34). The judgment creditor has to prove by way of certified documents the following requirements set out in Art. 38: (i) a certified copy of the decision sought to be enforced; (ii) proof that the decision is final and binding; (iii) proof that the decision would be enforceable in

Tunisia; (iv) the defendant was duly notified of the proceedings brought against him in Tunisia; and (v) a certified translation of the aforementioned documents.

3.2 With reference to each of the specific regimes set out in question 1.1, does the regime specify a difference between recognition and enforcement? If so, what is the difference between the legal effect of recognition and enforcement?

The Lugano Convention, the Treaty between Germany and Israel and the one between Germany and Tunisia all distinguish between recognition and enforcement of a foreign judgment. However, these treaties ascribe the same effect to recognition and enforcement as under German procedural law.

The Hague Convention on Civil Procedure does not address questions of recognition of cost orders, but only governs their enforcement.

The Hague Convention on Maintenance Obligations itself does not distinguish between recognition and enforcement. Recognition and enforcement of a decision shall be governed by the law of the enforcement state (Art. 13). Therefore, recognition and enforcement under the Convention have the same effects as under German procedural law.

3.3 With reference to each of the specific regimes set out in question 1.1, briefly explain the procedure for recognising and enforcing a foreign judgment.

Lugano Convention

The procedure is set out above at question 3.1.

Hague Convention on Civil Procedure

The request to have a cost order declared enforceable has to be done through diplomatic channels (Art. 18 I). Up until today, Germany has not ratified the Hague Convention on the International Access to Justice of 25 October 1980 which would facilitate this cumbersome procedure.

A decision on the enforceability is subject to subsequent appeal by the losing party (Art. 19 I).

Hague Convention on Maintenance Obligations

Recognition and enforcement of the foreign judgment is governed by the law of the enforcement state (see above at question 3.2). Therefore, sects. 722 and 723 ZPO apply (see above at questions 2.4 and 2.6).

Treaty between Germany and Israel

Judgments are recognised automatically without any specific procedure. A party may only bring a declaratory action to refuse recognition, Art. 9 II.

Enforcement is governed by German law unless the Treaty provides otherwise (Art. 11). Consequently, the judgment creditor has to initiate the enforcement proceeding with the competent regional court (*Landgericht*) in Germany where the debtor has its seat or where enforcement is sought (Art. 14 I). A German court does not look into merits of the judgment (Art. 16). However, the defendant may raise substantive objections against the underlying claim if these objections have arisen after the judgment was given (Art. 16 II).

Treaty between Germany and Tunisia

The judgment creditor has to bring an action before the German regional court where the judgment debtor has its seat or where the enforcement shall take place (Art. 37).

3.4 With reference to each of the specific regimes set out in question 1.1, on what grounds can recognition/enforcement of a judgment be challenged under the special regime? When can such a challenge be made?

Except for the Hague Convention on Civil Procedure and the Hague Convention on Maintenance Obligations, all treaties listed under section 1 set out grounds for refusal of enforcement (Arts. 34 and 35 (Art. 45 I) Lugano Convention, Art. 5 and Art. 10 Treaty between Germany and Israel and Arts. 29, 30 and 39 Treaty between Germany and Tunisia). The grounds are largely comparable to the grounds set out in sect. 328 I ZPO (see above at question 2.3) and typically are: (i) the enforcement would violate public policy; (ii) the court that has given the foreign judgment lacked jurisdiction over the dispute; (iii) a lack of due notification of the foreign court proceedings; (iv) the judgment is incompatible with a pending dispute between the same parties in the state where the enforcement is sought; (v) the judgment is incompatible with an earlier judgment given in Germany between the same parties and regarding the same matter in dispute; or (vi) the operative part of the foreign judgment has already been fulfilled.

4 Enforcement

4.1 Once a foreign judgment is recognised and enforced, what are the general methods of enforcement available to a judgment creditor?

Prior to selecting a specific enforcement measure, the judgment creditor must officially serve the judgment debtor with a copy of the judgment certifying its enforceability (*Klausel*).

The measures of enforcement available to a judgment creditor under German law depend on the nature of the judgment as well as the nature of the assets of the judgment debtor in Germany. They comprise the following: (i) seizure of movable assets by way of a bailiff (sect. 803 *et seqq.* ZPO); (ii) seizure of claims/bank accounts by way of a court order (sect. 828 *et seqq.* ZPO); (iii) seizure of immovable assets by way of foreclosure, registry of a force mortgage, or compulsory administration (sect. 866 I ZPO); or (iv) measures to obtain restitution of specific things and to forcibly obtain certain actions or omissions (sect. 883 *et seqq.* ZPO).

5 Other Matters

5.1 Have there been any noteworthy recent (in the last 12 months) legal developments in your jurisdiction relevant to the recognition and enforcement of foreign judgments? Please provide a brief description.

In a recent decision, the BGH confirmed that German courts apply the violation of *ordre public* very restrictively (BGH, decision of 22 June 2017 – IX ZB 61/16). The BGH confirmed its long-standing case law that it does not qualify as a violation of the *ordre public* if a German court – based on mandatory German law – had decided differently to a foreign court. It is only decisive where the result of the foreign court’s decision – based on its own law – is in such strong conflict with the considerations of justice enshrined in German law that this result is intolerable. Accordingly, in the case at hand, the BGH confirmed the lower German courts’ decisions that the enforcement of a judgment in which an Italian court had awarded both restitution of legal costs and liquidated damages to a defendant

would not violate public policy. The Italian court of appeal held that the plaintiff's action was brought in bad faith as the Italian courts manifestly lacked international jurisdiction. Therefore, it awarded – based on a provision of the Italian civil code of procedure – the defendant damages. The German courts correctly classified the damages awarded under the Italian provision not as punitive, but as liquidated damages. While the former violate the *ordre public*, the latter do not. The courts held that the purpose of the awarded damages was – contrary to punitive damages – not to penalise the plaintiff, but to compensate the opposing party's damages even if these could not be calculated.

In July 2017, the regional higher court of Hamburg denied the declaration of enforcement of a Russian judgment (OLG Hamburg, judgment of 13 July 2017 – 6 U 152/11). The OLG held that, contrary to sect. 328 I No. 5 ZPO, German judgments were not reciprocally recognised and enforced in Russia. The principle of reciprocity requires that recognition and enforcement of a German judgment does not face significantly higher difficulties than the recognition and enforcement of a Russian judgment in Germany. The regional higher court confirmed that the plaintiff has the burden to prove that the requirement of reciprocity is met. The bar is usually not set too high. This case, however, shows the difficulties if a set of circumstances is at stake which is unknown to the jurisdiction having issued the judgment. The plaintiff adduced several means of evidence: first, the court having given the judgment to be enforced made a statement. It purported that it would enforce a comparable judgment being rendered in Germany. However, this

statement could not be substantiated by official statements by the Russian Ministry of Justice. Second, an expert gave testimony: the applicable rules for enforcement were not clear as to whether a comparable German judgment would be enforced. Further, Russian scholars are also divided on this question. Lastly, the expert could not exclude the possibility that Russian courts would deny enforcement of a comparable German judgment. Accordingly, the higher regional court of Hamburg held that the proof of reciprocity was not made.

5.2 Are there any particular tips you would give, or critical issues that you would flag, to clients seeking to recognise and enforce a foreign judgment in your jurisdiction?

Judgments quickly exceed a value of EUR 5,000. In these cases, the regional higher courts are competent to decide on the enforcement of the foreign judgment. Under German law it is mandatory for clients to be represented by counsel in proceedings pending with the regional courts. Therefore, foreign judgment creditors need to retain counsel. Contrary to the general rule of court fees being dependent on the amount of the dispute, court costs for exequatur proceedings amount to EUR 240. It has to be noted, though, that fees for counsel may indeed be higher as they do not depend either on the amount of dispute or on pre-agreed hourly rates. It should be noted that, contrary to other jurisdictions, contingency fees are prohibited under German law.

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