IPA Institute for Procedural Law and Attorney Regulations

Leibniz Universität Hannover

National Report
Germany

prepared by

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Questionnaire for national reports

Revised

General guidelines

This questionnaire addresses practical and theoretical aspects regarding the structure, contents and effects of enforcement titles in EU Member States and one Candidate Country. Each partner should provide substantive answers for their respective State/Country (or additional State/Country, if specifically stipulated by the coordinator). Certain questions require knowledge on instruments of cross-border enforcement in the EU, particularly Regulation 1215/2012 ("Brussels Ia Regulation"; hereinafter also: B IA). The latter questions address the interplay of national law and the EU regime on cross-border enforcement in civil and commercial matters.

For useful information, especially relating to B IA and cross-border enforcement in the EU, please refer, among other sources, to:

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[1]
- Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[2]
- Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[3]
- Study on residual jurisdiction (Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations),[4]
- Report on the Application of Regulation Brussels I in the Member States (Heidelberg Report),[5]

[1] OJ L 351/1, 20.12.2012. Available at:
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN.
[2] COM(2010) 748. Available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF.
[3] COM(2009) 174 final. Available at:
http://ec.europa.eu/civiljustice/news/docs/report_judgements_en.pdf.
[4] http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.
[5] B. Hess, T. Pfeiffer, P. Schlosser, Study JLS/C4/2005/03, 2007. Available at:
http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

- The Commission's Civil Justice Policy site,[6]
- The European e-Justice portal,[7] embedded with the European Judicial network (and the old e-Justice portal).[8] The portal features several many useful sources, e.g. Study on European Payment Order, Study on making more efficient the enforcement of judicial decisions within the European Union etc.
- The Access to Civil Justice portal[9] hosted by the University of Maribor, Faculty of Law together with the results of our previous projects and the project blog.

The structure of each individual report does not necessarily have to follow the list of questions enumerated below, however, following the structure is strongly advised. The questions raised should be dealt with within the reports, however, the authors are free to decide where this will be most suitable. If authors choose to address certain issues elsewhere within the questionnaire, then they are instructed to make cross-references and specify where they have provided an answer for the respective question (e.g. "answer to this question already provided in 1.6."). Following the structure of the questionnaire will enable and ease comparisons between the various jurisdictions.

The list of questions is not regarded as a conclusive one. It may well be that we did not foresee certain issues that present important aspects in certain jurisdictions. Please address such issues on your own initiative where appropriate. On the other hand, questions that are of no relevance for your legal system can be left aside.

Please provide representative references to court decisions and literature. Please try to illustrate important issues by providing examples from court practice. If possible, please include empirical and statistical data.

Please do not repeat the full questions in your text. There is no limitation as to the length of the reports.

Languages of national reports: English.

Deadline: 30 April 2020.

Upload report to: "https://www.dropbox.com/request/Vw2BGUFUFRO8ukJylrfr".

In case of any questions, remarks or suggestions please contact project coordinators, prof. dr. Vesna Rijavec: vesna.rijavec@um.si and prof. dr. Tjaša Ivanc: tjasa.ivanc@um.si; or Denis Baghrizabehi: denis.baghrizabehi@um.si.

[6] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice_en.
[7] https://e-justice.europa.eu/home.do?plang=en&action=home.
[8] http://ec.europa.eu/civiljustice/simplif_accelerat_procedures/simplif_accelerat_procedures_ec_en.htm.
[9] https://www.pf.um.si/en/acj/.

Terminology used in the questions

The use of a unified terminology can certainly ease the comparison between national reports. For the purposes of this questionnaire, the following definitions shall apply:

Action: Used in the sense of lawsuit, e.g. "bringing an action" (starting a lawsuit, filing a suit). Should be differentiated from 'claim'.

Appeal in Cassation: Second appeal in the Romanic family of civil procedure (in the Germanic family one uses "Revision" instead).

Application: Request addressed to the court. Note: the term "motion" is in B IA exclusively used for acts issued by the court.

Astreinte: Monetary penalties used as a means of enforcing judgments in certain civil law jurisdictions. A proper English term to describe "*astreinte*" does not exist.

Authentic instrument: A document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

(i) relates to the signature and the content of the instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose

Civil Imprisonment: Imprisonment of a judgment debtor in order to force them to satisfy the judgment.

Claim / Defence on the Merits: Claim or defence which concerns the specific case at hand and not preliminary (procedural) issues. Opposite of preliminary defences.

Claimant: Before the Woolf Reforms (England and Wales) designated as "Plaintiff". In your contributions, please only use "claimant" (the term which is also used in B IA).

Co-litigants: More than one person being considered a party or several parties on either the Claimant or the Defendant side.

Counsel: Generic term for the lawyer assisting a party. We would advise to use this terminology instead of "advocate", "procurator", etc.

Court of origin: The court which has given the judgment the recognition of which is invoked or the enforcement of which is sought.

Court settlement: A settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings.

Default: Failure to perform the required procedural act (e.g. where the summoned defendant does not appear); failure to perform.

Defaulter: Party in a civil action who does not perform the required procedural act.

Defendant: Please use this term instead of "Respondent".

Enforcement: Use the term enforcement instead of execution.

Enforcement officer: Official involved in enforcing court rulings. Enforcement is among the duties of a "*huissier de justice*" in France and other jurisdictions belonging to the Romanic family of civil procedure.

Ex officio / Sua Sponte: Both "*ex officio*" and "*sua sponte*" are used to indicate that the judge may act spontaneously without being asked to do so by the parties. In other words, we are dealing with powers of the judge that he may exercise of his own motion.

Final judgment: Judgment that is binding on the parties and against which generally no ordinary legal remedy is permitted.

Hearing: Session before the court, held for the purpose of deciding issues of fact or of law. For civil law jurisdictions, we would suggest avoiding using the terminology "trial" (which in English civil procedure refers to a specific stage in litigation).

Interlocutory Proceedings: Proceedings that are not aimed at obtaining a final judgment on the merits in the case but aim at an intermediate, non-final decision in a pending lawsuit.

Joinder of Claims: The position whereby Claimant raises (either initially or after the initiation of proceedings) several claims.

Judgment: Any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

Judicial Case Management: An approach to litigation in which the judge or the court is given powers to influence the progress of litigation, usually in order to increase efficiency and reduce costs.

Main Hearing: In German: *Haupttermin*.

Means of recourse against judgments: General terminology to indicate all possible means to attack judgments, e.g. ordinary appeal, opposition, cassation, revision etc.

Member State of origin (MSO): The Member State in which in which the judgment has been given, the court settlement has been approved or concluded or the authentic instrument has been drawn up or registered.

Member State addressed (MSA): The Member State in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought.

Operative part: The "tenor" or "holding" part of the Judgement which contains a "finding" or "declaration" or "order" to the debtor to pay a sum of money or undertake an action. Usually denotes the obligation of the debtor, executable in enforcement proceedings. In German: *Urteilstenor*.

Opposition: Act of disputing a procedural act or result, e.g. a default judgment.

Preclusion: The fact that a party is barred (precluded) from taking specific steps in the procedure since the period for taking these steps has expired ("*Reihenfolgeprinzip*").

Preliminary defences: "Exceptions"; (usually) procedural defences. Opposite of defences on the merits.

Process server: Official serving the summons on the opponent party. This is among the tasks of a "*huissier de justice*" in France and other jurisdictions belonging to the Romanic family of civil procedure.

Second instance appeal: First appeal, not to be confused with a Cassation Complaint or Revision (i.e. second appeal or third instance appeal).

Statement of Case: General terminology for the documents containing the claim, defence, reply, rejoinder etc. Before the Woolf (England and Wales) reforms these documents were indicated as "pleadings". In French: "conclusions".

Statement of Claim: Document containing the claim.

Statement of Reasons: The part of the judgment that contains the grounds for the decision.

Statement of Defence: Document containing the defence.

Part 1: General inquiries regarding Enforcement titles

1.1 Briefly present how an "enforcement title" is defined in your national legal order.

Comment: *In addition to the definition, enumerate the domestic judicial (and other legal) instruments which conform to the above definition of an enforcement title. If there is a statutory definition, then please provide the citation to the exact article/paragraph of that law and an English translation. Provide a list of enforcement titles.*

The German national legal order defines an enforcement title as an authentic instrument, which declares the substantive claim or legal liability that should be materiealized enforceable.[10] Accordingly, the enforcement title has to display the substantive claim of the enforcement-creditor against the enforcement-debtor.[11] The enforcement title is the basis for enforcement proceedings; it entitles the enforcement-creditor to demand enforcement by the enforcement authorities; it constitutes the parent act that allows the enforcement authority to access the enforcement-creditors assests or rights and it determines the content and scope of enforcement.[12] Thus, it has to include the following items: the claim that is to be enforced, as well as both parties to the enforcement proceedings, namely the creditor and the debtor.[13]

Domestic judicial and other legal instruments that can serve as an enforcement title are mainly set out by the Zivilprozessordnung (henceforth: ZPO)[14], in particular in § 704 ZPO and § 794 I ZPO. The central provision is § 704 ZPO, according to which final judgments constitute enforcement titles:

§ 704 ZPO – Vollstreckbare Endurteile

> Die Zwangsvollstreckung findet statt aus Endurteilen, die rechtskräftig oder für vorläufig vollstreckbar erklärt sind.

In English:

§ 704 ZPO – Enforceable final judgements

[10] H. F. Gaul et al., 'Zwangsvollstreckungsrecht' (C. H. Beck 2010), p. 142.
[11] H. Brox and W.-D. Walker, 'Zwangsvollstreckungsrecht' (Verlag Franz Vahlen 2018), p. 22.
[12] Gaul et al., supra n. 10, p. 142; O. Jauernig and C. Berger, 'Zwangsvollstreckungs- und Insolvenzrecht' (C. H. Beck 2010), p. 4.
[13] H.-J. Musielak and W. Voit, 'Grundkurs ZPO' (C. H. Beck 2018), p. 403.
[14] German Code of Civil Procedure.

Compulsory enforcement may be pursued based on final judgments that have become final and binding, or that have been declared provisionally enforceable.

Provisions that are applicable to enforcement based on final judgments also apply to other enforcement titles, § 795 first sentence ZPO. Since reserve judgments equal final judgments according to § 302 (3) ZPO and § 599 (3) ZPO, they also constitute enforcement titles.[15]

Further enforcement titles are enumerated in § 794 (1) ZPO:

§ 794 ZPO – Weitere Vollstreckungstitel	**§ 794 ZPO - Further enforceable legal documents**
(1) Die Zwangsvollstreckung findet ferner statt:	(1) Compulsory enforcement may furthermore be pursued:
1. aus Vergleichen, die zwischen den Parteien oder zwischen einer Partei und einem Dritten zur Beilegung des Rechtsstreits seinem ganzen Umfang nach oder in Betreff eines Teiles des Streitgegenstandes vor einem deutschen Gericht oder vor einer durch die Landesjustizverwaltung eingerichteten oder anerkannten Gütestelle abgeschlossen sind, sowie aus Vergleichen, die gemäß § 118 Abs. 1 Satz 3 oder § 492 Abs. 3 zu richterlichem Protokoll genommen sind;	1. Based on settlements concluded by the parties, or between one of the parties and a third party, in order to resolve the legal dispute either in its full scope or as regards a part of the subject matter of the litigation, before a German court or before a dispute-resolution entity established or recognised by the Land department of justice (Landesjustizverwaltung), as well as based on settlements that have been recorded pursuant to section 118 (1), third sentence, or section 492 (3) for the record of the judge;
2. aus Kostenfestsetzungsbeschlüssen;	2. Based on orders assessing the costs;
2a. (weggefallen);	2a. (repealed);
2b. (weggefallen);	2b. (repealed);
3. aus Entscheidungen, gegen die das Rechtsmittel der Beschwerde stattfindet;	3. Based on decisions against which a complaint may be lodged as an appellate remedy;
3a. (weggefallen);	3a. (repealed);
4. aus Vollstreckungsbescheiden;	4. Based on writs of execution;
4a. aus Entscheidungen, die Schiedssprüche für vollstreckbar erklären, sofern die Entscheidungen rechtskräftig oder für vorläufig vollstreckbar	4a. Based on decisions declaring arbitration awards as enforceable, provided that the decisions are final and binding or have been declared provision-

[15] Jauernig and Berger, supra n. 12, p. 9.

erklärt sind;	ally enforceable;
4b. aus Beschlüssen nach § 796b und § 796c;	4b. Based on orders pursuant to section 796b or section 796c;
5. aus Urkunden, die von einem deutschen Gericht oder von einem deutschen Notar innerhalb der Grenzen seiner Amtsbefugnisse in der vorgeschriebenen Form aufgenommen sind, sofern die Urkunde über einen Anspruch errichtet ist, der einer vergleichsweisen Regelung zugänglich, nicht auf Abgabe einer Willenserklärung gerichtet ist und nicht den Bestand eines Mietverhältnisses über Wohnraum betrifft, und der Schuldner sich in der Urkunde wegen des zu bezeichnenden Anspruchs der sofortigen Zwangsvollstreckung unterworfen hat;	5. Based on records or documents that have been recorded in accordance with the requirements as to form by a German court or by a German notary within the bounds of his official authority, provided that the record or document has been recorded regarding a claim that can be provided for by a settlement, that is not directed at obtaining a declaration of intent, and that does not concern the existence of a tenancy relationship for residential spaces, and furthermore provided that the debtor has subjected himself, in the record or document, to immediate compulsory enforcement of the claim as specified therein;
6. aus für vollstreckbar erklärten Europäischen Zahlungsbefehlen nach der Verordnung (EG) Nr. 1896/2006;	6. Based on European orders for payment that have been declared enforceable according to regulation no 1896/2006
7. aus Titeln, die in einem anderen Mitgliedstaat der Europäischen Union nach der Verordnung (EG) Nr. 805/2004 des Europäischen Parlaments und des Rates vom 21. April 2004 zur Einführung eines Europäischen Vollstreckungstitels für unbestrittene Forderungen als Europäische Vollstreckungstitel bestätigt worden sind;	7. Based on European orders for payment of unconstested claims according to regulation no 805/2004;
8. aus Titeln, die in einem anderen Mitgliedstaat der Europäischen Union im Verfahren nach der Verordnung (EG) Nr. 861/2007 des Europäischen Parlaments und des Rates vom 11. Juli 2007 zur Einführung eines europäischen Verfahrens für geringfügige Forderungen (ABl. L 199 vom 31.7.2007, S. 1; L 141 vom 5.6.2015, S. 118), die zuletzt durch die Verordnung (EU) 2015/2421 (ABl. L 341	8. Based on European orders for payment of small claims according to regulation no 861/2007;

vom 24.12.2015, S. 1) geändert worden ist, ergangen sind;

9. aus Titeln eines anderen Mitgliedstaats der Europäischen Union, die nach der Verordnung (EU) Nr. 1215/2012 des Europäischen Parlaments und des Rates vom 12. Dezember 2012 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen zu vollstrecken sind.

9. Based on enforcement titles rendered by a member state of the European Union and that are to be enforced pursuant to regulation no 1215/2012.

(2) Soweit nach den Vorschriften der §§ 737, 743, des § 745 Abs. 2 und des § 748 Abs. 2 die Verurteilung eines Beteiligten zur Duldung der Zwangsvollstreckung erforderlich ist, wird sie dadurch ersetzt, dass der Beteiligte in einer nach Absatz 1 Nr. 5 aufgenommenen Urkunde die sofortige Zwangsvollstreckung in die seinem Recht unterworfenen Gegenstände bewilligt.

(2) Insofar as, pursuant to the stipulations of sections 737, 743, section 745 (2), and of section 748 (2) it is necessary to sentence a party involved to tolerating compulsory enforcement, this shall be substituted by the party involved approving, in a record or document prepared pursuant to subsection (1) number 5, the immediate compulsory enforcement against the objects that are subject to the title he holds.

1.2 How are "civil and commercial" matters defined in your national legal order?

Civil matters are defined in **§ 13 Gerichtsverfassungsgesetz (GVG)**[16] as

> (1) […] bürgerliche Rechtsstreitigkeiten, die Familiensachen und die Angelegenheiten der freiwilligen Gerichtsbarkeit (Zivilsachen).

In English:

> (1) [...] civil disputes, family matters and non-contentious matters (civil matters).

Commercial matters are defined in **§ 95 GVG**.

§ 95 GVG

(1) [...] bürgerlichen Rechtsstreitigkeiten, in denen durch die Klage ein Anspruch geltend gemacht wird:

§ 95 GVG

(1) Commercial matters within the meaning of this Act shall be civil disputes in which an action is

[16] German Courts Constitution Act.

	brought to assert a claim:
1. gegen einen Kaufmann im Sinne des Handelsgesetzbuches, sofern er in das Handelsregister oder Genossenschaftsregister eingetragen ist oder auf Grund einer gesetzlichen Sonderregelung für juristische Personen des öffentlichen Rechts nicht eingetragen zu werden braucht, aus Geschäften, die für beide Teile Handelsgeschäfte sind;	1. against a merchant within the meaning of the Commercial Code, insofar as he is registered in the commercial register or the cooperatives register or need not be registered therein pursuant to a special statutory arrangement governing corporate entities established under public law, arising out of transactions that are commercial transactions for both parties;
2. aus einem Wechsel im Sinne des Wechselgesetzes oder aus einer der im § 363 des Handelsgesetzbuchs bezeichneten Urkunden;	2. arising out of a bill of exchange within the meaning of the Bills of Exchange Act or arising out of one of the documents designated in section 363 of the Commercial Code;
3. auf Grund des Scheckgesetzes;	3. on the basis of the Cheque Act;
4. aus einem der nachstehend bezeichneten Rechtsverhältnisse:	4. arising out of one of the legal relationships designated hereafter:
a) aus dem Rechtsverhältnis zwischen den Mitgliedern einer Handelsgesellschaft oder Genossenschaft oder zwischen dieser und ihren Mitgliedern oder zwischen dem stillen Gesellschafter und dem Inhaber des Handelsgeschäfts, sowohl während des Bestehens als auch nach Auflösung des Gesellschaftsverhältnisses, und aus dem Rechtsverhältnis zwischen den Vorstehern oder den Liquidatoren einer Handelsgesellschaft oder Genossenschaft und der Gesellschaft oder deren Mitgliedern;	a) out of the legal relationship between the members of a commercial partnership or cooperative or between the partnership or cooperative and its members or between the silent partner and the owner of the commercial business, both during the existence of and after the dissolution of the partnership relationship, and out of the legal relationship between the managers or liquidators of a commercial partnership or cooperative and the partnership or cooperative or its members;
b) aus dem Rechtsverhältnis, welches das Recht zum Gebrauch der Handelsfirma betrifft;	b) out of the legal relationship concerning the right to use the commercial firm name;

c) aus den Rechtsverhältnissen, die sich auf den Schutz der Marken und sonstigen Kennzeichen sowie der eingetragenen Designs beziehen;

c) out of the legal relationships concerning the protection of trademarks, other identifying marks and registered designs;

d) aus dem Rechtsverhältnis, das durch den Erwerb eines bestehenden Handelsgeschäfts unter Lebenden zwischen dem bisherigen Inhaber und dem Erwerber entsteht;

d) out of the legal relationship originating in the acquisition of an existing commercial business "inter vivos" between the previous owner and the acquirer;

e) aus dem Rechtsverhältnis zwischen einem Dritten und dem, der wegen mangelnden Nachweises der Prokura oder Handlungsvollmacht haftet;

e) out of the legal relationship between a third party and the party liable on grounds of lack of proof of statutory authority or commercial power of attorney;

f) aus den Rechtsverhältnissen des Seerechts, insbesondere aus denen, die sich auf die Reederei, auf die Rechte und Pflichten des Reeders oder Schiffseigners, des Korrespondentreeders und der Schiffsbesatzung, auf die Haverei, auf den Schadensersatz im Falle des Zusammenstoßes von Schiffen, auf die Bergung und auf die Ansprüche der Schiffsgläubiger beziehen;

f) out of the legal relationships under maritime law, especially those concerning the shipping business, those concerning the rights and obligations of the manager or owner of a ship, the ship's husband and the crew of the ship, and those concerning average, compensation for damages in the event of collisions between ships, salvage operations and claims of maritime lien holders;

5. auf Grund des Gesetzes gegen den unlauteren Wettbewerb;

5. on the basis of the Act against Unfair Competition;

6. aus den §§ 9, 10, 11, 14 und 15 des Wertpapierprospektgesetzes oder den §§ 20 bis 22 des Vermögensanlagengesetzes.

6. arising out of sections 9, 10, 11, 14 and 15 of the Securities Prospectus Act or sections 20 to 22 of the Capital Investment Act.

(2) Handelssachen im Sinne dieses Gesetzes sind ferner

(2) Commercial matters within the meaning of this Act shall furthermore be

1. die Rechtsstreitigkeiten, in denen sich die Zuständigkeit des Landgerichts nach § 246 Abs. 3 Satz 1, § 396 Abs. 1 Satz 2 des Aktiengesetzes, § 51 Abs. 3 Satz

1. the legal disputes over which the Regional Court has jurisdiction pursuant to section 246 subsection (3) sentence 1 or section 396

3 oder nach § 81 Abs. 1 Satz 2 des Genossenschaftsgesetzes, § 87 des Gesetzes gegen Wettbewerbsbeschränkungen, es sei denn, es handelt sich um kartellrechtliche Auskunfts- oder Schadensersatzansprüche, und § 13 Abs. 4 des EG-Verbraucherschutzdurchsetzungsgesetzes richtet,	subsection (1) sentence 2 of the Stock Corporation Act, pursuant to section 51 subsection (3) sentence 3 or section 81 subsection (1), sentence 2 of the Cooperatives Act, pursuant to section 87 of the Act against Restraints on Competition, unless these concern claims for information or damages under cartel law, and section 13 subsection (4) of the Act implementing the EC Consumer Protection Cooperation Regulation,
2. die in § 71 Abs. 2 Nr. 4 Buchstabe b bis f genannten Verfahren.	2. the proceedings specified in section 71 subsection (2), number 4, letters b to f.

1.3 Which bodies conform to the definition of "Courts and Tribunals" as provided for by the B IA under your domestic legal system?

In order to determine which bodies under the German legal system conform to the definition of 'Courts and Tribunals' as provided for by the B IA, the interpretation of the CJEU has to be considered as guidance, since the term 'Court' is not further defined by the B IA. The CJEU defines a court or tribunal within the scope of the regulation as any court or tribunal, 'which, by virtue of its functions, itself decides on disputes between parties'.[17] According to the case law of the CJEU, the term 'Court' requires that the legal body has to act on behalf of the state, that it has to act independently and impartially and that it has to adhere to the essential procedural guarantees of the rule of law.[18] This includes the requirement that the proceedings preserve the principle of a contradictory proceeding ('*kontradiktorisches Verfahren*') in which the defendant is granted the right to be heard.[19] Thus, the CJEU applies a rather restrictive interpretation of the term 'Court' with regards to the B IA and understands the term 'Court' not in a functional, but rather in an organisational sense. Therefore, administrative authorities

[17] CJEU, 2 June 1994, Case C-414/92, Solo Kleinmotoren v Boch, ECLI:EU:C:1994:221.
[18] CJEU, 9 March 2017, Case C-551/15, Pula Parking d.o.o. v Tederahn, ECLI:EU:C:2017:193; CJEU 9 March 2017, Case C-484/15, Zulfikarpašić v Gajer, ECLI:EU:C:2017:199.
[19] J. Antomo, in V. Vorwerk and C. Wolf (eds.), Beck'scher Online Kommentar ZPO (C. H. Beck 2020), Art. 3 Brüssel Ia-VO margin n. 3.

and members of legal professions are not encompassed by the term 'Court' under the B IA, apart from the (exhaustive) exceptions under Art. 3 B IA.[20] National courts of the member states have to be able to easily identify whether a judicial decision of another member state court is involved for the purpose of a quick enforcement procedure.[21]

Accordingly, under the German legal system the following national judicial institutions, namely competent courts ('*Gerichte*'), conform to the definition of 'Courts and Tribunals' as provided for by the B IA:

- the district courts ('*Amtsgericht*'),
- the regional courts ('*Landgericht*'),
- the higher regional courts ('*Oberlandesgerichte*')
- and, the German Federal Court of Justice ('*Bundesgerichtshof*'), irrespective of the fact whether these courts have been approached as a civil court ('*Zivilgerichtsbarkeit*') or as a criminal court ('*Strafgerichtsbarkeit*'), e.g. in case the decision was rendered as part of criminal proceedings in an adhesion proceeding regarding civil and commercial matters;[22]
- labour courts ('*Arbeitsgericht*'), with a system of successive stages of jurisdiction starting with the local labour courts, followed by a labour court ('*Arbeitsgericht*') for each of the respective states ('*Landesarbeitsgericht'*) and finally the German Federal Labour Court ('*Bundesarbeitsgericht'*);
- special commercial courts ('*besondere Handelsgerichte*').

Arbitral tribunals do not meet the requirements for a 'Court' under this definition. Thus, the recognition and enforcement of arbitral awards is not encompassed by the scope of the B IA.[23]

[20] Antomo, in Vorwerk and Wolf (eds.), supra n. 19, Art. 3 Brüssel Ia-VO margin n. 5.
[21] Antomo, in Vorwerk and Wolf (eds.), supra n. 19, Art. 3 Brüssel Ia-VO margin n. 6.
[22] Antomo, in Vorwerk and Wolf (eds.), supra n. 19, Art. 1 Brüssel Ia-VO margin n. 40.
[23] Antomo, in Vorwerk and Wolf (eds.), supra n. 19, Art. 1 Brüssel Ia-VO margin n. 107, Art. 3 Brüssel Ia-VO margin n. 4.

1.4 Briefly present the types of domestic decisions (e.g. Judgments, Decrees, Decisions, Orders) which may be rendered/issued under your Member State's civil procedure.

Comment: *Briefly elaborate on the meaning and effects of these of types of decisions. Please note that the word "decision" is used as a generic and neutral term, e.g. in Slovenia, "decisions" rendered by the court shall take form either of a "judgment" (Slovene: "Sodba") or of a decree (Slovene: "Sklep"). "Civil procedure" is to be understood as any procedure so designated by domestic law. In addition, decisions not rendered in civil procedure, but having a civil character (e.g. decision on damages in criminal procedure), should also be included. Indicate which of these decisions may be considered enforcement titles. Additionally, please state what these decisions are called in the official language of your Member State. If enforcement titles are exhaustively enumerated by statute, please provide the citation to the exact article/paragraph of that statute and an English translation.*

There are three different types of domestic decisions under the German civil procedure: '*Urteile*' which could be translated to judgments in a traditional sense, '*Beschlüsse*' meaning orders and '*Verfügungen*' meaning rulings that generally concern the conduct of the proceedings, cf. § 160 III No. 6 ZPO. However, the type of the decision should be classified by its content according to its definition rather than the mere translation as it is difficult to find a fitting translation for the entire variety of domestic decisions.

Judgments are decisions of a court issued on the basis of a necessary oral hearing. Judgments are required to adhere to certain formal requirements, § 313 ZPO.[24] They become existent by announcement. A second instance appeal, '*Berufung*', or an appeal in cassation, '*Revision*', can be lodged against first instance judgments.[25] After the expiry of the period determined for the means of recourse against judgements the judgment receives the effect of formal res judicata, § 705 ZPO.[26] Formal res judicata is requirement for material res judicata, § 322 ZPO. Furthermore, the court deciding upon the action is bound by its judgment, § 318 ZPO.

[24] See the model judgment of a court of first instance that has been provided by the authors on http://blog.pf.um.si/enforcement-titles/germany/.
[25] W. Grunsky and F. Jacoby, 'Zivilprozessrecht' (Verlag Franz Vahlen 2018), p. 203.
[26] See text to n. 5.1.1 infra.

On the one hand, a distinction is made according to the content between a judgment on the merits ('*Sachurteil*') and a procedural judgment ('*Prozessurteil*').[27] By issuing a judgment on the merits, the court decides on the merits of the claim. Judgments on the merits in favour of the claimant can be granting performance ('*Leistungsurteil*'), affecting the legal relationship ('*Gestaltungsurteil*'), or be in form of a declaratory judgment ('*Feststellungsurteil*'). Judgments granting performance are enforceable once formal res judicata is given or the judgment is declared provisionally enforceable pursuant to § 704 I ZPO.[28] Following a hearing, a controversial judgment ('*streitiges [kontradiktorisches] Urteil*') is issued, whereas a default judgment is rendered due to the default of either party ('*Versäumnisurteil*'), § 330 et seq. ZPO. If the defendant accepts the claim, the court issues a judgment by confession ('*Anerkenntnisurteil*'), § 307 ZPO. If the claimant waives its claim, a waiver judgment is issued ('*Verzichtsurteil*'), § 306 ZPO. On the contrary, if the court dismisses an action as inadmissible due to the lack of a procedural requirement, a procedural judgment is rendered.

On the other hand, a distinction within the judgments is made according to the effect on the instance.[29] Depending on whether the judgment terminates the instance or not, it is either called a final judgment ('*Endurteil*') according to § 300 ZPO, or an interim judgment ('*Zwischenurteil*') according to § 303 ZPO. Final judgments terminate the instance fully, § 300 ZPO ('*Vollendurteil*'), or partly, § 301 ZPO ('*Teilurteil*'). Final judgments are considered enforcement titles pursuant to § 704 ZPO.[30]

A third distinction is made according to the criterion of conditionality.[31] The unconditional judgment is the rule. A court may also render a conditional judgment ('*Vorbehaltsurteil*') according to § 302 ZPO, for example, when considering an offset with a counterclaim. For appeal and enforcement purposes, the conditional judgment is regarded as a final judgment, § 302 III ZPO. As its existence depends on the outcome of the subsequent proceedings, it receives the effect of formal res judicata, however not the material res judicata.[32]

[27] Grunsky and Jacoby, supra n. 25, p. 203.
[28] See text to n. 6.1 infra.
[29] Grunsky and Jacoby, supra n. 25, p. 204.
[30] See text to n. 1.1 supra and n. 6.1 infra.
[31] Grunsky and Jacoby, supra n. 25, p. 204.
[32] O. Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 302 ZPO margin n. 29 et seq.

Orders are decisions of the court issued without an oral hearing or under exempted oral hearing or, even though issued on the basis of a necessary oral hearing, due to an explicit statutory provision issued as a '*Beschluss*', for example the '*Beweisbeschluss*' pursuant to § 358 ZPO.[33] Examples for orders are: the approval of legal aid ('*Bewilligung der Prozesskostenhilfe*') or the suspension of enforcement proceedings ('*einstweilige Einstellung der Zwangsvollstreckung*'). Orders that are issued under § 796b ZPO and § 796c ZPO are considered enforcement titles according to § 794 I No. 4b ZPO.[34] An immediate appeal can be lodged against an order, cf. § 567 ZPO.

Rulings are decisions of the presiding judge or another judge, which usually contain measures of organisation of procedure, for example, the determination of date or deadlines, or which are of internal importance, for example, decisions on the resubmission of the documents. Rulings are mostly not contestable.[35] There is no possibility to lodge an appeal against a ruling, cf. § 329 ZPO.

1.5 Taking account of the euro-autonomous definitions of "Judgment" and "Authentic instrument" elaborated by the CJEU for the purposes of B IA, which domestic decisions and instruments conform to these definitions?

Comment: *Please explain which domestic decisions and instruments are problematic in the light of the euro-autonomous definitions and why. Explain which decisions and instruments do not fall within the definitions. If you use English translations of domestic decisions, then please also provide the domestic term in brackets next to the translation, e.g. In Slovenia, condemnatory Judgements [Sodbe] issued in litigious proceedings…".*

The wording of Art. 2 lit. a clearly states that, in principle, all types of final decisions of the national courts of a member state are recognised in the member states, irrespective of their designation, their form, the type of proceedings in which the were rendered, and the function-

[33] Grunsky and Jacoby, supra n. 25, p. 203.
[34] See text to n. 1.1, n. 5.1.3 infra and n. 11.17 infra.
[35] Grunsky and Jacoby, supra n. 25, p. 203.

al jurisdiction of the court. It is only important that a judicial institution issued the decision[36] and that the decision has external effect.[37] Therefore, rulings that constitute measures of organisation of procedure[38] and interim procedural decisions are not covered by the definition of '*judgment*' in accordance with Art. 2 B IA.[39]

Not only judgments on the merits, but also procedural judgments and judgments by default are encompassed by the definition.[40] Furthermore, the German ZPO contains regulations which allow for judgments in a shortened form, meaning judgments that are drafted without the facts and the reasoning, cf. § 313a ZPO and § 313b ZPO. These conform to the definition, as the form of the judgment is irrelevant.[41] Nothing else follows from § 313a (4) ZPO, § 313b (3) ZPO and § 30 Anerkennungs- und Vollstreckungsausführungsgesetz (henceforth: AVAG), which provide for a subsequent supplementation of a decision required abroad. These provisions merely intend to make it easier for the party to prove the requirements of Art. 37 B IA and the absence of grounds for refusal under Art. 45 B IA abroad, especially if the absence of grounds would be regarded as a violation of the ordre public in a member state.[42] The order that costs have to be fixed ('*Kostenfestzsetzung*') under § 104 et seq. ZPO, § 11 Rechtsanwaltsvergütungsgesetz (henceforth: RVG) or § 21 Rechtspflegergesetz (henceforth: RPflG) is encompassed by the definition. Yet, the mere invoice for court costs ('*Gerichtskostenrechnung*'), which the judicial authorities issue to the debtor according to § 19 Gerichtskostengesetz (henceforth: GKG), § 22 GKG, and § 29 GKG, as well as the basic decision on costs, are not encompassed.[43] Moreover, it does it matter whether the decision by the court is already final and binding ('*nicht rechtskräftige Entscheidungen*'); it is sufficient that the decision has effects, which are capable of being recognised and enforced.[44] This leads to the conclusion that also provisional decisions are covered by the definition of '*judgment*'

[36] P. Gottwald, in W. Krüger and T. Rauscher (eds.), Münchener Kommentar zur Zivilprozessordnung, Issue 3 (C. H. Beck 2017), Art. 2 Brüssel Ia-VO margin n. 2.
[37] A. Stadler, in H.-J. Musielak and W. Voit (eds.), Zivilprozessordnung Kommentar (Verlag Franz Vahlen 2020), Art. 2 EuGVVO nF margin n. 2.
[38] See text to n. 1.4 supra.
[39] OLG Hamm, Beschluss v 2 October 2008 – 19 W 21/08, EuZW 2009, p. 95; Stadler, in Musielak and Voit (eds.), supra n. 37, Art. 2 EuGVVO nF margin n. 2.
[40] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 2.
[41] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 3.
[42] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 3.
[43] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 8.
[44] Antomo, in Vorwerk and Wolf (eds.), supra n. 19, Art. 3 Brüssel Ia-VO margin n. 7.

under the B IA.[45] Decisions declaring an appeal unfounded or merely annulling the contested decision and referring the case back to the court of first instance ('*Rechtsmittelentscheidungen*') are recognised, though they are not suitable for enforcement.[46] Court decisions on the progress of the proceedings, which the parties cannot comply with without the involvement of the court, do not fall under the definition of '*judgment*'. Neither the decision on the taking of evidence ('*Beweisbeschluss*') is a judgment in the sense of the B IA as it is an interim procedural decision, nor measures for the preservation and procurement of evidence ('*Maßnahmen der Beweissicherung und Beweisbeschaffung*') prior to the commencement of court proceedings.[47] Similarly, the German '*Grundurteil*' according to § 304 ZPO, which is an interlocutory judgment on the merits of the case, is not encompassed by the definition as it also only has internal binding effect.[48] Also decisions, which do not have cross-border effects, such as the revocation or declaration of (in-)admissibility of enforcement measures ('*gerichtliche Aufhebung oder (Un-)Zulässigkeitserklärung von Vollstreckungsmaßnahmen*'), do not comply with the definition of '*judgment*'.[49] Enforcement acts, such as orders of attachment and transfer ('*Pfändungs- und Überweisungsbeschlüsse*') are not '*judgments*'.[50]

Considering the model decision under the Kapitalanleger-Musterverfahrensgesetz (henceforth: KapMuG), it is doubtful whether it is to be recognised in other member states. In this decision the higher regional courts establish the existence of individual claim-substantiating or claim-excluding requirements for the liability due to incorrect capital market information, or a disputed legal question with binding effect on the court of first instance, § 22 I sentence 1 KapMuG. In this respect, it is a procedural interim decision without relevance for other countries.[51] The German legislator wanted to ensure that foreign courts are also bound be the model decision and, thus, additionally ordered in § 22 II KapMuG that the model decision becomes final. However, the German legislator cannot unilaterally extend the circle of decisions

[45] Antomo, in Vorwerk and Wolf (eds.), supra n. 19, Art. 3 Brüssel Ia-VO margin n. 7.
[46] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 17.
[47] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 18.
[48] G. Mäsch, in J. Kindl et al., Gesamtes Recht der Zwangsvollstreckung (Nomos 2016), Art. 32 Brüssel I-VO margin n. 2.
[49] Mäsch, in Kindl et al., supra n. 48, Art. 32 Brüssel I-VO margin n. 5.
[50] H. Schack, 'Internationales Zivilverfahrensrecht mit internationalem Insolvenz- und Schiedsverfahrensrecht' (C. H. Beck 2017), margin n. 901.
[51] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 19.

requiring recognition, so that it remains doubtful whether such model decision will be recognised in other countries.[52]

Judgments, which deal with questions of arbitration, are not to be recognised under the B IA. However, judgments, which have been rendered in denial of the validity or in disregard of an arbitral agreement, are to be recognised.[53]

1.6 Have the national courts of your Member State addressed any questions for a preliminary ruling (Art. 263 TFEU) to the CJEU regarding the notion of "Judgment"?

The Regional Court Bremen presented the CJEU the dispute between four German insurance companies (Gothaer Allgemeine Versicherung AG, ERGO Versicherung AG, Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts and Nürnberger Allgemeine Versicherungs-AG) and a German company that is insured at these insurances (Krones AG) on the one side, and, a transport and logistics company (Samskip GmbH) on the other side.[54] The German Court presented the following questions:

'*1. Are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that the term "judgment" also covers in principle those judgments which are restricted to the finding that the procedural requirements for admissibility are not satisfied (so-called "procedural judgments")?*

2. Are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that the term "judgment" also covers a judgment ending proceedings by which a court declines jurisdiction on the basis of a jurisdiction clause?

3. Having regard to the case-law of the Court of Justice on the principle of extended effect (Case 145/86 Hoffmann [1988] ECR 645), are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that each Member State is required to recognise the judgments of a court of another Member State on the effectiveness of a jurisdiction clause agreed on by the parties, where the finding as to the effectiveness of the jurisdiction clause has become

[52] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 20.
[53] Gottwald, in Krüger and Rauscher (eds.), supra n. 36, Art. 2 Brüssel Ia-VO margin n. 6.
[54] LG Bremen, Urteil v 25 August 2011 – 11 O 253/10, unalex DE-2369; CJEU, 15 November 2012, Case C-456/11, Gothaer Allgemeine Versicherung et al. v Samskip GmbH, ECLI:EU:C:2012:719.

final under the national law of that court – even where the decision on the point forms part of a procedural judgment dismissing the action?'[55]

The CJEU ruled:

'*1. Art. 32 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it also covers a judgment by which the court of a Member State declines jurisdiction on the basis of a jurisdiction clause, irrespective of how that judgment is categorised under the law of another Member State.*

2. Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that the court before which recognition is sought of a judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – regarding the validity of that clause.'[56]

1.7 Please explain the level of judicial control (the "power of assessment") exerted by the courts when rendering default judgments in your Member State.

Comment: *The power of assessment may significantly vary. For instance, the courts may be barred from examination of the substance of the case or limited to checking compliance with mandatory rules of law.*

In Germany, the default judgment and its requirements are regulated in § 330 et seq. ZPO. In order to render a default judgment against the defendant, not only general requirements must be met, but also the conclusiveness of the claim as the basis for the judgment must be given. The courts have to examine whether these requirements are met.[57] General requirements are:

I. Hearing

Firstly, an oral hearing must have been scheduled pursuant to § 330 ZPO, § 331 I ZPO and § 332 ZPO.

[55] CJEU, 15 November 2012, Case C-456/11, Gothaer Allgemeine Versicherung et al. v Samskip GmbH, ECLI:EU:C:2012:719.
[56] CJEU, 15 November 2012, Case C-456/11, Gothaer Allgemeine Versicherung et al. v Samskip GmbH, ECLI:EU:C:2012:719.
[57] Grunsky and Jacoby, supra n. 25, p. 161.

II. Default of one of the parties

Secondly, a party must fail to appear at a hearing, or fail to submit any oral argument in spite of having appeared at the hearing according to § 333 ZPO. In cases, where representation by a lawyer is mandatory (in front of regional courts, higher regional courts and the German Federal Court of Justice), a party is in default if its lawyer does not appear to the hearing.

Has the opponent requested a default judgment even though there is no default, the court must dismiss the application by order, § 335 I ZPO and § 336 I ZPO.

III. Duly summons

Thirdly, the parties must be duly summoned, in particular they must be summoned in due time, cf. § 335 I No. 2 ZPO. Otherwise, the court must dismiss the application for default judgment by order, § 335 I No. 2 ZPO and § 336 I ZPO.

IV. Admissibility of the action

Finally, the action must be admissible.[58] This requirement is not expressly stipulated for rendering a default judgment, however, the default judgment constitutes a judgment on the merits, which cannot be rendered without the procedural requirements.[59] Is a procedural requirement definitely missing, the action is rejected as inadmissible in a procedural judgment without regards to the presence of the opponent. If the action was brought in the wrong legal way, the court shall, ex officio, refer the legal dispute to the correct legal way despite of the default of one party according to § 17a II GVG.[60]

Are the general requirements met, the court then exercises its power of assessment, which encompasses the examination of the conclusiveness of the claim as the basis of the default judgment against the defendant, § 331 II, II ZPO. § 331 II ZPO contains a legal fiction. The claimant's actual oral submission is feigned as having been granted and, thereby, conceded by the defendant as truthful. The court only examines whether the granted submission justifies the claim, § 331 I sentence 1, II ZPO.[61] The examination of the substance is, thus, limited to whether the facts brought forward by the claimant can be subsumed under a legal basis and no

[58] G. Toussaint, in Vorwerk and Wolf (eds.), supra n. 19, § 331 ZPO margin n. 3.
[59] Grunsky and Jacoby, supra n. 25, p. 163.
[60] Grunsky and Jacoby, supra n. 25, p. 163.
[61] Grunsky and Jacoby, supra n. 25, p. 164.

counter-rights intervene.[62] The conclusiveness finds its limitation where the court encounters facts that are clearly incorrect, for example, the asserted is impossible or the opposite is clearly correct.[63]

On the contrary, a default judgment against the claimant is rendered without examining the substance. The court has no discretionary powers.[64]

The party against which a default judgment has been delivered is entitled to enter a protest against the judgment, § 339 ZPO.

Part 2: General aspects regarding the structure of Judgements

2.1 Which elements are comprised in the structure of a domestic (civil) Judgment in your legal order?

Comment: *A judgment normally contains an array of (necessary) information in separate constituent parts (elements), e.g. the title; the proclamation that the Court issues the Judgment in the name of the people; the Court and the judge rendering the judgment; Parties to the dispute; the Operative part; the Reasoning; the Legal instructions etc.*

In the German legal order, the structure of a domestic civil judgment is mostly set out in § 313 ZPO.[65] According to § 313 I ZPO, the following elements are comprised in the structure of a judgment:

I. The title '*Im Namen des Volkes*', § 311 I ZPO

In the first place, the judgment contains the title: '*Im Namen des Volkes*', meaning '*In the name of the people*' pursuant to § 311 I ZPO.[66]

II. The '*Rubrum*', § 313 I No. 1 to 3 ZPO

[62] Stadler, in Musielak and Voit (eds.), supra n. 37, § 331 ZPO margin n. 7.
[63] H. Prüttung, in W. Krüger and T. Rauscher (eds.), Münchener Kommentar zur Zivilprozessordnung, Issue 1 (C. H. Beck 2020), § 331 ZPO margin n. 20.
[64] Stadler, in Musielak and Voit (eds.), supra n. 37, § 330 ZPO margin n. 4.
[65] See the model judgment of a court of first instance that has been provided by the authors, supra n. 24.
[66] H.-J. Musielak, in Musielak and Voit (eds.), supra n. 37, § 313 ZPO margin n. 3.

The second element of the judgment is called '*Rubrum*' in German. It translates to '*heading*' in English. This part contains the designation of the parties, their legal representatives, and the attorneys of record, § 313 I No. 1 ZPO. Furthermore, it sets out the designation of the court and the names of the judges contributing to the decision, § 313 I No. 2 ZPO. Lastly, the '*Rubrum*' sets out the date on which the court proceedings were declared terminated, § 313 I No. 3 ZPO. Although not explicitly mentioned, the header also includes the file number.[67]

III. The '*Urteilstenor*', § 313 I No. 4 ZPO

The third element of the judgment is called '*Tenor*' or '*Urteilsformel*', and contains the operative provisions of a judgment. Usually, the operative part is split into three points: first, the decision on the substance of the case including the interest rates, second, the decision on the costs, and third, the decision on the (if applicable: provisional) enforceability.[68]

IV. The '*Tatbestand*', § 313 I No. 5 ZPO

The fourth part addresses the facts of the case and is, thus, called '*Tatbestand*'. According to § 313 II sentence 1 ZPO, it shall briefly summarise the essential content, the claims asserted and the means of challenge or defence brought before the court, highlighting the petitions filed. The details of the circumstances and facts as well as the status of the dispute thus far ('*Prozessgeschichte*') are to be included by reference being made to the written pleadings, the records of the hearings, and other documents, according to § 313 II sentence 2 ZPO. Only in the cases highlighted by law it is not necessary to include the facts of the case, cf. § 313a ZPO and § 313b ZPO.

V. The '*Entscheidungsgründe*', § 313 I No. 6 ZPO

The fifth element of the judgment contains the reasoning, in German '*Entscheidungsgründe*', on which a ruling is based. Pursuant to § 313 III ZPO it shall contain a brief summary of the considerations of the facts and circumstances of the case and the legal aspects on which the decision is based. Only in the cases highlighted by law it is not necessary to include the reasoning, for example, § 313a ZPO and § 313b ZPO.

VI. The legal instructions, § 232 ZPO

Following the reasoning, the judgment has to name legal instructions regarding the possibility of appeal pursuant to § 232 ZPO. These are part of the judgment according to the wording of

[67] I. Saenger, in I. Saenger (ed.), Zivilprozessordnung Handkommentar (Nomos 2019), § 313 ZPO margin n. 4.
[68] C. Feskorn, in R. Zöller, Zöller Zivilprozessordnung Kommentar (ottoschmidt 2020), § 313 ZPO margin n 10.

§ 232 ZPO, thus, this part also has to be signed.[69] This requirement exists since 01.01.2014 for every contestable decision.[70]

VII. The signature

The judgment ends with the signature of the judges contributing to the decision in accordance with § 315 ZPO.

2.2 Is the structure of a Judgement prescribed by law or court rules or developed in court practice (tradition or custom convention)?

Comment: *If applicable, please provide the citation to the exact article/paragraph of the rule and an English translation.*

In the German legal order, the structure of a domestic civil judgment is set out in § 313 ZPO.[71]

§ 313 ZPO – Form und Inhalt des Urteils	**§ 313 ZPO – Form and content of the judgment**
(1) Das Urteil enthält:	(1) The judgment shall set out:
1. die Bezeichnung der Parteien, ihrer gesetzlichen Vertreter und der Prozessbevoll-mächtigten;	1. The designation of the parties, their legal representatives, and the attorneys of record;
2. die Bezeichnung des Gerichts und die Namen der Richter, die bei der Entschei-dung mitgewirkt haben;	2. The designation of the court and the names of the judges contributing to the decision;
3. den Tag, an dem die mündliche Verhandlung geschlossen worden ist;	3. The date on which the court proceedings were declared terminated;
4. die Urteilsformel;	4. The operative provisions of a judgment;
5. den Tatbestand;	5. The merits of the case;
6. die Entscheidungsgründe.	6. The reasons on which a ruling is based.
(2) Im Tatbestand sollen die erhobenen Ansprüche und die dazu vorgebrachten Angriffs- und Verteidigungsmittel unter Hervorhebung der gestellten Anträge nur ihrem	(2) The section addressing the facts and the merits of the case is to summarise, in brief and based on the essential content, the claims asserted and the means of challenge or de-

[69] R. Greger, in Zöller, supra n. 68, § 232 ZPO margin n. 5.
[70] Saenger, in Saenger (ed.), supra n. 67, § 313 ZPO margin n. 35.
[71] See text to n. 2.1 supra.

wesentlichen Inhalt nach knapp dargestellt werden. Wegender Einzelheiten des Sach- und Streitstandes soll auf Schriftsätze, Protokolle und andere Unterlagen verwiesen werden.

fence brought before the court, highlighting the petitions filed. The details of the circumstances and facts as well as the status of the dispute thus far are to be included by reference being made to the written pleadings, the records of the hearings, and other documents.

(3) Die Entscheidungsgründe enthalten eine kurze Zusammenfassung der Erwägungen, auf denen die Entscheidung in tatsächlicher und rechtlicher Hinsicht beruht.

(3) The reasoning for the judgment shall contain a brief summary of the considerations of the facts and circumstances of the case and the legal aspects on which the decision is based.

2.3 How standardised (regarding form and structure) do you consider judgments from your Member State to be (e.g. inadequately; adequately; standardised, although exceptions can be found)?

Comment: *If the law regulates this issue, then it is expected that judgments are standardised. However, if certain courts tend to disregard standards or if standards are too loosely defined, then please elaborate. If your Member State has multilevel governance structures (e.g. federalisation; autonomous regions) please elaborate if the different governance structures also apply different standards.*

Since the German Code of Civil procedure regulates this issue explicitly, the form and structure of judgments is standardised in Germany. Courts do not tend to disregard these standards. This is in particular due to the fact that a judgment serves as the basis for enforcement and the enforcement organs also use this standardised structure.[72] Therefore, in order to avoid difficulties within the enforcement procedures, the courts do not deviate from the standardised structure.[73]

The courts are sometimes inconsistent merely regarding one point within the heading: some judgments include the subject matter of the dispute after the first part of the '*Rubrum*', whereas others leave it out as this can be deduced from the merits of the case and the reasoning.[74] An example would be to include: '*due to wage claim*'.

[72] See text to n. 1.1 supra.
[73] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 4.
[74] Musielak, in Musielak and Voit (eds.), supra n. 37, § 313 ZPO margin n. 3.

2.4 How are the different elements of the Judgment separated from one another (e.g. headline, outline point etc.)?

The different elements of the judgment are separated through headlines and paragraphs.[75] Also the use of tenses differentiates the various parts from each other. In the left side corner, one can find the designation of the court and the file number. The title is placed in the middle. The '*Rubrum*' follows with the headline on the left side and the introduction: '*In dem Rechtsstreit*', in English: '*In the dispute*'. The position of the parties is stated under the personal information in parenthesis and indented to the right. Thereafter, the operative part is highlighted from the other parts by being indented. The points made within the operative part must be numbered in roman or arabic numbers. The facts of the case follow with this headline on the left side. The present tense and the imperfect are used for the indisputable part of the facts, whereas indirect speech is used to describe the views of the claimant. The current claims are then stated in the present tense and also indented.[76] The same applies for the views of the defendant. The application-related history of the dispute is described in the perfect tense. This is followed by the reasoning, which is introduced with the headline on the left side. The reasoning is written in the judgment diction.

Paragraphs are used to separate thought processes within the parts. The use of margin numbers is usual compared to the non-usual use of bullet points.

[75] See the model judgment of a court of first instance that has been provided by the authors, supra n. 24.
[76] Saenger, in Saenger (ed.), supra n. 67, § 313 ZPO margin n. 19.

2.5 If courts, other than courts of first instance, may issue enforceable judgments, how does the structure of such judgments differ from judgments issued by the courts of first instance?

Comment: *The question comes into play especially in cases where, after recourse, appellate and other courts may modify first instance judgments or decide on the claim independently. In addition to general observations, please focus on the operating part, e.g. does it make reference to first instance judgements, how does it uphold or dismiss those judgements?*

The structure of the appellate judgment, in German '*Berufungsurteil*', is mostly the same as the structure of judgments issued by the courts of first instance. Additionally, § 540 ZPO has to be taken into account. This section contains the following modifications to the structure of judgments:

§ 540 ZPO – Content of the appelate judgment

(1) Instead of the facts of the case and the reasons on which the ruling is based, the appellate judgment shall set out:

1. A reference to the findings of fact as made in the ruling being contested, depicting any changes or amendments,
2. A brief summary of the reasons for the modification, repeal or confirmation of the decision contested.

(2) …

§ 540 ZPO aims to relieve the appellate courts in drafting the judgments. It does so by firstly limiting the content of the appellate judgment to changes and amendments concerning the facts of the case.[77] Therefore, the appellate courts can refer to the judgments rendered by the courts of first instance with regards to the facts of the case and, if found, depict any changes or amendments.[78] Secondly, also concerning the reasoning the appellate courts may refer to the first instance judgment, and include only a brief summary of the reasons for the decision taken by itself into the appellate judgment. One cannot see a lack of reasoning pursuant to § 547 No. 6 ZPO in this reference.[79] Thereby, the appellate courts uphold some parts of the judgments of the courts of first instances, whereas they dismiss other parts by including the

[77] W. Ball, in Musielak and Voit (eds.), supra n. 37, § 540 ZPO, margin n. 1.
[78] Ball, in Musielak and Voit (eds.), supra n. 37, § 540 ZPO margin n. 3.
[79] Ball, in Musielak and Voit (eds.), supra n. 37, § 540 ZPO margin n. 7.

changes or amendments as well as a short summary of the reasons that led to the modification, or, if there are no changes or amendments, to the confirmation of the first instance judgment considered.

2.6 How does the assertion of a counterclaim affect the structure of the Judgment?

Comment: *In addition, explain when a counterclaim can be entertained in the same proceedings and be decided in a single Judgment (if possible).*

In order to answer the question, § 322 II ZPO is of utmost importance. § 322 II ZPO reads as follows in German:

§ 322 ZPO – Materielle Rechtskraft	**§ 322 ZPO – Legal validity of the judgment in substance**
(1) …	(1) …
(2) Hat der Beklagte die Aufrechnung einer Gegenforderung geltend gemacht, so ist die Entscheidung, dass die Gegenforderung nicht besteht, bis zur Höhe des Betrages, für den die Aufrechnung geltend gemacht worden ist, der Rechtskraft fähig.	(2) Should the defendant have asserted the set-off of a counterclaim, the decision as to the counterclaim not existing shall be able to attain legal validity up to the amount for which the set-off has been asserted.

The idea behind this regulation is, that in principle, preliminary questions and objections of the defendant do not acquire res judicata. § 322 II ZPO constitutes an exemption to this.[80] The reason for this is that otherwise the defendant could introduce the claim for set-off in a second proceeding and would, thus, be unjustifiably privileged. If he were to be sentenced despite the set-off, he could – provided that the judgment would not have res judicata in this respect – assert in the second proceeding that this claim still existed. This would enable him to assert his claim for set-off twice before the court and would put him in a privileged position compared with a (alleged) claimant (holder of claims/ '*Forderungsinhaber*') who actively enforces his claim twice without any objective reason. This is opposed by § 322 II ZPO.[81]

Therefore, the assertion of a counterclaim affects the structure of the judgment to the extent that the set-off is only reflected in the tenor of the judgment. The set-off and the decision on

[80] See text to n. 5.1.4.1 infra and n. 5.5.2.2 infra.
[81] P. Gurber, in Vorwerk and Wolf (eds.), supra n. 19, § 322 ZPO margin n. 62.

the set-off do not have to be precisely stated in the tenor, as the res judicata effect must result from the reasoning.[82]

2.7 Does the Judgment include a specification of the time-period within which the obligation in the operative part is to be (voluntarily) fulfilled by the defendant? Conversely, does the judgment contain a specification of the time-period within which the judgment is not to be enforced? Does the judgment contain a specification of the time-period after which the judgment is no longer enforceable?

Comment (2.7): *If applicable, please also explain what happens if the court does not include the above time period(s). If applicable, how would the court, acting as a court of the Member State addressed, deal with a situation where a judgment is no longer enforceable after the limitation period for enforcement has expired, and this time period was not specified by the court in the Member State of origin, either because there is no obligation for the court to specify the period or because the court unintentionally omitted the specification.?*

The judgment can include a specification of the time-period within which the obligation in the operative part is to be fulfilled by the defendant. According to § 255 I ZPO, the claimant can demand that the court determines a deadline for fulfilling the obligation to which the defendant is ordered in the judgment. The period of time can be expressed by the claimant or can be left to the courts' discretion.[83] The time-period starts with the res judicata of the judgment.

According to § 717 I ZPO, the earliest end of the provisional enforceability of the original judgment is the date of promulgation of the reversing or modifying judgment, or the service in cases of a decision without an oral hearing. The judgment creditor is then obliged to pay damage, if the provisionally enforceable judgment is modified according to § 717 II ZPO.

[82] P. Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 195.
[83] Greger, in Zöller, supra n. 68, § 255 ZPO margin n. 4.

2.8 What personal information must be specified in the Judgment for the purposes of identifying the Parties to the dispute?

Comment: *For example, in Slovenia, the Judgment will list the Parties' name and surname, residence and Unique Personal Identification Number (so-called "EMŠO"). This number is provided to each citizen of Slovenia and is also a feature in other countries of the former Yugoslavia. The information is stated in the Introduction to the judgment and is usually not repeated in other parts of the judgment.*

In Germany, the heading element of the judgment ('*Rubrum*') lists the personal information of the parties, their legal representatives and attorneys of record as accurately as possible. The names and surnames of the parties and valid postal addresses are inevitable. The positions either as claimant or as defendant have to be added.[84] Has one of the parties died after the action was filed, its heirs have to be indicated in the judgment.[85] Is the party '*Partei kraft Amtes*', meaning party by virtue of its office, then the judgment has to state the parties' function next to their name. Examples are the insolvency administrator and the executor of wills, who become party to the dispute.[86] Is the party not a natural person but a legal entity, the judgment has to indicate the name of the company etc. and the names of its legal representative and attorneys of record in accordance with § 313 I No. 1 ZPO. Also legal representatives are to be designated as accurately as possible, since service is to be made on the legal representative, cf. § 170 I ZPO. The attorneys of record, whether one or more, are all also to be designated as specifically as possible. The designation of the parties and their legal representatives has probative force for the enforcement.[87] The information is usually not repeated in other parts of the judgment. The parties are referred to as claimant or accordingly defendant.

[84] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 4.
[85] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 4.
[86] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 4.
[87] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 4.

2.9 How do courts indicate the amount in dispute?

Comment: *Please elaborate how this amount is specified (if this information is specified), especially in cases where amendments to claims occur during proceedings.*

The amount in dispute has multiple meanings. In Germany, we distinguish between three types of amounts in dispute: first, the amount in dispute which is in particular relevant for the determination of the substantive jurisdiction of the court according to § 23 No. 1 GVG and § 71 (1) GVG ('*Zuständigkeitsstreitwert*'), second, the court and attorney fees ('*Gebührenstreitwert*') and third, the appeal amount in dispute ('*Rechtsmittelstreitwert*').[88] Calculation of the amount in dispute is based on the subject matter of the dispute. The subject matter of the dispute is specified in the statement of claim.[89]

Regulations concerning the '*Zuständigkeitsstreitwert*' can be found in § 2 – § 9 ZPO. The relevant provisions regarding court fees are found primarily in § 39 et seq GKG. Only if the GKG is silent on a special provision, § 3 – § 9 ZPO become applicable according to § 48 I sentence 1 GKG. The calculation of attorney fees is regulated in the RVG, especially § 23 I sentence 1 RVG, though it can be subject to an arrangement between the attorney and the party. According to the wording of the law, the appeal amount in dispute is understood to be the amount of the subject of the appeal, cf. § 511 II No. 1 ZPO (for the second instance appeal, in German '*Berufung*') and § 567 II ZPO (for the appeals for costs, in German '*Kostenbeschwerde*'). The amount has to be reached for the admissibility of the appeal. Also in this respect § 2 – 9 ZPO are applicable, cf. § 2 ZPO.

The courts indicate the amount in dispute at their sole discretion, § 2 ZPO and § 3 ZPO. The indication is made in Euro as long as no foreign currency is owed.[90] The amount in dispute is usually specified in the reasoning of a judgment, or in a separate order.[91] By being specified within the reasoning of a judgment, the indication of the amount in dispute can only challenged together with the judgment.[92] The '*Gebührenstreitwert*' is usually specified in a separate order, cf. § 63 GKG and § 32 I RVG.

[88] U. Becker, in M. Anders and B. Gehle (eds.), Baumbach/Lauterbach/Hartmann/Anders/Gehle Zivilprozessordnung (C. H. Beck 2020), Introduction § 3 ZPO margin n. 1 et seq..
[89] P. Gottwald, in L. Rosenberg et al., Zivilprozessrecht (C. H. Beck 2018), § 32 ZPO margin n. 28.
[90] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 8.
[91] Grunsky and Jacoby, supra n. 25, p. 60.
[92] Gottwald, in Rosenberg et al., supra n. 89, § 32 ZPO margin n. 27.

The point in time at which the action is brought is decisive for the determination of the amount according to § 4 ZPO. Where the matter has been appealed, it is the point in time at which the appeal has been filed. If several claims are asserted in one action (joinder of claims), these claims are added together pursuant to § 5 ZPO. Rising or falling of the amount in dispute of the unaltered subject matter of the dispute ('*Streitgegenstand*') during the proceedings is irrelevant.[93]

Amendments to an action are regulated in § 263 ZPO and § 264 ZPO. An amendment of an action is the amendment of the subject matter of the dispute as set out in the application.[94] The claim may be amended if the defendant has agreed to it or if the court believes such a modification to be expedient, § 263 ZPO. As to the '*Zuständigkeitsstreitwert*', the amounts are not added but rather determined separately for the time before and after the amendment of the action.[95] Furthermore, one has to differentiate between amendments that reduce and amendments that increase the amount in dispute. In cases of the extension of an action, the amount in dispute increases. From this point in time on, the new amount in dispute applies. The fees are calculated once according to the highest value.[96] The amendment to the claim regularly entails cost problems if it reduces the amount in dispute. For example, if the claimant reduces its claim which was originally filed for 3.000 € to 1.500 € with the agreement of the defendant, costs might have already occurred out of the higher amount in dispute. A decision on these costs is then to be made like in § 269 III ZPO (abandonment of action) at the expense of the claimant, or in accordance with § 91a ZPO.[97]

2.10 How do courts indicate the underlying legal relationship (legal assessment of the dispute), if this circumstance bears further relevance, e.g. in enforcement proceedings.

The courts indicate the underlying legal relationship in the operative part of the judgment, the so-called '*Tenor*', which is the decisive part for subsequent enforcement proceedings. All relevant information has to be included in this part. It is first, the decision on the substance of the case including the interest rates, second, the decision on the costs, and third, the decision

[93] Gottwald, in Rosenberg et al., supra n. 89, § 32 ZPO margin n. 30.
[94] E. Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 263 ZPO, margin n. 7.
[95] K. Herget, in Zöller, supra n. 68, § 3 ZPO margin n. 16.104.
[96] Herget, in Zöller, supra n. 68, § 3 ZPO margin n. 16.105.
[97] H. Roth, in R. Bork and H. Roth (eds.), Stein/Jonas Kommentar zur Zivilprozessordnung, Issue 3 (Mohr Siebeck 2016), § 263 ZPO, margin n. 34.

on the (if applicable: provisional) enforceability.[98] Further details regarding the legal relationship are found in the reasoning part, where the court tells the grounds on which it decided to come to the conclusion of the tenor.

2.11 Comment: *Take for example § 850f of the German ZPO, where enforcement is sought against earned income (wage) of the debtor. The law imposes limitations to the scope of the attachable part of the income. However, these limitations may be disregarded to an extent, if enforcement is pursued for a claim arising from an intentionally committed tort. The execution court must therefore be able to identify the legal relationship (intentional tort). Similar examples might include the indication of maintenance or annuity by way of damages.* Can the Claimant seek interim declaratory relief and what effects (if any) are attributed to the decision on this claim? How is the decision specified in the Judgment?

The execution court cannot examine the legal relationship on its own, but is bound by the determination of the trial court regarding this matter. Thus, the requirement for § 850f II ZPO, the intentional tort, must be specified in the enforcement title, the judgment. It is sufficient if statements hereto can be found in the reasoning.[99] Yet, § 850f II ZPO also applies if the operative part of the judgment did not state that the payment order is based on intentionally committed tort. It is sufficient if the execution court can interpret the judgment, in particular its reasoning, in that sense.[100] However, the execution court may not take evidence pursuant to § 355 et seq. ZPO. Thereby, there must also be no risk of changing the judgment in its substance. If an interpretation is not possible, the claimant can and has to seek a declaratory action according to § 256 I ZPO at the trial court against the judgment debtor that the original judgment is based on an intentionally committed tort ('*titelergänzende Feststellungsklage*').[101] Due to different subject matters of dispute, the res judicata of the previously is-

[98] See text to n. 2.1 supra.
[99] C. Meller-Hannich, in J. Kindl et al., supra n. 48, § 850f ZPO margin n. 15.
[100] W. Lüke, in B. Wieczorek and R. A. Schütze, Zivilprozessordnung und Nebengesetze Issue 10/1 (De Gruyter 2015), § 850f ZPO margin n. 31a.
[101] BGH, 05.04.2005, VII ZB 17/05, NJW 2005, p. 1663; R. Nober, in Anders and Gehle (eds.), supra n. 88, § 850f ZPO margin n. 11.

sued performance judgment does not prevent the declaratory action.[102] The claimant can, however, also file an interim declaratory relief already within the proceedings regarding performance in addition to the application for performance.[103]

2.12 What kinds of decisions can a court issue in regular litigation proceedings?

Comment: *For example, in certain Member States, the court may decide on procedural issues (e.g. admission of evidence; modification of claim) with a "decree" and a "Judgment" on the merits of the case. Provisional and protective measures may or may not be tied to the proceedings.*

In regular litigation proceedings, a court may decide in form of a judgment, an order and a ruling as already addressed in Part 1 of the questionnaire.[104] Is the action admissible, the court decides on the merits of the case by judgment or by order. Courts may decide by means of rulings ('*Verfügungen*') on internal procedural and organisational issues regarding the proceeding itself.[105] In the event the court does not have jurisdiction, it has to declare, at request of the claimant, that it has no jurisdiction by means of an order and refer the case back to the competent court in accordance with § 281 I ZPO.

According to § 355 I sentence 1 ZPO, the taking of evidence shall in principle take place before the court hears the case. The court order instructing one or the other manner of taking evidence is not contestable according to § 355 II ZPO. Furthermore, '*should an impediment prevent evidence from being taken, and should it not be certain for how long this situation will continue, the court is to set a period by court order*' according to § 356 ZPO. § 358 and the following of the ZPO contain further regulations regarding evidence. § 358 ZPO reads: '*Should the taking of evidence require separate proceedings ['besonderes Verfahren'], the court shall issue the corresponding instructions in an order for evidence to be taken*'. The content of such order is regulated in § 359 ZPO. Moreover, according to § 144 I sentence 1

[102] Lüke, in Wieczorek and Schütze, supra n. 100, § 850f ZPO margin n. 31b; see text to n. 5.1.4.2 infra.
[103] Meller-Hannich, in Kindl et al., supra n. 48, § 850f ZPO margin n. 15.
[104] See text to n. 1.4 supra.
[105] See text to n. 1.4 supra.

ZPO the court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report by order.[106]

The admissibility of a modification of a claim (objective modification) pursuant to § 263 ZPO may be decided in form of an interim judgment, but is usually subject to the final judgment.[107] A modification of the parties to the dispute (subjective modification) is a subjective modification in accordance with § 263 ZPO. It can be subject to an interim judgment in case one of the parties objects to the admissibility of a party modification.[108] Furthermore, the court decides in a separate order the amount in dispute according to § 63 II sentence 1 GKG ('*Streitwertfestsetzung*').

2.13 How are Judgments drafted when (if) they contain a "decision" on issues other than the merits of the case?

Comment: *Such decisions can, for example, pertain to the modification of a claim, withdrawal of a claim, joinder of parties, joinder of proceedings etc.*

A joinder of parties ('*Streitgenossenschaft*'), § 59 et seq. ZPO, is specified in the header of the judgment along with the original parties to the dispute. Joinders are numbered consecutively. If there are several claimants who present their case in a uniform manner, there are no further characteristics to the judgment. In the case of different presentations however, first, the entire presentation of the claimant is to be drafted within the facts part of the judgment. Only thereafter the presentations of the other claimants follow. Where there are similarities and differences in the presentations, first, the similarities of the presentations are drafted together and the differences are drafted in a distinguished manner thereafter.[109]

The joinder of claims, or the so-called objective accumulation of actions, according to § 260 ZPO is relevant in the facts part of the judgment, as well as the operative part and the reasoning. The provision regulates the so-called objective accumulation of actions. According to it, the claimant can combine several claims against the same defendant in one action, and is,

[106] K. Bünningmann, in Anders and Gehle (eds.), supra n. 88, § 144 ZPO margin n. 18 et seq.
[107] K. Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 263 ZPO margin n. 14.
[108] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 263 ZPO margin n. 29.
[109] See text to n. 7.1 infra.

therefore, not forced to assert several claims with several actions.[110] One form is the cumulative joinder of claims ('*kumulative Klagenhäufung*'). Usually, the claimant petitions a main and an alternative claim ('*Haupt- und Hilfsantrag*'), which takes form of an '*eventuelle Klagenhäufung*' ('*eventual joinder of claims*'). The court can only decide upon the alternative claim if the main claim is dismissed.[111] Otherwise, the alternative claim is disregarded.[112] On the contrary, an alternative joinder of claims ('*alternative Klagenhäufung*') '*conviction to […] or […]*' is inadmissible due to the lack of certainty, § 253 II No. 2 ZPO.

The withdrawal of a claim is regulated in § 269 ZPO. It is possible to withdraw an action without the consent of the defendant only until the time at which the defendant is to be first heard on the merits of the case, § 269 I ZPO. After this point in time, the action is brought to decision. With regards to the withdrawal of a claim, one has to differentiate: the withdrawal in full by the claimant and the withdrawal in part by the claimant. If a claim is withdrawn partially, the history of this is to be included into the procedural history of the facts part of the judgment. Is the claim withdrawn entirely, the court issues an order according to § 269 IV ZPO, which states that the claimant has withdrawn its claim.[113] If not already done, the amount in dispute shall be determined pursuant to § 63 II GKG by order.[114]

The action waiver is regulated in § 306 ZPO. If the claimant waives its action, the court renders a waiver judgment. Pursuant to § 313b I sentence 2 ZPO the judgment is to be describes as a waiver. The admissibility requirements must be given as the waiver judgment constitutes an action dismissing judgment on the merits.[115] Thus, filing a new action on the same subject matter is not possible due to the res judicata the waiver judgment unfolds. The names of the judges do not have to be set out in the judgment according to § 313b II sentence 2 ZPO. The judgment has to include the designation of the parties, their legal representatives, and their attorneys of record only to the extent that this information deviates from the information provided in the statement of claim according to § 313b II sentence 3 ZPO.

[110] Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 260 ZPO margin n. 1.
[111] Greger, in Zöller, supra n. 68, § 260 ZPO margin n. 6a.
[112] Greger, in Zöller, supra n. 68, § 260 ZPO margin n. 4a.
[113] S. Weber, in Anders and Gehle (eds.), supra n. 88, § 269 ZPO margin n. 30.
[114] Greger, in Zöller, supra n. 68, § 269 ZPO margin n. 17.
[115] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 306 ZPO margin n. 22.

2.13.1 How does this effect the operative part and/or the reasoning?

Some decisions on issues other than the merits of the case may affect in particular the reasoning. The examination whether the action is still pending or has been closed by court settlement is a preliminary question of the reasoning. Furthermore, cases of modification of a claim (cf. § 263 ZPO), withdrawal of a claim in whole or in part (cf. § 269 ZPO), or joinder of parties are preliminary questions of the reasoning.[116] These affect the admissibility requirements and what the substantive legal situation is.[117] Is the withdrawal of the claim inadmissible, the reasons of its inadmissibility shall be presented within the reasoning.

The withdrawal of a claim is also relevant for the operative part of the judgment, especially the decision on the costs which is issued pursuant to § 269 III ZPO. In cases of withdrawals of a claim in part the court has to justify the decision on costs within the operative part. The joinder of parties also affects the decision on costs of the operative part.

In cases of a joinder of claims, the reasoning is guided by the substantive claims made by the claimant, which must be mentioned one after the other when drafting the judgment, regardless of whether they have been announced in one or more pleadings.[118] With regards to an '*Eventualklagenhäufung*', the main claim has a procedural priority. The judgment can only relate to the alternative claim in the reasoning if the main claim is dismissed. Is the main claim justified, then the judgment can only refer short to the alternative claim that under these requirements the alternative claim is not to be further examined. The same applies for the reasoning, which can state, for example: '*The action is justified only according to the alternative claim. The main claim remains unsuccessful*' or '*The main claim is unfounded, whereas the claimant is successful with the alternative claim.*' The operative part has to include the statement '*The action is dismissed with regards to the remainder*'.

Especially the reasoning part is affected by a waiver judgment. The content of the waiver judgment is regulated in § 313b ZPO. There is no need to include the facts and the merits of

[116] See text to n. 7.1 infra.
[117] Cf. Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 123.
[118] Greger, in Zöller, supra n. 68, § 260 ZPO margin n. 4b.

the case as well as the reasoning. In cases of a partial waiver judgment, the facts and merits of the case and the reasoning have to be included.[119] The operative part of the judgment is as follows: '*the claimant is dismissed on the ground that his claim has been waived*' ('*Der Kläger wird auf Grund des Verzichts mit dem Anspruch abgewiesen*'). It may include the exact specification of the claim, which is important in particular considering the unfolding of the res judicata. In case of a partly waiver, it must be indicated which part of the claim is waived.[120]

2.13.2 Which decisions (2.12) can be incorporated into the judgment?

The admissibility of a modification of a claim and the modification of the parties can be incorporated into the final judgment.[121] The decision regarding fixing the costs ('*Kostenfestsetzungsbeschluss*') can be incorporated into the judgment in accordance with § 105 ZPO.[122] The decision regarding the amount in dispute, which is made by means of a separate order according to § 63 II sentence 1 GKG ('*Streitwertfestsetzung*'), can also be incorporated into the judgment.

2.13.3 Can provisional and protective measures form part of a Judgment or can they only be issued separately?

Usually, provisional measures ('*einstweilige Maßnahmen*') are issued as a separate judgment or as an order if no oral hearing was held.[123] In Germany we have two forms of protective measures ('*Sicherungsmaßnahmen*') in the civil process, namely seizure ('Arrest') according to § 916 ZPO which takes place for the purpose of securing enforcement for a monetary claim or a claim which may become a monetary claim, and an injunction ('*einstweilige Verfügung*') according to § 935 et seq. ZPO which can be ordered to secure all other claims. The seizure is issued in a separate judgment or order according to § 922 I ZPO. In urgent cases and if the petition for an injunction is to be dismissed, the decision on the injunction may be issued without a hearing for oral argument, thus, by means of an order, in accordance with § 937 II

[119] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 306 ZPO margin n. 30.
[120] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 306 ZPO margin n. 24.
[121] See text to n. 2.12 supra.
[122] J. Flockenhaus, in Musielak and Voit (eds.), supra n. 37, § 105 ZPO margin n. 4.
[123] Becker, in Anders and Gehle (eds.), supra n. 88, § 935 ZPO margin n. 18.

ZPO. Otherwise, the decision on the injunction is issued in form of a judgment according to § 936 ZPO and § 922 I sentence 1 ZPO.

Part 3: Special aspects regarding the operative part

3.1 What does the operative part communicate?

The operative part is the heart of the judgment. It communicates three decisions of the court: first, the decision on the substance of the case, second, the decision on the costs, and, third, the decision on the (if applicable: provisional) enforceability.[124] The decision on the enforceability is a procedural decision. The operative part forms the basis for res judicata and, thereby, the finality of the judgment.[125] This creates the decisive prerequisite for enforcement. Therefore, the operative part of the judgment must be formulated in such way that the parties and the organs of enforcement can clearly recognize what they have to do or refrain from doing and what legal effects result from the operative part.[126]

3.1.1 Must the operative part contain a threat of enforcement?

Comment: *A threat of enforcement is to be understood as a legal instruction referring to the possibility of enforcement proceedings if the debtor does not voluntarily perform the obligations imposed by the judgment.*

Yes, in Germany, the operative part comprises three points as already mentioned.[127] One of these points is the decision on the (if applicable: provisional) enforceability.[128] § 709 sentence 1 ZPO states that judgments other than the ones mentioned in § 708 ZPO are to be declared provisionally enforceable against provision of security. Judgments mentioned in § 708 ZPO are to be declared provisionally enforceable without any provision of security. Typically, it is enough for the court to state: '*Das Urteil ist vorläufig vollstreckbar*'. In English: '*The judg-*

[124] See text to n. 2.1 supra.
[125] See text to n. 4.3.1 infra.
[126] H.-J. Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 10.
[127] See text to n. 2.1 supra and n. 3.1 supra.
[128] See text to n. 3.1 supra and n. 6.1 infra.

ment is provisionally enforceable.' However, the previously mentioned provision of security needs to be included if applicable.[129]

3.1.2 Must the operative part include declaratory relief if the Claimant sought payment (e.g. if the debtor's obligation to perform is found to be due and the Claimant requested performance)?

The operative part must not include declaratory relief if claimant sought payment. In Germany, the operative part is adjusted to the action sought and, thereby, answers the statement of claim. The court is bound by the parties' petitions according to § 308 I ZPO. In the questioned scenario, the finding that the debtor's obligation to perform is due is stated in the reasoning of the judgment. Has the claimant requested declaratory relief, then it is encompassed by the operative part.[130]

3.1.3 Is the specification of the debtor's obligation finalized by the court or is it left to later procedures/authorities?

The court finalizes the specification of the debtor's obligation, which is part of the operative part of the judgment that is written by the judges deciding on the issue.

3.1.4 How is the operative part drafted in a the case of a prohibitory injunction (German: "Unterlassungsklage")?

The operative part has to clearly identify the object of the prohibition.[131] This shall enable the defendant to prepare its future behaviour accordingly.[132] In the event of difficulties in describing the cause of the disruption, facilitations are permitted.[133] If the object to which the prohibitory injunction relates cannot be described in words, an illustration may be included into

[129] See text to n. 6.1 et seq. infra in detail; M. Hunke, in Anders and Gehle (eds.), supra n. 88, § 313 ZPO margin n. 12.
[130] See text to n. 5.1.4 infra for the scope of the operative part.
[131] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 8a.
[132] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 10.
[133] Cf. BGH, Urteil v 14 October 1999 – I ZR 117/97, NJW 2000, p. 2207.

the operative part; if even this is not possible (e.g. cinema and television recordings, theatrical performances, software), then it is possible to refer to attachments, particularly to data carriers.[134] As a rule, the reproduction of the statutory prohibition does not satisfy the requirement of certainty.[135] As an exception, however, this is sufficient if a concretisation is not possible, for example, because of missing limit and guideline values.[136]

3.1.5 If applicable, how is the operative part drafted in an interim judgment?

Comment: *Should a claim be in dispute both on its merits and as regards its amount, the court may take a (preliminary) decision on the merits. An interim judgement in the context of the above question should therefore be understood as a judgement on the merits (basis, grounds, liability) of the claim (e.g. a court issues a judgement regarding the liability of a defendant for tort, but leaves the amount of the damages to be decided later in a "final" judgement).*

This situation is encompassed by § 304 ZPO. The operative part can, for example, be formulated as follows: '*Der Klageantrag ist dem Grunde nach gerechtfertigt.*'[137] In English: '*The statement of claim is justified on the merits of the case.*' If necessary, the court imposes restrictions, for example, performance only from a certain date on: '*Die Klage ist dem Grunde nach gerechtfertigt für Schäden, die [es folgt der Zeitpunkt] entstanden sind, im Übrigen nur im Rahmen des § 830 Abs. 1 S. 2 BGB.*'[138] In English: '*The action is justified on the merits of the case for damages, which as occurred [the point in time follows], otherwise only within the framework of § 830 I sentence 2 BGB.*' Another restriction is if the claimant has only claimed a half: '*Der Klageantrag ist dem Grunde nach – zur Hälfte – gerechtfertigt.*' In English: '*The statement of claim is – to a half – justified on the merits of the case.*' Apart from that the action has to be dismissed.[139] The reservation of individual elements must be made explicitly,

[134] BGH, Urteil v 14 October 1999 – I ZR 117/97, NJW 2000, p. 2207.
[135] BGH, Urteil v 2 April 1992 – I ZR 131/90, NJW 1992, p. 1691 at p. 1692.
[136] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 8a.
[137] BGH, Urteil v 3 November 1978 – IV ZR 61/77, VersR 1979, p. 25.
[138] OLG Celle, Urteil v 16 December 1981 – 9 U 185/80, VersR 1982, p. 598.
[139] Hunke, in Anders and Gehle (eds.), supra. n. 88, § 304 ZPO margin n. 23.

preferably in the operative part, but at least in the reasoning of the judgment, though it can be also subject to interpretation.[140]

A decision on the costs is not required, as the amount of the winning and losing is not yet determined. Similarly, the operative part lacks a decision on the (if applicable: provisional) enforceability.[141]

3.1.6 If applicable, how is the operative part drafted in an interlocutory judgment?

Comment: *Within the context of the question, an interlocutory judgement refers to a temporary decision regulating the matter of the dispute. Take for example the French "Ordonnance de référé«, which is a provisional decision made on the application of one party, the other one being there or having been called, in cases where the power to order immediately the necessary measures is vested to a judge who is not called to decide the whole case.*

The operative part of an interlocutory judgment on the **seizure** according to § 916 ZPO can be formulated as follows in the event it is dismissed: '*Der Arrestantrag wird zurückgewiesen.*' or '*Die Arrestklage wird abgewiesen.*' In English: '*The request for seizure is denied*' or '*The action for seizure is dismissed.*' It is not necessary to include the addition '*as inadmissible*' ('*als unzulässig*') or '*as unfounded*' ('*als unbegründet*'), since the decision needs no justification in reasons.[142] The decision on costs is taken pursuant to § 91 ZPO. The provisional enforceability encompasses only the decision on costs; it depends whether the decision was rendered in a judgment or by order. In the first case, § 708 No. 6 ZPO, § 711 ZPO and § 713 ZPO are applicable. In the second case, § 794 I No. 3 ZPO is applicable for enforcement as orders are not declared provisionally enforceable.[143]

If the application for seizure is successful, the following rules apply to the drafting of the operative part of the interlocutory judgment pursuant to § 922 ZPO: the main sentence begins with the introductory formula '*To secure enforcement because of […]*', which emphasises the

[140] Feskorn, in Zöller, supra n. 68, § 304 ZPO margin n. 29.
[141] Hunke, in Anders and Gehle (eds.), supra n. 88, § 304 ZPO margin n. 23.
[142] M. Huber, in Musielak and Voit (eds.), supra n. 37, § 922 ZPO margin n. 5.
[143] Huber, in Musielak and Voit (eds.), supra n. 37, § 922 ZPO margin n. 5.

protective function of the seizure.[144] Subsequently, a precise description of the seizure claim including ancillary claims, and the type of the seizure (in rem or personal) has to be included[145]: '*Wegen einer Kaufpreisforderung des Gläubigers gegen den Schuldner aus dem Kaufvertrag vom […] in Höhe von […] EUR nebst […] % Zinsen seit dem […] und wegen veranschlagter Kosten in Höhe von […] EUR wird in das bewegliche und das unbewegliche Vermögen des Schuldners der dingliche Arrest angeordnet.*' In English: '*For the purchase price claim of the creditor against the debtor under the purchase agreement of […] amounting to […] EUR plus […] % interest since […] and for estimated costs of […] EUR, the debtor's movable and immovable property shall be subject to a seizure order in rem.*' Additionally, the court has to express ex officio an authorisation to avert enforcement of the seizure in favour of the debtor pursuant to § 923 ZPO: '*Gegen Hinterlegung von […] EUR wird die Vollziehung des Arrests gehemmt und der Schuldner kann die Aufhebung des vollzogenen Arrests beantragen.*' In English: '*Against the deposit of […] EUR, the execution of the seizure is suspended and the debtor can apply for the lifting of the executed seizure.*' Furthermore, the decision on costs has to be included, which follows the general rules of § 91 ZPO and the subsequent.[146]

The operative part of an interlocutory judgment on the **injunction** according to § 935 ZPO is formulated in the same way as the judgment on the seizure if it is dismissed.[147] If the application is justified, the following applies: due to the different types of injunctions ('*Sicherungsverfügung*', § 935 ZPO; '*Regelungsverfügung*', § 940 ZPO; '*Leistungs-[Befriedigungs-]verfügung*') and the multitude of legal protection objectives, the main claim cannot, as in the case of the seizure, be drafted in accordance with a uniform basic model. Rather, it depends on the particularities of the individual case.[148] The court determines which orders are necessary to achieve the purpose pursuant to § 938 ZPO that governs the content of the injunction.

The protective order ('*Sicherungsverfügung*') begins with the introductory formula; then the claim is mentioned together with the measure taken to avert the danger. It states, for example, '*Zur Sicherung des Anspruchs auf Übergabe und Übereignung des Bildes […] wird die Her-*

[144] Huber, in Musielak and Voit (eds.), supra n. 37, § 922 ZPO margin n. 5.
[145] G. Vollkommer, in Zöller, supra n. 68, § 922 ZPO margin n. 9.
[146] Vollkommer, in Zöller, supra n. 68, § 922 ZPO margin n. 10.
[147] Huber, in Musielak and Voit (eds.), supra n. 37, § 935 ZPO margin n. 7.
[148] Huber, in Musielak and Voit (eds.), supra n. 37, § 935 ZPO margin n. 8.

ausgabe der Sache durch den Antragsgegner an einen vom Antragsteller beauftragten Gerichtsvollzieher zur Verwahrung angeordnet.'[149] In English: '*In order to secure the claim for transfer and transfer of ownership of the picture […], the defendant is ordered to hand over the item to a bailiff appointed by the claimant for safekeeping.*'

In the case of a regulation order ('*Regelungsverfügung*') the disputed legal relationship, for example, a tenancy for business premises, and the type of the provisional regulation, for example, a provisional prohibition of the use of a certain room, must be precisely specified. The same applies to dispositions with compositional effect, for example, if the defendant's management authority and power of representation as managing director of a certain company is provisionally limited or withdrawn.[150]

In the case of a benefit order ('*Leistungsverfügung*'), mainly for payment in money, the court tends to rule as in the case of a judgement granting performance, although payment ceilings or time limits must be determined. For example, the defendant is obliged '*to pay the claimant up to […] EUR per month.*'[151]

The statement in the main action is then followed by a threat of a penalty, § 890 II ZPO, if the injunction is of prohibitory nature or orders tolerance.[152] It is not unusual for the courts to state within the operative part that the interlocutory judgment on injunction only contains a provisional decision: '*[…] wird einstweilen untersagt […]*' or '*[…] wird bis zur Entscheidung in der Hauptsache […].*'Although the rules governing the seizure are applied to the injunction, § 923 ZPO is not applicable to it[153], as '*the repeal of an injunction against provision of security is permissible only under special circumstances*' according to § 939 ZPO. Other than that, the decision on costs is undertaken in the same way as in the seizure.

As to the decision on the enforceability within the operative part, seizures and injunctions are immediately enforceable without further ado due to their nature.[154]

[149] Huber, in Musielak and Voit (eds.), supra n. 37, § 935 ZPO margin n. 8.
[150] Huber, in Musielak and Voit (eds.), supra n. 37, § 935 ZPO margin n. 8.
[151] Huber, in Musielak and Voit (eds.), supra n. 37, § 935 ZPO margin n. 8.
[152] Huber, in Musielak and Voit (eds.), supra n. 37, § 935 ZPO margin n. 9.
[153] Vollkommer, in Zöller, supra n. 68, § 923 ZPO margin n. 5.
[154] Vollkommer, in Zöller, supra n. 68, § 929 ZPO margin n. 1.

3.1.7 How is the operative part drafted in the case of alternative obligations, i.e. where the debtor may decide among several modes of fulfilling a claim?

In Germany, it is not possible to draft a judgment in this way with the consequence that the defendant may decide among several modes of fulfilling a claim. This would violate the principle of legal certainty of the operative part, cf. § 253 II No. 2 ZPO and § 308 ZPO.[155]

3.1.8 How is the operative part drafted when a claim is wholly or partially dismissed (on substantive grounds)?

Comment: *For the purposes of the question, a "dismissal" refers to the situation where a claim appears to be without justification, either in and of itself or as the result of an objection lodged by the defendant (German: Klageabweisung).*

In the event of a whole or partial dismissal of a claim, the operative part cannot be phrased as follows: '*dismissed as unfounded*' ('*abgewiesen als unbegründet*'); this is possible only where such inclusion into the operative part is needed for clarification.[156] Otherwise, the operative part just states '*dismissed*' or in case of a partial dismissal '*The defendant is ordered to […], apart from that the action dismissed*'.

3.1.9 How is the operative part drafted when a claim is wholly or partially rejected (on formal/procedural grounds)?

Comment*: For the purposes of the question, a "rejection" refers to the situation where the court finds it cannot entertain a claim due to formal/procedural reasons (or lack thereof), e.g. if it lacks jurisdiction or if the prescribed time for filing the action has elapsed.*

In the event of whole or partial rejection on procedural grounds, the operative part cannot be phrased as follows: '*rejected as inadmissible*' ('*abgewiesen als unzulässig*'). It just states '*re-*

[155] Saenger, in Saenger (ed.), supra n. 67, § 313 ZPO margin n. 11.
[156] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 8.

jected', except in cases prescribed by law, for example, § 341 I sentence 2 ZPO, § 522 I sentence 2 ZPO, § 552 I sentence 2 ZPO.[157]

3.1.10 How is the operative part drafted if the debtor invokes set-off? Provide an example.

> Comment: *In certain jurisdiction, set-off (compensation invoked in proceedings) requires the operative part to specify how the claim and counter-claim are extinguished and to what extent. This may, for instance, be done by specifying the amount of both claims and declaring the amount to be compensated.*

This scenario is described in § 322 II ZPO, which reads as follows: '*Should the defendant have asserted the set-off of a counterclaim, the decision as to the counterclaim not existing shall be able to attain legal validity up to the amount for which the set-off has been asserted.*'[158] This provision shall also apply in the event that the defendant successfully defended himself by way of set-off and the claim for set-off, therefore, no longer exists.[159] The set-off and the decision on the set-off are not stated in the operative part. This is due to the fact that the res judicata effect must result from the reasoning according to § 322 II ZPO.[160]

The claimant may obtain a reserve judgment according to § 302 ZPO until a decision on the set-off is rendered, cf. § 302 IV sentence 1 ZPO, if the action on the principal claim is ready for decision.[161] The final judgment of subsequent proceedings decides on the validity of the reserve judgement, § 302 IV sentence 2 ZPO: '*where it becomes apparent in the further course of the proceedings that the plaintiff's claim was unfounded, the earlier judgment shall be reversed, the plaintiff's claim shall be dismissed and the costs shall be ruled on otherwise.*'

An example of the wording for the operative part of a reserve judgment is: '*1. The defendant is ordered to pay the claimant […] EUR. 2. The defendant bears the costs of the litigation. 3. The judgment is provisionally enforceable against the provision of security amounting to*

[157] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 8.
[158] See text to n. 2.6 supra.
[159] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 195.
[160] Saenger, in Saenger (ed.), supra n. 67, § 322 ZPO margin n. 45.
[161] Grunsky and Jacoby, supra n. 25, p. 136.

[…] % of the amount to be enforced. 4. The judgment is rendered under the reserve of the decision on the purchase price claim put forward by the defendant for set-off.'[162]

If it turns out that the counterclaim for payment of the purchase price does not exist, the wording of the operative part of the final judgment of the subsequent proceedings is, for example: '*1. The reserve judgment from […] is confirmed under the elimination of the reservation. 2. The defendant bears also the costs of the subsequent proceeding. 3. The judgment is provisionally enforceable regarding these costs (§ 708 No. 5 ZPO analogue).*' If the counterclaim for payment of the purchase price exists, the wording of the operative part of the final judgment of the subsequent proceedings is, for example: '*1. The reserve judgment from […] is set aside. 2. The action is dismissed. 3. The claimant bears the entire costs of the proceeding. 4. The judgment is provisionally enforceable (§ 708 No. 11 ZPO). The claimant may prevent the enforcement by providing security amounting to […] % of the amount enforceable under the judgment, unless the defendant provides security before enforcement amounting to […] % of the amount to be enforced (§ 711 sentence 1 ZPO).*'[163]

3.2 Are there specifications pertaining to the structure and substance of the operative part of the Judgment in your national legal system – set out by law or court rules or developed in court practice? If so, please provide an English translation of the relevant provisions.

The specifications regarding the structure and the substance of the operative part of the judgment are specified in the law to some extent. Regarding the decision on the substance of the case and the decision on costs, § 308 ZPO contains regulations:

§ 308 ZPO – Bindung an die Parteianträge	**§ 308 ZPO – Binding effect of the parties' petitions**
(1) Das Gericht ist nicht befugt, einer Partei etwas zuzusprechen, was nicht beantragt ist. Dies gilt insbesondere von Früchten, Zinsen und anderen Nebenforderungen.	(1) The court does not have authority to award anything to a party that has not been petitioned. This shall apply in particular to usufruct or fruits, interest, and other ancillary claims.
(2) Über die Verpflichtung, die Prozesskosten zu tragen, hat das Gericht auch ohne An-	(2) The court is to rule on the obligation to bear the costs of the proceedings even with-

[162] Grunsky and Jacoby, supra n. 25, p. 137.
[163] Grunsky and Jacoby, supra n. 25, p. 137.

trag zu erkennen.

out a corresponding petition having been filed.

With regards to the decision on the enforceability, § 709 sentence 1 ZPO contains a regulation: '*other judgments are to be declared provisionally enforceable against provision of security, the amount of which is to be determined.*'[164] In German: '*andere Urteile sind gegen einer der Höhe nach zu bestimmende Sicherheit für vorläufig vollstreckbar zu erklären.*'

3.3 Does the operative part contain elements from or references to the reasoning of the judgment (grounds for the decision/legal assessment)?

The operative part neither contains elements from nor references to the reasoning of the judgment.[165] It has to be self-explanatory.[166] However, the relevant reasons within the reasoning may be used to interpret the operative part if necessary.[167]

3.4 Elaborate on the wording used in your national legal system, mandating the debtor to perform.

Comment: *For instance, in Slovenia, the debtor is not specifically "ordered" to perform by the wording of the operative part, since the operative part only finds the debtor "liable to pay" a certain amount. However, in practice, it is universally understood that this "liability" is to be understood as a duty to perform and not merely as declaratory relief. Would you find such wording problematic?*

In Germany, the wording of the operative part in the event of performance is: '*Der Beklagte wird* ***verurteilt*** *[…]*'[168], meaning '*the defendant is ordered to […]*'. Thus, the wording is to be understood as a duty to perform.

[164] See text to n. 3.1.1 supra.
[165] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 8.
[166] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 11; see text to n. 5.1.4 infra.
[167] Weber, in Anders and Gehle (eds.), supra n. 88, § 322 ZPO margin n. 9 et seq., 20.
[168] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 9.

3.5 If applicable, explain how the operative part is drafted in cases of reciprocal relationships where the Claimant's (counter-)performance is prescribed as a condition for the debtor's performance? How specifically is this condition set out?

In the scenario of a '*Zug-um-Zug Verurteilung*', where the claimant's performance is prescribed as a condition for the debtor's performance, the exact performance of the claimant must be described in the operative part of the judgment in sufficient detail.[169] This enables the identification of the claimant's performance, at least by way of interpretation. The executing organs must be able to check the completeness and accuracy of the claimant's performance, if necessary, with the assistance of an expert.[170]

A typical wording is, for example: '*Der Beklagte wird verurteilt, an den Kläger 1.000 EUR nebst 9 % Zinsen seit dem 01.03.2020 zu zahlen, Zug um Zug gegen Beseitigung folgender Mängel: (es folgt eine genaue Bezeichnung der einzelnen Mängel).*'[171] In English: '*The defendant is ordered to pay the claimant 1.000 EUR together with interest at the rate of 9 % since 01.03.2020, step by step against the elimination of the following defects: (a precise description of the individual defects follows).*'

3.6 How are the interest rates specified and phrased in a judgment ordering payment?

Comment: *Please provide a typical wording and the legal basis – not concerning the merits but concerning the requirement in procedural law as to how to draft the operative part*.

In the case of a judgment ordering payment including interest rates, the enforcement officer must be able to calculate the amount without further ado on the basis of the official base rate and the date on which interest commences.[172] Therefore, it is not sufficient if only a variable interest rate (e.g. libor rate) is mentioned in the operative part.[173] Furthermore, the interest

[169] BGH, Urteil v 7 May 2015 – VII ZR 145/12, NJW 2015, p. 2812, at p. 2815.
[170] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 11.
[171] M. Anders and B. Gehle, 'Das Assessorexamen im Zivilrecht' (Verlag Franz Vahlen 2015), p. 87.
[172] Hunke, in Anders and Gehle (eds.), supra n. 88, § 313 ZPO margin n. 12.
[173] OLG Frankfurt, Urteil v 12 December 1991 – 5 U 207/90, NJW-RR 1992, p. 684, at p. 685.

rates can be expressed in percentage points even though percentage was applied for in error.[174]

A typical wording is, for example: '*Der Beklagte wird verurteilt, an den Kläger 1.000 EUR nebst Zinsen in Höhe von 5 Prozentpunkten über dem Basiszinssatz seit dem 01.03.2020 zu zahlen.*'[175] In English: '*The defendant is ordered to pay the claimant 1.000 EUR together with interest rate at 5 percentage points above the base rate since 01.03.2020'.*

3.7 Please demonstrate how the operative part differs when claims to impose different obligations on the debtor are joined (e.g. performance, prohibitory injunction etc.) or when the action is of a different relief sought (e.g. action for performance, action for declaratory relief, action requesting modification or cancellation of a legal relationship).

Comment: *Please elaborate on the second part of the question only if such a joinder of claims is admissible. Please accompany your answer by providing typical (abstracted) examples of operative parts in situations where the debtor is ordered to pay an amount of money; when he is ordered to perform an action; when a prohibitory injunction is issued against him; when he is ordered to hand over moveable property. Additionally, formulate abstracted examples of declaratory relief (including negative declaratory relief) and actions for the creation, modification or cancellation of legal relationships).*

In the following, one can find typical examples of the wording of the operative part based on the different actions sought by the claimant:

I. Action for payment

The operative part is as follows in situations where the debtor is ordered to pay an amount of money: '*The defendant is ordered to pay the claimant […] EUR together with interest rate at […] percentage points above the base rate since […].*'[176]

II. Action for performance other than payment

[174] Feskorn, in Zöller, supra n. 68, § 313 ZPO margin n. 10.
[175] Anders and Gehle, supra n. 171, p. 87.
[176] Saenger, in Saenger (ed.), supra n. 67, § 313 ZPO margin n. 13.

The operative part is as follows in situations where the debtor is ordered to perform an action other than payment: '*The defendant is ordered to transfer the claimant the ownership over the property registered in the land register of […], and to approve the registration of the property in the land register.*'[177] Or '*The defendant is ordered to provide the claimant with information on the existence and the remainder of the estate of […], who died in […] on […].*'[178]

III. Prohibitory action

The operative part is as follows in situations where a prohibitory injunction has been issued against the debtor: '*The defendant is ordered to refrain from designating the claimant as a […] while avoiding a fine of up to […] or an order detention up to […] for each case of infringement.*'[179]

IV. Action for performance in form of hand over of moveable property

The operative part is as follows in situations where the debtor is ordered to hand over moveable property: '*The defendant is ordered to transfer the claimant the ownership and hand over the passenger car of the make […], type […], year of construction […], chassis number […].*'[180]

V. Declaratory relief

The operative part is as follows in situations where a declaratory relief has been issued against the debtor: '*It is established that the claimant is the owner of […].*'[181] Yet, it is enough to only state the determination: '*The claimant is the owner of […].*'[182] The operative part of a negative declaratory relief is as follows: '*It is established that the defendant is not a shareholder of the X-GmbH.*'[183]

[177] Anders and Gehle, supra n. 171, p. 87.
[178] Anders and Gehle, supra n. 171, p. 88.
[179] Anders and Gehle, supra n. 171, p. 88.
[180] Anders and Gehle, supra n. 171, p. 88.
[181] Saenger, in Saenger (ed.), supra n. 67, § 313 ZPO margin n. 13.
[182] Grunsky and Jacoby, supra n. 25, p. 95.
[183] Grunsky and Jacoby, supra n. 25, p. 95.

VI. Action for creation, modification or cancellation of a legal relationship

The operative part is as follows in situations where an action for creation, modification or cancellation of a legal relationship has been issued: '*The defendant is excluded from the Y-OHG.*'[184] Or: '*The enforcement of the judgement of […] from […] (reference number […]) is declared inadmissible.*'[185]

In the event that several claims are joined by the claimant, § 260 ZPO is applicable:

§ 260 ZPO – Consolidation of claims

> Several claims of the plaintiff against one and the same defendant may be consolidated in one action, even if they are based on different grounds, if the court hearing the case is competent for the entirety of the claims and if the claims may permissibly be dealt with in the same type of proceedings.

The statement of claim can be formulated as follows: '*Der Kläger beantragt den Beklagten zu verurteilen, an ihn […] zu übereignen und herauszugeben, hilfsweise an ihn […] EUR zu zahlen.*' In English: '*The claimant claims that the court should order the defendant to transfer the ownership and hand over […] to him, or, in the alternative, to pay him […] EUR.*' The operative part is affected in a way that it can only relate to one of those two claims, since the court can only refer to the alternative claim if the main claim is dismissed.[186] Thus, the operative part has to dismiss the action apart from that. The operative part can, for example, be formulated as follows: '*The defendant is ordered to […]. The action is dismissed with regards to the remainder.*'

[184] Grunsky and Jacoby, supra n. 25, p. 95.
[185] Saenger, in Saenger (ed.), supra n. 67, § 313 ZPO margin n. 13.
[186] See text to n. 2.13 supra.

3.8 May the operative part refer to an attachment/index (for example, a list of "tested claims" in insolvency proceedings)?

Comment: *Please explain the "technique" of drafting such operative parts and how attachments are actually attached/connected to the judgment? Which attachments can be referred to in the operative part?*

The operative part may refer to attachments of the judgment if they are intended to designate objects, which cannot be described otherwise, such as engineering drawings and computer programs.[187] It can either include attachments in itself or refer to them as accurately as possible.[188]

3.9 What are the legal ramifications, if the operative part is incomplete, undetermined, incomprehensible or inconsistent?

Comment: *Explain whether this presents a ground for appeal or other legal remedy. Explain how this affects enforcement proceedings.*

An unclear operative part can firstly be corrected according to § 319 ZPO. Thereafter, '*typographical errors, computational errors and similar, obvious inaccuracies in the judgment are to be corrected by the court at any time, also ex officio*'. Is, for example, the decision on costs only missing in the operative part but can be found in the reasoning, § 319 ZPO is applicable.[189] The same applies for a claim, which was dealt with in the reasoning but is missing in the operative part. Furthermore, an incomplete judgment as a result of an inadvertently omitted decision on main or subsidiary claims, or on costs, can be supplemented in accordance with § 321 ZPO.[190] Pursuant to § 716 ZPO, the provision of § 321 ZPO shall apply where a judgment has no decision on the provisional enforceability. Is the operative part not subject to a correction, it can then be interpreted. The reasoning is used for interpretation as previously stated.[191] Where the operative part of the judgment differs from the reasoning, the operative

[187] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 11.
[188] See text to n. 3.1.4 supra.
[189] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 319 ZPO margin n. 10.
[190] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 319 ZPO margin n. 10.
[191] See text to n. 3.3 supra.

part alone is relevant, since it alone constitutes the final judgment of the judge.[192] If, however, an operative part is so contradictory and undetermined in itself that its content cannot be determined even by way of interpretation, the judgment is ineffective and incapable of res judicata.[193] An appeal may be lodged against such an ineffective judgment.[194] In appeal proceedings such deficiencies must be taken into account and lead to annulment of the judgment.[195] If the judgment has formally become final (formal res judicata), the parties to the 'old' proceeding can renew the dispute, as the ineffective judgment lacks material res judicata.[196] According to the prevailing opinion, the ineffectiveness of the judgment can also be made subject to an action for a declaratory judgment pursuant to § 256 ZPO if, in the particular case, the interest in making a declaratory finding can be affirmed.[197]

3.10 May the operative part deviate from the application as set out by the claimant? If so, to what extent? In other words, how much discretion does the court enjoy when formulating the operative part?

The court is bound to the parties' applications according to § 308 I sentence 1 ZPO. It may not award anything to a party that has not been petitioned. This applies in particular to '*usufruct or fruits, interest, and other ancillary claims*' according to § 308 I sentence 2 ZPO. This regulation is the expression of the disposition maxim, which dominates the German civil procedure. The court may neither formulate more nor less than what is set out by the claimant in its application, as well as nothing different than claimed.[198] This depends on the request of the claimant. Therefore, one can note that the courts do not have much discretion when formulating the operative part. Exceptions to § 308 I ZPO are: § 308 II ZPO, § 308a ZPO, and § 9 No. 3 and 4 UKlaG. For example: the court may not decide upon a claim that is not claimed any-

[192] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 19.
[193] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 19.
[194] Musielak, in Krüger and Rauscher (eds.), supra n. 63, intro to § 300 ZPO margin n. 6.
[195] Saenger, in Saenger (ed.), supra n. 68, § 313 ZPO margin n. 14.
[196] Musielak, in Musielak and Voit (eds.), supra n. 37, § 300 ZPO margin n. 7.
[197] Musielak, in Musielak and Voit (eds.), supra n. 37, § 300 ZPO margin n. 7.
[198] Feskorn, in Zöller, supra n. 68, § 308 ZPO margin n. 2.

more, namely the court can neither deny nor award it. A prohibitory injunction cannot be dismissed for a statement that is not subject of the application for a prohibitory injunction.[199]

Part 4: Special aspects regarding the reasoning

4.1 If applicable, how does the law or court rules or legal practice govern the structure and content of the reasoning of the judgment?

The fundamental and central regulation regarding the reasoning can be found in § 313 III ZPO. It states what exactly has to be included within the reasoning of a judgment: it shall contain a brief summary of the considerations of the facts and circumstances of the case and the legal aspects on which the decision is based.[200] Further specifications contain § 313a ZPO and § 313b ZPO. These specifications consider the omission of the reasoning in special cases. However, the law does not prescribe the structure of the reasoning of the judgment in detail, but should correspond to a judicial practice that has been established and practised over a long period.[201]

4.1.1 Is there a specific order to be followed when drafting the reasoning?

Comment: *The reasoning usually contains both factual and legal grounds for the decision. Should these aspects follow a predetermined order or may they intertwine?*

Yes, there are several aspects, which have to be taken into account when drafting the reasoning. In particular, procedural priority is given to the admissibility over the merits, to the main claim over the alternative claim and the main defence over the auxiliary set-off.[202] There is no separation between factual and legal grounds; these aspects do not follow a predetermined order, they can intertwine. Usually, the structure of the reasoning is as follows:

I. The overall result ('*Gesamtergebnis*')

[199] Feskorn, in Zöller, supra n. 68, § 308 ZPO margin n. 2.
[200] See text to n. 2.1 supra.
[201] Grunsky and Jacoby, supra n. 25, p. 212; See the model judgment of a court of first instance that has been provided by the authors, supra n. 24.
[202] F. Stein, 'Aufbau und Inhalt der Entscheidungsgründe im Zivilurteil – Ein Überblick', JuS (2014), p. 320 at p. 323 – 324.

First, the overall result is stated. It contains the statements whether the action was, for example, '*admissible or inadmissible*', '*admissible and justified*', '*admissible but unfounded*', '*the action is justified in the amount of ..., otherwise unfounded*'.

II. The interpretation of the prayers ('*Auslegung des Klageantrages*')

Second, the interpretation of the prayers follows if such interpretation is necessary. Only if it is clear which claims are subject to the decision, the admissibility and the merits can be discussed.[203] Usually, clear applications are being made in practice. Is this the case, this part is to be left out within the reasoning. The parties' real intentions are to be investigated. In case of doubt, what is wanted is what is reasonable according to the standards of the legal system and corresponds to the interests as understood.

III. Other preliminary inquiries ('*Sonstige Vorfragen*')

Third, other preliminary questions need to be addressed. Such preliminary questions may be: whether the action is still pending, the effectiveness of a court settlement or a revocation, a modification of the claim, a partial withdrawal of claim or a modification to the parties of the dispute.[204]

IV. The admissibility of the action ('*Zulässigkeit der Klage*')

The admissibility of the action follows. Herein, the court addresses procedural requirements. In principle, the court addresses general requirements only if they are not given or if they are problematic although they are met. Special requirements are generally addressed. If the admissibility is not problematic or disputed, the reasoning contains the following sentence: '*there are no objections to the admissibility of the action*'.[205] Is the admissibility denied, only statements regarding the requirement that is not given are being made. Should more requirements be missing, only one requirement has to be discussed and denied; it is usually the one that is to be denied in the easiest way.[206]

V. The merits of the case ('*Begründetheit der Klage*')

Subsequently, the merits of the case are discussed. Where there is only one application, the main claim takes precedence over additional claims. In case of an objective accumulation of

[203] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 111.
[204] See text to 2.13.1 supra.
[205] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 114.
[206] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 115.

claims, it is recommended to address the applications consecutively. The relevant legal basis must always be stated at the beginning of the legal explanations. In case the main claim is denied, the court does not address the additional claims, as these will also not be given in general. Where facts relevant to the decision are dispute and evidence has been taken, the relevant element must first be subsumed by the proven fact and then assessed.[207]

VI. Procedural rulings ('*Prozessuale Nebenentscheidungen*')

The last part of the reasoning are procedural rulings, which follow the merits of the case, or, if the action was inadmissible, the admissibility of the action. Here, the decision on costs and the decision regarding the provisional enforceability are being made.[208] In general, a reference to the relevant regulations, which are the basis for these decisions, is sufficient. Only complicated procedural rulings need explanations.[209] A justification of the decision on costs is necessary if it can be contested isolated. An isolated contest is only possible in the cases prescribed by law: § 91a II ZPO, § 99 II ZPO, § 99 II ZPO by analogy and § 269 V sentence 1 ZPO, as well as in decisions on costs under the Gesetz über das Verfahren in Familiensachen (henceforth: FamFG).

4.1.2 How lengthy/detailed is the reasoning?

The law expresses a bid in § 313 III ZPO and prescribes a brief reasoning. If the decision does not set out the reasons for the judgment at all, an absolute ground for an appeal according to § 547 No. 6 ZPO is given. Furthermore, it is not sufficient to provide only keyword references in the sense of a 'reminder', which can only be understood by those who took part in the oral proceedings. The brevity of the reasons for the decision must not be at the expense of their comprehensibility.[210] Therefore, a '*brief summary of the considerations of the facts and circumstances of the case*' as defined in § 313 III ZPO is to be understood as a presentation which omits everything that is not necessary to sufficiently justify the decision taken. Thereby, the court has to answer questions that are of central importance to the proceedings and to which the parties submitted their position, otherwise the judgment does not contain a suffi-

[207] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 117.
[208] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 123.
[209] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 124.
[210] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 16.

cient reasoning.[211] The required brevity of the reasons for the decision, thus, does require explanations that are limited to the essentials and that are precisely worded, yet not incomplete.[212] In practice, the length of the reasoning depends entirely on the case.

4.1.3 Do you find the reasoning to be too detailed?

The courts adjust the reasoning to the case they have at hand and its complexity. Depending on the case, some points need a further explanation. A general statement to this point can, therefore, not be made.

4.1.4 Are the parties' statements (adequately) summarised in the grounds for decision?

The parties' statements are mostly subject of the facts of the case, the '*Tatbestand*'. Within the reasoning, the parties' statements are, therefore, considered as provided. Although the court does not have to deal with every argument put forward by the parties in their statements in the reasoning, the court must nevertheless give its opinion on the essential facts of the case.[213] If it does not do so, this suggests that the submissions were not taken into account, so that a violation of the right to be heard can be assumed, unless the submissions, which were not taken into account, were irrelevant or obviously unfounded according to the legal viewpoint of the court.[214] In particular, a careful assessment of the evidence gathered is required and the reasons, which led to the judicial decision, must be stated pursuant to § 286 I sentence 2 ZPO.[215] Otherwise, a chance for a second instance appeal emerges.

[211] Elzer, in Vorwerk and Wolf (eds.), supra n. 19, § 313 ZPO margin n. 129.
[212] Stein 2014, supra n. 202, p. 320 at p. 320.
[213] BAG, Urteil v 11 December 2013 – 4 AZR 250/12, NJW 2014, p. 2382, at margin n. 17.
[214] Musielak, in Musielak and Voit (eds.), supra n. 37, Introduction margin n. 28.
[215] Musielak, in Krüger and Rauscher (eds.), supra n. 63, § 313 ZPO margin n. 17.

4.1.5 Is it possible to distinguish between the parties' statements and the court's assessment (the problem of an unclear distinction between the parties' statements and the court's findings and interpretation)?

Yes, it is possible to distinguish between the parties' statements and the court's assessment, especially, as the parties' statements are mostly stated in the '*Tatbestand*'. Therein, a distinction is made between the claimants' statements and the statements of the defendant. In the reasoning the court distinguishes the parties' statements through formulations. In Germany, considerable weight is given to the language, especially the tense, and the formulations.[216]

4.2 In the reasoning, do the courts address procedural prerequisites and applications made after the filing of the claim?

Comment: *Prerequisites are to be understood as all criteria necessary to initiate the proceedings correctly under national law, e.g. jurisdiction, standing, party capacity etc.*

Yes, German courts address procedural prerequisites within the reasoning in the part '*admissibility of the action*'.[217] Which procedural prerequisites are necessary depends on the action filed, as some actions require special procedural prerequisites. The court reviews ex officio the following general procedural requirements:

1. the German jurisdiction or the international jurisdiction of German courts ('*deutsche Gerichtsbarkeit*'),
2. the legal responsibility ('*Rechtswegzuständigkeit*'),
3. the factual, local and functional competence ('*sachliche, örtliche und funktionelle Zuständigkeit*'),
4. the capacity to be a party to court proceedings and the capacity to sue and to be sued according to § 56 I ZPO ('*Partei- und Prozessfähigkeit*'),
5. in the event of incapacity to sue the legitimisation of a legal representative according to § 56 I ZPO ('*wirksame gesetzliche Vertretung*'),

[216] See text to n. 2.4 supra.
[217] See text to n. 4.1.1 supra.

6. the required authorisation to pursue legal proceedings ('*Prozessführungsbefugnis*'),
7. the proper filing of an action ('*ordnungsgemäße Klageerhebung*'),
8. the lack of other lis pendens ('*mangelnde anderweitige Rechtshängigkeit*'),
9. the lack of other res judicata ('*mangelnde anderweitige Rechtskraft*'),
10. the need and interest for legal protection ('*Rechtsschutzbedürfnis*'),
11. where applicable, conciliatory proceedings ('*Güteverhandlung*').[218]

The court examines upon plea: the plea of arbitration and the plea of lack of security regarding the reimbursement of costs.[219] Courts, however, leave statements regarding the admissibility out when drafting the judgments in cases in which no procedural prerequisite is problematic or disputed.[220]

Applications made after the filing of the claim are considered in the beginning of the reasoning within the part '*other preliminary inquiries*'.[221]

4.3 Are independent procedural rulings properly re-addressed in the judgment?

For example, in practice it is usual to incorporate the so-called '*Streitwertfestsetzung*' (the determination of the amount in dispute) into the judgment, although being an independent procedural decision pursuant to § 63 II sentence 1 GKG. Furthermore, the '*Kostenfestsetzungsbeschluss*' can be incorporated into the judgment.

Another example is the '*Beweisbeschluss*' according to § 358 ZPO and the subsequent, which can be separately ordered by the court. The judgment can re-address the '*Beweisbeschluss*' in the reasoning when taking into account the evidence.

§ 387 ZPO regulates the interlocutory proceedings regarding the refusal to testify ('*Zwischenstreit über Zeugnisverweigerung*'):

§ 378 ZPO – Interlocutory proceedings regarding the refusal to testify

(1) Upon having heard the parties, the court hearing the case shall rule on whether or not the refusal is lawful.

[218] Grunsky and Jacoby, supra n. 25, p. 125-126.
[219] Grunsky and Jacoby, supra n. 25, p. 126.
[220] See text to n. 4.1.1 supra.
[221] See text to n. 4.1.1 supra.

(2) …
(3) …

The court rules by a '*Zwischenurteil*' (interim judgment), which declares the witness's refusal to testify to be justified or unjustified, cf. § 390 I sentence 1 ZPO; this is also the operative part of the main proceedings.[222] Considering interlocutory proceedings regarding the third-party intervention in support of a party to the dispute, § 71 ZPO, the decision on the admission is also taken in a '*Zwischenurteil*', however, the decision can also be combined with the final judgment in the main proceedings.[223]

4.3.1 What legal effects (if any) are attributable to the reasoning, e.g. is the reasoning encompassed within the effects of the finality of the Judgment?

The judgment attains formal res judicata after the expiry of the period determined for the lodgement of the admissible legal remedy or of the admissible protest according to § 705 sentence 1 ZPO. According to § 322 (1) ZPO, the judgment attains material res judicata only insofar as the complaint or the claims asserted by counterclaims have been ruled on.[224] According to the wording of this provision the res judicata is limited to the operative part, the tenor, of the judgment.[225] The court can and should interpret the operative part where needed.[226] The relevant reasons considered within the reasoning of the judgment can, therefore, be used for the interpretation of the operative part next to the interpretation of the part stating the facts of the case.[227] This interpretation may only be carried out within narrow limits.

[222] Huber, in Musielak and Voit (eds.), supra n. 37, § 387 ZPO margin n. 3.
[223] S. Weth, in Musielak and Voit (eds.), supra n. 37, § 71 ZPO margin n. 6.
[224] See text to n. 5.1.3 infra.
[225] Grunsky and Jacoby, supra n. 25, p. 246.
[226] Vollkommer, in Zöller, supra n. 68, Introduction § 322 ZPO margin n. 31.
[227] Weber, in Anders and Gehle (eds.), supra n. 88, § 322 ZPO margin n. 9 et seq., 20.

Part 5: Effects of judgments – the objective dimension of res judicata

5.1 A final judgment will, in most Member States, obtain res judicata effect.[228] With regard to this point, please answer the following questions:

5.1.1 What are the effects associated with res judicata in your national legal order?

In general, the German concept of res judicata is divided into a formal effect (*formelle Rechtskraft*) and a substantive effect (*materielle Rechtskraft*).[229] According to § 705 ZPO, judgements only attain a formal res judicata effect after the expiry of the period determined for the means of recourse against judgements. This effect ensures that the judgement may not be changed or revoked.[230] On the other hand, material res judicata as stipulated by § 322 I ZPO serves the purpose to prevent a second dispute concerning the matter in dispute ('*Streitgegenstand*') to avoid redundant proceedings and contradictory decisions.[231] In the end, res judicata contributes to legal justice by creating legal certainty.[232]

The nature and consequences of this effect are a contentious issue amongst German authorities. According to the '*Materielle Rechtskrafttheorie*' (substantive understanding of substantive res judicata), adhered to by the '*Reichsgericht*' (predecessor of the German Federal Court of Justice)[233], the judgement establishes the right or claim that has been awarded. [234] In case the judgement is lawful, it confirms the legal position by creating an additional legal basis.[235] In case the judgement is mistaken, an erroneously awarded right is established or the wrongly denied right is excluded. [236] Accordingly, any court that is subsequently seised with an action

[228] If your national legal order does not operate with the principle of res judicata, then please thoroughly describe the alternative doctrine governing finality of judgements. Please answer the questions in this Part of the questionnaire by mutatis mutandis applying your respective doctrine. If this is not possible, please approximate the answers as far as possible or provide additional explanations.
[229] Gottwald, in Krüger and Rauscher (eds), supra n. 63, § 322 ZPO margin n. 1; Gottwald, in Rosenberg et al., supra n. 89, § 152 ZPO margin n. 1.
[230] Gottwald, in Rosenberg et al., supra n. 89, § 152 ZPO margin n. 1.
[231] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 1.
[232] C. Althammer, in R. Bork and H. Roth (eds.), Stein/Jonas Kommentar zur Zivilprozessordnung, Issue 4 (Mohr Siebeck 2016), § 322 ZPO margin n. 28.
[233] RG, Urteil v 20 February 1900 – VIa 395/99, RGZ 46, p. 334.
[234] Cf. Gottwald, in Rosenberg et al., see supra n. 89, § 152 ZPO margin n. 3.
[235] Cf. Gottwald, in Rosenberg et al., see supra n. 89, § 152 ZPO margin n. 3.
[236] Cf. Gottwald, in Rosenberg et al., see supra n. 89, § 152 ZPO margin n. 3.

concerning the same matter in dispute has to come to the same conclusion given that the first court's decision developed the legal situation.[237] To the contrary, the German Federal Court of Justice[238] and the majority of authorities adhere to the '*Prozessuale Rechtskraftstheorie*' (procedural understanding of substantive res judicata)[239], which largely adheres to the principle of ne bis in idem.[240] Following the procedural understanding, any further dispute concerning the same matter in dispute, whether within a second action or as a preliminary question within a subsequent proceeding, is inadmissible.[241]

In summary, the German concept of substantive res judicata is generally associated with two consequences. On the one hand, any subsequent action concerning the same matter in dispute is inadmissible.[242] On the other hand, the parts of the judgment that become res judicata[243] constitute precedence for any further proceedings involving the same parties.[244]

5.1.2 What decisions in your Member State have the capacity to become res judicata?

The relevant criterion for a judgement to become res judicata is whether or not the judgement resolves the dispute finally and without any restrictions, § 322 I ZPO. Hence, res judicata applies to all judgements that contain a final and binding decision concerning the requested remedies, including default judgements, judgements by confession or writ of executions.[245] The same applies to arbitral awards pursuant to § 1055 ZPO. Interim judgements per se do not finally decide the dispute and, therefore, obtain res judicata effects only in so far as they con-

[237] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 22.
[238] BGH, Beschluss v 16 June 1993 – I ZB 14/91, BGHZ 123, 30.
[239] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 13; U. P. Gruber, in Vorwerk and Wolf (eds.), supra n. 19, § 322 ZPO margin n. 11; Musielak, in Musielak and Voit, supra n. 37, § 322 ZPO margin n. 5; Gottwald, in Rosenberg et al., supra n. 89, § 152 ZPO margin n. 8; Saenger, in Saenger (ed.), supra n. 67, § 322 ZPO margin n. 11.
[240] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 20. However, some authorities interpret the procedural understanding in a way, that any subsequent action is only inadmissible insofar as it contradicts the first decision, see Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 19 footnote 21 for further references.
[241] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 20.
[242] See text to n. 5.1.4.2 supra.
[243] See text to n. 5.1.4 supra.
[244] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 194; Gottwald, in Rosenberg et al., see supra n. 231, § 152 ZPO margin n. 9.
[245] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n. 1; B. Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 705 ZPO margin n. 1.

cern a third party.[246] The same holds true for tentative judgements as those do not finally decide the dispute.[247] Likewise, judgements rendered during an appeal or cassation complaint that lift the opposed judgement or refer the dispute to the court of origin do not obtain res judicata effect.[248] Procedural judgements obtain res judicata effect with regard to the procedural question in case the action is rejected as inadmissible, for example due to a lack of jurisdiction.[249]

The effect of res judicata for court decisions other than judgements (*'Beschluss'*) differs. Such decisions are subject to res judicata without restriction in matters concerning family and marriage disputes if they finally resolve the dispute, § 113 I 2 Gesetz über das Verfahren in Familiensachen and in den Angelegenheiten der Freiwilligen Gerichtsbarkeit (henceforth: FamFG) together with § 322 I ZPO.[250] For any other of those decisions to become res judicata, they have to (1) be subject to formal res judicata, (2) be irrevocable and (3) be possibly relevant for the same or follow-up proceedings.[251] Provisional measures generally do not become res judicata, only with regard to other provisional measures between the same parties.[252]

5.1.3 At what moment does a Judgement become res judicata?

Comment: Pinpoint the time and/or requirements when the judgment meets the criteria for becoming res judicata.

Formal res judicata generally requires the absence of any possibility to challenge the judgement, § 705 I ZPO.[253] Formal res judicata forms the most basic requirement for substantive res judicata. However, this does not mean that any decision which became formal res judicata does automatically become substantive res judicata due to the fact that not any decision entails content that can be subject to substantive res judicata.[254]

A judgement resulting from a contradictory proceeding becomes res judicata

[246] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n.10.
[247] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n.11.
[248] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n. 11.
[249] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n. 2.
[250] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n. 2.
[251] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n. 2.
[252] Gottwald, in Rosenberg et al., supra n. 89, § 153 ZPO margin n. 4.
[253] See text to n. 5.1.2 supra.
[254] Gottwald, in Rosenberg et al., supra n. 89, § 150 ZPO margin n. 3; see text to n. 5.1.4 infra.

a) the moment it is announced/served if it is not subject to any recourse, § 310 III ZPO.[255]
b) the moment the period to take recourse against the judgement expired.[256]
c) the moment when both parties' waiver of their respective right to challenge/appeal the judgement becomes effective.[257]
d) the moment one party's withdrawal of a challenge/appeal becomes effective if the period for any further challenge/appeal has already expired.[258]
e) the moment the decision following the challenge/appeal becomes res judicata if the original judgement is not lifted or the original proceedings are not continued.[259]

In case of a partial recourse the remaining part becomes res judicata the moment the partial recourse could not be extended to the remaining part of the judgement and the partial recourse could not be joined by the other party.[260] Until this point in time, the partial recourse bars the remaining part of the judgement from becoming res judicata.[261]

A default judgement becomes res judicata

a) the moment the period for the protest against the default judgement expires or the waiver of the right to protest prior to the expiry, § 346 ZPO.[262]
b) the moment the withdrawal of the protest or a decision rejecting the protest becomes effective.[263]
c) in case the protest is inadmissible, §§ 238 II, 345 ZPO, the moment the period to take recourse against the judgement expired, §§ 517, 548 ZPO, or the mo-

[255] G. Götz, in W. Krüger and T. Rauscher (eds.), Münchener Kommentar zur Zivilprozessordnung (C. H. Beck 2016), Issue 2, § 705 ZPO margin n. 5; Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 4.
[256] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 705 ZPO margin n. 6; Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 7; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 705 ZPO margin n. 6.
[257] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 8.
[258] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 11.
[259] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 12.
[260] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 705 ZPO margin n. 12; Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 13.
[261] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 705 ZPO margin n. 12.
[262] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 14.
[263] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 15.

ment the waiver of the right to take recourse against the judgement by the defaulting party becomes effective.[264]

Other decisions ('*Beschlüsse*') become res judicata

a) the moment they are issued, § 329 ZPO, if they are not subject to any means of recourse.[265]
b) in case they are subject to means of recourse
   (1) the moment the period to challenge the decision expires.
   (2) the moment both parties' mutual waiver of the right to take recourse against the decision becomes effective, or, prior to this time, with the exhaustion of all possibilities to take recourse against the decision.
   (3) the moment the withdrawal of the challenge becomes effective after the expiry of the period to challenge the decision, or the moment a decision rejecting the recourse against the decision becomes effective.[266]

5.1.3.1 How (if at all) does the exercise of the right to appeal/the exercise of legal remedies affect this moment?

The German concept of substantive res judicata requires finality of the underlying decision, formal res judicata. Accordingly, res judicata requires that the judgement cannot be subject to any means of recourse. Once one party exercises its right to take recourse against the decision, the underlying decision is, in general, barred from becoming res judicata.[267]

[264] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 16.
[265] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 17.
[266] Gottwald, in Rosenberg et al., supra n. 89, § 151 ZPO margin n. 18.
[267] See text to n. 5.1.3 supra.

5.1.3.2 How does the answer to this question differ depending on whether the remedies being invoked are considered "ordinary" or "extraordinary" under your domestic law – is the classification of remedies into one of these two categories dependent on these effects?

German domestic law classifies means of recourse against a decision prior to their finality as ordinary remedies.[268] In contrast, extraordinary remedies only become relevant after the decision already received res judicata, e.g. the restoration of the status quo ante, § 233 ZPO, redress granted in the event a party's right to be given an effective and fair legal hearing has been violated, § 321a ZPO, action for retrial of the case, §§ 579, 580 ZPO and constitutional complaints, Art. 93 I Nr. 4a GG.[269] In short, ordinary remedies prevent the decision in question from becoming res judicata whilst extraordinary remedies require the decision in question to be res judicata and aim at revoking the res judicata effect.[270]

5.1.4 Is res judicata restricted to the operative part of the judgment in your legal system or does it extend to the key elements of the reasoning or other parts of the judgment?

The content of res judicata is defined by § 322 I ZPO. According to § 322 I ZPO, 'Judgments are able to attain legal validity only insofar as the complaint or the claims asserted by counterclaims have been ruled on.' This wording does not refer to a particular material claim but rather to a procedural claim, the matter in dispute ('*Streitgegenstand*').[271] The starting point to determine the matter in dispute is the operative part of the judgement ('*Tenor und Entscheidungsformel*').[272] To further substantiate and interpret the matter in dispute, the statement of reason might be taken into consideration.[273] In case the judgement rejects the claim or in case of a default judgement, the operative part is not sufficient to establish the matter in dispute.[274]

[268] Cf. Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 705 ZPO margin n. 6.
[269] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 705 ZPO margin n. 4.
[270] BGH, Urteil v 18 March 1987 – IVb ZR 44/86, BGHZ 100, 203; Götz, in Krüger and Rauscher (eds.), supra n. 255, § 705 ZPO margin n. 4.
[271] BGH, Beschluss v 29 June 2006 – III ZB 36/06, NJW-RR 2006, p. 1502; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 111; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 705 ZPO margin n. 4. Likewise, § 253 II N. 2 ZPO requires the claimant to specify the matter in dispute within its statement of claim rather than specifying a particular legal basis.
[272] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 87.
[273] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 87.
[274] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 88.

The same holds true if the defendant is ordered to pay 1.000 EUR. In these circumstances, the statement of reasons has to be taken into account whether the matter in dispute concerning a contractual payment claim, a claim arising out of tort etc.[275] Yet, res judicata only applies to the final decision rendered by the court and the elements of the reasoning if they are necessary to substantiate or interpret the operative part.[276] Hence, res judicata covers the result of the subsumption process, but not the subsumption process and any steps taken therein itself.[277]

5.1.4.1 Are courts bound by prior rulings on preliminary questions of law?

> Comment: A court in Member State A has to rule whether a seller must deliver goods. In its decision, the court argues that the contract between the seller and the buyer is null and void because of some errors of will. If the seller in Member State B later submits an action for the payment of the purchase price, does a court in Member State B have to dismiss that claim, as it is bound by the reasoning in the judgment of the court in Member State A, which argued that there had been an error of will? Will this be the case in your Member State? In other words, does finality pertain to preliminary questions on points of law? If it does, how are preliminary questions decided upon? Does the decision on preliminary issues form part of the operative part or reasoning? How are they elaborated in the Judgment?

The German concept of res judicata does not apply to preliminary questions of law.[278] German res judicata merely covers the decision that the seller must not deliver goods to the seller. It does not entail the findings that the parties negotiated a contract but that the result of these negotiations is null and void due to some errors of will, as those findings are mere steps within the subsumption process.[279] Parties that wish these questions to be finally decided and be subject to res judicata have the option to seek an intermediate declaratory judgement ('*Zwischenfeststellungsurteil*') according to § 256 II ZPO. If either party of the comment wants the findings on the error of will concerning the contract to become res judicata, it has to apply for such an intermediate declaratory judgement. Otherwise, German courts are not

[275] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 87.
[276] Gottwald, in Rosenberg et al., supra n. 89, § 154 ZPO margin n. 9.
[277] Gottwald, in Rosenberg et al., supra n. 89, § 154 ZPO margin n. 9.
[278] BGH, Urteil v 7 July 1993 – VIII ZR 103/92, BGHZ 123, 137; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 margin n. 100; Gottwald, in Rosenberg et al., supra n. 89, § 154 ZPO margin n. 14.
[279] See text to n. 5.1.4 supra.

bound by the prior finding that the contract was null and void due to an error of will. Only in case the preliminary question is entailed within the operative part of the judgment, other courts are bound by the prior ruling.[280]

To the contrary, § 322 II ZPO stipulates an exception for a set off. Accordingly, the set off - as preliminary question of law - is subject to res judicata irrespective of the fact whether it has become part of the operative part or not.[281]

5.1.4.2 Does your legal order operate with the concept of "claim preclusion"?

Comment: Claim preclusion bars a claim from being brought again on an event, which was the subject of a previous legal cause of action that has already been finally decided between the parties. Consider the following examples.

First example: A claimant files suit for damages he incurred in a traffic accident, alleging that the defendant acted negligently. The court dismisses the claim. The claimant then files a second action for damages arising from the same traffic accident; however, this time he alleges battery (intentional tort) on defendant's side. Is the second action admissible?

Second example: A claimant files suit for personal injury (non-material damages) he incurred in a traffic accident. The court awards the claimant the relief sought. The claimant then files a second action, wherein he claims material damages from the same traffic accident. Is the second action admissible or should the claimant have requested all damages in the first action?

It follows from substantive res judicata, which is based upon ne bis in idem, that the same matter in dispute should not be judged again.[282] Accordingly, a second action is inadmissible once the matter in dispute has been finally decided and this decision became substantive res judicata. Hence, the 'lack of substantive res judicata within the same matter of dispute' is a negative requirement for every action brought before German courts.[283]

[280] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 52.
[281] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 195.
[282] BGH, Urteil v 22 October 2013 – XI ZR 42/12, NJW 2014, p. 314 at p. 314 margin n. 13; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO paras. 10 et seq., 40.
[283] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 40; Gottwald, in Rosenberg et al., supra n. 89, § 152 ZPO margin n. 10.

For this context, it is of utmost importance to define the matter in dispute to analyse the extent of the precluding effects of substantive res judicata.

§ 322 I ZPO refers to the claim as the basis for substantive res judicata. Pursuant to the original interpretation of this term, the legislator meant the legal basis for the substantive claim.[284] Accordingly, this interpretation has been referred to as the materiel theory of matter in dispute.[285] However, this theory finds its limits when it comes to declaratory relief as these proceedings aim at the declaration concerning the existence or non-existence of a legal relationship instead of dealing with a specific substantive claim.[286] The same applies to a situation of concurrent substantive claims.[287]

To overcome these problems, the term 'claim' has to be determined as a procedural claim, which is the matter in dispute.[288] As a procedural claim, it should be assessed from a procedural point of view.

The majority of authorities determines the matter in dispute according to the relief sought as well as the reason leading to the action considers those factors to be of equal relevance.[289] This interpretation is in line with § 253 II No. 2 ZPO, which requires the relief sought and its reason to be mentioned within the statement of claim. The reason for the action consists of the underlying factual circumstances.

Others are of the opinion that it is difficult to determine the factual circumstances and, accordingly, solely rely upon the relief sought in order to determine the matter in dispute. However, the factual circumstances should be used to interpret the relief sought. The difference between these options is rather a question of phrasing rather than having a legal impact.

To summarize, the matter in dispute should be defined as the decision desired by the claimant determined by the relief sought and the underlying factual circumstances.[290]

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[284] Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 8.
[285] Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 8.
[286] Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 8.
[287] Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 9; C. Wolf, 'Streitgegenstand', Comments to BGH, Beschluss v 29 June 2006 – II ZR 36/06, JA (2006), p. 740 at p. 741.
[288] Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 10.
[289] Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 27; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 112; Musielak, in Musielak and Voit, supra n. 37, Introduction margin n. 68; Gruber, in Vorwerk and Wolf (eds.), supra n. 19, § 322 ZPO margin n. 20.
[290] Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 28; Wolf 2006, supra n. 287, p. 740 at p. 741; see text to n. 9.1.2 supra.

Likewise, the German Federal Court of Justice considers the relief sought as well as the factual circumstances relevant to determine the matter in dispute.[291] Based upon these considerations, it set up criteria in order to determine the factual circumstances. Relevant are the facts that form part of the complex of facts submitted to support the relief sought, when considered from the reasonable point of view of the parties and taking into account the character of the entirety of circumstances.[292] Irrespective of the fact whether all circumstances have been presented by the parties, the matter in dispute covers all legal basis that might arise out of the factual circumstances and that are in line with the relief sought by the claimant.[293]

In the first example, the court dismissed the claim being substantively based upon negligence. Nevertheless, for determining the matter in dispute, merely the procedural claim is relevant. Within the first example, this procedural claim can be referred to as the existence of claims for the claimant against the defendant concerning the car accident. When the court dismissed the action, this dismissal of the matter in dispute entails all legal basis that possibly allow the claimant to seek damages. The moment the first judgment becomes formal res judicata, the operative part becomes substantive res judicata. This means any further action based upon the question of claims arising out of the car accident are inadmissible due to the fact that the negative requirement of lack of substantive res judicata within the same matter in dispute is not fulfilled, irrespective of the fact that the second claim is based upon battery instead of negligence.[294]

The scenario illustrated within the second example differs. The first action relates to non-material damages, the second one to material damages. To support its first action, the claimant has to present facts in order to establish non-material damages. These facts differ from the facts required to establish material damages. Even though both scenarios are rooted within the same accident, they constitute different matters in dispute. Therefore, the claimant is not barred from bringing the second action as there has not been any previous finding within the

[291] BGH, Urteil v 22 October 2013 – XI ZR 42/12, NJW 2014, p. 314; BGH, Urteil v 5 November 2010 – IX ZR 293/07, BGHZ 183, 77; BGH, Urteil v 23 February 2006 - I ZR 272/02, BGHZ 166, 253; BGH, Urteil v 3 April 2003 – I ZR 1/01, BGHZ 154, 342; BGH, Urteil v 19 December 1991 - IX ZR 96/91, BGHZ 117, 1.
[292] BGH, Urteil v 22 October 2013 – XI ZR 42/12, NJW 2014, p. 314 at p. 315.
[293] BGH, Urteil v 22 October 2013 – XI ZR 42/12, NJW 2014, p. 314 at p. 315; Wolf 2006, supra n. 287, p. 740 at p. 741.
[294] See for a comparable example W. Lüke, Zivilprozessrecht I (C. H. Beck 2020), § 14 margin n. 4.

same matter in dispute yet.[295] However, the claimant cannot rely upon the court's findings of the first action with regard to the defendant's liability for the accident. Those findings did not become res judicata unless the claimant pursued a 'Zwischenfeststellungsklage' according to § 256 II ZPO.[296]

5.1.4.3 Are courts bound by the determination of facts in earlier judgements?

Comment: Consider the following example. A claimant files suit for personal injury (non-material damages) he incurred in a traffic accident. The court finds that the claimant correctly observed traffic rules and drove through a green light. The court awards the claimant the relief sought. The claimant then files a second action, wherein he claims material damages. In these proceedings, however, the court finds that the claimant drove through a red light. Is this a permissible finding or should the court give effect to the findings of the first judgement?

The facts that have been determined by the court and that have become the basis for the judgement do not become res judicata.[297] Hence, the findings of the court in the second action are permissible under the German concept of substantive res judicata.[298]

This is in line with the principle that the Germen Civil Procedure does not allow for declaratory relief concerning mere facts.[299] Accordingly, the claimant could not circumvent the problem by pursuing a Zwischenfeststellungsklage pursuant to § 256 II ZPO. However, it might use the Zwischenfeststellungsklage to seek declaratory relief concerning the legal basis.[300] In

[295] In the opposite case, the German Federal Court of Justice hold that an investor would be barred with a second action pursuing the same damages, even though the first action was based upon a different consultative error. It found, that the consultation prior to an investment constitutes one complex of facts when being considered from the reasonable view of the investor and taking into account the entirety of circumstances. To split the consultation into different parts according to different consultative errors would be contrary to the natural perception of the cirucmstances and, thus, artificially, divide one complex of facts, BGH, Urteil v 22 October 2013 – XI ZR 42/12, NJW 2014, p. 314 at p. 315, paras. 16 et seq.

[296] See text to n. 5.1.4.1 supra.

[297] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 77; Gottwald, in Rosenberg et al., supra n. 89, § 154 ZPO margin n. 12.

[298] An exception exists for the declaration concerning the authenticity of authentic documents, Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 78.

[299] BGH, Urteil v 27 March 2015 – V ZR 296/13, NJW-RR 2015, p. 915 at p. 915, margin n. 7; Gottwald, in Rosenberg et al., supra n. 89, § 154 ZPO margin n. 12; Roth, in Bork and Roth (eds.), supra n. 97, § 256 ZPO margin n. 29.

[300] C. Wolf, 'Reichweite der Rechtskraft', Comments to BGH, Urteil v 5 November 2009 – IX ZR 239/09, JA (2010), p. 662 at p. 664.

this case, the finding that the claimant is generally entitled to damages based on the car accident would bind the court in the second proceedings according to substantive res judicata.

5.2 If part of a civil claim is being claimed in civil proceedings, how does this affect the remainder of the claim, taking into account res judicata effects?

The claim only becomes substantive res judicata insofar as it has been part of the court's decision. In case the claimant only brings part of its claim to the court, the matter in dispute is limited to this part of the dispute. Accordingly, the claimant is not barred from brining an action for the remainder of the claim in a second proceeding.

However, some authors are of the view that this finding cannot hold true if the claimant decides to pursue only parts of a civil claim and the court rejects the claim as unfounded. To reject the partial claim, the court has to examine the entire case and come to the conclusion, that the claim brought forward by the claimant does not exist within the matter in dispute.[301] Hence the rejection of the part claimed inevitably refers to the reminder of the claim as well.[302] Only if the part of the claim refers to a particularly individualized part of the entire claim, e.g. a claim for rental for particular months, the rejection of the claim only refers to this part of the claim.[303] The remainder, e.g. the claim for rental for other months, are not barred by substantive res judicata. This is due to the fact that the matter in dispute solely entails the specific months, not the entire contractual relationship concerning the rent.

The majority of authors[304] as well as the German Federal Court of Justice[305] do not differentiate between scenarios in which the court granted or rejected the partial action. Pursuant to §

[301] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 142; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 128; Musielak, in Musielak and Voit, supra n. 37, § 322 ZPO margin n. 70.
[302] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 142; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 128; Musielak, in Musielak and Voit, supra n. 37, § 322 ZPO margin n. 70.
[303] Musielak, in Musielak and Voit, supra n. 37, § 322 ZPO margin n. 72.
[304] Gruber, in Vorwerk and Wolf (eds.), supra n. 19, § 322 ZPO margin n. 25; Saenger, in Saenger (ed.), supra n. 67, § 322 ZPO margin n. 25; Weber, in Anders and Gehle, supra n. 88, § 322 ZPO margin n. 65. See Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 141 for further references.
[305] BGH, Urteil v 5 November 1985 – IV ZR 40/84, NJW 1986, p. 1166. In this decision, the German Federal Court of Justice found that the rejection of the partial claim does not affect the remainder of the claim even in

322 I ZPO, the procedural claim only becomes res judicata insofar as that it has been brought before the court. Given this wording, these authors argue that the remainder of the claim has not been brought before the court yet. Hence, any res judicata effect would be contrary to the wording of § 322 I ZPO.

5.3 In the case of a negative declaratory action, what is the effect of a finding that the matter is res judicata?

Comment: For example, A initiates an action against B for a declaration that he does not have to pay B 1000 EUR (negative declaration). If the court dismisses the claim, does the judgment at the same moment declare that A does have to pay B 1000 EUR? If the dismissal of a negative declaratory action is the equivalent of a declaration of the converse (in inter partes proceedings), is such a judgment enforceable for the creditor (in this case: B)?

Within German civil proceedings, a declaratory action is designed to declare the existence or non-existence of a defined legal relationship pursuant to § 256 I ZPO.[306] Accordingly, negative declaratory actions aim at the declaration of the non-existence of a legal relationship, e.g. a payment-obligation arising out of a particular contract.[307] The dismissal of a negative-declaratory action means that the court came to the conclusion that the matter in dispute provides for a legal basis to establish the legal relationship, e.g. that there is a legal basis for the payment obligation. Hence, the negative declaratory judgment dismissing the action encompasses the positive finding of the opposite. The res judicata effect of a dismissal of a negative declaratory action equals the res judicata effect of the finding of the positive opposite.[308] However, this does not apply if the court dismisses the action on the ground that it cannot declare whether the relationship exists or not.

If A initiates an action against B for a declaration that he does not have to pay B 1000 EUR and if the court dismisses the claim, the court found that there is a legal relationship, meaning

case the rejection came to the conclusion that the matter in dispute does not provide for a claim in its entirety. By doing so, the Court referred to its continued legal practice.

[306] Gottwald, in Rosenberg et al., supra n. 89, § 91 ZPO margin n. 1.

[307] Gottwald, in Rosenberg et al., supra n. 89, § 91 ZPO margin n. 1; See Roth, in Bork and Roth (eds.), supra n. 97, § 256 ZPO margin n. 125.

[308] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 256 ZPO margin n. 37.

that there is a legal basis for the payment obligation. Accordingly, the dismissal of the negative declaratory action encompasses the positive finding that A has to pay B 1000 EUR. However, as long as the amount of the claim has not been specified (by the defendant), the negative declaratory judgment is comparable to a '*Grundurteil*' (an interim judgement concerning the well-foundedness of the claim).[309]

Nonetheless, B has to initiate an action against A in order to receive an enforcement title. As declaratory actions are only aimed at the declaration of the existence or non-existence of a legal relationship, they do not order the losing party to pay.[310] In other words, the operative part of declaratory judgments does not contain a legal order that could be enforced.[311] Yet, the negative declaratory judgement binds the court of the second proceedings after it became res judicata.

5.4 If a court issues an interim judgment concerning the well-foundedness of a claim, does this judgment have any effects outside of the pending dispute?

Comment: Can a party rely on the res judicata effects of such a judgment in separate proceedings (is the court in another set of proceedings bound by the judgment) or are these effects confined to the dispute in which the judgment was rendered? Note: an interim judgment on the well-foundedness of a claim refers to a judgment finding the liability of the defendant to pay, but leaves the amount of payment to be determined in a subsequent judgement (the same as under question 3.1.5).

Pursuant to § 304 I ZPO, the court can issue an interim judgment concerning the well-foundedness of a claim. Even though interim judgements can become formal res judicata, they do not finally decide the claim.[312] Accordingly, such judgements are not subject to substantive res judicata.[313] Nonetheless, courts are bound by their prior interim judgements within the

[309] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 256 ZPO margin n. 38.
[310] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 704 ZPO margin n. 6; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 704 ZPO margin n. 5.
[311] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 704 ZPO margin n. 6; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 704 ZPO margin n. 5. However, delcaratory judgements, both – negative and positive, contain an allocation of the legal costs. This part of the judgement is enforceable after the costs have been determined by the court by means of the cost decision (*'Kostenfestsetzungsbeschluss'*).
[312] Althammer, in Bork and Roth (eds.), supra n. 232, § 304 ZPO margin n. 60.
[313] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 3.

same proceedings according to § 318 ZPO. Other from that, interim judgments do not provide for further binding effects. However, interim judgments can finally decide certain points towards third parties.[314] In this regard, they constitute final judgements for the interim dispute with the third party and, therefore, obtain substantive res judicata effects.[315]

5.5 Suppose the following hypothetical. If, in Member State Y, a seller (S) as claimant is suing the buyer (B) as defendant for payment of the purchase price, B will not be able to sue S in Member State Z for liability on a warranty at the same time due to lis pendens rules under B IA.

5.5.1 Is it possible for B to sue S in Member State Z after the case in Member State Y has been decided with res judicata effect? What is the position regarding this question in your Member State?

Once the court in Member State Y rendered its decision with res judicata effect, the second action in Member State Z (Germany) would not be barred due to the lis pendens rules under B IA. However, any procedural effects of res judicata of the judgement rendered by the court in Member State Y are subject to autonomous German procedural law.[316] German procedural law recognizes res judicata by means of a negative requirement for the admissibility of the action initiated by B. While under the European definition of matter in dispute, a claim for the purchase price and a claim for liability on warranty belong to the same matter in dispute, the German definition takes a narrower approach. In German civil procedure, the matter in disputes depends on the relief sought by the claimant under the given circumstances. Even though the underlying factual circumstances might be the same, the relief sought in the judgment of the court of Member State Y, a claim for the payment of the purchase price only deals will all legal basis that might lead to this claim. Hence, from the German perspective, the decision does not deal with the question of liability on warranty at all. Consequently, the res judicata of the judgment rendered by the court in Member State Y does not bar the action initiated by B in front of a German Court.

[314] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 51.
[315] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 51.
[316] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 328 ZPO margin n. 168.

5.5.2 If it is possible for B to sue S in Member State Z (in the above situation), will the court in State Z be bound by the reasoning in the judgment from the court in Member State Y? What is the position on that question in your national legal order:

5.5.2.1 If in domestic cases you do not extend res judicata effect to the elements of a court's reasoning (Question 5.1.4)?

The German court that is seised with the action initiated by B would not be bound by any prior findings of the court in Member State Y. The German concept of res judicata only entails the operative part of the judgement, in particular the ruling itself. The reasoning and the facts are only relevant to interpret the operative part. Accordingly, the German court would be allowed to discuss the validity of the sales contract and find it to be null and void, even though the court in Member State Y granted the claimant the right to request the payment of the purchase price.

5.5.2.2 If res judicata effect is extended to elements of the reasoning in the Member State of origin but not in the Member State addressed?

The effects associated with res judicata and the judgment in the State of Origin are extended to the State addressed the moment the foreign judgment has been recognised As the objective and subjective extents of res judicata are subject to the *lex fori* of the State of Origin,[317] some authorities generally ascribe the foreign judgement with the effects of the Memberstate of Origin even in case these effects exceed the effects associated with a comparable judgement in the memberstate addressed ('*Wirkungserstreckung*').[318] However, this would lead to the conclusion that the recognition extends the effect of the judgment that already has become effective, namely the preclusion of a second procceding in the Member State of Origin. Accordingly, the recognition has to assign the foreign judgment with effects arising from German Civil Procedure.[319] To avoid this problem, some authorities determine the effects associated with the Wirkungserstreckung by equipping the foreign judgment with the effects associ-

[317] R. Geimer, 'Internationales Zivilprozessrecht' (ottoschmidt 2020), p. 1012.
[318] Cf. C. v. Bar and P. Mankowski, 'Internationales Privatrecht I' (C. H. Beck 2003), p. 430.
[319] v. Bar and Mankowski, supra n. 318, p. 432.

ated to a German judgment that equals the judgment with regard to the effects associated to it in the State of Origin ('*Wirkungsangleichung*').[320] However, the fact that the judgment has to be given effect according to German civil procedural law does not lead to the conclusion the the foreign judgment has to be dealt with as if it was a German judgment.[321] Rather, German civil procedural law can give effect to a foreign judgment.[322]

Accordingly, the majority of authorities is of the opinion that the effects associated with a judgment are generally stipulated by the *lex fori* of the State of Origin whilst German civil procedural law stipulates the outer limits of these effects.[323] This means that the principle of determining the effects of a judgment according to the *lex fori* of the State of Origin finds its limits when the extents of the effects, i.e. res judicata, of the *lex fori* of the State of Origin are complete alien to the German system ('*Kumulationstheorie*' or '*kontrollierte Wirkungserstreckung*').[324] For example, the German civil procedure does not know the principle of 'issue estoppel' and, thus, such effects are not extended when recognising the foreign decision. Likewise, the German system does not know a generally binding effect of the legal reasoning of the judgment. Accordingly, this effect could not be extended even though it is part of the *lex fori* of the Member State of Origin.[325] While the domestic German concept does not extend the effects of res judicata to preliminary questions, this extension is not an alien to German civil procedure, e.g. § 322 II ZPO. Accordingly, the binding effect of decisions concerning preliminary questions can be extended.[326]

However, these different opinions do not matter with regard to European judgments as the limitations do not apply within the sphere of application of B Ia.[327] Within the sphere of application of B Ia, judgments generally are recognized *ipso iure*.[328] Pursuant to the CJEU, the

[320] v. Bar and Mankowski, supra n. 318, p. 432; Geimer, supra n. 317, p. 1005.
[321] v. Bar and Mankowski, supra n. 318, p. 432.
[322] v. Bar and Mankowski, supra n. 318, p. 432.
[323] Cf. v. Bar and Mankowski, supra n. 318, p. 432, footnote 607 with further references; Geimer, supra n. 317, p. 1005.
[324] v. Bar and Mankowski, supra n. 318, p. 432; Geimer, supra n. 317, p. 1005 et seq.
[325] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 328 ZPO margin n. 171.
[326] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 328 ZPO margin n. 172.
[327] BGH, Urteil v 12 December 2007 – IV ZR 20/07, FamRZ 2008, p. 400; Geimer, supra n. 317, p. 1021; R. Geimer, in R. Geimer und R. Schütze, Europäisches Zivilverfahrensrecht (C. H. Beck 2010), Art. 33 Brüssel I margin n. 13; S. Leible, in T. Rauscher, Europäisches Zivilprozess- und Kollisionsrecht, Issue I (ottoschmidt 2016), Art. 36 B Ia margin n. 5.
[328] Leible, in Rauscher, supra n. 327, Art. 36 B Ia margin n. 2.

recognition results in the extension of the effects of the judgment.[329] If the law of the Member State of Origin extend res judicata effects to the reasoning of the judgements, a German court is bound by the reasoning of the judgement as long as the requirements for recognition and enforcement are met.[330] With regard to Art. 33 B I[331], the German Federal Court of Justice explicitly stated that '*even if the effects associated with the judgment in the Member State of origin exceed the effects associated with a comparable judgment under law of the Member State addressed, the latter has to acknowledge all effects associated with the judgment without restrictions within the sphere of application of the Brussel I regulation.*'[332]

5.5.2.3 If res judicata effect is not extended to elements of the reasoning in the Member State of origin but is in Member State addressed?

The effects assigned to a judgment after the recognition cannot go beyond the effects that were originally associated with the judgment in the Member State of Origin.[333] The recognition of the foreign judgement merely extends the effects associated with the judgment in the Member State of Origin to the Member State addressed. Hence, the recognition cannot only extend effects that already existed, it cannot assign further effects to the judgment.[334]

5.5.3 How do you handle the limitation period problem in the scenario described above? The lis pendens case law of the CJEU prevents the filing of a warranty liability claim in State Z as long as a payment claim is pending in State Y. How can the buyer prevent the limitation period from running in State Z (your home State) without making the warranty case pending?

The problem of limitation period is qualified as a matter of substantive law. Hence, the problem only arises if German law is the law applicable to the substance of the dispute. In this

[329] CJEU 4 February 1988, Case C-145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg, ECLI:EU:C:1988:61; CJEU 28 April 2009, Case C-420/07, Meletis Apostolides v David und Linda Orams, ECLI:EU:C:2009:271.
[330] Geimer, in Geimer and Schütze, supra n. 327, Art. 33 Brüssel I margin n. 13.
[331] Art. 33 B I is largely identical to Art. 36 B Ia, Leible, in Rauscher, supra n. 327, Art. 36 B Ia margin n. 1.
[332] BGH, Urteil v 12 December 2007 – IV ZR 20/07, FamRZ 2008, p. 400.
[333] Geimer, supra n. 317, p. 1012.
[334] Geimer, in Geimer und Schütze, supra n. 327, Art. 33 Brüssel I margin n. 12.

case, the majority of German authorities is of the opinion that any foreign action prevents the expiration of the limitation period pursuant to § 204 I Bürgerliches Gesetzbuch if the judgment can be recognised and enforced.[335] Accordingly, actions that have been initiated within the sphere of application of B Ia generally stop the limitation period, even if the court seised with the dispute lacks the jurisdiction.[336] However, this effect is limited to the matter in dispute[337] which has to be interpreted autonomously as it affects the interpretation of German substantive law. Following this interpretation, B is barred from bringing its claim for liability on warranty in Germany due to European lis pendens. At the same time, B cannot rely on this action's effect to impede the limitation period as – according to the German understanding – the claim for the purchase price and the claim for liability on warranty do not concern the same matter in dispute.[338]

These cases are particularly problematic if the first action is a negative declaratory relief as – in domestic cases – an action for negative declaratory relief does not stop the limitation period even if concerns the same matter in dispute.[339] However, the problem does not occur within German civil procedure. If the second action requests performance for the same matter in dispute, it renders the negative declaratory action inadmissible as the action seeking performance provides for more legal protection.[340] This is due to the fact that only the judgment resulting from an action seeking performance could be enforced, the claimant of the negative declaratory action loses its interest in the declaratory relief, which is a requirement for the admissibility of declaratory actions in German civil procedure pursuant to § 256 I ZPO.[341] However, the first action bars the admissibility of the second action even in case it is a negative declaratory relief in the sphere of application of B Ia.[342]

[335] P. Gottwald, 'Internationales Zivilprozessrecht' (ottoschmidt 2013), p. 330; H. Grothe, in F. J. Säcker et al., Münchener Kommentar zum Bürgerlichen Gesetzbuch, Issue 1 (C. H. Beck 2018), § 204 BGB margin n. 10.
[336] Chr. Wolf, 'Verjährungshemmung auch durch Klage vor einem international unzuständigen ausländischen Gericht?', IPRax (2007), p. 180.
[337] H. Dörner, in R. Schulze, Bürgerliches Gesetzbuch (Nomos 2019), § 204 BGB margin n. 2.
[338] Cf. C. Wolf, 'Rechtshängigkeit und Verfahrenskonnexität nach EuGVÜ', EuZW (1995), p. 365 at p. 367.
[339] BGH, Urteil v 15 August 2012 – XII ZR 86/11, NJW 2012. p. 3633; Grothe, in Säcker et al., supra n. 335, § 204 BGB margin n. 4; M.-R. McGuire, 'Verfahrenskoordination und Verjährungsunterbrechung im Europäischen Prozessrecht' (Mohr Siebeck 2004), p. 235.
[340] BGH, Urteil v 21 December 2005 – X ZR 17/03, NJW 2006, p. 515; Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 256 ZPO margin n. 66 et seq.; Gottwald, in Rosenberg et al., see supra n. 231, § 91 ZPO margin n. 27.
[341] Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 256 ZPO margin n. 66 et seq.
[342] McGuire, supra n. 339, p. 89 et seq.

In the view of some authorities, the problem does not exist as the defendant of the first action maintains the possibility to raise a counterclaim that stops the limitation period.[343] However, it is possible that the claim which is barred due to the first action becomes time-barred prior to the defendant's knowledge of the first action.[344]

> Example: The debtor initiates its negative declaratory action in Member State A on December, 1st. Without having knowledge of this action, the creditor initiates its action seeking performance on December, 15th in Member State B. The limitation period for the substantive claim expires on December, 31st. If the service of the negative declaratory action to B takes more than a month, the substantive claim would be time-barred prior to the creditors chance to initiate the counter-claim.[345]

It has been suggested to implement a solution following the English doctrine of relation back, according to which the date of initiation of the counter-claim refers back to the date of initiation of the first action for the purposes of determining the stop of the limitation periods.[346] Yet, no solution exists that allows the buyer to stop the limitation period without filing a claim.

Part 6: Effects of judgements - res judicata and enforceability

6.1 What is the relation of res judicata to enforceability, i.e. can a judgment be enforced before it is res judicata?

Comment: *Does your legal order operate with the institution of "provisional enforceability", i.e. the enforceability of judgments that are not (yet) res judicata, but have nonetheless been endowed, either by the decision of a court or by operation of law, with the attribute of enforceability? Do you think such (foreign) judgments might be controversial from the perspective of the (procedural) legal order of your Member State, if the creditor attempted to enforce them? For an example of provisional enforceability, see §§704, 708, 709 of the German ZPO).*

The relevant sections for provisional enforceability are the following:

§ 704 ZPO – Enforceable final judgements

[343] Leible, in Rauscher, supra n. 327, Art. 29 B Ia margin n. 17.
[344] McGuire, supra n. 339, p. 97 et seq.
[345] McGuire, supra n. 339, p. 97.
[346] McGuire, supra n. 339, p. 337 et seq.

Compulsory enforcement may be pursued based on final judgments that have become final and binding, or that have been declared provisionally enforceable.

§ 708 ZPO - Provisionally enforceable judgments delivered without security being provided

The following are to be declared provisionally enforceable without any provision of security:

1. Judgments delivered based on an acknowledgment or a waiver;
2. Default judgments and judgments handed down on the basis of the record as it stands against the party failing to appear at the hearing pursuant to section 331a;
3. Judgments by which the protest was overruled as inadmissible pursuant to section 341;
4. Judgments delivered in proceedings on claims arising from a deed, or from a bill of exchange, or in proceedings on claims asserted concerning the payment of a cheque;
5. Judgments declaring that a judgment subject to a reservation of rights delivered in proceedings on claims arising from a deed, from a bill of exchange or on claims asserted concerning the payment of a cheque is upheld by way of cancelling the reservation;
6. Judgments refusing to issue seizures or injunctions, or judgments repealing them;
7. Judgments delivered in disputes between the lessor and the lessee or sublessee of residential or other spaces, or between the lessee and the sublessee of such spaces regarding permission to use the spaces, the use or vacation of same, the continuation of the lease relationship for residential spaces based on sections 574 to 574b of the Civil Code (Bürgerliches Gesetzbuch, BGB) as well as regarding the retention of objects introduced into the leased spaces by the lessee or sublessee;
8. Judgments meting out an obligation to pay maintenance, annuities for the deprivation of a maintenance claim or annuities for injuries to limb or health, insofar as the obligation refers to the period following the time at which an action was brought in the courts and the last quarter preceding that time;
9. Judgments pursuant to sections 861 and 862 of the Civil Code (Bürgerliches Gesetzbuch, BGB) for the restoration of possession or for the removal or cessation of an interference with possession;
10. Appellate judgments in disputes under property law. Where leave to appeal is denied by a judgment or court order pursuant to section 522 (2), this is to mandate that the judgment is provisionally enforceable without any provision of security;
11. Other judgments in disputes under property law if the matter on which the sentence is handed down is not in excess of 1,250 euros, or if only the decision as to costs is enforceable and enables enforcement in the amount of not more than 1,500 euros.

§ 709 ZPO - Provisionally enforceable judgments delivered against security

Other judgments are to be declared provisionally enforceable against provision of security, the amount of which is to be determined. Insofar as a monetary claim is to be en-

> forced, it shall be deemed compliant with the present rule if the amount of the security is specified in a determined ratio to the amount to be enforced in the particular case. Where a judgment upholding a default judgment is concerned, it is to stipulate that enforcement efforts under the default judgment may be continued only against provision of security.

According to § 704 ZPO, the general principle is a final and binding judgment – i.e. a judgment that has become res judicata – as the basis for the enforcement of judgments.[347] To the contrary, the provisional enforcement of judgements merely constitutes the exemption.[348] However, the practical experience is the opposite.[349]

Provisional enforcement is possible prior to the judgment becoming res judicata subject to the condition that the court rendering the judgement added a clause allowing for the provisional enforcement, § 704 ZPO. The judgments mentioned within § 708 ZPO can be provisionally enforced without security, the remainder of judgments can be provisionally enforced against the provision of security only pursuant to § 709 ZPO.

Within the sphere of application of § 708 No. 1-3 ZPO, the clause reads as follows:

> The judgment is provisionally enforceable.

Within the sphere of application of § 708 No. 4-11 ZPO, the clause reads as follows:

> The judgment is provisionally enforceable. The judgment-debtor can avert the enforcement by security deposit in the amount of 110% if the judgement-creditor does not provide a security deposit in the same amount prior to the enforcement.

Within the sphere of application of § 709 ZPO, the clause reads as follows:

> The judgment is provisionally enforceable against a security in the amount of 110% of the amount to be enforced under the judgement.

6.1.1 Is provisional enforceability suspended (by operation of law or at the discretion of the court) if an appeal is lodged?

Means of recourse against a judgement generally do not influence the provisional enforceability of the judgment. Rather, the provisional enforceability is possible to balance the (time) risk

[347] Gaul et al., supra n. 10, p. 175.
[348] Gaul et al., supra n. 10, p. 175.
[349] Gaul et al., supra n. 10, p. 269.

that follows from recourse against the judgment.[350] Otherwise, the judgment-debtor would have the option to delay enforcement by using any means of recourse against the judgment, irrespective of the respective chances of success.[351] As the delay in enforcement bears the risk of a decrease of the assets of the judgment-debtor, the provisional enforceability of the judgment eliminates this risk.[352]

However, § 719 I ZPO provides for the enforcement-debtor's right to temporarily stop the enforcement in case of an appeal, § 719 II ZPO stipulates the same right for the scenario of a cassation complaint.

§ 709 ZPO - Provisional termination in the case of appellate remedies and protests having been filed

(1) Insofar as a judgment declared provisionally enforceable is protested against or appealed, the stipulations of section 707 shall apply mutatis mutandis. Compulsory enforcement under a default judgment may be terminated only against provision of security unless the default judgment was handed down in a manner not in keeping with the law, or the party failing to comply with procedural rules demonstrates to the satisfaction of the court that it failed to comply with procedural rules through no fault of its own.

(2) If an appeal on points of law is lodged against a judgment declared provisionally enforceable, the court hearing the appeal on points of law shall direct, upon corresponding application being made, that compulsory enforcement is to be temporarily stayed should the enforcement entail a disadvantage that it is impossible to compensate or remedy, unless overriding interests of the creditor should contravene this decision. The parties are to demonstrate to the satisfaction of the court that the factual prerequisites are given.

(3) The decision is delivered by court order.

§ 707 ZPO - Temporary stay of enforcement

(1) If a petition is filed for the restoration of the status quo ante or for proceedings to be reopened, or if an objection as provided for by section 321a is lodged, or if the legal dispute is continued following the pronouncement of a judgment subject to a reservation of rights, the court may direct, upon corresponding application being made, that compulsory enforcement be temporarily stayed, against or without provision of security, or that it be pursued only against the provision of security, and that the enforcement measures are to be revoked against provision of security. Compulsory enforcement may be discontinued without any security being provided only if it is demonstrated to the satisfaction of the court that the debtor is una-

[350] Brox and Walker, supra n. 11, p. 33.
[351] Brox and Walker, supra n. 11, p. 33.
[352] Brox and Walker, supra n. 11, p. 33.

ble to provide security and that the enforcement would entail a disadvantage that it is impossible to compensate or remedy.

(2) The decision is delivered by a court order. The court order is incontestable.

In case of an appeal or the opposition to a default judgement, the enforcement debtor can apply with the court seised in the matter to stop, limit or reverse the provisional enforcement. [353] This application requires the appeal or opposition to be admissible, the appeal or opposition must not be pointless.[354] If the recourse is not absolutely pointless, the court seised has to weigh the enforcement-creditor's interests in the provisional enforcement against the enforcement-debtor's interest in the stay of the provisional enforcement.[355]

In addition, for judgements which are provisionally enforceable without security, the stop of the provisional enforcement is only possible if the enforcement-debtor proves that it might suffer a damage that it could not be compensated for.[356] Otherwise, the enforcement should be continued against security. If the provisional enforcement was allowed against security, the enforcement-debtor can apply for a stop of provisional enforcement only if it establishes that the security does not cover the potential damage arising out of the enforcement.[357] If the court seised orders the stay of provisional enforcement, it generally does so against security provided by the enforcement-debtor.[358] Only in exceptional circumstances – being that the enforcement-debtor establishes that it cannot provide security and that the provisional enforcement causes irreversible harm – the court orders stay of the enforcement proceedings without security provided by the enforcement-debtor.[359] This exception does not apply to the provisional enforcement of default judgements which could only be stayed against security provided by the enforcement-debtor, § 719 I sentence 2 ZPO.

During a cassation complaint, the enforcement-debtor can apply for a stay of the provisional enforcement.[360] For this application to be successful, the cassation complaint has to be admissible, the success of the cassation complaint must not be excluded in any event and the enforcement-debtor has to prove *prima facie* that the provisional enforcement would lead to a

[353] Gaul et al., supra n. 10, p. 293; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 707 ZPO margin n. 9.
[354] Gaul et al., supra n. 10, p. 293.
[355] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 707 ZPO margin n. 18.
[356] Gaul et al., supra n. 10, p. 293.
[357] Gaul et al., supra n. 10, p. 293.
[358] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 707 ZPO margin n. 22.
[359] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 707 ZPO margin n. 23.
[360] Gaul et al., supra n. 10, p. 294.

damage that it could not be compensated for.[361] However, the court seised with the cassation complaint can only order the stay of provisional enforcement if the interests of the enforcement-creditor do not outweigh the interests of the enforcement-debtor.[362]

6.1.2 Who bears the risk if the provisionally enforceable judgement is reversed or modified?

The provisional enforcement grants the enforcement-creditor the advantages of enforcing the judgment prior to its final and binding character.[363] Accordingly, the enforcement-creditor bears the risk of taking these advantages, in particular the threat of being liable in case the judgment is changed or reversed.[364]

6.1.2.1 Must the judgment creditor provide security before the judgment can be enforced?

Whether or not the enforcement-creditor has to provide security depends on the judgment itself.

Judgments based on an acknowledgement or a waiver by the defendant, default judgments and judgements rejecting the opposition to default judgments are enforceable without providing security, § 708 No. 1-3 ZPO. In these scenarios, the judgments are already based upon the action of the defendant. Accordingly, it is not justified to further protect the defendant's interests.[365]

Judgments resulting from a proceeding based on documents, a bill of exchange or a cheque, § 708 No. 4 ZPO, judgments confirming preliminary judgments resulting from such proceedings, § 708 No. 5 ZPO, judgments that reject or lift provisional measures, § 708 No. 6 ZPO are provisionally enforceable due to their urgency.[366] Judgments resulting from rental disputes, § 708 No. 7 ZPO, judgments ordering the payment of special maintenance or annuity resulting from an accident etc, § 708 No. 8 ZPO, judgments concerning the possession of goods, § 708 No. 9 ZPO are subject to provisional enforcement without security given their

[361] Gaul et al., supra n. 10, p. 294.
[362] Gaul et al., supra n. 10, p. 294.
[363] Gaul et al., supra n. 10, p. 269.
[364] Gaul et al., supra n. 10, p. 269.
[365] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 708 ZPO margin n. 9.
[366] Gaul et al., supra n. 10, p. 269.

special need for timely remedial actions.[367] Further, all judgements resulting from an appeal in monetary proceedings, § 708 No. 10 ZPO are subject to provisional enforcement without security as the appeal that rendered the same judgment again provides for a higher reliability of the judgment's content.[368] Lastly, judgments that do not order the payment of more than 1.250 € (1.500 € if the amount only refers to the costs of the proceedings) are provisionally enforceable without security given that the threat for damages is relatively low considering the amount in dispute.[369]

However, the enforcement-debtor has to be provided with the chance to avert the enforcement by providing security in the events of § 708 No. 4-11 pursuant to § 711 ZPO ('*Abwendungsbefugnis*'). This should eliminate the risk that the enforcement-creditor forfeits the outcome of the enforcement due to a delay caused by the enforcement-debtor. The amount of security is meant to cover 100 % of the amount that will be enforced plus a certain percentage that should cover additional costs.[370] If the enforcement-creditor wishes to continue the enforcement, it has to provide security in case the judgment is changed or reversed.[371]

All other judgments are provisionally enforceable against security provided by the enforcement-creditor according to § 709 ZPO. The amount of the security has to be determined on a case-by-case basis but should in general be suited to cover all potential damages arising out of the provisional enforcement in case the judgment is changed or reversed.[372]

6.1.2.2 Must the creditor compensate the debtor for damages he has suffered by the judgement being enforced, or by the payments he had to make, or any other actions he had to take in order to avert enforcement?

§ 717 II ZPO stipulates the enforcement-creditors liability with regard to damages resulting from the provisional enforcement of the judgment in case it is changed or reversed.

§ 717 ZPO - Effects of a judgment reversing or modifying the original judgment

(1) …

[367] Gaul et al., supra n. 10, p. 269.
[368] Gaul et al., supra n. 10, p. 269.
[369] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 708 ZPO margin n. 19.
[370] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 708 ZPO margin n. 6.
[371] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 708 ZPO margin n. 10.
[372] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 709 ZPO margin n. 4.

(2) If a judgment declared provisionally enforceable is reversed or modified, the plaintiff shall be obligated to compensate the defendant for the damages he has suffered by the judgment being enforced, or by the payments he had to make, or any other actions he had to take in order to avert enforcement. The defendant may assert the claim to compensation of damages in the pending legal dispute; once this claim is asserted and filed, it is to be deemed as having become pending at the time at which the payment was made or other action was taken.

(3) The stipulations of subsection (2) are not to be applied to the appellate judgments designated in section 708 number 10, to the exception of default judgments. Insofar as such a judgment is reversed or modified, the plaintiff is to be sentenced, upon a corresponding petition having been filed by the defendant, to reimburse the latter for the payments made or other actions taken on the basis of that prior judgment. The obligation of the plaintiff to so reimburse the defendant is determined by the rules as to the surrender of the result of any unjust enrichment. Once the petition has been filed, the claim to reimbursement is to be deemed as having become pending at the time at which the payment was made or other action was taken; even where the petition is not filed, the effects tied to the pendency of the matter pursuant to the stipulations under civil law shall occur with the payment being made or other action being taken.

The ratio underlying the provision is debated amongst authorities. Some authors are of the opinion that the liability stipulated by § 717 II ZPO follows from unlawful behaviour.[373] The moment the judgment that created the basis for the provisional enforcement is changed or reversed, the basis for the enforcement ceases. That moment, the access to the assets of the enforcement-debtor – i.e. the enforcement - becomes unlawful.

However, this opinion does not consider the fact that the moment the enforcement took place, the provisionally enforceable judgment still constituted a basis for the enforcement and that a lawful action could not be turned into an unlawful one in retrospective.[374] Rather, the enforcement-creditor that enforces the judgment prior to res judicata willingly takes the risk associated with the provisional enforcement and, hence, § 717 II ZPO bases the liability upon this risk.[375] Accordingly, the German Federal Court of Justice concludes that § 717 II ZPO

[373] Cf. Gaul et al., supra n. 10, p. 300 at footnote 17.
[374] Gaul et al., supra n. 10, p. 301.
[375] Brox and Walker, supra n. 11, p. 42; Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 7; J. Kindl, in Saenger (ed.), supra n. 67, § 717 ZPO margin n. 1; R. Lackmann, in Musielak and Voit, supra n. 37, § 717 ZPO margin n. 4; W. Münzberg, in R. Bork and H. Roth, Stein/Jonas Kommentar zur Zivilprozessordnung, Issue 7 (Mohr Siebeck 2002), § 708 ZPO margin n. 9; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 717 ZPO margin n. 7.

stipulates a procedural absolute liability for the risks inherent to the provisional enforcement of judgements.[376]

The enforcement-debtor's claim for damages requires that the judgment that has been provisionally enforced is (partially) changed or reversed with regard to the content of the judgment.[377] This means that it is not sufficient if the enforcement-clause is changed or reversed.[378] However, it is not relevant whether the judgment is changed or reversed for substantive or procedural reasons.[379] The claim further requires that the enforcement-creditor enforced the judgment or that the enforcement of judgement was imminent causing the enforcement-debtor to comply with the judgement.[380] The latter requires that the enforcement-creditor acted in a way threatening the enforcement-debtor with the enforcement of the judgment ('*Vollstreckungsdruck*').[381]

6.1.2.3 Does the answer to the previous question (6.1.2.2) vary, if the debtor voluntarily payed (performed) the claim?

In case the enforcement-debtor voluntarily performs the claim without any pressure from being applied by the enforcement-creditor, the claim for damages does not arise as the second requirement of the damage claim is not met given that the enforcement-creditor did enforce the judgment and there has not been any imminent threat of enforcement. [382] Whilst it is true that the enforcement-creditor bears the risk of the enforcement prior to res judicata,[383] the risk of enforcement prior to res judicata cannot materialize if the enforcement-creditor does not

[376] BGH, Urteil v 5 February 2009 – IX ZR 36/08, NJW-RR 2009, p. 658; BGH, Urteil v 17 November 2005 – IX ZR 179/04, NJW 2006, p. 443; BGH, Urteil v 5 October 1982 – VI ZR 31/81, BGHZ, 85, 110.
[377] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 14.
[378] Brox and Walker, supra n. 11, p. 42; Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 14.
[379] Brox and Walker, supra n. 11, p. 42; Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 17.
[380] Brox and Walker, supra n. 11, p. 43; Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 15.
[381] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 15.
[382] Gaul et al., supra n. 10, p. 304.
[383] Gaul et al., supra n. 10, p. 304.

provisionally enforce the judgment.[384] Rather, the voluntary performance deprived the enforcement-creditor of the chance to refrain from enforcing the judgment.[385]

The same holds true for payments following non-enforceable titles, in particular declaratory judgments.[386]

6.1.2.4 Does the answer to the previous question (6.1.2.2) vary, if the judgement was a default judgement, by a first instance court or a court of appeals?

In general, the answer to question 6.1.2.2 remains the same. While judgments rendered by a court of appeals are associated with higher legal certainty, the modification or reversion of these judgments usually does not lead to a damage claim pursuant to § 717 II ZPO. Rather, the enforcement-creditor merely has to return the results of the enforcement by means of unjust enrichment according to § 717 III ZPO. However, in case of a default judgment, the court only considers the claim on a prima facie basis. Hence, the higher legal certainty cannot justify the the exclusion of the claim for damages. Accordingly, § 717 III ZPO only applies to court of appeals' judgments rendered after contradictory proceedings.[387]

Nevertheless, some authors find it to be contradictory if the enforcement-creditor was allowed to refrain from appearing in the proceedings and from defending itself properly, only to claim damages for the enforcement of a judgment that it might have prevented in case it had appeared in the proceedings or defended itself.[388] As the damage claim constitutes a standard substantive damage claim, it is subject to the usual provisions of substantive law. Accordingly, the court might consider the fact that the enforcement resulted from a default judgment by means of objections of the enforcement-creditor, in particular the objection that the enforcement-debtor contributed to the damages ('*Mitverschulden*') pursuant to § 254 Bürgerliches Gesetzbuch (henceforth: BGB).[389] The German Federal Court of justice has accepted the objection of contribution with regard to provisional measures in case the respective other party

[384] Gaul et al., supra n. 10, p. 304.
[385] Gaul et al., supra n. 10, p. 304.
[386] Gaul et al., supra n. 10, p. 304.
[387] Brox and Walker, supra n. 11, p. 45, 46.
[388] Gaul et al., supra n. 10, p. 308.
[389] Lackmann, in Musielak and Voit, supra n. 37, § 717 ZPO margin n. 13; Gaul et al., supra n. 10, p. 308.

gave reason to initiate or continue with the provisional measures.[390] Likewise – also with regard to provisional measures – the enforcement-debtor can contribute to the damages by refraining from raising a promising opposition.[391] So far, there has not been any decision with regard to default judgments.

However, the risk associated with the enforcement prior to res judicata materializes, irrespective of the fact whether the enforcement-debtor contributed to the judgment or not.[392] Therefore, it follows from the nature of an absolute risk liability claim that the fact that the judgment that has been provisionally enforced was obtained by default of the enforcement-debtor.

6.1.2.5 What is the scope of the compensation? Is it limited to direct loss or is indirect loss also covered?

The scope of the compensation is subject to the general provision of damage calculation contained in the Bürgerliches Gesetzbuch, §§ 254 et seq. BGB.[393] In general, those provisions aim at the restoration of the *status quo ante*, § 249 I BGB. In case this is not possible, the enforcement-creditor has to monetarily compensate the enforcement-debtor for its losses, §§ 250, 251 BGB. These losses include direct monetary losses as well as loss of profit, § 252 BGB, but do not entail immaterial losses.[394] Furthermore, the damages do not encompass the losses caused during the enforcement itself.[395]

[390] BGH, Urteil v 13 October 2016 – IX ZR 149/15, NJW 2017, p. 1600 at p. 1603.
[391] BGH, Urteil v 23 March 2006 – IX ZR 134/04, NJW 2005, p. 2557 at p. 2560.
[392] LG Nürnberg-Fürth, Urteil v 30 September 2015 – 6 O 488/07, ECLI:DE:LGNUERN:2015:0930.60488.07.0A; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 717 ZPO margin n. 16.
[393] BGH, Urteil v 3 July 1984 – VI ZR 264/82, NJW 1985, p. 128 at p. 129; Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 18.
[394] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 18.
[395] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 717 ZPO margin n. 18.

6.2 Does your legal order prescribe a suspensive period within which the judgement creditor cannot initiate the enforcement proceedings? For example, must the judgement creditor first demand payment from the debtor before he can move to enforcement (execution of the judgement)?

Comment: *The question is framed in general terms regarding enforcement of judgements, not in relation to provisional enforceability. If answered in the positive, please indicate what are the legal consequences of the suspension, i.e. is the judgement by operation of law not considered enforceable within this period or does the judgement creditor merely take on the risk of bearing costs for enforcement*.

The German concept of enforcement requires that the enforcement-debtor has been served with the enforcement-title, i.e. the judgement, pursuant to § 750 I ZPO. In general, the enforcement-creditor can apply for the enforcement once the enforcement-debtor has been served. However, there are to exceptions to this general principle.[396]

§ 750 ZPO - Prerequisites for compulsory enforcement

(1) Compulsory enforcement may be commenced only if the persons for and against whom it is to be performed have been designated by name in the judgment or in the court certificate of enforceability attached to it, and if the judgment has already been served or is served concurrently. Service by the creditor shall be deemed compliant with the present rule; in such event, the execution copy of the judgment need not set out the facts and circumstances on which the ruling is based, nor need it set out its reasons.

(2) Where the enforcement concerns a judgment the enforceable execution copy of which was issued pursuant to section 726 (1), or where a judgment that is legally effective for or against one of the persons designated therein in accordance with sections 727 to 729, 738, 742, 744, section 745 (2) and section 749 is to be enforced for or against one of these persons, the court certificate of enforceability must also have been served along with the judgment to be enforced prior to the commencement of compulsory enforcement, or must be served concurrently with the commencement of compulsory enforcement, and where the court certificate of enforceability has been issued based on public records or documents, or based on records or documents that have been publicly certified, a copy of such records of documents is likewise to be served.

(3) A compulsory enforcement pursuant to section 720a may be commenced only if the judgment and the court certificate of enforceability have been served at least two (2) weeks earlier.

In case the judgement concerns a monetary claim and is enforceable against security only, § 720a ZPO, the commencement of the enforcement is time-barred for two-weeks starting the

[396] Brox and Walker, supra n. 11, p. 92.

day the enforcement-title and the enforcement-clause have been served to the enforcement-debtor, § 750 III ZPO.[397] Accordingly, it is not possible for the enforcement-creditor to commence the enforcement. Pursuant to § 720a III ZPO, the enforcement-debtor is entitled to avert the enforcement by providing security in the amount of the claim that should be enforced. The two-week time limit grants the enforcement-debtor with the opportunity to provide the security required to avert the enforcement.[398]

Likewise, cost-decisions that are separated from the judgment, exequatur decisions concerning arbitral awards, out of court settlements and enforceable authentic documents can be enforced after the expiration of a two-week time period only.[399] During the two weeks, the enforcement-debtor is granted with the opportunity to prepare for the enforcement.[400]

6.3 Does the judgment incorporate elements akin to the French "command and order to the enforcement officer" (*Mandons et ordonnons a tous huissiers de justice à ce requis de mettre le present jugement à execution*) and what are its effect?

In German civil procedure, the judgment or enforcement title constitutes the legal basis for the enforcement.[401] The enforcement title determines the content and scope of enforcement and, thus, forms the parent act that allows the enforcement officer to infringe the enforcement-debtors assests.[402] However, the enforcement only takes place on the basis of the enforcement title that has been equipped with an enforcement clause pursuant to § 724 ZPO.[403]

§ 724 ZPO - Enforceable execution copy

(1) Compulsory enforcement will be pursued based on an execution copy of the judgment furnished with the court certificate of enforceability (enforceable execution copy).

(2) The enforceable execution copy is issued by the records clerk of the registry of the court of first instance and, should the legal dispute be pending with a court of higher instance, by the records clerk of that court's registry.

[397] H.-J. Heßler, in Krüger and Rauscher (eds.), supra n. 255, § 750 ZPO margin n. 87.
[398] Lackmann, in Musielak and Voit, supra n. 37, § 750 ZPO margin n. 23.
[399] Brox and Walker, supra n. 11, p. 92.
[400] Brox and Walker, supra n. 11, p. 92.
[401] Gaul et al., supra n. 10, p. 146.
[402] Gaul et al., supra n. 10, p. 146.
[403] Gaul et al., supra n. 10, p. 146.

The copy of the judgment or enforcement title that has been provided with the enforcement clause consttutes the enforceable execution copy ('*vollstreckbare Ausfertigung*').[404] The enforcement clause officially evidences that the enforcement title exists and that it is in fact enforceable.[405] Accordingly, the enforcement title is the precondition for the claim to enforcement while the enforcement clause merely serves the purpose of its execution.[406]

> **§ 725 ZPO - Court certificate of enforceability**
>
> The court certificate of enforceability:
>
> "The above execution copy is issued to (designation of the party) for the purposes of compulsory enforcement "
>
> is to be added to the execution copy of the judgment at its end, it is to be signed by the records clerk of the court registry, and is to be furnished with the court seal.

The enforcement officer is only allowed to enforce the judgment if he has been provided with the enforceable execution copy.[407] At the same time, the enforcement officer is obliged to enforcement the judgment in order to fulfill the enforcement-creditor's claim to enforcement against the state. Accordingly, the enforcement clause is a precondition for the enforcement officers legal duty to enforce the judgment. This means that the enforcement clause in connection with the judgment and the legal provision concerning enforcement add up to an order to the enforcement officer to enforcement the judgment and, thereby, fulfills the same purpose as the order to the enforcement officer whilst not stating it as explicit as the French *mandons et ordonnons a tous les huissers*.

However, these considerations only hold true as long as the enforcement concerns movable property or the release of movable property as the enforcement officer is not competent for any further enforcement measures. The undertaking of acts or defaults or a declarations of will have to be enforcement by the court competent for the proceedings itself pursuant to §§ 887, 890, 894 ZPO. Enforcement concerning claims or other assests as well as enforcement concerning immovable property have to be undertaken by the enforcement court ('*Vollstreckungsgericht*') pursuant to §§ 828, 857, 864 et seq. ZPO.[408] In these cases, the judgment still has to be provided with an enforcement clause to be subject to enforcement pursuant to §

[404] Gaul et al., supra n. 10, p. 146.
[405] Gaul et al., supra n. 10, p. 146.
[406] Gaul et al., supra n. 10, p. 146.
[407] Gaul et al., supra n. 10, p. 318.
[408] E. Riedel, in Vorwerk and Wolf (eds.), supra n. 19, § 828 ZPO margin n. 1.

724 ZPO.[409] However, the enforcement clause does not entitle the enforcement officer but rather the compentent enforcement authority to enforcement the judgment and, thus, does not contain an equivalent to an order to the enforcement officer. Nevertheless, the judgment as the enforcement title in connection with the enforcement clause still provides for the basis of the enforcement-creditors claim to enforcement and, in consequence, establishes a duty for the competent enforcement authority to enforce the judgment.[410]

6.4 How would your legal order deal with foreign enforcement titles, which involve property rights or concepts of property law unknown in your system?

The enforcement of foreign judgments in Germany is in general subject to German law.[411] If the enforcement-proceedings lead to concepts which are foreign to the German system, this problem will be solved on the level of substantive law.[412] The foreign legal concept will be transformed in a functionally equivalent concept of German substantive law ('*Transposition*').[413] With regard to property law, this principle has b een stipulated within Art. 43 II Einführungsgesetz zum Bürgerlichen Gesetzbuch (henceforth: EGBGB).[414]

Art. 43 EGBGB - Rights in rem

(1) Interests in property are governed by the law of the country in which the property is situated.

(2) If an item, to which property interests attach, gets into another country, these interests cannot be exercised in contradiction to the legal order of that country.

(3) If a property interest in an item that is removed from another country to this country, has not been acquired previously, as to such acquisition in the country, facts that took place in another country are considered as if they took place in this country.

[409] Gaul et al., supra n. 10, p. 320.
[410] Cf. Gaul et al., supra n. 10, p. 318, 319.
[411] Schack, supra n. 50, margin n. 1061.
[412] BGH, Beschluss v 3 April 2019 – VII ZB 24/17, NJW-RR 2019, p. 930 at p. 932.
[413] A. Spickhoff, in H. G. Bamberger et al., Beck'scher Online Kommentar BGB (C. H. Beck 2020), Art. 43 EGBGB margin n. 13.
[414] Introductory Act to the German Civil Code.

Part 7: Effects of Judgments – Personal boundaries of res judicata

7.1 How are co-litigants and third persons (individuals who are not direct parties of the proceedings) affected by the judgment (e.g. alienation of a property or a right, which is the subject of an ongoing litigation; indispensable parties)?

In general, res judicata only affects the parties that were involved in the proceedings given that the parties can control and influence the proceedings.[415] Third parties are only affected by res judicata subject to the provisions §§ 325-327 ZPO[416] as they could not have influenced the proceedings and were not granted the right to be heard.[417] Parties to the proceedings are the claimant and the defendant.[418]

In case of a joinder of parties (*litis consortium* or subjective accumulation of claims), each member of the joinder initiates its own action that will be dealt with together with the actions started by the remainder of the joinder.[419] Accordingly, judgments independently become res judicata for each of the respective member of the joinder.[420] The same holds true for the scenario of a necessary joinder of parties, § 62 ZPO, even though the legal relationship that made the joinder necessary requires a uniform decision.[421] The latter might especially apply in the scenario of a property or a right which is owned by more than one person or a legal entity, e.g. if the judgment affects right associated with land that belongs to a community of heirs.[422]

If a third party has a legitimate interest in one party prevailing over the other, it may intervene in support of that party, § 66 ZPO. Whilst the party intervening does not become a party to the proceedings[423], § 68 ZPO stipulates that the factual and legal findings of the main proceedings are binding for the court seised with the follow-up proceeding between the intervening party and the opponent of the main proceeding.[424] In case A sued her lawyer B for damages arising out of the mandating contract, B's insurance company might intervene in support of B accord-

[415] Grunsky and Jacoby, supra n. 25, p. 214; Gottwald, in Rosenberg et al., supra n. 89, § 157 ZPO margin n. 1.
[416] In particular § 325 ZPO, see text to n. 7.3 infra.
[417] Gottwald, in Rosenberg et al., supra n. 89, § 157 ZPO margin n. 1.
[418] Grunsky and Jacoby, supra n. 25, p. 69.
[419] C. G. Paulus, 'Zivilprozessrecht' (Springer 2013), p. 43.
[420] Rather, 'the' judgement in case of a joinder of parties does not exist as the judgment concerning each member of the joinder of parties might be different, Gottwald, in Rosenberg et al., supra n. 89, § 48 ZPO margin n. 20.
[421] Gottwald, in Rosenberg et al., supra n. 89, § 49 ZPO margin n. 54.
[422] Paulus, supra n. 419, p. 43.
[423] Gottwald, in Rosenberg et al., supra n. 89, § 50 ZPO margin n. 47.
[424] Paulus, supra n. 419, p. 209; H.-J. Schultes, in Krüger and Rauscher (eds.), supra n. 63, § 68 ZPO margin n. 1.

ing to § 66 ZPO. In case A won the proceedings and received compensation from B, these facts are binding when B has to sue his insurance company for indemnification. In case the decision delivered in the main proceedings has an effect on the legal relationship between the party intervening and the opponent of the main proceedings, the party intervening is subject to the same provisions as he had joined the party it supported, § 69 ZPO ('*Streitgenössische Nebenintervention'*). Accordingly, the effects of judgments rendered in the main proceedings are the same as the effects in case of a joinder of parties.[425]

In case a party believes that it will be able to assert a warranty claim or a claim to indemnification against a third party should the main procceding's outcome not be in its favour, it might file third-party notice to that third party (*litis denuntiatio*) pursuant to § 72 I ZPO. According to § 74 I ZPO, the effects of this third-party notice are the same as the effects of a third-party intervention.

7.2 Do certain judgments produce in rem (*erga omnes*) binding effects?

Judgments that declare resolutions of legal bodies of legal entities null and void, for example the resolution resulting from the general meeting of shareholders pursuant to § 248 Aktiengesetz as well as comparable resolutions rendered in Limited Liability Companies ('*GmbH*'), §§ 47, 48, 75 II GmbH-Gesetz, or registered associations ('*Eingetragener Verein*'), § 32 BGB, receive *erga omnes* effects.[426] The same applies to decision arising out of proceedings concerning the parentage pursuant to § 184 II Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG). Those judgments have in common that they generally affect a group of people and, thus, it is of utmost importance to avoid contradictory decisions.[427]

[425] Gottwald, in Rosenberg et al., supra n. 89, § 50 ZPO margin n. 47.
[426] B. Gsell et al., beck-online.Grosskommentar BGB (C. H. Beck 2020), § 32 BGB margin n. 254; C. Schäfer, in W. Goette et al., Münchener Kommentar zum Aktiengesetz Issue 4 (C. H. Beck 2016), § 248 AktG margin n. 13; J. Wertenbruch, in H. Fleischer and W. Goette, Münchener Kommentar zum GmbHG Issue 2 (C. H. Beck 2019), Annex to § 47 GmbHG margin n. 360.
[427] Gottwald, in Rosenberg et al., supra n. 89, § 157 ZPO margin n. 5.

7.3 How are (singular and universal) successors of parties affected by the judgment?

Comment (7.3): *Explain how succession of parties occurs after the rendering of the judgment as well as in potential enforcement proceedings, and what acts, if any, must be undertaken for interested persons to demonstrate succession. In addition, explain whether there are circumstances in which succession is not possible, e.g. succession to non-pecuniary damages claims.*

§ 325 ZPO - Subjective legal validity

(1) A judgment that has entered into force shall take effect for and against the parties to the dispute and the persons who have become successors in title of the parties after the matter has become pending, or who have obtained possession of the disputed object such that one of the parties or its successor in title has become constructive possessor.

(2) The stipulations of civil law benefiting parties deriving rights from a person who is not a beneficiary in this regard shall apply mutatis mutandis.

(3) Should the judgment concern a claim arising from a realty charge, mortgage, charge on land, or annuity charge on land, it shall also be effective, with regard to the property, against the successor in title to any property so encumbered that has been disposed of, wherever the successor in title was not aware of any dispute pending before the court. The judgment shall be effective against the highest bidder obtaining title to real property by court order at an enforced auction only wherever the pending dispute was registered by no later than the date of the auction, prior to the call for bids having been made.

(4) If the judgment concerns a registered maritime mortgage, subsection (3), first sentence, shall apply mutatis mutandis.

According to § 325 I ZPO, res judicata affects the parties as well as anyone who became a successor of either party after the action has become pending. The same applies to anyone who received the possession of the object in dispute. Once the succession has been completed, the legal effects of res judicata are the same as the effects that the judgment would have had on the predecessor.[428] This holds true for universal succession as well as for singular succession without restrictions.[429] In addition, it is not relevant whether the succession is triggered by the parties or a by an official measure, whether it has been complete or only partial.[430] Rather, the decisive factor is that the authority to claim a right (from the perspective of the credi-

[428] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 325 ZPO margin n. 18.
[429] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 325 ZPO margin n. 23; Gottwald, in Rosenberg et al., supra n. 89, § 157 ZPO margin n. 7.
[430] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 325 ZPO margin n. 31 et seq.; Gruber, in Vorwerk and Wolf (eds.), supra n. 19, § 325 ZPO margin n. 10; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 727 ZPO margin n. 10.

tor) or to be obliged to comply with a claim (from the perspective of the debtor) has been lost by one party and has been obtained by another party.[431] This includes the mere change of possession of the object in dispute.[432]

Pursuant to § 265 I ZPO, the succession does not affect the party's position. However, the legal successor has the right to become an intervening party, § 265 II ZPO, without having the opportunity to contradict its predecessor.[433]

§ 265 ZPO - Disposition or assignment of the object in dispute

(1) The fact that the dispute has become pending does not rule out the right enjoyed by either of the parties to dispose over the object in dispute or to assign the claim being asserted.

(2) Such disposition or assignment shall not affect the proceedings. Without the opponent's consent, the successor in title shall not be entitled to assume the proceedings as the primary party instead of the predecessor in title, nor shall it be entitled to pursue a third-party intervention through an action against the two parties to a pending lawsuit. Should the successor in title act in support of a party to the dispute as an intervening third party, section 69 is not applicable.

(3) Should the plaintiff have disposed of or assigned his rights, the objection may be raised that he is no longer authorised to assert the claim wherever the judgment handed down against the successor in title pursuant to section 325 would not be valid.

In order to enforce the judgment, the enforcement-clause has to be modified to display the successor instead of its predecessor, § 727 I ZPO. For the court to issue the modified version of the judgment, the party requesting the modification has to prove the legal succession, which equals the legal term used within § 325 I ZPO.[434] To substantiate the legal succession, the party requesting the modification has to provide authentic documents to substantiate its allegation unless the succession is commonly known in public.[435]

§ 727 ZPO - Enforceable execution copies for and against successors in title

(1) An enforceable execution copy may be issued to the successor in title of the creditor designated in the judgment as well as against that successor in title of the debtor designated in the judgment, and against that possessor of the object that is

[431] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 727 ZPO margin n. 10.
[432] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 325 ZPO margin n. 22; Gruber, in Vorwerk and Wolf (eds.), supra n. 19, § 325 ZPO margin n. 12.
[433] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 265 ZPO margin n. 25.
[434] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 727 ZPO margin n. 10 and 22, 23.
[435] Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 727 ZPO margin n. 24.

the subject matter of the legal dispute, against whom the judgment has taken effect pursuant to section 325, provided that the legal succession or the circumstances of possession are known to the court or are proven by public records or documents, or records or documents that have been publicly certified.

(2) If the legal succession or the circumstances of possession are known to the court, this is to be mentioned in the court certificate of enforceability.

Part 8: Effects of Judgments - Temporal dimensions

8.1 Can changes to statute or case-law affect the validity of a judgment or present grounds for challenge?

The answer to this question has to differentiate between a subsequent change of statute and the subsequent change of case law. However, both do affect the validity of a judgment and both do not present grounds for challenge.

In particular circumstances, a subsequent change of statute can affect the res judicata effect. If the new statute is clearly meant to affect disputes that have been finally and bindingly resolved in the past, the enforcement-debtor can invoke the change of statute as a new fact in order to initiate a Vollstreckungsgegenklage[436].[437]

A mere change in case law does not affect the res judicata effect. Only in case that the German Federal Supreme Court ('*Bundesverfassungsgericht*') declared a statute to be null and void, the enforcement-debtor can avert the enforcement of a judgment based on this statute by means of the Vollstreckungsgegenklage.[438] Likewise, pursuant to § 10 Unterlassungsklagengesetz (UKlaG), the addressee of an injunction concerning the unlawful use of general conditions ('*Unterlassungsklage*') can invoke the Vollstreckungsgegenklage if the German Federal Court of Justice has allowed the use of the or comparable general conditions after the injunction has been rendered.[439]

[436] See text to n. 8.3 supra.
[437] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 256; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 158.
[438] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 159.
[439] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 255; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 159.

8.2 If the judgment requires the debtor to pay future (periodic) instalments (e.g. maintenance or an annuity by way of damages), how can the judgment be challenged in order to amend the amount payable in each instalment?

The judgement concerning future (periodic) instalments entails a prognosis concerning the height of the instalment. In case the height proves to be too low, the judgment has to be modified pursuant to § 323 ZPO ('*Abänderungsklage*').[440]

§ 323 ZPO - Modification of judgments

(1) Should a judgment stipulate an obligation to recurrent performance becoming due in the future, each part may petition for it to be modified. The complaint shall be admissible only if the facts and circumstances submitted by the plaintiff result in a material change to the factual or legal circumstances on which the decision is based.

(2) The complaint may only be based on grounds that have arisen after the hearing on the facts in the preceding proceedings was closed, and which it is or was not possible to assert by way of entering a protest.

(3) The modification is permissible for the time following the date on which the complaint has become pending.

(4) Should the factual or legal circumstances have undergone a material change, the decision is to be adjusted while upholding the foundations on which it is based.

The sphere of application of this provision reaches to all periodic instalments, which are defined as a plurality of obligations arising out of one particular legal relationship and where each individual obligation is only a matter of lapse of time.[441]

8.3 Can facts that occur after the last session of the main hearing and are beneficial to the defendant (debtor), be invoked in enforcement proceedings with a legal remedy?

The German system of enforcement is based upon a formalized enforcement process.[442] To accelerate the enforcement of judgments, the enforcement is based upon the judgment containing the enforcement-clause that has been served to the enforcement-debtor rather than being based upon the substantive claim.[443] Accordingly, enforcement officers in general only check these requirements as they do not have to deal with the substantive claim.[444] Nevertheless, the enforcement-creditors right to the enforcement of the judgment is rooted in the sub-

[440] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 323 ZPO margin n. 15.
[441] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 258 ZPO margin n. 3.
[442] Gaul et al., supra n. 10, p. 717.
[443] Gaul et al., supra n. 10, p. 717.
[444] Gaul et al., supra n. 10, p. 717.

stantive claim underlying the judgment. In the event that facts arise after the judgment has become res judicata and that these facts lead to a temporarily or permanent objection towards the claim, the enforcement-creditors right to enforcement is no longer justified as the substantive claim underlying the enforcement-title has (temporarily) ceased.[445] Pursuant to § 767 I ZPO, the enforcement-debtor can initiate an action impeding the enforcement ('*Vollstreckungsgegenklage*').

§ 767 ZPO - Action raising an objection to the claim being enforced

(1) Debtors are to assert objections that concern the claim itself as established by the judgment by filing a corresponding action with the court of first instance hearing the case.

(2) Such objections by way of an action may admissibly be asserted only insofar as the grounds on which they are based arose only after the close of the hearing that was the last opportunity, pursuant to the stipulations of the present Code, for objections to be asserted, and thus can no longer be asserted by entering a protest.

(3) In the action that he is to file, the debtor must assert all objections that he was able to assert at the time at which he filed the action.

The Vollstreckungsgegenklage does not affect the judgment's res judicata effect but rather declares the enforcement based upon the judgment inadmissible insofar as the new facts justified an objection to the substantive claim.[446] Likewise, the Vollstreckungsgegenklage does not affect the judgment or its substantive findings.[447]

Moreover, the facts must have occurred after the last session of the main hearing in which the court examined the facts underlying the judgments pursuant to § 767 II ZPO, irrespective of the fact whether the party was aware of the facts or not. In case the facts had occurred prior to this last hearing but the party did not become aware of the facts, it could not initiate a Vollstreckungsgegenklage. In this case, the enforcement-debtor has to initiate – if the requirements are met - an action seeking restitution pursuant to § 580 ZPO.

8.4 Can set-off of a judicial claim be invoked by the debtor in enforcement proceedings, even if the debtor's counterclaim already existed during the original proceedings?

Some authorities as well as German case law are of the opinion a set-off of a judicial claim might be invoked by the debtor in enforcement proceedings only if the facts justifying the set-

[445] Gaul et al., supra n. 10, p. 718.
[446] Gaul et al., supra n. 10, p. 720.
[447] Gaul et al., supra n. 10, p. 721.

off did not exist prior to the last hearing establishing the facts of the case.[448] If the facts already existed prior to this hearing, the enforcement-debtor cannot rely upon these facts during the enforcement proceedings.[449] Whilst it is true that the set-off becomes effective the moment it is invoked by the enforcement-debtor, this does not change the fact that the facts leading to the enforcement had already occurred.[450] However, the enforcement-debtor is not precluded from invoking the off-set during the enforcement if the facts had not occurred prior to the last hearing but the enforcement-debtor had the chance to cause these facts to occur.[451]

To the contrary, some authorities consider invoking the set-off to be a new fact.[452] If the enforcement-debtor invokes the set-off after the last hearing that established the facts, the fact would have occurred after this point in time and, consequently, the enforcement-debtor could initiate a Vollstreckungsgegenklage pursuant to § 767 I ZPO.

Part 9: Lis pendens and related actions in another Member State and irreconcilability as a ground for refusal of recognition and enforcement

9.1 The B IA Regulation uses the concept of a "cause of action" for the purposes of determining lis pendens.

9.1.1 How does your national legal order determine lis pendens?

Within German civil procedure, lis pendens ('*Rechtshängigkeit*') requires that the action has been initiated by the claimant and has been served to the defendant, §§ 263 I and 253 I ZPO.[453] The effects of lis pendens refer to the matter in dispute.[454] Once the matter in dispute

[448] BGH, Urteil v 8 May 2014 – IX ZR 118/12, NJW 2014, p. 2045 at p. 2047; W. Ernst, 'Gestaltungsrechte im Vollstreckungsverfahren', NJW 1986, p. 401 at p. 403; S. Lorenz, 'Schwebende Unwirksamkeit und Präklusion im Zwangsvollstreckungsrecht', NJW 1995, p. 2258 at p. 2260; N. Preuß, in Vorwerk and Wolf (eds.), supra n. 19, § 767 ZPO margin n. 48; B. Rimmelspacher, 'Materielle Rechtskraft und Gestaltungsrechte', JuS 2004, p. 560 at p. 564; K. Schmidt and M. Brinkmann, in Krüger and Rauscher (eds.), supra n. 255, § 767 ZPO margin n. 82.
[449] Gaul et al., supra n. 10, p. 744.
[450] Schmidt and Brinkmann, in Krüger and Rauscher (eds.), supra n. 255, § 767 ZPO margin n. 82.
[451] BGH, Urteil v 7 July 2005 – VII ZR 351/03, NJW 2005, p. 2926.
[452] Althammer, in Bork and Roth (eds.), supra n. 232, § 322 ZPO margin n. 241; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 166; Lackmann, in Musielak and Voit, supra n. 37, § 767 ZPO margin n. 37; Gottwald, in Rosenberg et al., supra n. 89, § 156 ZPO margin n. 4.
[453] Gottwald, in Rosenberg et al., supra n. 89, § 99 ZPO margin n. 4.
[454] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 261 ZPO margin n. 2.

has become lis pendens, neither of the parties can initiate a second action concerning the same matter in dispute ('*Rechtshängigkeitssperre*').[455] Accordingly, lis pendens concerning the same matter in dispute stipulates a negative procedural requirement rendering the action inadimissible equal to the the absence of res judicata concerning the same matter in dispute.[456]

9.1.2 How does the B IA concept of a "cause of action" correspond to any similar domestic concept in your national legal order? Describe how your national legal order establishes the identity of claims.

The German concept of matter in dispute (cause of action) is a contentious issue within German civil procedure.[457] The majority of authorities as well as the German Federal Court of Justice apply a two-tier understanting of same matter in dispute.[458] According to this understanding, the matter in dispute entails the decision desired by the claimant determined by the relief sought and the underlying factual circumstances.[459] To determine the underlying cirucumstances, one has to consider the facts that form part of the complex of facts submitted by the claimant to support the relief sought, when considered from the reasonable point of view of the parties and taking into account the character of the entirety of circumstances.[460] Identity of claims only exists if the relief sought is aiming at the same result based upon the same factual circumstances. Different reliefs sought based upon the same factual circumstances, same reliefs sought based upon different factual circumstances and different reliefs sought based upon different factual circumstances do not add up to an identity of claims.[461]

[455] Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 261 ZPO margin n. 4.
[456] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 261 ZPO margin n. 13; Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 261 ZPO margin n. 42; see text to n. 5.1.4.2 infra.
[457] H. Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 2 ZPO margin n. 3.
[458] BGH, Urteil v 22 October 2013 – XI ZR 42/12, NJW 2014, p. 314; BGH, Urteil v 5 November 2010 – IX ZR 293/07, BGHZ 183, 77; BGH; Urteil v 23 February 2006 - I ZR 272/02, BGHZ 166, 253; BGH, Urteil v 3 April 2003 – I ZR 1/01, BGHZ 154, 342; BGH, Urteil v 19 December 1991 - IX ZR 96/91, BGHZ 117, 1; Gottwald, in Rosenberg et al., see supra n. 89, § 93 ZPO margin n. 27; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 322 ZPO margin n. 112; Musielak, in Musielak and Voit, supra n. 37, Introduction margin n. 68; Gruber, in Vorwerk and Wolf (eds.), supra n. 19, § 322 ZPO margin n. 20; see text to n. 5.1.4.2 infra.
[459] Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 2 ZPO margin n. 4; Gottwald, in Rosenberg et al., supra n. 89, § 93 ZPO margin n. 28; Wolf 2006, supra n. 287, p. 740 at p. 741.
[460] BGH, Urteil v 22 October 2013 – XI ZR 42/12, NJW 2014, p. 314 at p. 315.
[461] Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 261 ZPO margin n. 56.

This understanding of identity of claims is narrower than the understanding according to the Kernpunkttheorie established by the CJEU.[462] Whilst claims that arise out of the same contract can constitute two different matters in dispute if the relief sought by the claimant differs,[463] the core (Kernpunkt) of both disputes is the same. In consequence, both actions concern the same matter in dispute according to the Kernpunkttheorie, irrespective of the relief sought by the claimant.[464]

9.1.3 Does your national legal order allow a negative declaratory action? If so, how is this action treated in relation to contradictory actions (e.g. for (payment of) damages)?

German civil procedure allows for a negative declaratory action.[465] Declaratory relief is aimed at the declaration of existence or non-existence of a legal relationship pursuant to § 256 I ZPO.[466] Accordingly, negative declaratory actions aim at the declaration of the non-existence of a legal relationship, e.g. a payment-obligation arising out of a particular contract.[467] The admissibility of a declaratory action requires inter alia that the claimant has a specific interest in the declaration.[468]

Declaratory actions contain the contradictory opposite.[469] Accordingly, the dismissal of a negative-declaratory action means that the court came to the conclusion that the matter in dispute does not provide for a legal basis to establish the legal relationship, e.g. that there is no legal basis for the remedy. However, declaratory judgments do not order the losing party to pay as declaratory actions are only aimed at the declaration of the existence or non-existence of a legal relationship and the operative part of declaratory judgments does not contain a legal order that could be enforced.[470] For this reason, any action seeking performance provides the *better* access to justice as the judgment would be enforceable.

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[462] Roth, in Bork and Roth (eds.), supra n. 97, Introduction § 253 ZPO margin n. 44.
[463] See text to n. 5.1.4.2.
[464] Roth, in Bork and Roth (eds.), supra n. 97, Introduction § 253 ZPO margin n. 44.
[465] Gottwald, in Rosenberg et al., supra n. 89, § 91 ZPO margin n. 1.
[466] Gottwald, in Rosenberg et al., supra n. 89, § 91 ZPO margin n. 1.
[467] Gottwald, in Rosenberg et al., see supra n. 89, § 91 ZPO margin n. 1; See Roth, in Bork and Roth (eds.), supra n. 97, § 256 ZPO margin n. 125.
[468] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 256 ZPO margin n. 16.
[469] See text to n. 5.3 infra.
[470] Götz, in Krüger and Rauscher (eds.), supra n. 255, § 704 ZPO margin n. 6; Ulrici, in Vorwerk and Wolf (eds.), supra n. 19, § 704 ZPO margin n. 5. However, delcaratory judgements, both – negative and positive, con-

Accordingly, lis pendens of a declaratory action does not render the action seeking performance concerning the same matter in dispute inadmissible.[471] Once the action seeking performance could not unilaterally be withdrawn,[472] the declaratory action will be dismissed due to a lack of interest in the declaration, given the fact that an action seeking performance concerning the same matter in dispute is pending.[473] Only in case the action seeking performance is initiated after the negative declaratory action has passed its last oral hearing and is ready for a decision, the lis pendens of the negative declaratory action bars the actions seeking performance.[474]

To the contrary, some authorities are of the opinion, that lis pendens of the negative declaratory actions bars the admissibility of the later action seeking performance. The defendant of the negative declaratory action should use its right to counterclaim and seek performance within the negative declaratory proceedings.[475] The German Federal Court of Justice applied this approach with regard to Art. 21 Brussels Convention (EuGVÜ), however, explicitly mentioning that this is due to the fact that the Brussels Convention does not know the concept of cessation of the interest in the declaration.[476]

9.1.4 How do you determine the identity of parties in national proceedings and how (if at all) does the methodology differ from that of the B IA?

Within German civil procedure, identity of parties refers to the involvement of the same parties, irrespective of their role in the proceedings.[477] Accordingly, identiy of parties covers sit-

tain an allocation of the legal costs. This part of the judgement is enforceable after the costs have been determined by the court by means of the cost decision (*'Kostenfestsetzungsbeschluss'*).

[471] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 256 ZPO margin n. 10.

[472] The action could not unilaterally be withdrawn once the defendant of the action seeking performance has argued within the main session, § 269 I ZPO, Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 256 ZPO margin n. 11.

[473] BGH, Urteil v 21 December 2005 – X ZR 17/03, NJW 2006, p. 515; BGH, Urteil v 7 July 1994 – I ZR 30/92, NJW 1994, p. 3107; BGH, Urteil v 22 January 1987 – 1 ZR 230/85, NJW 1987, p. 2680; Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 256 ZPO margin n. 16.

[474] BGH, Urteil v 22 January 1987 – 1 ZR 230/85, NJW 1987, p. 2680; Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 256 ZPO margin n. 11.

[475] Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 256 ZPO margin n. 67; Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 261 ZPO margin n. 65 footnote 134 with further references.

[476] BGH, Urteil v 11 December 1996 – VIII ZR 154/95, NJW 1997, p. 870 at p. 872.

[477] Gottwald, in Rosenberg et al., supra n. 89, § 99 ZPO margin n. 24.

uations in which the original claimant is the defendant in consecutive proceedings.[478] In addition, the subjective dimension of lis pendens is equal to the subjective dimension of res judicata.[479] Consequently, identity of parties also refers to all third parties that might be affected by res judicata of the potential judgment, inparticular the original parties' legal succesors.[480]

The basic definition of identiy of parties under the B IA regulation does not differ.[481] However, the CJEU has held in its decision *Drouot v CMI* that identity of parties exists if there is such a degree of identiy between the interests of both parties that a judgment delivered against one of them would have the force of res judicata as against the other.[482] That would be the case where a party by virtue of its right of subrogation, brings or defends an action in the name of the other party without the latter being in a position to influence the proceedings.[483]

Whilst the subjective dimension of German lis pendens also refers to res judicata, it would not apply in the scenario described by the CJEU, as third parties that had no influence on the proceedings are not affect by res judicata.[484]

9.1.5 How should we understand the requirement that judgments need to have "the same end in view" as expressed by the CJEU?

The German concept of matter in dispute depends on the relief sought by the claimant ('*Klageantrag*') and the factual circumstances. The European concept of matter in dispute refers to the Kernpunkt, the core of the dispute. This core should be determined by the subject-matter and the cause of action.[485] While the subject matter has been defined as the purpose of the action, the cause of action covers the factual circumstances as well as the legal basis.[486] In this context, the legal basis does not refer to the material claim, but rather to the legal question that

[478] Roth, in Bork and Roth (eds.), supra n. 97, Introduction § 261 ZPO margin n. 25.
[479] Becker-Eberhard, in Krüger and Rauscher (eds.), supra n. 63, § 261 ZPO margin n. 51.
[480] Bacher, in Vorwerk and Wolf (eds.), supra n. 19, § 261 ZPO margin n. 17; Gottwald, in Rosenberg et al., supra n. 89, § 99 ZPO margin n. 24.
[481] Leible, in Rauscher, supra n. 327, Art. 29 B Ia margin n.10; Stadler, in Musielak and Voit, supra n. 37, Art. 29 B Ia margin n. 4.
[482] CJEU 19 May 1998, Case C-351/96, Drouot Assurances v CMI and others, ECLI:EU:C:1998:242.
[483] CJEU 19 May 1998, Case C-351/96, Drouot Assurances v CMI and others, ECLI:EU:C:1998:242.
[484] See text to n. 7.1 supra.
[485] CJEU 8 December 1987, Case 144/86, Gubisch Maschinenfabrik v Palumbo, ECLI:EU:C:1987:528; Leible, in Rauscher, supra n. 327, Art. 29 B Ia margin n. 13.
[486] CJEU 6 December 1994, Case C-406/92, Tatry v Maciej Rataj, ECLI:EU:C:1994:400; CJEU 8 December 1987, Case 144/86, Gubisch Maschinenfabrik v Palumbo, ECLI:EU:C:1987:528; McGuire, supra n. 339, p. 85.

has to be dealt with.[487] When determining this legal question, the economical as well as legal interests pursued by the claimant should be taken into account.[488]

Applying the German concept of matter in dispute to *Gubisch v Palumbo*, Gubisch's action for payment and Palumbo's negative declaratory action with regard to the sales contract's validity do not concern the same matter in dispute given that both actions involved different reliefs sought.[489] In addition, the relief sought for payment of the purchase price does not include the declaration that the contract is valid as the matter in dispute does not cover preliminary questions of law.[490]

9.2 Does your national legal order operate with the notion of "related actions"? If so, what are the effects it ascribes to them? Please accompany the answer with relevant case law.

Pursuant to § 148 ZPO, a court may direct that the proceedings are to be suspended until other proceeding has been dealt with and terminated in case the decision on this proceedings depends either wholly or partial on the question of whether a legal relationship does or does not exist (preliminary question of law) and this relationship forms part of the matter in dispute of the other proceedings.[491]

> **§ 148 ZPO - Suspension if a decision in another matter is anticipated**
>
> Where the decision on a legal dispute depends either wholly or in part on the question of whether a legal relationship does or does not exist, and this relationship forms the subject matter of another legal dispute that is pending, or that is to be determined by an administrative agency, the court may direct that the hearing be suspended until the other legal dispute has been dealt with and terminated, or until the administrative agency has issued its decision.

§ 148 ZPO serves the purpose of avoiding a redundant assessment of the same legal question and, ultimately, of avoiding contradictory decisions within the same matter in dispute.[492] Accordingly, the stay of proceedings requires 'Vorgreiflichkeit', which means that the decision

[487] CJEU 8 December 1987, Case 144/86, Gubisch Maschinenfabrik v Palumbo, ECLI:EU:C:1987:528; McGuire, supra n. 339, p. 235.
[488] Leible, in Rauscher, supra n. 327, Art. 29 B Ia margin n. 14.
[489] G. Wagner, in R. Bork and H. Roth, Stein/Jonas Kommentar zur Zivilprozessordnung, Issue 10 (Mohr Siebeck 2011), Art 27 B I margin n. 25.
[490] Wagner, in Bork and Roth (eds.), supra n. 489, Art 27 B I margin n. 25, see text to n. 5.1.4.1 infra.
[491] J. Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 148 ZPO margin n. 1; Roth, in Bork and Roth (eds.), supra n. 97, § 148 ZPO margin n. 1.
[492] Roth, in Bork and Roth (eds.), supra n. 97, § 148 ZPO margin n. 1; Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 1.

arising out of the second proceedings has to have at least a partial prejudicial effect, in particular by means of res judicata effects, legal restructuring of the relationship or the effects of a third party intervention.[493] In this context, legal relationship refers to a specific and legal link between a person and another person or an object, equal to the relationship that can be subject of a declaratory action.[494] If the requirements are met, the stay of proceedings lies within the discretion of the court.[495] When exercising the discretion, the court has to weigh the prospects of success of the concurrent proceedings against the dealy of the original proceedings in case of a stay of proceedings as well as to take the purpose of § 148 ZPO and the interests of the parties into account.[496] In addition, the court has to examine whether the acceleration of proceedings could better (sooner) be reached by different means.[497] However, mere considerations of suitability must not be relevant. The effects of a stay of proceedings are stipulated by § 249 ZPO.[498] In particular, the expiration of procedural limitation periods is suspended during the stay of proceedings and procedural acts during the stay of proceedings do not have effects towards the other parties.[499]

German case law concerning the relation of proceedings within the sphere of application of § 148 ZPO stipulates:

- a stay of proceedings has not been granted
    - in case of separate claims of different parts of the same legal claim even tough both claims are based upon the same subject matter;[500]
    - for a Vollstreckungsgegenklage based on a set-off in case the foreign proceedings that are dealing with the set-off claim are close to a decision and the re-

[493] BGH, Beschluss v 27 June 2019 - IX ZB 5/19, NJW-RR 2019, p. 1212; Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 6.
[494] Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 6.
[495] BGH, Beschluss v 3 April 2014 – IX ZB 88/12, NJW 2014, p. 2798; Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 6.
[496] BGH, Beschluss v 3 April 2014 – IX ZB 88/12, NJW 2014, p. 2798; BGH, Beschluss v 7 May 1992 – V ZR 192/91, NJW-RR 1992, p. 1149; OLG Nürnberg, Urteil v 15 May 2012 – 14 U 928/10, juris at margin n. 54 et seq.; OLG Frankfurt aM, Beschluss v 31 January 2002 – 12 W 229/01, IPRax 2002, p. 523; Roth, in Bork and Roth, supra n. 97, § 148 ZPO margin n. 31 et seq.; Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 6.
[497] BGH, Beschluss v 26 October 2006 – VII ZB 39/06, NJW-RR 2007, p. 307; Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 13.
[498] Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 16.
[499] Stadler, in Musielak and Voit, supra n. 37, § 249 ZPO margin n. 2.
[500] BGH, Beschluss v 27 June 2019 – IX ZB 5/19, NJW-RR 2019, p. 1212.

quested stay of proceedings was merely used as a means to avoid a decision of the court declining its international jurisdiction.[501]

- for trademark protection proceedings with regard to proceedings concerning the annulment of the same trademark if the latter's chances of success are less probable than the chances of no success;[502]

- a stay of proceedings has been granted
  - for a proceeding requesting the defendant to refrain from impairing the claimants property until the decision in a proceeding has been rendered that dealt with a challenge of a disprossesional resolution as the outcome of this challenge influenced the ownership of the object in dispute.[503]

In addition, German civil procedure provides for the option of consolidation of proceedings. Pursuant to § 147 ZPO, the court may direct that proceedings are to be consolidated in order to be heard and decided at the same time wherever the claims formin the subject matter of the proceedings, whether involving the same of different parties, have legal ties amonst each other, or wherever they could have been asserted in one single complaint.

§ 147 ZPO - Consolidation of proceedings

> Wherever the claims forming the subject matter of several proceedings pending with a court, whether involving the same or different parties, have legal ties amongst each other, or wherever they could have been asserted in one single complaint, the court may direct that such proceedings be consolidated in order to be heard and decided on at the same time.

The consolidation requires that the proceedings are pending before the same court. Whilst it does not require the same judge to be competent, it is necessary that it is the same type of division within one court (single judge, senate etc.).[504] Further, neither of the proceedings must be ready for the decision yet.[505] A consolidation of proceedings further requires that the proceedings have legal ties amongst each other, ie that the proceedings are legally connected. In order to define the connection, the authorities refer to the definition of the relation required for the jurisidiction over counter-claims pursuant to § 33 ZPO. This relation requires a legal

[501] BGH, Beschluss v 3 April 2014 – IX ZB 88/12, NJW 2014, p. 2798 at p. 2801.
[502] BGH, Urteil v 18 September 2014 – I ZR 228/12, juris.
[503] BGH, Beschluss v 7 May 1992 – V ZR 192/91, NJW-RR 1992, p. 1149.
[504] Althammer, in Bork and Roth (eds.), supra n. 97, § 147 ZPO margin n. 2.
[505] Althammer, in Bork and Roth (eds.), supra n. 97, § 147 ZPO margin n. 4.

connection rather than a mere factual connection between both proceedings.[506] However, the term legal connection has to be interpreted broadly to also encompass economical relations.[507]

The German Federal Court of Justice had decided that the requirement of a legal connection has been met in the followings scenarios:

- claim and counterclaim are based upon the same factual circumstances, e.g. reciprocal damage claims arising out of the same traffic accident[508] or the amount of a counterclaim that has been used as a set-off exceeding the amount of the original claim;[509]
- claim and counterclaim are based upon different factual circumstances but are dependent on each other, e.g. a claim following from the validity of a contract and the counterclaim arising out of the invalidity of the same contract;[510]
- or, in the absence of mutual factual circumstances and the interdependency of the claims, if the proceedings concern different legal relationships that have arisen out of related circumstances which economically and considering their purpose from the point of view of a reasonable third person belong together, such as different contracts within an ongoing business-relationship.[511]

The consolidation of the proceedings gets effective by a decision of the court that is competent to decide the consolidatet proceedings.[512] It does not depend on a request by either of the parties and lies withtin the discretion of the court.[513]

Two inpedent proceedings lose their independency due to the consolidation and form a joint proceeding with a joint main hearing, a common gathering of evidence and a joint decision as of the moment of the consolidation instead.[514] Parties who act on the same side become a joinder of parties.[515] If the parties had reversed roles in the different proceedings, the actions

[506] Roth, in R. Bork and H. Roth, Stein/Jonas Kommentar zur Zivilprozessordnung, Issue 1 (Mohr Siebeck 2016), § 33 ZPO margin n. 26.
[507] Toussaint, in in Vorwerk and Wolf (eds.), supra n. 19, § 33 ZPO margin n. 12.
[508] BGH, Urteil v 13 March 2007 - VI ZR 129/06, NJW 2007, p. 1753.
[509] BGH, Urteil v 21 April 1997 – II ZR 221/05, VIZ 1997, p. 548 at p. 549.
[510] Cf. BGH, Urteil v 21 February 1975 – V ZR 148/43, NJW 1975, p. 1228 margin n. II a, cf. R. Patzina, in Krüger and Rauscher (eds.), supra n. 63, § 33 ZPO margin n. 20.
[511] BGH, Versäumnisurteil v 7 November 2001 – VIII ZR 263/00, NJW 2002 p. 2182 at p. 2184.
[512] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 6.
[513] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 7.
[514] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 9.
[515] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 9.

become claim and counterclaim due to the consolidation.[516] Procedural acts that happened prior to the consolidation do not become invalid but do not automatically affect the consolidated proceedings.[517] Especially with regard to evidence gathering, the court has to adhere to the right to be heard which can make a repition of the evidence gathering necessary in order to give all parties the chance to influence the consolidated proceeding.[518]

The consolidation does not affect the compentence of the originally competenct court, even in case the consolidation leads to an increase of the amount in dipuste that would have shifted the jurisdiction from a district court to a regional court.[519]

9.3 Has your Member State experienced cross-border cases involving related actions within the meaning of the B IA?

There is German case law concerning Art 30 B Ia (and its predecessors). However, the use of Art 30 B Ia is rare in court praxis.[520]

In a recent decision, the German Federal Court of Justice has discussed the relation between the Convention on the Contract for the International Carriage of Goods by Road (CMR) and B Ia.[521] It applied the option to stay the proceedings stipulated by Art. 29 I B Ia to Art. 31 II CMR and found that an action seeking performance does not prevail over a negative declaratory action that has been initiated first. Accordingly, the court that was seised with the action seeking performance could have stayed the proceeding in favour of the negative declaratory action pursuant to Art. 31 II CMR. In addition, the German Federal Court of Justice held that Art 30 B Ia can be applied within the sphere of application of the CMR as the latter does not contain a comparable provision dealing with related proceedings.

[516] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 9.
[517] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 11.
[518] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 11.
[519] Fritsche, in Krüger and Rauscher (eds.), supra n. 63, § 147 ZPO margin n. 13.
[520] Leible, in Rauscher, supra n. 327, Art. 30 B Ia margin n. 2.
[521] BGH, Urteil v 25 July 2019 – I ZB 82/18, NJW-RR 2020, p. 98.

9.3.1 How have your courts defined irreconcilability for the purpose of related actions?

There is only very few german case law concerning the definition of irreconcilability.[522] The Landgericht Düsseldorf (Regional Court) decided in 2009 with regard to Art 28 B I, that the term irreconcilability has to be interpreted broadly and covers all cases of a mere risk of contradictory decisions, even if those judgements would be enforceable independently and their legal consequences do not contradict each other.[523] Accordingly, the term has to be interpreted more broadly than the same term used in Art. 34 II B I with regard to the enforceability of judgments and requires less intensitiy of identity than required by Art. 27 B I.[524] Likewise, Art. 28 B I does not require a cumulative identity of parties.[525] The Landgericht Düsseldorf held that the necessary relation between the actions was not met even though they concerned the same factual circumstances as the actions were based upon the violation of different intellectual property rights.[526]

In another decision, the Landgericht Düsseldorf did not stay the proceedings concerning the violation of a European trademark due to a negative declaratory action concerning the same trademark that was previously initiated in Belgium.[527] The court held that the possibility that two court of different member states come to different conclusion towards the extent of protection of a European trademark is not covered by Art. 27 B I and, thus, did not give rise to danger of contradictory decisions.[528] Further, the Landgericht found that the possible divergence with regard to the extent of protection does not render both proceedings irreconcilable pursuant to Art. 28 III B I.[529]

9.3.2 How have your courts exercised the discretion to stay proceedings?

Pursuant to the German Federal Court of Justice, German courts have to consider the purpose of Art. 30 B Ia when exercising their discretion.[530] Accordingly, they have to take into ac-

[522] The German Case Law Database juris contains 14 results for Art. 28 B I and Art. 30 B Ia.
[523] LG Düsseldorf, Beschluss v 17 March 2009 – 4b O 218/08, juris at margin n. 50.
[524] LG Düsseldorf, Beschluss v 17 March 2009 – 4b O 218/08, juris at margin n. 50.
[525] LG Düsseldorf, Beschluss v 17 March 2009 – 4b O 218/08, juris at margin n. 50.
[526] LG Düsseldorf, Beschluss v 17 March 2009 – 4b O 218/08, juris at margin n. 51.
[527] LG Düsseldorf, Urteil v 5 June 2008 – 4a O 27/07, juris.
[528] LG Düsseldorf, Urteil v 5 June 2008 – 4a O 27/07, juris at margin n. 58.
[529] LG Düsseldorf, Urteil v 5 June 2008 – 4a O 27/07, juris at margin n. 59.
[530] BGH, Urteil v 19 February 2013 – VI ZR 45/12, juris at margin n. 24.

count that the stay of proceedings serves the purpose of a better coordination of case law and to avoid incoherent and contradictory decisions, even in case they can be independently enforced.[531] In order to do so, they have to consider the degree of connection between both proceedings and assess the degree of risk of contradictory decisions, both parties' interests, the progress of both proceedings, a duty to support procedural economy, both court's proximity to the dispute and possible evidence and the jurisdiction of the court that has been seised first.[532]

The Landgericht Erfurt held that Art. 28 B I does not stipulate any rules as to how to exercise the discretion.[533] Accordingly, the Landgericht referred to national law in order to determine the requirements.[534] With reference to § 148 ZPO,[535] the court found that it was not obliged to stay the proceedings even though the factual circumstances underlying both proceedings were the same as the link between the proceedings was not close enough in order to stipulate an obligation to stay the proceedings.[536] Particularly, the court came to its conclusion due to the fact that the parties to both proceedings were not identical.[537]

The Landesarbeitsgericht Niedersachsen (Labour Court of Lower-Saxony) has denied the stay of a proceeding initiated in Germany seeking the handover of an object due to a proceeding initiated in France concerned with a claim for protection against dismissal and a payment claim.[538] The court found that the handover claim did not depend on the validity of the contract of employment and, therefore, the results from the French proceeding would hardly have been relevant for the German proceeding.[539] In addition, it found the probability of contradictory judgments to be low given the circumstances. In consequence, the Landesarbeitsgericht confirmed the finding of the Arbeitsgericht that the claimant's interest in a swift decision con-

[531] BGH, Urteil v 19 February 2013 – VI ZR 45/12, juris at margin n. 24.
[532] BGH, Urteil v 19 February 2013 – VI ZR 45/12, juris at margin n. 24.
[533] LG Erfurt, Teilurteil v 30 December 2005 – 2 HKO 69/04, juris at margin n. 32.
[534] LG Erfurt, Teilurteil v 30 December 2005 – 2 HKO 69/04, juris at margin n. 32.
[535] See text to n. 9.2 infra.
[536] LG Erfurt, Teilurteil v 30 December 2005 – 2 HKO 69/04, juris at margin n. 32. This would have been the case if it was not possible to render a decision as the requirements for the proceedings could not be assessed (reduction of discretion, '*Ermessensreduzierung*'), BGH, Urteil v 19 February 1986 – VIII ZR 91/85, NJW 1986, p. 1744 at p. 1746; Wendtland, in Vorwerk and Wolf (eds.), supra n. 19, § 148 ZPO margin n. 13.
[537] LG Erfurt, Teilurteil v 30 December 2005 – 2 HKO 69/04, juris at margin n. 32.
[538] LAG Niedersachsen, Urteil v 29 June 2016 – 13 Sa 1152/15, juris at margin n. 45, 46.
[539] LAG Niedersachsen, Urteil v 29 June 2016 – 13 Sa 1152/15, juris at margin n. 45, 46.

cerning the international jurisdiction outweighed potential reasons speaking in favour of a stay of the proceeding.[540]

The Oberlandesgericht Frankfurt ordered the stay of proceedings for payments arising out of a commercial agency contract due to a previously initiated Italian proceeding requesting the declaration that the defendant of the German proceeding is not liable for damages arising out of the termination of the commercial agency contract.[541] The court found that any decision granting the declaration sought by the German defendant in the Italian proceedings would bind the German court in its finding concerning the damage claim pursuant to Art. 33 B I.[542] Given the identity of the matter in dispute, the Oberlandesgericht stayed the proceedings according to Art. 27 B I.[543] However, it stated that the same reasoning applied within Art. 28 B I.[544]

The Saarländisches Oberlandesgericht Saarbrücken had to deal with the relation between a proceeding concerning claims against a carrier and its insurance company arising out of a traffic accident during the transfer of a sailing yacht initiated in France and a proceeding initiated by the owner of a security vehicle in Germany seeking damages arising out of the same traffic accident.[545] The court found that the action initated in France concerned contractual damage claims whilst the German proceeding had to deal with non-contractual claims arising out of traffic law.[546] In this regard, it is irrelevant that both proceedings serve the same (economical) purpose as they are based upon different legal basis and, therefore, there is not danger of contradictory judgments.[547] Further, the court took into account that it could not be estimated when the proceeding in France will be brought to an end.[548] In addition, the Landgericht Saarbrücken had the closer and more real connection to the dispute pursuant to the principle of proximity to the proof given that the traffic accident happened in its district.[549] While the defendant of the German proceeding argued that this might result in an overcompensation

[540] LAG Niedersachsen, Urteil v 29 June 2016 – 13 Sa 1152/15, juris at margin n. 45, 46.
[541] OLG Frankfurt aM, Beschluss v 29 June 2006 – 12 U 195/05, juris.
[542] OLG Frankfurt aM, Beschluss v 29 June 2006 – 12 U 195/05, juris at margin n. 32.
[543] OLG Frankfurt aM, Beschluss v 29 June 2006 – 12 U 195/05, juris at margin n. 32.
[544] OLG Frankfurt aM, Beschluss v 29 June 2006 – 12 U 195/05, juris at margin n. 33.
[545] Saarländisches OLG Saarbrücken, Urteil v 20 February 2014 – 4 U 391/12, juris.
[546] Saarländisches OLG Saarbrücken, Urteil v 20 February 2014 – 4 U 391/12, juris at margin n. 74.
[547] Saarländisches OLG Saarbrücken, Urteil v 20 February 2014 – 4 U 391/12, juris at margin n. 75.
[548] Saarländisches OLG Saarbrücken, Urteil v 20 February 2014 – 4 U 391/12, juris at margin n. 76.
[549] Saarländisches OLG Saarbrücken, Urteil v 20 February 2014 – 4 U 391/12, juris at margin n. 77.

for the claimant, the court ruled that Art. 28 B I only aims at the prevention of contradictory decisions and does not entail a protection againt material overcompensation.[550]

Part 10: Court settlements

10.1 What are the prerequisites for the conclusion of a court settlement?

Pursuant to § 794 I ZPO, a court settlement that should become an enforceable legal document has to be concluded in front of a German court during the course of a pending proceeding.[551] The competence to conclude the court settlement in general lies with the court that has the jurisdiction for the proceeding.[552] The settlement itself can take place during the oral hearing or by the exchange of memoranda.[553] In addition, the court can suggest a settlement offer in writing that the parties can accept pursuant to § 278 VI ZPO.[554]

§ 794 ZPO - Further enforceable legal documents

(1) Compulsory enforcement may furthermore be pursued:

1. Based on settlements concluded by the parties, or between one of the parties and a third party, in order to resolve the legal dispute either in its full scope or as regards a part of the subject matter of the litigation, before a German court or before a dispute-resolution entity established or recognised by the Land department of justice (Landesjustizverwaltung), as well as based on settlements that have been recorded pursuant to section 118 (1), third sentence, or section 492 (3) for the record of the judge;

(…)

§ 278 ZPO - Amicable resolution of the dispute; conciliation hearing; settlement

(1) …

(6) A settlement may also be made before the court by the parties to the dispute by submitting to the court a suggestion, in writing, on how to settle the matter, or by their accepting, in a corresponding brief sent to the court, the suggested settlement made by the court in writing. The court shall establish, by issuing a corresponding order, that the settlement concluded in accordance with the first sentence has been

[550] Saarländisches OLG Saarbrücken, Urteil v 20 February 2014 – 4 U 391/12, juris at margin n. 80.
[551] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 3.
[552] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 3.
[553] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 3.
[554] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 3.

reached, recording the content of same in the order. Section 164 shall apply mutatis mutandis.

10.1.1 Describe the necessary elements a court settlement must contain.

The most decisive point is that the court settlement has to contain a provision settling the proceedings for the entire dispute or the part that is concerned by the court settlement.[555] The further requirements are debated amongst German authorities and case law.

The majority of authorities argues that the court settlement is of a two-tier nature.[556] The court settlement consists of the procedural act that closes the proceedings as well as of the material settlement that confirms or modifies the legal relationship between the parties pursuant to § 779 ZPO.[557] Accordingly, the court settlement has to contain the requirements for a out of court settlement, i.e. a mutual giving-in in order to settle the dispute concerning a legal relationship, a claim or the enforcement of a claim.[558] However, the giving-in can consist of the mere waiver of the right to pursue a court decision on the issue.[559] Other authorities are of the opinion that the sole purpose of a court settlement is the finalization of the proceedings.[560] Therefore, the court settlement does not require any further content than a provision closing the proceedings.[561] In practice, parties often are willing to close the proceedings only in case there has been some substantive giving-in in order to resolve the legal dispute.[562]

The court settlement must concern the entire matter in dispute or at least a quantitative part of it.[563] In addition, it can entail problems which are no part of the matter in dispute or which are part of the matter in dispute of another dispute if there is a link between both matters in dis-

[555] H. Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 54.
[556] BGH, Urteil v 14 July 2015 – VI ZR 326/14, NJW 2015 p. 2965; J. F. Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 1; M. Schwab, 'Zivilprozessrecht' (C. F. Müller 2016), p. 186.
[557] Schwab, supra n. 556, p. 186.
[558] Schwab, supra n. 556, p. 186.
[559] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 25; Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 20.
[560] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 54 with further references.
[561] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 54.
[562] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 20.
[563] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 5; Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 15.

pute.[564] It is not relevant whether the court settlement confirms the existing legal status or whether this is modified by the court settlement.[565] Third parties can be affected by court settlements if they participate in the negotations and conclusion of the court settlement.[566] In case the third party is only positively affected by the court settlement, it could by concluded without the third party's participation.[567]

10.1.2 What formal requirements must be satisfied (e.g. signature of the parties; service)?

As the court settlement is a procedural act, the requirements to undertake procedural acts have to be fulfilled.[568] In particular, parties have to be represented by a lawyer if necessary pursuant to § 78 ZPO and the power of attorney must cover the right to conclude court settlements, which generally is the case pursuant to § 81 ZPO.[569]

In case the court settlement is concluded within the oral hearing, it has to become part of the official protocol of the hearing that has to be confirmed by the parties.[570] This follows from § 127a BGB, that stipulates that the notarial certification necessary for the validity of out of court settlements is replaced by the recording of the the court settlement within the hearing protocol.[571] The recording of the settlement can transfer a out of court settlemen into a court settlement.[572]

If the settlement is concluded by means of memoranda, the parties have to agree upon a settlement and accept it withtin a memoranda submitted to the competent court.[573] In this scenario, the court renders a decision concerning the content of the settlement.[574] This decision is

[564] BGH, Beschluss v 3 August 2011 – XII ZB 153/10, NJW 2011, p. 3451; BGH, Urteil v 18 June 1999 – V ZR 40/98, NJW 1999, p. 2806 at p. 2807; Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 15. This view has been adopted by the German legislator, BT-Drs. 14/4722, p. 82.
[565] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 15.
[566] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 15.
[567] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 12.
[568] BGH, Beschluss v 20 February 1991 - XII ZB 125/88, NJW 1991, p. 1743; BGH, Urteil v 16 December 1982 – VII ZR 55/82, NJW 1983, p. 1433 at p. 1434; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 4.
[569] Gaul et al., supra n. 10, p. 242.; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 4.
[570] Gaul et al., supra n. 10, p. 243; Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 9.
[571] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 9.
[572] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 10.
[573] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 11.
[574] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 11.

not subject to means of recourse and it does not become res judicata.[575] Further, the settlement remains of contractual nature irrespective of the fact that is has been confirmed by a court decision.[576]

10.1.3 How are the parties identified?

There is no general rule as to identify the parties within a court settlement. The court settlement is a procedural contract subject to the parties' disposition. However, most formula and standard court settlements identify the parties similar to the rubrum of a judgment.

[575] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 11.
[576] Gottwald, in Rosenberg et al., supra n. 89, § 131 ZPO margin n. 11.

Example Court Settlement[577]

Regional Court Hannover

Case No 13 S 98/19

Protocol of the public hearing conducted by the 13th division for civil disputes on 5th May 2020

in the presence of presiding judge Ms M,
judges Mr B and Mr Q,
clerk of the registry Mr L.

In the matter

Name and address, Phone and Email, Date of Birth, - Claimant/Party No. 1 -
represented by Lawyer A

against

Name and address, Phone and Email, Date of Birth, - Defendant/Party No. 2 -
represented by Lawyer B

were present Claimant, Lawyer A, Defendant, Lawyer B and concluded the following settlement:

1. The defendant is obliged to pay the claimant EUR 10,000 together with interest in the amount of 5 % per year starting from October 11th, 2018 until 5th June 2020. The payment shall be directly submitted to the claimant.
2. This settles all claims between the claimant and the defendant arising out of or connected to the dispute 13 S 98/19.
3. Each party has to bear its own legal costs, the court fees are split between the parties.[578]
4. The parties can revoke this settlement by submitting the revocation to court in writing until 12th May 2020.

This settlement has been played to and confirmend by the claimant and the defendant.

Signatures

[577] C. Theimer and A. Theimer, 'Mustertexte zum Zivilprozess' (C. H. Beck 2012), p. 388 et seq.
[578] This division of costs is reffered to as '*Kosten werden gegeneinander aufgehoben'*.

10.1.4 What (substantive) legal relationships can be settled in a court settlement?

The matter in dispute must be at the disposal of the parties in order to become part of a court settlement.[579] The possibility for a legal relationship to become part of a court settlement corresponds to the possibility to be part of an arbitration agreement pursuant to § 1030 ZPO.[580] Pursuant to § 1030 I sentence 1 ZPO, this applies to all proprietary disputes. Non-proprietary disputes that can be subject to a court settlement are determined by implication of those non-proprietary disputes that are precluded, namely marriage-, childhood-, civil partnership- and parentage-disputes.[581] In addition, disputes concerning claims for redress within a limited liability company ('*Gesellschaft mit beschränkter Haftung*', GmbH) cannot be part of a court settlement.[582] The same holds true for disputes concerning decisions from general annual meetings.[583] With regard to consumer protection law, especially the law following the directive 2011/83/EU of the European Parliament and of the Council on consumer rights, the court settlement cannot deviate from the provisions of the law to the disadvantage of the consumer.[584] The same applies to the non-disposable protection laws for employees.[585]

In general, the content of the court settlement has to comply with the general rules of civil law. In particular, the settlement must not violate prohibition laws pursuant to § 134 BGB and comply with the notion of good faith and fair dealing pursuant to § 138 BGB.[586]

10.2 When does a court settlement become enforceable?

It goes without saying that the court settlement has to adhere to the requirements stipulated above in order to constitute an enforcement title.[587] Pursuant to § 795 ZPO, the court settle-

[579] M. Habersack, in F. J. Säcker and R. Rixecker et al., Münchener Kommentar zum Bürgerlichen Gesetzbuch, Issue 6 (C. H. Beck 2017), § 779 BGB margin n. 5.
[580] C. Wolf and N. Eslami, in Vorwerk and Wolf (eds.), supra n. 19, § 1030 ZPO margin n. 7.
[581] Habersack, in Säcker and Rixecker et al., supra n. 579, § 779 BGB margin n. 6, 7; Wolf and Eslami, in Vorwerk and Wolf (eds.), supra n. 19, § 1030 ZPO margin n. 7.
[582] Habersack, in Säcker and Rixecker et al., supra n. 579, § 779 BGB margin n. 9.
[583] Habersack, in Säcker and Rixecker et al., supra n. 579, § 779 BGB margin n. 9.
[584] Habersack, in Säcker and Rixecker et al., supra n. 579, § 779 BGB margin n. 11.
[585] Habersack, in Säcker and Rixecker et al., supra n. 579, § 779 BGB margin n. 12.
[586] C. Seiler, in K. Reichold and R. Hüßtege, Thomas/Putzo Zivilprozessordnung (C. H. Beck 2020), § 794 ZPO margin n. 16.
[587] Gaul et al., supra n. 10, p. 242; Seiler, in Reichold and Hüßtege, supra n. 586, § 794 ZPO margin n. 33.

ment is subject to the general provisions of cumpolsory enforcement as judgments.[588] In general, the court settlement becomes enforceable the moment it has been concluded by the parties and after it has been certified as the enforceable copy of the court settlement pursuant to §§ 795, 724, 725 ZPO.[589] If the parties have agreed upon the unilateral or bilateral right of revocation of the court settlement, the settlement becomes effective and, thus, enforceable only after the period of time for the revocation has expired.[590]

As the court settlement does not contain an operative part, it often is difficult to determine the enforceable content.[591] If the enforceable content does not become clear from the court settlement itself, the officer at the court where the court settlement has concluded has to specify the enforceable content within the proceedings leading to the enforcement-clause ('*Klauselerteilungsverfahren*').[592]

10.3 How are (singular and universal) successors of parties affected by the court settlemet?

Comment: *Explain how succession of parties occurs after the rendering of the court settlement as well as in potential enforcement proceedings, and what acts, if any, must be undertaken for interested persons to demonstrate succession. In addition, explain whether there are circumstances in which succession is not possible.*

Pursuant to § 795 ZPO, the enforcement of titles mentioned within § 794 ZPO, including court settlements, is subject to the same provisions as the enforcement of judgments. Accordingly, a succession of parties after the court settlement has become enforceable is subject to the same prerequisits applying in the scenario of succession of parties af the judgment has become enforceable.[593] In particular, the enforcement-clause has to be adapted to display the new constellation of parties pursuant to § 727 ZPO prior to enforcement of the court settlement.

[588] Gaul et al., supra n. 10, p. 245.
[589] Gaul et al., supra n. 10, p. 245; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 15 et seq.
[590] BGH, Urteil v 27 October 1983 – IX ZR 68/83, NJW 1984, p. 312; Seiler, in Reichold and Hüßtege, supra n. 586, § 794 ZPO margin n. 19.
[591] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 108.
[592] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 108.
[593] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 16 et seq.; see text to n. 7.3 supra.

In case the court settlement contains a right or a claim in favour of a third party, the third party can rely upon the court settlement as the basis for enforcement of the right or claim only if it has been involved in the negotiation and conclusion of the court settlement.[594]

10.4 If applicable, describe how the legal relationship, once settled, can be amended?

The material part of the court settlement rearranges the legal relationship between the parties.[595] Accordingly, the parties are free to rearrange their relationship again once the settlement has been concluded. In case the re-rearranged legal relationship contradicts the enforceable content of the court settlement, the enforcement-debtor can initiate a Vollstreckungsgegenklage pursuant to §§ 795, 767 I ZPO. The preclusion contained in § 767 II ZPO only affects judgments and does not apply in this scenario.[596]

10.5 If applicable, describe how (under what circumstances) a court settlement can no longer be considered enforceable?

The validity of the court settlement does not depend on the validity of the substantive settlement just as well as the validity of the judgment does not depend on the existence of the substantive claim.[597] Rather, the court settlement remains enforceable as long as it has not been modified, changed or reversed by a court decision.[598]

10.6 If applicable, describe how errors in a court settlement can be remedied and the recourses that are available against a notarial act, whether independently or during enforcement proceedings.

Given the two-tier nature of the court-settlement, one has to differentiate between errors concerning the substantive settlement and errors concerning the procedural act.[599]

In case of a procedural error, the court settlement does not unfold the effect of closing the proceedings.[600] Accordingly, the proceedings during which the court settlement was conclud-

[594] Gaul et al., supra n. 10, p. 245.
[595] Seiler, in Reichold and Hüßtege, supra n. 586, § 794 ZPO margin n. 30.
[596] Gaul et al., supra n. 10, p. 241.
[597] Gaul et al., supra n. 10, p. 240.
[598] Gaul et al., supra n. 10, p. 240; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 17.
[599] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 17, 26; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 58, 68.

ed are to be continued upon application of one of the parties.[601] However, the continuance of the proceedings does not bare the enforcement of the court settlement.[602] The enforcement-debtor can apply for a preliminiary stay of enforcement pursuant to an analogy of §§ 707, 719, 769 ZPO during the ongoing proceedings.[603] In addition, the enforcement-debtor can initiate an action against the court settlement pursuant to § 732 ZPO ('*Klauselerinnerung*') based on the fact that given the procedural error the court settlement should not have been provided with the enforcement clause.[604] The effects of a procedural error for the substantive part of the settlement depend on the will of the parties.[605] In this case, it has to be determined by means of interpretation whether or not the parties wanted to conclude an out-of-court settlement.[606] In general, the idea that the parties conclude the settlement in order to eliminate the uncertainty thas goes along with a court proceeddings leads to the conclusion that the parties would not have settled the issue without the procedural part of the settlement.[607] However, there is no general rule expressing this idea.[608]

In case of an error within the substantive part of the court settlement, the solution becomes more difficult. In general, the lack of the legal basis for the court settlement does not affect its enforceability. Rather, the enforcement-debtor has to invoke these facts within the continuing proceedings or it has to initiate a Vollstreckungsgegenklage pursuant to § 767 I ZPO.[609] In case the court settlement lacked substantive validity from the very beginning, the majority of

[600] BGH, Urteil v 10 March 1955 – II ZR 201/53, NJW 1955, p. 705; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 17; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 58.
[601] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 17.
[602] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 17.
[603] BGH, Urteil v 16 December 1970 – VIII ZR 85/69, NJW 1971, p. 467 at p. 468; BGH, Urteil v 29 September 1958 – VII ZR 198/67, NJW 1958, p 1970 at p. 1971; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 17.
[604] BGH, Urteil v 18 January 1954 – IV ZR 96/54, NJW 1954, p. 182; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 17; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 60.
[605] BGH, Urteil v 24 October 1984 – Ivb ZR 35/83, NJW 1985, p. 1962 at p. 1963; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 66.
[606] BGH, Urteil v 24 October 1984 – Ivb ZR 35/83, NJW 1985, p. 1962 at p. 1963, upholding the substantive part of the court settlement; OLG Karlsruhe, Urteil v 1 December 1994 – 2 UF 131/94, NJW 1995, p. 1561 at p. 1562, denying the validity of the substantive part of the court settlement; Lackmann, in Musielak and Voit, supra n. 37, § 794 ZPO margin n. 20.
[607] BGH, Urteil v 24 October 1984 – Ivb ZR 35/83, NJW 1985, p. 1962; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 66.
[608] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 66
[609] See text to n. 10.4 supra.

authorities comes to the conclusion that the court settlement did not close the proceedings.[610] Those errors have to be remedied according to the remedies available for procedural errors, i.e. an application for the continuance of the proceedings.[611] However, the procedural effects of the court settlement remain unaffected in case the lack of substantive validity is based upon an avoidance of the settlement based upon the law,[612] in cases of force majeure or hardship ('*Störung der Geschäftsgrundlage', clausula rebus sic stantibus*, § 313 BGB)[613] and in case the parties cancel the settlement by contract[614].[615]

Part 11: Enforceable notarial acts

11.1 Briefly describe the competence the notary holds in civil and commercial matters in your Member State.

Pursuant to § 1 Bundesnotarordnung (BNotO), notaries are an independent public office for the certification of documents and other tasks associated with legal services. The main task of notaries is the certification of a legal process or legal acts.[616] The result of this certification is a public document ('*Öffentliche Urkunde*') that is assigned with an evidentiary function pursuant to § 415 ZPO.[617] In addition, the notary is requested to assist and advise the parties during the legal process or legal act.[618] In doing so, the notary should achieve the best result possible for both parties in order to avoid subsequent disputes concerning the legal process or legal act.[619] Accordingly, the notary contributes to the German court system by either providing relief for the courts when avoiding the dispute in the first place or by accelerating the proceedings by providing reliable evidence given the public document that the court can rely on.[620]

[610] BGH, Urteil v 29 July 1999 – III ZR 272/98, NJW 1999, p. 2903; BGH, Urteil v 12 July 1965 – II ZR 118/63, NJW 1965, p. 2147; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 71.
[611] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 71, 76.
[612] BGH, Urteil v 10 March 1955 – II ZR 201/53, NJW 1955, p. 705.
[613] BGH, Urteil v 5 February 1986 – VIII ZR 72/85, NJW 1986, p. 1348.
[614] BGH, Urteil v 15 April 1964 – I b ZR 201/63, NJW 1964, p. 1524.
[615] Cf. Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 72.
[616] U. Bracker, in S. Görk, Beck'scher Online Kommentar BNotO (C. H. Beck 2019), § 1 margin n. 6.
[617] Bracker, in Görk, supra n. 603, § 1 BNotO margin n. 7.
[618] Bracker, in Görk, supra n. 603, § 1 BNotO margin n. 8.
[619] Bracker, in Görk, supra n. 603, § 1 BNotO margin n. 10.
[620] Bracker, in Görk, supra n. 603, § 1 BNotO margin n. 11.

11.2 Is (can) a notarial act be considered an enforcement title in your respective Member State/Candidate Country? If so, briefly present, how the concept of a notarial act as an enforcement title is defined in your national legal order.

Comment: *If the definition is provided by a provision of law, then please provide the citation to the exact article/paragraph of that rule and an English translation.*

Yes, notarial acts can be an enforcement title in Germany.[621] Pursuant to § 794 I No. 5 ZPO, the German notary must have acted within the bounds of his official authority when issuing that notarial act and the subject matter must concern a claim that could be subject to a (court) settlement.[622] Further, the act itself must neither be directed at obtaining a declaration of intent nor must it concern the existence of a tenancy relationship for residential spaces. In addition, the enforcement-debtor must have subjected itself to immediate enforcement within the notarial act.[623]

§ 794 ZPO - Further enforceable legal documents

(1) Compulsory enforcement may furthermore be pursued:

(…)

5. Based on records or documents that have been recorded in accordance with the requirements as to form by a German court or by a German notary within the bounds of his official authority, provided that the record or document has been recorded regarding a claim that can be provided for by a settlement, that is not directed at obtaining a declaration of intent, and that does not concern the existence of a tenancy relationship for residential spaces, and furthermore provided that the debtor has subjected himself, in the record or document, to immediate compulsory enforcement of the claim as specified therein;

(…)

11.3 Is, according to your domestic legal order, a notarial act an enforcement title *per se* or must it contain additional conditions/clauses to be considered as such?

Comment: *For instance, in Slovenia, notarial acts are considered enforcement titles only if they contain a so called 'direct enforceability clause'.*

Pursuant to § 794 I No. 5 ZPO, notarial acts can only be considered an enforcement title if the act contains a clause in which the enforcement-debtor subjects itself to immediate enforcement ('*Unterwerfungserklärung*').

[621] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 39 et seq.
[622] See text to n. 10.1.4 infra.
[623] See text to n. 11.3 supra.

11.3.1 If there is a certain clause (that constitutes the notarial deed an enforcement title) please set out an example of such a clause (cite an example clause). Furthermore, explain if there a difference in said clause if the deed refers to monetary or non-monetary claims?

> The attendant NAME ENFORCEMENT-DEBTOR(S) subjects himself to enforcement based on this notarial act in favor of NAME ENFORCEMENT-CREDITOR(S) based on and in the amount of the claim(s) mentioned in § X in his entire assets.

The Unterwerfungserklärung must contain the name of the debtor as well as the name of the creditor.[624] In case of a plurality of debtors or creditors, their legal relationship has to be clearly specified.[625] In addition, the clause has to contain the procedural claim underlying the enforcement, i.e. the concrete cause of action.[626] If the claims encompass the payment of interest, the Unterwerfungsklausel has to refer to the payment of interests, in particular the amount and the first day the interests become due.[627] Further, the debtor can subject its entire assets to enforcement or limit the enforcement to e.g. the movable or immovable assets.[628] However, there are no specific requirements with regards to monetary or non-monetary claim, except the fact that the notarial act must not concern the obtainment of a declaration of intent.

11.3.2 Is the debtor's consent to direct enforceability considered to be part of a notarial act?

The debtor's consent has to become part of the notarial act for the latter to serve as an enforcement title.[629]

11.3.3 If the previous question is answered in the positive, can such consent be of a general nature or specific and concrete to the debtor's obligations arising from the notarial act?

In 2014, the German Federal Court of Justice held that Unterwerfungserklärungen of a general nature do not adhere to the requirements stipulated by § 794 I No. 5 ZPO.[630] Rather, the

[624] Gaul et al., supra n. 10, p. 254.
[625] Gaul et al., supra n. 10, p. 254.
[626] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 163; see text to n. 11.3.3 supra.
[627] Gaul et al., supra n. 10, p. 254.
[628] Gaul et al., supra n. 10, p. 256; M. Kindler, in H. Heckschen and S. Herrler et al. (eds.), Beck'sches Notarhandbuch (C. H. Beck 2019), § 31 margin n. 433.
[629] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 150.

notarial act has to specifically refer to the content of the enforcement.[631] Accordingly, it has to entail the same content as a civil judgment in order to be enforceable.[632] In other words, the notarial act has to replace the operative part of the judgment.[633] Therefore, the claim that should be subject to enforcement has to be identified.[634] In this context, the term claim refers to the procedural claim, i.e. the matter in dispute.[635] Whilst this does not require the notarial act to specify the substantive legal basis,[636] the economic surroundings of this legal basis have to be mentioned, e.g. the amount that has to be paid, the interest due or the object that is affect by the procedural claim.[637]

Pursuant to § 800 ZPO, the owner of immovable property can subject itself to enforcement of liens of property in a way that this applies to the respective owner of the immovable property.[638]

11.4 How is a notarial act structured in your domestic legal order? What elements must it contain?

There are no requirements for the structure of the notarial act.[639] However, §§ 6 et seq. Beurkundungsgesetz (henceforth: BeurkG) and the Bundesnotarordnung specify the requirements for the process of certification of the notarial act. In particular, the notary has to sign the notarial act on German territory as it constitutes an *acta iure imperii*.[640]

These formal requirements refer to all the information that become part of the enforceable notarial act pursuant to § 794 I No. 5 ZPO, in particular the designation of the claim, any side-

630 BGH, Urteil v 19 December 2014 – V ZR 82/13, NJW 2015 p. 1181.
631 Lackmann, in Musielak and Voit (eds.), supra n. 37, § 794 ZPO margin n. 34.
632 Lackmann, in Musielak and Voit (eds.), supra n. 37, § 794 ZPO margin n. 34.
633 Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 150.
634 Kindler, in Heckschen and Herrler et al. (eds.), supra n. 628, § 31 margin n. 438; Lackmann, in Musielak and Voit (eds.), supra n. 37, § 794 ZPO margin n. 34; Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 184; see text to n. 11.3.1 infra.
635 Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 163.
636 Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 164.
637 Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 169, 170.
638 Kindler, in Heckschen and Herrler et al. (eds.), supra n. 628, § 31 margin n. 437.
639 Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 43.
640 BGH, Urteil v 30 April 1998 – IX ZR 150/97, NJW 1998 p. 2830 at. 2831; Lackmann, in Musielak and Voit (eds.), supra n. 37, § 794 ZPO margin n. 40.

claims, the identification of the circumstances that are a precondition for the enforcement, the creditor as well as the debtor and the Unterwerfungserklärung.[641]

11.5 What personal information must be specified in the notarial act for the purposes of identifying the Parties?

The requirements concerning the identification of parties stem from the Beurkundungsgesetz. Pursuant to § 10 BeurkG in connection with § 26 II Dienstordnung für Notare (henceforth: DONot), the parties have to be identified in a way excluding any possibility for a confusion. Accordingly, the parties have to be mentioned with their full names (first name and family name), name of birth, date of birth, residence (and apartment), marital status, and – in case it can be assumed that the notarial act will be used outside of Germany – the parties' nationalities.[642] The notary has to confirm the information by checking the parties' IDs. Accordingly, the notarial act has to display the official number of the ID that has been used to confirm the personal data.[643] If the use of a representative has been necessary, the notarial act has to identify the representative as well.[644]

In addition, the notary has to check whether the parties that are present have the (mental) capacity to conduct legal acts pursuant to § 11 BerurkG.[645] However, the capacity to perform legal acts shall only be mentioned within the notarial act in case the notary has doubts towards this capacity by either of the parties.[646]

11.6 Must a notarial act, considered to be an enforcement title, contain a threat of enforcement?

§ 794 I No. 5 ZPO conclusively enumerates the requirements for the notarial act to serve as an enforcement title. This requires in particular the debtor's declaration to subject itself to en-

[641] Kindler, in Heckschen and Herrler et al. (eds.), supra n. 628, § 31 margin n. 430 et seq.; Lackmann, in Musielak and Voit (eds.), supra n. 37, § 794 ZPO margin n. 40; Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 199.
[642] Kindler, in Heckschen and Herrler et al. (eds.), supra n. 628, § 31 margin n. 218 et seq; W. Litzenburger, in Bamberger et al., supra n. 413, § 10 BeurkG margin n. 2.
[643] Litzenburger, in Bamberger et al., supra n. 413, § 10 BeurkG margin n. 7.
[644] Litzenburger, in Bamberger et al., supra n. 413, § 10 BeurkG margin n. 3, 5.
[645] Litzenburger, in Bamberger et al., supra n. 413, § 11 BeurkG margin n. 6 et seq.
[646] Litzenburger, in Bamberger et al., supra n. 413, § 10 BeurkG margin n. 6.

forcement. Any further threat to enforcement within the notarial act is not required.[647] However, the notarial copy has the be certified as the enforceable copy of the notarial act by the inclusion of an enforcement-clause. In case of a notarial act as the basis for the enforcement, the notary that performed the notarial act is competent to issue the enforceable copy pursuant to § 797 II ZPO.

11.7 If applicable, how lengthy and important is the part of the notarial act, which contains warnings and explanations by the notary?

According to § 17 BeurkG, the notary is under the duty to figure out the parties' true intentions, to settle the factual circumstances and the inform the parties about the legal consequences of their respective actions.[648] This includes the notary's duty to inform the parties about the pre-conditions of their legal matter (such as legal capacity, necessary representation etc.), pre-conditions that can impede the legal consequences (such as a violation of good faith and fair dealing pursuant to § 138 BGB or § 242 BGB etc.), all requirements that have to be met to pursue the legal matter and to elaborate on alternative option to design the legal relationship.[649] In consequence, the notarial act has to be phrased in an unequivocal way with regards to these duties whilst there is no express duty to implement the warnings within the notarial act.[650] Rather, § 18 BeurkG stipulates that only warnings with regards to the necessity of permissions rendered by a court or public authority has to become a part of the notarial act.

However, the notary has to read the notarial act to the parties pursuant to § 13 I BeurkG.[651] Afterwards, the parties have to confirm the content[652] and sign the notarial act[653] prior to the notary's signature that finalizes the notarial act.[654] For notarial acts concerning rights and obligations of consumers, the notary should make every effort for the consumer to be present at the certification in person or represented by a personal confidant according to § 17 IIa No 1 BeurkG.[655] Pursuant to § 17 IIa No 2 BeurkG, the notary is obliged to grant the consumer a

[647] Cf. Kindler, in Heckschen and Herrler et al. (eds.), supra n. 628, § 31 margin n. 423 et seq.
[648] Kindler, in Heckschen and Herrler et al. (eds.), supra n. 628, § 31 margin n. 80.
[649] Litzenburger, in Bamberger et al., supra n. 413, § 17 BeurkG margin n. 3.
[650] Litzenburger, in Bamberger et al., supra n. 413, § 17 BeurkG margin n. 15.
[651] Litzenburger, in Bamberger et al., supra n. 413, § 13 BeurkG margin n. 1 et seq.
[652] Litzenburger, in Bamberger et al., supra n. 413, § 13 BeurkG margin n. 8.
[653] Litzenburger, in Bamberger et al., supra n. 413, § 13 BeurkG margin n. 9.
[654] Litzenburger, in Bamberger et al., supra n. 413, § 17 BeurkG margin n. 21.
[655] Litzenburger, in Bamberger et al., supra n. 413, § 17 BeurkG margin n. 37 et seq.

reasonable opportunity to prepare for the certification by providing it with a draft notarial act[656] and, in case the notarial act concerns a right of immovable property, the consumer has to be granted 14 days prior to the signature of the notarial act to sufficiently check the terms and conditions.[657] These requirements likewise serve a warning-function.

11.7.1 Is the notary obliged to explicitly warn the parties about the direct enforceability of the act?

As the notarial act has to contain the Unterwerfungsklausel to be enforceable and since the notary has to inform the parties about the legal consequences of their respective actions, a duty to warn the parties about the direct enforceability follows from the interplay of provisions of the Beurkundungsgesetz.[658] However, the notarial act must not contain a part displaying that the notary warned the parties.

11.7.2 Is there a need for parties and/or the notary to sign each page of a notarial act, to be considered valid?

There is no such need, neither for the parties nor for the notary. Rather, it is common that the notarial act is signed below (after) its closing remarks.[659]

11.8 What are the consequences if the parties fail to meet the formal requirements for a valid notarial act?

The consequences of a violation of formal requirements depend on the provision that stipulated the formal requirement.[660] If the certification process violates basic formal certification requirements, the declaration of intent underlying the certification is null and void.[661] However, any such failure does not affect the enforceable notarial act.[662] Once the notarial act has

[656] Litzenburger, in Bamberger et al., supra n. 413, § 17 BeurkG margin n. 45.
[657] Litzenburger, in Bamberger et al., supra n. 413, § 17 BeurkG margin n. 48.
[658] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 206.
[659] Litzenburger, in Bamberger et al., supra n. 413, § 13 BeurkG margin n. 17.
[660] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 255.
[661] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 255.
[662] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 255.

been declared enforceable, it remains enforceable until it has been lifted.[663] Objections with regard to the formal validity of the enforceable notarial act could be raised within an action seeking the annulment of the notarial act pursuant to § 579 ZPO, objections with regard to the substantive part could be raised within a Vollstreckungsgegenklage.[664]

Notarial acts that have not been established by a notary ('*Nicht-Urkunde*' or '*Scheinurkunde*') are null and void, even if the fake notarial act has been validly declared enforceable.[665] The debtor can prevent the enforcement based upon fake notarial acts with a Vollstreckungsgegenklage pursuant to § 767 ZPO by analogy.[666]

11.9 What kind of (substantive) obligations, arising out of legal relationships and contained in a notarial act can become directly enforceable, according to your domestic legal order (e.g. mortgage)? Conversely, are there legally valid obligations, which cannot become directly enforceable due to restrictions in legislation or due to judicial decisions?

Comment: *For instance, in Slovenia, taxes, which arise from the claim-enforcement procedure, cannot be directly enforced by the creditor. The same applies to some bank products.*

§ 794 I No. 5 ZPO stipulates the requirements for the substantive claim. The claim itself must neither be directed at obtaining a declaration of intent[667] nor must it concern the existence of a tenancy relationship for residential spaces.[668] This restriction does not apply to claims which do not affect the validity of the tenancy relationship, e.g. claims for rent or claims for the clearing of the residential space after the tenancy relationship has been annulled by a court etc.[669] Further, the restriction only applies to claims directed at the tenant, claims direct at the landlord can become part of an enforceable notarial act.[670] Lastly, the restriction only affects tenancy relationship for residential living spaces, not commercial spaces.[671]

In addition, it must be suitable to be part of a settlement.[672] However, this requirement is without any relevance in practice as the enforceable notarial act does not change the legal

[663] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 255.
[664] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 255.
[665] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 256.
[666] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 256.
[667] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 108.
[668] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 108.
[669] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 108; Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 221.
[670] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 220.
[671] Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 222.
[672] See text to n. 10.1.4 infra.

relationship.[673] According to the German Federal Court of Justice, the claim can be of public law nature as well.[674]

Pursuant to § 788 ZPO, the cost arising out of the enforcement are paid by means of enforcement. Accordingly, it is neither necessary that the debtor subject itself to the enforcement concerning the costs of the enforcement nor that the notarial act contains a provision dealing with the cost of the enforcement.[675] However, this does not entail the costs for the certification itself, e.g. the notary fee as well as other legal costs.[676] These cannot be subject to direct enforcement if they are not specified within the notarial act.[677]

11.10 Is it possible that conditional claims, contained in a notary act are directly enforceable? If so, are there any special conditions, which have to be met in notarial acts or in enforcement procedure?

Yes, the enforceable notarial act can entail a conditional claim subject to the requirement that the claim remains specified.[678] This requires that the notary that issues the enforcement-clause can determine the fulfilment of the condition without any doubts, irrespective of the fact whether the condition concerns the existence, amount or maturity of the claim.[679] It is further possible to subject the enforcement itself to certain conditions, e.g. the enforcement into immovable property that is yet to buy by the debtor.[680]

[673] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 51; Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 215.
[674] BGH, Beschluss v 20 October 2005 – I ZB 3/05, NJW-RR 2005, p. 645; Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 51; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 110.
[675] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 115.
[676] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 115.
[677] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 115.
[678] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 112.
[679] BGH, Beschluss v 30 June 1983 – V ZB 20/82, NJW 1983 p. 2262; Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 112.
[680] Hoffmann, in Vorwerk and Wolf (eds.), supra n. 19, § 794 ZPO margin n. 49.

11.11 Can obligations, contained in a directly enforceable notary deed, be contained in attachments to the notarial act or must they be set out specifically within the text of the act?

Declarations which are contained in attachments to the notarial act are to be considered a part of the notarial act if they are attached to the notarial act and if the text of the notarial act refers to the attachment, § 9 I sentence 2 BeurkG.[681] However, the reference to attachments only suffices to further specify the content of the notarial deed.[682] The necessary content for an enforceable notarial act[683] has to be contained within the notarial act itself.[684]

11.12 Is it possible for parties to conclude a contract wherein they set up a legal (contractual) relationship and only later bring said contract to the notary in order to confirm the direct enforceability of obligations, arising out of the contract?

Yes, that is possible. The notary has to issue a notarial act with the necessary content displaying the legal relationship and including the Unterwerfungserklärung. However, it is important to mention that only the notarial act forms the basis of enforcement. The contract that has been concluded between the parties is of no relevance with regard to the enforcement. If it is attached to and referred to within the notarial act, it might serve to specify and interpret the notarial act.

11.13 Must the notarial act include the specification of the time period in which the obligation of the debtor is to be performed? In conjunction, is there the possibility that a notarial act is directly enforceable even if the time period has not yet expired? If so, under what conditions?

The notarial act must not contain the specification of the time period in which the obligation of the debtor is to be performed. In case the enforcement of the claim depends on a time period to expire, the enforcement must not take place prior to the expiration of the time period pursuant to § 751 I ZPO. Even in case the notarial act concerns a payment by installments and the debtor subjected itself to enforcement for the entire payment, the enforcement for the en-

[681] Kindler, in Heckschen and Herrler et al. (eds.), supra n. 628, § 31 margin n. 253; Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 202.
[682] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 124; Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 202.
[683] See text to n. 11.2 infra.
[684] Münzberg, in Bork and Roth (eds.), supra n. 375, § 794 ZPO margin n. 124; Wolfsteiner, in Krüger and Rauscher (eds.), supra n. 255, § 794 ZPO margin n. 202.

tire payment cannot take place prior to the date after which the last installment has become due.[685] § 751 ZPO does not cover the cases in which the claim underlying the enforceable notarial act has already become due but the enforcement itself is subject to the expiration of a time period, e.g. due to a court order.[686] In this case, the enforcement-creditor can apply for the certification of the enforcement-clause prior to the expiration of the time period. However, the public authority competent for the enforcement must not start with the enforcement prior to the expiration of the time-period.[687] Together with the beginning of the enforcement or after the enforcement had begun, the debtor can waive the right to stay the enforcement until the expiration of the time period.[688] In the absence of any specification, the time period is considered to start the moment the notarial act becomes effective.[689]

11.14 Disregarding EU legislation, are there any special restrictions regarding recognition and enforcement under the private international law of you Member State, pertaining specifically to foreign notarial acts?

Pursuant to § 328 ZPO, recognition shall only be granted to foreign judgments. The term judgment does not encompass enforceable notarial acts.[690] Accordingly, foreign notarial acts cannot be recognised and enforced disregarding EU legislation.[691] Nevertheless, the content of the foreign notarial act unfolds its substantive effect and has to be considered within a German proceeding.[692]

[685] Heßler, in Krüger and Rauscher (eds.), supra n. 255, § 751 ZPO margin n. 10.
[686] Heßler, in Krüger and Rauscher (eds.), supra n. 255, § 751 ZPO margin n. 14.
[687] Heßler, in Krüger and Rauscher (eds.), supra n. 255, § 751 ZPO margin n. 14.
[688] Heßler, in Krüger and Rauscher (eds.), supra n. 255, § 751 ZPO margin n. 31.
[689] Heßler, in Krüger and Rauscher (eds.), supra n. 255, § 751 ZPO margin n. 11.
[690] I. Bach, in Vorwerk and Wolf (eds.), supra n. 19, § 328 ZPO margin n. 1; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 328 ZPO margin n. 74.
[691] Bach, in Vorwerk and Wolf (eds.), supra n. 19, § 328 ZPO margin n. 8; Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 328 ZPO margin n. 74.
[692] Gottwald, in Krüger and Rauscher (eds.), supra n. 63, § 328 ZPO margin n. 74.

11.15 Is it possible to bring grounds of objection in enforcement proceedings, concerning not only enforcement proper (execution), but opposition to the claim itself? In other words, can the debtor raise grounds against the claim contained in the notary act in enforcement proceedings?

According to § 795 ZPO, the enforcement resulting from a notarial act is subject to the same provisions as the enforcement based upon a judgment. Consequently, the possibilities to bring grounds of objections concerning the claim itself correspond to the options to bring grounds of objections towards the claim itself contained in a judgment.[693]

11.16 If your domestic legal order does not operate with enforceable notarial acts, how would you enforce a foreign enforceable notarial act?

11.17 Are there other authentic instruments under your domestic legal order, which are considered enforcement titles?

Next to judgments, § 794 ZPO conclusively lists the enforceable legal documents.

§ 794 ZPO - Further enforceable legal documents

(1) Compulsory enforcement may furthermore be pursued:

1. Based on settlements concluded by the parties, or between one of the parties and a third party, in order to resolve the legal dispute either in its full scope or as regards a part of the subject matter of the litigation, before a German court or before a dispute-resolution entity established or recognised by the Land department of justice (Landesjustizverwaltung), as well as based on settlements that have been recorded pursuant to section 118 (1), third sentence, or section 492 (3) for the record of the judge;

2. Based on orders assessing the costs;

2a. (repealed)

2b. (repealed)

3. Based on decisions against which a complaint may be lodged as an appellate remedy;

3a. (repealed)

4. Based on writs of execution;

4a. Based on decisions declaring arbitration awards as enforceable, provided that the decisions are final and binding or have been declared provisionally enforceable;

4b. Based on orders pursuant to section 796b or section 796c;

[693] See text to n. 8.3 infra.

5. Based on records or documents that have been recorded in accordance with the requirements as to form by a German court or by a German notary within the bounds of his official authority, provided that the record or document has been recorded regarding a claim that can be provided for by a settlement, that is not directed at obtaining a declaration of intent, and that does not concern the existence of a tenancy relationship for residential spaces, and furthermore provided that the debtor has subjected himself, in the record or document, to immediate compulsory enforcement of the claim as specified therein;
6. Based on European orders for payment that have been declared enforceable according to regulation no 1896/2006;
7. Based on European orders for payment of unconstested claims according to regulation no 805/2004;
8. Based on European orders for payment of small claims according to regulation no 861/2007;
9. Based on enforcement titles rendered by a member state of the European Union and that are to be enforced pursuant to regulation no 1215/2012.

(2) Insofar as, pursuant to the stipulations of sections 737, 743, section 745 (2), and of section 748 (2) it is necessary to sentence a party involved to tolerating compulsory enforcement, this shall be substituted by the party involved approving, in a record or document prepared pursuant to subsection (1) number 5, the immediate compulsory enforcement against the objects that are subject to the title he holds.

Instructions for contributors

1. References

As a rule, specific references should be avoided in the main text and, preferably, should be placed in the footnotes. Footnote numbers are placed after the final punctuation mark when referring to the sentence and directly after a word when referring to that word only. We humbly invite our authors to examine carefully our sample references which are preceded by [•]. These sample references put the theory of our authors' guidelines into practice and we believe that they may serve to further clarify the preferred style of reference.

1.1. Reference to judicial decisions

When citing national judicial authorities, the national style of reference should be respected. References to decisions of European courts should present the following form:

[Court] [Date], [Case number], [Party 1] [v] [Party 2], [ECLI] (NB: the "v" is not italicised)

- ECJ 9 April 1989, Case C-34/89, Smith v EC Commission, ECLI:EU:C:1990:353.
- ECtHR 4 May 2000, Case No. 51 891/9, Naletilic v Croatia.

1.2. Reference to legislation and treaties

When first referring to legislation or treaties, please include the article to which reference is made as well as the (unabbreviated) official name of the document containing that article. The name of a piece of legislation in a language other than English, French or German should be followed by an italicised English translation between brackets. In combination with an article number, the abbreviations TEU, TFEU, ECHR and UN Charter may always be used instead of the full title of the document to which the abbreviation refers. If the title of a piece of legislation constitutes a noun phrase, it may, after proper introduction, be abbreviated by omission of its complement. Thus:

- Art. 2 Protocol on Environmental Protection to the Antarctic Treaty (henceforth: the Protocol).
- Art. 267 TFEU.
- Art. 5 Uitleveringswet [Extradition Act].

1.3. Reference to books

1.3.1 First reference

Any first reference to a book should present the following form: [Initial(s) and surname(s) of the author(s)], [Title] [(Publisher Year)] [Page(s) referred to]

- J.E.S. Fawcett, The Law of Nations (Penguin Press 1968) p. 11.

If a book is written by two co-authors, the surname and initials of both authors are given. If a book has been written by three or more co-authors, 'et al.' will follow the name of the first author and the other authors will be omitted. Book titles in a language other than English,

French or German are to be followed by an italicised English translation between brackets. Thus:

- L. Erades and W.L. Gould, The Relation Between International Law and Municipal Law in the Netherlands and the United States (Sijthoff 1961) p. 10 – 13.
- D. Chalmers et al., European Union Law: cases and materials (Cambridge University Press 2010) p. 171.
- F.B. Verwayen, Recht en rechtvaardigheid in Japan [Law and Justice in Japan] (Amsterdam University Press 2004) p. 11.

1.3.2 Subsequent references

Any subsequent reference to a book should present the following form (NB: if more than one work by the same author is cited in the same footnote, the name of the author should be followed by the year in which each book was published):

[Surname of the author], [supra] [n.] [Footnote in which first reference is made], [Page(s) referred to] Fawcett, supra n. 16, p. 88.

- Fawcett 1968, supra n. 16, p. 127; Fawcett 1981, supra n. 24, p. 17 – 19.

1.4. Reference to contributions in edited collections

For references to contributions in edited collections please abide by the following form (NB: analogous to the style of reference for books, if a collection is edited by three or more co-editors only the name and initials of the first editor are given, followed by 'et al.'):

[Author's initial(s) and surname(s)], ['Title of contribution'], [in] [Editor's initial(s) and surname(s)] [(ed.) or (eds.)], [Title of the collection] [(Publisher Year)] [Starting page of the article] [at] [Page(s) referred to]

- M. Pollack, 'The Growth and Retreat of Federal Competence in the EU', in R. Howse and K. Nicolaidis (eds.), The Federal Vision (Oxford University Press 2001) p. 40 at p. 46.

Subsequent references follow the rules of 1.3.2 supra.

1.5. Reference to an article in a periodical

References to an article in a periodical should present the following form (NB: titles of well-known journals must be abbreviated according to each journal's preferred style of citation):

[Author's initial(s) and surname(s)], ['Title of article'], [Volume] [Title of periodical] [(Year)] [Starting page of the article] [at] [Page(s) referred to]

- R. Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa-New Zealand', 17 Waikato Law Review (2009) p. 74 at p. 80 – 82.
- S. Hagemann and B. Høyland, 'Bicameral Politics in the European Union', 48 JCMS (2010) p. 811 at p. 822.

Subsequent references follow the rules of 1.3.2 supra.

1.6. Reference to an article in a newspaper

When referring to an article in a newspaper, please abide by the following form (NB: if the title of an article is not written in English, French or German, an italicised English translation should be provided between brackets):

- [Author's initial(s) and surname(s)], ['Title of article'], [Title of newspaper], [Date], [Page(s)]: T. Padoa-Schioppa, 'Il carattere dell' Europa' [The Character of Europe], Corriere della Serra, 22 June 2004, p. 1.

1.7. Reference to the internet

Reference to documents published on the internet should present the following form: [Author's initial(s) and surname(s)], ['Title of document'], [<www.example.com/[...]>], [Date of visit]

- M. Benlolo Carabot, 'Les Roms sont aussi des citoyens européens', <www.lemonde.fr/idees/article/2010/09/09/les-roms-sont-aussi-des-citoyens- europeens_1409065_3232.html>, visited 24 October 2010. (NB: 'http://' is always omitted when citing websites)

1.8. Cross-references

In referring to other chapters and sections of the text, as well as to other footnotes, supra is used to refer to previous sections of the contribution, whereas infra is used to refer to subsequent sections. Cross-references should never refer to specific page numbers. Thus:

- See text to n. 10 supra.
- See text between n. 10 and n. 12 infra.
- Compare n. 10 supra.

2. Spelling, style and quotation

In this section of the authors' guidelines sheet, we would like to set out some general principles of spelling, style and quotation. We would like to emphasise that all principles in this section are governed by another principle – the principle of consistency. Authors might, for instance, disagree as to whether a particular Latin abbreviation is to be considered as 'common' and, as a consequence, as to whether or not that abbreviation should be italicised. However, we do humbly ask our authors to apply the principle of consistency, so that the same expression is either always italicised or never italicised throughout the article.

2.1 General principles of spelling

- Aim for consistency in spelling and use of English throughout the article.
- Only the use of British English is allowed.
- If words such as member states, directives, regulations, etc., are used to refer to a concept in general, such words are to be spelled in lower case. If, however, the word is intended to designate a specific entity which is the manifestation of a general concept,

the first letter of the word should be capitalised (NB: this rule does not apply to quotations). Thus:

- [...] the Court's case-law concerning direct effect of directives [...]
- The Court ruled on the applicability of Directive 2004/38. The Directive was to be implemented in the national law of the member states by 29 April 2006.
- There is no requirement that the spouse, in the words of the Court, 'has previously been lawfully resident in another Member State before arriving in the host Member State'.
- Avoid the use of contractions.
- Non-English words should be italicised, except for common Latin abbreviations.

2.2. General principles of style

- Subdivisions with headings are required, but these should not be numbered.
- Use abbreviations in footnotes, but avoid abbreviations in the main text as much as possible.
- If abbreviations in the main text improve its legibility, they may, nevertheless, be used. Acronyms are to be avoided as much as possible. Instead, noun phrases are to be reduced to the noun only (e.g., 'the Court' for 'the European Court of Human Rights'). If this should prove to be problematic, for instance because several courts are mentioned in the text (e.g., the Court of Justice and the European Court of Human Rights), we ask our authors to use adjectives to complement the noun in order to render clear the distinction between the designated objects (e.g., the Luxembourg Court/the European Court and the Strasbourg Court/the Human Rights Court). As much will depend on context, we offer considerable liberty to our authors in their use of abbreviations, insofar as these are not confusing and ameliorate the legibility of the article.
- In English titles, use Title Case; in non-English titles, use the national style.

2.3. General principles of quotation

- Quotations are to be placed between single quotation marks, both in the main text and in the footnotes (thus: 'aaaaa').
- When a quotation forms part of another quotation, it is to be placed between double quotation marks (thus: 'aaaaa "bbbbb" aaaaa').
- Should a contributor wish to insert his own words into a quotation, such words are to be placed between square brackets.
- When a quotation includes italics supplied by the contributor, state: [emphasis added].