MANUAL - Austria

for legal practitioners dealing with cross-border enforcement of civil claims

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This Manual is intended to help practitioners (primarily authorities in the field of civil enforcement) facing a foreign enforcement title. It offers answers to the most pressing issues faced in cross-border enforcement proceedings in a step-by-step manner, starting with the visual inspection and identification of the elements of the enforcement title. However, the Manual should only be used as an assisting tool in an unofficial capacity and cannot replace the scrutiny of regular inspection. The materials for this Manual have been sourced from national reports and other deliverables obtained within the EU-En4s project.

Contents

1. Judgement

1.1 Headlines that form part of the judgement

The Austrian Civil Procedure Code (henceforth: ZPO) does also not explicitly set out the "headlines" of a judgement. The §§ 417 following ZPO define the form and the content of a written judgment. According to this a written version of the judgment must include:

1. the name of the court and the names of the judges who took part in the decision; if a regional court passes a judgment of special jurisdiction in commercial matters or an independent commercial court passes a judgment of general jurisdiction, this must also be indicated;
2. the designation of the parties by name (first name and surname), employment, place of residence and party status as well as the designation of their representatives; in matters of civil status, moreover, the date and place of birth of the parties; in the cases of § 75a ZPO, the indication of the place of residence shall be omitted;
3. the operative part of the judgment;
4. the reasons for the decision.

(2) The operative part of the judgment and the grounds for the decision must be external. The reasons for the decision must contain, in a compact form, the essential arguments and forms of order sought by the parties, the out-of-court settlements, the findings of fact, the assessment of evidence and the legal assessment.

(3) The judgment shall contain a reference to the submissions declared inadmissible by the court on the basis of sections 179, 180(2), 275(2) and 278(2), as well as to the evidence which was not permitted to be used on account of the unsuccessful passing of a time limit set for the taking of evidence.

(4) Default judgments, waivers and acknowledgements may be issued in shortened form, using a duplicate of the claim or a heading. The detailed rules shall be laid down by regulation.

Judgments shall be pronounced and made on "Behalf of the Republic" according to Art. 82 (2) Federal Constitutional Law (henceforth: B-VG). This formula is usually situated at the top of the judgment. A break of the formal requirement of Art 82 (2) B-VG, however, remains without sanction.

The written judgment must be divided into three clearly separate sections, namely the judgment header *(Urteilskopf*), the judgment ruling *(Urteilsspruch)* and the reasons for the decision *(Entscheidungsgründe)* (§ 114 (2) Rules of Procedure for Courts of first and second Instance; henceforth: Geo).

Typically, the keywords "reasons for decisions" *(Entscheidungsgründe),* "findings" *(Feststellungen),* "assessment of evidence" *(Beweiswürdigung)* and "legal assessment" *(Rechtliche Beurteilung)* are used as headings. However, this merely serves to improve the structure and readability of a judgement. All of these "headings" are mostly centre aligned. They are normally not numbered. There are no formal requirements as to what the headings should look like. A further subdivision with subheadings is generally not made.

The "ordering part" is located at the beginning of the judgment (before the reasons for the decision) and says whether the application *(Klagebegehren)* is dismissed or rejected or whether it is well founded.

1.2 Structural and substantive division/sequence of the Reasoning

The reasons of the decision must be separated externally from the operative part of the judgment (§ 417 (1) no 4 ZPO). They contain the following information:

- the reproduction of the party's arguments
- an indication of the evidence provided
- the listing of the requests for evidence rejected as delayed (§ 417 (3) ZPO)
- the findings of fact on which the Court of First Instance based its findings
- the assessment of evidence
- the legal assessment
- the reasons for the decision on costs.

In practice, the facts of the case are often mentioned at the beginning of the reasons for the decision, as long as they are undisputed or are expressly declared to be beyond dispute.
In the assessment of the evidence, the Court of First Instance deals with the results of the evidence and explains why it reaches its findings. The legal assessment contains the subsumption of the established facts under legal facts.
A "structural division" of the reasonings text does not exist in Austria. The text is divided into paragraphs only; it is neither listed nor numbered.

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": Urteilskopf
"the operating part": Urteilsspruch oder Urteilstenor
"the reasoning of the judgement": Entscheidungsgründe
"legal instruction": rechtliche Beurteilung

1.4 Short description of the elements of the judgement

The structure of a judgment is defined in §§ 417 ff ZPO.

The heading of the judgment includes the business number *(Geschäftszahl),* the standardized heading *("Im Namen der Republik"),* the designation of the court *(Bezeichnung des Gerichts),* the parties and their representatives *(Bezeichnung der Parteien und deren Vertreter),* the designation of the matter of the dispute (*Bezeichnung des Streitgegenstands),* whether an oral hearing took place and a jurisdictional formula *(Das Gericht hat ... zu Recht erkannt).*

The operative part is the core of the judgment and contains the decision on the action as well as all other requests to be settled by judgment. Furthermore, certain decisions must also be included in the judgment. The court is bound by the motions of the parties when rendering its judgment. It may not award any party anything that has not been applied for (see § 405 ZPO). A judgment on performance must also contain a time limit, which in principle corresponds to 14 days (see § 409 ZPO).

The reasons for the decision, which must be kept separate from the judgment, have to contain the following (in accordance with § 417 (2) ZPO):

- the submissions and requests of the parties,
- if applicable, findings as to the fulfilment of the requirements of the proceedings,

- the evidence taken and the citation of rejected applications for evidence,
- the establishment of the facts,
- the consideration of evidence,
- the legal assessment,
- and the reasons for the decision on costs.

The judgment is concluded with the date of the decision and the signature of the judge or the chairman of the judges' panel.

1.5 Graphical separation of the elements of the judgement

Usually, the judgment is separated by headings. However, the formatting is left to the judge, so not every judgment looks the same. The content is given and follows the regulations of § 417 ZPO.

1.6 Specification of time-period in which the judgement must be performed

The conditions for the enforceability of a domestic enforcement title are in part already checked when the certificate of enforceability *(Vollstreckbarkeitsbestätigung)* is issued. The following applies regarding to the time limits:

- Suspensive time-limits for appeal (suspensive *RM-Fristen)* must be completed (for instance the time-limit for charging a second instance appeal (*Berufung)* § 464 (1) ZPO, the time-limit for charging an ordinary appeal in cassation *(ordentliche Revision).*
- In general, there is a 14-day performance period regarding the judge's debt (§ 409 (1) ZPO). This time-limit must also have expired.
- The enforcement title may not become ineffective because of time schedule: Attention: Enforcement titles regarding inventories (e.g. eviction order - *Räumungsurteil)* must be enforced within six months of the end of the eviction period; § 575 (3) ZPO. In Austria, judicial debt is generally time-barred after 30 years.

In order to enforce a foreign judgment in Austria, there are special conditions to consider. In the absence of an enforcement title made enforceable by international agreement or by a European act, the certificate of enforceability (*Vollstreckbarkeitsbestätigung)* must confer domestic enforceability on such a title (Exequatur). There are some requirements which must be fulfilled for a declaration of enforceability (*Vollstreckbarerklärung*) – see § 406 of the Austian Austrian *Exekutionsordnung* (Federal Act on execution and safeguarding proceedings, hereinafter – EO);

- The enforcement title must be enforceable in the member state of origin (henceforth: MSO). A foreign enforcement title that has been declared enforceable by a final decision cannot have more effect in Austria than in the MSO. (§ 406 EO)
- Reciprocity must be guaranteed by international treaties or regulations. (§ 406 EO)

When the BIA Regulation became legally binding, the importance of bilateral agreements has significantly decreased. The BIA regulation is no longer formally based on reciprocity. It assumes that titles from one member state are in principle accepted and enforced in the other member states.

1.7 Identification of Parties

The parties must normally be identified by name (first name and surname), occupation, place of residence and status as a party of the procedure (§ 75 ZPO). If there is a confidentiality interest worthy of protection, the need to state the place of residence may be omitted.

In personal status cases, the date and place of birth of the parties must be included. For a judgment to be entered in the land register, the date of birth of the affected parties must also be stated. In the case of legal entities that are registered in the commercial register, the commercial register number must be entered.

1.8 Indication of the amount in dispute

The amount in dispute is made by the claimant. He must indicate the amount in dispute in his action. If the amount in dispute consists in an amount of money, it (the amount in dispute) will be determined by this amount. Only the amount of the principal claim is relevant. Interest and additional claims are not included in the amount in dispute (see § 54 (2) *Jurisdiktionsnorm* or Jurisdictional Order; henceforth - JN). If the subject of the dispute (*Streitgegenstand*) has no monetary value, the claimant must evaluate the subject of the dispute in terms of property. If the claimant fails to do so, the amount in dispute will be assumed to be 5.000 EUR (see § 56 (2) JN).

The assessment of the subject of the dispute by the claimant is in principle binding for the court and for the defendant (see § 60 (4) JN). In practice the complaints regarding the amount in dispute (*Streitwertbemängelung*) for the decision on costs according to § 7 *Rechtsanwaltstarifgesetz* (Attorney rate Act, henceforth - RATG) is important. If the defendant considers the claimant´s assessment of the amount in dispute (*Streitwertbewertung)* to be too high or too low, he can complain about it at the latest in the preparatory hearing (*vorbereitende Tagsatzung*). If the parties do not agree, the court must do the assessment of the amount in dispute. This decision is not appealable. Disputes without an asset have not been valued by the claimant (for instance a status action).

1.9 Indication of the underlying legal relationship

In its reasoning, the court must also mention, among other things, the legal assessment of the dispute. For this purpose, the court must subordinate the established facts to a legal fact. The objective of the legal assessment is to resolve the question whether the facts established by the court create the legal consequence sought by the claimant. Where a court is bound by the legal opinion expressed by a higher instance in a setting aside order (*Aufhebungsbeschluss*), the legal assessment may be limited to a simple reference.

However, the legal assessment of the dispute is no longer of relevance in the execution proceedings (*Exekutionsverfahren*) that follows the trail (*Erkenntnisverfahren*). As is well known, the execution proceedings only serve to enforce a claim established in the trail.

In Austria there is also the possibility for the creditor to obtain a monetary claim by enforcement of salary. Due to debtor protection considerations, the debtor must be left with a certain unattachable exemption amount (subsistence minimum - *Existenzminimum*).

A disregard of the subsistence minimum, due to an enforcement of a claim arising from an intentionally committed tort, is not known in the Austrian EO. The court of execution must therefore not be able to recognise the legal assessment.

1.10 Information contained in the operative part

The operative part is the core of each judgment and contains the decision on the application (*Klagebegehren*) and all other substantive issues to be settled in judgment (see also § 404 (1) ZPO). The operative part of the judgment includes, inter alia, decisions on the substantive issues. Specifically, these are: the decision on the application, the decision on the set-off defence (*Aufrechnungseinrede*), if the principal claim is at least partially valid, the decision on applications for interim measures according to §§ 236, 259 ZPO, the statement of fault (if this is provided for in the marriage proceedings). The operative part of the judgment shall also include the following decisions (*Beschlüsse*): the decision on the costs of the proceedings (see § 52 (1) ZPO), the rejection and dismission of process claims (*Prozesseinreden*) and the claim of the irregular formation of the court, if the main proceeding is continued (see § 261 (1) ZPO), any other decisions reserved to the judgment or taken jointly with it (for example the approval of a change of claim). For the purpose of determining the exact scope of the *res judicata*, the judgment dismission the application must clearly state the application which is dismissed. A completely permissive judgment corresponds, with regard to its content, entirely to the application of the claimant.

In rendering its judgement, the court shall be bound by the submissions of the parties (see § 405 ZPO). Therefore, no plus or *aliud*, but a minus may be awarded. The court my not award anything to a party that is not applied. According to the jurisprudence, an infringement of this provision constitutes only a procedural fault (*Mangelhaftigkeit des Verfahrens*); the dominating theory, on the other hand, assumes nullity (*Nichtigkeit*).

A performance judgment must always include a performance period in its operative part (see § 409 ZPO). Unless the law provides different, this is 14 days.

1.11 Existence of a threat of enforcement

An Austrian judgment usually contains the following phrase: “The defendant is obliged to pay the claimant XX EUR and 4% interest since XX within 14 days, otherwise it will be enforced”. If the defendant does not pay voluntarily within the performance period, the debtor creditor (*betreibende Gläubiger*) can file a request for enforcement (*Exekutionsantrag*) and thereby initiates the execution proceedings.

1.12 Final specification of debt

In its judgment, the court decides on the application (*Klagebegehren*) and all other substantive motions on which a judgment is given (for example, the decision on the set-off defence (*Aufrechnungseinrede*), if the principal claim is justified).

The claimant later fills in the application for enforcement (*Exekutionsantrag*) on the basis of the present title. The court of enforcement follows this (application) when enforcing the debtor’s claim.

1.13 Partial rejection of a claim

If the claimant's application is not justified in substance, the judge must dismiss it with a judgment *(mit Urteil abweisen)*. It belongs to the legal assessment of the judge to determine whether the claim is justified in substance or not.

According to that, a "normal" judgement is issued, that contains the following passage in the operative part: "The claimant's application (repetition of the exact wording of the application) is dismissed".

1.14 Set-off of a claim

The offsetting defence (*Aufrechnungseinrede*) is a conditional defence (*Eventualeinrede*). A decision on it is only possible if at least part of the main claim is justified. A decision on the compensation claim can only be made up to the amount in which the main claim rightly exists (see § 411 (1) last sentence ZPO).

The following decisions can be taken on the offsetting defence:

- If the claim is not fully justified, the action will be dismissed (*abweisen*) by judgment. The existence of the counterclaim (*Gegenforderung*) is not checked at all (contingent nature of the set-off defence). The counterclaim is therefore not mentioned at all in the operative part of the judgment.
- If the existence of the principal claim is disputed and the existence of the counterclaim is undisputed, the existence or non-existence of the principal claim must first be decided. Under no circumstances may the action be dismissed immediately (only because of the existence of the counterclaim).
- If the claim and the counterclaim are both ready for decision at the same time, a final judgment must be rendered.

In principle, a three-part judgment must be drafted:

1) The sued claim exists with ... EUR rightly (*Die eingeklagte Forderung besteht mit ... EUR zu Recht*);
2) The defendant's counterclaim exists with ... EUR rightly (*Die Gegenforderung des Beklagten besteht mit ... EUR zu Recht*);
3) [if the counterclaim is less than the principal claim]: The defendant is therefore obliged to pay the claimant ... EUR. (*Der Beklagte ist daher schuldig, dem Kläger ... EUR zu bezahlen*)

   [if the counterclaim is equal to or higher than the principal claim]: The action is therefore dismissed (Das Klagebegehren wird daher abgewiesen)

If the claim is ready for decision earlier than the counterclaim, an interlocutory judgment can be given on the principal claim (see § 391 Abs 3 ZPO). This interlocutory judgment may look like this:

1) The defendant is liable to pay the claimant ... EUR. (*Der Beklagte ist schuldig, dem Kläger ... EUR zu bezahlen.)*
2) The counterclaim will be decided by final judgment. *(Über die Gegenforderung wird mit Endurteil entschieden.)*
3) The decision on costs is reserved for the final judgment. *(Die Kostenentscheidung bleibt dem Endurteil vorbehalten.)*

The interlocutory judgment on the principal claim is a judgment on the merit which is independently appealable and enforceable (see § 391 Abs 3 ZPO).

The final judgment which follows the interlocutory judgment does not cancel the latter, but, if the counterclaim exists, it states that the principal claim has been repaid or reduced by offsetting.

If the counterclaim exists, the final judgment is expressed as follows:

1) The counterclaim from Date-Month-Year of ... EUR exists up to the amount of the claim or with an amount of ... EUR rightly. *(Die Gegenforderung von ... EUR besteht bis zur Höhe der Klagsforderung bzw mit einem Betrag von ... EUR zu Recht.)*
2) The claim of ... EUR awarded by interlocutory judgment is therefore extinguished by offsetting. *(Die mit Teilurteil zuerkannte Klagsforderung von ... EUR ist daher durch Aufrechnung erloschen.)*

1.15 References to the Reasoning found within the operative part

There is no element at the operative part regarding to the reasoning of the judgment in Austria. A judgment in full agreement corresponds fully to the content of the request for an appeal (*Klagebegehren*). In the case of a negative judgment, the legal action that is rejected must be specified precisely (so that the extent of the legal force can be determined exactly).

1.16 Wording used to mandate performance

In Austria the following wording is used mandating the debtor to perform:

The defendant is liable to pay the claimant the sum of 7.000 EUR, plus 4% interest from January, 1st 2020, and to cover the costs of the proceedings, fixed at 1.400 EUR. All of this within 14 days, otherwise the defendant will be executed.

In general, everybody in practice knows how to deal with this wording and there are no practical problems referring the word “liable”. In Austria the expression „is liable to pay/perform“ means: “(...) *ist schuldig (...) zu leisten”.*

1.17 Reciprocal claims

In cases of reciprocal relationships, the operative part of the judgment is drafted according to the rules, set out for the offsetting defence, described in the section 1.14 Set-off of a claim

1.18 Indication of interest (rates)

Typical wording of an operative part (especially regarding the interest rate): The defendant is liable to pay the claimant 100.000 EUR within 14 days, plus 4 % interest since 28.7.2010, otherwise the claim will be executed. (*Die beklagte Partei ist schuldig, der klagenden Partei binnen 14 Tagen bei sonstiger Exekution 100.000 EUR samt 4% Zinsen seit 28.7.2010 zu bezahlen*.)

The Austrian Code of Civil Procedure orders in its § 54a ZPO that the party, that is liable to pay costs and does not pay the amount awarded by the court before the date on which the judgment becomes enforceable, has to pay default interest at the legal rate from the date of the judgment on costs (see § 54a (1) ZPO). What is meant by “interest at the legal rate” is defined in § 1000 Allgemeines

Bürgerliches Gesetzbuch (General Civil Code of Austria; henceforth: ABGB). This is therefore 4% per year (see § 1000 (1) ABGB).

1.19 Legal ramification for incomplete, undetermined, incomprehensible or inconsistent operative part

The operative part of a judgment contains the decision on the action and the other substantive motions to be settled in form of a judgment. It is (in accordance with § 405 ZPO) determined and limited by the wording and the content of the claim.

The request for an action must be specific (see § 226 (1) ZPO). If the request for an action is too vague, the court may not grant it. However, it does not go further than the wording of § 405 ZPO if the court clarifies an unspecified claim (*Klagebegehren*) in such a way that it includes in its operative part specifications which, although expressly not contained in the claim, can be perfectly deduced from the underlying factual argument. If, therefore, the vagueness of the request is merely an error of wording, the court may complete the operative part with the information necessary to establish its accuracy.

Moreover, the court may give a clearer and more explicit wording to the operative part, even if it departs from the wording of the request. The court may not exceed the limits of the request as defined by the parties, in particular it may not grant an *aliud* or base its decision on facts which were not provided in the previous proceedings (it may not award the parties anything which has not been applied for). However, the court may grant a quantitative reduction of the requested legal consequence (for example, instead of the desired 6.000 EUR, only 3.000 EUR are awarded).

§ 405 ZPO does not specify the legal consequences on an offence against it. Austrian academics have different views on this: On the one hand, it is argued that there is a ground for nullity (which is not mentioned in § 477 ZPO) or a failure to respect the right to be heard. On the other hand, there are those who believe that a violation of § 405 ZPO is another procedural violation. On the other hand, an incorrect legal assessment is recognised in this. For many years, jurisdiction has been agreed that a violation of § 405 ZPO is a procedural violation which cannot be perceived *ex officio.* It should therefore be raised on appeal. This should even apply to a complaint that has not been raised at all.

1.20 Legal effects of the Reasoning of the judgement

As a basic rule it can be said that only the operative part of the judgment becomes final. However, the operative part alone is rarely sufficient to individualise the claim as provided in § 411 ZPO. The substantive *res judicata* therefore extends to those reasonings which are necessary for the interpretation and individualisation of the operative part (relative *res judicata* effect of the reasoning). To be more specific, only the facts set out in the reasoning, the facts relied on in support of the claim and established as such by the court and the legal conclusion of the subsumption may be used for interpretation. This is of particular importance in dismission the action. The legally binding negation of the claim is in principle limited only to the reasons used by the court to dismiss the claim but does not prevent the same claim from being pursued on the basis of other facts which create rights.

1.21 Obtaining the res judicata effect

The final judgment fixes the basis for the decision which existed at the end of the oral proceedings. It is also referred to as the relevant time of decision. As a rule, this means the end of the oral proceedings

of the first instance, because in civil proceedings a prohibition of innovation generally applies from this point in time.

If the permission to innovate also includes the possibility of submitting *nova producta* (facts that occur after the end of the hearing at first instance) the relevant time of decision is postponed to the end of the second instance hearing.

Changes in the facts of the case after the end of the oral hearing of the first or second instance are not covered by the substantive legal force.

1.22 Res judicata of negative declaratory relief

With the action for a negative declaratory judgment, the claimant seeks a declaratory judgment that a certain legal relationship with the defendant does not exist, that the right claimed by the defendant does not exist or that the defendant is not entitled to the claimed right. The purpose of an action for a negative declaratory judgment is primarily to put an end to a state of uncertainty that is harmful to both parties, to prevent the defendant from claiming the right as a cause of legal uncertainty and to force the defendant to prove the claimed right.

The substantive force of a positive declaratory judgment also has the effect, between the same parties (or their successors in title), on an action for a negative declaratory judgment (or an application for interim judgment) concerning the same law or legal relationship. The same also applies in the reverse case.

Declaratory judgments have only declaratory effect. They therefore do not create a claim for benefits *(schaffen keinen Leistungsanspruch)* and are not enforceable (apart from a claim for compensation for legal costs included in the judgment).

1.23 Suspensive periods barring the enforcement of a judgement

The requirements for enforceability are in part already checked by the title court (*Titelgericht*) (when the confirmation of enforceability - *Vollstreckbarkeitsbestätigung* is issued) and in part when the execution is granted (*bei der Exekutionsbewilligung*) (by the execution court - *Exekutionsgericht*). This leads to the division between formal (regarding to the confirmation of enforceability; § 7 (3) - (6) EO) and substantive (regarding to the granting of the execution; § 7 (2) in conjunction with § 36 (1) Z 1 EO) enforceability.

This question concerns the formal enforceability. To obtain a confirmation of enforceability, the following conditions must be fulfilled:

- The enforcement title must have been properly served on the debtor (see § 416 (1) ZPO);
- Time limits for appeals with suspension effect must have expired (see § 464 (1) ZPO: deadline for filing an appeal (*Berufung*); § 505 (2) ZPO: deadline for filing an ordinary appeal (*ordentliche* Revision);
- The performance period (which is usually 14 days) must have expired (see § 409 (1) ZPO in conjunction with § 7 (2) EO);
- The due date (*Fälligkeit*) of the service must have occurred (see § 7 (2) EO);
- A possible condition precedent (*mögliche aufschiebende Bedingung)* must have occurred (see § 7 (2) EO);

- The enforcement title must not have expired due to the passage of time.

The certificate of enforceability is an official certification by title court that the execution title is enforceable. Therefore, it is not necessary for the court of execution to ask the title court whether the respective enforcement title is enforceable. When the certificate of enforceability is issued, only the formal requirements are checked. The substantive conditions for enforcement are only reviewed during the approval procedure (by the court of execution). This is an essential difference to the German enforcement clause *(deutsche Vollstreckungsklausel; in Deutschland werden vor der Erteilung der Vollstreckungsklausel sowohl die formellen als auch die materiellen Vollstreckungsvoraussetzungen geprüft).*

A certificate of enforceability issued unlawfully or incorrectly shall, either *ex officio* or at the request of one of the parties, be revoked by decision (*Beschluss*) (see § 7 (3) und (4) EO). The decision to set aside the certificate of enforceability (*Aufhebungsbeschluss*) must be served on all parties and - in contrast to the certificate of enforceability itself - is appealable (see § 517 (1) Z 6 ZPO).

In other words, if a decision (*Urteil or Beschluss*) is not (at least) formal enforceable, it cannot be validly enforced by the creditor. If the enforcement is nevertheless granted (in the absence of a valid confirmation of enforceability), the debtor must lodge an appeal (*Rekurs*) and, once the appeal is legally valid, a request for discontinuation. The bearing of costs is again based on § 75 EO.

2. Court settlements

2.1 Elements of a court settlement

The execution of a court settlement is based on its formal requirements, which are specified in the section 2.2 Formal requirements. In order for the court settlement to be used as an enforcement title without writ of execution, it must meet the certainty requirements of an execution title. In any case, the court settlement must name the parties, the date of the conclusion of the settlement and the subject of the settlement. In addition, according to case law, a signature of the parties is always required to give effect to the court settlement.

2.2 Formal requirements

For a settlement to constitute an executory title, the minutes recording the subject matter of the settlement must be signed by the judge and the secretary (§ 213 ZPO) and (according to the case law) also by the parties.

The court settlement has the character of both a procedural act and a legal transaction under civil law. The process is terminated only by a settlement concluded in the form and in compliance with the requirements of procedural law.

The substantive legal validity of a court settlement must be assessed in accordance with the provisions of civil law. If the court settlement is ineffective, e.g. due to the violation of logging regulations, it can be valid as a private legal transaction. The court settlement may contain a suspensive condition. However, a resolving condition is not permitted.

Furthermore, a court settlement can only end the process in the case of absolute obligation to hire a lawyer if it has been concluded with the assistance of lawyers.

2.3 Identification of Parties

The identification of the parties of the court settlement is not a problem in practice and is therefore not regulated by law. It is therefore necessary to refer to the general rules for determining the parties to civil proceedings.

Determining characteristics are first and foremost the information required under § 75 (first name and surname, profession, address), in addition also useful additions (date of birth, company register number, etc.) and, with regard to § 235 (5) ZPO, the entire content of the statement of claim, because the person who was objectively undoubtedly meant in consideration of this entire content is treated as a party - if necessary by correcting the party designation. A distinction must be made between the question of who is a party and the question of whether this party is also correctly designated, whether it is capable of being a party, whether it is capable of taking legal action or is properly represented, and whether it is also rightly suing (active legitimation) or being sued (passive legitimation) in substantive law terms.

3. Notarial deeds

3.1 Prerequisites for enforceability

According to § 3 of the *Notariatsordnung* (henceforth - NO) a notarial deed is executable like a settlement concluded in court if it contains a specific obligation to a performance or omission in respect of which a settlement is permissible and the obligor has expressly agreed in this or a separate notarial deed that the notarial deed shall be immediately enforceable (submission clause).

The notarial act becomes immediately enforceable by the submission clause. This means that the enforceability of the notarial act is given without further proceedings. The declaration of subjection is therefore not opposed to the agreement of a performance period in the notarial deed.

The declaration of submission may be contained in a separate document, which in turn must meet the requirements of a notarial deed. The reference to the deed containing the obligation to perform must also be clearly established.

3.2 Special clause

The obligated parties give their express consent that this notarial deed shall be immediately enforceable in favour of the debtor party with regard to the above points together with further interest.

If the deed refers to monetary or non-monetary claims, the submission clause is designed in the same way. However, it is important that it nevertheless fulfils the requirements for the certainty of an enforcement title.

3.3 Consent

The creditor does not have to consent to the declaration of submission *expressis verbis*. It becomes legally effective even without his acceptance in accordance with § 3 lit d NO. The creditor therefore does not need to participate in the establishment of the notarial deed.

3.4 Structure

The notarial act itself is the written deed drawn up by the notary for the parties, which, with the notary's assistance, has the force of a public deed. A fixed structure is not prescribed by law, but it is important that all formal requirements are met. These requirements are found in § 68 (1) NO, according to which the notarial deed must in any case contain:

a) the place, then the year, month and day of the hearing;
b) the first name and surname, and the office location of the notary, and, if a second notary was present, also of the latter;
c) (revoked);
d) the content of the transaction, with reference to any powers of attorney or other enclosures, unless these are attached (§ 48 (2) NO);
e) at the end, the statement that the act has been read out to the parties or the designation of those formalities by which, according to the provisions of this Act, the lecture was replaced and the statement of the approval of the act by the parties;
f) the signatures of the parties and, if the involvement of witnesses, confidants or interpreters is required under the provisions of this Act, also of these persons. Identity witnesses may add their signatures either at the end of the document or after the reference to the confirmation of identity.
g) if the notarial deed is drawn up on paper, the notary's signature on paper with the affixing of his official seal (§ 47 (2) NO); if the notarial deed is drawn up electronically, the notary's electronic certification signature (§ 47 (3) NO) after all other signatures have already been buried; in the case of § 56 (2) NO, the official signatures or the electronic certification signatures of both notaries.

3.5 Personal information

Due to the obligatory identity check by the notary and the signature process that takes place before him, the clear assignment of the signature to the party is guaranteed.

The verification of identity is standardised in § 55 NO. If the notary does not know the party personally and in name, his identity must be confirmed to him

1. by means of an official photo ID (§ 36b (2) second sentence NO);
2. by two witnesses known to him personally and by name or identified by official photo identification (§ 36b (2) second sentence NO);
3. by a witness known or identified in this way and a document other than an official photo ID presented by the party, the possession of which indicates that the identity of the person presenting the document is assumed to be that of the person for whom the document is intended, provided there are no objections to this assumption, or;
4. by a second notary public consulted.

The determination of identity by the notary is of particular importance, as it is an integral part of the declaratory content of the deed which constitutes the complete proof. The notary must take the utmost care to establish the identity of the party. If the notary fails to check the identity of the party unknown to him personally or not known to him in name, the notarial deed does not have the force of a public deed (§ 66 NO). If it is not possible to establish identity in accordance with § 55 NO, the notary must refuse to perform the official act.

3.6 Obligations contained in attachments

According to § 3 NO, in order to be enforceable, the notarial act must contain an obligation to perform or refrain from performing. The obligation to make a certain performance does not have to be made with a certain wording, it is sufficient that it is clear from the context of the notarial deed - for example from the credit document attached to the notarial deed - to which performance the debtor has committed himself. The attached private deed must be confirmed by the notary and only serves to specify the object of the performance.

3.7 Conditional claims

Since 1993, § 7 (2) EO has been decisive for the proof of the occurrence of a condition or an agreed point in time, therefore an official or officially certified document is required. This obligation to provide evidence shall only apply to conditions precedent. In the case of resolutory conditions, it is not the responsibility of the operating party to prove whether the condition has already occurred and destroyed the operated claim, but the obligated party must assert this by means of an opposition action. The Court is not required to inquire into the fulfilment of a condition.