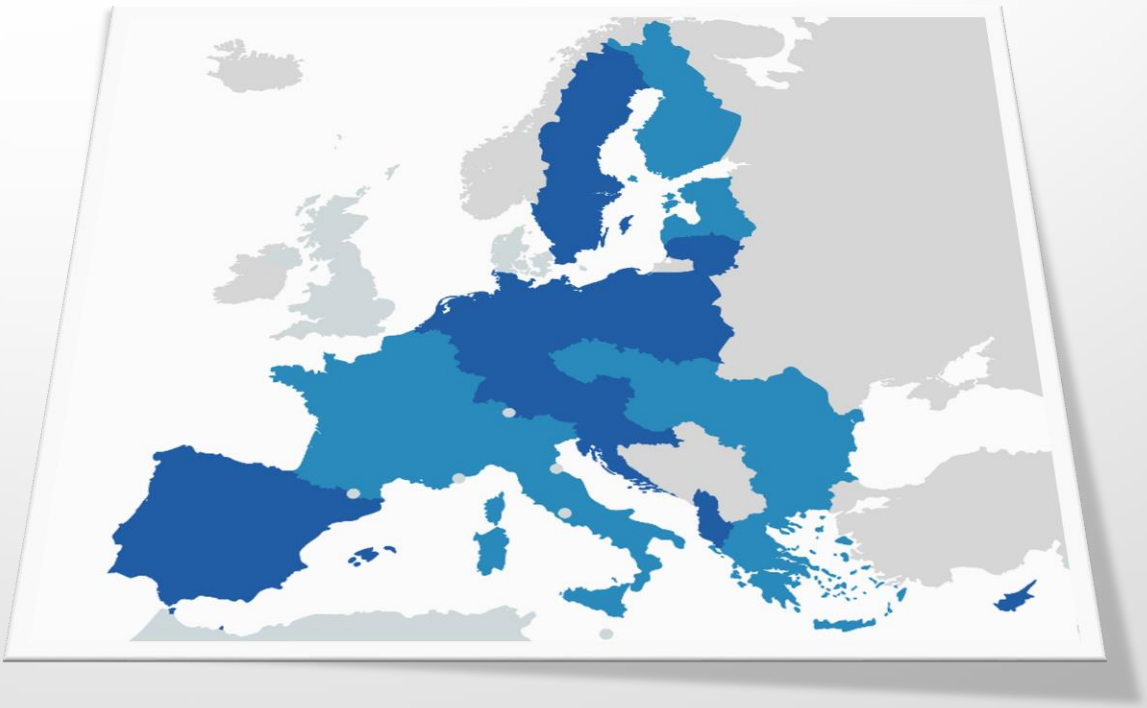

MANUAL

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

Project EU-En4s — JUST-AG-2018/JUST-JCOO-AG-2018
Funded by the European Union's Justice Programme (2014-2020)

The contents of these Manuals represent the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contain.

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MANUAL - ALBANIA

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

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Manual – Albania

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 Albanian Civil Procedure Code (hereinafter - ACPC) does not explicitly set out the "headlines" of a judgement. However, Art 310 of ACPC states the structure of the judgement.

An ordinary civil judgment must contain three parts: (i) Introduction, (ii) Reasoning and (iii) Ordering/operative part.

In the introduction part of the judgment there must be mentioned: 1. The court which has adjudicated the case; 2. Name(s) of the judge(s) and the secretary; 3. The time and place of the issuance of the judgment; 4. The parties, indicating their identity and their position as Claimant, defendant, intervenors as well as their representatives; 5. The name of the prosecutor if he has participated; 6. *Petitum;* 7. The final claims of the parties; 8. The opinion of the prosecutor if he has participated in the hearing.

The reasoning part of the judgment must mention: 1. the circumstances of the case, as they have been assessed during the hearing, and the conclusions drawn by the court; 2. the evidence and reasons on which the judgment is based; 3. the legal provisions on which the judgment is based.

The ordering/operative part of the judgment must mention: 1. what the court has decided; 1/1. If the court imposes obligations for the parties, it should be specified their specific contents and that the judgment is enforceable by the Enforcement Officer. 2. Who is in charge of the court expenses; 3. The right of appeal and the time limit for its submission. (art. 310 ACPC)

The introductory part is typically confined to the front page of the Judgement. It features a graphic of the Albanian coat of arms, Republic of Albania/Name of the court. It contains the refence number of the case (registering number) number and date of the judgement. Cantered aligned is written "Judgement in the name of the Republic and the name of Court and the composition of the court by providing the name and surname of the Judge or judges if the judgement is rendered by three judges. The judgement continues with the day on which the main hearing has been completed, the name of the secretary that assisted the hearings; the name of the parties and their representatives; the subject-matter of the claim; the cause of action (legal basis on which the claim is based).

The court outlines the descriptive-reasoning part in capital letters by stating "OBSERVED".

At the end of the reasoning part, is stated that "FOR THESE REASON" and followed by the number of the legal provisions on which the judgement is based.

The court outlines the operative part by stating in (usually) capital letters that it has "DECIDED".

All of the above headlines are center aligned. None of them are numbered.

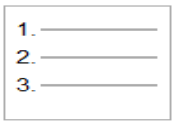
Based on the fact that the criteria of the form and structure of the judgments are expressly provided for in the law, the judgments of the Albanian courts are standardized. Referring to the case law these criteria are adequately applied.

There are not any formal or informal guideline regarding the structure and form of judgement. However, apart from the general structure of the judgement, the Reasoning of the judgement is sometimes subdivided with the inclusion of internal headlines. In order to provide clarity and structure to the Reasoning, the court might choose to address specific issues within the context of its ruling. For example, although not binding and depending on the individual style of the judge, court may sub-dived the (i) facts and circumstances of the case, (ii) the legal basis applicable in the context of the case, (iii) the evaluation of the court.

These optional headlines are left-indented. They are not numbered or listed, however, the paragraphs are usually numbered with Arabic numbers.

1.2 Structural and substantive division/sequence of the Reasoning

There is no binding guideline for the formal structure into paragraphs. However, the judges follow an individualistic style. Generally, the reasoning part in Albanian judgements issued by courts of general jurisdiction is usually structured into paragraphs. Depending on the individualistic style of the judge these paragraphs are numbered with Arabic numerals in accordance with the following format (they are subdivided into decimal numbers like. 1.1; 2.1... etc.):



The numbering does not, in and of itself, connote any particular value or information. The use of paragraphs and their numbering should be considered a stylistic figure, employed to enhance the transparency of information. This does not mean, however, that the judgement does not follow a predetermined order regarding its substance.

Apart from the structure determined by Art. 310 of ACPC all other formalistic styles depend on the judge. Article 310 of ACPC provides that:

“The judgment must contain the introduction, the reasoning part and the ordering part.

I. In the introduction of the judgment must be mentioned: 1. the court which has adjudicate the case; 2. the court member and the secretary; 3. the time and place of the issuance of the judgment; 4. the parties, indicating their identity and their position as Claimant, defendant, intervenors as well as their representatives; 5. the name of the counsel, if he has participated; 6. the object of the action *(petitium);* 7. the final claims of the parties; 8. the opinion of the prosecutor if he has participated;

II. In the reasoning part must be mentioned: 1. the circumstances of the case, as they have been assessed during the hearing, and the conclusions drawn by the court; 2. the evidence and reasons on which the judgment is based; 3. the legal provisions on which the judgment is based. The court judgment for claims worth up to 150 000 ALL should contain an introduction and operative part, under paragraph 1 of this Article. If the parties, within three days of notification of this judgment, notify the court in writing that they will appeal the judgment, the court shall reason the judgment and notify the parties.

III. In the operative part, among others must be mentioned: 1. what has the court decided; 1/1. If the court imposes obligations for the parties, their specific content and that the decision is enforceable by Enforcement Officer. 2. who is in charge of the court expenses; 3. the right of appeal and the time limit for its submission.

Article 308(1) of ACPC provides that: ‘The judgment must be signed by all court members that have participated in the issuance of the judgment. A judge, whose opinion has been in the minority shall inscribe the word “against” on the judgment and then sign it'.

1.3 Textual identification of the elements comprising the judgement

“the introduction of the judgement”: Hyrje

“the operating part”: Pjesa urdhëruese

“the reasoning of the judgement”: Pjesa përshkruese-arsyetuese

“legal instruction”: e drejta e ankimit

1.4 Short description of the elements of the judgement

The structure of a civil domestic judgment depends on whether it is an ordinary judgment or a judgment on small claims and it is defined by the article 310 of ACPC.
An ordinary civil judgment must contain three parts: (i) Introduction, (ii) Reasoning and (iii) Ordering/operative part.

In the introduction part of the judgment there must be mentioned:

1. The court which has adjudicated the case;
2. Name(s) of the judge(s) and the secretary;
3. The time and place of the issuance of the judgment;
4. The parties, indicating their identity and their position as Claimant, defendant, intervenors as well as their representatives;
5. The name of the prosecutor if he has participated;
6. *Petitum;*
7. The final claims of the parties;
8. The opinion of the prosecutor if he has participated in the hearing.

The reasoning part of the judgment must mention:

1. The circumstances of the case, as they have been assessed during the hearing, and the conclusions drawn by the court;
2. The evidence and reasons on which the judgment is based;
3. The legal provisions on which the judgment is based.

The ordering/operative part of the judgment must mention:

1. What the court has decided; 1/1. If the court imposes obligations for the parties, it should be specified their specific contents and that the judgment is enforceable by the Enforcement Officer.
2. Who is in charge of the court expenses;
3. The right of appeal and the time limit for its submission. (art. 310 ACPC)

A judgment on small claims (small claims are considered the claims up to 150,000 LEK and that arise from contractual relationship) should contain only two parts:

(i) Introduction part
(ii) Operative part.

If the parties, within three days of notification of this judgment, notify the court in writing that they will appeal the above judgment, the court shall reason the judgment and notify it to the parties. (art. 310/II (3) ACPC)

1.5 Graphical separation of the elements of the judgement

Usually, the different elements of the Judgment are separated in headlines written in bold and/or in capital letters. However, the formatting is left to the judges, so not every judgment looks the same.

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

The Albanian judgments do not contain any time-period within which the obligation should be fulfilled voluntarily by the debtor and it does not contain either a period of time within which the judgment should not be enforced. But the enforcement procedure of the judgment follows two stages: (1) Voluntarily enforcement and (2) Mandatory enforcement.

The notice of voluntarily enforcement is provided explicitly by articles 517-519 ACPC. At the commencement of the enforcement of a judgment, the Enforcement officer issues to the debtor a notice for voluntarily enforcement of the obligation contained within the enforcement order designating for this purpose a timeframe of: (i) five days when the judgment involves a salary or an order for maintenance and (ii) ten days for all other judgments.

The mandatory enforcement cannot start before the time limits provided in article 517 of the ACPC above (time frame for voluntarily enforcement) have expired, unless it exists a danger that with the expiry of the time limit the enforcement shall become impossible. In such a case the Enforcement officer can start immediately with the mandatory enforcement. (Art. 519 ACPC)

According to article 310(3) ACPC, Albanian judgments contains the right to appeal and the time at which this right can be exercised.

Albanian law does not explicitly provide for a statute of limitations for enforcement of a judgment, which is an enforcement title. But, referring to article 113 of the Albanian Civil Code (hereinafter – ACC), indirectly, it is understood that the enforcement of a judgments is statute-barred in time depending on the lawsuits for which they have been granted. Requirements for the mandatory enforcement of the judgment that are related to lawsuits, for which the statute of limitation does not apply, do not lapse. (n. 113 (2) ACC)

1.7 Identification of Parties

The judgment specifies the parties' name and surname, paternity and/or motherhood, place of birth, residence, nationality and Personal Identification Number or the number of the identification document (passport). In the case of legal entities that are registered in the commercial register, the commercial register number and its site must be entered. The information is written in the introduction part of the judgment and is not repeated in other parts of the judgment.

1.8 Indication of the amount in dispute

The value of the claim is assessed by the Claimant at the moment of bringing the action to the court according to the rules provided in articles 65-70 of the ACPC. The *petitium* and *causam petendi* should be taken into consideration in determining the value of the claim. In the case of a claim of an indefinable value, their value will be determined at the end of the hearing session.

Claims presented in the same process against the same person should be put together including matured interest, expenses and claimed damages. When the fulfilment of an obligation by shares is requested by several persons or against several persons, the value of the claim will be determined by the entire obligation (art. 65 ACPC).

The value of the claim related to the existence, validity or dissolution of a legal obligation relationship is determined on basis of that part of the ratio which is under dispute. If the lease contract of

immovable objects has terminated, the value is determined on the basis of the amount of the requested rent, but if there are contests on the continuation of the lease contract, the value is determined by adding up the lease payments for the contested period. On a division of property, the value is determined by the value of the requested part. (art. 66 ACPC)

In case of a claim for a periodic maintenance obligation, when the title is objected, the value is determined on the basis of the total amount which should be given over two years. In cases related to life rents, when the title is objected, the value is determined by the sum of the values for twenty years, whereas in case of temporary rents, the value is determined by the annual sums requested for up to ten years. (art. 67 ACPC)

When a sum of money or a movable object is requested, the value is determined on the basis of the indicated amount or, of the declared value by the Claimant. In the absence of the indication or declaration, it is accepted that the determination of the value is in the competence of the court. The defendant may object the value declared or assumed as above, but only at the beginning of his defence. (art. 68 ACPC)

In the case of an action for revindication of an immovable property or rights in rem thereon, the value of the claim shall be determined by the market value of the property or of the rights claimed. (art. 69 ACPC)

The value of the claim objecting the mandatory enforcement is determined by the claimed credit for which the claim is filed. The value of the claim of a third person who objects the mandatory enforcement depends on the value of the objects for which the objection is made. (art. 70 ACPC).

The claimant should make the calculation and pay the court's fee at the moment of initiating the process. If the value of the claim will be considered unreasonable by the court, the latter has right to indicate another value. Special appeal may be submitted due to the wrong assessment of the amount on dispute. (art. 65 & 110 ACPC)

If the claimant makes a request for amendment of the *petitium* of the claim (when it is an amount of money) and the court accepts its request, then, the court request to the party to pay the court's fee for the difference required. If the value of the claim is reduced the difference is not returned to the claimant.

The initial amount in dispute (the amount claimed by the Claimant) is stated in the introduction and reasoning parts of the judgment. If during the hearing the claimant amends the *petitium,* this fact is specified in the reasoning part of the judgment. In the operative part it will be shown the amount in dispute as determined by the court.

1.9 Indication of the underlying legal relationship

According to the Albanian procedural law, the nature of the legal relationship does not have any bearing on the enforcement procedure.

Exceptionally, in the case of actions that may be filed at the enforcement stage, the law provides for certain special arrangements where the enforcement title is an act of granting bank loans or an act of granting loans from non-bank financial institutions.

In the process initiated by an action for invalidity of an enforcement title, the court may decide to suspend the enforcement of the judgement with or without a guarantee. When the enforcement title is an act of granting bank loans or an act of granting loans from non-banking financial institutions, the court may decide to suspend the enforcement of judgment, only with a guarantee and for a period no longer than 3 months, except when the court, within this term, takes a final judgment to accept the claim. When the 3 months term expires or when the court, within this term, decides to reject the claim or to dismiss the hearing of the case, the measure to suspend the enforcement of the judgement is considered as not in force. The court shall not decide on the suspension of the enforcement of the judgment when the debtor claims that the obligation imposed on the enforcement title, which is an act of granting bank loans or an act of granting loans from non-bank financial institutions, exists to a lesser extent. The court examines the requests for suspension within 5 days. Against this judgment a special appeal may be submitted. (art. 609 ACPC)

Against the actions of an Enforcement officer carried out in contravention of the procedures provided by the ACPC and against the refusal of the Enforcement officer to carry out actions imposed by law, the parties can make an appeal to the court that enforces the judgment, within 5 days from the day of performance of the action or refusal to perform, when the parties have been present in the conduct of the action or have been summoned and, in other instances, from the day they have been notified or have been informed of the action or refusal. The appeal against the actions or refusal to act of the Enforcement officer shall not suspend enforcement of the judgment, unless the court decides otherwise. When the enforcement title is an act of granting bank loans or an act of granting loans from non-bank financial institutions and the court has decided to suspend the enforcement of the judgment, the suspension measure is considered to have ceased having effect within 20 days from the moment of granting the judgment on suspension. (art. 610 ACPC)

1.10 Information contained in the operative part

The operative part must communicate:

a. What the court has decided;

b. If the court imposes obligations for the parties, their specific content and that the judgment is enforceable by Enforcement Officer. (This is called Enforcement order);

c. Who is in charge of court costs;

d. The right of appeal and the time limit for submitting it. (art. 310/III ACPC)

1.11 Existence of a threat of enforcement

The operative part does not contain any threat of enforcement. It contains the information about the right of appeal and the time limit for submitting it (art. 310/III ACPC)

1.12 Final specification of debt

The ACPC expressly provides that if the court imposes obligations to the parties, it must communicate the specific content of the obligation in the operative part of the judgment (art. 310, paragraph III, 1/1).

1.13 Partial rejection of a claim

When a claim is wholly dismissed, the operative part communicates the "dismissal of the claim" (*vendim per rrezim padie*). When a claim is partially dismissed the operative part communicates "the

partially acceptance of the claim" (*pranim i pjesshem i padise*) by specifying the claims which are accepted and "dismissal of the other parts of the claim".

Example: The operative part of the judgment of the Tirana District Court, No. 9268, dated on 30.10.2008.

'The court decides:

- Partial admission of the claim of the Claimant 'the Company "Sh M" ltd.
- Obligation of the Defendant 'UT' to pay to the Claimant 'Sh M' ltd the amount of 2,059,660 ALL, which it is related to the final statement of works for the reconstruction of the building of the Faculty of Foreign Languages.
- Obligation of the Defendant 'UT' to unlock the 5% guarantee of the works value of the object in the amount of 489,244 ALL.
- Cessation of adjudication (dismissal) of the case for the rest of the claim.'

1.14 Set-off of a claim

In cases where the debtor invokes set-off, the final judgement may eventually decide, among other, acceptance of the claim and/or counterclaim, by specifying the amount of both claims and declaring the amount to be compensated.

Example: The court decides to uphold the claim therefore A should pay to B the amount of 100 LEK; The court decides to uphold the counterclaim, therefore B should pay to A the amount of 80 LEK; Eventually as a result of compensation, A must pay to B the amount of 20 LEK.

1.15 References to the Reasoning found within the operative part

The operative part does not contain element from or references to the reasoning part of the judgement.

1.16 Wording used to mandate performance

In Albania the debtor is specifically ordered to perform by the wording of the operative part. It is usually formulated "the obligation of the Defendant to pay in favour of the Claimant". It is clearly understood that this 'liability' means a duty to perform, and the practice did not find it problematic.

1.17 Reciprocal claims

Albanian legal order does not provide for judgments that contains conditional obligations. According to a Unified Judgment of the Albanian High Court, a judgment must contain a known, required and precise obligation, which is not related to the fulfilment of certain deadlines and, above all, unconditional due to other circumstances or other mutual obligations.

1.18 Indication of interest (rates)

In a judgement ordering payment, the court shall provide (upon the party request) for the interest rates usually specifying the amount of interests calculated by an expert during the trial and the period calculated from a specific date to the date of submission of the expert report and setting a daily interest rate from that date to the date of enforcement of the judgment. In some cases, the interest rates are specified by referring to the interest rate published by the Central Bank of Albania on bank deposits or

in the interest rates provided by the law, such as the legislation in force that regulates late payments in contractual and the commercial obligations.

When the enforcement title, for which an enforcement order is issued, is an act for granting bank credit or monetary obligations, the Court shall provide for the legal interest rates in accordance with the legislation in force that regulates late payments in contractual and the commercial obligations (art. 511/ç ACPC).

Example:

“The court decides:

- …Obligation of the Defendant "C 2002" ltd’ to settle the payment of legal interest in favour of the Defendant for the period 15.10.2012 to 15.12.2014 in the amount of 164.616 (one hundred and sixty-four thousand six hundred sixteen) ALL.
- Obligation of the Defendant ‘The company "C 2002" ltd’ to pay in favour of the Claimant the sum of 2,568 (two thousand five hundred and sixty-eight) ALL per day from 15.12.2014 (date of submitting the expert’s report) until the enforcement of the judgment...”

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

In cases where the operative part is incomplete, undetermined, incomprehensible or inconsistent the ACPC provides for some legal remedies, as follows:

Correction of mistakes: ‘After proclamation of the judgment the court cannot annul or change it. At the request of the parties or ex officio it may correct at any time only material errors made in writing or in calculation, or any obvious inaccuracy of the judgment.

After summoning the parties, in hearing, the court assess the request in conformity with the rules of the ACPC, issues the judgement, which it should be attached to the corrected judgement.

A special appeal may be made to the Court of Appeal against the issued judgment in the cases provided in the second paragraph of this article.’ (art. 312 ACPC)

Completion of decision: ‘Each of the parties may request the completion of the judgment, within thirty days from the announcement of the judgment, in case the court is not pronounced on all the claims on which the party has presented evidence. After summoning the parties, the court considers the request by the same court member and issues such complementary judgment. Appeal may be made against such judgment in conformity with the general rules.’ (art. 313 ACPC)

Clarification and interpretation of judgment: ‘The court has the right to give clarifications or to make the interpretation of the judgment it has issued when it is obscure and upon the parties’ request. The request for clarification and interpretation of the judgment may be submitted at any time, as long as the judgment is not enforced. A special appeal may be made against the above judgments in conformity with the general rules.

The court’s judgment issued on the above cases is attached to the original judgment issued by the court.’ (art. 314 ACPC)

1.20 Legal effects of the Reasoning of the judgement

Referring to the jurisprudence of the Albanian Constitutional Court, *res judicata* includes not only the operative part of the judgment, but also the findings of fact and the application of law, set out in the reasoning part of the decision, conditionally that the fact and legal relationships are performed in function of rendering the decision and form the object of the adjudication upon which the court rendered the judgment.

1.21 Obtaining the res judicata effect

The ACPC identifies the final judgment of the Appeal Court with the judgment of *res judicata's* effect. The ACPC' provisions (articles 450, 450/a and 472 ACPC) on this issue have generated debates and issues that have been addressed not only by domestic doctrine, but also by the ECHR's judgments in which the Republic of Albania has been one of the parties.

According to article 450 of the ACPC, the judgment of the first instance becomes irreversible (*i formës së prerë*) when: a) it cannot be appealed ; b) no appeal (at the Appeal Court) has been made against it within the time limits determined by law or when the appeal has been withdrawn; c) the appeal submitted has not been accepted; ç) the judgment of the court is left in force, is changed or the hearing in the second instance (Appeal court) has been ceased.

A judgment that has become irreversible shall be mandatory for parties, their heirs, for the people who take away rights from the parties, the court that has issued the judgment and for all other courts and other institutions. A judgment that has become irreversible has authority over only what has been decided between the same parties, on the same subject (*petitium*) and for the same cause (*causam petendi*). A conflict that has been resolved with an irreversible judgment cannot be adjudicated again unless the law provides otherwise. (art. 450/a ACPC) A civil irreversible condemnatory judgment is an enforcement title, and therefore binding. (art. 510(a) ACPC)

On the other hand, against the judgment of the Appeal court (which, as explained above is considered to be an irreversible judgment) parties are free to exercise the right of appeal (recourse), which is an ordinary mean of appeal. Judgments of the Appeal court and those of first instance may be appealed through recourse to the High Court: a) for incorrect implementation of material or procedural law, of essential importance for the unification, certainty and/or development of case law; b) when the appealed judgment is different from the case law consolidated by the Civil Chamber or the unified case law of the Joint Chambers of the High Court; c) there are serious violations of procedural norms, resulting in the invalidity of the judgment or of the hearing's procedure. (art. 472 ACPC)

Beyond the above provisions, Albanian doctrine and case laws share another view with respect to the *res judicata's* effect of the judgment. The Albanian legal doctrine has held that the judgment of the Court of Appeal, despite being considered irreversible and enforceable under articles 450 and 510 of the ACPC, becomes *res judicata* only after the High Court rejects the recourse or adjudicates the recourse and upholds the judgment of the court of appeal. In other words, the judgment of the High Court (and not the judgment of the Appeal Court) should have the effect of *res judicata* as long as the judgment of the Appeal Court may be appealed by an ordinary mean of appeal.

Moreover, referring to the Joint Chambers of the Albanian High Court (regardless the fact that it refers to a criminal case, the issue is the same), a judgment can be enforced without necessarily having the status of *res judicata.* The judgment of the Appeal Court is enforceable but does not constitute *a res*

judicata judgment. In other words, every judgment that is *res judicata* is always enforceable, but not the other way around, since not every enforceable judgment is *res judicata.*

The confusion in the Albanian legislation (identification of the final judgment with the *res judicata* judgment) has been addressed directly in some ECtHR's judgments in which one of the parties has been the Republic of Albania. In the case Rrapo vs. Republic of Albania the ECtHR states that, the Court does not accept the Government's argument that, in extraditing the applicant, they complied with the final Court of Appeal's judgment. For the purposes of the Convention, a final judgment which has become *res judicata* is a judgment which may not be subject to control by a higher instance court and, eventually, quashed, whereas the present Court of Appeal's judgment was lawfully quashed by the Supreme Court's judgment and those proceedings are still pending. The ECtHR has held the same position in other cases such as Gjyli vs. Republic of Albania, Xheraj vs. Republic of Albania etc.

1.22 Res judicata of negative declaratory relief

Negative declaratory actions are provided by article 32 (b) the ACPC but are rarely applicable in Albania. They are also provided by article 188(a) of the Albanian Law on Industrial Property which states that: '1. Any interested person may bring a lawsuit against the owner of the patent to prove that a particular action does not constitute an infringement of the patent… If a lawsuit shall be submitted about the infringement of a patent by its owner or licensee against a person, the later has the right to submit a counterclaim to prove that his action does not constitute an infringement of the patent. The aforementioned lawsuit can be submitted together with the request for the revocation of the patent'.

A negative declaratory judgment may not be enforced because it does not contain obligations but may serve as a basis for the later issuance of a binding judgment. Declaratory judgments do not have effect against the third parties who have not been called to in the hearing if they challenge the facts established in the judgment. (art. 391 ACPC)

1.23 Suspensive periods barring the enforcement of a judgement

According to the Albanian law, there is not any suspensive period within which the judgment creditor cannot initiate the enforcement proceedings, but there is a limitation period within which the Enforcement Officer cannot initiate the mandatory enforcement.

First of all, it should be noted that an enforcement process cannot commence without having an enforcement order. An enforcement order is included in the judgment when the enforcement title is a judgement. In the other cases, it is a court judgment that establishes the existence of an enforcement title capable of being enforced and consequently orders the enforcement authority to enforce the content of that enforcement title.

The enforcement process is carried out in two phases: (1) Voluntary enforcement; and (2) Mandatory enforcement. The Enforcement Officer should exhaust the voluntary enforcement before proceeding with mandatory enforcement.

At the commencement of the enforcement of the judgment, the Enforcement officer issues to the debtor a notice for voluntary enforcement of the judgment contained within the enforcement order, designating for this purpose, a timeframe of 5 (five) days when the subject of the judgment involves a salary or an order for maintenance and a timeframe of 10 (ten) ten days for all other cases. (art. 517 para. 1 ACPC)

Mandatory enforcement cannot commence before the time limits provided in article 517 ACPC have expired, unless a danger exists that with the expiry of the time limit the enforcement shall be made impossible. In such a case the Enforcement officer may start immediately the mandatory enforcement. (art. 518 ACPC)

2. Court settlements

2.1 Elements of a court settlement

A court settlement has the same structure as a judgment, as provided by article 310 ACPC. So, the court settlement contains: the introduction, reasoning and operative part.

i. Example of a court settlement (solved through mediation):

"No of Judgment 11-2012-5082-1665, Date of registration: 08.05.2012
Date 18.06.2012

Judgment

The District Court of Durres (introduction part)
Judge: _____
Assisted by court recorder_____, today on 18.06.2012, after reviewing the civil case between:
Claimant: _____, fatherhood, motherhood, DOB, education, address, civil status, ID number.
Respondent: _____ fatherhood, motherhood, DOB, education, address, civil status, ID
Object (*Petitium*): Dissolution of marriage; Approval of agreement regarding the consequences after the dissolution of the marriage.
Legal Provisions: Article 125, 132, 146 Family Code

At the end of the hearing, parties respectively required as follows:

Claimant: Dissolution of the marriage without determining the fault and approval of the agreement with regard to the consequences;
Respondent: Dissolution of the marriage without determining the fault and approval of the agreement with regard to the consequences;

After reviewing the case, the Court FINDS THAT: (reasoning part)

Claimant ___is seeking the dissolution of the marriage with the Defendant _____, without determining the fault and also regulation of the consequences that come from the dissolution of the marriage, in relation to exercising parental responsibility and contributing to the upbringing and education of children.
Pursuant to articles 51 and 320 ACPC, the court finds that there is substantive and territorial jurisdiction to resolve this conflict as it is the court of the place of marriage and residence of the spouses.
In the conciliation session dated 31.05.2012, the court suggested to the parties the alternative solution of the case, thus respecting its legal obligation based on law 10385 dated 24.02.2011 "On mediation in resolving disputes".

After the court obtained the consent of the parties, with the decision dated 31.05.2012, it passed the case for settlement through the mediation office.
On 13.06.2012, the mediation office notifies the court of the agreement reached between the parties regarding the regulation of the consequences that come from the dissolution of the marriage.
Before the court considered the request and the conclusion of the court session pursuant to article 126 of the Family Code, it first heard separately each of the spouses, then the two together, without the presence of their representatives and finally held the court session with the presence of the parties and representatives.
At the preparatory session, the spouses were heard separately and both stated that there is no possibility of reconciliation and that they have a common opinion not only on the dissolution of the marriage but also on the settlement of the consequences, by the agreement made in the presence of the mediator ___ dated 13.06.2012.
In that agreement, the parties have stated that they agree on the dissolution of the marriage and have foreseen the terms of the agreement for the settlement of the consequences that come from the dissolution of the marriage as:

> "Leaving the child ____ DOB____, for raising and educating to the Respondent ____.
> Claimant has the right to meet his child ___ every Saturday from 10:00 to 16:00. Claimant will pick up the child at the Respondent's residence and hand it over to the Respondent's residence at the appointed time, and has the right to keep him the first two weeks of August of each year in his or her home.
> Claimant is obliged to pay the alimony for the child ____ in the amount of 15,000 LEK per month.
> Respondent ___ after the dissolution of the marriage takes the surname, he/she had before the marriage."

During the hearing, the parties stated in the presence of each other that it was their real and free will expressed in the agreement on the dissolution of the marriage and the regulation of the consequences.
From the evidence examined in the trial, it is proven that the Claimant ____ and the Respondent ____ have entered into marriage on 31.03.2010 and the Respondent before the marriage had the surname "____" and after the marriage took the surname "____". This fact is proved by the marriage certificate no. _____. During their marriage, the spouses gave birth to their son _____ on 18.05.2010, a fact that is proven by the family certificate no. _____ date 03.05.2010 and birth certificate.
Regarding to the reasons of the dissolution of the marriage, the parties declare that due to constant quarrels and disputes, as a result of excessive jealousy, they have terminated their joint life, losing the marriage, its function and both spouses have expressed the will to dissolve the marriage. Based on article 127 of the Family Code, the court decided to dissolve the marriage after establishing the conviction that the will of each party is real and each party has given its consent freely to the dissolution of the marriage.
By the agreement made in the mediation office of Durres, in the presence of the mediator ___ on 13.06.2012, the spouses have provided the conditions of the agreement with regard to the consequences that come from the dissolution of the marriage, such as:

> "Leaving the child ____ DOB____, for raising and educating to the Respondent ____.
> Claimant has the right to meet his child ___ every Saturday from 10:00 to 16:00. Claimant will pick up the child at the Respondent's residence and hand it over to the Respondent's residence at the appointed time, and has the right to keep him the first two weeks of August of each year in his or her home.

Claimant is obliged to pay the alimony for the child ____ in the amount of 15,000 LEK per month.

Respondent ___ after the dissolution of the marriage takes the surname, he/she had before the marriage."

The court, after getting convinced that the will of each party is real and free, concludes that the agreement regulating to the consequences of the dissolution of the marriage must be approved, as the agreement sufficiently ensures the interest of the child and spouses and is also signed by the parties in the court recording.

The court in reaching this conclusion takes into account not only the will of the spouses, but also the age of the child (2 years old) which due to the bio-physiological needs of the child needs the presence of the mother and due to good living conditions as the Defendant declared at the hearing.

Regarding the surname, article 146/1 of Family Code provides that: "The spouse who has changed his surname by marriage, after the dissolution of the marriage takes the surname he had before the marriage. Defendant ____ after the dissolution of the marriage has the right to take the surname he had before the marriage.

Regarding the above, the court concludes that the marriage should be dissolved and the agreement on resolving the consequences should be approved

THEREFORE

Court, based on articles 306, 309 ACPC and articles 125, 126 and 127 of Family Code

DECIDES (operative part)

1. Dissolution of the marriage between the spouses;

2. Approval of agreement dated 28.12.2012 through which the parties have agreed on the following terms:

"Leaving the child ____ DOB____, for raising and educating to the Respondent ____.

Claimant has the right to meet his child ___ every Saturday from 10:00 to 16:00.

Claimant will pick up the child at the Respondent's residence and hand it over to the Respondent's residence at the appointed time, and has the right to keep him the first two weeks of August of each year in his or her home.

Claimant is obliged to pay the alimony for the child ____ in the amount of 15,000 LEK per month.

Respondent ___ after the dissolution of the marriage takes the surname, he/she had before the marriage."

3. After the judgment will become irreversible, one copy of this judgment will be sent to the Civil Status Office of the Administrative Unit No. 3, Durres;

4. Parties are in charge of the expensive costs.

5. Against this judgment an appeal can be submitted to the Appeal Court of Durresi within 15 days, starting this time limit from the next day of the announcement of the Judgment.

It was announced in Durres on.....'

ii. Example of operative part of a court settlement (solved through reconciliation reached during the hearing):

'The court decides:

1. The settlement by agreement of the civil case with no. Reg. Them 106/1035 (11217-00667- 51-16), dated 06.04.2016.

2. Approval of the Act-Agreement with no. Rep. 129 and no. Kol 58, dated 07.02.2017 of the notary Mrs. R. K, member of the Chamber of Notaries Tirana, for the resolution of the judicial conflict by agreement.
3. Act-Agreement with no. Rep 129 and no. Kol 58, dated 07.02.2017 of the notary Mrs. R.K, member of the Tirana Notary Chamber, for the resolution of the judicial conflict in accordance will be attached and becomes an integral part of this judgment.
4. This judgment, in its final form, constitutes an enforcement title.
5. Attached to this judgment is issued the enforcement order.
6. A special appeal is allowed against this judgment within 5 days in the Shkodra Court of Appeals, starting this deadline from the day after the announcement of this decision. For the third default parties, this deadline starts from the next day of notification of this judgment.
It was announced today in Shkodra, on 07.02.2017.'

iii. Example of operative part of a judgment for referring the case to the mediation:

'The court decides:

1. Referring the case for mediation solution;
2. The time limit for submitting an agreement or for continuation of the process is 2 months;
3. Suspension of the procedure for this period of time.'

2.2 Formal requirements

According to article 158/ç (3)(4)(5) ACPC:

When reconciliation is reached before starting the hearing, a record is held, which is signed by the parties. The judge approves the reconciliation by a judgment (court settlement).

In case of submission of an agreement obtained through reconciliation or mediation, the court decides to approve it, if the latter is not inconsistent with the law.

When the reconciliation is reached in the hearing, the terms of the agreement shall be reflected in the court record. The court shall give its approval judgment, which in any case it should not be against the law.

The structure of the court settlement is provided in the section 2.1 Elements of a court settlement

The settlement provided by the parties reached through mediation should identify: a) the parties; b) the description of the dispute; c) the obligations and conditions that the parties impose on each other and the manner and term of their fulfilment; ç) the signature of the parties and the mediator. The deadline for the fulfilment of the obligations set out in the agreement is decided by the parties in agreement with each other. The agreement shall be in writing and shall contain clear and precise obligations.

2.3 Identification of Parties

In the court settlement, the parties are identified as in the example, provided in the section 2.1 Elements of a court settlement

3. Notarial deeds

3.1 Prerequisites for enforceability

A notarial act is not an enforcement title *per se.* The Albanian courts are the authority to declare if such an act can be an enforcement title, through issuing an enforcement order. The enforcement order is a judgment that establishes the existence of an enforcement title capable of being enforced and consequently orders the enforcement authority to enforce the content of that enforcement title.

The competent court for issuing the enforcement order (in the case when the enforcement title is a notarial act) will be determined in accordance with article 49 of the ACPC, which provides that: 'Actions, requesting obligatory enforcement on objects, are brought in the court of the place where these objects are or the biggest part of their value is. Actions requesting obligatory enforcement on performance of or omission to perform a certain action are brought in the court of the place where such enforcement must be fulfilled.'

The examination of the request for issuing the enforcement order is conducted by the judge without the presence of the parties. The court issues the enforcement order based on the documents filed by the applicant.

The enforcement order contains: a) the data identifying the debtor and creditor; b) the origin of the obligation; c) the concrete obligation deriving from the enforcement title until the moment of issuance of the enforcement order; ç) when the enforcement title, for which an enforcement order is issued, is an act for granting bank credit or monetary obligations, the Court shall provide for the legal interest rates in accordance with the legislation in force that regulates late payments in contractual and the commercial obligations. (art. 511 ACPC)

3.2 Special clause

According to article 510(d) ACPC only (i) a notarial document containing monetary obligations as well as (ii) documents for the grant of bank and non-bank financial institutions loans can be enforcement titles.

Usually, the notarial act capable of being enforceable contains the expression that: 'The parties declare that they agree, recognize and acknowledge that this notarial statement constitutes an enforcement title'. However, this citation does not make a notarial act an enforcement title. It is the court which assesses the capacity of the notarial act to become an enforcement title and issue an enforcement order.

With regard to the criteria's that the court evaluates when deciding on whether or not a notarial act is an enforcement title, one should refer to the Unified Judgment of the Joint Chambers of the High Court No. 980 dated 29.9.2000, which aims to clarify (i) what is meant by notarial acts containing monetary obligations in terms of the enforcement title; (ii) comparison of these acts with the bill of exchange, as the most striking one to highlight their nature and features.

According to the said Unified Judgment, 'a two-pronged legal action (contract), whether a bilateral contract, such as a contract of sales or a one-sided contract, such as a loan contract, cannot be an

enforcement title. For an act issued by a competent state body, or prepared and certified by a public servant, under the conditions explicitly provided for by law, to be an enforcement title, it must contain a recognized, precisely defined, and a payable obligation, which is not related to meeting certain deadlines and above all, unconditional from other circumstances or from other mutual obligations.

The notarial act as an enforcement title must itself contain a legal action with one-sided obligation for the payment of a certain sum of money. Also, the enforceable obligation contained therein cannot be contested for its non-existence at the time of drafting and signing the act, nor there is a need to prove it. It is presumed true. The act of payment of a sum of money, drawn up in the form of a notarial declaration, being an enforcement title, may be challenged only on grounds of falsehood or on grounds provided for in section 609/1 ACPC (invalidity of enforcement title).

The notarial act of paying a sum of money as an enforcement title resembles in its content to a bill of exchange, but differs from it because it does not have the quality of a valuable letter and, therefore, cannot be used, marketed as such.

A notary act as an enforcement title may also contain an obligation arising from a previous contract, or, more broadly, from any other prior legal action to which the debtor has been a party. This new obligation, which often does not extinguish previous liabilities, as it is assumed by the debtor unilaterally and unconditionally, gains an independent existence.'

3.3 Consent

Usually, the notarial act capable for becoming enforceable contains the expression that: 'The parties declare that they agree, recognize and acknowledge that this notarial statement constitutes an enforcement title'. But this citation does not make notarial act an enforcement title. It is the court which assesses the capacity of the notarial act to be enforceable.

3.4 Structure

The notarial act shall be drafted by the notary in the presence of the parties and shall contain:

a. the number of repertoire and collection, the electronic identification number of the act and the venue of drafting of the act;
b. the day, month and year of drafting, the type of act, the time and the minute when the act was started and finished, when applicable;
c. the addresses of all parties;
d. the detailed description of the circumstances, the condition of the parties that sign the act and any other elements which occur in the presence of the notary;
e. the name and surname of the notary and the location of the notary office;
f. the name and the last name, the father's name, the date of birth and the residence of the parties, the name and the seat when it is the case of a legal person; the name, the fatherhood and the last name of their representatives and of any other person participating in the act, and the verification made by the notary regarding the identity of the parties, their civil status, their legal capacity and their capacity to act;
g. the statements of the parties and the acts presented by them;

h. the clear specification of the objects that compose the object of the act with all their qualities and distinguishing signs. When the items are immovable, they shall be identified by the location where they are situated and their exact boundaries;

i. In the act shall be mentioned serious occurrences that may have been verified during its editing, when the parties require such thing;

j. the documentation to be attached to the act and being an integral part of the latter;

k. the fact that the notary read aloud every word and explained the act to the parties and their statements that they have understood and accepted it, as well as the fact of signing in the presence of the notary;

l. the signature of the parties and of all the persons present in the notarial act, and the notary's signature and seal.

3.5 Personal information

The notarial act should contain the name and the last name, the father's name, the date of birth and the residence of the parties, the stated addresses of all parties, the name and the seat when it is the case of a legal person; the name, the fatherhood and the last name of their representatives and of any other person participating in the act, and the verification made by the notary regarding the identity of the parties, their civil status, their legal capacity and their capacity to act.

3.6 Obligations contained in attachments

The obligation should be contained in the notarial act, which should be signed by the parties and notary.

3.7 Conditional claims

The information regarding the possibility of the conditional claim, contained in the notarial act, to be directly enforceable, is provided in the section 3.2 Special clause.

MANUAL - Austria

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

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Manual – Austria

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.

MANUAL - Croatia

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

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Manual – Croatia

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.

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Contents

1. Judgement

1.1 Headlines that form part of the judgement

In judgment of Croatian courts, headlines are not explicitly determined. The Civil Procedure Act prescribes elements of the judgment in Art. 338, as translated in the document available here: http://www.vsrh.hr/EasyWeb.asp?pcpid=286:

> "A written judgment must have an introduction, operative part and reasoning.
>
> The introduction to the judgment contains: an indication that the verdict is pronounced on behalf of the Republic of Croatia, name of the court, name and surname of an individual judge, president of the council, judge rapporteur and members of the council, name and surname or title, personal identification number and domicile, residence or seat of the parties, their representatives and attorneys, a brief indication of the subject matter of the dispute, the day of the conclusion of the main hearing, an indication of the parties, their representatives and attorneys who attended that hearing and the day when the judgment was rendered.
>
> The operative part of the judgment contains the court's decision to accept or reject certain claims concerning the main subject matter and ancillary claims and the decision on the existence or non-existence of a claim raised for set-off (Article 333).
>
> In the reasoning, the court will summarize the claims of the parties, the facts they presented and the evidence they proposed. The court will specifically state and explain which of these facts it established, why and how it established them, and if it established them based on evidence, which evidence it presented and why and how it assessed them, which provisions of substantive law it applied in deciding on the parties' claims, and will also state, if necessary, the views of the parties on the legal basis of the dispute and on their proposals and objections on which he did not give his reasons in the decisions he has already made during the proceedings.
>
> In the reasoning of a default judgment, a judgment based on absence, a judgment based on admission of a claim and judgment based on waiver of a claim, only the reasons justifying the rendering of that judgment will be presented."

Additionally, Court Ordinance (*Sudski poslovnik),* NN no. 37/2014, 49/2014, 8/2015, 35/2015, 123/2015, 45/2016, 29/2017, 33/2017, 34/2017, 57/2017, 101/2018, 119/2018, 81/2019, 128/2019, 39/2020, 47/2020, in Art. 62, lays down in detail the rules on drafting the judgment and other decisions:

> "(1) Court decisions and other documents shall be written in Times New Roman, 12 pt, on A4 paper.
>
> (2) Judgments, important decisions, and decisions of the appellate court are always written on the entire page, leaving a blank space of 2.5 cm wide from the upper and lower, right and left edge of the paper, without spacing, provided that certain parts of the decision (introduction, operative part and reasoning) are visibly separated.
>
> (3) On the first page of court decisions and other documents in the upper right corner, a blank space of 7x4.5 cm shall be left for printing the mark of the postal item in the form of a barcode.

(4) Court decisions and other documents shall be printed on both sides. If the court decision is made up of several sheets, all the sheets will be joined by stitching or gluing.

(5) The coat of arms of the Republic of Croatia in the original colours or in black and white shall be affixed to judgments and decisions terminating the proceedings in the upper left corner. The name "Republic of Croatia" and the name and seat of the court and the seat of the permanent service shall be placed below the coat of arms.

In the middle, above the introduction, "U I M E R E P U B L I K E H R V A T S K E" [I N T H E N A M E O F T H E R E P U B L I C O F C R O A T I A], will be placed in capital separated letters, and below that, in capital letters, the name of the decision "P R E S U D A" [J U D G M E N T] or "R J E Š E N J E " [D E C R E E] will be placed.

(6) In other court decisions, the coat of arms of the Republic of Croatia in the original colours or in black and white shall be placed in the upper left corner. The name "Republika Hrvatska" [Republic of Croatia] and the name and seat of the court and the seat of the permanent service shall be placed below the coat of arms. "R E P U B L I K A H R V A T S K A" [R E P U B L I C O F C R O A T I A] will be placed in capital letters in the middle above the introduction, and below that the name of the decision "R J E Š E N J E " [D E C R E E] will be placed in capital letters.

(7) In the upper right corner in all decisions below the blank space referred to in paragraph 3 of this Article, the reference number of the case and the subnumber under which the decision was made shall be placed. If the decision consists of several pages, the reference number and subnumber under which it was rendered shall be placed on each page in the upper right corner.

(8) The introduction of the decision, made by the council, shall state the names of all members of the council, starting with the president of the council.

(9) Below the introduction, and above the text of the operative part, the decision made by the court ("*presudio je*" [ruled], "*riješio je*" [decided], etc.) shall be indicated in a separate line, in small separated letters without bolding. Below the saying, and before the beginning of the explanation, the title "*Obrazloženje*" [Reasoning] is placed with a capital letter, without separation and bolding.

(10) Below the text of the reasoning, in the middle of the page, the place and date of publication of the decision or rendering shall be put, and on the right half of the page the signature of the presiding judge or individual judge (name and surname), while on the left half of the page the signature of the record keeper shall be put, if prescribed by the rules of appropriate procedure.

(11) The court seal shall be placed to the left of the signature of the president of the council or the individual judge."

Legal instruction is not mentioned in Art. 338 of the Civil Procedure Act. It forms a part of the decision even though it is not one of the constitutive, obligatory parts of thereof. Pursuant to Art. 66 of the Court Ordinance, in all originals and copies of decisions against which the filing of a regular legal remedy is allowed, the instruction on the legal remedy is placed under the signature of the president of the council or the judge. The instruction on legal remedy contains instruction on the type of legal remedy available, the period of time within which and the institution to which it may be submitted, and the number of required copies.

1.2 Structural and substantive division/sequence of the Reasoning

There are no requirements regarding the structure of the Reasoning of the judgment. The text is not divided by listings and numbers. However, the judgment should contain elements prescribed by the law, which were described in the section on the headlines that form part of the judgment.

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": uvod

"the operating part": izreka

"the reasoning of the judgement": obrazloženje

"legal instruction": pouka o pravnom lijeku

1.4 Short description of the elements of the judgement

The Civil Procedure Act prescribes elements of the judgment in Art. 338, the detailed description of which is provided in the section 1.1 Headlines that form part of the judgement.

1.5 Graphical separation of the elements of the judgement

Different parts of the judgment are separated by titles and/or new paragraphs with an empty row, while the elements of the operative part of the judgment are separated by numbering and new row.

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

As a rule, judgments rendered by Croatian courts contain the specification of the time-period within which the obligation in the operative part has to be voluntarily fulfilled (*paricijski rok*).

According to Art. 333(1) of the Civil Procedure Act, a judgment which contains a decision on the merits (claim and/or counterclaim), which may no longer be challenged by an appeal, becomes final. If a decision has been made in the judgment on a claim raised by the defendant by an objection for set-off, the decision about existence or non-existence of such claim becomes final.

In many situations, the judgment by becoming final (*pravomoćna*) also becomes enforceable. In other situations, additional preconditions have to be met which relate to the claims for acting, sustaining, or abstaining (omitting). Where the court decision orders fulfilment of the claim for acting or handing over (e.g. payment), the enforceability is conditioned not only by finality but also by the expiry of the deadline for voluntary fulfilment which runs form the day the decision was served to the debtor, unless the law provides otherwise. By expiry of that deadline, the final judicial decision in which the court ordered fulfilment of the claim on acting or handing over becomes enforceable. Such precondition is not prescribed for the court decision in which the court ordered fulfilment of the claim for sustaining or abstaining (omitting), save exceptionally when the enforcement title document provides for a particular deadline for the debtor to adjust his or her behaviour to this obligation. In this case, the court decision becomes enforceable when the specially set period of time expires; otherwise, the enforceability appears simultaneously with finality. Thus, the court decision in which the court ordered fulfilment of the claim for sustaining or abstaining (omitting) regularly becomes enforceable at the same time it becomes final.

The rule that the finality of the decision is the only precondition for its enforceability has further exceptions provided in the legislation. Such are the situation in which the legislation does not touch upon the finality or enforceability of a particular type of decisions, but only prescribes that the enforcement is allowed prior to finality. Most commonly these situations prescribed by the rules of the civil procedure aim at punishing the party which in certain manner misuses or violates his or her procedural rights.

There is a special regime concerned with the decision on protecting the possession which has to be enforced within the period determined by the law. The claimant is precluded from requesting the enforcement of the decree ordering the defendant in the proceeding for the protection of possession to take certain action, if the former has failed to request the enforcement within thirty days subsequent to the expiry of the period which has been set for this action in the decree.

1.7 Identification of Parties

In Croatia, the judgment contains the parties' names and surnames, address and personal identification number (OIB, previously JMBG). This information is stated in the introductory part of the judgment.

1.8 Indication of the amount in dispute

Value of the dispute is initially stated by the plaintiff in the statement of claim. This is his or her duty in particular when this is relevant for determining the subject-matter jurisdiction, composition of the court, type of the proceedings, power to represent a party or right to compensation of the costs of proceedings, and the object of the claim is not the pecuniary amount.

Value of the dispute is regulated under Art. 35 *et seq.* of the Civil Procedure Act. The basic rule is that only the value of the main claim is relevant for determining the value of the dispute. Interest, litigation costs, penalty charges and other subordinate claims shall be taken into account only if they are part of the principal claim. If the value changes in the course of the dispute, the last effective value is to be stated.

1.9 Indication of the underlying legal relationship

The underlying legal relationship is of importance for the enforcement proceedings. The Croatian Enforcement Act differentiates between two main types of enforcement proceedings: the enforcement for the collection of a monetary claim (Arts. 74-245 of the Enforcement Act) and enforcement for the purpose of realizing a non-monetary claim (Arts. 246-277) which are subject to further divisions.

Enforcement for the collection of a monetary claim:

1. Enforcement on real-estate (Arts. 79-132i of the Enforcement Act);
2. Enforcement on movables (Arts. 133-168 of the Enforcement Act);
3. Enforcement on monetary claims (Arts. 171-218 of the Enforcement Act);
4. Enforcement of claims to deliver movables or to transfer real estate (Arts. 219-227 of the Enforcement Act);
5. Enforcement on a share for which a share document has not been issued and on a share or business share in a company (Arts. 228-232 of the Enforcement Act);
6. Enforcement on securities recorded in accounts with the central depository company (Arts. 233-238 of the Enforcement Act);
7. Enforcement of other property or material rights (Arts. 239-240 of the Enforcement Act);

8. Special provisions on enforcement on the property of legal entities (Arts. 241-245 of the Enforcement Act).

Enforcement for the purpose of realizing a non-monetary claim:

1. Court penalties (Arts. 247-248 of the Enforcement Act);
2. Enforcement for the delivery and handing over movables (Arts. 249-254 of the Enforcement Act);
3. Enforcement for the purpose of emptying and handing over real estate (Arts. 255-259 of the Enforcement Act);
4. Enforcement in order to enforce a claim for act, suffering or omission (Arts. 260-266 of the Enforcement Act);
5. Enforcement for the purpose of returning employees to work or service (Arts. 267-270of the Enforcement Act);
6. Enforcement by division of things (Arts. 271-275 of the Enforcement Act);
7. Enforcement of the claim for giving a declaration of will (Arts. 276-277 of the Enforcement Act).

There are also specific examples of relevance of the underlying legal relationship. In the case of enforcement of monetary claims, if the enforcement is carried out on the debtor's salary, the amount of two thirds of the average net payment in the Republic of Croatia is exempted from enforcement. On the other hand, if the enforcement is carried out to collect a claim based on maintenance of a child, the amount of one fourth is exempted. The exempted amount in case of maintenance other than child maintenance, compensation for damage to health or reduction or loss of ability to work and compensation for lost maintenance due to the death of the maintenance provider, is one half of the average net payment in the Republic of Croatia.

In certain cases, the underlying legal relationship is discernible from the operative part of judgment. For instance, in maintenance disputes the term "on the basis of maintenance" (*na ime uzdržavanja*) appears in the operative part. In any case, the legal relationship may always be determined based on the reasoning of the judgment.

1.10 Information contained in the operative part

The operative part of the judgment communicates whether the court's decision upholds or rejects individual claims concerning the main subject matter and ancillary claims, and, if applicable, the court's decision on the existence or non-existence of a claim raised for set-off. It also communicates the deadline for performance ordered by the court. It usually also communicates the court's decision on the costs of the proceedings, under the last number.

1.11 Existence of a threat of enforcement

It is not necessary that the operative part contains the threat of enforcement. Usually, the condemnatory judgments contain the order which is accompanied by the wording "under the threat of the enforcement" (*pod prijetnjom ovrhe*). However, even where such wording is missing that does not affect the availability of enforcement, provided the other conditions are met.

1.12 Final specification of debt

The specifications of the debtor's obligation are in principle finalised by the court in its decision. The operative part of the decision is drafted by the court and the order addressed to the defendant has to be specified. The court may order the defendant to fulfil certain obligation only if that obligation has

become due until the end of the main hearing. There is an option to later on make corrections to the interest rates: The enforcement rules allow for corrections in the request for enforcement based on the court decision as an enforcement title document in case the interest rate had changed. Therefore, the enforcement may be carried out for the interest calculated under the rate different than in the operative part of the decision which is being enforced. This is applicable irrespective of whether the interests (the statutory interests) have increased or decreased. There are court cases which state that the court has an *ex officio* duty to monitor this matter and may order different specification of interests than requested by the creditor, which is an exception to the principle of strict formal legality.

There are certain exceptions to the rule that court may order the defendant to fulfil an obligation only if it has become due. According to Art. 326 of the Civil Procedure Act, the court may order the debtor to perform a specific act only if that act has become due before the commencement of the proceedings. If the court grants a request for maintenance, it may oblige the debtor to perform also those acts that have not become due. A judgment imposing on the debtor the obligation to deliver or take possession of objects that have been leased or let out may be rendered even before the termination of such relationships.

1.13 Partial rejection of a claim

In situations in which a claim is wholly dismissed, the operative part of the judgment normally contains a declaration to that effect, e.g. “the defendant’s claim whereby he requests.... is wholly dismissed as unfounded” (*odbija se kao neosnovan u cijelosti tužbeni zahtjev tužitelja kojim zahtijeva...).* Where there is more than one defendant, the claim may be wholly dismissed only in respect to all of them or just some of them, e.g. “the claim is dismissed as unfounded in relation to the second defendant...” (*odbija se kao neosnovan tužbeni zahtjev u odnosu na drugotuženika...).*

In situations in which a claim is partially dismissed and partially upheld, the operative part of the judgment normally contains a declaration on dismissal, e.g. “the claim is dismissed as unfounded in the part in which the claimant requested the court to order the defendant to...” *(odbija se kao neosnovan tužbeni zahtjev u dijelu u kojem je tužitelj zahtijevao da sud naloži tuženiku...).* The other number of the operative part of the judgment identifies which part of the claim is upheld.

Thus, the basic rule is that, regardless of the dismissal in whole or in part, the claims which are dismissed are identified and specified in the operative part of the judgment.

1.14 Set-off of a claim

Upon the objection of a set-off, the court has a duty to establish whether the claim exists or not and to establish one or both claims and their respective amounts. If possible, the claims will be set off against each other and the balance will be ordered to be paid to the creditor. Hence the operative part of the judgment in such instances usually contains the declaratory part (on the existence of the claims) under the first two numbers of the operative part of the judgment, the constitutive part (on setting them off) under the number three of the operative part of the judgment, and lastly, the condemnatory part (ordering the payment of the balance if there is any) under the number four of the operative part of the judgment.

1.15 References to the Reasoning found within the operative part

The operative part of the judgment does not usually contain the elements or references to the reasons for a decision. More often than not such reasons, including the grounds (substantive and procedural) are stated only in the reasoning.

1.16 Wording used to mandate performance

In Croatian law the operative part of the condemnatory judgment always has to contain the phrasing "[the defendant] is ordered [payment of the ...]" (*nalaže se [tuženiku plaćanje iznosa od...]).* This order has to be clearly stated and the contents of the ordered performance have to be precisely defined.

1.17 Reciprocal claims

In Croatian law it is possible, under the Enforcement Act, that the operative part of the judgment states the conditional or reciprocal obligation in the manner that the defendant's obligation is conditioned by the previous or simultaneous performance of the claimant's obligation or fulfilment of a condition. In such instances, the operative part of the judgement contains the order to the defendant which is conditioned.

The enforcement of such decision is carried out pursuant to art. 33 of the Enforcement Act.

1.18 Indication of interest (rates)

Interest rates are precisely listed in the operative part of the judgment. However, when statutory interests are at stake which are determined according to the provision in Art. 29 of the Obligations Act, it is possible to "rectify" the failure in it precise listing in the operative part of the judgment by invoking this provision.

There is an option that the interests are determined in the enforcement proceedings, which is explained in the section 1.12 Final specification of debt.

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

If the operative part of the judgment is incomplete, undetermined, incomprehensible or alike it is in severe violation of the rules of the civil procedure. Such violation always exists where the operative part of the judgment is incomprehensible, contradictory to itself or the reasoning, or if the judgment lacks reasons on decisive facts or if on the decisive facts there is contradiction between reasons of the judgment and contents of the documents or minutes on statements in the proceedings or such documents or minutes themselves. The outcome is that the judgment has to be annulled in the appeal proceedings regardless whether the party stated this grounds or not.

1.20 Legal effects of the Reasoning of the judgement

In Croatian civil procedural law, the finality of the decision (in its subjective and objective limits) and its enforceability relate only to the operative part of the decision (judgment or decree). Reasoning does not produce such effects.

1.21 Obtaining the res judicata effect

Res judicata effects is produced at the same time when the judgment becomes final (unappealable).

1.22 Res judicata of negative declaratory relief

Negative declaratory claims and judgments are extremely rare in Croatian court practice. However, it may be stated that in a situation in which there is a positive declaratory judgment, the outcome would be that the negative declaratory action concerning the same factual and legal basis is inadmissible.

Although the authors cannot support their position by reference to Croatian case law of legal doctrine, it seems logical that in the opposite situation where the negative declaratory judgment is rendered a positive one on the same issue between the same parties would also be inadmissible as there would be a *res judicata* effect on that matter. The most logically challenging situation is where the claim for negative declaratory judgments was dismissed as unfounded. In such a case the court may not on its own motion decide by ordering the losing party to pay the amount in question unless (because of the doctrine of *non ultra petita),* unless the winning party raises such a counterclaim in the same proceedings. Therefore, the judgment whereby the court dismisses the negative declaratory judgment (such as in the hypothetical above), there is no enforceability attached to this judgment on the merits (only on costs of proceedings, if any) as any statements on the amount due by the other party would be contained only in the reasons. Conversely, if the defendant in such proceedings would raise a counterclaim asking the court to order the plaintiff to pay the due amount, if upheld this would be included in the operative part of the judgment and would eventually become final and enforceable.

1.23 Suspensive periods barring the enforcement of a judgement

Under Croatian law, judgment always leaves certain period of time after the service on that party to voluntarily perform the obligation ordered therein. Upon expiry of that period of time without voluntary performance taking place, there is no additional step necessary prior to the commencement of the enforcement proceedings.

2. Court settlements

2.1 Elements of a court settlement

The Civil Procedure Act does not contain explicitly a provision on the necessary contents of the court settlement as is the case for the judgment or a decree. It is thus possible to answer this question indirectly in the light of the provisions of the Enforcement Act on the conditions related to the enforceability of the court settlement (as an enforcement title document) and its adequacy for enforcement. Enforceability of the court settlement is regulated under Art. 27of the Enforcement Act which states that the settlement is enforceable if the claim which has to be fulfilled according to it has matured. Maturity of the claim is proven by minutes on the settlement or public document or solemnised private document, and if neither is possible, by the final decision rendered in the litigation proceedings to declare the maturity.

Court settlement, as any other enforcement title document, is adequate for enforcement if it names the creditor, the debtor, the object type, quantity and time for performance of the obligation. Consequently, to be able to order enforcement on the basis of the court settlement it has to name at least the mentioned information.

Art. 322(1) of the Civil Procedure Act provides that the parties' agreement on the settlement is recorded in the minutes. It also defines what minutes contain. Under Art. 124(1) and (2) of the Civil Procedure Act, the minutes contain: name and composition of the court, place, day and time, the matter at dispute and names of the present parties, third parties and their statutory representatives or attorneys. Thus, the minutes have to contain essential information on the contents of the act.

Art. 322(2) and (3) of the Civil Procedure Act additionally state that the settlement is entered into when the parties, following the reading of the minutes, sign the minutes on the settlement. Upon their request, the parties are issued their certified copy of the minutes containing the settlement.

As a result of the recent amendments to the Civil Procedure Act, the court may propose to the parties the resolution of the dispute by mediation. Settlement entered into in the mediation proceedings carried out at the court before the judge mediator is considered a court settlement.

2.2 Formal requirements

Formal requirements are discussed in detail in the section 2.1 Elements of a court settlement.

2.3 Identification of Parties

There are no specific rules on identifying the parties, hence the parties should be identified in the same way as in the judgment: by name and surname, personal identification number, address of the domicile or residence, or seat.

3. Notarial deeds

3.1 Prerequisites for enforceability

It is necessary that both the notarial deed and the solemnized private deed (which are enforcement title documents, and thus enforcement titles) are provided with the so-called enforceability certification (*potvrda ovršnosti).* It is issued by a notary public pursuant to Art. 36(5) of the Enforcement Act. If the debtor lodges a legal remedy, the court conducting the enforcement proceedings will examine whether the conditions for issuing such a certificate have been met, taking into account the statements of persons authorized to confirm the occurrence of the circumstances on which the acquisition of that capacity depends. If the court finds that the conditions for issuing a notarial certificate of enforceability have not been met, it shall revoke that certificate by a decision in enforcement proceedings. According to Art. 6 the request for revocation of the certificate of enforceability given by the notary public on his document submitted outside the enforcement proceedings is decided in non-contentious proceedings by the municipal court in whose territory the notary's seat is located. In fact, the court always decides on revocation of the certificate of enforceability given by the notary public, but when it is requested in connection with the legal remedy of the debtor, in that case it is the court that conducts the enforcement proceedings.

3.2 Special clause

a) An example of a clause referring to a monetary claim:

> "The lessee agrees that, on the basis of this contract and after any monetary claim the lessor has against him is due, direct enforcement will be carried out against him."

b) An example of a clause referring to a non-monetary claim:

> "The lessee agrees that under this contract, once it ceases to produce legal effects, enforcement may be carried out directly against him for the purpose of handing over the leased premises to the lessor."

3.3 Consent

The debtor's consent to direct enforceability is considered to be part of a notarial act. The consent refers to a specific obligation.

3.4 Structure

The content of a notarial deed is prescribed by Art 69 of the Notarial Act. According to it, a notarial deed must contain:

1) data on notaries public who participate in the drafting of the deed (surname and name, their notarial capacity and seat);
2) data on participants: on natural persons (personal and birth name, domicile address, date of birth), and on legal entities (entity registration number [*matični broj subjekta* – MBS] from the court register or the number of another register and registered office);
3) an indication of the manner in which the identity of the persons under point 2) has been established;
4) the text of the legal act with an indication of powers of attorney and attachments;
5) a note that the notarial deed was read to the participants or formalities were performed which under this Act replace the reading of the deed;
6) day, month, year and place, and, when required by law or participants, the hour when the deed was drawn up;
7) signature of the persons under points 1) and 2), the official seal of the notary public who drew up the notarial deed.

3.5 Personal information

Personal information that must be specified in the notarial act for the purposes of identifying the parties is stated in the section 3.4 Structure of a notarial deed.

3.6 Obligations contained in attachments

In Croatian law, attachments contain clarifications. According to a rule in Art. 71 of the Notarial Act which states that participants may attach to the notarial deed power of attorney and other attachments in the original or transcript, but if the issuer did not confirm them in the notarial deed, they cannot obtain greater credibility than prior to attaching. There is also a rule from Art. 57 of the Notarial Act which stipulates the duty to read to the parties and ask direct questions to make sure that the content of the notary deed corresponds to the will of the parties while the attachments are read only at the request of the parties.

3.7 Conditional claims

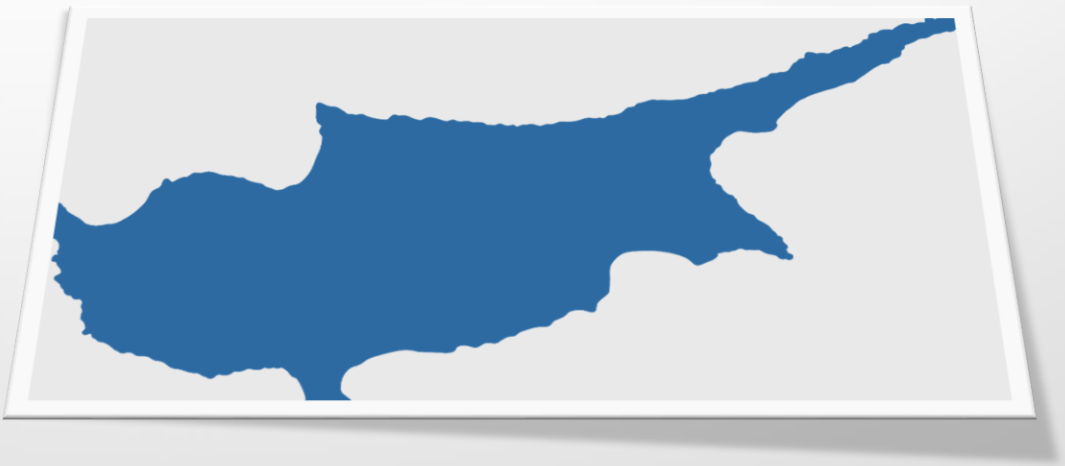
Art. 54(4) of the Notarial Act regulates the case when the obligation depends on a condition or deadline that is not determined by the calendar. For the enforceability of a notarial deed, unless the parties have agreed otherwise, it is necessary to establish by a public document or a document certifying the creditor's signature, i.e. by a final judgment rendered in civil proceedings, that the condition has occurred or that the deadline has expired.

In principle the preconditions for the enforcement of a conditional obligation are regulated by Art. 33 of the Enforcement Act. It states that when the debtor's obligation is conditioned by the occurrence of a condition, the court will, at the proposal of the bailiff, order enforcement if he declares that the condition has occurred.

However, if the debtor points out in the appeal that the condition has not occurred, the court will decide on the occurrence of the condition in the enforcement proceedings, unless the decision depends on establishing the disputed facts.

If the decision depends on establishing the disputable facts, the court will decide on the legal remedy in enforcement proceedings if they are generally known, if their existence can be determined by applying the rules on legal presumptions or if the bailiff proves the conditions with a public document or a publicly certified private document. In other cases, the court will suspend the proceedings.

The bailiff who fails to prove in the enforcement proceedings that the condition has occurred, may initiate litigation to establish that on the basis of the enforcement document he is authorized to request unconditional enforcement in order to realize his claim.



MANUAL - Cyprus

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

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Manual – Cyprus

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 use of headings in first instance judgments is not regulated by law or the Civil Procedure Rules (henceforth – CPR) and does not follow a formal structure. The template of a judgment will vary depending on the formatting tools and personal writing style of the individual judge. Several judgments incorporate headings/subtitles while others include none. Headings tend to be left-indented but they may also be centre-aligned and are sometimes numbered. Lastly, on rare occasions, the judgment will also include a table of content which refers to the headings used in the main part of the judgment.

In the general structure of the judgment the following headings are frequently encountered:

- Introduction/History of the case
- Claims of both sides
- Testimony
- Assessment of Testimony
- Legal Aspect
- Conclusion/Outcome

The different parts of the judgment are sometimes sub-divided with the inclusion of sub-headings/sub-titles. For example, when examining the legal issues raised by the case at hand, the court may choose to divide the examination of these issues into distinctive sections (depending on the number of legal issues which need determination) in order to provide clarity and structure to its reasoning. Alternatively, the court may resort to the use of sub-titles in its assessment of evidence, in order to indicate clearly the type(s) of evidence adduced, including any witness testimony.

1.**2 Structural and substantive division/sequence of the Reasoning**

The Reasoning in Cyprus judgements is structured into paragraphs, which do not have to be numbered, unless the judge wishes to do so. There is flexibility in the structure, in terms of substantive sequence, to be followed when drafting the reasoning, with the only requirement being that the court presents the reasons for its decision by reference to the law and evidence. There are no specific rules or principles regarding drafting the reasoning of a judgment, thus the common practice can only be presented. The court will often refer to the claims of the parties at the beginning of the judgment. As a matter of practice, the court will first set out the claimant's side as provided firstly in the claim. Subsequently, the court will discuss the defence put forward by the defendant and any counterclaims. At this point, the judgment may refer to specific extracts from the claim and the defence and counterclaim, the closing speeches of the lawyers etc. The court will proceed to assess the evidence referred to by the parties and any witness testimony (including testimony of the parties themselves). Subsequently, the court will consider the legal issues at play to reach its findings. A duly reasoned decision is expected to distinguish between the positions of the parties and the court's assessment. If necessary, the reasoning of a court judgment will also address procedural prerequisites and applications relating to the proceedings, including those raised after the filing of the claim.

1.3 Textual identification of the elements comprising the judgement

- "the introduction of the judgement": Εισαγωγή
- "the operating part": διατακτικό

- "the reasoning of the judgment": αιτιολόγηση της απόφασης
- "legal instruction": οδηγίες

1.4 Short description of the elements of the judgement

While the precise structure of the judgment may vary depending on the circumstances of the case and the legal issues arising therein, a civil court judgment is comprised of the following elements:

- Title: the title includes the case number, specific court hearing the case, the name of the judge, the names of the parties and the lawyers of the parties. Any amendments to the parties and the party names will be indicated in the title. Also, when the defendant(s) files a counterclaim, the party names will appear for a second time in reverse, to indicate that the defendant is a claimant on the basis of a counterclaim (and that the claimant is a defendant in this respect).
- Introduction/History of the case – on occasions the court will provide a brief introduction to the case.
- Claims of both sides: the court will refer to the claims of the parties at the beginning of the judgment (frequently this forms part of the introductory part of the judgment). Reference to the claims of the party will also be made throughout the judgment to the extent that these are relevant and necessary. As a matter of practice, the court will first set out the claimant's side as provided foremostly in the claim. Subsequently, the court will discuss the defence put forward by the defendant (and any counterclaims, if relevant). In this respect, the court may refer to specific extracts from the claim and the defence (and counterclaim if relevant), the closing speeches of the lawyers etc.
- Testimony: the court will present, to the extent necessary, the testimony brought forward by each side.
- Assessment of testimony: the court will assess the admissibility and probative value of testimony. If specific issues arise from the testimony, the court may choose to discuss them separately.
- Legal aspect: at a later part of the judgment, the court will elaborate on the legal issues arising in the case at hand. Firstly, the court will set out the relevant law(s), and case-law. Subsequently, in the same section, or different section(s) (depending on the number of legal issues which need determination), the court will reach its final conclusions of the issues at hand, by reference to the law and evidence.
- Interest: where relevant, the court will discuss the issue of interest.
- Conclusion/outcome: this last section in the judgment encapsulates the findings of the court with respect to the liability of the parties and the operative part of the judgment (including legal costs).

1.5 Graphical separation of the elements of the judgement

The way the different elements of the judgment are presented and separated from one another largely depends on the personal writing style of the individual judge and the formatting tools she/he may employ in drafting the judgment

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

As a matter of practice, it is clearly understood that the obligation in the operative part is to be fulfilled by the defendant immediately, unless the operative part specifies otherwise. This practice is also supported by Order 40 Rule 7 of the Civil Procedure Rules which provide as follows:

> ‘Every person to whom any sum or money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to apply for the issue of writs to enforce payment thereof’

This provision is subject to two exceptions. Firstly, if the judgment or order specify a period within which payment is to be made, no writ can be issued by the court until the period expires. Secondly, the court or judge may stay execution, at the time of giving judgment or at a later stage, ‘until such time as they or he shall think fit.’ For example, the operative part may stipulate that the defendant has a limited period within which to perform or that payments will be made at regular intervals (e.g. monthly or annually) or that the defendant would start fulfilling his/her obligations from a specified date onwards etc. In Stelios Panayiotou and Sons Limited v Nicolaou, the defendants were ordered to hand over within 30 days the property in the possession of the claimants. On the other hand, in Bank of Cyprus Public Company Limited v Perikenti and others, one of the defendants was ordered to repay the debt on an annual basis (plus interest). The wording of the court specified the amount to be payed each year and the interest rate. Furthermore, the judgment stipulated the date on which repayment of the debt would start, this being six months after the issuance of the judgment. Failure on the part of the debtor to perform the obligations in the operative part may render a judgment immediately enforceable. For example, in Tsiamezi v Construction Company CHPTH Alexandrou Ltd, the court issued an eviction order against the defendants which was suspended for a limited period of time. As specified in the operative part, failure on the part of the defendants to make the monthly interim payments, would result ‘in the automatic termination of suspended enforcement, and as a consequence, the eviction order would become immediately enforceable.’

The time-period during which a judgment remains enforceable is regulated by the Civil Procedure Rules. Hence, the judgment itself does not specify a time-period. On 24 March 2020, the enforcement period of judgments was extended from ten to twelve years. If no enforcement takes place within this period, the party alleging to be entitled to enforcement, must request the leave of the court. The process is stipulated by Rule 40 Order 8 of the Civil Procedure Rules as follows:

> ‘Where twelve years have elapsed since the judgment or date of the order, or where any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case the Court or Judge may impose such terms as to costs or otherwise as shall be just.'

1.7 Identification of Parties

Unless other provision is made, all actions before a District Court begin with a writ of summons (Forms 1 and 2). When the writ of summons is presented in court for sealing it must contain the following personal information of the Parties:

> ‘the name in full of the plaintiff and the defendant, the address in full and occupation of the plaintiff and, so far as they can be ascertained, of the defendant, and the plaintiff's address for service within the municipal limits of the town or village in which is situated the registry in which the writ is being filed.'

The title of the action consists of the name of the court in which the writ is filed, the names of the parties, the number of the action and the year in which the action is instituted. The title of the action

may be amended when necessary. For example, parties may be added or struck out. Also, party names may be amended to correct a mistake or error. For the purposes of identifying the parties in a judgment, every judgment 'shall be entitled with the full title and amended title (if any) of the action in which it is given.' Furthermore, the judgment will indicate which parties were presented or represented during the proceedings.

1.8 Indication of the amount in dispute

The courts indicate the amount in dispute with reference to the claim. If there is an assertion of a counterclaim on the part of the defendant, the court judgment will also indicate the counterclaimed amount as specified in the counterclaim. Any amendments to the pleadings (including the amount in dispute) are regulated by Order 25 of the Civil Procedure Rules. Depending on the circumstances, leave of the court may be required by means of an application under Order 48 of the Civil Procedure Rules. The outcome of such an application will be determined in an interim judgment. The final judgment will refer to any changes made to the amount in dispute.

1.9 Indication of the underlying legal relationship

A court judgment provides a legal assessment of the dispute following an elaboration of the claims/counterclaims of the parties, the evidence referred to and a discussion on the legal aspects of the case. Ultimately, the court's legal assessment of the dispute will also determine the content of the operative part and the court's decision on the relief sought. This is the structure followed by civil law judgments irrespective of whether the judgment and/or orders included therein may be subject to further enforcement proceedings. As a matter of law and practice, it is clearly understood that the obligation in the operative part is to be fulfilled by the defendant immediately, unless the operative part specifies otherwise. Enforcement proceedings may be pursued against any party who fails to abide by the judgment and the order(s) issued against them.

1.10 Information contained in the operative part

The operative part in the judgment encapsulates the outcome of the case and the resulting liability of the parties (if any) based on the claim and the counterclaim (if applicable). Where the relief sought is partially accepted/rejected, the operative part will specify which parts were accepted by the court and which parts were ultimately rejected and issue the relevant order(s) and/or award damages. Lastly, the operative part provides on the matter of the legal costs and which side(s) will pay for them.

1.11 Existence of a threat of enforcement

Pursuant to section 47 of the Courts of Justice Law of 1960, court judgments are binding on all the parties as soon as they are issued (unless there is an order to the contrary in the judgment itself). Generally, judgments do not contain a threat of enforcement as such in the operative part. Significantly, a successful party who obtains a judgment in their favour does not automatically obtain the relief sought. As a matter of both law and practice, it is clearly understood that the obligation in the operative part is to be fulfilled by the defendant immediately, unless the operative part specifies otherwise. As provided by the Civil Procedure Law and the relevant rules of procedure, the courts have an array of powers to enforce compliance by parties who fail to obey the judgment and the orders issued against them, including but not limited to the seizure and sale of the defendant's movable property, the sale of the defendant's immovable property and the registration of a charging order over the immovable property.

At the same time, the court has the power to compel compliance of its orders (whether such orders direct the doing of an act or prohibit it) by means of a fine, imprisonment or sequestration. Notably, where the court issues an order which directs an act to be done (mandatory) or prohibits the doing of an act (prohibitory), the copy of the order which is to be served to the person required to obey it, shall incorporate an endorsement to the following effect:

> 'If you, the within-named A.B., neglect to obey this order, by the time therein limited, you will be liable to be arrested and to have your property sequestered.'

1.12 Final specification of debt

A judgment which orders the payment of money is called 'judgment debt'. The person against whom the judgment ordering the payment of money is made is the 'judgment debtor'. The operative part of the judgment finalises the debtor's obligation. The judgment specifies the debtor's obligation, the annual interest carried by the judgment debt until full repayment, and which side(s) will pay for the costs. Furthermore, the Court Registrar is instructed to calculate the legal costs, which will ultimately be approved by the Court. In specifying the debtor's obligation, the operative part may indicate whether it concerns a loan agreement, current account, payment of invoices etc.

1.13 Partial rejection of a claim

Pursuant to Order 27 of the Civil Procedure Rules, any party is entitled to raise any point of law by the pleadings. Such point of law 'shall be disposed of by the Court at any stage that may appear to it convenient.' If the Court is of the opinion that its decision on the point of law so raised 'substantially disposes of the whole action, or of any distinct cause of action, ground of defence, counter-claim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just.' Furthermore, the court may strike out any pleading for disclosing no reasonable cause of action. In such a case, or when the action or defence is deemed to be 'frivolous or vexatious', the Court 'may order the action to be stayed or dismissed, or judgment to be entered accordingly as may be just.'

Where the claim is partially or wholly dismissed on substantive grounds, the operative part will indicate so succinctly but clearly, with reference to the relief sought in the claim (and where relevant the counterclaim). If the relief sought is partially rejected, the operative part will specify which parts were accepted by the court and which parts were ultimately rejected, issue the relevant order(s) and decide on the legal costs. However, the operative part will not elaborate on the substantive grounds themselves, on the basis of which the claim was wholly or partially rejected. The substantive grounds will be discussed earlier in the main body of the judgment. As seen from the examples below, the operative part will incorporate very little to no reference to the substantive grounds at play which determined the conclusions of the court.

Example 1: total rejection of claim (and counterclaim):

> 'From what I have tried to explain above during the analysis and evaluation of the testimony presented before me, and the rejection of the testimony of both parties as unreliable and without making any findings, my conclusion is to reject both the claim and the counterclaim. I consider that under the circumstances the more just order with respect to the costs is for each side to be burdened with its costs.'

Example 2: total rejection of claim (acceptance of counterclaim):

> 'Following the above, I conclude that this action should be dismissed and is dismissed with costs in favor of Defendant 1 and 2 and against the Claimant.

> With regard to the Counterclaim, a decision is issued in favor of Defendant 1 (Counterclaim Claimant) and against the Claimant (Counterclaim Defendant 1) for the amount of ... EUR plus legal interest with costs in favor of Defendant 1 (Counterclaim Claimant) and against the Claimant (Counterclaim Defendant 1).
>
> Costs will be calculated by the Registrar and approved by the Court.'

Example 3: partial rejection of claim:

> 'Based on all the above, the action is partially successful, and an order is issued stating that when calculating the inheritance share of Defendant 3, the amount of ...£ is to be taken into account, as indicated above, at an interest of ...% per annum from ... until distribution.
>
> The said amount shall be deducted from her inheritance share for the benefit of the claimants.
>
> As far as costs are concerned, a matter at the discretion of the Court, give then nature of the case and the fact that the action is partially successful, I consider that it is fair not to award any costs in favour of any party. Each side shall bear its own costs.'

1.14 Set-off of a claim

In civil proceedings in Cyprus, it is not possible for the debtor to invoke set-off whereby the claim and the counterclaim may be extinguished (completely or to an extent). Consequently, the operative part makes no reference to this. The operative part may specify the debt of the defendant pursuant to the successful claim (wholly or partially) of the claimant. At the same time, if applicable, the operative part will specify separately the debt of the claimant based on a successful counterclaim (wholly or partially) raised by the defendant. In instances, the court may reject completely both the claim and the counterclaim. Alternatively, the court may reject the claim in its entirety and accept the counterclaim. Notably, a set off may take place with respect to the costs: 'A set-off for damages or costs between parties may be allowed.'

1.15 References to the Reasoning found within the operative part

As a matter of practice, the operative part will present very succinctly the decision of the court with reference to the relief sought in the claim (and where relevant the counterclaim) and issue the relevant order(s) and/or award compensation. On most occasions, the operative part will start as follows: 'Based on the above...', 'Following the above...' etc.

Any reference to the reasoning of the court (if made), will be very brief. For example:

> 'From what I have tried to explain above during the analysis and evaluation of the testimony presented before me, and the rejection of the testimony of both parties as unreliable and without making any findings, my conclusion is to reject both the claim and the counterclaim. I consider that under the circumstances the more just order with respect to the costs is for each side to be burdened with its costs.'

1.16 Wording used to mandate performance

Pursuant to section 47 of the Courts of Justice Law of 1960, court judgments are binding on all the parties as soon as they are issued (unless there is an order to the contrary in the judgment itself). In Cyprus, the debtor is not specifically 'ordered' to perform by the wording of the operative part. The operative part only finds the debtor 'liable to pay' a certain amount (plus interest and legal costs). In practice, it is clearly understood that the orders in the operative part, including the ones for the

payment of debt, are to be performed by the debtor immediately, unless the operative part specifies otherwise.

1.17 Reciprocal claims

In civil proceedings in Cyprus, it is not possible for the debtor to invoke set-off with respect to reciprocal but independent obligations. The Supreme Court distinguished between the banking right to a set-off and the issue of set-off arising from reciprocal but independent obligations. The latter does not apply to civil proceedings in Cyprus. Rather, it creates a cause for a separate action or counterclaim. The issue of bank off-setting is an accounting act to determine the customer's account balance and 'does not create an independent cause of action or claim.'

1.18 Indication of interest (rates)

Section 33 of the Court of Justice Law of 1960 regulates interest rates in the context of any court proceedings for the collection of any debt for which an interest is payable. According to section 33(1), the court will award an interest either on the basis of an agreement between the parties or otherwise as provided by law, starting from the period the interest started accruing due until final repayment. The interest shall not exceed the maximum statutory rate. Moreover, section 33(2) provides that every court judgment (including the part relating to the legal costs) shall bear a legal interest per annum, from the date of filing the action until the final repayment of the debt. This legal interest is reviewed every December by the Minister of Finance.

The court has discretion to vary the award of interest as follows: a) on the entire amount awarded by the judgment, for a period between the date of filing the action until the date on which the judgment is issued; b) on part of the amount awarded by the judgment, for the whole or only part of the period between the date of filing the action until the date on which the judgment is issued. In cases of fraud, the interest accrues from the date the actionable right was created, regardless of whether an action is pending.

The wording used in the operative part reflects, but does not explicitly refer, to the above legal basis on the award of interest in judgments ordering payment. The operative part will specify: 1) the amount of money awarded by the judgment; 2) the interest (specifying when this is the legal interest instead of the interest agreed between the parties); 3) whether the interest applies to the entire amount or part of it; and 4) the period of time (unless the court decides otherwise, it covers the period between the filing of the claim until full repayment of the debt).]

Example of a typical wording:

> The Court found in favor of the defendant and decided that the claimants would pay the defendant 'the total amount of ... EUR, plus legal interest on the total amount from the date of issuance of the decision.'

In this case, as the court explained in its reasoning, it would be legally incorrect and unfair to award the higher interest rate provided by the agreement between the parties. On the same basis, the court decided that the interest would accrue from the delivery of the judgment and not the filing of the claim.

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

The Civil Procedure Rules give the power to the court to correct clerical mistakes in the pleadings, judgments or orders which arise from an accidental slip or omission, depending on the nature and extent of the mistake. The court may proceed to make the correction following an application by one of the parties. Significantly, no right to appeal arises on this basis. This is the so-called 'slip rule' and it reflects Order 28 Rule 11 of the old English Civil Procedure Rules.

According to The Annual Practice 1959, when applying this rule, any error or omission 'must be an error in expressing the manifest intention of the Court; the Court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order'. Similarly, the Supreme Court of Cyprus has stated that the slip rule is 'intended to harmonize the text of the decision with the obvious intention of the court'. Such a power may be exercised pursuant to Order 25 Rule 6 of the Civil Procedure Rules and the Court's inherent powers to correct errors or omissions in the order or judgement. Such a power is not absolute; it is 'limited to errors owing to failure to give expression in the order or judgment to the manifest intention of the Court.' The case of Lazarou v Nemesis Construction Company and another clearly encapsulates the legal ramifications when the operative part is incomplete, undermined, incomprehensible or inconsistent:

> 'in order for the «slip rule» to apply, it must be established that some parts of the decision are correct and some are wrong and in need of correction, but the finality of court judgments, including those at the level of the Court of Appeal, leaves no room for the correction of judgments, with the inclusion of orders which concern substantive arrangements and which cannot be classified as errors.'

1.20 Legal effects of the Reasoning of the judgement

The reasoning encompasses the court's reasons for deciding the case, including the rule of law (*ratio decidendi*) on which the decision is based. The Supreme Court has distinguished between the *ratio decidendi* of the case and the result of the case as follows:

> 'The ratio of the judicial decision (*ratio decidendi*) is the rule of law on which the result of the decision is based, in contrast to its result for which a *res judicata* is created (see Chanvery Lane Safe Deposit eta v IRC [1966] 1 ALL ER 1 (HL); Eleftheriou-Kaga v Democracy (Case No. 494/87 13.2.1989). Binding is the rule of law that directly supports the decisions and is inextricably linked to the outcome, as opposed to the part of the reasoning, the development of which is not objectively necessary for the decision.'

1.21 Obtaining the res judicata effect

Order 34 of Civil Procedure Rules regulates the entry of a judgment. Unless the Court has directed that a judgment be not drawn up until a certain date or until a certain event has happened, every judgment shall, on the application of any party to the Registrar, be entered in a book to be kept for the purpose. Every judgment when entered shall be dated as of the day on which it was pronounced, and shall, save where it otherwise directs, take effect from that date, and a note shall be made in the book in which it is entered of the date of entry. In other words, a judgment becomes *res judicata* at the day on which it was pronounced, thus the doctrine has immediate effect in Cyprus. Where any judgment is given subject to the filing of any affidavit or production of any document, the Registrar shall examine the

affidavit or document produced, and if the same shall be regular and contain all that is by law required, the judgment shall be entered accordingly.

1.22 Res judicata of negative declaratory relief

The negative declaratory relief is *res judicata* itself, which means that parties cannot bring new claims asking for negative declaratory relief. However, the dismissal of a negative declaratory action is not an immediate equivalent of a declaration of the opposite, so the judgment does not become enforceable for the creditor. For example, when party A initiates an action against B for a declaration that he does not have to pay B an amount of money, and the court dismisses the claim, this does not mean that A has to pay B the amount of money. B should start new proceedings asking for A to pay him the money, but in this case, the court will not have to examine again whether A owns money to B or not, as this was *res judicata* from the previous decision. The court in the second proceedings will only examine, for example, the exact amount of money, the method of payment etc.

1.23 Suspensive periods barring the enforcement of a judgement

Every person to whom any sum or money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to apply for the issue of writs to enforce payment thereof, subject nevertheless as follows:

(a) If the judgment or order is for payment within a period therein mentioned, no writ shall be issued until after the expiration of such period;
(b) The Court or Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.

When ten years have elapsed since issuing of the judgment or order, or when any change has been made to the parties who are entitled or subject to enforcement, the party claiming to be entitled to enforcement may apply to the Court for permission to perform accordingly. And the Court or the Judge, if satisfied that the party to the application is entitled to do so, may issue a decree to that effect, or may order, as in any other matter necessary, the rights of the parties.

2. Court settlements

2.1 Elements of a court settlement

A Rule of Court declared in court must incorporate the terms of the agreement reached between the parties. As a simple contract it must be interpreted as such. Its construction ‘must be as near to the minds and apparent intention of the parties as is possible and as the law permits.’ According to the Supreme Court, the cardinal presumption is that 'the parties have intended what they have in fact said. So their words must be construed as they stand'.

Where a party accepts a judgment by consent, this is done with reference to the relief sought by the claimant in the claim. For example, a defendant can accept a judgment with respect to an amount of money claimed by the party bringing the action. Alternatively, a defendant can accept a judgment against them for a part of the claim (while court proceedings continue for the remainder of the claim).

2.2 Formal requirements

The parties (and/or their representatives) must appear before the court and ‘declare’ the settlement reached between them. The conclusion of the settlement agreement and its terms are recorded by

the court and become a Rule of Court. The Rule of Court is a simple contract; it is not transformed into a judgment. Thus, it is subject to the provisions of Contract Law (CAP 149). Alternatively, a valid court settlement requires that one or more of the defendants(s) (and/or their representatives) appear before the court and accept a judgment against them. Such acceptance constitutes a judgment which becomes binding as soon as it is issued (unless there is an order to the contrary in the judgment itself).

2.3 Identification of Parties

The parties in a settlement are identified in the same manner as in all other cases (discussed in detail in the Section 1.7 Identification of Parties in the court judgment). They are identified based on the information contained in the title of the action, which, ultimately, becomes part of the title of the judgment upon entry of judgment.

MANUAL - GERMANY

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

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Manual – Germany

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 content of a German judgment is stipulated by § 313 of The Code of Civil Procedure, *Zivilprozessordnung* (hereinafter - ZPO).

§ 313 ZPO
Form and content of the judgment

(1) The judgment shall set out:

1. The designation of the parties, their legal representatives, and the attorneys of record;
2. The designation of the court and the names of the judges contributing to the decision;
3. The date on which the court proceedings were declared terminated;
4. The operative provisions of a judgment;
5. The merits of the case;
6. The reasons on which a ruling is based.

(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 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 are to be included by reference being made to the written pleadings, the records of the hearings, and other documents.

(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.

The overall title of the court's decision consists of the type of judgment, i.e. "*Urteil*" or "*Beschluss*", which has been rendered in the name of the people, "*im Namen des Volkes*".

According to § 313 (1) No. 4 ZPO, the judgment sets out the operative part under the headline "*Tenor*". Afterwards, the merits of the case are presented under the headline "*Tatbestand*" pursuant to § 313 (1) No. 5 ZPO. The reasons on which the ruling is based pursuant to § 313 (1) No. 6 ZPO are laid out under the headline "*Entscheidungsgründe*". In general, there are no further rules concerning the structure or the headlines of the judgment.

Some courts do not specifically name the headlines. The "*Tatbestand*" could be referred to as "I.", the legal reasoning could be referred to as "II.". In this scenario, "III." usually contains the decision on costs.

1.2 Structural and substantive division/sequence of the Reasoning

The paragraphs of German judgments are numbered in the margin. However, these numbers are not related to the content of the judgment.

The legal reasoning part (*Entscheidungsgründe*) is subdivided and structured according to its content. The different layers of the structure are the following: I. – 1. – a.- aa – (1). The structure should enable to reader to follow the legal reasoning. For example, "I." can deal with the legal consideration concerning the first legal problem or relief sought while "II." refers to the second legal problem or the counter-claim. The use of this type of structure is not mandatory but common practice in Germany.

In case the admissibility of the action is in question, the legal reasoning deals with these problems first. The legal reasoning of the substantive claim is structured according to the relief sought and to the preconditions of the substantive law. The answer to the main legal question is followed by the answer to side issues. Those side issues can for example consist of the decision concerning the provisional enforceability of the judgment. The decision on costs and the decision concerning the amount in dispute usually conclude the judgment before the legal instructions and the signature of the judge(s).

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": Rubrum

"the operating part": Tenor

"the reasoning of the judgement": Entscheidungsgründe

"legal instruction": Rechtsbehelfsbelehrung

1.4 Short description of the elements of the judgement

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

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

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.

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

VII. The signature

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

1.5 Graphical separation of the elements of the judgement

The different elements of the judgment are separated through headlines and paragraphs. 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. 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.

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

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. 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.

1.7 Identification of Parties

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. Has one of the parties died after the action was filed, its heirs have to be indicated in the judgment. 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. 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. The information is usually not repeated in other parts of the judgment. The parties are referred to as claimant or accordingly defendant.

1.8 Indication of the amount in dispute

The amount in dispute has multiple meanings. In Germany, there are 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 of Gerichtsverfassungsgesetz (Germans Courts Constitution Act, henceforth – GVG) and §71 (1) GVG ('*Zuständigkeitsstreitwert'*), second, the court and attorney fees ('*Gebührenstreitwert'*) and third, the appeal amount in dispute ('*Rechtsmittelstreitwert'*). 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.

Regulations concerning the '*Zuständigkeitsstreitwert*' can be found in § 2 – § 9 ZPO. The relevant provisions regarding court fees are found primarily in § 39 *et seq* of Gerichtskostengesetz or The Law on Court Costs (henceforth – 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 Rechtsanwaltsvergütungsgesetz (Act of the Renumeration of Lawyers, hereinafter – 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 EUR as long as no foreign currency is owed. The amount in dispute is usually specified in the reasoning of a judgment, or in a separate order. By being specified within the reasoning of a judgment, the indication of the amount in dispute can only challenged together with the judgment. The '*Gebührenstreitwert'* is usually specified in a separate order, cf. § 63 GKG and § 32 I RVG.

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.

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. 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. 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. 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 EUR to 1.500 EUR 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.

1.9 Indication of the underlying legal relationship

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 on the (if applicable: provisional) enforceability. 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.

1.10 Information contained in the operative part

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. 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. 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.

1.11 Existence of a threat of enforcement

In Germany the operative part comprises three points. One of these points is the decision on the (if applicable: provisional) enforceability. § 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 judgment is provisionally enforceable.' However, provision of security needs to be included if applicable.

1.12 Final specification of debt

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.

1.13 Partial rejection of a claim

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. 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'.

1.14 Set-off of a claim

The scenario when the debtor invokes the set-off of a claim 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.' 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. 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.

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. 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 [...] % 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.'

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).'

1.15 References to the Reasoning found within the operative part

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

1.16 Wording used to mandate performance

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

1.17 Reciprocal claims

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. 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.

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).*' 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).'

1.18 Indication of interest (rates)

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. Therefore, it is not sufficient if only a variable interest rate (e.g. libor rate) is mentioned in the operative part. Furthermore, the interest rates can be expressed in percentage points even though percentage was applied for in error.

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.*' 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'.

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

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'*. If, for example, the decision on costs only missing in the operative part but can be found in the reasoning, § 319 ZPO is applicable. 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. 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. Where the operative part of the judgment differs from the reasoning, the operative part alone is relevant, since it alone constitutes the final judgment of the judge. 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.* An appeal may be lodged against such an ineffective judgment. In appeal proceedings such deficiencies must be taken into account and lead to annulment of the judgment. 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*. 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.

1.20 Legal effects of the Reasoning of the judgement

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. According to the wording of this provision the *res judicata* is limited to the operative part, the tenor, of the judgment. The court can and should interpret the operative part where needed. 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. This interpretation may only be carried out within narrow limits.

1.21 Obtaining the res judicata effect

Formal *res judicata* generally requires the absence of any possibility to challenge the judgement, § 705 I ZPO. 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.*

A judgement resulting from a contradictory proceeding becomes *res judicata*

a) the moment it is announced/served if it is not subject to any recourse, § 310 III ZPO.
b) the moment the period to take recourse against the judgement expired.
c) the moment when both parties' waiver of their respective right to challenge/appeal the judgement becomes effective.
d) the moment one party's withdrawal of a challenge/appeal becomes effective if the period for any further challenge/appeal has already expired.
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.

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. Until this point in time, the partial recourse bars the remaining part of the judgement from becoming *res judicata.*

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.
b) the moment the withdrawal of the protest or a decision rejecting the protest becomes effective.
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 moment the waiver of the right to take recourse against the judgement by the defaulting party becomes effective.

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

a) the moment they are issued, § 329 ZPO, if they are not subject to any means of recourse.
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.

1.22 Res judicata of negative declaratory relief

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. 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. 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. 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 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).

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. In other words, the operative part of declaratory judgments does not contain a legal order that could be enforced. Yet, the negative declaratory judgement binds the court of the second proceedings after it became *res judicata.*

1.23 Suspensive periods barring the enforcement of a judgement

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.

§ 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 day the enforcement-title and the enforcement-clause have been served to the enforcement- debtor, § 750 III ZPO. 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.

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. During the two weeks, the enforcement-debtor is granted with the opportunity to prepare for the enforcement.

2. Court settlements

2.1 Elements of a court settlement

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. 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. 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. Accordingly, the court settlement has to contain the requirements for an 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. However, the giving-in can consist of the mere waiver of the right to pursue a court decision on the issue. Other authorities are of the opinion that the sole purpose of a court settlement is the finalization of the proceedings. Therefore, the court settlement does not require any further content than a provision closing the proceedings. 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.

The court settlement must concern the entire matter in dispute or at least a quantitative part of it. 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 dispute. It is not relevant whether the court settlement confirms the existing legal status or whether this is modified by the court settlement. Third parties can be affected by court settlements if they participate in the negotiations

and conclusion of the court settlement. In case the third party is only positively affected by the court settlement, it could by concluded without the third party's participation.

2.2 Formal requirements

As the court settlement is a procedural act, the requirements to undertake procedural acts have to be fulfilled. 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.

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. 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 court settlement within the hearing protocol. The recording of the settlement can transfer an out of court settlement into a court settlement.

If the settlement is concluded by means of memoranda, the parties have to agree upon a settlement and accept it within a memoranda submitted to the competent court. In this scenario, the court renders a decision concerning the content of the settlement. This decision is not subject to means of recourse and it does not become *res judicata*. Further, the settlement remains of contractual nature irrespective of the fact that is has been confirmed by a court decision.

2.3 Identification of Parties

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 rubrum of a judgment, that is described in the section 1.7 Identification of Parties.

3. Notarial deeds

3.1 Prerequisites for enforceability

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*').

3.2 Special clause

> 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. In case of a plurality of debtors or creditors, their legal relationship has to be clearly specified. In addition, the clause has to contain the procedural claim underlying the enforcement, i.e. the concrete cause of action. 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. Further, the debtor can subject its entire assets to enforcement or limit the enforcement to e.g. the movable or immovable assets. 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.

3.3 Consent

The debtor's consent has to become part of the notarial act for the latter to serve as an enforcement title. 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. Rather, the notarial act has to specifically refer to the content of the enforcement. Accordingly, it has to entail the same content as a civil judgment in order to be enforceable. In other words, the notarial act has to replace the operative part of the judgment. Therefore, the claim that should be subject to enforcement has to be identified. In this context, the term claim refers to the procedural claim, i.e. the matter in dispute. Whilst this does not require the notarial act to specify the substantive legal basis, 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.

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.

3.4 Structure

There are no requirements for the structure of the notarial act. However, §§ 6 et seq. *Beurkundungsgesetz* (Notarial Recording Act, henceforth - BeurkG) and the *Bundesnotarordnung* (Federal Code for Notaries*)* 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.*

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-claims, the identification of the circumstances that are a precondition for the enforcement, the creditor as well as the debtor and the *Unterwerfungserklärung*.

3.5 Personal information

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. 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. If the use of a representative has been necessary, the notarial act has to identify the representative as well.

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. 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.

3.6 Obligations contained in attachments

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. However, the reference to attachments only suffices to further specify the content of the notarial deed. The necessary content for an enforceable notarial act has to be contained within the notarial act itself.

3.7 Conditional claims

The enforceable notarial act can entail a conditional claim subject to the requirement that the claim remains specified. 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. 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.

MANUAL - Lithuania

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

Project EU-En4s — JUST-AG-2018/JUST-JCOO-AG-2018
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The content of this Manual represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contain.

Manual – Lithuania

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

Lithuanian laws do not explicitly set out the "headlines" of a judgement, but there are Recommendations from the Supreme Court for instruction exposition. Civil procedure code enumerates that a judgement should contain an introductory part, an ordering part, a statement of ground (the Reasoning), and a legal instruction regarding an appeal. It stems naturally that headlines are a collateral necessity for the proper identification of these building blocks (article 270 of the Civil Procedure Code – later CPC).

The introduction is outlined by the statement that the judgment has been rendered in the name of the state. The introductory part is typically confined to the front page of the Judgement. In addition to the former statement, it features the reference number of the case, the name of the court, together with a graphic of Lithuanian coat of arms, the name and surname of the presiding judge and other members of the panel, the name and surname as well as the permanent or temporary residence of the parties and their representatives and/or attorneys, a brief description of the matter of dispute, the day on which the main hearing has been completed, and the day on which the judgment has been rendered.

Neither is there an explicit "Ordering part" in terms of a headline. Rather, the court outlines the operative part by stating in (usually) capital letters that it has "DECIDED".

The Reasoning and the Legal instructions are marked by separate headlines in the judgement. Usually, these are written in all capital letters. Sometimes, a space between each letter is applied for visual impact or the letters are written in bold. All of the above headlines are usually numbered. The Reasoning of the judgement headline could be subdivided and named separately.

1.2 Structural and substantive division/sequence of the Reasoning

The Reasoning in Lithuanian judgements issued by courts of is usually structured into paragraphs and all the text numbered with Arabic integrally (including Reasoning part).

Usually reasoning part written in respect of the following sequence:

- The allegations of the claimant,
- The defence (objections) raised by the defendant,
- List of admitted and dismissal evidence
- Determination of disputed and undisputed facts of the case
- The intertwined legal and factual assessment of the case
- The costs of litigation

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": ĮŽANGINĖ DALIS

"the operating part": APRAŠOMOJI DALIS

"the reasoning of the judgement": MOTYVUOJAMOJI DALIS

"legal instruction": REZOLIUCINĖ DALIS

1.4 Short description of the elements of the judgement

The elements of the judgement are listed in Article 270 of the Code of Civil procedure of Lithuania.

Article 270. Contents of the judgement

1. The judgement of the court shall consist of the introduction, the recital, the motivation and the substantive provisions.

2. The following shall be indicated in the introduction of the judgement:

1) time and place of the adoption of the judgement;
2) the name of the court which adopted the judgement;
3) the bench of the court (name(s) of the judge(s)), the recording clerk of the court hearing, the parties, other persons participating in the proceedings;
4) the matter of the dispute.

1.5 Graphical separation of the elements of the judgement

Usually, different elements of the judgment are separated from one another by headlines.

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

Usually, no time period is specified in the judgment, however, such possibility is mentioned in the Code of civil procedure (Article 271: "1. When passing a judgement, the court shall, if necessary, set a specific procedure and time limit for enforcing the judgement, defer or schedule the enforcement.")

1.7 Identification of Parties

In procedural documents (e.g. claim) the following personal information must be specified for identification of parties: name, last name (surname) and unique (personal) identification number. Personal number consists of specific five numbers plus the birth date of a person (in the middle of the code) is provided to each citizen of Lithuania. All the legal persons are registered in Register of legal entities and the main data of the legal person could be reached to everyone https://www.registrucentras.lt/jar/index_en.php

The same data is in the resolution part of the judgement if the court adjudge amount.

1.8 Indication of the amount in dispute

The claimant specifies the concrete amount of the claim in introduction and resolution parts of the final action (article 135, part 1 item 1 of Civil procedure code).

The Court states it in the introductory part when summarizes the final claim.

All the procedural questions regarding amendments to claim occur during proceeding usually resolved by the court at the preparation stage, because at the stage of the trial such amendments could not be arisen (except exceptional cases and situations when amount claim is reduced, the court adjudges a partial dispute taking partial judgement or decision).

1.9 Indication of the underlying legal relationship

No data provided.

1.10 Information contained in the operative part

The precise elements of the operative part are stated in article 270.5 of the Code of civil procedure:

1) the conclusion of the court to grant the claim and/or counter-claim in full or in part, at the same time setting forth the contents of the allowed claim, or to dismiss the claim and/or counter-claim;
2) in the cases provided for by laws, the amount of the adjudged interest and the time period by which they shall be exacted;
3) direction as to the distribution of litigations costs;
4) the court's conclusions regarding other issues settled by the judgement;
5) the time limits and procedure of appeal against the judgement.

1.11 Existence of a threat of enforcement

The existence of a threat of enforcement is very unusual for Lithuania. However, the bailiff under the article 659 Civil procedure code calls the debtor to execute the decision in 10 days period voluntarily.

1.12 Final specification of debt

The debtor's obligations are set exclusively by the Court and the bailiff sets the execution fees of the judgement. According to Article 270(5) of the CPC the court determines whether the claim or counterclaim shall be satisfied or not. Also, the court has to decide on all litigation costs and distribution of the payment of litigation costs between the parties. Pursuant to the case law, a judgment is a motivated individual binding act of law adopted by a court on behalf of the Republic of Lithuania, which, when interpreting and applying legal norms to specific relations of the parties, substantially and definitively resolves a legal dispute: substantive legal relations of the parties are established, changed or terminated.

1.13 Partial rejection of a claim

When a claim is wholly or partially rejected it simply states that the claim is rejected, and brief reasoning is provided. Court in the operative part would only state that "the claim is rejected" or "the claim is rejected in so far as it concerns X, Y and Z" or "to find the defendant liable for X and reject all the other claims brought by the claimant".

The court would then add a sentence on the court's fees.

1.14 Set-off of a claim

The fact that the debtor invokes a set-off of a claim it is not reflected in the operative part. It is explained in the general reasoning.

As a general point, the operative part in Lithuanian judgements is extremely brief. It does not even say something like "for the reasons stated above". It mostly only states "the claim is rejected" or "the claim is upheld. The damages to be awarded to the claimant are X EUR".

1.15 References to the Reasoning found within the operative part

The operative part does not contain elements from or references to the reasoning of the judgment.

1.16 Wording used to mandate performance

In Lithuania the debtor may or may not be specifically "ordered" to perform by the wording of the operative part – both options are possible. But since in the enforcement document, the operative part of the judgement must be quoted directly, it is unequivocally understood as an order (item 4, p. 1, art. 648).

1.17 Reciprocal claims

No specific rules regarding reciprocal claims are provided by law since the judgement cannot contain such elements in the first place.

1.18 Indication of interest (rates)

Interest rate is stated in private laws. The debtor shall also be bound to pay a certain interest established by laws on the sum adjudged to the creditor for the period from the moment of the commencement of the case in the court until the final execution of the judgement (article 6.37 part 2 of Civil code). Under article 6.210 of Civil code where a debtor fails to meet his monetary obligation when it falls due, he shall be bound to pay an interest at the rate of five percent per annum upon the sum of money subject to the non-performed obligation unless any other rate of interest has been established by the law or contract. Where both parties are businessmen or private legal persons, the interest at the rate of six percent per annum shall be payable for a delay in payment unless any other rate of interest has been established by the law or contract.

The court in a judgement usually phrase like following: the defendant shall pay 5 or 6 percent (it depends on the legal status – corporal or legal person) interest from the day the claim was submitted until the debt is fully recovered.

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

The matter is regulated by Article 278 of the Code of civil procedure: Construction of the judgement

1. If the judgement is unclear, the court that adopted the judgement shall have the right to construction, at the request of the participants in the proceedings as well as on its own initiative, of the judgement rendered by it, however, without changing its contents.
2. It shall be allowed to construct the judgement, provided it is pending, the period during which the judgement may be enforced has not expired or this period has not been resumed.
3. The issue regarding the construction of the judgement shall be settled at the court hearing. The persons participating in the proceedings shall be notified of the time and venue of the hearing. However, failure by such persons to appear does not prevent from determining the issue of construction of the judgement.
4. The court ruling regarding the construction of the judgement may be appealed against by a separate appeal

If it is the Bailiff who finds the decision unclear, the matter is regulated by Article 589 of the same Code: Construction of the procedural decision of the court and of enforcement thereof:

1. Where the procedure for enforcing the procedural decision of the court is unclear, a bailiff shall address the court, which has adopted the procedural decision, for the construction of the enforcement procedure.
2. A request of the bailiff provided for in paragraph 1 of this Article shall be considered by the court in accordance with the procedure prescribed in Article 593 of this Code.

1.20 Legal effects of the Reasoning of the judgement

Reasoning does not really have any legal effects as of itself.

1.21 Obtaining the res judicata effect

First instance court judgement has got *res judicata* characteristic after 30 days period from the first instance court judgement declared if appeal was not submitted or after the appellate procedure is finished (and the case has not been remanded) (article 307 part 1 of Civil procedure code). If the party miss the deadline for important reasons, the court has a right to renew the term to appeal but no later within 3 months period after the judgement was declared (article 307 part 3 of Civil procedure code). After the expiration of this term the judgement may be revoked only through reopen procedure with limited grounds.

Moreover, in the cases finished by the court decision adjudged on the basis of parties' peace treaty negative *res judicata* aspect is declared.

1.22 Res judicata of negative declaratory relief

Negative declaratory action is not possible in Lithuania.

1.23 Suspensive periods barring the enforcement of a judgement

No data provided.

2. Court settlements

2.1 Elements of a court settlement

There are no necessary elements, the only requirement is not to affect the rights of the third parties.

2.2 Formal requirements

The parties sign the document that the court approves by rendering a judgement. When such judgement is rendered, it becomes a 'normal' judgement that can, for example, be appealed.

2.3 Identification of Parties

Parties are identified from the personal details (personal codes for natural persons and register codes for legal persons).

3. Notarial deeds

3.1 Prerequisites for enforceability

A notarial deed is an enforcement title *„per se"* in such cases:

- entry of enforcement clauses of the protested and non-protestable promissory notes and cheques;
- enforcement clauses from notarial approves contracts from which arise pecuniary obligations;
- notarial enforcement clauses on the compulsory recovery of debts under a mortgage (pledge) creditor's statement, executed and certified by civil claims.

3.2 Special clause

The notary can only issue deeds regarding monetary claims.

3.3 Consent

Debtor’s consent is not considered as a part of a notarial deed.

3.4 Structure

There is no structure enshrined in the laws, except notarial enforcement clauses on the compulsory recovery of debts under a mortgage (pledge) creditor's statement, executed and certified by civil claims, which is defined by the Minister of Justice.

The procedure for making notarial enforcement clauses is regulated by the Act December 30, 2015, The Minister of Justice of the Republic of Lithuania by Order No. 1R-381 approved Form of “Executive Records”, Description of the procedure for performing notarized transactions that gave rise to pecuniary obligations.

3.5 Personal information

Name, surname, and personal identification number must be specified for natural persons. For legal persons - a company document from the national registry of legal persons.

3.6 Obligations contained in attachments

Obligations, contained in a directly enforceable notary deed, must be set out specifically within the text of the notarial deed.

3.7 Conditional claims

There are no special conditions which have to be meet in notarial deeds or in enforcement procedure.

MANUAL - Netherlands

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

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Manual – Netherlands

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Contents

1. Judgement

1.1 Headlines that form part of the judgement

Art. 230 para 1 of the Dutch Code on Civil Procedure sets out the relevant elements with regard to the content of the judgement. The court follow the structure of this article when issuing a judgement. In practice, the requirements set out by this article have led to a structure of the judgement ("*vonnis*" or in appeal proceedings "arrest"), which is as follows:

- The text "In the name of the King" *("In de naam van de Koning")* only in cases of a final decision;
- Type of the decision, judgement ("*vonnis*" or in appeal proceedings "arrest") or order ("*beschikking*");
- Name of the court issuing the decision;
- Case number;
- Name of the parties, place of residence, role in the procedure and name of the representatives;
- The course of the procedure (documents that were exchanged by the parties, hearings etc.);
- Facts of the case as determined by the court;
- The claim as laid down in the writ of summons and, where applicable, the counterclaim;
- The reasoning of the decision (regarding the claim and the counterclaim);
- The decision, including, where applicable, instructions to the parties;
- Name and signature of the judge and the registrar and the date of the judgment.

The different parts of the judgment (the course of proceedings, facts, claim, reasoning and decision) are separated by numbers. In addition, the reasoning may be divided in subheadings, showing a certain decision of the court with regard to a specific point. Dutch judgements are numbered and, as such, follow a very streamlined structure.

1.2 Structural and substantive division/sequence of the Reasoning

The courts use Arabic numerals in accordance with the following format, 1., 2., 3. and 1.1., 1.2., 1.3. and even 1.1.1, 1.1.2. etc. This, of course, depends on the complexity of the case.

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": (Inleiding), however, the Dutch system does not include such "introduction"
"the operating part": (De beslissing/alternatively referred to as "dictum")
"the reasoning of the judgement": (De beoordeling/motivering van de beslissing)
"legal instruction": (rechterlijke instructies)

1.4 Short description of the elements of the judgement

The structure of a domestic (civil) judgment is determined by the requirements as to the content of a domestic (civil) judgment based in the national provisions. Article 121 Dutch Constitution (Grondwet) sets outs two requirements with regard to the content of a domestic (civil) judgement. First, the judgment has to contain the reasons for the decision. Therefore, it must be motivated by the court. Second, the judgment must be issued in public. These requirements are further refined out in the Dutch Code on Civil Procedure (hereinafter – Rv). In particular, Article 28 Rv sets out the requirement that a decision must be given in public and Article 30 Rv states that the decision must be motivated by the court.

In addition, for both kind of decisions, the Rv set requirements as to the content in Article 230 Rv for the judgment ("*vonnis*" or in appeal proceedings "arrest") and Article 287 in combination with Article 230 Rv for the order ("*beschikking*"). Based on these requirements, the Judiciary has developed a certain structure of the domestic (civil) judgements in the Netherlands, which will be shown in the following.

Judgment ("*vonnis*" or in appeal proceedings "arrest")

Article 230 para 1 Rv contains the requirements on the content of a judgment ("*vonnis*" or in appeal proceedings "arrest") issued by a Dutch court in civil matters. The judgment ("*vonnis*" or in appeal proceedings "arrest") must state the names and place of residence of the parties as well as the names of their counsels or legal representatives (sub a). Further, the course of the procedure has to be included in the judgement ("*vonnis*" or in appeal proceedings "arrest") (sub b) as well as the claim as formulated in the writ of summons together with the statements of the parties (sub c). Where applicable, the claim and the statements of the prosecution have to be included in the judgment (sub d). This is mostly the case in matters where the prosecution is playing a role. Furthermore, the judgment ("*vonnis*" or in appeal proceedings "arrest") must state the ground of the judgment (sub e) as well as the decision (sub f). At the end, the name of the judge and, in case of a decision by a chamber, the name of the president of the chamber (sub g) as well as the date of the judgment (sub h).

In practice, these requirements have led to a structure of the judgement ("*vonnis*" or in appeal proceedings "arrest"), which is as follows:

- The text "In the name of the King" ("*In de naam van de Koning*") only in cases of a final decision;
- Type of the decision, judgement ("*vonnis*" or in appeal proceedings "arrest") or order ("*beschikking*");
- Name of the court issuing the decision;
- Case number;
- Name of the parties, place of residence, role in the procedure and name of the representatives;
- The course of the procedure (documents that were exchanged by the parties, hearings etc.);
- Facts of the case as determined by the court;
- The claim as laid down in the writ of summons and, where applicable the counterclaim;
- The reasoning of the decision (regarding the claim and the counterclaim);
- The decision, where the court can give as well instructions to the parties;
- Name and signature of the judge and the registrar and the date of the judgment.

Order ("*beschikking*")

The requirements regarding the content of an order ("*beschikking*") are laid down in Article 287 Rv, which refers to the requirements applicable for judgment ("*vonnis*") as laid down in Article 230 Rv. Therefore, the requirements as to the content are similar for the judgement ("*vonnis*" or in appeal proceedings "arrest") and order ("*beschikking*") in the Netherlands.

The common structure of an order ("*beschikking*") is based on Article 287 Rv in combination with Article 230 Rv as follows:

- Type of the decision, judgment ("*vonnis*" or in appeal proceedings "arrest") or order ("*beschikking*");
- Name of the court issuing the decision;
- Case number;
- Name of the parties, place of residence, role in the procedure and name of the representatives;

- The course of the procedure (documents that were exchanged by the parties, hearings etc.);
- Facts of the case as determined by the court;
- The petition;
- The grounds of the decision regarding the petition;
- The decision;
- Name and signature of the judge and the registrar and the date of the judgment.

1.5 Graphical separation of the elements of the judgement

The different elements of the Judgments are separated headings (which are emphasized by bold letters) as well as numbers, like 1. Procedure, 2. Facts, 3. The claim(s), 4. The reasoning and 5. The decision. The different sections are therefore visually divided in the judgments.

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

In decisions where a party is ordered to do something, the courts regularly state that the obligation has to be fulfilled within a certain amount of time after the service of the judgement on the defendant. In practice, the counsel of the winning party contacts the counsel of the party losing the procedure and asks whether this party is voluntarily willing to fulfil the obligation as laid down in the operative part. Here the party has discretion in the enforcement of the Judgment. In the event the losing party refuses to voluntarily fulfil the judgment, the winning party can enforce the decision. Then the time period as laid down in the operative part is applicable.

In cases without a specific time-period, the obligation has to be fulfilled as soon as the judgment is being enforced based on the rule of enforcement. However, here again, the counsels first negotiate whether the party is willing to voluntarily fulfil the judgment.

In the Netherlands, the judgments do not contain a specification of a time-period within which the judgment is not to be enforced or a specification of the time-period after which the judgment is no longer enforceable. This is not common in the Netherlands. However, there might be situations in which the claim relates to an event (prohibition of a TV show due to infringement of copyright or the seizure of good at the customs in the event of a specific transportation). Once the event takes place without the enforcement, the judgment factually loses its effect.

1.7 Identification of Parties

In the judgment, the parties must be specified in case of a natural person by their last name and their initials. In addition, the place of residence must be included in the judgment. Legal entities must be specified by their legal form, the name and place of establishment of the legal entity. This data corresponds with the data from the Chamber of Commerce, where the company is registered.

1.8 Indication of the amount in dispute

The amounts in dispute are shown by quoting the claim as it was formulated in the writ of summons or – in the event the claim has been changed during the procedure – in the document in which the claim was last changed. The judgment always contains the latest version of the claim as formulated by the plaintiff. This claim as laid down by the plaintiff is automatically taken over by the court in the judgment. The court issues the judgment on the basis of the claim as formulated by the plaintiff.

1.9 Indication of the underlying legal relationship

The Dutch civil courts, generally speaking, do not include any specific information in the operative part other than the decision with regard to the claim as formulated by the plaintiff. Additional information which could be of relevance after the judgment has been issued, e.g. in enforcement proceedings, is provided in the reasoning of the court, if at all. There, the court may state some circumstances explaining the enforcement. Besides this, the Dutch civil procedure does not know an organ like the execution court in Germany. After the judgment is issued, it will be enforced by the bailiff, who must interpret the operative part of the judgment. If any issues arise with regard to the enforcement, the parties have the opportunity to start an interim procedure regarding the enforcement of the judgment (“exec*utie kort geding”).*

1.10 Information contained in the operative part

The operative part contains the decision of the court. Basically, it is an answer to the claim of the plaintiff as formulated in the writ of summons. In case of a – for the plaintiff – negative decision, the court can state that the claim is dismissed due to formal aspects or substantive issues. In case of a – for the plaintiff – positive decision, the court states what the obligation for the defendant is. In addition, the court states the decision regarding the costs. With respect to the costs, the court states a sum of the costs to be paid by the party which has lost the procedure. Furthermore, the court declares whether the decision is provisionally enforceable, which also has effect on the decision regarding the costs. At the end, the court states in a sentence that, besides the decision, anything else which might have been claimed shall be rejected. By doing so, the court clearly states what the decision is.

1.11 Existence of a threat of enforcement

A threat of enforcement does not form a part of the operative part. The reason for this is that the judgment is an enforcement title which forms the basis of the enforcement. However, based on Article 430 para 3 Rv the title needs to be served on the defendant. Especially for titles where the debtor is obliged to pay a sum, the service of the judgment is combined with an order of the bailiff, in which the debtor is being ordered to fulfil the obligation as laid down in the judgment within a period of two days. This obligation is laid down in Article 439 para 1 Rv, which regulates the seizure of movables. Without the service of the title as well as the order, a seizure of the movables shall be null.

1.12 Final specification of debt

The specification of the debtor’s obligation is finalized by the court. It is therefore very important how the claim is formulated in the writ, as the court takes this formulation as a basis for his decision.

1.13 Partial rejection of a claim

In case of a wholly dismissal, the court states in the operative part that the claim is dismissed. It does not provide the grounds for dismissal. These can be found in the reasoning of the judgment.

In cases where the claim is partly dismissed, the operative part is in such cases divided into two parts. One part where the court states what part of the claim was successful, so the debtor is ordered to fulfil. In the second part – at the end of the operative part – the court states that everything else shall be dismissed.

1.14 Set-off of a claim

There are no specific requirements with regard to the operative part in cases of a set-off invoked by the debtor. In general, the courts evaluate the invoking of a set-off by the debtor in the reasoning of the judgments. In the decision, the operative part, the court states the final decision. It states there the (remaining) amount that the debtor is obliged to fulfil in case the set-off was effectively invoked by the debtor.

1.15 References to the Reasoning found within the operative part

It is possible that the court refers to parts of the reasoning or other parts of the judgment, like the facts. This is mostly the case if the reasoning contains an extensive explanation, which could specify the decision laid down in the operative part of the judgment. This is the case if the court states under the reasoning part of the judgment that the debtor has acted unlawfully and explains precisely what was unlawful. In such cases it could state in the operative part that it declares that, by acting as laid down in the reasoning, the debtor has acted unlawfully. Another option is that the court refers to picture or other visual parts which are included in the reasoning or under the facts of the judgment.

1.16 Wording used to mandate performance

In the Netherlands, the usual wording is as follows: “The court orders Party X to pay Party Y an amount of ... as ... (e.g. damage) within X days after the service of the judgment, plus the statutory interest rates as laid down in Article 6:119 of Burgerlijk Wetboek (Civil Code, hereinafter – BW) or in case of commercial claims Article 6:119a BW, from the DATE until the day of complete payment.” This is the common wording in the operative part when a debtor is ordered to pay.

1.17 Reciprocal claims

In cases of reciprocal relationships, the specific conditions are not set out in the operative part of the judgment, but in the reasoning. In cases, for instance, where the Claimant is willing to perform, but demands the payment of the debtor, the court does not state the performance of the Claimant in the operative part but describes it in the reasoning. In the operative part, the court drafts that the debtor is ordered to pay the amount which has been claimed by the Claimant. In certain cases, the court can include in the operative part that the claim is due under a condition that the Claimant has to fulfil. In such cases, the court states that the debtor has to perform a certain obligation, however, only after the claimant has performed an obligation first.

1.18 Indication of interest (rates)

The interest rates are specified and phrased in the operative part by stating the amount of the principal claim, the interest rate and the beginning date of the obligation to pay interest rates. A common wording can be found in section 1.16 Wording used to mandate performance.

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

Legal ramification depends on the fault in the operative part. In cases where the operative part contains an obvious mistake, which is clear to all parties, such as a number (instead of 1000 the court wrote 100000), there is a chance of rectification of this clear mistake. This rectification has to be filed at the court issuing the judgment.

In other cases, incomplete, undetermined, incomprehensible or inconsistent operative parts can be dealt with in appeal proceedings, where, according to Dutch law, the claim can be amended. Another option regarding incomplete, undetermined, incomprehensible or inconsistent operative parts is to start a preliminary procedure ("*kort geding"*) during the enforcement of the judgment. In these cases, the court in charge has to interpret how the operative part of the judgment must be read.

1.20 Legal effects of the Reasoning of the judgement

The reasoning is part of the decision, which means that the decisions made in a separate interlocutory judgment have a binding character and the court is bound to its ruling in the following procedure. That means that the court, once deciding that it has jurisdiction or that one party has the burden of proof, is bound by this earlier decision. The earlier decisions form therefore part of the appeal proceedings, as they can only be challenged together with the final decision. This is different if the first instance court gives his permission to separately challenge an earlier decision in an appeal procedure. This principle of Dutch appeal proceedings is laid down in Article 337 para 2 Rv.

1.21 Obtaining the res judicata effect

A judgment becomes *res judicata* either if it is issued by the highest judicial instance or if no judicial remedy (for example appeal) is open against this judgement. Another option is that the party that has lost the proceedings will declare that it will accept the decision (so-called "*berusting*" conform Article 334 Rv). In these situations, the Judgment will become *res judicata*.

1.22 Res judicata of negative declaratory relief

According to Dutch civil procedural law, the question whether a negative declaratory action can be initiated is controversial. In general, the claimant cannot just bring forward a negative declaratory action but needs to demonstrate that he has a specific interest in the negative declaratory action.

In principle, the negative declaratory action is the mirror image of the positive declaratory action or the action for performance. Regarding the example, the situation is that such a decision – dismissal of a negative declaratory action – does not have the effect that the claimant can enforce the claim after such a judgment. This is only a declaratory action and not an action where the debtor is ordered to pay. If the Claimant wants to enforce the payment, he will need to start actions for performance against the debtor. Then he will be able to enforce such a payment.

1.23 Suspensive periods barring the enforcement of a judgement

In general, a suspensive period is not prescribed in the Dutch civil procedure. However, to enforce the judgment, it has to be served on the debtor as laid down in Article 439 Rv. In addition, in case the Claimant wishes to seizure moveable goods, first, an order needs to be served on the debtor demanding a payment or a performance according to the title within two days. This period can be shortened by the court. Therefore, there is a relatively short period which needs to be taken into consideration before the enforcement – at least with regard to moveable goods – can be started.

2. Court settlements

2.1 Elements of a court settlement

There must be a settlement reached by the parties. This settlement must be reached regarding the dispute, so that by reaching the settlement the procedure will end. These kinds of settlements are qualified as settlement agreement ("*vaststellingsovereenkomst*") as laid down in Article 7:900 Dutch

Civil Code. Based on this provision, the parties have to reach a settlement regarding a dispute between them over their legal relationship. The court settlement is therefore a settlement agreement written down by the court in an executorial form.

2.2 Formal requirements

The court settlement has to be in written form and must be signed by the parties as it is laid down in Article 89 Rv. The court settlement will be written down in a form of a report of a court hearing. In addition, when a court settlement is issued by the court, it will be issued in an executorial form. That means that it can be enforced without any further steps.

2.3 Identification of Parties

The parties are identified like in a judgement (see paragraph 1.7 Identification of Parties for the details), as the court settlement is issued in an executorial form.

3. Notarial deeds

3.1 Prerequisites for enforceability

A notarial act is not automatically an enforcement title. In order to become an enforcement title, the notarial deed needs to be in form of an executorial title ("*grosse*"). That means that the notary has to state that the deed is drawn up as a "*grosse*". This is a special authentic copy of the deed made by the notary in which he states the words "In the name of the King" ("In naam van de Koning"). At the end of the deed the words "*Uitgegeven voor eerste grosse"* ("Issued as first executional form") must be included in the act. In addition, the deed needs to be first served on the person against whom the enforcement will be done. Only if these requirements are fulfilled, the notarial act is qualified as an enforcement title.

3.2 Special clause

In order to have the effect of an enforcement title, the notarial act must contain at the beginning the words "In the name of the King" (*"In naam van de Koning"*) and at the end of the deed the words "Issued as first executional form" (*"Uitgegeven voor eerste grosse"*) included in the deed. This requirement is laid down in Article 50 on the Dutch Act of the Notary (*"Wet op het notarisambt"*). Furthermore, the notary has to use his seal at the end of the document. There are no differences between deeds that refer to monetary claims and the ones that refer to non-monetary claims.

3.3 Consent

It is not necessary that debtors give the consent in order to issue the notarial act in enforceable form.

3.4 Structure

The deed starts with the date of the deed and the name of the notary. Then the names of the parties and their personal data (birthdate, place of residence or establishment, the ID including the number of the ID which was used for identification, as well as the authority issuing the ID, and if applicable the status of a natural person, married etc.). The sort of deed that is being issued (deed for mortgage etc.). Then the document contains the statement or the agreement, which concerns the parties involved. A notarial deed can also contain an observation of the notary of for instance an executorial auction. In such a case, the notary lays down his observations made in a certain situation. At the end of the deed,

the notary states that the identity of the parties is examined. Furthermore, the place where the deed is made. In addition, the notary states that the parties were informed about the content of the deed as well as the consequences signing the deed. Finally, the deed must be signed, and the notary must put his seal on the document.

3.5 Personal information

The personal data includes the following: birthdate, place of residence or establishment, the ID including the number of the ID which was used for identification, as well as the authority issuing the ID, and if applicable the status of a natural person, married etc. In case of a legal entity, the legal status, the number of the Chamber of Commerce, where this entity is registered. In addition, the name of the person acting for the entity must be stated as well as his function within the entity.

3.6 Obligations contained in attachments

The obligations must be contained in the deed. Attachments can only be used to – if needed – explain the obligations laid down in the deed. The deed however must contain the obligations.

3.7 Conditional claims

It is not possible that conditional claims are directly enforceable. With regard to conditional claims, the conditions set out in the deed need to be clear or at least determinable. Therefore, if obligations of the conditions are not formulated in a clear manner, the enforcement of a notary deed might be rejected.

MANUAL - Poland

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

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Manual – Poland

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 Polish Code of Civil Procedure does not explicitly set out the "headlines" of a judgement. There are two main parts of a judgement: the operative part and the reasoning part. The operative part of a judgement consists of *komparycja* (introductory part) and *tenor* (the court's adjudication on the claims of the respective parties).

Article 325 of the Code enumerates that the operative part of a judgement should include the name of the court, names of the judges, court reporter and prosecutor, if any, the date and place of the hearing of the case and the issuing of the judgement, names of the parties and the subject-matter of the case as well as the court's adjudication on the claims of the respective parties.

The introductory part of a judgement ("*komparycja*") consists of:

1. Reference symbol of files
2. Image of a crowned white eagle

Article 118 § 1 of the Regulation of the Minister of Justice of 18 June 2019 laying down rules concerning the operation of the common courts further specifies the content of a judgement. It says that at the top of the document there is an image of a crowned white eagle (the national emblem of the Republic of Poland).

3. Expression "JUDGEMENT IN THE NAME OF THE REPUBLIC OF POLAND"

A judgement contains the title "judgement"' ("*wyrok*") and a proclamation that the judgement is issued in the name of the Republic of Poland. Article 118 § 1 of the Regulation of the Minister of Justice of 18 June 2019 laying down rules concerning the operation of the common courts further specifies the content of a judgement, and indicates that after the word "judgement" the type of judgement should be clarified if it is required pursuant to separate provisions (e.g. "default judgement").

4. Date and place of issuance of the judgement

A judgement next specifies the date on which the case was considered and whether it was considered at a hearing or a closed-doors session, and the date on which a judgement was rendered.

5. Information on the court that rendered the judgement

e.g. 'Court of Appeal in Wrocław, I (1st) Civil Department' ['*Sąd Apelacyjny we Wrocławiu, Wydział I Cywilny*']

6. Enumeration of the names of the judges

A judgement must specify the court by including the name(s) of the judge(s) who rendered the judgement. Article 118 § 2 of the Regulation clarifies that the enumeration of the names of the judges shall include their first names and last names, preceded by the word "judge" or "judges", "court assessor", "lay judge" or "lay judges", and in cases of delegation of the judge an abbreviation "(*del.*)" after the word "judge". In practice, a judgement indicates not only first names and last names, but also the professional title of the judge, e.g. "Judge of Court of Appeal ['*Sędzia SA (Sądu Apelacyjnego*)'] Jacek Gołaczyński". In accordance with Article 118 § 2 of the Regulation, the name of the judge may

be followed by the annotation (rep.) ['*(spr.)*'], signifying the judge reporting the case. The above applies solely to judicial panels, which as a rule sit in cases concerning a second instance appeal against judgements or decrees. If a case is tried by a panel of judges, one of the judges will act as the presiding judge and a judgement will include an additional annotation: 'Presiding Judge – Judge of Court of Appeal Jacek Gołaczyński' ['*Przewodniczący SA Jacek Gołaczyński*'].

7. Name(s) of the court reporter and prosecutor (if any)
8. Subject-matter of the case and names of the parties of the proceedings

A judgement contains information on the parties to proceedings by specifying which party is the claimant and which party is the defendant, and what is the subject-matter of the case, e.g. a case initiated by a claim 'filed by Piotr Rodziewicz versus Maria Dymitruk for payment'. If a judgement constitutes a ruling with regards to a second instance appeal against a judgement of a court of first instance, a judgement must also include information that the appellate court considered a second instance appeal, e.g. filed by the claimant against a judgement rendered by Regional Court in Wrocław on [...] in case [...] – here the reference number of the files of the court of first instance is specified, e.g. 'I C 23/19'.

This introductory part of a judgement is followed by *tenor*, which contains the resolutions made by the court. Resolutions are formulated as concise items.

First, the court renders a verdict as to the principal claim of the party, and in closing renders a decision as to the costs of the trial and potentially renders a judgement to be provisionally enforceable. Judgements awarding claims are usually worded as follows: '[the court] awards the claimant with the amount of 100,000 PLN (say: one hundred thousand złoty) from the defendant, with statutory interest charged from [...] until the date of payment' ['*zasądza od pozwanego na rzecz powoda 100.000 zł (słownie: sto tysięcy złotych) z ustawowymi odsetkami od dnia [...] do dnia zapłaty']*. Until 07/11/2019, parties were unable to seek the award of interest on costs of trial, which currently is possible. Due to the above, if a party seeks the award of costs of trial with interest, a verdict as to such interest can be included in the court's resolution with regards to costs. Such a decision may be worded as follows: '[the court] awards the claimant with the amount of 5,400 PLN (say: five thousand and four hundred złoty) from the defendant in court costs, with statutory interest charged from the date of the judgement becoming final until the date of payment' *['zasądza od pozwanego na rzecz powoda 5.400 zł (słownie: pięć tysięcy czterysta złotych) tytułem zwrotu kosztów procesu wraz z ustawowymi odsetkami w wysokości odsetek ustawowych za opóźnienie od dnia uprawomocnienia się wyroku do dnia zapłaty'].*

In accordance with Article 324 § 3 of the Code of Civil Procedure, the operative part of a judgement shall be signed by all the members of the court. As a result, a judgement is signed by the entire judicial panel, even where a judge renders a dissenting opinion (*votum separatum*). In such an event, a note reading 'vs' is placed next to that judge's surname.

Unlike the operative part of a judgement, the reasoning is not obligatory. As a result, judgements do not have to contain a statement of reasons. As a general rule, the court will draw up a statement of reasons for a judgement or a decree only at the request of a party filed within 7 days of the announcement of the judgement or its service if it was rendered at a closed-doors hearing.

In contrast to the operative part, the reasoning part is marked by a separate headline in a judgement. Usually, the word Reasoning/Justification/Statement of reasons ("*Uzasadnienie*") is written in all capital letters. If the reasoning part is written, in accordance with Article 327 § 1 of the Code of Civil Procedure, it should contain:

1) the factual basis for the case resolution, namely the facts that the court considers to have been proved, evidence on which the court relied, reasons for which the court denied credibility and probative value to other evidence,
2) the legal basis for a judgement, including a reference to the relevant provisions of law.

Customarily, a reasoning of a first-instance judgement is subdivided into three parts: historic part (the court describes the course of proceedings), factual basis part (starting with the expression "*Sąd ustalił następujący stan faktyczny:*" ["*the court ascertained the following findings of fact:*"]), and legal basis part (starting with the expression "*Sąd zważył, co następuje:*" ["*the court considered the following:*"]).

According to Article 330 of the Code of Civil Procedure, in cases heard by a panel of three professional judges, a statement of reasons for a judgement shall be signed by the judges who participated in the rendering of the judgement (if any of the judges is unable to sign the statement of reasons, the presiding judge or the most senior judge shall state the reasons for such missing signature in the judgement), and a statement of reasons for a judgement issued in a case heard with the participation of lay judges shall be signed by the presiding judge only. If a dissenting opinion is given, the statement of reasons for the judgement shall be signed by the presiding judge and the lay judges.

Legal instructions are not part of a judgement, but they are appended to a cover letter concerning the service of the judgement.

1.2 Structural and substantive division/sequence of the Reasoning

The structure of a reasoning part is not exhaustively regulated in the legislation and is largely the product of many years of judicial practice. As already explained, customarily the reasoning of a first-instance judgement is subdivided into three parts: historic part, factual basis part, and legal basis part. These three parts are not marked by listings or by numbers.

The historic part, where the court describes the course of proceedings (including how the parties have presented their respective cases: the allegations of the claimant, and the defence raised by the defendant) is not preceded by any kind of headline, number, or explicit expression, and it occurs after the word "*Uzasadnienie*".

Then the factual basis part (with the description of the facts that the court considered to have been proved, evidence on which the court relied, reasons for which the court denied credibility and probative value to other evidence) starts with the words *"Sąd ustalił następujący stan faktyczny:"* ["The Court ascertained the following findings of fact:"]. This expression is usually written in bold.

Subsequently, the legal basis part (including the legal assessment of the dispute with a reference to the relevant provisions of law) begins with the expression *"Sąd zważył, co następuje:"* [“The Court considered the following:"]). Again, these words are usually written in bold. This part shall end with the reasoning concerning the costs of the proceedings.

There is no practice of subdivision of the above-mentioned parts into smaller sections.

1.3 Textual identification of the elements comprising the judgement

“the introduction of the judgement”: (komparycja)

“the operating part”: (tenor)

“the reasoning of the judgement”: (uzasadnienie)

"legal instruction": (pouczenie)

1.4 Short description of the elements of the judgement

A judgment contains the title 'judgment' ['*wyrok'*] and a proclamation that the judgment is issued in the name of the Republic of Poland. The judgment therefore has a solemn character, which is also intended to ensure respect for the judgment from parties to proceedings and state authorities, including enforcement agencies.

The judgment then contains information on the court that rendered the judgment, e.g. 'Court of Appeal in Wrocław, I (1st) Civil Department' *['Sąd Apelacyjny we Wrocławiu, Wydział I Cywilny'],* and the reference number of files of the case, prescribed in detail by provisions of regulations governing the operation of courts law – which take the form of a regulation issued by the Minister of Justice – and provisions of regulations governing the operation of court offices – which take the form of a direction issued by the Minister of Justice. Each department of each court of a given tier uses specific reference number. For example, the I Civil Department of a Court of Appeal uses reference numbers that begin with 'I', followed with the letters 'A', which means that the case is considered by a court of appeal (*sąd apelacyjny*) and 'Ca', which signify that the case is a civil case (C) and is being considered as a result of a second instance appeal against a judgment (a). If the court is reviewing an appeal against a decree issued by a regional court, i.e. a lower-tier court, the reference number of the files will read 'I A Cz', with the letter 'z' – signifying a second instance appeal against a decree ['*zażalenie'*] – replacing the letter 'a' – signifying a second instance appeal against a judgment ['*apelacja'*]. Other cases that do not concern second instance appeals against decrees or against judgments are recorded in the 'Co' register. Reference numbers assigned to civil trial cases in courts of first instance contain the letter 'C', while reference numbers assigned to trial commercial cases contain the letters 'GC'.

The judgment also specifies the court by including the name(s) of the judge(s) who rendered the judgment. The first names and last names of judges and their professional titles are given, e.g. Judge of Court of Appeal ['Sędzia SA (Sądu Apelacyjnego)'] Jacek Gołaczyński. The name may be followed by the annotation (rep.) ['(spr.)'], signifying the judge reporting the case. The above applies solely to judicial panels, which as a rule sit in cases concerning a second instance appeal against judgments or decrees. If case is tried by a panel of judges, one of the judges will act as the presiding judge and the judgment will include an additional annotation: 'Presiding Judge – Judge of Court of Appeal Jacek Gołaczyński' ['Przewodniczący SA Jacek Gołaczyński'].

The judgment next specifies the date on which the case was considered and whether it was considered at a hearing or a closed-doors session, and the date on which the judgment was rendered. Under Polish law, the announcement of a judgment may be adjourned by 14 days or up to a month in particularly complex cases or cases before accounting chambers. In such event, the judgment contains information on the date of the hearing and the date on which the judgment was announced. Judgments may be rendered at a closed-doors hearing if the case can be resolved after the parties to proceedings present a statement of claim, statement of defence and any additional preliminary submissions, and do not request for a hearing to be scheduled. In this event, the judgment specifies the date on which it was rendered and states that it was rendered at a closed-doors hearing. Default judgments include a clear annotation that they were rendered by default, i.e. pursuant to art. 339 Code of Civil Procedure.

The judgment contains information on the parties to proceedings by specifying which party is the claimant and which party is the defendant, and what is the subject matter of the case, e.g. a case initiated by a claim 'filed by Jan Kowalski versus Jan Nowak for payment'. If the judgment constitutes a ruling with regards to a second instance appeal against a judgment of a court of first instance, the

judgment must also include information that the appellate court considered a second instance appeal, e.g. filed by the claimant against a judgment rendered by Regional Court in Wrocław on [...] in case [...] – here the reference number of the files of the court of first instance is specified, e.g. 'I C 23/19'.

This introductory part of the judgment is followed by the operative part ['*sentencja'*], which contains the resolutions made by the court. Resolutions are formulated as concise items.

First, the court renders a verdict as to the principal claim of the party, and in closing renders a decision as to the costs of the trial and potentially renders the judgment to be provisionally enforceable. Judgments awarding claims are usually worded as follows: '[the court] awards the claimant with the amount of 100,000 PLN (say: one hundred thousand złoty) from the defendant, with statutory interest charged from [...] until the date of payment' *['zasądza od pozwanego na rzecz powoda 100.000 zł (słownie: sto tysięcy złotych) z ustawowymi odsetkami od dnia [...] do dnia zapłaty'*]. Until 07/11/2019, parties were unable to seek the award of interest on costs of trial, which currently is possible. Due to the above, if a party seeks the award of costs of trial with interest, a verdict as to such interest can be included in the court's resolution with regards to costs. Such a decision may be worded as follows: '[the court] awards the claimant with the amount of 5,400 PLN (say: one hundred thousand złoty) from the defendant in court costs, with statutory interest charged from the date of the judgment becoming final until the date of payment' *['zasądza od pozwanego na rzecz powoda 5.400 zł tytułem zwrotu kosztów procesu wraz z ustawowymi odsetkami w wysokości odsetek ustawowych za opóźnienie od dnia uprawomocnienia się wyroku do dnia zapłaty'*]. In the case of judgments rendered by an appellate court (after considering a second instance appeal against a judgment of the court of first instance), which become final and effective on the date they are rendered, the deadline for the payment of such interest must be specified as the date falling 7 days after the date of rendering the judgment. Pursuant to art. 324 section 3 Code of Civil Procedure, the judgment is signed by the entire judicial panel, even where a judge renders a dissenting opinion (*votum separatum*). In such event, a note reading 'vs' is placed next to that judge's surname.

Decrees rendered in non-trial proceedings, payment orders rendered in prescriptive, summary and electronic summary proceedings do not include the solemn statement 'In the name of the Republic of Poland'. However, other components of the judgment discussed above remain the same.

Judgments, court decrees and payment orders as a rule do not contain a statement of reasons. The court will draw up a statement of reasons in exceptional circumstances, e.g. where it overturns a judgment of the court of first instance and refers the case back to be re-examined. The court will draw up a statement of reasons for a judgment or decree only at the request of a party filed within 7 days of the announcement of the judgment or its service if it was rendered at a closed-doors hearing. In the case of payment orders, after an objection is filed the payment order is rendered null and void or the court issues a judgment upholding or revoking the payment order in whole or in part, in regular proceedings.

1.5 Graphical separation of the elements of the judgement

The operative part of a judgment is composed of items and always follows the initial part, which is composed of the number and date of the judgment, information on the court rendering the judgment – including the judicial panel – and on the case. The operative part is followed by the signatures of judges who rendered the judgment. The statement of reasons is a clearly separate part of judgment and is not obligatory. In most cases, the statement of reasons is drawn up at a later time, at the request of a party to proceedings. If a statement of reasons for the judgment is drawn up, it is clearly separate from the judgment itself and follows the words 'Statement of reasons'. As regards the order, the

statement of reasons is always appended to the judgment and therefore follows the operative part and signatures of judges. Constituent parts of the statement of reasons are regulated in art. 327 (1). Code of Civil Procedure. Pursuant to provisions of this art., the statement of reasons must specify the factual basis for the resolution, including a description of facts that the court found to have been proven, evidence on which the court based its findings and reasons why it found other evidence to be unreliable and lacking evidentiary value, as well as an explanation of the legal basis for the judgment, citing the relevant provisions of law. Pursuant to art. 327 (1) section 2 Code of Civil Procedure, a statement of reasons for a judgment is to be drawn up in a concise manner. The outline of the content of the statement of reasons and its structure are a product of judicial practice, which as a rule must be consistent with the requirements resulting from the above-specified provision of law.

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

The time-period within which the obligation is to be fulfilled is specified only in exceptional cases. As a rule, it is possible to specify the deadline by which the debtor is required to fulfil the obligation. However, civil procedure does not include any regulations that would enable the court to specify in the judgment that the judgment will cease to be enforceable after the expiry of a certain period of time. A judgment that imposes an obligation, e.g. ordering the payment of a specific amount of money, must be complied with by the debtor after it becomes final and effective, and if the judgment is rendered provisionally enforceable – after the judgment is rendered and served on the debtor. At the debtor's request, the court may specify a different due date for the payment of the amount of money when it divides the amount to be repaid into instalments pursuant to art. 320 Code of Civil Procedure. The same rules for specifying a different time period for fulfilling an obligation may be included in a court decree in the matter of revoking joint ownership, dividing assets or dividing an estate, where deadlines for fulfilling obligations, such as making payments and contributions or handing over items are specified (art. 212 section 3 Code of Civil Procedure, art. 624 Code of Civil Procedure). The effect of specifying a time period or dividing the amount due into instalments is that rendering a writ of execution to a judgment in the part where a time period was specified will be possible only after that period of time expires. Commencing enforcement action as to an obligation in respect of which a time period for its fulfilment was specified will therefore be possible only after the time period specified in the judgment expires.

1.7 Identification of Parties

Provisions of civil procedure do not specify in detail how the parties to proceedings should be identified in the judgment. However, regulations stipulate that parties to proceedings must be identified in the submission that initiates the proceedings. The claimant is therefore required to identify itself in the action. If the claimant is a natural person who does not carry out business activity, they must specify their personal identification number (PESEL), and if the claimant does carry out business activity, they must specify their personal identification number (PESEL) or tax identification number (NIP, also used to register natural persons in the Central Register and Database of Business Activity – CEIDG). If the claimant is a legal person entered into the register of businesses of the National Court Register or the register of associations, other social and professional organisations, Health Care Institutions – it is required to specify its number in the National Court Register (KRS). The claimant is also required to specify information that will enable the court to determine the defendant's identification number. The court has access to a database with PESEL numbers of every Polish citizen and may determine the defendant's PESEL on its own based on information provided by the claimant. Of importance is the fact that when first contacting the court, e.g. when filing a statement of defence or objection against a payment order or default judgment, the defendant is required to provide their identification number.

In the judgment, the court usually describes both parties only using their names and surnames (in the case of natural persons) or names (legal persons, unincorporated legal entities). The court does not specify the parties' PESEL, NIP or KRS number. These numbers are specified only in the writ of execution, allowing enforcement officers, who also have access to PESEL, CEIDG and KRS databases), to again verify the identity of a given party and institute enforcement action against that person.

1.8 Indication of the amount in dispute

The amount awarded by the court is stated in the operative part of the judgment in numbers and in words, specifying the time period in which contractual interest – if stipulated in the contract – statutory interest for late payment or interest for delay in commercial transactions is to be charged, provided that a claim for the award of interest was made. If the claimant sought the award of a periodic obligation, the court indicates that the entire amount must be paid, but interest for late payment is charged on specific amounts due for specific periods, which is reflected in the operative part of the judgment.

1.9 Indication of the underlying legal relationship

Under Polish law, the operative part of the judgment itself does not precisely specify the underlying legal relationship that led to the award of the obligation. The above circumstances are described in the statement of reasons for the judgment, if one was drawn up. However, as noted above, every judgment, decree, payment order contains information on the subject matter of the case, e.g. child maintenance, remuneration for work, legitime, compensation, general damages. Based on this, an enforcement officer is able to determine whether the case concerned e.g. an employment relationship. The same can be deduced from the name of the court that rendered the decision (e.g. 4th Department of Labour and Social Security), the family court has jurisdiction over cases concerning maintenance (3rd Department of Minor and Family Affairs). Enforcement officers are therefore able to glean information on the nature of the claim based on the operative part of the judgment itself and based on this ascertain whether there is any basis for limiting enforcement action.

1.10 Information contained in the operative part

No data was provided.

1.11 Existence of a threat of enforcement

Under Polish law, no information or legal instruction is included in the operative part of the judgment or the statement of reasons, in particular concerning the possibility of initiation of enforcement proceedings by the creditor or *sua sponte.* Decisions in the operative part contain only the description of the obligation that the debtor must perform, without specifying the consequences of failing to do so.

1.12 Final specification of debt

The court specifies the obligation to be performed, e.g. to hand over the real property located at 123 Mickiewicza street in Wrocław, recorded in land and mortgage register no [...], kept in the custody of District Court for the district of Wrocław-Krzyki. In the case of a monetary obligation, the due amount is specified in numbers and words, and an obligation to pay interest may be imposed (if interest is contractual, the court determines the interest rates, the date from which they are due and the principal amount; if interest is statutory, the interest rate is not specified and the enforcement agency is responsible for calculating these matters). There are obligations that the enforcement agency cannot

further particularise, e.g. obligations involving the duty to perform a specific action (make a declaration of intent, publish this declaration in the press, etc.). However, where the court awards a specific amount of money in a foreign currency, the enforcement officer is responsible for converting this amount into Polish złoty in the course of enforcement proceedings.

1.13 Partial rejection of a claim

If the court examining the case finds that the claimant's claim is fully or partially invalid, the court will wholly or partially dismiss the action and render a decision as to the costs of the trial, if the defendant has incurred such costs and is requesting the court to award their reimbursement from the claimant. Depending on a specific decision, the operative part of such a judgment may be worded differently. If the court dismisses the action in whole, the operative part will read as follows:

1. " [the court] dismisses the action;
2. [the court] awards the defendant 450 PLN from the claimant in reimbursement of costs of the trial".

If the court only partially dismisses the action, the operative part of the judgment will usually read as follows: '[the court] awards the claimant 50,000 PLN [say: fifty thousand złoty] from the defendant and dismisses the remaining claims of the action'. Depending on practice and the court, if an action is partially dismissed, the decision of the court may be divided into two items in the operative part of the judgment or the entire decision may be included in a single item of the operative part. There are no rules that would regulate in detail how to formulate the operative part of the judgment in such circumstance, it depends on the practice followed by a given judge.

1.14 Set-off of a claim

The judgment of the court does not include any remarks as to whether a set-off was granted or refused. This issue is discussed only in the statement of reasons for the judgment if one was drawn up.

Under Polish law, a set-off of the amount due to the defendant against the amount sought by the claimant in the claim is allowed. Currently (from 07/11/2019), claims for a set-off have been significantly limited and may only be sought with regards to amounts resulting from the same legal relationship (art. 203 (1) Code of Civil Procedure), unless the amount due is not contested by the parties or its existence is confirmed by a document that did not originate solely with the defendant. Claims for a set off must be raised no later than on the date of the commencement of a dispute as to the essence of the case by the defendant or within two weeks of the due date of this amount due. Raising such a claim requires meeting all formal requirements, such as bringing an action and paying the requisite fees. Similar restrictions as to the ability to raise claims for set-off were implemented pursuant to the above amendment of the act in summary and commercial proceedings, which means that the defendant will not always be able to invoke this mechanism in examination proceedings. Therefore, the defendant may request revoking the enforceability of an enforcement title pursuant to art. 840 Code of Civil Procedure if the defendant's claim for a set-off was not resolved during the trial due to procedural reasons, by demonstrating that as a result of a set-off, the amount due no longer exists in whole or in part.

1.15 References to the Reasoning found within the operative part

The operative part does not contain any elements of the statement of reasons, including provisions that served as the legal basis for the judgment.

1.16 Wording used to mandate performance

Under Polish law, the operative part of the judgment specifies the obligation that the debtor is required to fulfil. Where the court orders the defendant to pay a specific amount of money, the wording used is '[the court] awards the claimant from the defendant'; where the obligation involves certain behaviour, the court orders the defendant to perform a specific action, e.g. '[the court] orders the defendant to hand over the car to the claimant'.

An obligation involving the cessation of specific behaviour by the debtor is formulated by the court by specifying what behaviour the defendant is to cease, e.g. '[the court] orders the defendant to cease disturbing the claimant's peace'; an obligation involving the acceptance of a specific situation *(pati, prestare)* will be worded as '[the court] orders the defendant to refrain from any actions interfering with the claimant's right to pass through the defendant's land property'.

1.17 Reciprocal claims

Polish law provides for enforcement titles that include a condition that the debtor's performance is dependent on the claimant's counter-performance. They also include enforcement titles that impose an obligation to perform simultaneous obligations (art. 488 of Civil code) and enforcement titles making the debtor's performance dependent on the earlier performance of an obligation by the creditor (art. 490 of Civil code). In such event, the court specifies in the operative part of the judgment that the parties should perform their obligations simultaneously or that the debtor is to perform its obligation after the creditor performs its obligation. The operative part may for example be worded as follows: '[the court] awards the claimant the amount of 132,000 PLN from the defendant, ordering the claimant to simultaneously hand over the abode located in P. on [...] street and pay the amount of 14,019 PLN, with statutory interest charged from 20 November 2011'.

1.18 Indication of interest (rates)

Regulations do not directly specify how to phrase resolutions concerning interest. However, the method used to award interest depends on the type of interest to be awarded. In the case of contractual interest (art. 359 section 1 of Civil code), the court should specify the rate of interest agreed between the parties in the operative part of the judgment. In the case of interest charged for a delay in fulfilling a financial obligation and interest due on the principal amount, Polish law stipulates a statutory rate of this interest and it is sufficient to include the passage 'with statutory interest for delay' in the operative part in the judgment – the enforcement officer will be able to calculate the amount of statutory interest due for delay (art. 481 section 2 of Civil code) or interest due on the principal amount (art. 359 section 2 of Civil code). The same rules apply to interest for delay in commercial transaction, the rate of which is announced pursuant to art. 11c of the act of 08/03/2013 on preventing excessive delay in commercial transactions.

Interest may be awarded for open-end or closed-end periods. The start and end dates for charging interest may be specified as specific calendar dates or as specific events that can be placed on a specific date. They may include past or future periods (if interest is awarded for an open-end period).

An example of the wording of an operative part of a judgment dealing with interest:

- '[the court] awards the claimant contractual interest from the defendant, charged at a rate of 3.5% per annum on the amount of 50,000 PLN from 05/05/2018 until 31/03/2020';
- '[the court] awards the claimant statutory interest for late payment from the defendant, charged on the amount of 50,000 PLN from 05/05/2018 until the date of payment';

- '[the court] awards the claimant statutory interest from the defendant, charged from the day following after the day of service of an authenticated copy of the statement of claim';
- '[the court] awards the claimant interest for delay in payment in commercial transactions from the defendant, charged from 31/03/2018 until the date of payment'.

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

If the operative part of the judgment is incomplete (it does not contain all the elements that were included in the statement of claim), a party may file a request for complementing the judgment within 14 days of the date of the judgment's announcement at a hearing, or within 14 days of service of the judgment if the judgment was rendered at a closed-doors session. If the scope of the request includes only a decision as to the costs of the trial or the immediate enforceability of the judgment, the court may render a decree to complement the judgment at a closed-doors session. The decree issued in this matter may be appealed.

If the judgment is inconsistent or incomprehensible, a party may at any time request for an interpretation of the judgment and the court will then clarify the meaning of its decision. If there are scrivener's errors, calculation mistakes or other obvious mistakes in the operative part of the judgment, the court may amend the judgment *sua sponte* or at the request of a party. Amending the judgment may not take the place of means of recourse, i.e. may only concern obvious mistakes, e.g. where the court mistakenly specified the party entitled to receive a payment, there is a spelling error in the name of one of the parties, etc., e.g. 'the court awards the claimant the amount of 50,000 PLN (say: fifty thousand złoty) from the claimant'.

The fact that the judgment is incomplete may not constitute a basis for filing a means of recourse, as there will be nothing to appeal against. A means of recourse may be filed only where a court ruled as to the merits of a given issue, which is impossible if the court issues an incomplete judgment that omits the issue.

Amending the judgment is not meant to be used for correcting errors with regards to the application of substantive or procedural law, but in practice it's not always easy to define what type of mistake (inaccuracy) we are dealing with in a given case. There is a trend in case law that speaks in support of keeping a narrow scope of situations where amending a judgment is possible, postulating that judgments should not be amended in a way that modifies the decision as to the merits of the dispute through changing the amounts awarded by the court or determinations made in the judgment, as well as a trend in favour of a broader perspective on this mechanism.

If a judgment is incomprehensible or contains an obvious mistake, its enforcement may not be possible. Enforcement officers are bound by the particulars of the judgment and may not interpret the judgment in case of doubts or amend obvious mistakes, as this lies solely within the competences of the court that examined the case.

1.20 Legal effects of the Reasoning of the judgement

Under Polish law, only the operative part of the judgment is binding with regards to *res judicata*. Opinions expressed by the court in the statement of reasons (written or oral) do not constitute *res judicata* but may be taken into account by other courts in other cases. Case law of the Supreme Court is of material importance for the binding effects of judicial decisions, as judgments of the Supreme Court issued in specific cases are binding on the court of lower instance that examines the case on which the Supreme Court deliberated. Where the Supreme Court adopts a resolution as panel of seven

judges or with the participation of all judges of the Civil Chamber, the judgment of the court binds on the parties to the trial, other courts and state authorities. Pursuant to art. 365 Code of Civil Procedure, a final judgment binds not only on the parties and the court that rendered the judgment, but also on other courts and public administration authorities, as well as other persons in circumstances provided for in the act.

1.21 Obtaining the res judicata effect

A judgment becomes *res judicata* when it becomes final. A judgment becomes final if no ordinary means of recourse is available or if no such means of recourse was filed within the statutory deadline.

1.22 Res judicata of negative declaratory relief

Polish civil procedure provides for the ability of seeking the determination of the existence or non-existence of a legal relationship or right. The action may therefore have a positive (for the determination of existence) or negative (for the determination of non-existence) character.

Action for the determination of a legal relationship or right may be granted if two substantive prerequisites are cumulatively met: the existence of a legal interest in the claim for granting legal protection through rendering a determining judgment, and the existence of a given legal relationship or right. The first of these prerequisites determines the effect of the action, deciding whether the examination and determination of veracity of the claimant's assertions is admissible. Demonstrating the existence of the second prerequisite is required for the action to be valid. The claimant is required to demonstrate both these prerequisites. Failure to demonstrate any of the prerequisites results in the dismissal of the action, as they constitute substantive and not formal prerequisites.

As regards the comment, Polish law does not provide for the ability to seek the determination of the existence or non-existence of an obligation if the party is entitled to a farther reaching claim, i.e. claim for payment.

1.23 Suspensive periods barring the enforcement of a judgement

Under Polish law, after a judgment is passed and becomes final and effective as a result of becoming final (a writ of execution is appended) or is rendered provisionally enforceable or enforceable by operation of law, the creditor may file an application with an enforcement agency to commence enforcement action at once, without having to request the debtor to voluntarily perform the obligation. To avoid enforcement action, the debtor should immediately contact the creditor and voluntarily perform the obligation. In this way, the debtor can avoid incurring additional costs related to enforcement proceedings.

2. Court settlements

2.1 Elements of a court settlement

The content of a settlement (the parties' declarations) shall be fully recorded in the minutes of a conciliation session (which is described in detail in the section 2.2 Formal requirements) and signed by all parties to the proceedings. If a party cannot sign the settlement, the court must include the reason for the lack of signature in the minutes. The settlement should specify precisely the claim pursued in the process and covered by the settlement as well as the scope and manner of its security and enforcement, with the exception that all pursued claims should be settled.

The content of the settlement must be clear and understandable for the parties as well as shall be capable of being enforced.

2.2 Formal requirements

In accordance with art. 185 Code of Civil Procedure, irrespective of the subject matter jurisdiction of the court, a motion for a summons to a conciliation session may be filed with a district court of general jurisdiction over the opposing party. The motion should briefly describe the facts of the case. Conciliation shall be conducted by a single judge. Minutes shall be taken from a conciliation session or, if the parties conclude a settlement agreement, the body of such agreement shall be noted in the minutes or in a separate document forming part thereof; the parties shall sign the agreement. If the agreement cannot be signed, the court shall state so in the minutes.

2.3 Identification of Parties

There are no specific regulations on how the parties to a settlement should be identified. In practice, most often they are identified by first and last names in the case of natural persons and by names in the case of legal persons as well as organisational units without legal personality. In addition, for the avoidance of doubts, depending on the type of the party, the personal identification number (PESEL), the tax identification number (NIP) or the National Court Register number (KRS) should be indicated. Alternatively, another register number can be used, if an entity is subject to registration. For example, investment funds are not entered in the National Court Register but in a separate investment funds register (the so-called RFI) kept by the Circuit Court in Warsaw, VII Civil Family and Registry Department.

3. Notarial deeds

3.1 Prerequisites for enforceability

A notarial act is an enforcement order. In the Polish legal order only an enforcement title (Polish *tytuł wykonawczy*) – not an enforcement order (Polish *tytuł egzekuzyjny*) – constitutes the basis for enforcement. The enforcement title is an enforcement order with a writ of execution [alternatively: an enforcement clause] (Polish *klauzula wykonalności*) (Article 776 Code of Civil Procedure). The writ of execution is a court deed which includes the court statement that the writ entitles to execution and, if necessary, defines its scope. As a result, the execution authority cannot initiate execution actions on the basis of a notarial enforcement order without enforcement title (notarial enforcement order + writ of execution) having been submitted by the creditor.

In accordance with Article 781 § 2 Code of Civil Procedure, the writ of execution for a notarial enforcement order shall be issued by the district court (Polish sąd rejonowy) of general jurisdiction for the debtor (as a general rule – the court in the place of residence of the debtor). Where this general jurisdiction cannot be determined, a writ shall be issued by the district court with jurisdiction over the geographical area in which the execution is to be commenced or, if the creditor intends to commence execution abroad, the district court with jurisdiction over the geographical area in which the order was issued. The writ of execution is issued at the request of the creditor. Applications for a writ of execution shall be adjudicated by the court immediately, in no case later than within three days from the day on which they are filed (Article 781 (1) Code of Civil Procedure).

Pursuant to Article 786 § 1 Code of Civil Procedure, if enforcement of an enforcement order depends on an occurrence which should be proven by the creditor, the court shall issue a writ of execution after proof of that occurrence has been submitted in the form of an official document or private document

bearing an officially certified signature. This shall not apply when enforcement depends on a simultaneous reciprocal obligation, unless the debtor's obligation is by a declaration of intent.

The issuance of a writ of execution depends on the following conditions:

- the notarial act complies with formal requirements,
- the time limit for the performance of the obligation has expired,
- the event that gave rise to the proceedings has occurred,
- the time limit for the creditor to apply for a writ of execution for the act has not expired.

In accordance with Article 782 (1) § 1 Code of Civil Procedure, the court shall refuse to issue a writ of execution if:

1. on the basis of the circumstances of a given case, it is obvious that the application for a writ of execution is contrary to law or whose purpose is to bypass law,
2. the circumstances of a given case and the content of an enforcement order suggest that the claim covered by the enforcement title is subject to limitation, unless the creditor presents a document stating that the course of limitation was interrupted.

As a general rule, after a writ of execution is issued, it is served on the creditor (Art. 794(2) § 1 Code of Civil Procedure).

3.2 Special clause

The content of the writ of execution is determined by the Regulation of the Minister of Justice of 6 April 2014 on the content of the writ of execution (Journal of Laws of 2014, item 1092). Pursuant to § 1 of the Regulation, the content of the writ of execution shall be as follows: "In the name of the Republic of Poland, (date), [District] Court in ... acknowledges that the title entitles to enforce in whole/in part ..., and orders all organs, agencies and other persons who may be affected to execute provisions of the title, and – when legally called for – render assistance" (Polish "*W imieniu Rzeczypospolitej Polskiej, dnia ... Sąd ..... w ..... stwierdza, że niniejszy tytuł uprawnia do egzekucji w całości/w zakresie ..... oraz poleca wszystkim organom, urzędom oraz osobom, których to może dotyczyć, aby postanowienia tytułu niniejszego wykonały, a gdy o to prawnie będą wezwane, udzieliły pomocy"*). In accordance with § 4 of the Regulation, the content of the writ of execution shall also include:

1. the registration number in the Universal Electronic System for Registration of the Population (PESEL) or taxpayer ID number (NIP) of the creditor and the debtor who are natural persons, if they are obliged to have one or if they have one even without being obliged to, or
2. the registration number in the National Court Register (KRS) or, if unavailable, the number in another relevant register or taxpayer ID number (NIP) of the creditor and the debtor who are not natural persons and are not obliged to be entered in a relevant register, if they obliged to have one.

Normally, when a writ of execution for a court enforcement order is issued, it takes the form of a printed or stamped clause affixed to an enforcement order (the writ of execution is entered in an enforcement order – Article 783 § 1 (1) Code of Civil Procedure). In the case of a notarial enforcement order, the situation is different. When a writ of execution for a notarial enforcement order is issued, it takes the form of a separate document – a court decree (Polish: *postanowienie*).

According to Article 783 § 1 Code of Civil Procedure, a writ of execution identifies the enforcement order and, if need be, specifies the benefit subject to execution and the scope of execution, and

determines whether the order is enforceable as final and non-appealable or as immediately enforceable. A writ of execution contains a provision to the effect that the enforcement order authorises enforcement. It is signed by a judge or court clerk (Article 783 § 1(1) Code of Civil Procedure).

Unless otherwise provided for by specific regulations, the court issues a writ of execution for an enforcement order involving payment in a foreign currency and obliges the enforcement officer to convert the awarded amount to Polish currency according to the mid-market exchange rate of the foreign currency issued by the National Bank of Poland on the day when the money allocation plan is made or, when no plan is made – on the day of payment of the amount to the creditor (Article 783 § 1 Code of Civil Procedure).

A writ of execution contains a provision to the effect that the enforcement order authorises enforcement. It is signed by a judge or court clerk (Article 783 § 1(1) Code of Civil Procedure).

An exemplary writ of execution for a notarial act reads as follows:

File No II Cz 138/15

DECREE

Kalisz, May 19, 2015

Regional Court in Kalisz, II Civil Department of Appeal composed of:

Chair: Regional Court Judge Wojciech Vogt

Judges: Regional Court Judge Barbara Mokras

Regional Court Judge Janusz Roszewski (rapporteur)

after hearing in camera on May 19, 2015 in Kalisz

the case on petition of R.S.

with the participation of J.R and Z.R.

for issuing a writ of execution for a notarial act

as a result of the applicant's complaint

against the decision of the District Court in Kępno of October 10, 2014, file No I Co 329/14

d e c i d e s t o:

1. issue a writ of execution for the notarial act of December 20, 2013 drawn up before the notary K.S. operating his/her notary office in J., street ..., Repertory A No 1404/2013, in the interest of the creditor R.S. against the joint and several debtors J.R. and Z.R. within the scope of the obligation set out in § 2, i.e. the payment of:
    - 13.200,00 PLN at the latest on 19 January 2014,
    - 13.200,00 PLN at the latest on 19 February 2014,
    - 123.200,00 PLN at the latest on 19 March 2014,
2. issue a writ of execution for the notarial act of December 20, 2013 drawn up before the notary K.S. operating his/her notary office in J., street ..., Repertory A No 1404/2013, in the interest of the creditor R.S. against the joint and several debtors J.R. and Z.R. within the scope of the

obligation set out in §§ 9 – 11, i.e. surrendering immovable properties (Real-estate Register No ... and Real-estate Register No ...).

There is no significant difference in the writ of execution if the act refers to monetary or non-monetary claims.

3.3 Consent

There is no way that a notarial act including a voluntary submission to execution can be drafted without the debtor's consent. The debtor is 1) the party to the contract concluded in the notarial act form (in a typical case), or 2) the person who carried out the unilateral juridical act in the form of a notarial act (the case provided for in Article 777 § 2 Code of Civil Procedure). In the content of the notarial act, there is always a clause stating that the person submits to execution (Polish *poddawać się egzekucji*).

The notarial act must be read over by the notary (or by a person authorized to do so by the notary in his/her presence) before being signed. While reading, the notary ought to make sure that the persons involved understand the content and the meaning of the notarial act, and that the act is conformable to their will (Article 94 § 1 of the Notaries Law). The debtor signs the notarial act at the end of the document (see Article 92 § 1 subparagraph 8 of the Notaries Law).

The notarial act must first describe in detail the obligation. The clause in which the debtor submits to execution must be specific and concrete, but it can refer to previously described elements.

An exemplary notarial clause:

§...
Submission to execution on the basis of
Article 777 § 1 subparagraph 4 of the Code of Civil Procedure

... (*the debtor*) submits to execution directly on the ground of the act on the basis of Article 777 § 1 subparagraph 4 Code of Civil Procedure in favour of ... (*the creditor*) in terms of obligation under the tenancy contract of ... (date) to surrender the subject of the contract, i.e. the immovable property located in ... (city), cadastral parcel No ..., described in detail in paragraph 1 of the act, free from defects and encumbrances, no later than ... days after the date of expiration or termination of the contract.

Polish version:

§...
Poddanie się egzekucji na podstawie art. 777 § 1 pkt 4) k.p.c.

... (*dłużnik*) poddaje się egzekucji wprost z niniejszego aktu na podstawie art. 777 §1 pkt 4 kodeksu postępowania cywilnego na rzecz ... (*wierzyciel*) co do obowiązku wydania przedmiotu Umowy dzierżawy z dnia ... (data) - w postaci nieruchomości położonej w ... (miejscowość) składającej się z działki o numerze geodezyjnym ..., szczegółowo opisanej w § 1 niniejszego aktu, w stanie wolnym, w terminie ... dni od dnia wygaśnięcia lub rozwiązania Umowy dzierżawy.

3.4 Structure

The structure of a notarial act is regulated by Article 92 § 1 of the Notaries Law. According to this provision, a notarial act shall include the following elements:

1. date of drawing up the act (day, month and year), and if necessary or at the party's request – starting time of drawing up the act (hour and minute) and the time of signing the act (hour and minute);
2. place of drawing up the act;
3. name and surname of the notary and the place of the notary's office;
4. in the case of natural persons: names, surnames, parents' names and the place of residence; in the case of legal persons and organizational entities not being legal persons: business name, registered office, name, surnames and the place of residence of persons who act as its organ, representative or agent and of other person who is present at the drawing up of the act;
5. parties' statements, if necessary with reference to documents presented by the parties;
6. at parties' request – assertion of facts and other essential circumstances that occurred during drawing up of the act;
7. affirmation of reading, acceptance and signing of the act;
8. signatures of persons participating in the drawing up of the act and persons present at the drawing up of the act;
9. signature of the notary.

Although Article 92 § 1 of the Notaries Law does not prescribe a specific sequence of the above-mentioned elements, customarily a notarial act consists of three parts:

1) the introductory part including: date and place of the drawing up of the act, name and surname of the notary, place of notary's office and presentation of the parties;
2) the main substantive part of the notarial act consisting of the declarations of the parties;
3) the final part (concerning notarial costs, extracts of the act, etc.) ending with signatures.

Substantive elements of the notarial act referred to in Article 777 § 1 subparagraph 4 Code of Civil Procedure:

1. identification of the debtor and the creditor;
2. debtor's voluntary submission to enforcement;
3. precise definition of the debtor's obligation (payment of a certain amount of money or provision of things of the type and quantity specified in the act, or surrendering an individual thing);
4. identification of the legal ground for the debtor's obligation (the contract between the debtor and the creditor);
5. indication of the time limit for performing the debtor's obligation or an event on which it is conditioned.

Substantive elements of the notarial act referred to in Article 777 § 1 subparagraph 5 Code of Civil Procedure:

1. identification of the debtor and the creditor;
2. debtor's voluntary submission to enforcement;
3. precise definition of the debtor's obligation (payment of a certain amount of money either directly determined in the act or expressed by means of a valuation clause);
4. indication of the event conditioning performance of the obligation;
5. indication of the time limit for the creditor to apply for a writ of execution for the act (after this deadline, the notarial act loses the status of an enforcement order, but it still may give rise to an issuance of an order for payment in the order for payment procedure on the basis of Article 485 § 1 subparagraph 1 Code of Civil Procedure).

Substantive elements of the notarial act referred to in Article 777 § 1 subparagraph 6 Code of Civil Procedure:

1. identification of the parties to the notarial act;
2. voluntary submission to enforcement made by the person, other than the personal debtor whose property, claim or right is mortgaged or pledged (the statement that he/she submits to execution against the mortgaged or pledged item in order to satisfy the monetary claim of the secured creditor);
3. precise definition of the creditor's monetary claim (certain amount of money either directly determined in the act or expressed by means of a valuation clause);
4. circumstances authorizing the creditor to commence the execution;
5. indication of the time limit for the creditor to apply for a writ of execution for the act.

In this case the execution is limited to the objects of the collateral.

3.5 Personal information

In accordance with Article 92 § 1 subparagraph 4 Notaries Law, a notarial act shall include the following information for the purpose of identifying the parties:

1. in the case of natural persons: names, surnames, parents' names and place of residence;
2. in the case of legal persons and organizational entities not being legal persons: business name, registered office, name, surnames and the place of residence of persons who act as its organ, representative or agent and of other person who is present at the drawing up of the act.

According to the resolution of the Supreme Court dated 26 June 2017 (file ref. No. III CZP 10/17), when identifying the parties, the notarial enforcement order should identify them at least as well as a court judgment does, because in this case a notarial act substitutes for a court judgment. This means that the notarial enforcement order should precisely identify its parties, and the notarial act cannot be drawn up as a ‘bearer document' (without identification of the creditor).

Taking the above into consideration, it should be concluded that the parties to the notarial enforcement order should be identified as indicated in Article 92 § 1 subparagraph 4 Notaries Law. When a writ of execution for a notarial enforcement order is issued, one more piece of identifying information is added:

1. the registration number in the Universal Electronic System for Registration of the Population (PESEL) or taxpayer ID number (NIP) of the creditor and the debtor who are natural persons, if they are obliged to have one or if they have one even without being obliged to, or
2. the registration number in the National Court Register (KRS) or, if unavailable, the number in another relevant register or taxpayer ID number (NIP) of the creditor and the debtor who are not natural persons and are not obliged to be entered in a relevant register, if they are obliged to have one (§ 4 of the Regulation of the Minister of Justice of 6 April 2014 on the content of the writ of execution).

Notaries as obligated institutions within the meaning of Article 2 of the Act of 1 March 2018 on counteracting money laundering and terrorist financing (unified text: Journal of Laws of 2019, item 1115) are obliged to apply customer due diligence measures towards their customers (Article 33 of the Act). Pursuant to Article 34 paragraph 1 of the Act, customer due diligence measures comprise, among others:

1. identification of a customer and verification of its identity,
2. identification of the beneficial owner and undertaking justified measures in order to:
    a. verify its identity,
    b. define the ownership and control structure – in the case of a customer being a legal person or an organisational unit without legal personality.

Notaries shall identify a person authorised to act on behalf of the customer and verify his/her identity as well as authorisation to act on behalf of the customer while applying the customer due diligence measures referred to in paragraph 1(1) and (2). Within the scope of application of the Act, in accordance with Article 36, notaries are obliged to include in the notarial act the following information about parties:

1. in case of a natural person:

    a. name and surname;
    b. citizenship;
    c. number of the Universal Electronic System for Registration of the Population (PESEL) or date of birth in the case a PESEL number has not been assigned, and the state of birth;
    d. series and number of the document confirming the identity of the person;
    e. residence address in case of availability of such information to the obligated institution;
    f. name (company), tax identification number (NIP) and address of the principal place of business in the case of a natural person pursuing economic activity.

2. in a case of a legal person or an organisational unit without legal personality:

    a. name (enterprise);
    b. organisational form;
    c. address of the registered office or address of pursuing the activity;
    d. taxpayer ID number (NIP), and in the case of unavailability of such a number – the state of registration, the commercial register as well as the number and date of registration;
    e. identification data referred to in subparagraph 1 (a) and (c) of a person representing such a legal person or organisational unit without legal personality.

Pursuant to Article 37 of the Act, the verification of identity shall be based on confirmation of determined identification data based on a document confirming the identity of a natural person, a document containing valid data from the extract of the relevant register or other documents, data or information originating from a reliable and independent source.

When a notarial act constitutes the basis for an entry in a land and mortgage register, it should also include additional information about legal persons necessary under implementing rules for the Act of 6 July 1982 on land and mortgage registers and on mortgage (unified text: Journal of Laws of 2019, item 2204), i.e. registration number in the National Court Register (KRS) and identification number issued in the national business register pursuant to the public statistics regulations (REGON number).

Although it is not mandatory, notaries often include the following information about the parties:

- names actually used by the parties,
- identity card (or passport) number and its expiry date.

3.6 Obligations contained in attachments

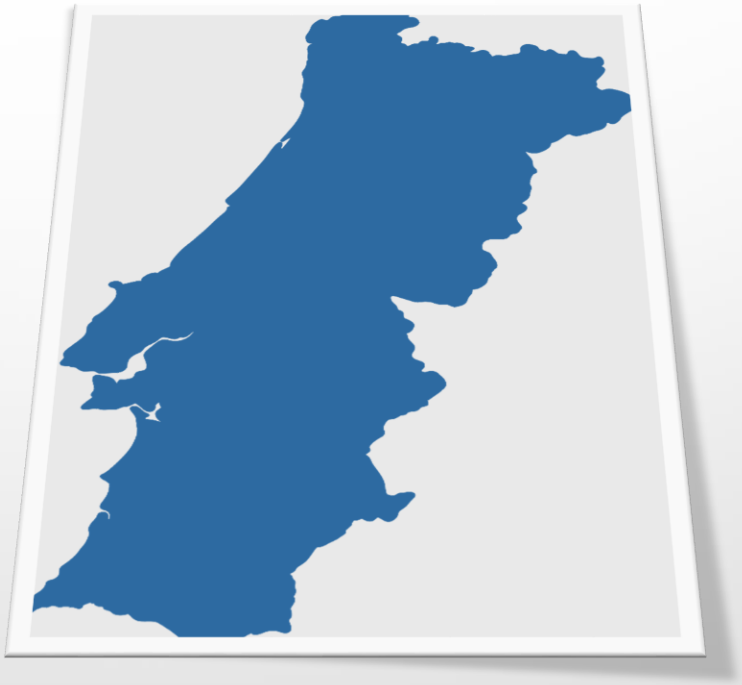
An attachment to a notarial act is an integral part of the act. Considering the above, there are no theoretical contraindications to contain debtor's obligations in the attachment to the notarial act. This approach is supported in legal scholarly literature (see A. Sadowski, 'Załączniki do aktu notarialnego', 9 Rejent (2008), p. 112 – 121). An attachment to a notarial act can incorporate legal obligations as long as two conditions are met: 1) within the text of the act there is a direct reference to the attachment, and 2) the attachment is initialled by the notary and the parties. An entirely different view on this issue (that the content of the attachment to the notarial act is not an integral part of the act) is also expressed in the doctrine (see S. Kulusiński, 'Prawo o notariacie – uwagi wizytatora', 1 Nowy Przegląd Notarialny (1999), p. 33), but this approach seems unconvincing.

On the other hand, when taking a pragmatic approach, it would be advisable to contain all elements of the voluntary submission to execution specifically within the text of the act. This would prevent any misunderstanding in the course of the issuance of a writ of execution by the court.

3.7 Conditional claims

Voluntary submission to execution may concern a future or a conditional debt (A. Marciniak, Comment on Article 777 of the Code of Civil Procedure, Nb 22, in A. Marciniak (ed.), Kodeks postępowania cywilnego. Tom IV. Komentarz. Art. 730 – 1095, C. H. Beck 2020). A future debt is debt made with the stipulation of a time limit. Conditional debt is debt made contingent on a future and uncertain event (condition).

It is also worth mentioning that in the case of the notarial act referred to in Article 777 § 1 subparagraph 4 Code of Civil Procedure, the debtor's obligation is clearly defined at the time of drafting the act. On the other hand, in the case of the notarial act referred to in Article 777 § 1 subparagraph 5 Code of Civil Procedure, the extent of the debtor's obligation is not yet known (P. Sławicki, Comment on Article 777 of the Code of Civil Procedure, in Piotr Sławicki and Paweł Sławicki, Postępowanie klauzulowe. Art. 776-795 k.p.c. Komentarz, Wolters Kluwer Polska 2019).



MANUAL - Portugal

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

Project EU-En4s — JUST-AG-2018/JUST-JCOO-AG-2018
Funded by the European Union's Justice Programme (2014-2020)

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Manual – Portugal

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 Portuguese Civil Procedure Code (hereinafter – CPC) does not explicitly set out the "headlines" of a judgement, but article 607 indicates the structure that a judgement should have.

A judgement should begin with an introductory part where the parties are identified, and the claim is summarised. Then the questions to be decided are indicated. The reasoning is a third part that must indicate the fact grounds (in first place) followed by the legal grounds. The judgment ends with the operative part in which the judge summarises the decision

All these parts are separated with headlines left-indented (even the introductory part) and are numbered (in general with roman numerals – I, II, II....).

Apart from the general structure of the judgement, the Reasoning of the judgement is subdivided with the inclusion of internal headlines to separate the fact and prove analysis from the legal reasoning. Moreover, when several issues have to be decided the judgement can numbered and headline each question to be decided (ex. 1. legal framework or the type of liability at stake; 2. liability requirements).

1.2 Structural and substantive division/sequence of the Reasoning

The fact reasoning numbered the proven facts and the unproven facts by numbers (1.; 2.; 3;...) or by letters (a. b. c. ...). This numbering can be used in the legal reasoning for instance, since the judge can indicate that having proved fact 1 or a. legally the solution is X. The judgement also justifies in this part why some facts are proved and some are not.

In terms of sequence of the reasoning, in general the following format is used:

- [when existing] Observations on certain procedural irregularities (e.g. illegitimacy of the parties),
- List of admitted evidence and dismissed submissions of evidence (with explanations as to the dismissal),
- Determination of disputed and undisputed facts of the case,
- The intertwined legal and factual assessment of the case (this section is usually subdivided by headlines in respect of the).

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": IDENTIFICAÇÃO DAS PARTES E OBJECTO DO LITÍGIO

"the operating part": DECISÃO

"the reasoning of the judgement": FUNDAMENTAÇÃO DE FACTO E DIREITO

"legal instruction": FUNDAMENTAÇÃO DIREITO

1.4 Short description of the elements of the judgement

- The judgment contains: the court identification, the case-number, the type of proceedings, the date on which the case-file was referred for decision (opening of the conclusion), the

identification of the official who referred it, the date of the decision, the signature of the judge (currently digital).

- In the final part, it also contains the condemnation in procedural costs and the order to notify the parties of the judgment.
- Aside from these elements, the sentence is divided into four parts: Report; Reasoning of Fact; Reasoning of Law; Operative Part (Final decision/ jurisdictional order):
    I. Report: The report summarizes the whole process. It identifies the parties, indicates the claim, states the reason for the claim, including the facts, mentions that the defendant was served, if there was a complaint, the grounds for the defence, and whether there was a prior hearing and a final hearing. It also states that the case is still in order and valid as to the procedural premises. Finally, it identifies the issues to be considered.
    II. Reasoning of Fact: It indicates the proven and unproven facts; it exposes the judge's conviction (reasons for the factual decision).
    III. Reasoning of Law: exposes the legal grounds and applies the right to the proven facts.
    IV. Operative Part: Indicates the final and concrete decision; whether the defendant is condemned or acquitted of the claim.

1.5 Graphical separation of the elements of the judgement

The four parts of the judgement are numbered.

In each part, the main components are separated by title and/or underlined.

Each component and each part are separated by spaces or asterisks. (Reasoning of Judgment; Proven facts; Non proven facts; Reasons for the factual decision; Law reasoning, ...)

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

The sentence does not set a time limit, by order of the judge, during which it is not enforceable, nor is there a time limit to be enforced.

It may happen, for example in the execution of an obligation to do a fact that there is a time limit to be complied with, but this will always have to result from the request, the judge is limited to deciding according to what was requested.

The sentence, as long as it is enforceable, can be enforced immediately. And it can be enforced as long as the obligation does not expire, but in that case the obligation itself is extinguished and it is not the judgment that loses its enforceability. Moreover, as the statute of limitations is not a matter of official knowledge, it can happen that the execution is proposed and followed up, for payment.

Regarding actions for payment of an obligation, the fact that it is not due at the time the action was brought does not prevent the existence of the obligation from being known, provided that the defendant contests it, or the defendant is ordered to satisfy the benefit at the appropriate time. Thus, the defendant shall be ordered to pay even if the obligation is overcome in the course of the proceedings or at a date subsequent to the judgment, but without prejudice to the time limit in the latter case.

For periodic obligations which have to be paid repeatedly over a certain period of time, the judgment may specify the monthly payments or the respective payment periods and amounts.

If a judgment imposes an obligation payment, it shall be enforceable until full payment is made.

The prescription period for obligations imposed by judgment is 20 years (Articles 311 and 309 of Civil Code). However, if the judgment refers to payments not yet due, the limitation period will be 5 years (Articles 311 and 310 of Civil Code).

1.7 Identification of Parties

Parties are identified in the introductory part of the judgment by full name, civil (marital) status, tax number (NIF), residence. (Article 552.o CPC)

After this identification, the parties are mentioned in the action only for their role as claimants or defendants.

1.8 Indication of the amount in dispute

The judgment cannot order a greater number or a different object than that requested (article 609 (1) CPC).

The amendment of the request is either by agreement or exceptionally in the case of Article 265.

In the sentence, the amounts indicated are those corresponding to the claim or its amendment, but all this will be explained in the part of the report

The monetary amounts are referred to by numerical value followed by the number in words. Example: 16 041,20 EUR (sixteen thousand forty-one euros and twenty cents).

1.9 Indication of the underlying legal relationship

- The judgement reasoning indicates the underlying legal relationship, gives the legal assessment of the dispute and explains how that relationship justifies a conviction to pay a certain obligation.
- There are cases in which the nature of the debt determines lower restrictions on the attachment of salary, as in the case of execution for maintenance (Article 738(4) CPC). However, since this is a special process (Article 933 CPC), the nature of the underlying legal relationship is identified by the type of enforcement proceeding itself.
- However, there are other situations in which the nature of the underlying relationship is not relevant for the purposes of execution and property liability. For example, if the execution is based on a judgment that sentenced only one of the spouses, even if the debt is, under civil law, the responsibility of both spouses, the creditor can only execute the sentenced spouse in the declaratory process. The creditor has the duty to propose declaratory action against both spouses in order to enforce both spouses. This is because in the enforcement procedure the legitimacy is formal, it is determined by who appears in the enforcement instrument as debtor and as creditor (Article 53 CPC).

1.10 Information contained in the operative part

The decision, also referred to as the operative part of the judgment, consists of the final conclusion in that the judge determines, in a clear and concise manner, the legal effects recognised and dictates the concrete corrective commands, or denies the action requested.

This is a prescriptive discourse, through which the judge, as the case may be:

- either dictates a concrete command of conduct, the purpose of which is to give or to do;
- or states the existence or non-existence of a fact or a right;

- or decrees the production of a constitutive, amending or extinctive effect.

The operative part of the judgment shall not, in principle, contain any mention of the rules applicable, since they must be included in the part concerning the legal basis.

The device of the merit sentence decomposes, analytically:

(a) in the formulation of a judgment of provenance or of dismissal of the action, the counterclaim or the peremptory exception in question;
(b) if all or part of the claims are well-founded:
- in actions of simple evaluation, the recognized legal effect is declared;
- in actions for condemnation, the defendant shall be condemned in the provision or instalments of dare or of make sure they're actually due;
- the constitutive, modifying or extinctive effect of the operate;
(c) in the event of dismissal, the defendant shall be acquitted.

The operative part of the judgement has also to indicate the court costs (Article 607(6) CPC Portuguese).

1.11 Existence of a threat of enforcement

The operative part does not contain a threat of enforcement. The possibility of enforcement is common knowledge.

1.12 Final specification of debt

As a rule, the judgment condemns a specific obligation and a fixed amount, with the exception of interest which will be calculated in the enforcement proceedings.

As for court costs, it is the court office that determines the final amount to be paid by the parties.

There are exceptional cases in which the obligation in which the defendant was sentenced is not immediately determined in the decision as to its quantity or quality.

For example, in cases in which the plaintiff makes a generic request and, at the end of the process, there are still no elements to fix the object or quantity, the court condemns in what will be determined (generic condemnation sentence) (Articles 556; 609(2)). That will be determinate in a proper incident, in the declarative phase, and the process can be reopened for that purpose (article 358), without prejudice of immediate condemnation in the part that is already liquid.

Another example is the judgments in cases that began with alternative requests, in which the judge can condemn in alternative obligations, whereby the debtor is released with the fulfilment of any of them. However, the choice still has to be made (by the creditor, the debtor or a third party, according to the applicable regime). This may be done in the enforcement phase (article 553).

1.13 Partial rejection of a claim

In the operative part of the judgement, it has to be indicated whether the requests made by the claimant are partially or totally granted or totally dismissal. The drafted in terms of structure is the same.

Example: Accordingly, on the basis of the above grounds:

a) I declare the action to be fully well-founded, stating that the claimant does not owe the defendant the sum of 1 618.92 EUR;
b) I dismiss the counterclaim in its entirety, acquitting the applicant of the defendant's claim.

1.14 Set-off of a claim

If set-off (compensation) is invoked in the counterclaim, the judge must declare whether it is well founded or unfounded and must specify the amount of both claims or declare the amount to be compensated.

Example: In view of the foregoing, I consider the present action to be partially proven and well-founded, and the counterclaim to be fully justified and, consequently, I order the Claimant to acknowledge the right to the compensation carried out by the Defendant in the amount of 1,211.00 EUR (one thousand two hundred and eleven euros)

1.15 References to the Reasoning found within the operative part

The operative part does not contain elements from or references to the reasoning of the judgment. The judge shall only declare whether the action is well-founded or unfounded (proceeds or dismisses) and shall state clearly which orders the parties will have to obey (a concrete command of conduct) if it is the case.

Example:

1. I now judge this action to be fully justified and, consequently,
2. I sentence the defendant L (...), S.A., to pay to the plaintiff M (...) S.A., the amount of 313,933.60 EUR (three hundred and thirteen thousand, nine hundred and thirty-three euros and sixty cents), relating to the value of the principal secured by the invoices, to which must be added the default interest, at the commercial legal rate, the interest due on the date of the injunction totals 51,753.93 EUR (fifty-one thousand, seven hundred and fifty-three euros and ninety-three cents) and the interest due until actual and full payment.

1.16 Wording used to mandate performance

In Portugal the wording of the operative part of the judgment must be clear and precise, necessary and sufficient to define the specific legal effects of the order decreed, so as not to raise doubts about the practical implementation of the enforcement or execution of the decision. Indeed, it is a requirement dictated by reasons of legal certainty and objective understanding of the verdict.

This definition is particularly acute in the field of *facere* obligations (doing something), in which adequate precision of the service to be performance is required, in special for the purpose of enforcing the sentence.

1.17 Reciprocal claims

The wording of operative part must be clear about the obligations to be fulfilled by the claimant and the defendant, and may specify dates, amounts and rules on the fulfilment of obligations.

1.18 Indication of interest (rates)

Regarding interest the judgement should indicate the due interest and the legal rate (different rates may be indicated if they are durable obligations).

The obligation to pay interest not yet due is specified by stating the legal rate and the date from which the interest is due.

Example: In view of the foregoing and in accordance with the grounds of law invoked, I find the action to be partially well-founded and, consequently, I order the Defendant's husband to pay the Claimant the sum of 3,500.00 EUR (three thousand and five hundred euros), and also default interest, at the legal rate of 4%, from February 8, 2018, until full payment.

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

According to Article 614 of the Portuguese CPC, if the sentence has errors in writing or calculation or any inaccuracies due to another omission or manifest lapse, it may be corrected by order, at the request of any of the parties or at the initiative of the judge.

In case of appeal, the rectification can only take place before it goes up, and the parties can argue before the superior court what they think regarding the rectification.

If neither party appeals, the rectification may take place at any time.

In accordance with Article 615(1)(e) CPC, the sentence is void when the judge orders the defendant to pay a greater quantity or in an object other than the requested.

In addition to the appeal, the parties may challenge the court decision on the ground of error detected by a complaint addressed to the judge who issued it.

1.20 Legal effects of the Reasoning of the judgement

A judgment shall be null and void if it does not state the reasons of law on which it is based; or the grounds are in opposition to the decision or there is some ambiguity or obscurity which renders the decision unintelligible, according with Article 615(1)(b) and (c) CPC.

1.21 Obtaining the res judicata effect

The judgment becomes *res judicata* when it is no longer susceptible of complaint or ordinary appeal, whether no objection has taken place within the legal timeframes, or the admissible used means of objection have been exhausted (Article 628 CPC).

As rule, the time limit for appeal is 30 days and shall run from notification of the judgement, reducing it to 15 days in in certain cases, for example those listed in Article 644(2); and is extended by 10 days (to 40 days) if the purpose of the appeal is to reconsider recorded evidence 638(7).

1.22 Res judicata of negative declaratory relief

If the action is of a simple assessment, that is to say, it merely states the existence or non- existence of a right or of a fact, that judgment is not, as a rule, enforceable.

A judgment must be of a condemnatory nature in order to be enforceable. The enforceable title is a judgment that is condemning and not any judgment (Article 704(a)).

Therefore, if a judgement declares that there is no right to a claim, it does not mean that the defendant is obliged to pay this amount.

In the case of a negative declaratory action if the court dismisses the claim the judge can declare the converse right of the defendant in a counterclaim exist. In this case such judgement is enforceable.

1.23 Suspensive periods barring the enforcement of a judgement

Portuguese legal order does not expressly prescribe a suspensive period within which the judgment creditor cannot initiate the enforcement proceedings.

2. Court settlements

2.1 Elements of a court settlement

The necessary elements a court settlement must contain are defined in Article 290(1).

Article 290(1) - "The confession, withdrawal or transaction can be made by authentic or private document, without prejudice to the requirements of form of the substantive law, or by declaration in the process."

2.2 Formal requirements

The formal requirements that must be satisfied are defined in Article 290.

2.3 Identification of Parties

The parties are identified by reference to the parties of the process. There are no specific rules.

3. Notarial deeds

3.1 Prerequisites for enforceability

A notarial act is an enforcement title *per se*, without prejudice of the dispositions of Article 707 for future obligations.

In Portugal, the "enforcement titles" list is defined by Civil Procedure Code. Depending on the document issued by the notary, if it is in that list it is an enforcement title. For example, the public deeds and the notarization of private documents are always enforcement titles, not being necessary any particular clause. The parties just have to declare to the notary that they agree with what is written on the document that they wish to authenticate.

3.2 Special clause

In Portugal, the "enforcement titles" list in defined by Civil Procedure Code. Depending on the document issued by the notary, if it is in that list, it is an enforcement title. For example, the public deeds and the notarization of private documents are always enforcement titles, not being necessary any particular clause. The parties just have to declare to the notary that they agree with what is written on the document that they wish to authenticate.

3.3 Consent

The debtor's consent must be notarized. The notarial act is a "authentication term" of the document signed by the debtor, where he declares to the notary that he agrees with what is written on the document that he wishes to authenticate. The consent must normally be specific and concrete so that can be considered an enforcement title.

3.4 Structure

Depending on the act, it necessary more or less requirements. All acts must have date of issue, location, the identification and signature of the notary. More elaborated acts, such as authentication terms and public deed, must have the full identification of the parties.

3.5 Personal information

Full name, marital status, birthplace, full address, fiscal number, and ID number.

3.6 Obligations contained in attachments

Obligations, contained in a directly enforceable notary deed, can be attachments to the notarial act. Attachments are an integral part of the notarial act. They can be on a document that stays archived with the deed and has the same importance and legal value.

3.7 Conditional claims

Conditional claims, contained in a notary act, can be enforceable. But with their own rules. The execution must be mandatory (first it is cited and only later it is seized) (Article 550(3)(a) and there is a mini preliminary procedure to demonstrate the verification of the condition (Article 715 CPC)).

MANUAL – Slovenia

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

Project EU-En4s — JUST-AG-2018/JUST-JCOO-AG-2018
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Manual - Slovenia

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 Slovenian Contentious Civil Procedure Act (hereinafter – CPA) does not explicitly set out the "headlines" of a judgement. The CPA enumerates that a judgement should contain an introductory part, an ordering (operative) part, a statement of ground (the Reasoning), and a legal instruction regarding an appeal. It stems naturally that headlines are a collateral necessity for the proper identification of these building blocks. They act as a communication vehicle.

That being said, there is no explicit "Introductory part" headline. This part of the judgement is characterized in detail in Art 324(2) of the Slovenian Contentious Civil Procedure Act (CPA). The introduction is outlined by the statement that the judgment has been rendered in the name of the people. The introductory part is typically confined to the front page of the Judgement. In addition to the former statement, it features the reference number of the case, the name of the court, together with a graphic of the Slovenian coat of arms, the name and surname of the presiding judge and other members of the panel, the name and surname as well as the permanent or temporary residence of the parties and their representatives and/or attorneys, a brief description of the matter of dispute (e.g. "for the payment of damages"), the day on which the main hearing has been completed, and the day on which the judgment has been rendered.

Neither is there an explicit "Ordering part" in terms of a headline. Rather, the court outlines the operative part by stating in (usually) capital letters that it has "DECIDED" or "ADJUDICATED".

On the contrary, the Reasoning and the Legal instructions are marked by separate headlines in the judgement. Usually, these are written in all capital letters. Sometimes, a space between each letter (e. g. R E A S O N I N G) is applied for visual impact or the letters are written in bold.

All of the above headlines are centre aligned. None of them are numbered.

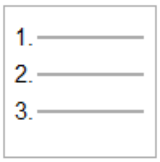
Apart from the general structure of the judgement, the Reasoning of the judgement is sometimes subdivided with the inclusion of internal headlines. In order to provide clarity and structure to the Reasoning, the court might choose to address specific issues within the context of its ruling. For example, if the court decided on a claim for damages, then it might divide the Reasoning into distinctive sections, which deal with individual prerequisites of the defendant's liability. Accordingly, one such headline could be "Harmful event", others could be "Causal nexus" and "Damage incurred", yet another could be "Negligence". Each of these can be further subdivided by new headlines/subtitles, since no formal rules exist on their drafting, e.g. usually the types of non-pecuniary damage are dealt under separate headlines ("fear", "physical pain" etc…).

There is no available study regarding the frequency and consistency on the usage of headlines in practice. It is up to each individual judge, whether he or she applies them or not. An annex to the Regulation on the rules for the uniform drafting of Supreme court decisions (ref. nu. Su 72/2009 - an internal legal act of the Slovenian Supreme court) only provides that such divisions are permissible (optional).

These optional headlines are left-indented. According to the mentioned Regulation they ought not be numbered or listed, however, the Regulation only applies to Supreme court decisions (they can, however, be taken as informal guidelines for other courts). First instance judgements therefore often feature such markings.

1.2 Structural and substantive division/sequence of the Reasoning

The Reasoning in Slovenian judgements issued by courts of general jurisdiction is structured into paragraphs. These paragraphs are numbered with Arabic numerals in accordance with the following format (they are not subdivided into decimal numbers):



The numbering does not, in and of itself, connote any particular value or information. The use of paragraphs and their numbering should be considered a stylistic figure, employed to enhance the transparency of information. This does not mean, however, that the judgement does not follow a predetermined order regarding its substance. It is customary established that the Reasoning is (albeit loosely) written in respect of the following sequence:

- [exceptionally] Observations on certain procedural irregularities (e.g. that the dispute has been reprimanded to the court following the decision of the appellate court; addressing a modification of the claim or partial withdrawal during the main hearing etc.),
- The allegations of the claimant,
- The defence (objections) raised by the defendant,
- List of admitted evidence and dismissed submissions of evidence (with explanations as to the dismissal),
- Determination of disputed and undisputed facts of the case (the court does concern itself with undisputed facts after this point),
- The intertwined legal and factual assessment of the case (this section is usually subdivided by headlines in respect of the),
- The costs of litigation.

1.3 Textual identification of the elements comprising the judgement

- “the introduction of the judgement” is called “uvod”
- “the operating part” is called “izrek”
- “the reasoning of the judgement” is called “obrazložitev”
- “legal instruction” is called “pravni pouk”.

1.4 Short description of the elements of the judgement

The structure of Slovenian civil judgements is determined by Article 324 CPA, which lists the following necessary parts of a written judgement: the introductory part, the operative part, the reasoning and legal instructions about the possibility to appeal.

The introductory part of the judgment contains the statement that the judgement has been rendered in the name of the people, the address of the court, the name and surname of the presiding judge and other members of the panel, the parties’ identification data (for details see 1.7 Identification of Parties) the name and surname as well as the permanent or temporary residence of the parties’ representatives and counsels, a brief description of the matter of dispute, the day on which the main hearing has ended, and the day on which the judgment has been rendered (the second paragraph of

Article 324 of CPA). The introductory part thus provides information on the relationship between the parties, the subject matter and the date on which the judgement was issued.

The operative part of the judgment contains the decision by which the court satisfies or dismisses particular claims relating to the main subject of dispute and secondary claims (e.g. regarding interest, costs, etc.), as well as the decision on the existence or non-existence of the claim asserted for the purpose of a set-off (the third paragraph of Article 324 of CPA).

In the reasoning, the court states the claims raised by the parties, the facts asserted by the parties to support these claims, the evidence, and the law applied in the rendering of the judgment (the fourth paragraph of Article 324 of CPA). In a default judgment, a judgment on the basis of acknowledgment of the claim, a judgment on the basis of relinquishment of the claim or an interim judgement rendered in agreement between the parties, the reasoning contains only the reasons that justify the rendering of such judgement (the fifth paragraph of Article 324 of CPA).

In legal instructions, the court states a time period within which the appeal may be submitted, necessary content of the appeal, a warning about setting aside any actions performed by an unauthorised counsel, a warning about the consequences of an incomprehensible or incomplete appeal, a warning about the consequences of a failure to pay court taxes, the court with which the appeal is to be submitted and the number of original copies to be submitted (the sixth paragraph of Article 324 of CPA).

1.5 Graphical separation of the elements of the judgement

The first page of a judgement contains only the introductory part, which is thus clearly separated from other parts of the judgement and at the same time conveniently represents the title page with the most important basic information about the case.

The operative part is preceded by the headline “DECIDED”, which connects the information about the court rendering the judgement from the introductory part with the content of the decision. The reasoning and legal instructions are preceded by respective titles.

The operative part is further divided into points, which are marked by Roman numerals (I., II., III., …) whereas the reasoning and legal instructions are divided into paragraphs or points, which are marked by Arabic numerals (1., 2., 3., …). In more complicated cases, some judges include sub-headings into the reasoning to indicate more clearly which issue is justified in which part, or separate the reasoning in parts (A, B, C, …). This is not standardised, but there is also no reason why any of these options would be considered problematic.

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

Under Article 313 of the Claim Enforcement and Security Act (henceforth – CESA), in a judgment ordering the performance of a certain obligation, the court shall also determine a time period in which the obligation is to be performed. The aim of this time limit is to prevent the claimant from seeking involuntary enforcement against the defendant, until the time limit expires. As a rule, the court will set this time period for positive obligations or for omissions, but not in the case of a decision that the defendant is required to endure certain claimant’s conduct – in such cases, the judgement is immediately enforceable. If the judgement does not contain the time period for a voluntary fulfilment of the obligation, the court of enforcement will set it in the enforcement order (Article 21 of CESA).

Unless otherwise provided by special regulations, the time limit for the performance of the obligation is fifteen days; however, the court may set a longer time period in the case of non-monetary

obligations (when it would be unrealistic to expect that the defendant could fulfil his or her obligation within 15 days, e.g. in the case of unfulfilled obligations under construction contract). In disputes involving bills of exchange and cheques, this time period is eight days. The time period for performance of the obligation starts to run on the first subsequent day following the service of the judgement upon the defendant.

Neither a judgement nor any legal provision contains any specifications of the time period within which the final judgement may not be enforced. After the time for voluntary fulfilment of the claim expires, the creditor (claimant) may start the enforcement procedure if the debtor (defendant) failed to perform his or her obligation.

A judgement does not contain any specifications of the time period after which the judgment is no longer enforceable. Instead, such provision is stipulated in the Obligations Code (Obligacijski zakonik, hereinafter - OZ). Article 356 of OZ states that all claims determined by a final court ruling or by a ruling by another relevant authority or through settlement before the court or another relevant authority shall become statute-barred after ten years, including those for which a shorter period is stipulated by the statute of limitations. All periodic claims originating from such rulings or settlement and falling due in the future shall become statute-barred after the period stipulated for the statute-barring of periodic claims. If the claimant attempts to enforce the performance of the obligation after the expiry of a 10-year limitation period, the defendant may file a complaint against the enforcement under Article 55 of CESA.

1.7 Identification of Parties

Personal information about the parties is listed in the introductory part of the judgement, on the front page, which provides basic information about the case. According to Article 180.a of CPA, the identification data for each party include the following:

- if the party is a natural person: name and surname, residence, as well as the Unique Personal Identification Number (EMŠO) if the party is recorded in the central population register, the tax ID number if the party is not recorded in the central population register, but is recorded in the tax register, or a date of birth if the party is not recorded in either the central population register or the tax register;
- if the party is a legal entity: legal name, registered office and business address, as well as the registration number or tax ID number if the registered office of the party is located in the Republic of Slovenia;
- if the party is an individual entrepreneur: personal name, legal name, registered office and business address, as well as the registration number or tax ID number if the party is registered in the Republic of Slovenia.

The purpose of including the identification data into the introductory part of the judgement is to determine the parties of the case, who are bound by the judgement. If the court fails to list all required data, such omission does not necessarily represent an infringement of essential procedural requirements (and grounds for appeal), as long as there is no doubt about who the party is and to whom the judgement refers.

1.8 Indication of the amount in dispute

The introductory part of the judgement includes, *inter alia*, a brief description of the matter of dispute (the second paragraph of Article 324 of CPA). The description depends on the type of the case and the

matter in question (e.g. it could state that the claim is for the invalidity of a contract), but for monetary claims, it also includes the amount in dispute.

Example: "*for the payment of 1,672.83 EUR*"

The amount of dispute is important because it determines the court that has jurisdiction on the substance of the matter and the type of proceedings (regular proceedings or small claims procedure), as well as the amount of court fees and the attorney tariff. Therefore, it is an essential component of the action in all cases of monetary claims (as one of the facts of the case), but also in all cases of non-monetary claims, if the jurisdiction of the court depends on the amount in dispute (the second paragraph of Article 180 of CPA). The CPA contains detailed provisions and criteria on how to determine the amount in dispute properly, in Articles 39 to 45.

If the claimant obviously sets the amount too low (e.g. because they want to pay lower court fees) or too high (e.g. because they want to financially intimidate the defendant), the court may establish a proper amount *ex officio* or upon the request of the defendant, respectively (Article 44 of CPA and Article 31 of Court Fees Act). The amount can also change if the claimant amends the amount in dispute or partially withdraws the claim under Articles 184 and 188. If the claimant reduces the amount of the claim, such amendment does not affect the jurisdiction, even if the case is adjudicated before the district court, whereas the new amount of the claim would place the case under the county court's jurisdiction. In such case, the district court's jurisdiction on the substance of the matter is considered settled at the moment the action was filed (*perpetuatio fori*, the third paragraph of Article 17 of CPA). However, if the case was under jurisdiction of the county court and the party changes the claim by increasing the amount in dispute, the case has to be relegated to the district court if it falls under its jurisdiction after the amendment.

In practice, every amendment of the amount in dispute is marked on the case file (by crossing out the previous amount and replacing it with the new one), and the amount stated in the introductory part is amended as well to reflect the changes. Procedural acts and decisions that lead to the amendment are addressed in the reasoning and, where relevant, included in the operative part.

1.9 Indication of the underlying legal relationship

The court is not required to explicitly state or qualify the underlying legal relationship in the introductory part or the operative part; the operative part contains only a specification or the scope of legal protection granted by the court, which does not include any legal assessment (see also section 1.15 References to the Reasoning found within the operative part). However, the legal assessment of the dispute is an important part of the reasoning. The court's decision does not depend only on the facts of the case as determined through the process of evidence taking, but also on legal provisions applied to these facts. The court may satisfy the claim only if finds a legal provision that ascribes the legal consequence sought by the claimant to the facts determined in proceedings.

The claimant is not required to provide his or her own legal assessment of the dispute, as the court is presumed – and required – to know the law (*iura novit curia*). Even if the claimant proposes his or her views of which legal provision should be applied in a particular case, the court is not bound by their proposal and is required to examine all possible legal grounds that could be relevant for the decision on merits of the claim. The court may dismiss the claim only if it determines that no legal norm supports the claim, considering the facts of the case. The court's assessment has to be justified and explained in the reasoning of the judgement, together with an explicit listing of relevant provisions and the court's argument of how they apply to the dispute in question (e.g.: a justification containing a conclusion that a defendant is strictly liable for damage caused by a dangerous thing owned by the

defendant under Articles 149 to 150 of OZ would be accompanied by an explanation of how these provisions were applied to the facts of that particular case and by the court's arguments of how it came to such conclusion).

1.10 Information contained in the operative part

According to the second paragraph of Article 324 of CPA, the operative part of the judgement contains the decision by which the court satisfies or dismisses particular claims relating to the main subject of dispute and secondary claims, as well as the decision on the existence or non-existence of the claim asserted for the purpose of a set-off.

The operative part determines the content of legal protection granted to the claimant against the defendant, and is especially important to determine subjective and objective limits to the legal effect of the judgement. The content of the operative part of a judgement becomes final. The content of the operative part of the judgement depends on the content of the claim. The claim already has to be specified in the action in a way that allows the court to directly transpose its content into the operative part, if it finds it justified.

1.11 Existence of a threat of enforcement

A judgement becomes enforceable by law, which is why there is no special legal provision that would require the court to include the threat of enforcement into the operative part of the judgement. However, Slovenian courts developed a practice of including a special phrase "under threat of enforcement" or "to avoid enforcement" after the decision regarding the amount or the scope of the claim and the time period for a voluntary fulfilment. Therefore, this phrase has become a standard part of the operative part of all Slovenian condemnatory judgement, even though this is in no way required by law. The omission of such phrase by the court has no legal consequences and does not represent a defect in the operative part.

1.12 Final specification of debt

The content of the operative part of the judgement depends on the content of the claim. The claim already has to be specified in the action in a way that allows the court to directly transpose its content into the operative part, if it finds it justified. In case the claim is not specified, it will also be unenforceable, which is why such action is considered incomplete. Under Article 108 of CPA, court will first give notice to the claimant to amend or supplement the claim, and then reject the claim if the claimant fails to do so.

The court of enforcement is bound by the principle of a strict formal legality, which prevents it from (re)examining the legality and correctness of the enforcement title or changing its contents in any way. Instead, it may allow and perform the enforcement only on the basis of a valid enforcement title and must, therefore, enforce the claim as determined in the operative part of the judgement. Any decision-making regarding the merits of the claim is restricted to the litigation and the role of the court of enforcement is only to realise the decision contained in the judgement. The operative part of the judgement may not leave any doubt regarding the claim and may not require any further legal reasoning to determine its content (e.g. 'the payment of appropriate damages' would require the court of enforcement to render its own decision on what the appropriate damages would be).

According to Article 21 of CESA, the enforcement title is suitable for enforcement if it states the creditor and the debtor, as well as the subject, type, scope of the obligation and the time in which it needs to be fulfilled. If any of these elements are impossible to determine in the operative part, such

judgement cannot be enforced. Therefore, the court rendering a decision about the claim is required to specify the content of the operative part in a precise and comprehensible manner, as the court of enforcement cannot remedy any deficiencies in this regard. If the operative part is undetermined or insufficiently determined, the enforcement will not be possible, whereas such infringement also constitutes an absolute infringement of essential procedural requirements under point 14 of the second paragraph of Article 339 of ZPP.

1.13 Partial rejection of a claim

A "dismissal" refers to the situation where a claim appears to be without justification.

In case the claim is wholly dismissed, the operative part repeats the wording from the claim and states that the claim is dismissed.

Example:

The claim, which reads as follows:

"The defendant is liable to pay to the claimant the amount of 10.000 EUR, together with statutory interest from 15 April 2020 until the date of the payment, within 15 days to avoid enforcement."

is dismissed.

1.14 Set-off of a claim

The CPA does not regulate a special action for the purpose of a set-off; however, the defendant may file a plea for a set-off as an instrument of his or her defence. Procedural set-off represents a special protection for the debtor's claim, the purpose of which is to achieve the dismissal of the claimant's claim (or a part thereof). The defendant may only invoke a set-off of a claim concerning the claimant's obligation that still exists and has not been set off yet before the litigation or outside the proceedings.

When the debtor invokes a set-off, they must precisely define the claim, state the amount of the claim and when it becomes due, as well as provide all the facts supporting the claim and propose evidence proving these facts. The plea for a set-off must thus contain basically the same elements as the action, since the operative part of the judgement will also include a decision on the existence or non-existence of the claim asserted for the purpose of the set-off, which will then become final and enforceable (the third paragraph of Article 319 of CPA). In such case, the operative part is composed of three parts: (1) the court determines the existence and amount of the claimant's claim; (2) the court determines the existence and the amount of the defendant's claim asserted for the purpose of the set-off; (3) the court declares a set-off and, depending on the compensated amounts, either fully dismisses the claimant's claim (where the defendant's claim against the claimant is determined in equal or higher amount than that of the claimant's claim against the defendant) or partially satisfies the claim (where the claimant's claim is higher than the claim that the defendant asserted for the purpose of the set-off).

The court may only decide on the existence of the defendant's claim if it first determined the existence of the claimant's claim. If the claimant's claim does not exist, the court dismisses his or her claim without even addressing the issue of the defendant's claim. The same applies if the case concluded with the rejection or withdrawal of the claim.

Examples:

A. Both claims exist.

'I. The claimant's claim in the amount of 1000 EUR is found to exist.

II. The defendant's claim in the amount of 1000 EUR is found to exist.

III. The claims are set off and the claimant's claim, which reads that the defendant is liable to pay to the claimant the amount of 1000 EUR, is dismissed.'

1.15 References to the Reasoning found within the operative part

The operative part of the judgement contains only a specification or the scope of legal protection granted by the court (i.e. a decision about the justification of the claim). Any additional elements, which would consist of a legal qualification or of facts upon which the decision is based, should be omitted from the operative part and explained in the reasoning instead. For example, the operative part should state that 'the defendant is liable to pay 10.000 EUR' but should not include additional qualifications like 'of damages', 'for maintenance', 'due to a breach of a contract', etc.

1.16 Wording used to mandate performance

A standard phrasing in a condemnatory judgement mandating the debtor to perform an obligation reads as the following example: 'The defendant is liable to pay to the claimant the amount of 10.000 EUR, together with statutory interest from 15 April 2020 until the date of the payment, within 15 days to avoid enforcement.' Therefore, the court does not explicitly order the debtor to perform and from a linguistic and grammatical standpoint, one could deduct that the court merely declared the debtor liable to perform the obligation, which would represent a declaratory relief. However, in practice, it is universally understood that the judgement is nevertheless condemnatory and that it imposes on the debtor the liability to perform the obligation contained in the operative part. For that reason, there are no real misunderstandings in regard to the wording in such cases. On the other hand, it is clear that such wording could lead to confusion and that some questions could arise especially in the context of cross-border enforcement, with participants who might not be familiar with the particularities of this traditional wording.

1.17 Reciprocal claims

The CPA contains no provision that would specifically regulate the content of the operative part in cases of reciprocal relationships. However, a rule on simultaneous performance is contained in Article 101 of OZ, which states that in bilateral contracts neither party shall be obliged to perform their own obligations if the other party is not simultaneously performing their obligations or is unwilling to do so, unless agreed otherwise or stipulated otherwise by law, or unless it follows otherwise from the nature of the transaction. If one party claims in court that they were not liable to perform the obligations until the other party performed theirs, the court shall impose on the party to perform the obligations when the other party performs their own. Therefore, a defendant may file a plea of a substantive nature to affect merits of the claim. The operative part in such cases will state that the defendant is liable to perform their obligation provided that the claimant performs their obligation as well.

1.18 Indication of interest (rates)

In the case of statutory interest, the operative part has to specify the date from which the interest for late payment will start to run and refer to the statutory interest. In the case of contractual interest, the operative part also has to include the interest rates (generally expressed in percent). The interest for different payments included in the same operative part may start to run on different dates (e.g. for late payments of obligations that are due periodically). In such case, the operative part has to determine precisely the date from which the interest starts to run for each individual part of the claim.

Example:

A. Statutory interest:

'The defendant is liable to pay to the claimant:

- the amount of 3.000 EUR, together with statutory interest from 1 January 2018 until the date of the payment,

- the amount of 3.000 EUR, together with statutory interest from 1 January 2019 until the date of the payment,

- the amount of 2.000 EUR, together with statutory interest from 1 January 2020 until the date of the payment,

all within 15 days to avoid enforcement.'

B. Contractual interest:

'The defendant is liable to pay to the claimant the amount of 10.000 EUR, together with contractual interest under a fixed annual interest rate of 8.5% from 15 April 2020 until the date of payment, within 15 days to avoid enforcement.'

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

According to the second paragraph of Article 2 of CPA, the court shall not refuse rendering a decision on the claim that is within its jurisdiction, which means that if all procedural requirements are met, the court must issue a decision regarding all submitted claims. The operative part of the judgement must thus contain decisions concerning all submitted claims, those that were satisfied and those that were dismissed. If the claim was partly satisfied and partially dismissed, the dismissed part of the claim must be specified as well. In the case of joint claims, the court must also specify which of them were rejected. A standard formulation that the court rejects all other parts of the claim is considered insufficient (except regarding the rejected amount of a monetary claim).

If the court fails to issue a decision on all claims or a part of a particular claim, the claimant may file an application with the court to supplement the judgement within fifteen days after the receipt of the judgement (the first paragraph of Article 325 of CPA).

In addition to being complete, the operative part has to be explicit and detailed enough for the contents of the court's decision about the claim to be perfectly clear and comprehensible. The operative part that is incomprehensible (i.e. undetermined or insufficiently determined, which in turn impedes both the judicial control in the appellate proceedings and the subsequent enforcement procedure) is considered an absolute infringement of essential procedural requirements under point 14 of the second paragraph of Article 339 of ZPP and thus represents the grounds for appeal.

These infringements of essential procedural requirements under point 14 can be grouped into three combinations: (1) incomprehensible or inconsistent operative part; (2) missing reasoning (entirely or of decisive facts), unclear, incomprehensible or inconsistent reasoning; and (3) the inconsistency between the operative part and the reasoning. The main consequence of these infringements is the fact that the appellate courts are objectively prevented from reviewing the judgement, which in turn represents the violation of the right to appeal.

Furthermore, these errors in the operative part generally cause the judgement to be ineffective since it is impossible to determine the proper content of the court's decision. Such judgement can still become final, but only in a formal sense (i.e. it is no longer possible to appeal against such judgement). According to Article 21 of CESA, the enforcement title (including a judgement) is suitable for enforcement if it states the creditor and the debtor, as well as the subject, type, scope of the obligation and the time in which it needs to be fulfilled. If any of these elements are impossible to determine in the operative part, such judgement cannot be enforced.

1.20 Legal effects of the Reasoning of the judgement

Unlike the operative part, the reasoning of the judgement is not subject to the effects of the finality of the judgement and is not binding on the parties. Its purpose is to explain and justify the decision which is contained in the operative part of the judgement. For that reason, the party cannot file an appeal against certain parts of the reasoning without also appealing against the operative part, to which the reasoning refers.

1.21 Obtaining the res judicata effect

The moment depends on the circumstances of the case, i.e. whether or not an appeal against the judgement is allowed and whether or not the parties exercise their right to appeal.

If, at the outset, no appeal is allowed against a judgement, the judgement is considered final when it is issued. The law does not expressly prescribe this consequence, but it has become validated in case-law. What is more, case-law specifically rejects some (older) theoretical viewpoints that postulate that such a judgement becomes final only after it is served onto the parties. Courts position their conclusion on the premise that the inability to challenge a judgement prompts its finality.

On the other hand, if the law allows for appeal, the action or inaction of parties must be considered. The judgement will become final when the period for lodging an appeal has elapsed, if no party lodged an appeal. The judgement can become final before the period has elapsed, if both parties waive their right to appeal. The same applies if only one party lodges an appeal and later withdraws it.

Legal academics have also tackled the issue of so-called divisible or indivisible temporal concepts of finality. Since the period for lodging an appeal may differ for parties depending on the service of the judgement (one party may be served before the other party), the judgement could hypothetically become final relative for each party at separate moments. Regardless, theory is unanimous that finality is a temporally indivisible concept. This should, however, not be confused with finality of the "whole" judgement or part of a judgement. If the appeal targets only part of a judgement (e.g. only one of multiple reliefs granted), then the remainder of the judgement (the "unchallenged" part, e.g. the remaining relief) will become final.

1.22 Res judicata of negative declaratory relief

With an action for negative declaratory relief, the claimant pursues to obtain a judicial determination that a certain right or legal relation exists does not exist (see: Art. 181(1) CPA). An action for (positive or negative) declaratory effect is also called a "prejudicial" action, since it resolves the question of the (non-)existence of a right or legal relationship, which would otherwise be considered as a preliminary question of law in an action for condemnatory relief. A final judgement on negative declaratory relief binds the parties and the court in later proceedings where a preliminary question of law arises, which was the object of the request for negative declaratory relief. Such a court cannot reach a new decision to the contrary. Additionally, a contradictory claim to the contrary (a claim for positive declaratory

relief) cannot be raised by the defendant against whom the action for negative declaratory relief was filed, neither during the trial (since such claims are considered to be caught by rules on *lis pendens*), nor after the judgement becomes final (due to rules of material finality).

The situation described in the example has been the subject of only one (published) judgement, among the available case-law database of the Slovene Supreme Court. There, the latter court stated that "the dismissal [on the merits of the case] of a negative declaratory action means that a positive declaratory action is justified because the claims are mutually exclusive." Applying that same rationale to the case at hand, a dismissal would mean that the court has indirectly determined that the creditor (the defendant) does indeed have a right against the debtor (the claimant) in the amount of 1000 EUR. However, the mere judgement by which the debtor's request for negative declaratory relief was dismissed does not entitle the creditor to the enforcement of the claim. Declaratory judgements are not enforcement titles since they lack a command for performance. The creditor will have to move for a separate condemnatory action and request payment. In that event, the seized court should not be able to decide contrary to the prior determination of the existence of the creditor's claim and should not allow the debtor to produce arguments, statements, and evidence to the contrary, due to effects of material finality.

Theory and case-law in Slovenia is lacklustre on this particular situation. Since Art. 181 CPA seems to be modelled after Art. 228 and 236 of the Austrian ZPO, we believe the findings of the Austrian doctrine can be applied in Slovenian law. Along these lines, the defendant (the debtor) cannot object on the grounds, which are already encompassed by the finality of the first judgement. The defendant may, however, only be entitled to such objections which, on the basis of later relevant facts, are intended to demonstrate that the claim determined indirectly by the rejection of the request for a negative declaratory relief has subsequently been extinguished in whole or in part and therefore no longer partially or no longer fully exists. This is in line with the temporal dimensions of finality which encompass the facts of the case as determined by the court up to the point of the last hearing session.

The aforementioned conclusion was reached for the ideal situation where the creditor demands payment of the exact amount as already specified by the debtor in the declaratory proceedings. The court entertaining the condemnatory action would be tasked in each individual case to scrutinize what the matter in dispute was in the declaratory proceedings. If the creditor would seek a higher amount to be payed, than he would have to provide statements of fact and proof for the excess amount, since that amount is not covered by the finality of the first judgement.

It may also become apparent to the court during the declaratory proceedings that the claim negated by the debtor is only partially existing or valid. In such a case, a partial dismissal would partially (in a lower amount) confirm the existence or validity of the creditor's claim.

1.23 Suspensive periods barring the enforcement of a judgement

In general, court decisions shall be enforceable when they become final and when the time limit has passed for voluntary performance of the debtor's obligations (paragraph 1, Article 19 CESA). The time limit for voluntary performance shall commence on the day following the service of the decision on the debtor (paragraph 2, Article 19 CESA). Therefore, the judgement is by operation of law not considered enforceable within this period.

The length of the latter period is in principle denoted in the law. Article 313 CPA stipulates that in a judgment ordering the performance of a certain obligation, the court shall also determine a time period in which the obligation is to be performed. Moreover, the latter article states that unless otherwise provided by special regulations, the adjudged obligation shall be performed within fifteen

(15) days, while in non-monetary obligations this period may be prolonged by the court. In disputes involving bills of exchange and cheques this period shall be eight days. The time period for performance of the adjudged obligation shall start running on the first day subsequent to the day when the judgment has been served upon the debtor.

In certain *lex specialis* cases the time period is to be determined by the court. For instance, in disputes for disturbance of possession the time period for rendition of the relief obtained by the plaintiff under the court decision shall be determined by the court with respect to the circumstances of the case (paragraph 1, Article 428 CPA).

2. Court settlements

2.1 Elements of a court settlement

The content of the court settlement may refer to anything that may be decided in the operative part of the judgment. The settlement may involve the whole claim or only a part thereof and it may also contain settling of other questions between the parties in dispute. It may also concern the relationship in other or all other open procedures between the parties. The subject matter covered with the settlement may be broader than the matter in dispute. It may also concern the quantitative part of the claim. If the settlement is condemnatory in nature the content must be suitable for possible enforcement procedures on the grounds of an enforceable title. It should contain identification of the parties, subject, type and scope of the obligation, the time limits for voluntary fulfilment (art. 21 of CESA).

Moreover, a third person who is not a party to the proceedings may also participate in the settlement. However, the third person may become liable on the grounds of concluded settlement only if the third party agreed to such liability. This means that this person signs the settlement or is involved in the process of concluding the settlement. However, the involvement of a third person is not mandatory if the settlement includes the establishment of certain rights for a third person.

2.2 Formal requirements

The court settlement concluded at the main hearing must become a part of the court record (article 307 CPA). The court record must be signed by a judge (article 126 CPA), which proves that the procedural prerequisites were satisfied, and that the settlement is not in contrary to mandatory rules and morality. If the settlement is concluded outside the main hearing, the settlement should be included in a special court record. Nevertheless, a court settlement shall be deemed to be concluded when the parties, having read the record on settlement, put their signatures on this record (307/3 CPA). The judge may also prepare a written proposal which is offered to the parties as a solution of their dispute. However, the proposal must reflect the true will of the parties and informed consent to settle the dispute in such a way.

At all times during the proceeding, the court is obliged to examine whether the claim subject to a final court settlement is pending in another procedure. Should the court establish that the action is pending in respect of a claim concerning which a court settlement has already been concluded, it shall reject the action (article 308. CPA).

2.3 Identification of Parties

There are no special rules in CPA on that matter. However, the settlement must be determined in objective and subjective terms. This means that the parties who are the holders of rights and

obligations must be identified with name and surname, personal identification number, address or residence, seat etc.

3. Notarial deeds

3.1 Prerequisites for enforceability

The notary deed is directly enforceable if it contains a direct enforceability clause provided that the person liable expresses his consent that such an instrument be made directly enforceable in the same or separate notarial deed and provided that the claim is due (see Article 4 of Notariat Act). There are certain contracts/agreements, which do not contain a direct enforceability clause, because they do not contain such obligations, which could lead to direct enforceability.

3.2 Special clause

According to Article 4 of the Notariat Act, a notarial deed, which includes an undertaking to provide something, to do something, to refrain from something or to tolerate something, regarding which a settlement may be reached, shall be an enforceable title, provided that the obliged person consents to it being directly enforceable in the same or separate notarial deed, and if the claim is due.

The clause is usually stated in the following way: 'The debtor gives explicit consent to this notarial deed being a directly enforceable title according to Article 4 of the Notariat Act and Article 20a of Claim Enforcement and Security Act.'

Example from Contract of sale: 'I, A.A., as debtor, expressly state that I agree with direct enforceability of this notarial deed, especially in so far as it relates to the payment of the purchase price in amount of XX, with due date DD.MM.YY. as stated in this notarial deed, together with interests from due date until payment and together with cost of enforced recovery, thereby acquiring this notarial deed power of directly enforcement title.'

3.3 Consent

Yes. Additionally, it is the duty of the notary drawing up the notarial deed, to explain in an understandable manner, to all the parties involved, especially to the person who is liable (obligated to give, perform, waive or suffer something) what direct enforceability and his/hers commitment mean and what the provided consequences could be.

Consent for direct enforceability always relates to a certain obligation or part of that obligation. Consent does not indicate a statement of contracting will but it is a process disposition.

A notarial deed is not directly enforceable without the consent of the person liable. The direct enforceability is the consequence of wills of all involved parties, after the notary has assured that the notarial deed complies with the law. The deed is signed by all parties. With the consent of parties, especially the consent of the person liable, the notarial deed is endowed with the power of direct enforceability.

The principle of 'formal legality' in enforcement proceedings does not allow any changes of the claim and the claim has to be enforced as it is. The enforcement authority has no right to make any judgement on the enforcement title at the level of substantive law and content. Therefore, the claim must be specified from the both in personal (subjective) and objective dimensions. The subjective dimension is determined by a precise definition of parties/clients, and the objective view is determined by a precise definition of the legal protection, which the creditor wants to directly enforce. It is

necessary to precisely state every individual object and/or to enter the type and quantity of replacement objects, which have to be provided by the liable person, and/or to precisely describe the service, waiver or permission.

A clause drafted too broadly/generally contains the risk that the liable person could contest the scope of his/her statement and/or enforce an error of will (VSL order III Cp 2872/2005).

3.4 Structure

A notarial deed shall include:

1. the surname and name of the notary, an indication that he or she is acting as the notary and his or her registered office;

2. the surname and name, birth data and place of residence of the participants in the legal transaction, their authorised persons, testamentary witnesses and interpreters, and if a legal person is participating in the legal transaction, its name and registered office, and the name and surname of the representative or authorised person;

3. indication of the manner in which the identity of persons referred to in the preceding point has been ascertained;

4. content of the legal transaction, indication of authorisations or attachments;

5. indication that the notary has read the notarial deed to the participants and that the participants have approved the notarial deed;

6. date, time and place of the drawing up of the notarial deed;

7. signatures of persons indicated in points 1 and 2, and the seal and stamp of the notary who has drawn up the notarial deed.

Prior to drawing up a notarial deed, a notary shall be required to request the parties to present any documents which form part of the legal transaction or several legal transactions between the same parties that pursue the same business purpose as the legal transaction which is to be recorded in the notarial deed, or which have another legal association with it (associated legal transaction).

If parties present documents referred to in the preceding paragraph or if the notary determines in another manner that these are associated legal transactions, he or she shall caution the parties on the legal consequences of transactions associated in such manner.

Copies of documents referred to in paragraph two of this Article presented by the participants in the legal transaction or which are in the possession of the notary, shall be attached to the notarial deed.

If the notary determines that documents on the associated legal transaction exist and the participants decline to present these documents, the notary shall refuse to draw up the notarial deed.

If one or more notaries are to participate in the drawing up of a notarial deed, the deed shall also record the data referred to in point 1 of paragraph one of this Article on these notaries and their signatures.

If the notarial deed is later supplemented, revised or amended by way of another notarial deed, this must be recorded by an official note on the previous original notarial deed or, if this has been handed over, on the certified copy held in safekeeping by the notary.

3.5 Personal information

Prior to drafting a notarial deed, a notary shall confirm the identity of the clients and other parties concerned. The manner of confirming the identity of persons participating in drafting of the notarial deed must always be noted in the notarial deed.

In the notarial deed following personal information must be specified: name, surname, birth date, residence address of clients and their representatives, witnesses and interpreters, and in case a participant or a representative is a legal person its name, place of registration and name and surname of the representative.

The process of identifying parties can be done on the basis of identity documents (e.g. identity card, passport, drivers licence), personal acquaintanceship or with two witnesses who confirm the identity of the party.

3.6 Obligations contained in attachments

The notarial deed has to contain obligations within the text of the act.

3.7 Conditional claims

If the maturity of the claim does not depend on the expiry of a deadline but on another fact stated in the notarial deed, the notary shall advise the party that a creditor's written notification to the debtor that the claim has become due, with a statement of the date of maturity and evidence of the serving of the written notification of the maturity of the claim to the debtor shall suffice as evidence of maturity. The notary shall advise the party that instead of proof of service of the written notification on the maturity of the claim to the debtor, the creditor shall authorise the notary to notify the debtor of the maturity.

The notary must, when authorised by the creditor to notify the debtor of maturity referred to in the previous paragraph, notify maturity without delay and compose a minute of this, which shall suffice in calling in the claim for a note of this fact in the land register.

The written statement of the creditor or the notification of the notary referred to in the third paragraph of this article shall be served by registered mail.

MANUAL - Spain

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

Project EU-En4s — JUST-AG-2018/JUST-JCOO-AG-2018
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The content of this Manual represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contain.

Manual – Spain

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

Art. 208 of Ley de Enjuiciamiento Civil or Civil Procedural Law (hereinafter – LEC) establishes the content of the different kinds of judgments:

"1. The order proceedings and judicial decisions will just express what is sent by them and will also include a succinct motivation when the Law or whoever dictates them finds it convenient.

2. Judicial decrees and non-judicial decrees will always be motivated and will content in separated and numerated paragraphs the factual background and the findings of Law in which the subsequent ruling will be founded.

3. In case of sentences and judicial decrees, the Court that pronounces them must be indicated, with expression of the Judge or Magistrates that integrate it and their signature, and indication of the reporting judge, when the Court is collegiate. In case of decisions pronounced by courtrooms, it will be enough with the reporting judge's signature. The judgments issued by the Letrado de la Administración de Justicia or Justice Administration Attorney (hereinafter – LAJ) shall always indicate the name of the one who pronounced it, with extension of his signature.

4. Every judgment will include a mention of the place and date of pronouncing, and whether it is final or it can be appealed, mentioning, in this latter case, which appeal is appropriate, before which legal body it must be interposed, and the term to appeal."

In practice, every judgment is drafted with a header indicating the date, place, identifying number/s (number of procedure, of appeal, of judgment), the name of the Judge or the reporting Judge, and the name of the parties involved, and ends with what information regarding legal remedies on the case (*pie de recurso*), specifying if the judgment can be appealed or not, and which kind of appeal can be issued (as it is referred in art. 208.4 LEC and art. 248.4 of Ley Orgánica del Poder Judicial (Constitutional Law of the Judicial Branch, hereinafter - LOPJ), and the signature. So, considering art. 208 LEC (and art. 209 LEC in case of judgments), and the Court practice, we can find the following elements in each kind of judgment:

- Decisions: Header, legal instructions, footer of appeal, signature.
- Judicial decrees: Header, factual background, legal findings, ruling, remedies, signature.
- Sentences: Header, factual background, findings of Law, ruling, footer of appeal, signature.
- Proceedings: Header, legal instructions/facts, footer of appeal, signature.
- Non-judicial decrees: Header, factual background, findings of Law, ruling, footer of appeal, signature.

In every judgment, part of the heading is in a different lettering style (usually bold). The rest of the content is separated by headlines in judicial decrees, sentences, and non-judicial decrees, and has no specific separation in decisions and proceedings. Those headlines are not mandatory by Law, but in practice are always used. They are not numbered either, but the content inside each part is numbered.

1.2 Structural and substantive division/sequence of the Reasoning

The Reasoning is divided by *fundamentos (*foundations) that are necessarily numbered as provided by arts. 208 and 209 LEC, usually with capital letters followed by a point and a dash, as the following example:

- PRIMERO.- ... (First)
- SEGUNDO.- ... (Second)
- TERCERO.- ... (Third)

This division is not necessarily by paragraphs. That means, a *fundamento* can be composed by one paragraph or more. There is no universal meaning of the numbers, but the sequence usually coincides with the order of the issues raised in the claim and the counterclaim, unless the Judge finds more useful to study the case in a different order.

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": *Encabezado*
"the operating part": *Fallo / Parte. Operativa*
"the reasoning of the judgement": *Razonamiento de la Sentencia*
"legal instruction": *Instrucción jurídica*

1.4 Short description of the elements of the judgement

Short description of the elements of the judgment is discussed in detail in Section 1.1 Headlines that form part of the judgement.

1.5 Graphical separation of the elements of the judgement

In every judgment, part of the heading is in a different lettering style (usually bold). The rest of the content is separated by headlines in judicial decrees, sentences, and non-judicial decrees, and has no specific separation in decisions and proceedings.

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

The judgment does not include any of those time-periods. Spanish Civil Procedural Law specifies, however, the time-period within which the judgment is not to be enforced, that is set by Law with a delay of twenty days since the judgment becomes final (art. 548 LEC). It is important to emphasise that, in Spanish legal order (Civil), a judgment can be judicially enforced only by request of the interested party, through a new procedure initiated by a petition for execution (except from actions for evictions, which can be included in the first claim and executed without further procedures).

Regarding the time-period after which the judgment is no longer enforceable, Art. 518 LEC establishes that "the enforcement action based on a sentence, a Court judgment or a LAJ judgment that approves a judicial transaction, or an agreement achieved during the procedure, arbitration award or mediation agreement, will expire if the pertinent petition for execution is not lodged within the first five years after the judgment or sentence became final."

1.7 Identification of Parties

It is mandatory to specify just the name and surnames of the parties, and, whenever it is necessary, it shall also include the legitimation and representation by virtue of which they act, either as legal representative of a natural person or an entity or company.

1.8 Indication of the amount in dispute

The amount is specified in the factual background (referring to the amount that the claimant requests in his lawsuit) and in the operative part (referring to the amount that the Court finds actually due).

When it is not known or partially known, the Judge must establish in the operative part the specific arithmetic rules that will be used to quantify it.

1.9 Indication of the underlying legal relationship

The underlying legal relationship is fundamental to provide the enforcement title, but the once obtained the title is independent and enforceable. Court interpretation and decision-making will be always determined by the cause of the judgment and the facts of the case.

1.10 Information contained in the operative part

The operative part of a sentence must include the pronouncements about the claims of the parties and the distribution of the costs and expenses of the procedure, although the granting (or not) of some of those claims may be deduced because of the findings of Law and may not be necessary developed. It must rule about the litigious issues between the parties, without exceeding those limits.

1.11 Existence of a threat of enforcement

The operative part may contain a threat of enforcement under certain conditions. For instance, Art. 1128 Código Civil or Civil law (hereinafter – CC) establishes that any obligation without a deadline may be fixed by the Court and therefore the enforcement can be related to its compliance.

1.12 Final specification of debt

The Court must specify its decision about the claims of the parties, including, if it is the case, the debtor's obligation. If the obligation is the payment of an amount of money or goods, art. 219 LEC establishes that, when a determined amount of money is claimed in a trial, the Court must indicate, if it issues a conviction sentence, the exact quantification of the due amount or the arithmetic rules that will be used to quantify during the enforcement of the judgment. It is not possible to leave the quantification (nor the specific obligation) to further procedures.

1.13 Partial rejection of a claim

There is no significant change in the drafting of the operative part in the case of rejection of a claim. In the case of whole dismissal, the Court says that they dismiss the claim ('*desestimamos el recurso/la demanda*'). In the case of partial dismissal of a claim, the Court writes in the sentence that they 'partially admit' the claims of the claimant, specifying which part of the claim is granted and which is dismissed. In Spanish, the phrase used for this purpose is '*estimamos parcialmente...*'. As an example, see STS 228/2011 of 3 January.

1.14 Set-off of a claim

Any invocation from the parties entitle to certain rights or compensation has to be addressed at the judgment.

1.15 References to the Reasoning found within the operative part

Usually, the operative part does not contain elements from or references to the reasoning of the judgment.

1.16 Wording used to mandate performance

In Spanish legal system, when the claims of the claimant are granted, the sentence says that the debtor is 'condemned' to do something (in Spanish, *'debo/debemos condenar a ...'*). This expression means that the Court recognises the obligation of the debtor to do (or stop doing) what the claimant requested, and it does not need another judgment to make it enforceable (it becomes enforceable the twenty days after it becomes final, as it was discussed in the Section 1.6 Specification of time-period in which the judgement must be performed, although it does need a further procedure to actually enforce the decision.

1.17 Reciprocal claims

In case of reciprocal relationships, where the counter performance is prescribed as a condition for the performance of the other party, the Judge considering the claims of the parties as in any other case.

1.18 Indication of interest (rates)

In the sentence, the Spanish Courts apply the following phrase: 'We must condemn the defendant to the payment of the amount of X EUR plus the legal interest of the money since the day [date]'. As an example, see SJPI 201/2019 of 30 December. The legal disposition is in art. 576.1 LEC, that provides the following redaction:

> "Since the sentence is issued in First Instance, every sentence or decision that condemns to the payment of an amount of liquid money will determine, in favour of the creditor, the accrual of an annual interest equal to the legal interest of the money incremented by two points or what it corresponds because of a pact between the parties or special disposition of Law."

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

Judgements must be exhaustive, clear, precise and congruent (referred to all the claims made by the parties and only to those claims), and the ruling must be motivated, as it is said in arts. 216 and 218 LEC. There is an instrument provided by art. 214 LEC that allows the Courts to clarify or correct a ruling. They cannot change the ruling, but they may clarify any obscure concept (within the two days after the publication of the decision) and rectify any material or arithmetic error (at any moment). This can be done *ex officio.* If the Court manifestly omits a ruling about any of the pretensions of the parties, they may ask, within the five days following the issuing of the judgement. In any case, judgements may be appealed.

1.20 Legal effects of the Reasoning of the judgement

The ruling must be based on the reasoning, and, sometimes, it may decision about certain claims may be considered within the findings of Law and it is not necessary to address them in the operative part. Also, the findings of Law refer jurisprudence setting a precedent that might be used in further procedures. The argument of the Court to make a decision must be equal in every judgment of the same Court and can be standardised if it is considered by higher instances.

1.21 Obtaining the res judicata effect

A judgement becomes *res judicata* (in its material aspect) when it decides on the main merits of the case, and it becomes final. That means that, either there is no possibility of filing an appeal, or the

deadline for filing it has expired. The procedural decisions and those ruled during summary procedures may not have material *res judicata* effect.

1.22 Res judicata of negative declaratory relief

Art. 222.1 LEC provides that "*res judicata* of final judgements, either when the claim is granted or dismissed, will exclude, as provided by Law, any further procedure with the exact same merits than those of the procedure in which that was ruled". The doctrine confirms that this prevision is valid for every kind of final sentence, including declaratory sentences, regardless the direction of the ruling.

1.23 Suspensive periods barring the enforcement of a judgement

Spanish Civil Procedural Law specifies the time-period during which the judgment may not be enforced. That is set by Law in twenty (20) days after the judgment becomes final (art. 548 LEC). It is important to emphasise that, under the Spanish legal order (Civil), a judgment can be judicially enforced only by request of the interested party, through a new process initiated by a petition for execution (except from actions for evictions, which can be included in the first claim and executed without further procedures). Although, it is not necessary to demand the payment before initiating the enforcement procedure, since the final conviction judgement is enough to seek the voluntary fulfilling of the obligation. During the delay of twenty days period the judgment is not enforceable.

2. Court settlements

2.1 Elements of a court settlement

Regarding the formal scheme of the settlement, as a contract, it is governed by the principle of formal freedom, as it is specified in art. 1.258 CC. It can be orally performed in the act of the hearing or agreed and signed in an external document that is brought to the trial. However, apart from the formal scheme, there are certain material elements that conform the Court settlement, that are set by the Court practice. Those are the following three:

- The *res dubia* or disputed right that involves an uncertain legal relationship between the parties.
- The parties' intention to replace the doubtful relationship with a true and incontestable relationship.
- The reciprocal concessions of the interested parties, to resolve the controversy.

2.2 Formal requirements

There exists a principle of formal freedom for this agreement. However, for a Court settlement to be effective, there exist some prerequisites, that include, as formal requirements, the signature or oral manifestation (express or tacit, but free and definitive) made by the parties and a special power of the legal representatives.

2.3 Identification of Parties

The parties are identified with the Parties Identity cards and deeds of incorporation and appointment of legal representatives and/or powers of attorney.

3. Notarial deeds

3.1 Prerequisites for enforceability

A Public Notary Document constitutes an Executive Title as such (art. 517 LEC).

Since July 23, 2015, certain, fix and due debts may be required through the Notary Public.

3.2 Special clause

There are model deeds for Notaries as executive title for payment of debt. The structure and main content being:

1. Introductory information, description of the parties and the debt, providing evidence with invoices, contracts, etc.;
2. Confirmation that is not one of the matters excluded (consumers, ...);
3. Notary "jurisdiction" and domicile of the debtor;
4. Execution title and requiring the debtor to pay or to provide evidence and allegations.

3.3 Consent

The debtor receives the notarial deed, but consent is not necessary to enforce the executive title.

3.4 Structure

Although it is not provided by Law, common practice has set that any public instrument made by notaries should be divided in the following parts:

- First part: It is used to identify the formal facts of the public instrument. Those are the preliminary mentions, and include a summary of the instrument, the protocol number, the location where the instrument is made, the date, and the identification of the Notary.
- Second part: Its function is to identify the appearing parties, the grantors, the means by which the representation is justified if it is the case, the judgment of capacity and the qualification of the act or contract.
- The proper content of the business, which is usually divided in: a) a factual background, where the facts are exposed and the object is identified, and b) the contract with all of its clauses.
- Some final mentions, that are usually divided in: a) granting, b) reservations and legal warnings, c) faith of knowledge, and d) giving of faith and authorization.

Nevertheless, that is the structure that is usually used, but it is not an imposition and it can change depending on the Notary and on the concrete act.

3.5 Personal information

Art. 156 of the Decree of the organisation and regime of the Notary collective (hereinafter – RN) requires that, for the correct identification of the parties, the document must designate their names and surnames, age, marital status, domicile, and the number of the DNI (*Documento Nacional de Identidad*, that is, national identity document). That article excepts the case of public officials involved in the exercise of their positions, in which case it will suffice with the indication of this and their name and surnames. Art. 156 10th RN also stablishes that, if the Notary of the parties find it necessary, the profession or any other personal data should be included.

3.6 Obligations contained in attachments

Obligations, contained in a directly enforceable notary deed, must be included in the Act, either in the text or attached.

3.7 Conditional claims

Notary documents are enforceable and conditional claims may be accepted.

MANUAL – Sweden

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

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Contents

1. Judgement

1.1 Headlines that form part of the judgement

Chapter 17 Section 7 of the Code of Judicial Procedure (*rättegångsbalken*) reads:

A judgment shall be in writing and specify in separate sections:

1. the court, time, and place of pronouncement of the judgment;
2. the parties and their attorneys or counsel [*Parter* and *Ombud*];
3. the operative part [*Domslut*];
4. the parties' claims and defences [or motions and positions, *Yrkanden* and *Inställning*], and the circumstances on which they are founded [grounds, *Grunder*]; and
5. the reasoning in support of the judgment [*Domskäl*], including a statement of what has been proved in the case.

A judgment rendered by a superior court shall, to the extent necessary, describe the judgment of the lower court.

If a party is entitled to appeal from a judgment or apply for the reopening of a default judgment, the judgment shall state the steps he must take to do so. [*Överklagandehänvisning*]

What is mandatory is the contents, not the specific headlines or their respective order. Nevertheless, the headlines found in most judgments are the ones indicated in brackets above, presented in the same order. Sections 1–3 are almost always found in the front/first page(s) of the judgment. At least in more complex cases the judgment often also includes the headline Background (*Bakgrund*) following the operative part and the headline Investigation/Evidence (*Utredning*). Additional subtitles adapted to the specific case are often used. The headlines or subtitles are usually not numbered.

1.2 Structural and substantive division/sequence of the Reasoning

The text in the Reasoning of the first instance judgment usually follows a standard sequence. The text of the Reasoning is usually structured in (sub)paragraphs, which are not marked in any specific way. Apart from the general structure of the judgment, the Reasoning of the judgment is sometimes subdivided with the inclusion of headlines. In order to provide clarity and structure to the Reasoning, the court often choose to address specific issues separately.

1.3 Textual identification of the elements comprising the judgement

"the introduction of the judgement": Bakgrund
"the operating part": Domslut
"the reasoning of the judgement": Domskäl
"legal instruction": Överklagandehänvisning

1.4 Short description of the elements of the judgement

Chapter 17 Section 7 of the Code of Judicial Procedure (hereinafter - RB) reads: A judgment shall be in writing and specify in separate sections:

1. the court, time, and place of pronouncement of the judgment;

2. the parties and their attorneys or counsel;
3. the operative part [*domslutet*];
4. the parties' claims and defences, and the circumstances on which they are founded; and
5. the reasoning in support of the judgment [*domskälen*], including a statement of what has been proved in the case.

A judgment rendered by a superior court shall, to the extent necessary, describe the judgment of the lower court.

If a party is entitled to appeal from a judgment or apply for the reopening of a default judgment, the judgment shall state the steps he must take to do so.

According to Chapter 17 Section 10 of the Code of Judicial Procedure (RB) every judgment shall be separately drawn up and signed by each of the legally qualified judges participating in the adjudication.

1.5 Graphical separation of the elements of the judgement

The different elements of the judgment are separated from one another with headlines. After the conclusion there is often a horizontal line.

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

The judgment does not include a specification of the time-period within which the obligation in the operative part is to be (voluntarily) fulfilled by the defendant. Nor does it contain a specification of the time-period within which the judgment is not to be enforced, or a specification of the time-period after which the judgment is no longer enforceable.

The judgment creditor applies to the Enforcement Authority (*Kronofogdemyndigheten*) for enforcement. Chapter 4 Section 11 first paragraph of the Enforcement Code (UB) reads:

> Before attachment takes place, notification of the case shall be sent to the debtor by post or given in an appropriate manner. The notification shall take place within such time as the debtor can be expected to have sufficient time to protect his rights.

Accordingly, the Enforcement Authority notifies the judgment debtor, usually by mail, that enforcement measures will take place if the judgment debtor does not pay the debt voluntarily within a certain time. In the average case, the debtor has a fortnight to abide by the instructions in the notification. During this time period it is very common that the judgment debtor invokes the national grounds in Chapter 3 Section 21 of the Enforcement Code (hereinafter - UB), trying to stop enforcement, in particular that the claim underlying the judgment is time-barred. Statute of limitation is regulated in the Swedish Act of Statute of Limitation (1981:130, Preskriptionslagen), and the time starts to run from the time when a claim is created. Time limits are 3 or 10 years.

1.7 Identification of Parties

There are no provisions on what personal information to be specified in the judgment for the purposes of identifying the parties to the dispute, cf. Chapter 17 Section 7 first paragraph Point 2 of the Code of Judicial Procedure (it was previously discussed in the section 1.4 Short description of the elements of the judgement). When there is no confidentiality regarding any personal data, it is a question of suitability which data should be stated in the judgment. In court practice the names, personal identity numbers/company registration numbers, and addresses are usually included. When published by the courts or the by the Swedish National Courts Administration (*Domstolsverket*) the names in the

judgments are anonymised by replacing the names by their initials. However, the judgments with the names are accessible according to the strong Swedish principle of public access to official documents.

1.8 Indication of the amount in dispute

The parties' claims and defences, and the circumstances on which they are founded shall be specified in a separate section of the judgment according to Chapter 17 Section 7 first paragraph 4 of the Code of Judicial Procedure (as it was previously discussed in the section 1.4 Short description of the elements of the judgement). This includes the amount in dispute and the specific tranches, etc. In cases where amendments to claims have occurred during proceedings the final claim is stated, sometimes with an indication like 'as finally determined'.

1.9 Indication of the underlying legal relationship

The reasoning in support of the judgment, including a statement of what has been proved in the case shall be specified in a separate section of the judgment according to Chapter 17 Section 7 first paragraph Point 5 of the Code of Judicial Procedure (as it was previously discussed in the section 1.4 Short description of the elements of the judgement). If relevant, this might include indications of the underlying legal relationship (legal assessment of the dispute).

1.10 Information contained in the operative part

The operative part [*domslutet*] shall communicate the explicit position of the court on every claim of the parties. There are no regulations on the specific formulations to be used.

The formulation of the operative part of a favourable judgment depends on the formulation used by the claimant. The court is supposed to consider the suitability of that formulation already before issuing a writ of summons.

If the claim is for a specific performance, that performance shall be clearly stated in the operative part, in order to make performance or enforcement possible "N N [the defendant] shall [or: is obliged to etc.] pay the sum of 50,000 SEK to N N [the claimant]" etc. If there are any reciprocal obligations, they shall also be clearly stated.

If the claim is for a declaratory judgment, this nature of the judgment shall be evident through the wording of the operative part ("the court declares that..." etc.).

Usually, no legal provisions are mentioned in the operative part, with one common exception, "interest under [a certain section of] the Interest Act (1975:635)", cf. Section 1.18 Indication of interest (rates).

1.11 Existence of a threat of enforcement

The operative part usually does not contain a legal instruction referring to the possibility of enforcement proceedings if the debtor does not voluntarily perform the obligations imposed by the judgment. A common exception is the threat of eviction from the property at the expense of the defendant if the defendant does not leave the property according to the judgment.

1.12 Final specification of debt

In most cases the specification of the debtor's obligation is finalized by the court and not left to later procedures/authorities.

1.13 Partial rejection of a claim

When an action [*käromål*] is dismissed on the merits the claim is, according to court practice, not specified in the operative part of the judgment, but that part only states "The action is dismissed [*Talan ogillas*]" or a similar wording.

It is not always clear from the operative part that a claim is only partially sustained (or that an alternative claim is dismissed). In order to know, the recital of the judgment – which includes the parties' claims and defences, and the circumstances on which they are founded – has to be considered. The same goes for deciding the extension of *res judicata.*

1.14 Set-off of a claim

If the debtor invokes set-off, the operative part might be drafted in different ways. There is no legal requirement that the operative part has to specify how the claim and counter-claim are extinguished and to what extent. In order to know, the recital of the judgment – which includes the parties' claims and defences, and the circumstances on which they are founded – might have to be considered.

At least in a case where there are several different claims and counter-claims and not all counter-claims are sustained a specification might found in the operative part. An example (based on a judgment from the District Court of Gothenburg (Göteborg) 7 May 2013 in case no. T 18130- 11), where the operative part in principle stated:

1. [The claimant] shall [*ska*] pay [an amount] to [the defendant] and interest from different times under the Interest Act (1975:635), Section 6, running from different dates regarding different tranches of the full amount until the date of payment.
2. [The defendant] has the right to deduct [an amount] from the claim according to 1.
3. The counterclaims of [one amount] and [another amount] are dismissed.

1.15 References to the Reasoning found within the operative part

The operative part usually does not contain elements from or references to the reasoning of the judgment (grounds for the decision/legal assessment), but it may, for the sake of clarity.

1.16 Wording used to mandate performance

Different formulations are used, e.g. that the debtor shall pay a certain amount to the claimant. The debtor is not always specifically "ordered" to perform by the wording of the operative part, when 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.

1.17 Reciprocal claims

The operative part states that the Claimant against e.g. payment of a certain, specified amount (etc.) shall obtain e.g. a certain, specified object. Cf. Section 1.14 Set-off of a claim.

1.18 Indication of interest (rates)

According to Chapter 18 Section 8 second paragraph of the Code of Judicial Procedure (RB), compensation for litigation costs shall include interest under the Interest Act (1975:635), Section 6, running from the date of the court's determination until the date of payment. No pleadings are needed

to this end. According to Section Chapter 18 Section 14 of the Code of Judicial Procedure (RB), the winning party is entitled to that interest, despite the absence of a demand.

Despite the fact that this provision on interest has been placed in the Code of Judicial Procedure (RB), it is qualified as a substantive matter under Swedish law. If a foreign law is applicable to the disputed relationship, the interest must be determined in accordance with the applicable foreign law, and not by Swedish law. Nevertheless, Swedish courts, by oversight, sometimes determine the interest by Swedish law.

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

According to Chapter 59 Section 1 Point 3 of the Code of Judicial Procedure (RB), a judgment that has entered into final force shall be set aside for grave procedural errors, on extraordinary appeal of a person whose legal rights the judgment concerns, if the judgment (as a whole) is so vague or incomplete that the court's adjudication on the merits cannot be ascertained therefrom. This also presents a ground for appeal of a judgment that has not yet entered into final force, Chapter 49 Section 14 Point 4 and Chapter 50 Section 26 of the Code of Judicial Procedure (RB). According to Chapter 5 Section 2 § first paragraph of the regulation on enforcement [*utsökningsförordningen*, 1981:981], the Enforcement Authority shall refer the applicant to make an extraordinary appeal as mentioned supra.

1.20 Legal effects of the Reasoning of the judgement

In principle, no legal effects are attributable to the reasoning as such. Sometimes the reasoning has to be consulted to understand the scope of *res judicata* and other effects of the finality of the judgment.

1.21 Obtaining the res judicata effect

A judgment meets the criteria for becoming *res judicata* upon the expiration of the time for appeal. See Chapter 17 Section 11 of the Code of Judicial Procedure (RB), which reads:

> Upon the expiration of the time for appeal, a judgment acquires legal force to the extent that it determines the matter at issue in respect of which the action was instituted.
>
> A judgment also has legal force to the extent that it adjudicates a debt claimed as a set-off. A question thus determined may not be adjudicated again.
>
> There are specific provisions applicable to extraordinary remedies.

1.22 Res judicata of negative declaratory relief

The judgment dismissing a negative declaratory action is not enforceable. If the court dismisses a claim for a negative declaration, the judgment is not considered as a finding of positive opposite at the same moment. In this case, the defendant has to initiate independent action.

1.23 Suspensive periods barring the enforcement of a judgement

The judgment creditor applies to the Enforcement Authority for enforcement. The Enforcement Authority notifies the judgment debtor according to Chapter 4 Section 12 of the Enforcement Code (UB), usually by mail, that enforcement measures will take place if the judgment debtor does not pay the debt voluntarily within a certain time. In the average case, the debtor has a fortnight to abide by the instructions in the notification.

2. Court settlements

2.1 Elements of a court settlement

The forms or elements for the court's settlement activities are pretty much left to the judge while still keeping his or her impartiality, when it has been determined that it is appropriate to raise the settlement issue.

2.2 Formal requirements

The court shall assist the parties in drawing a written agreement, if need be. Usually, it is sufficient that the parties orally tell the content of the agreement to the court, and that the agreement is noted in the record. The agreement is then read aloud to the parties. The court cannot change the agreement when the record is printed, even if the agreement is unclear and could gain from rephrasing. The record does not state anything on the merits. Instead it is noted: "After reviewing the case the parties agree to the following settlement." *("Efter genomgång av målet träffar parterna följande förlikning.")*

The contents of a settlement agreement should as a principle be short. In the average case it is sufficient to state the amount and the day of payment, and that the parties agreement regulates the parties' dealings fully or in partially. If there are ambiguities or incompleteness in a settlement which might lead to problems in enforcement problems, the court should try to remedy this through questions and comments.

After the settlement, the case is closed either by dismissal or by confirmation in a judgment. Chapter 17 Section 10 of the Code of Judicial Procedure (RB) reads:

> If the parties agree on a settlement of the dispute, the court, upon request of both parties, shall enter a judgment confirming the settlement.

2.3 Identification of Parties

If the settlement is confirmed by the court, the parties are named and identified in the confirming judgment (Identification of the parties in the judgment was previously discussed in the section 1.4 Short description of the elements of the judgement).

3. Notarial deeds

There are no notarial acts or other authentic instruments under the Swedish legal order, which are considered enforcement titles. In a comparative study covering Sweden it has rightly been stated that 'it does not seem justified to state that the Swedish legal systems builds *[sic!]* upon a concept that is at least comparable to that of the authentic instrument under civil law.'

In the same study it was, also rightly, stated: 'In fact, for Sweden, the study found that there does not even exist a legal term that would serve to adequately translate the notion of the authentic instrument into the Swedish language without running the risk of provoking far-reaching incoherence within the Swedish legal system.'