MANUAL - GERMANY

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)

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 4

1.1 Headlines that form part of the judgement 4

1.2 Structural and substantive division/sequence of the Reasoning 4

1.3 Textual identification of the elements comprising the judgement 5

1.4 Short description of the elements of the judgement 5

1.5 Graphical separation of the elements of the judgement 6

1.6 Specification of time-period in which the judgement must be performed 6

1.7 Identification of Parties 6

1.8 Indication of the amount in dispute 7

1.9 Indication of the underlying legal relationship 8

1.10 Information contained in the operative part 8

1.11 Existence of a threat of enforcement 8

1.12 Final specification of debt 8

1.13 Partial rejection of a claim 8

1.14 Set-off of a claim 9

1.15 References to the Reasoning found within the operative part 9

1.16 Wording used to mandate performance 9

1.17 Reciprocal claims 10

1.18 Indication of interest (rates) 10

1.19 Legal ramification for incomplete, undetermined, incomprehensible or inconsistent operative part 10

1.20 Legal effects of the Reasoning of the judgement 11

1.21 Obtaining the res judicata effect 11

1.22 Res judicata of negative declaratory relief 12

1.23 Suspensive periods barring the enforcement of a judgement 12

2. Court settlements 13

2.1 Elements of a court settlement 13

2.2 Formal requirements 14

2.3 Identification of Parties 14

3. Notarial deeds 14

3.1 Prerequisites for enforceability 14

3.2 Special clause 14

3.3 Consent 15

3.4 Structure 15

3.5 Personal information 15

3.6 Obligations contained in attachments 16

3.7 Conditional claims 16

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.