

# DABELSTEIN & PASSEHL

Rechtsanwälte  Hamburg · Leer





DABELSTEIN & PASSEHL

Rechtsanwälte  Hamburg · Leer

# RECOGNITION AND ENFORCEMENT OF FOREIGN ORDERS AND JUDGMENTS IN GERMANY

LONDON SEMINAR

27 September 2012 at Gibsons Hall

*Dr. Thomas Brüggemann, Dabelstein & Passehl (Hamburg, Leer)*





# Introduction

- General Principles (I.)
- How to enforce non-European judgments (II.)
- How to enforce a European judgment (III.)
- Recognition and enforcement of Insolvency Proceedings (IV.)





## I. General Principles

- Basic requirements to enforce a foreign judgment:
  - Recognition
  - Enforceability
- Judgements need to be rendered enforceable by a German Enforcement judgment – no direct enforcement
- German Courts do not re-examine the merits of a foreign judgment







## II. HOW TO ENFORCE NON-EUROPEAN JUDGMENTS

**Recognition and Enforcement of third-country judgments  
according to German Law**





## Recognition

- Multilateral international conventions: Lugano 1988/2007
- Bilateral international treaties (e.g. with Tunisia, Norway and Israel)
- Otherwise: **sect. 328** German code of civil procedure (ZPO)
- Reasons to deny recognition will be examined ex officio. The burden of proof lies with the party seeking recognition
- Judgment has to be final and binding
- No re-examination of the merits of the judgment





## Recognition (2)

- “Judgment” => any final decision of a civil court. Does not include:
  - Judgment subject to a condition
  - Arrests
  - judgments confirming an arbitral award
  - No enforcement of foreign enforcement judgments
- Interim injunctions and interlocutory decisions are usually not recognized as they are not final and typically do not provide for hearing of the defendant
- Generally, differences of foreign jurisdictions are accepted in Germany (e.g. pre-trial discovery, success fees for lawyers, class action)
- The following may not be recognized (acc. to German High Court):
  - Punitive damages
  - Inappropriate damage for pain and suffering (ordre public)
- Partial recognition of a judgment is possible





## Grounds for refusal, sect. 328 ZPO

- Lack of jurisdiction according to German private international law (“mirror principle”)
- Claim submissions were not duly served on defendant and defendant did not participate in the proceedings
- Judgment is contrary to:
  - German judgment or
  - earlier (recognized) foreign judgment or
  - with proceedings in Germany pending longer than the foreign proceedings
- Lack of reciprocity
- Judgment is contrary to public policy (ordre public)







## Enforcement

- German Enforcement Judgment (Exequatur) required
- Procedure is regulated in sect. 722 and sect. 723 of German Code for Civil Procedure. Note: Provisions do not apply to arbitral awards
- Procedure:
  - Filing of a legal claim before the court where the debtor is seated or where he has assets
  - Submit certified copy of foreign judgment (no certification of a notary required)
  - Provide evidence that foreign judgment is final and binding
  - Procedural rules for standard civil cases apply
- Consequences of the enforcement judgment:
  - Foreign judgment is in all aspects considered as equal to national judgment.
  - Enforcement measures can commence once the exequatur-judgment is final and binding.





## Time and costs

- As the procedural rules for standard civil matters apply, the court procedure can take several months; in case of an appeal against the judgment even a few years
- Cost: Based on the German legal provisions for court fees and lawyer's fees
- Example of a claim in the amount of 100,000:
  - Court fees: EUR 200 plus expenses (first instance)
  - Lawyer's fees: EUR 812 plus VAT (unless otherwise agreed)





## III. Enforcing European Judgments

- Regulation 44/2001 (Brussels Regulation)
- Regarding enforcement of European judgments, the respective national law of the member states is superseded by the Brussels Regulation
- every judicial decision in commercial and civil matters issued by a member state court will be treated equally and is automatically recognized
- No differentiation between judgments and orders
- Judicial decisions in the sense of Art. 33 include decisions regarding the respective costs of the proceedings





## Enforcement Procedure

- Art. 38, 39, 41, 53 BR: Application for declaration of enforceability with an „original“ copy of the judgment and a certificate of the court of origin according to Annex V
- Immediate declaration of enforceability (Art. 41), but no measures of enforcement yet other than protective measures (Art. 47 par. 3)
- Defendant may challenge the enforcement decision within one month after it was issued (Art. 43)
- Limited grounds for appeal: Art. 34, 35 BR





## Grounds for appeal

- if manifestly contrary to public policy
- if claim submission was not duly served and defendant did not participate in proceedings – unless defendant failed to challenge the judgment in time
- if contrary to judgment of the State of execution between the same parties
- if contrary to earlier judgment from abroad (EU or other) between the same parties (if recognizable in State of execution)
- in certain (limited) cases where the foreign court violated specific rules of the Brussels Regulation (insurance, consumers, exclusive jurisdiction)







## IV. Recognition and enforcement of Insolvency Proceedings-Non EU proceedings

- Sect. 343 German Insolvency Code (InsO) => principle of universality; initiation of foreign insolvency, protective- and associated measures (e.g. notice of distringas) are recognized
- court decision initiating insolvency proceedings required
- Grounds for denial: court has no jurisdiction, recognition would violate fundamental principles of German law
- No reciprocity required





## IV. Recognition and enforcement of Insolvency Proceedings- EU Proceedings

- EU Regulation on insolvency proceedings
- Automatic recognition of EU court orders initiating, conducting or terminating insolvency proceedings (including the insolvency register)
- Only reason to deny recognition: ordre public
- No “mirror principle” required > jurisdiction not examined
- Enforcement according to Brussels Regulation
- Regulation not applicable to insolvency proceedings of banks, insurance companies, financial service providers





## Consequences of recognition

- Legal consequences of foreign decision will apply domestically
- power of disposition conveyed to foreign insolvency administrator
- Foreign insolvency administrator can file for public announcement of the foreign insolvency proceedings, sect. 345 InsO
- Insolvency administrator has to observe domestic law when executing his power of disposition
- individual enforcement no longer admissible
- domestic civil law suits are interrupted, sect. 352 InsO





## IV. Secondary Insolvency proceedings

- Foreign insolvency does not render secondary domestic insolvency proceedings inadmissible
- Secondary proceedings possible when the debtor has assets in Germany, sect. 356 et seq. InsO
- Liquidator in foreign main proceedings can invoke rights to information and involvement, sect. 358 InsO
- Surplus from secondary proceedings has to be released to main proceedings, sect. 357 InsO





**DABELSTEIN & PASSEHL**

Rechtsanwälte  Hamburg · Leer

**THANK YOU!**

