

# Recognition and Enforcement of Australian Judgments in Germany

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## 1. Introduction

If you have taken proceedings in Australia against a German company or a person in Germany and obtained a judgment, or if a judgment debtor has assets in Germany, the question arises whether the judgment can be enforced against the debtor in Germany. This article provides an overview of the recognition and enforcement of Australian judgments in Germany.

## 2. Recognition of Australian Judgments

### 2.1. Methods of Recognition

In Germany, a foreign judgment may be recognised in any of the following three ways:

- 2.1.1. by a Statement of Enforcement (Vollstreckbarkeitserklärung) issued on the foreign judgment by a German court. This can only be issued if a relevant international treaty or convention between the countries concerned is in place. Unfortunately, no such treaty or convention in respect of civil matters exists between Germany and Australia;
- 2.1.2. by an enforcement “clause” or order (Vollstreckungsklausel) issued by a German court. This is only possible for matters which fall under the ambit of the German Recognition and Enforcement Act (Anerkennungs- und Vollstreckungsgesetz = AVAG). Again unfortunately, judgments by Australian courts do not fall under this Act; or
- 2.1.3. by an enforcement judgment (Vollstreckungsurteil) issued by a German court (sections 328, 722 and 723 of the Civil Procedure Code) (Zivilprozessordnung = ZPO). This procedure may be used for Australian judgments.

### 2.2. Civil Procedure Code

The relevant provisions for recognition and enforcement of foreign judgments in Germany generally are set out in sections 328, 722 and 723 of the Civil Procedure Code (the Code).

The first step in the procedure under the Code is to lodge an application at the local court or district court which has jurisdiction in the area where the debtor has his, her or its abode or place of business. It is advisable to lodge the application in the German language. A copy of the judgment must be attached to the application. The application

must satisfy the principle of certainty (Bestimmtheitsgrundsatz), i.e. the relevant court, date, court file number and enforceable content of the foreign judgment, must be clearly identified in the application. Enforcement can also be limited to a specific part of the judgment.

Once an application which fulfils all the formal requirements has been lodged, the sole matter for the court's consideration is the admissibility of the enforcement of the foreign judgment in Germany. The question whether the foreign judgment should be recognised or not is then examined by the judge making the decision in the case.

#### 2.2.1. Judgment

Pursuant to section 328 of the Code, "judgments of a foreign court" are capable of being recognised. The term "judgment" is defined as judgments made in proceedings where all parties were given a right to be heard. Court orders and default judgments are therefore also capable of being recognised. However, interim orders or consent orders cannot be recognised. The reasoning for this is that, in the case of interim or consent orders, the court has not made a final decision in the matter.

#### 2.2.2. Decision must be legally binding

A further requirement for the recognition of a foreign judgment is that it must be legally binding. A judgment is legally binding if no legal remedy is available for the parties against the judgment.

#### 2.2.3. Civil or commercial matter

The foreign judgment must concern a civil matter or a commercial matter. Other regulations apply to the enforcement of judgments in criminal or administrative matters.

#### 2.2.4. Grounds for Exclusion

In order for a foreign judgment to be recognised, there must be no grounds for exclusion of the foreign judgment under German law. The possible grounds for exclusion are set out in section 328 of the Code. Under section 328, sub-section 1 paragraph 1, of the Code, the foreign court issuing the judgment must not lack jurisdiction in its own country under German law. The test whether the court in Australia could have lacked jurisdiction is whether the Australian court would have had jurisdiction in the matter under German law. The purpose of this provision is to enforce the exclusive jurisdictions of certain courts in Germany.

If the debtor was not correctly served with documents when the proceedings were commenced (originating process) or was not served within a reasonable time, with the result that the debtor was unable to provide an adequate defence, then the foreign judgment cannot be recognised (Section 328 subsection 1 paragraph 2 of the Code). This exclusion aims at securing the constitutionally entrenched right to a fair trial (article 103, paragraph 1 of the

German Constitution) (GG = Grundgesetz). The definition of “reasonable time” is determined on a case-by-case basis.

Two questions arise in regard to this exclusion from recognition. Firstly, when does incorrect service of documents result in the judgment being excluded from recognition? This question has given rise to some controversy but it appears that German courts tend to adopt a position favourable to recognition in determining the issue. Therefore this ground for exclusion would not apply if the situation can be remedied under Australian or German law.

Secondly, what consequences would arise if the debtor was not correctly served in Australia but failed to raise this issue as a defence or answer to the proceedings in the Australian court? This question generally remains unanswered under German law. However, the German High Court (Bundesgerichtshof) has excluded a foreign judgment from recognition pursuant to section 328, sub-section 1, paragraph 2 of the Code in these circumstances.

With regard to seeking exclusion of a judgment on the grounds of failure to properly serve the originating process, the debtor cannot rely on this exception if he or she has entered an appearance in the proceedings in the foreign court despite incorrect service.

Section 328, sub-section 1, paragraph 3 of the Code also excludes an Australian judgment from recognition if the judgement is inconsistent with a previous German judgment or a foreign judgment still to be recognised. In order for the judgment to be recognised, the matter can also not previously have been decided, even in Germany. The important issue in this regard is whether the legal effect of the opposing German or foreign judgment would be inconsistent with the judgment for which recognition is sought.

The most common basis for the exclusion of recognition of an Australian judgment is the argument that the judgment breaches the German “ordre public” (section 328, sub-section 1, paragraph 4 of the Code). There are still no set rules to govern which foreign judgments are incompatible with the German ordre public. However, the following guidelines exist:

- the ordre public law, which is very similar to Article 6 of the Introductory Act to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch = EGBGB) which carries the heading “public order”, applies to breaches of substantive as well as procedural law; and
- there are very few cases where a breach of the ordre public has been found to exist.

The final requirement for the recognition of an Australian judgment is the “principle of reciprocity” set out in section 328, sub-section 1, paragraph 5 of the Code. This section provides that the recognition of foreign judgements is subject to an act which is governed by the sovereign equality of countries.

The principle of reciprocity is, however, itself limited by section 328, subsection 1, paragraph 5 of the Code which explicitly provides that the principle of reciprocity does not apply to disputes which do not concern claims of a monetary value or to custody or marriage disputes.

The principle of reciprocity only requires that the recognition and enforcement of a German judgment in Australia is not significantly more difficult than the recognition and enforcement of a foreign judgment in Germany. This means that similar requirements for the enforcement of foreign judgments apply in both countries.

### 2.3. Debtor's Legal Remedies

If the enforcement of the foreign judgment is admissible, the court will make orders accordingly. However, before enforcement of the recognised judgment can be commenced in Germany, the judgment of the German court must be served on the debtor. The debtor then has one month from the date of service to lodge an appeal with the Court of Appeal having jurisdiction in the matter.

### 2.4. Section 767 of the Civil Procedure Code

Pursuant to sections 722 and 723 of the Code, German courts do not consider whether the foreign judgment is substantively correct. If a debtor wishes to challenge the claim set out in the judgment, he or she must commence separate proceedings in the court of first instance which would have jurisdiction in the matter decided by the foreign court. The objections would only be admissible if they are based on reasons that arose after the conclusion of the last oral hearing in the matter, and cannot be made directly against the judgment by way of legal remedy.

## **3. Enforcement**

After the Australian judgment has been recognised in Germany, the creditor may then seek to enforce the judgment. Below is a brief overview of the enforcement procedure for a judgment for a money claim.

A judgment for a money claim may be enforced on a debtor's movable and immovable assets.

### 3.1. Enforcement on movable assets

Enforcement on a debtor's movable assets is initiated by instructing the Germany equivalent of the sheriff of the court that has jurisdiction in the matter. The jurisdiction is determined by the debtor's abode or, if the debtor is a company, by the company's business address in Germany. The "sheriff" will then request the debtor to pay the money due. If the debtor does not pay then the "sheriff" is able to search the debtor's residence or, in the case of a company, place of business. If he finds seizable items which belong to the debtor, he could either take them with him or place an official seal on the items. Subsequently, the items are sold by auction. The proceeds of the auction will then, after deduction of costs, be paid to the creditor.

If the search of the debtor's residence or place of business is unsuccessful and the debtor is an individual, it would be possible to apply for an affidavit of means by the debtor. If the debtor is a company, the affidavit would be made by its director or directors.

In addition to the seizure of a debtor's moveable assets, it is also possible to apply to the court for orders allowing the judgment creditor to obtain the benefit of the debtor's claims against third parties and to garnishee monies due to the debtor, such as from an employer. If the debtor's wages are garnisheed, only an amount above what is needed by the debtor in order to meet living expenses, can be recovered.

### 3.2. Enforcement on immovable assets

It is also possible to enforce a judgment against the debtor's real property by applying to the local court which has jurisdiction in the matter, to order a sale by court order, forced administration or registration of a forced mortgage.

## **4. Conclusion**

It is apparent that the procedure for recognition of Australian judgments in Germany is very technical. In addition, the procedure may well be time-consuming and expensive, as it is generally necessary to instruct a lawyer in Germany to appear on the judgment creditors' behalf. The workload of German courts is very high and therefore the procedure may take several months.

Moreover, although there are various options to enforce a judgment in Germany, enforcement can only be successful if the debtor has sufficient assets or income to meet the debt. In these circumstances, it is advisable to make enquiries regarding the debtor's assets and income before proceedings to recognise and enforce an Australian judgment in Germany are commenced.

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