

## THE GERMAN ENFORCEABLE NOTARIAL ACT IN CROSS-BORDER CASES

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JENS BORMANN

German Federal Chamber of Notaries, Berlin, Germany  
bnotk@bnotk.de

CORRESPONDING AUTHOR

bnotk@bnotk.de

**Abstract** The subject of this article is to explain and discuss the legal framework for German enforceable notarial acts in cross-border traffic. The first part will illustrate the prerequisites for the enforcement of a notarial act in Germany, especially in circumstances when the creditor or debtor lives abroad. The second section is dedicated to the enforcement of German enforceable notarial acts abroad. After presenting the principles of international law, the main legislative acts regarding enforcement in the European and international framework will be analysed in detail.

**Keywords**enforcement,  
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clause,  
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enforcement certificate,  
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enforcement,  
executur procedure

## 1 Introduction

The principles of European integration have resulted in more and more private law contracts being concluded between contractual parties from different Member States. The so-called Rome I Regulation<sup>1</sup> offers the contractual parties a harmonised legal framework for this purpose. The Rome I Regulation also determines the applicable law to be used for the respective contract.

However, not all contracts are implemented as originally intended by the contractual parties. Occasionally, the creditor must enforce a debt against the debtor. It is important for the creditor and for the functioning of the internal market that they can enforce a debt even if the debtor resides or holds their assets in another Member State.

Enforcement proceedings from enforceable notarial acts, therefore, have enormous practical significance. The value of a claim is largely determined by whether it can be enforced in case of an emergency. Enforceable acts have therefore become indispensable in the legal system in Germany (Wolfsteiner, 2020: § 794).<sup>2</sup> They are of paramount importance in practice. On the one hand, they considerably relieve the courts. On the other hand, enforceable acts offer the creditor the possibility to obtain an enforcement order quickly and inexpensively without having to initiate possibly lengthy court proceedings. In cases where the existence of a claim is not disputed and the debtor only defaults due to payment difficulties, it is possible for the creditor to obtain an enforcement order at a cost that is usually less than one-tenth of the costs that would be incurred in a court action with immediate recognition (Wolfsteiner, 2020: § 794).<sup>3</sup>

For this reason, it was very important for European unification, especially for the functioning of the internal market, that reliable regulations on cross-border enforcement of notarial acts were also created. After all, as is the case on a national level, it is of paramount importance in a functioning internal market that citizens and businesses can obtain an enforcement order easily and inexpensively.

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<sup>1</sup> Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter: Rome I).

<sup>2</sup> Margin number 137.

<sup>3</sup> Margin number 137 with further references.

The following, by way of introduction under Section II, is an overview of the German regulations on the enforcement of notarial acts. Section III then examines the cross-border enforceability of notarial acts within and outside the EU. Finally, a concluding contribution is made in section IV.

## **2 Overview of the enforcement of notarial acts in Germany**

The basic prerequisites for enforcement under German law are the existence of an enforcement order (see 1.), the granting of a compulsory enforcement clause (see 2.) and the service of the order (see 3.).

### **2.1 Enforcement order**

German civil procedural law only allows state enforcement if an enforcement order exists. Pursuant to Section 704 (1) of the Code of Civil Procedure (*Zivilprozessordnung*; hereinafter: ZPO), the enforcement of final judgements that have become binding or are provisionally enforceable shall be carried out in order to satisfy the claims of a creditor against a debtor. Court judgement enforcements are thus the normal legal case in Germany. However, an enforceable notarial act may also constitute an appropriate enforcement order (Section 794 (1) no. 5 of the ZPO). In addition to the court, the notary is also able to draw up an enforcement order since they, too, are also the holder of a public office (Section 1 of the Federal Code for Notaries (*Bundesnotarordnung*; hereinafter: BNotO). The underlying reason for this notarial competence is that the prescribed notarial authentication with its manifold precautionary measures justifies, on the one hand, a factual presumption that the claim embodied in the act exists and, on the other hand, it ensures that the debtor is aware of the legal consequences of the submission of enforcement. Finally, the enforceable act serves, in particular, the citizen's right to self-determination under state control (Becker-Eberhard, 2009: 532).

An order is suitable for compulsory enforcement if it is effective, sufficiently precise and enforceable.

Among the various enforceable notarial acts in Germany, the so-called declaration of submission to enforceability dominates in practice. The authoritative standard in German law is Section 794 (1) no. 5 of the ZPO, which sets out the requirements for enforcement. Accordingly, compulsory enforcement is issued in the case of acts

“that have been recorded in accordance with the requirements as to form by a German court or by a German notary within the bounds of official authority, provided that the record or document has been recorded regarding a claim that can be provided for by a settlement, that is not directed at obtaining a declaration of intent, and that does not concern the existence of a tenancy relationship for residential spaces, and furthermore, provided that the debtor has subjected themselves, in the record or document, to immediate compulsory enforcement of the claim as specified therein”.

Therefore, the requirements for an enforceable notarial act are the following:

- Firstly, the act must be established by a German notary within the scope of their official powers and in accordance with the required form. The German Authentication Act (*Beurkundungsgesetz*; hereinafter: BeurkG) is the authority on effectiveness. The caveat that it must be a German notary who creates the act is explained by the fact that only the German notary exercises official public power in Germany, which has been transferred to them by the state as a public authority. The notary’s authority ends at the federal borders, so a notarial act established abroad is invalid. A notarial act is considered invalid if, for instance, it was signed by the notary abroad.
- Secondly, the substantive claim must be suitable for enforcement. The obligation to make a declaration of intent is not yet considered an appropriate claim and will therefore have to be enforced firstly by a court. Furthermore, the tenancy of residential premises is not covered either, *i.e.* the claim must not concern the effectiveness or ineffectiveness of a tenancy. In this way, people’s residences are protected.

Furthermore, the nature of a declaration of submission to enforcement as an enforcement order requires that the enforceable content must be sufficiently specific. The respective enforcement body should be able to directly deduce from the enforcement order the extent to which the enforcement can be sought. The debtor, creditor and the claim to be enforced must therefore be described or determined in a sufficiently concrete manner in the declaration of submission (Cf. BGH NJW 1986: 1440).

- Thirdly, the debtor must declare themselves subject to immediate enforcement with regard to the claim. This declaration is called a declaration of submission and is considered a procedural claim (BGH NJW 2008: 2266).

The enforceable act is established in the authentication procedure according to the BeurkG (Wolfsteiner, 2020: § 794).<sup>4</sup> The required contents of the act, *i.e.* the designation of the specific claim and the declaration of submission, which must be strictly separated from each other, must be authenticated (Wolfsteiner, 2020: § 794).<sup>5</sup> This means that, compared to other countries, a German notarial act is not automatically enforceable but must be accompanied by a declaration of submission to enforcement, which has been authenticated by a notary.

As with any enforcement procedure in Germany, the other prerequisites for enforcement must be met, in addition to the enforcement order. In particular, the clause and the service of written notice must be issued.

## **2.2 Enforcement clause**

The clause is issued in a so-called “clause procedure”, which involves examining whether the order is formally enforceable. This procedure follows the authentication procedure, which is also carried out by the notary as far as notarial acts are concerned. The result of this procedure is the enforceable copy of the act, *i.e.* the copy of the act that is provided with the so-called enforcement clause.

The clause procedure serves two purposes:

- Firstly, the clause granting body, *i.e.* the notary in the case of notarial acts, certifies the enforceability of the order to the enforcement bodies. The enforcement bodies, such as the bailiff, are thus relieved of making their own examination of enforceability.

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<sup>4</sup> Margin number 148.

<sup>5</sup> Margin number 153.

- Secondly, the decisive questions in enforcement proceedings are to be answered uniformly at a central authority with exclusive jurisdiction. This is to ensure uniformity in the decision-making.

The clause procedure is thus procedurally independent. Within the scope of the proceedings, the order is only examined for its formal enforceability. Substantive objections against the underlying substantive claim are not examined.

The notary's role in the clause granting procedure is not as the authenticating body, but instead, they take on a judicial function. The clause procedure is, in principle, an adversarial procedure in which the notary has to make the right decision. They must not observe any of their otherwise advisory and assistance duties. Rather, the notary acts as an independent judge, free from any instructions and only bound to the legal system on their decision regarding the enforcement clause. The function of the notary corresponds to that of a court registrar. The notary must check the formal eligibility of the applicant, *i.e.* the person requesting the clause.

According to Section 797 (2) no. 1 of the ZPO, the notary who holds the act in custody, *i.e.* the notary who recorded the act (Section 45 (1) of the BeurkG) or, in the case of termination of office or change of office, the "successor" within the meaning of Section 51 (1) of the BNotO, has the exclusive authorisation to issue the enforcement clause. The notary must grant the enforcement clause if the prerequisites are met and thus is granted no further discretion.

Compulsory enforcement from a notarial enforcement order is carried out – as with any other order – on the basis of an enforceable copy (Section 724 (1) of the ZPO). Pursuant to Section 52 of the BeurkG, the notary issues enforceable copies "in accordance with the existing provisions". The reference to the provisions of the ZPO leads to the corresponding applicability of Section 724 *et seq.* of the ZPO. The enforceable copy consists of a copy of the enforceable act which contains an enforcement clause. It is the physical basis of the enforcement. The grant is made solely on the basis of the provisions of the ZPO; the BeurkG has no viability, so that there is a clear divide between the authenticating body and the judicial body. The wording of the clause is based on Section 725 of the ZPO and thus usually contains the following wording: "This copy is given to (name of party) for the purpose of execution." The clause must be apparent as a certificate for execution

and sufficiently designate the creditor. The debtor, on the other hand, does not necessarily have to be identified.

The enforcement clause must be attached to the copy of the enforcement document and be sealed and signed in person by the issuing body, in this instance, the notary. Before the enforceable copy is delivered to the applicant creditor, the original shall be marked with the time and recipient party to which it was issued.

## **2.3 Serving the debtor**

### **2.3.1 Serving the debtor within Germany**

In order to be able to enforce the enforcement order, service is required in addition to the order and the clause. The enforcement order, *i.e.* the enforceable notarial act, must be served to the debtor. Service is defined under Section 166 (1) of the ZPO as the notification of a document to a person in the form specified in that order. Furthermore, paragraph 2 stipulates that documents whose service is mandatory are to be served *ex officio*. This is the case for compulsory enforcement under Section 750 of the ZPO.

The purpose of service is twofold:

- Firstly, the debtor should be able to inform themselves reliably of the circumstances of the impending execution on the basis of the documents served to them. In this respect, the service preserves the debtor’s right to be heard in the enforcement proceedings.
- Secondly, serving the debt instrument constitutes a “final warning” to the debtor. However, this protective function is not the actual purpose because, as a general rule, service can be combined with the act of enforcement.

The service of the enforcement order can therefore take place before or at the same time as the enforcement.

### 2.3.2 Serving the debtor abroad

Serving a debtor is recognised as an act of sovereignty, which means that German authorities can only undertake service abroad with the consent of the foreign state (Süß, 2019: § 28).<sup>6</sup>

Two different circumstances must be distinguished here: Serving an act in another EU Member State and serving an act in a third country. The differences between the service of an act in an EU Member State and in a third country reveal how the harmonisation of the law on service at the EU level contributes decisively to speed, simplification and legal certainty in legal transactions within the internal market.

#### 2.3.2.1 Service in an EU Member State

Concerning service in another EU Member State, the current European Regulation (EC) No. 1393/2007<sup>7</sup>, the so-called EU Regulation on the service (hereinafter: EU Service Regulation), still applies. As of 1 July 2022, the recast of the EU Service Regulation in the form of Regulation (EU) 2020/1784 of 25 November 2020<sup>8</sup> will apply.

The EU Service Regulation essentially recognises two means of service:

- On the one hand, there is service by transmitting and receiving agencies pursuant to Article 2 *et seq.* of the EU Service Regulation. Here, the German court transmits the document to the competent foreign court, which then arranges for service in accordance with the respective national law.
- On the other hand, there is service by postal service by registered letter with international advice of delivery pursuant to Articles 14 and 16 of the EU Service Regulation and Sections 183 (1) and 1068 (1) of the ZPO. Therefore, service can be carried out by post from Germany to anywhere

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<sup>6</sup> Margin number 346 with further references.

<sup>7</sup> Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No. 1348/2000.

<sup>8</sup> Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast).



in the EU (Süß, 2019: § 28).<sup>9</sup> However, the notary cannot post the item themselves but must use the transmitting agency to do so.

The competent transmitting agency for extrajudicial acts, *i.e.* for enforceable notarial acts, is, according to Section 1069 (1) No. 2 of the ZPO, the local court in whose district the authenticating notary has its office.

A translation of the document is generally not required.

### **2.3.2.2 Service in a third country**

The second case concerns service in a third country. Here, again, a differentiation must be made:

- If the third State is a party to the 1965 Hague Service Convention, that Convention shall apply. Unlike the European Regulation, a translation is mandatory. In addition, service usually takes longer.
- If the third country is not such a contracting party, so-called non-contractual traffic, only informal service by simple delivery to the addressee can be considered, provided that they are willing to accept.

## **3 Enforcement of German notarial acts in cross-border cases**

### **3.1 Principle**

The principle, as stated above, is that a national enforceable order cannot be enforced abroad without the involvement of the concerned State. Enforcement in a State other than that in which the order was established is prohibited under international law at the starting point. Enforcement is a sovereign task, and therefore the principle can be considered as a result of the sovereignty of States.

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<sup>9</sup> Margin number 347 with further references.

The cooperation of the executing State, which is required in principle, has two purposes:

- First, it is intended to ensure a structured and unambiguous presentation of the enforceable content in a language that is understandable to the executing State.
- Secondly, it provides control of the content.

The enforceability of German notarial acts abroad is governed by the respective foreign law. Enforceability is in general impossible if the corresponding foreign law does not know the institution that is responsible for the enforcement of national notarial acts. This is the case in Anglo-Saxon law. Therefore, German enforceable notarial acts cannot be enforced in the USA, Canada or, since Brexit, in the United Kingdom (Armbrüster, 2020: § 1).<sup>10</sup>

In the context of the Latin notaries, however, especially in continental Europe and South America, notarial acts are, in principle, enforceable (Armbrüster, 2020: § 1).<sup>11</sup> A special submission to compulsory enforcement, as is required in Germany, is not necessary there.

### **3.2 Possibilities of enforcing German notarial authentic acts within the EU**

The necessity of an intergovernmental regulation of enforcement possibilities within the member states of the EU and for a functioning internal market had already been recognised at an early stage. However, the following EU legal acts have emerged successively and are not based on a uniform concept; the current structure of cross-border enforcement within the EU has evolved from tentative progress in different directions, depending on the possibility of a political compromise (Vollmer, 2016: 20).<sup>12</sup> This results in the differences between the various legal acts.

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<sup>10</sup> Margin number 91.

<sup>11</sup> *Id.*

<sup>12</sup> With further references.

It is possible to enforce German notarial acts abroad, in particular on the basis of the following regulations:

- Regulation No. 1215/2012/EC<sup>13</sup> enables the enforcement of notarial acts in civil and commercial matters throughout the Union (except Denmark) (hereinafter: Brussels Ia Regulation); the predecessor of the Brussels Ia Regulation is Regulation (EC) No. 44/2001<sup>14</sup> (hereinafter: Brussels I Regulation), which is still applicable to notarial acts established before 1 October 2015.
- Of practical significance (Süß, 2019: § 28)<sup>15</sup> is the Regulation No. 805/2004/EC<sup>16</sup> creating a European Enforcement Order for uncontested claims (hereinafter: Uncontested Claims Regulation).
- The cross-border enforcement of succession claims is governed by Regulation (EU) No. 650/2012 (hereinafter: Succession Regulation)<sup>17</sup>.
- Enforceable acts relating to maintenance claims shall be recognised and enforced in another Member State of the EU bound by the Hague Maintenance Protocol through Regulation No. 4/2009<sup>18</sup> (hereinafter: Maintenance Regulation).

These EU legal acts will be dealt with in detail below.

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<sup>13</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>14</sup> Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>15</sup> Margin number 350.

<sup>16</sup> Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

<sup>17</sup> Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and creating a European Certificate of Succession.

<sup>18</sup> Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

### 3.2.1 Enforcement under the Brussels Ia Regulation

The Brussels Ia Regulation currently applies to EU Member States in civil and commercial matters. It is directly applicable in the Member States as a Regulation. It replaced the Brussels I Regulation and the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters with the aim of further improving the free movement of judgments and access to justice within the EU, see Recital 1 of the Brussels Ia Regulation. The Brussels Ia Regulation applies to all notarial acts formally established on or after 10 January 2015. The Regulation shall not apply to claims arising out of a matrimonial regime, maintenance obligations and claims arising out of a succession.

The decisive factor for the applicability of the Brussels Ia Regulation and thus the possibility of enforcing a notarial act in another Member State is – in addition to the existence of a civil or commercial matter – the existence of an “authentic instrument” (Article 58 (1) of the Brussels Ia Regulation).

The term is used in Article 2 point (c) of the Brussels Ia Regulation according to the definition of the CJEU in the UNIBANK decision of 17 June 1999. Accordingly, an authentic act exists if the following three conditions are met:

- Firstly, the authenticity of the act should have been established by a public authority.
- Secondly, this authenticity should relate to the content of the act and not only, for example, to the signature.
- And thirdly, the act has to be enforceable in itself in the State in which it was established.

Notarial acts are covered by this rule.

According to Article 58 of the Brussels Ia Regulation, an authentic act that is enforceable in the Member State of origin is also enforceable in the State of enforcement. This abolished the so-called exequatur procedure for authentic acts; a separate declaration of enforceability in the executing State is thus no longer necessary – unlike under the Brussels I Regulation (for more details, see b) below).

In addition, according to Articles 52 and 58 of the Brussels Ia Regulation, there is no review of the content of the order by the executing State – this is called the prohibition of the so-called *révision au fond*. Pursuant to Article 58 (1) sentence 2 of the Brussels Ia Regulation, enforcement may only be refused if it is manifestly contrary to the public policy of the Member State of enforcement. Whether this is the case is to be determined in the proceedings for refusal of enforcement pursuant to Article 58 (1) subsection 2 in conjunction with Article 46 *et seq.* and Article 45 of the Brussels Ia Regulation.

For the enforcement of a German enforceable notarial act, only a certificate of the German notary, the so-called enforcement certificate (Article 60 of the Brussels Ia Regulation), is required. An enforcement clause according to Section 724 *et seq.* of the ZPO is no longer required according to Section 1112 of the ZPO, as it is replaced by the certificate. The certificate shall be issued at the request of the judgement creditor. It contains a summary of the enforceable obligation recorded in the authentic act.

The notary must also serve a copy of the certificate *ex officio* on the judgement debtor pursuant to Section 1111 (1) sentence 3 of the ZPO, even if the debtor is domiciled abroad. The certificate shall be drawn up in accordance with the form set out in Annex II of the Brussels Ia Regulation.

Even if the executing State does not, in principle, review the content of the act, the debtor is not defenceless against enforcement. The Brussels Ia Regulation provides him with a legal remedy against enforcement. They can request the court in the executing State for non-enforcement. However, if the judgement debtor does not lodge an appeal, the executing State shall not intervene in the enforcement of the enforceable notarial act established in another Member State.

The enforcement of enforceable notarial acts in other EU countries is thus considerably facilitated by the Brussels Ia Regulation, in particular by the abolition of the exequatur procedure and the prohibition of *révision au fond*. This is impressively shown by the comparison with the Brussels I Regulation, which is discussed below. The Brussels I Regulation continues to apply to notarial acts that were established before 1 October 2015.

### 3.2.2 Enforcement under the Brussels I Regulation

Under the Brussels I Regulation, a declaration of enforceability is required for the enforcement of a notarial act. Accordingly, the creditor must have the act declared enforceable in the executing State. This procedure is considered the exequatur procedure. The declaration of enforceability is the so-called exequatur. The competent authority for issuing the exequatur is the court or another authorised body, according to Annex II of the Brussels I Regulation notified by the concerned Member State. In Germany, the certificates are issued by the court, authority or person of public trust who is responsible for issuing an enforceable copy of the order (Section 56 sentence 1 of the Law on the Execution of Intergovernmental Treaties and the Implementation of European Union Agreements in the Field of Recognition and Enforcement in Civil and Commercial Matters (*Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Abkommen der Europäischen Union auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen; AVAG*). For an enforceable notarial act, the notary who safeguards the act is competent to issue the certificate (Section 797 (2) sentence 1 of the ZPO).

The declaration of enforceability is issued upon application. It is examined *ex officio* as to whether the submitted order is an authentic act within the meaning of the Brussels I Regulation. In addition, it is examined as to whether the formal requirements pursuant to Articles 57 and 38 *et seq.* of the Brussels I Regulation are met. However, no substantive grounds for refusal are examined, in particular, whether the contents of the act violate public policy. Thus, the exequatur procedure is highly formalised, which contributes to the rapidity of the procedure. Nevertheless, the executing State must be involved in contrast to the Brussels Ia Regulation. The debtor is not heard in the process. They shall only be served with the declaration of enforceability and, where this has not yet been done, with the decision.

However, the debtor has the possibility to appeal against the granting of the declaration of enforceability. The proceedings for the granting of the clause, which were initially pursued unilaterally by the creditor, are then continued as adversarial proceedings. However, the declaration of enforceability is to be set aside only if enforcement of the act would be manifestly contrary to the *ordre public* in the Member State of enforcement. The question of an obvious conflict with the *ordre public* is only examined if the debtor lodges a remedy.

Other grounds for refusal according to Articles 34 and 35 of the Brussels I Regulation, as they would have to be examined in the case of enforcement from a court decision, are not examined. On the one hand, this is due to the fact that individual grounds for refusal in these articles simply do not fit on acts. On the other hand, the enforceable act is always based on the debtor's voluntarily and expressly declared consent to the execution against their property. This circumstance justifies the extensive waiver of the review of the content and the conclusion of the enforcement order.

### **3.2.3 Cross-border enforcement of uncontested claims**

Another contribution to the realisation of the internal market in the field of cross-border enforcement is made by the EU Regulation on the European Enforcement Order. This applies in all EU Member States except Denmark.

The Uncontested Claims Regulation opens up the possibility of enforcing claims arising from enforceable notarial acts as a European Enforcement Order for uncontested pecuniary claims in other Member States. Enforceable acts of a German notary can be certified on the basis of the Uncontested Claims Regulation and enforced without further recognition and enforcement proceedings in the territory of the European Union, except for Denmark.

The order must be based on an undisputed claim. According to Article 3 point (d) of the Uncontested Claims Regulation, a claim is always deemed to be uncontested if it has been expressly "acknowledged" in an authentic act. All claims for which the

debtor has submitted to execution in the act, *i.e.* those claims from an enforceable notarial act, are recorded as uncontested (Franzmann, 2005: 470, 471).<sup>19</sup>

The claim must also be due. Enforcement can take place under the Uncontested Claims Regulation whenever the due date is fixed or the claim is unconditionally due (Franzmann, 2005: 470, 472). Whether the due date results from the declaration of submission or the enforcement clause, is irrelevant (Wolfsteiner, 2005).<sup>20</sup> This is where the differences to German national enforcement law become apparent for train-for-train services<sup>21</sup> In German clause proceedings, the maturity according to Sections 795, 726 (2) of the ZPO is not to be examined. The notary grants the enforcement clause immediately, even in the case of concurrent performance without proof of the debtor's satisfaction or default of acceptance. The examination is only carried out *ex officio* in the enforcement proceedings by the bailiff or the enforcement court (Sections 756, 765 of the ZPO). Claims which are to be fulfilled concurrently cannot be certified as a European Enforcement Order unless the creditor proves to the notary that they have performed in advance or have offered the performance incumbent on them in a manner justifying default of acceptance.

The procedure for the enforcement of uncontested claims under the Uncontested Claims Regulation is as follows:

First, the authentic act to be enforced is certified as a European Enforcement Order by the competent authority in the Member State of origin on the basis of Annex II of the Uncontested Claims Regulation. The scope of review is very limited compared to court decisions. It only needs to be verified that the authentic act is enforceable in the Member State of origin pursuant to Article 6 (1) point (a) of the Uncontested Claims Regulation. It does not matter whether the Member State in which enforcement is to be sought knows notarial acts as enforcement acts (Franzmann, 2005: 470, 472). The further requirements of Article 6 of the Uncontested Claims Regulation do not have to be present as they only apply to judicial decisions.

The involvement of the enforcing Member State is not envisaged when issuing the certification.

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<sup>19</sup> Franzman points out that this is to be understood against the background that notarial acts in most countries of the Latin notarial system are enforceable in themselves without the need for a separate declaration of submission.

<sup>20</sup> Margin number 53.94.

<sup>21</sup> On this topic, see Franzmann (2005), 470, 472.



The notary competent for the issuance of the certification in the case of a German notarial act is the notary in charge of the issuance of an enforceable copy (Section 1079 of the ZPO). This is the notary who keeps the act in safe custody. The application for the issuance of the certificate may be made immediately after its establishment. A hearing of the debtor does not take place. If the notary refuses the confirmation, the creditor may lodge an appeal pursuant to Section of the 54 BeurkG.

Once a notarial act has been certified as a European Enforcement Order, its enforcement can only be refused under very limited prerequisites. The debtor only has the rectification and revocation procedure pursuant to Article 10 of the Uncontested Claims Regulation at their disposal. This means that reasons for refusal of enforcement are no longer examined at any time. This also applies to any infringements of the *ordre public* of the executing Member State. This is mainly due to the nature of notarial acts. They contain enforceable claims established contractually or unilaterally by the debtor, *i.e.* with consent. The notary, as a neutral and legally competent person, and the notarial authentication procedure already secure the debtor's rights when the act is established. The establishment of an enforcement order without the debtor's participation or even knowledge is excluded from the outset – as opposed to default judgements, for example.

The Uncontested Claims Regulation stands alongside the Brussels Ia Regulation. If the authentic act falls within the scope of both regulations, the enforcement creditor has the choice under which regulation the cross-border enforcement shall be applied. The option ceases to exist as soon as the creditor has obtained enforceability under one of the two regulations. However, the Uncontested Claims Regulation has been largely superseded in practice by the Brussels Ia Regulation, as both legal acts no longer provide for an enforceability declaration procedure (Wolfsteiner, 2020: § 794).<sup>22</sup> Another argument in favour of the Uncontested Claims Regulation, however, is the lower level of verifiability in the executing State just described.

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<sup>22</sup> Margin number 133.

### 3.2.4 Cross-border enforcement under the Succession Regulation

Another relevant legal act at the EU level is the Succession Regulation. The Succession Regulation covers the area of wills and succession law, including maintenance obligations arising on death. These subject areas are correspondingly excluded from the material scope of application of the Brussels Ia Regulation (Article 1 (2) point (f) of the Brussels Ia Regulation). The Succession Regulation is applicable insofar as the act concerns inheritance claims arising from deaths occurring after 16 August 2015 (Article 60 of the Succession Regulation).

The Succession Regulation enables the cross-border enforceability of notarial acts as “authentic instruments” within the meaning of Article 3 (1) point (i) of the Succession Regulation within its scope of application pursuant to Article 60 of the Succession Regulation.

Articles 60 and 43 *et seq.* of the Succession Regulation provide for the exequatur procedure according to the law of the executing State. The reference in Article 60 of the Succession Regulation to the corresponding application of the enforcement procedure for judicial decisions, as provided for in Article 45 *et seq.*, is intended to provide an equally rapid and efficient exequatur procedure for the enforcement of authentic acts. This is to enable the immediate enforcement of authentic acts in the other Member States as well (Schmidt, 2021; Art. 60 of the EU Succession Regulation).<sup>23</sup>

The declaration of enforceability of a notarial act shall be made on application. The act must be enforceable under the law of the Member State of origin, Article 60 (1) of the Succession Regulation. The requirements for enforceability are therefore assessed solely according to the law of the Member State of origin. Formal enforceability is sufficient, *i.e.* it must be an authentic act of a type that can generally be enforced in the Member State of origin. Proof of enforceability is provided by the certificate pursuant to Article 60 (2) of the Succession Regulation. The certificate must be in the form of standard form II in accordance with the Commission Implementing Regulation (EU) No. 1329/2014.<sup>24</sup> With regard to jurisdiction for the

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<sup>23</sup> Margin number 5 with further references.

<sup>24</sup> Commission Implementing Regulation (EU) No. 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No. 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law,

declaration of enforceability of a notarial act, Article 60 (1) of the Succession Regulation refers to the procedure under Article 45 *et seq.* of the Succession Regulation. In Germany, the notary as the issuing “authority” is also responsible for issuing the certificate in relation to notarial acts (Schmidt, 2021; Art. 60 of the EU Succession Regulation).<sup>25</sup>

In the context of the appeal against the declaration of enforceability pursuant to Article 60 (3) of the Succession Regulation in conjunction with Articles 50 and 51 of the Succession Regulation, only the *ordre public* applicable to judgments under Article 40 point (a) of the Succession Regulation is relevant; the grounds for non-recognition under Article 40 points (b) to (d) of the Succession Regulation are not applicable (Tolani, 2021; Art. 60 of the EU Succession Regulation). As in the context of Article 52 of the Succession Regulation, however, the appellate court must also examine the formal requirements of enforceability to be examined by the court of first instance or the notary (Tolani, 2021; Art. 60 of the EU Succession Regulation).<sup>26</sup>

To conclude, succession law does not benefit from the abolition of exequatur, which the reform of the Brussels Ia Regulation has brought to the other areas of civil and commercial law since 2015. However, a revision of the Succession Regulation is envisaged for 2025, which could lead to an abolition of the exequatur procedure according to the Brussels Ia Regulation.<sup>27</sup>

### **3.2.5 Cross-border enforcement under the Maintenance Regulation**

The Maintenance Regulation is also worth mentioning. It regulates, among other things, the international enforcement of maintenance titles. The Maintenance Regulation distinguishes between: (Volmer, 2016: 20, 22)<sup>28</sup>

- States bound by the 2007 Hague Maintenance Protocol<sup>29</sup>: Here, enforcement shall be carried out on the basis of a certificate of enforceability issued by the Member State of origin; and

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recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession of 9 December 2014.

<sup>25</sup> Margin number 20.1.

<sup>26</sup> For these formal requirements, see the list in *J. Schmidt*, in: Beck-OGK, as of 01 August 2021, EU Succession Regulation, Art. 60, margin number 24.

<sup>27</sup> On this topic, see *J. Schmidt*, in: Beck-OGK, as of 01 August 2021, EU Succession Regulation, Art. 60 margin number 4.

<sup>28</sup> who also points out the resulting confusion of the Regulation.

<sup>29</sup> These are the EU Member States, except for Denmark and Ireland.

- States not bound by the Convention: In this case, an exequatur procedure must be carried out in the executing State.

The Maintenance Regulation thus contains both variants of the enforcement procedures already introduced by the Brussels Ia Regulation, on the one hand, and the Brussels Ia Regulation and the Succession Regulation on the other hand. In this respect, reference is made to the above statements.

The fact that in the case of cross-border enforcement, the acts must undergo a separate – although minimalist – procedure either in the Member State of origin or in the executing Member State, means that no further formality, such as an apostille or legalisation, is required.

The Maintenance Regulation is expressly *lex specialis* for maintenance claims within its material and territorial scope of application according to Article 68 (2) of the Maintenance Regulation; this is also recognised in recital 10 of the Brussels Ia Regulation.

### 3.3 Enforcement outside the EU

In relation to third countries, it must generally be assumed that – in the absence of corresponding agreements under international law – court judgements from Germany will at most be recognised there as enforcement orders, whereas enforcement will not be carried out from German notarial acts (Süß, 2019: § 28).<sup>30</sup> The 41st Hague Convention of 2 July 2019 on the recognition and enforcement of foreign judgements in civil or commercial matters, which has not yet entered into force, only regulates the recognition and enforcement of judgements. It is also applicable to court settlements but not to authentic acts.

An exception in the international sphere is the Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereinafter: Lugano II). It applies between the EU Member States, Switzerland, Norway and Iceland. Lugano II contains, for the enforcement of notarial acts, rules that are, to a large extent, similar to those stipulated by the Brussels I Regulation (in the version applicable until 20 December 2012). Article 57

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<sup>30</sup> Margin number 350.

of the Lugano II, therefore, requires an exequatur in accordance with the rules in Article 38 *et seq.* of the Lugano II (Süß, 2019: § 28).<sup>31</sup>

The conclusion of further agreements under international law that deal with the enforcement of German notarial acts in third countries is currently unpredictable. As a consequence, an unconditional regulation on the enforcement of notarial acts with worldwide validity remains a distant dream.

#### **4 Conclusion**

The notary, as a holder of a public office, is able to confer enforceability equivalent to that of a court decision to a claim that, at first, has been merely established by means of a contract or a unilateral declaration of intent. Notaries derive this sovereign function from the Member State in which they are appointed to exercise their activity. It is justified above all by the prescribed notarial authentication with its manifold provisos and the resulting trust in notaries. The enforceable act has proven itself in its functions.<sup>32</sup>

In the course of time, the legal framework has become more and more harmonised. Mutual trust between the Member States has grown. The harmonisation of enforcement procedures enables European notaries to offer citizens and businesses an enforcement order that is applicable in Europe without any significant formalities. The involvement of the executing State is no longer required. European notaries thus make a significant contribution to relieving the courts and, finally, to the functioning of the internal market. A well-functioning internal market cannot afford enforcement in other EU countries on the basis of court-ordered claims. Simplified cross-border enforceability on the basis of notarial acts is finally based on the trust that the creation of the enforceable act will be legally impeccable. For this reason, it is of major importance that the enforceable act is drawn up properly. This is what European notaries stand for.

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<sup>31</sup> Margin number 350.

<sup>32</sup> As expressly stated in the official explanatory note to the 2nd amendment to the Compulsory Execution Act Bundestag printed paper 13/341 as of 27 January 1995, 20 *et seq.*

## Note

This paper is based on a presentation given by the author at the International Conference on “Diversity of Enforcement Titles in Cross-Border Debt Collection in the EU” on 3 September 2021 in Maribor, Slovenia.

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