

# The enforcement of an advance on costs for substitute performance at the expense of a Russian debtor in German-French legal relations

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## **I. Introduction**

International enforcement regarding the performance of actions that may be taken by others pursuant to Section 887 of the German Code of Civil Procedure (ZPO) raises complex questions within the Brussels Ibis Regulation. These issues concern the correct classification of such enforcement measures, the legal status of a third-party debtor in the context of the enforcement of monetary claims, and potential grounds for refusing enforcement that may arise with respect to international jurisdiction and any defects in service of process. Currently, French courts are seized of the question as to whether a German judgment—in which the German creditor of a Russian debtor was awarded an advance on costs pursuant to Section 887(2) ZPO—can be fully enforced in France by means of a garnishment order directed against a French third-party debtor.

## **II. The facts of the case**

The Creditor (C) is Germany's largest gas importer and supplies energy providers as well as major industrial customers nationwide with gas. Pursuant to long-term contracts, it sources a significant portion of its imports from the Debtor (D), a company belonging to a corporate group controlled by the Russian state. The agreed place of delivery in each instance was located in Bavaria. However, on June 14, 2022, D largely suspended its gas deliveries to C. On July 22, 2022, the Regional Court of Weiden ordered D to continue supplying C with gas for a further three months. The Regional Court rejected a motion filed by C seeking

authorization to have the existing contracts fulfilled by a third party of its choice. Following an immediate appeal lodged by C, the Higher Regional Court (OLG) of Nuremberg issued a ruling on September 12, 2022, authorizing C to have the performance owed by D—within the scope of fulfilling the contracts concluded between the parties—rendered by a third party of C’s choice at D’s expense; furthermore, pursuant to Section 887(2) ZPO, the Court ordered D to make an advance payment to cover the costs incurred in rendering said performance. Subsequently, on November 17, 2022, the Higher Regional Court of Nuremberg issued a certificate regarding this decision pursuant to Art. 53 of the Brussels *Ibis* Regulation, in which the order for the advance payment was classified as a decision on the substance of the matter (Field 4.6.1). On May 9, 2023, C initiated the garnishment of claims held by D against a French third-party debtor (F) in order to recover a partial amount of the advance payment owed by D. Notice of this attachment was served upon D on May 17, 2023, by means of a letter addressed to the competent authority of the Russian Federation, pursuant to the Hague Service Convention; a copy thereof was sent via registered mail with return receipt requested. On December 21, 2023, F filed a lawsuit against C before the Tribunal Judiciaire de Nanterre seeking the lifting of the measures taken against it. This lawsuit was dismissed on December 20, 2024. D subsequently lodged an appeal against this decision with the Cour d’appel de Versailles, which was granted on January 8, 2026. Cassation proceedings are currently pending before the Cour de Cassation.

### **III. Enforcement by Substitute Performance**

The compulsory enforcement of claims requiring an act, toleration, or forbearance is governed under German law by Sections 887 et seq. ZPO. These provisions apply to all acts that do not relate to the settlement of a monetary claim, the surrender of a specific object, or the submission of a declaration of intent. Specifically, a distinction is drawn between actions that may be taken by others—to which Section 887 ZPO applies—and actions where this is not the case, the enforcement of which is governed by Section 888 ZPO. Actions may be taken by others if they can be performed not only by the debtor personally but also by a third party. This clearly applies to the gas deliveries at issue in the present case. In such instances, the creditor is not compelled to force the debtor personally to render the performance owed. Rather, pursuant to Section 887(1) ZPO, the creditor may apply to the court of first instance for authorization to have the act performed by a third party at the debtor’s expense. Concurrently, the creditor

may request that the debtor be ordered to make an advance payment to cover the costs that will be incurred in performing the act (Section 887(2) ZPO). In the case at hand, the OLG Nuremberg granted such an advance payment of costs to the creditor.

#### **IV. A “judgment” within the meaning of Art. 2(a) of the Brussels *Ibis* Regulation**

“Judgments” within the meaning of Art. 2(a) of the Brussels *Ibis* Regulation—as distinguished from mere enforcement measures—are characterized by the fact that they do not yet result in the final satisfaction of the creditor but rather still require compulsory enforcement. Already in 2009, the Federal Court of Justice (BGH) held that the granting of an advance on costs pursuant to Section 887(2) ZPO constituted a decision within the meaning of Art. 32 of the Brussels I Regulation, which could be recognized and enforced abroad. This view is further supported by the fact that the BGH compared the enforcement of fungible acts under Section 887(2) ZPO with the cross-border enforcement of coercive fines which today is governed by Art. 55 of the Brussels *Ibis* Regulation. Notwithstanding the position of Section 887(2) ZPO within German procedural law, it should be noted that the rule is structured identically to comparable obligations to make advance payments for substitute performance under substantive law (e.g., under the law of contracts for work and services). Such claims may, of course, be recognized and enforced pursuant to the Brussels *Ibis* Regulation. Moreover, in the well-known *Realchemie* case, the CJEU ruled that a decision imposing a coercive fine to enforce an obligation to act or to refrain from acting (Section 890 ZPO) may be enforced pursuant to the Brussels I Regulation. However, the distinction between Section 887(2) ZPO and Section 890 ZPO can, in individual cases, prove quite difficult. Particularly in the case of continuing obligations—such as the ongoing supply of parts or raw materials—the boundary between a substitutable act (Section 887 ZPO) and an obligation to refrain from acting (Section 890 ZPO) is fluid: depending on the wording of the operative part of the judgment, the same factual situation can be framed either as a positive obligation to perform or as an obligation to refrain from interrupting delivery, and enforced accordingly. This practical interchangeability of enforcement methods illustrates how inappropriate it would be to treat the resulting enforcement orders differently at the European level.

In addition, an argumentum a fortiori applies: since, according to the case law of the CJEU (*Realchemie*), an order imposing a coercive fine under Section 890 ZPO

-which constitutes merely a sanction without a compensatory function - qualifies as a “judgment” within the meaning of the Brussels *Ibis* Regulation, then this must apply all the more to an order for an advance on costs under Section 887(2) ZPO, because the latter decision is based on a judicial assessment of the anticipated costs of substitute performance and thus qualifies as a judgment on the merits unlike a mere coercive fine. It would therefore be inconsistent to characterize a decision imposing a coercive fine as an enforceable “judgment” within the meaning of Art. 2(a)(1) of the Brussels *Ibis* Regulation, while denying this classification for a decision ordering an advance payment pursuant to Section 887(2) ZPO.

Nor does Art. 2(a)(2) of the Brussels *Ibis* Regulation preclude the classification of this ruling as a “judgment”; this provision contains specific stipulations regarding the classification of provisional measures as judgments within the meaning of Chapter III of the Brussels *Ibis* Regulation. Pursuant to this provision, where a decision has been rendered without the defendant having been summoned, the decision embodying the measure must have been served on the defendant prior to enforcement. In this regard, it is important to emphasize that an order to pay an advance on costs does not constitute a mere ancillary ruling to the preceding provisional injunction, but rather a procedurally independent order to pay, possessing its own distinct substantive content. In particular, following the issuance of the decision regarding the advance payment, a distinct enforcement proceeding is conducted pursuant to Section 794(1) No. 3 ZPO in conjunction with Sections 803 et seq. ZPO; this proceeding adheres to the provisions governing the enforcement of monetary claims and is independent of the enforcement of the preliminary injunction.

Furthermore, in the present case, the French courts—with regard to the classification of the Nuremberg decision as a “judgment” within the meaning of Art. 2(a) of the Brussels *Ibis* Regulation—must observe the binding effect of the certificate issued pursuant to Art. 53 of the Brussels *Ibis* Regulation, in which the decision on the advance payment was characterized as a judgment on the substance (Field 4.6.1). Art. 53 of the Brussels *Ibis* Regulation provides that the court of origin shall issue a certificate to enable the enforcement of the judgment in the requested Member State. This certificate confirms that the judgment is enforceable and must be submitted to the courts of the requested Member State (see, in particular, Art. 37(2), Art. 42(1)(b), and Art. 43(1) of the Brussels *Ibis* Regulation). In this respect, the Cour d’appel de Versailles rightly held that the classification of the decision at issue as a judgment on the merits within the

meaning of Art. 2(a)(1) and Art. 39 of the Brussels *Ibis* Regulation may not be called into question by the French court. In order to clarify the binding nature of the Art. 53 certificate, the Federal Court of Justice recently referred this question to the CJEU. In light of the pertinent conclusions of the Advocates General in preceding cases, a positive answer is expected. As AG Bobek explained in the *Salvoni* case, “[t]he purpose of the Art. 53 Certificate is to authoritatively [!] state that the judgment is enforceable. [...] Whereas, in the system established by [the Brussels I Regulation], production of the certificate in question was not required, it became obligatory with the entry into force of [Brussels *Ibis*]. That is because the new regulation, doing away with the need for an exequatur, provides for a simplified procedure based on the principle that a decision issued in a Member State should be treated as if it had been issued in the Member State addressed.” And AG Pikamäe was even more explicit in the case of *J v H Limited*: “[I]t is common ground that the court of origin drew up and issued the certificate on the basis of its order of 20 March 2019, which therefore falls within the scope of Regulation No 1215/2012. Under these circumstances, there is indeed, a priori, an enforceable judgment given in a Member State within the meaning of Art. 2(a) and Art. 39 of Regulation No 1215/2012 that comes within the system of direct enforcement laid down in that regulation, a factual reality that is binding upon the court addressed.”

## **V. The Legal Status of the Third-Party Debtor in the Enforcement of Claims**

Enforcement proceedings may also—particularly in cases of attachment of claims—involve third-party debtors. In this regard, the question arises as to whether such parties can avail themselves of the mechanisms provided by the Brussels *Ibis* Regulation for the refusal of the enforcement of a judgment. In this context, a distinction must be drawn between the refusal of recognition (Art. 45 Brussels *Ibis* Regulation) and the refusal of enforcement (Art. 46 Brussels *Ibis* Regulation). With regard to the refusal of enforcement of a foreign judgment, Art. 46 of the Brussels *Ibis* Regulation stipulates: “On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Art. 45 is found to exist.” The German version of Art. 46 is even clearer, unequivocally speaking of “an application of the debtor” (“auf Antrag des Schuldners”). The wording of this provision thus excludes third-party debtors or other interested third parties. Consequently, based on a grammatical interpretation, standing to apply is vested

exclusively in the debtor—i.e., the person against whom enforcement is sought—or, where applicable, their legal successor.

The legislative history corroborates this interpretation. Already under Art. 43 of the Brussels I Regulation, all remedies that national procedural law made available to interested third parties against the authorization of enforcement were excluded. While the enactment of the Brussels *Ibis* Regulation did indeed abolish the requirement for exequatur—and thus the separate procedure for declaring a judgment enforceable in the requested Member State (Art. 39 of the Brussels *Ibis* Regulation)—this reform was intended solely to further facilitate and expedite the cross-border enforcement of claims (see Recital 26 Brussels *Ibis*). Conversely, this measure was not intended to expand the powers of third parties to invoke grounds for refusal of enforcement pursuant to Art. 46 of the Brussels *Ibis* Regulation. This is evidenced by the fact that a proposal submitted by the Spanish delegation—seeking to extend the scope of Art. 46 of the Brussels *Ibis* Regulation to cover “any interested party”—was not adopted during the legislative process.

Finally, when interpreted systematically, this is also confirmed by an a contrario argument based on the wording of Art. 45 of the Brussels *Ibis* Regulation, given that it refers there not solely to the debtor, but to “any interested party”. Since Art. 46 of the Brussels *Ibis* Regulation was deliberately drafted more narrowly than Art. 45 of the Brussels *Ibis* Regulation with regard to standing to apply, it is impermissible to allow a third-party debtor to invoke the grounds for refusal of recognition under Art. 45 of the Brussels *Ibis* Regulation in the guise of national enforcement law. To do so would allow national enforcement law to frustrate the clear intention of the European legislature. In this respect, the principle remains that the procedure for the refusal of enforcement under the Brussels *Ibis* Regulation constitutes an autonomous and self-contained system. Consequently, Art. 46 of the Brussels *Ibis* Regulation precludes legal remedies that national law makes available to interested third parties against the authorization of enforcement.

## **VI. The International Jurisdiction of German Courts**

A potential ground for refusing enforcement could arise under Art. 46 in conjunction with Art. 45(1)(e)(ii) of the Brussels *Ibis* Regulation. This would be the case under two conditions: First, international jurisdiction to decide an advance on costs (Section 887(2) ZPO) would have to derive from the exclusive jurisdiction established in Art. 24(5) of the Brussels *Ibis* Regulation; and second, that provision would have to preclude the recovery, in another Member State, of

an advance on costs awarded in Germany. However, the decision rendered pursuant to Section 887(2) ZPO does not, in itself, exert any coercive effect upon the debtor. According to the Federal Court of Justice, such an effect would be a prerequisite for classifying the advance order as an enforcement measure. Even in a purely domestic context, a decision regarding an advance on costs constitutes merely an enforceable judgment within the meaning of Section 794(1) No. 3 ZPO—one that is enforced, like an ordinary monetary claim, in accordance with Sections 803 et seq. ZPO. The exclusivity of international venues in the matters specified in Art. 24(5) of the Brussels *Ibis* Regulation applies invariably only to the adjudicatory proceedings, and not to the subsequent enforcement of a resulting judgment regarding a monetary claim. Furthermore, this would result in an objectively unjustified disparity in the treatment of obligations to advance costs, depending on whether such obligations are governed by substantive law (e.g., Section 637(3) of the German Civil Code - BGB) or by the respective procedural code (e.g., Section 887(2) ZPO).

## **VII. Effective Service**

A further ground for refusing enforcement could arise from Art. 46 in conjunction with Art. 45(1)(b) of the Brussels *Ibis* Regulation. In this regard, the Versailles Court of Appeal based its reasoning on the following findings: The debtor D had not been formally summoned to appear before the Nuremberg Higher Regional Court; instead, this Court had dispensed with formal service via mutual legal assistance “for reasons of expediency” and had simply transmitted the documents by email on 9 September 2022; D had been granted a period of only three days (including a weekend) to submit a response, even though the matter involved a claim amounting to € 5.7 billion; and the certificate issued under Art. 53 of the Brussels *Ibis* Regulation noted that the decision had been rendered in default proceedings but left blank the field for the date of service of the document instituting the proceedings.

The CJEU has recognized that service by public notice, effected in accordance with national law, does not infringe Union law, provided that the requested court has satisfied itself that all inquiries required by the principles of diligence and good faith have been carried out to locate the defendant. This reasoning also applies to a situation where, despite the creditor and the court of origin knowing the debtor’s address, it is practically impossible to effect service in the debtor’s State due to a lack of cooperation from local authorities. This is the case where the court of origin has attempted to effect service on the debtor in accordance

with national and international law (specifically the Hague Service Convention) and where—as in the present case—the success of that service was thwarted by the authorities of the State that exercises legal and economic control over the debtor company. The effective protection of a creditor who has obtained a judgment enforceable within the EU against a debtor established in a third State would be disproportionately jeopardised if the mere refusal—potentially in bad faith—of a third State to effect service were to prevent any enforcement within the Union in a State other than that of the court of origin.

Moreover, since the debtor company had become aware of the content of the order in good time, it could also have lodged an objection based on a breach of the right to be heard pursuant to Section 321a ZPO. However, it failed to do so; consequently, refusal of enforcement on the grounds of a defect in service is precluded under Art. 46 in conjunction with Art. 45(1)(b), final clause, of the Brussels *Ibis* Regulation. According to established case law of the CJEU, this ground for refusal is excluded if the defendant could have challenged the decision in the State of origin but failed to do so. The concept of a legal remedy is to be interpreted autonomously and broadly; it encompasses any measure capable of subsequently affording the defendant the right to be heard, expressly including an application for restoration of the status quo ante.

## **VII. Summary**

German judgments regarding the payment of an advance on costs for a substitute performance pursuant to Section 887(2) ZPO—much like decisions concerning cost advances based on substantive law—may be enforced abroad pursuant to Art. 39 Brussels *Ibis* Regulation; these constitute “judgments” within the meaning of Art. 2(a) Brussels *Ibis*. If the court of origin has certified, pursuant to Art. 53 Brussels *Ibis*, that the original decision falls within the scope of Art. 2(a) in conjunction with Art. 39 Brussels *Ibis*, the requested court is bound by that certification; this is likely to be confirmed by the CJEU in the reference proceedings initiated by the German Federal Court of Justice. The exclusive jurisdiction established under Art. 24(5) Brussels *Ibis* does not preclude the cross-border enforcement of a judgment regarding an advance on costs by means of the attachment of claims.

The fact that Art. 46 Brussels *Ibis* limits the standing to invoke grounds for refusal of enforcement solely to the debtor is based on a deliberate legislative decision to expedite the cross-border enforcement of claims. This underlying policy must not be undermined by third-party debtors invoking grounds for refusal of recognition

under Art. 45 Brussels *Ibis* while ostensibly acting under the guise of national enforcement law. This applies in particular to grounds for refusal intended solely to safeguard the principal debtor's right to be heard (Art. 45(1)(b) Brussels *Ibis*). Furthermore, when examining potential defects in service, it must be taken into account whether a third state has delayed or frustrated service requested by the creditor pursuant to the Hague Service Convention; this behaviour must not operate to the detriment of a creditor seeking to enforce, under the Brussels *Ibis* Regulation, a judgment regarding an advance on costs obtained within the EU. If the mere refusal of judicial assistance by a third state were to result in a judgment validly obtained in Germany being incapable of full enforcement in other EU Member States, the effectiveness of European enforcement law vis-à-vis debtors in third states would be at stake.