

## THE EFFECT OF ENFORCEABILITY

**Accepted**

01. 12. 2020

**Revised**

03. 02. 2021

**Published**

30. 06. 2021

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**Abstract** In this paper, the author focuses on the effect of enforceability, in particular in relation to Austrian law. However, insights into German and European law are also provided. Enforceability is an effect of a judgment which is basically only granted to performance judgments. Declaratory and constitutive decisions (with the exception of the decision on costs) are not enforceable as such. As a result, the order for performance contained in the judgment can be enforced by state coercive measures. Enforceability occurs upon termination of the performance period. Enforceability is neither a consequence of, nor necessarily coincides with, *res judicata*. The introduction of the Brussels Ia Regulation has fundamentally changed the system of enforcement of foreign decisions. Decisions given in the EU Member State and enforceable in that State are now enforceable in another Member States without the need for a declaration of enforceability.

**Keywords**formal  
enforceability,  
substantive  
enforceability,  
confirmation of  
enforceability,  
title  
authority,  
judicial  
officers,  
action for  
cessation on  
the grounds of  
impugment,  
recognition

## 1 Concept and terminology

Contrary to first impressions, the concept of “enforceability” is a complex one. It is a central concept of general procedural theory, which is used in civil procedural law as well as in administrative law and tax law terminology (on the three-lane enforcement system, see Neumayr and Nunner-Krautgasser, 2018: p. 2; on the clash of judicial, administrative and financial enforcement, see Neumayr and Nunner-Krautgasser, 2018: p. 268 *et seq.*).

The meaning is iridescent and ambiguous: Often the “enforceability” is referring to a **claim**: Then one speaks of an “enforceable claim,” which is the case in numerous provisions in Austrian law (*e.g.*, in § 7 (2), § 36 (1) No. 1, § 89, § 320 EO). These provisions address the enforceability of the claim itself, which may (or may not) be accompanied by the enforceability of a corresponding title. The enforceability of the claim must not be confused with the so-called “enforcement claim,” which is the public-law claim of an individual to enforcement (on the “enforcement claim,” see Neumayr and Nunner-Krautgasser, 2018: p. 2).

In most cases, however, “enforceability” is used to describe the procedural component, namely the enforceability of a **title**. “Enforceability” in this case describes a substantial decision-making effect: It consists in the fact that the owner of a claim can demand enforcement by state enforcement authorities (Rechberger and Simotta, 2017: p. 564; § 1 No. 1 EO).

Enforceability in this procedural sense can only be granted to titles which, by their content, are directed towards a performance (Rechberger and Simotta, 2017: p. 564). Therefore, only performance orders contained in (granting or officially issued) performance titles are enforceable. In the case of declaratory and constitutive decisions as well as in the case of a dismissal of a request for performance, however, enforcement - and thus also enforceability as such - is only conceivable to the extent that it concerns an order regarding procedural costs included in the decision (cf. Rechberger and Simotta, 2017: p. 564).

Sometimes, however, the term “enforceability” is used in a very broad sense; it then includes - as a generic term - **also other or all legal effects of a decision**. This can even comprise the legal effects of declaratory and constitutive decisions as well as of decisions by which claims are rejected.

This leads to a terminological subtlety: The term “enforceability in the broader sense” is used in German law in connection with **provisional enforceability** (§§ 708 *et seq.* deutsche Zivilprozessordnung [hereinafter: dZPO]). Austrian law, however, has in principle not implemented the concept of provisional enforceability. There is only one exception which concerns certain decisions in labour law cases (§ 61 Arbeits- und Sozialgerichtsgesetz [hereinafter: ASGG]) (see in particular Rechberger, 1991: p. 189 *et seq.*). However, in general, instead of provisional enforceability, there are certain provisions in Austrian law (§§ 370 *et seq.* Exekutionsordnung [hereinafter: EO]), which (under certain conditions) allow a creditor who (due to the lack of enforceability of the title in the above sense) is not yet able to carry out enforcement leading to satisfaction, to carry out security enforcement (see Neumayr and Nunner-Krautgasser, 2018: p. 308 *et seq.*).

## 2 Enforceability in Austrian enforcement law

In Austrian enforcement law, the term “enforceability” occurs in several contexts, whereby the lack of enforceability (as a decision effect) evokes different legal consequences in each case (For more details, see 2. concept and terminology).

The subgroups of enforceability can be roughly divided into two categories, namely the so-called “**formal**” and the so-called “**substantive**” **enforceability** (Neumayr and Nunner-Krautgasser, 2018: p. 68).

### 2.1 Formal enforceability

#### 2.1.1 Definition

**Formal enforceability** is expressed in the provisions of § 7 (3) to (6) EO. According to these provisions, the courts or authorities have to confirm that a title cannot be challenged by a legal remedy that inhibits enforceability and that the time limit for performance has expired. If this can be confirmed, a title is **formally enforceable in the sense of § 1 EO**.

The confirmation of formal enforceability must generally be made by means of a so-called “confirmation of enforceability” (in German “*Vollstreckbarkeitsbestätigung*” or “*Vollstreckbarkeitsklausel*”).

The Austrian confirmation of enforceability is sometimes also referred to as the “enforceability clause.” However, the Austrian **confirmation of enforceability** must not be equated with the **enforcement clause under German law**: Because in the context of the Austrian enforceability confirmation, only the formal prerequisites just described are checked, but not the other (substantive) prerequisites for enforcement (Neumayr and Nunner-Krautgasser, 2018: p. 74). This applies above all to the occurrence of a condition, to the time limit and to legal succession. In Austria, the examination of such requirements takes place at a later stage, namely within the so-called “proceeding to obtain an enforcement order” (“*Benilligungsverfahren*”) (cf. Rechberger and Oberhammer, 2009: p. 44 *et seq.*). The enforcement order is an act by which the court authorizes the enforcement; only on the basis of this authorization may the actual enforcement proceeding as such take place. Thus, the Austrian law of enforcement is based on a completely different system than the German law.

This shows once again that, despite or perhaps just because of the (supposedly) identical language, one has to be truly careful with terms and definitions. In this context, at least, adoption of the German terminology would be extremely misleading; therefore, it has to be avoided.

### 2.1.2 Procedure

As a matter of principle, in Austria, **every enforcement title must be accompanied by a confirmation of enforceability**. An **exception** exists only for certain titles:

- **Settlements (§ 1 No. 15 EO)**
- **Enforceable notarial acts (for these, a submission clause is sufficient), and**
- **decisions determining the enforcement costs.**

For these titles, **no confirmation** of enforceability is required (§ 54 (2) EO).

The confirmation of enforceability is issued by the **authority that has created the enforcement title (“title authority”)** (cf. Neumayr and Nunner-Krautgasser, 2018: p.75). The issuance of the confirmation, therefore, does not belong to the enforcement proceedings (as does any revocation), but to the respective **judgment proceedings** and is governed by the **provisions applicable to these proceedings** (ZPO, AußStrG, IO, EO, StPO, AVG, BAO, *etc.*) (Neumayr and Nunner-Krautgasser, 2018: p. 77; Rechberger and Oberhammer, 2009: p. 44 *et seq.*). This is important, for example, with regard to the obligation to consult a lawyer, to the costs, or the admissibility of novation (Rechberger and Oberhammer, 2009: p. 45).

As far as judicial titles are concerned, the issuance of the confirmation of enforceability falls within the scope of activity of **judicial officers** (so-called *Rechtspfleger*, § 16 (1) No. 2 RpfLG). The confirmation of enforceability is issued without hearing the opponent. If the application to issue a confirmation of enforceability is **rejected**, the applying party can file a **legal remedy called “recourse” (“Rekurs”)**, which is the legal remedy against court resolutions under Austrian law.

In the case of **arbitral awards**, the chairman of the arbitral tribunal, or, if he or she is prevented from doing so, another arbitrator, must, at the request of a party, confirm the validity and enforceability of the award on a copy of the award (§ 606 (6) ZPO).

### 2.1.3 Effect

The confirmation of enforceability - as defined in § 292 (1) ZPO - is a **binding testimony that there is formal enforceability**. According to the prevailing opinion, all courts are bound by the confirmation of enforceability issued, with the exception of the court that has issued it (cf Neumayr and Nunner-Krautgasser, 2018: p. 74).<sup>1</sup> As a result, there is no need for the court of enforcement to ask whether the title is actually formally enforceable (Neumayr and Nunner-Krautgasser, 2018: p. 74 and Rechberger and Oberhammer, 2009: p. 45).

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<sup>1</sup> OGH 18.4.1978, 3 Ob 42/78 (3 Ob 43/78); 29.11.1989, 3 Ob 610/89; 21.7.2004, 3 Ob 82/04m; 21.12.2006, 3 Ob 146/06a; 23.9.2008, 5 Ob 174/08m; 14.12.2010, 3 Ob 189/10f; RIS-Justiz RS0000180.

This is the **only function** of the Austrian confirmation of enforceability. All other conditions for enforcement are - as already mentioned under 3.1.1 - checked during the proceeding to obtain an enforcement order.

Insofar as a confirmation of enforceability is required, it is an **absolute prerequisite for enforcement** according to the prevailing Austrian view (§ 54 Abs 2 EO) (Rechberger and Oberhammer, 2009: p. 45). Its deficiency renders enforcement inadmissible. If no confirmation of enforceability is attached to the application for an enforcement order, the court must return the application and give an order to rectify the application (§ 54 (3) EO). If the order for rectification remains unsuccessful, the application for enforcement must be rejected (Rechberger and Oberhammer, 2009: p. 45).

If enforcement is granted although there is **no confirmation of enforceability**, the party against whom enforcement is sought can file a legal remedy (“recourse”) against the enforcement order (cf. Rechberger and Oberhammer, 2009: p. 45). However, if the enforcement order has already entered into legal effect, the absence of the confirmation of enforceability must be asserted with an application for cessation. If the absence of the enforceability confirmation is only discovered in the enforcement proceedings, the execution must be stopped ex officio (§ 39 (1) 10 EO).

If, finally, a confirmation of enforceability has been issued incorrectly (*e.g.*, because the title has not entered into legal effect for lack of proper service), the unlawfully issued confirmation of enforceability must be **revoked** in accordance with § 7 (3) to (5) EO (Rechberger and Oberhammer, 2009: p. 46).

## 2.2 Substantive enforceability

### 2.2.1 Definition

In contrast to the formal enforceability just discussed, the term “substantive enforceability” is used to describe the **prerequisites that must be met in order for an enforcement order to be objectively lawful**. Seen in this light, the formal enforceability of the title (but not its confirmation!) can also be understood as a partial aspect of substantial enforceability. If there is no substantive enforceability, the applying party has **no enforcement claim**.

However, the requirements of substantive enforceability are **not identical with the requirements that must be asserted and proven** (and subsequently reviewed by the court) in the context of an application for an enforcement order: In particular, negative facts mentioned in the title need neither be asserted nor proven; they are, therefore, not to be reviewed in the authorization procedure. This applies, for example, to the assertion that the obligated party did not pay or (in the case of a cassatory clause) that a deadline was missed. Nevertheless, such facts constitute a part of substantive enforceability.

### 2.2.2 Substantive requirements of enforcement in detail

The **prerequisites for substantive enforceability** are described in particular in § 7 (1) and (2) and § 9 EO; they are reflected in § 36 EO.

Essentially, it is about the following requirements:

- The order for performance must meet the **substantive requirements of a valid enforcement title** (§ 7 (1) EO): The parties must, therefore, be clearly identifiable from the title (Höllwerth, 2019: § 7 EO No. 24); any ambiguities are to the detriment of the applying party. However, a correction of the party designation is permissible, provided there is no doubt about the party identity, and it is ensured that this does not result in a change of party. If a legal succession has taken place prior to the enforcement order, this must be proven in the sense of §§ 9, 10 EO.

In addition, the title must be **sufficiently defined in terms of content**; *i.e.*, the object, type, scope, and time of the owed performance or omission must be evident from it (Jakusch, 2015: § 7 EO No. 35 *et seq.*). Therefore, the title must make it clear beyond a doubt what, how much, and when is to be performed (or which actions and for what duration are to be omitted or tolerated).

If the prerequisites mentioned in § 7 (1) EO are missing, a decision can only become enforceable if it is possible to supplement the order for performance by a court judgement, namely by way of a title supplement

action according to § 10 EO (Jakusch, 2015: § 7 EO No. 35 *et seq.*).<sup>2</sup> Otherwise, an indefinite decision is not enforceable; it is then considered a “decision with reduced effect.”

- The claim securitized in the title must, in principle, be **due** (§ 7 (2) EO). Before the due date, there is, therefore, normally no material enforceability. Exceptions are made with regard to claims to recurring benefits with maintenance character (§ 406 (2) ZPO).
- If the applying party must make an **advance payment** according to the title, substantive enforceability is only given when the advance payment has been made.
- If the enforceability of the claim securitized in the title is **dependent on a condition precedent**, this condition must have been met; otherwise, the substantive enforceability is not given (§ 7 (2) EO).<sup>3</sup>
- The substantive enforceability also includes the **absence of a waiver of enforcement or a stay of enforcement** (arg § 36 (1) Nr 3 EO). The fact that this (as a negative fact) can neither be asserted nor proven in the licensing procedure is - as already mentioned - irrelevant in this respect.

Insofar as the prerequisites of substantive enforceability must be presented and reviewed by the court, their deficiency must lead to a rejection of the application for enforcement, meaning that an enforcement order must not be issued.

If the court has overlooked the absence of these prerequisites and yet issued an enforcement order, the party against whom enforcement is sought can file a **recourse** against the enforcement order, combined with an **application for postponement** of the proceedings (§ 42 (1) No. 7 EO). However, the scope of the recourse is severely restricted due to the interdiction of novation (Neumayr and Nunner-Krautgasser, 2018: p. 69).

Furthermore, according to the prevailing opinion, the party against whom enforcement is sought can also file an **action for cessation on the grounds of impugment (“Impugnationsklage”;** § 36 EO) and apply for a postponement of the proceedings according to § 42 (1) Nr 5 EO (Deixler-Hübner, 2020: § 36 EO

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<sup>2</sup> OGH 23.10.2002, 3 Ob 207/01i.

<sup>3</sup> OGH 19.9.2001, 3 Ob 113/01s.

No. 12 *et seq.*; Jakusch, 2015: § 36 EO No. 11 *et seq.*; Neumayr and Nunner-Krautgasser, 2018: p. 70).

Insofar as prerequisites of substantive enforceability need not be presented and reviewed by the court, deficiencies can, in any case, be asserted by way of an **action for cessation on the grounds of impugnement** (§ 36 EO; Art XVII EGEO), respectively by way of an **application for cessation** (§ 40 EO).

### 3 Enforceability and recognition

In recent literature, there is an extensive discussion whether the **effect of enforceability is also subject to recognition**. The background to this question is the following: According to the **traditional regime of international civil procedural law** (namely the Brussels I Regulation before its recast), the effect of enforceability is not transferred to another state by “mere” recognition (Geimer, 2015: No. 3100; Nunner-Krautgasser, 2009: p. 798). Instead, it must be granted constitutively and originally in an enforceability declaration procedure (exequatur procedure) with a sovereign decision (Geimer, 2015: No. 3100 *et seq.*; Köllensperger, 2015: p. 44 *et seq.*; Oberhammer, 2014: Art 33 EuGVVO No. 1). Therefore, according to the prevailing opinion prior to the recast, the **levels of recognition and enforceability were to be strictly separated** (Nunner-Krautgasser, 2009: p. 798; Köllensperger, 2015: p. 44 *et seq.*).

Nowadays, however, we have to deal with the wake of the **abolition of exequatur** and the **new version of Article 39** of the Brussels Ia Regulation, according to which decisions are enforceable in other Member States “without any declaration of enforceability being required.” Since then, there has been an increasing number of voices that want to depart from the traditional dogma of separation (Althammer/Wolber, 2016: p. 56; Geimer, 2014: p. 113; Geimer, 2015: No.2756c; Geimer, 2019: Art 36 EuGVVO No. 2; Hess, 2015: Art 36 EuGVVO No. 2; Ulrici, 2016: p. 131; as well Neumayr, 2015: No. 3.896; similar Thöne, 2015: p. 149 *et seq.* **different** Peiffer and Peiffer, 2018: Art 36 EuGVVO No.37). *Geimer*, for example, speaks “of a recognition of enforceability in the sense of an extension of effect,” especially since the scope of enforceability is not determined by the law of the second state, as was previously the case, but by the law of the first state (Geimer, 2015: No. 2756c; Geimer, 2013: p. 313; Geimer, 2014: p. 113).

*Philipp Anzenberger* and the author (not yet published!) also take this view: If “recognition” is to be understood as the import of decision effects, and if enforceability is no longer granted separately by an act of sovereignty but automatically extends to all other Member States by means of Article 39 Brussels Ia Regulation, then it is only logical to assume that the **effect of enforceability is now also subject to recognition**. This is supported by the fact that the grounds for refusal of recognition (Art 45 Brussels Ia Regulation) and the grounds for refusal of enforcement (Art 46 Brussels Ia Regulation) are identical in terms of content.

Indeed, it is true that the grounds for a refusal of recognition and the grounds for a refusal of enforcement are to be asserted differently (cf. Article 36 and Article 46 *et seq.* Brussels Ia Regulation). However, in our opinion, this is not a viable argument against harmonization: These differences only concern the different procedural handling of the effects of the decision, but they say nothing about their dogmatic classification.

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