



# The ACTORS OF ENFORCEMENT

In terms of enforcement the ZPO (Code of Civil Proceedings) differentiates between the *enforcement of pecuniary claims* (§§ 803-882a) and *enforcement to effect the surrender of property, or to effect actions or omissions* (§§ 883-898). This distinction is based on general regulations (§§ 704-802).

Under §§ 803-871, the ZPO distinguishes between **movables** (§§ 803-863) and **immovables** (§§ 864-871), since there are - understandably - different enforcement procedures in each case.

As a result, enforcement differs not just in terms of the items involved, but also in terms of the relevant law enforcement agencies.

Accordingly, there is no single law enforcement agency entrusted with all types of enforcement. Rather, a distinction can be made between the following law enforcement agencies:

- The bailiff (§ 753 I)
- The court with jurisdiction over enforcement (§ 764)
- The trial court of first instance (§§ 887, 888, 890)
- The land registry (§ 867 I)

The **bailiff** is mainly responsible for the area of enforcement against chattels (§§ 808-827) and the surrender of property (§§ 883 and 885).

Enforcement of pecuniary claims in immovable property (judicial sequestration and compulsory auction) as well as claims and other rights (claims for surrender and other rights §§ 857-860) is, with the exception of the entry of a mortgage in the land registry (which is the responsibility of the **land registry**), a matter for the **court with jurisdiction over enforcement**.

The **trial court** is responsible for enforcement of compulsory performance or injunctions (authorisation of the creditor to take action at the debtor's expense, submission of a declaration of intent, coercive penalty payments and coercive detention).

## • The Bailiff

The bailiff is responsible primarily for tangibles (attachment and realisation). The bailiff is, according to German law, a **civil servant** who is, under § 154 of the Judicial System Act ("Gerichtsverfassungsgesetz" or "GVG"), entrusted with effecting service, delivering summonses and enforcement of judgments.

As stated above, the bailiff is not only responsible for enforcement against chattels and the surrender of property, but also for the administration of official oaths (§899). For this reason, the ZPO contains the general valid regulations describing the duties of the Bailiff in the section "General Regulations".





# The ACTORS OF ENFORCEMENT

## 1. THE BAILIFF'S LEGAL STATUS

§ 753 Enforcement by a bailiff *“(1) Insofar as enforcement is not allocated to the courts, it is performed by bailiffs acting on behalf of the creditor.*

*(2) The creditor can call upon the assistance of the court due to the issue of an enforcement order. The bailiff appointed by the court is treated as having been appointed by the creditor.*

*(...)”*

In accordance with this section of the Act, the bailiff is generally responsible for enforcement unless it is allocated to the courts.

In some cases, the bailiff is excluded from carrying out his office. § 155 GVG enumerates these cases.

§ 155 *“The bailiff is excluded by law from carrying out his office:*

► **I. in civil proceedings:**

- 1. if he is himself a party to the litigation or the legal representative of a party, or is a co-beneficiary, a co-obligor or is obliged to pay damages with a party to the litigation;
- 2. if his spouse, or civil partner is a party to the litigation, even if the marriage or civil partnership no longer exists;
- 3. if one of the litigants is, or was, related directly, or by marriage, to the bailiff, or is the uncle/aunt/niece nephew of the same, or is a sister/brother-in-law of the same;

► **II. in criminal proceedings:**

- 1. if the bailiff has himself been affected by the crime;
- 2. if the bailiff, or his spouse or civil partner has been charged with the crime, or is the victim of it;
- 3. if the bailiff is, or was, related to the person charged with or affected by the crime to the same degree as described in I (3).”

However, he cannot be refused on grounds of bias.

§ 154 *“The service and business relationship with the civil servant (bailiff) entrusted with effecting service, delivering summonses and enforcement of judgments is regulated in the Federal High Court by the Federal Minister of Justice and in the regional court by the regional justice administration.”*

Under § 154 the business and service relationship with the bailiff is regulated at federal level. However, additional regulations may be put in place at regional level.





# The ACTORS OF ENFORCEMENT

It has to be stressed that the bailiff should not be confused with the **enforcement officer**. The latter enforces claims on behalf of a government agency (e.g. the Federation, municipality, federal tax office). Thus they are bound by the instructions given them. Thus any public law agency may have recourse to enforcement officers to enforce their own claims.

In contrast to an enforcement officer, the bailiff is an **autonomous enforcement body** and is therefore only **subject to the law** and **works independently**. This, however, means that his decisions can only be reviewed by the court with jurisdiction over enforcement.

## 2. SUPERVISION OF THE BAILIFF

As mentioned above, the bailiff is an autonomous enforcement body responsible for the administration of justice. This means that he is part of the local court entrusted with public authority. And this is understandable since, as this often involves infringements of the debtor's basic rights, only an enforcement body at state level is able to carry out enforcement. The bailiff is subject to the supervision of the supervising judge at the local court. He cannot receive individual instructions from the supervising judge.

In accordance with § 766, the court with jurisdiction over enforcement makes decisions *"regarding applications, defences and objections affecting the manner of enforcement or the its proceedings to be complied with by the bailiff."*

## 3. BREACH OF DUTIES

Since the bailiff is entrusted with tasks to be carried out by a public authority, he exercises state jurisdiction. In the case of an infringement of official duties in the course of carrying them out, the state is liable under Article 34 of the German Constitution and § 839 of the BGB (German Civil Code) (*"Liability upon Infringement of Official Duties"*).

### The Reform of the Office of the Bailiff

The Bundesrat (Federal Assembly) introduced a proposed bill to the Bundestag for the reform of the office of the bailiff on 24/03/2010 (Bundestag-print 1/1225).

In the future, the tasks of the bailiff will no longer be only carried out under coercion from officials but also by private companies, so-called loan agencies, which will be supervised by the state.

According to the draft bill, the creditor should be given a free choice between several competing bailiffs.

The basis for such a fundamental reform is an amendment to the German Constitution. To effect this, a 2/3 majority of the German Bundestag would have to agree. At least the opposition parties in parliament have declared their rejection of the proposal, so that the required majority seems unlikely. The implementation of the draft bill is therefore improbable for the foreseeable future.





# The ACTORS OF ENFORCEMENT

The German Association of Bailiffs (der *Deutsche Gerichtsvollzieher Bund*) is currently attempting to achieve reforms within its current system run by officials. The transfer of the pledge of receivables is in particular the focus of discussion. These reforms are essential to ensure the success of enforcement.

## [Law regarding the inquiry into the facts of enforcement of 29/07/2009](#)

(Federal Journal 2009 - I, 2258 ff)

The above Act takes effect on 01/01/2013. Further, more far-reaching powers are thereby transferred to Germany's bailiffs. The determination of the debtor's estate, in case of a refusal to provide the required information, is the main point of discussion. Information such as account information and, in the case of automobiles, car owner information can be determined electronically.

Similarly, publication of the debtor's estate is timed for the commencement of the enforcement. The debtor's register is kept and copies are then issued by the bailiffs.

## • The Court with Jurisdiction over Enforcement

The court with jurisdiction over enforcement is responsible for the enforcement of pecuniary claims against real estate (judicial sequestration and compulsory auction), as well as moveables (garnishment, claims for the surrender of assets, other rights).

**§ 764 Court with Jurisdiction over Enforcement** *“(1) It is the responsibility of the local courts as courts with jurisdiction over enforcement to organise enforcement actions and the co-operation associated with them, allocated to the court. (2) Unless the law designates a different local court, the local court with jurisdiction over the area where the enforcement is to take, or has taken, place is regarded as the court with jurisdiction over enforcement. (...)”*

In accordance with § 764 the court with jurisdiction over enforcement is the **local court** in whose area enforcement proceedings are to take place, or have already taken place.

§ 828 regulates the jurisdiction of the court with jurisdiction over enforcement. According to the said section, the court with jurisdiction over enforcement is responsible for the enforcement of claims and other property rights. The court responsible for attachment is responsible for the garnishment of a claim (§ 930).

Just like the bailiff, the court with jurisdiction over enforcement has further powers i.e. not just those listed in §§ 828-863. For that reason, §§ 764 - 765 also contain basic regulations.





# The ACTORS OF ENFORCEMENT

§ 828 II “The local court with general domestic jurisdiction over the debtor is responsible as the court with jurisdiction over enforcement. Otherwise the local court before which an action can be brought against the debtor under § 23 is responsible.”

Local jurisdiction follows the rules of *General Jurisdiction* (§§ 13-19a of the ZPO).

The **land registry** is responsible for immovables and, as part of that, the registration of a mortgage (see point IV). Exceptions to this are judicial sequestration and compulsory auction since they are entirely within the jurisdiction of the court with jurisdiction over enforcement (§ 1 I of the Compulsory Auctions and Judicial Sequestration Act or “ZVG”): “The local court as court with jurisdiction over enforcement in the area where the piece of land is located is responsible for the judicial sequestration and compulsory auction of the same.”

## • The Trial Court of First Instance (§§ 887, 888, 890)

The trial court of first instance is responsible for the enforcement of execution orders which oblige the debtor to **conduct, tolerate or refrain [injunctions] from certain actions**. The trial court of first instance is the court which was responsible for the decision in the first instance i.e. the court which issued the judgment which is to be enforced.

The trial court is therefore responsible for carrying out **acts which can be performed by third parties** and **acts which cannot be performed by third parties**:

### 1. ACTS WHICH CAN BE PERFORMED BY THIRD PARTIES

#### § 887 OF THE ZPO

§ 887 Acts which can be performed by a third Party “(1) Should the debtor not fulfil his duties in performing an action, which can be performed by a third party, the creditor should, upon request, be empowered by the trial court of first instance to have the said action carried out at the debtor’s expense.

(2) The creditor may apply to have the debtor ordered to pay the costs incurred in performance of the action in advance without prejudice to the right to make an additional claim should performance of the action entail greater expenditure [than expected].

(3) The aforementioned regulations do not apply to enforcement to effect the surrender or provision of property.”





# The ACTORS OF ENFORCEMENT

In accordance with § 887, the trial court can empower the creditor to have an action performed at the debtor's expense. The trial court of first instance is responsible, in accordance with § 887 I.

## IMPLEMENTATION OF ENFORCEMENT

**§ 891 Sentence 1:** *“The decisions to be made in accordance with §§ 887 to 890, are to be issued by court order.”*

Therefore, a court order will be issued without an oral hearing or following an optional hearing. Nevertheless, the debtor has to be heard before a decision is made (§ 891 Sentence 2).

As this concerns actions which can be performed by third parties, the application will either be rejected by the court or the creditor will be entitled to have the action performed by a third party at the debtor's expense. At the same time, he may make an application to have the debtor ordered to make an advance payment (§ 887 II).

Under § 892, the creditor can involve a bailiff for the purpose of enforcement if the debtor opposes performance of the action, or, to put it another way, if the debtor does not fulfil his duties to tolerate certain actions.

## LEGAL REMEDY

Under § 793, there can be immediate appeal against decisions made during enforcement proceedings without an oral hearing. Immediate appeal is available both to the debtor and to the creditor.

Since, however, under § 892, the creditor may involve a bailiff for the purpose of enforcement, he is also entitled to make an **objection about the manner of enforcement** *“Vollstreckungserinnerung”*.

## 2. ACTIONS WHICH CANNOT BE PERFORMED BY THIRD PARTIES

### § 888 ZPO

**§ 888 Actions which cannot be performed by third parties** *“(1) Should it not be possible for a third party to perform an action and the action is solely dependent on the debtor's wishes, the trial court of first instance shall, upon request, hold that the debtor be required to undertake the action through the payment of an **administrative fine** and where this cannot be collected, **by compulsory detention**. The individual fine may not exceed the amount of EUR 25,000. The regulations of the fourth section regarding detention shall apply as appropriate to compulsory detention.*

*(2) There is no threat of coercive measures.*

*(3) These regulations do not apply in cases where judgment is required on the performance of services resulting from a service contract.”*

Since this case does not involve the completion of an action which can be performed by a third party, the enforcement cannot take place by substituted performance, but only by coercive measures, such as an administrative fine, or detention.





# The ACTORS OF ENFORCEMENT

It must be stressed that enforcement can only take place when the action which cannot be performed by third parties depends exclusively on the debtor's readiness to undertake such action. This means that enforcement cannot take place if, for example, the action requires specialist knowledge (the onus is on the debtor to prove this).

§ 888 III excludes enforcement of a judgment regarding the performance of services under a service contract. This section applies solely to performances of actions which cannot be performed by third parties. § 887 enables the enforcement of claims for performance of actions which can be performed by third parties.

## IMPLEMENTATION OF ENFORCEMENT

„The debtor has to be heard before the decision is made“ (§ 891 Sentence 2). The trial court fixes an administrative fine or period of detention (§ 888 I) but there can be no threat of coercive measures (§ 888 II).

### 3. THE COMPULSORY IMPLEMENTATION OF CLAIMS TO REFRAIN FROM OR TOLERATE CERTAIN ACTIONS

Under § 890 I, the trial court imposes a **fine** (of no more than EUR 250,000 ) for disobedience to the court or a **period of detention** against the debtor where the debtor has contravened an enforcement order.

Here also, the creditor may involve a bailiff, under § 892, in order to remove the debtor's resistance to performance of the action the debtor is obliged to tolerate.

The question is, how would one define the **obligation to refrain from an action**? This could involve an enforcement order obliging the debtor to do nothing where he could otherwise have done something.

**Tolerating an action** is a form of refraining from doing something. In this case too, the debtor is obliged to do nothing in the sense that he has to “tolerate” the action or behaviour of a third party.

Under § 890 II, the judgment is to be preceded by a corresponding warning.

The court decides at its own discretion whether a fine or a period of detention is to be imposed for disobedience to the court, therefore the creditor does not need to file a request. The penalty is enforced by the court.





# The ACTORS OF ENFORCEMENT

## 4. SUBMISSION OF A DECLARATION OF INTENT

§ 894 **Fictional submission of a Declaration of Intent** *“Should the debtor be obliged to submit a declaration of intent, the declaration is deemed given as soon as the judgment takes effect. If the declaration of intent is made dependent on performance in return, this takes effect as soon as an enforceable copy of a legally enforceable judgement has been issued in accordance with the regulations of §§ 726 and 730.”*

§ 894 regulates the submission of a declaration of intent quickly and simply. This is deemed submitted once the judgment takes effect. As the very title of § 894 suggests, this is, however, a **legal fiction**.

§ 894 applies only to judgments (or decisions) which have already taken effect. This means that, for example, in settlements which are not final and absolute – although under § 794 I No. 1 they are treated as enforcement orders – only the duty but not the statement of a declaration of intent may be imposed. In such cases the creditor must proceed in accordance with § 888.

### • The Land Registry

The land registry is a public body responsible for keeping the land register. Under § 1 I of the Land Registration Code (*Grundbuchordnung* or “GBO”), land registries are kept by the local courts (land registries).

Under § 866, enforcement against a piece of land is carried out by registering a **mortgage** for a pecuniary claim of more than EUR 750 (§ 866 III). The mortgage is entered in the land register at the creditor’s request (§ 867). The court registrar is responsible in cases regarding the land registry (§ 3 No. 1h of the RPfG (*Law regarding the duties of the Court Registrar*)). Once the mortgage has been registered, the regulations of the BGB (*German Civil Code*) (§ 1184 ff.) must be adhered to.

It must, however, be stressed that enforcement does not end with the registration of the mortgage. The creditor can also petition for judicial sequestration or compulsory auction, and thereby realise the value of the assets. The debtor may lodge objections against the enforcement demand (§ 767 Defences against Enforcement).





# The ACTORS OF ENFORCEMENT

Enforcement			Enforcement agencies	
On the basis of pecuniary claims	Against real estate	<ul style="list-style-type: none"> <li>- Mortgage §867</li> <li>- Judicial sequestration §869 ZVG</li> <li>- Compulsory Auction §869 ZVG</li> </ul>	Land registrar or court with jurisdiction over enforcement	
	In movable property	Intangibles §§ 808-827	Bailiff	
In claims and other rights §§ 828-863		<ul style="list-style-type: none"> <li>- Claims §§828-845, 850-856</li> <li>- Surrender of Property §§846-849</li> <li>- Other Rights §§857-860</li> </ul>	Court with jurisdiction over enforcement	
On the basis of other claims (actions or omissions)	Actions which can be performed by third parties	Surrender of Property	Chattels § 883 ff. of the ZPO	Bailiff
			Land §885 of the ZPO	Bailiff
	Other Action	Empowerment of the creditor to undertake action at the debtor's expense § 887 of the ZPO	Trial court	
	Actions which cannot be performed by third parties	Submission of a Declaration of Intent §§ 894-898 of the ZPO	Trial court	
Other Action § 888 of the ZPO (fine or detention for disobedience to the court)		Trial court		

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