



Attachments of IMMOVABLE PROPERTY

Professional E-note

• The seizure and disposal of real estate in Germany¹

Enforced sale is the execution of a claim by State enforcing resources. The creditor is able to make execution against the immovable assets on account of a money claim and to settle his claim accordingly. Immovable assets include land and the buildings on it, residential property, partially owned property and rights analogous to land such as hereditary building rights. Aircraft and ships are similarly treated as immovable assets, provided they have been registered. Their disposal is subject to special provisions. The essential law for execution on real estate as an asset, i.e. on immovables, is the Compulsory Sale and Compulsory Administration Act as published on 20 May 1898, usually abbreviated to “ZVG”.

A special form of enforced sale is apportionment sale to dispose of jointly held property (§ 180 ZVG).

Unlike compulsory administration, enforced sale, which is aimed at the proceeds of the property, results in disposal of the substance.

1. JURISDICTION

The procedure is carried out before the Local court as execution court. This is known as material jurisdiction. The Local court in whose district the property is situated has local jurisdiction. However, jurisdiction for the districts of several local courts is not infrequently concentrated on one Local court.

Aircraft are sold centrally by the Brunswick Local Court. The Federal Aviation Office is established in Brunswick; the place where the Office is established is relevant to the appropriate execution court.¹

The Court Officer is functionally (“personally”) responsible (§ 3 (1) i RPfLG). Applications for recording at the Court office are noted down by the office’s recording officer.

2. PROCEDURE

APPLICATION

The Creditor (claimant creditor) must apply for enforced sale as the method of compulsory enforcement. This may be the creditor to rights entered in the Land Register (creditors in rem) or a creditor to another cash receivable (personal creditor).

¹ Partly taken from Wikipedia





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The Court Officer examines whether the application is in order and the formal prerequisites exist for ordering compulsory sale. The prerequisites for this are the production of execution title, the normal execution clause and service of the execution title and execution clause. The decision introducing proceedings must be served by the Court on the debtor and if applicable also on the creditor. The debtor (e.g. property owner), the claimant creditor and persons whose interests are shown on the Land Register, especially the creditors to other rights, participate in the compulsory sale proceedings. Further participants may be added depending on the stage of proceedings - also while proceedings are in progress. Tenants similarly participate in proceedings by announcing their claim.

That compulsory sale has been ordered is entered in Section II of the Land Register at the request of the execution court. This entry encroaches on public confidence in the accuracy of the Land Register regarding the owner's position. Serving the Court's decision on the debtor or receipt of the request for registration at the Land Registry is regarded as seizure of the property on the creditor's behalf.

Further creditors may join in compulsory sale proceedings. The same prerequisites and effects apply to the joining decision. The joining decision takes effect when served on the debtor. Although the same sale procedure is concerned, the claimant creditors are independent of each other. For example, proceedings may be brought or terminated separately in respect of each individual creditor.

LEGAL REMEDIES

An immediate complaint to the appropriate regional court is permissible against decisions of the execution court - both for the creditor and for the debtor.

TEMPORARY SUSPENSION ON APPLICATION BY THE DEBTOR

The debtor can apply for suspension of compulsory sale in accordance with § 30a ZVG. The application must be made within two weeks following service of the decision ordering or on joining proceedings. This application is likely to be successful if the debtor can show that he can settle the creditor's claim within six months. In that case, the compulsory sale is suspended for a maximum of six months. The court can make suspension of compulsory sale dependent on certain conditions, e.g. appropriate payment by instalments.

In addition, the debtor may apply for temporary suspension under § 765a Code of Civil Procedure if the sale may cause hardship contrary to public policy. Or if there is risk to life and limb. In either case, the debtor must show appropriate proof to the execution court. On a risk to life and limb, a medical certificate must be produced on a regular basis. If the execution court rejects the application, an immediate appeal to the appropriate regional court is permissible. Precedent has not been





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uniform. There have also been courts taking the view that the *psychological stress* on an execution debtor is better dealt with by rapid sale proceedings than by further delay. However, the Federal Court of Justice (BGH) has held in its decisions¹ that the sale should be temporarily postponed e.g. on risk of suicide (medically certified).

TEMPORARY SUSPENSION ON APPLICATION BY THE CREDITOR

Every creditor bringing proceedings is able to have the compulsory sale temporarily suspended under § 30 ZVG. To do so, he “approves” the temporary suspension. This approval may be given at any time in proceedings, for negotiations to take place out of court with the debtor or on tactical procedural grounds in order e.g. to prevent acceptance of what the creditor regards as an inadequate highest bid. The creditor can agree to temporary suspension twice only. The third suspension approved is regarded as withdrawal of the sale application and results in abandonment of proceedings.

BEFORE THE SALE DATE

The execution court must fix the market value of the property to be sold before execution date. Fixing this market value serves only to determine the value limits for certain creditors’ and debtors’ protective rights within the sale period. The Court Officer may assess the market value of property as he sees fit. However, an expert is usually appointed to produce a market value report. In fact, a report already existing may in principle serve as basis for ascertaining market value. This market value report is then communicated to participants in the proceedings or the ascertained value of the property is disclosed for comment. The report may also be inspected by prospective bidders.

After the participants have been heard, the market value is fixed on the basis of this report by decision. This decision may be challenged by any participant by objection.

After the market value has been fixed, the sale date is decided. 9 to 12 months normally pass between compulsory sale being ordered and fixing the sale date, regionally also up to 24 months. The date is publicised by posting up at the Local Court and publication in the Official Journal. Under § 38 (2) ZVG, publication on the internet is also regarded as publication in the Official Journal. Publication is mostly also additionally made in a local newspaper and on the municipal notice board (§ 39 ZVG).

SALE DATE

The sale date is public. Anyone has access (§ 169 GVG). It consists of three parts: the announcement (§ 66 ZVG), the bidding period (§ 73 ZVG) and a hearing for participants present on acceptance of the bid (§ 74 ZVG).¹





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NOTICES

Before the actual sale, counsel reads out the land registry entries and identifies the creditors who have requested compulsory sale (*claimant creditors*). The “lowest bid” is also included in the notification section. It includes the rights that continue to apply on account of preferential Land Registry entries and the part of the lowest bid to be paid in cash, amounting to the minimum costs of the sale procedure, while other public charges (e.g. land taxes) and ancillary payments are added to the rights that continue to exist. The continuing rights are of particular importance to potential bidders.

The subject matter of the notification part also includes the amounts of the additional or initial payments. These are cash payments that a bidder must pay in addition to his bid should it subsequently emerge that continuing rights no longer exist. At this stage of the sale period, the creditors have a last opportunity to notify their claims within their ranking, before counsel asks for bids to be placed.

BIDDING PERIOD

The minimum period in which bids can be placed during the sale (bidding time) is 30 minutes. In the past, interested parties had at least one hour's time to place bids (“bidding hour”). There is no limit to the maximum bidding time; the sale continues until The Court Officer announces the end of the sale. This is generally done when no further bids are placed after the last bid has been called three times.

The bidder indicates a particular bid within the time limit, i.e. the amount that he wishes to pay. The bid during the plot sale period covers only the cash bid, i.e. the amount that the potential bidder must pay in cash. Every potential bidder must also include the rights that continue to exist in this cash bid (see lowest bid), in order to receive the actual price for which he has bid.

The maximum bid placed during the period is called the highest bid.

SECURITY

The creditor conducting the proceedings or another person entitled to do so (for example the debtor) can require each bidder to put up security immediately after placing a bid usually amounting to 10% of the market value. In the case of especially low market values, security may also be a little higher if certain ancillary charges so require. Such security can be put up by a confirmed cheque issued by the Federal Bank no earlier than the third working day before the sale date, a bank draft, issued by a bank permitted to do so, by the third working day at the earliest before the sale date, or a suretyship issued by such bank (§ 69 ZVG). Only drafts issued by the bank itself and consequently under which payment can be immediately obtained under Art. 12 (1) Cheques Act can serve as reliable security, but not cheques issued by the bidder, even if submitted together with a redemption promise by the bank.¹ Unless security is immediately put up, the Court will reject the bid. It was still possible up to 15 February 2007 to put up security by handing over cash within the period. Prior transfer to an account at the Regional Higher Cash Offices now supersedes a cash payment. If the bidder concerned is not adjudicated, the court will immediately return the security after the sale date.





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CREDITORS' RIGHT

Every claimant creditor can grant a stay of proceedings at any time, irrespective of the amount of the bid and the stage of proceedings (§ 30 ZVG). If the highest ranking claimant creditor agrees to stay the proceedings, this usually means immediate stay of proceedings because the lowest bid has changed. All bids placed up till then become invalid. The grant of a stay by lower ranking creditors will not usually affect the sale period. A creditor can also obtain a compulsory sale of property in the event of the insolvency of the property owner without valuation of the insolvent estate. Under § 49 InsO, compulsory sale from the insolvent estate is also possible against the express wishes of the receiver in the bankruptcy. The receiver is able only, in the case of compulsory sale of property by the creditors, to request provisional stay of proceedings by the court under relaxed conditions.

NOTIFICATION

At the end of the bidding period, the execution court asked participants present at the hearing whether requests will be made. Claimant creditors can also grant stay of proceedings at this stage, while the debtor can also still request protection against execution under § 765a Code of Civil Procedure.

If no effective bid has been placed during the sale period, the court will stay proceedings by its own moving. The claimant creditors will then be able to apply for continuation of proceedings.

If the highest bid (including the cash bid for remaining rights) is less than 7/10ths of the market value, an entitled person may apply for cancellation of the adjudication.

Taking account of requests, the court will give its decision on the adjudication. The court may also allow a special adjudication date for this. On constitutional grounds, the execution court must also avoid a cheap sale. If the highest bid is less than 3/10ths of the market value, the execution court will put off its decision to give the execution debtor an opportunity to make a special application for protection against execution.¹

The execution court will give a decision on whether to allow or refuse adjudication.

The execution court must take account of both creditors' and also debtors' interests in protection in its decision. If the best bid given during the sale period (highest bid) is less than 7/10ths of the market value, adjudication must be refused in accordance with § 74a (1) ZVG on application by an entitled person who's bid lies within this 7/10ths limit. If the highest bid is less than half of the market value (5/10ths), adjudication must be refused ex officio under § 85a (1) ZVG. In either case, a new sale date must be fixed, within which these limits no longer apply (in sale terms, the 2nd period). If no bid is placed in the sale period or if adjudication is refused on account of a creditor being granted a stay, the value limits will continue to apply in the subsequent period.





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Stay of proceedings by the highest ranking claimant creditor before adjudication is announced will similarly usually result in refusal of adjudication. He can therefore expect the 7/10ths or 5/10ths limits to continue to apply under a subsequent sale period (in sale terms, still the first period).

The highest bidder awarded adjudication is called the auction purchaser.

TRANSFER OF RISKS, LIABILITY AND BENEFITS

The risk of accessories and other items included in the sale (*tools, machinery, etc.*) being lost is transferred to the highest bidder at the end of the sale. At this point, he is not yet the auction purchaser of the property by adjudication.

The risk of destruction of the property together with the components associated with it (*building etc.*) passes to the auction purchaser on adjudication “*and at the precise moment of adjudication. The senior court officer therefore also records the precise time in the adjudication decision, together with the date.*”¹

All charges, even those not known, pass to the successful bidder on adjudication. Liability also passes to the purchaser on adjudication. He assumes existing insurance policies, if any (§ 56, § 60 and § 114 VVG).

Usufruct passes to the successful purchaser on adjudication.¹

EFFECTS OF THE ADJUDICATION DECISION

If adjudication is made, the successful purchaser becomes owner of the property from notification of the grant of adjudication. This is an exception to the principle that transfer of title requires Land Registry entry.

The adjudication decision constitutes executory title for the acquirer for implementing his rights on taking up possession. Compulsory execution for clearance and allocation can already be enforced against the possessor of the property before legal effect. The acquirer, not the court, must execute. Execution is undertaken not by the court but by the acquirer with the assistance of the judicial officer. The Local Court must declare the adjudication decision executable for this purpose (execution clause).

FOLLOWING GRANT OF ADJUDICATION

If adjudication is granted, the Court Officer will decide on an allocation date. On that date, the sale proceeds are allocated to the creditors in the order laid down by law.

The remaining auction price is therefore due at allocation date, which is usually approx. 8-12 weeks following the adjudication date, and bears interest at 4% p.a. as from grant of adjudication.





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The Land Registry will correct the Land Register at the request of the execution court. The court will approach the Land Registry when the adjudication decision assumes legal effect, the allocation plan has been implemented and payment of the land acquisition tax is confirmed by producing an approval certificate from the Tax Office.

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For further information, please contact eje@europe-eje.eu

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