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Clarity and definiteness of norms in Austrian civil procedure law

Abstract

The norms applicable to Austrian civil procedural law are found in various legal sources: In addition to the ZPO, the JN, the AußStrG, the EO, the IO, the GOG and the Geo 1. Instanz are authoritative. The multitude of legal sources can impair its clarity. Thus, procedural norms can also be found in legal acts in which they are not presumed. For example, the UWG requires the court, upon request or ex officio, to take precautions and measures to ensure that no party obtains new information about the trade secret at issue in the course of the proceedings that goes beyond their respective previous level of knowledge. This regulatory technique leads to the fact that regulations can be overlooked. The Austrian legislator is aware of the problem: For example, he unalteredly adopted the regulation on the use of technical devices for the transmission of words and images during the taking of evidence in civil court proceedings, which is standardised in section 91a GOG, into the ZPO. As reasoning, he states that by increasing the „visibility" of this provision, its application is promoted.

The original version of the Austrian Code of Civil Procedure dates back to 1895. Even if certain terms are outdated, the wording does not affect the clarity of the Code. In part, however, an adaptation of the norms to the interpretation by literature and jurisprudence seems sensible. For example, section 406 of the Code of Civil Procedure stipulates that an order for performance is only admissible if the maturity has already occurred at the time of the creation of the judgment. According to unanimous opinion, it is not the time of the creation of the judgment that is decisive, which cannot be determined objectively, but the conclusion of the oral proceedings of the first instance.

The clarity of determination can be affected by the deviations from European civil procedure law. This applies in particular to the area of jurisdiction. For example, according to section 92a JN, the place of action is decisive in actions for damages, however under Articke 7 No. 2 Brussels Ia Regulation the place of action and success is decisive. The scope of application of the provisions differs despite their different objectives: Section 92a JN applies to contractual and tortious claims, Article 7 No.

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2 Brussels Ia Regulation only to tortious claims. Section 92a JN is only applicable to disputes on compensation for damage resulting from the death or injury of one or more persons, from a deprivation of liberty or from damage to a physical object. Article 7 No. 2 Brussels Ia Regulation applies to all tort claims covered by the scope of the Regulation.

Clarity is affected by numerous references in the individual norms. For example, section 528 ZPO contains a total of more than 10 references to other provisions.

Despite the shortcomings pointed out, the ZPO has proven to be a well-functioning instrument that takes sufficient account of the clarity of norms and determinations.

According to the French philosopher *Voltaire* (1694–1778), *"every law [...]* should be *clear, uniform and exact; to interpret it is almost always to spoil it*." This (especially the first half-sentence) must apply in particular to civil procedural norms. These require a particularly high degree of clarity and definiteness in order to ensure access to the courts and thus effective enforcement of claims. Only in this way can the fulfilment of an important task of civil procedure, namely the restoration and preservation of legal peace *inter partes* and for the legal community,[1] be ensured. In this article, examples are used to examine how precise and consistent the norms and provisions of Austrian civil procedure law are.

1. General – overview of Austrian civil procedure law

Austrian civil procedure law consists of a large number of different codified legal acts. The central source of law for civil proceedings is the Code of Civil Procedure (Zivilprozessordnung, ZPO),[2] whose provisions in labour and social law cases are supplemented and modified in particular by the Labour and Social Court Act (Arbeits- und Sozialgerichtsgesetz, ASGG)[3]. The Non-Contentious Proceedings Act (Außerstreitgesetz, AußStrG)[4] is primarily

[1] *Fasching,* Lehrbuch des österreichischen Zivilprozessrechts[2] (1990) note 1 et seqq.; *G. Kodek/Mayr*, Zivilprozessrecht[5] (2021) note 8 et seqq. and note 22; *Rechberger/Simotta*, Grundriss des Zivilprozessrechts[9] (2017) note 20.

[2] Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO), RGBl 1895/113 i.d.g.F.; Law of 1 August 1895, on judicial proceedings in civil disputes (Code of Civil Procedure – ZPO), RGBl 1895/113 as amended.

[3] Bundesgesetz vom 7. März 1985 über die Arbeits- und Sozialgerichtsbarkeit (Arbeits- und Sozialgerichtsgesetz – ASGG), BGBl 1985/104 i.d.g.F.; Federal Act of 7 March 1985 on Labour and Social Jurisdiction (Labour and Social Court Act – ASGG), BGBl 1985/104 as amended.

[4] Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG), BGBl I 2003/111 i.d.g.F.; Federal Act on Judicial

relevant for non-contentious proceedings. Since the non-contentious proceedings apply to numerous special matters[5] – such as the keeping of the land register and the company register as well as the proceedings on the placement of mentally ill persons – special laws – such as the General Land Register Act (GBG),[6] the Company Register Act (FBG),[7] the Nursing Home Residence Act (HeimAufG[8]) and the Placement Act (UbG)[9] – must also be observed. In principle, the general part of the AußStrG applies to these proceedings. In order to take into account the particularities of the respective proceedings, the special laws contain numerous deviations from the general part of the AußStrG.

The provisions of the Execution Code (EO)[10] and the Introductory Act to the Execution Code (EGEO)[11] apply in particular to enforcement proceedings and interim legal protection proceedings, and the provisions of the Insolvency Code (IO),[12] also apply in particular to insolvency and restructuring proceedings, whereby special laws such as the Restructuring Code (ReO)[13] must also be observed.

Proceedings in Non-Contentious Matters (Außerstreitgesetz – AußStrG), BGBl I 2003/111 as amended.

[5] For an overview, see for example *G. Kodek* in *Gitschthaler/Höllwerth*, Kommentar zum AußStrG I[2] (2019) § 1 note 87; *Motal* in *Schneider/Verweijen*, AußStrG (2019) § 1 note 50.

[6] Bundesgesetz vom 2. Feber 1955 über die Grundbücher (Allgemeines Grundbuchsgesetz 1955 – GBG 1955), BGBl 1955/39 i.d.g.F.; Federal Act of 2 February 1955 on Land Registers (General Land Register Act 1955 – GBG 1955), BGBl 1955/39 as amended.

[7] Firmenbuchgesetz (FBG), BGBl 1991/10 i.d.g.F.; Companies Register Act (FBG), BGBl 1991/10 as amended.

[8] Bundesgesetz über den Schutz der persönlichen Freiheit während des Aufenthalts in Heimen und anderen Pflege- und Betreuungseinrichtungen (Heimaufenthaltsgesetz – HeimAufG), BGBl I 2004/11 i.d.g.F.; Federal Act on the Protection of Personal Freedom during Residence in Homes and Other Nursing and Care Facilities (Heimaufenthaltsgesetz – HeimAufG), BGBl I 2004/11 as amended.

[9] Bundesgesetz vom 1. März 1990 über die Unterbringung psychisch Kranker in Krankenanstalten (Unterbringungsgesetz – UbG), BGBl 1990/155 i.d.g.F.; Federal Act of 1 March 1990 on the Placement of Mentally Ill Persons in Hospitals (Placement Act – UbG), BGBl 1990/155 as amended.

[10] Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Exekutionsordnung – EO), RGBl 1896/79 i.d.g.F.; Law of 27 May 1896 on execution and security proceedings (Exekutionsordnung – EO), RGBl 1896/79 as amended.

[11] Einführungsgesetz zur Exekutionsordnung (EGEO), BGBl 1953/6 i.d.g.F.; Law concerning the introduction of the Execution Code, BGBl 1953/6 as amended.

[12] Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO), RGBl 1914/337 i.d.g.F.; Federal Act on Insolvency Proceedings (Insolvency Code – IO), RGBl 1914/337 as amended.

[13] Bundesgesetz über die Restrukturierung von Unternehmen (Restrukturierungsordnung – ReO), BGBl I 2021/147 i.d.g.F.; Federal Act on the Restructuring of Companies

In addition, the Jurisdiction Standard (JN)[14] contains regulations on the exercise of jurisdiction and the competence of the ordinary courts in civil law cases and is relevant for all civil proceedings. The provisions of the JN are supplemented by other special procedural provisions. For example, the JN does not contain any provisions on jurisdiction for compulsory enforcement proceedings, interim relief proceedings and insolvency proceedings; the relevant provisions in this regard are found in particular in the EO[15] and the IO.[16]

At the same time as the JN and the ZPO, the Civil Procedure Introductory Act (EGZPO)[17] and the Jurisdiction Introductory Act (EGJN)[18] entered into force, which, in addition to adaptation and transitional provisions, also contain provisions that supplement the regulations of the ZPO and JN (see point 2.2.). For this reason, they are still relevant.

In addition, there are other legal acts that are relevant to civil proceedings. For example, service is regulated in a separate law – the Service of Documents Act (Zustellgesetz, ZustG)[19] (see 2.4). Standards on the organisation and rules of procedure of the courts are contained in the Court Organization Act (Gerichtsorganisationsgesetz, GOG),[20] the Rules of Procedure for the

(Restructuring Ordinance – ReO), BGBl I 2021/147 as amended.

[14] Gesetz vom 1. August 1895, über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm – JN), RGBl 1895/111 i.d.g.F.; Law of 1 August 1895, on the Exercise of Jurisdiction and the Jurisdiction of the Ordinary Courts in Civil Matters (Jurisdiktionsnorm – JN), RGBl 1895/111 as amended.

[15] Jurisdiction in compulsory enforcement proceedings results, for example, from sections 3 et seqq. EO and for interim relief proceedings from section 387 EO. See in more detail *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[4] (2018) 336 et seq.; *Schneider* in *Mohr/Pimmer/Schneider*, EO[17] (2021) § 3 and § 4 et seqq.

[16] Jurisdiction in insolvency proceedings results from section 63 (1) IO and section 182 (1) IO. See in more detail *Dellinger/Oberhammer/Koller*, Insolvenzrecht[4] (2018) note 40 et seqq.

[17] Gesetz vom 1. August 1895, betreffend die Einführung des Gesetzes über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Civilprocessordnung), RGBl 1895/112 i.d.g.F.; Law of 1 August 1895, concerning the introduction of the law on judicial proceedings in civil disputes (Civilprocessordnung), RGBl 1895/112 as amended.

[18] Gesetz vom 1. August 1895, betreffend die Einführung des Gesetzes über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdictionsnorm), RGBl 1895/110 i.d.g.F.; Law of 1 August 1895, concerning the introduction of the law on the exercise of jurisdiction and the jurisdiction of the ordinary courts in civil law cases (Jurisdictionsnorm), RGBl 1895/110 i.d.g.F.

[19] Bundesgesetz über die Zustellung behördlicher Dokumente (Zustellgesetz – ZustG), BGBl 1982/200 i.d.g.F.; Federal Act on the Service of Official Documents (Zustellgesetz – ZustG), BGBl 1982/200 as amended.

[20] Gesetz vom 27. November 1896, womit Vorschriften über die Besetzung, innere Einrichtung

Courts of First and Second Instance (Geschäftsordnung für die Gerichte I. und II. Instanz (Geo)[21] and the Act on the Supreme Court (OGHG)[22] (see 2.1). The professional law of lawyers and other court personnel is regulated in particular in the Judges and Public Prosecutors Service Act (RStDG),[23] the Legal Officers Act (RpflG),[24] the Experts and Interpreters Act (SDG),[25] the Lawyers' Act (RAO)[26] and the Notaries' Act (NO).[27]

Important constitutional foundations of civil procedure law can be found in particular in the Federal Constitutional Law (B-VG),[28] such as Article 10 (1) No. 6 B-VG, according to which the Federal Government and therefore not the provinces are responsible for legislation and enforcement for civil law, official secrecy (Article 20 [3] B-VG), the right to the lawful judge (Article 83 B-VG) and the independence of judges (Article 87 B-VG), and in the European Convention on Human Rights (ECHR[29]), which has constitutional status in Austria, such as the fundamental right to a fair trial (Article 6 ECHR) and to respect for private and family life (Article 8 ECHR).

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und Geschäftsordnung der Gerichte erlassen werden (Gerichtsorganisationsgesetz – GOG), RGBl 1896/217 i.d.g.F.; Law of 27 November 1896 enacting provisions on the staffing, internal organisation and rules of procedure of the courts (Court Organisation Act – GOG), RGBl 1896/217 as amended.

[21] Geschäftsordnung für die Gerichte I. und II. Instanz (Geo), BGBl 1951/264 i.d.g.F.; Rules of Procedure for the Courts of First and Second Instance, BGBl 1951/264 as amended.

[22] Bundesgesetz vom 19. Juni 1968 über den Obersten Gerichtshof, BGBl 1968/328 i.d.g.F.; Federal Act of 19 June 1968 on the Supreme Court, BGBl 1968/328 as amended.

[23] Bundesgesetz über das Dienstverhältnis der Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte und Richteramtsanwärterinnen und Richteramtsanwärter (Richter- und Staatsanwaltschaftsdienstgesetz – RStDG), BGBl 1961/305 i.d.g.F.; Federal Act on the Employment Relationship of Judges, Public Prosecutors and Trainee Judges (Judges and Public Prosecutors Service Act – RStDG), BGBl 1961/305 as amended.

[24] Bundesgesetz vom 12. Dezember 1985 betreffend die Besorgung gerichtlicher Geschäfte durch Rechtspfleger (Rechtspflegergesetz – RpflG), BGBl 1985/560 i.d.g.F.; Federal Act of 12 December 1985 on the Administration of Judicial Business by the Rechtspfleger (Rechtspflegergesetz – RpflG), BGBl 1985/560 as amended.

[25] Bundesgesetz über die allgemein beeideten und gerichtlich zertifizierten Sachverständigen und Dolmetscher (Sachverständigen- und Dolmetschergesetz – SDG), BGBl 1975/137 i.d.g.F.; Federal Act on Generally Sworn and Court-Certified Experts and Interpreters (Expert and Interpreter Act – SDG), BGBl 1975/137 as amended.

[26] Rechtsanwaltsordnung, RGBl 1868/96 i.d.g.F.; Lawyers' Act, RGBl 1868/96 as amended.

[27] Notariatsordnung, RGBl 1871/75 i.d.g.F.; Notarial Code, RGBl 1871/75 as amended.

[28] Bundes-Verfassungsgesetz, BGBl 1930/1 i.d.g.F.; Federal Constitutional Act, BGBl 1930/1 as amended.

[29] Konvention zum Schutze der Menschenrechte und Grundfreiheiten, BGBl 1958/210 i.d.g.F.; Convention for the Protection of Human Rights and Fundamental Freedoms, BGBl 1958/210 as amended.

In addition, EU legal acts concerning civil procedural law and various bilateral and multilateral treaties must be taken into account. These include for example the Brussels Ibis Regulation,[30] the Regulation No. 805/2004,[31] the Brussels IIter Regulation,[32] the Regulation No. 4/2009,[33] the Regulation No. 2016/1103,[34] the Regulation No. 2016/1104[35] and the Regulation No. 2015/848[36]. They regulate certain aspects of the procedure – such as international jurisdiction, the consequences of multiple lis pendens and the recognition and enforcement of judgments. The Regulation No. 1896/2006[37] and the Regulation No. 861/2007[38] provide for European procedures. Both the European order for payment procedure and the European Small Claims Procedure are only an optional alternative to the procedures under national law so that it is up to the claimant to choose in which procedure he wants to enforce his claims.[39]

The international treaties ratified by Austria or applicable in Austria include the Hague Procedural Convention,[40] the Hague Child Abduction

[30] 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, OJ 2012 L 351/1 as amended.

[31] 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, OJ 2004 L 143/15.

[32] Council Regulation (EU) 2019/1111 of 25 June 2019 concerning jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction, OJ 2019 L 178/1.

[33] 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, OJ 2009 L 7/1.

[34] Council Regulation (EC) 2016/1103 of 24 June 2016 implementing enhanced cooperation in matters of jurisdiction, applicable law and recognition and enforcement of decisions in matters concerning matrimonial property regimes, OJ 2016 L 183/1.

[35] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in matters of jurisdiction, applicable law and recognition and enforcement of decisions in matters relating to matrimonial property regimes of registered partnerships, OJ 2016 L 183/30.

[36] Council Regulation (EU) No. 848/2015 of 20 May 2015 on insolvency proceedings (recast), OJ 2015 L 141/19.

[37] Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 2006 L 399/1.

[38] Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 2007 L 199/1.

[39] Cf. only *Garber* in *Angst/Oberhammer,* Kommentar zur Exekutionsordnung[3] (2015) Vor § 79 note 338.

[40] Convention of 1 March 1954 on Civil Procedure, BGBl 1957/91 as amended.

Convention[41] and the Hague Child Protection Convention.[42] The numerous bilateral and multilateral recognition and enforcement treaties should also be noted.[43] Of particular importance – in addition to the Lugano Convention[44] – is the agreement with the neighbouring state of Liechtenstein,[45] because the Principality of Liechtenstein is not a contracting state of the Lugano Convention.

2. Impairment of the clarity of norms and determinations due to the multitude of legal acts and norms

2.1. General and impairment of the clarity of norms and determinations by the necessary demarcation between legal acts

It is questionable whether the multitude of different legal sources applicable in Austria counteracts the clarity of Austrian civil procedure law in general. The regulations of the individual proceedings in separate laws (ZPO, ASGG, AußStrG, EO and IO) do not impair the clarity; also the exclusion of areas that apply to individual parts of the proceedings – such as the regulation of jurisdiction in the JN or the regulations regarding service in the ZustG – does not cause significant legal uncertainty (see point 2.4.). Individual, closely related areas – such as the norms on the organization and the rules of procedure of the courts, which are currently contained in particular in the GOG, the Geo and the OGHG – could have been combined into a single body of law in order to take into account the postulate of clarity and thus legal certainty. There is no clear answer to the question of the form in which the legal basis for the progressive digitalization of court proceedings and the communication with the persons involved in court proceedings should be standardized. Here, too, a *"cross-procedural*" special law could possibly provide more clarity.

In any case, the multiplicity of legal sources means that the practitioner must first determine the relevant legal sources for the specific procedure or

[41] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Hague Child Abduction Convention, BGBl 1988/512 as amended.

[42] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, BGBl III 2011/49 as amended.

[43] For an overview, see *Garber* in *Angst/Oberhammer,* EO[3] Vor § 79 note 4.

[44] Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007, OJ 2007 L 339/3.

[45] Agreement between the Republic of Austria and the Principality of Liechtenstein on the Recognition and Enforcement of Judgments, Arbitral Awards, Settlements and Authentic Instruments, BGBl 1975/114 as amended.

the specific stage of the procedure. The delimitation of the sources of law does not generally cause any difficulties.

This applies, for example, to the demarcation between contentious and non-contentious legal action and thus to the question of whether the provisions of the ZPO or those of the AußStrG are to be applied. According to sectéion 1 AußStrG, for example, all civil law cases – unless otherwise ordered – belong to the contentious legal process. Thus, the Austrian legislator has opted for the primacy of contentious civil proceedings. It is not necessary that the applicability of the non-contentious legal process and thus of the AußStrG is expressly stipulated in the law;[46] rather, an undoubtedly conclusive[47] or clear allocation from the internal context of the asserted claim is sufficient.[48] According to the case law, the non-contentious procedure is always to be applied even if this results from the nature of the asserted claim and the legal relationship between the applicant and the court thereby established.[49] Although there is no demonstrative or even taxative enumeration in the civil procedure laws,[50] the demarcation between contentious and non-contentious legal action does not usually cause any difficulties in practice. Admittedly, problematic and doubtful cases remain: This applies, for example, to the area of company law proceedings.[51] From section 120 (1) No. 2 JN, which (among other things) refers to section 166 UGB[52], it can be inferred that the legislator assigns the court order of the balance sheet or other clarifications to be issued at the request of a limited partner as well as the presentation of

[46] *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 80.

[47] *Fucik/Rechberger* in *Rechberger/Klicka,* ZPO⁵ (2019) Art I EGZPO note 6; *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 80; *Rechberger/Klicka* in *Rechberger/Klicka,* AuStrG³ (2021) § 1 note 2 und 6; OGH 9 Ob 106/01f EFSlg 98.756; OGH 1 Ob 219/01i MietSlg 53.816; OGH 1 Ob 202/00p MietSlg 52.821 = RZ 2001/14; OGH 7 Ob 97/00s EvBl 2000/200; OGH 5 Ob 61/98a MietSlg 50.280.

[48] *Fasching,* Lehrbuch² note 112; *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 80; *Rechberger/Klicka* in *Rechberger/Klicka,* AußStrG³ § 1 AußStrG note 6; OGH 5 Ob 163/86 SZ 60/18; cf. also OGH 7 Ob 26/87 VersRdSch 1988, 26; OGH 5 Ob 255/15h NZ 2016/153

[49] RIS-Justiz RS0005781; cf. also *Rechberger/Klicka* in *Rechberger/Klicka,* AußStrG³ § 1 AußStrG note 6.

[50] The demand for a "streamlining of the non-contentious matters" (*Mayr*, Grundlagen einer Reform des Außerstreitverfahrens, in *Rechberger*, Außerstreitreform – in der Zielgeraden, LBI XX [1999] 1 [24 et seqq.]) was not taken up by the legislator (ErläutRV zum AußStrG [224 BlgNR 22. GP] 17) out of political pragmatism.

[51] *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 84.

[52] Bundesgesetz über besondere zivilrechtliche Vorschriften für Unternehmen (Unternehmensgesetzbuch – UGB), dRGBl 1897/219; Federal Act on Special Civil Law Provisions for Companies (Unternehmensgesetzbuch – UGB), dRGBl 1897/219.

books and documents for the effective exercise of the control rights to the non-contentious proceedings. According to the prevailing view[53], this also applies to other book inspection proceedings. For the special audit according to §§ 45 et seqq. GmbHG[54] it results from the – in case of applicability of the ZPO unnecessary – cost reimbursement rule of section 47 (4) GmbHG that the legislator obviously assumes an allocation to the non-contentious proceedings here.[55] Overall, it can therefore be assumed that the legislator generally does not understand information and audit claims in company law as *"civil disputes assigned to the trial court*".[56] In contrast, according to sections 117 and 127 UGB, decisions on the withdrawal of the management or representation authority of a shareholder of the advertising OG (KG, section 161 [2] UGB) as well as on the dismissal of a GmbH managing director in the advertising GmbH (§ 16 [2] GmbHG) are made in contentious proceedings.[57] The appointment or dismissal of liquidators in the liquidation stage is to be decided in non-contentious proceedings for the aforementioned legal forms according to the general opinion[58]. In the area of family law, the classification of the proceedings for the appointment of a marriage estate (now endowment) within the scope of application of the AußStrG 1854[59] – the procedural code preceding the now applicable AußStrG – was particularly controversial. From the wording of § 1221 ABGB, according to which the determination of the marriage estate is to take place *"without strict investigation of the property status*", the prevailing view[60] derived a conclusive referral to the non-contentious proceedings. Since the claim to marriage property or to

[53] *G. Kodek/G. Nowotny,* Das neue AußStrG und das Verfahren vor dem Firmenbuchgericht, NZ 2004, 257 (258 et seq.); *Rassi,* Verfahrensrechtliche Fragen der Bucheinsicht, ÖJZ 1997, 891.

[54] Gesetz vom 6. März 1906, über Gesellschaften mit beschränkter Haftung GmbH-Gesetz – GmbhG), RGBl 1906/58 i.d.g.F.; Law of 6 March 1906, on limited liability companies (GmbH-Gesetz – GmbhG), RGBl 1906/58 as amended.

[55] *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 84; OGH 6 Ob 314/03z RdW 2004/377.

[56] *G. Kodek/G. Nowotny,* NZ 2004, 257 (259).

[57] *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 85.

[58] *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 85.

[59] Gesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen, RGBl 1854/208 i.d.F. BGBl I 2001/131; Law on judicial proceedings in legal matters other than litigation, RGBl 1854/208 as amended by I 2001/131.

[60] *Rintelen,* Grundriß des Verfahrens außer Streitsachen (1914) 117; *Ott,* Geschichte und Grundlehren des Rechtsfürsorgeverfahrens (1906) 96 et seqq.; *Pfersmann,* ÖJZ 1987, 117 [note on judgement]; OGH 3 Ob 294/25 SZ 7/147; OGH 1 Ob 480/35 SZ 17/109; OGH 3 Ob 91/37 SZ 19/35; OGH 6 Ob 281/01v JBl 2003, 57 = ecolex 2002/342; RIS-Justiz RS0022224; different view *Frauenberger-Pfeiler,* JAP 2002/03, 111 (note on judgement).

equipment is to be qualified as a claim to maintenance[61] and since the entry into force of the AußStrG maintenance claims between parents and children are generally referred to the non-contentious proceedings,[62] the view also applies to the AußStrG.[63]

The difficult demarcation between contentious and non-contentious legal action in individual cases is alleviated for those seeking legal protection by section 40a sentence 1 JN. According to this provision, the question in which proceedings a case is to be dealt with and settled does not depend on the designation by the party, but on the content of the claim and the party's submissions. If the applicant for legal protection chooses the wrong type of proceedings within the different branches of civil court proceedings, a request for legal protection is not rejected. If a request for legal protection is wrongly designated as a claim (to be dealt with in contentious proceedings) or as an application (to be dealt with in non-contentious proceedings), the court shall reinterpret the wrongly designated request for legal protection into the correct one and hear and decide on it in the procedure provided for by law.[64] The scope of application of the provision of section 40a JN is not limited to the demarcation between contentious and non-contentious proceedings, but is also relevant for the demarcation between other types of proceedings – such as for execution and non-contentious proceedings,[65] execution and contentious civil proceedings[66] as well as insolvency and contentious civil proceedings.[67]

The question of which sources of civil procedural law are to be applied can also cause difficulties in relation to European civil procedural law. For example – as the numerous preliminary references of national courts to the ECJ show[68] – there are practical problems in qualifying a case as a civil or commercial case within the meaning of Article 1 Brussels Ibis Regulation.

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[61] OGH 1 Ob 61/03g NZ 2004/4.

[62] Until the new version of the AußStrG came into force, the legal maintenance claims of minor children were to be decided in non-contentious proceedings, whereas those of adult children were to be decided in contentious proceedings (RIS-Justiz RS0116366; RS0119814).

[63] *G. Kodek* in *Gitschthaler/Höllwerth,* AußStrG I² § 1 note 86.

[64] On the procedure, see *Simotta,* Das Vergreifen in der Verfahrensart und seine Folgen, in Festschrift Fasching (1988) 463.

[65] OGH 3 Ob 52/92 NZ 1993, 44 concerning the land register procedure as well as OGH 6 Ob 209/03h RdW 2004, 599 concerning the company register procedure.

[66] RIS-Justiz RS000003.

[67] OGH 7 Ob 264/06h MietSlg 59.790; e. g. also in the reinterpretation of a (dunning) action into a claim filing, *Winkler* Mahnverfahren und Konkurs, ZIK 2001/127, 74.

[68] Cf. the examples in *Garber* in *Mayr*, Handbuch des europäischen Zivilverfahrensrechts (2017) note 3.71 et seqq.

The decisions of the ECJ are not always convincing and fit into the system developed by the ECJ.[69] For example, according to the decision of the ECJ in the case *Hellenic Republic v Kuhn*[70], actions against a state for fulfilment of the bond conditions or for damages for non-fulfilment of the bond conditions cannot be qualified as civil or commercial matters within the meaning of Article 1 Brussels Ibis Regulation, even though government bonds are not fundamentally different from bonds issued by private individuals.[71]

Uncertainties also arise from the lack of legal definitions. For example, the Brussels IIter Regulation does not define the term *"marriage*" so that the question of whether same-sex marriages are also covered by the scope of application of the Regulation or whether the provisions of national law apply in this respect is judged differently.[72] The reason for not providing a legal definition was probably the fear that otherwise the unanimity required for the enactment or amendment of this regulation (Article 81 [3] sentence 2 TFEU[73]) could not have been achieved.[74] In contrast, less controversial issues were explicitly regulated. In the scope of application of the Brussels IIbis Regulation[75], the question of whether the concept of a child should be determined autonomously under Union law or according to the relevant personal statute was disputed.[76] The dispute was clarified by the inclusion of a legal definition of the term *"child*". According to Article 2 (2) No. 6 Brussels IIter Regulation, a child is a person under the age of 18. The provisions on international child abduction (Article 22 to 29 Brussels IIter Regulation), however, only apply to children up to the age of 16, which does not result from the normative part of the

[69] On this system, see *Garber/Neumayr,* Zur grenzüberschreitenden Vollstreckung gerichtlicher Entscheidungen über Urlaubszuschläge nach dem BUAG. Ein Beitrag zur Auslegung des Art 1 LGVÜ 2007 und des Art 1 EuGVVO 2012, in Festschrift 75 Jahre Bauarbeiter-Urlaubs- und Abfertigungskasse (2021) 175.

[70] ECJ 15.11.2018, Case C-308/17, *Hellenic Republic v Kuhn,* ECLI:EU:C:2018:911.

[71] On this subject, see in detail *Arnold/Garber,* Ein vermeintlicher Pyrrhussieg für Griechenland: Die Grenzen staatlicher Souveränität im Internationalen Zivilverfahrensrecht, IPRax 2019, 385.

[72] On the state of opinion *Garber/Lugani*, Die neue Brüssel IIb-VO, Zak 2022/11, 204 and *Garber/Lugani*, Die Neufassung der Brüssel IIb-VO, NJW 2022, 2225 (2226).

[73] Treaty on the Functioning of the European Union, OJ 2012 C 326/47.

[74] *Garber*, Neuerungen im Ehe- und Familienrecht: Zur Revision der Brüssel IIa-VO und zu den Güterrechtsverordnungen, in *König/Mayr*, Europäisches Zivilverfahrensrecht in Österreich V: Die Reformen gehen weiter (2018) 109 (122).

[75] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility,repealing Regulation (EC) No. 1347/2000, OJ 2004 L 338/1.

[76] On the state of opinion *Garber* in *Gitschthaler*, Internationales Familienrecht (2019) Art 1 Brüssel IIa-VO note 63.

Regulation, but from Recital 17 to the Brussels IIter Regulation. For reasons of clarity, the exception should have been included in the legal definition of Article 2 (2) No. 6 Brussels IIter Regulation.[77]

Difficulties may arise despite a legal definition. This applies in particular if they are not specific enough (cf. for example the definition of the term *"court*" in Article 2 No. 5 Regulation 1896/2006 ["*court" means all authorities of the Member States that are competent for a European order for payment or any other related matter*]; a similarly general definition can be found in Article 2 [2] No. 1 Brussels IIter Regulation).

The demarcation between the individual regulations – in particular between the Brussels Ibis Regulation and the Regulation No. 2015/848[78] – also causes considerable difficulties.

Practical difficulties are caused by the large number of special laws that affect non-contentious proceedings. In each concrete individual case, it must be examined whether a provision of the general part or a special provision is applicable.[79] The provisions of the general part are not already superseded if the special provisions contain a deviating provision, but only if this provision has a conclusive character, which must be determined on the basis of the teleology of the norm.[80] Although the special laws impair the clarity of civil procedural law, this ensures that the special features of the matter are taken into account.

As a result, it can be stated that the multitude of provisions and legal sources does not in principle impair the clarity of norms and determinations in Austrian civil procedure law – apart from exceptions. Frictions can also arise – apart from the examples already given – due to subsequent amendments and additions to the law that break through the previous system (see point 2.2.), due to a lack of coordination between the sources of law (see point 2.3.) as well as due to a lack of exclusivity of a law (see point 2.4.).

2.2. Impairment of the clarity of standards and determinations by subsequent amendments and additions to the law

The determination of the applicable legal norms or the applicable legal act may be affected by subsequent amendments and additions to the law if these break the existing structure and systematics.

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[77] *Garber/Lugani,* NJW 2022, 2225 (2226).

[78] On the delimitation, see for example *Garber,* Zum Anwendungsbereich der EuInsVO 2015, in *Nunner-Krautgasser/Garber/Jaufer*, Grenzüberschreitende Insolvenzen im europäischen Binnenmarkt (2017) 21 (66 et seqq.).

[79] *Motal* in *Schneider/Verweijen*, AußStrG § 1 note 61.

[80] *Motal* in *Schneider/Verweijen*, AußStrG § 1 note 61.

The EGZPO, which entered into force at the same time as the ZPO, already contains numerous provisions that supplement the special provisions of the ZPO. Particularly worth mentioning are the provisions on proceedings before the stock exchange arbitration courts (Article XIII to XXVII EGZPO), the obligation to declare assets on oath and its enforcement (manifestation action; Article XLII EGZPO) and the right of action to compel the production of a community document (Article XLIII EGZPO). It would have made sense to include the provisions directly in the ZPO. Finding the norms can cause difficulties, especially for persons who are not familiar with the ZPO.

The following example also shows that observing the structure and systematics is of particular importance: The Civil Procedure Amendment 2004[81] introduced section 91a GOG, which regulates the use of technical devices for the transmission of words and images during the taking of evidence. With the Civil Procedure Amendment 2009[82] the provision was transferred unchanged from the GOG to the ZPO. The justification given in

[81] Bundesgesetz, mit dem die Jurisdiktionsnorm, die Zivilprozessordnung, das Außerstreitgesetz, die Exekutionsordnung, das Gerichtsorganisationsgesetz, die Rechtsanwaltsordnung, das Bundesgesetz zur Durchführung des Europäischen Übereinkommens vom 27. Jänner 1977 über die Übermittlung von Anträgen auf Verfahrenshilfe, das Grundbuchsumstellungsgesetz, das Firmenbuchgesetz, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz 1962, das Rechtsanwaltstarifgesetz, das Rechtsanwaltsprüfungsgesetz, das Disziplinarstatut für Rechtsanwälte und Rechtsanwaltsanwärter geändert werden (Zivilverfahrens-Novelle 2004), BGBl I 2004/128; Federal Act amending the Jurisdiction Standard, the Code of Civil Procedure, the Non-Contentious Proceedings Act, the Execution Code, the Court Organisation Act, the Lawyers' Act, the Federal Act implementing the European Convention of 27 January 1977 on the Transmission of Applications for Procedural Assistance. Jänner 1977 on the Transmission of Applications for Procedural Assistance, the Land Register Reorganisation Act, the Company Register Act, the Court Fees Act, the Judicial Collection Act 1962, the Lawyers' Fees Act, the Lawyers' Examination Act, the Disciplinary Statute for Lawyers and Trainee Lawyers (Civil Procedure Amendment 2004), BGBl I 2004/128.

[82] Bundesgesetz, mit dem die Jurisdiktionsnorm, das Einführungsgesetz zur Zivilprozessordnung, die Zivilprozessordnung, das Arbeits- und Sozialgerichtsgesetz, das Außerstreitgesetz, die Exekutionsordnung, die Konkursordnung, das Gerichtsorganisationsgesetz, das Rechtspflegergesetz, das Gebührenanspruchsgesetz, das Sachverständigen- und Dolmetschergesetz, das Gerichtsgebührengesetz und das Mietrechtsgesetz geändert werden (Zivilverfahrens-Novelle 2009), BGBl I 2009/30; Federal Act amending the Jurisdiction Standard, the Introductory Act to the Code of Civil Procedure, the Code of Civil Procedure, the Labour and Social Court Act, the Non-Contentious Proceedings Act, the Execution Code, the Bankruptcy Code, the Court Organisation Act, the Rechtspfleger Act, the Fee Claim Act, the Expert Witness and Interpreter Act, the Court Fees Act and the Tenancy Law Act (Civil Procedure Amendment 2009), BGBl I 2009/30.

the materials is that this is also intended to achieve an *"increased visibility" of* this provision, which promotes its application.[83]

An example of an unsuccessful amendment is section 26h UWG[84]. The provision was created with the UWG amendment 2018[85]. Section 26h UWG is intended to ensure the confidentiality of trade secrets in the course of court proceedings. The provision serves a relatively protected exploitation of trade secrets in court proceedings and is intended to enable the court to exploit confidential information without losing the protection of secrecy. The provision deviates from the basic rules of the evidence procedure of the ZPO (cf. sections 266 et seqq. ZPO).[86] The provision is therefore rightly described as a *"paradigm shift"*.[87] For this reason, it would have made more sense to include the provision in the ZPO – especially since the ZPO also contains rules on the protection of business secrets. Section 172 (2) ZPO stipulates that the court may exclude the public at the request of even one of the parties if business secrets have to be discussed and proven for the purpose of deciding the legal dispute. Pursuant to section 305 No. 4 ZPO, the production of documents may be refused in certain cases[88] if the party would violate a state-recognized duty of confidentiality, from which it has not been validly released, or a business secret by producing the document. Pursuant to section 321 (1) No. 5 ZPO, a witness may refuse to testify about questions that the witness cannot answer without disclosing a trade secret. The reason why the legislator did not include the provision in the ZPO may have been that the 2018 amendment to the UWG was intended to introduce a comprehensive package for the protection of confidential business information into the UWG – the package served to implement Directive (EU) 2016/943 on the protection of confidential know-how and confidential business information (trade secrets) against unlawful acquisition and unlawful use and disclosure[89] – and the

[83] ErläutRV zur ZVN 2009 (89 BlgNR 24. GP) 14.

[84] Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG, BGBl 1984/448; Federal Act against Unfair Competition 1984, BGBl 1984/448.

[85] Bundesgesetz, mit dem das Bundesgesetz gegen den unlauteren Wettbewerb 1984, die Zivilprozessordnung und das Verbraucherbehörden-Kooperationsgesetz geändert werden (UWG-Novelle 2018), BGBl I 2019/109; Federal Act amending the Federal Unfair Competition Act 1984, the Code of Civil Procedure and the Consumer Authorities Cooperation Act (UWG Amendment 2018), BGBl I 2018/109.

[86] On the system before the provision came into force, see *Garber*, Der Schutz von Geschäfts- und Betriebsgeheimnissen im Zivilprozess – ein Überblick, ÖJZ 2012, 640.

[87] *Rassi,* Prozessualer Vertraulichkeitsschutz. Zur Umsetzung der GeschäftsgeheimnisRL im Verfahrensrecht, ipCompetence 2019 H 21, 28 (30).

[88] For the exceptions, see for example section 304 ZPO.

[89] OJ 2016 L 157/1.

legislator limited itself to amending the UWG. In order to take into account the postulate of clarity of legal norms, the ZPO should have at least referred to the norm. This would have increased visibility and strengthened the clarity of norms and determinations.

Due to the positioning of section 26h UWG and the lack of reference to the provision in the ZPO, it is questionable whether the scope of application of the provision is limited to the scope of application of the UWG. In our opinion, the provision must also be applied to other cases for reasons of equality, because there is no factual differentiation between trade secrets worthy of protection.

2.3. Impairment of the clarity of norms and determinations due to lack of coordination between the legal sources

The multiplicity of legal sources can impair legal certainty if they are not coordinated with each other, resulting in divergences that are not objectively justified. This is particularly evident in the demarcation between the existing cognisance procedures. According to Austrian civil procedure law, claims – as already explained – are to be enforced in contentious or in non-contentious proceedings. The central source of law for contentious proceedings is in particular the ZPO, for non-contentious proceedings the AußStrG. Due to the different objectives of the proceedings, there are numerous differences in the structure of the proceedings, which are also objectively justified. The non-contentious procedure differs from the contentious procedure in particular through

- the greater freedom of form, which is also expressed in the weakening of the principle of certainty (§ 9 AußStrG),
- the increased flexibility of the proceedings, which is expressed, for example, in the fact that the holding of a hearing is only optional (§ 18 AußStrG), [90]
- the strengthened concept of welfare (§ 14 AußStrG), on the basis of which the court has a stronger duty to provide guidance,
- the principle of investigation – which is, of course, only gradually strengthened in comparison with the ZPO, which is in any case characterized by far-reaching powers to collect material for official purposes, [91]

[90] Cf. for example *Gaul,* Der Grundsatz der Öffentlichkeit im Verfahren der freiwilligen Gerichtsbarkeit, in Festschrift Matscher (1993) 111.

[91] Instead of many *Neumayr*, Außerstreitverfahren[6] (2017) 11.

- the taking of evidence and
- the partially envisaged initiation of proceedings by the authorities.[92]
- In addition, there is the structural possibility of handling multi-party proceedings.

In contrast, certain aspects are regulated differently, although the factual justification for this is at least questionable. This applies, for example, to the qualitative division of the subject matter of the proceedings. In civil proceedings, it is permissible to issue a basic judgment under section 393 (1) ZPO, a basic judgment under section 393 (2) ZPO and an interim judgment on the statute of limitations under section 393a ZPO.[93] section 36 (2) AußStrG 2003 allows – in addition to a partial decision – according to the express wording only the issuance of an interim decision on the ground of the claim. A pedant to the basic judgement according to section 393 (2) ZPO and to the interim judgement on the statute of limitations according to section 393a ZPO does not expressly exist in non-contentious proceedings; in certain cases, however, there is a need for the qualitative division of the subject matter of the proceedings also in non-contentious proceedings by means of a decision corresponding to section 393 (2) or section 393a ZPO.[94]

In order to emphasise its character as a separate procedural code independent of the contentious proceedings, the AußStrG does not contain a general reference to the norms of the ZPO.[95] Only in individual places reference is made to certain §s or norms of the ZPO, which are to be applied in non-contentious proceedings mutatis mutandis and taking into account

[92] On the above principles see also *Deixler-Hübner*, Außerstreitverfahrensrecht[2] (2018) note 14 et seqq.; *Klicka/Oberhammer/Domej*, Außerstreitverfahren[5] (2014) note 111; *Mayr/Fucik*, Einführung in die Verfahren außer Streitsachen[2] (2019) note 112; *Neumayr*, Außerstreitverfahren[6] 6 et seqq.

[93] For the terms see *Rechberger/Simotta*, Grundriss[9] note 906 et seqq.

[94] *Garber,* Zur Zulässigkeit eines Zwischenbeschlusses zur Verjährung im außerstreitigen Verfahren – Betrachtungen de lege lata und de lege ferenda, in Festschrift P. Bydlinski (2022) 277; cf. also *Schrott*, Anforderungen der Praxis an das außerstreitige Erkenntnisverfahren erster Instanz, Richterwoche 1995, 245 (255 et seq.), according to which it is sometimes expedient or required by procedural economy in non-contentious proceedings to make a partial decision on a part of the asserted claim or an interim decision on the reason for the claim. It could require very extensive and time-consuming proceedings to clarify whether a certain asset was subject to post-marital division at all, and it could again be very lengthy and expensive to establish the value and finally to determine the form of division. An interim decision on the question of whether certain assets are subject to post-marital division is very practical and cost-saving in individual cases and should be considered when thinking about reform.

[95] ErläutRV zum AußStrG 2003 (224 BlgNR 22. GP) 6.

the principles of the general part of the AußStrG[96]. However, it does not follow from the absence of a general reference that existing gaps in the law may not be closed by analogous application of the ZPO or the EGZPO.[97] If the conditions for analogy are met, individual provisions of the ZPO and the EGZPO can be applied in non-contentious proceedings. Analogy can therefore only be considered if the „*situation of interests is comparable*"[98] and the lack of a suitable legal norm constitutes an *"unplanned regulatory gap"*.[99] The determination of these prerequisites can cause friction in individual cases and impair the clarity of procedural norms.[100]

2.4. Impairment of the clarity of norms and determinations due to lack of exclusivity

Special laws exist for individual stages of proceedings. For example, the service of judicial documents is regulated in a separate law – the ZustG – but not conclusively. In addition to the ZustG, the GOG, the ZPO and the AußStrG, which also contain provisions on service, must also be taken into account for the proceedings for the recognition of judgments.

Pursuant to section 87 ZPO, service is to be effected ex officio pursuant to sections 89a et seqq. GOG, otherwise pursuant to the ZustG, unless the ZPO provides otherwise. Such other regulations contain in particular section 83 (1) ZPO and sections 87 to 121 ZPO, which partly supplement the ZustG, partly deviate from it. For non-contentious proceedings, the provisions of the Code of Civil Procedure on service and the ZustG are applicable pursuant to section 24 of the Austrian Non-Contentious Proceedings Act (AußStrG), unless otherwise provided. These provisions also supplement and modify the provisions of the ZPO and the ZustG.

In numerous other laws, there are deviating special provisions under service law that take precedence over the general rules. Such special provisions are constantly being created and can lead to great legal uncertainty.[101] For reasons of legal certainty, it would have made sense to regulate service in a separate law.

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[96] *G. Kodek* in *Gitschthaler/Höllwerth*, AußStrG I[2] § 1 note 20.

[97] Cf. the examples in *Motal* in *Schneider/Verweijen*, AußStrG § 1 note 53.

[98] OGH 4 Ob 193/06w RZ-EÜ 2007/182.

[99] *F. Bydlinski*, Juristische Methodenlehre und Rechtsbegriff[2] (1991) 120 et seq., 237.

[100] See *Garber* in Festschrift P. Bydlinski 277 (291 et seqq.).

[101] *Stumvoll* in *Fasching/Konecny,* Kommentar zu den Zivilprozessgesetzen II/2[3] (2016) § 87 ZPO note 2.

3. Impairment of the clarity of norms and determinations through non-adaptation of the norms to the established case law

According to Austrian law, the judgements of the civil courts do not have any binding effect beyond the individual case and do not create law (cf. section 12 ABGB).[102] The precedent effect inherent in Anglo-Saxon case law, by which the courts are – in principle – bound by previous decisions made in similar cases, because previous court decisions create generally binding law, is alien to Austrian civil procedure law.[103] Nevertheless, a de facto effect of the precedents must not be overlooked; above all, the decisions of the Supreme Court have an important *"guiding function"*.[104] As a rule, the lower courts do not deviate from the established case law of the Supreme Court. In order to exclude contradictions between the individual senates of the Supreme Court as far as possible, there is the establishment of reinforced senates and their jurisdiction to resolve legal questions of fundamental importance (cf. section 8 OGHG).[105] Therefore, also according to the legal situation applicable in Austria, the continuity of jurisdiction is guaranteed, which is absolutely necessary for legal certainty and legal peace.[106]

Despite the guiding function of the decisions of the Supreme Court, in some cases it appears useful to adapt norms to the interpretation made by the Supreme Court in terms of content or language in order to take into account the clarity of civil procedure law. In this way, the norms become understandable on their own, without having to resort to case law.

For example, section 406 sentence 1 ZPO provides that an order for performance is only admissible if the due date has already occurred at the time of the creation of the judgment. Since the facts of the case, which are

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102 See for example *Rechberger/Simotta*, Grundriss[9] note 1055.

103 *Walter,* Die Funktion der Höchstinstanzen im Rechtsstaat Österreich, RZ 1999, 58.

104 *Garber,* Zum Vorliegen einer Rechtsfrage von erheblicher Bedeutung: Ausgewählte Fragen und Entscheidungen, ÖBl 2018/26, 102 (107); *Rechberger/Simotta*, Grundriss[9] note 1055. Cf. also OGH 5 Ob 519/91 SZ 64/35 = ecolex 1991, 383 = ÖBA 1992, 69 (*Rummel*), according to which a deviation from the case law of the Supreme Court in an individual case, which results from the fact that the interpretation by the court of appeal cannot be reconciled with the case law correctly cited per se, is of considerable importance for legal certainty if there is a risk that constantly judged principles are undermined by subsumption errors.

105 *Feldner,* Verstärkte Senate beim Obersten Gerichtshof (2001); *Lovrek/Musger* in *Fasching/Konecny,* Kommentar IV/1[3] (2019) Vor §§ 502 et seqq. ZPO note 52 et seqq.; on the preservation of uniformity of case law see also *Neumayr*, Die Judikaturdokumentation RIS-Justiz im österreichischen Rechtsinformationssystem, ZZPInt 20 (2015) 73 (81).

106 *Klicka* in *Fasching/Konecny,* Kommentar III/2[3] (2018) Vor § 411 ZPO note 2.

subject to judicial assessment, may be subject to constant change due to the passage of time, the relevant point in time for the law-creating facts must be determined. Section 406 ZPO bases the due date of the claim on the time of the creation of the judgment. According to settled case law[107] and general opinion in the doctrine[108], the provision is generally to be understood in such a way that the point in time to which the decision must refer must be the conclusion of the oral proceedings at first instance.[109] The point in time of the creation of the judgement cannot be objectively determined. Also, a reference to the actual issuance of the judgment outside the hearing would lead to different results depending on how quickly the issuance of the judgment takes place. Contrary to the wording, the provision is not only decisive for the due date of the claim, but for the entire legally generating facts.[110]

Another example of the failure to adapt a law to case law is sentence 2 of section 406 ZPO. Accordingly, in the case of claims for alimony, payments may also be ordered which only become due after the judgement has been issued. Case law qualifies as alimony periodic payments in cash or in kind, which legally and economically serve to satisfy – even if only partially – the current immediate needs of the entitled person.[111] As a further prerequisite – and probably to compensate for the broad interpretation of the term *"alimony"* – case law requires that the debtor has violated[112] or threatens to violate his or her obligations for the award of maintenance amounts that are not yet due.[113] In order to take the postulate of legal clarity into account, it seems sensible to amend section 406 ZPO in the sense of the case law.[114] This can ensure that the provision is understandable in itself.

Of course, the legislator does not have to follow the interpretation of the Supreme Court. It is also conceivable that a rewording of the relevant legal provision could result in a different legal situation from the interpretation by the Supreme Court.

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107 OGH 4 Ob 501/93 EvBl 1993/101; OGH 7 Ob 192/12d SZ 2012/144; OGH 2 Ob 103/15h EvBl 2016/140; OGH 1 Ob 93/16g GesRZ 2017/119 (*Kalss*).

108 *Brenn* in *Höllwerth/Ziehensack,* ZPO (2019) § 406 note 1; *Fucik* in *Fasching/Konecny*, Kommentar III/2[3] § 406 ZPO note 2; *Rechberger/Simotta*, Grundriss[9] note 598.

109 For the exceptions see *Brenn* in *Höllwerth/Ziehensack,* ZPO § 406 note 4 as well as *Fucik* in *Fasching/Konecny*, Kommentar III/2[3] § 406 ZPO note 14 et seqq.

110 *Fucik* in *Fasching/Konecny,* Kommentar III/2[3] § 406 ZPO note 1.

111 Cf. RIS-Justiz RS0022402.

112 OGH 5 Ob 276/61 EvBl 1961/530; OGH 1 Ob 591/81; OGH 7 Ob 510/82 SZ 55/23.

113 OGH 10 Ob 58/13x EFSlg 143.982; OGH 2 Ob 32/14s.

114 Cf. *Fasching,* Lehrbuch[2] note 1064, who criticises the lack of a legal basis for the restriction of (threatened) violations (see now section 101 AußStrG); similarly *Rechberger/Simotta*, Grundriss[9] note 598.

4. Impairment of the clarity of standards and determinations due to structure, language and references

4.1. Impairment of the clarity of norms and provisions due to the structure of the law

An essential element for the clarity of procedural norms is the structure of the legal sources and their embedding in the existing system. The existing procedural law systems in Austria are basically structured systematically.

The ZPO, for example, is divided into several parts. The first section of the first part of the ZPO contains general provisions – such as norms on the party, (party capacity and) procedural capacity, party majorities and the participation of third parties in the legal dispute, costs of proceedings, provision of security and procedural aid. The second section deals with pleadings in the proceedings (content, formal requirements), service, time limits and hearings, consequences of default and how to fight them, as well as interruption and suspension of the proceedings. The third section regulates the oral proceedings, in particular their publicity, the task and the course of the oral proceedings, the chairing of the hearing and the police. The second part regulates the course of proceedings before the courts of first instance. The first section of the second part concerns the procedure up to the judgement, with provisions on the action, the defence and the hearing of the dispute as well as on the procedure of taking evidence being included here. The second section of the second part concerns judgments and orders. The third part regulates the procedure before the district courts, the fourth part the appellate procedure, whereby first the appeal (first section), the revision (second section) and the recourse (third section), finally the party application to the Constitutional Court (fourth section) and finally the action for annulment and reopening (fifth section) are regulated. The sixth section deals with special types of proceedings such as the European Small Claims Procedure, the Mandate Procedure, the Procedure in Disputes over Bills of Exchange, the Procedure in Disputes arising from the Tenancy Agreement and the Arbitration Procedure.

The AußStrG is divided into several main pieces; the respective main pieces are subdivided into sections. Main piece I concerns the scope of application and the parties (chapter 1), the procedure (chapter 2), the decisions (chapter 3), the appeal (chapter 4), the appeal on a point of law (chapter 5), the application for modification (chapter 6), the reimbursement of costs (chapter 7), the enforcement of decisions (chapter 8) and the party

application to the Constitutional Court (chapter 9). The following main pieces contain special provisions for proceedings in matrimonial, child and adult protection matters, probate proceedings and notarisation. The final main paragraph contains final and transitional provisions.

The ZPO and the AußStrG differ in their structure. Since they are two different proceedings, the different structure does not have a significant impact on legal certainty. The structure of both the ZPO and the AußStrG can basically be described as systematic, even though a different structure – e.g. putting the provisions on the action first in the ZPO – may also seem sensible. The systematic structure ensures that the norms are clear and easy to find. This is partly interrupted by subsequent amendments and additions to the law (see already under point 2.2).

4.2. Impairment of the clarity of norms and determinations by the language used

Some of the procedural norms are still valid in their original version and date back to the 19th century, such as certain norms of the ZPO. For this reason, the language is partly outdated. This applies both to the spelling (e.g. *"Thatsachen"* instead of *"Tatsachen"* in section 172 [2], section 226 [1] and section 266 [1] ZPO or *"Prozeßgericht"* instead of *"Prozessgericht"* in section 64 [1] No. 4, section 68 [1] and [2] and section 227 [1] No. 1 ZPO) and to the phrases (*"behufs*" in section 21 [1], section 38 [1] and section 56 [2] ZPO). Within the framework of the overall reform of the execution law (GREx),[115] the spelling of the laws affected by the reform was adapted to the regulations in force today.

[115] Bundesgesetz, mit dem die Exekutionsordnung, das Einführungsgesetz zur Exekutionsordnung, die Insolvenzordnung, das Allgemeine bürgerliche Gesetzbuch, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz, das Unternehmensgesetzbuch, das EWIV-Ausführungsgesetz, das Genossenschaftsgesetz, das GmbH-Gesetz, das Aktiengesetz, die Notariatsordnung, das Rechtsanwaltstarifgesetz, das Eingetragene Partnerschaft-Gesetz, das Urkundenhinterlegungsgesetz, das Rechtspflegergesetz, das Sicherheitspolizeigesetz, das Bundesgesetz, mit dem Verstöße gegen bestimmte einstweilige Verfügungen zum Schutz vor Gewalt und zum Schutz vor Eingriffen in die Privatsphäre zu Verwaltungsübertretungen erklärt werden, das Asylgesetz 2005, das Niederlassungs- und Aufenthaltsgesetz, das Mineralrohstoffgesetz und das Insolvenz-Entgeltsicherungsgesetz geändert werden sowie die Anfechtungsordnung und das Vollzugsgebührengesetz in die Exekutionsordnung übernommen werden (Gesamtreform des Exekutionsrechts – GREx), BGBl I 2021/86; Federal Act amending the Execution Code, the aw concerning the introduction of the the Execution Code, the Insolvency Code, the Civil Code, the Court Fees

However, the obsolete language does not fundamentally affect the clarity of the procedural norms. On the one hand, the provisions are printed in the currently valid spelling in the available editions of the law[116], on the other hand, the procedural norms are mainly addressed to lawyers and to persons familiar with the use of laws – such as certified judicial officers or law enforcement officers – so that it can be assumed that they know or can ascertain the meaning of obsolete expressions.[117] The court has a special duty to instruct and instruct unrepresented persons so that there is no lack of protection in this respect (cf. section 432 ZPO as well as section 14 AußStrG). This ensures that unrepresented parties can participate in the proceedings in a qualitatively equivalent manner even without legal assistance.

For the same reasons, the use of technical terms is not harmful. Moreover, the use of technical language is unavoidable in legal texts – especially those dealing with a complex matter such as civil procedure.

With regard to the language, it is to be criticised that long sentences consisting of several subordinate clauses are used in some cases (e.g. section 266 [2] ZPO: *"The extent to which such a confession is annulled or impaired in its effectiveness by additions and restrictions attached to it by the party, and what influence a revocation has on the effectiveness of the confession, is to be assessed by the court according to its discretion guided by careful consideration of all circumstances"*). For better comprehensibility, the use of shorter sentences would have made more sense. However, this does not significantly impair clarity.

There is potential for linguistic improvement in many provisions – this applies in particular to the area of the right of appeal of the ZPO (see also under point 4.3)[118] and the provisions concerning subject-matter and local jurisdiction.

Act, the Judicial Collection Act, Federal Act on Special Civil Law Provisions for Companies, executive law of EWIV, the Cooperative Law, Law on limited liability companies, the Stock Corporation Act, the Notaries' Act, the Lawyers' Fees Act, the Registered Partnership Act, the Document Deposit Act, the Judicial Officer Act, the Security Police Act, the Federal Act declaring violations of certain temporary injunctions to protect against violence and to protect against invasion of privacy as administrative offences, the Asylum Act 2005, the Settlement and Residence Act, the Mineral Resources Act and the Insolvency Remuneration Protection Act will be amended and the rules on contestation and the Enforcement Fees Act will be included in the Execution Rules (Gesamtreform des Exekutionsrechts – GREx), BGBl I 2021/86.

116 Code Civil Procedure 2022/23[50] (2022); Paragraph – Civil Procedure[16] (2021).

117 On the perpetuation of outdated language by case law, see *Neumayr*, ZZPInt 20 (2015) 73 (99).

118 *Geroldinger*, Der Zugang zum OGH in Zivilsachen, in *G. Kodek*, Zugang zum OGH (2012) 65.

Linguistic frictions also arise from the fact that the legislator is imprecise in the use of terms. Thus, it does not differentiate terminologically between domestic jurisdiction and international jurisdiction, but uses exclusively the term domestic jurisdiction (cf. e.g. sections 27a, 28, 32 [4], sections 42, 43, 76, 104 JN, sections 230, 239 [3], section 260 [3] ZPO, section 14 [2] KSchG[119]). Since domestic jurisdiction differs from international jurisdiction with regard to its prerequisites and effects and its lack is sanctioned in a different way than the lack of international jurisdiction, a conceptual distinction must also be made between domestic jurisdiction and international jurisdiction.[120]

4.3. Impairment of the clarity of standards and determinations through references

References cannot be avoided in extensive legal texts. This applies in particular to civil procedural law, which consists not only of extensive legal acts (the ZPO has over 600 provisions), but also of several legal sources (see already under point 2). Here, references seem to make sense in order to avoid repetitions or to refer to special norms existing in other laws and their validity.

In certain areas, however, too many references are made. This applies, for example, to the right of appeal under the ZPO. § 508 ZPO, which standardizes the admissibility and prerequisites for an application for modification, contains a total of more than ten references to other relevant standards. The legal situation characterized by the *"jungle of reference chains"*[121] results in a complex and complicated system.[122] Chains of references of this kind considerably impair the clarity of norms and provisions. This negative effect can only be eliminated by recasting and restructuring.[123]

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[119] Bundesgesetz vom 8. März 1979, mit dem Bestimmungen zum Schutz der Verbraucher getroffen werden (Konsumentenschutzgesetz – KSchG), BGBl 1979/140), BGBl 1979/140 i.d.g.F.; Federal Act of 8 March 1979 laying down provisions for the protection of consumers (Consumer Protection Act – KSchG), BGBl 1979/140 as amended.

[120] *Garber* in *Fasching/Konecny*, Kommentar I[3] (2013) § 42 JN note 2 et seqq.

[121] *Danzl*, Die Anrufbarkeit des OGH in streitigen Zivilrechtssachen, in Festschrift Sprung (2001) 39 (49, 82); see also *Neumayr* in *Höllwerth/Ziehensack*, ZPO § 502 note 4.

[122] *Neumayr* in *Höllwerth/Ziehensack,* ZPO § 502 note 4.

[123] *Geroldinger* in *G. Kodek*, Zugang zum OGH 65.

5. Impairment of the clarity of norms and determinations by international and European civil procedure law

5.1. General

Austria's domestic civil procedure rules are superseded, supplemented or modified by Union legal acts affecting civil procedure law and various bilateral and multilateral state treaties. The clarity of civil procedure law is affected by the numerous bilateral and multilateral conventions as well as the numerous Union legal acts affecting civil procedure law. In concrete individual cases, the question of whether an international or European legal act applies in relation to another state can be difficult to assess. A simplification could be the publication on the website of the Federal Ministry of Justice of the bilateral and multilateral conventions or Union legal acts to be observed in Austria. The status table published on the website of the Hague Conference on Private International Law could serve as a model.[124] For European legal acts, the publication of this information on a website operated by the European Union – such as the European Justice Portal[125] – would make sense.

5.2. Impairment of the clarity of norms and determinations due to divergences between European and domestic civil procedural law

There are numerous differences between European civil procedure law and the corresponding standards of Austrian civil procedure law.

These differences can affect legal clarity. For example, the Austrian jurisdiction system differs in structure and rules from the jurisdiction system of European civil procedure law. The different requirements make the (already unclear and confusing)[126] jurisdiction system of Austrian law even more complex. For example, according to Article 7 No. 2 Brussels Ibis Regulation, according to the case law of the ECJ[127] both the place of action

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124 Available at https://www.hcch.net/ (15.7.2022).

125 Available at https://e-justice.europa.eu/ (15.7.2022); see for example *Garber/Neumayr*, Europäisches Zivilverfahrensrecht (Brüssel I/IIa ua): Materielles Recht, in *Eilmansberger/Herzig*, Jahrbuch Europarecht 2011 (2011) 255 (270); *Garber/Neumayr*, Europäisches Zivilverfahrensrecht (Brüssel I/IIa ua): Materielles Recht, in *Herzig*, Jahrbuch Europarecht 2015, 175 (181).

126 Cf. the criticism in *Fasching*, Lehrbuch[2] note 190; *Schoibl*, Die Entwicklung des österreichischen Zivilverfahrensrechts (1987) 111.

127 ECJ 30.11.1976, Rs 21/76, *Bier/Mines de Potasse d' Alsace*, ECLI:EU:C:1976:166; the view is also shared by the literature (see, for example, *Schmaranzer* in *Burgstaller/Neumayr/Geroldinger/Schmaranzer*, Internationales Zivilverfahrensrecht [Loseblattausgabe, 9th

and the place of success give rise to jurisdiction; the comparable provision in Austrian civil procedure law – section 92a JN – is exclusively linked to the place of action.[128] The extended interpretation of section 92a JN proposed by parts of the doctrine[129] by analogous application of the case law of the ECJ is methodologically not convincing and was rightly expressly rejected by the Supreme Court[130]. There are further divergences between section 92a JN and Article 7 No. 2 Brussels Ibis Regulation: Section 92a JN only applies to certain offences: Compensation can only be claimed for damage resulting from the killing or injury of one or more persons, from the deprivation of liberty or from damage to a physical object.[131] The scope of application of Article 7 No. 2 Brussels Ibis Regulation, on the other hand, covers all claims arising from tortious acts, including quasi-crimes.[132] The prerequisite, however, is that the liability for damage is not linked to a contract within the meaning of Article 7 No. 1 Brussels Ibis Regulation.[133] The place of jurisdiction for the infliction of damage according to section 92a JN, on the other hand, applies irrespective of whether the claims for damages are based on tort or breach of contract.[134]

In addition to compulsory jurisdictions – in which a deviating agreement on jurisdiction is inadmissible – the Austrian jurisdiction system also knows simple exclusive jurisdictions, in which a deviating agreement on jurisdiction is possible.[135] The simple exclusive jurisdictions are unknown to the Brussels Ibis Regulation. An agreement on jurisdiction is permissible if divergent conditions exist;[136] also the formal requirements differ.[137] An adaptation of Austrian civil procedure law to European civil procedure law

Lfg, 2000] Art 5 EuGVO note 52; *Simotta* in *Fasching/Konecny,* Kommentar V/1[2] Art 5 EuGVVO note 300 et seqq.).

128 *Braun* in *Höllwerth/Ziehensack,* ZPO § 92a JN note 6; *Mayr* in *Rechberger/Klicka,* ZPO[5] § 92a JN note 2.

129 *Rechberger/Simotta*, Grundriss[9] note 306; see also *Simotta* in *Fasching/Konecny*, Kommentar I[3] § 92a JN note 9/1.

130 OGH 2 Ob 157/04h ecolex 2004, 860 (*Mayr*) = JBl 2005, 260.

131 *Braun* in *Höllwerth/Ziehensack,* ZPO § 92a JN note 2; *Mayr* in *Rechberger/Klicka,* ZPO[5] § 92a JN note 1.

132 Instead of many *Simotta* in *Fasching/Konecny*, Kommentar V/1[2] (2008) Art 5 EuGVVO note 269 et seqq.

133 *Simotta* in *Fasching/Konecny*, Kommentar V/1[2] Art 5 EuGVVO note 268.

134 *Ballon,* Die Rechtsprechung in Zuständigkeitsfragen, in Festschrift Fasching (1988) 55 (62).

135 *Rechberger/Simotta*, Grundriss[9] note 287.

136 On the differences, see *Burgstaller/Neumayr* in *Burgstaller/Neumayr/Geroldinger/Schmaranzer*, Internationales Zivilverfahrensrecht Art 23 EuGVO note 16 and 31.

137 See *Burgstaller/Neumayr* in *Burgstaller/Neumayr/Geroldinger/Schmaranzer*, Internationales Zivilverfahrensrecht Art 23 EuGVO note 30 et seq.

is recommended here.[138] The standardisation of the rules would considerably improve the clarity of the law on jurisdiction.

When adapting Austrian civil procedural law to European civil procedural law, it is important to proceed with caution. The rules in European civil procedure law should not be adopted in their entirety and unchecked for the cases regulated by domestic law. Deviations may arise, for example, in the structuring of the procedures – this concerns in particular the divergences between the European and the Austrian order for payment procedure[139] – and in the prerequisites of individual legal institutions and remedies – such as the different structuring of reinstatement in the previous state according to §§ 146 et seqq. ZPO and Article 19 Regulation No. 805/2004, Article 20 Regulation No. 1896/2006 and Article 19 Regulation No. 861/2007.[140] It must be considered whether deviations are objectively justified. In any case, an adaptation is not necessary if the national Regulation fits into the existing system. This applies, for example, to the examination of jurisdiction, which is carried out differently in European civil procedure law than in Austrian civil procedure law.[141] The examination of jurisdiction under Austrian law essentially corresponds[142] to the examinations of other procedural prerequisites so that an adaptation to the European model would break through the existing system and counteract its structure and clarity.

5.3. Impairment of the clarity of norms and determinations through the use of and deviation from formulations of European civil procedure law

Frictions also arise from the fact that the Austrian legislator partly adopts formulations of European civil procedure law, even if the system provided for in Austria does not correspond to that of European civil procedure law. In

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138 See also *Maxl,* Produkthaftung, internationales Zivilprozeßrecht und internationales Privatrecht, JBl 1992, 156 (160) for product liability claims against foreign producers.

139 See for example the considerations in *Mayr*, Das europäische Mahnverfahren und Österreich, JBl 2008, 503, who makes a careful comparison between the procedures and partly affirms, partly denies the approximation of the Austrian order for payment procedure.

140 Thus, under Austrian law – in contrast to the rules in European civil procedure law – a lesser degree of negligence does not preclude reinstatement.

141 For the model in the scope of application of the Brussels Ibis Regulation see for example *Schoibl* in *Fasching/Konecny,* Kommentar V/1[2] Anhang zu Art 25–26 EuGVVO note 1; for the model under domestic law see *Rechberger/Simotta*, Grundriss[9] note 568 et seqq.

142 Admittedly, there are differences in detail; see, for example, *Rechberger/Simotta*, Grundriss[9] note 762 et seq.

other cases, the Austrian legislator deviates from the wording of the European legislator, even if the same objective is pursued and European civil procedure law in this respect represents a model for domestic regulation.

An example of the first case mentioned is section 584 ZPO. According to this provision, if an action is brought before the state court in a matter that is the subject of an arbitration agreement, the state court shall dismiss the action unless the respondent makes a submission on the merits or makes oral submissions without objecting. A similar provision can be found in Article 26 Brussels Ibis Regulation,[143] according to which a court does not assume jurisdiction if the defendant enters an appearance to invoke the lack of jurisdiction. Within the scope of application of the Brussels Ibis Regulation, the court in limine litis may in principle not examine its jurisdiction of its own motion,[144] but must give the defendant the opportunity to establish international jurisdiction by appearing in the proceedings. In contrast, under domestic law, the court must examine jurisdiction in limine litis in contentious civil proceedings and dismiss the action if it lacks jurisdiction. It is questionable whether the admissibility of the ordinary course of law as a prerequisite of the proceedings may be examined ex officio in limine litis – as was the case before section 584 ZPO came into force – or whether the inadmissibility of the course of law can only be exercised on the basis of a plea by the defendant, which the defendant must raise before entering the plea.[145]

An example of the latter case is section 14 (1) last half-sentence KSchG. According to section 14 KSchG, an agreement on the place of jurisdiction between a consumer and an entrepreneur is only permissible to a limited extent; no limitation applies *"to legal disputes that have already arisen."* This adopts a provision of European civil procedure law. According to Article 19 No. 1 Brussels Ibis Regulation, rules in consumer matters may be derogated from *"if the agreement is made after the dispute has arisen"*. Although Article 19 No. 1 Brussels Ibis Regulation was the model for the Austrian regulation, the wording of the provision deviates from the European regulation for no apparent reason.

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[143] For the provisions that served as a model for section 584 ZPO, see *Hausmaninger* in *Fasching/Konecny*, Kommentar IV/2[3] (2016) § 584 ZPO note 1, 12 et seqq. and note 17 et seqq.

[144] For the exceptions see *Schoibl* in *Fasching/Konecny,* Kommentar V/1[2] Anhang zu Art 25–26 EuGVVO note 1.

[145] For the state of opinion see *Kloiber/Haller* in *Kloiber/Rechberger/Oberhammer/Haller,* Das neue Schiedsrecht: Schiedsrechts-ÄnderungsG 2006 (2006) 22; *Rechberger* in *Liebscher/Oberhammer/Rechberger,* Schiedsverfahrensrecht I (2011) note 6/21; *von Saucken,* Die Reform des österreichischen Schiedsverfahrensrechts auf der Basis des UNCITRAL-Modellgesetzes über die internationale Handelsschiedsgerichtsbarkeit (2004) 99.

5.4. Impairment of the clarity of standards and determinations due to translation errors

Significant adverse effects arise from translation errors of European legal acts into other languages. [146]

For example, the German language version of Article 9 Brussels IIter Regulation[147] differs from other language versions. This provision provides for special jurisdiction to modify a judicial decision on contact that has already been issued. If certain conditions are met[148], the courts of the Member State that issued the contact judgment also have jurisdiction to modify or adapt that judgment. The provision has the effect of maintaining the jurisdiction of the courts of the Member State in which the child was habitually resident before the move for a period of three months. As a precondition, the German version stipulates that the *"parent with rights of access"* according to the decision on rights of access must continue to be habitually resident in the Member State of the child's former habitual residence. If, on the other hand, the person with rights of access is a person other than the remaining parent, such as a grandparent or step-parent, according to part of the doctrine[149] the general jurisdiction pursuant to Article 8 (1) Brussels IIbis Regulation should remain. However, the restriction of the scope of application to the parent with rights of access is based on a translation error. The other language versions do not contain a corresponding restriction, but use the neutral term *"person entitled to contact or visitation"*. For example, the Hungarian version reads *"a láthatási jog jogosultja"*. This corresponds to the wording of the English version (*"holder of access rights"*), the French version (*"titulaire du droit de visite"*), the Italian version (*"titolare del diritto di visita")*, the Dutch version (*"persoon die ingevolge die beslissing het omgangsrecht heeft"*) and

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[146] See the numerous examples in *Fucik/Neumayr*, Einander recht verstehen, in *Clavora/Garber*, Sprache und Zivilverfahrensrecht: 3. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz (2013) 15 (27 et seqq.); *Fucik/Neumayr*, Einander recht verstehen, RZ 2013, 154 (160 et seqq.).

[147] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2003 L 338/1.

[148] Cf. for example *Garber* in *Gitschthaler*, Internationales Familienrecht Art 9 Brüssel IIa-VO note 18 et seqq.

[149] *Fleige*, Die Zuständigkeit für Sorgerechtsentscheidungen und die Rückführung von Kindern nach Entführungen nach Europäischem IZVR (2006) 232 et seq.; *Rauscher* in *Rauscher*, Europäisches Zivilprozess- und Kollisionsrecht IV[4] (2015) Art 9 Brüssel IIa-VO note 10; *Weber* in *Mayr*, Handbuch des europäischen Zivilverfahrensrechts note 4.117.

the Spanish version (*"titular del derecho de visita"*) so that consequently every holder of a right of access, such as a grandparent or step-parent with their own right of access, is covered.[150] This translation error is eliminated in the Brussels IIter Regulation: In contrast to the wording of Article 9 Brussels IIter Regulation, Article 8 Brussels IIter Regulation no longer requires that the parent with rights of access continues to reside habitually in the Member State of the child's former habitual residence, but that the *"persons entitled to access"* continue to reside there.[151] The wording of Article 8 (2) of the Brussels IIter Regulation was adapted accordingly.

However, the Brussels IIter Regulation contains other translation errors.[152] The recognition of jurisdiction after a court has been seised pursuant to Article 10 (1) (b) (ii) Brussels IIter Regulation requires that the parties *"have been informed of their right to contest the jurisdiction of the court seised"*. The German language version is misleading in that it seems to refer to possible legal remedies according to the lex fori (*"anfechten"*).[153] In other language versions, it can be inferred that the court has to instruct that a party can prevent the prorogation by not accepting jurisdiction. For example, the Hungarian language version uses the phrase *"kapjon a joghatósággal szembeni kifogásemelési jogáról"*, the English language version *"right not to accept the jurisdiction"*, the French *"droit de ne pas accepter sa compétence"* and the Italian *"diritto di non accettare la competenza"*.

6. Result

Austrian civil procedure laws generally exhibit a high degree of clarity and definiteness; in individual sub-areas there is a need for improvement with regard to language, systematics and structuring. Particular challenges arise from European civil procedure law. Alignment with the standards of European civil procedure law can lead to a further improvement in clarity and definiteness in sub-areas – for example with regard to the jurisdiction system.

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150 *Garber* in *Gitschthaler*, Internationales Familienrecht Art 9 Brussels IIa-VO note 27.

151 *Garber*, Internationale Zuständigkeit für Verfahren betreffend die elterliche Verantwortung, in *Garber/Lugani*, Die Brüssel IIb-Verordnung: Zuständigkeit, Anerkennung und Vollstreckung in Eheachen und Kindschaftssachen einschließlich der internationalen Kindesentführung (2022) note 6/20; *Garber/Lugani,* Zak 2022/11, 204 (205); *Garber/Lugani*, NJW 2022, 2225 (2227).

152 The German language version published in July 2019 contains numerous spelling errors in upper and lower case.

153 *Garber* in *Garber/Lugani*, Die Brüssel IIb-Verordnung note 6/245; *Garber/Lugani,* Zak 2022/11, 204 (205); *Garber/Lugani*, NJW 2022, 2225 (2227).