QUESTINONNAIRE

Version 2016

General guidelines

This questionnaire addresses the practical application of B IA before the national courts of member states with an emphasis on the interplay of Regulation and national rules regarding the enforcement procedure as a whole and the remedies in particular.

Please refer for existing information relating to B IA in the EU, among others to:

- 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,[1]
- Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[2]
- Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[3]
- Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[4]
- Study on residual jurisdiction (Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations),[5]
- Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I');[6] with accompanying Appendix D[7] and Appendix E,[8]

[1] OJ L 351/1, 20.12.2012. Available at:
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN
[2] COM(2009) 175 final. Available at:
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0175&from=EN
[3] COM(2010) 748. Available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF
[4] COM(2009) 174 final. Available at:
http://ec.europa.eu/civiljustice/news/docs/report_judgements_en.pdf
[5] http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf
[6] http://ec.europa.eu/justice/civil/files/study_cses_brussels_i_final_17_12_10_en.pdf
[7] http://ec.europa.eu/justice/civil/files/brussels_i_appendix_d_17_12_10_en.pdf
[8] http://ec.europa.eu/justice/civil/files/brussels_i_appendix_e_15_12_10_en.pdf

- Report on the Application of Regulation Brussels I in the Member States (‘Heidelberg Report’),[9]
- Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) Note (Study by Ilaria Pretelli),[10]
- The Commission’s Civil Justice Documents compilation,[11]
- European Judicial network in civil and commercial matters,[12] where other rudimentary information regarding national order for payment and small claims procedure for most Member States can also be found,[13]
- European e-Justice Portal,[14]
- European Judicial Network Documents, e.g. Citizens' guide to cross-border civil litigation in the European Union, Practice guide for the application of the Regulation on the European Enforcement Order, Judicial cooperation in civil matters in the European Union etc., which can be found at the web page of European Judicial Network,[15]
- Study on European Payment Order, Study on making more efficient the enforcement of judicial decisions within the European Union etc. All of them are available at the web page of European Judicial Network[16] etc.

The structure of each individual report does not necessarily have to follow the list of questions enumerated below. The questions raised should be dealt with within the reports, however the authors are free to decide where this will be suitable. Following the structure of the questionnaire will make it easier to make comparisons between the various jurisdictions.

The list of questions is not regarded to be a conclusive one. It may well be that we did not foresee certain issues that present important aspects in certain jurisdictions. Please include such issues where suitable. On the other hand, questions that are of no relevance for your legal system can be left aside.

Please give representative reference to court decisions and literature. Please try to illustrate important issues by providing examples from court practice. If possible, please include empirical and statistical data.

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[9] B. Hess, T. Pfeiffer, P. Schlosser, Study JLS/C4/2005/03, 2007. Available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf

[10] European Parliament Directorate-general for internal policies, I. Pretelli, 2011. Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_NT(2011)453205

[11] http://ec.europa.eu/justice/civil/document/index_en.htm

[12] http://ec.europa.eu/civiljustice/simplif_accelerat_procedures/simplif_accelerat_procedures_ec_en.htm.

[13] For case of Slovenia see: http://ec.europa.eu/civiljustice/simplif_accelerat_procedures/simplif_accelerat_procedures_sln_en.htm.

[14] For European Order for Payment procedure see: https://e-justice.europa.eu/contentPresentation.do?idTaxonomy=41&lang=en&vmac=r9Klvk5c5yBXTTpIFcE3eO1ILsSHvqIyFn4mfXJsyLxOw1eIXN-A4iEn1ghxe4PUfmIXktLJDRjq1LeHcGY6HAAAAzMAAAC_.
For European Small Claims Procedure see: https://e-justice.europa.eu/contentPresentation.do?idTaxonomy=42&lang=en&vmac=qu-zZrpu8lja62kGDeATAFhREcgMT4qv4YmtKfdXNfmehAJtx1tqZZSY2wLGuXL2B4q74ERMigBc7S447YG47wAAHccAAALd.

[15] http://ec.europa.eu/civiljustice/publications/publications_en.htm .

[16] http://ec.europa.eu/civiljustice/publications/publications_en.htm .

Please do not repeat the full questions in your text. There is no limitation as to the length of the reports.

Languages of national reports: English.

Deadline: 1 November 2016.

In case of any questions, remarks or suggestions please contact project coordinator, prof. dr. Vesna Rijavec: vesna.rijavec@um.si; or Katja Drnovšek: katja.drnovsek@um.si

Terminology used in the questions

The use of a unified terminology can certainly ease the comparison between national reports. For the purposes of this questionnaire, the following definitions shall apply:

Action: Used in the sense of lawsuit, e.g. ‘bringing an action’ (starting a lawsuit, filing a suit).

Application: Request addressed to the court. Note: the term ‘motion’ is in B IA exclusively used for acts issued by the court.

Astreinte: Monetary penalties used as a means of enforcing judgments in certain civil law jurisdictions. A proper English term to describe ‘*astreinte*’ does not exist.

Authentic instrument: A document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:
(i) relates to the signature and the content of the instrument; and
(ii) has been established by a public authority or other authority empowered for that purpose

Cassation Complaint: Second appeal in the Romanic family of civil procedure (in the Germanic family one uses ‘Revision’ instead).

Civil Imprisonment: Imprisonment of a judgment debtor in order to force him to satisfy the judgment.

Claim / Defence on the Merits: Claim or defence which concerns the specific case at hand and not preliminary (procedural) issues. Opposite of preliminary defences.

Claimant: Before the Woolf Reforms designated as ‘Plaintiff’. In your contributions, please only use ‘claimant’ (the term which is also used in B IA).

Counsel: Generic term for the lawyer assisting a party. We would advise to use this terminology instead of ‘advocate’, ‘procurator’, etc.

Court of origin: The court which has given the judgment the recognition of which is invoked or the enforcement of which is sought.

Court settlement: A settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings.

Default: Omitting the execution of the required procedural act (e.g. where the summoned defendant does not appear).

Defaulter: Party in a civil action who does not execute the procedural act which should have been executed by him.

Enforcement: Use the term enforcement instead of execution.

Enforcement officer: Official involved in enforcing court rulings. Enforcement is part of the tasks of a ‘*huissier de justice*’ in France and other jurisdictions belonging to the Romanic family of civil procedure.

Ex officio / Sua Sponte: Both ‘*ex officio*’ and ‘*sua sponte*’ are used to indicate that the judge may act spontaneously without being asked to do so by the parties. In other words, we are dealing with powers of the judge which he may exercise at his own motion.

Final judgment: Judgement, which is binding to parties and against which generally, no ordinary legal remedy is permitted.

Hearing: Session before the court, held for the purpose of deciding issues of fact or of law. For civil law jurisdictions, we would suggest to avoid using the terminology ‘trial’ (which in English civil procedure refers to a specific stage in litigation).

Interlocutory Judgment: All judgments which do not decide the merits of the case.

Interlocutory Proceedings: Proceedings which are not aimed at acquiring a final judgment on the merits in the case but aim at an intermediate, non-final decision in a pending lawsuit.

Judgment: Any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

For the purposes of Chapter III, ‘judgment’ includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;

Judicial Case Management: An approach to litigation in which the judge or the court is given powers to influence the progress of litigation, usually in order to increase efficiency and reduce costs.

Main Hearing: In German: *Haupttermin*.

Means of recourse against judgments: General terminology to indicate all possible means to attack judgments, e.g. ordinary appeal, opposition, cassation, revision etc.

Member State of origin (MSO): The Member State in which in which the judgment has been given, the court settlement has been approved or concluded or the authentic instrument has been drawn up or registered.

Member State addressed (MSA): The Member State in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought.

Opposition: Act of disputing a procedural act or result, e.g. a default judgment.

Preclusion: The fact that a party is barred (precluded) from taking specific steps in the procedure since the period for taking these steps has expired (‘*Reihenfolgeprinzip*’).

Preliminary defences: ‘Exceptions’; (usually) procedural defences. Opposite of defences on the merits.

Process server: Official serving the summons on the opponent party. This is part of the tasks of a ‘*huissier de justice*’ in France and other jurisdictions belonging to the Romanic family of civil procedure.

Second instance appeal: First appeal, not to be confused with a Cassation Complaint or Revision (i.e. second appeal or third instance appeal).

Statement of Case: General terminology for the documents containing the claim, defence, reply, rejoinder etc. Before the Woolf reforms these documents were indicated as ‘pleadings’. In French: ‘conclusions’.

Statement of Claim: Document containing the claim.

Statement of Defence: Document containing the defence.

Questionnaire for national reports

Part 1: Main features of the national enforcement procedures for recovery of monetary claims (general overview)

1.1. Briefly present domestic legal sources on enforcement.

In Austrian law, enforcement in civil and commercial matters is mainly regulated in the Austrian Enforcement Code **(Exekutionsordnung – EO)**. Subsidiarily, the rules of the Austrian Civil Procedure Code **(Zivilprozessordnung – ZPO)** apply with respect to several parts of the enforcement procedure (e.g. the taking of evidence, the rules for the parties or the court's resolutions and the means of legal recourse; cf. § 78 EO). Also, some relevant provisions can be found in other legal acts, such as the Jurisdiction Act **(Jurisdiktionsnorm – JN),** the Court Organization Act **(Gerichtsorganisationsgesetz – GOG),** the Act on Judicial Officers **(Rechtspflegergesetz – RPflG)** or the Act on Land Valuation **(Liegenschaftsbewertungsgesetz – LBG).**

1.2. Was there a recent reform or is there an ongoing reform in progress? If yes, please comment the changes introduced by the reform or proposed solutions.

The Austrian Enforcement Code dates back to the year 1896 and has remained in force in large parts up until today. Over the last 25 years, however, the Enforcement Code has been reformed in several individual steps (the largest of which shall be named here quickly):[17] Starting with a large rework of the enforcement out of claims in 1991 (in force since 1992),[18] the legislator most importantly launched a reform of the enforcement out of tangible movables as well as the introduction of a simplified procedure for issue of an enforcement order in 1995,[19] followed by a vast redraft of the enforcement out of immovable property in 2000[20] and another rather large rework of forced administration of immovable property in 2008.[21] The latest big reform came into force in 2017,[22] mainly containing several adaptations and

[17] Konecny, 1998: 107.
[18] Bundesgesetzblatt 628/1991 (available at www.ris.bka.gv.at -> Bundesrecht).
[19] Bundesgesetzblatt 519/1995.
[20] Bundesgesetzblatt I 59/2000.
[21] Bundesgesetzblatt I 37/2008.
[22] Bundesgesetzblatt I 100/2016.

implementations necessary due to the Brussels Ia-Regulation and the European Account Preservation Order-Regulation.

1.3. **Please indicate whether there exists an underlying philosophical or dogmatic framework for your system of enforcement.**

Austrian enforcement procedure is initiated at and carried out **by the courts.** Despite the existence of deviating models in other European countries, this was explicitly desired by the legislator of the ZPO and the EO:[23] "*Whenever state authority is in service of civil law, as with enforcement law, it is appropriate, that this is done by state officials, so that everyone can see, that it is not private persons that act as empowered representatives"*[24]. Because: *"Enforcement is never a purely private affair and just a matter of the parties; instead each individual enforcement procedure – even if its dimensions were utterly insignificant – always touches the general interest, in fact in a very meaningful way"*[25]. The underlying idea is of course the general purpose of civil procedure (established by *Franz Klein*) as a means of social welfare that solves conflicts in a fast and efficient way.[26] However, more recent voices in the literature have criticized this structure as "out-dated".[27]

1.4. **Are there different types of enforcement procedures in your member state?**

Comment: *Does the legal framework in your member state provide for different and/or multiple types of enforcement procedures in civil or commercial matters, e.g. does it envisage special regime for enforcing money claims on the one hand and non-money claims on the other? does it envisage shortened/simplified/summary proceedings for certain claims etc? Also, explain interconnections between administrative and civil enforcement procedures, if existent and any other possible interrelation with other fields of law.*

[23] Rechberger, 1988: 120-121.
[24] In German: *„Wenn die Staatsgewalt in die Dienste des Privatrechts tritt, wie es bei der Execution der Fall ist, so ist es entsprechend, daß dies durch die Staatsbeamten geschieht, damit man es sehe, daß nicht Private als Bevollmächtigte der Staatsgewalt auftreten…"*; Materialien II 2.
[25] In German: *„Die Execution ist niemals reine Privatsache und bloße Parteienangelegenheit; jedes einzelne Executionsverfahren – und wären seine Dimensionen noch so unscheinbar – berührt immer auch das Gesammtinteresse, und zwar ganz nahe"*, Materialien I 458; also cf. Rechberger, 1988: 121.
[26] Fasching, 1990: p 45; Konecny, 2013: Einleitung p 12.
[27] Rechberger & Oberhammer, 2009: p 19.

There are three different "archetypes" of enforcement procedures in Austria: Judicial enforcement, administrative enforcement and fiscal enforcement.[28] However, enforceable instruments stemming from administrative and fiscal bodies can under certain circumstances also be enforced according to the Austrian Enforcement Code (cf. § 1 nr 10-14 EO). **Administrative monetary claims** even have to be enforced according to the rules of the EO (§ 3 VVG[29]). **Fiscal monetary claims** that shall be enforced out of claims or tangible movables and **fiscal claims for handing out movables assets** may alternatively be enforced according to the Fiscal Enforcement Code **or** the Enforcement Code (§ 3 para 2 AbgEO[30]). Any other type of enforcement of fiscal claims mandatorily has to be enforced following the rules of the Enforcement Code (§ 3 para 3 AbgEO).

As far as civil matters are concerned, the Austrian Enforcement Code offers various types of enforcement procedures, depending on whether the debtor owns a money or a non-money claim: **Money claims** can be enforced by the means of enforcement out of immovable property (§§ 87-247 EO), enforcement out of tangible movables (§§ 249-289 EO), enforcement out of claims (§§ 290-324 EO), out of surrender claims (§§ 325-329 EO), or enforcement out of other assets (such as companies, intellectual property rights, shareholder rights, etc.; §§ 330-345 EO). Regarding **non-money claims** the Austrian Enforcement Code contains very diverse provisions; e.g. for the distribution of moveable assets (§§ 346-348 EO), for eviction (§ 349 EO), for granting or rescinding rights laid down in the land register (§ 350 EO), or for enforcing mandatory (§§ 353-354 EO) or prohibitory injunctions (§ 355 EO).

If the creditor seeks satisfaction for a **money claim below 50.000 Euro,** he or she has to apply for enforcement in the **simplified procedure** for issuing an enforcement order, unless (§ 54b para 1 EO):

- the creditor applies for enforcement out of immovable property (nr 1).
- the creditor needs to produce documents other than the enforceable instrument (nr 3).
- the instrument is a foreign enforceable instrument that still needs to be declared enforceable (nr 4).

[28] Cf. Neumayr & Nunner-Krautgasser, 2011: 238.
[29] *„Verwaltungsvollstreckungsgesetz 1991"* = Administrative Enforcement Code 1991.
[30] *„Abgabenexekutionsordnung"* = Fiscal Enforcement Code.

- the applying creditor can give evidence that the item sought to be seized would be hidden or withdrawn if the debtor was served with the enforcement order prior to seizure (nr 5).

The simplification consists in the fact, that the creditor does not need to produce the enforceable instrument (§ 54b para 2 nr 2 EO); instead he or she only has to name the day of issue of the confirmation of enforcement (§ 54b para 2 nr 1 EO). The idea behind this simplified procedure is to enable and facilitate the use of the electronic communication in enforcement procedures.[31]

It is noteworthy, that there is an ongoing debate on the question, whether the **certificate** according to Art 53 Brussels Ia-Regulation shall be **considered a document** according to § 54b para 1 nr 3 EO, which would result in the inapplicability of the simplified procedure for European enforcement titles that are to be enforced according to the Brussels Ia-Regulation.[32]

1.5. **Is your system of enforcement considered to be centralized or decentralized?**

Comment: *Decentralization may manifest itself in various forms. For instance, in decentralized jurisdiction (both subject-matter and territorial come into play); decentralized rules of procedure (in federative states where different levels (both horizontally and vertically) of government and authorities have to be taken into account; the power and scope of the court and/or other authority/body in enforcement matters – does it hold competence in all mattes enforcement or are certain acts ('steps' of the enforcement procedure) ascribed/delegated to different authorities. Please provide a general overview on the above matter. In addition, please specify which authority/body is competent in matters of (refusal of) recognition and enforcement (is there a special authority/body at the 'level of the state' which decides on said matters, or does the individual for instance – akin to countries with common law – file an action on the foreign judgment.*

As far as **legislation in enforcement law** is concerned, Austria has a centralized system: Legislation and "enforcement" of civil law is within the competence of the federal government (Art 10 para 6 B-VG).[33]

Regarding the **actual enforcement,** according to § 17 para 1 EO, Austrian enforcement procedures are carried out by the district courts ("*Bezirksgerichte*", which are the lowest level

[31] Neumayr & Nunner-Krautgasser, 2011: 104
[32] **For the applicability** of the simplified procedure Mohr, 2013: 33, arguing that the certificate just replaces the confirmation of enforceability; **doubtful** Köllensperger, 2015: 54.
[33] Holzhammer, 1993: 7.

courts). So as far a **"territorial distribution"** of enforcement cases is concerned, the Austrian system of enforcement therefore is very decentralised. Also, there is no centralization with regard to the type of enforcement procedure **("distribution with regard to the subject-matter");** whether it is enforcement of monetary claims or non-monetary claims: Any district court has to carry out every type of enforcement within its local jurisdiction (cf. §§ 18 and 19 EO).

1.6. The authorities/bodies and agents involved. Which authorities/bodies have competence with respect to enforcement?

The individual steps of enforcement are distributed amongst various court members: Several – rather standardized – types of enforcement procedures (for example large parts of the process of enforcement out of tangible movables and out of claims, which represent the vast majority of enforcement proceedings) are nowadays in the hands of **judicial officers.**[34] **Judges** are competent for the more complicated matters, such as the forced sale of immovable property, the enforcement to effectuate a conduct, toleration or omission of an action as well as the declaration of enforceability of **foreign decisions** (§ 17 para 3 nr 1 RPflG). Finally, **court bailiffs** are competent for several (factual) enforcement acts, such as the seizure and sale of tangible movables or the eviction.[35]

1.7. How 'private' is the system in actuality, if it is private at all?

> Comment: *The above term 'private' refers to the role of a 'private individual' in enforcement proceeding (both the creditor, debtor and other involved persons), i.e. how much significance do his actions and omissions hold; how much does he partake in advancing the procedure to later stages; is he involved in the designation of means of enforcement etc. In other words, describe the weight that the principle of 'dispositivity' holds in your system, in contrast to the ex officio powers of the court or other authority/body.*

The Austrian enforcement law is largely characterized by the **principle of free disposition of parties,**[36] the (weakened) **inquisitorial principle**[37] and the **principle of ex officio conduct of**

[34] Neumayr & Nunner-Krautgasser, 2011: 4 and 7; Rechberger & Oberhammer, 2009: p 20 and 21.
[35] Neumayr & Nunner-Krautgasser, 2011: 4-5; Rechberger & Oberhammer, 2009: p 23-28.
[36] Heller, Berger & Stix, 1969: 3; Neumayr & Nunner-Krautgasser, 2011: 27-29.

the proceedings.[38] Any enforcement procedure is started by an application; the applying party there decides what method of enforcement he or she wants to use and may stop the enforcement at any time on application (§ 39 para 1 nr 6 EO).[39] The court may collect all evidence necessary for its decision (§ 55 para 3 EO); however, there is no obligation to investigate facts that were not brought forward by the parties.[40] Also, in the proceedings for the issuing of an enforcement order, the court is not allowed to ask the parties to provide further evidence (§ 55 para 2 EO).[41] Once started, the enforcement procedure is generally carried out ex officio;[42] however, in some situations the applying party needs to participate in the procedure (for example by providing the necessary manpower and means of transport for an eviction; cf. § 349 para 1 EO) or file further applications (for example the application to set a new auction date in relation to enforcement out of immovable property, if the bids have not met the reserve price; cf. § 151 para 3 EO).[43]

1.8. Briefly enumerate the means of enforcement (methods which serve to procure involuntary collection of the claim).

Depending on whether the debtor has a money or a non-money claim, the Austrian Enforcement Code offers various types of enforcement procedures: **Money claims** can be enforced by the means of enforcement out of immovable property (§§ 87-247 EO), enforcement out of tangible movables (§§ 249-289 EO), enforcement out of claims (§§ 290-324 EO), orders (§§ 325-329 EO), or enforcement out of other assets (such as companies, intellectual property rights, shareholder rights, etc.; §§ 330-345 EO). Regarding **non-money claims,** the Austrian Enforcement Code contains very diverse provisions; for example, for the distribution of moveable assets (§§ 346-348 EO), for eviction (§ 349 EO), for granting or rescinding rights laid down in the land register (§ 350 EO), or for enforcing mandatory (§§ 353-354 EO) or prohibitory injunctions (§ 355 EO).

[37] Jakusch, 2015: § 55 EO p 11; Neumayr & Nunner-Krautgasser, 2011: 29; Rassi, 2014: § 55 EO p 25-27; Rechberger & Simotta, 1992: p 111.
[38] Heller, Berger & Stix, 1969: 3; Neumayr & Nunner-Krautgasser, 2011: 29-31.
[39] Neumayr & Nunner-Krautgasser, 2011: 27-28.
[40] Cf. Jakusch, 2015: § 55 EO p 11; Rassi, 2014: § 55 EO p 27.
[41] Rassi, 2014: § 55 EO p 27.
[42] Rechberger & Simotta, 1992: p 117.
[43] Neumayr & Nunner-Krautgasser, 2011: 29-30.

1.9. **In short, present the underlying principles which govern the enforcement procedure in short.**

Comment: *Focus on both the principles which adhere to enforcement procedure in international capacity, e.g. territorial, sovereignty principle regarding coercive measures and the principles relating to procedural aspects in narrower terms e.g. principle of efficiency, protection of the debtor, priority principle, publicity, (non)mandatory hearing etc.*

Some of the leading principles (principle of free disposition of parties, weakened inquisitorial principle and the principle of ex officio conduct of the proceedings) were already explained in chapter 1.7.

Furthermore, there is **no strict principle of written proceedings** in Austrian enforcement law; instead there are flexible rules that mainly promote the efficient conduct of the proceedings: Applications, for example, can also be filed orally at the court and parties and third persons can be examined by the court if necessary.[44] Enforcement proceedings are (with the exception of auctions) **not public.**[45]

The enforcement procedure shall be carried out in a **fast and economic way**[46] in order to enable an efficient satisfaction of creditors (if the matter in dispute was a money claim: according to the **priority principle**).[47] However, numerous provisions on the **protection of the debtor** (for example on items and claims immune from seizure [§§ 250-251, 290 EO] or on restrictions regarding the seizure of claims [§§ 290a-293 EO]) shall ensure that the debtor's livelihood is secured and that the debtor's assets are not diminished more than necessary.[48]

In an **international context,** Austrian enforcement law is characterized by **the territorial principle:** No sovereign state other than Austria may exercise jurisdiction and set enforcement acts on Austrian territory.[49] However, there are some exemptions from Austrian jurisdiction on Austrian territory **(immunities):** If a person, an object or a place is covered by immunity according to public international law, enforcement acts by the court against this person, object or place are inadmissible (§ 31 para 1 EO).

[44] Neumayr & Nunner-Krautgasser, 2011: 31-32.
[45] Rechberger & Simotta, 1992: p 130-131.
[46] Heller, Berger & Stix, 1969: 4.
[47] Neumayr & Nunner-Krautgasser, 2011: 32.
[48] Heller, Berger & Stix, 1969: 3.
[49] Neumayr & Nunner-Krautgasser, 2011: 49-52.

1.10. **Does the stage of 'permitting the enforcement' exist in your legal system? Please comment, e.g. German '*Titel mit Klausel*'.**

Comment: *The stage of 'permitting the enforcement' is a mandatory phase of the enforcement proceedings found in certain member states, in which the court examines the enforcement title and specifically checks if all the (procedural and substantive) prerequisites for enforcement all met. If all prerequisites are found to be present, then the court allows for the enforcement to be undertaken and the enforcement proceedings enter the following phase of the procedure. The court thus issues a 'decision' or 'order', permitting the enforcement. The described phase is a pre-course to further enforcement action. It can also act in the capacity of 'title import' for foreign judgements, which means that member states withholding this stage will not be as greatly affected by the abolition of exequatur as those lacking it.*

Any enforcement according to the Austrian Enforcement Code requires a previous authorization by the court; therefore the enforcement procedure is split up into two parts: The **"proceeding to obtain an order for enforcement"** and the **"enforcement proceeding"** as such,[50] the latter of which is (generally – whenever the enforcement of money claims is involved) divided into the three subphases **seizure, realisation of the value of the asset** and **satisfaction** of the creditors.[51] In order for the court to issue an enforcement order, the creditor needs to produce an **enforceable instrument;** enforceability usually needs to be **confirmed** by the authority that issued the enforceable instrument.[52]

The **proceedings to obtain an enforcement order** starts with the **application** by one party. Such an application shall contain (according to § 54 para 1 EO): The names of the applying **party** and the party whom enforcement is sought against (nr 1), any circumstances that are relevant for determining the court's **jurisdiction** (nr 1), a description of the **claim** to be enforced and of the **relevant enforceable instrument** (nr 2), a specification of the **method of enforcement** desired as well as (in the case of a money claim) of the objects that shall be subject to the enforcement (nr 3). Additionally, the party filing the application needs to **produce the enforceable instrument,** including the **confirmation of enforceability** and (if it is a foreign title) the **declaration of enforceability** (§ 54 para 2 EO).

[50] Rechberger & Oberhammer, 2009: p 74.
[51] Rechberger & Oberhammer, 2009: p 141-143.
[52] Jakusch, 2015: § 7 EO p 98-100/1.

The court then has to investigate, whether the **procedural requisites for enforcement** (such as jurisdiction, the capacity to be a party, the existence of an enforceable instrument with the conformation of enforceability, the existence of an application that includes the necessary content, etc.[53]) are met and if the application is **"objectively founded"** (which – according to the prevailing opinion – means that there is an **identity between the parties** named in the enforceable instrument and in the application and that the enforceable instrument contains a well-determined order to pay or to act or refrain from acting[54]). The court usually does so merely on the **basis of the court file;** however, in some circumstances the debtor may be heard prior to the issue of an enforcement order (for example when authorising enforcement of a prohibitory or mandatory injunction; cf. § 358 EO). A failure to satisfy the procedural requisites leads to a dismissal of the application as inadmissible, a lack of the objective foundation leads to dismissal of the application on the merits. However, according to § 54 para 3 EO, the court has to give the party a chance to make corrections, if the application is incomplete or the necessary documents are not attached. The legal remedy against a decision on an application for an enforcement order is the **recourse** (§ 65 para 1 EO).

If the creditor seeks satisfaction for a **money claim below 50.000 Euro,** he or she **has to apply** for enforcement in the **simplified procedure for the issuing of an enforcement order,** unless (§ 54b para 1 EO):

- The creditor applies for enforcement out of immovable property (nr 1).
- The creditor needs to produce documents other than the enforceable instrument (nr 3).
- The instrument is a foreign enforceable instrument that still needs to be declared enforceable (nr 4).
- The applying creditor can give evidence that the item sought to be seized would be hidden or withdrawn if the debtor was served with the enforcement order prior to seizure (nr 5).

The simplification consists in the fact, that the creditor **does not need to produce the enforceable instrument** (§ 54b para 2 nr 2 EO); instead he or she only has to name the day of issue of the confirmation of enforcement (§ 54b para 2 nr 1 EO). The idea behind this simplified procedure is to enable and facilitate the use of the **electronic communication** in

[53] For an extensive list cf. Neumayr & Nunner-Krautgasser, 2011: 101.
[54] Cf. Jakusch, 2015: § 7 EO p 12-73; Neumayr & Nunner-Krautgasser, 2011: 102-103.

enforcement procedures.[55] Since the formal requirements for obtaining the issue of an enforcement order are significantly lowered, the debtor is granted an additional legal remedy, called **"objection"** (*"Einspruch"*; § 54c EO[56]). By the means of this (additional) legal remedy, the debtor may assert that the applying creditor does not hold the enforceable instrument that was named in the application or that the asserted data in the application does not match the enforceable instrument (§ 54c para 1 EO).[57]

1.11. **Subject-matter jurisdiction in enforcement proceedings. Please provide a short presentation of the judicial system - courts system.**

1.12. **Territorial jurisdiction in enforcement proceedings. Please provide a short description in this regard.**

1.11 and 1.12 combined:

According to § 17 para 1 EO, Austrian enforcement procedures are carried out by the **district courts** (which are the lowest level courts). Generally, the court competent for carrying out the "enforcement proceedings" is also competent for the **"proceedings to obtain an order for enforcement"**[58] (§ 4 EO).[59] However, in some cases (for example if a creditor wants to enforce out of several of the debtor's immovable properties; cf. § 6 EO) the order of enforcement may stem from a different court than the one competent for carrying out the enforcement.[60]

The rules for **territorial jurisdiction** are laid down in §§ 18 and 19 EO (§ 19 EO, however, only contains special – practically almost irrelevant – provisions):

1. An enforcement out of **immovable properties** that are registered in a public register shall be carried out at the court where the respective resister (for example a land register) is kept (§ 18 nr 1 EO). If the immovable property is not registered, the competent court is the court where the property is located (§ 18 nr 2 EO).

[55] Neumayr & Nunner-Krautgasser, 2011: 104.
[56] Cf. chapter ■■■.
[57] Neumayr & Nunner-Krautgasser, 2011: 157.
[58] For further explanation cf. chapter ■■■ 1.10 ■■■.
[59] Neumayr & Nunner-Krautgasser, 2011: 58.
[60] Neumayr & Nunner-Krautgasser, 2011: 58; Rechberger & Oberhammer, 2009: p 15.

2. An enforcement out of **claims** shall be carried out at the court where the debtor has his or her place of general jurisdiction (which is generally[61] the place of domicile or habitual residence; cf. § 66 para 1 JN), or in the lack of such (in Austria), the court of the domicile, habitual residence or headquarter of the third party debtor, or in the lack of such (in Austria), the court, where a pledge for the respective claim is located (§ 18 nr 3 EO).

3. For **all other types** of enforcement, the competent court is the court where the enforcement object is located, or in the lack of such, the court where the first act of enforcement has to be carried out (§ 18 nr 4 EO).

1.13. How are conditional claims enforced in your member state?

Conditional claims can be enforced according to Austrian enforcement law. According to § 7 para 2 EO, when applying for an enforcement order regarding claims subject to a **condition precedent** (*"aufschiebende Bedingung"*), the creditor needs to prove the fulfilment of the condition by producing an official document[62] or officially authenticated[63] private document. If the creditor cannot produce one of these two types of written evidence, he or she has to initiate a new civil procedure, where he or she has to prove the fulfilment of the condition in a separate civil procedure (so-called "purification action" [*"Purifikationsklage"*]).[64]

There are no explicit provisions on claims subject to a **condition subsequent** (*"auflösende Bedingung"*) in the Austrian Enforcement Code; however, according to literature[65] and case law,[66] those enforceable instruments can be enforced without the necessary for any prior measures. Instead it is up to the debtor to assert the fulfilment of the condition in a separate civil procedure (depending on the type of condition the appropriate action could be an

[61] For subsidiary places of general jurisdiction cf. § 67 JN.
[62] Cf. § 292 para 1 ZPO; Nunner-Krautgasser & Anzenberger, 2015: 20-21; Rechberger & Simotta, 2010: p 795.
[63] Nunner-Krautgasser & Anzenberger, 2015: 20-21; Rechberger & Simotta, 2010: p 795.
[64] Anzenberger & Haas, 2016: 9.
[65] Anzenberger & Haas, 2016: 9-11; Jakusch, 2015: § 7 EO p 78.
[66] OGH 3 Ob 169/03d; 3 Ob 217/00h; RIS-Justiz RS0001368.

"opposition action" [*"Oppositionsklage"*] or an "impugnation action" [*"Impugnationsklage"*]).[67]

1.14. **Legal succession after the enforcement title was obtained: What has to be done to proceed with the enforcement against the successors? How about the creditor's successors, are any changes required in the enforcement title?**

According to § 9 EO, it is possible to issue an order for enforcement **in favour of another person** or **against another person** than the one named in the enforceable instrument, if the applying party can **prove the legal succession** by producing an according official document[68] or officially authenticated[69] private document.[70] If the applying party cannot produce one of these two types of written evidence, according to § 10 EO he or she has to initiate a new civil procedure, where he or she has to prove the legal succession (so-called "purification action" [*"Purifikationsklage"*]).[71]

1.15. **Enforcement titles: Decisions (judgments and other court decisions), settlements, public documents. Please elaborate – how does your system define enforcement titles, e.g. via enumeration, general clause etc? Also, provide a short commentary.**

§ 1 EO contains an exhaustive[72] list of all the *"acts and documents"* that serve as a ground for the issue of an enforcement order **("enforcement titles" or "enforceable instruments").** Those enforceable instruments can be issued by a **court** (such as judgements and resolutions from civil courts [nr 1]; payment orders [nr 3]; court settlements [nr 5] or criminal court´s findings on the procedural costs or on private claims [nr 8]), by an **administrative authority** (such as decisions by administrative authorities on civil claims [nr 10]; decisions by public insurance institutions, granting or refusing services [nr 11]; or the fiscal authorities' payment orders or confirmations of payment default [nr 13]), or by **unofficial bodies** (such as an arbitral award or an arbitral settlement [nr 16]).

[67] Anzenberger & Haas, 2016: 9-11; Jakusch, 2015: § 7 EO p 78.
[68] Cf. § 292 para 1 ZPO; Nunner-Krautgasser & Anzenberger, 2015: 20-21; Rechberger & Simotta, 2010: p 795.
[69] Nunner-Krautgasser & Anzenberger, 2015: 20-21; Rechberger & Simotta, 2010: p 795.
[70] Jakusch, 2015: § 9 EO p 16.
[71] Jakusch, 2015: § 10 EO p 1; Neumayr & Nunner-Krautgasser, 2011: 79.
[72] Rechberger & Oberhammer, 2009: p 77.

1.16. **Requirements for issuing the certificate, certifying that the judgment is enforceable (confirmation of enforceability) - procedural steps. Which procedural steps must be undertaken, to obtain the certificate?**

Any enforcement according to the Austrian Enforcement Code requires a previous authorization by the court; therefore the enforcement procedure is split up into two parts: The **"proceedings to obtain an enforcement order"** and the **"enforcement proceedings"** as such.[73] In order for the court to grant an enforcement order, the creditor needs to produce an **enforceable instrument** with its **enforceability confirmed** by the authority that issued the enforceable instrument.[74]

The **confirmation of enforceability** serves as a certification that the enforcement title is (formally) enforceable. This means, that the enforceable instrument **has come into effect** (which is for example the case, when it was served on the defendant) and that **no legal remedy with a suspensory effect** is available.[75] According to case law, the confirmation of enforceability also provides proof of the fact that the **time limit for complying with the instrument** (which is usually set in the instrument) has **expired.**[76] The issuing of the confirmation of enforcement is still **part of the procedure in the main case** and therefore performed by the court or authority that issued the enforceable instrument.[77]

Once the creditor obtained a confirmation of enforceability, he or she can try to obtain an **enforcement order** (cf. chapter 1.10).

1.17. **Service/notifications of documents and decisions (provide a wholesome picture of service and notification in the enforcement proceedings). Please present an overview of said activity, e.g. which documents are served and the method of service, how notifications are made.**

The service of documents and decisions in enforcement law generally follows the respective rules in civil procedure (§§ 87 – 121 ZPO as well as the Act on the Service of Documents **[Zustellgesetz – ZustellG]**).[78] Court resolutions (including those initiating a procedure)

[73] Rechberger & Oberhammer, 2009: p 74.
[74] Jakusch, 2015: § 7 EO p 98-100/1; Neumayr & Nunner-Krautgasser, 2011: 73.
[75] Höllwerth, 2009: § 7 EO p 150; Jakusch, 2015: § 7 EO p 95.
[76] OGH 3 Ob 289/04b; 2 Ob 232/08v; 4 Ob 16/10x; RIS-Justiz RS0000188 (available at www.ris.bka.gv.at -> Judikatur -> Justiz).
[77] Jakusch, 2015: § 7 EO p 98-100/1; Neumayr & Nunner-Krautgasser, 2011: 73.
[78] Neumayr & Nunner-Krautgasser, 2011: 121.

generally do not need to be served on the recipient in person, they can also be served on a so called **"subsidiary recipient"** (which is any person that lives at the same address as the recipient or is his employer or employee [§ 16 para 2 ZustellG]).[79] If the document cannot be served at the delivery point, and the delivery agent has reasons to believe that the recipient regularly appears at the delivery point, the document may also be served by **deposit** (§ 17 para 1 ZustellG). The service of document is generally **carried out by the post service** (§ 88 para 1 ZPO); however, it can under certain circumstances also be **carried out by court servants** or servants of the municipality. One of those cases (which is important with regard to enforcement proceedings) is where a document is served on the occasion of the performance of an official act (§ 88 para 1 nr 5 ZPO); for example, when a court bailiff attempts seizure of movable assets.

According to § 89a GOG, documents can also be delivered electronically (via the system for **electronic legal transactions**) to any person who lodged a submission to the court electronically in the respective case.[80]

Under some circumstances, the service of documents requires a **public announcement** (for example the announcement of the appointment of an administrator in forced administration [§ 99 para 2 EO], or the announcement of an auction date regarding a compulsory auction [§ 170b Abs 1 EO]). This happens by publishing an **edict** at the website http://www.edikte.gv.at.

1.18. Division between enforcement and protective measures.

1.18.1. What and/or which provisional measures are possible (are provided for) in your member state? Enumerate and briefly describe.

1.18.2. Difficult requirements for protective measures. Which provisional measures are possible (are provided for) in your member state and what are the requirements for issuing them? Please accompany the answer with a comment on the 'difficulty' of actually meeting those requirements.

[79] Neumayr & Nunner-Krautgasser, 2011: 122.
[80] Neumayr & Nunner-Krautgasser, 2011: 122.

There are two very distinct security measures in Austrian Civil Procedure Law, both of which are (despite of some criticism on that systematic positioning[81]) laid down in the Austrian Enforcement Code: "**Security enforcement" (or "asset freezing as a stage in the enforcement process";** §§ 370-377 EO) and "**interim measures"** (§§ 378-402 EO).

Both of these protective measures will be discussed in more detail in chapter ■■■ 4.6. ■■■

1.19. **Comments and critical approach to your legislation. Please identify deficiencies of your national system, e.g. length of enforcement proceedings; success rate of enforcement; interconnectivity and over-lapping to other areas of law (insolvency proceedings).**

Due to the constant reform process that started in the 1980's,[82] Austria currently disposes of a rather modern and well-functioning enforcement law. Nevertheless, there is room for improvement in several aspects: For example, roughly one third of all enforcements out of moveable tangible assets does not yield any income; however, the debtor is only obliged to compile a list of assets **after** an unsuccessful enforcement out of moveable tangible assets or an unsuccessful enforcement out of claims (§ 47 para 1 EO). Obliging the debtor to **deliver a list of assets beforehand** (or providing other means of detecting assets[83]) could result in a **higher success rate** of enforcement procedures (partly because assets could be detected more easily, partly because many unpromising enforcement procedures would not even be initiated).

Another – a little more technical – point of criticism is the lack of rules on **enforcement out of companies:** According to § 341 EO, companies can be subject to forced administration and forced rental, but there are no provisions on selling the debtor's company, which is why the prevailing opinion is opposed to such a possibility under current law.[84] For systematic reasons (especially at the interface between property law and enforcement law [85]) this is understandable; from an economic point of view, however, it is curious that a company can be sold according to civil law and can be transferred in an insolvency procedure, but cannot

[81] Holzhammer, 1993: 442
[82] See above chapter 2.
[83] One will be implemented in the course of the national implementation of the Regulation establishing a European Account Preservation Order: According to the new § 424 para 2 EO, the debtor will have to reveal the bank account he owns in Austria.
[84] Cf. Frauenberger, 2014: § 341 EO p 3.
[85] Cf. Oberhammer, 2015: § 331 EO p 79-84.

subject to seizure in an enforcement procedure (which means that instead the creditor needs to enforce out of all the company’s assets – obviously for far less revenue).

Another point of criticism to mention is that there could be a better **“interconnectivity” between enforcement law and insolvency law.** In the absence of an application for the opening of an insolvency procedure (or in default of sufficient money to carry it out), an insolvency procedure will not be opened, meaning that enforcement procedures are piling up, creating more and more debts for the debtor (and possibly even for the creditors, if they are unable to recover the costs of enforcement proceedings). One possible measure to cope with this problem could be to allow the *ex officio*-opening of an insolvency procedure as soon as several enforcement proceedings have been unsuccessful.

Part 2: National procedure for recognition and enforcement of foreign judgements

2.1. Which of the three systems is enacted in your system, disregarding EU or other international acts: (1) *Révision au fond*; (2) *Contrôle limité*; (3) *Ex lege*.

Before answering the following questions, it is important to highlight the distinction between the **"extent of review"** of a foreign decision before recognition and enforcement and the **"formal procedure"** that is required for the recognition and declaration of enforceability. While the "extent of review" will be displayed in this chapter, the "formal procedure" shall be discussed in chapter 2.3.

The Austrian national system provides for a ***contrôle limité*** as far as the extent of review of a foreign decision is concerned: The basic requirement for recognition and enforcement is the formal **reciprocity** (§ 406 EO [previously § 79 para 2 EO]), which can be established by international treaties or regulations from the ministry of justice.[86] Also, the enforcement of the judgement requires its **enforceability in the state of origin** (§ 406 EO [previously § 79 para 2 EO]).

Apart from these requirements, **recognition and enforceability shall be denied,** if[87]

1. the foreign court did not have ("fictional") **international jurisdiction** for the legal case, this "fictional" international jurisdiction has to be measured by the Austrian rules for jurisdiction (so called "Austrian formula of jurisdiction"; § 407 nr 1 EO [previously § 80 nr 1 EO]);[88]

2. the **right to be heard was violated** (for example if the defending party if the defendant was not served with the document which initiated the proceedings or did not have the chance to participate in the proceedings due to a procedural error; § 407 nr 2 and § 408 nr 1 EO [previously § 80 nr 2 and § 81 nr 1 EO]);[89]

[86] Nunner-Krautgasser, 2009a: 535.
[87] Cf. Nunner-Krautgasser, 2009a: 535.
[88] Garber, 2016: § 80 EO p 8.
[89] Nunner-Krautgasser, 2009a: 535.

3. if recognition or enforcement would be contrary to the ***ordre public*** (§ 408 nr 2 and 3 EO [previously § 81 nr 2 and 3 EO]).[90]

If these requirements are met and none of the named grounds of refusal are fulfilled, the foreign decision shall be recognised and enforced **without any further review.**

2.2. What is the concept of 'recognition' and 'enforcement' of foreign judgements in your member state?

Comment: *Please firstly evaluate the terms on their own and later-on conduct a comparison. In doing so, refer to the established theories on the subject-matter which strive to provide an explanation on the effects of decision on recognition and/or enforcement (does the decision hold constitutive effects; does the decision provide for a extension of effects from the state of origin and state of enforcement; does it cumulate both effects).*

It is important to note that most of the explicit national provisions are tailored towards the **enforcement of foreign judgments** (cf. §§ 406-414 EO [previously §§ 79-84c EO]);[91] there are only few explicit rules on the **recognition of foreign judgment** (§ 415 EO [previously § 85 EO]; as far as family law goes, there are some more provisions in §§ 97-100 and § 115 AußStrG).

Due to the principle of territoriality, court decisions are generally limited to the national territory of the state that issued the decision.[92] So in order for this decision to take effects in other states, they need to be **contributed effectiveness** (either *ex lege* or by another sovereign act). [93] This contribution of effectiveness is called **recognition** and works by "importing" several effects of the foreign decision to Austria. Once recognised, the foreign decision has to be accepted as binding and cannot be contested any more.[94] Roughly spoken, the effects that can be imported by recognising a decision are the *res iudicata* effect, the binding effect and the constitutive effect of a decision.[95] While there are different theories on the precise **extent of the contribution of effectiveness** (there are the "theory of the extension of effects", the

[90] Nunner-Krautgasser, 2009a: 535.
[91] Nunner-Krautgasser, 2009: 533.
[92] Neumayr & Nunner-Krautgasser, 2011: 109.
[93] Nunner-Krautgasser, 2009b: 793.
[94] Nunner-Krautgasser, 2009b: 793.
[95] Neumayr & Nunner-Krautgasser, 2011: 109; Rechberger & Oberhammer, 2009: p 121.

"theory of equal treatment" and the so-called "cumulation theory"), the prevailing opinion favours the **cumulation theory:** According to this theory, a decision shall generally have the same effects as it does in the state of origin. However, it cannot be contributed more effects than a comparable Austrian decision.[96]

By the sole means of recognition, however, the decision cannot be granted **enforceability.** Instead, the decision needs to be granted enforceability by a separate sovereign act, the so-called **declaration of enforceability,** which is a court resolution (§ 410 para 1 EO [previously § 83 para 1 EO]). According to § 413 EO (previously § 84b EO), the declaration enforceability effects that the foreign enforceable instrument shall be treated equally to an Austrian one; however, it cannot surmount the effects it has in the country of origin.[97]

Any procedural aspects (for example, whether the declaration of enforceability has a binding effect) will be treated in the following subsection.

2.3. Main features of 'delibation' (*procedura di delibazione*) or '*incidenter*' procedure – type of procedure. Which type of procedure is provided for in your system? Accompany the answer with commentary.

Comment: *On the continent usually two distinct civil procedures exist. One is a separate non-contentious civil procedure especially tailored for recognition and enforcement of foreign judgements in Italy called 'procedura di delibazione'. However, in certain countries a possibility also exist that the foreign judgement is recognised and enforced directly within the procedure of enforcement (in the meaning of the execution) (in France called 'incidenter' procedure).*

This question needs to be answered separately for recognition and enforcement:

Recognition is principally **carried out automatically** (*ipso iure*) in the Austrian national system.[98] This means that no special procedure is required for the recognition of a decision; if a party refers to the effects of a foreign decision, the court simply needs to examine the prerequisites for recognition as a preliminary question.[99] This also means, however, that (generally) there is no "explicit" decision on the recognition of a decision and therefore no

[96] Nunner-Krautgasser, 2009b: 800.
[97] Cf. Slonina, 2016: § 84b EO p 1.
[98] Nunner-Krautgasser, 2009b: 800; Rechberger & Oberhammer, 2009: p 121.
[99] Nunner-Krautgasser, 2009b: 800.

binding effect for future procedures (which may lead to diverging assessments in different procedures). Therefore, the Austrian legislator has added two additional instruments: According to **§ 415 EO** (previously § 85 EO), a party may apply for the **declaration** that a foreign decision (§ 415 nr 1 EO) is to be recognised, if the decision was about a pecuniary matter (§ 415 nr 2 EO) and is not available to enforcement (§ 415 nr 2 EO). On such an application, the addressed court issues a resolution, granting a **binding effect** (which means, that whenever the recognition of the decision occurs as a preliminary question in any further procedure, the respective court may not freely asses the recognisability of the decision but is instead bound to the decision). The second instrument is an **application according to § 236 para 3 ZPO:** This so-called "application for a declaration during a procedure" (*"Zwischenantrag auf Feststellung"*) may be filed during a civil procedure, if the question of recognition occurs as a preliminary question. It is then decided upon in the actual sentence of the judgement and has a **declaratory effect** (meaning that it has a *res-iudicata*-effect and a binding effect).[100]

It is noteworthy that according to the prevailing opinion, the application according to § 236 para 3 ZPO only applies on the recognition of decisions from states where the relevant **European legal acts** (such as Brussels Ia, Brussels IIa of the European Regulation on maintenance obligations) **do not apply.**[101] According to these authors, the provision of § 236 para 3 ZPO goes further than required by the European Regulations (since it grants the above-mentioned declaratory effect) and therefore **contradicts** them, which must lead to its inapplicability in a European context.

Enforcing a foreign decision in Austria, however, generally requires a **constitutive act** according to § 403 EO (previously § 79 para 1 EO): the so-called **declaration of enforceability** (*"Vollstreckbarerklärung"* or *"exequatur"*).[102] This (theoretically) happens in a separate procedure; however, the application for the declaration of enforceability may be combined with the application to obtain an enforcement order (§ 414 para 1 EO; previously (§ 84a para 1 EO), which happens in almost all of the cases.[103] Both applications shall be decided on simultaneously (§ 414 para 1 EO; previously § 84a para 1 EO).

[100] Cf. Rechberger & Simotta, 2010: p 562.
[101] Cf. Deixler-Hübner, 2004: § 236 ZPO p 24; Rechberger & Simotta, 2010: p 563.
[102] Neumayr & Nunner-Krautgasser, 2011: 113.
[103] Neumayr & Nunner-Krautgasser, 2011: 118.

2.4. Jurisdiction in matters of recognition and enforcement (substantive and territorial). Provide a short description.

According to § 17 para 1 EO, Austrian enforcement procedures are carried out by the **district courts** (which are the lowest level courts); the same goes for recognition and the declaration of enforceability (§ 82 and § 85 EO). The competent authority for the declaration of recognition and enforceability is generally the district court of the debtor's domicile or head quarter (§ 82 nr 1 EO) **or** the district court that is competent for the conduct of the enforcement (§ 82 nr 2 EO; there are slightly deviant rules for Vienna, however).[104] These rules (obviously) only apply as far as there are no special provisions in European Law or Public International Law (cf. § 86 EO).

2.5. Type of decision. Explain types of procedure and types of decision in your member state? Highlight any possible atypical procedures/decisions and their effects.

There are two "prototypes" of decisions in contentious civil proceedings: The **judgement** and the court **resolution.** While a judgement is the **meritory decision** on an application for a judgement (such an application could for example be an "action" [*"Klage"*], an "application for a declaration during a procedure" [*"Zwischenantrag auf Feststellung"*] or an "objection of compensation" [*"Aufrechnungseinrede"*][105]), **formal decisions** are issued in the form of a resolution (for example dismissing decisions due to the lack of procedural requisites, such as the lack of international jurisdiction).[106] The most important differences between judgments and "mere" court resolutions are the **legal remedies** that may be raised to fight them,[107] the more formal structure of a judgment[108] and the more formal way of issuing a judgment (resolutions are generally announced orally during the hearing and are in that case not issued separately to the parties[109]).

[104] Neumayr & Nunner-Krautgasser, 2011: 117; for more details on territorial jurisdiction in enforcement matters cf. chapter ■■■; also cf. Slonina, 2015: § 82 EO p 1-6.
[105] Rechberger & Simotta, 2010: p 824.
[106] Rechberger & Simotta, 2010: p 825.
[107] Cf. chapter 4.1. ■■■.
[108] Cf. Rechberger & Simotta, 2010: p 936.
[109] Rechberger & Simotta, 2010: p 934.

It is important to note, that the **decision on the procedural costs** is considered a **resolution,** even though it is usually incorporated in the judgement.[110]

However, not all meritory decisions are issued in the form of a judgement. And while they are not considered judgments, they have equivalent effects to judgements:[111]

The most important of these "exceptions" is the Austrian **payment order:** If the claimant "only" demands for payment of an amount that does not exceed 75.000 Euros, the court has to issue a payment order without any previous hearing of the defendant (§ 244 para 1 ZPO). This type of procedure is **mandatory.**[112] The defendant then has four weeks to raise an **objection** against this payment order (§ 248 para 4 ZPO); if he does so in time, the payment order is suspended automatically (§ 249 para 1 ZPO) and the court has to proceed in an ordinary procedure (§ 257 para 1 ZPO). If the defendant does not raise an objection in time, however, the payment order becomes an enforceable instrument (§ 1 nr 3 EO).

There is a similar (but only facultative[113]) procedure for **claims that arise out of a cheque or a bill of exchange** (§§ 555-559 ZPO); this procedure is of little practical importance, however.[114] The court, again, issues a **special payment order** (called "cheque payment order" or "bill of exchange payment order"), which represents an enforceable instrument (§ 1 nr 2 EO). If the defendant raises an objection within 14 days (§ 556 para 3 ZPO), its enforceability is impeded and the court has to proceed as if it was an ordinary procedure (§ 557 para 3 ZPO);[115] however, some special rules (that are not worth mentioning here, though) apply in this procedure.

Another type of procedure (and enforceable instrument) exists for the **judicial termination** of rental and tenancy contracts (which is provided for in many situations in Austrian tenancy and rental law[116]) and for obtaining a so-called **"court order to hand over (or take over) the tenancy object"** (*"Übergabeauftrag"* or *"Übernahmeauftrag"*; cf. §§ 560-576 ZPO). On application of a party, such an order is served on the defendant without a prior hearing; he or she then has four weeks to raise objections (§ 567 para 1 ZPO), which (again) initiates an

[110] Rechberger & Simotta, 2010: p 825.
[111] Rechberger & Simotta, 2010: p 928.
[112] Kodek & Mayr, 2015: p 687.
[113] Kodek & Mayr, 2015: p 1187.
[114] Kodek & Mayr, 2015: p 1186.
[115] Kodek & Mayr, 2015: p 1194.
[116] Cf. Anzenberger, 2014: 27.

ordinary procedure (which some special rules; cf. §§ 571-575 ZPO). Otherwise, the court order becomes an enforceable instrument (§ 1 nr 4 EO). However, the court order loses its enforceability (regarding the possibility of eviction, not regarding the costs), if the claimant does not file an **application for an enforcement order within six months** (§ 575 para 3 ZPO).

Finally, there is a special summary procedure on the **interference with possession** (“*Besitzstörungsverfahren”*; §§ 454-459 ZPO), which only treats the (last) factual possession of an object and any illegal interference with (§ 457 ZPO). The court decides in the form of a so-called **“final resolution”** (“*Endbeschluss”*), which can only be fought by the means of a recourse (cf. § 518 ZPO). This “final resolution” constitutes an enforceable instrument (§ 1 nr 1 EO),[117] but it has only a “provisional character”, because it **does not impede any later action** on the right of possession or on claims that arise out of it (§ 459 ZPO). Also, it has **no binding effect** for later (ordinary) proceedings.[118]

[117] Jakusch, 2015: § 1 EO p 12.
[118] Kodek, 2004: § 459 ZPO p 89.

Part 3: Recognition and Enforcement in B IA

3.1. Certification or declaration of enforceability in Member States of origin (Art. 53. B IA).

"Article 53
The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I."

3.1.1. Requirements. Provide a critical assessment on the requirements regarding the certification.

From an Austrian point of view, the data provided in the certification according to Art 53 is **sufficient** to provide an Austrian enforcement court with all the **necessary information** to assess the so-called "formal enforceability" of the decision (under national law, this would be certified by the "confirmation of enforceability" [*"Vollstreckbarkeitsbestätigung"*]). The relevant information the Austrian enforcement court needs is:[119]

1. Was the decision **served** correctly on the defendant (which is the prerequisite for the following two assessments)?

2. Has the **time frame to comply** with the decision expired?

3. Can the defendant still raise **regal remedies with a suspensory effect**?

While the certification contains a separate section on the **service of the decision** (cf. point 4.5. of the standard form), the other two other questions (**time frame to comply** and **legal remedies with a suspensory effect**) are not explicitly addressed in the standard form. However, in point 4.4, the issuing court needs to state whether the decision is enforceable in the Member State of origin, which will most likely only be the case where the time frame to comply has expired and no legal remedies with a suspensory effect are available. But even if this was (exceptionally) not the case, refusing enforcement due to a lack of these (national) prerequisites would likely constitute a violation of Art 39 Brussels Ia-Regulation, if the decision is enforceable in the Member State of origin.

[119] Cf. Neumayr & Nunner-Krautgasser, 2011: 73.

One slightly problematic point to highlight from an Austrian perspective is the question how to proceed if the enforceable instrument contains a **condition precedent**[120] or if it contains a claim that is to be **performed concurrently:** the problem with these two types of decisions is that the issuing court possibly cannot certify that the *"judgement is enforceable in the Member State of origin without any further conditions having to be met"* (cf. point 4.4 of the standard form); depending on how these conditions are regarded in the Member State of origin. Therefore, the conjunction of the characteristics *"judgement is enforceable"* and *"without any further conditions having to be met"* could be problematic in the sense that (such as in Austria) the (formal) "enforceability" is checked at the issuing court, whereas the conditions precedent are checked at the enforcement court. The form is therefore missing a check box, stating *"The judgement will be enforceable, if the following conditions are met: _____"*. Under the current situation, the issuing court might not be able to mark any of the check boxes provided for in point 4.4 simply because the condition is not met, which could cause problems in the Member State of enforcement.

If Austria is the **issuing Member State,** conditions precedent will not be a problem, because a judgement cannot contain such conditions (cf. § 406 para 2 ZPO); this could for example happen in court settlements (for which there is a separate standard form).[121] Claims that are to be **performed concurrently,** however, can be awarded in a judgement.[122] In this case, an Austrian court would have to certify the enforceability of the judgment, because in Austria such a claim is considered enforceable (as described below; also cf. § 8 para 1 EO).

If Austria is the **Member State of enforcement,** according to § 7 para 2 EO, the creditor needs to prove the fulfilment of the **condition precedent** by producing an official document [123] or officially authenticated [124] private document when applying for the enforcement order (which happens at the enforcement court). Regarding claims that are to be **performed concurrently**, the enforcement court has to issue an order for enforcement without demanding any evidence that the counterperformance has been carried out (§ 8 para 1 EO); the defendant then can only apply for a postponement of the proceedings.[125]

[120] Cf. chapter ■■■.
[121] Cf. Anzenberger & Haas, 2016: 9.
[122] Fucik, 2004: § 404 ZPO p 7.
[123] Cf. § 292 para 1 ZPO; Nunner-Krautgasser & Anzenberger, 2015: 20-21; Rechberger & Simotta, 2010: p 795.
[124] Nunner-Krautgasser & Anzenberger, 2015: 20-21; Rechberger & Simotta, 2010: p 795.
[125] Neumayr & Nunner-Krautgasser, 2011: 102.

3.1.2. **Does a specific legal remedy exist to challenge the certificate of enforceability in the Member State of origin? If yes, how does it influence the course of civil enforcement?**

3.1.3. **What happens if the court of the Member State of origin certifies the enforceability for a judgment which has not yet acquired this effect (e.g. in Slovenia the time limit for voluntary fulfilment of the claim in the legally binding judgment (a prerequisite for enforceability) has not yet expired)? Can the court thereafter repeal the certificate? In connection: What happens if the judgment was served to the wrong address or to the wrong person? Does this constitute a ground for withdrawal of certificate of enforceability in the Member State of origin?**

Introduction to 3.1.2. and 3.1.3. combined:

Since the Brussels Ia-Regulation does **not provide for any specific rule** regarding the withdrawal or correction of the certificate according Art 53 B IA, national rules need to be applied to close this gap.[126]

When implementing the directives from the Regulation on a European Enforcement Order[127], the Austrian legislator created an explicit provision on the issuing, the withdrawal and the correction of the certificate according to Art 9 and 10 of the EEO-Regulation in § 419 EO (previously § 7a EO).[128] The legislative materials state that this provision shall **apply on all certifications issued according to European Regulations** (including the Brussels I and Brussels Ia-Regulation);[129] this was also confirmed by the Austrian Supreme Court.[130]

Answer to 3.1.2. specifically:

There is a **legal remedy to challenge** the **certificate of enforcement according to Art 53 Brussels Ia-Regulation** laid down in § 419 EO (even though it might not be called “specific”, since the provision only makes a reference to another provision). According to § 419 para 1 EO, the provision to challenge the **“national equivalent”** (the “confirmation of enforceability” [“*Vollstreckbarkeitsbestätigung*”]) laid down in § 7 para 3 EO shall apply:

[126] Cf. Stöger & Haider, 2012: Art 4 Abs 3 EUV p 27.
[127] REGULATION (EC) No 805/2004.
[128] ErläutRV 928 BlgNR 22. GP 1 and 4; to be found at https://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00928/fname_040352.pdf .
[129] ErläutRV 928 BlgNR 22. GP 4.
[130] OGH 3 Ob 152/15x.

According to § 7 para 3 EO, if the (national) confirmation of enforceability was issued unlawfully or by mistake, the court shall withdraw it *ex officio* or on application of any person involved; the court does so in the form of a resolution.

Such an application gives the party the right to apply for **postponement** of the enforcement procedure (§ 42 para 2 EO); if the confirmation was withdrawn, the enforcement procedure shall be terminated *ex officio* or on application (§ 39 para 1 nr 9 and para 2 EO). Now there is no explicit reference in the grounds for postponement and cessation for the case that a **foreign certificate according to Art 53 Brussels Ia-Regulation was withdrawn.** However, from our point of view, the displayed provisions can be applied here *per analogiam*, so that challenging a certificate issued in another Member State also constitutes a ground for postponement and subsequently (if the challenging was successful) for a cessation of enforcement.[131]

Answer to 3.1.3. specifically:

Both the correct service and the expiration of the time frame to comply with the judgement are prerequisites for the so-called “formal enforceability” of the decision and therefore prerequisites for the issuing of a “confirmation of enforceability” (under national law) or a certificate according to Art 53 Brussels Ia-Regulation (under the Brussels Ia-regime). Therefore, according to Art 419 para 1 EO in conjunction with § 7 para 3 EO, the Austrian court would have to **withdraw the certificate** *ex officio* or on application of any person involved.

3.1.4. **B IA does not provide, neither for withdrawal of certificate nor for a certificate of non-enforceability. How would the domestic court thereafter deal with unlawfully issued certificates due to deficiencies of requisites (e.g. certificates issued where the claim has not yet actually acquired the attribute of enforceability; where the judgment was served to the wrong person etc.)?**

Comment: *In addition to certificate of enforceability, the Regulation does not include any provisions related to rectification or withdrawal of certificate (cf. Art. 10 of 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). This issue is therefore governed by domestic law in the*

[131] Also cf. below in chapter ■■■.

Member state of origin. Moreover, certificate of non-enforceability unfortunately does not exist (Art. 6(2) Reg. 805/2004), which could ease termination or suspension of enforcement procedure in Member State of enforcement in cases where a judgement has ceased to be enforceable or its enforceability has been suspended or limited. Is it a technical matter that can be handled by the clerk?

3.1.5. **What are the effects of the certificate in your legal order in the Member State of origin (e.g. Germany – '*Klausel*')? Comment on the type of procedure/decision and the effects it produces.**

Question 3.1.4. and 3.1.5. combined:

For the question, how to deal with a wrongful certificate if Austria is the **Member State of origin** cf. chapter 3.1.2. and 3.1.3.

In order to understand the measures, which the court in the **Member State of enforcement** can take, it is necessary to understand the effects of the certificate: According to the prevailing opinion in Austria, the certificate according to Art 53 Brussels Ia-Regulation has **no binding effect.**[132] This means that in theory the enforcement court could verify the facts that were certified by the court of origin.[133] But since the proceedings to obtain an order for enforcement[134] is generally an *ex-parte*-procedure (§ 3 para 2 EO), in practice most of the times the court will have no contrary information and therefore assume the truth of the certified facts.[135] Still, the debtor has the chance to prove the opposite in any legal remedy he or she raises.[136]

This is the **major difference** in comparison to the **national "confirmation of enforceability"**, which is considered a court resolution with a binding effect (except for the issuing court itself, which can correct or even withdraw the confirmation according to § 7 para 3 EO).[137]

If during the procedure to obtain an enforcement order the enforcement court has any suspicion that the certified facts could be wrong, it can **investigate** on their truthfulness ***ex officio*** (§ 55 para 3 EO) and dismiss the creditor's application. Once the enforcement order is

[132] OGH 3 Ob 152/15x; Garber, 2015: Art 53 EuGVVO p 12; Kodek, 2015a: Art 53 EuGVVO p 3; Rassi, 2008: Art 54 EuGVVO p 12.
[133] Kodek, 2015a: Art 53 EuGVVO p 3; a slightly diverging opinion: Rassi, 2008: Art 54 EuGVVO p 12.
[134] Cf. chapter ■■■.
[135] Rassi, 2008: Art 54 EuGVVO p 12.
[136] Rassi, 2008: Art 54 EuGVVO p 12.
[137] Jakusch, 2015: § 7 EO p 97; Neumayr & Nunner-Krautgasser, 2011: 73; OGH 3 Ob 610/89.

issued, the **debtor** has the possibility to raise a legal remedy against enforcement (cf. chapter 3.1.6.). It is questionable, however, if the **court** can cease enforcement ***ex officio*:** Despite the fact that many of the grounds for cessation of the enforcement can be exercised *ex officio* (§ 39 para 2 EO), there is no such ground listed for the situation when the court becomes aware of the wrongful certification according to Art 53 Brussels Ia-Regulation. While this problem has not been addressed in scientific literature yet, it is arguable from our point of view that the ground for cessation in **§ 39 para 1 nr 9 EO is to be applied analogously** in this situation (as long as the wrongful certification is related to questions that are subject to the national “certification of enforceability”[138]). The situations are identical, since in both cases the necessary requirements for the “formal enforceability”[139] are actually not given. Since the analogous application is very plausible in cases in which the certificate was withdrawn in the Member State of origin,[140] § 39 para 1 nr 9 EO could arguably also take place in situations in which this was not the case: Under national law, a cessation due to the lack of formal enforceability requires the withdrawal of the confirmation of enforceability, because of the binding effect[141] of the confirmation. But since (according to the prevailing opinion in Austria[142]) the certificate according to Art 53 Brussels Ia-Regulation has no such binding effect, it would be consequent to assume that the court of enforcement may cease enforcement independently of the existence (and also of a possible withdrawal) of the certificate, if it comes to the conclusion that the certified requirements for enforcement are not met.

3.1.6. Control and Correction. What options are available for challenging errors?

The possibilities for corrections if **Austria is the Member State of origin** have already been discussed in chapter 3.1.2. The possibilities for ***ex-officio*-corrections** of the enforcement court if **Austria is the Member State** of enforcement were discussed in chapter 3.1.4. What is left open to depict are the possibilities of the **debtor** to **challenge enforcement** if **Austria is the Member State of enforcement.**

[138] Cf. chapter ■■■.
[139] Cf. chapter ■■■.
[140] Cf. chapter ■■■.
[141] Jakusch, 2015: § 7 EO p 97; Neumayr & Nunner-Krautgasser, 2011: 73; OGH 3 Ob 610/89.
[142] OGH 3 Ob 152/15x; Garber, 2015: Art 53 EuGVVO p 12; Kodek, 2015a: Art 53 EuGVVO p 3; Rassi, 2008: Art 54 EuGVVO p 12.

If the certification was withdrawn or corrected in the Member State of origin, the creditor can – as mentioned above[143] – file an **application for cessation** according to § 39 para 1 nr 9 EO (*per analogiam*). But even if the certificate was not withdrawn or corrected, the creditor may file such an application, since the certificate has no binding effect.[144] Since an argument by analogy requires a similar situation, such an application can only be sustained if the debtor can prove the **wrongfulness of the certificate** regarding the requirements for the issuing of a confirmation of enforceability,[145] namely

- the correct service of the decision on the defendant,
- the expiration of the time frame to comply with the decision
- the non-availability of suspensory legal remedies.

Such an application gives the applying party the right to simultaneously apply for **postponement** of the enforcement procedure (§ 42 para 2 EO).

Even though the wording of § 36 para 1 nr 1 EO would also permit an “action for cessation on the grounds of impugnment”[146] in this case, such an action is inadmissible if the debtor can raise an application for cessation on the same ground (there is a subsidiarity of the action).[147]

3.1.7. Plurality of certificated documents (number of copies of certificate). Provide a comment on said subject and possible problems which may stem from it.

Since the creditor might want to enforce the judgment in different Member States (or at different courts or enforcement agents in the same Member State), he or she – depending on the respective enforcement law – might need multiple copies of the judgement as well as multiple copies of the certificate according to Art 53 Brussels Ia-Regulation.

[143] Cf. chapter ■■■.
[144] OGH 3 Ob 152/15x; Garber, 2015: Art 53 EuGVVO p 12; Kodek, 2015a: Art 53 EuGVVO p 3; Rassi, 2008: Art 54 EuGVVO p 12.
[145] Cf. chapter ■■■.
[146] Cf. chapter ■■■.
[147] Jakusch, 2015: § 36 EO p 10/1; also cf. Deixler-Hübner, 2015: § 36 EO p 43.

Any Austrian court of origin has to issue additional copies of the decision as well as of the certification according to Art 53 Brussels Ia-Regulation (§ ■■■). However, the applying party has to pay court fees for these copies (cf. chapter ■■■).

3.1.8. Legal nature of the certificate of enforcement. The relation between B IA and national rules. Please comment on possible discrepancies and similarities.

The **national “confirmation of enforceability”** (*“Vollstreckbarkeitsbestätigung”*) according to § 7 para 1 EO is considered a **court resolution** with a binding effect (except for the issuing court itself, which can correct or even withdraw the confirmation according to § 7 para 3 EO).[148]

The **legal nature of the certificate according to Art 53 Brussels Ia-Regulation,** on the other hand, has not yet been debated in Austrian scientific literature. What has been debated though are the effects of the certificate: According to the prevailing opinion, it has **no binding effect.**[149] This could of course lead to the conclusion that the certificate does not have the legal nature of a court resolution; instead it could just be seen as an official document proving some certain facts. On the other hand, the certificate is **subject to the procedure of correction and withdrawal** according to § 419 para 1 and 7 para 3 EO.[150] Such a withdrawal is carried out in the form of a court resolution (§ 7 para 3 EO), which can be contested by the means of a recourse.[151] Also, the applying creditor may raise a **recourse if he or she is not granted the certification** he or she has applied for.[152] Both facts could be interpreted as indications for the legal nature of a court resolution.

Overall, both points of view appear to be justifiable; a determination of the legal nature could even be considered dispensable, since the effects of the certificate as well as the procedure of its issuing (including legal remedies) are mostly undisputed. Given the described effects and

[148] Jakusch, 2015: § 7 EO p 97; Neumayr & Nunner-Krautgasser, 2011: 73; OGH 3 Ob 610/89.
[149] OGH 3 Ob 152/15x; Garber, 2015: Art 53 EuGVVO p 12; Kodek, 2015a: Art 53 EuGVVO p 3; Rassi, 2008: Art 54 EuGVVO p 12.
[150] Cf. chapter ■■■.
[151] Jakusch, 2015: § 7 EO p 113.
[152] This was stated for the European enforcement order (cf. Jakusch, 2015: § 7a EO p 13; LG Feldkirch 3 R 199/12 f). But since § 419 EO (previously § 7a EO) shall also apply on the certificate issued according to Art 53 Brussels Ia-Regulation (cf. chapter ■■■), it is arguable that the creditor also needs to be granted a recourse here.

the procedure of its issuing, it seems more consequent, however, to consider the certificate according to Art 53 Brussels Ia-Regulation a **mere certification** (in other words: a public document that “only” has evidential value) **and not a court resolution.** This view explains better why the certificate has no binding effect, while at the same time it does not seem incompatible with the current system to “just” consider the decision on an application on the correction or withdrawal (as well as the dismissing decision on the application for issuing a certificate) a court resolution (which gives the applying party the right to fight such a decision).

3.1.9. ***Post festum*** **cancelation or withdrawal of certificate of enforceability in Member State of origin. How should such an event be treated and what effects, if any, are to be ascribed to it?**

If the certificate was withdrawn in the Member State of origin, this represents a **ground for cessation of the enforcement** proceedings (§ 39 para 1 nr 9 EO *per analogiam*[153]), which can be picked up *ex officio* as well as on application (§ 39 para 2 EO). Such an application for cessation may be combined with an application for postponement of the enforcement procedure (§ 42 para 2 EO). Despite the lack of a binding effect, the certificate is a formal requirement for enforcement in another Member State (Art 42 para 1 Brussels Ia-Regulation), so that due to its proximity to the national “confirmation of enforceability” (which is also a formal requirement for enforcement and certifies the same facts necessary for the enforceability in Austria) it seems reasonable to consider its withdrawal a ground for cessation.

3.1.10. **Does the certificate need to be served to the defendant at all? Does it have to be served within a specific timeframe? Note that these questions refer to the Member State of origin.**

3.1.11. **Service of declaration of enforceability, if it is foreseen in the national law. How is the service conducted? Describe the conditions for and methods of service.**

[153] Cf. chapters ■■■ and ■■■.

Questions 3.1.10. and 3.1.11. combined:

The **national "confirmation of enforceability"**[154] is issued by **placing a stamp** stating "this copy is enforceable" (*"Diese Ausfertigung ist vollstreckbar"*; § 150 para 2 Geo) on a copy of the decision. Then another "signature stamp" of the decision-making person (the judge or judicial officer) as well as a signature from the leader of the judge's administrative office (*"Leiter der Geschäftsabteilung"*) are placed (§ 150 para 3 Geo). This copy is then handed out to the applying party (usually the creditor), but there **is no service on the counterparty** (usually the debtor).[155]

Regarding the **certificate according to Art 53** Brussels Ia-Regulation, **a service on the defendant is not foreseen** in any national provision, if Austria is the Member State of origin. This is consistent with the prevailing opinion, according to which the service of the certificate (cf. Art 43 para 1 Brussels Ia-Regulation) is carried out by the Member State of enforcement.[156]

3.1.12. **Although Art. 40 of the B IA enables the creditor to apply for any protective measures which exist under the law of the Member State addressed prior to the first enforcement measure, this interim step requires additional costs and can cause delays. Please provide a critical assessment.**

"Article 40

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed."

Comment: *One of the major concerns which relates to certificate of enforceability (Art. 53). According to Article 43 (1) where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. Mentioned provision does not sufficiently take into account the surprise effect of enforcement. Seizure or attachment of debtor's property is usually the first enforcement measure, which freezes debtor's property and precludes debtor's to dispose with its assets. If the certificate of enforceability is served on the debtor prior to the first enforcement measure, there is no surprise effect of enforcement. What is more, in that way the court even warns the debtor that*

[154] Cf. chapter ■■■.
[155] Höllwerth, 2009: § 7 EO p 158.
[156] Kodek, 2015a: Art 43 EuGVVO p 4; Mohr, 2013: 34; also cf. chapter ■■■.

creditor attempts to attach his assets and debtor can dispose of his assets and prevent the recovery of debts.

Overall, the necessity for protective measures according to Art 40 Brussels Ia-Regulation has decreased significantly in comparison to the previous legal situation (according to Art 47 Brussels I-Regulation), because the creditor now can apply directly for enforcement without the need for exequatur.[157] Nevertheless, the use of national protective measures according to Art 40 Brussels Ia-Regulation (instead of actual enforcement according to Art 39 Brussels Ia-Regulation) can be helpful in some situations, for example to **maintain the surprise effect:**[158] While generally, the defendant needs to be served the certificate according to Art 53 Brussels Ia-Regulation prior to any enforcement measure (Art 43 para 1 Brussels Ia-Regulation), this requirement does not need to be fulfilled when applying for national security measures according to Art 40 Brussels Ia-Regulation (Art 43 para 3 Brussels Ia-Regulation). Another area of application are decisions that are enforceable but can still be contested in the Member State of origin (if they have no *res iudicata* effect yet),[159] or decisions where a creditor suspects the debtor to raise legal remedies in the enforcement stage.[160]

Even though an “additional” protective measure according to Art 40 Brussels Ia-Regulation will often imply additional costs (that will in many cases eventually hit the debtor) and may even cause delays (which is mostly the creditor’s problem and therefore doesn’t need to be weighed off here), for the named situations it seems appropriate to provide such an instrument to the creditor. Overall, the current combination of Art 40 and 43 Brussels Ia-Regulation seems like a **reasonable trade-off** between the debtor’s right to a fair trial and the creditor’s interest in an effective enforcement.

For a description of the set of provisional measures provided for according to Art 40 Brussels Ia-Regulation in Austrian national law, cf. chapter ■■■ 4.6. ■■■.

3.1.13. Certificating the amount of interests. Provide a comment on possible problems and solutions.

[157] Mankowski, 2016: Art 40 Brüssel Ia-VO p 2.
[158] Kodek, 2015a: Art 40 EuGVVO p 1 and 5.
[159] Kodek, 2015a: Art 40 EuGVVO p 5.
[160] Mankowski, 2016: Art 40 Brüssel Ia-VO p 2.

> Comment: *Regarding the enforcement of interests, the certificate of enforceability does not contain easily discernable data where a judgment refers to statutory interests which are calculated in accordance with (most commonly) domestic law of the Member state of origin (e.g. Point 5.2.1.5.2.1 of certificate). In some member states, the interest rate of (default) interests is determined by statute and changes from time to time (e.g. Slovenia every 6 months). If an enforcement agent in Slovenia (Member State of enforcement) has to enforce a foreign judgment, in terms of speedy (efficient) procedure, he is not interested in the foreign (for example Italian) statute governing the interests rate. Contrary, the enforcement agent is interest in the exact amount of interests or - at the very least - a precise calculation formula to calculate them. In that regard, Points 5.2.1.2. and 5.2.1.3.contained in certificate under Regulation (EC) No 805/2004 are much more suitable for these purposes, because they enable the enforcement authority in the Member State of enforcement to calculate the amount of interests very easily. Replacing Annex of Brussels I Recast with a new, more detailed Annex would be very appropriate.*

For a judgement (or any other title) to be enforceable under Austrian enforcement law it needs to be **well-determined.**[161] For money-claims (including interests) this means that they need to be described and displayed in a way that the exact number of the amount owed (including the interests) can be deduced from the enforceable instrument (e.g. the judgement) without the necessity to gather further parameters from other sources.[162] (For variable interests [cf. § 8a EO] as well as for fractional amounts in judgements [cf. § 405 EO] there are special provisions, however.) This means that an enforceable instrument that awards statutory interests, which are to be calculated in accordance with a foreign statute (as provided for in point 4.6.1.5.2.1. of the certificate), **would (theoretically) not meet the requirements** of determination that are necessary for an enforcement in Austria.

However, according to the Austrian Supreme Court[163] and the prevailing scientific opinion[164], the requirements of determination regarding a **foreign enforceable instrument** have to be **set lower** than the requirements regarding an Austrian enforceable instrument; especially when it comes to titles than are to be enforced according to the European Regulations (as long as the title is enforceable in the respective Member State of origin).[165] So while the foreign enforceable instrument still needs to be **determinable without the necessity for any further assessing or evaluating decision** (in this case, the creditor needs to file a so-called

[161] Jakusch, 2015: § 7 EO p 35-73; Neumayr & Nunner-Krautgasser, 2011: 113.
[162] Jakusch, 2015: § 7 EO p 43.
[163] OGH 3 Ob 160/98w; 3 Ob 98/03p; RIS-Justiz RS0117940.
[164] Burgstaller & Höllwerth, 2001: § 79 EO p 13-14; Neumayr & Nunner-Krautgasser, 2011: 113.
[165] Burgstaller & Höllwerth, 2001: § 79 EO p 13-14.

“purification action” [*“Purifikationsklage”*] [166]), it is admissible to **take evidence** that is required to carry out the calculations necessary to **determine the amount enforceable** according to the title (for example where the calculation basis can be found in foreign statutes, foreign judgements or foreign official statistical data).[167] Such **evidence can** (from our point of view) be seen in the **certificate** according to Art 53 Brussels Ia-Regulation. So if the certificate states (in point 4.6.1.5.2.1.) the foreign statutory provision that should be used to calculate the interests, this is sufficient to “only” request a translation of the relevant provision and not any further evidence (for example an expert in this foreign law) to determine the relevant provisions. In this sense the data (regarding interests) provided for in the certificate (especially point 4.6.1.5.2.1. of Annex I) are **definitely useful** from an Austrian point of view.

Yet, from an Austrian perspective, there is **room for improvement:** It would be of further assistance to **display the relevant provisions in the certificate,** since it is generally easier for the court of origin to insert the provision (even if it is “only” in its own language) than for the court of enforcement to find those foreign provisions. And since it is very likely that most enforcement states (and not only Austria) will need the foreign statutory provision to carry out the enforcement, it could be considered more efficient in general to make the court of origin deliver this information. At the very least, a section could be added after point 4.6.1.5.2.1. of Annex I (for example in a future point 4.6.1.5.2.2.), stating *“other relevant information to determine the interests”*, giving the issuing court the opportunity (especially if the applying creditor demands so) to optionally deliver some deliberative input that could be of use in the Member State of enforcement.

3.1.14. How does party succession affect the content of the certificate and the overall procedure?

The impact of party succession to the enforcement proceedings in general (if Austria is the Member State of enforcement) was already described in section ■■■. The fact that the certificate according to Art 53 Brussels Ia-Regulation was issued (still) naming the previous creditor or debtor will not change anything in this regard, because the enforceable instrument was also issued on the name of the previous party.

[166] Burgstaller & Höllwerth, 2001: § 79 EO p 15.
[167] Burgstaller & Höllwerth, 2001: § 79 EO p 14.

If Austria is the Member State of origin and the party succession (on the side of the creditor) happens **after**[168] the issuing of the judgement but **before** the issuing of the certificate, the applying creditor will have to prove the legal succession to the court (in order to prove his or her entitlement to apply for the issuing of a certificate).

3.2. Recognition and Enforcement in Member State of enforcement.

3.2.1. The concept of 'recognition' (Art. 36/1). Provide your understanding.

"Article 36
1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

Note: The Austrian understanding of recognition according to the Brussels Ia-Regulation is (obviously) predetermined by the relevant case law of the European Court of Justice and should therefore (at least theoretically) be in accordance with the understanding in all the other Member States.

The concept of recognition according to Art 36 para 1 Brussels Ia-Regulation (in an Austrian understanding) is rather similar to the above-described "national" concept of recognition.[169] For a foreign decision to take effects in Austria, it needs to be **contributed effectiveness;** this contribution of effectiveness is called **recognition** and works by "importing" some of the effects of the foreign decision to Austria.[170]

As far as the **effects of recognition** are concerned, the European Court of Justice ruled (in the case *"Hoffmann v Krieg"*[171]) in favour of the so-called "theory of the extension of effects":[172] According to the ECJ, a foreign judgement that has been recognized in accordance with the European Regulation *"must in principle have the same effects in the state in which enforcement is sought as it does in the state in which the judgment was given"*[173]. This case

[168] For the legal situation when a legal succession occurs during the proceeding cf. Nunner-Krautgasser, 2014: Vor § 1 ZPO p 148-157.
[169] Cf. chapter ■■■.
[170] Neumayr & Nunner-Krautgasser, 2011: 109.
[171] ECJ Case 145/86 *Hoffmann v Krieg*.
[172] Cf. Kodek, 2015a: Art 36 EuGVVO p 32; Neumayr & Nunner-Krautgasser, 2011: 109.
[173] ECJ Case 145/86 *Hoffmann v Krieg*.

law of the ECJ has been largely accepted in Austrian literature[174] and jurisdiction, despite some criticism regarding the problems that can occur in several cases (for example regarding the different scopes of a judgment's binding effects[175]). Roughly spoken, the **effects** that can be imported by recognising a decision are the *res iudicata* effect, the binding effect and the constitutive effect of a decision.[176]

The recognition according to the Brussels Ia-Regulation happens **automatically** (Art 36 para 1 Brussels Ia-Regulation).[177]

3.2.2. The scope of a judgement's authority and effectiveness. Do you see any national (problematic) issues considering the doctrine of spreading the effects of a judgment from the Member State of origin to the Member State of enforcement?

While the "theory of the extension of effects" fits very well for the **constitutive effect** of a judgment (actually it fits a lot better than the "theory of equal treatment", because this would mean that the constitutive effect could "shape" the legal relationship differently in every Member State[178]), it is sometimes rather problematic regarding the ***res iudicata* effect** as well as the **binding effect** (and similar effects, for example the "binding effect" a judgment may have due to third party notices).

The largest field of issues there is of course the fact, that the **extent** of the *res iudicata* effect as well as of the binding effect **may vary strongly** in the respective Member States.[179] These variations occur for several reasons, for example for the divergences of the concept of the "the matter in dispute" or for different approaches regarding the question which parts of the judgment shall be considered binding (and for whom). This not only can cause "unfamiliar" situations in the recognizing Member State but may also turn out to be cumbersome in practice, since the deciding court in the recognizing Member State needs to find out the extent of the named effects in the Member State of origin.

[174] Kodek, 2015a: Art 36 EuGVVO p 32; Neumayr & Nunner-Krautgasser, 2011: 109, Nunner-Krautgasser, 2009: 799.
[175] Cf. Nunner-Krautgasser, 2009: 799.
[176] Neumayr & Nunner-Krautgasser, 2011: 109.
[177] Kodek, 2015a: Art 36 EuGVVO p 25; Neumayr & Nunner-Krautgasser, 2011: 110.
[178] Cf. Nunner-Krautgasser, 2009: 799.
[179] Nunner-Krautgasser, 2009: 799.

Another problematic aspect regarding the ***res iudicata* effect** is that while there is a uniform set of rules rules for *lis pendens* (Art 29-34 Brussels Ia-Regulation), the *res iudicata* effect may vary in each single Member State due to divergences of the "scope of the matter in dispute" (and may – as it is the case in Austria – also deviate from the European concept of "matter in dispute" [cf. the wording "*the same cause of action"* in Art 29 nr 1 Brussels Ia-Regulation]). This causes the strange situation that while a second procedure may be inadmissible while the first one is pending, due to a different concept of the *res iudicata* effect in the Member State of origin (in comparison to the *lis pendens* rules) a second (similar) action could possibly be brought in after the termination of the first procedure if the *res iudicata* effect allows so.

3.2.3. Having in mind Art 43/1, is it possible to begin with the first enforcement measure and limit the enforcement proceedings to protective measures, when the certificate issued pursuant to Article 53 has not been served on the defendant (debtor) yet? Should this matter be clarified by the CJEU?

"Article 43

1. *Where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person."*

"Article 53

The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I."

Comment: *In some jurisdictions (e.g. Slovenia and Austria) the first enforcement measure and protective measure overlap. For instance, when enforcing debtor's movable property, the first enforcement measure is seizure of certain movables (e.g. vehicle). Seizure of a certain movable is a protective measure. The following problem may therefore come to fruition: taking into account Art 43/1; may a protective measure which, in certain member states overlaps and is considered as the initial step in enforcement procedures, be regarded as a 'first enforcement measure', thus requiring the service of the certification and thereby stripping the protective measure of self-standing effect?*

Declaration of enforceability is now issued in the Member State of origin and is compared to declaration of enforceability according to Art. 38 of B I (44/2001), which was issued in Member State of enforcement.

Where enforcement is sought of a judgement given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure

(Art. 43/1). That is why for the debtor it is crucial that declaration of enforceability is served to him prior to the beginning of enforcement. This is the German solution. The Slovenian and Austrian solution differs – declaration of enforceability is not ex officio served to debtor. That is why a creditor with an Austrian or Slovenian enforceable title can only apply for protective measures according to Art. 40 (in Slovenia predhodne odredbe, in Austria Exekution zur Sicherstellung according to par. 373 EO).

Could this be ground for preliminary ruling for the Court of Justice of the EU? (e.g. 'Is a national law, such as the one in the case at hand, where a self-standing protective measure overlaps with a first measure of enforcement, compatible with the Regulation').

3.2.4. A key question is whether the certificate on standard form B IA was served before commencing enforcement. Comment.

Comment: *Standard form does not allow and does not have a rubric that certificate was served. It is very convenient for the creditor that the service is done in the Member State of origin, not in Member State of enforcement.*

Answers 3.2.3. and 3.2.4. combined:

First of all, it needs to be clarified **who is responsible for the service** of the certificate on the creditor foreseen in Art 43 para 1 Brussels Ia-Regulation. According to the prevailing opinion in Austria, the service shall be carried out by the court **in the Member State of enforcement.** [180] This can be deducted from the wording in Art 43 para 1 Brussels Ia-Regulation, which states that the certificate shall be served on the person against whom the enforcement is sought, where "*enforcement is sought of a judgment given in another Member State*". Since the provision talks about a "judgment given in another Member State", the instruction of a service on the debtor is obviously directed at the Member State of enforcement (and not to the Member State where the judgment was issued). Also, from a systematic point of view, it makes more sense to attribute the service to the Member State of enforcement, since it is the enforcement court (or the enforcement officer) has to check whether the certificate was served on the debtor. This is of course much easier, if the Member State of enforcement (and not the Member State of origin) serves the certificate directly, since otherwise the enforcing court or official need to get in touch with the court of origin (it would even be questionable, whether an Austrian court has to give any information to a "private person" such as a French *huissier de justice*).

[180] Cf. Kodek, 2015a: Art 43 EuGVVO p 4; Mohr, 2013: 34; this is also the prevailing opinion in Germany, cf. Mankowski, 2016: Art 43 Brüssel Is-VO p 11.

The other important question to clarify is **how to interpret the phrase *"prior to the first enforcement measure"*** in Art 43 para 1 Brussels Ia-Regulation. This is especially delicate in Austria, since – depending on the type of enforcement procedure and on the means of enforcement – it is possible (and common legal practice) to serve the enforcement order simultaneously with the first enforcement measure (cf. § 249 para 3 EO).[181] As far as the certificate is concerned, however, such a practice seems inadmissible in the lights of recital 32, which states that the certificate shall *"be served on that person in reasonable time before the first enforcement measure"*. Now it could possibly be argued, that enforcement measures that "only" create seizure of moveable tangibles (or take them into custody) could still be admissible, since they are very similar to protective measures (which are admissible according to Art 43 para 3 Brussels Ia-Regulation) and do not create an irreversible situation. The prevailing opinion in Austria, however, seems to believe that even the seizure or taking into custody requires the certificate to be served within "a reasonable time" in advance.[182] So any means of enforcement (§§ 87-369 EO) require the prior service of the certificate on the defendant, even if "only" the **subphase seizure**[183] shall be carried out at first.

What finally needs to be clarified, is with **how much of an advance** the certificate is to be served on the debtor. Generally, the Austrian enforcement code requires the debtor to raise legal remedies within 14 days of service (cf. the recourse or the objection according to § 54c EO[184]), which is why *Mohr* proposed that this should be the time frame granted the debtor here as well.[185] *Kodek*, on the other hand, argues that in a European context, the time frames are usually longer (he brings forward the example of the 30 days available to oppose the European Payment Order [Art 16 para 2 Payment Order Regulation]). So if the debtor does not have his or her residence in Austria, *Kodek* proposes a time period that is oriented at the European Regulations (he proposes four weeks or 30 days).[186] From our point of view, it is preferable to deem a **period of 14 days** sufficient to comply with the requirements of recital 32: For (almost) any other act to set, the debtor is granted "only" 14 days regardless of his or her domicile. It would not be very convincing, to make an exception here, especially because the "time frame of service in advance" is independent from the possibility to raise a

[181] Cf. Neumayr & Nunner-Krautgasser, 2011: 228.
[182] Kodek, 2015a: Art 43 EuGVVO p 3; Mohr, 2013: 34.
[183] Cf. chapter ■■■.
[184] Cf. in more detail chapter ■■■.
[185] Mohr, 2013: 34.
[186] Kodek, 2015a: Art 43 EuGVVO p 3.

legal remedy against enforcement on the ground of Art 45 Brussels Ia-Regulation.[187] Also, a period of four weeks or longer would significantly delay the enforcement procedure (without a real necessity in most cases).

Despite of the existing scientific opinions, for all of these open questions it would of course be desirable to have a ruling from the European Court of Justice.

3.2.5. Although the *ex-ante* exequatur has been abolished, the challenge stage is retained as a result of negotiations. How is the residual stage regulated in your member state? How does your system enable the debtor to invoke a challenge? What kind of procedural instruments are at his disposal?

Comment: *By initiating a procedure in accordance with the national law of the Member State (of enforcement) the grounds for refusal of enforcement listed in Art 45 can be invoked by any interested party. However, the particularities are scarce and much is left desired – seeking introspective into national law.*

These questions are answered in detail in chapter ■■■ 4.5.2. ■■■

[187] Cf. chapter ■■■.

Part 4: Remedies

4.1. General observations on the systemization and availability of national remedies. Provide a short explanation of legal remedies in the national civil procedure of your member state. How is your domestic system of legal remedies structured (e.g. a division between ordinary and extraordinary remedies)?

Austrian civil procedure law (this also applies to enforcement law) provides for **three instances** (so that a court decision can – theoretically – be revised twice).[188] While a first instance **judgement** (which is a decision in the substance of the matter[189]) if fought by **appeal,** the legal remedy against a second instance judgement is called **revision.** Any other decision, order or disposal is called a **resolution** (§ 425 para 1 ZPO), which can be fought by the means of a **recourse.** Any resolution that allows a recourse or changes the first-instance-resolution can be fought by a legal remedy called **revisional recourse** ("Revisionsrekurs"). However, the third instance court (which is **always** the Austrian Supreme Court) cannot be invoked easily:

- A revision as a well a revisional recourse are only admissible, if the decision depends on a (formal or material) **legal question, that has major significance for the legal unity, the legal certainty or the legal development** (§ 502 para 1 ZPO; § 528 para 1 ZPO).

- Also, for most matters in dispute (the exceptions are listed in § 502 para 4 and 5 ZPO) there are boundaries regarding the **value in dispute:** If the value in dispute does not exceed 5.000 Euros, a revision (or revisional recourse) is always inadmissible (§ 502 para 2 ZPO; § 528 para 2 nr 1 ZPO), if the value in dispute lies between 5.000 Euros and 30.000 Euros, the court of second instance needs to declare the revision or revisional recourse admissible (§ 502 para 3 ZPO; § 528 para 2 nr 1a ZPO). If the court of second instance declared the revision or revisional recourse inadmissible, any party may apply for amendment of this sentence according to § 508 ZPO (and at the same time bring in the revision or revisional recourse). If the value in dispute is above 30.000 Euro, the parties may bring in a revision (or revisional recourse) even if the

[188] Rechberger & Simotta, 2010: p 47.
[189] Cf. chapter ■■■.

second instance court declared it inadmissible; in this case it is called an **extraordinary revision (or extraordinary revisional recourse),** which has no suspensive effect (§ 505 para 4 ZPO).

- Finally, there is only a limited number **grounds for a revision** or revisional recourse (cf. § 503 ZPO).[190]

Besides these "core legal remedies", Austrian civil procedure law contains a large number of additional legal remedies – hereby called **"legal remedies in a broader sense"** – in order to provide the necessary legal protection and a fair trial to anybody whose civil rights and obligations are affected by a decision (or another court act). These legal remedies in a broader sense will be described in the following section, as far as they are relevant for enforcement law.

If the court of first instance was a **district court** (*"Bezirksgericht"*), which is always the case in an enforcement procedure,[191] the court of second instance is a **lower regional court** (*"Landesgericht"*; § 3 para 1 JN) and the court of third instance is the **Austrian Supreme Court** (*"Oberster Gerichtshof"*; § 3 para 2 JN). If (in exceptional cases, for example in the case of an "action for cessation on the grounds of opposition" in labour law matters; cf. § 35 para 2 EO) the court of first instance was a **lower regional court** (*"Landesgericht"*), then the court of second instance is a **higher regional court** (*"Oberlandesgericht"*; § 4 JN); the court of third instance is (always) the **Austrian Supreme Court** (*"Oberster Gerichtshof"*; § 4 JN).

4.2. Remedies in enforcement procedure.

4.2.1. Provide a concise description of all the remedies (and other recourse, i.e. separate enforcement claims) available throughout the enforcement procedure (and separate/adjacent procedures), for all involved persons. Therein, specify the requirements for each remedy.

4.2.2. Characteristics of legal remedies in enforcement procedure. Remedies differ in effect and the way in which they exert that effect. Herein focus on the nature and attributes of different remedies in your system, e.g. does

[190] Rechberger & Simotta, 2010: p 1044.
[191] Cf. Chapter ■■■.

invoking a certain remedy suspend the proceedings for the time being; which body/authority is equipped with the competence on rendering a decision in remedial procedures (hierarchy of competence); is a given remedy unilateral or bilateral (does the opposing party have the option of supplying an answer); what powers does the appellate body/authority have, e.g. cassation.

4.2.3. Should objections be brought up in enforcement or in separate procedure?

Answers 4.2.1.-4.2.3. combined:

General remarks:

Structuring the various legal remedies (in a broader sense) as well as the separate Austrian enforcement actions within the framework of this questionnaire is a rather difficult task, since there are no convincing boundaries for some categories in Austrian law (as it is suggested by the division into chapter 4.2. and 4.3.): Some of those instruments aim at a court's mistake, others just try to establish the correct formal or material legal situation without the court being responsible for this deviation (because simply the possibility for errors is accepted due to the nature and necessities of enforcement proceedings). Some of the instruments may be raised before the fought decision was taken, some (actually: most) need to be raised afterwards. Some legal remedies claim circumstances that have occurred before the decision was taken, other claim circumstances that occurred afterwards, some provide the possibility for both, etc.

Despite the difficult task of categorizing these "instruments", in order to fit into this questionnaire, we will use the following structure: In **chapter 4.2.** we will explain the **"legal remedies in a broader sense".** Besides the main legal remedy, the **recourse,** there are several other legal remedies in a broader sense (such as the **contradiction,** the **presentation,** the **complaint against enforcement acts,** or the **objection**).

Some other legal remedies in a broader sense (such as the protest, the reminder or the complaint[192]) will be left out here, since they are of minor importance and are hardly of interest in the context of the questionnaire or the project as such.

Then in **chapter 4.3.** we will deal with those objectives that need to be raised in a **separate civil action** (such as the ■■■). Also, the parties can apply for **postponement** (§§ 42-45a EO)

[192] For those in more detail cf. Neumayr & Nunner-Krautgasser, 2011: 158.

or **cessation** of the enforcement procedure (§§ 39-41, 45 and 45a EO). Parts of the grounds to raise a claim on the grounds of opposition or impugnment can also be asserted by the means of an application for cessation (§ 40 EO). For this reason, it makes sense to us, to also provide a short overview on these applications in this chapter on "opposition".

The legal remedies

The recourse:

Most court decisions in an enforcement procedure are **resolutions** (§ 62 EO), therefore the most important legal remedy is the **recourse.** Since the enforcement courts are always district courts,[193] the court of second instance (dealing with a recourse) is always a **regional court** (cf. § 3 para 1 JN). The time period for raising a recourse is (again generally) **14 days** from the date of service.[194] Generally the **parties** are legitimated to bring in a recourse; however, sometimes **third persons** are also granted this right (for example the third party debtor when he or she is served the prohibition of payment; § 294 para 4 EO).[195] One important requirement for the admissibility of a recourse is that the decision represents a **disadvantage** for the filing party.[196] This is (in general) the case, whenever the court's decision does not completely comply with the party's application (so-called "formal disadvantage").[197] There are only restricted **grounds for a recourse;**[198] also it is inadmissible to make new assertions or present new evidence in the recourse (so called **"prohibition of novation"**).[199] This affects *nova producta* as well as *nova reperta*.[200]

The recourse is generally[201] **devolutive** (which means that the recourse needs to be treated by the court of second instance), it is generally **not suspensive** (which means that the enforceability of the resolution is not postponed by the mere fact that a recourse was filed; cf.

[193] Cf. chapter ■■■.
[194] Neumayr & Nunner-Krautgasser, 2011: 149.
[195] Neumayr & Nunner-Krautgasser, 2011: 150.
[196] Rechberger & Oberhammer, 2009: p 176.
[197] Rechberger & Oberhammer, 2009: p 176.
[198] Rechberger & Oberhammer, 2009: p 177; for those grounds cf. Rechberger & Simotta, 2010: p 1056.
[199] Jakusch, 2015: § 65 EO p 33; Neumayr & Nunner-Krautgasser, 2011: 151; Rechberger & Oberhammer, 2009: p 178.
[200] Neumayr & Nunner-Krautgasser, 2011: 151.
[201] Some exceptions are listed in § 522 ZPO.

§ 67 para 1 EO) and generally dealt with in an ***ex parte*-procedure** (which means that the counterparty do not need to be given the opportunity to comment on the recourse; cf. § 65 para 1 EO).[202]

The contradiction:

The contradiction exists in two different forms:

1. According to § 397 EO, the contradiction is a **legal remedy against interim measures,** if the counterparty was not heard prior to the issuing of the interim measure. The contradiction goes further than the recourse, as far as grounds for the legal remedy are concerned: Essentially **all circumstances that would make the measure inadmissible** may be asserted in the contradiction;[203] also there is no prohibition of novation.[204] The contradiction has no suspensory effect.[205]

2. The contradiction is also an **“anticipated legal remedy”** (mainly) during the procedure of **enforcement out of immovable property:** The contradiction may be raised against the “fall of the hammer” (§ 182 EO) as well as regarding the existence, the rank or the amount of a claim lodged in the distribution process (§ 128 para 2, §§ 213, 286 para 1, and § 307 para 2 EO). Whenever a contradiction is possible (for grounds cf. for example § 184 EO), a recourse may only be filed if the contradiction was unsuccessful (§ 187 para 1 EO).[206] This shall increase the durability of these court resolutions (because objections need to be raised immediately).[207]

The presentation:

[202] Neumayr & Nunner-Krautgasser, 2011: 148.
[203] Kodek, 2015a: § 398 EO p 4.
[204] Kodek, 2015a: § 398 EO p 2; Neumayr & Nunner-Krautgasser, 2011: 154.
[205] Kodek, 2015a: § 397 EO p 12.
[206] Neumayr & Nunner-Krautgasser, 2011: 154.
[207] Cf. Neumayr & Nunner-Krautgasser, 2011: 154.

Any decision of a **judicial officer** that cannot be contested according to other procedural rules for reasons of the (low) value in dispute may be appealed by the so-called "presentation" to the judge (§ 12 RPflG). The presentation is very similar to the recourse, but instead of the court of second instance, it is a judge of the court of the same instance that takes a meritory decision.[208] The time frame for a presentation is 14 days (§ 12 para 2 RPflG), it is an *ex-parte*-remedy[209] and has no suspensory effect, unless the judge awards it with such on application of the party (§ 12 para 3 RPflG).[210]

The complaint against enforcement acts:

Since the **court bailiff's** (factual) **actions** cannot be considered a court decision (and therefore are not subject to the recourse), there is a necessity for an additional legal remedy: **Anybody** who is wronged by a court bailiff's official act (or the omission of such) may raise the "complaint against enforcement acts" within 14 days of taking notice of the wrongful behaviour (§ 68 EO). The complaint against enforcement acts requires a **legitimate interest** of the appealing party; such an interest is only given, if the mistake made can be corrected (which means that once the enforcement procedure ended, there is no more room for this legal remedy).[211] The complaint against enforcement acts does not have a suspensory effect but can constitute a ground for an application for postponement of enforcement (§ 42 para 1 nr 8 EO).

The objection:

In the simplified procedure for obtaining an order for enforcement, the creditor **does not need to produce the enforceable instrument** (§ 54b para 2 nr 2 EO); instead he or she only has to name the day of issue of the confirmation of enforcement (§ 54b para 2 nr 1 EO).[212] In return, the debtor is granted an additional legal remedy, called **"objection"** ("Einspruch"; § 54c EO). In this (additional) legal remedy, the debtor may assert within 14 days, that the applying creditor does not hold the enforceable instrument that was named in the application or that the

[208] Neumayr & Nunner-Krautgasser, 2011: 154-155.
[209] Neumayr & Nunner-Krautgasser, 2011: 154.
[210] Neumayr & Nunner-Krautgasser, 2011: 154.
[211] Neumayr & Nunner-Krautgasser, 2011: 156.
[212] Cf. chapter ■■■.

asserted data in the application does not match the enforceable instrument (§ 54c para 1 EO). In this case, the court must order the creditor to deliver the enforceable instrument within 5 days (§ 54d para 1 EO). If the creditor does not comply with this order or the produced enforceable instrument doesn’t match the information in the creditor’s application, the enforcement procedure shall be ceased (§ 54e para 1 EO).

The objection has a “partial suspensory effect”: It will not hinder the seizure of assets nor the mere preparation of realization of the assets. However, the actual realization (for example by auction) of the assets must be postponed until the decision on the objection.[213]

4.3. Opposition in enforcement.

4.3.1. If a separate judicial procedure to enforce claims from judgements is not foreseen in your member state, what options does the debtor have in order to challenge inadmissibility of particular enforcement on the grounds that appeared (came into being) after the enforcement title was acquired (*nova producta*) or due to the inadmissible way of performing enforcement?

4.3.2. On which grounds does opposition against an enforcement decision have to be substantiated? In case no substantiation is queried, does an ‘assertion’ of opposition suffice?

4.3.3. Are the grounds for enforcement exhaustively listed or encompassed by a general clause or described in exemplary fashion? If a general clause is present, how is it formulated and what is its relation to exemplary listed grounds. Are the grounds subdivided into ‘categories’, e.g. Slovenian and to a certain extend Austrian theory incorporate an understanding of ‘impugnation’ and ‘opposition’ grounds; while the first refer to situations where a creditor possesses a valid enforcement title and an existent claim but cannot enforce it (due to a timely preclusion for instance), the latter refer to situations where the creditor holds a valid enforcement title, however a fact, which has arisen after the title attained the attribute of enforceability (see above *nova product*), prevents the enforcement (for instance due to the extinguishing of the claim because of compensation, voluntary fulfilment by the debtor etc,).

Answers 4.3.1.-4.3.3. combined:

[213] Jakusch, 2015: § 54c EO p 10.

General notes: Please read the general notes in chapter 4.2.

Cessation of the enforcement procedure:

There is a vast number of situations that need to lead to a **cessation of the enforcement procedure.** Some of these situations can occur after the order of enforcement was issued (for example the payment of the debt), others may already have occurred before, but were simply not introduced into the proceeding yet (since the procedure on the issuing of an enforcement order is generally unilateral[214] and the existence of the claim shall not be re-examined[215]). All the grounds for a cessation need to be examined **on application,** but many of them also need to be taken up *ex oficio* by the court (§ 39 para 2 EO). The grounds are listed in § 39 para 1 EO, for example

1. when the enforceable instrument was declared null and void, when it was repealed or declared invalid in any other way (nr 1),

2. when the enforcement is carried out out of objects that are not subject to enforcement (nr 2),

3. when the confirmation of enforceability[216] was revoked (nr 9), or

4. when the declaration of enforceability[217] of a foreign enforceable instrument was revoked (nr 11).

Additionally, there are some grounds listed in § 40 para 1 EO: If – after the issuing of the enforceable instrument – the creditor was satisfied or has agreed on a deferment of payment (so-called **“application for cessation on the grounds of opposition”**) or if the creditor has renounced the initiation of an enforcement proceeding in general or at least for a certain, unexpired amount of time (so-called **“application for cessation on the grounds of impugnment”**). The creditor needs to be heard before issuing an according resolution, unless

[214] Cf. chapter ■■■.
[215] Neumayr & Nunner-Krautgasser, 2011: 3.
[216] Cf. chapter ■■■.
[217] Cf. chapter ■■■.

the satisfaction or the creditor's declaration can be proved by the means of reliable proof (§ 40 para 1 EO). If such a decision requires a more detailed enquiry, the debtor will be "sent" to a civil court, where he or she needs to file an action with his objections (§ 40 para 2 EO; this will be explained in the next section).[218]

Enforcement actions:

The existence or non-existence of the claim documented in the enforceable instrument is **not examined in the enforcement procedure.** If the "extinction of a claim" or circumstances that make its enforceability inadmissible cannot be demonstrated by the means of reliable proof, the debtor needs to **file a separate action.** Depending on the grounds of objection against enforcement that the debtor wants to raise, there are two different types of actions:

The **"action for cessation on the grounds of opposition"** (*"Oppositionsklage"*; § 35 EO) may be raised, if the debtor asserts that the claim was **extinguished or suspended** after the issuing of the enforceable instrument (*nova producta*). If the enforceable instrument is a **judicial decision,** the relevant point in time (regarding the qualification as a *novum*) is the last possible moment, in which the extinction or suspension could have been brought forward in the procedure (§ 35 para 1 EO). Since this is a normal civil procedure, those grounds need to be substantiated by precise assertion (and then proved at the usual standard of proof [high likelihood][219]). If the action is successful, the judgement serves as a judicial assessment that the claim is extinguished or suspended (and therefore renders the enforceable instrument invalid) and also automatically leads to a cessation of the enforcement procedure (§ 35 para 4 EO).

The **"action for cessation on the grounds of impugnment"** (*"Impugnationsklage"*; § 36 EO) may be raised, if the debtor (§ 36 para 1 EO)

1. contests that relevant facts for the **maturity or enforceability of the claim** or the assumed **legal succession** have occurred (nr 1),

[218] Neumayr & Nunner-Krautgasser, 2011: 175.
[219] Cf. Nunner-Krautgasser & Anzenberger, 2015: 17.

2. contests that the claim, for which enforcement was granted, truly results from an index clause (nr 2),

3. asserts that the creditor has renounced the initiation of an enforcement proceeding in general or at least for a certain, unexpired amount of time (nr 3).

So there is a list of grounds for impugnment; however, the first point is also some sort of general clause for grounds for impugnment. Again, since this is a “regular” civil procedure, those grounds need to be substantiated by precise assertion (and then proved at the usual standard of proof [high likelihood][220]). If the action is successful, the judgement automatically leads to a cessation of the enforcement procedure (§ 36 para 3 EO).

The last (important) enforcement claim worth mentioning is the **“action for cessation on the ground of third party objections”** *(Exszindierungsklage*; § 37 EO): This action may be raised by any third person, if the enforcement is carried out out of any asset (or parts of such) on which he or she claims a right (for example property) which would render enforcement inadmissible (§ 37 para 1 EO).

During the procedure on any of these actions, the enforcement procedure may be **postponed** on application (§ 42 para 1 nr 5 EO).

4.4. Remedies in international private procedure, i.e. remedies foreseen in national law, relating to recognition and enforcement of foreign judgments under private international law (cross-border situations), excluding B IA .

4.4.1. Types and main features of legal remedies.

Foreign enforceable instruments need to be **recognized and declared enforceable** according to §§ 406-416 EO (previously §§ 79-86 EO), unless bi- or multilateral treaties or European law provide so differently (which is very often the case[221]). On such an application, the court decides by the means of a resolution without prior hearing of the opposing party and without any oral hearings (§ 410 para 1 EO [previously § 83 para 1 EO]). The legal remedy against

[220] Cf. Nunner-Krautgasser & Anzenberger, 2015: 17.
[221] Cf. Burgstaller & Höllwerth, 2001: § 80 EO p 3-4.

this resolution is a **recourse;**[222] however, there are some slight modifications of the normal rules on the recourse (§ 411 para 1 and 2 EO [previously § 84 para 1 and 2 EO]): The opposing party in any case needs to be heard (§ 411 para 1 EO [previously § 84 para 1 EO] and § 521a ZPO) and the time limits for raising a recourse as well as for the opposing party’s replication is four instead of two weeks (§ 411 para 1 EO [previously § 84 para 1 EO]). If the opposing party lives abroad (or has its headquarter abroad) and the recourse is his or her first chance to participate in the proceedings, the time limit is even extended to eight weeks (§ 411 para 1 nr 1 EO [previously § 84 para 2 nr 1 EO]). If the debtor raises a recourse, there is **no strict prohibition of novation;** therefore, he or she can claim facts and circumstances that were not on record at the court of first instance (§ 411 para 2 nr 2 EO [previously § 84 para 2 nr 2 EO]).

As described above,[223] the recognition of a decision can also be declared during a regular civil procedure upon an **application according to § 236 para 3 ZPO:** This so-called “application for a declaration during a procedure” (*“Zwischenantrag auf Feststellung”*) may be filed, if the question of recognition occurs as a preliminary question. It is then decided upon in the actual sentence of the judgement and has a **declaratory effect** (meaning that it has a *res-iudicata*-effect and a binding effect).[224] In this case, the “normal” rules on the appeal against this judgement apply.[225]

4.4.2. Grounds for challenging foreign judgement.

The foreign judgement itself cannot be challenged in Austria; however, there are legal remedies against its recognition and enforcement. According to the prevailing opinion, the party raising a recourse may bring up, that the **requirements** for recognition and enforcement (§§ 406 and 407 EO [previously § 79 para 2 and § 80 EO]) **are not met** or that there is a **ground for a refusal** (§ 408 EO; [previously § 81 EO]):[226]

[222] Slonina, 2015: § 84 EO p 1.
[223] Cf. chapter ■■■.
[224] Cf. Rechberger & Simotta, 2010: p 562.
[225] Cf. chapter ■■■.
[226] Burgstaller & Höllwerth, 2001: § 84 EO p 31; Garber, 2015a: § 81 EO p 21; also cf. Neumayr & Nunner-Krautgasser, 2011: 118; Rechberger & Oberhammer, 2009: p 136; Slonina, 2015: § 84 EO p 10; also cf. chapter ■■■.

Generally, in order for foreign enforceable instruments to be recognized and declared enforceable according to Austrian national law, they need to be **enforceable in the state or origin**[227] and the **reciprocity of enforceability** needs to be laid down in bi- or multilateral treaties or guaranteed in regulations (§ 406 EO [previously § 79 para 2 EO]). Furthermore, if the enforceable instrument is a foreign judgement, an authentic instrument or a court settlement, the declaration of enforceability shall only be granted, if (§ 407 EO [previously § 80 EO]):

1. The foreign country had international jurisdiction (according to Austrian rules on international jurisdiction; nr 1),[228]

2. The party, whom enforcement is sought against, was summoned correctly (nr 2),[229]

3. There is no more suspensory legal remedy against the enforceable instrument available (nr 3).

However, the confirmation of enforceability shall be refused regardless of §§ 406 and 407 EO [previously §§ 79 and 80 EO], if (§ 408 EO [previously § 81 EO]):

1. The opposing party could not participate in the procedure for procedural irregularities (nr 1),

2. The conduct that shall be enforced is illegal or not subject to enforcement according to Austrian law (nr 2),

3. If the legal relationship to be recognized or the claim to be enforced is **not valid or unenforceable** according to Austrian law for reasons of public order or public morality (nr 3).

[227] Neumayr & Nunner-Krautgasser, 2011: 113.
[228] Garber, 2015a: § 80 EO p 8.
[229] Garber, 2015a: § 80 EO p 16-19.

4.4.3. Please indicate what are the differences compared to the grounds in B IA.

The grounds for refusal (some of which are formulated as requirements for granting) of recognition and enforcement are largely similar in Brussels Ia and Austrian national law. Both include the refusal for the **lack of fair hearing** (§ 407 nr 2 and § 408 nr 1 EO [previously § 80 nr 2 and § 81 nr 1 EO]; Art 45 para 1 lit b Brussels Ia-Regulation) as well as the **contradiction to the *ordre public*** (§ 408 nr 2 and 3 EO [previously § 81 nr 2 and 3 EO]; Art 45 para 1 lit a Brussels Ia-Regulation). However, it would probably be possible to find some cases (especially with regard to the lack of fair hearing), where the protective scope between the Brussels Ia-Regulation and the Austrian national law diverge slightly (the “problem” is, that there is very little case law under national law); but the basic concept is identical.

While **reciprocity** is explicitly listed as a requirement in § 406 EO, the Brussels Ia-Regulation “automatically” establishes reciprocity amongst the Member States (which is why there is no further necessity for such an “explicit” requirement). So there is similarity in that regard as well.

The **enforceability** (respectively the lack of suspensive legal remedies) **in the state of origin** is a prerequisite under Austrian national law (§§ 406 and 407 nr 3 EO); its lack needs to be claimed in the recourse according to the prevailing opinion.[230] It is also a prerequisite according to Art 39 Brussels Ia-Regulation; however, its lack does not represent a ground for a refusal according to Art 45 Brussels Ia-Regulation (instead the lack needs to be claimed by the means of an application for cessation[231]).

The **two major differences** between the Austrian national law and the Brussels Ia-regime regard international jurisdiction in the main proceeding as well as the irreconcilability with previous judgements. Both regimes contain a ground for refusal based on **international jurisdiction;** Art 45 para 1 lit e “only” punishes violations of the jurisdiction-regime of the sections 3-6 of chapter II of the regulation, whereas § 407 nr 1 EO requires the court of origin to have international jurisdiction based on Austrian national law.[232] Finally, Art 45 para 1 lit c and d Brussel Ia-Regulation holds a ground for refusal if the **judgment to be recognized is**

[230] Cf. chapter ■■■.
[231] Cf. chapter ■■■.
[232] Cf. chapter ■■■.

irreconcilable with a previous judgment in that very Member State or in a third State, if the judgement fulfils the conditions necessary for its recognition in the Member State addressed. Austrian national law doesn’t provide any similar ground of refusal; this might be explained by the fact, that the existence of multiple enforceable instruments is at least tolerated in some provisions (cf. § 61 IO[233]). However, in some extreme cases (for example if two judgements contradict each other in an incompatible way) it is arguable, that the recognition and enforcement could contradict the Austrian *ordre public*.

4.5. Remedies concerning Enforcement of Foreign Judgements according to B IA following the abolishment of exequatur.

4.5.1. Remedies in the Member State of origin regarding the enforcement title itself. Do these remedies influence the enforcement procedure in the Member State of enforcement?

This depends very much on the effects of the legal remedy: If the legal remedy has a suspensory effect (and therefore postpones the enforceability of the decision), the requirements of Art 39 Brussels Ia-Regulation are no longer fulfilled, which removes the enforceability in other Member State (at least according to the Brussels Ia-Regulation). But even if the decision happens to be still enforceable, depending on the legal remedy, the parties can apply for **postponement** (§§ 42-45a EO) **of the enforcement procedure.** Reasons for postponement in this context are for example:

1. If an action was filed with the objective to **declare the enforceable instrument null and void or invalid** or that shall otherwise eliminate the enforceable instrument (§ 42 para 1 nr 1 EO).

2. If a party applies for the **reopening of the proceedings** or the ***restitution in integrum*** regarding the enforceable instrument (§ 42 para 1 nr 2 EO).

3. If an **extraordinary revision**[234] was filed against the second instance judgement (§ 42 para 1 nr 3 EO).

[233] Insolvenzordnung = Austrian Insolvency Code.
[234] Cf. chapter ■■■.

If subsequently the enforceable instrument is declared null and void, is repealed or declared invalid in any other way, the debtor may apply for the **cessation of the enforcement procedure** (§ 39 para 1 nr 1 EO).

4.5.2. Refusal of enforcement. What and/or which are the proceedings in your Member State (of enforcement)? Present the procedural aspects of the application for refusal and the role of national procedural law (Art. 47).

“Article 47
1. The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted.
2. The procedure for refusal of enforcement shall, in so far as it is not coveredby this Regulation, be governed by the law of the Member State addressed.
3. The applicant shall provide the court with a copy of the judgment and, where necessary, a translation or transliteration of it.
The court may dispense with the production of the documents referred to in the first subparagraph if it already possesses them or if it considers it unreasonable to require the applicant to provide them. In the latter case, the court may require the other party to provide those documents.
4. The party seeking the refusal of enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.”

Until recently, scientific literature was rather divided regarding the **correct national regal remedy** to seek refusal for recognition and enforcement according to Art 47 para 2 Brussels Ia-Regulation.

Mohr proposed that the right legal remedy would be the **application for cessation** of the enforcement procedure;[235] according to *Kodek*, however, this was not sufficient, because the mere application for cessation does not establish (as far as future proceedings are concerned) that the foreign title is not to be recognized or enforced.[236] Instead, he suggested that the applicant needed to apply for a **decision, stating that the recognition and/or enforcement is refused** in Austria.[237] On the similar situation regarding the European Enforcement Order (Art 21 of the Regulation on the European Enforcement Order), *Oberhammer* held the view that the adequate legal remedy would be the **action for cessation on the grounds of impugnment.**[238] According to *Slonina*, the best way would be to analogically apply the

[235] Mohr, 2013: 34.
[236] Kodek, 2015b: Art 47 EuGVVO p 7.
[237] Kodek, 2015b: Art 47 EuGVVO p 7.
[238] Oberhammer, 2006: 496; rejecting this opinion Slonina, 2015: § 86 EO p 30.

procedure according to §§ 411, 414, 415 or 416 EO (previously §§ 84, 84c, 85 or 86 EO), which would give the debtor the possibility to file an application for the refusal of recognition and enforcement independently from a (possibly) pending enforcement procedure.[239] Another (albeit rather vague) proposition came from *Plavec*, suggesting that the procedure on the refusal of recognition or enforcement should be a proceeding *sui generis*.[240]

Very recently, the Austrian legislator has created a provision on how to claim the grounds for refusal of enforcement; this shall be done with an **application for the cessation of enforcement** (§ 418 para 1 EO). Such an application can be filed within 8 weeks of the serving of the enforcement order (§ 418 para 2 EO). However, if the grounds for refusal have emerged **after** the service of the enforcement order (or if the debtor – through no fault of his – has not taken notice of this ground for an unpredictable and unavoidable incident), the period of eight weeks starts with the day on which the debtor was first able to take notice of the grounds for refusal. He or she has to assert those circumstances in the application and name the according means of evidence (§ 418 para 3 EO). The **court competent** for such an application is (prior to the commencement of enforcement) the court where the enforcement order was applied for or (after the commencement of enforcement) the court where the enforcement is carried out (§ 45 para 2 EO; most of the times these courts are identical).[241]

The problem with the legislator’s solution is that, according to the prevailing opinion,[242] the Regulation requires an **establishing effect** of the decision on the refusal of recognition or enforcement. However, a mere application for cessation of the enforcement does not provide such an establishing effect (including a binding effect for future enforcement proceedings). So if the creditor keeps seeking enforcement in Austria despite of the existence of grounds for refusal, the debtor will need to raise a separate action, establishing the non-recognition or non-enforceability of the foreign title.

But there is another major problem: The Austrian legislator’s solution is only tailored towards the **refusal of enforcement** (since an application for the cessation of the enforcement procedure can only be filed if there is an actual enforcement procedure); in particular, there is no separate legal remedy for the mere **refusal of recognition.** The best solution seems to be the **application according to § 415 EO** (previously § 85 EO), since Art 47 nr 2 Brussels Ia-

[239] Slonina, 2015: § 86 EO p 30.
[240] Plavec, 2015: 11.
[241] Neumayr & Nunner-Krautgasser, 2011: 146.
[242] Kodek, 2015b: Art 47 EuGVVO p 11.

Regulation states, that the procedure for refusal of enforcement and also of recognition[243] shall be governed by the law of the Member State addressed.[244] According to some authors, § 415 EO (which explicitly only regulates the application for an explicit declaration of the recognition) shall also be applicable on the **declaration of the non-recognition** of foreign decisions; this results from the principle of equal arms.[245] As for the procedure, § 415 EO refers to the previous provisions (on the declaration of enforcement), that shall apply correspondingly. For the formal declaration of recognition (granting and establishing effect), the appropriate procedure is the *ex parte*-procedure in § 83 EO.[246] However, as far as the refusal of recognition (in the context of Brussels Ia) goes, the appropriate procedure is rather the one regulated in § 84c EO, treating the suspension or modification of the declaration of enforceability: On such an application, the creditor shall be heard prior to issuing a resolution (§ 84c para 2 EO); also such an application may be combined with an application for cessation of the enforcement proceeding (§ 84c para 1 EO). A resolution according to § 85 EO has a **binding effect.**[247]

4.5.3. What are your own specifics regarding required documents?

As described above,[248] the party filing the application generally needs to **produce the enforceable instrument,** including the **confirmation of enforceability** and (if it is a foreign title) the **declaration of enforceability** (§ 54 para 2 EO). Within the application area of the Brussels Ia-Regulation, however, a declaration of enforceability is not needed anymore and the **certificate according to Art 53 Brussels Ia-Regulation** replaces the confirmation of enforceability.

While generally, the creditor needs to produce a **copy of the decision** when filing an application for enforcement,[249] this is not necessary in the simplified proceedings. Also, the **copy of the judgment** is only required if the court doesn’t possess a copy of the judgement yet.

[243] Kodek, 2015b: Art 47 EuGVVO p 7.
[244] Cf. Nunner-Krautgasser, 2016: 8.
[245] Burgstaller & Höllwerth, 2001: § 85 EO p 13.
[246] Burgstaller & Höllwerth, 2001: § 85 EO p 17.
[247] Burgstaller & Höllwerth, 2001: § 85 EO p 4.
[248] Cf. chapter ■■■.
[249] Cf. chapter ■■■.

The **translation or transliteration** does only need to be provided, where it is necessary (cf. Art 47 para 3 Brussels Ia-Regulation). This is the case, where the court needs to be able to **grasp the content of the decision** and is **unable to do so for the lack of language skills.**[250]

4.5.4. Service of documents and representation in your member state. How will service of documents pursuant to B IA be conducted in your member state? Please elaborate.

If the party seeking refusal of recognition or enforcement does not have a postal address in the Member State addressed (as it is facilitated in Art 47 para 4 Brussels Ia-Regulation), the service of documents works according to national and European acts. So the court may use the means provided for in the Regulation on the service of documents (Regulation No 1393/2007) or (subsidiarily[251]) the means provided by national law.[252] However, as for the explicit provision in Art 47 para 4 Brussels Ia-Regulation, the debtor cannot be ordered to name an authorized representative according to § 98 para 1 ZPO.

4.5.5. Opposition by the defendant (objection against recognition and enforcement of foreign judgement) – prerequisites and procedure. Does the law envisage ‘*incidenter*’ or separate procedure. Separate procedure at the first instance/at the second instance. Elaborate on the particularities of the herein provided issues.

As described above,[253] the grounds for **refusal of enforcement** may be raised in an **application for the cessation of enforcement** (§ 418 para 1 EO). According to § 45 para 3 EO, the **parties have to be heard** on the application, unless the application is clearly unjustified. Such a hearing, however, does not have to be oral; instead the parties can also be asked to give written statements (§ 55 para 1 EO). There is no “separate procedure” on such an application; instead it is part of the enforcement procedure. The court resolution on the application for the cessation of enforcement can be fought with a **recourse** (cf. chapter ■■■).

[250] Garber, 2015b: Art 47 EuGVVO p 27.
[251] ECJ C-325/11, *Alder*.
[252] Cf. Neumayr & Nunner-Krautgasser, 2011: 121.
[253] Cf. chapter ■■■.

The **refusal of recognition** needs to be applied for according to § 85 EO,[254] the according court resolution again can be fought with a **recourse.** Since the counterparty needed to be heard on the application (cf. chapter ■■■), there is no need for the extension of the time limit for raising a recourse in § 84 EO.

4.5.6. Second appeal, (third instance appeal) as a remedy – is it to be utilized only in cases of violation (of procedural or substantive law) or can it be used for control of facts as well?

Comment: In Slovenia the law provides for appeal (pritožba) or revision (revizija). Whilst the former generally encompasses the control of facts, the latter does not permit for such control.

The ground for raising a revisional recourse (cf. chapter ■■■) are limited to the grounds listed in § 503 ZPO:[255]

1. The **Nullity** of the decision or the procedure in the second instance (nr 1 and 2),

2. a **discrepancy** between the **court record** and the **decision** (nr 3), or

3. the decision is based on a **wrong legal opinion** (nr 4).

So the Supreme Court can only be addressed with cases of violation of procedural or substantive law, but cannot control facts (with the only exception of the discrepancy between the court record and the decision, in this case, the factual basis of the decision may be changed).[256]

Also, according to § 418 para 4 EO, a recourse against the decision on a recourse (this might be a revisional recourse; but there are also other recourses, for example against rejecting decisions) can exceptionally also be raised, if the second instance court has confirmed the first instance decision entirely (generally, this would be inadmissible according to § 528 para 2 nr 2 ZPO).

[254] Cf. chapter ■■■.
[255] Zechner, 2005: § 528 ZPO p 40.
[256] Zechner, 2005: § 528 ZPO p 40.

4.5.7. Who is eligible to apply for a refusal of recognition or enforcement? How do you understand the euro-autonomous interpretation?

According to the (seemingly) prevailing opinion in Austria, it is **only the debtor** (or his or her legal successor) that has the right to apply for the refusal of recognition or enforcement.[257] Third parties (or an intervening party) cannot apply for the refusal.[258] However, these statements seems to (primarily) address the application for a refusal of enforcement.

From our point of view, as far as recognition goes, any person that can prove a legal interest in refusing the recognition of a decision may file an application according to Art 45 Brussels-Ia-Regulation. However, in Austrian literature, there has not yet been a broader discussion on how to interpret the term “interested party”.

4.5.8. Suspension and limitation of enforcement proceedings (Art. 44). How is it regulated in your legislation?

“Article 44
1. In the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3, the court in the Member State addressed may, on the application of the person against whom enforcement is sought:
(a) limit the enforcement proceedings to protective measures;
(b) make enforcement conditional on the provision of such security as it shall determine; or
(c) suspend, either wholly or in part, the enforcement proceedings.”

2. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin.

As explained above (cf. chapter ■■■), the grounds for refusal of enforcement need to be raised in an **application for the cessation of enforcement.** If the application is granted, the enforcement procedure **ends** (therefore Austria chose the option in Art 44 nr 1 lit c Brussels Ia-Regulation).

[257] Garber, 2015b: Art 47 EuGVVO p 12; Kodek, 2015a: Art 47 EuGVVO p 2.
[258] Kodek, 2015a: Art 47 EuGVVO p 2.

4.6. Protective measures.

4.6.1. Which protective measures are available, in National perspective, according to Art. 40?

There are two different types of protective measures in Austrian enforcement law, both of which are available to a foreign creditor according to Art 40 Brussels Ia-Regulation:[259] "Asset freezing as a stage in the enforcement process" or **"security enforcement"** (*"Exekution zur Sicherstellung"*) according to §§ 370-377 EO and **"interim measures"** (*"Einstweilige Verfügungen"*) according to §§ 378-402 EO.

The "security enforcement" is an actual enforcement procedure for creditors that have obtained a not-yet-enforceable title regarding a money claim; however, is limited to the subphase **"seizure".** [260] Interim measures, on the other hand, are issued in a summary procedure (which can be commenced even during or before the main procedure[261]) and represent **enforcement titles on their own** that shall secure the success of the main proceeding.

It is important to note that there are **three subtypes** of interim measures, depending on their regulatory objective:

1. Interim measures that shall secure a **money claim** (§ 379 EO).

2. Interim measures that shall secure a **non-monetary claim** (§ 381 nr 1 EO; this could for example be handing over property, the tolerance of a behaviour or the omission of a behaviour[262]).

3. Interim measures that shall secure **rights or legal relationships** (§ 381 nr 2 EO; e.g. measures that shall prevent acts of violence in a family).

However, and this is also important to note, the first subtype is subsidiary to the security enforcement (§ 379 para 1 EO), which means that as soon as security enforcement is admissible, the creditor cannot apply for an according interim measure. And since in the

[259] Kodek, 2015a: Art 40 EuGVVO p 3; Rassi, 2008: Art 47 EuGVVO p 7.
[260] Cf. chapter ■■■.
[261] Neumayr & Nunner-Krautgasser, 2011: 287.
[262] Neumayr & Nunner-Krautgasser, 2011: 294.

context of Art 40 Brussels Ia-Regulation (in other words: if there is already an enforceable decision), security enforcement will be admissible in most cases (as described in section ■■■ 4.6.2. ■■■), there is hardly any field of application for this first type of interim measures.

4.6.2. What are the prerequisites for these protective measures?

Security enforcement:

The main prerequisite for **security enforcement** is the **existence of a title regarding a money claim** (cf. chapter ■■■),[263] even if it not yet enforceable. While §§ 370-371a EO only list Austrian titles, Art 40 Brussels Ia-Regulation effects that comparable **foreign titles** equally authorize a creditor to apply for security enforcement.[264]

Valid titles (cf. §§ 370-371a EO) are most titles that stem from civil courts (especially final judgements in the first or second instance); payment orders, however, generally[265] do not entitle a creditor to apply for a security enforcement.[266] In a European context, from our point of view there are good reasons to see this differently though, because the payment order in order to fall within Art 40 Brussels Ia-Regulation needs to be enforceable already, whereas the prevailing opinion in Austria only targets non-enforceable Austrian payment orders.)

Also, while in some cases a creditor that holds an Austrian title needs to prove an objective risk that enforcement will be impeded, if the security enforcement shall be granted on the basis of Art 40 Brussels Ia-Regulation, according to the prevailing opinion, the applying creditor **does not need to prove and risk or danger of impediment** of enforcement.[267]

Interim measures:

[263] Neumayr & Nunner-Krautgasser, 2011: 276-277.
[264] Kodek, 2015a: Art 40 EuGVVO p 3; Sailer, 2016: § 370 EO p 11a.
[265] The only exception are payment orders that have come into legal force but are then faught by the means of a *restitutio in integrum* (cf. § 371 nr 3 EO).
[266] Neumayr & Nunner-Krautgasser, 2011: 277; Sailer, 2016: § 370 EO p 6.
[267] Kodek, 2015a: Art 40 EuGVVO p 2; Rassi, 2008: Art 47 EuGVVO p 12.

Generally, it is noteworthy, that unlike for security enforcement (that requires a title), interim measures **can already be issued during a procedure or even before its initiation.**[268] This difference is of little importance in the context of Art 40 Brussels Ia-Regulation though, since the creditor needs to dispose of an enforceable instrument in order for this provision to apply.

The first prerequisite of all three subtypes of interim measures is the **certification**[269] of the asserted claim, right or legal relationship to be secured.[270] Producing the foreign enforceable instrument (in the case of Art 40 Brussels Ia-Regulation) will in general be sufficient for this purpose.

The second prerequisite of those three subtypes is (in Austrian national cases) the **legal interest** in issuing a security measure, which is given if there is a danger of impediment of the enforcement, frustration of the claim, immanent violence or an irretrievable damage (cf. § 379 para 2 and § 381 nr 1 and 2 EO).[271] But again, according to the prevailing opinion, when applying on the basis of Art 40 Brussels Ia-Regulation, the applying creditor **does not need to prove and risk or danger of impediment** of enforcement.[272] So this second prerequisite does not apply in the application area of Art 40 Brussels Ia-Regulation.

4.6.3. How long do protective measures last (duration period)?

Security enforcement:

When granting security enforcement, the enforcement court needs to **set a duration period** *ex officio* (§ 375 para 2 EO);[273] in practice, however, most of the times security enforcement is granted *"until the title is enforceable"* (so until no fixed calendar day).[274] As soon as the title becomes enforceable, the procedure **automatically transforms into a regular enforcement procedure** (aiming at the creditor's satisfaction).[275] The debtor has the possibility, however,

[268] Neumayr & Nunner-Krautgasser, 2011: 287.
[269] 'Certification' in this context means to prove with a lower standard of proof; 'only' predominant (instead of high) likelihood is required here; cf. Nunner-Krautgasser & Anzenberger, 2015: 17.
[270] Neumayr & Nunner-Krautgasser, 2011: 292, 295 and 297.
[271] Neumayr & Nunner-Krautgasser, 2011: 292, 295 and 297.
[272] Kodek, 2015a: Art 40 EuGVVO p 2; Rassi, 2008: Art 47 EuGVVO p 12.
[273] Zechner, 2000: § 370 EO p 2.
[274] Sailer, 2016: § 375 EO p 15; Zechner, 2000: § 370 EO p 2.
[275] Neumayr & Nunner-Krautgasser, 2011: 282; Zechner, 2000: § 374 EO p 1.

to apply for the **cessation of the security enforcement** based on the general grounds for cessation[276] or on the special grounds in §§ 376 and 377 EO (for example when the creditor can prove that the claim has been settled or that a security has been deposited; cf. § 376 para 1 nr 1 and 2 EO).

Interim measures:

When issuing an interim measure, the court has to **set a duration period** (§ 391 para 1 EO); when doing so, according to Austrian case law, the court is not strictly bound to the application (this is a rather controversial subject though).[277] The duration period can be limited with a fixed calendar date, but can also be limited with the enforceability of the secured claim.[278]

Also, if the interim measure is issued prior to commencing a civil procedure or an enforcement procedure, the court has to set a **time frame for the applying party to do so** (§ 391 para 2 EO).[279] If the applying party fails to initiate the civil procedure or the enforcement procedure in time, the interim measure shall be revoked *ex officio* (§ 391 para 2 EO).[280]

4.6.4. Effects of protective measures - *Auszahlungsverbot (Verfügungsverbot)* or pledge (mortgage).

Security enforcement:

When granting security enforcement, the enforcement court orders the **seizure of moveable tangibles, the preregistration of a charge on immoveable properties, the seizure of claims** or potentially the **forced administration** (§ 374 para 1 EO). This seizure (pledge), the preregistrations and the forced administration have an *in rem* effect and therefore grant **priority over later creditors.**[281]

[276] Cf. chapter ■■■.
[277] Kodek, 2015b: § 391 EO p 1.
[278] Kodek, 2015b: § 391 EO p 2.
[279] Kodek, 2015b: § 391 EO p 15.
[280] Kodek, 2015b: § 391 EO p 16.
[281] Neumayr & Nunner-Krautgasser, 2011: 275; Zechner, 2000: § 370 EO p 1.

Interim measures:

The court **large number of instruments** at its disposal in order to secure the endangered claim, right or legal relationship (cf. for example § 379 para 3 and § 382 EO; the list in § 382 – applicable for subtype 2 and 3 – is not even exhaustive). Examples would be the order to hand out objects to the court (§ 382 para 1 nr 1 EO), the order to carry out some specific actions (§ 382 para 1 nr 4 EO) or an order addressed at a third person prohibiting payment (§ 379 para 3 nr 3 EO). None of these measure have an *in rem* effect (cf. explicitly § 379 para 4 EO). However, if a third person was issued a prohibition (of payment or handing out an object), he or she is liable for damages caused by disregarding the court order (§ 385 para 2 EO).

4.6.5. Can an enforcement motion be refused entirely due to the objection regarding foreign enforcement title or is this just limited to the security measures?

While the debtor is fighting the foreign enforcement title in a way that its **enforceability is postponed,** then national security measures consequently cannot be applied for on the basis of Art 40 Brussels Ia-Regulation (since the enforceability is a requirement of this provision). This does not necessarily mean that Austrian security measures are inadmissible in any case, but the applying party cannot use the benefits of Art 40 Brussels Ia-Regulation any more. If the enforceability of the decision remains “in force” despite the legal remedy in the Member State of origin, then the security measures remain unaffected in general.

4.7. Grounds for refusal.

4.7.1. What are the past characteristics in your member state regarding grounds for refusal of recognition? Do you see any new problems regarding grounds for refusal?

In practice, the most common ground for refusal was the one regarding **defectiveness or complete lack of service** on the defendant prior to a default judgement (Art 34 nr 2 Brussels

I-Regulation; now Art 45 para 1 lit b Brussels Ia-Regulation).[282] The reason for this is, that despite of all efforts to harmonize and increase its effectiveness, the international service of documents within Europe is still a frequent source of problems and errors.[283] In contrast, the refusal due to a contradiction to the ***ordre public*** is traditionally practiced very restrictively; it should only apply in very drastic and exceptional situations.[284] The same goes for the grounds regarding **irreconcilable judgements,** those also have little practical relevance.[285]

The grounds for refusal have remained more or less the same (the most important extension concerns jurisdiction over individual contracts of employment), so there are hardly any new problems from an Austrian perspective.[286]

4.7.2. What is your opinion on the fact that the grounds for refusal in the B I (44/2001) apply in B IA as well?

While it might have had to be considered consequent to abolish the refusal due to a contradiction to the *ordre public* (as it was originally planned), from our point of view, there is no real harm done in (roughly) sticking to the previously existing grounds for a refusal. The mutual trust between the national justice systems is of course the basis for establishing a European judicial area; however, this ground for refusal can be a potent “safety net” in extreme situations (as those that have been broadly discussed in literature, for example the case ECJ C-7/98 *Krombach/Bamberski*). Since it very rarely applies in practice,[287] we do not consider it a problematic contradiction to the mutual trust or a major obstacle to the European integration.

4.7.3. Please comment on the most problematic grounds in your member state in more detailed manner.

One practical problem from an Austrian point of view regarding the ground in Art 45 para 1 lit b Brussels Ia-Regulation **(service of the document instituting the proceeding)** is that –

[282] Mayr, 2011: p IV/28.
[283] Mayr, 2011: p IV/28.
[284] Mayr, 2011: p IV/25.
[285] Rassi, 2008: Art 34 EuGVVO p 65 and 78.
[286] Cf. Frauenberger-Pfeiler, 2015: 241-242; Köllernsperger, 2015: 50.
[287] Mayr, 2011: p IV/25.

according to the wording – it needs to be served *“in sufficient time and in such a way as to enable him to arrange for his defence”*. Now according to Austrian civil procedure law, the defendant generally has four weeks to react to an action or an equivalent motion (cf. § 230 para 1 ZPO, § 567 para 1 ZPO). Other Member States may consider this time limit as insufficient; in such a case, the claimant can apply for an extension of the time limit granted to the defendant (§ 128 para 2 ZPO).[288]

4.7.4. Grounds regarding related actions and irreconcilable judgements. Do you find any open issues in your member state in this regard?

As mentioned above, the grounds regarding two irreconcilable judgements have little practical relevance.[289] One open issue in Austria is the question, whether the Austrian judgment (in the case of Art 45 nr 1 lit c Brussels Ia-Regulation) has to have a *res iudicata* effect or not; most Austrian authors seem to believe, that this has to be the case in order to constitute a ground for the refusal.[290]

Another issue is (of course) the question, **under what circumstances a judgment has to be considered irreconcilable** with an earlier judgment; this, however, is not a national problem but a question of the interpretation of the Regulation.

[288] Mayr, 2004: § 230 ZPO p 48.
[289] Rassi, 2008: Art 34 EuGVVO p 65 and 78.
[290] Kodek, 2015b: Art 45 EuGVVO p 45; Rassi, 2008: Art 34 EuGVVO p 72 and 73.

Part 5: Final critical evaluation of B IA – what necessary adaptations to national legislations need to be done?

5.1. Does B IA in your opinion actually simplify, speed up and reduce the costs of litigation in cross-border cases concerning monetary claims and eases cross-border enforcement of judgments?

Regarding recognition and enforcement: On paper, the abolition of the exequatur procedure of course simplifies and speeds up enforcement proceedings. In Austria, however, an application for the declaration of enforceability (exequatur) can be **combined** with an application for an enforcement order (§ 412 EO [previously § 84a EO]). Such a combination has been common practice in Austria,[291] especially since there is identical jurisdiction for both applications (§ 409 nr 2 EO [previously § 82 nr 2 EO]). Also, according to § 84a para 1 sentence 2 EO, the decision on both applications shall be issued simultaneously. So the parties (especially the applying creditor) in Austria will in most cases not notice an important difference as far as simplification goes. There is one noteworthy difference regarding **legal remedies,** however. Under the **Brussels I-regime** (as well as under national law), the debtor was (respectively: still is) able to raise a recourse against the declaration of enforceability; the time frame for the recourse is **four weeks** and another four weeks for the response to the recourse (§ 411 para 1 EO [previously § 84 para 1 EO, where it was "one month"]). This may even be extended to **eight weeks,** if the applying party does not have his or her residence in Austria and the recourse is his or her first chance to participate in the proceeding (§ 411 para 2 nr 1 EO). While the enforcement court may initiate enforcement immediately, it must not enter the subphase **"realisation of the value of the asset"**[292] before the declaration of enforceability has come into legal force (§ 412 para 2 EO). Under the **Brussels Ia-Regime,** on the other hand, the debtor may raise the grounds for refusal in an application for cessation of the enforcement proceedings (§ 418 para 1 EO).[293] Such an application can be filed within **eight weeks** of the issuing of the enforcement order (§ 418 para 2 EO). So overall, the time frames for the legal remedies remain more or less the same as well.

There is a big difference as far as the distribution of tasks at the courts are concerned, however: According to § 17 para 3 nr 1 RpflG, the decision on the declaration of enforceability as well as the whole enforcement procedure until the legal force of this decision

[291] Neumayr & Nunner-Krautgasser, 2011: 119.
[292] Cf. chapter ■■■.
[293] Cf. chapter ■■■.

lies in the functional competence of the **judge.** Since there is no more declaration of enforceability with the regime of the Brussels Ia-Regulation, those enforcement procedures are now in the hands of **judicial officers** (unless they would be in the judge’s competence anyways, for example an enforcement out of immovable property).[294] This means that enforcement procedures based on judgements from other Member States become cheaper for the Austrian justice system.

5.2. Which is, from the creditor’s point of view, the most convenient alternative in your member state in case of cross-border collection of debts in the EU?

There are actually few real alternatives to enforcement in accordance to the Brussels Ia-Regulation: One alternative would be to file an action directly in the Member State of enforcement, if there is a possibility to do so within the jurisdiction regime of Brussels Ia. With such an enforcement title, there is no more necessity for recognition and enforcement according to Brussels Ia. Other options (that are used relatively little in practice, though) are of course the **European Payment Order,** the **European Small Claims Procedure** and the **European Enforcement Order.**

Regarding the rather small scope of preliminary measures regarding the freezing of bank accounts, there now is the new instrument of the **European account preservation order,** which can be more attractive in several cases.[295] This is of course only a security measure and does not create an enforceable instrument for actual (“definitive”) debt collection.

5.3. Language issues: Is it possible or advisable to choose the form in the language of the debtor?

Since it is the court that issues the certificate according to Art 53 Brussels Ia-Regulation, the applying creditor generally has no choice of language here. Generally, every court issues standard forms in its own language and the receiving court uses the standard form of its own language to obtain an official translation.[296] The question is, however, whether the court **may**

[294] Mohr, 2013: 32-33.
[295] Anzenberger & Ivanc, 2017: ■■■.
[296] Mankowski, 2012: 623.

issue the certificate in a different language (for example if the applying party asks for that). Since the Brussels Ia-Regulation does not give directives on this question, it is up to national law to regulate the languages a court may chose.

In Austria, the official court language is German (Art 8 para 1 B-VG, § 53 Geo). This means, that **German** is the language in which all court orders and arrangements have to be made and that court organs and the parties have to communicate in German.[297]

However, according to the ethnic minority act (“Volksgruppengesetz”), in some specific Austrian regions parties may communicate with the courts in Slovenian, Croatian or Hungarian language. More specifically, according to § 16 of the ethnic minority act, decisions and decrees (that need to be served to the parties) have to be issued in German and in the language of the respective ethnic minority if the procedure was carried out in this language. Based on this provision, from our point of view parties can apply for the issuing of the standard forms in Slovenian, Croatian or Hungarian language at the respective district courts.

If Austria is the Member State of enforcement (and not the Member State that issues the certificate according to Art 53 Brussels Ia-Regulation), it is certainly advisable to provide the form in German language, since otherwise according to Art 37 para 2 Brussels Ia-Regulation, the court may request a translation or a transliteration of the contents of the certificate.

5.4. Do you anticipate that the principle of national procedural autonomy shall be adversely affected by the provisions of B IA?

Comment: *The principle (in essence) provides that member states are free to choose the remedies and procedures which govern the enforcement of EU law. The principle is not confined to the enforcement of substantive rights, even more so, its importance is revealed in cases such as the one at hand. B IA (in part) relies on remedies provided by national procedural law. The latter must therefore conform the euro-autonomous nature of B IA and provide for adequate remedies in terms of interpretation, effectiveness, effective judicial protection of non-discrimination. If these prerequisites are not duly respected, certain corrections to national procedural law are in order, perhaps even ad hoc introduction of new remedies.*

Costs. Since the recognition and enforcement of foreign judgements no longer requires *exequatur,* what is your take on the costs which will incur with respect to enforcing judgments under B IA in comparison to enforcing them under BI? Will it be more cost – effective?

[297] Danzl, ■■■: § 53 Geo Anm 1.

Comment: *Try to indicate the specific costs which may arise in relation to the procedure envisaged under the BI A. Tariffs, lawyer's fees, etc.*

Any harmonization of procedural law on a European level will necessarily affect the **national procedural autonomy** of the Member States to a certain extent (which is not solely an Austrian phenomenon but affects all Member States equally). If the question aims at gathering information on **how much** the Austrian civil procedure law has had to adapt to implement the requirements from the provisions on recognition and enforcement in the Brussels Ia-Regulation, the answer is that there has been rather little adaptation: Some new provision were created; for example § 418 EO regarding the application for the cessation of enforcement due to the grounds for refusal in Art 45 Brussels Ia-Regulation (and possibly another provision would be necessary for the refusal of recognition). So the total efforts for the implementation were tolerable.

Regarding the **costs,** there is little difference as far as Austrian involvement is concerned: Since under both regimes the creditor generally[298] needs a **certificate** (Art 54 Brussels I-Regulation and Art 53 Brussels Ia-Regulation), there is generally no difference in costs if **Austria is the Member State of origin.** According to Point 15 lit a of the tariff list of the court fee act **("Gerichtsgebührengesetz"; GGG)**, the court fees for any official certificate that shall be issued to a party are 3,57 Euro per page. This needs to be paid in order to receive a copy of the certificate according to Art 54 Brussels I-Regulation or according to Art 53 Brussels Ia-Regulation. The lawyer's tariffs for an application to issue a certificate is determined by tariff list 1 (TP 1. I. b.) of the law on lawyer's tariffs (**"Rechtsanwaltstarifgesetz"; RaTG**); it depends on the value in dispute, and lies between 3,50 and 260,10 Euros (in 2016).

If **Austria is the Member State of enforcement,** there are slight differences between the old and the new situation: Despite of the necessity for an exequatur procedure under the Brussels I-regime, there were no additional court fees for the exequatur; instead, the creditor just needs to pay the fees for the regular enforcement procedure.[299] However, the statutory lawyer's tariffs (according to the law on lawyer's tariffs **["Rechtsanwaltstarifgesetz";**

[298] There were possible exceptions according to Art 55 Brussels I-Regulation, however.
[299] Burgstaller & Höllwerth, 2001: § 79 EO p 35.

RaTG]) were higher if the creditor needed to apply for the exequatur of the decision first: If the application for exequatur was filed separately, the lawer’s tariff was to be determined according to the tariff list 2 (“*Tarifpost 2”*) of the RaTG, if it was combined with the application for an enforcement order, it was to be determined according to the tariff list 3A (“*Tarifpost 3A”*) of the RaTG (instead of tariff list 2 for only the application for an enforcement order).[300] The actual tariff depends on the value in dispute; in the tariff list 2 it is between 14,90 and 1.298,50 Euros (in 2016), in the tariff list 3A it is between 29,20 and 17.308,80 Euros (in 2016). Since there is no more exequatur under the Brussels Ia-regime, there **will not be any additional costs** for the fact that it is a foreign title that needs to be enforced. This does not take into consideration the costs for the translation of the certificate according to Art 53 Brussels Ia-Regulation if such a translation is needed.[301]

[300] Burgstaller & Höllwerth, 2001: § 79 EO p 35.
[301] Cf. chapter ■■■.

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