Questionnaire for national reports

Revised

General guidelines

This questionnaire addresses practical and theoretical aspects regarding the structure, contents and effects of enforcement titles in EU Member States and one Candidate Country. Each partner should provide substantive answers for their respective State/Country (or additional State/Country, if specifically stipulated by the coordinator). Certain questions require knowledge on instruments of cross-border enforcement in the EU, particularly Regulation 1215/2012 ("Brussels Ia Regulation"; hereinafter also: B IA). The latter questions address the interplay of national law and the EU regime on cross-border enforcement in civil and commercial matters.

For useful information, especially relating to B IA and cross-border enforcement in the EU, please refer, among other sources, 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]
- 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,[2]
- Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation

[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(2010) 748. Available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF.

(EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[3]

- 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),[4]
- Report on the Application of Regulation Brussels I in the Member States (Heidelberg Report),[5]
- The Commission's Civil Justice Policy site,[6]
- The European e-Justice portal,[7] embedded with the European Judicial network (and the old e-Justice portal).[8] The portal features several many useful sources, e.g. Study on European Payment Order, Study on making more efficient the enforcement of judicial decisions within the European Union etc.
- The Access to Civil Justice portal[9] hosted by the University of Maribor, Faculty of Law together with the results of our previous projects and the project blog.

The structure of each individual report does not necessarily have to follow the list of questions enumerated below, however, following the structure is strongly advised. The questions raised should be dealt with within the reports, however, the authors are free to decide where this will be most suitable. If authors choose to address certain issues elsewhere within the questionnaire, then they are instructed to make cross-references and specify where they have provided an answer for the respective question (e.g. "answer to this question already provided in 1.6."). Following the structure of the questionnaire will enable and ease comparisons between the various jurisdictions.

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

Please provide representative references 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.

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

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[3] COM(2009) 174 final. Available at:
http://ec.europa.eu/civiljustice/news/docs/report_judgements_en.pdf.

[4] http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

[5] 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.

[6] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice_en.

[7] https://e-justice.europa.eu/home.do?plang=en&action=home.

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

[9] https://www.pf.um.si/en/acj/.

Languages of national reports: English.

Deadline: 30 April 2020.

Upload report to: "https://www.dropbox.com/request/Vw2BGUFUFRO8ukJylrfr".

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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). Should be differentiated from 'claim'.

Appeal in Cassation: Second appeal in the Romanic family of civil procedure (in the Germanic family one uses "Revision" instead).

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

Civil Imprisonment: Imprisonment of a judgment debtor in order to force them 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 (England and Wales) designated as "Plaintiff". In your contributions, please only use "claimant" (the term which is also used in B IA).

Co-litigants: More than one person being considered a party or several parties on either the Claimant or the Defendant side.

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: Failure to perform the required procedural act (e.g. where the summoned defendant does not appear); failure to perform.

Defaulter: Party in a civil action who does not perform the required procedural act.

Defendant: Please use this term instead of "Respondent".

Enforcement: Use the term enforcement instead of execution.

Enforcement officer: Official involved in enforcing court rulings. Enforcement is among the duties 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 that he may exercise of his own motion.

Final judgment: Judgment that is binding on the 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 avoiding using the terminology "trial" (which in English civil procedure refers to a specific stage in litigation).

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

Joinder of Claims: The position whereby Claimant raises (either initially or after the initiation of proceedings) several claims.

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.

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.

Operative part: The "tenor" or "holding" part of the Judgement which contains a "finding" or "declaration" or "order" to the debtor to pay a sum of money or undertake an action. Usually

denotes the obligation of the debtor, executable in enforcement proceedings. In German: *Urteilstenor*.

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 among 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 (England and Wales) reforms these documents were indicated as "pleadings". In French: "conclusions".

Statement of Claim: Document containing the claim.

Statement of Reasons: The part of the judgment that contains the grounds for the decision.

Statement of Defence: Document containing the defence.

Part 1: General inquiries regarding Enforcement titles

1.1 Briefly present how an "enforcement title" is defined in your national legal order.

Comment: In addition to the definition, enumerate the domestic judicial (and other legal) instruments which conform to the above definition of an enforcement title. If there is a statutory definition, then please provide the citation to the exact article/paragraph of that law and an English translation. Provide a list of enforcement titles.

Answer: The enforcement title is an official document by which a certain claim can be realized by execution. The enforcement title thus gives the creditor the right to demand execution. If all the conditions for execution are met, the state is obliged to execute the claim. Without an enforcement title, the creditor has no right to enforcement, even if he is entitled to a material claim. The enforcement title must always have a clear content, i.e. it must be directed to a specific performance, acquiescence or omission. The execution title is the basis for the application for execution and the execution permit. These may not exceed the title in their content and scope. It determines the parties to the proceedings and, indirectly, the type of execution: If, for example, a monetary claim is to be brought in, only an execution for a monetary claim can be considered.[10]

Paragraph 1 of the Austrian *Exekutionsordnung* (Enforcement Order, henceforth: EO) regulates the execution titles. They can be roughly divided into:

- court titles (titles issued by an ordinary civil or criminal court)
- administrative titles
- documents not issued by an administrative authority (e.g. enforceable notarial acts).[11]

The following applies in particular:

§ 1 Exekutionsordnung (Code of Enforcement)	
Executory titles within the meaning of the present law are the following acts and documents established within the territory of this law:	Exekutionstitel im Sinne des gegenwärtigen Gesetzes sind die nachfolgenden im Geltungsgebiete dieses Gesetzes errichteten Akte und Urkunden:
1. final judgments and other judgments (*Urteile*), decisions (*Beschlüsse*) and administrative orders (*Bescheide*) of civil courts in disputes, if further legal proceedings are excluded or if an appeal suspending execution is not granted;	1. Endurteile und andere in Streitsachen ergangene Urteile, Beschlüsse und Bescheide der Zivilgerichte, wenn ein weiterer Rechtszug dawider ausgeschlossen oder doch ein die Execution hemmendes Rechtsmittel nicht gewährt ist;

[10] M. Neumayr and B. Nunner-Krautgasser, Exekutionsrecht[4] (Manz 2018) p. 65 f.

[11] Neumayr and Nunner-Krautgasser, supra n. 10, p. 71.

2. payment orders issued in the mandate and bill of exchange procedure and in the official liability procedure, if they have not been objected to in time;	2. Zahlungsaufträge, die im Mandats- und Wechselverfahren sowie im Amtshaftungsverfahren erlassen wurden, wenn gegen sie nicht rechtzeitig Einwendungen erhoben worden sind;
3. orders for payment issued in the order for payment procedure which are no longer subject to a statement of opposition (*Einspruch*)	3. die im Mahnverfahren erlassenen Zahlungsbefehle, welche einem Einspruch nicht mehr unterliegen;
4. judicial terminations of an inventory contract for land, buildings and other immovable or legally declared immovable property, for ship mills and structures built on ships, if no protest has been lodged against the termination in due time, as well as, under the same condition, judicial orders for the transfer or takeover of the inventory object;	4. gerichtliche Aufkündigungen eines Bestandvertrages über Grundstücke, Gebäude und andere unbewegliche oder gesetzlich für unbeweglich erklärte Sachen, über Schiffmühlen und auf Schiffen errichtete Bauwerke, wenn gegen die Aufkündigung nicht rechtzeitig Einwendungen erhoben worden sind, sowie unter der gleichen Voraussetzung die gerichtlichen Aufträge zur Übergabe oder Übernahme des Bestandgegenstandes;
5. settlements which have been concluded on private law claims in front of civil or criminal courts (court settlements);	5. Vergleiche, welche über privatrechtliche Ansprüche vor Zivil- oder Strafgerichten abgeschlossen wurden;
6. decisions (*Beschlüsse*) given in non-contentious proceedings, in so far as they are enforceable under the rules applicable to them;	6. in Verfahren außer Streitsachen ergangene Beschlüsse, soweit sie nach den dafür geltenden Vorschriften vollstreckbar sind;
7. the legally binding court decisions (Beschlüsse) issued in the insolvency proceedings and the official entries in the register of applications filed in the insolvency proceedings, provided that they are enforceable under § 61 *Insolvenzordnung* (Insolvency Code)	7. die im Insolvenzverfahren ergangenen rechtskräftigen gerichtlichen Beschlüsse und die amtlichen Eintragungen in das im Insolvenzverfahren angelegte Anmeldungsverzeichnis, soweit sie nach § 61 IO vollstreckbar sind;

8. legally binding findings of the criminal courts which rule on the forfeiture, extended forfeiture, confiscation or seizure of assets or objects or on the confiscation or realisation of seized or confiscated assets (§ 115a StPO), on the enforcement of a foreign decision in criminal matters concerning orders relating to property (§ 65 ARHG, § 52d EU-JZG), on the costs of criminal proceedings or on claims under private law, or which declare an ordered security to be forfeited;	8. rechtskräftige Erkenntnisse der Strafgerichte, welche den Verfall, den erweiterten Verfall, die Konfiskation oder die Einziehung von Vermögenswerten oder Gegenständen aussprechen oder über die Einziehung oder die Verwertung sichergestellter oder beschlagnahmter Vermögenswerte (§ 115a StPO), über die Vollstreckung einer ausländischen Entscheidung in Strafsachen betreffend vermögensrechtliche Anordnungen (§ 65 ARHG, § 52d EU-JZG), über die Kosten des Strafverfahrens oder über die privatrechtlichen Ansprüche ergehen oder eine bestellte Sicherheit für verfallen erklären;
9. final decisions and rulings of civil and criminal courts, imposing fines or penalties on parties or their representatives;	9. rechtskräftige Beschlüsse und Entscheidungen der Zivil- und Strafgerichte, wodurch gegen Parteien oder deren Vertreter Geldstrafen oder Geldbußen verhängt werden;
10. decisions of the administrative authorities on claims under private law, provided that they are enforceable in accordance with the provisions applicable to them and that the enforcement is transferred to the ordinary courts by statutory provisions;	10. Entscheidungen der Verwaltungsbehörden über privatrechtliche Ansprüche, soweit sie nach den dafür geltenden Vorschriften vollstreckbar sind und die Exekution durch gesetzliche Bestimmungen den ordentlichen Gerichten überwiesen ist;
11. orders of the insurance institutions (§ 66 ASGG), with which benefits are awarded or claimed back;	11. Bescheide der Versicherungsträger (§ 66 ASGG), mit denen Leistungen zuerkannt oder zurückgefordert werden;
12. Orders of the administrative authorities as well as findings and decisions of the administrative courts, the Administrative Court and the Constitutional Court, provided that they are enforceable according to the regulations applicable to them and the enforcement is transferred to the ordinary courts by statutory provisions;	12. Bescheide der Verwaltungsbehörden sowie Erkenntnisse und Beschlüsse der Verwaltungsgerichte, des Verwaltungsgerichtshofes und des Verfassungsgerichtshofes, soweit sie nach den dafür geltenden Vorschriften vollstreckbar sind und die Exekution durch gesetzliche Bestimmungen den ordentlichen Gerichten überwiesen ist;

13. payment orders and statements of arrears issued in respect of direct taxes, charges and social security contributions, as well as state, district and municipal surcharges, which are enforceable in accordance with the provisions relating thereto;	13. die über direkte Steuern, Gebühren und Sozialversicherungsbeiträge sowie über Landes-, Bezirks- und Gemeindezuschläge ausgefertigten, nach den darüber bestehenden Vorschriften vollstreckbaren Zahlungsaufträge und Rückstandsausweise;
14. decisions of the administrative authorities and courts mentioned in nos. 10 and 12 which impose fines, penalties or the reimbursement of costs of proceedings, provided that they are enforceable under the provisions applicable to them and that the execution has been transferred to the ordinary courts by statutory provisions;	14. Entscheidungen der in Z 10 und 12 genannten Verwaltungsbehörden und Gerichte, mit denen Geldstrafen, Geldbußen oder der Ersatz der Kosten eines Verfahrens auferlegt wird, soweit sie nach den dafür geltenden Vorschriften vollstreckbar sind und die Exekution durch gesetzliche Bestimmungen den ordentlichen Gerichten überwiesen ist;
15. settlements concluded before a municipal mediation office, before police authorities or before other public bodies called upon to enter into settlements, if the effect of a court settlement is attached to them by the existing regulations;	15. Vergleiche, welche vor einem Gemeindevermittlungsamt, vor Polizeibehörden oder vor anderen zur Aufnahme von Vergleichen berufenen öffentlichen Organen abgeschlossen wurden, falls denselben durch die bestehenden Vorschriften die Wirkung eines gerichtlichen Vergleiches beigelegt ist;
16. the awards of arbitrators and arbitral tribunals which are no longer subject to appeal to a higher arbitral body and the settlements concluded before them;	16. die einer Anfechtung vor einer höheren schiedsgerichtlichen Instanz nicht mehr unterliegenden Sprüche von Schiedsrichtern und Schiedsgerichten und die vor diesen abgeschlossenen Vergleiche;
17. the notarial acts specified in § 3 of the Law of 25th July 1871, RGBl. No. 75.	17. die im § 3 des Gesetzes vom 25. Juli 1871, RGBl. Nr. 75, bezeichneten Notariatsakte.

1.2 How are "civil and commercial" matters defined in your national legal order?

Answer: In contrast to the ECJ, the Austrian doctrine is based on a much narrower concept of civil law and has developed a number of theories, three of which have become more important:

- The subject theory focuses on whether the carrier of the law belongs to the circle of legal subjects under public or private law.

- The subjection theory delimits the scope to the extent that the partners in the legal relationship are equal to each other or are in a relationship of superiority and subordination.
- The theory of interests is based on the interests of the parties, depending on whether the public interest is predominant or not.[12]

1.3 Which bodies conform to the definition of "Courts and Tribunals" as provided for by the B IA under your domestic legal system?

Answer: The material scope of the B IA Regulation covers civil and commercial matters regardless of the nature of the jurisdiction (see Art 1 B IA[13]). The B IA Regulation is also applicable (in addition to proper civil proceedings) when a civil or commercial claim will be enforced in non-contentious, labour or criminal proceedings. Public law disputes are not covered by B IA.[14]

The following ordinary courts, which correspond to the above-mentioned definitions, are established in Austria:

- District Courts (*Bezirksgerichte*),
- District Court for commercial matters (*Bezirksgericht für Handelssachen*); the district court for commercial matters exists only in Vienna; in all other federal provinces of Austria, disputes under company law are settled by the district courts "in commercial matters (*Bezirksgericht in Handelssachen*),
- Regional Courts (*Landesgerichte*),
- Regional Court for commercial matters (*Handelsgericht*); the regional court for commercial matters exists only in Vienna; in all other federal provinces of Austria, disputes under company law are settled by the regional courts "in commercial matters" (*Landesgerichte in Handelssachen*),
- Labour- and Social Court (*Arbeits- und Sozialgericht*); the labour- and social court exists only in Vienna; in all other federal provinces of Austria, disputes under labour- and social law are settled by the Regional Courts "in labour- and social matters" (*LG "als Arbeits- und Sozialgericht"*),
- Higher Regional Courts of Appeal (*Oberlandesgerichte*),
- Supreme Court (*Oberster Gerichtshof*).

It follows from the recital no. 12 that the B IA Regulation should not apply to arbitral tribunals. The "New York Convention of 1958" applies to the recognition and enforcement of arbitral awards.

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[12] O. Ballon and R. Fucik and E. Lovrek, Comments on § 1 *Jurisdiktionsnorm* (Jurisdiction Code) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd I[3] (Manz 2013) § 1 JN Rz 63 ff.

[13] "*This Regulation shall apply in civil and commercial matters* ***whatever the nature of the court or tribunal***." Art 1 first sentence B IA Regulation.

[14] W. Rechberger and D.A. Simotta, Zivilprozessrecht: Erkenntnisverfahren[9] (Manz 2017) p. 62.

1.4 Briefly present the types of domestic decisions (e.g. Judgments, Decrees, Decisions, Orders) which may be rendered/issued under your Member State's civil procedure.

Comment: *Briefly elaborate on the meaning and effects of these types of decisions. Please note that the word "decision" is used as a generic and neutral term, e.g. in Slovenia, "decisions" rendered by the court shall take form either of a "judgment" (Slovene: "Sodba") or of a decree (Slovene: "Sklep"). "Civil procedure" is to be understood as any procedure so designated by domestic law. In addition, decisions not rendered in civil procedure, but having a civil character (e.g. decision on damages in criminal procedure), should also be included. Indicate which of these decisions may be considered enforcement titles. Additionally, please state what these decisions are called in the official language of your Member State. If enforcement titles are exhaustively enumerated by statute, please provide the citation to the exact article/paragraph of that statute and an English translation.*

Answer: Usually the final decision in a matter is made in the form of a judgment (*Urteil*), while the court's procedural decisions are made by formal decisions/orders (*Beschlüsse*). In addition the parties may be able to reach a settlement (which can be confirmed by the judge; *gerichtlicher Vergleich*).

The final decision is usually rendered in the form of a judgment (*Urteil*). It decides on the merits of the claim as well as the parties' main petitions. In exceptional cases the judgment can be announced orally right after closing the hearing, but usually the judgment will be issued in written form. Besides several formal requirements such as the description of the court and the parties, the judgment contains the reasons for the decision and the verdict itself. The reasons for the decision include the court's legal assessment, the evaluation of evidence presented during the trial and the judicial ascertainment of facts.

In addition to regular judgments there are some special configurations of judgments. The most important one is the default judgment (*Versäumungsurteil*), which can be issued if the defendant is absent from the hearing or failed to file a statement of defence upon the plaint of the plaintiff.

Procedural matters are usually decided by issuing a (formal) decision or an order (*Beschluss*). It does not decide on the merits of the petitions of the parties, but settles certain procedural requirements, a request to submit a statement or the provision of legal aid. If the decision regarding a certain procedure was made during the hearing, it will be rendered orally, otherwise it will be delivered to the parties of the dispute in written form.[15]

1.5 Taking account of the euro-autonomous definitions of "Judgment" and "Authentic instrument" elaborated by the CJEU for the purposes of B IA, which domestic decisions and instruments conform to these definitions?

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[15] F. Heidinger and A. Hubalek, Angloamerikanische Rechtssprache Band 2^2 (LexisNexis 2013) p. 56 f.

Comment: *Please explain which domestic decisions and instruments are problematic in the light of the euro-autonomous definitions and why. Explain which decisions and instruments do not fall within the definitions. If you use English translations of domestic decisions, then please also provide the domestic term in brackets next to the translation, e.g. In Slovenia, condemnatory Judgements [Sodbe] issued in litigious proceedings…".*

Answer: For the concept of judgment within the meaning of Article 2 (a) of the B IA, the national designation is not relevant. In any case, this term covers the following forms of decision: *Urteil*, *Beschluss*, *Zahlungsbefehl* and the *(Wechsel)Zahlungsbefehl*. In principle, this term also covers provisional measures (*einstweilige Verfügungen*), although problems may arise in that the defendant was not heard before the decision was issued.[16] In principle, it is also irrelevant whether the decision was made in contentious or non-contentious proceedings; awards made to private parties in criminal proceedings also fall under the concept of decision in the sense of Article 2 lit a of the B IA Regulation.[17]

Provisional measures are problematic, because the ECJ restricts recognition and enforcement to decisions that were issued in contradictory proceedings or were not issued in contradictory proceedings due to delay. The intentionally one-sided provisional measure is therefore not a recognizable and enforceable decision.[18]

A list of which Austrian authentic instruments fall under the euro-autonomous concept does not exist or is not meaningful. In any case, authentic instruments are documents which:[19]

- have been drawn up in the prescribed form by an Austrian authority (as holder of sovereign power; including the Austrian representation and consular authorities abroad) within the limits of its official powers
- by a person of public faith (usually a notary) in whose business circle they were established in the prescribed form;
- have been drawn up abroad and are deemed to be authentic instruments in the State in which they were drawn up (foreign authentic instruments); such instruments are deemed to be authentic instruments in Austria if
- (formal) reciprocity exists between Austria and the state of establishment and
- the document has the prescribed certification.

1.6 Have the national courts of your Member State addressed any questions for a preliminary ruling (Art. 263 TFEU = AEUV) to the CJEU regarding the notion of "Judgment"?

[16] J. Rassi, Comments on Art 32 *EuGVVO* (BIA-Regulation) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen BdV/1^2 (Manz 2008) Art 32 EuGVVO Rz 15 f.

[17] Rassi, supra n. 16, Rz 18.

[18] Rassi, supra n. 16, Rz 34.

[19] C. Brenn, Comments on Art 57 *EuGVVO* (BIA-Regulation) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen BdV/1^2 (Manz 2008) Art 57 EuGVVO Rz 11.

Answer: As far as can be seen, there are no preliminary rulings addressed to the ECJ on the term "Judgement".

1.7 Please explain the level of judicial control (the "power of assessment") exerted by the courts when rendering default judgments in your Member State.

Comment: *The power of assessment may significantly vary. For instance, the courts may be barred from examination of the substance of the case or limited to checking compliance with mandatory rules of law.*

Answer: If a party does not enter into the dispute orally or in writing, the law (*in concreto* §§ 396, 442 *Zivilprozessordnung* [Austrian Code of Civil Procedure] henceforth: ZPO) provides, as a consequence of default, that a default judgment must be issued on request of the not belated party.[20]

When the not belated party applies for a default judgment, the court must give judgment on the application if the following conditions are fulfilled.

A default judgment may not be entered if (§ 402 ZPO):

- a process requirement is missing,
- the judge has doubts regarding the regularity or timeliness of delivery,
- the action is undetermined,
- the court knows, that the party is prevented from carrying out the litigation action by unavoidable events (for example by natural disasters),
- the not belated party cannot immediately provide the proof for a reason that has to be considered ex officio.[21]

If all conditions for making a default judgment are fulfilled, the court must rule on the application to make a default judgment and on the action within eight days or immediately in the same hearing. But if the defendant has already raised a procedural objection, the default judgment may only be issued after this objection has been rejected (§ 396 (3) ZPO).[22]

When making a default judgment, the actual submissions of the not belated party shall be taken as the basis for the decision. This must be considered true in principle. Arguments of the defaulter, which have already been submitted by a statement of case, are not taken into account.[23]

Part 2: General aspects regarding the structure of Judgements

[20] G. Kodek and P. Mayr, Zivilprozessrecht[4] (Facultas 2018) Rz 871.

[21] Kodek and Mayr, supra n. 20, Rz 879.

[22] Kodek and Mayr, supra n. 20, Rz 880.

[23] Kodek and Mayr, supra n. 20, Rz 881.

2.1 Which elements are comprised in the structure of a domestic (civil) Judgment in your legal order?

Comment: *A judgment normally contains an array of (necessary) information in separate constituent parts (elements), e.g. the title; the proclamation that the Court issues the Judgment in the name of the people; the Court and the judge rendering the judgment; Parties to the dispute; the Operative part; the Reasoning; the Legal instructions etc.*

Answer: The structure of a judgment is defined in §§ 417 ff ZPO.

The heading of the judgment includes the business number (*Geschäftszahl*), the standardized heading ("*Im Namen der Republik*"), the designation of the court (*Bezeichnung des Gerichts*), the parties and their representatives (*Bezeichnung der Parteien und deren Vertreter*), the designation of the matter of the dispute (*Bezeichnung des Streitgegenstands*), whether an oral hearing took place and a jurisdictional formula (*Das Gericht hat … zu Recht erkannt*).

The operative part is the core of the judgment and contains the decision on the action as well as all other requests to be settled by judgment. Furthermore, certain decisions must also be included in the judgment. The court is bound by the motions of the parties when rendering its judgment. It may not award any party anything that has not been applied for (see § 405 ZPO). A judgment on performance must also contain a time limit, which in principle corresponds to 14 days (see § 409 ZPO).

The reasons for the decision, which must be kept separate from the judgment, have to contain the following (in accordance with § 417 (2) ZPO):

- the submissions and requests of the parties,
- if applicable, findings as to the fulfillment of the requirements of the proceedings,
- the evidence taken and the citation of rejected applications for evidence,
- the establishment of the facts,
- the consideration of evidence,
- the legal assessment,
- and the reasons for the decision on costs.

The judgment is concluded with the date of the decision and the signature of the judge or the chairman of the judges' panel.[24]

2.2 Is the structure of a Judgement prescribed by law or court rules or developed in court practice (tradition or custom convention)?

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[24] M. Bydlinski, Comments on § 417 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/2^{3} (Manz 2018) § 417 ZPO Rz 1 ff.

Comment: *If applicable, please provide the citation to the exact article/paragraph of the rule and an English translation.*

Answer: The structure of a judgment is defined in §§ 417 ff ZPO (see question 2.1).

§ 417 ZPO (Code of Civil Procedure)	
(1) A written version of the judgment must include: 1. the name of the court and the names of the judges who took part in the decision; if a regional court passes a judgment of special jurisdiction in commercial matters or an independent commercial court passes a judgment of general jurisdiction, this must also be indicated; 2. the designation of the parties by name (first name and surname), employment, place of residence and party status as well as the designation of their representatives; in matters of civil status, moreover, the date and place of birth of the parties; in the cases of § 75a ZPO, the indication of the place of residence shall be omitted; 3. the operative part of the judgment, 4. the reasons for the decision. (2) The operative part of the judgment and the grounds for the decision must be external. The reasons for the decision must contain, in a compact form, the essential arguments and forms of order sought by the parties, the out-of-court settlements, the findings of fact, the assessment of evidence and the legal assessment. (3) The judgment shall contain a reference to the submissions declared inadmissible by the court on the basis of sections 179, 180(2), 275(2) and 278(2), as well as to the evidence which was not permitted to be used on account of the unsuccessful passing of a time limit set for the taking of evidence. (4) Default judgments, waivers and acknowledgements may be issued in shortened form, using a duplicate of the claim or a heading. The detailed rules shall be laid down by regulation.	(1) Das Urteil hat in schriftlicher Ausfertigung zu enthalten: 1. die Bezeichnung des Gerichtes und die Namen der Richter, die bei der Entscheidung mitgewirkt haben; wenn ein Landesgericht ein Urteil der besonderen Gerichtsbarkeit in Handelssachen oder ein selbständiges Handelsgericht ein Urteil der allgemeinen Gerichtsbarkeit fällt, ist auch dies anzuführen; 2. die Bezeichnung der Parteien nach Namen (Vor- und Zunamen), Beschäftigung, Wohnort und Parteistellung sowie die Bezeichnung ihrer Vertreter; in Personenstandssachen überdies auch den Tag und den Ort der Geburt der Parteien; in den Fällen des § 75a ZPO hat die Angabe des Wohnortes zu entfallen; 3. den Urteilsspruch; 4. die Entscheidungsgründe. (2) Der Urteilsspruch und die Entscheidungsgründe sind äußerlich zu sondern. Die Entscheidungsgründe haben in gedrängter Darstellung zu enthalten: das wesentliche Vorbringen und die Anträge der Parteien, die Außerstreitstellungen, die Tatsachenfeststellungen, die Beweiswürdigung und die rechtliche Beurteilung. (3) Das auf Grund der §§ 179, 180 Abs. 2, 275, Abs. 2, und 278, Abs. 2, vom Gerichte für unstatthaft erklärte Vorbringen, sowie jene Beweise, deren Benutzung wegen des fruchtlosen Verstreichens einer für die Beweisaufnahme bestimmten Frist nicht gestattet wurde, sind im Urteil anzuführen. (4) Versäumungs-, Verzicht- und Anerkenntnisurteile können in gekürzter Form und mit Benutzung einer Ausfertigung der Klage oder einer Rubrik ausgefertigt werden. Die näheren Vorschriften werden durch Verordnung erlassen.
§ 417a ZPO	

(1) Where a judgment has been delivered orally in the presence of both parties (§ 414 ZPO) and neither party has lodged an appeal against the judgment in due time (§ 461(2) ZPO), the written copy of the judgment may contain a statement of the grounds of the judgment, limited to the essential arguments of the parties and the reasoning of the Court of First Instance on which the judgment was based, in so far as such information is necessary to assess the res judicata of the judgment (shortened copy of the judgment). (2) Paragraph 1 may only be applied if the chairman submits the shortened written version of the judgment for enforcement within fourteen days from the date on which the period for lodging an appeal (section 461(2) ZPO) has expired for each party.	(1) Ist ein Urteil in Anwesenheit beider Parteien mündlich verkündet worden (§ 414 ZPO) und hat keine der Parteien rechtzeitig eine Berufung gegen das Urteil angemeldet (§ 461 Abs. 2 ZPO), so können in der schriftlichen Ausfertigung des Urteils die Entscheidungsgründe auf das wesentliche Vorbringen der Parteien und das, was das Gericht davon der Entscheidung zugrundegelegt hat, beschränkt werden, soweit diese Angaben zur Beurteilung der Rechtskraftwirkung des Urteils notwendig sind (gekürzte Urteilsausfertigung). (2) Der Abs. 1 darf nur angewendet werden, wenn der Vorsitzende die gekürzte schriftliche Abfassung des Urteils binnen vierzehn Tagen ab jenem Zeitpunkt zur Ausfertigung abgibt, ab dem für jede Partei die Berufungsanmeldungsfrist (§ 461 Abs. 2 ZPO) abgelaufen ist.
§ 418 ZPO	
(1) The written version of the judgment meant for the court folders shall be signed by the President of the Senate and the Secretary. If the judgment is recognized by default at the request of the plaintiff or by a judgment of renunciation or acknowledgement, the written version of the judgment intended for the court folders may be replaced by the judgment note to be signed by the judge. The detailed rules concerning the judgment note shall be laid down by decree. (2) The extract from a judgment must contain, in addition to the operative part of the judgment, the information referred to in § 417 no.1 and no. 2 ZPO. (3) No extracts or copies of the judgment may be issued before the written versions of the judgment have been delivered to the parties.	(1) Die für die Gerichtsakten bestimmte schriftliche Abfassung des Urteiles ist vom Vorsitzenden des Senates und vom Schriftführer zu unterschreiben. Wird durch Versäumungsurteil nach dem Begehren des Klägers oder durch Verzicht- oder Anerkenntnisurteil erkannt, so kann die für die Gerichtsakten bestimmte Abfassung des Urteils durch den vom Richter zu unterschreibenden Urteilsvermerk ersetzt werden. Die näheren Vorschriften über den Urteilsvermerk werden durch Verordnung erlassen. (2) Der Auszug eines Urteiles muss nebst dem Urteilsspruch auch die in § 417 Z 1 und 2 ZPO bezeichneten Angaben enthalten. (3) Vor Zustellung der schriftlichen Urteilsausfertigungen an die Parteien können Auszüge und Abschriften des Urteiles nicht erteilt werden.

2.3 How standardised (regarding form and structure) do you consider judgments from your Member State to be (e.g. inadequately; adequately; standardised, although exceptions can be found)?

Comment: *If the law regulates this issue, then it is expected that judgments are standardised. However, if certain courts tend to disregard standards or if standards are too loosely defined, then please elaborate. If your Member State has multilevel governance structures (e.g. federalisation; autonomous regions) please elaborate if the different governance structures also apply different standards.*

Answer: Since§§ 417 ff ZPO regulate the form and the content of an Austrian judgment, a high degree of standardization can be assumed.

The written judgment is structured in three clearly separate sections: the judgments header, the operative part and the reasons for the decision (see § 114 (2) *Geschäftsordnung für die Gerichte*

I. und II. Instanz [Rules of Procedure for the courts of first and second instance]). § 417 (1) and (2) ZPO also apply to decisions in the form of judgments of second and third instance.[25]

Judgments are furthermore issued "on behalf of the republic" (see Art 82 (2) Bundes-Verfassungsgesetz (Federal Constitutional Law; henceforth: B-VG). However, a failure to fulfill the formal requirement of Art 82 (2) B-VG is not subject to sanctions.[26] Simplified copies of judgments (§§ 417a, 418 ZPO) and easier justification of certain judgments (§§ 500a, 510 (3) ZPO) are the exception.

2.4 How are the different elements of the Judgment separated from one another (e.g. headline, outline point etc.)?

Answer: Usually the judgment is separated by headings. However, the formatting is left to the judge, so not every judgment looks the same. The content is given and follows the regulations of § 417 ZPO.

2.5 If courts, other than courts of first instance, may issue enforceable judgments, how does the structure of such judgments differ from judgments issued by the courts of first instance?

Comment: *The question comes into play especially in cases where, after recourse, appellate and other courts may modify first instance judgments or decide on the claim independently. In addition to general observations, please focus on the operating part, e.g. does it make reference to first instance judgements, how does it uphold or dismiss those judgements?*

Answer: The Austrian appellate courts should in principle rule on the substance of the case itself (***meritorious***).[27] This principle is fulfilled only very incompletely in practice. Most courts annul the appealed decision and refer the case back to the court of origin for a new hearing.

Appeals against judgments are decided by judgment when the court decides on the merits. For example, when it confirms the decision from the first instance, unsubstantiated nature of the appeal or confirmation of the appeal and modification of the first-instance-judgment.[28]

In some cases, appeals against judgments are also decided by decision (*Beschluss*).[29] This mainly concerns formal decisions.

Appeals against a decision (*Beschluss*) are always decided by decision (*Beschluss*).[30]

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[25] M. Bydlinski, supra n. 24, Rz 2.

[26] K.-H. Danzl, Comments on § 114 *Geo* (Rules of Procedure for the courts of first and second instance) in K.-H. Danzl (ed.), Kommentar zur Geschäftsordnung für die Gerichte I. und II. Instanz[7] (Manz 2019) § 114 Geo Anm 4; H. Fasching, Lehrbuch des österreichischen Zivilprozeßrechts[2] (Manz 1990) p. Rz 1478.

[27] Kodek and Mayr, supra n. 20, Rz 1035.

[28] Kodek and Mayr, supra n. 20, Rz 1037.

[29] Kodek and Mayr, supra n. 20, Rz 1038.

[30] Kodek and Mayr, supra n. 20, Rz 1039.

It may be fixed, that all final judgments from an Austrian court of appeal are enforceable.

Regarding the structure of such decisions see question 2.1.

2.6 How does the assertion of a counterclaim affect the structure of the Judgment?

Comment: *In addition, explain when a counterclaim can be entertained in the same proceedings and be decided in a single Judgment (if possible).*

Answer: The counterclaim is an independent action by the defendant against the claimant in an already pending action, whose hearing at first instance has not yet been concluded. It serves to enforce a matter in dispute which is closely related to the facts of the case.[31]

The following conditions must be fulfilled in order to initiate a counterclaim:

- Identity of the parties (with reversed roles)
- Pendency of the action – the hearing at first instance must not have been concluded The claim brought in with counterclaim must be in a certain relationship to the claim out of the "main action" (connexity, compensability, prejudiciality)
- The court of the main action must not have unprimordial factual or local jurisdiction over the counterclaim[32]

The following procedural particularities exist in relation to the counterclaim:

The judge may combine the proceedings on the claim and the counterclaim for common hearing and decision (§ 187 ZPO).

If both proceedings are combined, the judge can make a partial judgment on the claim that first became ready for judgment.[33]

Regarding the question how a counterclaim influences the structure of the (common) judgment: There is no difference to other judgments. The structure of a judgment has already been discussed in question 2.1.

2.7 Does the Judgment include a specification of the time-period within which the obligation in the operative part is to be (voluntarily) fulfilled by the defendant? Conversely, does the judgment contain a specification of the time-period within which the judgment is not to be enforced? Does the judgment contain a specification of the time-period after which the judgment is no longer enforceable?

[31] Rechberger and Simotta, supra n. 14, p. 343.

[32] Rechberger and Simotta, supra n. 14, p. 343 f.

[33] Rechberger and Simotta, supra n. 14, p. 344.

Comment (2.7): *If applicable, please also explain what happens if the court does not include the above time period(s). If applicable, how would the court, acting as a court of the Member State addressed, deal with a situation where a judgment is no longer enforceable after the limitation period for enforcement has expired, and this time period was not specified by the court in the Member State of origin, either because there is no obligation for the court to specify the period or because the court unintentionally omitted the specification.?*

Answer: The conditions for the enforceability of a domestic enforcement title are in part already checked when the certificate of enforceability (*Vollstreckbarkeitsbestätigung*) is issued.[34] The following applies regarding to the time limits:

- Suspensive time-limits for appeal (suspensive RM-Fristen) must be completed (for instance the time-limit for charging a second instance appeal (*Berufung*) § 464 (1) ZPO, the time-limit for charging an ordinary appeal in cassation (*ordentliche Revision*).
- In general, there is a 14-day performance period regarding the judge's debt (§ 409 (1) ZPO). This time-limit must also have expired.
- The enforcement title may not become ineffective because of time schedule: Attention: Enforcement titles regarding inventories (e.g. eviction order = *Räumungsurteil*) must be enforced within six months of the end of the eviction period; § 575 (3) ZPO. In Austria, judicial debt is generally time-barred after 30 years.[35]

  In order to enforce a foreign judgment in Austria, there are special conditions to consider. In the absence of an enforcement title made enforceable by international agreement or by an European act, the certificate of enforceability (*Vollstreckbarkeitsbestätigung*) must confer domestic enforceability on such an title (*Exequatur*).[36] There are some requirements which must be fulfilled for a declaration of enforceability (*Vollstreckbarerklärung*) – see § 406 EO:
- The enforcement title must be enforceable in the member state of origin (henceforth: MSO). A foreign enforcement title that has been declared enforceable by a final decision cannot have more effect in Austria than in the MSO. (§ 406 EO)
- Reciprocity must be guaranteed by international treaties or regulations. (§ 406 EO)

  When the BIA Regulation became legally binding, the importance of bilateral agreements has significantly decreased. The BIA regulation is no longer formally based on reciprocity. It assumes that titles from one member state are in principle accepted and enforced in the other member states.[37]

2.8 What personal information must be specified in the Judgment for the purposes of identifying the Parties to the dispute?

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[34] Neumayr and Nunner-Krautgasser, supra n. 10, p. 68.

[35] Neumayr and Nunner-Krautgasser, supra n. 10, p. 68 f.

[36] Neumayr and Nunner-Krautgasser, supra n. 10, p. 18.

[37] Neumayr and Nunner-Krautgasser, supra n. 10, p. 119.

Comment: *For example, in Slovenia, the Judgment will list the Parties' name and surname, residence and Unique Personal Identification Number (so-called "EMŠO"). This number is provided to each citizen of Slovenia and is also a feature in other countries of the former Yugoslavia. The information is stated in the Introduction to the judgment and is usually not repeated in other parts of the judgment.*

Answer: The parties must normally be identified by name (first name and surname), occupation, place of residence and status as a party of the procedure (§ 75 ZPO). If there is a confidentiality interest worthy of protection, the need to state the place of residence may be omitted.

In personal status cases, the date and place of birth of the parties must be included. For a judgment to be entered in the land register, the date of birth of the affected parties must also be stated. In the case of legal entities that are registered in the commercial register, the commercial register number must be entered.[38]

2.9 How do courts indicate the amount in dispute?

Comment: *Please elaborate how this amount is specified (if this information is specified), especially in cases where amendments to claims occur during proceedings.*

Answer: The amount in dispute is made by the claimant. He must indicate the amount in dispute in his action. If the amount in dispute consists in an amount of money, it (the amount in dispute) will be determined by this amount. Only the amount of the principal claim is relevant. Interest and additional claims are not included in the amount in dispute (see § 54 (2) *Jurisdiktionsnorm* [Jurisdictional Order; henceforth: JN]).[39] If the subject of the dispute (*Streitgegenstand*) has no monetary value, the claimant must evaluate the subject of the dispute in terms of property. If the claimant fails to do so, the amount in dispute will be assumed to be 5.000, - Euro (see § 56 (2) JN).[40]

The assessment of the subject of the dispute by the claimant is in principle binding for the court and for the defendant (see § 60 (4) JN).[41] In practice the complaints regarding the amount in dispute (*Streitwertbemängelung*) for the decision on costs according to § 7 *Rechtsanwaltstarifgesetz* (Attorney rate Act; henceforth: RATG) is important. If the defendant considers the claimant´s assessment of the amount in dispute (*Streitwertbewertung*) to be too high or too low, he can complain about it at the latest in the preparatory hearing (*vorbereitende Tagsatzung*). If the parties do not agree, the court must do the assessment of the amount in dispute. This decision is not appealable.[42] Disputes without an asset have not be valued by the claimant (for instance a status action).[43]

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[38] E. Gitschthaler, Comments on § 75 *Zivilprozessordnung* (Code of Civil Procedure) in W. Rechberger and T. Klicka (eds.), Kommentar zur Zivilprozessordnung[5] (Verlag Österreich 2019) § 75 ZPO Rz 1 ff.

[39] Rechberger and Simotta, supra n. 14, p. 132.

[40] Rechberger and Simotta, supra n. 14, p. 133.

[41] Rechberger and Simotta, supra n. 14, p. 133.

[42] Rechberger and Simotta, supra n. 14, p. 133.

[43] Rechberger and Simotta, supra n. 14, p. 133.

2.10 How do courts indicate the underlying legal relationship (legal assessment of the dispute), if this circumstance bears further relevance, e.g. in enforcement proceedings.

Comment: *Take for example § 850f of the German ZPO, where enforcement is sought against earned income (wage) of the debtor. The law imposes limitations to the scope of the attachable part of the income. However, these limitations may be disregarded to an extent, if enforcement is pursued for a claim arising from an intentionally committed tort. The execution court must therefore be able to identify the legal relationship (intentional tort). Similar examples might include the indication of maintenance or annuity by way of damages.*

Answer: In its reasoning, the court must also mention, among other things, the legal assessment of the dispute. For this purpose, the court must subordinate the established facts to a legal fact. The objective of the legal assessment is to resolve the question whether the facts established by the court create the legal consequence sought by the claimant.[44] Where a court is bound by the legal opinion expressed by a higher instance in a setting aside order (*Aufhebungsbeschluss*), the legal assessment may be limited to a simple reference.[45]

However, the legal assessment of the dispute is no longer of relevance in the execution proceedings (*Exekutionsverfahren*) that follows the trail (*Erkenntnisverfahren*). As is well known, the execution proceedings only serve to enforce a claim established in the trail.

In Austria there is also the possibility for the creditor to obtain a monetary claim by enforcement of salary. Due to debtor protection considerations, the debtor must be left with a certain unattachable exemption amount (subsistence minimum = *Existenzminimum*).[46]

A disregard of the subsistence minimum, due to an enforcement of a claim arising from an intentionally committed tort, is not known in the Austrian EO. The court of execution must therefore not be able to recognise the legal assessment.

2.11 Can the Claimant seek interim declaratory relief and what effects (if any) are attributed to the decision on this claim? How is the decision specified in the Judgment?

Answer: The action for a declaratory judgment (*Feststellungsklage*) is only subsidiarily applicable in relation to the action for performance (*Leistungsklage*). It is limited to the establishment of a legal right or relationship and does not create an enforcement title.[47] The action for a declaratory judgment is inadmissible if the claimant receives everything with a performance judgment that he would also achieve with an action for a declaratory judgment.[48]

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[44] M. Bydlinski, supra n. 24, Rz 11; W. Rechberger and T. Klicka, Comments on § 417 *Zivilprozessordnung* (Code of Civil Procedure) in W. Rechberger and T. Klicka (eds.), Kommentar zur Zivilprozessordnung[5] (Verlag Österreich 2019) § 417 ZPO Rz 4.

[45] RIS-Justiz RS0041854.

[46] Neumayr and Nunner-Krautgasser, supra n. 10, p. 272 ff.

[47] Rechberger and Simotta, supra n. 14, p. 330.

[48] OGH 23.11.2000, 8 Ob 27/00d MietSlg 52.733.

The interim application for a declaration (*Zwischenantrag auf Feststellung*) is an application made by the claimant or the defendant during an ongoing proceeding. It contains the request to consult with a judgment on the existence or non-existence of a prior right. This results that the preliminary question becomes independent. The preliminary question is included in the judgment (decision on the claim) and therefore has a binding effect.[49]

If the interim application for a declaration is ready for decision earlier than the action itself, the court may make an interim judgment on it (§ 393 (2) ZPO). Otherwise it will be decided together with the claim in the final judgment (§ 236 (1) ZPO).[50]

2.12 What kinds of decisions can a court issue in regular litigation proceedings?

Comment: *For example, in certain Member States, the court may decide on procedural issues (e.g. admission of evidence; modification of claim) with a "decree" and a "Judgment" on the merits of the case. Provisional and protective measures may or may not be tied to the proceedings.*

Answer: The Austrian courts must make many decisions in the course of a trial. The law (in conreto the ZPO) gives them two tools for this: judgment and decision (*Beschluss*).

The judgment decides on the content of the claim that has been asserted. The claim is either fully or partially accepted or dismissed. The judgment is a decision on the merits of a claim by the parties.[51] Not all decisions on the merits take the form of a judgment. There are some exceptions: for example, the final decision in the possession interference procedure (*Endbeschluss im Besitzstörungsverfahren*), the conditional order for payment in the order for payment procedure (*bedingter Zahlungsbefehl im Mahnverfahren*) etc.[52]

Procedural or formal issues are usually decided by a decision (*Beschluss*). A decision must also be made for the costs of the proceedings. This decision will be included in the judgment.[53] The typical cases in which the court decides by a decision are the existence of procedural requirements or other decisions that shape or guide the proceedings.[54]

Provisional and protective measures serve to ensure the success of the main proceedings in a special rush procedure. Such measures may be taken before the proceedings concerning the claim are even initiated. The application for a provisional or protective measure leads to a separate fast-track and simplified procedure. Therein, the substantive claim and the allowability of its compulsory safeguarding are examined. The issue of an interim injunction is therefore a summary proceedings for the purpose of obtaining a decision (*summarisches Erkenntnisverfahren*).[55]

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[49] Rechberger and Simotta, supra n. 14, p. 336.

[50] Rechberger and Simotta, supra n. 14, p. 338.

[51] Kodek and Mayr, supra n. 20, Rz 863.

[52] Rechberger and Simotta, supra n. 14, p. 514.

[53] Rechberger and Simotta, supra n. 14, p. 515.

[54] Kodek and Mayr, supra n. 20, Rz 864.

[55] Neumayr and Nunner-Krautgasser, supra n. 10, p. 321.

2.13 How are Judgments drafted when (if) they contain a "decision" on issues other than the merits of the case?

Comment: *Such decisions can, for example, pertain to the modification of a claim, withdrawal of a claim, joinder of parties, joinder of proceedings etc.*

Answer: A modification of a claim is any change in the subject matter of the dispute (§ 235 ZPO). It may have the form of a written pleading or oral argument at the hearing. The modification of a claim is allowed until the end of the oral proceedings at first instance. The claimant can modify the claim at any time until the dispute is pending without further conditions. After the dispute has become pending, the claimant requires the consent of the defendant. The court can also allow the modification of the claim against the will of the defendant by a decision (*Beschluss*). This decision (no matter what the amount in dispute is) is appealable.[56]

When withdrawing the application, the claimant makes a declaration during the proceedings that he wishes to withdraw the decision on the application for legal protection submitted in the action. There is a difference between the withdrawal of the claim without waiver of claims (*ohne Anspruchsverzicht*) and with waiver of claims (*unter Anspruchsverzicht*). The latter makes it impossible to bring a new action for the same claim (obstacle to proceedings = *Prozesshindernis*). The withdrawal of a claim leads to the end of the process. For reasons of legal certainty, the court makes a declaratory decision on this.[57] The withdrawal without waiver of claims is possible in regional court proceedings (*Verfahren vor dem Landesgericht*) without the consent of the defendant until the defence (*Klagebeantwortung*) is delivered; in district court proceedings (*Verfahren vor dem Bezirksgericht*) until the beginning of the oral hearing (§ 237 (1) ZPO). After that a withdrawal without waiver of claims is only possible with the consent of the defendant. A withdrawal with waiver of claims is allowed without the consent of the defendant during the entire procedure (including the appeal procedure).[58]

2.13.1 How does this effect the operative part and/or the reasoning?

Answer: This does not affect the operative part or the reasoning 24ft he action originally brought, because – as already mentioned above – the court deals with the withdrawal and/or amendment of the claim in a separate decision (*Beschluss*).

2.13.2 Which decisions (2.12) can be incorporated into the judgment?

Answer: The decision on the claim for costs is, by its nature, a decision (*Beschluss*) which must be included in the judgment dealing with the case in its entirety (§ 52 (1) ZPO). The decision on costs by itself can only be appealed by appeal (*Rekurs*). If the decision on the merits is

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[56] Kodek and Mayr, supra n. 20, Rz 544 ff.

[57] Kodek and Mayr, supra n. 20, Rz 553 ff.

[58] Kodek and Mayr, supra n. 20, Rz 557 f.

appealed against, the appeal (*Berufung*) on costs constitutes one point on appeal (appeal on costs).

2.13.3 Can provisional and protective measures form part of a Judgment or can they only be issued separately?

Answer: For the answer to this question compare question 2.11.

Part 3: Special aspects regarding the operative part

3.1 What does the operative part communicate?

Answer: The operative part is the core of each judgment and contains the decision on the application (*Klagebegehren*) and all other substantive issues to be settled in judgment (see also § 404 (1) ZPO). As already mentioned, the operative part of the judgment includes, inter alia, decisions on the substantive issues. Specifically, these are: the decision on the application, the decision on the set-off defence (*Aufrechnungseinrede*), if the principal claim is at least partially valid, the decision on applications for interim measures according to §§ 236, 259 ZPO, the statement of fault (if this is provided for in the marriage proceedings). The operative part of the judgment shall also include the following decisions (*Beschlüsse*): the decision on the costs of the proceedings (see § 52 (1) ZPO), the rejection and dismission of process claims (*Prozesseinreden*) and the claim of the irregular formation of the court, if the main proceeding is continued (see § 261 (1) ZPO), any other decisions reserved to the judgment or taken jointly with it (for example the approval of a change of claim). For the purpose of determining the exact scope of the res judicata, the judgment dismission the application must clearly state the application which is dismissed. A completely permissive judgment corresponds, with regard to its content, entirely to the application of the claimant.[59]

In rendering its judgement, the court shall be bound by the submissions of the parties (see § 405 ZPO). Therefore, no plus or aliud, but a minus may be awarded. The court my not award anything to a party that is not applied. According to the jurisprudence, an infringement of this provision constitutes only a procedural fault (*Mangelhaftigkeit des Verfahrens*); the dominating theory, on the other hand, assumes nullity (*Nichtigkeit*).[60]

A performance judgment must always include a performance period in its operative part (see § 409 ZPO). Unless the law provides different, this is 14 days.[61]

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[59] Rechberger and Simotta, supra n. 14, p. 516; M. Bydlinski, supra n. 24, Rz 5 f; Rechberger and Klicka, supra n. 44, Rz 3; Kodek and Mayr, supra n. 20, Rz 897 f.

[60] Kodek and Mayr, supra n. 20, Rz 899; Rechberger and Simotta, supra n. 14, p. 517; M. Bydlinski, supra n. 24, Rz 5 f; Rechberger and Klicka, supra n. 44, Rz 3.

[61] Kodek and Mayr, supra n. 20, Rz 900; Rechberger and Simotta, supra n. 14, p. 518; M. Bydlinski, supra n. 24, Rz 5 f; Rechberger and Klicka, supra n. 44, Rz 3.

3.1.1 Must the operative part contain a threat of enforcement?

Comment: *A threat of enforcement is to be understood as a legal instruction referring to the possibility of enforcement proceedings if the debtor does not voluntarily perform the obligations imposed by the judgment.*

Answer: An Austrian judgment usually contains the following phrase: "The defendant is obliged to pay the claimant XX Euros and 4% interest since XX within 14 days, **otherwise it will be enforced**". If the defendant does not pay voluntarily within the performance period, the debtor creditor (*betreibende Gläubiger*) can file a request for enforcement (*Exekutionsantrag*) and thereby initiates the execution proceedings.

3.1.2 Must the operative part include declaratory relief if the Claimant sought payment (e.g. if the debtor's obligation to perform is found to be due and the Claimant requested performance)?

Answer: Performance claims (*Leistungsklagen*) are directed, among other things, at the conviction of the defendant to a positive action (for example to pay a sum of money).[62] Each performance claim contains two elements:

- the request for a declaration that the claimant is justified against the defendant (*implizites Feststellungsbegehren*)
- the request that the defendant is ordered to provide a specific service (*explizites Leistungsbegehren*)[63]

Only the order for performance is expressed in the statement of claim; the implicit statement that the claimant is entitled to the claim in dispute against the defendant also comes into force. The order for performance contained in a performance judgment may be enforced.[64]

3.1.3 Is the specification of the debtor's obligation finalized by the court or is it left to later procedures/authorities?

Answer: In its judgment, the court decides on the application (*Klagebegehren*) and all other substantive motions on which a judgment is given (for example, the decision on the set-off defence (*Aufrechnungseinrede*), if the principal claim is justified).[65]

The claimant later fills in the application for enforcement (*Exekutionsantrag*) on the basis of the present title. The court of enforcement follows this (application) when enforcing the debtor's claim.

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[62] Kodek and Mayr, supra n. 20, Rz 501.

[63] Kodek and Mayr, supra n. 20, Rz 502.

[64] Kodek and Mayr, supra n. 20, Rz 503.

[65] Rechberger and Simotta, supra n. 14, p. 516 f; see § 404 (1) ZPO.

3.1.4 How is the operative part drafted in the case of a prohibitory injunction (German: "Unterlassungsklage")?

Answer: Practical examples for the operative part of a prohibitory injunction:

- The defendant is guilty to use a particular clause in the general terms and conditions (*Allgemeine Geschäftsbedingungen*) in commercial transactions with consumers.
- The defendant is guilty of using a certain (misleading) company name.
- The defendant is guilty of failing to play the piano between 10.00 p.m. and 08.00 a.m.[66]

3.1.5 If applicable, how is the operative part drafted in an interim judgment (Zwischenurteil)?

Comment: *Should a claim be in dispute both on its merits and as regards its amount, the court may take a (preliminary) decision on the merits. An interim judgement in the context of the above question should therefore be understood as a judgement on the merits (basis, grounds, liability) of the claim (e.g. a court issues a judgement regarding the liability of a defendant for tort, but leaves the amount of the damages to be decided later in a "final" judgement).*

Answer: The interim judgment decides on a point of dispute, whose clarification is a precondition for the decision on the merits. In Austria there are different types of interim judgments:

- **The interim judgment on the merits of the claim** (*Grundurteil*) according to § 393 (1) ZPO)

This will be settled if in a legal dispute the claim is contested in terms of its merits and amount and the hearing is at first only ready for a decision regarding the merits of the claim.[67] It has no material legal effect (*materielle Rechtskraftwirkung*) extending over and above the specific legal dispute. Therefore, it is not a declaratory judgment according to § 228 ZPO.[68] Regarding its opposition: it is the same as with the final judgment. The appeal of an interim judgment on the merits of the claim suspends the further hearing of the action until the interim judgment becomes final (*rechtskräftig*).[69]

- **The interim judgment on an application for interim relief** (*Grundlagenurteil*) according to § 393 (3) ZPO

The interim judgment on an application for interim relief will be settled when the hearing of an interim application for a declaratory judgment (*Zwischenfeststellungsantrag*) according to §§ 236, 259 ZPO is ready for decision.[70] This decision represents a real declaratory judgment

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[66] Kodek and Mayr, supra n. 20, Rz 506.

[67] Kodek and Mayr, supra n. 20, p. Rz 887.

[68] Rechberger and Simotta, supra n. 14, p. 526; H. Fasching, 'Das Zwischenurteil über den Grund des Anspruchs (§ 393 Abs 1 ZPO)', Österreichische Juristen-Zeitung (1958) p. 264 at p. 266 - 267; Kodek and Mayr, supra n. 20, Rz 888; **differing view** Rechberger and Simotta, supra n. 14, p. 527.

[69] Rechberger and Simotta, supra n. 14, p. 526 f; Kodek and Mayr, supra n. 20, Rz 890.

[70] Rechberger and Simotta, supra n. 14, p. 527; Kodek and Mayr, supra n. 20, Rz 891.

(*echtes Fesstellungsurteil*) and has a legal effect (*Bindungswirkung*) that goes beyond the specific legal dispute.[71] It can be appealed against independently[72] and the appeal does not in principle have an inhibitory effect.[73]

- **The interim judgment on the limitation period** (*Zwischenurteil zur Verjährung*) according to § 393a ZPO

The court may rule on the claim for limitation (*Verjährungseinrede*) with an interim judgment. This is intended to clarify any limitation period at an early stage.[74] The interim judgment on the limitation period can only be given if the claim is not time-barred.[75] If the claim is barred by limitation, the action must be dismissed by judgment (*Klage mit Urteil abweisen*).[76] It is appealable like a final judgment and has binding effect beyond the specific legal dispute.[77]

Practical example on an interim judgment (operative part):

I) The defendant is liable to the claimant under the insurance contract for 50% of the damage from the fire of 30.4.2019. (in other words: the claimant's reason for claiming against the defendant is justified)

II) The decision on costs is reserved for the final judgment (in other words: the claim's amount is settled in the final judgment)

3.1.6 If applicable, how is the operative part drafted in an interlocutory judgment?

Comment: *Within the context of the question, an interlocutory judgement refers to a temporary decision regulating the matter of the dispute. Take for example the French "Ordonnance de référé« (=einstweilige Maßnahme/eV), which is a provisional decision made on the application of one party, the other one being there or having been called, in cases where the power to order immediately the necessary measures is vested to a judge who is not called to decide the whole case.*

Answer: Answered above under question 3.1.5.

3.1.7 How is the operative part drafted in the case of alternative obligations, i.e. where the debtor may decide among several modes of fulfilling a claim?

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[71] A. Deixler-Hübner, Comments on § 393 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/2^3 (Manz 2018) § 393 ZPO Rz 26.

[72] See § 393 (3) ZPO.

[73] Rechberger and Simotta, supra n. 14, p. 527 f.

[74] Kodek and Mayr, supra n. 20, Rz 889.

[75] B. Reisenhofer, 'Neuerungen im Zivilverfahrensrecht durch das Budgetbegleitgesetz 2011', Juristische Ausbildung und Praxisvorbereitung (2011/2012), H 6, p. 41 at p. 44; B. Köck, `Das Zwischenurteil zur Verjährung', Zivilrecht aktuell (2011), H 9, p. 167 at p. 167; RIS-Justiz RS0127852 [T3].

[76] Explanatory notes to the 2011 Budget Accompanying Act (*Erläuterungen zum Budgetbegleitgesetz 2011*), p. 86; RIS-Justiz RS0127852 [T3].

[77] Rechberger and Simotta, supra n. 14, p. 528 f.

Answer: Practical example for a real alternative obligation:

The defendant is liable to either repair the roof of the house in 8010 Graz, X-Street 1 or to reduce the rent for the apartment in 8010 Graz, X-Street 1 Top 4 to 300 Euros.

The alternative obligation (alternative claim) is a claim for the debtor to be judged on one of several performances ("either" – "or"). A real alternative obligation only exists when the debtor has the right to choose.[78] The alternative accumulation of actions (*alternative Klagenhäufung*) (the claimant allows the judge to decide which claim should be decided on) and the false alternative obligation (*unechtes Alternativbegehren*) (it is up to the judge to decide which of several benefits offered by the claimant to choose from) are inadmissible. Such claims are not specific enough.[79]

3.1.8 How is the operative part drafted when a claim is wholly or partially dismissed (on substantive grounds)?

Comment: *For the purposes of the question, a "dismissal" refers to the situation where a claim appears to be without justification, either in and of itself or as the result of an objection lodged by the defendant (German: Klageabweisung).*

Answer: If the claimant's application is not justified in substance, the judge must dismiss it with a judgment (*mit Urteil abweisen*). It belongs to the legal assessment of the judge to determine whether the claim is justified in substance or not.

According to that, a "normal" judgement is issued, that contains the following passage in the operative part: "The claimant's application (repetition of the exact wording of the application) is dismissed".

3.1.9 How is the operative part drafted when a claim is wholly or partially rejected (on formal/procedural grounds)?

Comment*: For the purposes of the question, a "rejection" refers to the situation where the court finds it cannot entertain a claim due to formal/procedural reasons (or lack thereof), e.g. if it lacks jurisdiction or if the prescribed time for filing the action has elapsed.*

Answer: Formal questions are dealt with in the form of a decision (*Beschluss*). If the court considers that it cannot entertain a claim due to formal or procedural reasons (for example if it lacks jurisdiction or if the prescribed time for filing the action has already been elapsed), the action must be rejected by decision (*mit Beschluss zurückweisen*).

According to that, a "normal" decision is issued, that contains the following passage in the operative part: "The claimant's application (repetition of the exact wording of the application) is rejected".

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[78] Rechberger and Simotta, supra n. 14, p. 347.

[79] Rechberger and Simotta, supra n. 14, p. 319.

3.1.10 How is the operative part drafted if the debtor invokes set-off? Provide an example.

Comment: *In certain jurisdiction, set-off (compensation invoked in proceedings) requires the operative part to specify how the claim and counter-claim are extinguished and to what extent. This may, for instance, be done by specifying the amount of both claims and declaring the amount to be compensated.*

Answer: The offsetting defence (*Aufrechnungseinrede*) is a conditional defence (*Eventualeinrede*). A decision on it is only possible if at least part of the main claim is justified.[80] A decision on the compensation claim can only be made up to the amount in which the main claim rightly exists (see § 411 (1) last sentence ZPO).

The following decisions can be taken on the offsetting defence:

- If the claim is not fully justified, the action will be dismissed (*abweisen*) by judgment. The existence of the counterclaim (*Gegenforderung*) is not checked at all (contingent nature of the set-off defence). The counterclaim is therefore not mentioned at all in the operative part of the judgment.[81]
- If the existence of the principal claim is disputed and the existence of the counterclaim is undisputed, the existence or non-existence of the principal claim must first be decided. Under no circumstances may the action be dismissed immediately (only because of the existence of the counterclaim).[82]
- If the claim and the counterclaim are both ready for decision at the same time, a final judgment must be rendered.[83]

In principle, a three-part judgment must be drafted:

1) The sued claim exists with … Euro rightly (*Die eingeklagte Forderung besteht mit ... Euro zu Recht*);
2) The defendant's counterclaim exists with … Euro rightly (*Die Gegenforderung des Beklagten besteht mit ... Euro zu Recht*);
3) [if the counterclaim is less than the principal claim]: The defendant is therefore obliged to pay the claimant … Euro. (*Der Beklagte ist daher schuldig, dem Kläger ... Euro zu bezahlen*)

   [if the counterclaim is equal to or higher than the principal claim]: The action is therefore dismissed (*Das Klagebegehren wird daher abgewiesen*)[84]

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[80] Rechberger and Simotta, supra n. 14, p. 382 f; Kodek and Mayr, supra n. 20, Rz 631.

[81] Rechberger and Simotta, supra n. 14, p. 383.

[82] Rechberger and Simotta, supra n. 14, p. Rz 383.

[83] Rechberger and Simotta, supra n. 14, p. 383 f.

[84] Rechberger and Simotta, supra n. 14, p. 383 f.

If the claim is ready for decision earlier than the counterclaim, an interlocutory judgment can be given on the principal claim (see § 391 Abs 3 ZPO). This interlocutory judgment may look like this:

1) The defendant is liable to pay the claimant … Euros. (*Der Beklagte ist schuldig, dem Kläger ... Euro zu bezahlen.*)
2) The counterclaim will be decided by final judgment. (*Über die Gegenforderung wird mit Endurteil entschieden.*)
3) The decision on costs is reserved for the final judgment. (*Die Kostenentscheidung bleibt dem Endurteil vorbehalten.*)[85]

The interlocutory judgment on the principal claim is a judgment on the merit which is independently appealable and enforceable (see § 391 Abs 3 ZPO).

The final judgment which follows the interlocutory judgment does not cancel the latter, but, if the counterclaim exists, it states that the principal claim has been repaid or reduced by offsetting.[86]

If the counterclaim exists, the final judgment is expressed as follows:

1) The counterclaim from Date-Month-Year of … Euro exists up to the amount of the claim or with an amount of … Euro rightly. (*Die Gegenforderung von ... Euro besteht bis zur Höhe der Klagsforderung bzw mit einem Betrag von ... Euro zu Recht.*)
2) The claim of … Euro awarded by interlocutory judgment is therefore extinguished by offsetting. (*Die mit Teilurteil zuerkannte Klagsforderung von ... Euro ist daher durch Aufrechnung erloschen.*)[87]

3.2 Are there specifications pertaining to the structure and substance of the operative part of the Judgment in your national legal system – set out by law or court rules or developed in court practice? If so, please provide an English translation of the relevant provisions.

Answer: The operative part of the judgment is the core of the judgment. It contains the decision on the application and the other substantive issues to be resolved in the form of a judgment. § 405 of the ZPO stipulates that the judgment is limited in content and wording to the action request in the claim.[88] The addition which frequently occurs in practice, "... in the event of any other execution..." is not a condition for the enforceability of the judgment.[89] In addition to this, in case of an affirmative performance judgement, a performance period is required which is

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[85] Rechberger and Simotta, supra n. 14, p. 384 f.

[86] Rechberger and Simotta, supra n. 14, p. 386.

[87] Rechberger and Simotta, supra n. 14, p. 386.

[88] M. Bydlinski, supra n. 24, Rz 5.

[89] OGH 13.1.1953 4 Ob 119/52; as well C. Brenn, Comments on § 417 *Zivilprozessordnung* (Code of Civil Procedure) in J. Höllwerth and H. Ziehensack (eds.), ZPO Taschenkommentar (LexisNexis 2019) § 417 ZPO Rz 7.

normally 14 days (§ 409 ZPO). The judge is obliged to set this, otherwise the judgement is immediately enforceable.[90]

As a result, the following points must be included in the judgment: [91]

- The decision on the petition (the substantive motion);
- the decision on the plea of set-off (provided that the claim is at least partially justified);
- the decision on an interim application for a declaratory judgment;
- the statement of fault in an action for divorce, annulment or annulment of marriage;
- the decision on an application for compensation for willful litigation;[92]
- the granting of authority to publish the judgment;
- a decision on the cost of proceedings;
- other decrees which are taken together with the judgment.

For further details see the answer under question 2.1.

3.3 Does the operative part contain elements from or references to the reasoning of the judgment (grounds for the decision/legal assessment)?

Answer: No. There is no element at the operative part regarding to the reasoning of the judgment in Austria. A judgment in full agreement corresponds fully to the content of the request for an appeal (*Klagebegehren*). In the case of a negative judgment, the legal action that is rejected must be specified precisely (so that the extent of the legal force can be determined exactly).

3.4 Elaborate on the wording used in your national legal system, mandating the debtor to perform.

Comment: *For instance, in Slovenia, the debtor is not specifically "ordered" to perform by the wording of the operative part, since the operative part only finds the debtor "liable to pay" a certain amount. However, in practice, it is universally understood that this "liability" is to be understood as a duty to perform and not merely as declaratory relief. Would you find such wording problematic?*

Answer: For an example in Austria we use the following wording, mandating the debtor to perform:

The defendant is liable to pay the claimant the sum of 7.000, - Euros plus 4% interest from January, 1st 2020, and to cover the costs of the proceedings, fixed at 1.400,- Euros. All of this within 14 days, otherwise the defendant will be executed.

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[90] R. Fucik, Comments on § 409 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/2[3] (Manz 2018) § 409 ZPO Rz 3.

[91] C. Brenn, supra n. 89, Rz 8; similar the list at Kodek and Mayr, supra n. 20, Rz 316.

[92] OGH 19.2.2016 8 Ob 2/16a.

In general, everybody in practise knows how to deal with this wording and there are no practical problems referring the word "liable". In Austria the expression „is liable to pay/perform" means: "*(...)* i*st schuldig (...) zu leisten*".

3.5 If applicable, explain how the operative part is drafted in cases of reciprocal relationships where the Claimant's (counter-)performance is prescribed as a condition for the debtor's performance? How specifically is this condition set out?

Answer: See the answer under question 3.1.10.

3.6 How are the interest rates specified and phrased in a judgment ordering payment?

Comment: *Please provide a typical wording and the legal basis – not concerning the merits but concerning the requirement in procedural law as to how to draft the operative part*.

Answer: **Typical wording of an operative part (especially regarding the interest rate):** The defendant is liable to pay the claimant 100.000 Euros within 14 days, plus 4 % interest since 28.7.2010, otherwise the claim will be executed. (*Die beklagte Partei ist schuldig, der klagenden Partei binnen 14 Tagen bei sonstiger Exekution 100.000 Euro samt 4% Zinsen seit 28.7.2010 zu bezahlen.*)

The Austrian Code of Civil Procedure orders in its § 54a ZPO that the party, that is liable to pay costs and does not pay the amount awarded by the court before the date on which the judgment becomes enforceable, has to pay default interest at the legal rate from the date of the judgment on costs (see § 54a (1) ZPO).[93] What is meant by "interest at the legal rate" is defined in § 1000 *Allgemeines Bürgerliches Gesetzbuch* (General Civil Code of Austria; henceforth: ABGB). This is therefore 4% per year (see § 1000 (1) ABGB).[94]

3.7 Please demonstrate how the operative part differs when claims to impose different obligations on the debtor are joined (e.g. performance, prohibitory injunction etc.) or when the action is of a different relief sought (e.g. action for performance, action for declaratory relief, action requesting modification or cancellation of a legal relationship).

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[93] M. Bydlinski, Comments on § 54a *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd II/1[3] (Manz 2015) § 54a ZPO Rz 2.

[94] M. Ramharter, Comments on § 1000 *Allgemeines Bürgerliches Gesetzbuch* (General Civil Law Code) in M. Schwimann and M. Neumayr (eds.), ABGB Taschenkommentar[4] (LexisNexis 2017) § 1000 ABGB Rz 5.

Comment: *Please elaborate on the second part of the question only if such a joinder of claims is admissible. Please accompany your answer by providing typical (abstracted) examples of operative parts in situations where the debtor is ordered to pay an amount of money; when he is ordered to perform an action; when a prohibitory injunction is issued against him; when he is ordered to hand over moveable property. Additionally, formulate abstracted examples of declaratory relief (including negative declaratory relief) and actions for the creation, modification or cancellation of legal relationships).*

Answer: Let us try to answer this question with a **simple example**:

A farmer is the owner of a large field. His neighbour drives (unauthorized) across this field nearly daily by his car to feed his animals. This causes the farmer considerable damage to his field every year. For this reason, the farmer brings an action against his neighbour for a prohibitory injunction (*Unterlassung*) and compensation for the damage caused. The court agrees with the farmer and judges the neighbour as follows:

1) The defendant is liable to pay the claimant 40.000 Euros within 14 days, otherwise executed, plus 4% interest since 7.3.2019, and to pay the costs of the proceedings, determined at 10.000 Euros.
2) The defendant is liable to the claimant to stop driving on the property (property number, location etc) from now on (otherwise executed) and in the future.

Example of an action (request for an action = *Klagebegehren*) for a **declaratory relief**:

1) It is determined (festgestellt) with the effect between the plaintiff and the defendant that the legal relationship/right exists/does not exist.
2) The defendant is liable to pay the claimant the costs of the proceedings according to § 19a RAO to the attention of the claimant's representative with 14 days, otherwise the claim will be executed.

A perfect example for **an action for the creation, modification or cancellation of a legal relationship** (*Rechtsgestaltungsklage*) is the divorce petition (*Scheidungsklage*):[95]

1) The marriage contracted between the claimant and the defendant on (date) in (place) is divorced with the effect that it is annulled with the force of the judgment. (The fault concerns the defendant party.)
2) The defendant is liable to pay the claimant the costs of the proceedings according to § 19a RAO to the attention of the claimant's representative with 14 days, otherwise the claim will be executed.

3.8 May the operative part refer to an attachment/index (for example, a list of "tested claims" in insolvency proceedings)?

[95] Rechberger and Simotta, supra n. 14, p. 333.

Comment: *Please explain the "technique" of drafting such operative parts and how attachments are actually attached/connected to the judgment? Which attachments can be referred to in the operative part?*

Answer: The request for an action must be specific (see § 226 (1) ZPO) in order to guarantee the enforceability of the performance order and the limits of the substantive force and effect of the judgment. This requirement is fulfilled, if (considering the use of language and local customs and in accordance with the rules of the profession it is possible to determine what is desired. In the case of a payment claim, the amount of money claimed must be indicated in numbers.[96] If the claim is too unspecified, the judge can postpone (*zurückstellen*) the claim for improvement. If it remains too unspecific, the action must be dismissed by decree (*mit Beschluss zurückweisen*).[97]

The claimant can make the content (of the action) of attached documents (e.g. building plans, site plans, photographs, etc.) an "**integrative part**" [98] of the request for an action. Example: The defendant is liable to give the claimant consent to the building measures according to the submitted plan of (date), drawn up by (name), enclosure (number).[99]

3.9 What are the legal ramifications, if the operative part is incomplete, undetermined, incomprehensible or inconsistent?

Comment: *Explain whether this presents a ground for appeal or other legal remedy. Explain how this affects enforcement proceedings.*

Answer: The operative part of a judgment contains the decision on the action and the other substantive motions to be settled in form of a judgment. It is (in accordance with § 405 ZPO) determined and limited by the wording and the content of the claim.[100]

As already mentioned in question 3.8 the request for an action must be specific (see § 226 (1) ZPO). If the request for an action is too vague, the court may not grant it.[101] However, it does not go further than the wording of § 405 ZPO if the court clarifies an unspecified claim (Klagebegehren) in such a way that it includes in its operative part specifications which, although expressly not contained in the claim, can be perfectly deduced from the underlying factual argument. If, therefore, the vagueness of the request is merely an error of wording, the

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[96] Rechberger and Simotta, supra n. 14, p. 317.

[97] Rechberger and Simotta, supra n. 14, p. 319.

[98] OGH 1.2.1977 5 Ob 505/77; 22.3.1983 2 Ob 582/82; RIS-Justiz RS0000489, RS0037420.

[99] A. Geroldinger, Comments on § 226 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/1³ (Manz 2017) § 226 ZPO Rz 89; OGH 28.5.1999 6 Ob 104/99h.

[100] M. Bydlinski, supra n. 24, Rz 5.

[101] R. Fucik, Comments on § 405 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/2³ (Manz 2018) § 405 ZPO Rz 6.

court may complete the operative part with the information necessary to establish its accuracy.[102]

Moreover, the court may give a clearer and more explicit wording to the operative part, even if it departs from the wording of the request.[103] The court may not exceed the limits of the request as defined by the parties, in particular it may not grant an *aliud* or base its decision on facts which were not provided in the previous proceedings (it may not award the parties anything which has not been applied for).[104] However, the court may grant a quantitative reduction of the requested legal consequence (for example, instead of the desired 6.000,- Euros, only 3.000,- Euros are awarded).[105]

§ 405 ZPO does not specify the legal consequences on an offence against it. Austrian academics have different views on this: On the one hand, it is argued that there is a ground for nullity (which is not mentioned in § 477 ZPO) or a failure to respect the right to be heard. On the other hand, there are those who believe that a violation of § 405 ZPO is another procedural violation. On the other hand, an incorrect legal assessment is recognised in this.[106] For many years, jurisdiction has been agreed that a violation of § 405 ZPO is a procedural violation which cannot be perceived ex officio.[107] It should therefore be raised on appeal. This should even apply to a complaint that has not been raised at all.[108]

3.10 May the operative part deviate from the application as set out by the claimant? If so, to what extent? In other words, how much discretion does the court enjoy when formulating the operative part?

Answer: The answer to this question has already been provided in 3.9.

Part 4: Special aspects regarding the reasoning

4.1 If applicable, how does the law or court rules or legal practice govern the structure and content of the reasoning of the judgment?

Answer: The reasons for the decision form the largest part of the judgment.[109] The reasoning must contain the following parts according to § 417 (2) ZPO:

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[102] Fucik, supra n. 101, Rz 7.

[103] OGH 21.10.1998 9 Ob 277/98w; 30.9.1997 5 Ob 2403/96k and many more.

[104] Fucik, supra n. 101, Rz 17.

[105] Rechberger and Simotta, supra n. 14, p. 517.

[106] Fucik, supra n. 101, Rz 59.

[107] RIS-Justiz RS0041240; especially OGH 18.10.2016 3 Ob 195/16x; 22.6.2012 1 Ob 80/12i; 9.11.2011 7 Ob 173/11h.

[108] Fucik, supra n. 101, Rz 63.

[109] M. Bydlinski, supra n. 24, Rz 7.

- The arguments and requests of the party
- Determinations regarding the existence of procedural requirements and if applicable the handling of procedural complaints
- The evidence provided and an explanation of the requests for evidence that were rejected as being out of time (§ 417 (3) ZPO)
- The findings of facts: first, the undisputed facts and then the facts accepted by the court as facts in the present case
- The assessment of evidence (§ 272 (3) ZPO): here it must be explained why the court accepted the facts it had established as proven.
- The legal assessment: it contains the subordination of the established facts under the legal parameters and the examination of the question whether the requested legal consequence can be concluded from the established facts.
- The reason for the decision on costs[110]

4.1.1 Is there a specific order to be followed when drafting the reasoning?

Comment: *The reasoning usually contains both factual and legal grounds for the decision. Should these aspects follow a predetermined order or may they intertwine?*

Answer: The findings of fact, the comments on the assessment of evidence and the presentation of the legal assessment must be kept strictly separate.[111] Mixing these parts of the reasoning makes it difficult not only to appeal but also to review the judicial decision.[112] The Austrian procedural law does not provide a specific order in which the court must proceed when giving reasons for its decision.

Rechberger and *Klicka* suggest the following order for the reasons for the decision:

At the very beginning, the essential arguments of the party must be submitted together with the party's submissions, i.e. above all the claimant's application and its reasons and the defendant's counterclaim and its objections. It is then immediately necessary to set out all the undisputed facts arising from the claimant's application. Not specifically mentioned in the law, but possibly necessary, are then findings on the existence of procedural requirements or on the refutation of procedural objections, that are decided in the judgment. This is followed by an explanation of the fact-finding. All evidence taken by the court shall be indicated. Next comes the actual finding of facts, in other words the statement of those facts on which the court based its decision and, finally, the reasons for its assessment of the evidence. The findings of fact must be strictly separated from the assessment of evidence! Another important part of the reasons for the decision is the legal assessment, which includes the legal norms applied, the subsumption and its result. Finally, the decision on costs must be justified.[113]

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[110] Rechberger and Simotta, supra n. 14, p. 518; Kodek and Mayr, supra n. 20, Rz 901.

[111] OGH 3.4.1974 1 Ob 43/74.

[112] M. Bydlinski, supra n. 24, Rz 12.

[113] W. Rechberger and T. Klicka, supra n. 44, Rz 4.

4.1.2 How lengthy/detailed is the reasoning?

Answer: The length or how detailed the reasoning of a decision could be is a very specific question that can only be answered in individual cases. The length of every single reasoning depends on the specific case.

4.1.3 Do you find the reasoning to be too detailed?

Answer: The Austrian Civil Procedure law sets a high standard for the explanation of the reasoning of a judgment. This is very welcome with regard to enforceability but also legal certainty. How detailed the reasons for the decision actually are in each case depends again on the case to be judged. A general statement to this point can therefore not be made.

4.1.4 Are the parties' statements (adequately) summarised in the grounds for decision?

Answer: As mentioned before, the reasoning must contain the parties' arguments (and the requests of the parties) in a brief and compact way, and only those arguments which were upheld until the end of the hearing. The presentation of the party's request and arguments relevant at the time of the decision, as well as the exact wording of the findings of fact, is necessary for the definition of the res judicata effect of the judgment for the future.[114]

4.1.5 Is it possible to distinguish between the parties' statements and the court's assessment (the problem of an unclear distinction between the parties' statements and the court's findings and interpretation)?

Answer: In practice there is no problem to distinguish between the parties' statements and the court's assessments. The reasoning shall clearly indicate the facts on which the court bases its decision and the arguments put forward by the party. In addition, the court expresses the parties' statements in the conditional tense, so that the grammar already shows what comes from the party and what comes from the court. Accordingly, the party's arguments are strictly separated from the court's assessments. This is also guaranteed by the fact that the assessments are usually given a separate heading in the judgment.

4.2 In the reasoning, do the courts address procedural prerequisites and applications made after the filing of the claim?

Comment: *Prerequisites are to be understood as all criteria necessary to initiate the proceedings correctly under national law, e.g. jurisdiction, standing, party capacity etc.*

Answer: As already mentioned in question 4.1 and 4.1.4 are all parties' arguments included in the reasoning of a judgment. The reasoning includes all arguments and applications that were held up until the end of the hearing.[115] Austrian courts do address all of the parties' arguments

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[114] M. Bydlinski, supra n. 24, Rz 7.

[115] M. Bydlinski, supra n. 24, Rz 7.

and applications (not only procedural prerequisites and procedural applications) in the reasoning as long as they are upheld until the end of the hearing. It is not relevant whether these (prerequisites) were already made when the action was filed or afterwards, as long as they are still valid until the end of the hearing.

4.3 Are independent procedural rulings properly re-addressed in the judgment?

Answer: Decisions (*Beschlüsse*) that can be appealed against independently, are not necessarily included in the judgment. However, decisions which are taken together with the judgment must be included in the operative part and discussed in the reasons for the decision.

4.4 What legal effects (if any) are attributable to the reasoning, e.g. is the reasoning encompassed within the effects of the finality of the Judgment?

Answer: As a basic rule it can be said that only the operative part of the judgment becomes final.[116] However, the operative part alone is rarely sufficient to individualise the claim as provided in § 411 ZPO. The substantive res judicata therefore extends to those reasonings which are necessary for the interpretation and individualisation of the operative part (**relative res judicata effect of the reasoning**).[117] To be more specific, only the facts set out in the reasoning, the facts relied on in support of the claim and established as such by the court and the legal conclusion of the subsumption may be used for interpretation.[118] This is of particular importance in dismission the action.[119] The legally binding negation of the claim is in principle limited only to the reasons used by the court to dismiss the claim, but does not prevent the same claim from being pursued on the basis of other facts which create rights.[120]

<u>Part 5: Effects of judgments – the objective dimension of res judicata</u>

5.1 A final judgment will, in most Member States, obtain res judicata effect.121 **With regard to this point, please answer the following questions:**

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[116] Kodek and Mayr, supra n. 20, Rz 925.

[117] Rechberger and Simotta, supra n. 14, p. 547 f.

[118] T. Klicka, Comments on § 411 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/2[3] (Manz 2018) § 411 ZPO Rz 74.

[119] Rechberger and Simotta, supra n. 14, p. 547 f.

[120] Klicka, supra n. 118, Rz 74; OGH 24.4.2012 5 Ob 19/12y; 6.5.2008 1 Ob 219/07y.

[121] If your national legal order does not operate with the principle of res judicata, then please thoroughly describe the alternative doctrine governing finality of judgements. Please answer the questions in this Part of the questionnaire by mutatis mutandis applying your respective doctrine. If this is not possible, please approximate the answers as far as possible or provide additional explanations.

5.1.1 What are the effects associated with res judicata in your national legal order?

Answer: In Austria you must differ between the substantive legal force (*materielle Rechtskraft*) and the formal legal force (*formelle Rechtskraft*).

The formal legal force is not an effect of a judgment, but it is a necessary precondition for the substantive legal force and for the creative effect of the judgment. The formal legal force is not necessary for the enforceability.[122] It means the non-appealability of a court decision.[123]

The substantive legal force makes a decision relevant. That means that a new decision on the same case is avoided. A substantive final decision determines authoritatively and finally what is right.[124]

The "unique effect" (*Einmaligkeitswirkung*) of res judicata prevents a new decision on the main question already decided. Just like the pendency of a dispute, res judicata does not allow a second trial on the same subject matter. Accordingly, res judicata acts as an obstacle to proceedings and must be exercised ex officio in every situation of the proceedings.[125]

The "binding effect" (*Bindungswirkung*) of res judicata prohibits the judge of the subsequent trial from independently answering the preliminary question that has already been finally decided. Because of the binding effect, the judge in the second trial must base his own decision on the preliminary question that has been finally decided. Any violation of the binding effect also results in the invalidity of the proceedings.[126]

5.1.2 What decisions in your Member State have the capacity to become res judicata?

Answer: All judgments (*Urteile*) of a domestic civil court and thus, for example, judgments by default have substantive legal force. Decisions (*Beschlüsse*) have substantive legal force if they are decisions on the merits. For example, decisions on the destruction of property and court dismissals have the same effect as judgments and therefore have the capacity to become res judicata.[127]

5.1.3 At what moment does a Judgment become res judicata?

Comment: *Pinpoint the time and/or requirements when the judgment meets the criteria for becoming res judicata*.

Answer: The final judgment fixes the basis for the decision which existed at the end of the oral proceedings. It is also referred to as the relevant time of decision. As a rule, this means the end

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[122] Rechberger and Simotta, supra n. 14, p. 541.

[123] Rechberger and Simotta, supra n. 14, p. 540.

[124] Rechberger and Simotta, supra n. 14, p. 542.

[125] Rechberger and Simotta, supra n. 14, p. 543.

[126] Rechberger and Simotta, supra n. 14, p. 544.

[127] Rechberger and Simotta, supra n. 14, p. 544 and p. 570.

of the oral proceedings of the first instance, because in civil proceedings a prohibition of innovation generally applies from this point in time.

If the permission to innovate also includes the possibility of submitting *nova producta*, the relevant time of decision is postponed to the end of the second instance hearing.

Changes in the facts of the case after the end of the oral hearing of the first or second instance are not covered by the substantive legal force.[128]

5.1.3.1 How (if at all) does the exercise of the right to appeal/the exercise of legal remedies affect this moment?

Answer: If the remedy is lodged in due time, the decision will not reach the stage of irreversibility (*formelle Rechtskraft*) for the time being. This is known as the suspensive effect of the remedy. In the case of an appeal (*Berufung*) and ordinary revision, the occurrence of substantive legal force is suspended, whereas the appeal (*Rekurs*) does not, in principle, suspend the enforceability of a decision. An extraordinary appeal in no way defers the enforceability of an appeal judgment.[129]

5.1.3.2 How does the answer to this question differ depending on whether the remedies being invoked are considered "ordinary" or "extraordinary" under your domestic law – is the classification of remedies into one of these two categories dependent on these effects?

Answer: As already mentioned in question 5.1.3.1, the appeal (*Berufung*) and ordinary appeal (*ordentliche Revision*) in due time inhibits the occurrence of substantive legal force and enforceability (see §§ 466 and 505 (3) ZPO).

The appeal (*Rekurs*) does not, in principle, suspend the enforceability of a decision (see § 524 (1) ZPO). However, the court may, on application, order a temporary suspension of the decision (*Beschluss*) if this does not cause excessive harm to the other party and would otherwise defeat the purpose of the appeal (*Rekurses*) (see § 524 (2) ZPO).

The effects of an extraordinary appeal (*außerordentliche Revision*) are different from those of an ordinary appeal. The filing of an extraordinary appeal only inhibits the occurrence of substantive legal force, but not the enforceability (see § 505 (4) ZPO). However, upon request, the court may grant a stay of execution (Aufschiebung der Exekution) (see § 42 (1) no. 2a EO).

5.1.4 Is res judicata restricted to the operative part of the judgment in your legal system or does it extend to the key elements of the reasoning or other parts of the judgment?

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[128] Rechberger and Simotta, supra n. 14, p. 549.

[129] Rechberger and Simotta, supra n. 14, p. 599.

Answer: The substantive legal force refers only to the legal consequences established in the judgment. The following elements of the judgment are therefore not covered by the substantive legal force: the factfinding[130] on which the decision is based and the legal assessment[131].[132]

The operative part of the judgement alone is usually not enough to individualise the claim, which is why the substantive legal force also extends to the grounds of the decision, helping to interpret and individualise the operative part (relative res judicata of the grounds of the decision).[133]

5.1.4.1 Are courts bound by prior rulings on preliminary questions of law?

Comment: *A court in Member State A has to rule whether a seller must deliver goods. In its decision, the court argues that the contract between the seller and the buyer is null and void because of some errors of will. If the seller in Member State B later submits an action for the payment of the purchase price, does a court in Member State B have to dismiss that claim, as it is bound by the reasoning in the judgment of the court in Member State A, which argued that there had been an error of will? Will this be the case in your Member State? In other words, does finality pertain to preliminary questions on points of law? If it does, how are preliminary questions decided upon? Does the decision on preliminary issues form part of the operative part or reasoning? How are they elaborated in the Judgment?*

Answer: A preliminary question is a question whose evaluation is required for the solution of another question (main question).[134] It is therefore a right or legal relationship on whose existence or non-existence the decision on a claim depends in whole or in part (see § 190 (1) ZPO). For example, the question of the existence of a contract is a preliminary question to the question of the obligation to perform under that contract.[135]

In principle, a preliminary question cannot be decided by a judgment. Its assessment will only be included in the reasoning, not in the operative part. It therefore has no legal force and has no binding effect beyond the specific legal dispute. Only if it is made independent by an interim application for a declaration (*Zwischenantrag auf Feststellung*) (see question 2.11) or a counterclaim (*Widerklage*) (see question 2.6), the preliminary question exceptionally can be decided with legal effect.[136] The procedural treatment of the preliminary question depends on

[130] Different view OGH 16.10.2015, 7 Ob 112/15v.

[131] RIS-Justiz RS0041285.

[132] Rechberger and Simotta, supra n. 14, p. 546 f.

[133] Rechberger and Simotta, supra n. 14, p. 547 f; Klicka, supra n. 118, Rz 74; on this subject in detail W. Kralik, Die Vorfrage im Verfahrensrecht (Manz 1953) p. 114 ff.

[134] Rechberger and Simotta, supra n. 14, p. 552.

[135] Rechberger and Simotta, supra n. 14, p. 552; Kodek and Mayr, supra n. 20, Rz 931.

[136] Rechberger and Simotta, supra n. 14, p. 552 f.

whether no decision has yet been made or whether a final decision has already been made on it.[137]

5.1.4.2 Does your legal order operate with the concept of "claim preclusion"?

Comment: *Claim preclusion bars a claim from being brought again on an event, which was the subject of a previous legal cause of action that has already been finally decided between the parties. Consider the following examples.*

First example: A claimant files suit for damages he incurred in a traffic accident, alleging that the defendant acted negligently. The court dismisses the claim. The claimant then files a second action for damages arising from the same traffic accident; however, this time he alleges battery (intentional tort) on defendant's side. Is the second action admissible?

Second example: A claimant files suit for personal injury (non-material damages) he incurred in a traffic accident. The court awards the claimant the relief sought. The claimant then files a second action, wherein he claims material damages from the same traffic accident. Is the second action admissible or should the claimant have requested all damages in the first action?

Answer: In civil proceedings, both the court and the parties must know from the outset about what will be heard and about what will be decided in the end. For this reason, the ZPO requires that every pleading must contain the "designation of the subject matter of the dispute" (*Bezeichnung des Streitgegenstands*) (see § 75 Z 1 ZPO).

Furthermore, the subject matter of the dispute is, among other things, of importance for the substantive legal force. The substantive legal force of the judgment refers only to the subject matter of the dispute (see § 411 ZPO). Where the subject matter of the dispute is identical, a new action for a final judgment must be rejected (*zurückweisen*) on application or ex officio (see §§ 239 (3) Z1 and 230 (3) ZPO).

The dominant opinion in Austria is based on a two-part concept of the subject matter of the dispute. In addition to the plea (claim for legal consequence), the subject matter of the dispute also includes the reason for the claim (basis of facts). The concrete extent of the respective subject matter of the dispute depends on the circumstance of the individual case.[138] This means a very restrictive definition of the subject matter of the dispute, which makes it difficult to change the submission of facts (*Tatsachenvorbringen*) during the proceedings. However, it is made easier to bring a second action with the same claim or to bring a new claim after the first claim has been dismissed with final effect, if only a different set of facts is submitted for this claim.[139]

There are two theories for the question of when another fact exists:

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[137] For more details to that see J. Höllwerth, Comments on § 190 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd II/3[3] (Manz 2015) § 190 ZPO Rz 5 f.

[138] A. Geroldinger, Comments on before § 226 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/1[3] (Manz 2017) before § 226 ZPO Rz 41 ff; Rechberger and Simotta, supra n. 14, p. 231 f.

[139] Rechberger and Simotta, supra n. 14, p. 231 f.

- **The theory of the "law-making" fact** (Theorie des rechtserzeugenden SV):

  This theory bases on whether the same "law-making" facts exist. If newly submitted facts allow or require a different set of facts and therefore a different rule of law must be applied, the subject matter of the dispute is no longer identical.[140]

- **The theory of the fact of life** (Theorie vom Lebenssachverhalt):

  This theory is based on the summary of the facts into a uniform life process. This view leads to a meaningful extension of the rather narrow two-part concept of the subject matter of the dispute and avoids the problem of multiple actions (which exists in conjunction with the theory of the "law-making" fact). Criticism is voiced about the fact, that the concept of "life facts" cannot be clearly defined, which can lead to certain legal instability.[141]

- **The core theory developed by the OGH** (Kerntheorie):

  According to this theory, what matters is whether the relevant facts essentially correspond to the established facts in the preliminary proceedings (*vorherige Instanz*).[142]

5.1.4.3 Are courts bound by the determination of facts in earlier judgements?

Comment: *Consider the following example. A claimant files suit for personal injury (non-material damages) he incurred in a traffic accident. The court finds that the claimant correctly observed traffic rules and drove through a green light. The court awards the claimant the relief sought. The claimant then files a second action, wherein he claims material damages. In these proceedings, however, the court finds that the claimant drove through a red light. Is this a permissible finding or should the court give effect to the findings of the first judgement?*

Answer: This question again concerns the concept of the subject matter of the dispute. See the answer from question 5.1.4.2.

5.2 If part of a civil claim is being claimed in civil proceedings, how does this affect the remainder of the claim, taking into account res judicata effects?

Let us turn this question into an example: A has a (civil) claim of EUR 1,000 resulting from a purchase contract. In court, however, he only asserts a claim of 600 Euro. Can he sue for the remaining 400 euros (out of the same contract) in a new lawsuit?

This question is not even rudimentarily discussed in any textbook or commentary. In this case, the subjects of dispute are identical. The judge must therefore dismiss the second claim as inadmissible. The uniqueness of the substantive legal force („*ne bis in idem*") prevents a new

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[140] Rechberger and Simotta, supra n. 14, p. 232 f; Geroldinger, supra n. 138, Rz 51.

[141] Rechberger and Simotta, supra n. 14, p. 233 f; Geroldinger, supra n. 138, Rz 52.

[142] Rechberger and Simotta, supra n. 14, p. 233 f; Geroldinger, supra n. 138, Rz 79 ff.

decision on the already decided main question. A second decision between the same parties on the same subject matter in dispute shall be made impossible by the force of res judicata.

5.3 In the case of a negative declaratory action, what is the effect of a finding that the matter is res judicata?

Comment: *For example, A initiates an action against B for a declaration that he does not have to pay B 1000 EUR (negative declaration). If the court dismisses the claim, does the judgment at the same moment declare that A does have to pay B 1000 EUR? If the dismissal of a negative declaratory action is the equivalent of a declaration of the converse (in inter partes proceedings), is such a judgment enforceable for the creditor (in this case: B)?*

Answer: With the action for a negative declaratory judgment, the claimant seeks a declaratory judgment that a certain legal relationship with the defendant does not exist, that the right claimed by the defendant does not exist or that the defendant is not entitled to the claimed right.[143] The purpose of an action for a negative declaratory judgment is primarily to put an end to a state of uncertainty that is harmful to both parties, to prevent the defendant from claiming the right as a cause of legal uncertainty and to force the defendant to prove the claimed right.[144]

The substantive force of a positive declaratory judgment also has the effect, between the same parties (or their successors in title), on an action for a negative declaratory judgment (or an application for interim judgment) concerning the same law or legal relationship. The same also applies in the reverse case.[145]

Declaratory judgments have only declaratory effect. They therefore do not create a claim for benefits (*schaffen keinen Leistungsanspruch*) and are not enforceable (apart from a claim for compensation for legal costs included in the judgment).[146]

With regard to the example given, it must be said that B cannot lead to an execution against A from the negative declaratory judgment that was dismissed. Accordingly, B must bring an action for performance against A.

5.4 If a court issues an interim judgment concerning the well-foundedness of a claim, does this judgment have any effects outside of the pending dispute?

[143] U. Frauenberger-Pfeiler, Comments on § 228 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/1^3 (Manz 2017) § 228 ZPO Rz 28.

[144] Frauenberger-Pfeiler, supra n. 143, Rz 30.

[145] Frauenberger-Pfeiler, supra n. 143, Rz 31.

[146] Frauenberger-Pfeiler, supra n. 143, Rz 148.

Comment: *Can a party rely on the res judicata effects of such a judgment in separate proceedings (is the court in another set of proceedings bound by the judgment) or are these effects confined to the dispute in which the judgment was rendered? Note: an interim judgment on the well-foundedness of a claim refers to a judgment finding the liability of the defendant to pay, but leaves the amount of payment to be determined in a subsequent judgement (the same as under question 3.1.5).*

Answer: The legal force of an interim judgment on the merits of the claim (in Austria: *Zwischenurteil über den Grund des Anspruchs or Grundurteil* according to § 393 (1) ZPO) is controversial in Austria.

A part of the theory[147] and the established jurisprudence[148] assume that the interim judgment on the merits of the claim does not have any material legal force beyond the specific legal dispute. It does not rule on the application itself, but only on its merits. Within the concrete legal dispute, however, there is a binding effect (within the proceeding). The question of the reason for the claim may no longer be raised in the further proceeding. The parties may not present any further facts concerning the reason for the claim.[149]

Another part of the theory[150] is the opinion that the interim judgment on the merits of the claim also has a legal effect that goes beyond the concrete dispute, because the reason for the claim is decided in the form of a judgment.[151]

5.5 Suppose the following hypothetical. If, in Member State Y, a seller (S) as claimant is suing the buyer (B) as defendant for payment of the purchase price, B will not be able to sue S in Member State Z for liability on a warranty at the same time due to lis pendens rules under B IA.

5.5.1 Is it possible for B to sue S in Member State Z after the case in Member State Y has been decided with res judicata effect? What is the position regarding this question in your Member State?

Answer: A negative requirement for proceedings (procedural obstacle) is a fact which may prevent a decision on the merits. The negative requirements for proceedings include in Austria inter alia:

- The pendency of the dispute (*die Streitanhängigkeit*)

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[147] O. Hule, 'Das Zwischenurteil nach § 393 (1) ZPO bei Klagenhäufung', Österreichische Juristen-Zeitung (1971) p. 253 at p. 289; H. Fasching, supra n. 68, p. 266; Kodek and Mayr, supra n. 20, Rz 888.

[148] RIS-Justiz RS0109754 [T2].

[149] Rechberger and Simotta, supra n. 14, p. 526 f.

[150] W. Rechberger and T. Kicka, Comments on § 393 *Zivilprozessordnung* (Code of Civil Procedure) in W. Rechberger and T. Klicka (eds.), Kommentar zur Zivilprozessordnung[5] (Verlag Österreich 2019) § 393 ZPO Rz 8; Deixler-Hübner, supra n. 71, Rz 20.

[151] Rechberger and Simotta, supra n. 14, p. 526 f.

- The legal force (*die Rechtskraft*)
- The withdrawal of the application with waiver of claims (*die Klagszurücknahme unter Anspruchsverzicht*).[152]

Relevant to the above-mentioned hypothec is the legal force. The substantive legal force makes the decision authoritative. This authoritative nature prevents a new decision on the same matter (unique effect, binding effect). A substantive final decision finally determines what is right. The aim of substantive legal force is to establish legal peace between the parties and to preserve legal certainty. Every dispute must come to an end.[153]

According to the procedural theory of res judicata in Austria, substantive legal force has no influence on the substantive legal situation. If the claimant is wrongly deprived of a claim by a final judgment, this claim will continue to exist under substantive law. However, the claimant can no longer assert this claim in new proceedings due to the unique and binding effect.[154]

The above mentioned unique effect forbids the re-negotiation and decision between the same parties, on the same request in kind, if the objects of the dispute (*Streitgegenstände*) are identical.[155] This is always the situation if the claim asserted in the new action is identical to the claim in the preliminary proceedings, which has already been finally decided (with res judicata effect).[156]

Although the parties to the example mentioned in the statement above are identical, the facts of the case are basically different: The jurisprudence[157] assumes that the request for payment of the purchase price and the claim for warranty (in particular the conversion of the contract) are two different requests.[158]

It should be noted, however, that there may be preclusionary effects for failed submissions. Accordingly, the submission of all facts which were legally necessary to oppose the decided claim and which existed at the end of oral proceedings at first instance is precluded.[159] This also applies in general to design rights (Gestaltungsrechte) (such as price reduction due to warranty). The (substantive) legal force of the judgment on payment of the purchase price therefore precludes the warranty claim, provided that this is based on a warranty offence which has already occurred up to the end of the oral hearing on the legally bindingly decided request.[160] If the warranty remedy arises after the end of the first instance hearing, which is not the case here, the buyer can of course rely on it.

In that specific case (given above) a claim in Austria is not possible.

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[152] Rechberger and Simotta, supra n. 14, p. 305.

[153] Rechberger and Simotta, supra n. 14, p. 542.

[154] Rechberger and Simotta, supra n. 14, p. 543.

[155] C. Brenn, Comments on § 411 *Zivilprozessordnung* (Code of Civil Procedure) in J. Höllwerth and H. Ziehensack (eds.), ZPO Taschenkommentar (LexisNexis 2019) § 411 ZPO Rz 11.

[156] RIS-Justiz RS0039347.

[157] 170 GIUNF 3789 (1907) (cit. after Klicka, supra n. 118, Rz 48.

[158] As well Brenn, supra n. 155, Rz 14.

[159] RIS-Justiz RS0041321; as well Brenn, supra n. 155, Rz 35; Klicka, supra n. 118, Rz 91.

[160] Brenn, supra n. 155, Rz 37; Klicka, supra n. 118, Rz 93.

5.5.2 If it is possible for B to sue S in Member State Z (in the above situation), will the court in State Z be bound by the reasoning in the judgment from the court in Member State Y? What is the position on that question in your national legal order:

Answer: It is not possible – according to the Austrian legal system – for B to sue S in Member State Z.

5.5.2.1 If in domestic cases you do not extend res judicata effect to the elements of a court's reasoning (Question 5.1.4)?

Answer: Again, it is not possible for B to sue S in Member State Z!

5.5.2.2 If res judicata effect is extended to elements of the reasoning in the Member State of origin but not in the Member State addressed?

Answer: Not necessary regarding to the answer to question 5.5.1.

5.5.2.3 If res judicata effect is not extended to elements of the reasoning in the Member State of origin but is in Member State addressed?

Answer: Not necessary regarding to the answer to question 5.5.1.

5.5.3 How do you handle the limitation period problem in the scenario described above? The lis pendens case law of the CJEU prevents the filing of a warranty liability claim in State Z as long as a payment claim is pending in State Y. How can the buyer prevent the limitation period from running in State Z (your home State) without making the warranty case pending?

Answer: § 393a ZPO allows (ex officio or upon application) to take a binding decision in advance which negates the limitation period.[161] The aim of the interlocutory judgment on the statute of limitations is to decide in advance on the question of the statute of limitations of a claim. This opens up an independent instance on the question of the statute of limitations.[162] Such an interlocutory judgment may be given only if the claim is not time-barred. If the claim is already time-barred, the action must be dismissed by judgment.[163] This interlocutory judgment is not only applicable to actions for performance but also to request for a declaratory

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[161] R. Fucik, Comments on § 393a *Zivilprozessordnung* (Code of Civil Procedure) in R. Fucik and A. Klauser and B. Kloiber (eds.), ZPO Taschenkommentar[11] (Manz 2011) § 393a ZPO, p. 407.

[162] Rechberger and Simotta, supra n. 14, p. 528; W. Rechberger and T. Klicka, Comments on § 393a *Zivilprozessordnung* (Code of Civil Procedure) in W. Rechberger and T. Klicka (eds.), Kommentar zur Zivilprozessordnung[5] (Verlag Österreich 2019) § 393a ZPO Rz 1.

[163] Rechberger and Simotta, supra n. 14, p. 528; Rechberger and Klicka, supra n. 162, Rz 2; A. Deixler-Hübner, Comments on § 393a *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/2[3] (Manz 2018) § 393a ZPO Rz 2.

judgment.[164] If an appeal is filed against the interlocutory judgment on the statute of limitations, the further hearing of the action is suspended until the interlocutory judgment becomes final (see § 393a sentence 2 ZPO in conjunction with § 393 (3) sentence 2 ZPO). The interlocutory judgment on the statute of limitations becomes final. The interlocutory judgment according to § 393a ZPO does not preclude a later dismissal of the action on the ground that the plea is not well founded. The basis for the claims must be regarded as given when passing such an interlocutory judgment. This judgment has binding effect beyond the specific legal dispute.[165]

Part 6: Effects of judgements - res judicata and enforceability

6.1 What is the relation of res judicata to enforceability, i.e. can a judgment be enforced before it is res judicata?

Comment: *Does your legal order operate with the institution of "provisional enforceability", i.e. the enforceability of judgments that are not (yet) res judicata, but have nonetheless been endowed, either by the decision of a court or by operation of law, with the attribute of enforceability? Do you think such (foreign) judgments might be controversial from the perspective of the (procedural) legal order of your Member State, if the creditor attempted to enforce them? For an example of provisional enforceability, see §§704, 708, 709 of the German ZPO).*

Answer: Regarding the effects of Austrian judgments, there is a difference between the procedural effects of judgments and the substantive effects of judgement. While the substantive legal effect (in German: Feststellungswirkung/declaratory effect) and the enforcement effect belong to the procedural effects, the creative effect (*Gestaltungswirkung*) and the effect of the elements of the matter (*Tatbestandswirkung*) belong to the legal effects of substantive law.

The formal legal force (irreversibility = *Unabänderlichkeit*) is not an effect of a judgment, but it is a necessary precondition for the material legal force of the judgment and the creative effect (*Gestaltungswirkung*) of it. However, formal legal force is not a necessary condition for enforceability. For example, even before the appeal judgment (*Berufungsurteil*) becomes final, execution can lead to satisfaction (*Exekution zur Befriedigung*) if it is challenged with an extraordinary appeal (*außerordentliche Revision*) (see § 505 (4) ZPO). An execution to secure a debt (*Exekution zur Sicherstellung*) can generally be initiated before a judgement has become final (see §§ 370 ff EO).[166]

In the case of enforceability before the judgment becomes final (provisional enforceability), care must be taken to ensure that the appeal has suspensive effect:

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[164] Köck, supra n. 75, p. 168.

[165] Rechberger and Simotta, supra n. 14, p. 528 f.

[166] Rechberger and Simotta, supra n. 14, p. 541 f.

- The filing of an appeal (*Berufung*) and an ordinary appeal (*ordentliche Revision*) suspend the material legal force and the enforceability of a decision (see §§ 466 and 505 (3) ZPO).[167]
- The filing of an appeal (*Rekurs*) does not in principle suspend the enforceability of the decision (Beschluss) (see § 524 (1) ZPO). The court may grant the decision (Beschluss) a temporary suspension if this does not result in a disproportionate disadvantage to the other party and the purpose of the appeal (*Rekurs*) is not otherwise frustrated (see § 524 (2) ZPO).[168]
- The filing of an extraordinary appeal (*außerordentliche Revision*) only suspends the legal force of the judgment, but not its enforceability (see § 505 (4) ZPO).[169]

Disputes at the Labour and Social Court are a special feature. The filing of the appeal (*Berufung*) only suspends the formal legal force, but not the effect of the determination (*Feststellungswirkung*), legal structuring (*Rechtsgestaltungswirkung*) and enforceability (see § 61 labour and social court law (*Arbeits- und Sozialgerichtsgesetz*; henceforth: ASGG). This is due to the fact that remuneration claims from employment relationships usually affect the livelihood of the person concerned.[170]

6.1.1 Is provisional enforceability suspended (by operation of law or at the discretion of the court) if an appeal is lodged?

Answer: Compare the answer to the question 6.1.

6.1.2 Who bears the risk if the provisionally enforceable judgement is reversed or modified?

Answer: The decision (*Beschluss*) is enforceable after the period for performance prescribed in the decision itself has passed.[171] In the opinion of the OLG Linz, the enforceability of a decision ends with its revision or modification on appeal because the decision of the appellate court can also be enforced immediately.[172] The obligated party must claim this with an application for discontinuation (*Einstellungsantrag*) according to § 39 EO.[173] According to that, the debtor (*Verpflichtete im Exekutionsverfahren*) preliminary bears the risk of enforceability.

6.1.2.1 Must the judgment creditor provide security before the judgment can be enforced?

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[167] Rechberger and Simotta, supra n. 14, p. 599.

[168] Rechberger and Simotta, supra n. 14, p. 651 f.

[169] Rechberger and Simotta, supra n. 14, p. 647 ff; OGH 25.3.2014, 10 Ob 3/14k.

[170] Rechberger and Simotta, supra n. 14, p. 749 f.

[171] G. Sloboda, Comments on § 524 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd IV/1[3] (Manz 2019) § 524 ZPO Rz 5.

[172] OLG Linz 18.1.1990, 4 R 341/89.

[173] W. Jakusch, Comments on § 39 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) § 39 EO Rz 12.

Answer: A security provided by the creditor before the enforcement of a judgment, is unknown to the Austrian Code of Civil Procedure. In single cases (for example a security regarding provisional measures in the case of an possession proceeding (*Besitzstörungsverfahren*), for temporary bans on construction and demolition (*vorläufige Bau- und Demolierungsverbote*), for litigation costs) the provision of security is also provided for in our legal system, but these cases do not concern enforcement.

6.1.2.2 Must the creditor compensate the debtor for damages he has suffered by the judgement being enforced, or by the payments he had to make, or any other actions he had to take in order to avert enforcement?

Answer: § 75 EO regulates the bearing of the costs of discontinued (eingestellt) execution proceedings. Therefore a difference is made between cases in which the creditor is subject to the cost risk of the discontinued execution proceedings regardless of any fault on his part, and all other cases of discontinuation of the execution, in which the creditor only bears the cost if he is at fault.[174] The claim shall be filed either ex officio or at the request of the obligor.[175] Although the law does not provide any grounds for this, the courts have recognized that if the requirements of § 75 EO are met, the debtor is entitled to claim compensation from the creditor for the costs not only of his application according to § 75 EO, but also of other costs incurred in the execution proceedings, such as for the application for postponement (*Kosten für den Aufschiebungsantrag*) and discontinuation (*Kosten für den Einstellungsantrag*), but also for his participation in the execution.[176] In any event, such an award of costs to the debtor requires an application. The order granting such an application must also include an order for performance.[177]

6.1.2.3 Does the answer to the previous question (6.1.2.2) vary, if the debtor voluntarily payed (performed) the claim?

Answer: If the pursued claim (*betriebene Anspruch*) has been fully satisfied **outside the enforcement proceeding**, the creditor is obliged to discontinue the execution immediately. If he fails to do so, he shall be liable for damages. However, it is also sufficient if the creditor hands over certain documents (for example the receipt for the payment of the claim) to the debtor so that he can apply for the suspension of the enforcement.[178]

6.1.2.4 Does the answer to the previous question (6.1.2.2) vary, if the judgement was a default judgement, by a first instance court or a court of appeals?

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[174] W. Jakusch, Comments on § 75 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) § 75 EO Rz 1.

[175] Jakusch, supra n. 173, Rz 17.

[176] L. Heller and F. Berger and L. Stix, Kommentar zur Exekutionsordnung Bd I[4] (Manz 1969), p. 754; OLG Wien 28.2.1989, 14 R 32/89 WR 527.

[177] Jakusch, supra n. 174, Rz 16.

[178] Jakusch, supra n. 173, Rz 41.

Answer: No. Compare the answer to question 6.1.2.2.

6.1.2.5 What is the scope of the compensation? Is it limited to direct loss or is indirect loss also covered?

Answer: See question 6.1.2.2 . Only direct costs are covered by the compensation.

6.2 Does your legal order prescribe a suspensive period within which the judgement creditor cannot initiate the enforcement proceedings? For example, must the judgement creditor first demand payment from the debtor before he can move to enforcement (execution of the judgement)?

Comment: *The question is framed in general terms regarding enforcement of judgements, not in relation to provisional enforceability. If answered in the positive, please indicate what are the legal consequences of the suspension, i.e. is the judgement by operation of law not considered enforceable within this period or does the judgement creditor merely take on the risk of bearing costs for enforcement.*

Answer: The requirements for enforceability are in part already checked by the title court (*Titelgericht*) (when the confirmation of enforceability = *Vollstreckbarkeitsbestätigung* is issued) and in part when the execution is granted (*bei der Exekutionsbewilligung*) (by the execution court = *Exekutionsgericht*). This leads to the division between formal (regarding to the confirmation of enforceability; § 7 (3) - (6) EO) and substantive (regarding to the granting of the execution; § 7 (2) in conjunction with § 36 (1) Z 1 EO) enforceability.[179]

This question concerns the formal enforceability. To obtain a confirmation of enforceability, the following conditions must be fulfilled:

- The enforcement title must have been properly served on the debtor (see § 416 (1) ZPO)
- Time limits for appeals with suspension effect must have expired (see § 464 (1) ZPO: deadline for filing an appeal (*Berufung*); § 505 (2) ZPO: deadline for filing an ordinary appeal (*ordentliche Revision*)
- The performance period (which is usually 14 days) must have expired (see § 409 (1) ZPO in conjunction with § 7 (2) EO)
- The due date (*Fälligkeit*) of the service must have occurred (see § 7 (2) EO)
- A possible condition precedent (*mögliche aufschiebende Bedingung*) must have occurred (see § 7 (2) EO)
- The enforcement title must not have expired due to the passage of time.[180]

The certificate of enforceability is an official certification by title court that the execution title is enforceable. Therefore, it is not necessary for the court of execution to ask the title court whether the respective enforcement title is enforceable. When the certificate of enforceability

[179] Neumayr and Nunner-Krautgasser, supra n. 10, p. 68.

[180] Neumayr and Nunner-Krautgasser, supra n. 10, p. 68 f.

is issued, only the formal requirements (see above) are checked. The substantive conditions for enforcement are only reviewed during the approval procedure (by the court of execution). This is an essential difference to the German enforcement clause (*deutsche Vollstreckungsklausel; in Deutschland werden vor der Erteilung der Vollstreckungsklausel sowohl die formellen als auch die materiellen Vollstreckungsvoraussetzungen geprüft*).[181]

A certificate of enforceability issued unlawfully or incorrectly shall, either ex officio or at the request of one of the parties, be revoked by decision (*Beschluss*) (see § 7 (3) und (4) EO). The decision to set aside the certificate of enforceability (*Aufhebungsbeschluss*) must be served on all parties and - in contrast to the certificate of enforceability itself - is appealable (see § 517 (1) Z 6 ZPO).[182]

In other words, if a decision (*Urteil* or *Beschluss*) is not (at least) formal enforceable, it cannot be validly enforced by the creditor. If the enforcement is nevertheless granted (in the absence of a valid confirmation of enforceability), the debtor must lodge an appeal (*Rekurs*) and, once the appeal is legally valid, a request for discontinuation. The bearing of costs is again based on § 75 EO.

6.3 Does the judgment incorporate elements akin to the French "command and order to the enforcement officer" (Mandons et ordonnons a tous huissiers de justice à ce requis de mettre le present jugement à execution) and what are its effect?

Answer: Instructions to the enforcement officer contained in the judgment are foreign to Austrian law. The following parties and other parties to the enforcement proceedings exist in Austria:

- the creditor (*betreibender Gläubiger*)
- the debtor (*Verpflichteter*)
- the judge (*Richter*)
- the official with certain judicial powers (*Rechtspfleger*)
- the enforcement officer (*Gerichtsvollzieher*)

The enforcement officer is responsible for the factual execution. In doing so, he is bound by the orders and instructions of the court of execution (see § 25 Abs 1 EO). He is instructed by the court of enforcement to carry out acts of execution until the order is fulfilled or it is stablished that the order cannot be fulfilled (see § 25 Abs 2 EO). He does not make any contestable decisions (like a judge or the official with certain judicial powers), but merely takes factual action.[183]

6.4 How would your legal order deal with foreign enforcement titles, which involve property rights or concepts of property law unknown in your system?

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[181] Neumayr and Nunner-Krautgasser, supra n. 10, p. 74.

[182] Neumayr and Nunner-Krautgasser, supra n. 10, p. 76.

[183] Neumayr and Nunner-Krautgasser, supra n. 10, p. 8 f.

Answer: The legal norm responsible for this problem is § 404 EO, which serves the implementation of the European legal requirements for title adjustment according to Art 54 B IA. Through the explicit implementation in the EO it is the consequence that this procedure also applies to the execution of titles which do not fall within the scope of application of the B IA.[184]

If a foreign judgment contains a measure or order which is foreign to the Austrian legal system (e.g. condominium ownership), it must be adapted to a measure or order provided for in the Austrian legal system which produces comparable effects and pursues similar objectives and interests.[185] However, no effect may be conveyed which goes beyond that in the country of origin.[186] No application is necessary within the area of application of the B IA; as a consequence, enforceable instruments within the area of application of the B IA must be adapted by the court of its own motion. Otherwise an application is necessary.[187] In terms of time, the adjustment must be made at the same time as the authorisation for execution is granted.[188] It follows that the adaptation of the title cannot be asserted independently outside of execution proceedings.[189]

Part 7: Effects of Judgments – Personal boundaries of res judicata

7.1 How are co-litigants and third persons (individuals who are not direct parties of the proceedings) affected by the judgment (e.g. alienation of a property or a right, which is the subject of an ongoing litigation; indispensable parties)?

Answer: In principle, the effects of the judgment extend only between the parties in the proceedings.[190] As Austrian civil proceedings are characterized by the formal concept of a party, the effects of a judgment only extend between that person named as claimant in the statement initiation the proceedings and the person named as defendant.

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[184] J. Höllwerth, Comments on § 404 Exekutionsordnung (Austrian Enforcement Order) in A. Burgstaller and A. Deixler-Hübner (eds.), Kommentar zur Exekutionsordnung[28] (LexisNexis 2019) § 404 EO Rz 1.

[185] Höllwerth, supra n. 184, Rz 12; T. Garber and C. Koller, Comments on before § 79 Exekutionsordnung (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) before § 79 EO Rz 220.

[186] Garber and Koller, supra n. 185, Rz 220; Neumayr and Nunner-Krautgasser, supra n. 10, p. 128.

[187] F. Mohr, 'Die Exekutionsordnungs-Novelle 2016, insbesondere die Neuerungen im internationalen Exekutionsrecht', in S. Clavora and M. Kapp and F. Mohr (eds.), Jahrbuch Insolvenz- und Sanierungsrecht sowie Exekutionsrecht 2017 (NWV Verlag 2017) p. 319 at p. 322.

[188] Mohr, supra n. 187, p. 322.

[189] Höllwerth, supra n. 184, Rz 10.

[190] P. Oberhammer,'Vertrag mit Schutzwirkung zugunsten Dritter und Rechtskrafterstreckung', Juristische Blätter (2000) p. 58 at p. 60; OGH 22.12.1975, 1 Ob 318/75 SZ 48/142.

In some cases, the law orders that the effects of certain judgments also extend to persons who were not involved in the proceedings themselves (effect-based litigation association = *wirkungsgebundene Streitgenossenschaft*). If these (third) persons take part in the proceedings (either as interveners or as co-claimants or co-defendants), because they are included in the effects of the judgment anyway, then it is absolutely necessary to issue a uniform judgment for and against all parties involved (unified litigant = *einheitliche Streitpartei* according to § 14 ZPO).[191]

In the following cases, uniform judgments must be given against and for all parties to the dispute:

- **where the law provides for the extension of res judicata:**

Judgments in favour of actions for nullification (*Nichtigerklärung*) of a shareholders' resolution (*Gesellschafterbeschluss*) are effective for and by all shareholders (even for those shareholders who have not sued for nullification) (see § 42 (6) GmbHG, § 198 (1) AktG).

Other examples of extension of legal effect *ex lege*:

the universal and individual legal succession[192] (Gesamt- und Einzelrechtsnachfolge), various judgments resulting from execution proceedings (see §§ 232 (2), 310 (2) EO)[193], the decision on the correctness and ranking of claims filed and disputed in the insolvency proceedings (see § 112 IO).[194]

- **when judgments themselves are legal formative**:

Sustained status judgments (for example a decision of divorce) have an effect on everyone. All other judgments on legal structures (*Rechtsgestaltungsurteile*) have an effect on all parties to the legal relationship in dispute that has to be established, annulled or amended by the judgment.[195]

It is a fact that there is always a conflict with Art 6 EMRK when extending the effects of a judgment to persons who have not been heard or have not been heard sufficiently in the proceedings. This problem has not yet been fully discussed in procedural law.[196]

7.2 Do certain judgments produce in rem (erga omnes) binding effects?

Answer: For the sustained status judgments (for example a decision of divorce), see above under question 7.1.

7.3 How are (singular and universal) successors of parties affected by the judgment?

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[191] Rechberger and Simotta, supra n. 14, p. 189 f.

[192] OGH 24.11.1998, 1 Ob 256/98y SZ 71/197.

[193] Compare also P. Oberhammer, Comments on § 310 Exekutionsordnung (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) § 310 EO Rz 5.

[194] Rechberger and Simotta, supra n. 14, p. 550 f.

[195] Rechberger and Simotta, supra n. 14, p. 189 f.

[196] Rechberger and Simotta, supra n. 14, p. 565 f.

Comment (7.3): *Explain how succession of parties occurs after the rendering of the judgment as well as in potential enforcement proceedings, and what acts, if any, must be undertaken for interested persons to demonstrate succession. In addition, explain whether there are circumstances in which succession is not possible, e.g. succession to non-pecuniary damages claims.*

Answer: On the extension of the effects of the judgment (*Rechtskrafterstreckung*) on the individual or universal successor, see above under question 7.1.

On legal succession (*Rechtsnachfolge*) in execution proceedings:

The application for execution must contain the exact names of the applicant (creditor) and the defendant (debtor) (see § 54 (1) Z 1 EO). The execution may only be granted for or against the person who is named as entitled or obliged in the execution title (judgment or decision) (see §§ 7 (1), 9 EO). In the case of legal succession (on the creditors' or debtors' side) AFTER the title is established, this must be proven by an authentic or officially certified document[197] („simple title completion" according to § 9 EO). A transfer of rights according to § 9 EO only exists if the former debtor or creditor has withdrawn (ausgeschieden) form the legal relationship. A mere accession on the creditors' or the debtors' side would not be sufficient. As examples can be mentioned: the reply by inheritance, the payment of another debt according to § 1358 ABGB. The document required by § 9 EO must contain all facts relevant to the succession. If the debtor disputes the succession, the suit according to § 36 (1) Z 1 EO (*Impugnationsklage*) is available to him for this purpose.[198]

If the creditor does not succeed in delivering the necessary documents in accordance with § 9 EO, which prove that he is the legal successor of the person entitled under the enforcement title, the action for supplementing the title (*Titelergänzungsklage*) (against the future debtor) according to § 10 EO is at his disposal. This suit establishes the existence of the enforcement claim of the (succeeded/new) creditor against the debtor.[199]

A legal succession to the very personal rights of the forerunner is not possible. Very personal rights are rights which are so closely linked to the person of their legal entity that they cannot be transferred and therefore expire on the death of that person. They can only be claimed and fulfilled by this person. Examples: the employee's duty to work, servitudes (*Dienstbarkeiten*), in principle also the copyright.

Part 8: Effects of Judgments - Temporal dimensions

[197] An authentic document is a document issued by an Austrian public authority within its official capacity in a certain form (for example by a notary, architect or civil engeneer). An officially certified document is a private document, whereby a court or a notary confirms that it has been signed by the issuer.

[198] Neumayr and Nunner-Krautgasser, supra n. 10, p. 89 f.

[199] Neumayr and Nunner-Krautgasser, supra n. 10, p. 103 ff.

8.1 Can changes to statute or case-law affect the validity of a judgment or present grounds for challenge?

Answer: The end of the hearing at first instance is the relevant moment for the decision on the substance.[200] From this time on, the prohibition of innovation (*Neuerungsverbot*) applies in Austrian civil proceedings.[201] The legal situation and the result of the evidence at the end of the hearing at first instance are relevant for the rendering of the judgment.[202]

The prohibition of innovation applies from the end of the oral proceedings at first instance. From that moment on, the parties in these proceedings are in general excluded from any further new submissions.[203] A review of the decision by the Appellate Court should take place only on the basis of the substantive applications and factual submissions available at that moment. In appeal proceedings, all innovations that did not occur at first instance (*nova producta* as well as *nova reperta*) are prohibited.[204] This prohibition shall not apply to facts and evidence which are capable of establishing or disproving the grounds of appeal relied on. Therefore, innovations which give rise to procedural deficiencies and supporting facts for the assessment of evidence are admissible.[205] The court has to take note of a change in the legal situation which has occurred in the meantime in every situation of the procedure, if the new rules are applicable to the legal dispute. Therefore, it must always be assessed in accordance with the transitional provisions whether a change in the law is necessary for an ongoing procedure.[206]

8.2 If the judgment requires the debtor to pay future (periodic) instalments (e.g. maintenance or an annuity by way of damages), how can the judgment be challenged in order to amend the amount payable in each instalment?

Answer: In principle, an action for performance may only be granted if the claim is due at the time the judgment is rendered (end of the hearing at first instance). If the claim is not due at this moment, the action must in principle be dismissed by judgment (*mit Urteil abweisen*). According to § 406 ZPO, however, a conviction for future payments (due after the end of the hearing at first instance) is possible in the case of maintenance claims (*Alimente*). The term „maintenance“ must be interpreted broadly. It should be understood to mean all recurrent cash or non-cash benefits of a maintenance nature. In addition, the debtor must have once violated or threatened to violate his obligation. The aim of this regulation is, that the beneficiary does not have to sue for every installment due separately. The final decision on the maintenance obligation shall remain in force until it is modified by a new decision (on the amount of the

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[200] Rechberger and Simotta, supra n. 14, p. 442 f.

[201] Rechberger and Simotta, supra n. 14, p. 549.

[202] Rechberger and Simotta, supra n. 14, p. 442 f.

[203] Rechberger and Simotta, supra n. 14, p. 442.

[204] Rechberger and Simotta, supra n. 14, p. 613 f.

[205] Rechberger and Simotta, supra n. 14, p. 614.

[206] OGH 24.4.2001, 4 Ob 89/01v ÖBl 2002/6, 72.

maintenance obligation). Amendments must be claimed by the debtor with an action for a negative declaratory judgment or, if enforcement has already been carried out, with an opposition action (*Oppositionsklage*). The creditor must claim an amendment with filing a new performance action.[207]

8.3 Can facts that occur after the last session of the main hearing and are beneficial to the defendant (debtor), be invoked in enforcement proceedings with a legal remedy?

Answer: Facts that occur after the end of the hearing at first instance are called „*nova producta*“. They are not covered b the preclusive effect of the substantive legal force and, if enforcement proceedings are already pending, can be claimed with the opposition action according to § 35 EO.[208]

If an application for execution is granted (*Exekutionsbewilligung*) although the claim on which the title is based has already been expired or been suspended, the debtor can assert this by filing an opposition action in the enforcement proceedings. He may raise all objections to the claim which have occurred after the enforcement title has become effective (*nova producta*). The opposition action does not serve the purpose of breaking the res judicata of the enforcement title, but to claim changes in the facts of the case which have occurred after the conclusion of the title proceedings.[209]

8.4 Can set-off of a judicial claim be invoked by the debtor in enforcement proceedings, even if the debtor's counterclaim already existed during the original proceedings?

Answer: The majority view is that offsetting constitutes a ground for filing an opposition action, but only if the claim could not be asserted in the title proceedings for objective reasons (for example because the offsetting situation did not arise until the end of the hearing at first instance).[210] If the offsetting was already possible in the title proceedings, the preclusion effect of the substantive legal force precludes later offsetting.[211]

Part 9: Lis pendens and related actions in another Member State and irreconcilability as a ground for refusal of recognition and enforcement

[207] Rechberger and Simotta, supra n. 14, p. 322 ff; R. Fucik, Comments on § 406 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/2[3] (Manz 2018) § 406 ZPO Rz 23 ff.

[208] Rechberger and Simotta, supra n. 14, p. 443.

[209] Neumayr and Nunner-Krautgasser, supra n. 10, p. 186.

[210] Neumayr and Nunner-Krautgasser, supra n. 10, p. 191; RIS-Justiz RS0001438; W. Jakusch, Comments on § 35 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) § 35 EO Rz 56.

[211] Neumayr and Nunner-Krautgasser, supra n. 10, p. 191; RIS-Justiz RS0000776; for a different view see Neumayr and Nunner-Krautgasser, supra n. 10, p. 192.

9.1 The B IA Regulation uses the concept of a "cause of action" for the purposes of determining lis pendens.

9.1.1 How does your national legal order determine lis pendens?

Answer: Court pendency does not arise until the action is received by the court. If a substantive claim is only made during the proceedings, the court pendency arises when the claim is asserted at the oral hearing or, in the case of a written claim, when the written statement is received by the court. Certain procedural effects are linked to the court pendency. The procedural relationship is established by the court pendency. For the time being, however, it is only bilateral between the plaintiff and the court; it only becomes tripartite when the claim is served on the defendant. If the pendency was lawful, according to § 29 JN the substantive, local or international jurisdiction and the admissibility of the legal process, which existed at the time of the court pendency, remain valid, as long as it is not treated as a question of prorogable jurisdiction, which is cured by submission of the case (*perpetuatio fori*). The value of the subject-matter of the dispute which is the subject of the jurisdiction is determined by the time of the court's pendency. In order to observe a time limit, it is sufficient to submit the claim to the court; in the case of procedural time limits, it is even sufficient to send the claim by post in due time.[212]

9.1.2 How does the B IA concept of a "cause of action" correspond to any similar domestic concept in your national legal order? Describe how your national legal order establishes the identity of claims.

Answer: The identity of the claim exists if the subject matter of the two actions is identical. In Austria, the theory of a two-part dispute is used to determine an identical subject matter in dispute. According to this theory, the identity of the claims exists if it is clear from the facts which have been brought forward and the request derived from them that both substantive motions are aiming at the same goal of legal protection. In addition, the claims must be derived from the same facts which give rise to the rights.[213] Both elements must be cumulative: The mere equality of the facts which give rise to the rights does not in itself establish an identity of the claims, nor does the mere equality of the claims.[214]

It follows, for example, that there is identity between positive and negative declaratory actions. The request for a negative declaratory action is the conceptual opposite of the request for a positive declaratory action.[215]

Pendency of a dispute presupposes in principle that the requests are equal. If the requests are different, even if they are derived from the same facts, there is usually no dispute pendency. The diversity of the requests may be expressed by the fact that they are different types of actions or that the content of the requested performance, determination or legal structuring is not

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[212] Rechberger and Simotta, supra n. 14, p. 414 ff.

[213] Rechberger and Simotta, supra n. 14, p. 424.

[214] RIS-Justiz RS0039217.

[215] Rechberger and Simotta, supra n. 14, p. 425.

identical. This means that, for example, there is no identity between an action for a declaratory judgment and a subsequent action for performance because the declaratory judgment is not enforceable. The action for performance thus has a legal protection objective that goes beyond that of the action for a declaratory judgment. On the other hand, there is identity between an action for a declaratory judgment and a subsequent action for a positive declaratory judgment because the declaratory judgment already contains the declaratory judgment.[216]

9.1.3 Does your national legal order allow a negative declaratory action? If so, how is this action treated in relation to contradictory actions (e.g. for (payment of) damages)?

Answer: In the case of actions for negative declaratory judgement, the declaration of the non-existence of the right or legal relationship or the lack of authenticity of a document is sought. Its purpose is to put an end to a state of suspense that is detrimental to both parties, to ward off the presumption as the cause of legal uncertainty and to force the opponent to prove or abandon the presumed right.[217]

They are admissible if the other requirements for declaratory actions are met. In addition to the general procedural requirements, two special procedural requirements must be met under § 228 ZPO for the admissibility of an action for a declaratory judgment: the declaratory capacity of the legal relationship and the legal interest of the plaintiff in the immediate declaratory judgment.[218]

The legal relationship to be established must be governed by private law or civil procedure and recourse to the courts in the strict sense must be permissible. Furthermore, the legal relationship to be established must in principle exist between the parties. It is possible to determine legal relationships that exist between a party and a third party or only between third parties if the legal relationship affects the legal position of the plaintiff. It is not possible to establish facts, except for the authenticity or falseness of a document and for certain legal characteristics of facts. Furthermore, no legal qualifications of a legal relationship as well as legal relationships themselves that do not exist before the end of the first instance hearing can be determined. Moreover, unenforceable rights, abstract legal issues and the possibility, admissibility, conceivableness, permissibility or immorality of a legal relationship cannot be determined. In declaratory actions, the right or legal relationship to be determined must also be described precisely and without doubt in terms of content and scope.[219]

According to § 228 ZPO, an action for a declaratory judgment can only be brought if the plaintiff has a legal interest in that legal relationship being established as soon as possible by a court decision.

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[216] P. Mayr, Comments on § 233 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/1[3] (Manz 2017) § 233 ZPO Rz 9.

[217] W. Rechberger and T. Klicka, Comments on § 228 *Zivilprozessordnung* (Code of Civil Procedure) in W. Rechberger and T. Klicka (eds.), Kommentar zur Zivilprozessordnung[5] (Verlag Österreich 2019) § 228 ZPO Rz 8.

[218] Rechberger and Klicka, supra n. 217, Rz 2.

[219] RIS-Justiz RS0037437.

A legal interest in establishing the non-existence of a legal relationship or right is recognised above all if the defendant (respondent) is aware of the right to which the plaintiff (claimant) is entitled, or is aware of a right of his own against the claimant and doubts about it are possible; however, this also means that the possible (future) assertion of a claim for benefits by the opposing party or by a third party who invokes the legal position of the opposing party deprives a negative declaratory relief of legal interest if the claim for declaratory relief is fully exhausted by the possible objections in the proceedings concerning the claim for benefits.[220]

The legal interest is lacking if the action for a declaratory judgment is unsuitable, i.e. if the legal effect of the declaratory judgment cannot guarantee the elimination of uncertainty for the legal relationship. However, it must also be denied if the plaintiff has either a simpler or more effective way of achieving the same goal or fully satisfying the need for legal protection, or if he has the possibility of obtaining more extensive legal protection (subsidiarity of the declaratory action).[221]

The legal interest is particularly lacking if the plaintiff can already bring an action for performance, the success of which makes it completely unnecessary to establish the legal relationship, whereby particular attention must be paid to this criteria of the complete exhaustion of the plaintiff's objective by the action for performance already possible.[222] The legal interest is, according to the prevailing opinion, to be examined ex officio at every stage of the proceedings (i.e. including the appeal proceedings) and its deficiency is to be perceived.[223] Since the legal interest is a procedural requirement, the action must be dismissed by order if it is defective. An appeal or revision is admissible against the order.[224]

9.1.4 How do you determine the identity of parties in national proceedings and how (if at all) does the methodology differ from that of the B IA?

Answer: The identity of the parties is present if the same legal entities again appear as parties in the second trial. However, due to the similarity of the pendency of the dispute to the validity of the judgment, the identity of the parties is also present if the second trial is conducted by or against a universal or individual successor in title.[225]

The personal scope of the pendency of a dispute extends only to the parties to the preceding dispute, whereby a reversal of the party roles does not of course cancel out the effect of the pendency. It does not extend to persons who were not involved in the preliminary proceedings, even if they appear as parties to the dispute in the subsequent proceedings.[226]

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[220] OGH 24.3.2015, 8 Ob 21/15v JusGuide 2015/35/14012.

[221] Rechberger and Klicka, supra n. 217, Rz 11.

[222] Rechberger and Klicka, supra n. 217, Rz 11.

[223] OGH 17.9.2014, 4 Ob 76/14a.

[224] Rechberger and Klicka, supra n. 217, Rz 14.

[225] Rechberger and Simotta, supra n. 14, p. 424.

[226] P. Mayr, Comments on before §§ 232 and 233 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd III/1[3] (Manz 2017) before §§ 232 and 233 ZPO Rz 7.

Who a party is is determined by the formal concept of a party and not by material justification or obligation. Thus, there is no dispute between, for example, actions against a partnership and against one or more of its partners.[227]

Accordingly, the Austrian concept of the parties' identity does not fundamentally differ from the methodology of the B IA.

9.1.5 How should we understand the requirement that judgments need to have "the same end in view" as expressed by the CJEU?

Answer: This question concerns the subject matter of the dispute in civil proceedings. For a detailed description of the Austrian theories of the subject matter of dispute in relation to that of the CJEU, please compare the answer to the question 5.1.4.2.

9.2 Does your national legal order operate with the notion of "related actions"? If so, what are the effects it ascribes to them? Please accompany the answer with relevant case law.

Answer: In the German version of the B IA, the term "related actions" is not used. Instead, the term "related proceedings" is used [228], which includes all procedures which are connected in a substantive - not only legal - way. It covers all cases in which there is a risk of conflicting decisions, even if the decisions are enforced separately and their legal consequences are not mutually exclusive.[229]

The combination of proceedings under § 187 ZPO is a measure of organisation of procedure which is undertaken primarily for practical considerations: Several proceedings pending before one and the same court with party identity on at least one side are to be heard together in order to accelerate and simplify the process. According to § 192 ZPO, the connection as well as its annulment is at the discretion of the court, whose order is incontestable.[230]

An action under § 187 ZPO combines only the hearing, not the cases into a single unit. These retain their legal independence.[231] A process connection has only factual consequences and does not create a dispute cooperative.[232] The admissibility of the connection is subject to the condition that all pending proceedings must be conducted in the same type of procedure. It is therefore not permissible to combine civil proceedings with non-contentious proceedings.[233]

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[227] P. Mayr, supra n. 216, Rz 4.

[228] Art. 29 B IA.

[229] A. Klauser and G. Kodek, JN-ZPO: Österreichisches und Europäisches Zivilprozessrecht - collection of decisions[18] (Manz 2018) Art. 30 EuGVVO Rz 4.

[230] N. Tunkel,'Massenverfahren. Institute der ZPO, Musterverfahren und Sammelklage', 7 Juristische Ausbildung & Praxisvorbereitung (2006/2007) p. 46 at p. 48.

[231] OGH 29.5.2001, 1 Ob 229/00h.

[232] RIS-Justiz RS0037236.

[233] LGZ Wien 44 R 677/02p EFSlg 105.787.

The joining of cases before different judges is subject to the agreement of the parties to the (subsequent) proceedings to be joined to this main act.[234]

However, the definition of "related actions" does not have the same scope as a combination of proceedings under Austrian law. Accordingly, their significance in practice is left to the concept of B IA.

9.3 Has your Member State experienced cross-border cases involving related actions within the meaning of the B IA?

Answer: As far as can be seen, there are no decisions on this issue in Austria that concern B IA.

The decisions cited here all relate to the previous regulation (B IA):

- A stay of proceedings by the court subsequently seized is out of the question in any event if there is no risk of actually contradictory decisions on related claims.[235]
- The decision on an official stay of the domestic proceedings due to a related action is at the dutiful discretion of the court subsequently seized.[236]
- There may be a connection even if different claims arising from one and the same contract are brought in different States.[237]
- The concept of relating actions may also include procedural set-off defences which are pleas in law in proceedings pending between the same parties abroad. [238]

9.3.1. How have your courts defined irreconcilability for the purpose of related actions?

Answer: As stated above, the definition of "related actions" does not have the same scope as a combination of proceedings under Austrian Law, therefore an answer is not possible.

9.3.2 How have your courts exercised the discretion to stay proceedings?

Answer: A distinction is made between two cases of suspension of proceedings: The first case of suspension is *ex lege*, without the need for a judge's decision. If a prescribed *ex lege* suspension is disregarded, the existence of a ground for invalidity must normally be assumed. Suspensions *ex lege* include the interruption in the event of the death or loss of the ability to stand trial of a party, the opening of insolvency proceedings or, for example, the death of the lawyer in the case of absolute lawyer's duty.[239]

The second possibility of interruption is by judicial order. The law may require or exempt the judge from the interruption. If, for example, a preliminary question arises in civil proceedings

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[234] OLG Linz 2 R 6/01t.

[235] OGH 25.5.1999, 1 Ob 115/99i EvBl 1999/187 = ZfRV 1999/70; RIS-Justiz RS0112100.

[236] RIS-Justiz RS0128721.

[237] OGH 25.5.1999, 1 Ob 115/99i EvBl 1999/187 = ZfRV 1999, 70; 22.2.2001, 6 Ob 295/00a ZfRV 2001/58 = JBl 2001, 796; RIS-Justiz RS0112099.

[238] OGH 25.5.1999, 1 Ob 115/99i EvBl 1999/187 = ZfRV 1999/70; RIS-Justiz RS0112099.

[239] Rechberger and Simotta, supra n. 14, p. 295 f.

which is already the subject of another dispute, the court may interrupt the proceedings pursuant to § 190 ZPO until the preliminary question has been finally decided.[240]

Part 10: Court settlements

10.1 What are the prerequisites for the conclusion of a court settlement?

Answer: A court settlement can be concluded before as well as during the legal dispute until it has been finally settled, but always only in the oral proceedings. The court settlement requires a consensus of the parties on the disputed claim. At the request of the parties, their agreement is to be documented by the judge, making it a court settlement. In order for the settlement to constitute an enforcement title, the protocol must be signed by the judge, the clerk and also by the parties.[241]

However, the judge may only record the settlement if:

1. there is domestic jurisdiction, international jurisdiction and admissibility of the legal process.
2. the parties have the capacity to be a party to the case and to institute proceedings or are represented by a lawyer.
3. there is not already a final decision on the subject of the settlement.
4. the subject matter of the settlement is capable of being settled at all.
5. the settlement is drafted in such a specific manner that it meets the requirements of the certainty of an enforcement title.

On the other hand, lack of jurisdiction as to substance and place does not constitute an obstacle to a court settlement.[242]

10.1.1 Describe the necessary elements a court settlement must contain.

Answer: The execution of a court settlement is based on its formal requirements, which are answered in the next question (10.1.2). In order for the court settlement to be used as an enforcement title without writ of execution, it must meet the certainty requirements of an execution title (see question 10.2).[243] In any case, the court settlement must name the parties, the date of the conclusion of the settlement and the subject of the settlement. In addition,

[240] Rechberger and Simotta, supra n. 14, p. 295 f.

[241] Rechberger and Simotta, supra n. 14, p. 370 ff.

[242] Rechberger and Simotta, supra n. 14, p. 370 ff.

[243] P. Anzenberger, Der gerichtliche Vergleich (unpublished habilitation thesis 2019) p. 113.

according to case law, a signature of the parties is always required to give effect to the court settlement.[244]

10.1.2 What formal requirements must be satisfied (e.g. signature of the parties; service)?

Answer: For a settlement to constitute an executory title, the minutes recording the subject matter of the settlement must be signed by the judge and the secretary (§ 213 ZPO) and (according to the case law) also by the parties.[245]

The court settlement has the character of both a procedural act and a legal transaction under civil law. The process is terminated only by a settlement concluded in the form and in compliance with the requirements of procedural law.[246]

The substantive legal validity of a court settlement must be assessed in accordance with the provisions of civil law. If the court settlement is ineffective, e.g. due to the violation of logging regulations, it can be valid as a private legal transaction.[247] The court settlement may contain a suspensive condition. However, a resolving condition is not permitted.[248]

Furthermore, a court settlement can only end the process in the case of absolute obligation to hire a lawyer if it has been concluded with the assistance of lawyers.[249]

10.1.3 How are the parties identified?

Answer: The identification of the parties of the court settlement is not a problem in practice and is therefore not regulated by law. It is therefore necessary to refer to the general rules for determining the parties to civil proceedings.

Determining characteristics are first and foremost the information required under § 75 (first name and surname, profession, address), in addition also useful additions (date of birth, company register number, etc.) and, with regard to § 235 (5) ZPO, the entire content of the statement of claim, because the person who was objectively undoubtedly meant in consideration of this entire content is treated as a party - if necessary by correcting the party designation. A distinction must be made between the question of who is a party and the question of whether this party is also correctly designated, whether it is capable of being a party, whether it is capable of taking legal action or is properly represented, and whether it is also rightly suing (active legitimation) or being sued (passive legitimation) in substantive law terms.

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[244] W. Jakusch, Comments on § 1 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) § 1 EO Rz 34.

[245] Rechberger and Simotta, supra n. 14, p. 368 f.

[246] A. Klauser and G. Kodek, JN-ZPO Österreichisches und Europäisches Zivilprozessrecht - collection of decisions[18] (Manz 2018) § 204 ZPO decision 1.

[247] Klauser and Kodek, supra n. 246, decision 2 ff.

[248] Klauser and Kodek, supra n. 246, decision 19.

[249] R. Fucik,'Der Vergleich', 79 Österreichische Juristen-Zeitung (2008) p. 741 at p. 743.

10.1.4 What (substantive) legal relationships can be settled in a court settlement?

Answer: The object of a court settlement can in principle be anything that can be the subject of a judgment. There are, however, claims which are not eligible for settlement under material law or procedural law in the public interest.[250]

Like any other execution title, the settlement must also contain a performance obligation.[251] In addition to the objects of settlement mentioned in the law (recognition of legal relationships, assumption of liability for a performance, acquiescence or omission), which would be considered claims for declaratory judgment and claims for performance, claims for legal structuring are also comparable, unless the legal structuring is reserved for the judge.[252]

A settlement is excluded in the case of

1. claims arising from illicit or prohibited activities.
2. the validity of a marriage and, in principle, in marriage and partnership proceedings.
3. the content of a testamentary disposition before its publication.
4. the claims for compensation for false statements regarding the capital contribution of a Austrian GmbH, insofar as the compensation is necessary to satisfy creditors.
5. the legal force and content of a decision.
6. the existence of a plea for annulment or reopening.
7. the admissibility or timeliness of an appeal.
8. the admissibility of a secondary intervention.[253]

Settlements concerning claims for damages of an Austrian AG against its members of the Executive Board are only admissible to a limited extent. Claims which are not purely pecuniary claims, on which no settlement can be concluded, cannot be the subject of an arbitration agreement pursuant to § 582 ZPO. The scope of the settlement is not limited to the subject matter of the dispute; a general settlement of all claims in dispute and doubtful claims between the parties is also permissible.[254]

10.2 When does a court settlement become enforceable?

Answer: According to § 1 Z 5 EO, a settlement which has been reached over civil matters before a court (civil or criminal court) constitutes an execution title. This means that the court settlement is enforceable if it contains a specific order for performance. According to Austrian

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[250] Anzenberger, supra n. 243, p. 79 f.

[251] Jakusch, supra n. 244, Rz 40.

[252] E. Gitschthaler, Comments on §§ 204 to 206 *Zivilprozessordnung* (Code of Civil Procedure) in W. Rechberger and T. Klicka (eds.), Kommentar zur Zivilprozessordnung[5] (Verlag Österreich 2019) §§ 204 to 206 ZPO Rz 15.

[253] Rechberger and Simotta, supra n. 14, p. 370.

[254] Rechberger and Simotta, supra n. 14, p. 370.

case law, the question of the enforceability of the court settlement is hereby always to be assessed according to procedural law.[255]

A settlement as defined in § 1 no. 5 EO requires that it has been concluded before a judge. It is not decisive whether the judge had factual, local or functional jurisdiction.[256]

The court settlement becomes enforceable when it has been effectively concluded and the agreed period for performance has expired. If the court settlement does not contain a time limit for performance, it is enforceable as of its effectiveness. The termination of the underlying proceedings is again not a prerequisite for the court settlement to be effective.[257]

A confirmation of enforceability is not required for court settlements under § 54 (2) EO. However, the content of the court settlement, as with other execution titles, must be sufficiently determined to be enforceable.[258] Nevertheless, the parties have the option of bringing an action to supplement the title in accordance with § 10 EO to remedy any uncertainty.[259]

A court settlement only becomes an enforcement title when it has been recorded in the protocol. In addition, case law requires the signature of the parties for civil court settlements.[260] Whether a concluded settlement constitutes an enforcement title is to be judged solely on the basis of procedural law.[261] No additional confirmation of enforceability is required.[262]

10.3 How are (singular and universal) successors of parties affected by the judgment?

Comment: *Explain how succession of parties occurs after the rendering of the judgment as well as in potential enforcement proceedings, and what acts, if any, must be undertaken for interested persons to demonstrate succession. In addition, explain whether there are circumstances in which succession is not possible.*

Answer: Generally, the distribution of the party roles for the execution proceedings is already made in the enforcement title. However, it can happen that in the period between the drafting of the enforcement title and the initiation of the execution, the substantive legal responsibility changes either on the creditor or on the debtor side. In order to avoid a situation in which in such a case the enforcement title already obtained lapses and a new enforcement title has to be created, § 9 EO allows the possibility of using the original enforcement title in favor of the new

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[255] Anzenberger, supra n. 243, p. 113.

[256] Jakusch, supra n. 244, Rz 31/1.

[257] Anzenberger, supra n. 243, p. 113.

[258] W. Jakusch, Comments on § 7 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung^3 (Manz 2015) § 7 EO Rz 35/2.

[259] W. Jakusch, Comments on § 10 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung^3 (Manz 2015) § 10 EO Rz 6.

[260] W. Jakusch, Comments on § 3 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung^3 (Manz 2015) § 3 EO Rz 34.

[261] Jakusch, supra n. 260, Rz 38/1.

[262] Jakusch, supra n. 260, Rz 42.

creditor or against the new debtor if the change in the person of the creditor or debtor which occurred after the creation of the enforcement title is proved by a qualified documents.[263]

The possibility of being able to carry out an execution for the benefit of or against a person other than the person named in the execution order by applying § 9 EO presupposes that the claim owed, for which an execution order already exists, has been transferred in substance. For the purposes of § 9 EO, a claim or obligation has only been transferred if the former creditor or debtor has withdrawn from the legal relationship.[264]

If the legal succession cannot be provided by qualified documents, the possibility of an action for the addition of a enforcement title is open. If the enforcement title is too indefinite and thus does not meet the requirements of § 7 (1) EO, an action for the supplementation of the title within the meaning of § 10 EO can be filed. The purpose of that action is not to create a new execution title, but only to prove that the conditions for execution have been met. The aim of the action is therefore to establish the existence of the claim for execution.[265]

The wording of the action for a enforcement title supplement depends on the legal classification of the title supplement action, but also on the respective subject matter of the proceedings. The case law regards it as an action for declaratory judgment on the existence of the claim for enforcement, which is why the action must be drafted accordingly.[266]

10.4 If applicable, describe how the legal relationship, once settled, can be amended?

Answer: The court settlement may provide for the possibility of revocation. In case of doubt, this is to be regarded as an agreement under procedural law. It is a suspensive condition. The settlement becomes effective after expiration of the revocation period.[267]

The parties may also withdraw from the settlement. This right is only available to the parties if it has been explicitly or implicitly reserved to them. This does not apply if the settlement concerns a simultaneous counter-performance to be rendered in the event of default. In this case, withdrawal is also possible if a right of withdrawal was not reserved.[268]

A court settlement is subject to challenge on the grounds of threat, deception and misapprehension. A challenge on the grounds of misapprehension is, however, only possible if the settlement is based on the same.[269] The procedural invalidity of a settlement may be asserted

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[263] W. Jakusch, Comments on § 9 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) § 9 EO Rz 1.

[264] Jakusch, supra n. 263, Rz Rz 2.

[265] Neumayr and Nunner-Krautgasser, supra n. 10, p. 103 f.

[266] Neumayr and Nunner-Krautgasser, supra n. 10, p. 106 f.

[267] Klauser and Kodek, supra n. 246, Rz 33.

[268] Klauser and Kodek, supra n. 246, Rz 49 f.

[269] Klauser and Kodek, supra n. 246, Rz 51.

by the parties by means of an application for continuation.[270] The material invalidity of a settlement may be asserted by means of an action for declaratory judgement.[271]

However, a court settlement may not be contested by means of an action for annulment or reopening. Appeals against a settlement are also not permitted.[272]

10.5 If applicable, describe how (under what circumstances) a court settlement can no longer be considered enforceable?

Answer: A court settlement can be challenged at any time by an action for a declaratory judgment on the grounds of invalidity or defects of intent.[273]

According to the prevailing doctrine of the double functionality of a court settlement, a strict distinction must be made between its material and its procedural part. A court settlement can be valid in procedural terms and thus result in the procedural settlement of the dispute, furthermore, it can also be valid as a substantive legal transaction and thereby, for example, have the effect of settling the dispute, but be ineffective in its function as an executory title; in the latter case, for example, a renewed enforcement of the settled object could not be countered by the plea of lacking legal protection.[274]

Even after a successful fight against the settlement with an independent lawsuit, its litigation-ending effect does not cease: Instead, claims arising from the lapse of the settlement agreement must be asserted by means of a separate new lawsuit.[275]

If the court settlement is invalid for procedural reasons and therefore *ex tunc*, the substantive agreement shall nevertheless remain in force.[276]

If the substantive legal prerequisites for the validity of a settlement are missing because it violates mandatory legal provisions, the agreement of the parties is also invalid as a court settlement.[277]

If the substantive legal requirements for the validity of a settlement are missing because the settlement is contrary to mandatory legal provisions, a revocation would also be possible: The revocation of the settlement itself can no longer be effectively revoked. A revocation filed in due time prevents the settlement from taking effect under procedural law and consequently prevents the creation of an execution title. A subsequent declaration to withdraw the revocation

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[270] Klauser and Kodek, supra n. 246, Rz 55.

[271] Klauser and Kodek, supra n. 246, Rz 56.

[272] Klauser and Kodek, supra n. 246, Rz 58 f.

[273] Gitschthaler, supra n. 252, Rz 8/1.

[274] W. Thöni, Comments on §§ 1375 to 1410 *Allgemeines Bürgerliches Gesetzbuch* (Austrian General Civil Law Code) in A. Fenyves and F. Kerschner and A. Vonklich (eds.), Großkommentar zum ABGB - Klang[3] (Verlag Österreich 2011) appendix: „court settlement“ (*„Der gerichtliche Vergleich“*) Rz 19.

[275] OGH 26.02.2015, 8Ob9/15d.

[276] Gitschthaler, supra n. 252, Rz 11.

[277] Thöni, supra n. 274, Rz 19.

in order to allow the effects of the settlement to reappear is only of a contractual nature, but it can no longer restore the effectiveness of the settlement that was eliminated by the revocation.[278] The specific form of revocation is subject to the parties' disposition; this arrangement must also be interpreted according to the will of the parties in each individual case. The revocation period is not a procedural period, therefore a reinstatement to the previous status is not possible.[279]

10.6 If applicable, describe how errors in a court settlement can be remedied and the recourses that are available against a notarial act, whether independently or during enforcement proceedings.

Answer: A court settlement may - as a dual-functional procedural act - have defects on the procedural or material side of the transaction if a procedural or material condition for the settlement is not met, whereby the court must refuse to record the settlement if the defect is detected in time.[280]

If it is a purely formal deficiency, the procedural invalidity of the settlement must be asserted in the former proceedings, i.e. with an application for continuation. Subsequently, however, the procedurally ineffective settlement can be quite effective as a transaction under material law, i.e. in its novating effect, unless it is evident from the party agreement or the clear interests of the parties that the elimination of the procedural side of the settlement also invalidates the substantive agreement.[281]

If the former plaintiff wants to pursue his original claim, he can only do so with the application for continuation, because a new filing of the original claim is opposed by the pendency of the first proceedings (which were only apparently terminated by the invalid court settlement). If the settlement debtor wishes to assert the procedural invalidity of the settlement, he may also do so by means of an application for continuation, but often he will resort to combating only the execution of the settlement. To this purpose, he must assert the invalidity of the court settlement as an executory title by means of a motion for discontinuance under § 39 (1) nr 10 EO. Here too, however, he must expect that the creditor will respond by filing a petition for continuation in the original proceedings and in this way obtain a new, flawless title.[282]

The material defects of a settlement are those reasons which lead to its original invalidity or entitle to challenge the settlement under substantive private law, especially the Austrian Civil Code. In case of disputes about the content of the settlement, the prevailing opinion allows for

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[278] Thöni, supra n. 274, Rz 12.

[279] Thöni, supra n. 274, Rz 9 ff.

[280] T. Klicka, Comments on § 206 *Zivilprozessordnung* (Code of Civil Procedure) in H. Fasching and A. Konecny (eds.), Kommentar zu den Zivilprozessgesetzen Bd II/3^{3} (Manz 2015) § 206 ZPO Rz 33.

[281] Klicka, supra n. 280, Rz 37.

[282] Klicka, supra n. 280, Rz 38 f.

an action for correction of the settlement wording in the sense of the agreement concluded in truth, as well as an action for determination of the content of the settlement.[283]

Depending on which party opposes the settlement, the independent assertion can take the form of an action for invalidation or avoidance of the settlement (usually by the settlement debtor), a recovery action under unjust enrichment law (if already enforced, also by the settlement debtor) or the invalidation or avoidance of the settlement and new enforcement of the original claims (by the creditor). The action brought by the settlement debtor is a procedural class action, since the judgment granting it eliminates the court settlement as an enforcement instrument, i.e. it is declared invalid or ineffective. The predominant doctrine also allows for an opposition action under § 35 EO for the party against whom a settlement is sought in the event of material deficiencies of the court settlement, although this only covers objections that arose subsequently.[284]

The appeals against an enforceable notarial act are dealt with in question 11.15.

[283] Klicka, supra n. 280, Rz 41.

[284] Klicka, supra n. 280, Rz 44 ff.

Part 11: Enforceable notarial acts

11.1 Briefly describe the competence the notary holds in civil and commercial matters in your Member State.

Answer: According to § 1 Regulations for Notaries (henceforth: NO) , notaries are appointed and publicly certified by the State to record and draw up authentic instruments in accordance with the law, in particular concerning legal declarations, legal transactions and facts from which rights are to be derived. Although notaries are partially vested with sovereign powers, the core of their activity remains private.[285]

As a public notary, he acts in a sovereign capacity. Documents drawn up by him within his legally assigned area of activity have the character of official documents according to § 292 (1) ZPO and § 47 AVG.[286]

The notary is only obliged to the law and bound by it. Like the judge, he is irreplaceable (§ 10 (5) NO) and irremovable (§ 19 (1) NO). The notary is independent in relation to the state and the parties. In economic terms, his independence extends further than that of professional judges. Although the notary is subject to supervision, he is not, however, subject to any personal or factual instructions in his activity, e.g. with regard to their usefulness or the content of the deeds.[287]

11.2 Is (can) a notarial act be considered an enforcement title in your respective Member State/Candidate Country? If so, briefly present, how the concept of a notarial act as an enforcement title is defined in your national legal order.

Comment: *If the definition is provided by a provision of law, then please provide the citation to the exact article/paragraph of that rule and an English translation.*

Answer: The notarial act is the written deed prepared by the notary for the parties, which is provided with the force of a public deed through the notary's involvement; the legal transaction or declaration is, so to speak, dictated to the notary by the parties. As this written deed remains in the notary's custody, it is represented in legal transactions by the execution. By notarisation, the notary certifies, in accordance with §§ 76 ff NO, legally relevant facts which he has recorded in his notarial record as having been perceived by him, namely the acts that took place before him or the oral declarations made by the parties or other persons.[288]

The requirements for the executability of a notarial deed can be found in § 3 NO. Accordingly, a notarial deed is executable like a court settlement if

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[285] K. Wagner and G. Knechtel, Notariatsordnung und alle einschlägigen Rechtsvorschriften[6] (Manz 2014) § 1 *Notariatsordnung* (Notary Regulations) Rz 2.

[286] Wagner and Knechtel, supra n. 285, Rz 1.

[287] Wagner and Knechtel, supra n. 285, Rz 10.

[288] Wagner and Knechtel, supra n. 285, Rz 14 f.

a) it establishes an obligation to perform or refrain from performing; this does not include the obligation to evict a flat or individual parts of a flat, unless the eviction is by the owner or co-owner of the property;
b) the person of the beneficiary and the obligor, the legal title, the object, the nature, the extent and the time of the performance or omission
c) a settlement of the obligation under lit. a is permissible;
d) the obligor has declared in this or in a separate notarial deed that the notarial deed is to be immediately enforceable (submission to execution). This declaration does not require acceptance by the entitled party in order to be legally effective. If a private deed is only confirmed by a notary by the obligated party (§ 54 (1) NO), the latter's submission to execution in the notarial deed drawn up for this purpose is sufficient for the enforceability of his notarially confirmed obligation.[289]

Notarial acts can be established in an enforceable form if certain conditions (lit. a to d) are met. If the establishment of an enforceable notarial deed is possible, the notary must inform the parties accordingly. This results from his duty to instruct. The enforceable notarial deed is an execution title in accordance with § 1 Z 17 EO.[290]

11.3 Is, according to your domestic legal order, a notarial act an enforcement title per se or must it contain additional conditions/clauses to be considered as such?

Comment: *For instance, in Slovenia, notarial acts are considered enforcement titles only if they contain a so called 'direct enforceability clause'.*

Answer: According to § 3 NO, a notarial deed is executable like a settlement concluded in court if it contains a specific obligation to a performance or omission in respect of which a settlement is permissible and the obligor has expressly agreed in this or a separate notarial deed that the notarial deed shall be immediately enforceable (submission clause).[291]

The notarial act becomes immediately enforceable by the submission clause. This means that the enforceability of the notarial act is given without further proceedings. The declaration of subjection is therefore not opposed to the agreement of a performance period in the notarial deed.[292]

The declaration of submission may be contained in a separate document, which in turn must meet the requirements of a notarial deed. The reference to the deed containing the obligation to perform must also be clearly established.[293]

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[289] § 3 *Notariatsordnung* (henceforth: NO).

[290] K. Wagner and G. Knechtel, Notariatsordnung und alle einschlägigen Rechtsvorschriften[6] (Manz 2014) § 3 *Notariatsordnung* (Notary Regulations) Rz 1.

[291] Neumayr and Nunner-Krautgasser, supra n. 10, p. 73.

[292] Jakusch, supra n. 244, Rz 102.

[293] Jakusch, supra n. 244, Rz 104.

11.3.1 If there is a certain clause (that constitutes the notarial deed an enforcement title) please set out an example of such a clause (cite an example clause). Furthermore, explain if there a difference in said clause if the deed refers to monetary or non-monetary claims?

Answer: The obligated parties give their express consent that this notarial deed shall be immediately enforceable in favour of the debtor party with regard to the above points together with further interest.[294]

If the deed refers to monetary or non-monetary claims, the submission clause is designed in the same way. However, it is important that it nevertheless fullfils the requirements for the certainty of an enforcement title.[295]

11.3.2 Is the debtor's consent to direct enforceability considered to be part of a notarial act?

Answer: The creditor does not have to consent to the declaration of submission *expressis verbis*. It becomes legally effective even without his acceptance in accordance with § 3 lit d NO.[296] The creditor therefore does not need to participate in the establishment of the notarial deed.[297]

11.3.3 If the previous question is answered in the positive, can such consent be of a general nature or specific and concrete to the debtor's obligations arising from the notarial act?

11.4 How is a notarial act structured in your domestic legal order? What elements must it contain?

Answer: The notarial act itself is the written deed drawn up by the notary for the parties, which, with the notary's assistance, has the force of a public deed.[298] A fixed structure is not prescribed by law, but it is important that all formal requirements are met. These requirements are found in § 68 (1) NO, according to which the notarial deed must in any case contain

a) the place, then the year, month and day of the hearing;
b) the first name and surname, and the office location of the notary, and, if a second notary was present, also of the latter;
c) (revoked)
d) the content of the transaction, with reference to any powers of attorney or other enclosures, unless these are attached (§ 48 (2) NO);

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[294] OGH 18.12.2002, 3 Ob 121/02v.

[295] Wagner and Knechtel, supra n. 290, decision 17.

[296] § 3 lit d NO.

[297] Wagner and Knechtel, supra n. 290, decision 6.

[298] J. Kisser, Best Practice - Formvorschriften und Beglaubigung (LexisNexis 2013) p. 4.

e) at the end, the statement that the act has been read out to the parties or the designation of those formalities by which, according to the provisions of this Act, the lecture was replaced and the statement of the approval of the act by the parties;
f) the signatures of the parties and, if the involvement of witnesses, confidants or interpreters is required under the provisions of this Act, also of these persons. Identity witnesses may add their signatures either at the end of the document or after the reference to the confirmation of identity.
g) if the notarial deed is drawn up on paper, the notary's signature on paper with the affixing of his official seal (§ 47 (2) NO); if the notarial deed is drawn up electronically, the notary's electronic certification signature (§ 47 (3) NO) after all other signatures have already been buried; in the case of § 56 (2) NO, the official signatures or the electronic certification signatures of both notaries.

11.5 What personal information must be specified in the notarial act for the purposes of identifying the Parties?

Answer: Due to the obligatory identity check by the notary and the signature process that takes place before him, the clear assignment of the signature to the party is guaranteed.[299]

The verification of identity is standardised in § 55 NO. If the notary does not know the party personally and in name, his identity must be confirmed to him

1. by means of an official photo ID (§ 36b (2) second sentence NO)
2. by two witnesses known to him personally and by name or identified by official photo identification (§ 36b (2) second sentence NO),
3. by a witness known or identified in this way and a document other than an official photo ID presented by the party, the possession of which indicates that the identity of the person presenting the document is assumed to be that of the person for whom the document is intended, provided there are no objections to this assumption, or
4. by a second notary public consulted.[300]

The determination of identity by the notary is of particular importance, as it is an integral part of the declaratory content of the deed which constitutes the complete proof. The notary must take the utmost care to establish the identity of the party. If the notary fails to check the identity of the party unknown to him personally or not known to him in name, the notarial deed does not have the force of a public deed (§ 66 NO). If it is not possible to establish identity in accordance with § 55 NO, the notary must refuse to perform the official act.[301]

11.6 Must a notarial act, considered to be an enforcement title, contain a threat of enforcement?

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[299] K. Wagner and G. Knechtel, Notariatsordnung und alle einschlägigen Rechtsvorschriften[6] (Manz 2014) § 1a *Notariatsordnung* (Notary Regulations) Rz 2.

[300] § 55 NO.

[301] K. Wagner and G. Knechtel, Notariatsordnung und alle einschlägigen Rechtsvorschriften[6] (Manz 2014) § 55 *Notariatsordnung* (Notary Regulations) Rz 1.

Answer: As stated above, no additional procedure is required for a notarial act to be directly enforceable. The declaration of subjection is sufficient for this purpose. Although the declaration of submission need not be identical to the law (*verba legalia*), it must, however, comply with the content requirements of § 3 (1) lit d NO.[302] A confirmation of enforceability is not required for an enforceable notarial deed pursuant to § 54 (2) EO.[303]

11.7 If applicable, how lengthy and important is the part of the notarial act, which contains warnings and explanations by the notary?

Answer: The legal transaction or the legal declaration is concluded or declared before the (not by the) notary. However, the notary is responsible for ensuring that the content of the deed corresponds to the true will of the parties. The notary must therefore not be content with merely recording the declarations of the parties as precisely as possible, but must ensure that these are suitable for bringing about the intended legal consequences. The notarial deed itself is the written deed produced by the notary for the parties, which is endowed with the force of a public deed through the involvement of the notary. The deed signed by the parties, the notary and any witnesses shall remain in the notary's custody. However, so-called "copies" of the original document as well as certified or simple copies or printouts are issued. These can be made on paper or in electronic form.[304] The notary's general duty to warn obliges him to issue any warnings and to inform about the scope of the declaration. However, this is not a part of the notarial act.[305] Therefore, the question cannot be answered.

11.7.1 Is the notary obliged to explicitly warn the parties about the direct enforceability of the act?

Answer: According to § 52 NO the notary is obliged, when recording a notarial deed, to investigate the personal ability and entitlement of each party to conclude the transaction as far as possible, to instruct the parties about the meaning and consequences of the transaction and to convince himself of their serious and true will, to record their declaration clearly and definitively in writing and, after reading the notarial deed, to ascertain by personal questioning of the parties that it corresponds to their will.[306]

The notary must also clarify any objections to formulations, in particular if these could lead to a legal dispute or possibly aim at the overreaching of one party. This instruction shall be recorded in writing if the parties nevertheless insist on the wording.[307]

[302] Jakusch, supra n. 244, Rz 102.

[303] § 54 Abs 2 EO.

[304] Kisser, supra n. 298, p. 4.

[305] § 52 NO.

[306] § 52 NO.

[307] A. Futterknecht and A. Scheer, Das Glossar für Rechtsanwälte und Konzipienten[2] (LexisNexis 2018) p. 217.

The notary is responsible for ensuring that the content of the deed reflects the true will of the parties. The notary must therefore not be content with merely recording the declarations of the parties as precisely as possible, but must ensure that these are suitable for bringing about the intended legal consequences.[308]

The extent of the instruction will depend on the given level of education and intelligence, the apparent knowledge of the party, the fact that it is represented by a legal expert or already advised by one, and will therefore be required differently for each party. The instruction must be given on the legal implications of the legal transaction and is one of the official duties of the notary.[309]

11.7.2 Is there a need for parties and/or the notary to sign each page of a notarial act, to be considered valid?

Answer: It is not necessary for the parties to sign each page of a notarial act.

A notarial act in paper form is signed at the end of the document by the notary and the participants (see § 68 (1) lit. g NO) second sentence in conjunction with § 47 (2) second sentence NO).

11.8 What are the consequences if the parties fail to meet the formal requirements for a valid notarial act?

Answer: The existence of a formal defect means that the document is not a public deed, which may also lead to the loss of a claim if the claim can only be based on a notarial deed.[310] The determination of identity is one of the contents of the document that constitutes the full proof. If the notary fails to verify the identity of a party unknown to him personally or in name, the notarial deed also does not have the force of a public deed (§ 66 NO). If the verification of identity is not possible, the notary must refuse to perform the official act.[311]

11.9 What kind of (substantive) obligations, arising out of legal relationships and contained in a notarial act can become directly enforceable, according to your domestic legal order (e.g. mortgage)? Conversely, are there legally valid obligations, which cannot become directly enforceable due to restrictions in legislation or due to judicial decisions?

Comment: *For instance, in Slovenia, taxes, which arise from the claim-enforcement procedure, cannot be directly enforced by the creditor. The same applies to some bank products.*

Answer: In principle, a notarial act can be concluded through many different civil law obligations. However, according to § 3 lit a NO it is generally not possible to agree with the

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[308] Kisser, supra n. 298, p. 4.

[309] K. Wagner and G. Knechtel, Notariatsordnung und alle einschlägigen Rechtsvorschriften[6] (Manz 2014) § 52 *Notariatsordnung* (Notary Regulations) Rz 7.

[310] Futterknecht and Scheer, supra n. 307, p. 217.

[311] Kisser, supra n. 298, p. 5.

notarial act an obligation to vacate a residence or individual parts of a residence.[312] Enforceable eviction obligations by means of a notarial deed are only permissible and effective for premises other than apartments or parts of apartments, such as business facilities, garages, etc., and for apartments or parts of apartments only if the obligor is also the (co-)owner of the property.[313]

In addition, § 3 lit. c NO must be observed, according to which a settlement concerning the object of the obligation must also be admissible.[314] Accordingly, reference should be made to question 10.1.4, where it has already been dealt with which types of legal relationships can be part of a court settlement.

11.10 Is it possible that conditional claims, contained in a notary act are directly enforceable? If so, are there any special conditions, which have to be met in notarial acts or in enforcement procedure?

Answer: Since 1993, § 7 (2) EO has been decisive for the proof of the occurrence of a condition or an agreed point in time, therefore an official or officially certified document is required.[315] This obligation to provide evidence shall only apply to conditions precedent. In the case of resolutory conditions, it is not the responsibility of the operating party to prove whether the condition has already occurred and destroyed the operated claim, but the obligated party must assert this by means of an opposition action.[316] The Court is not required to inquire into the fulfilment of a condition.[317]

11.11 Can obligations, contained in a directly enforceable notary deed, be contained in attachments to the notarial act or must they be set out specifically within the text of the act?

Answer: According to § 3 NO, in order to be enforceable, the notarial act must contain an obligation to perform or refrain from performing.[318] The obligation to make a certain performance does not have to be made with a certain wording, it is sufficient that it is clear from the context of the notarial deed - for example from the credit document attached to the notarial deed - to which performance the debtor has committed himself.[319] The attached private deed must be confirmed by the notary and only serves to specify the object of the performance.[320]

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[312] § 3 lit a NO.

[313] Wagner and Knechtel, supra n. 290, Rz 3.

[314] § 3 lit c NO

[315] Wagner and Knechtel, supra n. 290, Rz 4.

[316] OGH 13.11.1991, 3 Ob 96/91.

[317] Wagner and Knechtel, supra n. 290, decision E 32.

[318] § 3 lit a NO.

[319] Wagner and Knechtel, supra n. 290, decision 32.

[320] Wagner and Knechtel, supra n. 290, decision 20.

11.12 Is it possible for parties to conclude a contract wherein they set up a legal (contractual) relationship and only later bring said contract to the notary in order to confirm the direct enforceability of obligations, arising out of the contract?

Answer: In principle, every contract can be drawn up by a public notary in the special form of a notarial deed by agreement of the parties.[321] However, with regard to the restrictions on the content of a notarial deed, please refer to question 11.9.

11.13 Must the notarial act include the specification of the time period in which the obligation of the debtor is to be performed? In conjunction, is there the possibility that a notarial act is directly enforceable even if the time period has not yet expired? If so, under what conditions?

Answer: In principle, every contract can be drawn up by a public notary in the special form of a notarial deed by agreement of the parties.[322] However, with regard to the restrictions on the content of a notarial deed, please refer to question 11.9.

11.14 Disregarding EU legislation, are there any special restrictions regarding recognition and enforcement under the private international law of you Member State, pertaining specifically to foreign notarial acts?

Answer: Pursuant to § 2 (1) EO, execution titles created by a domestic authority or public body operating abroad are also deemed equivalent to domestic execution titles. This includes in particular the execution titles created abroad by Austrian diplomatic missions. Pursuant to § 2 (2) of the EO, foreign execution titles that are to be enforced under an international agreement without a separate declaration of enforceability are also treated as domestic execution titles.[323]

Finally, under § 84b EO, foreign enforcement orders which have been declared enforceable in accordance with the provisions of §§ 79 ff EO are also deemed equivalent to domestic enforcement orders. It is true that foreign enforcement orders can be granted even before the enforceability declaration issued to them has become final, but their execution is subject to certain restrictions until the enforceability declaration becomes final.[324] One speaks in this context of a declaration of enforceability or exequatur proceedings.[325]

The concept of acts and deeds drawn up abroad is broad and covers not only judicial findings such as judgments, orders and preliminary injunctions, but also court settlements and public deeds, as well as declarations of obligation made by a foreign notary and arbitration awards.[326]

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[321] Kisser, supra n. 298, p. 4.

[322] Kisser, supra n. 298, p. 4.

[323] Jakusch, supra n. 244, Rz 3.

[324] Jakusch, supra n. 244, Rz 4.

[325] T. Garber, Comments on § 79 Exekutionsordnung (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung^3 (Manz 2015) § 79 EO Rz 1.

[326] Garber, supra n. 325, Rz 1.

The foreign instrument must be fit for execution in the State of origin and, although it is not yet final in the State of origin, it must in any event be enforceable.[327]

11.15 Is it possible to bring grounds of objection in enforcement proceedings, concerning not only enforcement proper (execution), but opposition to the claim itself? In other words, can the debtor raise grounds against the claim contained in the notary act in enforcement proceedings?

Answer: The opposition action (§ 35 EO) is also open for defence against an unjustified execution if the execution was granted on the grounds of an enforceable notarial deed.[328] However, defects relating to the validity or the legally effective conclusion of the enforceable notarial deed constituting the execution title are not grounds for opposition [329], since an opposition action or application does not constitute a means of breaking the validity of the execution order.[330] Here, there is rather the possibility of an impugnation action (§ 36 EO). In this case, the notarial act is contested on formal grounds, for example, because the formal requirements of § 3 NO are not fulfilled. This applies in particular if the subjection clause is missing.[331] The material invalidity of the legal transaction recorded in the notarial deed cannot be asserted with this action. This would only be possible by means of an action under § 39 EO (suspension of execution).[332]

The possibility of an action for imputation also exists if the content of the enforceable notarial act does not correspond to the will of the parties. If the obligated party has already paid what is due according to the true intention of the party, he has the choice between opposition and impugnation proceedings. If the authorisation for execution does not correspond to the intention of the parties on which the settlement or enforceable notarial deed forming the execution title is based, and if the obligor has already performed the service that corresponds to the true intention of the parties after the conclusion of the settlement or the enforceable notarial deed, the title-related claim is extinguished by this service and the obligor has the option of bringing an opposition action.[333] However, he may also bring an action for impugnation. In this case, the obligor can choose between the two legal remedies.[334]

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[327] A. Burgstaller and J. Höllwerth, Comments on § 79 Exekutionsordnung (Austrian Enforcement Order) in A. Burgstaller and A. Deixler-Hübner (eds.), Kommentar zur Exekutionsordnung[5] (LexisNexis 2001) § 79 EO Rz 3.

[328] Jakusch, supra n. 210, Rz 64.

[329] Jakusch, supra n. 210, Rz 51/1.

[330] S. Dullinger, Comments on § 35 Exekutionsordnung (Austrian Enforcement Order) in A. Burgstaller and A. Deixler-Hübner (eds.), Kommentar zur Exekutionsordnung[20] (LexisNexis 2015) § 35 EO Rz 18.

[331] Neumayr and Nunner-Krautgasser, supra n. 10, p. 202.

[332] A. Deixler-Hübner, Comments on § 36 Exekutionsordnung (Austrian Enforcement Order) in A. Burgstaller and A. Deixler-Hübner (eds.), Kommentar zur Exekutionsordnung[20] (LexisNexis 2015) § 36 EO Rz 35.

[333] Jakusch, supra n. 210, Rz 46.

[334] W. Jakusch, Comments on § 36 *Exekutionsordnung* (Austrian Enforcement Order) in P. Angst and P. Oberhammer (eds.), Kommentar zur Exekutionsordnung[3] (Manz 2015) § 36 EO Rz 33.

In the case of an action for impugnation, it makes no difference whether the facts relating to the object of the objection occurred before or after the execution order was issued.[335] If the execution deed is not a court decision (such as an enforceable notarial deed), only facts (*nova producta*) which have occurred after the execution deed was created can constitute a ground for opposition.[336]

The assertion of substantive legal defects of the enforceable notarial deed is only possible according to § 39 EO. The basis for the discontinuation of the proceedings within the meaning of § 39 EO is provided by actions for substantive objections against the creation of an enforceable notarial deed.[337] In any event, the execution must be discontinued if the enforceable notarial deed has been successfully challenged on the grounds of lack of will. An action for non-existence of the claim would also be possible.[338]

11.16 If your domestic legal order does not operate with enforceable notarial acts, how would you enforce a foreign enforceable notarial act?

Answer: This question is not applicable since Austrian notarial acts are to be considered enforceable if the conditions are met (see above).

11.17 Are there other authentic instruments under your domestic legal order, which are considered enforcement titles?

Answer: Apart from court judgments, rulings and orders, there are two types of authentic instruments in particular which are to be regarded as execution titles under § 1 EO. On the one hand there are so-called arrears statements which are enforceable. These are public deeds on the existence and enforceability of public-law liabilities. Thus, the administrative authority only discloses the outstanding payment obligation. Arrears statements are not notifications and do not have to be sent to the debtor. On the other hand, arbitral awards and arbitrational court settlements are enforceable.[339]

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[335] Neumayr and Nunner-Krautgasser, supra n. 10, p. 202.

[336] Dullinger, supra n. 330, Rz 27.

[337] A. Deixler-Hübner, Comments on § 39 Exekutionsordnung (Austrian Enforcement Order) in A. Burgstaller and A. Deixler-Hübner (eds.), Kommentar zur Exekutionsordnung[26] (LexisNexis 2018) § 39 EO Rz 6.

[338] Jakusch, supra n. 173, Rz 13.

[339] Neumayr and Nunner-Krautgasser, supra n. 10, p. 72 f.

Instructions for contributors

1. References

As a rule, specific references should be avoided in the main text and, preferably, should be placed in the footnotes. Footnote numbers are placed after the final punctuation mark when referring to the sentence and directly after a word when referring to that word only. We humbly invite our authors to examine carefully our sample references which are preceded by [•]. These sample references put the theory of our authors' guidelines into practice and we believe that they may serve to further clarify the preferred style of reference.

1.1. Reference to judicial decisions

When citing national judicial authorities, the national style of reference should be respected. References to decisions of European courts should present the following form:

[Court] [Date], [Case number], [Party 1] [v] [Party 2], [ECLI] (NB: the "v" is not italicised)

- ECJ 9 April 1989, Case C-34/89, Smith v EC Commission, ECLI:EU:C:1990:353.
- ECtHR 4 May 2000, Case No. 51 891/9, Naletilic v Croatia.

1.2. Reference to legislation and treaties

When first referring to legislation or treaties, please include the article to which reference is made as well as the (unabbreviated) official name of the document containing that article. The name of a piece of legislation in a language other than English, French or German should be followed by an italicised English translation between brackets. In combination with an article number, the abbreviations TEU, TFEU, ECHR and UN Charter may always be used instead of the full title of the document to which the abbreviation refers. If the title of a piece of legislation constitutes a noun phrase, it may, after proper introduction, be abbreviated by omission of its complement. Thus:

- Art. 2 Protocol on Environmental Protection to the Antarctic Treaty (henceforth: the Protocol).
- Art. 267 TFEU.
- Art. 5 Uitleveringswet [Extradition Act].

1.3. Reference to books

1.3.1 First reference

Any first reference to a book should present the following form: [Initial(s) and surname(s) of the author(s)], [Title] [(Publisher Year)] [Page(s) referred to]

- J.E.S. Fawcett, The Law of Nations (Penguin Press 1968) p. 11.

If a book is written by two co-authors, the surname and initials of both authors are given. If a book has been written by three or more co-authors, 'et al.' will follow the name of the first author and the other authors will be omitted. Book titles in a language other than English,

French or German are to be followed by an italicised English translation between brackets. Thus:

- L. Erades and W.L. Gould, The Relation Between International Law and Municipal Law in the Netherlands and the United States (Sijthoff 1961) p. 10 – 13.
- D. Chalmers et al., European Union Law: cases and materials (Cambridge University Press 2010) p. 171.
- F.B. Verwayen, Recht en rechtvaardigheid in Japan [Law and Justice in Japan] (Amsterdam University Press 2004) p. 11.

1.3.2 Subsequent references

Any subsequent reference to a book should present the following form (NB: if more than one work by the same author is cited in the same footnote, the name of the author should be followed by the year in which each book was published):

[Surname of the author], [supra] [n.] [Footnote in which first reference is made], [Page(s) referred to] Fawcett, supra n. 16, p. 88.

- Fawcett 1968, supra n. 16, p. 127; Fawcett 1981, supra n. 24, p. 17 – 19.

1.4. Reference to contributions in edited collections

For references to contributions in edited collections please abide by the following form (NB: analogous to the style of reference for books, if a collection is edited by three or more co- editors only the name and initials of the first editor are given, followed by 'et al.'):

[Author's initial(s) and surname(s)], ['Title of contribution'], [in] [Editor's initial(s) and surname(s)] [(ed.) or (eds.)], [Title of the collection] [(Publisher Year)] [Starting page of the article] [at] [Page(s) referred to]

- M. Pollack, 'The Growth and Retreat of Federal Competence in the EU', in R. Howse and K. Nicolaidis (eds.), The Federal Vision (Oxford University Press 2001) p. 40 at p. 46.

Subsequent references follow the rules of 1.3.2 supra.

1.5. Reference to an article in a periodical

References to an article in a periodical should present the following form (NB: titles of well-known journals must be abbreviated according to each journal's preferred style of citation):

[Author's initial(s) and surname(s)], ['Title of article'], [Volume] [Title of periodical] [(Year)] [Starting page of the article] [at] [Page(s) referred to]

- R. Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa-New Zealand', 17 Waikato Law Review (2009) p. 74 at p. 80 – 82.
- S. Hagemann and B. Høyland, 'Bicameral Politics in the European Union', 48 JCMS (2010) p. 811 at p. 822.

Subsequent references follow the rules of 1.3.2 supra.

1.6. Reference to an article in a newspaper

When referring to an article in a newspaper, please abide by the following form (NB: if the title of an article is not written in English, French or German, an italicised English translation should be provided between brackets):

- [Author's initial(s) and surname(s)], ['Title of article'], [Title of newspaper], [Date], [Page(s)]: T. Padoa-Schioppa, 'Il carattere dell' Europa' [The Character of Europe], Corriere della Serra, 22 June 2004, p. 1.

1.7. Reference to the internet

Reference to documents published on the internet should present the following form: [Author's initial(s) and surname(s)], ['Title of document'], [<www.example.com/[...]>], [Date of visit]

- M. Benlolo Carabot, 'Les Roms sont aussi des citoyens européens', <www.lemonde.fr/idees/article/2010/09/09/les-roms-sont-aussi-des-citoyens-europeens_1409065_3232.html>, visited 24 October 2010. (NB: 'http://' is always omitted when citing websites)

1.8. Cross-references

In referring to other chapters and sections of the text, as well as to other footnotes, supra is used to refer to previous sections of the contribution, whereas infra is used to refer to subsequent sections. Cross-references should never refer to specific page numbers. Thus:

- See text to n. 10 supra.
- See text between n. 10 and n. 12 infra.
- Compare n. 10 supra.

2. Spelling, style and quotation

In this section of the authors' guidelines sheet, we would like to set out some general principles of spelling, style and quotation. We would like to emphasise that all principles in this section are governed by another principle – the principle of consistency. Authors might, for instance, disagree as to whether a particular Latin abbreviation is to be considered as 'common' and, as a consequence, as to whether or not that abbreviation should be italicised. However, we do humbly ask our authors to apply the principle of consistency, so that the same expression is either always italicised or never italicised throughout the article.

2.1 General principles of spelling

- Aim for consistency in spelling and use of English throughout the article.
- Only the use of British English is allowed.
- If words such as member states, directives, regulations, etc., are used to refer to a concept in general, such words are to be spelled in lower case. If, however, the word is intended to designate a specific entity which is the manifestation of a general concept,

the first letter of the word should be capitalised (NB: this rule does not apply to quotations). Thus:

- [...] the Court's case-law concerning direct effect of directives [...]
- The Court ruled on the applicability of Directive 2004/38. The Directive was to be implemented in the national law of the member states by 29 April 2006.
- There is no requirement that the spouse, in the words of the Court, 'has previously been lawfully resident in another Member State before arriving in the host Member State'.
- Avoid the use of contractions.
- Non-English words should be italicised, except for common Latin abbreviations.

2.2. General principles of style

- Subdivisions with headings are required, but these should not be numbered.
- Use abbreviations in footnotes, but avoid abbreviations in the main text as much as possible.
- If abbreviations in the main text improve its legibility, they may, nevertheless, be used. Acronyms are to be avoided as much as possible. Instead, noun phrases are to be reduced to the noun only (e.g., 'the Court' for 'the European Court of Human Rights'). If this should prove to be problematic, for instance because several courts are mentioned in the text (e.g., the Court of Justice and the European Court of Human Rights), we ask our authors to use adjectives to complement the noun in order to render clear the distinction between the designated objects (e.g., the Luxembourg Court/the European Court and the Strasbourg Court/the Human Rights Court). As much will depend on context, we offer considerable liberty to our authors in their use of abbreviations, insofar as these are not confusing and ameliorate the legibility of the article.
- In English titles, use Title Case; in non-English titles, use the national style.

2.3. General principles of quotation

- Quotations are to be placed between single quotation marks, both in the main text and in the footnotes (thus: 'aaaaa').
- When a quotation forms part of another quotation, it is to be placed between double quotation marks (thus: 'aaaaa "bbbbb" aaaaa').
- Should a contributor wish to insert his own words into a quotation, such words are to be placed between square brackets.
- When a quotation includes italics supplied by the contributor, state: [emphasis added].