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A general overview of enforcement in commercial and civil matters in Austria

1. Legal sources and reform process

Main sources of law:

- Execution Code (Exekutionsordnung – EO)
- Civil Procedure Code (Zivilprozessordnung – ZPO)
- Jurisdiction Act (Jurisdiktionsnorm – JN)
- Court Organization Act (Gerichtsorganisationsgesetz – GOG),
- Act on Judicial Officers (Rechtspflegergesetz – RPfLG)
- Act on Land Valuation (Liegenschaftsbewertungsgesetz – LBG)

1. Legal sources and reform process

Austrian Execution Code

- **Entry into force: 1896**
- **Important reforms:**
 - 1991: large rework of the enforcement out of claims
 - 1995: reform of the enforcement out of tangible movables & introduction of a simplified procedure for issue of an enforcement order
 - 2000: redraft of the enforcement out of immovable property
 - 2008: large rework of forced administration of immovable property
 - 2021: significant changes to the enforcement out of other property rights & to the modalities enforcement out of claims and out of tangible movables

2. Dogmatic framework of the Austrian system of enforcement

2.1. Competence of the courts and distribution of tasks

- Enforcement procedure:
 - Initiated and carried out by the **courts**
“Whenever state authority is in service of civil law, as with enforcement law, it is appropriate, that this is done by state officials, so that everyone can see, that it is not private persons that act as empowered representatives”
(Materialien II 2)
 - Underlying idea: General purpose of civil procedure as a means of social welfare that solves conflicts in a fast and efficient way
- Individual steps of enforcement are distributed amongst various court members:
 - **Judicial officers:** Several, rather standardized types of enforcement procedures (e.g. large parts of the process of enforcement out of tangible movables and claims)
 - **Judges:** more complicated matters (e.g. forced sale of immovable property, declaration and confirmation of enforceability of **foreign decisions**)
 - **Court bailiffs:** several factual enforcement acts (e.g. the seizure and sale of tangible movables or the eviction)

2. Dogmatic framework of the Austrian system of enforcement

2.2. Procedural principles in Austrian enforcement law

- Principle of **free disposition of parties**
 - Weakened **inquisitorial principle**
 - Principle of ***ex officio* conduct of the proceedings**
- Enforcement procedures
- are started on **application**
 - are **not public** (with the exception of auctions)
 - shall be carried out in a **fast and economic way** in order to enable an efficient satisfaction of creditors (if the matter in dispute was a money claim: priority principle)
- **No strict principle of written proceedings** (e.g. applications can also be filed orally at the court and the parties as well as third persons can be examined by the court if necessary)
- Provisions on **protection of the debtor** (e.g. on items and claims immune from seizure [§§ 250-251, 290 EO] or on restrictions regarding the seizure of claims [§§ 290a-293 EO])

3. Conduct of enforcement

3.1. General aspects

The enforcement procedure is split into two parts:

- **Proceedings to obtain an order for enforcement**
 - **Enforcement proceedings**
 - Seizure
 - Realisation of the value of the asset
 - Satisfaction of the creditors, whenever the enforcement of money claims is involved
- Creditor needs to produce an **enforcement title** (enforceability usually needs to be **confirmed** by the authority that issued the enforcement title)
- Foreign enforcement titles generally need to be **declared enforceable**; however, many European enforceable instruments are now to be enforced without a previous declaration of enforcement

3. Conduct of enforcement

3.2. Enforcement titles

Concluding list of “enforcement titles” in § 1 EO, which can be issued

- by a court
- by an administrative authority
- by unofficial bodies

3.3. Confirmation of enforceability

- Certification that the enforcement title is (formally) enforceable
- Enforceable instrument **has come into effect** and **no legal remedy with a suspensory effect** is available
- Confirmation provides proof of the fact that the **time limit for complying with the instrument** (which is usually set in the instrument) has **expired**

3. Conduct of enforcement

3.4. Foreign enforceable instruments: Declaration of enforceability

- Foreign enforceable instruments (generally) need to be **recognized and declared enforceable** according to European law, bi- or multilateral treaties, or (subsidiarily) §§ 406-416 EO.

Requirements:

- Enforceability in the state of origin
- Reciprocity of enforceability
- **Abolition of the exequatur procedure:** No requirement of a declaration of enforceability for titles that fall within Brussels Ia (Art 36 Brussels Ia-Regulation), but also for titles that stem from the European Small Claims Procedure and for European Payment Orders

3. Conduct of enforcement

3.5. Order for enforcement

- **Application** to obtain an order for enforcement by one party (§ 54 para 2 EO)
 - Additionally, the party filing the application needs to produce the enforcement title, including the confirmation of enforceability and (if it is a foreign title) the declaration of enforceability.
- The court has to investigate (merely on the basis of the court file):
 - whether the **procedural requisites for enforcement** are met and
 - if the application is **“objectively founded”**
(which means that there is an **identity between the parties** named in the enforceable instrument and in the application and that the enforceable instrument contains a well-determined order to pay or to act or refrain from acting)
- Failure to satisfy the procedural requisites → dismissal of the application as inadmissible
- Lack of the objective foundation → dismissal of the application on the merits
- § 54a EO: The court has to give the party a chance to make corrections, if the application is incomplete or the necessary documents are not attached.
- Legal remedy against a decision on an application for an enforcement order: **recourse** (§ 65 para 1 EO).

3. Conduct of enforcement

3.5. Order for enforcement

- If the creditor seeks satisfaction for a **money claim below 50.000 Euro**, he or she **has to apply** for enforcement in the **simplified procedure for grant of an enforcement order**, unless (§ 54b para 1 EO):
 - The creditor applies for enforcement out of immovable property (nr 1).
 - The creditor needs to produce documents other than the enforceable instrument (nr 3).
 - The instrument is a foreign enforceable instrument that still needs to be declared enforceable (nr 4).
 - The applying creditor can give evidence that the item sought to be seized would be hidden or withdrawn if the debtor was served with the enforcement order prior to seizure (nr 5).
- **Simplification:**
 - Creditor **does not need to produce the enforcement title**; he/she only has to name the day of issue of the confirmation of enforcement
 - Enable and facilitate use of the **electronic communication** in enforcement procedures
- Formal requirements for obtaining the issue of an enforcement order are significantly lowered → debtor is granted an additional legal remedy, called **“objection”** (“Einspruch”; § 54c EO).
 - Through this (additional) legal remedy, the debtor may assert that the applying creditor does not hold the enforcement title that was named in the application or that the asserted data in the application does not match the enforcement title (§ 54c para 1 EO).

3.6 Carrying out the enforcement

General aspects

Austrian Execution Code offers various types of enforcement procedures:

- **Money claims** can be enforced by the means of
 - enforcement out of immovable property (§§ 88-247 EO),
 - enforcement out of tangible movables (§§ 249-288 EO),
 - enforcement out of claims (§§ 289-325 EO),
 - enforcement out of other assets (such as companies, intellectual property rights, shareholder rights, etc.; §§ 326-345 EO)
- **Non-money claims:** very diverse provisions
 - distribution of moveable assets (§§ 346-348 EO),
 - eviction (§ 349 EO),
 - granting or rescinding rights laid down in the land register (§ 350 EO),
 - enforcing mandatory (§§ 353-354 EO)
 - prohibitory injunctions (§ 355 EO).
- Enforcement procedures are always carried out by the **district courts** (§ 3 EO).
- The local jurisdiction for the enforcement of money claims is determined by the debtor's at their **domicile or habitual residence** (§ 4 EO) (unless immovable property is to be seized; in this case, the district court at the place of the immovable property has jurisdiction (Sec. 5b EO).

3.6 Carrying out the enforcement

Enforcement out of immovable property

- Granting of a registration of a charge on the property
 - Forced administration
 - Forced sale of the property
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- Notice of the enforcement order needs to be entered into the **land register** (§ 89 para 1, §§ 98 and 137 EO)
 - As far as forced administration goes → court appoints an **administrator** (§ 99 para 1 EO)
 - The execution court has to **approve accounting** (§ 83a EO) and **distribute the surpluses** to the creditors (§§ 122-128 EO).
 - Regarding an order for sale, the court will appoint an **expert** to appraise the value of the property (§ 140-145 EO). Then the auction conditions shall be set and made public by edict.

3.6 Carrying out the enforcement

Enforcement out of immovable property

- Auction is open to the public and held by the judge; the lowest valid bid equals **half the estimated value of the real estate** (§ 85 para 2 and 2 EO).
- Whoever **bids most** during the auction and can immediately **deposit a security** worth 10% of the appraised value, but at least 1.000 Euros (§§ 179 and 180 EO) wins the auction.
- The buyer then has two months to pay the bid amount (§ 201 EO).
- While the **risks are passed** to the buyer at the moment of the “fall of the hammer” (§ 207 para 1 EO), the **property** is only **handed over** after all the requirements are met (§ 207 para 2 EO).
- The court schedules a hearing with the creditors and decides on the **distribution of the highest bid**.
- Once the decision on the distribution becomes res judicata, the **creditors** can be **satisfied** and the **land register is adjusted**.

3.6 Carrying out the enforcement

Enforcement out of tangible movables

- **Competence:**
 - Judicial officers: Authorisation of enforcement (§ 17 para 2 nr 1 lit b RpfLG);
 - Court bailiffs: seizure and realization of those assets
- After the **authorisation of enforcement**, the court instructs the bailiff **where to attempt seizure** (§ 25b EO).
- The **seizure** is accomplished by **registering the assets in the seizure report** (§ 253 EO); this grants the creditor a form of lien for the purposes of enforcement.
- On the application of the creditor, the assets have to be taken into custody (§ 259 para 1 EO).
- The **realisation of the assets** happens in an open sale (§ 268 EO) or in an auction (§ 270 EO);
- The distribution of the revenues largely follows the relevant rules in the context of enforcement out of immovable property (§ 286 EO).

3.6 Carrying out the enforcement

Enforcement out of claims

- **Competence:**
 - Judicial officers (§ 17 para 2 nr 1 lit b RpflG).
- Vast majority of claims are enforced according to the rules in §§ 289-325 EO on **“ordinary claims”** (there are some special provisions for negotiable instruments or claims documented in the land register)
- After the issue of the enforcement order, the court issues a **double order**:
 - The third-party debtor is served with an **order prohibiting payment** (this also effects the seizure of the claim; § 294 para 1 EO),
 - The debtor is served with a **freezing order** (§ 294 EO).
- If the creditor doesn't know the third-party debtor → provide the debtor's date of birth in the application to obtain an enforcement order
 - Court requests the **main association of social security** providers to find out, whether the debtor is employed somewhere (§ 295 para 1 EO)
 - If the creditor does not dispose of the debtor's date of birth either, the **register office** has to provide that information, if the creditor produces the enforceable instrument there (§ 295 para 3 EO);

3.6 Carrying out the enforcement

Enforcement out of claims

- Upon receiving the order prohibiting payment: third-party debtor shall give a **declaration on all facts of interest** regarding
 - the existence and the extent of the claim
 - the probability of actual satisfaction of the creditor (so-called “third-party declaration”; § 301 EO).
- Practically most relevant way of realizing the claim: **Assignment for the purposes of enforcement** (§ 308 EO)
 - Creditor may demand the claim from the third-party debtor as if it was his or her own claim;
 - The claim against the debtor is paid off only in accordance with the actual payment the third party debtor makes (§ 312 EO).

3.6 Carrying out the enforcement

New developments: Enforcement packages

- **Latest reform:** Two "enforcement packages" to increase the success rate of enforcement proceedings
- **“Simple enforcement package”:**
 - Covers the enforcement out of **claims** and out of **tangible movables**.
 - In principle, the enforcement proceedings shall be continued until the claim has been brought or the enforcement proceedings have been discontinued (§ 18 para 1 EO).
 - If no assets were found or identified or if not all claims could be satisfied, the proceedings shall be suspended (generally for six months; cf. § 18 para 2 and 3 EO).
- **“Extended enforcement package”:**
 - Covers the enforcement out of **claims**, out of **tangible movables** and of **other assets** (e.g. companies, intellectual property rights, shareholders' or founders' rights, etc).
 - Only if the claim to be recovered **exceeds EUR 10,000** or if the enforcement under the **simple execution package** has been **unsuccessful** (§ 20 para 2 EO).
 - For the enforcement, an administrator shall be appointed, who:
 - shall determine the existing assets of the debtor
 - may perform acts of seizure and realization (§ 81 EO) and
 - shall prepare a distribution draft and enforce it, in particular in the case of several petitioning creditors (§ 87a EO)

4. Security measures

Two security measures in Austrian Civil Procedure Law:

- **Asset freezing** (or forced administration) as a stage in the enforcement process (§§ 370-377 EO)
- **Interim measures** (§§ 378-402 EO).

Asset freezing:

- Creditor that has obtained an instrument relating to a **money claim** may apply for freezing measures (§ 370 EO) before the title has become *res judicata*
- Requirement: **objective endangerment** of the creditor's satisfaction → **Creditor** has to prove, that
 - enforcement of his claim would be **significantly more difficult** or even **rendered impossible** or
 - would have to be enforced in a country, where **enforcement is not assured by European or international law** (§ 370 EO).
- Creditor **cannot obtain full satisfaction** by the means of asset freezing as a stage in the enforcement process: asset freezing can (generally) not go further than the "seizure phase"
- As soon as a title becomes enforceable, the asset freezing measure **automatically transforms** into enforcement that serves the satisfaction of the creditor; any further steps to realise the value of the frozen asset → application of the creditor
- If asset freezing as a stage in the enforcement process is admissible, the creditor cannot apply for an interim measure (§ 379 para 1 EO).

4. Security measures

Interim measures:

- Issued in a **summary procedure** and secure the success of the main procedure; can be issued and enforced during and even before the commencement of the main procedure
- **Three “archetypes” of interim measures:**
 - Measures to secure a money claim (§ 379 EO).
 - Measures to secure a non-money claim (§ 381 nr 1 EO).
 - Measures to secure a right or a legal relation (§ 381 nr 2 EO).
- Applying party (called “the endangered party”) needs to assert and to prove
 - **Existence of the claim or of a right or legal relation** that needs to be clarified
 - **Interest in issuing an interim measure** → consists either in the danger of not being satisfied or in the necessity to prevent imminent violence or an irretrievable damage
- **Possible security measures:**
 - Custody of moveable tangible assets (§ 379 para 3 nr 1 EO; § 382 para 1 nr 1 EO),
 - Prohibitions towards the opposite party to set some defined actions (§ 379 para 3 nr 2 EO; § 382 para 1 nr 4 EO)
 - Third party prohibitions (§ 379 para 3 nr 3 EO; § 382 para 1 nr 7 EO).
- **Standard of proof** in a proceeding on an interim measure is lowered to **predominant likelihood**.



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Thank you for your attention!