NATIONAL REPORT FOR AUSTRIA ON ELECTRONIC EVIDENCE AND VIDEOCONFERENCING

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Project DIGI-GUARD 2023

DIGI-GUARD

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Digital communication and safeguarding the parties' rights: challenges for European civil procedure – DIGI-GUARD

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Questionnaire for national reports

On electronic evidence and videoconferencing

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This questionnaire addresses practical and theoretical aspects regarding the taking of (electronic) evidence and videoconferencing in (cross-border) civil litigation. Each partner should provide substantive answers for their respective Member State (or additional Member State, if specifically stipulated by the coordinator). Certain questions require knowledge on instruments of cross-border enforcement in the EU, particularly Regulation (EU) 2020/1783 ("Recast Taking of Evidence Regulation"). The latter questions address the interplay between 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) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1783),
- Impact assessment of the Taking of Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0285),
- Other *travaux preparatoires* of the Recast Taking of Evidence Regulation (see e.g. https://www.europeansources.info/record/proposal-for-a-regulation-amending-regulation-ec-no-1206-2001-on-cooperation-between-the-courts-of-the-member-states-in-the-taking-of-evidence-in-civil-or-commercial-matters/)
- Council Guide on videoconferencing in Cross-border proceedings (https://www.consilium.europa.eu/en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/)
- The Access to Civil Justice portal hosted by the University of Maribor, Faculty of Law together with the results of our previous projects, especially our previous project Dimensions of Evidence in European Civil Procedure (https://www.pf.um.si/en/acj/projects/pr01/).

The structure of each individual report should follow the list of questions enumerated below, to the utmost extent possible. 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 is 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. If so, indicate expressly the lack of relevance and consider explaining the reason(s).

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. **Where the answer would be "no" or "not applicable", because something is not regulated in your national legal order, please specify how you think it should be regulated**.

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

Languages of national reports: English.

Deadline: 31 March 2023.

In case of any questions, remarks or suggestions please contact project coordinators, prof. dr. Vesna Rijavec: vesna.rijavec@um.si and prof. dr. Tjaša Ivanc: tjasa.ivanc@um.si ; or to assist. Denis Baghrizabehi: denis.baghrizabehi@um.si.

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1. General aspects regarding electronic evidence

(Note that the following definitions apply:

- *Authentic evidence: the content of evidence was indeed created or drawn by a person or entity declared to be its creator or author; authenticity refers to the genuine source.*
- *Reliable evidence: the content of evidence is true, accurate and non-compromised; reliability refers to the truth and accuracy of content.)*

1.1. Does the law of your Member State provide any definition of electronic evidence?

(If applicable, cite the definition of electronic evidence.)

There is no definition of electronic evidence in Austrian civil procedure law;[1] however, some amendments have been made to the Code of Civil Procedure[2] (hereinafter: ZPO) over time in order to adapt it to the changed (technical) circumstances (see in particular below questions 1.3. – 1.4.).

1.2. Does the law of your Member State define of what is considered as paper document?

(If yes, please provide the definition. If not, please indicate the relevant case law.)

Evidence by documents is regulated in §§ 292 et seq. ZPO. However, a definition of a document (in paper form) is not found there; the ZPO presupposes this.[3] Principles of documentary evidence have been developed by academic doctrine: Accordingly, a document is a written record of human thought, usually intended to record facts.[4] However, this definition is kept open and does not exclude electronic documents;[5] the paper form itself is not defined in any more detail.

1.3. How is electronic evidence categorised among means of evidence within the law of your Member State?

(In answer to this question, please explain whether electronic evidence is categorised among traditional means of evidence or if electronic evidence forms a new means of evidence. Please cite relevant provisions (esp. if electronic evidence forms a new means of evidence). If electronic evidence is categorised among traditional means of evidence, please explain the reason for this categorisation and elaborate to which category of traditional evidence electronic evidence is assigned (for example, elaborate when electronic evidence is considered a document and when it is an object of inspection). Should electronic evidence be categorised among traditional means of evidence, please also comment on possible problems regarding an analogous application of traditional evidence rules.)

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[1] *L. Hofmann*, 'Digitale Beweismittel nach der österreichischen ZPO', in *L. Feiler* and *M. Raschhofer* (eds.), Innovation und internationale Rechtspraxis. Rechtsprobleme entstehen nicht im Hörsaal (facultas.wuv 2009) p. 285 at p. 287; *T. Weidinger*, 'Neue, digitale Beweismittel im Zivilprozess', 10 Zeitschrift für Informationsrecht (2022) p. 12 at p. 12; *W. H. Rechberger* and *M.-R. McGuire*, 'Die elektronische Urkunde und das Beweismittelsystem der ZPO', in *W. H. Rechberger* (ed.), Die elektronische Revolution im Rechtsverkehr – Möglichkeiten und Grenzen (MANZ 2006) p. 1 at p. 3 et seq.; cf. *W. H. Rechberger* and *T. Klicka* in *W. H. Rechberger* and *T. Klicka* (eds.), ZPO – Zivilprozessordnung[5] (Verlag Österreich 2019) Vor § 292 ZPO Rz 6; *W. H. Rechberger* and *D.-A. Simotta*, Zivilprozessrecht. Erkenntnisverfahren[9] (MANZ 2017) Rz 852.

[2] Zivilprozessordnung RGBl 1895/113.

[3] *L. Bittner* in *H. W. Fasching* and *A. Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen III/1[3] (MANZ 2017) § 294 ZPO Rz 6; *M. Spitzer* in *M. Spitzer* and *A. Wilfinger*, Beweisrecht (MANZ 2020) Vor §§ 266 ff ZPO Rz 25; *Rechberger* and *McGuire*, supra n. 1, p. 11.

[4] *Bittner* in *Fasching* and *Konecny*, supra n. 3, § 292 ZPO Rz 1 f; *H. W. Fasching*, Lehrbuch des österreichischen Zivilprozessrechts[2] (MANZ 1990) Rz 944; *Rechberger* and *Klicka*, supra n. 1, Vor § 292 ZPO Rz 11; *Rechberger* and *Simotta*, supra n. 1, Rz 854; *Wilfinger*, supra n. 3, Vor §§ 292 ff ZPO Rz 1; RIS-Justiz RS 0110196; cf. RIS-Justiz RS0093299.

[5] Cf. *Wilfinger*, supra n. 3, Vor §§ 292 ff ZPO Rz 2.

The ZPO provides for five means of evidence: Documents, witnesses, experts, visual inspection and examination of the parties.[6] Electronic evidence does not form a new category of evidence; rather, according to the prevailing opinion, it is to be integrated into the existing catalogue of evidence of the ZPO,[7] even if said catalogue is not of a taxative nature and would in principle be open to the introduction of new means of evidence.[8] If electronic evidence cannot be easily assigned to one of the existing means of evidence, the rules for the closest related means of evidence shall be applied to it.[9] It is therefore not possible to give a general answer as to which means of evidence electronic evidence should be allocated to. Since the rules on documentary evidence in the ZPO are very detailed and electronic documents are of great practical importance,[10] the rules on documentary evidence will serve as a starting point for the considerations on electronic evidence in general on several occasions throughout this report.

Electronic evidence is equated with a document by the legislator (see in detail below question 1.4.) if it represents the content of thoughts in written form,[11] which is the case with e-mails[12] and presumably also with text messages.[13] Chat messages, Word documents or PDF files are therefore also likely to fall under the scope of the concept of documents.[14] Apart from the written form, a distinction is to be made between matters of enquiry ("Auskunftssachen"), which embody a thought content (even if not in writing), and matters of visual inspection ("Augenscheinsgegenstände"), where the sole purpose is to give the judge an impression of the external appearance of an object or a locality.[15] In academic doctrine, electronic evidence is classified both as a matter of enquiry and as an object of visual inspection.[16] According to *Gitschthaler* and *Weidinger*, the decisive factor is therefore whether the electronic evidence conveys something mentally without words or whether it is only a matter of appearance (for the consequences of this classification, see below question 3.3.).[17]

1.4. Does the law of your Member State explicitly regulate that evidence or data in electronic form has evidentiary value?

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[6] *B. Nunner-Krautgasser* and *P. Anzenberger*, Evidence in Civil Law – Austria (Lex localis 2015) p. 12; *E.-M. Bajons*, 'Österreich' (national report), in *H. Nagel* and *E.-M. Bajons* (eds.), Beweis – Preuve – Evidence. Grundzüge des zivilprozessualen Beweisrechts in Europa (Nomos 2003) p. 427 at p. 451; *Rechberger* and *Simotta*, supra n. 1, Rz 851; *Spitzer*, supra n. 3, Vor §§ 266 ff ZPO Rz 24.

[7] *G. E. Kodek* and *P. G. Mayr*, Zivilprozessrecht[5] (facultas 2021) Rz 856; *Rechberger* in *Fasching* and *Konecny*, supra n. 3, Vor § 266 ZPO Rz 101; *Rechberger* and *McGuire*, supra n. 1, p. 11; *Rechberger* and *Klicka*, supra n. 1, Vor § 292 ZPO Rz 10; *Rechberger* and *Simotta*, supra n. 1, Rz 852; *Weidinger*, supra n. 1, p. 13.

[8] *Hofmann*, supra n. 1, p. 287; *Kodek* and *Mayr*, supra n. 7, Rz 856; *Rechberger* in *Fasching* and *Konecny*, supra n. 3, Vor § 266 ZPO Rz 100; *Rechberger* and *Klicka*, supra n. 1, Vor § 292 ZPO Rz 2; *Rechberger* and *Simotta*, supra n. 1, Rz 852; *Rechberger* and *McGuire*, supra n. 1, p. 11.

[9] *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 12; *Rechberger* and *Simotta*, supra n. 1, Rz 852.

[10] Cf. *Rechberger* and *McGuire*, supra n. 1, p. 1 et seq.

[11] *Rechberger* and *Klicka*, supra n. 1, Vor § 292 ZPO Rz 4; cf. *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 21.

[12] *F. Schmidbauer*, 'Beweis und Anscheinsbeweis bei der Übermittlung einer E-Mail-Erklärung', 10 Zivilrecht aktuell (2008) p. 83 at p. 83.

[13] *Weidinger*, supra n. 1, p. 14; *Bittner* in *Fasching* and *Konecny*, supra n. 3, § 292 ZPO Rz 9 et seq.

[14] *T. Weidinger*, '(Neue) digitale Beweismittel im Zivilprozess – ist das österreichische Beweisrecht technologischen Neuerungen gewappnet?', in *C. Fink* et al. (eds.), Zukunft der zivilrechtlichen Streitbeilegung (Verlag Österreich 2022) p. 97 at p. 116 with further references in n. 157; *Weidinger*, supra n. 1, p. 14.

[15] *Weidinger*, supra n. 1, p. 17 – 18; cf. *Spitzer*, supra n. 3, Vor §§ 266 ff ZPO Rz 25 – 28.

[16] *E. Gitschthaler* in *Fasching* and *Konecny*, supra n. 3, § 368 ZPO Rz 5; *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 318 ZPO Rz 4 et seq.; *Spitzer*, supra n. 3, Vor §§ 266 ff ZPO Rz 25 et seq. with further references; *Rechberger* and *McGuire*, supra n. 1, p. 12 et seq.; see *A. Walther*, 'Zur Abgrenzung von Urkundenbeweis, Beweis durch Auskunftssachen und Augenschein im österreichischen Zivilprozeßrecht', 71 Österreichische Richterzeitung (1993) p. 47.

[17] *Gitschthaler* in *Fasching* and *Konecny*, supra n. 3, § 368 ZPO Rz 5; *Weidinger*, supra n. 14, p. 116 – 118 with further references; *Weidinger*, supra n. 1, p. 17 – 18.

(If yes, please cite the provision regulating the evidentiary value of electronic evidence (e.g., "electronic data shall not be denied legal effect or considered inadmissible as evidence in the proceedings solely on the grounds that they are in electronic form"). Please also explain if there is any presumption regarding the evidentiary value, admissibility, reliability or authenticity of electronic evidence.)

The eIDAS (Regulation [EU] 2014/910) provides in Art 25 that an electronic signature may not be denied legal effect and admissibility as evidence in legal proceedings solely because it is in electronic form or because it does not meet the requirements for qualified electronic signatures.[18]

With the changes in §§ 292 and 294 ZPO with the Professional Law Amendment Act for Notaries, Lawyers and Civil Engineers 2006,[19] the Austrian legislator clarified that electronic documents are to be considered equal to paper documents with regard to their evidential value, provided that they are signed with an electronic signature.[20] Such a signature requires, in the case of private documents, a qualified electronic signature within the meaning of § 4 (1) of the Signature and Confidential Services Act[21] (hereinafter: SVG),[22] and in the case of public documents, an official signature pursuant to § 19 of the E-Government Act[23] (hereinafter: E-GovG).[24] Pursuant to § 292 (1) of the Code of Civil Procedure, such an electronic public document constitutes full proof of what is officially decreed or declared therein by the authority or testified to by the authority or the certifying officer.[25] Pursuant to § 294 ZPO, an electronic private document provides full proof that the declarations contained in it originate from the issuer.[26] There are no specific regulations in Austrian law on electronic objects of visual inspection.

1.5. Does the law of your Member State explicitly differentiate between electronic and physical private documents as evidence?

(Please elaborate on whether the law of your Member State regulates electronic documents and if an electronic document has the same legal effect as a physical document. Please emphasise whether there are any provisions differentiating between electronic and physical documents. If applicable, please cite the provisions regulating electronic documents.)

§ 294 ZPO does not differentiate – similar to § 292 ZPO for public documents[27] – between electronic and physical private documents; both forms in principle have the same probative value and are subject to the free assessment of evidence pursuant to § 272 ZPO.[28]

1.6. Does the law of your Member State recognise the special evidentiary value of public documents, and does this also apply to electronic public documents?

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[18] *C. Brenn*, 'Recht der elektronischen Signaturen', in *W. Zankl* (ed.), Rechtshandbuch der Digitalisierung (MANZ 2021) Kap 8 Rz 8.43 (up to date as of 1 July 2021, rdb.at)

[19] Berufsrechts-Änderungsgesetz für Notare, Rechtsanwälte und Ziviltechniker 2006 BGBl I 2005/164.

[20] ErläutRV 1169 BlgNR 22. GP 34; *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 21; *Rechberger* and *Klicka*, supra n. 1, § 292 ZPO Rz 2; *Wilfinger*, supra n. 3, Vor §§ 292 ff ZPO Rz 2; cf. *Bajons*, supra n. 6, p. 459 for the old legislation.

[21] Signatur- und Vertrauensdienstegesetz BGBl I 2016/50.

[22] *Bittner* in *Fasching* and *Konecny*, supra n. 3, § 294 ZPO Rz 6; *Rechberger* and *Klicka*, supra n. 1, § 294 ZPO Rz 1 – 2; *Wilfinger*, supra n. 3, § 294 ZPO Rz 3.

[23] E-Government-Gesetz BGBl I 2004/10.

[24] *Bittner*, supra n. 3, § 292 ZPO Rz 30; *Rechberger* and *Klicka*, supra n. 1, § 292 ZPO Rz 2; *Wilfinger*, supra n. 3, § 292 ZPO Rz 8.

[25] *Rechberger* and *Klicka*, supra n. 1, § 292 ZPO Rz 1; *Wilfinger*, supra n. 3, § 292 ZPO Rz 9.

[26] *Wilfinger*, supra n. 3, § 294 ZPO Rz 6; *Brenn*, supra n. 18, Kap 8 Rz 8.44.

[27] *Rechberger* and *Klicka*, supra n. 1, § 292 ZPO Rz 2.

[28] ErläutRV 1169 BlgNR 22. GP 34; *Rechberger* and *Klicka*, supra n. 1, § 294 ZPO Rz 1 f; *Wilfinger*, supra n. 3, § 294 ZPO Rz 3; cf. OGH 27.2.2014, 8 ObA 12/14v.

(If yes, please cite the provision regulating public documents in electronic form. Please emphasise whether any provisions differentiate between electronic and physical public documents.)

Yes, public documents have a special evidentiary value: On the one hand, according to § 310 (1) ZPO, they have the presumption of authenticity (equivalent to prima facie evidence), i.e. that they originate from the stated issuer.[29] On the other hand, they also provide full proof of what is decreed, declared or testified to in the document (§ 292 [1] ZPO); proof to the contrary remains admissible.[30] Since § 292 ZPO, as already mentioned, does not differentiate between electronic and physical documents, this applies equally to electronic public documents.

1.7. Describe the legal effects of changing the form of electronic evidence to physical.
(In answer to this question, please explain whether it is admissible to change electronic evidence (e.g., websites, social networks, or e-mail) to a physical form and, what legal effect such change has. Please also specify, whether electronic evidence is treated as a copy and whether printouts are necessary when submitting particular types of electronic evidence (e.g., websites, social networks or e-mail). If applicable, please cite the provisions relating to changing the form of electronic evidence.)

§ 20 E-GovG stipulates that an electronic document printed on paper has (or retains) the evidentiary value of a public document if the electronic document has been provided with an official electronic signature that can be verified by returning it to the electronic format or by other precautions taken by the authority.[31] Corresponding regulations can be found for the judiciary (§ 89c [3] of the Courts Organisation Act[32] [hereinafter: GOG]), notaries (§ 13 [2] Notarial Code[33]) and civil engineers (§ 18 [1] Civil Engineers Act 2019[34]).[35] The SVG, however, lacks a comparable provision.

There are no regulations governing the parties' handling of electronic evidence. They are not obliged to submit them in electronic form; conversely, they are also not obliged to print them out (if that is possible at all). In some cases, however, the probative value of electronic evidence could suffer because it is not possible to verify authenticity; for example, in the case of a (simple) printout of an email.[36] *Schmidbauer* argues that in this case, the presentation of the electronic form of the evidence can be demanded; specifically, this will be done by the judge inspecting the email inbox.[37]

In general, § 81a (3) GOG states that electronic submissions to a file kept on paper are to be printed out and attached to the file as if they had been submitted in paper form; the electronic submission must be retained. Enclosures whose printing is not possible (e.g. video files) or impractical shall be attached to the file in an electronic storage medium.[38]

1.8. Describe the legal effects of changing the form of physical evidence to electronic.
(In answer to this question, please explain whether it is admissible to change evidence in the physical form to electronic and what legal effect such a change has. If applicable, please cite the provisions relating to changing the form of physical evidence.)

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[29] *Rechberger* and *Simotta*, supra n. 1, Rz 856.
[30] *Rechberger* and *Klicka*, supra n. 1, § 292 ZPO Rz 1.
[31] Cf. *M. Spornberger*, 'E-Government', in *W. Zankl* (ed.), Rechtshandbuch der Digitalisierung (MANZ 2021) Rz 17.70 – 17.75.
[32] Gerichtsorganisationsgesetz RGBl 1896/217.
[33] Notariatsordnung RGBl 1871/75.
[34] Ziviltechnikergesetz 2019 BGBl I 2019/29.
[35] *Wilfinger*, supra n. 3, § 292 ZPO Rz 8.
[36] *Schmidbauer*, supra n. 12, p. 83.
[37] *Schmidbauer*, supra n. 12, p. 83 et seq.
[38] *B. Nunner-Krautgasser* and *J. Schnur*, 'Digitalisierung und Legal-Tech im österreichischen Zivilverfahren', in *E. Hoffberger-Pippan* et al (eds.), Digitalisierung und Recht. Jahrbuch 2022 (NWV im Verlag Österreich 2022) p. 155 at p. 164.

Since electronic evidence is not a category of evidence in its own right, but is integrated into the existing categories (see above question 1.3.), there are also no specific rules on how to proceed when converting physical evidence into electronic evidence.

However, § 81a (4) GOG provides regulations for the transmission of physical submissions in electronic form:[39] Accordingly, submissions received by the court on paper are to be transferred into an electronic document by the court registry in accordance with state-of-the-art technology. This can be done, for example, by scanning documents and saving them in PDF format.[40]

Since the digitisation process does not change the content, the category of evidence generally remains unaffected. For example, a scanned paper document remains a (now electronic) document and does not mutate into an object of visual inspection.[41]

1.9. Explain the rules and what is considered to be an original and what a copy (the concept of original).
(If applicable, please cite relevant provisions.)

A legal definition of what is an original and what is a copy cannot be found in the ZPO. However, the concept is familiar to the ZPO;[42] § 299 ZPO provides for the possibility of ordering a party to submit the "Urschrift", i.e. the original. Therefore, according to the prevailing opinion, documents do not have to be submitted in the original,[43] a copy ("Abschrift") is sufficient.

1.10. Describe the legal effects of a copy of electronic evidence within the law of your Member State.
(In answer to this question, please explain when electronic evidence is considered a copy. Please also elaborate on the legal effects of a copy of electronic evidence, and, if applicable, cite the relevant provisions. Should the law of your Member State not regulate copies of electronic evidence, please explain how the court perceives a copy of electronic evidence.)

Copies of electronic evidence are not regulated by law. The categorisation of electronic evidence into "original" and "copy" is, in our opinion, not expedient because copying always occurs during transmission to the court.[44] The decisive starting point should therefore be the integrity (intactness) of the electronic evidence, which can be verified, for example, by means of electronic signatures.[45] If the integrity cannot be easily verified, this circumstance should be taken into account by the judge according to the principle of free assessment of evidence pursuant to § 272 ZPO.[46]

[39] *B. Sommer*, 'Die Zivilverfahrens-Novelle 2022: Erweiterte Digitalisierung in der Justiz und Effizienzsteigerung im Zivilverfahrensrecht', 18 Zivilrecht aktuell (2022) p. 144 at p. 145.
[40] *Nunner-Krautgasser* and *Schnur*, supra n. 38, p. 164; cf. 138/ME 27. GP Erläut 8.
[41] *Rechberger* and *Klicka*, supra n. 1, Vor § 292 ZPO Rz 4; cf. *Weidinger*, supra n. 1, p. 15.
[42] See *Bittner* in *Fasching* and *Konecny*, supra n. 3, § 292 ZPO Rz 38.
[43] RIS-Justiz RS0040406; *Wilfinger*, supra n. 3, § 299 ZPO Rz 1; different probably *Bittner* in *Fasching* and *Konecny*, supra n. 3, § 292 ZPO Rz 38.
[44] Cf. already ErläutRV 1169 BlgNR 22. GP 5; *Rechberger* and *McGuire*, supra n. 1, p. 5.
[45] Cf. *Schmidbauer*, supra n. 12, p. 85 – 86.
[46] Cf. *Weidinger*, supra n. 1, p. 18.

2. Authenticity, reliability and unlawfully obtained electronic evidence

2.1. Are there any particular procedure, guidelines, mechanism or protocol on how the parties shall obtain electronic evidence in order to preserve their authenticity and reliability before submitting them to the court?
(If applicable, also comment on possible effects regarding the admissibility of electronic evidence if they are not obtained in accordance with such procedures or technical guidelines.)

According to the prevailing view, electronic evidence (like any other evidence) is admissible regardless of how it was obtained.[47] A certain protocol is therefore not to be observed, although for reasons of evidential value it is advisable to ensure that an electronic document has an appropriately qualified signature (cf. below question 2.3.).

2.2. Is there any particular procedure on how the court should identify the source of electronic evidence?
(If any official guidelines, mechanisms or protocols are established within the law of your Member State to identify the source of evidence, by either the expert or the court, please mention those as well (e.g. in the case of evidence derived from cloud computing, blockchain or using AI algorithms).)

No, the examination of the source of electronic evidence is not specifically regulated. Regularly, due to a lack of own knowledge, the judge will have to rely on an expert with relevant expertise if and to the extent that the question becomes relevant in the trial.[48]

2.3. Does the law of your Member State stipulate different rules or provisions for different types of electronic evidence? (*Please explain whether certain types of electronic evidence are presumed authentic and reliable and others inauthentic and unreliable. If applicable, please cite the provisions regarding (in)authenticity and (un)reliability of electronic evidence.)*

Electronic signatures (e.g. in the sense of the SVG or the E-GovG) have a high degree of authenticity because they are to be regarded as equivalent to writing in the sense of a handwritten signature (cf. § 4 [1] SVG) and thus help electronic documents to have the same evidentiary value as paper documents (cf. §§ 292, 294 ZPO).[49] Otherwise, the law does not contain any regulations in this regard; it is rather up to the judge to decide, within the framework of the assessment of evidence,[50] whether he considers evidence to be authentic (for example, whether he considers a certain platform to be particularly susceptible to fakes).[51]

2.4. Does an unfamiliarity with the technical part and a (high) possibility of manipulation of electronic evidence impact its evidentiary value?
(Please elaborate on whether the technical nature and a [high] possibility of manipulation of electronic evidence have any impact on the court's assessing of the evidentiary value.)

This question cannot be answered in general terms; however, it cannot be ruled out across the board that judges might be resentful of electronic evidence due to a lack of familiarity and an increased susceptibility to manipulation and therefore assign it a lower probative value. This does not seem entirely

[47] Cf. *Kodek* and *Mayr*, supra n. 7, Rz 786; *Rechberger* in *Fasching* and *Konecny*, supra n. 3, Vor § 266 ZPO Rz 69 – 75; *Rechberger* and *Simotta*, supra n. 1, Rz 831; *Spitzer*, supra n. 3, Vor §§ 266 ff ZPO Rz 29 – 33.
[48] Cf. in general *Kodek* and *Mayr*, supra n. 7, Rz 837 et seq; *Rechberger* and *Simotta*, supra n. 1, Rz 869 et seq.
[49] *Rechberger* and *Klicka*, supra n. 1, § 294 ZPO Rz 1 f; *Weidinger*, supra n. 1, p. 14; *Wilfinger*, supra n. 3, § 294 ZPO Rz 3.
[50] Cf. on the principle of the free assessment of evidence *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 8 et seq.; *Rechberger* in *Fasching* and *Konecny*, supra n. 3, § 272 ZPO Rz 4 et seq; *Bajons*, supra n. 6, p. 440.
[51] Cf. *Rechberger* and *McGuire*, supra n. 1, p. 27; *Wilfinger*, supra n. 3, § 294 ZPO Rz 4 et seq.

unproblematic, as a judge's prejudices should not play a role in the assessment of evidence. However, this is – at least partially – mitigated by the need to give reasons for the assessment of evidence.[52]

2.5. When should the court appoint experts to process electronic evidence?
(Please enumerate cases in which the court may or must appoint an expert when processing electronic evidence.)

Simply put: Whenever it is relevant to the decision. This will be the case in particular if the authenticity of an electronic object of visual inspection (keyword: deepfake) or an electronic document is disputed by the opposing party; the judge will usually not have the necessary (technical) expertise to examine these allegations. In this case, the judge has to appoint an expert ex officio; this cannot be prevented by the parties even through concurring declarations of intent.[53]

2.6. Who bears the costs if an expert needs to be appointed to assess the reliability, authenticity and (un)lawful manner of obtaining electronic evidence?
(Please explain the distribution of costs related to potential expert assessments and opinions on the reliability, authenticity and lawful manner of obtaining electronic evidence.)

In principle, the (sometimes substantial) fees of an expert are legal costs which the parties have to bear according to the decision on the obligation to pay costs (cf. §§ 41 et seq. ZPO).[54] The party requesting the expert evidence ("Beweisführer") shall be ordered to pay an advance on costs pursuant to § 365 ZPO.[55]

The appointment of an expert, which is necessary due to defective evidence, could under certain circumstances be a case of cost separation pursuant to § 48 ZPO:[56] If the person providing the evidence is at fault (for example, because he or she failed to obtain the evidence in a formally correct manner), he or she can be ordered to pay the full costs incurred by him or her ex officio or upon application, irrespective of the outcome of the proceedings.[57]

2.7. What options are available to a party claiming that electronic evidence has been compromised, tampered with, manipulated or obtained illegally (e.g. by hacking into an IT system)?
(Please explain whether any special procedures are established within the law of your Member State to challenge the reliability, authenticity or manner of obtaining electronic evidence. If no special procedure exists, explain regular remedies that would apply in such a case. If applicable, cite relevant provisions, case law, guidelines or other sources regulating the procedure to challenge the admissibility of compromised electronic evidence.)

There are no special rules for the objection of manipulation of a piece of electronic evidence. Specific regulations can be found in the ZPO on dealing with documents. First of all, the party will have to dispute the authenticity of an (electronic) document if it is requested to make a statement pursuant to § 298 (3) ZPO.[58] If a judgment adverse to the party is subsequently rendered and the court bases findings on the contents of the document, the party may appeal against this judgment on the grounds of incorrect findings of fact based on incorrect assessment of evidence.[59]

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[52] On this topic see *Rechberger* in *Fasching* and *Konecny*, supra n. 3, § 272 ZPO Rz 7 et seq. with further references.
[53] *Fasching*, supra n. 4, Rz 997 and Rz 856.
[54] *Fasching*, supra n. 4, Rz 1002; *Rechberger* and *Simotta*, supra n. 1, Rz 873.
[55] *Fasching*, supra n. 4, Rz 1009; in detail *Krammer* in *Fasching* and *Konecny*, supra n. 3, § 365 ZPO Rz 1 et seq.
[56] See in general *M. Bydlinski* in *H. W. Fasching* and *A. Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen II/1[3] (MANZ 2015) § 48 ZPO Rz 3.
[57] Cf. *Bydlinski* in *Fasching* and *Konecny*, supra n. 56, § 48 ZPO Rz 5.
[58] Cf. *G. E. Kodek* in *Fasching* and *Konecny*, supra n. 3, § 298 ZPO Rz 10.
[59] Cf. *Rechberger* and *Simotta*, supra n. 1, Rz 1092.

2.8. How is the admissibility of compromised or illegally obtained electronic evidence regulated within the law of your Member State?
(Is the court bound by any rules regulating the admissibility of compromised or illegally obtained (electronic) evidence (e.g. explicit rules provided under your national legislation, rules developed through case law, etc.)? If the rules regulating the admissibility of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

Austrian civil procedural law does not contain any prohibitions on the use of evidence, which is why illegally obtained evidence may in general also be used in the proceedings.[60] An exception is a violation of a prohibition of evidentiary methods (by the court); for example, if the court uses impermissible coercion, the evidence obtained in this way may not be used. One of the concrete issues being discussed in Austria is the compulsory presentation of a person for blood group testing.[61] The same must also apply to electronic evidence.

2.9. Which party carries the burden of proving the (in)authenticity or (un)reliability of electronic evidence?
(Please explain whether the party producing electronic evidence carries the burden of proving such evidence authentic and reliable or whether the party who challenges electronic evidence is charged with proving its inauthenticity and unreliability.)

The answer to this question is governed by the general rules of the burden of proof: According to these the plaintiff regularly has to prove the facts substantiating the claim, the defendant the facts impeding the claim.[62] Thus, if the plaintiff derives his claim from electronic evidence (such as a scanned purchase contract), it is up to him to prove the authenticity of this evidence. The defendant, on the other hand, has to prove the authenticity of evidence that prevents the plaintiff's claim (e.g. a chat transcript that disproves the plaintiff's statements).

2.10. Does the court have the discretion to challenge the authenticity and reliability of electronic evidence even if neither party objects the authenticity and reliability of electronic evidence?
(Please explain if the court can challenge the authenticity and reliability of electronic evidence ex officio, e.g. when there is a high possibility that electronic evidence has been manipulated and neither party objected the authenticity and reliability of electronic evidence.)

The concurring statement of the parties on the authenticity and correctness of a piece of electronic evidence puts this matter of fact out of dispute and, according to case law, constitutes a prohibition of a subject of evidence in proceedings governed by the principle of disposition.[63] The court may only disregard the concurring statement of the parties if it is clearly incorrect. This may be the case, for example, if the opposite of the admitted facts is generally known, the statement contradicts generally

[60] *Kodek* and *Mayr*, supra n. 7, Rz 786; *B. Nunner-Krautgasser* and *P. Anzenberger*, 'Inadmissible Evidence: Illegally Obtained Evidence and the Limits of the Judicial Establishment of the Truth', in *V. Rijavec* et al. (eds.), Dimensions of Evidence in European Civil Procedure (Wolters Kluwer 2016) p. 195 at p. 201 et seq.; *Rechberger* in *Fasching* and *Konecny*, supra n. 3, Vor § 266 ZPO Rz 69 – 75; *Rechberger* and *Simotta*, supra n. 1, Rz 830 – 831; *Rechberger* and *Klicka*, supra n. 1, Vor § 266 ZPO Rz 23 f; *Spitzer*, supra n. 3, Vor §§ 266 ff ZPO Rz 29 – 33.
[61] *Rechberger* in *Fasching* and *Konecny*, supra n. 3, Vor § 266 ZPO Rz 71 with further references.
[62] RIS-Justiz RS0109287, most recently OGH 24 November 2015, 1 Ob 192/15i; *Rechberger* and *Simotta*, supra n. 1, Rz 818.
[63] RIS-Justiz RS0039949, most recently OGH 21 February 2022, 5 Ob 129/19p; see also OGH 6 Ob 52/14m MietSlg 66.692; cf. *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 17.

accepted principles of experience or the court has become aware of contrary facts in the course of its official activities.[64]

2.11. How is the manipulation or (un)lawful manner of obtaining electronic evidence assessed by the court in the case of a challenge?
(In answer to this question, please explain whether judges are expected to assess if evidence was compromised or illegally obtained by themselves, whether an expert may or must be appointed, and whether any other rules and requirements have to be complied with.)

This depends on whether the manipulation of the evidence is recognisable to the judge without expertise, which will regularly not be the case especially with electronic evidence.[65] In this case, the judge will have to appoint an expert ex officio. The expert's opinion is subsequently subject to the free assessment of evidence (§ 367 in conjunction with § 327 ZPO).[66]

2.12. What are the consequences if the court finds that evidence was indeed compromised or obtained illegally?
(The question refers to procedural implications, e.g. the exclusion of evidence or considerations when assessing the weight of such evidence.)

The unlawful obtaining of evidence by a party does in principle not constitute a defect of the judgement that could be relevant in appeal proceedings (see above question 2.8.).[67] According to one doctrinal opinion, however, if the use of evidence is tantamount to a serious encroachment on the constitutionally protected rights of the parties, nullity of the judgement may be considered. In this case, the court would have to refrain from using the evidence.[68]

Manipulation or other interference with electronic evidence is subject to the free assessment of evidence pursuant to § 272 ZPO.[69] If the court of first instance bases its decision on findings of fact from compromised electronic evidence, this may cause a defect in the judgement, which can be challenged with the ground of appeal of incorrect findings of fact due to incorrect assessment of evidence.[70]

2.13. Does the law of your Member State enable for the parties to submit written statements of witnesses?
(*If yes, are pre-recorded oral statements of witnesses admissible as evidence?)*

No, written testimony is not possible because it would contradict the principle of immediacy (in conjunction with the principle of orality), which is decisive for the procedure of taking evidence in civil proceedings. This is based on the idea that the personal impression of the judge is most likely to ensure the clarification of the facts.[71] § 281a ZPO provides for an exception with regard to the contents of the minutes of other court proceedings: Here, the minutes may be used as evidence and a new (direct) taking of evidence may be dispensed with if either

- the parties were involved in these proceedings and there is no request to the contrary by one of the parties or the evidence is no longer available (§ 281a no. 1 lit a and b ZPO), or
- the parties not involved in the proceedings expressly agree to this (§ 281a no. 2 ZPO).

[64] See in detail *Fasching*, supra n. 4, Rz 851; cf. *Kodek* and *Mayr*, supra n. 7 Rz 789; *Rechberger* and *Simotta*, supra n. 1, Rz 833.
[65] Cf. *Rechberger* and *McGuire*, supra n. 1, p. 25.
[66] *Rechberger* and *Simotta*, supra n. 1, Rz 869 and Rz 871.
[67] *Rechberger* and *Klicka*, supra n. 1, Vor § 266 ZPO Rz 23 f; *Rechberger* and *Simotta*, supra n. 1, Rz 831.
[68] *Fasching*, supra n. 4, Rz 936; probably agreeing *Rechberger* and *Simotta*, supra n. 1, Rz 831.
[69] *Weidinger*, supra n. 1, p. 18; *Weidinger*, supra n. 14, p. 119.
[70] Cf. *Rechberger* and *Simotta*, supra n. 1, Rz 1092.
[71] *Rechberger* and *Simotta*, supra n. 1, Rz 843.

3. Duty to disclose electronic evidence

3.1. How is the duty to disclose electronic evidence regulated within the law of your Member State?
(Please explain whether there are any special rules explicitly regulating the disclosure of electronic evidence or if general rules of disclosure apply instead. Should the rules regulating disclosure of particular means of evidence (e.g. documents, physical objects, affidavits) be applied to disclosure of electronic evidence by analogy, please explain which rules are to be used under which circumstances. Include the name of the act and the article(s) containing relevant provisions.)

The scope of the duty to disclose evidence strongly depends on which category of evidence one assigns the electronic evidence to (see above question 1.3.): §§ 303–309 ZPO are dedicated to the (un)conditional obligation to disclose documentary evidence[72] (which apply mutatis mutandis to information matters according to § 318 [2] ZPO); the duty to disclose objects of visual inspection results from § 369 ZPO (see in particular below question 3.3.).[73] In § 359 (2) ZPO, an obligation to disclose is stipulated for the expert evidence; however, this will presumably be of minor importance for the area of electronic evidence.[74]

3.2. What is the scope of the party's duty to disclose electronic evidence within the law of your Member State?
(Please address the circumstances under which the party is required to provide electronic evidence (e.g. the evidence was obtained in a particular manner, the evidence refers to both parties, the parties brought up the evidence when testifying, etc.), the type of evidence they are required to provide (if applicable) and procedural requirements (e.g. does the party in need of evidence have to request particular evidence with an explicit motion, does the court have any discretion when ordering disclosure, are there any time limits, etc). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

In the case of (electronic) documents, the duty of the opposing party to disclose pursuant to § 304 (1) ZPO is unconditional in three specific cases (cf. on the conditional duty to disclose question 3.4.), i.e. it cannot be refused:

- If the opposing party has itself referred to the document in the course of the presentation of evidence (no. 1);
- if the opposing party is obliged under civil law to surrender or disclose the document (no. 2);
- if the content of the document is common to both parties to the proceedings (no. 3). Pursuant to § 304 (2) ZPO, the document is joint if it was drawn up in the interest of both parties or if mutual legal relationships are expressed therein, whereby, pursuant to sentence 2 leg cit, written negotiations concerning a joint legal transaction are also to be included.[75]

In procedural terms, the procedure is such that the court orders the opposing party to disclose the document at the request of the evidence provider (§ 303 [1] ZPO).[76] Pursuant to § 303 (2) ZPO, the applicant must submit a copy of the document or state its contents as precisely and completely as possible if he does not have a copy. Furthermore, he or she must state the facts to be proven with the document and explain which circumstances make the possession of the document by the opposing party

[72] See in general *Rechberger* and *Simotta*, supra n. 1, Rz 859 et seq.
[73] See *Rechberger* and *Klicka*, supra n. 1, § 369 ZPO Rz 1 et seq.
[74] See in detail on various disclosure obligations *J. C. T. Rassi*, Kooperation und Geheimnisschutz bei Beweisschwierigkeiten im Zivilprozess (Jan Sramek Verlag 2020) p. 82 et seq.
[75] *Rechberger* and *Simotta*, supra n. 1, Rz 860; *Rechberger* and *Klicka*, supra n. 1, § 304 ZPO Rz 1 et seq.
[76] *Rechberger* and *Klicka*, supra n. 1, § 303 ZPO Rz 2.

probable.[77] If the opposing party denies possession of the document and the court considers the facts to be proved to be relevant to the decision and the obligation to disclose the document to exist, it may order its examination by order. The aim is to find out whether the opposing party is in possession of the document, is aware of its whereabouts or has removed it or rendered it unusable.[78] The duty of the opposing party to disclose evidence and to testify is not subject to sanctions, but subject to the free assessment of evidence by the judge according to § 307 (2) ZPO.[79]

The same applies mutatis mutandis to (electronic) matters of enquiry pursuant to § 318 (2) ZPO as well as to (electronic) objects of visual inspection pursuant to § 369 ZPO: Therefore, under the conditions of § 304 ZPO, there is also an obligation to disclose, under certain circumstances the opposing party may be questioned and the refusal to disclose or to testify is subject to the free assessment of evidence.[80]

3.3 Does the duty to disclose electronic evidence apply to third persons?
(Please elaborate on whether persons not directly involved in proceedings must present or disclose electronic evidence under the same conditions as the parties or whether different rules apply. If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

Third parties are also obliged to disclose documents pursuant to § 308 ZPO if they are obliged to hand over the document according to civil law or if the document is common to the person providing the evidence and the third party within the meaning of § 304 (2) ZPO. Otherwise, there is no (relative) obligation to disclose documents.[81]

Here, too, the order for disclosure of the document is issued at the request of the person providing the evidence, pursuant to § 308 (1) ZPO. This is done after hearing the opposing party and the third party, whereby if the third party denies being in possession of the document, the person providing the evidence must make this fact credible (§ 308 [2] sentence 1 ZPO). According to § 308 (2) sentence 3 ZPO, the order is enforceable after it has become final and after expiry of the ordered time limit for submission.[82] This is an essential difference to the parties' obligation to submit documents, which cannot be enforced (see above question 3.2.).

The enforceable duty of third parties to disclose documents also applies to matters of enquiry according to § 318 (2) ZPO,[83] but not to objects of inspection (cf. § 369 ZPO).[84] This makes the classification of electronic evidence (see question 1.3.) as either one or another particularly relevant if the disclosure is to be enforced upon a third party.[85] *Kodek* argues that the provisions on the duty to disclose for third parties may be applicable by analogy to electronic objects of inspection. Otherwise, so the author, the third party could influence his duty to disclose by his choice of the respective storage medium (traditional paper form or electronic storage).[86]

3.4. Are there any limits to the duty to disclose electronic evidence specified within the law of your Member State?
(Does your national legislation stipulate reservations and exceptions to the duty of disclosure that would apply to (or also to) electronic evidence? On the one hand, the question refers to the right to refuse

[77] *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 303 ZPO Rz 25.
[78] *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 307 ZPO Rz 9.
[79] *Rechberger* and *Klicka*, supra n. 1, § 307 ZPO Rz 2; *Wilfinger*, supra n. 3, § 307 ZPO Rz 3 et seq.
[80] See *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 318 ZPO Rz 4 et seq.
[81] *Rechberger* and *Simotta*, supra n. 1, Rz 861; *Wilfinger*, supra n. 3, § 308 ZPO Rz 1.
[82] *Wilfinger*, supra n. 3, § 308 ZPO Rz 4; *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 16.
[83] *Wilfinger*, supra n. 3, § 318 ZPO Rz 3 and 5.
[84] *Spitzer*, supra n. 3, § 369 ZPO Rz 2.
[85] Cf. *Spitzer*, supra n. 3, Vor §§ 266 ff ZPO Rz 27 et seq.
[86] *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 318 ZPO Rz 5.

disclosure, privileges, the protection of secrecy and similar restrictions. On the other hand, it refers to measures imposed to prevent abuse in the form of fishing expeditions (requesting non-specific or broad information and evidence in the hope of gaining compromising materials) or excessive disclosure (providing an unmanageable volume of information in the hopes of confusing the parties or the court and delaying proceedings). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

Yes, specifically § 305 ZPO[87] provides reasons for which the production of an (electronic) document can be refused (by the opposing party), as long as they do not fall under § 304 ZPO (arg "other documents"). These reasons are:

- If the content concerns matters of family life (no. 1);
- if the opposing party would violate a duty of honour by producing the document (no. 2);
- if the disclosure of the document would disgrace the party or third persons or would entail the risk of criminal prosecution (no. 3);
- if, by producing the document, the opposing party would betray a state-recognised duty of confidentiality from which he or she has not been validly released, or an art or trade secret (no. 4);
- in the case of equally important reasons justifying the refusal to disclose the document (standard offence, no. 5).

Pursuant to § 318 (2) ZPO and § 369 ZPO, this applies mutatis mutandis to (electronic) information matters and (electronic) objects of inspection.

3.5. What are the consequences of a violation or non-compliance with the duty to disclose electronic evidence?
(Please explain whether any coercive measures or sanctions may be imposed against a party or a third person who unjustifiably refuses to comply with their duty to disclose (electronic) evidence. Does your national legislation provide for any presumptions or fictions regarding the truth of facts to be proved with undisclosed evidence? If the rules for disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

As already explained (cf. questions 3.2. and 3.3.), a party cannot be compelled to disclose evidence or to testify; however, according to the legislator's conception, refusal can and should be taken into account in the judge's free assessment of evidence (§ 307 [2] ZPO), which will regularly be to the disadvantage of the refusing party.[88] On the other hand, third parties can be compelled to disclose evidence (§ 308 [2] sentence 3 ZPO).[89]

3.6. Have there been any problems before the national courts in your Member State arising from differences in national regulations of the duty to disclose electronic evidence, or are such problems to be expected in the future?
(The answer to this question should contain an overview of any case law addressing the duty to disclose electronic evidence (or other evidence, if the same issue could arise concerning electronic evidence) in the context of cross-border proceedings, most notably any cases in which the problems resulted from national differences in the scope of the duty to disclose such evidence (e.g. a broader scope of the duty to disclose evidence in one participating Member State than in the other, privileges or exceptions existing in one Member State but not in the other, etc.). If no such case law exists, please explain any potential problems discussed in legal literature or any problems you expect to arise in practice.)

[87] See in general *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 305 ZPO Rz 1 et seq.
[88] See *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 307 ZPO Rz 13 et seq.
[89] *Wilfinger*, supra n. 3, § 308 ZPO Rz 4.

As far as can be seen, the obligation to disclose evidence is not discussed in Austrian case law with regard to cross-border proceedings.

With regard to the disclosure of documents, *Kodek* points out that the obligation to disclose documents is always governed by Austrian law, even in cross-border proceedings. It has not yet been conclusively clarified whether grounds for refusal of disclosure that exist abroad are also to be applied.[90]

A problem most recently discussed in Austria by *Rassi* is that of the tensions between the parties' interests in secrecy (especially with regard to business secrets) and the clarification of the facts as the basis for a fair trial and effective legal protection.[91]

[90] *Kodek* in *Fasching* and *Konecny*, supra n. 3, § 303 ZPO Rz 15.
[91] See *Rassi*, supra n. 74, p. 163 et seq. with further references.

4. Storage and preservation of electronic evidence

(Storage and preservation of electronic evidence refer to the preservation of electronic evidence in active cases which have not yet been concluded with a final act. For archiving electronic evidence in closed cases, see the next part of the questionnaire.)

4.1. How is the storage and preservation of electronic evidence regulated within the law of your Member State?

(Please list legal acts or other documents establishing rules for the proper storage and preservation of electronic evidence (e.g. including guidelines, protocols and instructions) and shortly indicate their content or purpose. If the relevant solutions have developed in practice, explain these as well.)

There are no special legal regulations for the storage of electronic evidence. The general rule of § 80 (2) GOG states that the keeping of registers and other business appeals as well as the storage of the contents of judicial records shall be carried out in accordance with the technical and personnel possibilities with the help of information and communication technology applications in the eJustice system (eJ).

For documents, however, there is the electronic document archive, in which documents such as electronically signed contracts can be stored and subsequently used in various proceedings (see § 91b GOG).[92] The documents are stored centrally and marked in the respective file by means of an identification number. The collections of documents of the company register courts have been kept exclusively electronically since 2005, those of the land register since 2006.[93] § 91b (7) GOG contains a special provision for these documents; accordingly, they are considered originals until proven otherwise.

4.2. Provide a short overview of requirements, standards, and protocols for properly storing and preserving electronic evidence.

(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of evidence. If there are any special rules regulating the storage of metadata, please describe them.)

Special regulations exist for the requirements for trust service providers in terms of the SVG; the Signature and Trust Services Ordinance[94] contains corresponding provisions in §§ 2 et seq. Furthermore, the interface description pursuant to § 7 of the Ordinance on the platform for electronic service of documents[95] contains a description of the type of data transmission, the complete data structure, the permissible formats, the rules on field contents and the maximum permissible scope. This interface description is freely accessible on the Internet.[96]

Regarding the storage of metadata, there is a recent development that must be taken into account: § 81a Abs 2 GOG, newly introduced by the Civil Procedure Amendment 2022,[97] lists potential file components.[98] According to the materials, all data resulting from additional functions of the digital file ("metadata") should not be part of the file.[99]

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[92] *Bundesministerium für Justiz*, 'IT-Anwendungen in der Justiz', <www.justiz.gv.at/file/2c94848b6ff7074f017493349cf54406.de.0/it-anwendungen%20in%20der%20%C3%B6sterreichischen%20justiz%20stand%20august%202020.pdf?forcedownload=true>, visited 16 March 2023, p. 21.

[93] *Bundesministerium für Justiz*, supra n. 92, p. 21.

[94] Signatur- und Vertrauensdiensteverordnung BGBl II 2016/208.

[95] Verordnung der Bundesministerin für Justiz über den elektronischen Rechtsverkehr BGBl II 2021/587.

[96] *Bundesministerium für Justiz*, 'Schnittstellenbeschreibung gemäß § 7 Abs. 2 ERV 2021', <kundmachungen.justiz.gv.at/edikte/km/kmhlp05.nsf/all/erv!OpenDocument>, visited 22 March 2023.

[97] Zivilverfahrens-Novelle 2022 BGBl I 2022/61.

[98] *Sommer*, supra n. 39, p. 145.

[99] ErläutRV 1291 BlgNR 27. GP 17; cf. *Sommer*, supra n. 39, p. 145.

4.3. Is electronic evidence stored in one central location, or is the storage decentralised?
(Please explain the "physical" location of servers or media where electronic evidence is stored, e.g. each court might be responsible for storing electronic evidence to be used before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to store electronic evidence for all (or several) courts, etc.)

According to the Federal Ministry of Justice, the data is stored centrally on servers of the Federal Computing Centre ("Bundesrechenzentrum", BRZ GmbH). The BRZ GmbH emerged from the outsourced IT areas of the Federal Ministry of Finance in 1997; the Republic of Austria is the sole owner of the BRZ GmbH.[100]

4.4. Who is entitled to carry out the activities related to storing and preserving electronic evidence?
(Please explain any potential requirements or limitations on who may carry out activities related to storing and preserving electronic evidence, e.g. private vs. public entities, certification or qualification requirements, etc.)

There are no provisions in law for this; see question 4.3 above.

4.5. Who may access electronic evidence in a particular case and how?
(Please explain who has access to electronic evidence, which conditions must be met, and which procedure must be followed.)

§ 298 ZPO regulates the inspection of a document submitted by the opposing party or a third party. It follows from Art 6 ECHR that, in order to be heard, it must be possible for the parties to deal with a document serving as evidence.[101] The same must presumably apply to electronic evidence that is comparable to a document in the way it is presented.

4.6. How is the accessibility of stored electronic evidence preserved over time?
(Which measures are taken to guarantee the accessibility of stored electronic evidence in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)

There is no publicly available information on this.

4.7. How is the transmission of electronic evidence to other courts (e.g. to an appellate court) carried out in order to preserve the integrity of evidence?
(Please explain whether there are any special procedures to be followed by another court to access the stored electronic evidence and/or protocols for transmitting such evidence intended to preserve the integrity of the evidence and to prevent any manipulation.)

The transmission between the courts takes place using the platform for electronic service of documents ("Elektronischer Rechtsverkehr", hereinafter: ERV) via an encrypted connection (see briefly above question 4.2.).[102]

For the transfer of large amounts of data, the so-called "Justice Box" ("Justizbox") was set up especially for the judiciary; this is specially secured and functions like common cloud storage (e.g. Dropbox, Onedrive).

4.8. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa?

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[100] Cf. *BRZ GmbH*, 'Organization', <www.brz.gv.at/en/who-we-are/our_organisation.html>, visited 20 March 2023.
[101] See *Wilfinger*, supra n. 3, § 298 ZPO Rz 1.
[102] On the topic of ERV see *Spornberger*, supra n. 31, Rz 17.173 et seq.

(Please describe rules regarding the possibility of a conversion from electronic form to physical and from physical form to electronic when storing evidence.)

Here, so-called "media breaks" or "media disruptions" are addressed; in this context, questions may arise as to the correspondence of what has been received with what has been recorded in the file and as to the verifiability.[103] There are no specific rules for the storage of electronic evidence, so the general rules apply (see already above questions 1.7 – 1.8).

§ 81a (3) GOG stipulates that in the case of a file kept on paper, submissions received in electronic form shall be printed out and treated as if they had been submitted in paper form. If printing is not possible or impractical, the enclosures shall be attached to the file on an electronic storage medium (e.g. USB stick or DVD).[104]

The reverse case is regulated in § 81a (4) GOG: If paper submissions are received for a digitally kept file, these are to be transferred into an electronic document (e.g. scanned) by the office according to the state of the art.[105] In doing so, it must be ensured that the electronic document matches the original supplement in terms of image and content. All submissions that are not to be delivered must be kept for at least six months to enable verification of conformity.

[103] ErläutRV 1291 BlgNR 27. GP 17.
[104] Cf. *Nunner-Krautgasser* and *Schnur*, supra n. 38, p. 164.
[105] Cf. *Nunner-Krautgasser* and *Schnur*, supra n. 38, p. 164; 138/ME 27. GP Erläut 8.

5. Archiving of electronic evidence

(Archiving of electronic evidence only refers to the preservation of electronic evidence in closed cases that have already concluded with a final act. Please include all information regarding the storing and preserving of electronic evidence in active cases in the preceding part of the questionnaire.)

5.1. How is the archiving of electronic evidence regulated within the law of your Member State?
(Please list legal acts or other documents establishing rules for the proper archiving of electronic evidence (e.g. including guidelines, protocols, instructions) and shortly indicate their content or purpose. If relevant solutions have developed in practice, explain these as well. If the rules regulating the archiving of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

There are no explicit regulations on the archiving of electronic evidence in Austrian civil procedure law. As with the storage and preservation of electronic evidence, there is not a lot of publicly available information on this topic. For available information, see also briefly questions 4.1 et seq. above.

5.2. Shortly explain the requirements, standards and protocols for properly archiving electronic evidence.
(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of electronic evidence. If there are any special rules regulating the archiving of metadata, please describe them.)

See above question 4.2.

5.3. Is electronic evidence archived in one central location, or is archiving decentralised?
(Please explain the "physical" location of archives, e.g. each court might be responsible for archiving electronic evidence collected before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to archive electronic evidence for all (or several) courts, etc.)

According to the Federal Ministry of Justice, the archiving of the data, as well as the storage and backup of electronic evidence, is carried out centrally on servers of the BRZ GmbH.

5.4. Who may carry out the archiving of electronic evidence?
(Please explain any potential requirements or limitations on who may carry out the archiving, e.g. private vs. public entities, certification or qualification requirements, etc.)

See above question 5.3.

5.5. Must electronic evidence be archived indefinitely, or must it be deleted or destroyed after a certain period? How is the accessibility of archived electronic evidence preserved over time?
(As electronic evidence is generally kept in an archive for an extended period of time, which measures are taken to guarantee its accessibility in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)

This is governed by the general regulations. According to § 174 (1) no. 1 of the Rules of Procedure for the Courts of First and Second Instance[106] (hereinafter: Geo), files of civil proceedings are in principle to be kept for thirty years. § 169 Geo provides for special regulations for documents that have been used for a decision or may be considered for it; according to para 3 leg cit, these regulations also apply to objects of visual inspection and matters of enquiry.

[106] Geschäftsordnung für die Gerichte I. und II. Instanz BGBl 1951/264.

5.6. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa? *(Please describe rules regarding the possibility of conversion from electronic form to physical and from physical form to electronic when archiving evidence.)*

There are no special rules on this topic that apply when archiving evidence; see in general above questions 1.7. – 1.8 and 4.8.

6. Training on IT development

6.1. Are the judges, court personnel or other legal practitioners required to undergo any training on technological developments relevant to taking, using and assessing electronic evidence?
(Please explain whether there are any official requirements for judges or other professionals to undergo training aimed specifically at improving their skills related to technological aspects of taking evidence, and if any such trainings (voluntary or mandatory) are provided by ministries, state agencies or other entities.)

Those responsible for education and training in the legal field are well aware of the importance of the topic: For example, the Austrian Academy of Administrative Justice offers a seminar for newly appointed judges entitled "Digital Justice" – held via videoconference – which, among other things, also deals with the challenges arising from new technical possibilities for the evidence procedure; specifically mentioned is the possibility of manipulating e-mails and electronic signatures.[107] It can be assumed that corresponding events are also included in the training of other judges.

[107] *Österreichische Akademie der Verwaltungsgerichtsbarkeit*, 'Einstiegsphase für neu ernannte Richter:innen', <www.jku.at/fileadmin/gruppen/326/Einstiegsphase2023_OEAVG_Programmheft.pdf>, visited 16 March 2023, p. 8.

7. Videoconference

7.1. In general, does the law of your Member State provide for videoconference technology to be used in civil proceedings?
(If you answered in the affirmative, please list the legal grounds (e.g. "Art. 100 of the Civil Code"). Please indicate when the legal grounds entered into force (e.g. 01.02.2010) and specify any amendments to the legal grounds. If an online (official or unofficial) English translation of the relevant provisions exists, please provide the URL (link). If there are "soft-law" instruments (e.g. guidelines) that supplement rules on conducting the videoconference, then please specify them.)

Yes, the use of videoconferencing in civil proceedings was already expressly regulated by the Civil Procedure Amending Act 2004[108] with effect from 1.1.2005 in § 91a GOG. However, the provision only provided for the use of videoconferencing for the examination of witnesses, parties and experts as an alternative to examination by mutual legal assistance. The Civil Procedure Amending Act 2009[109] transferred the content of § 91a GOG unchanged into § 277 ZPO.[110] The Budget Accompanying Act 2011[111] eliminated its character as a mere alternative to the hearing by a commissioned or requested judge; video conferencing is now to be primarily used here.[112] According to § 277 ZPO, a hearing by way of legal assistance is only to be conducted if it is more expedient taking into account the economy of the proceedings or if it is necessary for special reasons.[113]

In addition, § 3 of the 1st COVID-19 Justice Accompanying Act[114] (hereinafter: 1. COVID-19-JuBG), which was introduced in connection with the COVID-19 pandemic, enables oral hearings and the taking of evidence to be conducted using suitable technical means of communication for the transmission of words and images, i.e. by videoconference.[115] The validity of the provision has already been extended several times,[116] and it is currently scheduled to expire on 30 June 2023.

Whereas § 277 ZPO only allows for the taking of evidence via videoconferencing, § 3 1. COVID-19-JuBG for the first time also created the possibility to conduct entire hearings in this way;[117] see in more detail below under the next question.

7.2. Does the law allow for videoconference technology to be used solely for the taking of evidence or also for conducting other procedural stages of the hearing? Videoconference in your Member State may be used for:
a) Witness testimony
b) Expert witness testimony
c) Inspection of an object (and/or view of a location)
d) Document (document camera)

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[108] Zivilverfahrens-Novelle 2004 BGBl I 2004/128.
[109] Zivilverfahrens-Novelle 2009 BGBl I 2009/30.
[110] *A. Schmidt*, 'Vernehmungen mit Videokonferenztechnik', in *R. Fucik* et al. (eds.), Zivilverfahrensrecht. Jahrbuch 2009 (nwv 2009) p. 167 at p. 169.
[111] Budgetbegleitgesetz 2011 BGBl I 2010/111.
[112] ErläutRV 981 BlgNR 24. GP 85 f; *C. Fink*, 'Die Digitalisierung der Justiz – Schwerpunkte der Zivilverfahrens-Novelle 2021', in *C. Fink* et al. (eds.), Zukunft der zivilrechtlichen Streitbeilegung (Verlag Österreich 2022) p. 1 at p. 5 – 6; *Rechberger* in *Fasching* and *Konecny*, supra n. 3, § 277 ZPO Rz 1; *Spitzer*, supra n. 3, § 277 ZPO Rz 1.
[113] *Spitzer*, supra n. 3, § 277 ZPO Rz 2.
[114] 1. COVID-19-Justizbegleitzgesetz BGBl I 2020/16.
[115] *T. Garber* and *M. Neumayr*, 'Zivilverfahren in der Krise: COVID-19 und die Auswirkungen auf zivilgerichtliche Verfahren', in *R. Resch* (ed.), Das Corona-Handbuch. Österreichs Rechtspraxis zur aktuellen Lage[1.06] (MANZ 2020) Kap 13 Rz 66/2 (up to date as of 1 July 2021, rdb.at).
[116] Most recently by the Federal Act BGBl I 2022/224.
[117] Instead of many, see *Spitzer*, supra n. 3, § 277 ZPO Rz 6.

e) Party testimony
f) Other means of evidence (please elaborate)
g) Conducting the hearing in broader/general terms (please elaborate)
(Specify whether videoconference technology can be used only for the taking of evidence by highlighting the categories of evidence. Please note that some Member States may not use the same categorisation of evidence or contain all above categories (e.g. party testimony). In such cases, please approximate your answer and provide additional explanation if needed. If the technology can be used in other stages of the procedure, please specify the scope of the technology's use.)

§ 277 ZPO aims at the questioning of natural persons in the context of evidence proceedings (arg "interrogation"), which includes witnesses, experts as well as the parties themselves.[118]

The conduct of entire hearings by way of videoconferencing was made possible during the COVID-19 pandemic by § 3 1. COVID-19-JuBG, which also allows for the hearing of the parties as well as the taking of evidence in the oral proceedings or outside of them to a greater extent than § 277 ZPO. However, it is scheduled that this provision will expire as of 30 June 2023 (see above question 7.1.).

In principle, oral proceedings by way of videoconferencing pursuant to § 3 1. COVID-19-JuBG are intended to counter the lack of sufficiently large hearing rooms and to minimise the risk of infection and transmission of COVID-19 if no security precautions can be taken. In addition, hearings with parties abroad who cannot enter Austria due to an entry restriction or entry ban are made possible. Whether an oral hearing or taking of evidence is conducted by videoconference is at the dutiful discretion of the court; parties can only request that. In particular, the court will have to consider the regional COVID-19 situation for its discretionary decision.[119]

7.2.1. If the law allows for (remote) view of location, how would such a videoconference be practically implemented?
(E.g. does the court appoint a court officer to operate the audiovisual equipment on site? For example, suppose there is a dispute between parties regarding the border/boundary between their immovable properties and the court needs to view the alleged border/boundary. Does a court officer carry the technical equipment to the site and follow instructions from the court, regarding the viewing angles etc.)

The ZPO does not contain any specific regulation for the conduct of an on-site inspection by means of a videoconference. § 277 ZPO refers to the examination of witnesses, parties and experts, thus does not regulate the possibility of such a "dislocated" visual inspection.

The admissibility of such evidence depends (as with other items of visual evidence, such as photographs) on whether it is mandatory to be on the spot in accordance with the principle of immediacy, which is ultimately up to the judge to decide[120] (aware that an erroneous decision causes the procedure to be defective[121]).

There is no comparable restriction in § 3 1. COVID-19-JuBG. Within its scope of application, evidence may therefore be taken in and out of the oral proceedings even without the prerequisites of § 277 ZPO being met.[122] If the court decides to conduct a site visit via video conferencing technology, it can be

[118] Cf. *Rechberger* in *Fasching* and *Konecny*, supra n. 3, § 277 ZPO Rz 1.
[119] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/4 et seq.
[120] *Rechberger* in *Fasching* and *Konecny*, supra n. 3, Vor § 266 ZPO Rz 92; cf. *Rechberger* and *Simotta*, supra n. 1, Rz 845.
[121] *Rechberger* and *Klicka*, supra n. 1, § 277 ZPO Rz 2; *Rechberger* and *Simotta*, supra n. 1, Rz 845; *Spitzer*, supra n. 3, § 277 ZPO Rz 4.
[122] *Spitzer*, supra n. 3, § 277 ZPO Rz 7.

assumed that a court clerk will operate the camera on site according to the judge's instructions. This is also the way it is done when a witness is examined in another court via videoconference.[123]

7.3. Which applications (software) are used for videoconferencing in civil court proceedings?
(Please investigate whether the courts use multiple applications.)

The Zoom videoconferencing platform is used, whereby internal judicial infrastructure is used in order to meet the special requirements of the judiciary with regard to confidentiality.[124] In a statement to the daily newspaper "Der Standard" in 2020, the Ministry of Justice stated that the service was operated on special servers in the Federal Computing Centre ("Bundesrechenzentrum", BRZ GmbH; see above question 4.3.).[125]

7.3.1. Are the applications (see Question 7.3.) commercially available?
(If so, specify whether they are specially modified for use in court proceedings.)

Zoom licences can be purchased commercially, but in the course of the taking of evidence pursuant to § 277 ZPO, access for parties and their representatives is regularly not necessary because the hearing is conducted via direct connection between the court hearing the case and a court in the immediate vicinity of the residence of the person to be heard. In the case of video hearings within the meaning of § 3 1. COVID-19-JuBG, the parties usually receive a link from the court (which has a commercial licence) and can then join using the free version of Zoom.

7.3.2. Are the applications (see Question 7.3.) interoperable with other applications?
(e.g. can a subject, using application X, join a videoconference, which is conducted via application Y)

Zoom is not compatible with other video conferencing platforms. In general, there are – as far as it is apparent – only a few video conferencing tools that allow communication with people using a different tool.

7.3.3. Does the application allow a text-based chat function during the videoconference; does it allow screen sharing and sharing of documents?
(whether and to what extent the court can restrict these functions (e.g., the parties can talk at any time, but only share their screen if permitted by the court.)

Zoom has a chat function and allows for sharing documents as well as for sharing one's own screen. The use of these functions is to be decided by the judge within the scope of his or her authority to conduct the proceedings, whereby he or she must observe general procedural principles. If a settlement is reached in the course of an oral hearing in the context of a videoconference, § 3 (3) 1. COVID-19-JuBG provides that the court must make the text of the settlement visible to the parties on the screen or read the text of the settlement aloud.[126]

7.4. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when taking evidence?
(E.g. may the court order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; only with the consent of the person providing testimony; at the request of (both) parties; only in exceptional circumstances etc.)

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[123] *Schmidt*, supra n. 110, p. 174.

[124] Cf. *Bundesministerium für Justiz*, 'Schutzmaßnahmen für Notbetrieb an Gerichten verlängert', <www.justiz.gv.at/justiz/2020/schutzmassnahmen-fuer-notbetrieb-an-gerichten-verlaengert.898.de.html>, visited 14 March 2023.

[125] *Sulzbacher*, 'Trotz Sicherheitsmängeln nutzen österreichische Ministerien Zoom', <www.derstandard.at/story/2000116689168/trotz-sicherheitsmaengel-nutzen-oesterreichische-ministerien-zoom>, visited 24 March 2023.

[126] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/13.

Pursuant to § 277 ZPO, the court shall give preference to the hearing by videoconference over the hearing by a commissioned or requested judge, as long as the latter is not necessary for special reasons or under consideration of procedural economy.[127] Consent of the parties is not required in principle, but they may raise their concerns about the videoconference and the importance of appearing directly in court. See on § 277 ZPO already question 7.1. above.

§ 3 (1) no. 1 1. COVID-19-JuBG makes it possible to take evidence by way of videoconference even without the prerequisites of § 277 ZPO being met; it is in the court's dutiful discretion to decide on the conduct of such a taking of evidence, especially with regard to the current COVID-19 danger situation.[128] However, in this case, the consent of the parties is required; pursuant to § 3 (1) no. 1 1. COVID-19-JuBG, this consent is deemed to have been granted if the parties do not object within a reasonable period of time set for them by the court.

7.5. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when conducting hearings?
(E.g. whether the court may order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; at the request of (both) parties; only in exceptional circumstances etc.)

The admissibility of videoconferences to an extent beyond the taking of evidence pursuant to § 277 ZPO results from § 3 1. COVID-19-JuBG (see already above questions 7.1 – 7.2.). The provision provides for some types of hearings that can be conducted without the consent of the parties; for others, the parties' consent is required.

If oral proceedings or a hearing are conducted using suitable technical means of communication for the transmission of words and images, the consent of the parties generally is required pursuant to § 3 (1) no. 1 1. COVID-19-JuBG.[129] If one party does not agree, the hearing shall be held in the hearing room.[130]

Without the consent of the parties, hearings and oral proceedings in placement, residential care and adult protection cases that would have to be conducted outside the court premises may be held by means of a videoconference if the health of a person involved in the proceedings or third parties would otherwise be seriously endangered. Under these circumstances, it is also possible to take evidence in the aforementioned matters by means of video conferencing during the oral proceedings or outside them; persons to be present at the hearing can also be connected via videoconference (§ 3 [1] no. 2 1. COVID-19-JuBG).[131]

§ 3 (2) 1. COVID-19-JuBG further provides that any person to be called as a witness, expert, interpreter or otherwise involved in the proceedings may request to be heard or questioned via video conference, if they certify an increased health risk from COVID-19 for themselves or for persons with whom they have necessary private or professional contact.[132]

Finally, § 3 (4) 1. COVID-19-JuBG provides that all types of hearings in execution and insolvency proceedings may be conducted by way of videoconference without the consent of the parties, unless the persons participating certify that they do not have the necessary technical means.[133]

[127] *Rechberger* and *Simotta*, supra n. 1, Rz 843; *Spitzer*, supra n. 3, § 277 ZPO Rz 3.
[128] See in general *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/5.
[129] *Spitzer*, supra n. 3, § 277 ZPO Rz 9.
[130] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/6.
[131] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/8.
[132] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/9; *Spitzer*, supra n. 3, § 277 ZPO Rz 10.
[133] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 73/12 et seq.

7.6. If the court orders the use of the technology, may the parties oppose that decision? If so, how do the parties make their opposition clear (e.g. appeal)?

Concerning the taking of evidence via videoconference pursuant to § 277 ZPO, the parties may express concerns to the court that such a taking of evidence violates the principle of immediacy. If the proceedings and subsequently the decision are indeed defective because of a video conference that was wrongly conducted (i.e. that does not serve as a substitute for the mutual legal assistance hearing in the case of § 277 ZPO), the parties can refer to this as a substantial procedural defect pursuant to § 496 (1) no. 2 ZPO in the course of an appeal against the decision.[134]

If an oral hearing or taking of evidence within the scope of § 3 1. COVID-19-JuBG is conducted using suitable technical means of communication for the transmission of words and images, the consent of the parties is generally required. If the parties do not object within a reasonable time limit set by the court, consent shall be deemed to have been given. No reason is required for the refusal, but a legally abusive refusal of consent, e.g. in order to drag out and delay the proceedings, is not to be observed.[135] If a party refuses its consent, the hearing must be held in the courtroom or adjourned. If the video conference and thus the hearing is held despite the lack of consent of the parties, this constitutes a violation of the principle of immediacy, which may ultimately also lead to a substantial procedural defect under § 496 (1) no. 2 ZPO.[136]

7.7. Does the law of your Member State provide that courts can, in civil procedure cases, impose coercive measures against a witness or a party to provide testimony?
(Explain also if the rules differ for videoconference testimony.)

According to § 333 (1) ZPO, a witness' testimony can also be compelled if necessary: If a duly summoned witness does not appear at the hearing without sufficient excuse, he or she is to be ordered to reimburse all costs caused by his or her non-appearance. In addition, the witness is to be summoned again and at the same time an administrative penalty is to be imposed, whereby in case of repeated absence the penalty is to be doubled and a compulsory production of the witness is to be ordered.[137]

In contrast, the hearing of the parties cannot be compelled (§ 380 [3] ZPO), but a non-appearance or an unjustified refusal to testify is to be assessed by the judge within the framework of the free assessment of evidence (§ 381 ZPO).[138]

7.7.1. Under which circumstances may a witness refuse testimony?
(Explain also if the rules differ for videoconference testimony.)

A witness may refuse to testify under § 321 (1) ZPO[139] for the following reasons:

- Danger of disgrace or criminal prosecution for themselves or a close relative (no. 1);
- questions, the answering of which would mean a pecuniary disadvantage for the person or close relatives (no. 2);
- with regard to facts about which the witness could not testify without breaching a duty of confidentiality (no. 3), for example due to his or her capacity as a lawyer (no. 4) or as a functionary or employee of an interest group (no. 4a);
- if an art or trade secret is endangered (no. 5);
- on questions concerning the exercise of his or her right to vote in secret (no. 6).

[134] *Spitzer*, supra n. 3, § 277 ZPO Rz 4; *Rechberger* and *Simotta*, supra n. 1, Rz 470.
[135] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/6.
[136] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/6.
[137] *Rechberger* and *Simotta*, supra n. 1, Rz 864.
[138] *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 15 et seq.; *Rechberger* and *Simotta*, supra n. 1, Rz 881.
[139] See in detail *A. Frauenberger* in *Fasching* and *Konecny*, supra n. 3, § 321 ZPO Rz 1 et seq.

The grounds for refusing to testify are the same regardless of how the interrogation is conducted.

Furthermore, it should be noted that according to Austrian law (cf. § 320 ZPO), in addition to the right to refuse to testify, there is also a prohibition to question certain witnesses at all. Consequently, the following persons may not be questioned according to § 320 ZPO:

- Persons who are incapable of communicating their perceptions or who were incapable of perceiving the fact to be proved at the time to which their statement is to relate (no. 1);
- clergy with regard to what has been confided to them in confession or otherwise under the seal of official spiritual secrecy (no. 2);
- State officials, if they would violate the official secrecy they are obliged to maintain by giving evidence, insofar as they are not released from the obligation to maintain secrecy by their superiors (no. 3);
- registered mediators under the Civil Law Mediation Act[140] in respect of what has been entrusted or otherwise disclosed to them in the course of mediation (no. 4).

These interrogation prohibitions must also be complied with regardless of how the interrogation is conducted.

7.7.2 Does the law of your Member State allow for cross-examination?
(Explain also if the rules differ for videoconference testimony.)

Yes, the ZPO provides for the parties' right to ask questions: Pursuant to § 289 (1) in conjunction with § 341 (1) ZPO, the parties may be present at the taking of evidence and address questions to witnesses.[141] In practice, this process regularly takes place in such a way that first the judge addresses his or her questions to the witness and subsequently invites the party who requested the witness to ask questions. Afterwards, the opposing party also has the opportunity to question the witness. The judge may reject questions that appear to him or her to be inappropriate.[142]

7.8. If videoconference technology is used to conduct hearings, how (if at all) can the court and/or parties terminate the use of videoconference technology and revert to regular (on-site) proceedings?
(Please explain the powers of the court and the parties in relation to choosing to conduct regular proceedings after the court has already decided that the hearing will be conducted through videoconference.)

The decision for/against a videoconference is not binding; a return to the hearing in the hearing room is therefore possible at any time.

7.9. Does the law (or best practice) provide, that the court should – before ordering the use of videoconference technology – check (please elaborate):
a) the internet connection availability (and/or speed) of the persons involved in the videoconference;
b) the technical equipment of the persons involved in the videoconference;
c) the technical literacy of the persons involved in the videoconference;
d) the physical capacity of the persons involved in the videoconference (e.g. if they are located in the Member State, their health status (hospitalisation; vocalisation, hearing and seeing));
e) other (please specify)?

[140] Zivilrechts-Mediations-Gesetz BGBl I 2003/29.
[141] See *Rechberger* and *Simotta*, supra n. 1, Rz 867.
[142] *Rechberger* in *Fasching* and *Konecny*, supra n. 3, § 289 ZPO Rz 4.

(In addition, please specify if the court has to conduct a "test" session" before the actual videoconference.)

The law does not contain any instructions on the judge's duty to check before a videoconference, but in any case, it is advisable to check the availability and stability of the internet connection, which should not pose any problems in the case of conferences between two courts. Starting with the introduction of the taking of evidence via videoconference in 2005 (see above question 7.1.), the judiciary invested a lot in the technical equipment of the courts.[143] Since 2011, all courts are equipped with the necessary technical equipment to conduct videoconferences.[144] This usually consists of a large main monitor, two additional swivelling monitors and a camera, which can be controlled by remote control and enables different camera perspectives; both overview and detail shots.[145]

In order for persons to be connected from their home or place of business, they must have the appropriate means of communication. The court must clarify this in advance in order to avoid any delays. An unrepresented party may request an adjournment of the hearing if no suitable technical means of communication are available to him or her, represented parties and witnesses may request a provisional abstention from the hearing (§ 3 [2] 1. COVID-19-JuBG). However, it is also possible to connect a witness from another room in the same court building.[146]

Again, the principles of procedure must be the guideline: Witnesses must be clearly understandable; it must also be possible for the parties to address questions to them.

7.10. Does the law (or best practice) offer special safeguards for vulnerable persons?
(Please explain whether the use of the videoconferencing technology must follow any special rules for vulnerable partakers (e.g. children; persons with illness; persons located in hospitals; whistle-blowers; elder persons).)

§ 289a ZPO allows a separate hearing in two cases, i.e. a hearing in which the parties only follow the proceedings via technical equipment for word and image transmission and thus also ask their questions: On the one hand, in the case of victims of crime (para 1 leg cit), on the other hand, in the case of persons who cannot reasonably be expected to be heard in the presence of the parties and their representatives due to the subject of the evidence and their personal involvement (para 2 leg cit).[147]

Especially for minors, § 289b (1) ZPO stipulates that their examination may be dispensed with if it would endanger the child's well-being, taking into account the child's mental maturity, the subject of the examination and any close relationship to the parties to the proceedings.[148] If the best interests of the child are only endangered by a hearing in the presence of the parties and their representatives, the minor may be heard separately upon request or ex officio within the meaning of § 289a ZPO (§ 289b (2) ZPO). A confidant of the minor shall be present at the hearing if this is in his or her interest (§ 289b (3) ZPO).[149]

In principle, the parties can only request hearings, oral hearings and taking of evidence via suitable technical means of communication for the transmission of words and images; whether or not such is carried out is at the dutiful discretion of the judge.[150] According to § 3 (2) 1. COVID-19-JuBG, however,

[143] *Schmidt*, supra n. 110, p. 171.
[144] *Bundesministerium für Justiz*, supra n. 92, p. 28; *Fink*, supra n. 112, p. 6.
[145] Cf. *Schmidt*, supra n. 110, p. 174.
[146] IA 436/A 27. GP Erläut 4; *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/10.
[147] *Rechberger* and *Klicka*, supra n. 1, § 289a ZPO Rz 1 et seq.
[148] *Anzenberger*, 'Vernehmung von Verbrechensopfern und Minderjährigen im Zivilverfahren nach §§ 289a und 289b ZPO', 72 Österreichische Juristenzeitung (2017) p. 249 at p. 249 – 252; *Rechberger* and *Simotta*, supra n. 1, Rz 848.
[149] *Anzenberger*, supra n. 148, p. 256; *Rechberger* in *Fasching* and *Konecny*, supra n. 3, § 289b ZPO Rz 1.
[150] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/5.

parties to the proceedings, witnesses, experts, interpreters and other persons to be involved in the proceedings may request to participate in the oral proceedings, to be questioned, to give expert opinions or to provide translation services by using suitable technical means of communication for the transmission of words and images until the expiry of the deadline specified in § 3 (1) 1. COVID-19-JuBG – and thus until the provision expires. However, in order to do so, they must certify an increased health risk from COVID-19 for themselves or for persons with whom they have necessary private or professional contact.[151]

7.11. Does the law of your Member State provide:

a) The location of the persons engaged in the videoconference (i.e. where the videoconference must or may be conducted) and the use of virtual filters and backgrounds?

(Member States' laws may allow only for court2court videoconference; other laws may not contain restrictions and the partakers may enter the videoconference from the location of their choice; explain whether, for example, a person may join the videoconference through their mobile device from their domicile or a car etc. Explain whether a person may use filters or change the background/backdrop. If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

Videoconferences, in particular those pursuant to § 277 ZPO, usually take place via a court-to-court connection, but that is not mandatory.[152] Especially in the case of witnesses who are not mobile due to illness, age or other impairments, a pragmatic approach will often be required in order to make the examination possible.

In a videoconference hearing, the judge is present in the courtroom and other participants in the proceedings are connected. It is also possible that they are connected from another room in the same court building. Not provided for in the framework of § 3 1. COVID-19-JuBG is a digital hearing room, where the judge conducts the hearing from another location (e.g. from the home office).[153] *Koller* concludes this from the reference in the materials[154] that hearings conducted by videoconference must also be announced in front of the hearing room.[155]

There are no rules on the use of filters or virtual backgrounds. However, if any of these are disruptive, the judge will be able to order that they are no longer used under his or her general trial management powers.

aa) How does the law sanction a person who does not conduct the videoconference at the designated location?

This case is not regulated by law, but it is not problematic if both the image and the sound are connected properly. In any case, it would be unjustified to equate this with non-appearance at the hearing. Technical disruptions in the conduct of hearings or the taking of evidence are not to be blamed on the parties to the proceedings; in particular, parties and party representatives are not to be regarded as defaulting for this reason.[156]

ab) Are there any rules for the inspection of the location where the person heard is situated and the privacy it offers?

[151] See *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/9.
[152] Cf. *Koller*, 'Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht', 142 Juristische Blätter (2020) p. 539 at p. 542.
[153] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/10 et seq.
[154] AB 139 BlgNR 27. GP 2.
[155] *Koller*, supra n. 152, p. 542; *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/12.
[156] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/14.

(If the person is situated at a private location, does the person have to "show" the court whether any other person is present at the location and/or – where (professional/business) secrecy is involved – whether the location offers sufficient privacy. Must the location adhere to any form of decency or décor? If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

There is no clear legal order for this case; however, if the exclusion of the public is necessary, it must be ensured regardless of how the hearing is specifically held.

A risk of abuse with regard to witness evidence by way of a videoconference is counteracted by the fact that the person being questioned can be viewed frontally and closely. The person being questioned may also be asked to look directly into the camera and may be told to pan around the room with the camera.[157]

ac) Suppose a person lives in a one-room apartment with family or a room rented with friends, and cannot find another suitable location. Does the law allow the presence of family members, roommates etc. in such cases? If yes, do these persons have to identify themselves?

Since court hearings are in principle open to the public, it would not be understandable why spectators or random participants should not be allowed in a videoconference or would have to identify themselves. The situation is different, however, if the public is excluded, in which case the judge must ensure that persons not involved in the proceedings leave the room. However, there are no specific rules that no other person may be in the room or that they would have to identify themselves; this is to be decided by the judge according to general principles within the scope of his or her power to conduct the proceedings.

Where oral hearings are conducted using videoconferencing, the principle of publicity shall be preserved by calling the case before the hearing room and allowing access to as many listeners as possible, in compliance with the prescribed safeguards.[158] When using technical means of communication, the principle of publicity shall be respected by the transmission of the videoconference in the hearing room.[159]

One could consider making a hearing conducted via videoconference public by publishing the link to it, for example on the court's website. In practice, however, the link to the hearings is usually only sent out to the participants and pre-registered spectators; it is not usually made freely available to all interested persons. Such a publication of the link would also have to be examined for its compatibility with § 22 Media Act[160] (see below question 7.12.).

d) the time when the videoconference may be conducted?

(Member States' laws may provide that videoconferences should not take place before e.g. 06:00 and no later than e.g. 18:00; does the law provide rules for videoconferencing if the persons are located in different time zones? If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

There is no provision in the law for this. However, there has been a case where the appellant claimed that he was disadvantaged by the timing of the hearing (see below question 7.14.3.).

d) the apparel and conduct of the persons taking part in the videoconference?

(Member States' laws may compel partakers to dress or conduct themselves in a special manner (e.g. toga outfit; standing in attention of the judge); please explain how these rules or traditions are followed

[157] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/14.
[158] IA 436/A 27. GP Erläut 4; *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/14.
[159] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/23.
[160] Mediengesetz BGBl 1981/314.

if videoconference technology is used. If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

There is no provision in the law for this; however, certain traditions have developed over time. For example, it is customary to rise when the judge enters the courtroom or when the hearing begins. Lawyers usually wear formal attire in court; the wearing of a gown is now only customary for the parties' representatives in criminal trials with lay participation. Judges sometimes wear a gown in civil proceedings.

d) the identification of the persons taking part in the videoconference?
(If the videoconference takes place in a court2court setting, this concern is usually dispelled, since court officials may check the identity; however, checking the identity of a person entering the videoconference from a private location may be troublesome. If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

The identification of the witness is carried out according to § 340 (1) ZPO by questioning him or her about name, birthday, occupation and place of residence. The presentation of a photo ID is required in addition in doubtful cases. The same applies to videoconferencing: Here, too, the witness must be questioned about his or her general details at the beginning; in case of doubt, the photo ID can be shown to an employee of the court on site or, if the videoconference does not take place between courts, identification can simply be provided by holding the photo ID up to the camera.

7.12. Can (or must) a videoconference be recorded?

No, videoconferences are not recorded and may not be recorded;[161] the minutes of the hearing, which must be recorded as in every hearing (§ 207 [1] ZPO), serve as documentation.[162] In general, according to § 22 Media Act, television and radio recordings and broadcasts as well as film and photo recordings of court hearings are inadmissible.[163]

7.12.1. Does the recording of a videoconference contain video feedback from all cameras in the court or only the camera in focus?
(Many software applications pin or highlight only one of the persons during the videoconference and close or minimize other (usually non-active) persons. A recording might thus capture only the actions of one person at a time.)

Since videoconferences are not recorded, this question cannot be answered directly. However, it is common practice to use a single camera when taking evidence via videoconference pursuant to § 277 ZPO.[164]

7.12.2. Which persons are shown on video during the videoconference?
(I.e. which persons have a camera pointed at them and can be seen on the screen; e.g. judge, party, advocate, expert witness, interpreter, court staff, witness, public.)

In courtrooms, the camera systems are regularly installed in such a way that they capture the judge's bench as well as both parties to the proceedings in the picture, so that the person to be questioned gets a good impression of all the actors relevant to the proceedings. It is possible to change the camera's setting to show different parts of the picture.[165]

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[161] *F. Scholz-Berger* and *J. Schumann*, 'Die Videokonferenz als Krisenlösung für das Zivilverfahren', 31 ecolex (2020) p. 469 at p. 470.
[162] See in general *Rechberger* and *Simotta*, supra n. 1, Rz 550 et seq.
[163] Cf. *Scholz-Berger* and *J. Schumann*, supra n. 161, p. 470.
[164] Cf. *Schmidt*, supra n. 110, p. 176.
[165] *Schmidt*, supra n. 110, p. 174 and p. 176.

7.12.3. How (which medium and format) and where is the footage of the videoconference stored and later archived?
(For example, it may be stored on a local machine or at a remote server.)

Since recordings are not allowed and therefore do not take place (see above question 7.12.), this question is not applicable.

7.12.4. Does the footage of the videoconference enter the record of the case?

Since recordings are not allowed and therefore do not take place (see above question 7.12.), this question is not applicable.

7.12.5. Who has access to view the footage after it has been recorded?

Since recordings are not allowed and therefore do not take place (see above question 7.12.), this question is not applicable.

7.12.6. Presume that the proceedings have concluded at the first instance and an appeal or other recourse has been submitted by the party. May the second instance court access and view the recording of the videoconference?

No, since no recordings are allowed, the court of second instance has no possibility to consult a recording. Pursuant to § 211 (1) ZPO, the minutes drawn up in accordance with the provisions of §§ 207 et seq. ZPO provide full evidence of the course and content of the hearing; (only) these are therefore to be consulted by the court of second instance.[166]

7.12.7. If the court orders *ex post* transcription of the hearing, does the court reporter write the Minutes of the case by transcribing the footage of the videoconference or is there a separate audio log for transcription?

Since there is no recording, this question cannot be answered directly. However, the minutes are usually dictated by the judge during the hearing using a digital sound carrier (dictaphone) and subsequently transcribed in full by the court registry.[167]

7.13. Concerning court interpreters – does the law (or best practice) provide for successive or simultaneous interpretation during the videoconference?

There is no legal requirement in this respect, but consecutive interpretation is the rule in practice.[168] The Austrian Association of Sworn and Court Certified Interpreters („Österreichischer Verband der allgemein beeideten und gerichtlich zertifizierten Dolmetscher") states on its website that court interpreters must be proficient in both consecutive and simultaneous interpreting.[169]

7.13.1. Where is the interpreter located during the videoconference?
(E.g. in the court room; in the room with the person being heard etc.)

[166] *F. Iby* in *H. W. Fasching* and *A. Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen II/3[3] (MANZ 2015) § 207 ZPO Rz 1 et seq.
[167] Cf. ErläutRV 1291 BlgNR 27. GP 9; *Iby*, supra n. 107, § 207 ZPO Rz 3/1.
[168] Cf. OGH 12 Os 177/86 JBl 1988, 56; OGH 11 Os 139/08p RZ 2009/20; OGH 14 Os 6/12g EvBl-LS 2012/103 (*Ratz*) (each on criminal procedure).
[169] *Österreichischer Verband der allgemein beeideten und gerichtlich zertifizierten Dolmetscher*, 'Anforderungen des Berufs', <www.gerichtsdolmetscher.at/Gerichtsdolmetscher/Anforderungen_des_Berufs>, visited 16 March 2023.

There is no provision regulating this aspect (but see § 82 Geo); the interpreter can therefore be in the courtroom as well as with the person to be heard. He or she may also be directly connected as a participant in the proceedings if this does not restrict the intelligibility of the speech.[170]

7.14. Immediacy, equality of arms and case management

7.14.1. How does the law of your Member State generally sanction an infringement of the principle of immediacy?

The principle of immediacy states that the basis for a decision should only be what took place before the adjucating court itself.[171] Pursuant to § 276 (1) ZPO, evidence must be taken in the course of the hearing before the adjudicating court; this is referred to as "objective immediacy".[172] Pursuant to § 412 (1) ZPO, the judgement may only be passed by those judges who participated in the (entire) oral proceedings. If the composition of the court changes, the oral proceedings must be held anew; this is referred to as "personal immediacy".[173]

A violation of personal immediacy through a breach of § 412 (1) ZPO causes nullity according to § 477 (1) Z 2 ZPO. If the legal hearing of the parties is impaired by a violation of § 276 (1) ZPO, the ground for nullity of § 477 (1) Z 4 ZPO applies. Other violations of the principle of immediacy result in a defect of the judgement in the sense of a substantial procedural defect pursuant to § 496 (1) no. 2 ZPO.[174]

7.14.2. Does the law of your Member State specify any special aspects regarding the principle of immediacy when using videoconferencing technology?

Yes, the legislator considers the taking of evidence by means of a videoconference to be direct, which is evident from the corresponding wording in § 277 ZPO.[175] In order for immediacy to be preserved in a videoconference under § 3 1. COVID-19-JuBG, the consent of the parties must be given; if a videoconference is held without the consent of the parties, there is a violation of the principle of immediacy, which can lead to a substantial procedural defect pursuant to § 496 (1) no. 2 ZPO.[176]

7.14.3. Have your courts dealt with cases alleging an infringement of the principle of immediacy or the impartiality of judges in videoconference proceedings?

(If so, please provide the core of the legal question addressed and the resolution, as well as citations.)

Yes, the scheduling of the hearing at 6:00 am (local time at the parties' location) and the rolling of an arbitrator's eyes were already claimed as reasons for an arbitrator's impartiality. However, these claims were unsuccessful. The early time resulted from the large time difference between the party's location and the court; it was therefore an acceptable compromise. Furthermore, the mere rolling of the eyes or

[170] Cf. *L. M. Wurm*, 'Die Videokonferenz in nationalen und grenzüberschreitenden Verfahren', 97 Österreichische Richterzeitung (2019) p. 231 at p. 232 – 233; *W. Fellner*, 'Neueste Entwicklungen und Perspektiven des IT-Einsatzes in Zivilverfahren', in *R. Fucik* et al. (eds.), Zivilverfahrensrecht. Jahrbuch 2009 (nwv 2009) p. 49 at p. 58.
[171] *Spitzer*, supra n. 3, § 276 ZPO Rz 1; *Rechberger* and *Simotta*, supra n. 1, Rz 467.
[172] *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 6; *Rechberger* and *Simotta*, supra n. 1, Rz 468; *Spitzer*, supra n. 3, § 276 ZPO Rz 6.
[173] *Nunner-Krautgasser* and *Anzenberger*, supra n. 6, p. 6; *Rechberger* and *Simotta*, supra n. 1, Rz 469; *Spitzer*, supra n. 3, § 276 ZPO Rz 2.
[174] *Rechberger* and *Simotta*, supra n. 1, Rz 470; *Spitzer*, supra n. 3, § 276 ZPO Rz 5.
[175] Cf. ErläutRV 613 BlgNR 22. GP 21; see also *Spitzer*, supra n. 3, § 277 ZPO Rz 1.
[176] *Scholz-Berger* and *Schumann*, supra n. 161, p. 472; *Spitzer*, supra n. 3, § 277 ZPO Rz 11; *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/6.

facial expressions of the judge does not cause justified doubts about the independence and impartiality of a co-arbitrator and therefore does not provide sufficient grounds for a challenge of the judge.[177]

7.14.4. How do parties (and their advocates) express objections or pose questions during a videoconference?
(This may be especially important when "leading questions" are posed.)

Here, too, there are no special regulations laid down by law for videoconferences. Pursuant to § 184 (1) ZPO, the parties have the right to ask questions, which they usually exercise after the judge. However, it is not uncommon for the judge to allow the parties to speak beforehand, so the process is reminiscent of a dialogue. The court can reject questions as inadmissible; the parties are also free to complain about the inadmissibility of questions (cf. § 184 [2] ZPO).[178]

7.14.5. How does an inspection of an object take place during a videoconference?
(For example, imagine a court has to examine a knife, which was submitted as evidence by a party in physical form to the court.)

The law does not comment on this; it is expedient to hold the object in the camera in such a way that it can be sensually perceived by all participants in the proceedings (judges, parties). The technical equipment of the hearing rooms plays an important role in this; movable cameras that can be optimally adjusted for the task at hand make it much easier to examine an object compared to a conventional webcam.[179]

7.14.6. Can documents only be presented by means of a document camera or also through the use of file/screen sharing in the videoconference application?

The presentation of documents can also be done by sharing the screen or the file. This interpretation is supported by § 3 (3) 1. COVID-19-JuBG, which provides that the text of a settlement to be concluded – among other possibilities, but mentioned first by the legislator – is to be made visible on the screen by the court.[180]

7.14.7. During the videoconference, does the application (software) highlight only the person actively speaking or are all participants visible at all times (and at the same size)?
(Often, the application will minimize or close the video of the person who is not active (speaking) during the videoconference.)

There is no legally prescribed mode here; in the courtroom, all persons should usually be visible. Otherwise, the participants can usually determine themselves in the video conferencing software used which persons they want to see and how large they want to see them.

7.14.8. Suppose that the connection becomes unstable, and the quality of the audio and/or video feed drops. One of the parties considers that the quality does not allow for correct testimony. Consider also that the video feed breaks down before or in the middle of the videoconference and only the audio feed is available. What options do the court and parties have in regards to the continuation of the videoconference? Can a continuation in such circumstances constitute grounds for appeal?

Technical difficulties in the conduct of hearings or taking of evidence are not to be blamed on the parties to the proceedings; in particular, a party or a party's representative may not be considered to be in default

[177] OGH 18 ONc 3/20s EvBl 2021/19 (*Hausmaninger/Loksa*); cf. VwGH 2006/19/0409.
[178] Cf. *Rechberger* and *Simotta*, supra n. 1, Rz 804.
[179] Cf. for concrete experiences at the beginning of the COVID-19 pandemic *C. Hochhauser*, 'Ein Mehraufwand', 98 Österreichische Richterzeitung (2020) p. 84 at p. 85.
[180] Cf. *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/13.

for such a reason. In case of technical difficulties during the hearing or taking of evidence, the hearing shall be interrupted (in the sense of "pausing") until the technical difficulties have been remedied.[181]

Only the use of means of communication for word and image transmission (i.e., video conferencing) is admissible. A telephone conference or hearing via telephone is not possible (anymore; it was possible at the beginning of the COVID-19 pandemic).[182]

7.14.9. If one party enjoys a better audio-visual experience due to better technical equipment and/or internet connection than the other, and the court allows the continuation of the proceedings, can the other party allege a breach of equality of arms?

In principle, in the event of technical difficulties, the hearing shall be interrupted until these difficulties have been resolved. If one party is significantly impaired by technical problems (e.g. if a party is visually impaired and also has a hearing impairment and he or she has already complained unsuccessfully about the poor quality of the transmission[183]) and the judge nevertheless does not interrupt the hearing, there could be a violation of Art 6 ECHR due to an infringement of the right to be heard and thus nullity according to § 477 (1) no. 4 ZPO.[184]

7.14.10. During the videoconference, the court suspects that a person being heard is receiving outside help/suggestions or is under duress. Can the court order the person to turn the camera and show the apartment or share their screen? Can the court request the person to shut down other technological devices in their vicinity during the videoconference? Can the court request that other persons be removed from the location of the videoconference?

The risk of abuse is prevented by allowing participants to observe the interrogated person frontally and closely and to ask him or her to look directly into the camera. Furthermore, the interviewee may be asked to pan around the room and to keep his or her hands visible at all times.[185] Such orders are issued by the presiding judge or the single judge within the scope of the conduct of the proceedings (cf. § 180 ZPO).[186]

If it is suspected that the person being questioned is under pressure and cannot give uninfluenced testimony, the questioning by video conference will have to be terminated and repeated in the courtroom.

7.15. Does the law (or best practice) provide any special rules for the participation of the party's advocate (e.g. together with the party at the same location, or in separate locations)?

There are no explicit rules on this issue, so in principle both options are permissible. Since the introduction of videoconferencing to conduct entire hearings was a product of the COVID-19 pandemic, it was initially common for parties and lawyers to connect from separate locations. In the meantime, this has changed somewhat; it is not at all uncommon for parties to participate in the videoconference together with their representative from their representative's – usually technically better equipped – office.

7.16. Are there any special rules pertaining to the distribution of costs in case of videoconferencing?
(Generally, a videoconference will have the effect of reducing the costs of the proceedings; nevertheless, does the law provide special rules on who bears the costs if, for example, one party opposes the

[181] IA 436/A 27. GP Erläut 4; *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/14.
[182] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/3.
[183] See ECtHR 9 April 2009, Case No. 22/03, Grigoryevskikh v Russia.
[184] Cf. *Rechberger* and *Simotta*, supra n. 1, Rz 483; *F. Steinbichler*, 'Rechtsschutz in Krisenzeiten: Garantien der EMRK', 29 Journal für Rechtspolitik (2021) p. 239 at p. 240 – 241.
[185] OGH 18 ONc 3/20s EvBl 2021/19 (*Hausmaninger/Loksa*).
[186] Cf. *Rechberger* and *Simotta*, supra n. 1, Rz 666 et seq.

videoconference but the court decides on it anyway? Are there special rules regarding the bearing of costs incurred for technical equipment? Are there special rules regarding the bearing of costs for interpreters?)

A list of costs shall be submitted by the end of the oral proceedings. In the case of a hearing with video technology pursuant to § 3 (3) 1. COVID-19-JuBG, this shall be deemed to have been submitted in due time if it is sent by electronic legal communication or by e-mail to the address notified by the decision-making body by the end of the working day following the oral proceedings at the latest.[187] The transmission by e-mail to the judge has proven to be an expedient solution in practice; however, it is not provided for by law.

There is no obligation to acquire appropriate means of communication. If a party or a witness does not have suitable technical means of communication at his or her disposal, the unrepresented party may request that the hearing be adjourned, the represented party and the witness may request that the hearing be temporarily suspended. Party representatives, experts and interpreters shall be assumed to have the necessary technology at their disposal.[188]

The fee for interpreters is increased in the case of particularly difficult interpreting activities pursuant to § 54 (1) no. 3 Fee Entitlement Act.[189] However, this is only the case if there is a particular technical difficulty in the specific case and not in the case of external circumstances that make the performance of the interpreting activity more difficult (e.g. wearing a mouth-nose protection or an FFP2 mask).[190]

7.17. How does the law guarantee the publicity of videoconference hearings?
(Please also explain legal measures to avoid problems that could arise due to the public nature of the hearing (e.g. too many participants in the videoconference).)

In order to preserve the principle of publicity, the case must also be called before the hearing room in proceedings with trial by video technology. Access must be granted to as many listeners as possible while observing the protective measures.[191] If the videoconference is broadcast simultaneously in the hearing room, the principle of publicity is respected.[192]

7.18. The Recast Regulation (EU) 2020/1783 on the taking of evidence in civil or commercial matters provides in Article 20 the primacy of direct taking of evidence through videoconference if the court considers the use of such technology to be "appropriate" in the specific circumstances of the case. What do you consider would fall in the category of "inappropriate"? In addition, should form N in Annex I of said Regulation be supplemented in your opinion (explain how and why)?

Reasons for considering the taking of evidence by videoconference to be "inappropriate" could arise, for example, from characteristics of the person to be examined. If a child is to be heard, a direct examination in the hearing room may be the better option in the individual case, because it allows the person conducting the examination to better respond to the needs of the child.[193] The same could be true

[187] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/13.
[188] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/3.
[189] Gebührenanspruchsgesetz BGBl 1975/136.
[190] OGH 11 Os 87/20h Zak 2020/620; *Fabrizy* and *Kirchbacher*, Strafprozessordnung und wichtige Nebengesetze[14] (MANZ 2020) § 54 GebAG Rz 2.
[191] IA 436/A 27. GP Erläut 4; *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/14.
[192] *Garber* and *Neumayr*, supra n. 115, Kap 13 Rz 66/23.
[193] See however recital 21 of Regulation (EU) 2020/1783; cf. *Bundesministerium für Justiz*, 'Erlass vom 20. Juni 2022 zur Verordnung (EU) 2020/1783 des Europäischen Parlaments und des Rates vom 25. November 2020 über die Zusammenarbeit zwischen den Gerichten der Mitgliedstaaten auf dem Gebiet der Beweisaufnahme in Zivil- oder Handelssachen (Beweisaufnahme) (Neufassung)',

for people with special needs, for whom the hearing by videoconference may be an unfamiliar or uncomfortable situation.

Furthermore, reasons for the inappropriateness of taking evidence by videoconference may also arise from the fact that the person being questioned is to be presented with objects of visual inspection. If this is not possible at all or only possible to a limited extent via videoconference (e.g., because the objects are very large or particularly small), a hearing via videoconference could be inappropriate.

It was recently pointed out that in the past a hearing via videoconference was refused by German courts because they had concerns about the videoconference software used by the Austrian courts (see above question 7.3.). However, the author also raised concerns as to whether this was permissible at all under Article 20 of Regulation (EU) 2020/1783.[194] In our opinion, the decision on the appropriateness of taking evidence by videoconference under Regulation (EU) 2020/1783 rests exclusively with the requesting court; therefore, there is no room for a review of the appropriateness by the requested court.

The requested court should, however, be able to refuse the direct taking of evidence if such direct taking of evidence would be contrary to the fundamental principles of the legal system ("ordre public") of that Member State (see recital 21 of Regulation (EU) 2020/1783).[195]

A supplement to Form N is not necessary in our opinion; if special information is to be submitted regarding appropriateness or other areas, the field "11. Other" can be used for this purpose. In most cases, Form N will be able to provide the necessary information even without the use of this field.

<www.ris.bka.gv.at/Dokumente/Erlaesse/ERL_BMJ_20220620_2022_0_444_240a/ERL_BMJ_20220620_2022_0_444_240a.pdf>, visited 21 March 2023, p. 8.

[194] *A. Zwettler*, 'Keine Videoeinvernahme von in der Schweiz aufhältigen Zeugen', 18 Zivilrecht aktuell (2022) p. 227 at p. 229.

[195] Cf. *Bundesministerium für Justiz*, supra n. 193, p. 8.