COMPARATIVE STUDY OF “RESIDUAL JURISDICTION”
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:

AUSTRIA

PREPARED BY:

JULIAN FEICHTINGER & KARIN LEHNER
CERHA HEMPEL SPIEGELFELD HLAWATI
CHSH
1010 Wien
(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

Apart from the European regulations (especially “Brussels I”) the main legal sources of jurisdictional rules in Austria are the EGJN (Introductory Law of the Court Jurisdiction Act), the JN (Court Jurisdiction Act), the EGZPO (Introductory Law of the Code of Civil Procedure) and the ZPO (Code of Civil Procedure).

2. Specific Rules (or Not) for Transnational Disputes

The (regional and objective) jurisdictional rules for national and international disputes are identical within the scope of application of the JN. There are no specific rules for transnational disputes in the Austrian legal system.

3. Specific Rules (or Not) for Article 4 (1) Jurisdiction

Due to the lack of specific Austrian jurisdictional stipulations that govern the jurisdiction of courts pursuant to Article 4 par 1 of the Brussels I Regulation, the traditional national rules of jurisdiction for cross-border cases are applicable (Klauser, Europäisches Zivilprozessrecht [2002], EuGVVO Art 4 Anm 2; Czernich/Tiefenthaler/Kodek, Kurzkommentar Europäisches Gerichtsstands- und Vollstreckungsrecht [2003], Art 4 Rz 1; OGH 6 Ob 337/97w; OGH 8 Ob 105/99w).

4. Influence of EU law

The application and interpretation of the Austrian jurisdictional rules are certainly influenced by the Brussels I Regulation and the case law of the ECJ. The extent of the influence cannot be described in general terms in the framework of this project. It would require a detailed analysis of the corresponding case law in order to identify substantial legal guidelines. However, there are specific areas that are affected; for example the areas of contract law (without a specific type), labour law, corporate law, tort, consumer contracts, family law and law of succession.

5. Impact of Other Sources of Law

In general there is an impact of the principles of constitutional law and human right principles on the application of national jurisdictional rules. This impact encompasses for example the principle of separation of justice and administration, the right to a constitutional proceeding, the right to a statutory judge, the principle of the publicity of proceeding or the right to equal treatment (Fasching in Fasching² I, Einleitung, Rz 57).

6. Other Specific Features
Other specific features with respect to the jurisdiction of Austrian courts are not apparent.

7. Reform

There is one proposal that might affect the Austrian rules of jurisdiction: At the moment, there are legal and political discussions about the introduction of a “class action” into the Austrian procedural system. Details are not available so far (cf. Rechberger, Verbandsklagen, Musterprozesse und „Sammelklagen“, Festschrift Welser [2004], 871 et seq.; Klauser, Von der „Sammelklage nach österreichischem Recht“ zur echten Gruppenklage, ecolex 2005, 744 et seq.; Scheuba, „Sammelklage“ – Einklang mit der ZPO erbeten, ecolex 2005, 747 et seq.; Kodek, Möglichkeiten zur gesetzlichen Regelung von Massenverfahren im Zivilprozess, ecolex 2005, 751 f.; Benn-Ibler, Sammeln zur Gruppenklage, AnwBl 2005, 371 et seq.).

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

Bilateral Conventions regulating international jurisdiction between Austria and third countries are:


- Reciprocity regarding the Recognition and Enforcement of Judicial Decisions and Settlements in Civil Matters and of Judicial Decisions in Maintenance Affairs in relation to the Canadian Province of British Columbia (Federal Law Gazette 1970/314)


Multilateral Conventions regulation international jurisdiction between Austria and third countries (beyond the scope of application of the Brussels I regulation) are:

- In force between Austria and Switzerland, Norway and Iceland (cf. Piltz, Vom EuGVÜ zur Brüssel-I-Verordnung, NJW 2002, 789(791)):
  

9. Practical Impact of International Conventions with Third States

The mutual recognition and enforcement in the framework of these conventions leads to a free circulation of judicial decisions. If proceedings have been conducted successfully abroad they do not have to be repeated in Austria. Consequently, this system leads to a reduction of workload for the national authorities; the judicial efficiency is increased considerably (cf. Czernich, Zu den Voraussetzungen der Anerkennung und Vollstreckung fremder Entscheidungen nach autonomen Recht (§ 79 EO), JBl 1996, 495 et seq.).

(C) Applicable National Rules Pursuant to Article 4 of Brussels I Regulation

10. Structure

In Austria, the general structure of jurisdiction is determined by § 27a JN.

This provision reads as follows:

Domestic Jurisdiction

§ 27a (1) If a civil legal matter complies with the requirements regarding the regional rule of jurisdiction, the domestic jurisdiction is given without meeting further requirements.

(2) Paragraph 1 does not apply as far as public international law defines entirely or partly a different position.

§ 27a par 2 JN has to be read in conjunction with Article 4 par 1 Brussels I Regulation, i.e., for actions against defendants who are not domiciled in a Member State the jurisdiction of the Austrian national rules apply. (Klauser, Europäisches Zivilprozessrecht [2002], EuGVVO Art 4 Anm 2; Czernich/Tiefenthaler/Kodek, Kurzkommentar [2003], Art 4 Rz 1). The existence of a domestic jurisdiction implies the international competence to decide a case (Matscher in Fasching² I § 27a JN Rz 5; 13); in contrast to the wording of § 27a JN (“domestic jurisdiction”) it is common sense that this provision covers the international competence (Mayr in Rechberger², Rz 1 Vor § 27a JN).

All in all, the rules of jurisdiction for actions against defendants who are not domiciled in a Member State are determined by § 27a par 1 JN in conjunction with §§ 65 et seq. JN (cf. Kropholler, Europäisches Zivilprozessrecht [2005], Art 4 Anm 1; Burgstaller in Burgstaller/Neumayer [Hrsg.],
Internationales Zivilverfahrensrecht 1, Art 4 EuGVO Anm 2). Consequently, if – according to these stipulations – a regional competence of an Austrian court does not exist there is no international competence of Austrian courts either (Rechberger/Simotta, Zivilprozessrecht [2003], Rz 66).

11. General Jurisdiction
Apart from the stipulation of § 27a par 1 JN which determines the international competence of Austrian courts in general there is no specific rule of jurisdiction that applies (only) if the defendant is domiciled in a non-EU state.

12. Specific Rule(s) of Jurisdiction

(a) Contract
Grounds of jurisdiction applicable in contract are the place of respective national residence or court of last domicile/residence (§ 67 JN General Jurisdiction); the place of performance of the contract (§ 88 par 1 JN Optional Place of Jurisdiction); the place of property of the defendant or place of the object (§ 99 JN Optional Place of Jurisdiction, subsidiary).

§ 88 reads as follows:

"§ 88 (1) Actions for a declaratory judgement whether a contract exists and actions for compliance or prolongation of a contract as well as for damages for non-performance and improper performance may also be filed at the court of the place where, under the agreement of the parties the contract shall be fulfilled by defendant. The agreement shall be proven by documentary evidence.

(2) Among entrepreneurs, this forum, based upon the place of performance, is also established by acceptance of an invoice which is submitted together with the goods or in advance and is annotated that payment shall be effected at a certain location where claims with regard to the transaction can also be brought unless the annotation or the invoice was rejected as being contrary to the contract and the invoiced batch was rejected as not ordered respectively."

(b) Tort
Grounds of jurisdiction applicable in tort are the place of respective national residence or court of last domicile/residence (§ 67 JN General Jurisdiction); the place of infliction of damage (§ 92a JN Optional Place of Jurisdiction) or the place of property of the defendant or place of the object (§ 99 JN Optional Place of Jurisdiction, subsidiary).
§ 92a reads as follows:

"§ 92a Actions about the compensation of damages, resulting from the killing or the injury of one or several persons, from the illegal restraint or from the damage of things may also be filed at the court in the district of which the behaviour occurred which led to the damages."

(c) Criminal Proceedings

There is no specific ground of jurisdiction as regards civil claims or restitution which are based on an act giving rise to criminal proceedings. Generally speaking, criminal courts are competent to decide about damages claims raised by the presumptive victim without regard to his citizenship, so-called Anschlussverfahren or Adhäsionsverfahren, §§ 365 et seq. StPO (Code of Criminal Proceedings). In extensive cases, however, these claims are referred to a civil court (Ballon in Fasching¹ § 1 JN Rz 40; 223; Mayr in Rechberger², Rzn 14 Vor § 1 JN).

(d) Secondary Establishment

(Specific) grounds of jurisdiction that allow to bring a claim against a defendant domiciled in a non-EU state on the basis that such a defendant has an establishment in Austria are the place of respective national residence or court of last domicile/residence (§ 67 JN General Jurisdiction); the place of the establishment (§ 87 JN: Optional Place of Jurisdiction); the place of property of the defendant or the place of the object (§ 99 JN Optional Place of Jurisdiction, subsidiary).

According to § 87 JN jurisdiction is limited to disputes that are arising in connection with the operation of the establishment.

§ 87 reads as follows:

"§ 87 (1) Persons, who have a mine, a factory, a commercial establishment or any other establishment of business or profession outside the court district where they have their domicile or usual residence, in contentious matters which relate to their commercial or professional activity, may be sued at the court, in the district of which their establishment or plant is located.

(2) If owners of mines, factories, trade or other commercial undertakings have branches outside the registered office, in contentious matters which relate to such branches, they may be sued at the court of the place where the branch is located.

(3) Persons, who, as proprietor, usufructuary or tenant manage a manor with residential or commercial buildings or have it managed by their appointed representatives, with regard to all issues relating to the management of the manor may be sued at the court, in the district of which the manor is located."
(e) Trust

There is no specific ground of jurisdiction for matters of trust; thus the general grounds of jurisdiction, as there is the place of respective national residence or court of last domicile/residence (§ 67 JN General Jurisdiction) or the place of property of the defendant or place of the object (§ 99 JN Optional Place of Jurisdiction, subsidiary), are applicable.

(f) Arrest and/or location of Property

There is no specific ground of jurisdiction based on the arrest of property for actions brought against defendants domiciled in non-EU states; again the general grounds of jurisdiction (place of respective national residence or court of last domicile/residence (§ 67 JN General Jurisdiction); place of property of the defendant or place of the object (§ 99 JN Optional Place of Jurisdiction, subsidiary)) are applicable.

13. Protective Rule(s) of Jurisdiction

There are no protective rules of jurisdiction for particular types of disputes for actions against defendants who are domiciled in non-EU states; however, the Austrian legislator has created special jurisdictions for certain types of disputes.

(a) Consumer contracts

i) § 14 par 3 KSchG stipulates that a legal jurisdiction may not be excluded by prorogation in cases of actions of consumers against professionals. Thus on the basis of this stipulation jurisdiction of Austrian courts is indispensable, i.e. if there is jurisdiction in Austria according to domestic law Austrian courts may not decline jurisdiction for claims by a consumer against a professional domiciled in a non-EU state even if there is a choice of court clause designating a non-EU court (also see question 22 a).

ii) Without national reference there are no specific restrictions or protective rules (Mayr in Rechberger², Rz 4 Vor § 83a JN; Simotta in Fasching³ I Vor §§ 83a und 83b JN (§ 14 KSchG) Rz 60; Vor §§ 83a und § 83b JN Rz 105).

(b) Individual Employment Contracts

i) According to § 4 par 1 lit a ASGG claimant is entitled to bring suit at the place of domicile of the employee, place of respective national residence of the employee or last place of domicile when the contract was terminated. Furthermore claimant is entitled to bring suit at the place the employee has/had to perform services or at the place remuneration is/was to be paid (§ 4 par 1 lit c and d ASGG).
ii) See above (i) provided that the action can also be filed where the employer is established.

(c) Insurance Contracts

i) In respect of claims of an insured, policyholder or beneficiary who bring a claim before an Austrian court against an insurer domiciled in a non EU-state § 6 par 3 VAG 1978 (Law on Insurance Control) stipulates that § 99 par 3 JN cannot be excluded. According to § 99 par 3 JN actions against foreign institutions, legal estates, associations or associations of individuals also can be brought at the domestic place of their permanent representation.

ii) As regards an insurer bringing a claim before an Austrian court against an insured, policyholder or beneficiary domiciled in a non-EU state there are no specific protective rules of jurisdiction.

(d) Distribution Contracts

There are no specific protective rules of jurisdiction in distribution contracts in the Austrian legal system.

(e) Protective Rules in Other Matters

We are not aware of other specific matters which are subject to protective rules of jurisdiction.

14. Rule(s) for the Consolidation of claims

(a) Co-Defendant

§ 27a JN in conjunction with § 93 JN allows a defendant domiciled in a non-EU state to be sued before an Austrian court as a co-defendant on the ground that one of the defendants has his place of general jurisdiction in Austria and the obligations of the defendants are connected (Simotta in Fasching, Zivilprozeßgesetze I', Rz 18, 19 zu § 93 JN). These stipulations are only applicable subsidiarily (Rechberger/Simotta, Zivilprozessrecht [2003], Rz 132; 135; OGH 4 Ob 34/98y; OGH 2 Ob 74/00x).

§ 93 JN read as follows:

Jurisdiction of Co-Defendants

§ 93 (1) Several persons who have their general jurisdictions in different court districts can be sued as co-defendants, if there is no other common specific jurisdiction, at any national
court where one of the co-defendants [...] has his general jurisdiction, unless the court cannot be made competent by prorogation of the parties either.

(2) Persons who are bound by a bill of exchange can be sued as co-defendants at the court of the place of payment.

(b) Third Party Proceedings

The Austrian legal system does not provide for specific actions on warranty or guarantee according to Art 6 No 2 Brussels I Regulation.

However, the Austrian legal system provides for an intervention by a third party in support of a plaintiff or defendant ("Nebenintervention") according to § 21 ZPO. (Burgstaller in Burgstaller/Neumayer [Hrsg.], Internationales Zivilverfahrensrecht [Band 1], Art 6 EuGVO Anm 9; Kropholler, Europäisches Zivilprozessrecht [2005], Art 6 Anm 19).

(c) Counter-Claims

As far as Brussel I Regulation is not applicable, according to Art 27a JN international jurisdiction for filing a counter claim before Austrian courts is given, if all conditions of § 96 JN are fulfilled (Simotta in Fasching, Zivilprozeßgesetze I, Rz 28 zu § 97 JN).

§ 96 JN read as follows:

Jurisdiction of Counter Claim

§ 96 (1) A counter claim can be brought at the court of the claim if the title of the counter-claim is linked to the title of the claim or would be qualified for compensation, further if the counterclaim is aimed at the determination of a legal relationship or a right which was contested during the proceedings, and on whose existence or non-existence the decision about the claim depends entirely or partly.

(2) The jurisdiction of counter claim is not appropriate if the competence of the court for the title pursued with the counterclaim or for an affirmative action for a right could not be established by prorogation of the parties or if at the point of time of the submission of the counterclaim the oral proceedings about the claim at first instance have already been closed.

Preconditions for the applicability of § 96 JN are that legal proceedings regarding the claim of defendant are already pending and that identity of the parties and a connection between claim and counter claim is given. Furthermore the court has to be locally, factually and internationally competent for filing the counter claim.
(d) Related Claims

According to § 94 JN claims regarding rights, which are subject to pending legal proceedings between third parties, can be filed at the same court until the final judgement is given.

 Preconditions for the applicability of § 94 JN are the existence of a primary claim, that the same right is claimed and that legal proceedings regarding this right are already pending. The claim can be asserted at the court of the pending proceedings irrespective of any other competence (Simotta in Fasching, Zivilprozeßgesetze I², Rz 1 ff).

According to § 27a JN international jurisdiction is given, if legal proceedings regarding the asserted claim are pending at an Austrian court (Simotta in Fasching, Zivilprozeßgesetze I², Rz 17).

(e) Any Problems Pertaining to Lack of Harmonisation

Any specific problems in practice created due to the lack of harmonisation of the above-mentioned rules in actions against non-EU domiciliaries are not apparent.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

(a) The rules listed in annex I

A rule of jurisdiction listed in Annex 1 of the Brussels I regulation in Austria is to be found in § 99 JN.

This provision reads as follows:

Jurisdiction of Property

§ 99 (1) Persons who do not have a general domestic jurisdiction can be sued in property matters at any court if the property of this person or the object of the claim are located in its district. The value of the domestic property should not be disproportionately less than the amount in controversy; for this calculation § 55 par 3 does not apply.

(2) For claims, the domicile or the place of respective residence of the garnishee is regarded as the place where the property is located. If the garnishee does neither have a domestic domicile nor a place of respective residence, but the object that is liable for this claim is located in the national territory, the place where the object is located is decisive for the determination of the jurisdiction.

(3) Foreign institutions, estates, corporations, cooperatives and other associations can also be sued in those domestic courts where the permanent domestic representation or the representative in charge of the errand of the business of such institutions and corporations is located.

(4) (invalid, concerns domestic seaports)
(b) Practical use of the rules listed in Annex I

In Practice, § 99 JN is applied very often in the following areas:

- Intellectual Property Law (e.g. OGH 4 Ob 128/03g; OGH 4 Ob 24/92)
- Corporate Law (e.g. OGH 6 Ob 502/94; OGH 8 Ob 92/04v; OGH 2 Ob 211/03w)
- Claims to alimony (e.g. EFSlg 20.710; LGZ Wien 43 R379/01f)
- Income from property (e.g. OGH 7 Ob 276/00i)

(c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

Application of Art 4 par 2 Brussels I Regulation by the Austrian courts:

Art 4 par 2 Brussels I Convention is irrelevant in Austria since the Austrian citizenship – in contrast to Art 14 Code Civil – on its own does not create a "jurisdiction of claimant" (Burgstaller in Burgstaller/Neumayer [Hrsg.], Internationales Zivilverfahrensrecht [Band 1], Art 4 EuGVO Anm 6; Czernich/Tiefenthaler/Kodek, Kurzkommentar Europäisches Gerichtsstands- und Vollstreckungsrecht [2003], Art 4 Rz 7). As a consequence, there are no cases reported or known in Austria where the courts have applied Art 4 par 2 of the Brussels I Regulation.

16. Forum necessitatis

§ 28 par 1 No 2 JN allows a court to exercise jurisdiction on the basis that there is no other forum available abroad (forum necessitatis): It provides that in case an Austrian jurisdiction is not given or cannot be identified, the Austrian Supreme Court has to determine the jurisdiction of an Austrian court inter alia if the plaintiff is an Austrian citizen or has the domicile, the respective residence or seat in the national territory and the pursuit of civil proceedings abroad is impossible or unacceptable. Among other things, impossibility is assumed if there is no other forum available abroad (Matscher in Fasching² I § 28 JN Rz 69).

§ 28 reads as follows:

"§ 28 (1) If in a civil legal matter the conditions for local jurisdiction of a domestic court in the sense of this Act or any other legal provision is not given or not to be ascertained, the Supreme Court shall determine one court to be locally competent in such matters in the case in question if

1. Austria, on basis of an international treaty is obliged to exercise jurisdiction;
2. Claimant is Austrian citizen or has a domestic domicile, usual residence or seat in Austria and in the particular case, law enforcement is not possible or unacceptable abroad;
3. domestic jurisdiction, but not a locally competent court have been agreed.

(2) The determination of a competent court according to para 1 shall be effected without taking into account whether apart from para 1 fig 2 or 3 an additional condition is met.

(3) Para 1 fig 2 and 3 as well as para 2 shall not be applied if under International Law or particular legal orders domestic jurisdiction is not given.

(4) In contentious civil legal matters, the determination of a competent court shall be effected upon application of a party or ex officio. In contentious civil legal matters, Claimant shall assert and evidence that the conditions under para 1 fig 2 or 3 are given."

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

The judgment of a non-EU state cannot be denied recognition or enforcement on the basis that the courts have exclusive jurisdiction to entertain the claim.

According to § 79 EO foreign records and documents have to be declared enforceable if they are enforceable according to the regulations of the state they were rendered and if reciprocity is ensured by treaties or regulations. Moreover the application for enforceability of foreign judgments has to be allowed only 1. if the legal matter was able to be instituted in the foreign country according to domestic jurisdiction-stipulations, 2. if the summons, which instituted the proceedings, was served upon the defendant and 3. if the foreign judgement is already enforceable under the foreign law (§ 80 EO).

(E) Declining Jurisdiction

18. Forum Non Conveniens

The rule of forum non conveniens, which has its roots in the Anglo-Saxon legal tradition (cf. Juenger, Forum non Conveniens – Who needs it?, FS Schütze (1999), 317(323 et seq.)), cannot be transferred into the Austrian legal system since the method of establishing the international jurisdiction is completely different.

The understanding of the Austrian system is that jurisdiction is predictable. The legislator has considered the requirements for the different international jurisdictions exhaustively during the legislative process; they have to be applied in a strict manner. It would be harmful to the principle of legal certainty if a judge was able to decide according to his sole discretion (Burgstaller/Neumayr, Beobachtungen zu Grenzfragen der internationalen Zuständigkeit: Von forum non conveniens bis Notzuständigkeit, FS Schlosser [2005], 119 (121); Schack, Internationales Zivilverfahrensrecht [2002], Rz 502).
Still there are reasons that allow Austrian courts to decline jurisdiction, especially immunity of the defendant, but also pending foreign proceedings (cp. question 19 b) or the final judgement of a foreign court (but only if the conditions of §§ 79f EO are fulfilled, cp. question 17) (vgl. Burgstaller, Internationales Zivilverfahrensrecht Rz 1.8). These rules are used to decline jurisdiction/stay the proceedings both in favour of non-EU and EU states.

19. Defendant is Domiciled in a Non-EU State and the Jurisdiction is Based on Domestic Law (Art 4 Brussels I Regulation)

When the defendant is domiciled in a non EU-state and the jurisdiction is based on domestic law pursuant to Art. 4 of the Brussels I regulation there are general rules allowing Austrian courts to decline jurisdiction or stay their proceedings in favour of the non EU-state. These rules are:

(a) Choice of court clause

§ 104 JN describes the conditions for prorogations. Under the terms of this stipulation parties can inter alia agree on a jurisdiction clause designating the exclusive jurisdiction of a foreign court. In such a case Austrian courts can decline jurisdiction/stay their proceedings in favour of the non-EU court unless the foreign judgement would not be accepted or enforceable in Austria or the pursuit of civil proceedings abroad seems to be impossible or unacceptable (Simotta in Fasching² I § 104 JN Rz 94).

(b) Parallel proceedings

Apart from bilateral conventions between Austria and third countries, which may deal with the question of parallel proceedings, Austrian courts can decline jurisdiction/stay their proceedings in cases of parallel proceedings if the foreign judgement is expected to be accepted and enforceable in Austria (Mayr in Fasching² III Vor §§ 232, 233 ZPO Rz 9; § 233 ZPO Rz 32; cp. question 17). Otherwise parallel proceedings can be seized in Austria even if foreign proceedings are already pending. Thus, according to Austrian law it is not relevant in such cases, whether the foreign court is seized before the national court.

(c) Subject-matter is closely related to a non-EU state

When the dispute relates to a right in rem in an immovable property and the immovable property is situated in a non-EU state, pursuant to §§ 27a, 81 JN the international jurisdiction of Austrian courts is not given and cannot be constituted by prorogation either. In this case Austrian courts have to decline their jurisdiction in favour of the non-EU state (cf. Simotta in Fasching² I § 81 JN Rz 39).

According to §§ 27a, 83c JN, in intellectual property cases or cases of unfair competition Austrian courts have always jurisdiction as long as the violation has a disadvantageous impact on the Aus-
trian market (Simotta in Fasching³ I § 83c JN Rz 38). Only if this is not the case, Austrian courts are not competent and therefore can decline jurisdiction in favour of the non-EU state.

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

a) Non-EU Jurisdiction Agreements

When the defendant is domiciled in the EU, a jurisdiction clause designates the court of a non-EU state and the jurisdiction of Austrian courts is based on the uniform rules of the Brussels I regulation, it is controversial in the Austrian doctrine whether national law or European law has to be taken into account. Scholars maintain, however, that a cumulation is necessary (cp. Burgstaller/Neumayr, Internationales Zivilverfahrensrecht Art 23 EuGV Rz 9ff.). Therefore Austrian courts first have to check whether there are “derogation bans” according to Art 23 para 5 EuGV. In a second step the relevant national stipulations are to be considered, i.e. in Austria § 104 JN. As explained before (cp. question 19 a), according to § 104 JN Austrian courts can decline jurisdiction/stay their proceedings in favour of the non-EU court in case of prorogation of a non-EU court unless the foreign judgement would not be accepted or enforceable in Austria or the pursuit of civil proceedings abroad seems to be impossible or unacceptable.

(b) Parallel Proceedings in a non-EU court

When the defendant is domiciled in an EU state and the jurisdiction is based on the uniform rules of the Brussels I regulation and a non-EU state court is seized of a parallel proceeding, the national jurisdiction stipulations are applicable (in case of lack of relevant regulations in bilateral conventions between Austria and the non-EU state) (Mayr in Fasching³ II. § 233 ZPO Rz 41). Austrian courts can decline jurisdiction/stay their proceedings in cases of parallel proceedings if the foreign judgement is expected to be accepted and enforceable in Austria (Mayr in Fasching³ III Vor §§ 232, 233 ZPO Rz 9; § 233 ZPO Rz 32; cp. question 17 and 19b). Otherwise they can be seized even if foreign proceedings are already pending.

c) “Exclusive” Jurisdiction in a non-EU State

When the defendant is domiciled in an EU state and Austrian jurisdiction is based on the uniform rules of the Brussels I regulation and there is an “exclusive jurisdiction” in a non-EU state Austrian courts may decline jurisdiction in favour of the non-EU court according to Art 22 EuGV ana- logue. Some scholars hold, however, that it should be left to the regulations of national law whether the “exclusive jurisdiction” of a non-EU state is accepted or not (Burgstaller/Neumayr, Internationales Zivilprozessrecht Art 22 EuGVO Rz 6f.). Therefore, according to this opinion international jurisdiction of Austrian courts would not be given in case the immovable property in question is not situated in Austria or the violation of the registered intellectual property has no disadvantageous impact on the Austrian market (cp. question 19c).
(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

In case of lack of jurisdiction in Austria the Austrian Supreme Court still has to determine one national court to exercise jurisdiction on the basis of § 28 par 1 No 2 JN inter alia if the plaintiff is an Austrian citizen or has his domicile, respective residence or seat within the national territory and the pursuit of civil proceedings abroad is impossible or unacceptable. The latter includes cases where the plaintiff would not gain adequate legal protection before the court of the non-EU state (Matscher in Fasching² I § 28 JN Rz 69).

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

(a) Claims from EU Consumers against non-EU defendants

§ 14 (3) KSchG constitutes prorogation-bans for claims by a consumer against a professional in favour of the consumer. A special domestic link of the consumer to Austria is not required. § 14 (3) KSchG is applicable when there is jurisdiction in Austria according to domestic law.

On the basis of this stipulation jurisdiction of Austrian courts is indispensable, i.e. if there is jurisdiction in Austria according to domestic law Austrian courts may not decline jurisdiction for claims by a consumer against a professional domiciled in a non-EU state even if there is a choice of court clause designating a non-EU court.

Thus there are no cases apparent where an Austrian court has found not to have jurisdiction (in view of a foreign choice of court clause) to hear a claim brought by a EU-consumer against a professional domiciled in a non EU-state.

(b) Claims from EU Employees against non-EU Employers

There is no case or practice visible whereby Austrian courts have found not to have jurisdiction or have declined jurisdiction (including on the basis of a foreign choice of court clause) to hear a claim brought by an employee domiciled in the EU against an employer domiciled in a non EU-state.

(c) Claims from EU Plaintiffs in Community Regulated Matters
There are no cases apparent where a claim was brought by a plaintiff domiciled in the EU in Community regulated matters (cf. commercial agents: RdW 1996, 63 et seq. OGH 1 Ob 579/95; competition law: OGH 4 Ob 122/03z). The Austrian jurisdiction was only declined on the basis of a choice of law clause when an Austrian commercial agent was working for a German company since the parties have declared the German jurisdiction competent for the settlement of all disputes (OGH vom 17.11.2004, GZ 9 =bA 78/04).

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

If the international jurisdiction of Austrian courts is given at the time when the claim is submitted to the court, a subsequent change of the relevant facts constituting the international jurisdiction, such as a subsequent change of domicile of the defendant, is irrelevant (apart from a case where the defendant obtains immunity during pending proceedings; then the court has to decline its jurisdiction subsequently (Ballon in Fasching² I § 29 Rz 18).

The international jurisdiction is perpetuated during the proceedings, so-called perpetuatio fori, constituted in § 29 JN. Thereby it is not relevant whether the international jurisdiction is based on the Brussels I Regulation or on domestic law (Ballon in Fasching² I § 29 JN Rz 3, 18).

Hence, cases where the protection of Community legislation was not granted because the person involved was no longer domiciled in the EU at the time the proceedings was instituted are not apparent in the Austrian case-law.


Cases or circumstances where the application of domestic jurisdictional rules have led in practice or are likely to jeopardize the application of mandatory Community legislation or the proper functioning of the internal market or the adequate judicial protection of EU nationals are not apparent.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

The relevant stipulation concerning domestic jurisdiction of Austrian courts in parental matters is § 110 JN. It reads as follows:
§ 110 (1) For the matters mentioned in § 109 [inter alia parental matters] the domestic jurisdiction is given if the minor

1. is an Austrian citizen or

2. the place of the regular residence or, for urgent measures, at least the current residence is located in Austria or

3. property is located in Austria as far as the measures concern the property.

(2) If the Austrian Minor has his respective residence or his property abroad or the matter concerns a foreign minor the court can refrain from the introduction or the continuation of the proceedings in as much as and as long as the measures taken or expected abroad sufficiently preserve the rights and interests of the minor. If an Austrian minor is concerned the decision of the local administrative authority has to be heard where the court is based.
26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

*What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?*

- Multilateral conventions between Austria and non-EU-countries:
  - Convention on authorities’ jurisdiction and law applicable in the area of protection of minors (Übereinkommen über die Zuständigkeit der Behörden und das anzuwendende Recht auf dem Gebiet des Schutzes von Minderjährigen = „Haager Minderjährigenschutzübereinkommen“) / Federal Law Gazette Nr. 446/1975;

- Convention on law applicable on maintenance obligations for children (Übereinkommen über das auf Unterhaltsverpflichtungen gegenüber Kindern anzuwendende Recht = „Haager Unterhaltsstatutübereinkommen“) / Federal Law Gazette Nr. 293/1961;


- Convention on protection of children and co-operation in respect of intercountry adoption (Übereinkommen über den Schutz von Kindern und die Zusammenarbeit auf dem Gebiet der internationalen Adoption = „Haager Adoptionsabkommen II“) / Federal Law Gazette Nr. 1999/145
28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these “exclusive” rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

Austrian courts do not have exclusive jurisdiction for matters of parental responsibility. Thus the judgement of a non-EU state relating to matters of parental responsibility cannot be denied recognition or enforcement on the basis that Austrian courts are the only ones having jurisdiction in such matters.

(H) Specific Country Questions

29. “Treaty system” for the Recognition of non-EU judgments

Is it correct that the recognition and enforcement of a non-EU judgments are subject in your country to a treaty basis?

This is correct. Art 79 of the Austrian Enforcement Act (Art 79 EO) includes the conditions under which non-EU-judgments have to be declared enforceable in Austria (also see question 17 of the Austrian report). One of these conditions is that reciprocity of enforceability is ensured by (multilateral or bilateral) treaties or regulations. Thus also Austria needs a treaty (or regulation) basis in order to recognize a non-EU judgment (e.g.: Regulation of the Minister of Justice on reciprocity in respect of recognition and enforcement of judicial decisions and arbitrages in civil law matters and of judicial decisions in maintenance matters in relation to the Canadian Province British Columbia (Verordnung des Bundesministers für Justiz über die Gegenseitigkeit hinsichtlich der Anerkennung und Vollstreckung gerichtlicher Entscheidungen und von Schiedssprüchen in Zivilrechtssachen sowie von gerichtlichen Entscheidungen in Unterhaltssachen im Verhältnis zur kanadischen Provinz Britisch-Kolumbien) / Federal Law Gazette Nr. 314/1970);

* 
* 
*