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# **“THE WAR OF THE ROSES”: AN OVERVIEW OF THE MOST CRITICAL LEGAL ISSUES IN INTERNATIONAL DIVORCES**

## **Private Clients’ Commission**

### **Workshop - National Report of Austria**

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## 1. INTERNATIONAL JOINT CUSTODY

### 1.1. Considering that your jurisdiction allows for joint custody of minors, please specify under which circumstances/conditions it can be granted.

In 2001<sup>1</sup> in Austria the possibility of joint custody after a divorce was introduced. In case the conditions set out in section 177 General Civil Code (Allgemeines bürgerliches Gesetzbuch) (ABGB) are met, the custody of both parents continues after the divorce. According to section 177 ABGB the parents must submit an agreement on the child's primary **place of residence** to the competent court. The court may approve this agreement if it reflects the **interests of the child**. No other preconditions are required.

If no agreement is produced within a reasonable period of time after the divorce or the agreement does not reflect the interests of the child, the courts must decide which parent will be granted sole custody. In this case joint custody is not possible.

Even unmarried parents can share custody by entering into an agreement (see section 167 ABGB). In this case the court may approve the agreement if both parents live in the same household with the child or the parents agree on the child's primary place of residence and the agreement reflects the interest of the child.<sup>2</sup>

In case both parents share custody, either of them, however, may at any time petition for joint custody to be revoked. The courts will then grant sole custody to one parent on the basis of the child's best interest.

### 1.2. Is there any recent case law in Austria regarding joint custody?

In Austria case law regarding joint custody is sparse. In its decisions no. 2Ob266/05i dated 1<sup>st</sup> of December 2005 and no. 7 Ob 193/07v dated 31<sup>st</sup> January 2007 the Supreme Court (OGH) stated that it is not possible to grant joint custody against the will of one parent. Each parent therefore can petition the court to end joint custody **without substantiation**.

### 1.3. Considering that the law of your jurisdiction does not provide for the possibility of joint custody, would an international court award granting joint custody be enforceable? If yes, under which conditions? If not, under which reasons?

See Question 1.1

## 2. CHILD CUSTODY VS. ALIMONY

### 2.1. Please provide information about the applicable law in your country, as well as the conflict of law rules, related to the following elements usually present in divorce:

#### a. Child Custody

#### General Rules and exceptions

According to section 144 ABGB the parents are **jointly entrusted with custody** (Obsorge). Custody in the sense of the law generally includes the care and education of the minor; the

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<sup>1</sup> See the 2001 Act Amending the Law of Parent and Child (Kindschaftsänderungsgesetz)

<sup>2</sup> *Haberl* in Schwimann, ABGB Vol. I, 2<sup>nd</sup> Edition, § 167 Marg. No. 3 and 16.

administration of the child's property and the legal representation. The unmarried mother is assigned the custody of the child solely, but also in this case according to section 166 ABGB the parents can agree on joint custody.

In case of a **divorce** the **joint custody** of both parents continues if the preconditions set out in section 177 ABGB (agreement on the child's primary place of residence; evaluation of the interest of the child) are met. The joint custody continues with one exception: according to academic opinion, after a divorce only the parent with whom the child resides is entitled to determine the residence of the child<sup>3</sup> (for details see answers to Case 3)

In case of joint custody parents should act by mutual assent in fulfilling their rights and duties.<sup>4</sup> If no agreement can be reached, each parent is authorized to make decisions independently. Only in certain important matters the consent of both parents is required. These important matters are enumerated exhaustively in section 154 (2) ABGB comprising for example the acquisition (or refusal) of citizenship, joining or leaving a religious denomination, changing the child's name, the assignment of the child's care, the early termination of an apprenticeship or employment contract. In addition, some extraordinary measures that fall outside the scope of proper business operations require the approval of the court in order to become legally effective. These extraordinary measures which are enumerated non-exhaustively in section 154 (3) ABGB comprise for example the sale and the encumbrance of real estate, the unconditional acceptance of an inheritance, the waiver of a right of inheritance, acceptance of an encumbered gift or rejection of a proffered gift, granting a loan or filing a complaint and making all procedural dispositions that relate to the matter in dispute.

The **parents** who are jointly entrusted with custody are **free to organise their rights and duties** with regard to the custody of the child. It is therefore possible to assign total custody to one parent and to entrust the other parent with only partial custody restricted to certain matters. This freedom however is restricted to some extent: The parent with whom the child resides must have the total custody in all events.<sup>5</sup> It is therefore not allowed to divide up the areas of custody.

If the parents do not reach an agreement, the competent court may grant **sole custody** to one parent on the basis of the child's best interest. In this case the parent with sole custody has the sole right to make decisions, while the other parent is limited to be informed and to express his/her opinion. In case of sole custody the requirement of the other parent's consent will not apply even to important matters concerning the child.<sup>6</sup> The approval of the court for extraordinary measures in terms of section 154 (3) ABGB is required nonetheless.

### **Conflict of law rules**

Under Austrian international private law, the law of the **nationality of the child** generally governs the relationship between the child and its parents (*Articles 24, 25 (2) Private Internationale Law Statute*). Therefore Austrian Law applies to the issue of custody if the child is an Austrian citizen.

Austria however has ratified the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants concluded in 1961.<sup>7</sup> The Convention

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<sup>3</sup> Hopf in Ferrari/Hopf, Reform des Kindschaftsrechts, (2001) 76.

<sup>4</sup> See section 144 ABGB.

<sup>5</sup> Schwimann in Schwimann, ABGB Vol. I, 2<sup>nd</sup> Edition, § 177 Marg. No. 9.

<sup>6</sup> Schwimann in Schwimann, ABGB Vol. I, 2<sup>nd</sup> Edition, § 154 Marg. No. 10.

<sup>7</sup> [www.hcch.net](http://www.hcch.net)

prevails over Austrian law if the child has its habitual residence in a contracting State of the convention.<sup>8</sup> According to the Convention the State of habitual residence of the child may order under certain circumstances (see Article 2 of the Convention) a protective measure applying its domestic law. In Austria for example courts may order a transfer of custody or regulate the extent and the exercise of the contact rights between parents and child.<sup>9</sup> In this case the conditions, dispositions and consequences of the transfer of custody or the visitation rights are determined by sections 144 and following ABGB.

b. Alimony/maintenance for spouses and children

### **Alimony for spouses after divorce**

The alimony for spouses after divorce is regulated in section 66 and following Austrian Marriage Act.

Basically the principle of fault applies in Austria.<sup>10</sup> A spouse therefore is not automatically entitled to alimony in Austria. Only if the ex partners split up for reasons of one partner's default, the predominantly guilty partner has to grant alimony to the one found non guilty for breach of marriage.<sup>11</sup> Therefore, in case both spouses are equally to blame for the failure of the marriage neither is obliged to pay alimony. Since 1999<sup>12</sup> however one important exception to this rule exists: according to section 68a Austrian Marriage Act it is possible for the court to order alimony payments of the innocent spouse to the guilty or predominately guilty spouse if the present care of their children by the guilty spouse or the care for their children/relatives during the marriage and therefore inability to earn a living by the guilty spouse.

The **amount** of the alimony depends mainly from the spouses' combined income. There is no rigid formula given by law. Established case law however calculates the amount of alimony according to guidelines expressed in percentages. A spouse with no income receives 33% of the other spouse's net income; a spouse with income receives 40 % of the common income less his or her own income. In case the spouse is obliged to meet other alimony obligations, the former spouse's claim is reduced by 3-4 % per child and by 1-3 % for the new spouse in an existing marriage.

The alimony for the spouse however can be subject to an **agreement** between the spouses. According to section 80 Austrian Marriage it is possible for spouses to reach an agreement before, after and during divorce proceedings.

### **Alimony for children**

The alimony for children is regulated in section 140 and following ABGB.

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<sup>8</sup> *Nademleinsky/Neumayr*, IFR Marg. No. 08.91.

<sup>9</sup> *Schwimann*, Internationales Privatrecht<sup>3</sup> (2001) 167.

<sup>10</sup> *Deixler-Hübner*, Scheidung, Ehe und Lebensgemeinschaft, 8<sup>th</sup> Edition, 2004, Marg. No. 149.

<sup>11</sup> See section 66 Austrian Matrimonial Law.

<sup>12</sup> The right to support – in certain circumstances – even for guilty spouses was introduced with the Matrimonial Law Amendment Act 1999.

In principle both parents have to contribute to satisfy the child's material and non material needs, including providing support.<sup>13</sup> The Austrian law however does not differentiate whether the parents are married or not or whether they are divorced. In fact, also after a divorce both parents have to support the child. The parent with present care of the child, however, contributes to the support by rendering this service. The non-resident parent therefore has to pay alimony alone.

According to Austrian law the **amount** of alimony depends mainly on 3 factors:

- the age of the child;
- the net income of the non-resident parent;
- deductions.

Also, in this case, no rigid formula is given by the law. Established case law however calculates the amount of alimony according to guidelines expressed in percentages. The calculation is based on certain percentage rates of the net income of the non-resident parent. In this context it is important to note that the non-resident parent has to use best efforts to find a job to match his/her professional skills. Otherwise the percentage rate has to be calculated by using a fictitious income representing his/her ability.<sup>14</sup>

Calculation of the alimony	
<b>age of the child</b>	<b>percentage</b>
0 to 6 years	16 % of the net income
6 to 10 years	18 % of the net income
10 to 15 years	20 % of the net income
above 15 years	22 % of the net income

Own income of the child reduces the alimony claim. In case the parent is obliged to meet other alimony obligations, the alimony for the child is reduced additionally. The reductions for further alimony obligations are calculated as follows:

Deductions for other alimony obligations	
For an further child under the age of 10 years	1 %
For an further child above the age of 10 years	2 %
For the new spouse (depending on the income of the new spouse)	between 0 to 3 %

Case law has furthermore developed an upper limit for alimony claims for children. This upper limit (the so called playboy limit) at present ranges between EUR 440 for children from 0 to 9 years and EUR 1.227,50 for children from 19 to 28 years and is adapted from time to time.

The alimony claim expires with the ability once the child can financially support him/herself.

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<sup>13</sup> See section 140 ABGB.

<sup>14</sup> *Neuhauser* in Schwimann, ABGB I, section 140 Marg. No. 64.

## Conflict of law rules

### Alimony for the spouse

The conflict of law rules concerning the alimony of the spouse in Austria are regulated exclusively by the Austrian Private International Law Statute. According to Article 20 Private International Law Statute the issue of alimony of the spouse is principally governed by the law of the common personal status (which in fact is the citizenship) of the spouses at the time of divorce. In case of absence of a common personal status, the last common personal status law applies provided one of them has retained it. Otherwise, the law of the state in which both spouses have their habitual residence, and in absence, the law of the state in which both spouses had their last habitual residence applies, provided one of them has retained it.

### Alimony for the child

Under Austrian international private law, the law of the **nationality of the child** generally governs the relationship between the child and its parents (*Articles 24, 25 (2) Private Internationale Law Statute*). Therefore the Austrian Law applies also to the issue of alimony if the child is an Austrian citizen.

Austria however ratified the Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children concluded on 15 th April 1958.<sup>15</sup> According to this Convention which is prior to Austrian domestic law, the law of the **habitual residence** of the child applies regardless of the citizenship of the parent or the child if the child is younger than 21 years.

- c. Other issues particularly relating to divorce disputes, that you consider appropriate to mention

## Visitation Rights

§ 148 ABGB ensures the maintenance of child's personal contact with both parents. After a divorce the parents generally should arrange the exercise of contact by **mutual agreement**. In case an agreement cannot be reached the court may regulate the exercise of the contact according to the interest of the child. The court in this case has to take into account mainly the needs and wishes of the child depending on the child's age.

The extent of the visitation rights depends on the individual case. The following standards have been developed in the case law<sup>16</sup>:

- The right of contact generally relates to two contacts per month.
- The intensity and duration of the visits increases with the child's age.
- At the age of three a child may already stay with the other parent for an entire day.

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<sup>15</sup>

[www.hcch.net](http://www.hcch.net)

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EFSIg. 78.007.

- Children over six years of ages may spend an entire weekend including an overnight stay with the other parent.

### Information Rights

The parent who is not entitled to child custody according to section 178 ABGB has the right to be informed of important matters concerning the child and to express himself or herself about them. These rights concern the important matters set out in section 154 (2) and (3) (see above).

## 3. QUESTIONS TO THE PRESENTED CASES

### Case 1

As there is no international treaty between Austria and the United States of America dealing with recognition and enforcement of parental responsibility, the enforcement of the award relating to **custody** is dealt by sections 112 ff Non-contentious Proceedings Act (Außerstreitgesetz). An award shall not be enforced

- if such enforcement is manifestly contrary to the best interests of the child or the public order of Austrian jurisdiction;
- if it was issued without the defendant having been given an opportunity to be heard, except for when the defendant obviously agreed to the award;
- if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in a non-Member State which fulfills the conditions necessary for its enforcement in Austria;
- if the authority which rendered the award should have had no jurisdiction under Austrian national procedural law.

Moreover, due to article 113 section 2 Non-contentious Proceedings Act the enforcement shall not be carried out if the person who has custody of the child did not have an opportunity to appeal against the award rendered in the other state.

The enforcement of **alimony** in Austria due to an award rendered in the US is dealt by the Foreign Maintenance Act (Auslandsunterhaltsgesetz). Austria and the United States of America granted each other reciprocity in a bilateral treaty (BGBl 1990/479). Awards dealing with alimony can be enforced in each state. The procedure of enforcement is dealt by sections 79 ff Enforcement of Civil Judgments Act (Exekutionsordnung).

- If you were John's attorney how would you advise him on an eventual enforcement of the award?

I would advise him to file an application due to article 113 section 1 no. 2 Non-contentious Proceedings Act. Under this article John could argue that he was not able to comment on the award rendered by the US authority. In this aspect he could plead his rights to be heard before court in connection with the **custody** of his child. Due to article 113 section 1 no. 1 the enforcement of the award related to the custody matter infringes public order if the award is contrary to the best interests of the child. The privation of custody by means of enforcement of a judicial award does infringe public order if John does not neglect his

parental responsibilities. The privation of custody should be an emergency measure and only enforced if the best interests of the child deem it necessary (Supreme Court, OGH 08.07.2003, 146/03d).

I would further advise him to file an appeal against the award rendered in the US arguing that 70% of his net income surpass the minimum living wage. The minimum living wage is evaluated by his monthly net income and considers any further **alimony** duty towards children or the ex wife.

Example: Due to the Austrian minimum-living-wage scale the minimum living wage of a monthly net income of EUR 2.000,-- is EUR 1.140,40. If John has to pay 70% of his monthly net income (EUR 1.400,--) he would be unable to live with his remaining means of EUR 600,--.

- b. Would it be possible to enforce the award in your jurisdiction?

The OGH (Supreme Court) stated in decision no. 3Ob229/06g dated 30<sup>th</sup> November 2006 that a different calculation of **alimony for children** is not subject to an infringement of public order, even if the amount of alimony differs considerably from the amount calculated in respect to the Austrian child alimony system. So it would not be possible to refer to Austria's calculation system for child alimony to succeed with an public order appeal. Under the Austrian child alimony system the alimony amount is calculated on the basis of the monthly net income considering the child's age and additional alimony duties.

Regarding **Mary's alimony** John could argue that the amount for her is not consistent with fundamental values of Austrian family law and divorce law. Austrian divorce law differs between divorce caused by default of one partner, divorce caused by both partners' default and divorce based on a mutual agreement. Each type of divorce provides different regulations for the ex-partner's alimony. Only if the ex partners split up for reasons of one partner's default, the guilty partner has to grant alimony to the one found non guilty for breach of marriage. In any way the payment of alimony may not put at risk the subsistence of the guilty partner. This principle shall be seen as fundamental value of Austrian legal order. Alimony of 70% of the net income for both, mother and child, shall not be considered fair and reasonable if John does not have a second source of revenue. 70% of the net income surpasses the minimum living wage in any event.

Basically the award dealing with custody would be recognised and enforced on the basis of articles 112 – 116 Non-Contentious Proceedings Act (Außerstreitgesetz). Article 113 Non-Contentious Proceedings Act provides reasons for the denial of enforcement. Article 113 section 1 no. 1 and 3 deals with the denial for reasons of infringement of public order. Foreign awards dealing with custody can only be enforced if they are enforceable in the state where the award was rendered and if there are no grounds for denial due to article 113 Non-Contentious Proceedings Act. The award must be declared enforceable in Austria. The enforcement proceedings are carried out due to *lex fori*; thus, the enforcement is carried out due to article 110 and article 79 section 2 Non-Contentious Proceedings Act. The enforcement due to the Austrian Enforcement of Civil Judgments Act is excluded expressively. Means for coercion are penalties and coercive detention.

- c. Please provide for case law denying the enforcement of unfair awards according to your jurisdiction.



The following case law deals with the non-recognition or non-enforcement of international custody and alimony awards which infringe public order. The infringement of public order defines the violation of main values and principles of Austrian substantive and procedural law. “Unfair” awards infringe public order.

OGH 31.08.2006, 6 Ob 189/06x; OGH 07.02.2008, 7 Ob 10/08h

Repudiation (*talaq* – unilateral divorce by the husband) under Islamic law infringes Austrian public order. Repudiation is not recognized as being a reason for divorce under Austrian divorce law.

- d. Please provide for case law granting enforcement of awards in your jurisdiction.

OGH 30.11.2006, 3 Ob 229/06g

A different calculation of alimony for children is not subject to an infringement of public order, even if the amount of alimony differs considerably from the amount calculated in respect of the Austrian child alimony system.

OGH 08.02.1995, 7 Ob 628/94

The reduction of alimony payments for a legitimate child due to alimony payments for the adoptive child does not infringe main principles of the Austrian law order, if the foreign law order basically regulates alimony payment for an adoptive child regardless of whether the obligor has own children or not.

## Case 2

**The Brussels II regulation** (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000) will be applied in the present case in respect to the custody matter. The Brussels II regulation deals with matters of **parental responsibility** (**custody**, visiting right). The principle of mutual recognition states that member states will recognise and uphold legal decisions taken by competent authorities in another member state.

Grounds of non-recognition for judgments relating to parental responsibility:

Article 23: A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy/public order (*ordre public*) of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes upon his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

(g) if the procedure laid down in Article 56 has not been complied with.

**The Brussels I regulation** (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters; abbr.: EUGVVO) will be applied to the present case in respect to the **alimony** matter.

Article 34 EUGVVO:

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy/public order (ordre public) in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35 EUGVVO:

1. Moreover, a judgement shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

- a. If you were Angela's attorney how would you represent her interests in relation to a future enforcement of such a court award in your jurisdiction?

If I were Angela's attorney I would try to find reasons for the non-recognition of the award in my jurisdiction due to the Brussels I regulation (EUGVVO) and the Brussels II regulation (see above). Basically the recognition of an award is the principle and the non-recognition of

an award the exception under both, the Brussels I regulation and the Brussels II regulation. I would advise her to argue that Peter's **custody** over the children may harm the best interests and well-being of the children. The best interests of the child is mentioned expressively in article 23 Brussels II regulation. Due to the Supreme Court's decision no. 6 Ob 170/04z dated 23<sup>rd</sup> September 2004 the best interests of the child is part of the fundamental values of Austria's jurisdiction. This argument more or less succeeds if children are minor and have a close relationship to their mother. Any other argument relating to alimony listed in article 34 Brussels I regulation and custody listed in article 23 Brussels II regulation supports the non-recognition under condition that Angela provides evidence for it.

- b. Would such an award be enforceable, under which conditions?

The award regarding custody is recognised ipso iure due to article 21 Brussels II regulation; this means that recognition is the principle regarding awards concerning parental responsibility. If there are no grounds for denying the recognition of the award (article 23 Brussels II regulation), the award may be enforced in any other Member State. Due to article 28 Brussels II regulation an award on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in any other member State when, on the application of any interested party, it has been declared enforceable there. The award regarding alimony is recognised ipso iure as well and must only be enforced. Due to article 38 Brussels I regulation an award issued in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. The enforcement shall be denied for grounds stated in articles 34 and 35 Brussels I regulation (article 45 Brussels I regulation).

- c. Please provide for case law denying the enforcement of unfair awards according to your jurisdiction.

OGH 28.01.2004, 3 Ob 104/03w

An alimony award rendered in Germany was not recognised and enforced in Austria because the defendant was not served with the document which instituted the proceedings; the defendant was not able to arrange for his defence as he could not comment on the alimony claim.

OGH 21.08.2003, 3 Ob 98/03p

An award being declared indefinite with regard to its contents may not be enforced in Austria. The obligation to pay alimony was linked to a notarial deed which was not provided to the German court. Although the German court accepted the alimony claim, it was not enforced as a matter of indefiniteness; it was unclear whether the notarial deed provided any supplemental regulations necessary for the alimony obligation.

- d. Please provide case law granting enforcement of awards in your jurisdiction

OGH 10.07.1996, 3 Ob 2031/96i

An award granting alimony for past time does not infringe ordre public.

OGH 28.07.1998, 1 Ob 317/97f

Foreign deadlines concerning the limitation of action do not infringe public order if foreign deadlines grant a longer period of time for filing a legal action than under Austria's jurisdiction.

Basically the recognition and enforcement of awards rendered in the EU is the principle, the non-recognition and non-enforcement the exception. For that reason there is no case law providing guidelines under which conditions an award rendered in the EU is recognised and enforced. As mentioned above an award rendered in the EU is recognised ipso iure and only denied for grounds provided in articles 34 and 35 Brussels I regulation. The same applies for the Brussels II regulation (article 23). Under Brussels I regulation and Brussels II regulation the award is enforceable in Austria if the award is enforceable in the Member State which rendered the award.

### Case 3

- a. Would the custody remain joint after Luisa moved abroad?

If both partners share custody they generally both have the right to determine the child's residence. They should act by mutual agreement. Although according to academic opinion, after a divorce only the parent with whom the child resides is entitled to determine the residence of the child,<sup>17</sup> this does not give him/her the right to move abroad without **consent** of the other parent. According to academic opinion actually the parent (without consent of the non resident parent) is not entitled to choose a residence for the child which would prevent a regular contact between the child and the non resident parent.<sup>18</sup>

In practice one of the parents in this case normally files a petition for joint custody to be revoked. As a consequence the court has to entrust one parent with sole custody on the basis of the child's best interest. The sole custody allows to the parent generally to move abroad. (See in detail Question b)

The answer of the question therefore depends on the agreement reached by Robert and Luisa with regard to the residence of the child. In case they agreed that the child should reside with Luisa, she is entitled to move abroad with the child if Robert agrees. Robert, however, can file a petition for joint custody to be revoked and ask for sole custody. The sole custody of Robert would prevent Luisa to move abroad with the child. In this case the child would have to live with Robert.

- b. In the present case, which parent would likely be granted the custody?

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<sup>17</sup> Hopf in Ferrari/Hopf, Reform des Kindschaftsrechts, (2001) 76.

<sup>18</sup> Weitzenböck in Schwimann, ABGB I, section 177 Marg. No. 5.

According to section 177 lit. a ABGB when deciding which parent shall be entrusted with sole custody the court must consider merely the **interest of the child**, which has to be determined on a case to case basis. In this context the court has to consider<sup>19</sup>

- the general interest of the child in a prosperous mental development;
- the psychological interest of the child in a professional education;
- the emotional interest of the child;
- the wishes of the child.

Furthermore the continuity of the child's upbringing is considered to be very important.<sup>20</sup> Therefore, in case the child lives with one parent for a longer period of time it is likely that him/her will be granted sole custody.

Generally the **principle of continuity** plays an important role in this context. Particularly with an older child the abort of grown social connections can be considered as a threat to the interest of the child.<sup>21</sup> The principle of continuity *per se* however does not prevent the parent with sole custody to move abroad. The OGH (Supreme Court) stated in decision no. 1Ob 274/00d dated 30th January 2001 that a relocation generally does not constitute a threat to the best interest of the child, even if this means a reduction of the visitation rights of the other parent. A large cultural contrast between the environment experienced so far and the environment in the new country however may be considered as a threat to the interest of the child.<sup>22</sup>

In the present case therefore it is not possible to give a final answer. The decision of the court mainly depends on the circumstances of the case. If the child lived with Luisa for a longer period of time and has a strong tie with her it is possible that she is granted sole custody. On the other hand, if Luisa intends to move to a country, which is for example in state of war or the child has strong social connections to Austria the sole custody is likely to be granted to Robert.

c. How would the visitation rights work out?

According to established case law (see for example decision of the OGH (Supreme Court) no. 2 Ob536/81 dated 20<sup>th</sup> October 1981) the visitation rights must enable an **intensive contact** between the child and the parent, who does not live in the household with the child.

As described above the extent of the visitation rights depends on the individual case. The following standards have been developed in the case law<sup>23</sup>:

- the right of contact generally exists twice a month;
- the intensity and duration of the visits increases with the child's age;

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<sup>19</sup> Established Case law: EF 40.895; 48.421; 84.168 and others.

<sup>20</sup> EF 87.064; EF 96.672

<sup>21</sup> EF 93.101.

<sup>22</sup> *Weitzenböck* in Schwimann ABGB I, section 176 Marg. No. 21.

<sup>23</sup> EFSlg. 78.007.

- beginning at three years of age a child can already stay with the other parent for an entire day
- children over six years of ages can spend an entire weekend including an overnight stay with the other parent.

The OGH (Supreme Court) however stated in decision no. 1Ob 133/04x dated 25th June 2004 that in certain circumstances (in this particular case the father lived abroad) the parent, who is granted the sole custody has to accept times of more intensive contact between the other parent and the child. Therefore the mother had to accept that the father spent several consecutive week-ends with the-child.

Supposed Robert is granted the sole custody Luisa could ask the court to regulate the visitations rights to a large extent. The child is already 12 years old and Luisa lives abroad. Therefore Luisa for example could ask for a visitation right for several weeks a year during vacation in order to keep up an intensive contact with the child.

## **BIBLIOGRAPHY**

Deixler-Hübner, Scheidung, Ehe und Lebensgemeinschaft, 8<sup>th</sup> edition, Vienna, Lexis Nexis ARD ORAC 2004.

Duchek/Schütz/Tarko, Zwischenstaatlicher Rechtsverkehr in Zivilrechtssachen, 2<sup>nd</sup> edition, Vienna, Manz, 1998.

Ferrari/Hopf, Reform des Kindschaftsrechts, 1st ed. Vienna, Manz 2001.

Fucik, Rechtsdurchsetzung von Unterhalt im Ausland, iFamZ, 2008, 357.

Koziol/Welser, Bürgerliches Recht Vol. I, 13th ed. Vienna, Manz, 2006.

Nademleinsky/Neumayr, Internationales Familienrecht Vienna, Facultas, 2007

Rummel, ABGB Kommentar Volume II, 3<sup>rd</sup> ed. Vienna, Manz, 2000.

Schwimann, Internationales Privatrecht, 3rd ed. Vienna, Manz, 2001.

Schwimann, ABGB Volume I, 3rd ed. Vienna, Lexis Nexis ARD ORAC 2005.