RECOGNITION OF A STATUS ACQUIRED ABROAD: AUSTRIA*

RECONOCIMIENTO DE UNA SITUACIÓN JURÍDICA RELATIVA AL ESTATUTO PERSONAL VÁLIDAMENTE CREADA O MODIFICADA EN EL EXTRANJERO: AUSTRIA

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Abstract: CJEU and ECtHR case law generally oblige the EU Member States to recognise a status acquired abroad. This report shows in detail how Austrian law complies with this obligation and how 'recognition' is ensured in Austrian practice. Two general observations can be made: First, public policy considerations and the recognition of foreign administrative decisions and certificates (e.g. birth certificate) play an increasingly important role. Second, whereas much attention is paid to the result, namely the (non-)recognition of a status in Austria, methodologically sound arguments and justifications are missing in practice.

Keywords: recognition, acceptance, status acquired abroad, Austrian private international law, status registration

Resumen: En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia ha cambiado y está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna. Este trabajo analiza los efectos de esta jurisprudencia europea sobre el Derecho internacional privado austriaco cuando este se enfrenta a una situación jurídica relacionada con el estatuto de la persona que ha sido válidamente creada en el extranjero y que se quiere hacer valer en Austria.

Palabras clave: estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, Derecho internacional privado austriaco.

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I. Introduction

1. The report first gives an overview of status recognition in its various subject matters, including parentage (especially surrogacy), adoption, marriage (same-sex and opposite-sex) and partnership (see *infra* II). It then presents an analysis of the overall methods of recognition as well as an explanation of the methods of recognition applied in Austria (see *infra* III). Furthermore, the paper reviews the effects and conditions of the registration of a foreign status, focusing especially on the technicalities in Austrian law (see *infra* IV). Finally, it provides an insight into the awareness of recognition in Austrian academia and politics (see *infra* V).

II. Status Recognition by Subject Matter

2. Questions regarding the recognition of a status determined or acquired abroad have arisen in the context of names, parentage (especially surrogacy), adoption, marriage (same-sex and opposite-sex) and partnerships. However, recognition by acceptance only played a role in the context of surrogacy and names as far as courts and administrative authorities are concerned.

1. Filiation

A) Paternity/Parentage

3. Paternity in this sense means the affiliation between a child and its parent which is not created by adoption. In other words, the rules applicable encompass paternity due to biological and genetic parentage, due to acceptance of parentage by declaration and parentage due to a marriage (registered relationship) with the (birth-)mother.

4. In case of a **foreign decision on the paternity to a child**, the rules regarding the recognition of adoption decisions are applied by analogy (see *infra* 3).[1] Such decisions encompass declaratory decisions or mere registrations/recordings of an acknowledgement of paternity[2], as well as judicial settlements. Recently, the OGH also 'recognised' the parentage of a father acknowledging his paternity before the competent Ukrainian authority under § 91a AußStrG as a *decision* of the Ukrainian authorities.[3] *Nademleinsky* points out the potential conflict with § 25 IPRG and concedes that court practice allows for easier recognition for intended parents in surrogacy cases.[4]

[1] OGH 27 November 2014, 2 Ob 238/13h (recognition of a Kenyan decision on fatherhood).

[2] See, for example, OGH 25 June 2020, 6 Ob 7/20b (recognition of an acknowledgement of fatherhood before the competent authority in Ukraine which resulted in a Ukrainian birth certificate).

[3] OGH 25 June 2020, 6 Ob 7/20b, *Zeitschrift für interdisziplinäres Familienrecht (iFamZ),* 2020, p. 306, 'recognised' the parentage after an acknowledgement of paternity before the competent Ukrainian authority.

[4] Nademleinsky, "Entscheidungen zum Internationalen Familienrecht", *Zeitschrift für Familien- und Erbrecht (EF-Z)*, 2021, p. 48; see also Verschraegen/Heindler, "Austria", in Meyer, *Public Policy and Private International Law*, Cheltenham, Edward Elgar, 2022, at mn. 57 (forthcoming): 'Under § 91a AußStrG any formal cooperation of a state organ is regarded as a 'decision' and can be recognised'.

5. In the absence of a foreign decision, parentage (fatherhood and motherhood[5]) is determined **by the application of the rules of PIL**. § 21 IPRG[6], which applies to children born in wedlock (i.e. to a married couple), refers to the common nationality of the spouses at the time of birth or, if the marriage was dissolved before, at the time of dissolution. If the spouses do not have a common nationality, the nationality of the child at the time of birth serves as a connecting factor. § 25 IPRG[7], which applies to children born outside of wedlock, refers to the nationality of the child at the time of birth (or at a later point in time by application of the favour principle) as a connecting factor. If the applicable law qualifies the person in question as a parent, this parentage is considered valid also from the perspective of Austrian law.

6. As regards the parentage of a child for the purpose of awarding the Austrian citizenship (i.e. determination of parentage to establish the Austrian nationality of a child), a slightly different approach is taken by the competent authorities. According to § 7 StbG[8], children acquire the Austrian nationality (automatically) at birth if their mother or father is an Austrian national. Interestingly, Austrian law determines the mother and the father of a child for these purposes with (direct) reference to Austrian substantive law, namely §§ 143 and 144 (1) ABGB. According to these rules, the mother is the woman who gave birth to the child (§ 143 ABGB) and the father is the person who was married to the mother at that time or who acknowledged his paternity or whose paternity was determined by court decision (§ 144 (1) ABGB).[9] No reference is made to the Austrian PIL rules (i.e. §§ 21, 25 IPRG). This approach avoids a so-called 'circle situation' (i.e. Austrian citizenship is determined by reference to parentage and parentage is determined by reference to the child's nationality, as is often the case with regard to § 25 (and 21) IPRG) which was heavily criticised in the past[10].

B) Surrogacy

7. In general, for the filiation of a child born by a surrogate mother the same rules apply as for 'traditional' paternity (see *supra* mn. 4-6). However, due to the involvement of a surrogate mother, some particularities exist, which will be illustrated by reference to two judgments of the Austrian Constitutional Court (VfGH)[11] and a recent judgment of a Tyrolian district court[12].

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[5] §§ 21 and 25 IPRG have to be applied by analogy to determine the motherhood as well, OGH 19 December 2007, 3 Ob 220/07h (motherhood of an Austrian woman to a Philippine child; name of the mother was faked in the birth register).

[6] § 21 IPRG: 'Die Voraussetzungen der Ehelichkeit eines Kindes und deren Bestreitung sind nach dem Personalstatut zu beurteilen, das die Ehegatten im Zeitpunkt der Geburt des Kindes oder, wenn die Ehe vorher aufgelöst worden ist, im Zeitpunkt der Auflösung gehabt haben. Bei verschiedenem Personalstatut der Ehegatten ist das Personalstatut des Kindes zum Zeitpunkt der Geburt maßgebend.'

[7] § 25 (1) IPRG: 'Die Voraussetzungen der Feststellung und der Anerkennung der Vaterschaft zu einem unehelichen Kind sind nach dessen Personalstatut im Zeitpunkt der Geburt zu beurteilen. Sie sind jedoch nach einem späteren Personalstatut des Kindes zu beurteilen, wenn die Feststellung bzw. Anerkennung nach diesem, nicht aber nach dem Personalstatut im Zeitpunkt der Geburt zulässig ist. Das Recht, nach dem die Vaterschaft festgestellt oder anerkannt worden ist, ist auch für deren Bestreitung maßgebend.'.

[8] Federal Law on Austrian citizenship 1985, Federal Law Gazette n°311/1985 (last amended by n°61/2018).

[9] Although § 7 StbG was not modified to encompass an explicit reference to § 144 (2) ABGB, which mirrors § 144 (1) ABGB regarding the same-sex spouse/partner of the mother as a parent and was introduced in 2015, such a reference to § 144 (2) ABGB must be read into § 7 StbG. Since 1 January 2015, all rules which refer to the 'father' and his 'paternity' shall be applied to the woman who is the registered partner (or wife) of the mother, thus encompassing cases of medically assisted reproduction (see § 144 (3) ABGB as amended by Federal Law Gazette n°I 35/2015).

For cases not yet covered by this amendment, the administrative courts have interpreted then § 144 ABGB in accordance with the principle of equality to encompass not only a man married to the mother but also a woman married to the mother (for details see Administrative Court Vienna, 26 April 2019, VGW-152/089/4757/2019-2, available at http://www.verwaltungsgericht.wien.gv.at/Content.Node/rechtsprechung/152-089-4757-2019.pdf (in German)).

[10] Lurger/Melcher, *Handbuch Internationales Privatrecht*, 2nd ed., Vienna, Verlag Österreich, 2021, mn. 2/147.

[11] For a critical review see Lurger, "Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot", *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax),* 2013, p. 282, Welcoming the decisions of the VfGH in the light of ECtHR Advisory Opinion (10 April 2019, Request n°P16-2018-001); Verschraegen, "Leihmutterschaft. Zum Recht auf Elternschaft", *iFamZ*, 2019, p. 266 *et seq*.

[12] BG NN (Tyrol) 21. November 2019, 2 FAM 54/19z. The judgment itself was not published, but a summary can be found in Nademleinsky, "Anerkennung ukrainischer Leihmutterschaft", *EF-Z,* 2020, p. 45 *et seq*.

8. First, in the '**US surrogacy case**', the Austrian VfGH revoked a decision of the municipal authority of Vienna (*Magistrat Wien*) in 2010, which denied two siblings, born to a surrogate mother (in vitro fertilisation) in Georgia (US) in 2006 and 2009, the Austrian nationality because their genetic, intended mother, an Austrian national with whom the children were living in Austria, was not their (birth-)mother.[13] Originally, both children were issued certificates of Austrian citizenship based on their birth certificates in September 2006 and April 2009. However, in 2009, in the context of an application for childcare allowance, the authorities were informed that at least one of the children was born by a surrogate mother. The Ministry of Interior thus considered their birth certificates 'incorrect' (as the genetic and intended mother was named as 'mother') and induced a re-assessment of the children's Austrian citizenship.

9. The 2010 decision of the municipal authority of Vienna argued – in accordance with an opinion issued by the Ministry of Justice – that the US Order of declaratory judgment by the Superior Court of Cobb County and Fulton County respectively, which determined the legal parentage of the intended parents (i.e. of the Austrian genetic mother and the Italian genetic father), could not be recognised due to a violation of the Austrian *ordre public*.[14] Furthermore, US law that would be applicable according to (an analogous application of) the Austrian PIL rules,[15] referred back to (substantive) Austrian law, which considers the woman who gave birth to the children as their mother (see § 143 ABGB).[16]

10. The VfGH then argued that the (substantive) US (!) rules on parentage and in vitro fertilisation were overriding mandatory rules ('*zwingende Rechtsvorschriften*') and thus 'overruled' Austrian substantive rules on parentage (including § 137b ABGB [now § 143 ABGB]). Furthermore, it argued that the Austrian *ordre public* does not prevent the recognition of the US order of declaratory judgment – as the rules prohibiting surrogacy in Austria do not form part of the *ordre public* – and that a refusal of recognition would be against the children's well-being/best interests (i.e. it would be deprived of the genetic, intended mother and would lose all maintenance and other financial rights). For an analysis (and critique) of the methodology employed see *infra* III.4.

11. Second, in the '**Ukraine surrogacy case**', the Austrian VfGH revoked a decision of the regional government of Vienna (*Landesregierung Wien*) which denied Austrian nationality to twins born to a surrogate mother in Ukraine in 2010 because their mother, an Austrian national with whom the children were living in Austria, was not their (birth-)mother.[17] In essence, the civil servant at the Austrian embassy in Kyiv (Ukraine), who was asked to issue emergency passports for the twins based on their Ukrainian birth certificates, which listed the intended (Austrian) parents as mother and father, suspected that the children were born by a surrogate mother. The intended parents were unable to dispel these doubts during repeated interviews. The genetic parentage of both Austrian intended parents was not doubted by the authorities. The authority essentially argued that the 'recognition of a surrogacy contract which involves an Austrian citizen' would violate the Austrian *ordre public*. Thus, even if applicable due to the Austrian PIL rules, Ukrainian law could not be applied, but Austrian (substantive) law had to be applied instead. According to Austrian substantive law, the intended mother, who is not the birth mother of the twins, is not their legal mother, and thus the children cannot acquire Austrian citizenship from their intended mother.

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[13] VfGH 14 December 2011, B13/11 (surrogacy, USA).

[14] In academic literature, this assessment was criticised (see *infra* III.3).

[15] In this case, § 21 IPRG names the nationality of the children as a connecting factor, given that the (genetic) parents in question do not have a common nationality (Austria, Italy). Due to their birth in the US, both siblings acquired the US citizenship at the time of birth. Thus, US law including its rules on PIL is applicable.

[16] As explained by Lurger, "Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot", *IPRax*, 2013, p. 285, this conclusion is incorrect as US/Georgia law clearly did not refer the issue to Austrian law but applied substantive US/Georgia law; the children received US citizenship at birth.

[17] VfGH 11 October 2012, B 99/12 ua (surrogacy, Ukraine).

12. The VfGH then argued that in such cases, 'foreign law' and 'consequently' 'proof by authentic foreign documents' must be used to determine legal parentage and (Austrian) citizenship. In any case, public policy (*ordre public*) cannot prevent the 'recognition of the Ukrainian birth certificate' or prohibit the application of Ukrainian law. In essence, the arguments against a violation of the Austrian *ordre public* were the same as in the US surrogacy case; in addition, the VfGH argued that such an application of the *ordre public* exception in the Ukraine surrogacy case essentially makes the children 'stateless persons'. For an analysis (and critique) of the methodology employed see III.4.

13. A **Tyrolian**[18] **district court judgment**[19] dealt with the recognition of a Ukrainian decision (i.e. the 'recognition of a birth certificate' in the words of the court) on the paternity of a child born by a surrogate mother in 2019 in Ukraine. Interestingly, the civil section of the district court applied § 91a AußStrG[20] analogously, although the foreign decision merely consisted of a registration of the intended parents as parents in the birth register by the Ukrainian civil registry office.[21] In accordance with the two aforementioned VfGH cases, reasons of public policy could not prevent recognition (i.e. the laws on artificial insemination which prohibits surrogacy in Austria are mandatory rules, but they do not form part of the Austrian *ordre public*; a general interest to prevent surrogacy is secondary to the well-being/interests of the child; the well-being/interests of the child demand recognition as it is living with the intended parents). Unfortunately, the judgment did not discuss the mirrored jurisdiction criterion *('österreichische Jurisdiktionsformel')* which requires the foreign authority to be competent according to Austrian jurisdiction rules (i.e. the child must have had its common habitual residence in Ukraine, which is, in our opinion, rather doubtful).

C) Adoption

14. An adoption certified by the (foreign) competent authority has to be recognised if the state in which the adoption was effected is a contracting state of the **Hague Adoption Convention** (Article 23 of the Convention).

15. Any other **foreign adoption decision** (either from a non-contracting state and also in the absence of an Article 23 Hague Adoption Convention-confirmation) has to be recognised in Austria (also incidentally, as a preliminary question), if it does not violate the Austrian *ordre public* and the right to be heard has been respected for all parties (unless the party who was not heard agrees with the decision) and there is no earlier decision that conflicts with the decision in question and the authority which issued the adoption decision would have been competent according to Austrian law (see § 91a AußStrG).[22] The term 'decision' is understood broadly in this sense and covers any judicial or administrative conduct (involvement) concerning the adoption, including the mere registration, recording or authentication of a private contract.[23]

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[18] Apparently, a district court in Vienna decided accordingly in a similar case in February 2020, see Nademleinsky, "Baby im fremden Bauch? Wunschkinder brauchen Rechtssicherheit", *Die Presse*, 16 March 2020.

[19] See *supra* at note 13.

[20] § 91a AußStrG: '(1) Eine ausländische Entscheidung über die Annahme an Kindes statt wird in Österreich anerkannt, wenn sie rechtskräftig ist und kein Grund zur Verweigerung der Anerkennung vorliegt. Die Anerkennung kann als Vorfrage selbständig beurteilt werden, ohne dass es eines besonderen Verfahrens bedarf. (2) Die Anerkennung der Entscheidung ist zu verweigern, wenn 1. sie dem Kindeswohl oder anderen Grundwertungen der österreichischen Rechtsordnung (ordre public) offensichtlich widerspricht; 2. das rechtliche Gehör einer der Parteien nicht gewahrt wurde, es sei denn, sie ist mit der Entscheidung offenkundig einverstanden; 3. die Entscheidung mit einer österreichischen oder einer früheren, die Voraussetzungen für eine Anerkennung in Österreich erfüllenden Entscheidung unvereinbar ist; 4. die erkennende Behörde bei Anwendung österreichischen Rechts international nicht zuständig gewesen wäre. (3) Die Anerkennung ist weiters jederzeit auf Antrag jeder Person zu verweigern, deren Zustimmungsrechte nach dem anzuwendenden Recht nicht gewahrt wurden, insbesondere weil sie keine Möglichkeit hatte, sich am Verfahren des Ursprungsstaats zu beteiligen.' For a description of the provision in English see mn. 15, 37 et seq.

[21] According to Ukrainian law, the intended parents are determined as legal parents this way. For the broad understanding of the term 'decision' in Austria and the application of § 91a AußStrG see mn. 15, 38.

[22] See *supra* at note 21.

[23] See OGH 27 November 2014, 2 Ob 238/13h, with further references; 31 August 2006, 6 Ob 189/06x; 29 January 2010,

16. Adoptions by (mere) private contract may be recognised by application of PIL, namely § 26 IPRG[24], which points to the law of the nationality of the adoptee and the adopter(s) which must be applied cumulatively.[25] Institutions similar to adoption, in particular, '*kafala'* in Islamic law, have not yet been dealt with by the OGH. It is, however, mentioned in Austrian literature that *kafala* might lead to the application of Art 4 (2) or (4) of the Hague Protocol on the Law Applicable to Maintenance Obligations (2007), meaning that another law applies if the creditor is unable by virtue of the laws referred to otherwise to obtain maintenance from the debtor.[26]

2. Couple Relationships

A) General

17. Foreign decisions on the marital or partnership status of a person (i.e. divorce or dissolution of partnership) – that were not issued by a Member State of the EU (applicability of the Brussels IIbis regulation) or an international (bilateral) treaty – are recognised in Austria if this would not result in a violation of the Austrian *ordre public* and the right to be heard has been respected for both spouses (unless, the spouse who was not heard agrees with the decision[27]) and there is no Austrian decision and no earlier decision that conflicts with the decision in question and the mirrored jurisdiction criterion would be fulfilled (see § 97 (2) AußStrG;[28] "*österreichische Jurisdiktionsformel*"[29]).

18. If a marriage or registered partnership is recognised by PIL rules (i.e. no foreign decision available), one has to take into account that there are often separate connecting factors for the question of the (recognition of the) status on the one hand (e.g. marriage) and its consequences on the other hand (e.g. succession). Thus, a status recognised due to the application of the *lex loci registrationis* (e.g. same-sex marriage in the Netherlands) may have no effects due to the applicability of the law of the nationality of the spouses (e.g. Polish nationality).[30]

B) Marriage

19. Due to the lack of a foreign decision, marriages concluded abroad are usually recognised (or not recognised) by application of the Austrian PIL rules, namely § 16 (2) IPRG (nationality of the spouses or alternatively *lex loci*) regarding the formal requirements and § 17 IPRG (cumulative application of the law of the nationality of each spouse) regarding substantive requirements.[31] § 17 (2) IPRG ensures that a new marriage is not prevented by the fact that the law of the nationality of one of

1 Ob 138/09i; 13 October 2011, 6 Ob 69/11g. See also OGH 20 December 2018, 6 Ob 142/18b; 25 June 2020, 6 Ob 7/20b, *iFamZ*, 2020, p. 306 (acknowledgement of paternity before the competent Ukrainian authority).

[24] § 26 (1) IPRG (in German): 'Die Voraussetzungen der Annahme an Kindesstatt und der Beendigung der Wahlkindschaft sind nach dem Personalstatut jedes Annehmenden und dem Personalstatut des Kindes zu beurteilen. Ist das Kind nicht entscheidungsfähig, so ist sein Personalstatut nur hinsichtlich der Zustimmung des Kindes oder eines Dritten, zu dem das Kind in einem familienrechtlichen Verhältnis steht, maßgebend'.

[25] OGH 2 September 2020, 3 Ob 71/20t (adoption of an adult refugee from Uganda).

[26] Gitschthaler, in Gitschthaler (ed), *Internationales Familienrecht*, Vienna, Verlag Österreich, 2019, HUP Art 4, mn. 16.

[27] OGH 23 October 2006, 7 Ob 199/06z (divorce by court in Texas, US).

[28] See *supra* at note 21.

[29] See, for instance, OGH 26 April 2017, 1 Ob 21/17w, *EF-Z*, 2017, p. 233 (Garber); for an explanation of the Austrian meaning, see mn. 13.

[30] OGH 12 May 2021, 6 Ob 66/21f, *EF-Z*, 2022, p. 77 (Heindler) (annulment of a second marriage of a Turkish national after divorce in Germany).

[31] See, for example, VfGH 9 June 2008, B860/07; G191/07 (Russian marriage); BVwG 30 May 2018, W165 2178103-1/3E (Syrian marriage); BVwG 29 May 2018, W212 2184938-1/5E (Syrian marriage); BVwG 3 January 2018, W144 2163719-1/2E (Syrian marriage); OGH 25 March 2014, 10 ObS 16/14x (cohabitation under the law of Israel).

the spouses does not recognise a decision regarding the dissolution/divorce of a prior marriage which is recognised in Austria.

20. Before 1 January 2019, **same-sex marriages** have been qualified as registered partnerships according to § 27a IPRG[32] – using the *lex loci celebrationis/registrationis* as a connecting factor – or marriages according to § 16, 17 IPRG[33]. Some also argued in favour of an application of § 1 IPRG (closest connection).[34] However, since the Constitutional Court required in a recent judgment from December 2017 that marriage has to be open to same-sex couples in Austria as of 1st of January 2019, same-sex marriages can no longer be considered as registered partnerships for the purposes of PIL. In this regard, § 17 IPRG was amended by including a new paragraph 1a addressing situations where the law of the nationality of one or both fiancés precludes same-sex marriage. In such a case, the *lex loci celebrationis* is to be applied with regard to the substantive requirements. The amendment was necessary. Several Austrian authorities reportedly performed same-sex marriages regardless of the law of the spouses' nationality, whereas others – as proposed in doctrine[35] – rejected requests with reference to the foreign law of the nationality.[36] Since Austrian private law rules generally apply without retroactive effect and neither § 17 (1a) IPRG nor the VfGH judgment contain any intertemporal regulations, pre-existing same-sex marriages (i.e., established before 1 August 2019 as regards § 17 (1a) IPRG and before 1 January 2019 as regards the substantive rules) remain untouched. Their validity from the perspective of Austrian law continues to be assessed by reference to the abovementioned rules (i.e., § 27a IPRG, § 1 IPRG or §§ 16, 17 (1) and (2) IPRG). Furthermore, a bulletin issued by the Ministry of Internal Affairs[37] advises that same-sex marriages which have been concluded before 1 January 2019 can either be reestablished in Austria and registered as such or an adaptation of the personal registry may be requested which leads to the registration of the (same-sex) marriage in the Austrian registry. In the latter case, the date of the registration is put down as marriage date.

C) Registered Partnership

21. For registered partnerships, the applicable PIL rule (§ 27a IPRG) refers to the *lex loci registrationis* and thus effectively 'accepts' the validity of a status acquired abroad. Such a connecting factor ensures recognition and avoids limping relationships but does not take 'the closest connection' into consideration.

D) Non-(state-)registered Relationship

22. Religious marriages and also non-registered partnerships ('domestic cohabitation')[38] have been characterised as situations to which the connecting factor in §§ 16, 17 IPRG ought to be applied. Sometimes also § 1 IPRG is considered to be applicable.[39]

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[32] VwGH 6 July 2016, Ro 2014/01/0018 (earlier instances). See also Nademleinsky/Neumayr, *Internationales Familienrecht*, 2nd ed., Vienna, Facultas, 2017, p. 40, with further references.

[33] Verschraegen, *Internationales Privatrecht*, Vienna, MANZ Verlag, 2012, p. 13 *et seq*.

[34] VfGH 12 March 2014, B 166/2013.

[35] See Budzikiewicz, "Internationales Familienrecht: Ein Blick auf die jüngsten Reformen im österreichischen IPR-Gesetz", *Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung (ZfRV)*, 2020, p. 37, at 39; Kathrein/Pesendorfer, „Ehe und eingetragene Partnerschaft für alle", *iFamZ,* 2018, p. 324, at 326; Nitsch, "Gleichgeschlechtliche Ehen im IPR – vom Personalstatut zum Begründungsstatut", *iFamZ*, 2019, p. 400.

[36] See Ertl, "Die Eheschließung gleichgeschlechtlicher Paare im IPR", *iFamZ,* 2019, p. 399, at note 10.

[37] BMI-VA1300/0055-III/3/b/2019 partially quoted in Aichhorn, "Diskriminierungsfreie Kollisionsnorm für gleichgeschlechtliche Ehen in Österreich", *EF-Z,* 2019, p. 258.

[38] OGH 25 March 2014, 10 ObS 16/14x, *EF-Z*, 2014, p. 230 (Verschraegen).

[39] Lurger/Melcher, *Handbuch Internationales Privatrecht*, 2nd ed., Vienna, Verlag Österreich, 2021, mn. 2/51.

23. In one case, the OGH had to determine (as a preliminary question) whether a 'non-registered partnership (cohabitation)' established in Israel qualified as a marriage.[40] For that purpose, it applied the Austrian PIL rules on marriage (§ 16 IPRG), which referred to the law of Israel. The law of Israel only allows religious marriages and a special sort of 'registered partnerships', but accords 'cohabitants' rights and obligations similar to those of spouses (e.g. inheritance rights, widow's pension etc). Interestingly, the Austrian OGH refused 'recognition' and thus did not grant widow's pension because such a 'cohabitation' was not a marriage, without paying attention to the fact that the status, which cohabitants have under the law of Israel, would grant them a widow's pension.

3. Capacity

24. Capacity (to contract) is 'recognised' by applying the respective EU or Austrian PIL rules, namely Article 13 Rome I Regulation or § 12 IPRG.[41]

25. Capacity to sue and to be sued is generally determined in accordance with Austrian procedural law. § 6a ZPO requires the court to request the competent (national) guardianship court to take measures for representation if the party's capacity to sue and to be sued is affected due to mental illness. There are no rules for situations where the Austrian guardianship court lacks international jurisdiction. Whereas courts are hesitant to apply § 6a ZPO in situations involving foreign guardianship courts by way of analogy,[42] a decision of the OGH suggests taking into consideration whether foreign guardianship authorities take appropriate action.[43]

4. Gender

26. Gender transition is 'recognised' by application of the respective EU or Austrian PIL rules. In a case decided by the Austrian Supreme Administrative Court (VwGH), recognition of gender transition was subject to an incidental question relevant to the decision whether a couple was entitled to marry.[44] The question of gender transition, thus, was not regarded as an independent issue but characterised as a question to the capacity to contract marriage. Thus, the VwGH held that the law of Thailand shall be applied in accordance with § 17 (1) IPRG. Had the application of the law of Thailand been an obstacle to the marriage, the Austrian public policy clause would have had to be applied in view of Article 12 ECHR.[45]

5. Name

27. Questions regarding names are subject to the law of nationality of the person (§§ 9 and 13 IPRG).

28. Particularly where a situation involves refugees and stateless persons, the application of § 9 IPRG might result in changes regarding the right to bear the name. Since Article 7 of the UN Convention on the Rights of the Child, Article 7 EU ChFR, and Article 8 ECHR protect the name,[46] public authorities

[40] OGH 25 March 2014, 10 ObS 16/14x.

[41] With further references: Verschraegen, in Rummel, *ABGB*, 3rd ed., Vienna, MANZ Verlag, 2004, § 12 IPRG n. 3.

[42] See OGH 28 August 1997, 3 Ob 116/97y (explicitly); 16 March 2004, 4 Nc 4/04g (implicitly).

[43] OGH 16 March 2004, 4 Nc 4/04g: 'Sofern sich nicht das Amtsgericht Kempten – nach Verständigung durch das Prozessgericht – doch dazu verstehen sollte, neuerlich eine Betreuung für die Klägerin zu bestellen'.

[44] VwGH 30 September 1997, 95/01/0061.

[45] VwGH 30 September 1997, 95/01/006; with further references Verschraegen/Heindler, "Austria", in Meyer, *Public Policy and Private International Law*, at mn. 45 (forthcoming).

[46] Verschraegen, "Grund- und menschenrechtliche Herausforderungen von Migrationsbewegungen für das Privatrecht", in Dethloff/Nolte/Reinisch, *Rückblick nach 100 Jahren und Ausblick: Migrationsbewegungen*, Heidelberg, C.F. Müller Verlag, 2018, p. 325, 339.

and courts must deviate from the application of the connecting factor in § 13 IPRG in such cases. In this context, recognition by 'acceptance' applies.

29. If EU citizens are concerned, Article 21 TFEU and the EU decisions on the exercise of the right of free movement and residence apply. The fact that a name is registered in different ways in two EU Member States is regarded as a restriction under Article 21 TFEU and requires justification based on objective considerations and proportionality in line with a legitimate objective of the national provision. In contrast, if a name is registered only in one state but, in case of dual citizenship, could be registered in a second state in a different way, the OGH held that the Austrian PIL rules (§ 13 (1) IPRG) referring to the law of the state, where the name is registered apply and the person is not entitled to change his name in accordance with the law of the state where he could possibility register in the future. The OGH explicitly mentioned that this interpretation of § 13 (1) IPRG does not violate Article 21 TFEU.[47]

30. The Austrian Ministry of the Interior refers to ECJ Case law (C-353/06 *Grunkin-Paul*) in its Instructions for Registry Offices (*Durchführungsanleitung für die standesamtliche Arbeit*) as of October 2014,[48] and states therein that names in certificates of birth issued by other EU Member States ought to be 'recognised' notwithstanding which law would be applicable in accordance with § 13 IPRG. Austrian courts regularly refer to ECJ decisions regarding names. Likewise, the VwGH referred to ECJ C-208/09 (*Sayn-Wittgenstein*) and stated that the Law on the Abolition of the Nobility shall be applied to Austrian citizens.[49] Similarly, the Austrian Constitutional Court referred to decisions of the ECJ and the ECtHR (ECtHR 11 September 2007, Bulgakov, Appl 59894/00) when deciding about the use of titles of nobility in names.[50] However, sometimes the abolition of titles of nobility is applied too formalistically and, in our opinion, fails to respect the diverging cultural and historical circumstances of foreign names.[51] This is particularly inconsiderate in the light of the ECtHR case law considering the name to be a component of private and family life in the meaning of Article 8 ECHR.[52] Therefore, the VfGH rightly points out that foreign names seemingly containing titles of nobility, such as 'of' or 'noble', shall only be prohibited based on public policy reasons if they are historically connected with a title of nobility or represent an actual (foreign) title of nobility.[53]

III. Methodological Analysis

1. General

31. Questions of status recognition are mostly raised as **preliminary questions** (marital status, e.g. regarding parentage,[54] asylum cases[55], and widow's pension[56]), but may also be qualified as main questions and be at the 'centre' of legal proceedings.

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[47] See, most recently, OGH 20 April 2021, 4 Ob 41/21i, *EF-Z*, 2021, p. 217 (Heindler) (a possible requirement to recognise applies only to names which are already borne in another Member State but does not affect the PIL rule (§ 13 IPRG) as such).

[48] BMI-VA1300/382-III/4/b/2014, 59.

[49] VwGH 27 February 2018, Ra 2018/01/0057; a similar decision was adopted by the same court with reference to ECJ case law in VwGH 25 November 2008, 2008/06/0144.

[50] VfGH 26 June 2014, B 212/2014; VfGH 9 October 2019, E 1851/2019; VfGH 2 March 2020, E 4050/2019.

[51] See, most recently, the decision of the Austrian embassy in Bern (Switzerland) regarding a French surname ('*de Milhé de Saint Victor*) of the Austrian wife of a French citizen, which was reduced to '*Milhé*' in "Adelsaufhebung: Wie die Behörden Namen dritteln", *Die Presse*, 22 July 2019.

[52] ECtHR 22 February 1994, *Burghartz vs Schweiz,* Appl n°16213/90; ECJ 22 December 2012, *Sayn-Wittgenstein*, C-208/09, mn. 52; Verschraegen/Heindler, "Austria", in Meyer, *Public Policy and Private International Law*, at mn. 35 (forthcoming).

[53] VfGH 2 March 2020, E 4050/2019 (Portuguese '*nobre de*'); see also Verschraegen/Heindler, "Austria", in Meyer, *Public Policy and Private International Law*, at mn. 37 *et seq* (forthcoming).

[54] OGH 16 October 2015, 7 Ob 142/15f, *EF-Z*, 2017, p. 104 (Nademleinsky).

[55] See, for example, VfGH 9 June 2008, B 860/07; G 191/07; BVwG 30 May 2018, W165 2178103-1/3E; BVwG 19 January 2016, W211 2118334-1/2E (marital status in view of a child marriage [denied with reference to *ordre public*]); according to § 2(1) n°9 NAG (BGBl n°I 2005/157), the maximum age of 21 was determined.

[56] OGH 25 March 2014, 10 ObS 16/14x.

32. As illustrated by the above overview, Austrian law knows **three different methods of recognition**:

1. **Recognition of judgments** (and other official decisions): A foreign status decision and the status established therein is recognised by Austrian authorities.[57]
2. **Recognition by PIL**: In the absence of a judgment or other decision that may be recognised, courts and public authorities have to apply the relevant national PIL rule to determine the *lex causae* governing the establishment of the status. If the requirements of the *lex causae* are fulfilled, Austrian law recognises this status as valid (as long as the Austrian *ordre public* is not violated).
3. **Recognition by acceptance**: A foreign status is recognised in Austria, despite the lack of a decision that may be recognised and irrespective of the applicable law according to PIL rules.

33. Whereas the **first two options** represent ways to 'recognise' a foreign status in result and are regulated by statutory provisions,[58] the last option embodies the acceptance of a foreign status as a specific and autonomous method. All methods have been used in Austria, but almost all cases dealing with the 'recognition' of a foreign status (i.e. a status that has been acquired abroad), used the first two options: If a decision can be recognised, it will be; if not (e.g. no 'qualified' decision, no decision at all), the status may still be 'recognised' for the purposes of Austrian law, if the applicable law, as determined by the Austrian PIL rules, considers the status to be legally valid[59]. Hence, the discussion is often limited to 'recognition of decisions' and 'recognition by PIL'[60].

34. So far, recognition of a foreign status by mere acceptance (**third option**) has only been used in a few very particular cases, namely recognition of names (due to EU law requirements)[61] and (possibly) parentage/motherhood in surrogacy cases[62]. Mere acceptance of a status as a method thus plays a relatively limited role in court practice; international obligations/requirements of mutual trust have not led to an increased application of 'recognition by acceptance' as a method in cases without precedent. It seems that this method is only used if there is no other way to remedy an 'unbearable' situation from a human rights point of view; the result rather than the method being decisive. However, the method itself is not named or identified by the court(s), but can only be derived from the court's reasoning, thus – especially in the surrogacy cases – it remains unclear whether the method employed actually can be qualified as recognition by acceptance (see also *infra* mn. 54 et seq).

35. Regarding the methods employed by the **respective courts and authorities**, it might be relevant that – in addition to ordinary courts, such as the civil district and regional courts and the OGH, which generally deal with issues of private law (including PIL) – also administrative courts and authorities, such as the regional administrative courts, the federal administrative court, the VwGH and the

[57] Herein, the debate is limited to the recognition of procedural effects ('*prozessrechtliche Wirkungen*') of the foreign decision (in particular focusing on the binding legal force) whereas the recognition of effects on substantive law ('*Tatbestandswirkung*'), i.e. the decision leads to subsequent occurrences on claims (e.g. for unjust enrichment), is determined by the respective connecting factor of the PIL rules of the lex fori. See recently OGH 25 April 2019, 4 Ob 230/18d, *EvBl*, 2019, p. 1008 (*B. Schneider*). In other cases, however, the OGH fails to properly distinguish procedural effects and effects on substantive law; see, e.g., OGH 26 May 2020, 2 Ob 87/19m, *EF-Z*, 2021, p. 44 (Nademleinsky) (a child born in 1998 after notarial divorce in Cuba (1997) is regarded as having been born in wedlock because Austrian courts performed divorce in 2002).

[58] There is a debate in the literature about the distinction between the first two options; see Nunner-Krautgasser, "Die Anerkennung ausländischer Entscheidungen – Dogmatische Grundfragen", *Österreichische Juristen-Zeitung (ÖJZ),* 2009, p. 793, 797.

[59] See, with further references, OGH 7 August 2001, 1 Ob 176/01s, *Juristische Blätter (JBl)*, 2002, p. 331.

[60] See, for example, BVwG 19 January 2016, W211 2118334-1/2E (stating that both Austrian as well as Afghan law (country of residence of the spouse requesting recognition of marital status) do not accept child marriages, however, without deciding which of the two legal regimes applies).

[61] See, for capacity of companies which are recognised in a similar way: OGH 22 June 1932, 1 Ob 573/32 SZ 14/132.

[62] VfGH 14 December 2011, B 13/11 (surrogacy, USA); 11 October 2012, B 99/12 (surrogacy, Ukraine).

VfGH, sometimes deal with questions of recognition, including issues of PIL. It is possible that these courts are significantly less familiar with the application of these rules and thus do not follow the same methodological approach or apply a similar methodological scrutiny (see, in particular, the judgments on surrogacy,[63] and the legal lacunae therein; for details see II.1.2 and 3). Furthermore, one has to keep in mind that only decisions of the highest courts (OGH, VwGH, VfGH) are published on a regular basis and that decisions of lower instances and lower instance administrative authorities are rarely available publicly. Even in decisions which have been published, the legal arguments are often not elaborated and explained in detail and are sometimes even missing altogether.

2. Recognition of Decisions: How Does It Work?

36. Private status decisions (i.e. change of legal status without the involvement of a public authority, such as religious ceremonies; private act drawn up by an individual) cannot be recognised as decisions.[64]

37. Recognition of judgments and other decisions (involving at least an administrative authority; the declaratory character of the decision is sufficient) (1) usually **does not require a special procedure** (i.e. 'automatic recognition').[65] However, a (facultative) procedure may take place if requested, for example, by the parties to a (foreign) adoption decision (§§ 91b and 91c AußStrG)[66] or regarding a foreign decision on the marital status of a person (§ 98 and 99 AußStrG), and legal interest is established.

38. To some extent, a **public authority in the state of origin** must be involved in the proceedings of the recognising state. For the recognition of a decision on the establishment of the status, it is sufficient that the involvement of the authority is limited to the registration or recording (of a contract or certificate) and that its decision is of a declarative nature only.[67]

39. Mirrored competence[68] and the right to be heard must have been respected if a foreign decision concerning the dissolution of marriage (§ 97 (2) n°4 AußStrG), the protection of adults (§ 131b (4) n°4 AußStrG), or the adoption/filiation (§ 91a (2) n°4 AußStrG[69]) shall be recognised in Austria; also no conflicting (Austrian) decision can exist in case of a recognition of a court decision (see II.1.3 *supra*).

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[63] VfGH 14 December 2011, B 13/11 (surrogacy, USA); 11 October 2012, B 99/12 (surrogacy, Ukraine).

[64] However, if the *lex causae* as determined by the IPRG considers a religious ceremony sufficient for the establishment of a status, such a status may be recognised (if it does not violate the Austrian *ordre public*). See OGH 25 March 2014, 10 ObS 16/14x (Jewish marriage).

[65] See, for example, for adoption cases: §§ 91a *et seq*. AußStrG (see note 21) as amended on 3 August 2009 (Federal Law Gazette n°I 2009/75). Note: This is different regarding judgments given before 2005 (i.e. before the relevant legislative amendment), see, for example, OGH 26 May 2020, 2 Ob 87/19m, *EF-Z*, 2021, p. 44 (Nademleinsky).

[66] See Fucik, "Anerkennung ausländischer Adoptionsentscheidungen", *iFamZ*, 2009, p. 271, at 272.

[67] Fucik, "Anerkennung ausländischer Adoptionsentscheidungen", *iFamZ*, 2009, p. 271, at 272, with further references. Critically, Nademleinsky, "Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen", *ÖJZ*, 2016, p. 1063 *et seq*. See OGH 27 November 2014, 2 Ob 238/13h with further references; OGH 31 August 2006, 6 Ob 189/06x; 29 January 2010, 1 Ob 138/09i; 13 October 2011, 6 Ob 69/11g. See also OGH 20 December 2018, 6 Ob 142/18b. See also *supra* mn. 4, 13 and 15.

[68] As regards the US surrogacy case, Arnold, "Fortpflanzungstourismus und Leihmutterschaft im Spiegel des deutschen und österreichischen internationalen Privat- und Verfahrensrechts", in Arnold/Bernat/Kopetzki, *Das Recht der Fortpflanzungsmedizin 2015*, Vienna, MANZ Verlag, 2016, at 143, considers that mirrored jurisdiction/competence was fulfilled, because the birthmother likely had US citizenship and the children acquired US citizenship at birth (*ius soli* principle), whereas Lurger, "Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot", *IPRax*, 2013, at 286, considers mirrored competence not to have been fulfilled, because the habitual residence of the intended parents and children was in Austria, thereby preventing a recognition of the US court decision.

[69] This provision is applied analogously for filiation. See OGH 27 November 2014, 2 Ob 238/13h, *EF-Z*, 2015, p. 144 (Nademleinsky); OGH 24 March 2015, 8 Ob 28/15y, *EF-Z*, 2015, p. 145 (Nademleinsky); OGH 16 October 2015, 7 Ob 142/15f, *JBl*, 2016, p. 56.

40. As regards the recognition of decisions, the decision is **not reviewed on its merits**[70], except with regard to public policy (see *infra* 5). Judicial decisions in violation of Article 6 ECHR cannot be recognised.

41. For the recognition of a (court) decision in special proceedings and in the context of a registration of the foreign decision in the Austrian personal status registry, a **copy of the court decision** must be provided.

42. The proceedings shall take place at the **district court**. The court decides on the recognition (non-recognition); its decision is binding for the parties (e.g. adoptee and adopter) but not binding for other persons, e.g. relatives of the adoptee.

3. Recognition by PIL: How Does It Work?

43. Recognition by PIL is **not subject to any special procedure**. If the validity (existence) of a status is in question (e.g. as a main or preliminary question), the Austrian PIL rules are applied and determine whether a status is recognised (i.e. exists from the perspective of Austrian law) or not; often, either Austrian substantive law or the law of the state of origin is applicable. Official registration or a formal request for recognition is not required. Under certain circumstances, a status acquired abroad (e.g. marriage in Las Vegas) is registered in the Austrian personal status registry (see *infra* IV, e.g. name of parents according to § 11 (2) PStG; gender[71] according to § 41 (3) PStG), but registration is not decisive or relevant for recognition.

44. As regards the recognition by PIL, this method is applied in the absence of any public authority decision; hence, a foreign status established, for example, by a religious ceremony or tradition may be 'recognised' if it is considered to be legally valid by the state of origin and the law of the state of origin is applied in accordance with Austrian PIL rules.[72]

45. Due to its nature, recognition by PIL requires a **revision of the legal validity** of the status as determined by foreign law. Thus, the court or public authority in question usually applies the foreign law to verify whether the status was acquired accordingly and does not 'accept' the status as documented by a foreign authority. In one case, the BVwG voiced doubts regarding the validity and authenticity of the documents used to prove a (religious) marriage. In the end, however, recognition by PIL was refused due to the fact that the groom was not present at the (necessary) registration of the religious marriage in the civil registry.[73] Similarly, doubts were discussed regarding the correctness of a confirmation of birth which named the intended mother as the birthmother.[74] Foreign law is to be applied *ex officio*, and generally, it is not the parties who ought to prove the law, i.e. the *lex originis* (§ 4 (1) IPRG; *iura novit curia*).

46. There is no particular requirement in Austrian law that the status must be documented (except for the recognition of decisions of course, where a 'decision' is required). **Documentation** (i.e. excerpts from public registries) is not required *per se*, but given their evidentiary purpose, such documents may prove that a ceremony (wedding) actually took place. As Austrian authorities must check whether the rules of the place where the wedding took place have been applied/are fulfilled, a lack of documents prevents recognition as it cannot be established that the foreign rules were followed.

[70] OGH 31 August 2006, 6 Ob 189/06x, no revision regarding the effects of a divorce 'decision' in the state of origin; *talaq* divorce.

[71] Since 2018, entries of the gender of a person into the Austrian civil registry are not limited to 'male' or 'female' but can also state 'inter' (or 'divers' or 'offen'). For details see VfGH 15 June 2018, G 77/2018-9 and VwGH 14 December 2018, Ro 2018/01/0015.

[72] OGH 20 August 1996, 10 Ob 2284/96x (marriage by tribal tradition in Nigeria).

[73] BVwG 29 May 2018, W212 2184938-1/5E.

[74] VfGH 11 October 2012, B 99/12 ua (surrogacy, Ukraine).

47. In some cases, certain documents are required for practical reasons. E.g. gender transition requires medical proof, documentary evidence has to be provided when legal entities exercise their fundamental freedoms under the TFEU by way of cross-border transformation or similar. However, if documentation exists, it can be used to prove the 'existence' of the status, so it primarily serves an evidentiary purpose. Such documentation is not limited to copies of registry entries but may also include photos, e.g. of a wedding ceremony.

48. In general, **no particular document quality** is required (e.g. private testimony, contracts etc may serve evidentiary purposes) if a document is used for evidentiary purposes in court proceedings, as long as the documents convince the civil registrar and the court. However, if a document shall have the evidentiary quality of an authentic instrument/official deed (öffentliche Urkunde), formal and material requirements have to be complied with (see § 293 (2) ZPO). If a document (translation) is evidently incomplete or inadequate and is afflicted with many errors, an amendment (i.e. authenticated translation) will be required by the court.[75]

49. Translation of the document recording the status is not required. Strictly speaking, however, national authorities might require a translation in order to use the document as proof. Documents filed with authorities to request entries in the civil registry must be translated by a duly authorised official translator or interpreter.[76]

4. Recognition by Acceptance

50. Acceptance as a specific method of recognition is applied in situations where recognition cannot be effected by recognition of a foreign (judicial) decision and the PIL rules do not point to the applicability of the 'law of origin' of the status or another law which deems the foreign status to be valid. However, it has not been qualified by the courts (or the legislator) as 'acceptance' or as a method different from the two traditional ones. Hence, related decisions are difficult to classify. Reasons for recognition by acceptance are compliance with EU law (regarding names) as well as public policy considerations, in particular the well-being/best interests of the child, and human rights (for surrogacy).[77] Doctrine requires a close connection of the situation in question with the state of origin for recognition by mere acceptance (without application of PIL rules).

51. Naturally, mere acceptance of a status based on the case law of the ECJ regarding free movement only applies to a foreign status originating from other EU Member States.[78] Otherwise, no such restrictions could be observed; in particular, in the surrogacy cases, it did not seem to play a role where the children were born. The way to identify a **state of origin** for the purpose of recognition/acceptance is hardly discussed in the academic literature or the courts. Usually, the state of origin is considered to be the registering state if the foreign status was registered in a civil registry or official documents are issued by a state. It is also possible to consider a state as the state of origin which is named by the parties as such, given that – except for recognition of decisions – the 'assessment' of the alleged state of origin does not seem to matter unless its law is considered to be applicable according to Austrian PIL rules.[79]

52. To our knowledge, the fundamental freedoms of the internal market are not explicitly discussed or referred to by the courts to support 'status recognition' outside the context of names (and

[75] See, for example, OGH 31 August 2006, 6 Ob 189/06x.

[76] § 11 (1) Ordinance of the Minister of the Interior implementing the Civil Registry (*Personenstandsgesetz-Durchführungsverordnung* 2013).

[77] VfGH 14 December 2011, B 13/11 (surrogacy, USA); 11 October 2012, B 99/12 (surrogacy, Ukraine).

[78] See, for instance, BMI-VA1300/382-III/4/b/2014, 59.

[79] See, for instance, VwGH 14 July 2005, 2005/06/0021. Such decisions, however, adhere to application of codified private international law rules.

companies).[80] In one case, where the applicants – same-sex spouses who wanted to re-marry in Austria – supported their arguments with a reference to EU law (freedom of movement and fundamental rights according to the EU Charter of Fundamental Rights) the VfGH mainly addressed the applicability of EU law in general.[81] However, despite the Dutch nationality of the applicants who had their habitual residence in Austria, it denied the applicability of EU law. (Status) Decisions of the ECtHR are rarely mentioned by the courts and administrative authorities; however, the courts often refer to the human rights of the ECHR and specific articles therein.

53. The recognition (or non-recognition) of a **name** indicated in a foreign certificate (of birth) occurs when Austrian public authorities make entries in Austrian registers or issue documents. These procedures are carried out by the competent administrative authority acting in accordance with the relevant administrative procedural rules which is most often the General Administrative Law Act (*Allgemeines Verwaltungsverfahrensgesetz*). Recognition or non-recognition by Austrian public authorities takes place by way of an administrative order (*Bescheid*), which is subject to judicial review pursued by administrative courts (meeting the requirements of Article 6 ECHR). Typically, §§ 9 and 13 IPRG, which indicate the law of the nationality of the name bearer as applicable, would be applied. If this law does not correspond to the foreign (name) status, an obligation to recognise (the name) nevertheless and to allow its use in Austria is deducted from EU law.

54. In the '**US surrogacy case**', it remains unclear whether status recognition is actually effected through recognition by judgment (despite non-violation of the *ordre public*, the US judgment might have suffered from the lack of mirrored jurisdiction ('*österreichische Jurisdiktionsformel*') of the US court according to the Austrian rules, which is a recognition requirement[82]), through application of the PIL rules or through mere acceptance. In its explanation, the VfGH addressed, on the one hand, both arguments of the lower instance: namely, the application of Austrian substantive law based on Austrian PIL rules and *renvoi* as well as the non-recognition of the US court decision. It considered both arguments unconvincing and stated that (1) the US Uniform Status of Children of Assisted Conception Act contained overriding mandatory provisions and had to be applied irrespective of the otherwise applicable law and that (2) the recognition of the US court decision did not violate the Austrian *ordre public*. This reasoning suggests that the recognition of the motherhood of the Austrian genetic and intended mother should be based on the recognition of a judgment (2) or recognition by PIL rules (1). On the other hand, the VfGH did not explicitly discuss the methodology employed and both, recognition of a decision and recognition by PIL, cannot be applicable at the same time. Furthermore, the qualification of the relevant rules of US law, in particular as regards the question of filiation/parentage, as overriding mandatory provisions and the possibility to recognise the US decision has been disputed in the literature.[83] Finally, one has to keep in mind that the VfGH is a Constitutional court whose judges are no experts in civil law or private international law, so that the methodological soundness of the decision is not self-evident. In any case, it is doubtful that the VfGH wanted to apply a 'new' method, namely the acceptance of legal facts regarding foreign surrogacies.

55. In effect, in the '**Ukraine surrogacy case**', the VfGH required the Austrian authorities to recognise the parentage of the children as determined by their Ukrainian birth certificates. This judgment might be an example of recognition by acceptance. However, some arguments of the VfGH seem

[80] A debate about the recognition of proprietary rights in movables acquired abroad started after the decision of the OGH 23 January 2019, 3 Ob 249/18s, *IPRax*, 2019, p. 548 (Lurger); Heindler, "Die Faustpfandpublizität im IPR", *Österreichisches Bank Archiv (ÖBA)*, 2020, p. 395, at 401 *et seq*; most recently: Lindenbauer, "Die Nichtanerkennung publizitätsloser ausländischer Mobiliarsicherheiten im Lichte der Europäischen Grundfreiheiten", *Austrian Law Journal (ALJ)*, 2021, p. 24 *et seq*.

[81] VfGH 12 March 2014, B 2016; see also VwGH 6 July 2016, Ro 2014/01/0018. Note: This case took place before the *Coman* judgment of the ECJ.

[82] See *supra* mn. 13.

[83] See *supra* and Lurger, "Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot", *IPRax*, 2013, at p. 285 *et seq*.

to suggest a recognition of the Ukrainian birth certificates of the twins. In accordance with the accepted methodology, however, birth certificates cannot be 'recognised' as regards the status contained therein; Austrian authorities are only required to recognise the authenticity of the document (see also *infra* at mn. 68). Thus, it is more likely that the VfGH wanted the competent authority to recognise the legal status which is put down in the birth certificates, namely the legal parentage of the Austrian intended parents. Furthermore, the application of the PIL rules – namely § 21 IPRG – would have led to the application of Austrian law, according to which the mother of a child is the woman who gave birth to it, thus qualifying the Ukrainian birthmother as the legal mother rather than the Austrian intended mother. In our opinion, a correct application of Austrian rules on the recognition of decisions and by PIL would have prevented recognition. The fact that the VfGH required 'recognition' (i.e. Austrian citizenship for the children) nevertheless suggests recognition by acceptance, however, one needs to keep in mind that the VfGH was not aware of the legal deficits of its argumentation. Hence, recognition by acceptance might have been the only way to ascertain recognition methodologically, but the VfGH did not (explicitly) use this method. Furthermore, lower instance courts[84] (and apparently also the Ministry of Justice[85]) seem to interpret the Ukraine surrogacy case methodologically as 'recognition by judgment'. As mentioned before, the term judgment is understood broadly by Austrian courts and the recognition of (the status contained in) a birth certificate which was established by a public authority (e.g. civil registry) abides by the rules on procedural recognition (of judgments). Following this opinion, which seems to be settled court practice, there is no room for acceptance as a (third) method.

5. The Role of Public Policy and Human Rights

56. Irrespective the method of recognition, public policy and human rights may be invoked in this context.[86] Whereas public policy is used by the various authorities as a two-way argument (i.e. to reject recognition and to encourage recognition), human rights (especially Article 8 ECHR) are always invoked to enable recognition.

57. Traditionally, a **violation of public policy** (*ordre public*) is a reason not to recognise a foreign status. In several cases, recognition (by PIL) was refused because the groom was not present at the (necessary) registration of the religious marriage in the civil registry and the marriage came into being as a marriage by representative/substitute.[87] Recognition by PIL would have been refused by the VwGH if Thai law had not allowed the marriage of a person who effectively changed its gender.[88] In other cases, the OGH declared that a divorce by *talaq* violates the Austrian public policy and that such a decision cannot be recognised.[89] In one case, the recognition of the marriage 'as concluded at a certain date' was refused, because the applicable law provided for the retroactive validity of a marriage from the date it was celebrated by a religious ceremony once it was registered by public authorities (e.g. religious ma-

[84] See *supra* mn. 13.

[85] See Reply to a Parliamentary Inquiry (question 4) from 10 March 2020 (573/AB vom 10.3.2020 zu 547/J (XXVII. GP).

[86] However, there are different public policy rules: § 6 IPRG regarding recognition by PIL and §§ 91a (2) and 97 (2) AußStrG regarding the recognition of foreign judgments/decisions.

[87] See, for example, BVwG 30 May 2018, W165 2178103-1/3E (Syrian marriage; groom was not present); BVwG 29 May 2018, W212 2184938-1/5E (Syrian marriage, groom was not present); contrary to the findings of the court, academic literature distinguishes between two situations: (i) marriages where a third party merely acts as a proxy for the groom/bride (*Handschuhehe*) should not trigger the public policy clause (see Verschraegen, in Rummel, ABGB, 3rd ed., Vienna, MANZ Verlag, 2004, § 16 mn. 4; Schwind, *Internationales Privatrecht*, Vienna, MANZ Verlag, 1990, p. 118 *et seq*; Nademleinsky/Neumayr, *Internationales Familienrecht*, 2nd ed., Vienna, Facultas, 2017, p. 49); (ii) if a representative is conferred the power to decide on the marriage, however, the public policy clause can be invoked (see Verschraegen, in Rummel, ABGB, 3rd ed., Vienna, MANZ Verlag, 2004, § 16 mn. 4; Nademleinsky/Neumayr, *Internationales Familienrecht*, 2nd ed., Vienna, Facultas, 2017, p. 42).

[88] VwGH 3 September 1997, 95/01/0061.

[89] OGH 31 August 2006, 6 Ob 189/06x; 28 June 2007, 3 Ob 130/07z; 7 February 2008, 7 Ob 10/08h; 13 October 2011, 6 Ob 69/11g; 20 October 2011, 2 Ob 81/11t; cf. on the decisions Heindler, "The Austrian Public Policy Clause and Islamic Family Law", *ELTE Law Journal,* 2016/2, p. 167, at 174 *et seq.*

rriage in June 2014 and registration in June 2016: marriage is valid under foreign law from June 2014; in Austria, its validity is only 'recognised' from June 2016 onwards).[90]

58. In cases regarding nobility titles in names, Austrian courts apply the Law on the Abolition of the Nobility of 1919.[91] The recognition of names acquired abroad may be refused in this regard as the abolition of nobility and the prohibition of titles of nobility form part of the Austrian *ordre public*.

59. Interestingly, recognition of a foreign decision or by PIL rules (respectively) was refused by the administrative authorities in the two surrogacy cases due to the fact that surrogacy was considered to violate the Austrian *ordre public*; the VfGH – as the higher authority – later clarified, that this is not the case (i.e. prohibition of surrogacy is a mandatory rule, but is not part of the fundamental values of the Austrian state and society and thus cannot prevent the application of foreign law, at least after the child was born).[92]

60. A party agreement or consent of both parties may not 'rehabilitate' a violation of the Austrian *ordre public* (e.g. *talaq* divorces may not be recognised just because[93] both parties consent[94]) unless the wife has given her consent right from the beginning of the *talaq* divorce.[95]

61. As regards the role of **human rights**, Article 8 ECHR was mentioned by the VfGH in the 'Ukraine surrogacy case', because its protection covers the right of a child to a certain citizenship as derived from its parents.

6. Reception, Transformation and Effects

62. As regards the classification and effects of a foreign status in Austria, reception[96] and transformation/transposition[97] can be distinguished. In general, status **reception seems to be the standard** in Austria. However, many foreign status exist in Austrian substantive law in a similar form (e.g. adoption, parentage/filiation, marriage etc), so this tendency should not be surprising. Nevertheless, Austrian law does not technically limit 'recognition' to relationships or status that exist in Austria. Austrian courts characterise the situation related to the foreign status in accordance with the available PIL rules and apply the relevant connecting factor. This may lead to the application of a law other than that of the origin or registration of the status. If the status is unknown to the applicable law, courts may reconcile differences.[98] The readiness to adapt and to reconcile usually requires that the situation is closely linked to the law of the registration/origin of the status. The fact that in the surrogacy cases a close relationship was not needed does not mean that such a relation will never be required.

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[90] BVwG 3 January 2018, W144 2163719-1/2E.

[91] See, for instance, VfGH 27 November 2003, B 557/03.

[92] VfGH 11 October 2012, B 99/12 ua (surrogacy, Ukraine).

[93] However, in situations where both parties consent a divorce might have been possible also according to substantive Austrian law; thus, the Austrian *ordre public* would not impede the recognition of *talaq* divorces in such situations.

[94] See OGH 28 June 2007, 3 Ob 130/07z and OGH 7 February 2008, 7 Ob 10/08h.

[95] OGH 27 November 2019, 6 Ob 115/19h, *EF-Z*, 2020, p. 138 (Nademleinsky); see with further references: *Gitschthaler*, "Das Zusammenspiel von IZVR und IPR im Familienrecht", in Heindler, *Festschrift 40 Jahre IPRG*, Vienna, Jan Sramek Verlag, 2020, p. 249, at 269.

[96] Reception means that the same status as abroad is recognised, e.g. same-sex couples who are legally considered to be married in the state of origin are recognised as married in the recognising state, notwithstanding whether the conditions of the *lex causae* or the *lex fori* are complied with.

[97] Transformation or transposition means that the domestic equivalent of the foreign status is applied, e.g. same-sex marriage is considered as a registered partnership for domestic purposes.

[98] See OGH 25 March 2014, 10 ObS 16/14x (recognition of a Jewish marriage); VwGH 6 July 2016, Ro 2014/01/0018 (*obiter*, as part of an accepted statement of the lower instances).

63. The only known case of **transformation/transposition** concerns same-sex marriages before the opening of the institute of marriage to same-sex couples in Austria in 2019. Until this date, same-sex marriages have been recognised as 'registered partnerships' in Austria (and were only authenticated as such in Austria by entry into the civil registry).[99]

64. As regards questions of parentage, the foreign status, namely motherhood or fatherhood, is recognised as such (i.e. no transformation). However, there is not yet a case regarding the recognition of a co-mother as mother or a co-father as father rather than as 'parent'.[100]

65. Furthermore, one has to keep in mind that there are different PIL rules (connecting factors) regarding a status and its **effects**. Therefore, the effects of a status might not be the same in Austria as they are in the state of origin for reasons of the law applicable. For example, the validity of a marriage is determined by the law of the country of which the fiancés are nationals (material validity) and *lex loci celebrationis* (formal validity) whereas the effects of the marriage are determined by the law of the (last) common nationality or of the (last) common habitual residence (§ 18 IPRG).

66. Status decisions recognised in Austria have the same legal effects as in the state of origin (extension of effects ['*Wirkungserstreckung*']).[101]

7. Renewal of Status

67. Independent from the three options of recognition, a status may be established 'anew' if the validity (existence) of a certain status that has been acquired abroad is unsure. For example, if the spouses are unsure whether their marriage is also valid with regard to Austrian law, they may marry (each other) again in Austria. However, it is not possible to 'renew' the status decision if such a status does not exist in Austria. For example, it was not possible for same-sex spouses to renew their marriage in Austria, as same-sex partners (irrespective of their nationality) could not marry according to Austrian law.[102] As of 2019, same-sex marriages are allowed (and a renewal of a married status acquired abroad before 2019 in accordance with Austrian law is possible[103]).

IV. Registration of a 'Foreign' Status

68. Courts usually recognise the legal situation/status in substance – either via recognition of a decision or by application of the Austrian PIL rules or, exceptionally, by mere acceptance; it is not the document (e.g. judgment, birth certificate) that is 'recognised' (as authentic). Documents (decisions, copies of registries; excluding judicial decisions) are usually (only) means of documentation/evidence, although their authenticity can be recognised independently from the recognition of their content (*negotium*).

69. Furthermore, the validity/existence of a foreign status for the purposes of Austrian law is (technically) independent from its registration (in Austria). However, if an Austrian national is involved, the registration (usually) 'proves' a certain status, whereas a lack of registration 'suggests' that a status is not 'recognised' in Austria. The registration thus has a special evidentiary effect: it is presumed that the status documented by the registration reflects the true underlying legal and actual situation. Therefore,

[99] VwGH 6 July 2016, Ro 2014/01/0018 (*obiter*, as part of an accepted statement of the lower instances); Lurger/Melcher, *Handbuch Internationales Privatrecht*, 2nd ed., Vienna, Verlag Österreich, 2021, mn. 2/53; Melcher, "Das neue österreichische Partnerschaftskollisionsrecht", *IPRax*, 2012, p. 82, at 84.

[100] Critically Nademleinsky/Neumayr, *Internationales Familienrecht*, 2nd ed., Vienna, Facultas, 2017, p. 160.

[101] Nademleinsky/Neumayr, *Internationales Familienrecht*, 2nd ed., Vienna, Facultas, 2017, p. 28.

[102] See VfGH 12 March 2014, B 166/2013; VwGH, 29 October 2014, 2013/01/002.

[103] See Aichhorn, "Diskriminierungsfreie Kollisionsnorm für gleichgeschlechtliche Ehen in Österreich", *EF-Z,* 2019, p. 258.

a certified copy of the status registration has a high value of proof. Nevertheless, once a status has been registered, changes may still occur and the underlying status may still be questioned. For example, in the 'US surrogacy case', the genetic and intended parents of the children were registered as parents in the birth certificate and the personal status registry for several years, before the question of parentage (and nationality of the children) came up in the context of a request for family allowance.[104]

70. A status that is acquired abroad has to be certified in Austria ('Nachbeurkundung') by entry into the Austrian civil registry if an Austrian national (or a stateless person/person with uncertain nationality and habitual residence in Austria or a Convention refugee with domicile or habitual residence in Austria) is involved (e.g. as a spouse or partner; § 35 (2) PStG). In the past[105], also a legal interest in such a certification had to be demonstrated (usually, if the status in question is not entered into a registry in the state of origin or is not certified/registered in a comparable way, e.g. limited content).[106] If a formal entry into the Austrian registry takes place, it must be in accordance with the Austrian rules; only a status that exists in Austrian law (and is covered by the term used in the Austrian personal statute law) may be (re-)registered.[107]

V. Awareness in Academia and Politics

1. Literature on Recognition

71. In Austria, the academic awareness of the issue of recognition as a challenge for a personal status acquired abroad and of recognition by acceptance as a distinct method is relatively high, although the number of Austrian contributions in form of journal articles is comparatively low – probably due to the limited number of researchers in PIL in Austria. Besides recognition of decisions and recognition by PIL, all **major textbooks on PIL** deal with the question of recognition by acceptance. *Verschraegen*[108] explains the ECJ case law on names and companies and *Egglmeier-Schmolke*[109] mentions the ECJ case law on names, while *Nademleinsky*[110], *Nademleinsky/Neumayr*[111] and *Lurger/Melcher*[112] also elaborate on other aspects of 'status recognition', namely the impact of the ECJ (and ECtHR) cases on other status related questions and information about recognition as an alternative method to recognition by PIL.

72. Aside from a couple of publications by Austrian authors in **Austrian, German and international journals** that deal with status recognition more comprehensively and also address methodological questions,[113] often, publications in Austrian journals deal with specific aspects of recognition (e.g.

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[104] VfGH 14 December 2011, B13/11 (surrogacy, USA).

[105] Federal Law from 19 January 1983 on civil status matters (Gesetz über die Regelung der Personenstandsangelegenheiten, PStG 1983), § 2 (2).

[106] VwGH 23 September 2014, 2012/01/005 (refusal to register a same-sex partnership as registered in Germany on 20 August 2008, due to a lack of legal interest; decision was based on then-§ 2 (2) PStG 1983).

[107] VwGH 6 July 2016, Ro 2014/01/0018 (refusal to register a same-sex marriage of Austrian nationals that has been established in the Netherlands as marriage; according to the Austrian civil status law at the time, the term marriage refers to a contract between two persons of a different gender; note: on 1 January 2019 marriage was opened for same-sex couples, hence foreign same-sex marriages may not be refused registration as marriage anymore).

[108] Verschraegen, *Internationales Privatrecht*, Vienna, MANZ Verlag, 2012, p. 6 *et seq*.

[109] Egglmeier Schmolke, *Internationales Privatrecht*, 2nd ed., Vienna, NWV, 2016, p. 53.

[110] Nademleinsky, *Internationales Scheidungs-, Ehe- und Güterrecht*, Vienna, MANZ Verlag, 2019.

[111] Nademleinsky/Neumayr, *Internationales Familienrecht*, 2nd ed., Vienna, Facultas, 2017, p. 31 *et seq*.

[112] Lurger/Melcher, *Handbuch Internationales Privatrecht*, 2nd ed., Vienna, Verlag Österreich, 2021, p. 59 *et seq*, 442 *et seq*; Lurger/Melcher, *Internationales Privatrecht*, 3rd ed., Vienna, Verlag Österreich, 2020, p. 47.

[113] Lurger, "Zukunftsperspektiven für das europäische Familien- und Erbrecht", in Bäck, *Familien- und Erbrecht. Europas Perspektiven*, Vienna, MANZ Verlag, 2007, p. 53; Lurger, "Der Einfluss der Personenfreizügigkeit des EGV auf das österreichische Familien- und Erbrecht", *EF-Z,* 2008, p. 126; Melcher, "Mutual Recognition of Registered Partnerships via EU Private International Law", *Journal of Personal Injury Law (JPIL),* 2013, p. 149; Melcher, "Private International Law and Registered Partnerships: an EU Perspective", *ERPL*, 2012, p. 1075; Müller/Schreiner, "Die Bedeutung des Kollisionsrechts für das Asylrecht", *migraLex Zeitschrift für Fremden- und Minderheitenrecht* (*migraLex)*, 2018, p. 62 (part I).

reception of ECJ decisions on the recognition of names[114], gender transition[115]) and often focus either on 'recognition of decisions' or 'recognition by PIL' in specific areas. All developments of the ECJ case law on names (e.g. more recent decisions such as *Bogendorff von Wolffersdorff* or *Sayn-Wittgenstein*) are described and discussed in the literature.[116] Moreover, ECtHR decisions are also explained and discussed to some extent in the academic literature. In general, academia (but also legal practitioners and the courts) are well acquainted with the relevant case law of the ECJ, the ECtHR and recent developments. In particular, ECJ case law on names and ECtHR case law are mentioned to support the (automatic) recognition of a foreign status as such. Usually, the simplicity and straightforwardness of such an 'acceptance' are mentioned favourably, whereas the risk of system disruption and the functioning of the current system (recognition of decisions and by PIL) are cited as arguments against recognition by acceptance. Lately, the discussion on recognition of foreign status decisions or a status established abroad without a decision was revived in the context of surrogacy[117] and migration[118]. Recent literature proposes recognition as a method in the field of capacity with regard to living wills.[119]

73. German (and Swiss) literature on questions of recognition (including recognition by acceptance), especially regarding the reception of the ECJ and ECtHR case law, is also widely read and used as a source of information in Austria.

2. Political and Legislative Awareness

74. Apart from a press statement issued by the conservative party aimed at **banning child marriages** concluded abroad (and determining the legal age to marry in Austria to be 18 years),[120] there is currently no political discussion regarding status recognition in Austria. However, problems arising from limping relationships – i.e. a status that has been established in one state, but is not 'recognised' in another state – have been discussed in the context of legislative proposals, e.g. regarding the enactment

[114] Kröll, "Adelsaufhebungsgesetz und Unionsbürgerschaft oder EuGH und Emotionen", *ZfRV,* 2010, p. 177; Ondreasova, "Namensrecht und das IPRG", *Zivilrecht aktuell (Zak),* 2013, p. 367; Lukan, „Adelsaufhebungsgesetz und ehemalige Adelstitel, die Teil des bürgerlichen Namens sind", *ZfRV*, 2015, p. 245; Wagner-Reitinger, "Änderungen im Namensrecht für Ehegatten und Kinder nach dem KindNamRÄG 2013", ÖJZ, 2013, p. 245, 250; Nademleinsky, "casenote", *EF-Z*, 2009/37, p. 35; Hinteregger, "Anerkennung des von einem deutschen Kind nach dänischem Recht erworbenen Doppelnamens durch die deutsche Personenstandsbehörde", *Zak*, 2009, p. 128.

[115] See, for instance, Gottschamel, "Die Regelung der Geschlechtsnamen", *Österreichisches Anwaltsblatt (AnwBl),* 2015, p. 653, 658 *et seq.*

[116] See, for example, Obwexer, "Diskriminierungsverbot und Unionsbürgerschaft", in Herzig, *Jahrbuch 2017 Europarecht*, Vienna, NWV*,* 2017, p. 63, 69 *et seq.*; Trstenjak, "Europäische Grundrechtecharta – Perspektiven für die vorsorgende Rechtspflege der Notare", in Kommenda, *Menschen.Recht Europäische Grundrechtecharta, Unionsbürgerschaft und Zugang der Bürger zum Recht – 24. Europäische Notarentage 2012*, Vienna, MANZ Verlag, 2013, p. 51, 68 et seq.

[117] Aspöck, "Anerkennung der Leihmutterschaft in Österreich!?", *Zak,* 2013, p. 371; Bernat, "casenote", *Recht der Medizin (RdM)*, 2013, p. 38; Lurger, "Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot", *IPRax,* 2013, p. 282; Herndl, "Die Abstammung des Kindes einer Leihmutter und ihre Auswirkungen im internationalen Erbrecht", *Österreichische Notariatszeitung (NZ)*, 2014, p. 253; Arnold, "Fortpflanzungstourismus und Leihmutterschaft im Spiegel des deutschen und österreichischen internationalen Privat- und Verfahrensrechts", in Arnold/Bernat/Kopetzki, *RdM*, p. 38: Das Recht der Fortpflanzungsmedizin 2016, p. 125; Komuczky, "Dogmatische Einordnung von ausländischen Leihmutterschaften in Österreich", *IPRax*, 2018, p. 282; Verschraegen, "Leihmutterschaft", *iFamZ*, 2019, p. 266.

[118] Lukits, "Mehrehen und Familiennachzug", *iFamZ,* 2017, p. 261; Müller/Schreiner, "Die Bedeutung des Kollisionsrechts für das Asylrecht", *migraLex*, 2018, p. 62 (part I) and *migraLex,* 2019, p. 16 (part II).

[119] Verschraegen, in Rummel/Lukas, ABGB, 4th ed., Vienna, MANZ Verlag, 2022, Anh. II.1. HESÜ mn. 68 (forthcoming).

[120] See, for example, https://www.derstandard.at/story/2000107886832/nr-wahl-oevp-will-eheschliessungen-kuenftig-erst-ab-18-jahren (in German). For changes in substantive law regarding child marriages see § 106a (Forced Marriage) Austrian Criminal Code as introduced on 13 August 2015 (Federal Law Gazette n°I 2015/112) and § 1 Austrian Marriage Act as amended on 25 April 2017 (Federal Law Gazette n°I 2017/59); see Viennet/Aronovitz/Bruckmüller/Curran/De Dycker/Fournier/Heindler/Pretelli/Westermark, "Mariage Forcé", *E-Avis ISDC 2018-13*, 2018, at p. 60 *et seq*; Pascher/Utz-Ferner, "Der Begriff der Familie im Asylverfahren und die Frage der Anerkennung von (Kinder-)Ehen", *ZfRV*, 2021, p. 163 at 167.

of the IPRG in 1978 in view of marriage,[121] regarding the adoption of an adult,[122] and in the recent past regarding a registered partnership which was introduced as a concept in 2012. The applicability of the *lex loci registrationis* was chosen in § 27a IPRG in order to avoid limping relationships and to ensure the recognition of such partnerships once they have been established in accordance with the law of the place of registration.[123] Most recently, § 17 (1a) IPRG has been introduced which also addresses hindrances due to limping relationships and status recognition.[124]

75. The **EU Regulation 2016/1191** on the circulation of public documents was actively discussed in Austrian academic literature;[125] a few legislative amendments have been enacted, e.g. regarding central authorities pursuant to Article 16 of the Regulation.

3. Recognition as a Topic in Legal Education

76. In legal education, recognition as an independent topic beyond the recognition of judgments and application of PIL rules hardly ever plays a role in mandatory classes (e.g. PIL lecture at the University of Graz [acceptance as a concept is discussed regarding companies and names and status]). In some elective subjects, the concept of recognition (regarding companies, names and other status relationships) is discussed in some depth at the University of Graz (e.g. in a course on 'Europäisches Privatrecht' [European Private Law]). To our knowledge, the concept of recognition by acceptance is not addressed explicitly in the education and advanced training of judges, but the relevant ECJ decisions are generally discussed. Unfortunately, we could not gather reliable information regarding officials at civil status authorities.

Table of Abbreviations:

ABGB	=	*Allgemeines Bürgerliches Gesetzbuch* (Civil Code)
AußStrG	=	*Außerstreitgesetz* (Non-contentious Proceedings Act)
BG	=	*Bezirksgericht* (District Court; first instance)
BMJ	=	*Bundesministerium für Justiz* (Federal Ministry of Justice)
BVwG	=	*Bundesverwaltungsgericht* (Austrian Federal Administrative Court)
ECHR	=	European Convention of Human Rights
ECJ	=	European Court of Justice
ECtHR	=	European Court of Human Rights
EF-Z	=	*Zeitschrift für Ehe- und Familienrecht* (Journal of Marriage and Family Law)
iFamZ	=	*Zeitschrift für interdisziplinäres Familienrecht* (Journal of Interdisciplinary Family Law)
IPRG	=	*Internationales Privatrechtsgesetz* (Austrian Act on Private International Law)
LG	=	*Landesgericht* (Regional Court; first or second instance)
LVwG	=	*Landesverwaltungsgericht* (Regional Administrative Court)
NAG	=	*Niederlassungs- und Aufenthaltsgesetz* (Settlement and Residence Act)
OGH	=	*Oberster Gerichtshof* (Austrian Supreme Court of Justice; third instance)
OLG	=	*Oberlandesgericht* (Higher Regional Court; second instance)

[121] Parliamentary Explanations, n°784, 14th legislative period, 29 [= EB RV 784 BlgNR 14. GP, 29].

[122] Parliamentary Explanations, n°471, 22nd legislative period, 34 [= EB RV 471 BlgNR 22. GP, 34].

[123] See, for example, Parliamentary Explanations, n°485, 24th legislative period, 18 [= EB RV 485 BlgNR 24. GP, 18].

[124] For details, see mn. 20 *supra*.

[125] Rechberger, "Die Europäische öffentliche Urkunde – ein Eckpfeiler der vorsorgenden Rechtspflege? ", in Rechberger, Brücken im europäischen Rechtsraum. Europäische öffentliche Urkunde und Europäischer Erbschein – 21. Europäische Notarentage 2009, Vienna, MANZ Verlag, 2010, p. 5; other literature is mostly descriptive: e.g. Reithofer, "EU-Urkundenverordnung – Neuerungen im Personenstandswesen", Österreichisches Staatsarchiv (ÖStA), 2016, p. 155; Nademleinsky/Neumayr, Internationales Familienrecht, 2nd ed., Vienna, Facultas, 2017, p. 38.

PStG = *Personenstandsgesetz* (Austrian Act on Civil Status Matters)
StbG = *Staatsbürgerschaftsgesetz* (Citizenship Act)
TFEU = Treaty on the Functioning of the European Union
VfGH = *Verfassungsgerichtshof* (Austrian Constitutional Court)
VwGH = *Verwaltungsgerichtshof* (Austrian Higher Administrative Court)
ZfRV = *Zeitschrift für Rechtsvergleichung* (Journal of Comparative Law)
ZPO = *Zivilprozessordnung* (Civil Procedure Code)