

THE ASSET TRACING
AND RECOVERY
REVIEW

EIGHTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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PREFACE

As Warren Buffet famously said, ‘only when the tide goes out do you discover who has been swimming naked’. The coronavirus pandemic has offered the global economy another opportunity to prove him right. Not only are new frauds being discovered, but the growing recession will challenge the budgets of victims, regulators and criminal enforcement bodies to bring those responsible to justice and to retrieve the proceeds. Remote interpersonal dealings are increasing the distance between business counterparties in a way that the internet did, and the growth of cryptocurrency transactions continues to do.

It is not possible to predict the trajectory of these developments. While it is now a cliché to speak of the ‘new normal’, nobody can be actually sure what that normal will be. Some even dispute that it is useful to speak of a normal at all. Nassim Taleb has argued that the financial world is more frequently and radically affected by extreme and unpredictable occurrences (which he calls ‘Sigma’ or ‘Black Swan’ events) than we acknowledge. According to Taleb, we live in ‘extremistan’ and not ‘mediocristan’. He has suggested that it is part of our makeup to blind ourselves to the influence of what we cannot predict.

Taleb may be right. For my part, I rather think that he is. But amid all the unpredictability, there are nevertheless some certainties. Society depends upon trust, and there will always be some people who abuse it. So some people will always commit fraud. Globalisation has ensured that major fraud will usually have an international element. Fraud lawyers will therefore have to be internationally minded.

Perhaps most of all, the growing international and technical complexity of fraud will continue to outstrip the ability of any one person to understand or remedy it. One of the heartening things about the legal profession over the past 25 years or so is the growth of an international community of lawyers specialising in fraud and asset tracing work who share knowledge and experience with each other about the events in their fields. This book continues to be a useful contribution to that community.

Robert Hunter

Robert Hunter Consultants

August 2020

AUSTRIA

*Valerie Hohenberg and Claudia Brewi*¹

I OVERVIEW

As new and innovative ways to channel illegally obtained assets constantly develop, asset tracing and recovery become increasingly difficult. While the Austrian legal system² provides helpful and effective remedies in this regard, new laws and regulations are regularly established to prevent fraudulent acts and connected money laundering in an even more efficient and state-of-the-art way. At present, Austrian criminal law broadly penalises, inter alia, acts of criminal fraud,³ breach of trust,⁴ fraudulent insolvency⁵ and untenable representation of fundamental information concerning certain corporations,⁶ often accompanied by money laundering.⁷ To recover related damages, claims can be based either on criminal offences or on civil fraud,⁸ and filed either with the Austrian criminal or civil courts.

Moreover, to successfully retrieve assets that have been obtained through fraudulent acts (or substitute value of such), both Austrian criminal and civil law provide for preliminary measures, such as warranting an asset freeze and correctives to obtain sufficient evidence. In this regard, it has to be noted that Austrian criminal law usually provides for faster and more efficient measures.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

Introduction to Austrian civil proceedings

Austrian civil proceedings consist of a maximum of three stages with a court of appeal or the Austrian Supreme Court deciding as third instance.⁹ Generally, minor cases (valued up to €15,000) are heard before the district courts in first instance, with the regional courts acting as the appellate courts. Major cases (valued higher than €15,000) are heard before

¹ Valerie Hohenberg is a partner and Claudia Brewi is an associate at Wolf Theiss.

² The Austrian legal system is based on codified principles of civil law. Judicial precedents are not binding, but are strongly taken into consideration by courts and the parties in dispute.

³ Sections 146 and 147 Austrian Criminal Code.

⁴ Section 153 Austrian Criminal Code.

⁵ Section 156 Austrian Criminal Code.

⁶ Section 163a Austrian Criminal Code.

⁷ Section 165 Austrian Criminal Code.

⁸ Section 870 Austrian Civil Code.

⁹ Section 2-4 Austrian Law on Court Jurisdiction.

the regional courts and appeals are decided by the courts of appeal in second instance.¹⁰ Additionally, commercial matters are decided by judges with economic expertise at either the district courts for commercial matters or commercial courts at the regional level.¹¹

With respect to the duration of civil proceedings in Austria, it can be said that, as in most jurisdictions, the complexity of a case is decisive. In Austria there is no general time limitation with respect to the closing of civil proceedings and the obtaining of an enforceable decision. However, in an international context, Austria holds a good rank regarding the overall duration of civil disputes. As a rule, courts of first instance require one year to decide on a facile case and up to three years in complex cases. Appellate proceedings may take between six months and one year. The Supreme Court usually renders its judgment within one year.

When initiating civil proceedings, a claimant must pay a court fee depending on the amount in dispute, falling due at the time of filing the claim. In principle, the parties must bear their own legal costs during the ongoing proceedings; however, the losing party must reimburse the costs of the proceedings of the winning party in the end. It is important to note that the winning party is only entitled to reimbursement of attorneys' fees on the basis of the Austrian Act on Attorneys' Tariffs, which most likely differs from the actual costs of the proceedings for each party.

Damages

If a person suffers financial damage due to fraudulent behaviour, damage claims can be filed with the competent civil court against the damaging party or parties. Under Austrian procedural law, it is possible to initiate civil proceedings concerning the same subject matter against different persons based on different legal grounds at the same or different venues or time. The individual claims may be decided differently in the judgment (given jointly or even separately) in respect to all persons involved.¹²

To initiate civil proceedings, the basic prerequisites of damage claims have to be established, which are (1) damage, (2) unlawful conduct, (3) causal link and (4) fault.¹³ The claim can be based on a contractual or non-contractual tortious misconduct, or both. The damaged party generally bears the burden of proof with respect to damages claims. However, if damages result from a criminal act, the burden of proof with respect to the casual link and fault is put on the damaging party.¹⁴

The amount of awarded damages generally depends on the degree of guilt, and thus, on whether the damaging party acted with slight negligence, gross negligence or intentionally. Damages must be compensated *in natura*, placing the claimant in the same position as if no damage occurred.¹⁵ In cases of gross negligence and intention, a claimant is entitled to receive additional compensation for lost profits.¹⁶ With respect to criminal acts of fraud and money

10 Sections 2-3 and 49-50 Austrian Law on Court Jurisdiction.

11 Section 51 Austrian Law on Court Jurisdiction.

12 Rechberger in Rechberger/Simotta, *Overview of the Austrian Civil Procedure Law*, Rn 384.

13 Section 1295 et seq. Austrian Civil Code.

14 Reischauer in Rummel, *Commentary on the Austrian Civil Code*, Section 1311 Austrian Civil Code, Rn 8, 17; Austrian Supreme Court of 2 September 1999, 2 Ob 76/97h.

15 Section 1323 Austrian Civil Code.

16 Section 1324 Austrian Civil Code.

laundering, a favourable judgement will always foresee the reimbursement of lost profits, as intentional behaviour is required. It should be noted that a legal remedy of punitive damages does not exist in Austria.

The limitation period for damage claims under Austrian law is typically three years from knowledge of the damage and the damaging party. However, if damage claims are based on intentional perpetrated criminal offences with liability for imprisonment for more than one year (e.g. aggravated fraud, breach of trust or money laundering), the limitation period is 30 years.¹⁷ To preserve one's right to claim damages that result from a damaging act, a declaration case can also be filed if the damages have not yet occurred, but are likely to occur in the future.¹⁸

Annulment

In cases of civil fraud in which a contract has been concluded, the damaged party is also entitled to file for an annulment of the contract.¹⁹ The claim must outline:

- a the unlawful and intentional misleading of the fraudulent party, and that the fraudulent party was acting intentionally, at least with *dolus eventualis*, regarding the causation of a misrepresentation to the other party;
- b that the damaged party believed in the misrepresentation; and
- c the causal link between the misrepresentation and the conclusion of the contract.²⁰

The statute of limitations for civil fraud is 30 years from conclusion of the contract.²¹

Restitution of benefits and physical objects

Austrian civil law provides for remedies of restitution of benefits and physical objects as well. In cases where the damaged party transferred an object to the fraudulent party, he or she can claim the restitution of the object as original owner from anyone who is currently in possession of it and lacks a proper chain of ownership.²² Another option would be to file an *actio publicana*, which requires the damaged party to merely prove a stronger or more legitimate possession than the current possessor.²³ However, if the possessor obtained the object against payment and based on a valid title in good faith, the damaged party may not succeed with his or her claim.

Moreover, the damaged party can also base its claims on the provision of unjust enrichment.²⁴ This again would entitle the damaged party to receive back its loss *in natura*. Should that not be possible or feasible, the damaged party has the right to receive a monetary substitute. The statute of limitations for unjust enrichment is 30 years from performance.²⁵

17 Section 1489 Austrian Civil Code.

18 Section 228 Austrian Civil Procedure Code.

19 Section 870 Austrian Civil Code.

20 Rummel in Rummel/Lukas, *Commentary on the Austrian Civil Code*, Section 870 Austrian Civil Code, Rn 3 et seq.

21 Rummel in Rummel/Lukas, *Commentary on the Austrian Civil Code*, Section 870 Austrian Civil Code, Rn 12.

22 Section 366 Austrian Civil Code.

23 Section 372 Austrian Civil Code.

24 In particular, Sections 1431 and 877, 879 Austrian Civil Code.

25 Lurger in Kletečka/Schauer, *Commentary on the Austrian Civil Code*, ON1.05, Sections 1431–1437, Rn 18.

Criminal remedies

Introduction to Austrian criminal proceedings

For a criminal prosecution to take place in Austria, Austrian jurisdiction has to be established. Whether Austrian criminal authorities are competent to pursue a case depends on the offence in question. Normally this is the case if an offence was committed or damages occurred in Austria, or are planned to occur.²⁶

Criminal investigations can either be initiated if a police department or the public prosecutor's office become aware that a crime has presumably been committed or due to a private or anonymous presentation of facts and circumstances that suffices to establish an initial suspicion. Notably, public prosecutors are bound to investigate all potential criminal offences that come to their knowledge *ex officio*. Therefore, it lies within the sole discretion of the public prosecutor whether investigations shall be continued or dismissed or if an indictment is being filed with the criminal courts to commence criminal proceedings. Whereas minor cases with a maximum punishment of one year of imprisonment or a monetary fine are decided by the district courts, major cases are decided by the regional courts in first instance. The composition of the tribunal at the regional courts depends on the seriousness of the crime.²⁷ In criminal proceedings, there is only one stage of appeal to either the competent higher regional court or the Austrian Supreme Court.

The duration of criminal investigations and proceedings depends on the complexity of the case, especially with respect to possible international requests for mutual legal assistance, the number of witnesses to be heard and expert opinions. In general, investigations shall not exceed three years, otherwise the public prosecutor is obliged to justify the longer duration to the competent criminal court.²⁸ In practice, white-collar crimes connected to cross-border money laundering most likely lead to longer investigation proceedings to collect all the necessary evidence (also through mutual judicial assistance) for the main proceedings. Notably, requests for international mutual legal assistance are not included in the three-year time limitation.

The costs for criminal proceedings are advanced by the state. However, with respect to attorneys' fees, the accused must pay for his or her costs upfront. If the accused is acquitted, his or her attorneys' fees will be partially reimbursed. If a criminal proceeding ends with a conviction, the convicted must bear, as a rule, the costs of the trial in the form of a lump sum, the costs of an expert, as well as the attorneys' fees of the private party (however, again limited to the costs according to the Austrian Act on Attorneys' Tariffs, which most often differs from the actual costs borne) and his or her own legal costs.²⁹

Victims' rights

The rights of victims of criminal offences in an investigation and subsequent criminal proceedings are very important in Austria. Therefore, the Austrian Criminal Procedure Code sets forth numerous provisions to protect and strengthen the position of crime victims. These victims' rights consist of:

- a* the right to inspect and copy the criminal file;
- b* being informed on the procedural progress;

26 Section 62–67 Austrian Criminal Code.

27 Sections 31 and 32 Austrian Criminal Procedure Code.

28 Section 108a Austrian Criminal Procedure Code.

29 Sections 389 and 381 Austrian Criminal Procedure Code.

- c* taking part in the criminal proceedings and having the right to question the accused and witnesses; and
- d* requesting the continuance of investigation proceedings closed by the public prosecutor.³⁰

It should be noted that any person directing or contributing to a crime is as criminally liable as the immediate perpetrator;³¹ thus, the victim's rights are also granted against these persons.

Private party joinder and damages

Victims of criminal offences can further join proceedings as a private party claiming damages against the accused.³² The private party joinder must be filed at court before the closing of the criminal proceeding. By this time, the exact amount claimed must be stated. As the private party is not responsible for paying fees associated with the proceedings (experts, court fees, evidence taking), the cost exposure for the damaged party essentially decreases. Notably, a private party joinder leads to the interruption of the limitation period with respect to civil proceedings.

A private party is entitled to request:

- a* the taking of evidence;³³
- b* the perpetuation of the criminal charges, in cases where the public prosecutor steps down;³⁴
- c* the following of the criminal proceedings and the presentation of an opening and closing speech; and
- d* an appeal against the decision of the court on the private party joinder.³⁵

In the case of a conviction, the court is obliged to decide on the civil claims of the private party as well. The damages can be awarded or declined; if the court is of the opinion that a claim is not sufficiently proven, based on the results of the criminal proceedings, it can also relegate the claim to the competence of a civil court. In the case of an acquittal, the court must always relegate the claim to the competence of a civil court. In this context, it should be noted that civil courts are not bound to the verdicts of criminal courts by law; however, the Austrian Supreme Court set forth that civil courts have to acknowledge the findings of the criminal courts regarding the conviction itself and the findings of the necessary facts and circumstances resulting in the conviction of the specific crime.³⁶

30 Section 66 et seq. Austrian Criminal Procedure Code.

31 Section 12 Austrian Criminal Code.

32 Section 67 Austrian Criminal Procedure Code.

33 Section 55 Austrian Criminal Procedure Code.

34 Section 72 Austrian Criminal Procedure Code.

35 Section 366 Austrian Criminal Procedure Code.

36 Legal Opinion of the Austrian Supreme Court No. RS0074219; Klicka in Fasching/Konecny3 III/2 Commentary on Austrian Civil Procedure Law, Section 411 Austrian Civil Procedure Code, Rn 29.

Criminal liability of companies

On 1 January 2006, the Austrian Corporate Liability Act came into force (VbVG). It applies to public and private entities (limited liability companies, stock companies) and business partnerships, penalising any acts against the Austrian Criminal Code.³⁷ Corporate groups do not fall under the scope of the VbVG, but parent companies can be held indirectly liable for acts of their subsidiaries due to their possible influence through principal decisions, their monitoring duty and corporate policies.

The requirements for a company to be held criminally liable include that a decisionmaker or ordinary employee committed a criminal offence,³⁸ and that it was either committed to the benefit of the company or by a breach of corporate duties.³⁹ The law provides for financial penalties (with a maximum fine of €1.8 million in total), but also alternative measures by giving orders, for example, an order to compensate damages, being put on probation or charitable activities.

Against this background, it should be noted that both individuals and a corporation itself can be held criminally liable for the same misconduct.⁴⁰

ii Defences to fraud claims

Statute of limitations

In cases where a claimant's civil claims are already time-barred, the opposing party may raise objections based on the statute of limitations. As a result, the court is obliged to exclude the civil lawsuit, as time-barred claims cannot be decided by courts. However, as Austrian civil courts do not examine a statute of limitations *ex officio*, time-barred claims may nevertheless result in enforceable judgments in cases where no objections are raised in the proceedings.

Moreover, the liability for criminal offences is subject to a statute of limitations. The time limitation commences with the completion of the offence or with the cessation of the criminalised conduct. The statute of limitations depends on the possible punishment for a certain crime and can be between one and 20 years (note that there is no statute of limitations for offences punishable by imprisonment between 10 and 20 years or by imprisonment for life).⁴¹ In cases where investigations are commenced that are not in line with the statute of limitations, criminal proceedings or a rendered verdict have to be dismissed.

Lack of competence or proof of unjustified allegations

Lack of competence in the addressed jurisdiction is another common defence argument, as the provisions in the Austrian Civil Procedure Code as well as the Austrian Criminal Procedure Code provide for various, however non-uniform, points of connection regarding the jurisdiction and competence of a court or public prosecution, for example, citizenship, location of assets and venue of the criminal act.

37 Section 1 Austrian Corporate Liability Act.

38 Section 2 Austrian Corporate Liability Act.

39 Section 3 Austrian Corporate Liability Act.

40 Section 1 and Section 3 Paragraph 4 Austrian Corporate Liability Act.

41 Section 57 Austrian Criminal Code.

Moreover, every defendant and accused has the right to prove that certain prerequisites of a claim or criminal offence are not met. As already set out, in civil law the general rule applies that every party has the burden of proof with respect to their raised allegations and arguments. In criminal law, the general rule of *in dubio pro reo* applies.

III SEIZURE AND EVIDENCE

It should be noted that asset tracing is neither a claim nor a remedy. However, it is a tool to identify assets, collect evidence and subsequently be able to assess possible legal measures and their chances of success. The overall goal is the recovery of deprived assets and consequently the denial of these assets to the persons who obtained them through fraudulent acts.

i Securing assets and proceeds

Preliminary injunctions (civil proceedings)

To secure monetary claims, one can request the issuance of a preliminary injunction at the civil courts. This can either take place in the course of pending civil proceedings in the respective matter or before filing a claim.⁴² The subjective endangerment must be successfully argued. If the damaged party already holds an enforceable decision, a request to secure these monetary claims can be filed without proving the subjective endangerment.

Following the Austrian courts, a subjective endangerment is established in cases where it is obvious that without a preliminary injunction the damaging party will damage, destroy, hide or move away assets in order to hinder the claimant from pursuing its claim.⁴³ In general, the latest behaviour of the defendant, as well as the specific circumstances of the case, are decisive.

The court can order the following preliminary measures with respect to the object at stake:⁴⁴

- a movable assets and money: judicial custody and administration; judicial prohibition of sale or pledging; judicial order to refrain third parties from moving assets;
- b immovable assets: judicial custody and administration; judicial prohibition of sale or pledging; judicial order prohibiting any registrations in the land registry; and
- c receivables: issuance of a garnishment order.

Preservation order (criminal proceedings)

To secure potential civil claims of a private party, the public prosecutor can order the securing of assets, including monies on bank accounts by prohibiting the issuance, pledging or disposal of the assets. The public prosecutor is entitled to order an asset freeze to (1) secure evidence, (2) secure civil claims and (3) secure a proprietary order that might be issued by the court at the end of the proceedings (e.g., confiscation or forfeiture).⁴⁵

Following the securing of assets, the public prosecutor will file an application to the court to seize these assets, as the order of the public prosecutor shall usually only be of a provisional nature. The public prosecutor is not bound to any explicit deadline in filing

42 Section 378 Austrian Enforcement Act.

43 Section 379, Paragraph 2 Austrian Enforcement Act.

44 Section 379, Paragraph 3 Austrian Enforcement Act.

45 Section 110 Austrian Criminal Procedure Code.

such an application.⁴⁶ Both the public prosecutor and the criminal court will lift the order to secure or seize assets when there is no more reasonable suspicion regarding the alleged criminal offences or if the prerequisites for the order ceased to exist.

In the case of a conviction, and the granting of the civil claims or parts thereof, the claim will be settled from the seized assets. In such a scenario, a forfeiture of the assets is not permissible in the amount granted to the private party.⁴⁷ However, if the court comes to a conviction but is of the opinion that the private joinder claims are not sufficiently proven and the private party is relegated to the civil courts, the private party can apply for an interim injunction in the case of a lift of the asset freeze by the criminal court. As soon as the private party holds a decision granting its claims, the criminal court must cancel the forfeiture retroactively, and the private party is entitled to request that the civil claim shall be settled from the assets that were first forfeited. If the accused has been acquitted, the court will most likely decide that the prerequisites for a seizure ceased to exist and will order its cancellation. In that case, the private party can again apply for a subsequent interim injunction related to its civil claims.

ii Obtaining evidence

Investigators

To trace, locate and identify assets to be seized, the involvement of professional investigators is often helpful. This not only refers to private investigators gathering evidence and private experts to understand certain money flows, but also to attorneys. In Austria, lawyers have access to a range of registers (WIEREG, FB, GB, ZMR) and open source data. Lawyers who specialise in asset tracing and recovery can easily connect information and decide on the necessary measures to collect crucial evidence to build a case.

Production of evidence in civil proceedings

In Austrian civil proceedings, evidence must be provided by the parties in first instance.⁴⁸ In this regard, the parties may present documents or request the questioning of witnesses to strengthen their arguments and argue against evidence requests by the opposing party. The production of evidence is in the sole discretion of the parties. However, the court is entitled to decide if certain evidence is admissible or inadmissible (e.g., not submitted in due time, not required) and if further evidence, especially an expert opinion, is required. It should be noted that the use of unlawfully obtained evidence is not generally prohibited in civil proceedings.

If only one party is in the sole possession of decisive evidence, the court may order its disclosure. However, such orders are not enforceable by law; the refusal of disclosure may only be considered by the court in its independent assessment of evidence.⁴⁹ As a result, criminal proceedings are often used as a tool to obtain the necessary evidence for civil proceedings.

46 Section 115 Austrian Criminal Procedure Code.

47 Legal Opinion of the Austrian Supreme Court No. RS0129916.

48 In appellate proceedings, evidence is generally not reexamined, and new evidence or new allegations are not admitted during the appellate proceedings.

49 Section 303 et seq. Austrian Civil Procedure Code.

Obtaining evidence in criminal proceedings

A private party joinder or presentation of facts and circumstances is a good tool to present the victim's perspective of the case to the public prosecutor (judge), and to provide additional evidence to the state or encourage the public prosecutor to produce further evidence. Especially in complex white-collar crime matters, private parties are often in the position to assess the case in greater detail and provide the public prosecutor with the background information needed to order additional evidentiary measures. Contrary to civil proceedings, means such as house searches or confiscation of data can be ordered by the public prosecutor to obtain evidence.⁵⁰ In cases of money laundering, the inclusion of the competent authorities should also be suggested. Against this background, a strong collaboration with the competent authorities in criminal proceedings is vital with respect to evidence production.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Section 165, Paragraph 1 of the Austrian Criminal Code determines that any person who hides or conceals the origin of any assets obtained through certain criminal acts – especially by making false statements in the context of legal transactions about the origin or true nature of these assets, property or other rights attached to them, the permission to control them, their transfer or about their whereabouts – is criminally liable for money laundering. According to Paragraph 2, the same applies to any person who knowingly takes possession of, stores, invests, administers, transforms, utilises or transfers these assets to a third person.

To prevent acts of money laundering in the first place, credit institutions are obliged to follow the know your customer principal. It requires banks, in particular, to gather information on the identity of their clients, customers and processed transactions before entering into business relationships (e.g., information on the ultimate beneficial owner, the origin of funds). Throughout the course of the business relationship, banks must continually check for suspicious behaviour. In cases of suspicion of money laundering, credit institutions must render a notification of suspicion to the Austrian Financial Intelligence Unit. In 2019, 2,882 of a total 3,656 notifications (in 2018: 3,494) were filed by Austrian credit institutions.⁵¹ Moreover, one part of the collaboration with the Austrian Financial Intelligence Unit also obliges credit institutions to provide information upon request irrespective of a notification of suspicion.⁵²

ii Insolvency

The Austrian Criminal Code further sets forth that any person who intentionally conceals, hides, sells or damages a part of a person's assets, pretends the of existence or honours a non-existing liability, or who otherwise reduces his or her assets in a bogus manner, thus thwarting or discounting the satisfaction of one or more of a person's creditors,⁵³ as well as any person whose gross negligence brings about that person's own insolvency,⁵⁴ can be

50 Part 8 of the Austrian Criminal Procedure Code.

51 Status report on money laundering 2019, rendered by the Federal Criminal Police Office, p 25-26.

52 Section 41 Banking Act.

53 Section 156 Austrian Criminal Code.

54 Section 159 Austrian Criminal Code.

held criminally liable. Furthermore, preferential treatment of creditors after entering into insolvency is prohibited.⁵⁵ All of these provisions also apply to executives of legal persons or an unincorporated entity if the person acts without the consent of the debtor.⁵⁶

In Austria, managing directors are obliged to file for insolvency if the requirements under the Austrian Insolvency Act are met. The law provides for 60 days from the occurrence of insolvency without delay. If a managing director does not act within this period of time, creditors can claim for the damage they have suffered as a result of the culpable delay of the insolvency application from him or her directly.⁵⁷ Furthermore, any creditor of the insolvent person or entity may lodge its claims in the insolvency proceedings. However, legal disputes that are intended to enforce or secure claims against the debtor cannot be initiated or continued after the opening of insolvency proceedings generally.⁵⁸ Only secured creditors and creditors with rights to assets that are in the possession of the debtor enjoy special provisions.

iii Arbitration

In the event of certain criminal acts by one of the parties, Austrian civil procedure law allows the contest of an arbitral award, as well as a judgment by civil courts, after it has been rendered. Thus, an arbitral award can be set aside if the requirements for an action to reopen civil proceedings are met.⁵⁹ Civil proceedings might be reopened upon application by a party, *inter alia*, due to criminal acts if:

- a a document on which the judgment was based was forged or falsified;
- b a witness, an expert or the opposing party has given false testimony during his or her examination, and the judgment is based on this testimony; or
- c the judgment was given as a result of an act that is punishable under one of the following criminal offences: wilful deception, embezzlement, fraud, forgery of documents, forgery of especially protected documents, forgery of public seals, indirect false certification, suppression of documents or displacement of boundary marks.⁶⁰

iv Fraud's effect on evidentiary rules and legal privilege

As outlined in Section II.i, in cases of criminal fraud the burden of proof with respect to fault and causal link is reversed. However, the effect on evidentiary rules in civil proceedings is limited to this. The evidentiary rules in criminal law are not affected; the principle of *in dubio pro reo*⁶¹ applies consequently.

With respect to legal privilege, an Austrian lawyer is generally bound by professional secrecy obligations in all matters that have been confided to him or her and for all facts that have otherwise become known in his or her capacity as a lawyer. This professional secrecy is safeguarded by various statutory provisions.⁶²

55 Section 158 Austrian Criminal Code.

56 Section 161 Austrian Criminal Code.

57 Section 69 Insolvency Act.

58 Section 6 Insolvency Act.

59 Section 611, Paragraph 2(6) Austrian Civil Procedure Act.

60 Section 530 Austrian Civil Procedure Act.

61 Article 6, Paragraph 2 European Convention on Human Rights; Section 259(3) Austrian Criminal Procedure Code.

62 For example, Section 321, Paragraph 1(4) Austrian Civil Procedure Code; Section 157, Paragraph 1(2) Austrian Criminal Procedure Code; Section 171, Paragraph 2 Austrian Federal Fiscal Code.

Moreover, an attorney's right to refuse to give evidence in criminal proceedings may not be circumvented by the confiscation of any documents or data medium or by the examination of an attorney's employees or subcontractors. In criminal proceedings, legal privilege extends to documents handed over by a client to his or her attorney. A verdict based on such evidence is null and void.⁶³ Civil procedure law also provides for the right to refuse to give evidence in civil proceedings. However, any evidence gained by violating this right can be used in these proceedings without any further consequences.⁶⁴ Nevertheless, an attorney's secrecy may be pierced by certain reporting obligations to the Federal Criminal Police Office regarding potential cases of money laundering or terrorist financing.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

With regard to civil remedies, a distinction must be made between the jurisdiction of Austrian courts and Austrian law as applicable substantive law in proceedings. The international jurisdiction of Austrian courts within the EU is regulated by the European Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).⁶⁵ As a rule, the courts of a Member State have jurisdiction for all claims against individuals or companies that are domiciled in that Member State.⁶⁶ In addition, as for damage claims, the courts of the place where the harmful event occurred or may occur have jurisdiction.⁶⁷

Furthermore, according to Austrian national law, a pecuniary claim may be brought before the court of the place where assets of the defendant or the claimed object is located, if Austrian courts do not have jurisdiction in any other way.⁶⁸ If proceedings with an international dimension are pending before Austrian courts, the Austrian International Private Law – including EU regulations, most notably the regulations on the law applicable to contractual or noncontractual obligations⁶⁹ – is applied to determine the applicable substantive law. Initially, parties can choose the applicable substantive law.⁷⁰ If there is no choice of law (e.g., the law applicable for an obligation arising out of damages claims), generally it is the law of the country in which the damage occurred.⁷¹

Austrian criminal law applies to all offences committed in Austria.⁷² An offence is committed at any place where the perpetrator acted or should have acted or where success

63 Section 157 Austrian Criminal Procedure Code.

64 Section 321, Paragraph 1(4) Austrian Civil Procedure Code.

65 Regulation (EU) 1215/2012 of 12 December 2012.

66 Article 4 Regulation (EU) 1215/2012 of 12 December 2012; Section 65 Austrian Law on Court Jurisdiction.

67 Article 7(2) EU Regulation 1215/2012.

68 Article 99 Austrian Law on Court Jurisdiction.

69 Regulation (EU) 593/2008 (Rome I) and Regulation (EU) 864/2007 (Rome II).

70 Article 3 Rome I; Article 14 Rome II.

71 Article 4 Rome II.

72 Section 62 Austrian Criminal Code.

occurred or should have occurred, according to the perpetrator's plan.⁷³ In the case of fraud, domestic jurisdiction is thus even given if the perpetrator acted abroad, but only if the effective loss of assets, which affects a third party, occurred in Austria.⁷⁴

ii Collection of evidence in support of proceedings abroad

Austrian courts and authorities grant judicial assistance in support of civil as well as criminal proceedings abroad. Regarding civil proceedings, the EU Evidence Regulation⁷⁵ and the Hague Evidence Convention⁷⁶ determine the judicial assistance of Austrian civil courts. Within the EU,⁷⁷ requests regarding the taking of evidence in another Member State or by a court of another Member State shall be transmitted by the requesting court directly to the court addressed.⁷⁸ The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.⁷⁹ Outside of the scope of the EU Evidence Regulation, judicial assistance is also generally granted upon request and in accordance with the Austrian law on the taking of evidence.⁸⁰ Nevertheless, a request for judicial assistance has to be declined if the remedy would be prohibited under Austrian law.⁸¹

Judicial assistance by Austrian authorities and courts in criminal proceedings is governed by various bilateral and multilateral treaties as well as the Austrian Act on International Cooperation in Criminal Matters. Austria is a signatory, *inter alia*, of the European Convention on Mutual Assistance in Criminal Matters, which provides for intensive cooperation in the field of the investigation of crimes, prosecution of criminal suspects and procuring of evidence, and other multilateral treaties that aim to enhance international cooperation in criminal matters, including asset tracing and recovery, such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

As fraudulently obtained assets are often funnelled or even laundered into other (often several) jurisdictions, it is also vital to bear in mind which jurisdictions allow for seizure of assets or proceeds and under which prerequisites. In some jurisdictions it is necessary to link the assets directly to a crime. However, in other jurisdictions it is sufficient to link assets only to the person who committed a crime.

In 2017, the European Regulation to facilitate cross-border debt recovery in civil and commercial matters went into force.⁸² The established European account preservation order (EAPO) prevents the transfer and withdrawal of funds that are held by a debtor or on his or

73 Section 67, Paragraph 2 Austrian Criminal Code.

74 Austrian Supreme Court of 12 March 1981, 12 Os 11/81.

75 Regulation (EU) 1206/2001 of 28 May 2001.

76 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970.

77 With the exception of Denmark according to Article 1, Paragraph 3 Regulation (EU) 1206/2001 of 28 May 2001.

78 Article 2 Regulation (EU) 1206/2001 of 28 May 2001.

79 Article 10 Regulation (EU) 1206/2001 of 28 May 2001.

80 Sections 38 and 39 Austrian Law on Court Jurisdiction.

81 Section 38, Paragraph 2 Austrian Law on Court Jurisdiction.

82 Regulation (EU) No. 655/2014 of 15 May 2014.

her behalf in a bank account maintained in a Member State of the European Union (except Denmark). It is designed for creditors, but also for companies or consumers domiciled in a Member State, holding monetary claims against a debtor in another Member State.

The application for an EAPO can be filed at any procedural stage. The debtor is not included in the proceedings to guarantee the surprise effect (*ex parte* procedure). The application shall be filed with the court competent for the proceedings on the substance matter or where a decision on the subject matter has already been obtained.⁸³ In cases where a creditor has not yet obtained a judgment in the main proceedings, the court shall issue its decision on an EAPO within 10 working days, or otherwise five.⁸⁴ The obtained EAPO can serve for further account preservations in other Member States. Thus, the creditor must only prove once that the requirements for an order are met.⁸⁵

Another feature of the EAPO is that it assists creditors in tracing bank accounts. In the case where a creditor has reason to believe that the debtor holds accounts with a bank in a specific Member State, but without having any further details, he or she may file a request to obtain account information.⁸⁶ This application requires an existing enforceable title or a risk that the enforcement would be jeopardised otherwise.

iv Enforcement of judgments granted abroad in relation to fraud claims

Enforcement proceedings in Austria are governed by the Austrian Enforcement Act. By virtue of Austria's membership in the EU, a distinction needs to be made between judgments filed by EU Member States and non-EU judgments when assessing the enforceability.

The procedure for the enforcement of EU judgments in Austria is governed by the Brussels I Regulation. Within this 'Brussels regime', a judgment rendered in a Member State of the EU is recognised in any other Member State without any special procedure.⁸⁷ Notwithstanding, there are a number of limited grounds on which recognition can be denied (e.g., judgments contrary to the *ordre public* of Austria).⁸⁸ Preliminary injunctions, which are of particular importance regarding asset tracing, are also classified as judgments in the sense of these provisions.

The enforcement of foreign or non-EU judgments requires a declaration of enforceability by the competent Austrian court prior to the actual enforcement.⁸⁹ The declaration of enforceability is issued if that judgment is enforceable in the state of origin and the reciprocity with the state of origin is established by bilateral treaties or other instruments.⁹⁰ However, even if these requirements are met, a declaration of enforceability may still be refused for several reasons (e.g., if the judgment or its enforcement violates basic principles of Austrian law (*ordre public*)).⁹¹ Once the declaration of enforceability has become effective, the foreign judgment may be considered equal to domestic enforceable titles.

83 Article 6 Regulation (EU) No. 655/2014 of 15 May 2014 .

84 Article 18 Regulation (EU) No. 655/2014 of 15 May 2014 .

85 Article 22 Regulation (EU) No. 655/2014 of 15 May 2014 .

86 Section 424 Austrian Enforcement Act; Article 14.

87 Article 36 Regulation (EU) 1215/2012 of 12 December 2012.

88 Article 45 Regulation (EU) 1215/2012 of 12 December 2012.

89 Section 403 Austrian Enforcement Act.

90 Section 406 Austrian Enforcement Act.

91 Section 408 Austrian Enforcement Act.

v Fraud as a defence to enforcement of judgments granted abroad

As discussed in Section V.iv, Austrian courts may refuse recognition or enforcement of a foreign judgment upon a request of the opposing party if it is not in accordance with the Austrian *ordre public*.⁹² Consequently, the Brussels I Regulation provides that the enforcement of a judgment granted abroad due to fraudulent behaviour (e.g., falsification of documents) may be refused.

On national level, the person against whom enforcement is sought can also apply for a refusal of the declaration of enforceability or the enforcement contrary to the Austrian *ordre public*. In the case of judgments rendered in other EU Member States, the opposing party may raise arguments against the enforcement with an application for discontinuation of the enforcement. Regarding judgments of third states, it should be noted that the opposing party is not included in the proceedings on the declaration of enforceability, but can file an appeal against such subsequently.⁹³

VI CURRENT DEVELOPMENTS

In the course of the implementation of the Fifth European Directive on the prevention of the use of the financial system for purposes of money laundering or terrorist financing,⁹⁴ new laws came into force with regard to the supervision of virtual currencies as well as enhancing international collaboration between the competent authorities.

The Law on Registration and Disclosure of Ultimate Beneficial Owners (WiEReG) was also adapted in January 2020.⁹⁵ The WiEReG sets forth that legal entities domiciled in Austria and trusts administered in Austria must identify their beneficial owners, carry out appropriate and regular checks and report these to the registry. The accuracy of the registered beneficial owners has to be confirmed on an annual basis from now on. In addition, public excerpts from the registry can now be obtained.

Moreover, in May 2020, the Austrian National Council approved the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.⁹⁶ In addition to confiscation measures and money laundering offences, it also regulates, among other things, minimum standards for the freezing, seizure and confiscation of certain assets and investigative powers with regard to accounts and banking transactions. The effects on Austria's national laws are not yet foreseeable, however changes with respect to the burden of proof regarding acts of money laundering were already under public discussion.

92 Article 45, Paragraph 1a (EU) 1215/2012 of 12 December 2012.

93 Sections 410 and 411 Austrian Enforcement Act.

94 Directive (EU) 2018/843 of 30 May 2018.

95 See <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009980> (checked on 15 July 2019).

96 See https://www.parlament.gv.at/PAKT/VHG/XXVII/II/I_00023/index.shtml.

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