*Christian Klausegger/Therese Fritz**

U.S. Discovery: The Austrian Perspective

I. Introduction

1. Scope

This paper intends to give a brief overview of the issues arising in connection with the taking of evidence in Austria in civil proceedings pending before U.S. courts, especially with regard to the deposition of witnesses and the disclosure of documents in the context of the pre-trial discovery.

2. Differences between Legal Systems

Taking evidence in line with U.S. rules in Austria may trigger a number of issues, as there are substantial differences between the U.S. legal system and the Austrian legal system.

The Austrian legal system considers the taking of evidence as sovereign act which may only be conducted by Austrian courts. Discovery rules are foreign to the Austrian system.[1] These and other differences may create issues. For example, should counsel in a U.S. trial try to take evidence in Austria, such as questioning a witness, this may interfere with Austria's sovereignty even if it was based on a permission of a U.S. court.

In the following we describe two possibilities available to foreign courts in the framework of legal assistance to obtain evidence in Austria in line with Austrian law:

- request to an Austrian court to take evidence and
- request to take evidence directly in Austria.

Further, the quite strict data protection laws in Austria may interfere with certain obligations resulting from U.S. procedural law. While an extensive discussion of this important issue would exceed the scope of this paper we shall briefly address data protection issues that may arise in connection with the taking of evidence in Austria.

II. Request to an Austrian court to take evidence

1. Basis and Scope of Legal Assistance

In general, according to Austrian law Austrian courts shall provide legal assistance to both domestic and foreign courts. Often the legal assistance to foreign courts is based on European Community law or international public law. However, as the U.S. are not a member to the European Union, the rules on legal assistance deriving from European Community law are not applicable. Moreover, no international treaties or bilateral contracts are applicable with regard to legal assistance between the U.S. and Austria. The **only** bi-lateral contract in force which could be relevant is the "*Treaty on Friendship, Commerce and Consular Rights between the Republic of Austria and the United States of America*" dated 19 June 1928. However, this treaty does not contain any rules on legal assistance.

Although the duty to provide legal assistance to U.S. courts can neither be derived from bi-lateral contracts nor from international treaties between Austria und the U.S., Austrian courts provide legal assistance to U.S. courts on the basis of customary public international law.

Austrian courts may provide legal assistance upon request of U.S. courts only pursuant to the Austrian rules on legal assistance contained in Austrian procedural law (§§ 38 et seq. Jurisdiction Act (*Jurisdiktionsnorm – JN)*, § 12 Austrian Act on the service of documents (*Zustellgesetz – ZustG*).[2]

§ 38 Jurisdiction Act (*Jurisdiktionsnorm – JN)* provides:

> *"Para 1: Austrian courts must provide legal assistance to foreign courts upon request should other applicable rules not provide otherwise.*
>
> *Para 2: Legal assistance must be refused if*
>
> – *the requested action does not fall within the jurisdiction of Austrian courts (i.e., a matter of civil procedure under Austrian law)*
>
> – *if the requested action is prohibited by Austrian laws."*

According to § 38 JN, only foreign courts and other foreign public authorities may request legal assistance from Austrian courts. Therefore, Austrian courts will not comply with requests from legal counsel.

2. Applicable Rules

§ 39 JN describes how legal assistance should be rendered. It reads:

> *"Para 1: The requested legal assistance must be carried out according to Austrian law [...].*
>
> *Para 2: The court may only deviate from applying Austrian law if the foreign court explicitly requests that the requested action shall be carried out pursuant to foreign law and if this action does not infringe Austrian law [...]."*

In general, Austrian courts apply Austrian procedural law when granting legal assistance, which in many areas diverges from the U.S. rules with regard to the taking of evidence.

However, if the U.S. court explicitly requests the taking of evidence to be carried out according to U.S. procedural law, Austrian courts may follow certain rules pursuant to § 39(2) JN if the procedure to be followed as requested by the U.S. court is not prohibited in Austria. While the request may not be rejected if the requested method is not prohibited but simply not known to the Austrian system, the taking of evidence is always prohibited if it infringes Austrian laws.[3]

3. Practical Implications

(a) Deposition of witnesses

For example, the right to refuse to give evidence is an area where Austrian law and U.S. law differ, as Austrian law knows more reasons than U.S. law according to which a witness may refuse to give testimony. Should a U.S. court order a party to provide testimony of a witness in Austria as part of pre-trial discovery, conflicts may arise if this witness refuses to give

* Binder Grösswang, Vienna, Austria.

1 *Czernich*, Österreichisch-Amerikanisches Zivilprozessrecht, JBl 2002, 625.

2 Section 16 Decree of 7 May 2004 on the international legal assistance and other legal relations with foreign countries in civil matters.

3 *Bajons* in *Fasching*[2], Zivilprozessgesetze, § 39 JN Z 13; *Czernich*, 627 et seq.

testimony on grounds which are legitimate only under Austrian law as this refusal may lead to high fines and other negative effects on the U.S. trial.[4]

Moreover, the Austrian rules on civil proceedings demand a high level of substantiation which also extends to the hearing of witnesses.

In Austrian proceedings courts therefore often reject questions from parties should they not derive from the pleaded facts of the case. However, in legal assistance matters courts may accept questions which normally would not be sufficiently substantiated for Austrian proceedings.

(b) Documentary Evidence

The request for disclosure of documents must be highly substantiated pursuant to the Austrian rules on civil proceedings. A request for disclosure of documents must contain a description of the document and its content. Purely exploratory evidence ("*Ausforschungsbeweis*") is not admissible. For example motions to disclose "the entire correspondence" or "pertinent documents" have been rejected by Austrian courts.[5] Unsubstantiated motions for the disclosure of documents are handled quite restrictively by the Austrian courts.

Hence, Pegal assistance requests for disclosure within the pre-trial discovery may not be sufficiently substantiated under Austrian law and may therefore be rejected by the Austrian courts. Although legal assistance is the only enforceable way regarding the disclosure of documents it is rarely used, as parties to a U.S. trial mostly comply with the requests for disclosure in order to avoid fines and other adverse consequences on the U.S. trial.[6]

III. Request to take evidence directly in Austria

1. Basis and Scope of Legal Assistance

While in principle the direct taking of evidence in Austria would interfere with Austria's sovereignty, U.S. courts may under certain circumstances directly take evidence in Austria pursuant to § 39a JN, which reads as follows:

> *"Para 1: The direct taking of evidence by foreign courts in Austria is only acceptable if permitted by the Minister of Justice.*
>
> *Para 2: Outside the scope of the Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, the request shall be permitted if:*
>
> - *reciprocity is ensured,*
> - *the intended taking of evidence does not violate basic principles of the Austrian legal system including the regulations contained in the European Convention on Human Rights (i.e., no violation of the Austrian "ordre public"),*
> - *the intended taking of evidence is performed on a voluntary basis and foreign courts do not apply coercive measures within Austria,*
> - *the intended taking of evidence complies with Austria's duties deriving out of public international law as well as Austria's foreign policy interests.*
>
> *Para 3: The permission may depend on the participation of an Austrian court in the taking of evidence [...]."*

Direct taking of evidence in civil matters by a foreign court is only permissible if authorized by the Minister of Justice pursuant to § 39a JN.[7] If no permission is granted, the direct taking of evidence in Austria will qualify as a breach of Austria's sovereignty.[8]

There are no specific formal requirements regarding the submission of the request. After having received a request from a foreign court, the Minister of Justice has to check whether the requirements set out in § 39a JN are met. If all conditions are met, the Minister of Justice has to grant the authorization. Hence, the Minister has no discretion in this regard. However, according to § 39a(3) JN the Minister of Justice may order a mandatory participation of an Austrian court when taking the evidence, such as hearing a witness.

2. Applicable Rules

§ 39 JN governs the applicable law in connection with the request to an Austrian court to take evidence pursuant to § 38 JN. However, there is no comparable rule regarding the applicable procedural rules when directly taking evidence in Austria. According to legal literature foreign courts may take evidence directly in Austria according to their procedural rules if these rules do not violate the Austrian "*ordre public*" or conflict with Austria's duties deriving out of public international law as well as Austria's foreign policy interests (please refer to § 39(2) JN).[9] The foreign authorities may, however, not apply any coercive measures pursuant to § 39a(2) JN.

3. Practical Implications

(a) Deposition of witnesses

As described above the direct taking of evidence pursuant to § 39a JN is only permissible if carried out by a foreign court. As already set out above not only courts but also may be subsumed under this rule. However, no permission can be granted to private persons to take evidence directly in Austria. Although the foreign court may also appoint a third person representing the court in the taking of evidence, this representative must, however, be independent of the parties.

Legal authorities hold that legal counsel of the parties cannot be representatives of the foreign court within the meaning of § 39a JN, even if they are authorized or assigned to do so by the U.S. court.[10] The annotations to the government bill to § 39a JN support this view.

Although, according to the above mentioned, legal counsel cannot be granted permission for directly taking evidence pursuant to § 39a JN, the direct taking of evidence by U.S. legal counsel circumventing the Austrian rules on legal assistance will nevertheless be qualified as a breach of Austria's sovereignty. Even though legal counsel are private persons with no coercive power in Austria, they may try to take evidence based on a judicial approval from a U.S. court. The failure of a party to co-operate may lead to penalties on the opposing party upon request of the legal counsel. Therefore discovery by U.S. legal counsel within Austria is considered as foreign sovereign act which infringes Austria's sovereignty and is not permissible.[11]

4 *Czernich*, 627

5 *Kodek* in *Fasching/Konecny*², Zivilprozessgesetze, § 303 ZPO Rz 22 et seq.

6 *Heidinger*, Geklagt in den USA, 86.

7 *Sengstschmid*, Handbuch Internationale Rechtshilfe in Zivilverfahren, 80.

8 *Czernich*, 627.

9 *Fucik* in *Fasching/Konecny*², Zivilprozessgesetze, §39a JN Rz 16.

10 *Fucik* in *Fasching/Konecny*² §39a JN Rz 4ff; *Mayr* in *Burgstaller/Neumayr*, IZVR § 39a JN Rz 2.

11 *Fucik* in *Fasching/Konecny*² §39a JN Rz 4ff; *Czernich*, 628.

Against this background the Minister of Justice has chosen a practical approach. Although legal counsel may explicitly not be qualified as commissioner of the U.S. court pursuant to Austrian law, the Minister of Justice usually approves requests for the permission to take evidence by U.S. legal counsel (if supported by U.S. courts). These permissions, however, often include an order pursuant to § 39a(3) JN that an Austrian court shall participate in the taking of evidence. However, even if these requests are approved by the Austrian Minister of Justice, it should be reiterated that neither foreign authorities nor legal counsel may exert coercive powers in Austria.

The reason why the Minister of Justice has adopted this approach may be that prior to the adoption of this practice more and more U.S. lawyers had taken depositions and requested the production of documents or things according to U.S. procedural law in Austria without having even asked for a permission or legal assistance. Although these actions were not permitted in Austria, the parties concerned very often abide by these requests in order to avoid risking sanctions by the U.S. courts.[12]

(b) Documentary Evidence

The request to directly take evidence in Austria is not relevant with regard to the disclosure of documents, as the parties may not apply any coercive powers, even if their application pursuant to § 39a JN should be granted. As already set out above, most parties nevertheless abide by the requests in order to avoid the risk of being fined and other potential adverse effects.

12 *Heidinger*, 86.

IV. Data protection issues

Even if a request for disclosure of documents is permissible under Austrian law, data protection issues may occur.

The Austrian Act concerning the Protection of Personal Data (*Datenschutzgesetz – DSG*) is implementing the "*Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*" ("*Data Protection Directive*") into the Austrian legal system. The principle of these provisions is that personal data shall only be transferred to countries outside the EU that guarantee an "adequate" level of protection. According to the European Commission the U.S. do not ensure this adequate level of protection.

One should therefore keep in mind that conflicts may arise when the disclosure of certain documents or data is ordered by U.S. courts which could lead to a situation in which a party is obliged to submit documents or data under U.S. law but on the other hand this disclosure is not permissible under the Austrian laws on data protection. This conflict can lead to situations in which it will be impossible to abide to both the U.S. order and to Austrian data protection law.

While full compliance with both obligations therefore may often not be possible, good faith compliance with both obligations seems to be possible. The potential for conflicts can also be reduced should counsel agree to submit certain documents or data in anonymized form or if the number of submitted documents is reduced to the absolute necessary.

*Eckard von Bodenhausen**

U.S. Discovery and Data Protection Laws in Europe

I. Introduction

Generally, German and European companies will experience conflicting expectations, if they are required to submit data in the course of U.S. pre-trial discovery: Shall they refuse to produce the data and risk sanctions according to U.S. law or obey the request and expose themselves to sanctions for the violation of German and European data protection laws?

The issue of cross-border pre-trial discovery has come into focus since the application of the rules was extended to "electronically stored information," also referred to as "ESI." Often companies are under significant pressure to produce data in relation to litigation and law enforcement investigations brought in the U.S.; the material that is required will frequently contain personal data relating to employees or third parties.[1] Therefore, a conflict arises between the disclosure obligations under U.S. rules and the application of the European data protection laws.

II. Conflict with German data protection rules

1. Extent of data protection / Application of data protection laws

The general German data protection requirements are set out in the German Federal Data Protection Act (*Bundesdatenschutzgesetz, "BDSG"*).[2] According to § 1 BDSG, protected data are all personal data generated inside Germany relating to an identified of identifiable natural person. Data regarding legal persons, partnerships or associations having no legal personality are only subject to the scope of protection if a personal reference exists.[3] Therefore, the following company data are protected by all means:

- Customer related data, as long as customers are natural persons;
- Employment records; and

* Dr. *Eckard von Bodenhausen*, LL.M Brödermann & Jahn, Hamburg, Germany

1 Article 29 Data Protection Working Party, Working Document 1/2009 on pre-trial discovery for cross border civil litigation; Working Paper 158 adopted on 11 Feb. 2009 (available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2009/wp158_en.pdf), p. 2.

2 Federal Data Protection Act (BDSG) in the version promulgated on 14 Jan. 2003 (Federal Law Gazette I, p. 66), last amended by Article 1 of the Act of 14 August 2009 (Federal Law Gazette I, p. 2814), in force from 1 Sept. 2009.

3 BGH NJW, 1986, 2505.