

Recognition of Mexican Divorces in Europe

Part II*

AUSTRIA

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Before the occupation of Austria by Nazi Germany, most of the provisions on marital law including divorce were—apart from a few special legal provisions—part of the ABGB (Civil Code). The Germans abolished most of these provisions and introduced a new marital law (*Eherecht*) which purported to be a unification of German and Austrian law, but which was in truth the introduction of slightly modified German law. It must be admitted that, apart from several typical Nazi elements which were later eliminated, this law was far more up-to-date than the century-old provisions of the ABGB; and thus, after the liberation, Austria preserved this law and it is connected (Ordinances to Implement the Marital Law) by special legislation, eliminating all peculiar Nazi-elements therefrom¹ and modifying some of the other provisions thereof. Thus the main source is the *Ehegesetz*, the Marital Law, as amended by Austrian legislation plus some former provisions of the Austrian Civil Code not formerly abolished by the Germans.² The Austrian procedural provisions, which are however little connected with the subject matter here involved, were left intact by the Germans and are, of course, still in force today. The main legal basis for our topic is the “4.

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¹ *E.g.*, the provisions that “Aryans” are forbidden to marry “non-Aryans,” especially Jews.

² Sections 44-46, 89-93, 98-99, 107, 110, 117, 118 and 122 ABGB.

Ordinance to Implement and to Complete the Marital Law and to Unify the International Family Law" of October 25, 1941, designated as "4. EV" (4. Eheverordnung, i.e. 4. Marital Ordinance); moreover the rather scanty provisions of the Austrian Civil Code concerning Private International Law (Conflict of Laws)³ may be *auxiliarily* relied upon.

Sect. 24 of the 4. EV. deals with foreign divorces. This section contains a peculiarity: it refers expressly to Sect. 328 of the German Law on Civil Procedure, and, while in Austria even during the German occupation the former Austrian procedural laws were kept in force and, of course, are still in force, the German Law on Civil Procedure had and still has to be applied as referred to in Sect. 24 of the 4.EV (details see later).

The said Sect. 24 of the 4.EV provides that a foreign divorce decree (or judgment or whatever the name might be) is effective in Austria only if the Federal Ministry of Justice, upon application, certifies by decree that the presuppositions of its (domestic) acknowledgment are existing, whereby the provisions of Sect. 328 of the *German* Law on Civil Procedure shall be applied in accordance with its general meaning. (The same applies also to decisions concerning nullity and separation and also to declaratory judgments about the valid existence or non-existence of a marriage.) If, however, both spouses are citizens of the same country where the divorce decree was issued, then this decision is recognized automatically in Austria without the necessity of resorting to the Ministry of Justice for certification.

Sect. 328 of the German Law on Civil Procedure, dealing with the recognition of foreign judgments in general, provides that such recognition is excluded in the following cases:

(1) If the courts which issued the judgment in question had no jurisdiction in this matter according to domestic (Austrian) law.

(2) If the defendant who lost the action is an Austrian and did not participate (approximately: appear) in the action, provided that the complaint was not served upon him personally within the country where the proceedings took place or was not served upon him in Austria by way of Austrian legal assistance.

(3) . . . does not apply here . . .

(4) If the acknowledgment of such a judgment would violate the *bonos mores* or the specific purpose of an Austrian Law.

³ Sections 4, 33-38, 300 ABGB.

(5) If reciprocity is not guaranteed; but if the judgment is only a divorce judgment (status judgment) without being connected with an adjudication of support, reciprocity may be waived.

Pursuant to Sect. 76(2) of the Austrian Law on Jurisdiction the provisions of para. 1 of the same section, about Austrian jurisdiction in marital matters, shall not be an obstacle to the recognition of a foreign divorce judgment if the husband was not an Austrian citizen or did not have his habitual residence in Austria.

Conclusions

The aforesaid legal provisions, taken together, show the following results:

(1) If (from the Austrian point of view) both spouses were foreign citizens at the time the action was commenced, or if the husband was a foreign citizen or if the husband had his domicile abroad,⁴ the foreign divorce (separation, nullity, etc.) judgment will be recognized in Austria.

(2) If the husband was a foreign, but the wife an Austrian citizen, the foreign judgment will be acknowledged in Austria only if the wife appeared in the proceedings or if complaint and summons were served upon her either within the state (country) where the proceedings took place, or, if she lived in Austria by way of Austrian legal assistance, *i.e.*, service through a requested Austrian court pursuant to the provisions of the Austrian Law on Civil Procedure.

In both instances the substantive laws of the country or state where the husband is a citizen must be applied. If both spouses were citizens of the country where the action was pending, the recognition takes place without further ado; otherwise the Austrian Ministry of Justice will, upon application, have to decide in a binding way whether such a foreign divorce should be acknowledged.⁵

(3) If, however, courts of a third country were resorted to, the

⁴ This criterion of domicile is one of the exceptional legal provisions in Austria where the domicile and not the citizenship is the point of contact. It will be applicable especially in a case where both spouses are foreigners, but of different citizenship; then the law of the husband's domicile will be decisive.

⁵ There is no resort to the ordinary courts; but since the said acknowledgment or its refusal constitutes an administrative decree of the office of last instance (Ministry of Justice), the Administrative Court (Verwaltungsgerichtshof) may be invoked.