
THE IMPACT OF THE COVID-19 PANDEMIC ON CIVIL PROCEEDINGS IN AUSTRIA¹

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KEYWORDS

Austria, avoidance, civil procedure, COVID-19, enforcement law, insolvency law, video conference

ABSTRACT

The COVID-19 pandemic has not only posed immense challenges to public health but has also necessitated a significant shift in legal frameworks to address the dynamic circumstances it has created. This article provides an overview of the measures taken in Austrian civil procedure law to cushion the impact of the pandemic. It covers changes that have reshaped the structure of civil procedural law in the long term, as well as specific „COVID provisions” that are still relevant today in some cases. Among other things, it discusses amendments to the Insolvency Code and the Execution Code, amendments to the General Social Insurance Act and the Federal Tax Code, and the 1st and 2nd COVID-19 Justice Accompanying Acts.

¹ Due to the broad scope of the topic, not all changes brought about by the COVID legislation can be presented in this article; for example, adjustments to fee law through §§ 14 et seq. 2nd COVID-19-JuBG and in § 35 GebG have to be excluded.

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I. INTRODUCTION

At the beginning of 2020, the COVID-19 pandemic hit Austria – like almost the entire world – hard. Over the course of the pandemic, the Austrian legislation had to take various measures to cushion the impact of the crisis on all areas of daily life. Most notably in spring 2020, some drastic regulations were enacted in civil procedure law. This article discusses changes that have reshaped the structure of civil procedural law in the long term (sections 2 to 5). In addition, special “COVID provisions” that are still relevant today in some cases will be presented (sections 6 and 7).² Alongside a general overview of the major changes, the focus is also on a more in-depth examination of individual topics that are or were problematic.

II. AMENDMENTS TO THE INSOLVENCY CODE

The first rapid amendment to the Insolvency Code (hereinafter: IO) already took place in March 2020; it concerned the obligation of a materially insolvent debtor to file an application within the scope of § 69 (2a) IO. This provision extends the maximum period³ for filing an insolvency petition from the (generally applicable) 60 days to 120 days if the insolvency (or in some cases over-indebtedness) has occurred because of a natural disaster. It was created in 2002 after a flood disaster in order to protect victims who were to expect compensation payments in a timely manner from nevertheless having to file an insolvency petition within the 60-day period.⁴ Article 22 of the 2nd COVID-19 Act then permanently added “epidemic and pandemic” to the demonstrative⁵ list of natural disasters. However, the majority of the Austrian literature assumes that this inclusion is merely of a clarifying nature,⁶ which is supported not only by the

² See (only on insolvency law) Eriksson, ‘COVID-19: Welche insolvenzrechtlichen Bestimmungen gelten noch, welche haben noch Bedeutung?’ [2022] ZIK 2; Langthaler, ‘Verlängerung von COVID-19-Bestimmungen’ [2022] iFamZ 4.

³ Schumacher in Koller/Lovrek/Spitzer (eds), *IO – Insolvenzordnung* (2nd edn, Verlag Österreich 2023, KLS²) § 69 IO Rz 26.

⁴ AB 1286 BlgNR 21. GP 1; Dellinger in Konecny/Schubert (eds), *Kommentar zu den Insolvenzgesetzen* (Manz, looseleaf service, 1997–2010) § 69 KO Rz 13; see also Reich-Rohrwig in Straube/Ratka/Rauter (eds), *Wiener Kommentar zum GmbH-Gesetz* (Manz, looseleaf service, since 2008) § 25 GmbHG Rz 115.

⁵ Dellinger in Konecny/Schubert (n. 4) § 69 KO Rz 13; Schumacher in Bartsch/Pollak/Buchegger (eds), *Österreichisches Insolvenzrecht II/2* (4th edn, Verlag Österreich 2004) § 69 KO Rz 99.

⁶ Stegner/Kalser/Wetter, ‘Ausgewählte Problemfelder der COVID-19-bedingten Änderungen des Insolvenz- und Eigenkapitalersatzrechts’ [2020] RdW 406, 407; Trenker, ‘Insolvenzrecht’

wording (“or similar disaster of comparable scope”) but also by the above-mentioned genesis of § 69 (2a) IO. A natural disaster situation is comparable to the situation of “healthy” entrepreneurs whose financial troubles arose from the pandemic or the measures taken to cope with it.⁷ Nevertheless, the legislator’s clarification is sensible because it ensures – especially in times of crisis – an urgently needed legal certainty and clarity.⁸ The general requirement of the insolvency petition being filed “without undue delay” must also be observed with respect to the extended time limit;⁹ therefore, the time limit of 120 days is only permissible in conjunction with promising and realistic (judicial or extrajudicial) attempts at reorganisation.¹⁰

Article 33 of the 4th COVID-19 Act then amended the Insolvency Code again: the old version of § 78 (2) IO, dating back to the original version of the Insolvency Code of 1914, had provided for an obligation to notify relevant post and telegraph offices, airports, railroad stations and shipping stations of the opening of insolvency proceedings. The obligation to notify airports, railroad stations and shipping stations (which had already been insignificant in practice¹¹) was permanently abolished.¹² According to the legislative materials, this measure is aimed at the avoidance of personal interactions in service processes.¹³ However, the obligation to notify postal and telegraph services still remained in effect. This was considered necessary with regard to the postal block, which only takes effect from the time of the notification.¹⁴ The obligation to notify the superior authority

in Resch (ed), *Das Corona-Handbuch – Österreichs Rechtspraxis zur aktuellen Lage*^{1.06} (As at: 1 July 2021) Kap 14 Rz 20; cf. Garber/Neumayr, ‘Zivilverfahren in der Krise: COVID-19 und die Auswirkungen auf zivilgerichtliche Verfahren’ in Resch, *Corona-HB*^{1.06} Kap 13 Rz 128; differently probably Mader, ‘Covid-19-Pandemie: Umfangreiche Änderungen im Insolvenzrecht’ [2020] DRdA-infas 288, 289 and Mohr, ‘COVID-19-Pandemie – Neuerungen im Insolvenzrecht durch die COVID-19-Gesetze’ [2020] ZIK 48, talking about the provision being “extended”.

⁷ Cf. Fidler, ‘Insolvenzantragspflicht, Geschäftsführerhaftung und Gesellschafterfinanzierung – drei Schlaglichter der COVID-Gesetzgebung’ [2020] ZFR 231 et seq.

⁸ Cf. Stegner/Kalser/Wetter [2020] RdW 406-407.

⁹ Dellinger in Konecny/Schubert (n. 4) § 69 KO Rz 6 and 14 et seq.; Schumacher in KLS² (n. 3) § 69 IO Rz 29.

¹⁰ In detail Dellinger in Konecny/Schubert (n. 4) § 69 KO Rz 14 et seq.; Schumacher in KLS² (n. 3) § 69 IO Rz 29; Trenker, ‘COVID-19-Update: Folgen für Fristen in Insolvenzverfahren nach dem 2. COVID-19-JuBG’ [2020] ZIK no. 64, section 6.

¹¹ AB 116 BlgNR 27. GP 13.

¹² Trenker in Resch, *Corona-HB*^{1.06} Kap 13 Rz 17.

¹³ AB 116 BlgNR 27. GP 12.

¹⁴ OGH 11.07.2001, 7 Ob 83/01h; OGH 8 Ob 26/89 SZ 62/115; Katzmayer in Konecny (ed), *Kommentar zu den Insolvenzgesetzen* (Manz, looseleaf service, since 2010) § 78 IO Rz 58; Schumacher in KLS² (n. 3) § 78 IO Rz 35.

of a debtor in public service (old version of § 78 [5] IO) was also deleted due to its lack of practical significance.

A further amendment relates to § 80 (4) IO: The obligation to deliver a certificate of appointment to the insolvency administrator through official channels has been removed because, according to the legislative materials, this is only required in practice if the insolvency administrator acts abroad.¹⁵ Hence, the insolvency administrator will only receive a certificate of appointment at his request.

Finally, and quite surprisingly,¹⁶ the obligation to notify credit institutions and depository institutions where the debtor has a deposit, credit balance account or safe deposit box, either alone or jointly with others, which had previously been regulated in § 78 (4) IO, was abolished. According to this provision, the insolvency court had had to notify the relevant bank of the opening of insolvency proceedings with an order to execute dispositions of the debtor's account only with the court's consent (so-called "account freeze").¹⁷ The legislative materials justify this abolition – in an extremely succinct way – with the fact that credit institutions make a query in the insolvency file anyway, if necessary.¹⁸ In *Hämmerle's* view,¹⁹ the abolition of § 78 (4) IO eliminated the legal basis for blocking joint accounts and deposits; a block is therefore only possible under the general safeguard provision of § 78 (1) IO. This provision requires the presence of a specific threat²⁰ and special care in the examination of the protective measure if it is directed at third parties.²¹ According to *Hämmerle*, after the repeal of § 78 (4) IO, a judicial blocking of an account can, therefore, only be ordered if there are concrete indications that a third party with the sole power of disposal could seize an account balance.²² This argumentation is conclusive: in fact, the legislator seems to have overlooked this "side effect" of removing the notification requirement.²³ However, the real practical effects have yet to emerge.

¹⁵ AB 116 BlgNR 27. GP 13.

¹⁶ Hämmerle, 'Sicherung der Insolvenzmasse ohne Bankkonten-Sperre?' [2020] ZIK 177.

¹⁷ Cf. Katzmayer in Konecny (n. 14) § 78 IO Rz 91 et seq.; Schumacher in KLS² (n. 3) § 78 IO Rz 52 et seq.; see Schumacher in KLS² (n. 3) § 78 IO Rz 51a for an analysis of the changes.

¹⁸ AB 116 BlgNR 27. GP 13.

¹⁹ Detailed Hämmerle [2020] ZIK 177.

²⁰ Katzmayer in Konecny (n. 14) § 78 IO Rz 30; Schumacher in KLS² (n. 3) § 78 IO Rz 28.

²¹ RIS-Justiz RS0120014; OGH 8 Ob 129/04k SZ 2005/65 = ZIK 2005/142.

²² Hämmerle [2020] ZIK 177, 181.

²³ Cf. Schumacher in KLS² (n. 3) § 78 IO Rz 51a.

III. AMENDMENTS TO THE EXECUTION CODE

Parallel to § 69 (2a) IO, the examples of natural disasters in § 158 (1) Execution Code (hereinafter: EO; old version of § 200b EO) were supplemented by “epidemic and pandemic”, thus clarifying that a postponement of enforcement is also possible if the COVID pandemic affects the debtor.²⁴ However, an extension provided by § 158 EO is only permissible in the context of compulsory auctions;²⁵ therefore, other types of enforcement proceedings cannot be deferred on the basis of this provision. However, for the enforcement of movable goods, § 282a EO orders that sale proceedings have to be postponed if the requirements of § 158 EO are met.²⁶ While *Jenny*²⁷ considers the limitation to certain types of enforcement as a deliberate decision of the legislator and argues that the provision would otherwise probably have been included in § 42 EO, *Garber/Neumayr*²⁸ argue in favour of an analogous application of § 158 EO to other enforcement proceedings. In this respect, the legislative materials only state that it should be clarified that epidemics and pandemics fall under the concept of natural disasters.²⁹ On the website of the Federal Ministry of Justice, however, it is stated that a postponement of enforcement proceedings due to the crisis is only provided for in the case of two types of enforcement, i.e. the compulsory auction of real estate and the enforcement of movable goods.³⁰ In our opinion, it can, therefore, be assumed that the legislator deliberately intended to cover only these two types of enforcement;³¹ hence – for lack of a loophole – there is no room for an analogous application of § 158 EO to other execution proceedings.

²⁴ See in detail Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 128.

²⁵ Jakusch in Angst/Oberhammer (eds.), *Kommentar zur Exekutionsordnung* (3rd edn, Manz 2015) § 42 EO Rz 13/1; Mini in Deixler-Hübner (eds.), *Exekutionsordnung – Kommentar* § 158 EO Rz 2 (As at March 2022, 360.lexisnexis.at).

²⁶ Mohr, ‘COVID-19-Pandemie – Stillstand der Exekutionsverfahren?’ [2020] ZIK no. 63, section 7.

²⁷ Jenny, ‘Ausgewählte Fragen der Fristenregelungen des 1. COVID-19-Justiz-Begleitgesetzes’ [2020] Zak 124, 125.

²⁸ Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 129.

²⁹ IA 397/A 27. GP 39; AB 112 BlgNR 14.

³⁰ Bundesministerium für Justiz, ‘Häufige Fragen – Corona und Justiz’ <https://www.justiz.gv.at/home/covid-19/haeufige-fragen.7bd.de.html> (As at 1 May 2023).

³¹ See also Mohr [2020] ZIK no. 63, section 7; Mohr, ‘COVID-19-Update zu den insolvenzrechtlichen Regelungen’ [2020] ZIK 212, 213.

IV. AMENDMENTS TO THE ASVG AND THE BAO

In order to ease the burden on companies affected by the measures taken to deal with the COVID crisis (in particular, by bans on entering and restrictions on operations), § 733 of the General Social Insurance Act (hereinafter: ASVG) contains special provisions for the collection of dues in the form of deferrals, partial and instalment payments, and a ban on avoidance.³² This provision has been amended repeatedly over the past two years. In the light of the deferral and instalment provisions, the Austrian Health Insurance Carrier (“Österreichische Gesundheitskasse – ÖGK”) was to be granted a certain degree of protection against avoidance as compensation: In this respect, § 733 (11) ASVG initially provided for a rebuttable³³ presumption, that the health insurance carrier was not aware or did not have to be aware of the employer’s intention to benefit and the employer’s insolvency at the time the dues were paid. Because of the great uncertainties about interpretation, the provision was then reworded. § 733 (11) ASVG, as amended, now provides for an absolute exclusion of avoidance with regard to payments made during the periods specified in § 733 (7) to (8b) ASVG. In this regard, the question of the period in which the protection against avoidance applies and which payments it relates to is of particular relevance for practice. *Derntl* argues that, based on the development of the statutory regulation, it can be assumed that comprehensive protection against avoidance existed until September 30, 2022.³⁴ The protective effect of this has already begun on 16 March 2020 because at this point in time the earliest payments covered (dues for February 2020, cf. § 733 [1] ASVG) were considered to be overdue within the meaning of § 59 (1) ASVG.³⁵ *Derntl* thus assumes a retroactive effect of the protection against avoidance; *Rebernig* also comes to this conclusion.³⁶ Numerous details are still questionable, in particular, whether payments made during the protected period but before or without the conclusion of a payment agreement are protected against avoidance and whether the protection against avoidance also covers payments for old periods. On both points, *Derntl* assumes comprehensive protection against avoidance.³⁷ However, in this case – esp. in view of the ratio of the provision and

³² Cf. AB 112 BlgNR 27. GP 19.

³³ See Lovrek, ‘Stellungnahme zum ME KonStG 2020’ (2020) 18/SN-31/ME 27. GP 2; Rebernig, ‘COVID-19: Einschränkungen in der Insolvenzanfechtung’ [2020] ZIK 172, 176; Rebernig in Konecny (n. 14) § 31 IO Rz 97; differently *Derntl*, ‘COVID-19: Einhebung von Beiträgen durch die ÖGK/2 FORG’ [2020] ZIK digital exklusiv no. 8, section 8.3.

³⁴ *Derntl*, ‘COVID-19: Einhebung von Beiträgen durch die ÖGK/2. SVÄG 2020 und ASVG-Änderung BGBl I 2021/35’ [2021] ZIK 6, 8; also Rebernig in Konecny (n. 14) § 31 IO Rz 97.

³⁵ *Derntl* [2021] ZIK 6, 8 et seq.

³⁶ Rebernig in Konecny (n. 14) § 31 IO Rz 97.

³⁷ *Derntl* [2021] ZIK 6, 8 et seq.

its character as an exceptional provision – the focus must be on the existence of concrete payment agreements and on payments on contributions (only) with regard to the deferral periods and partial and instalment payment periods affected by § 733 (11) ASVG. Regrettably, a party application to repeal § 733 (1) ASVG as amended by Federal Law Gazette I 158/2020 has been rejected by the Austrian Constitutional Court.³⁸

In addition, the COVID measures also provided for tax deferrals and the possibility of instalment payments to ease the burden on taxpayers.³⁹ Originally, an irrebuttable⁴⁰ presumption of the non-existence of the subjective facts for the avoidance of insolvency had been planned.⁴¹ This concept was dropped due to severe criticism during the reviewing process.⁴² However, with the introduction of the COVID-19 instalment payment model (§ 323e Federal Tax Code [hereinafter: BAO]) on 1 January 2021, an absolute exclusion of avoidance was anchored in § 323e (2) no. 5 BAO: “Payments made to a tax authority during the instalment payment period cannot be contested under the Insolvency Code [...] or the Avoidance Act [...]”⁴³ The related legal questions correspond to those regarding § 733 (11) ASVG. Since the instalment payment period pursuant to § 323e (2) no. 3 BAO ended on 30 September 2022, the exclusion of avoidance will continue to have practical significance for some time. With regard to the history of the provision, it should be noted that the instalment payment model was not included in the original version of the COVID-19-StMG⁴⁴ but was only introduced subsequently by way of an amendment in the second reading in the National Council.⁴⁵

The above-mentioned forms of absolute exclusion of avoidance evoked constitutional concerns: *Lovrek* criticised the proposed irrebuttable presumption by pointing out the resulting unjustified preferential treatment of the Treasury

³⁸ VfGH G 344/2021.

³⁹ 31/ME 27. GP Erläut 12.

⁴⁰ Lovrek, ‘Stellungnahme zum ME KonStG 2020’ (2020) 18/SN-31/ME 27. GP 2, assumed that the recognised “toothlessness” of the parallel provision (old version of § 733 ASVG) was decisive for the proposal to standardise an irrebuttable presumption. Cf. Derntl [2020] ZIK digital exklusiv no. 8, section 8.3.

⁴¹ § 323c Abs 17 BAO idF ME KonStG 2020, 31/ME 27. GP.

⁴² See for example the opinions on the ME KonStG 2020, 31/ME 27. GP by König/Trenker, 6/SN-31/ME 27. GP, KSV1870, 4/SN-31/ME 27. GP 3 f, Lovrek, 18/SN-31/ME 27. GP, Pariasek, 7/SN-31/ME 27- GP, and Riel, 2/SN-31/ME 27. GP.

⁴³ Translation by the authors. The Avoidance Act has been repealed in the meantime; the corresponding provisions are now found in §§ 438 et seq. EO.

⁴⁴ COVID-19-Steuermaßnahmengesetz BGBl I 2021/3.

⁴⁵ See StenProtNR 69. Sitzung 27. GP 185; critically Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 4/2 (FN 13) and Rebernig in Konecny (n. 14) § 31 IO Rz 97.

and, moreover, the interference with other insolvency creditors' property rights.⁴⁶ *Mohr* also considered the unequal treatment of creditors to be constitutionally questionable, referring to the principle of *par condicio creditorum*.⁴⁷ *Trenker*⁴⁸ and *Rebernig*⁴⁹ joined in the criticism as well. It remains to be seen whether the concerns regarding § 323e BAO will also be brought to the attention of the Constitutional Court.

V. AMENDMENTS TO THE GEO

Under the impact of the COVID pandemic, the Rules of Procedure for the Courts of First and Second Instance (Geschäftsordnung für die Gerichte I. und II. Instanz, hereinafter: Geo) also had to be amended by decree of the Federal Ministry of Justice⁵⁰ with effect from 14 March 2020. § 54 (3a) Geo now provides for the possibility of using reservation systems: in the organisation and handling of the public court consultation day, advance notification systems may be used with the proviso that the receipt of non-urgent applications without corresponding timely advance notification may be refused. This enables a reduction or better control of the number of physical contacts. A scheduled expiry of this provision is not envisaged.

§ 24 Geo as amended by Federal Law Gazette II 2020/90 provided that the communication of parties shall be limited to the extent necessary to safeguard the procedural and party rights.⁵¹ This provision expired – after several extensions – on 1 July 2020 (see § 645 [2] Geo).⁵²

VI. 1ST COVID-19 JUSTICE ACCOMPANYING ACT

The 2nd COVID-19 Act,⁵³ promulgated on 21 March 2020, included, among numerous other provisions, the 1st COVID-19 Justice Accompanying Act (hereinafter: 1st COVID-19-JuBG), which provided for various measures to

⁴⁶ Lovrek, 'Stellungnahme zum ME KonStG 2020' (2020) 18/SN-31/ME 27. GP 2 f; cf. Rebernig [2020] ZIK 172, 176 et seq.

⁴⁷ Mohr [2020] ZIK 212, 214.

⁴⁸ Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 28/2.

⁴⁹ Rebernig in Konecny (n. 14) § 31 IO Rz 97.

⁵⁰ BGBl II 2020/90.

⁵¹ See Frauenberger-Pfeiler/Florian, 'Zivilverfahrensrechtliche Aspekte der COVID-19-Gesetzgebung. Fristen, Gerichtsbetrieb, Zustellung' [2019/20] JAP 231, 234.

⁵² Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 8/1.

⁵³ BGBl I 2020/16.

address the crisis in the justice sector. It has been amended eight times and adapted to the ongoing pandemic situation; the provisions finally expired at the end of 30 June 2023 (see § 12 [1] 1st COVID-19-JuBG).

6.1. Interruption of time limits

§ 1 1st COVID-19-JuBG provided for the interruption of all procedural time limits in judicial proceedings beginning to run after the entry into force of the Act or still running at the time of entry into force until the expiry of 30 April 2020. Thereafter, they began to run anew. After the original version of § 1 1st COVID-19-JuBG was promulgated, the exact calculation of the time limit was unclear.⁵⁴ The legislature responded by clarifying the matter in the 4th COVID-19 Act⁵⁵ to avoid uncertainty on such an important issue.⁵⁶ As a result, a 14-day deadline ended 15 May 2020, and a four-week deadline ended 29 May 2020.⁵⁷

Pursuant to § 1 (1) last sentence of the 1st COVID-19-JuBG, the time limits in proceedings on the legality of an ongoing deprivation of liberty under the Accommodation Act, the Home Residence Act, the Tuberculosis Act and the Epidemic Act 1950 were not covered. Performance time limits were also expressly not covered. According to the materials, this exception served the purpose of clarification due to the ambiguous classification of performance time limits as substantive or procedural time limits.⁵⁸ However, it was unclear whether the interruption of national time limits applied to time limits under European civil procedural law as well.⁵⁹

Pursuant to § 1 (2) 1st COVID-19-JuBG, in individual cases the court could declare a time limit not to be interrupted, at the same time setting a new reasonable time limit.⁶⁰ Pursuant to § 3 leg cit, certain conditions had to be met, in particular

⁵⁴ See Kolmasch, 'Unterbrechung und Hemmung von Fristen aufgrund der COVID-19-Krise' [2020] Zak 115 et seq.; Schindl, 'Das 2. COVID-19-Gesetz und ein altes Fristenproblem' [2020] Zak 113.

⁵⁵ BGBl I 2020/24.

⁵⁶ IA 403/A 27. GP 33.

⁵⁷ OGH 10 Ob S 141/20p [2021] DRdA-infas no. 72; see also Holzmannhofer/Madl, 'Auswirkungen der COVID-19-Krise auf verfahrensrechtliche Fristen' [2020] ecolex 375.

⁵⁸ AB 112 BlgNR 27. GP 8; see also Frauenberger-Pfeiler/Florian [2019/20] JAP 231, 232.

⁵⁹ See in detail Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 24; Frauenberger-Pfeiler, 'Zur Unterbrechung „europäischer“ Fristen durch die nationale COVID-Gesetzgebung' [2020] ecolex 790; Frauenberger-Pfeiler/Florian [2019/20] JAP 231, 233; see OGH 1 Ob 203/20i and related Kranzer, 'Einspruchsfrist gegen den EuZB durch § 1 Abs 1 1. COVID-19-JuBG gehemmt?' [2021] ZfRV 75.

⁶⁰ Barth, 'COVID-19 und die Folgen für familienrechtliche Angelegenheiten und den Gerichtsbetrieb' [2020] iFamZ 68, 69 et seq.; Frauenberger-Pfeiler/Florian [2019/20] JAP 231, 232.

the interest in continuing the proceedings had to outweigh the general interest in curbing COVID-19.⁶¹

6.2. Suspension of time limits for appeal to the court

§ 2 of the 1st COVID-19-JuBG supplemented the time limit regime with an inhibition of time limits for bringing a case to court. Accordingly, the period from the entry into force of the provision on 22 March 2020 until the expiration of 30 April 2020 was not to be included in the time during which an action or application must be brought before a court or a declaration must be made; thus, inhibition of the continuation of the time limits was ordered.⁶² As examples of time limits covered by § 2 1st COVID-19-JuBG, the legislative materials expressly mentioned, for example, limitation periods, the time limit for the action of trespass pursuant to § 454 ZPO, and the time limit for contesting dismissal pursuant to § 105 ArbVG.⁶³

6.3. Hearings, oral proceedings and taking of evidence

Due to the strict exit and contact restrictions imposed in Austria in spring 2020, measures to maintain a certain “emergency operation mode” at the courts were necessary. § 3 1st COVID-19-JuBG as amended prior to BGBl I 2020/30⁶⁴ provided that hearings and oral proceedings were only to be held under the conditions of § 1 (3) 1st COVID-19-JuBG. Accordingly, they could only take place if this was urgently required to avert a danger to life and limb, security and freedom or to avert substantial and irreparable harm to a party to the proceedings. In this context, they could also be carried out or performed without the personal presence of all parties involved using suitable technical means of communication.⁶⁵

⁶¹ See with examples Frauenberger-Pfeiler/Florian [2019/20] JAP 231, 232.

⁶² Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 52; Jenny [2020] Zak 124, 126; Kolmasch [2020] Zak 115, 116; Trenker, ‘2. COVID-19-Gesetz: Folgen für Fristen in Insolvenzverfahren’ [2020] ZIK digital exklusiv no. 7, section 3.2.; Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 8.

⁶³ AB 112 BlgNR 27. GP 9. For more examples, see Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 48 ff; Kolmasch [2020] Zak 115, 116.

⁶⁴ In an amendment made in the meantime through the 4th COVID-19 Act, provisions on the processing of judicial acts and service of documents were removed.

⁶⁵ See for example Barth [2020] iFamZ 68 et seq.; Koller, ‘Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht’ (2020) 146 JBl 539, 540 et seq.; Leupold, ‘Öffentlichkeit im Zivilprozess – Verfahrensgrundsätze und Rechtsentwicklung im Lichte der Krise’ [2021] JRP 339, 347 et seq.; Lutschounig, ‘COVID-19 und Tagsatzungen in Insolvenzverfahren’ [2020] ZIK no. 59; Scholz-Berger/Schumann, ‘Die Videokonferenz als Krisenlösung für das Zivilverfahren’ [2020] ecolex 469. See also Nunner-Krautgasser/Schnur, ‘Digitalisierung

The legislative materials mention here, in particular, the possibility of a video conference or a telephone conference.⁶⁶ However, the above-mentioned requirements of § 1 (3) 1st COVID-19-JuBG had to be fulfilled for holding a video conference as well.⁶⁷

After strict exit restrictions had ended, § 3 1st COVID-19-JuBG was adapted by the 8th COVID-19 Act⁶⁸: Even non-essential hearings were allowed to take place in presence again, and at the same time, a differentiated regulation on the use of videoconferencing was created. A telephone conference – according to the legislative materials⁶⁹ before the amendment only “exceptionally” possible – was no longer provided for.⁷⁰ Pursuant to § 3 (1) no. 1 1st COVID-19-JuBG, oral proceedings and hearings could be held by video conference with the parties’ consent. No. 2 leg cit provided that in certain legal cases (accommodation, home stay and adult protection cases that would have to be conducted outside the court premises) a video conference could even be held without the consent of the parties if the health of a person involved in the proceedings or third parties would otherwise be seriously endangered. § 3 (2) 1st COVID-19-JuBG enabled persons belonging to a COVID-19 risk group or having inevitable contact with such a group to participate in the proceedings via video conference. In addition to parties to the proceedings and witnesses, the regulation also covered experts, interpreters and other persons to be involved in the proceedings. § 3 (3) 1st COVID-19-JuBG provided for special provisions regarding the minutes of the hearing, the list of costs and the conclusion of a settlement for hearings conducted by video conference.⁷¹

§ 3 (4) 1st COVID-19-JuBG provided a special regulation for hearings, negotiations, examinations, creditors’ meetings and creditors’ committee meetings in execution and insolvency proceedings and in proceedings to which the procedural provisions of the EO and IO apply: These could also be conducted by video conference without the consent of the parties if the persons to be heard

und Legal Tech im österreichischen Zivilverfahren’ in Hoffberger-Pippan/Ivankovics/Ladeck (eds.), *Jahrbuch Digitalisierung und Recht* (NWV 2022) 155, 166 et seq.

⁶⁶ AB 112 BlgNR 27. GP 9.

⁶⁷ Lutschounig [2020] ZIK no. 59, section 3.2.; cf. Mohr [2020] ZIK digital exklusiv no. 4, section 6; critically Trenker [2020] ecolex 367, 369.

⁶⁸ BGBl I 2020/30.

⁶⁹ AB 112 BlgNR 27. GP 9.

⁷⁰ Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 66/3.

⁷¹ Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 66/13.

or entitled to participate did not certify within one week from service of the summons that they did not have the necessary technical equipment.⁷²

§ 3 1st COVID-19-JuBG expired at the end of 30 June 2023. The ministerial draft for the Amendment to Civil Procedure 2021 (Zivilverfahrens-Novelle 2021 – ZVN 2021⁷³) had provided for the transfer of the holding of hearings by way of video conferencing into permanent law (specifically in § 132a ZPO), but this provision was no longer included in the government's proposal and was subsequently not adopted. This was probably due to critical comments⁷⁴ made during the reviewing process,⁷⁵ especially by the Austrian Bar Association.⁷⁶ However, since there was also positive feedback⁷⁷ from practitioners, an amended draft for § 132a ZPO was submitted as part of the Amendment to Civil Procedure 2023 (Zivilverfahrens-Novelle 2023 – ZVN 2023⁷⁸), which finally entered into force on July 14, 2023. Since that time, Austria has had the permanent option of conducting certain negotiations by videoconference⁷⁹ – the COVID-19 pandemic has thus left its mark here as well.

6.4. Discontinuation of court activity

§ 4 1st COVID-19-JuBG supplemented § 161 ZPO and § 25 (1) no. 5 AußStrG, which regulate the discontinuation of court activity due to war or any other event.⁸⁰ According to these provisions, proceedings in all pending cases

⁷² See in detail Mohr [2020] ZIK 48, 53 et seq.; Riel, 'COVID-19: Sanierungsplantagsatzung' [2020] ZIK 67.

⁷³ ME ZVN 2021, 138/ME 27. GP.

⁷⁴ Available at https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00138/index.shtml#tab-Stellungnahmen (As at 1 May 2023). Also critically Scholz-Berger/Schumann [2020] ecolex 469 and Oberhammer/Scholz-Berger, 'Zivilverfahren und COVID-19' <https://www.initiativegrundrechte.at/artikel/detail/zivilverfahren-und-covid-19> (As at 1 May 2023).

⁷⁵ Also see Bösch/Jelly, 'Für & Wider: Tagsatzungen per Videokonferenz' [2022] AnwBl 50.

⁷⁶ ÖRAK, 'Stellungnahme zum ME ZVN' (2021) 30/SN-138/ME 27. GP 4 et seq.

⁷⁷ Schumacher, 'Corona-Krise und das Zivilverfahren' [2020] AnwBl 616, 620 et seq.; Wittmann-Tiwald/Wannenmacher, 'Videokonferenzen, Fast-Track-Prozesse und englischsprachige Verfahren undenkbar' [2021] ecolex 178; cf. LG Klagenfurt, 'Stellungnahme zum ME ZVN' (2021) 45/SN-138/ME 27. GP 3.

⁷⁸ Zivilverfahrens-Novelle 2023 – ZVN 2023 BGBl I 2023/77.

⁷⁹ See Spitzer/Wilfinger, 'ZVN 2023: Videoverhandlung im Zivilprozess' [2023] ÖJZ 606; Hotter, 'ZVN 2023: Die Übernahme der Videoverhandlung ins Dauerrecht' [2023] ecolex 763.

⁸⁰ See Fink in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen* II/3 (3rd edn, Manz 2015) § 161 ZPO, for "other events" within the meaning of § 161 ZPO in particular Rz 3; Rechberger/Klicka in Rechberger/Klicka (eds.), *Außerstreitgesetz*³ (Verlag Österreich 2021) § 25 AußStrG Rz 7.

shall be suspended for the duration of that state of affairs. If court operation is no longer possible due to COVID-19, the Federal Ministry of Justice shall announce this on the website www.justiz.gv.at (§ 4 [1] 1st COVID-19-JuBG); this announcement has only declarative effect.⁸¹ Para 2 leg cit provided that the higher-ranking Higher Regional Court (or, as the case may be, the Supreme Court) shall, at the request of one of the parties, designate another court to decide the case (so-called delegation) if urgent procedural acts are to be performed.⁸²

6.5. Reminder under the Insolvency Code

§ 5 1st COVID-19-JuBG contained a special provision to protect reorganisation plan debtors⁸³ from the consequences of default under § 156a IO: If a written reminder – required for the occurrence of qualified debtor default⁸⁴ – for a liability that became due after the provision entered into force on 22 March 2020 was sent between the entry into force and the expiry of 30 April 2020, it did not give rise to default under § 156a (1) IO. Since a reminder during this period was ineffective, the creditor had to send a reminder again after its expiry in order to bring about the consequences⁸⁵ of default.⁸⁶

6.6. Authorization to issue ordinances

§ 8 1st COVID-19-JuBG provided for an extensive ordinance authorization for the Federal Ministry of Justice, which was intended to enable a rapid response to future developments in the exceptional situation of the pandemic.⁸⁷ While the regulation was in force, three ordinances based on § 8 1st COVID-19-JuBG have been issued, each with the (somewhat misleading⁸⁸) title “COVID-19 Ziviljustiz-VO” (COVID-19 Civil Justice Ordinance). The 1st COVID-19 Civil Justice

⁸¹ AB 112 BlgNR 27. GP 10; Mohr, ‘COVID-19-Pandemie – ein Überblick über die für das Insolvenzverfahren relevanten Änderungen durch das 2. COVID-19-Gesetz’ [2020] ZIK digital exklusiv no. 4, section 8.

⁸² See Barth, [2020] iFamZ 68, 70; Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 80 et seq.; Mohr [2020] ZIK digital exklusiv no. 4, section 8.

⁸³ AB 112 BlgNR 27. GP 10.

⁸⁴ Nunner-Krautgasser/Anzenberger in KLS² (n. 3) § 156a IO Rz 9.

⁸⁵ See Nunner-Krautgasser/Anzenberger in KLS² (n. 3) § 156a IO Rz 19 et seq.

⁸⁶ Mader [2020] DRdA-infas 288, section 293; Mohr [2020] ZIK 48, 55; Trenker, [2020] ZIK digital exklusiv no. 7, section 5.7.1.; Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 32.

⁸⁷ AB 112 BlgNR 27. GP 11; Frauenberger-Pfeiler/Florian [2019/20] JAP 231, 236.

⁸⁸ The abbreviation “VO” is normally used for EU legal acts: Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 108/1.

Ordinance⁸⁹ facilitated the submission of certain petitions to the court;⁹⁰ it expired again at the end of 31 December 2020. The 2nd⁹¹ and 3rd COVID-19 Civil Justice Ordinances⁹² each extended the deadline for the facilitated granting of advances on maintenance payments pursuant to § 7 1st COVID-19-JuBG.⁹³

6.7. Deliberations and voting

In all matters to be decided by the ordinary courts or by the Administrative Court in a non-public session, deliberations and votes could be held by circular letter in accordance with § 11 1st COVID-19-JuBG until the expiry of the provision. However, if a member of the Senate demanded that a Senate meeting be held, such a meeting had to be convened. The purpose of this provision was to prevent people from meeting in person. The legislative materials point out that circular resolutions were already considered permissible in part; for reasons of legal certainty, however, a clarification should be made.⁹⁴ *Garber/Neumayr* criticize that the legislator should have allowed consultation via video or telephone conference due to the stronger incentive for discussion.⁹⁵ However, such a conference was permissible as well while the provision was in force because it is closer to a “real” Senate meeting than a vote by circulation.⁹⁶

VII. 2ND COVID-19 JUSTICE ACCOMPANYING ACT

The provisions of the 2nd COVID-19 Justice Accompanying Act (hereinafter: 2nd COVID-19-JuBG) that are directly relevant to civil procedure law have meanwhile expired or have lost their significance (for the most part) and shall therefore only be mentioned for the sake of completeness. However, a reference must be made to § 10 of the 2nd COVID-19-JuBG, which excluded the avoidance of bridging loans for the interim financing of COVID-19 short-time work

⁸⁹ BGBl II 2020/163.

⁹⁰ Frauenberger-Pfeiler/Florian [2019/20] JAP 231, 236.

⁹¹ BGBl II 2020/459.

⁹² BGBl II 2021/130.

⁹³ See Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 90 et seq.

⁹⁴ AB 112 BlgNR 27. GP 13.

⁹⁵ Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 114.

⁹⁶ Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 116; likewise Garber/Neumayr, ‘COVID-19 und der österreichische Zivilprozess. Ausgewählte Fragen’ [2020] GVRZ 20, Rz 56.

assistance pursuant to § 37b AMSG (only) pursuant to § 31 IO.⁹⁷ The protection against avoidance applies to loans granted between 1 March 2020 and 30 June 2021 and may, therefore, still be relevant today.⁹⁸ Also relevant until recently was § 15 2nd COVID-19-JuBG, which provided for the exemption from fees of certain advance maintenance decisions;⁹⁹ the provision expired on 30 June 2023.¹⁰⁰

§ 6 2nd COVID-19-JuBG contained a special provision allowing a postponement of eviction pursuant to § 349 EO and expired at the end of 29 June 2021 (see § 17 [8] 2nd COVID-19-JuBG).¹⁰¹

§ 7 2nd COVID-19-JuBG provided for the possibility of extending procedural deadlines in insolvency proceedings and, at the same time, excluded the applicability of § 1 1st COVID-19-JuBG to insolvency proceedings. Therefore, procedural deadlines, instead of being generally interrupted, could be extended by up to 90 days by the insolvency court upon request or ex officio.¹⁰² § 7 2nd COVID-19-JuBG also expired at the end of 29 June 2021 pursuant to § 17 (8) leg cit.

§ 8 2nd COVID-19-JuBG provided for simplification of service in insolvency proceedings: For the duration of the interruption of the time limit pursuant to § 1 1st COVID-19-JuBG, publication in the insolvency file replaced service on the creditors.¹⁰³ The provision expired at the end of 31 December 2020 (§ 17 [1] 2nd COVID-19-JuBG).

A key provision of the 2nd COVID-19-JuBG under insolvency law was its § 9: This provision suspended the obligation to file for insolvency in the event of over-indebtedness occurring between 1 March 2020 and 30 June 2021¹⁰⁴ and precluded the opening of insolvency proceedings on the basis of a petition filed by a creditor based solely on over-indebtedness.¹⁰⁵ This was intended to prevent fundamentally “healthy” entrepreneurs from having to file a petition to open

⁹⁷ Other grounds for avoidance shall not be affected: Mohr, ‘COVID-19-Pandemie – weitere Änderungen im Insolvenzrecht in Kraft getreten’ [2020] ZIK no. 56, section 4; Schneider, ‘COVID-19: Änderungen im Insolvenzrecht’ [2020] ÖJZ 485, 490.

⁹⁸ In detail Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 26 et seq.

⁹⁹ See Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 98 and 137.

¹⁰⁰ Article 2 BGBl I 2022/224.

¹⁰¹ Differently Garber/Neumayr in Resch, *Corona-HB*^{1.06} Kap 13 Rz 130.

¹⁰² Poltsch/Puschmann/Seiser/Übertsroider, ‘Vorgehensweise der Insolvenzgerichte unter Berücksichtigung der COVID-19-Gesetze’ [2020] ZIK 60, 61 et seq.; Trenker, ‘COVID-19 und das Insolvenzrecht’ [2020] ecolex 367, 368.

¹⁰³ Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 16 et seq.

¹⁰⁴ The validity of the provision has been extended several times, most recently by BGBl I 2021/48.

¹⁰⁵ Rebernig [2020] ZIK 172, 173 et seq.; Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 4.

insolvency proceedings solely due to the effects of the COVID pandemic.¹⁰⁶ How to deal with a creditor's application that was nevertheless filed was unclear: according to the prevailing opinion, it would have had to be dismissed as (currently) obviously unfounded.¹⁰⁷ However, the obligation to file a petition was only waived for over-indebtedness as the cause of insolvency. In the case of inability to pay debts, a debtor remained obliged to file a petition to open insolvency proceedings pursuant to § 69 IO; likewise, a creditor could file a petition to open insolvency proceedings on account of the debtor's inability to pay debts during the entire pandemic.¹⁰⁸ In practice, however, very few insolvency proceedings were opened during this period because the tax authorities in particular filed almost no bankruptcy petitions at all.

§ 11 2nd COVID-19-JuBG allowed deferral of payment plan instalments due for a period of up to nine months (until its expiration on 30 June 2021) if the debtor's income and asset situation changed due to measures taken to prevent the spread of COVID-19.¹⁰⁹

Finally, § 11a leg cit extended the maximum payment periods for the reorganisation plan pursuant to § 141 (1) sentence 1 and § 169 (1) lit a IO from two to three years; this applied to reorganisation plan applications submitted by 31 December 2021.¹¹⁰

VIII. CONCLUSION

The majority of the "COVID provisions" in civil procedure law have already expired with only a few remaining in effect. Most of the changes that are still in force after the period of crisis legislation are minor adjustments or cautious modernizations of existing regulations; there have been no major upheavals. An important change, however, was the (permanent) introduction of court hearings by video conference through the ZVN 2023. In the near future, the practice will presumably be occupied with the consequences of the exclusions of avoidance in the ASVG and in the BAO, as these – constitutionally questionable – provisions are likely to continue to cause problems for some time. To summarise, it can be said that the COVID-19-related changes to Austrian civil procedure law were, for

¹⁰⁶ AB 116 BlgNR 27. GP 21; see also Mohr [2020] ZIK 48, 49 et seq.

¹⁰⁷ Mohr [2020] ZIK 48, 49; Poltsch/Puschmann/Seiser/Übertsroider [2020] ZIK 60, 67; Schneider, 'COVID-19: Update: Antragspflicht und Eröffnungsverfahren' [2020] ZIK no. 57, section 1.5.; Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 23.

¹⁰⁸ Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 21.

¹⁰⁹ Mohr [2020] ZIK 48, 55 et seq.; Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 34 et seq.

¹¹⁰ Trenker in Resch, *Corona-HB*^{1.06} Kap 14 Rz 37 et seq.

the most part, sensible and appropriate measures for challenging times. The fact that most of them have now been repealed is also to be welcomed, as some of them were quite drastic measures – these should be reserved for times when they are needed.

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