Determination of an Obligation by a Third Party and "Apparent Inequity" On the Influence of the German BGB on Austria

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I. "Pandectization" and "Germanization" of Austrian Law

Within the continental European civil law systems, the Austrian “Allgemeines Bürgerliches Gesetzbuch” (“ABGB”) is the second oldest civil law codification still remaining in force today. Dating back to the year 1812, it is rivaled only by the French “Code Civil” from 1804 in terms of age. Yet, despite its often antiquated language, its substance is still widely considered “modern”.[1] Due to its flexible rules it seems well equipped to account for rapid technological and societal changes. Notwithstanding the ABGB’s long tradition and its merits, German civil law doctrine with its younger “Bürgerliches Gesetzbuch” (“BGB”) from 1900 would have a formative effect on Austrian law.

The Austrian legislator itself imported some ideas of German civil law. For instance, in 1938 after the so-called “Anschluss”, the annexation into Nazi Germany, the German Marriage Act[2] and Commercial Law Code[3] were introduced in Austria as a first effort of legal unification.[4] Although purged of their perfidious ideological implications following 1945, these have remained in effect to this day. At least from the perspective of legal dogmatics, this kind of German influence does not pose significant further problems. Yet, a number of German civil law concepts were transferred to Austria without legislative changes, solely by legal scholarship and the courts.[5]

Above all, the German school of legal thought known as “Pandectism” still influences Austrian legal thinking today.[6] While its actual characteristic features are still subject of much academic debate, suffice it to say for present purposes that “Pandectism” was the predominant way of legal thinking in the 19th century.[7] This "pandectization"

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[1] E.g. *C. Wendehorst*, Zum Einfluss pandektistischer Dogmatik auf das ABGB, in Fischer-Czermak/Hopf/Kathrein/Schauer (eds), Festschrift 200 Jahre ABGB (2011) 75; *Mayer-Maly*, Die Lebenskraft des ABGB, NZ 1986, 265.

[2] Ehegesetz (RGBl I 1938, 807).

[3] Handelsgesetzbuch (RGBl I 1938, 1999).

[4] For an overview cf *Bukor/Meissel*, Das ABGB in der Zeit des Nationalsozialismus, in Fischer-Czermak/Hopf/Kathrein/Schauer (eds) Festschrift 200 Jahre ABGB (2011) 17.

[5] Cf *E.A. Kramer*, Der Einfluss des BGB auf das schweizerische und österreichische Privatrecht, AcP 2000, 355 (391 ss); *Kerschner*, Die lex-lata-Grenze: Zentrales Element des gewaltenteilenden Rechtsstaates oder bloße Chimäre? Gesetzesbindung und ABGB, in Fenyves/Kerschner/Vonkilch (eds) 200 Jahre ABGB. Evolution einer Kodifikation (2012) 119.

[6] Cf *C. Wendehorst*, Zum Einfluss pandektistischer Dogmatik auf das ABGB, in Fischer-Czermak/Hopf/Kathrein/Schauer (eds) Festschrift 200 Jahre ABGB (Vienna 2011) 75 (88) ff.

[7] Cf Haferkamp/Repgen (eds) Wie pandektistisch war die Pandektistik? Symposium aus Anlass des 80. Geburtstags von Klaus Luig am 11. September 2015 (Tübingen 2017).

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of Austrian private law sparked a revival of legal scholarship on the one hand.[8] For example, the works of Joseph Unger[9], sometimes even referred to as the "pride of Austrian law"[10], come to mind. On the other hand, pandectism made its mark on the partial amendments to the Austrian civil code, the ABGB, in the early 20th century.[11]

In the course of the 20th century, however, the term "Germanization"[12] seems more appropriate to describe the dynamic. Increasingly, the approximation of German and Austrian law took place less in the form of a reception of pandectist scholarship, but more as a direct adoption of the German civil code, the BGB.[13] Both scholars and the courts[14] played their respective parts in transforming Austrian private law. Numerous examples are well known. So far, less attention has been paid to the body of case law originating in the years from 1939 to 1945, a period when during which the German Reichsgericht had jurisdiction over Austria. The rules governing the determination of an obligation by a third party provide an illustrative example. They also show that an awareness of historical developments can help doctrine to get back on sound legal ground.

II. Determination of an Obligation by a Third Party

Situations in which negotiating parties would want a third party to determine one of their contractual obligations are not overly hard to imagine: Suppose the negotiating

[8] For Austria *Meissel*, Joseph Unger und das Römische Recht. Zu Stil und Methoden der österreichischen „Pandektistik", in Haferkamp/Repgen 17; *Mathiaschitz*, Handeln auf eigene Gefahr. Joseph Unger und seine Konzeption einer verschuldensunabhängigen Haftung „pro utilitate communi" (jur. Diss., Vienna 2017) 93 ff; *Brauneder*, Rechtsfortbildung durch Juristenrecht in Exegetik und Pandektistik in Österreich, ZNR 1983, 22.

[9] Cf *Meissel*, Joseph Unger. Der Jurist als „politischer Professor", in Ash/Ehmer (eds) Universität. Politik. Gesellschaft (2015) 209; *Mathiaschitz*, Handeln auf eigene Gefahr. Joseph Unger und seine Konzeption einer verschuldensunabhängigen Haftung „pro utilitate communi" (jur. Diss., Vienna 2017) 5 ff.

[10] *Schrutka von Rechtenstamm*, Joseph Unger als Lehrer der Österreichischen Rechtswissenschaft, Neue Freie Presse vom 3. Mai 1913, 2.

[11] Cf *C. Wendehorst* in FS 200 Jahre ABGB 85 ff.

[12] Cf the terminology of *Bukor/Meissel*, Das ABGB in der Zeit des Nationalsozialismus, in FS 200 Jahre ABGB 17 (30).

[13] *C. Wendehorst* in FS 200 Jahre ABGB 98.

[14] For examples cf *E.A. Kramer*, Der Einfluss des BGB auf das schweizerische und österreichische Privatrecht, AcP 2000, 355 (391 ff); *Kerschner*, Die lex-lata-Grenze: Zentrales Element des gewaltenteilenden Rechtsstaates oder bloße Chimäre? Gesetzesbindung und ABGB, in Fenyves/Kerschner/Vonkilch (eds) 200 Jahre ABGB. Evolution einer Kodifikation (Vienna 2012) 119.

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parties are generally ready to conclude their contract.[15] However, they encounter difficulties in agreeing on the precise terms of one of the parties' obligations, e.g. on the price a buyer has to pay for an item. It is just as conceivable that the agreement fails due to the parties' lack of necessary expertise in some area. For example, the parties agree on the sale of an item at market price but simply do not know what the market price is. In order to overcome these obstacles, they delegate the determination of the respective obligation to a third party.

Subsequently, this person's task is to complement the contract in a manner that is directly binding on the parties. The parties obviously expect him or her to make an impartial, neutral and "fair" decision that does not unduly favor either one of them; in other words, a decision based on "fair discretion".[16] If the third party disregards this requirement, the question arises whether the disadvantaged party can challenge an "unfair" determination.[17] The answer has consequences reaching beyond the aforementioned cases in which an obligation in the actual sense is to be determined by the third party. The governing rules are also applied analogously to those frequently occurring cases of "expert determination" that will be addressed later on.[18]

A. Statutory Law and Interpretation by Courts and Scholars

In Austrian law, statutory rules on the determination of an obligation by a third party are rare. There are only two provisions in the ABGB. Both concern the sales contract and serve as a basis for analogy for other transactions.[19] According to § 1056 ABGB, the purchase price can also be determined by a third party. This provision also governs the fate of the contract if the third party does not act. However, § 1060 ABGB is more interesting in this context. Initially, it generally allows the contracting

[15] Cf *Garger*, Das Schiedsgutachtenrecht (Vienna 1996) 54 f.

[16] On the terminology cf *Kleinschmidt*, Delegation von Privatautonomie auf Dritte (Tübingen 2014) 189 f; *Würdinger* in MüKoBGB II[7] § 315 mn 31; *Mayer-Maly* in Staudinger, BGB[12] (1979) § 315 mn 51 ff.

[17] This article only addresses the remedy due to the inequity of the price determination. Other grounds to challenge the third party's decision, such as error or coercion are not discussed. This, however, does not mean that they are not conceivable (cf for Germany § 318 BGB).

[18] Cf below.

[19] RIS-Justiz RS0020089; RS0020079; recently OGH 5.7.2017, 7 Ob 8/17b; 30.5.2017, 8 Ob 86/16d, ÖBA 2017, 636; *Aicher* in Rummel, ABGB[3] § 1056 mn 11; *Garger*, Schiedsgutachtenrecht 67 ff; *Risak*, Einseitige Entgeltgestaltung im Arbeitsrecht (Vienna 2008) 97; *Binder/Spitzer* in Schwimann/Kodek, ABGB IV[4] § 1056 mn 2; *Apathy/Perner*, KBB[5] § 1056 mn 2; *Verschraegen* in Kletecka/Schauer, ABGB-ON[1.04] § 1056 mn 24; *Rüffler*, Der Schiedsgutachter, in Schuhmacher/Stockenhuber/Straube/Torggler/Zib (eds) Festschrift für Josef Aicher (Vienna 2012) 663 (669); *Welser/Zöchling-Jud*, Bürgerliches Recht II[14] (Vienna 2015) mn 112; *Mayer-Maly* in Klang IV/2[2] 266 f; differently for lease contracts *Würth* in Rummel, ABGB[3] § 1094 ABGB mn 18.

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party to rescind the contract „only“[20] for lesion beyond moiety (*laesio enormis*). In its second sentence, § 1060 ABGB expressly extends this to cases in which the purchase price was determined by a third party. In the case of lesion beyond moiety, the ABGB assumes that the third party does not have the expected honesty and expertise.[21] Below this extreme objective inequivalence, the determined price remains binding on the parties. That is, however, only according to the text of § 1060 ABGB.

Hence, a survey of academic writing[22] and the case law[23] provides some surprise. There, in addition to the laesio enormis, another corrective appears: the “apparent inequity” (*offenbare Unbilligkeit*). Looking for this standard in the text of the law would be in vain. Its origin can only be explained by a comparison with German law. In §§ 315 to 319, the German BGB, in a typically pandectistic manner, sets forth a uniform regime of rules governing the determination of an obligation by a third party for all types of contract. Here, § 319 deserves special attention. Accordingly, the third party’s decision is indeed non-binding if it is "apparently inequitable".[24] Thus, Austrian courts and scholarly literature pretend that, in addition to § 1060 ABGB, the German § 319 BGB is also applicable in Austria.

If the determination of price is apparently inequitable, the judge can therefore intervene and correct it to an equitable price. The term is of course as elusive as it is suggestive. Who would want to be bound by an apparently inequitable decision? Still, it is crucial to understand how the “apparently inequitable” standard is applied. In Germany, it is generally understood as a tool to review the result of the third party’s decision.[25] As a guideline, German case law has established that a decision fails the “apparently inequitable” standard if it deviates more than 20 or 25% from the

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[20] „Only“ is to be understood in light of this old discussion about the requirement of „pretium iustum“ (*Mayer-Maly* in Klang 298); cf *Winner*, Wert und Preis im Zivilrecht (Vienna 2008) 30 ff.

[21] Cf *J. Ofner*, Der Urentwurf und die Berathungsprotokolle des Österreichischen Allgemeinen Gesetzbuches II (Vienna 1889) 89; *Zeiller*, Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der oesterreichischen Monarchie III (Vienna 1812) 359 f.

[22] *Aicher* in Rummel § 1056 mn 10; *Verschraegen* in ABGB-ON § 1056 mn 22; *Binder/Spitzer* in Schwimann/Kodek § 1056 mn 14; *Garger*, Schiedsgutachtenrecht 96 ff; *Rüffler* in FS Aicher 675 ff; *Apathy* in KBB § 1056 mn 3; sometimes any kind of inequity is deemed sufficient, cf *Mayer-Maly*, cmt on OGH 4.11.1986, 14 Ob 136/86, DRdA 1988/11; *Risak*, Entgeltgestaltung 139 ff; *Holzner*, cmt on OGH 25.08.1993, 1 Ob 4/93, JBl 1994, 252 (256); *Welser*, Widerrufsvorbehalt und Teilkündigungsvereinbarung bei entgeltwerten Leistungen des Arbeitgebers, DRdA 1991, 1.

[23] RIS-Justiz RS0016832; RS0020079.

[24] The German BGB does not contain an express provision of laesio enormis (cf on German case-law *Armbrüster* in MüKoBGB I[7] § 138 mn 114).

[25] Cf *Würdinger* in MüKoBGB § 319 mn 8.

hypothetical equitable decision.[26] Furthermore, the apparent inequity could also be understood as a review of the decision-making process that also takes into account the third party's reasoning:[27] Were the motivating factors uncalled-for? Irrespective of the employed theory, the "apparent inequity" standard is a far more extensive way of reviewing the third party's decision than the laesio enormis can ever be.

B. A History of "Germanization"

In order to understand how this adoption of § 319 BGB came about, it is worth taking a stroll through legal history. Over the course of time, it seems to have been decisive which foreign law § 1060 ABGB was compared to, i.e. which legal system was the comparative benchmark.

1. Origin in Roman Law

Both § 1060 ABGB and § 319 BGB have their roots in the discussions of Roman jurists.[28] Roman jurists had not yet developed an overarching set of rules for third party determination spanning all types of contract. Instead, the issue was dealt with within the frameworks of individual contracts. We therefore encounter two models in the Roman sources: the determination of the purchase price was – at least under Justinianic law – incontestable.[29] In contrast, the determination of shares in a *societas* could be corrected in case of so-called *manifesta iniquitas*.[30]

2. Legislative History

This *manifesta iniquitas* made its way into Austrian sales law. Thus, the first two drafts of the ABGB, the Codex Theresianus[31] and the draft by Horten[32], provided for

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[26] E.g. BGH 26.4.1991, V ZR 61/90, NJW 1991, 2761 (2762); cf *Würdinger* in MüKoBGB § 319 mn 6; *Garger*, Schiedsgutachtenrecht 151 ff; critical about percentage points *Rüffler* in FS Aicher 677 f; for Austria cf OGH 30.8.2006, 7 Ob 184/06v (20% not enough); 17. 12. 2007, 2 Ob 236/07f (30% not enough); *Horvath/Hodel*, cmt on OGH 28.2.2011, 9 Ob 80/10w, GesRZ 2011, 314.

[27] E.g. *Rieble* in Staudinger (2015) BGB § 315 mn 347 ff, § 319 mn 8.

[28] Cf *Cristaldi*, Sulla clausola ‚quanti Titius rem aestimaverit' nella riflessione dei giuristi romani, Revue Internationale des droits de l'antiquité 58 (2011) 99; *Giannozzi*, La determination de l'objet du contrat *arbitratu boni viri* en droit romain, in Laurent-Bonne/Pose/Simon (eds) Les piliers du droit civil. Famille, propriété, contrat (Paris 2014) 181; *Kleinschmidt*, Delegation 196 ff.

[29] C 4.38.15 (*Imp. Iustinianus A. Iuliano pp*); Just. Inst. 3.23.1.

[30] D 17.2.76, 78 (*Proculus 5 epistularum*); D 17,2,80 (*Proculus libro quinto epistularum*).

[31] 3rd Part, Caput IX § 6 Nr 55, published by *Harras von Harrasowsky*, Der Codex Theresianus und seine Umarbeitungen III (Vienna 1884) 143 f.

[32] 3. Teil, Caput IX §§ 21-24; *Harras von Harrasowsky*, Codex Theresianus IV (Vienna 1886) 383.

judicial correction if a party could show "apparent inequity". A drastic change in direction, however, was introduced by the subsequent draft by Karl Anton von Martini: As in Justinianic sales law, Martini's draft no longer allowed a party to challenge an inequitable price determination at all.[33] Martini, as was so often the case, took the Prussian Civil Code – the ALR, which had since been implemented – as a model.[34]

Martini's draft was the basis for the final work of the legislative commission under the auspices of Franz von Zeiller. The legislative minutes illustrate that the commission spent a considerable amount of time discussing the case of an inequitable price determination. It was controversial among the members, who were divided into two camps[35]: Some, as in the Prussian ALR, opposed any remedy to challenge the third party's price determination. Others advocated for a remedy at least in cases of laesio enormis. In the end, the majority opted for the latter and the aforementioned second sentence of § 1060 ABGB found its way into the statutory text. The authors of the ABGB thus allowed the laesio enormis complaint with the intention of going beyond the strict attitude of the Prussian ALR. For them, this was not a restriction of the parties' protection against an inequitable price determination but rather an extension. In their minds, § 1060 ABGB places particular emphasis on the protection of the parties. The legislator both considered the case of an inequitable price determination and deliberately did not include any further remedies than provided by the laesio enormis.[36]

3. Legal Scholarship in the 19th and Early 20th Century

Austrian scholars in the 19th century shared this understanding. Scheidlein[37], Nippel[38], Winiwarter[39] and Stubenrauch[40] all emphasized that the remedy of laesio enormis is

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[33] § 9 of the sixth chapter (*Hauptstück*); *Harras von Harrasowsky*, Codex Theresianus V (1886) 179.

[34] ALR I 11. Titel § 48; on the ALR‘s influence on the ABGB in general cf *Barta*, Zur Kodifikationsgeschichte des österreichischen bürgerlichen Rechts in ihrem Verhältnis zum preußischen Gesetzbuch: Entwurf Martini (1796), (W)GGB (1797), ABGB (1811) und ALR (1794), in Barta/Palme/Ingenhaeff (eds) Naturrecht und Privatrechtskodifikation. Tagungsband des Martini-Colloquiums 1998 (Vienna 1999) 321 (358 ff).

[35] *J. Ofner*, Urentwurf 89; cf *Zeiller*, Commentar 359 f.

[36] *Mayer-Maly* in Klang 298; dissenting *Aicher* in Rummel § 1060 mn 2.

[37] *Scheidlein*, Handbuch des österreichischen Privatrechts (Vienna 1814) 475.

[38] *Nippel*, Erläuterungen des allgemeinen bürgerlichen Gesetzbuches VII/1 (Vienna 1834)180.

[39] *Winiwarter*, Das persönliche Sachenrecht[2] (Vienna 1844) 268.

[40] *Stubenrauch*, Das allgemeine bürgerliche Gesetzbuch III (Vienna 1858) 253.

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a peculiarity rather than a matter of course. A peculiarity in comparison to what is easy to make out: § 1060 ABGB was expressly contrasted with the corresponding provision in the Prussian ALR.[41] The ABGB was usually portrayed as allowing a remedy despite everything that spoke against it. The same can be said for the first half of the 20th century.[42] The German BGB, implemented in the year 1900, initially did not have the same impact here as in other areas of Austrian law[43]. For the time being, the Prussian ALR remained the comparative benchmark.

4. A Decision of the German Reichsgericht and its Consequences

That changed by the middle of the 20th century. Significantly, the shift was brought about by a judgment of the German Supreme Court, the *Reichsgericht* in Leipzig. In the Nazi era, the eighth chamber of the *Reichsgericht* had jurisdiction over civil matters in Austria since April 1st, 1939 and decided on the basis of the ABGB, which was still applicable. It was composed mainly of judges who were former members of the dissolved Austrian Supreme Court, the *Oberster Gerichtshof* (OGH).[44] Insofar as the (published) case-law of this "Austrian Chamber" has been the subject of academic analysis, scholars assume that the ABGB remained largely "independent" und was not heavily influenced by the German BGB.[45] Apart from ideologically particularly charged areas such as marriage and parentage law, the adoption of German law remained the exception rather than the rule.[46]

In 1942, however, the *Reichsgericht* issued a landmark decision that stands in clear contrast to this tendency.[47] It ruled that a price determination by third parties is non-binding if it "apparently contradicts equity". The *Reichsgericht* did not provide a

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[41] Cf *Nippel*, Erläuterungen 180; *Winiwarter*, Sachenrecht 268.

[42] *Krapf* in *Stubenrauch*, Das allgemeine bürgerliche Gesetzbuch II[8] (Vienna 1903) 282; *Krasnopolski/Kafka*, Lehrbuch des österreichischen Privatrechts III. Österreichisches Obligationenrecht (Vienna 1910) 378 f; *Ehrenzweig*, System des österreichischen Privatrechts II/1[2] (Vienna 1928) 408 FN 31; *Bettelheim* in Klang II/2 (Vienna 1934) 979.

[43] Cf *C. Wendehorst* in FS 200 Jahre ABGB 86.

[44] Cf *Bukor/Meissel* in FS 200 Jahre ABGB 30 ff; *Seiler*, Das Reichsgericht und das österreichische ABGB, in Kern/Schmidt-Recla (eds) 125 Jahre Reichsgericht (Berlin 2006) 151 (158); *Haferkamp*, Vergleich der Judikatur des Reichsgerichts zum BGB und zum ABGB während der NS-Zeit, in Dölemeyer/Mohnhaupt (eds) 200 Jahre ABGB (1811-2011): die österreichische Kodifikation im internationalen Kontext (Frankfurt a.M. 2012) 159 (164 ff); *Wedrac*, Die Richter des Obersten Gerichtshofes vom Anschluss 1938 bis zur Eingliederung in das Reichsgericht 1939, RZ 2014, 152.

[45] *Seiler* in 125 Jahre Reichsgericht 151 ff; *Haferkamp* in 200 Jahre ABGB 171 ff.

[46] Examples on the influence of national socialist ideology on the courts can be found in *Bukor/Meissel* in FS 200 Jahre ABGB 30 ff.

[47] RG 18.11.1942, VIII 102/42 DREvBl 1943/90.

doctrinal justification for this, merely relying on the "prevailing opinion, which is in accordance with the principle laid down in § 319 of the BGB". Source material for this allegedly "predominant opinion" in Austria is sorely missing. As mentioned above, legal scholarship and precedents would not have supported the ruling.[48] The decision cited only two older decisions, both of which dealt with cases in which the German BGB was obviously applicable. Without openly admitting it, the *Reichsgericht* had "germanized" the ABGB. It did so by no longer requiring *laesio enormis* as a condition for reviewing the price determination but instead letting the less blatant "apparent inequity" suffice. It can only be assumed that – against the backdrop of the extensive pricing regulations existing at the time – the court found the restrictive approach of the ABGB inadequate.[49]

Ever since this decision, the non-binding nature of a price determination in the event of apparent inequity has been firmly settled in Austrian case-law.[50] Until the 1980s, the *Reichsgericht*'s decision was cited as precedent.[51]

C. Doctrinal Justifications in Legal Scholarship

Meanwhile, legal scholarship has unanimously aligned with the case-law.[52] It differs only in terms of doctrinal justification. A more detailed outline of the arguments is merited. They show the doctrinal paths on which German law can gain a foothold in Austria.

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[48] Also *Swoboda*, Das österreichische Allgemeine bürgerliche Gesetzbuch III. Das Recht der Schuldverhältnisse (Vienna 1942) 267.

[49] Cf § 2 of the law on the formation of price (*Preisbildungsgesetz vom 29.10.1936*, RGBl I 1936, 927) that authorized the *Reichskommissar* to take measures that ensure „economically justified prices" . This law is cited in the unpublished version of the Reichsgericht's opinion.

[50] Cf RIS-Justiz RS0016832; RS0020079.

[51] OGH 20.11.1952, 1 Ob 856/52, SZ 25/308; 21.4.1966, 1 Ob 71/66, SZ 39/75; 13.7.1966, 7 Ob 125/66, SZ 39/132; 4.11.1986, 14 Ob 136/86.

[52] Cf *Aicher* in Rummel § 1056 mn 10; *Verschraegen* in ABGB-ON § 1056 mn 22; *Binder/Spitzer* in Schwimann/Kodek § 1056 mn 14; *Garger*, Schiedsgutachtenrecht 96 ff; *Rüffler* in FS Aicher 675 ff; *Apathy* in KBB § 1056 mn 3.

1. Contract Interpretation According to Commercial Custom

The prevailing view makes use of the interpretation of the contract.[53] After all, it is undisputed that the parties can agree on more extensive remedies of review.[54] In this view, an apparently inequitable price determination is non-binding irrespective of the text of the law.[55] This reverses the dispositive nature of § 1060 ABGB into its opposite: it is not the judicial review for apparent inequity that has to be agreed upon but, conversely, its exclusion. The suggestive character of the term "apparent inequity" is easily discernable: The parties cannot seriously want to be bound by an apparently inequitable price determination[56] – as would actually be the case according to § 1060 ABGB.

However, the origins of the "apparent inequity" standard reinforce these doubts even further. A commercial custom was neither the reasoning for the *Reichsgericht*'s landmark decision nor did it play a role in subsequent case-law. Instead, it was introduced retrospectively by legal scholarship.

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2. Analogy to More Recent Legislation

In part, the "apparent inequity" standard is justified on the level of statutory law. *Garger*[57] treads his own path, relying on an analogy. To begin with, he also recognizes that originally, there is no unintentional gap in the law.[58] Normally, that would mean the end of the story since any step further would exceed the limits of statutory interpretation. According to Garger, however, § 1060 ABGB is "defective and downright incomprehensible".[59] Therefore, he goes on to examine if the remedies to review the third party's price determination can be expanded. Garger's starting point is that due to more recent legislation in the field of Private law, a subsequent gap in

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[53] *Aicher* in Rummel § 1056 mn 8; *Verschraegen* in ABGB-ON § 1056 mn 22; *Welser*, DRdA 1991, 1; *Holzner*, JBl 1994, 252 (256); *Risak*, Entgeltgestaltung 139 ff; *Garger*, Schiedsgutachtenrecht 94 f; cautiously *Mayer-Maly* in Klang 260 f.

[54] *Mayer-Maly* in Klang 260 f; *Aicher* in Rummel § 1060 mn 2.

[55] The decision is deemed non-binding in any case of inequity by *Welser*, DRdA 1991, 1; *Holzner*, JBl 1994, 252 (256); *Risak*, Entgeltgestaltung 139 ff.

[56] Cf *Aicher* in Rummel § 1056 mn 10; *Risak*, Entgeltgestaltung 139 ff.

[57] *Garger*, Schiedsgutachtenrecht 84 ff.

[58] Ibid 85 f.

[59] Ibid 86 f.

statutory law has arisen.[60] Thus, today's legal system emphasizes the objective fairness of price more strongly than at the time of the codification.[61] Therefore, stricter requirements are also to be placed on the fairness of a price determination. *Garger* concludes that an apparently inequitable price determination cannot be binding on the parties.

Claims of subsequent gaps in statutory law – although certainly conceivable[62] – should be made with caution.[63] The legislator's intent must not be carelessly disregarded. As proof for his theory, *Garger* refers above all to legislation concerning the inclusion of general terms and conditions into a contract, mostly done in commercial contracts.[64] For example, § 879 (3) ABGB has the appropriateness of secondary obligations in mind. § 864a ABGB wants to prevent surprising and disadvantageous clauses. In addition, according to *Garger*, developments in tenancy and labor law have to be taken into account.[65] For example, the free agreement of rental prices has been almost eliminated in the ABGB. In labor law, instruments of collective labor law have largely displaced the private, autonomous wage structure.

It is noticeable that in all of these cases there is an imbalance in power between the parties. Businesses using general terms and conditions, employers and landlords are typically economically stronger than their contractual partners. The latter are therefore especially protected by the law.[66] However, it cannot be deduced from this alone that objective fairness of price generally plays a stronger role today, irrespective of a comparable power imbalance between the parties. Hence, there is no subsequent gap in statutory law in defiance of the legislator's intent.

3. "Natural Principles of Law"

Nevertheless, the idea of a gap in statutory law further appears in a different guise. According to another theory, the non-binding nature of an apparently inequitable

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[60] Ibid 87.

[61] Ibid 92.

[62] *F. Bydlinski*, Juristische Methodenlehre und Rechtsbegriff[2] (Vienna 2011) 577 ff; *Koziol-Welser/Kletečka*, Bürgerliches Recht I[14] (Vienna 2014) mn 107; *Kerschner/Kehrer* in Klang[3] §§ 6,7 mn 113; *Kodek* in Rummel/Lukas, ABGB[4] § 7 mn 23; *Schauer* in Kletečka/Schauer, ABGB-ON[1.02] § 7 mn 9; *Rüffler*, Analogie: Zulässige Rechtsanwendung oder unzulässige Rechtsfortbildung? JRP 2002, 60 (72 f); *Canaris*, Die Feststellung von Lücken im Gesetz[2] (Berlin 1983) 135 f; RIS-Justiz RS0005927.

[63] *F. Bydlinski*, Methodenlehre 580; *Kerschner/Kehrer* in Klang§§ 6,7 mn 113.

[64] *Garger*, Schiedsgutachtenrecht 91.

[65] Ibid.

[66] E.g. *F. Bydlinski*, System und Prinzipien des Privatrechts (Vienna 1996) 539 ff, 708 ff.

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price determination follows from the “natural principles of law” (§ 7 ABGB).[67] At its core, this idea operates under the premise that § 1060 ABGB does not do justice to the natural principles of law. A recourse to these principles would, however, also require a gap in statutory law, which – as demonstrated above – does not exist.[68]

4. Violation of Good Faith

§ 879 ABGB states that a contract is void if its content violates good faith. Thus, some argue that the non-binding nature of an apparently inequitable price determination is mandated by the ABGB’s good faith-clause.[69] If this were the case, the concept of the text of the law itself (§1060 ABGB) would be a violation of good faith. In addition, § 1060 ABGB would lose its purpose. After all, the parties could in almost every case invoke the apparent inequity anyway.

D. “Inadequate and Downright Incomprehensible”?

In light of these methodological justifications, one cannot help but get one impression: All of them are based on a certain skepticism towards § 1060 ABGB. Thus, the aforementioned efforts to bring this skepticism into recognized dogmatic categories: commercial custom, an analogy to more recent legislation, natural principles of law, and a violation of good faith. The adoption of § 319 BGB seems to have gone so smoothly mainly because § 1060 ABGB is no longer perceived as reasonable today. Legal history offers an obvious explanation: Today, the “comparative benchmark” is no longer the Prussian ALR but the German BGB. The references to the Prussian ALR in academic literature[70] and the case law[71] have given way to those to the BGB. This, in turn, changes the perspective: § 1060 ABGB, which lets a party challenge the price determination only in case of laesio enormis, is now juxtaposed to the much more lenient § 319 of the German BGB, which requires only an “apparent inequity”. § 1060 ABGB no longer acts as an extension of the parties’ protection, as it did in the 19th century, but as a restriction. This culminates in the statement that § 1060 ABGB is "inadequate and downright incomprehensible"[72].

[67] *Mayer-Maly*, DRdA 1988/11.

[68] This is a specific requirement mentioned in § 7 ABGB.

[69] *Binder/Spitzer* in Schwimann/Kodek § 1056 mn 14.

[70] E.g. *Gschnitzer* in Klang IV/1² 54.

[71] E.g. OGH 26.07.1996, 1 Ob 501/96, SZ 69/168.

[72] *Garger*, Schiedsgutachtenrecht 86.

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Considering the interests of the parties, however, § 1060 ABGB is actually not that incomprehensible. The parties were ready to "close the deal" and no longer wanted to be held back by difficulties in agreeing on a specified purchase price.[73] At the very least, they did not want to burden themselves with further rounds of negotiations and social conflicts. After all, that was their entire motivation to outsource the price determination to a third person. Subsequent challenges could undermine this purpose of the agreement.

Therefore, there are good reasons to restrict the availability of remedies. § 319 BGB does precisely that when it requires not just "inequity", but "apparent inequity", just as § 1060 ABGB when it requires laesio enormis. At any rate, the remedy of laesio enormis provides a higher degree of legal certainty than the more opaque "apparent inequity".[74] Thus, the third party's decision is probably challenged less often under the rules of laesio enormis in the first place. The market value, which is the point of reference for the laesio enormis, is also easier to determine than the "apparent inequity" with its case-by-case approach.[75] The laesio enormis also clearly specifies the degree of the tolerated deviation from the market value. The foreseeability this standard creates is in the interest of the parties.

Moreover, even under § 1060 ABGB the parties are not entirely unprotected against minor inequities. They can always invoke the third party's liability.[76] In the contract with the parties, the third party regularly takes on the obligation to set the price at "equitable discretion". If that margin of discretion is culpably exceeded, the third party is liable for the financial loss incurred even if the price determination remains binding between the parties.

Hence, from a policy perspective, § 1060 ABGB is by no means so unreasonable that it should be supplanted by § 319 BGB.

E. Implications Beyond the Determination of Price

Admittedly, in legal practice, third party price determination may not be the most pressing issue. However, its underlying rules derive considerable meaning from the broad field of their analogous application.

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[73] *Garger*, Schiedsgutachtenrecht 54 f.

[74] *Mayer-Maly* in 261.

[75] *Eccher/Riss* in KBB[5] § 305 mn 1; *Würdinger* in MüKoBGB § 315 mn 31.

[76] *Aicher* in Rummel § 1056 mn 5.

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1. Third Party Determination of Other Obligations

Thus, §§ 1056 and 1060 ABGB have also become the basis for the third party determination of other obligations. As stated by § 319 BGB, a third party's decision is considered non-binding in case of apparent inequity.[77] On the one hand, it has become clear that this is based on a flawed reading of §§ 1056 and 1060 ABGB. On the other hand, it is quite conceivable that the review of a third party determination is structured differently depending on the type of contract at hand. After all, different contracts entail different problems.

Moreover, the limited review provided by both § 1060 ABGB and § 319 BGB does not seem appropriate to those frequent cases in which an obligation is to be determined not by a third but by one of the contracting parties. It is obvious that a contracting party is potentially much more likely to be guided by its own interests.[78] As a consequence, a good argument can be made for broader review in such cases, one not limited to „apparent inequity" but taking into account any kind of inequity. Indeed, one of the advantages of the Austrian ABGB is the flexibility its fragmented provisions offer in deriving rules that are easily adaptable to different situations warranting diverging treatment. Yet, the prevailing case-law still applies the „apparent inequity" standard.[79]

2. Expert Determination

There are also consequences for cases of „expert determination". In contrast to the determination of an obligation discussed so far, „expert determination" is not about complementing or amending a contract. Instead, a third party is entrusted with the task of establishing or clarifying certain disputed facts.[80] The most common examples, at least in the case-law, can be found in insurance contract law: establishing the cause and the extent of an injury[81], the degree of a disability[82], or the prerequisites for a claim

[77] RIS-Justiz RS0020089; RS0020079; *Aicher* in Rummel § 1056 mn 11.

[78] Cf *Bürge*, Preisbestimmung durch einen Vertragspartner und die Tagespreisklausel, JBl 1989, 687.

[79] RIS-Justiz RS0020010; differently the prevailing academic literature, cf *Aicher* in Rummel § 1056 mn 8.

[80] Cf *Rüffler* in FS Aicher 665 f; *Kleinschmidt*, Delegation 26 ff.

[81] OGH 20.7.1990, 7 Ob 1017/90; 11.7.1991, 7 Ob 20/91; 26.11.1992, 7 Ob 23/92; 19.1.1994, 7 Ob 2/94; 20.11.1996, 54 R 368/96y; 23.12.1998, 7 Ob 164/98p; 26.4.2000, 7 Ob 332/99w; 30.6.2004, 7 Ob 130/04z; 3.6.2009, 7 Ob 51/09i; 2.9.2009, 7 Ob 75/09v; 28.10.2009, 7 Ob 147/09g; 5.5.2010, 7 Ob 222/09m; 24.11.2010, 7 Ob 220/10v; 28.4.2003, 7 Ob 79/03y; 27.2.2012, 7 Ob 204/11t; 28.3.2012, 7 Ob 19/12p; 16.12.2015, 7 Ob 124/15h.

[82] OGH 30.8.2006, 7 Ob 184/06v; 20.12.2006, 7 Ob 185/06s; 8.3.2007, 7 Ob 291/06d; 30.9.2009, 7 Ob 135/09t; 28.10.2009, 7 Ob 214/09k; 10.9.2014, 7 Ob 113/14i, SZ 2014/104.

under a legal expenses insurance (i.e. the „sufficient prospect of success")[83]. However, expert determination is also important outside of insurance contract law. For example, a third party can establish a company value in a merger or an acquisition.[84]

Courts apply §§ 1056 and 1060 ABGB analogously to cases of expert determination.[85] Thus, the third party's decision is assumed to be non-binding if it is „apparently incorrect". The terminological modification from "apparently inequitable" to "apparently incorrect" is explained by the third party's task of establishing facts.[86] Yet again, this analogy raises a problem: It only works under the premise that § 1060 ABGB provides a basis for the „apparently inequitable" standard. In Germany, § 319 BGB is applied analogously to expert determinations in this way.[87] Taking the language of § 1060 ABGB seriously, at most one could claim that expert determinations can be challenged in cases of *laesio enormis*. But of what use is the remedy of *laesio enormis* when a case is, for example, about establishing the cause of an injury? Or when the „sufficient prospect of success" in a law suit is at issue? It simply fails when it comes to such yes or no-questions. Thus, § 1060 ABGB is not a suitable basis for an analogy here.

III. Conclusion

This article demonstrated that the perspective of legal history can make a valuable contribution to legal dogmatics and that it can be helpful to initially regard developments of law as historical facts which do not necessarily adhere to a strict legal methodology. Numerous ideas from Germany have now been imported into Austrian private law. There is nothing wrong with that, as long as legal methodology allows it. If it does not, a return to the text of the ABGB is not only indicated out of "patriotic" adherence with the law. Sometimes forgotten advantages are hidden in the more than 200 year old ABGB. If they are brought back to light by an analysis of

[83] OGH 28.6.1995, 7 Ob 13/95; 30.9.1998, 7 Ob 236/97z; 7.8.2002, 7 Ob 177/02h; 27.11.2002, 7 Ob 213/02b; 16.11.2007, 7 Ob 243/07x, SZ 2007/181; 27.8.2008, 7 Ob 103/08k; 8.7.2009, 7 Ob 236/08v; 16.12.2009, 7 Ob 194/09v, SZ 2009/168; 30.3.2011, 7 Ob 130/10h, SZ 2011/41; 30.11.2011, 7 Ob 202/11y; 27.2.2012, 7 Ob 215/11k; 23.1.2013, 7 Ob 201/12b, SZ 2013/5; 27.1.2016, 7 Ob 1/16x; 27.1.2016, 7 Ob 234/15k.

[84] OGH 21.4.1966, 1 Ob 71/66 SZ 39/75; 10.11.2011, 2 Ob 209/10i; 28.8.2014, 6 Ob 85/14i.

[85] RIS-Justiz RS0016769; RS0016832; cf *Rüffler* in FS Aicher 668 f; *Fasching*, Lehrbuch des österreichischen Zivilprozeßrechts[2] (Vienna 1990) mn 2168; *Aicher* in Rummel § 1056 mn 12

[86] *Rüffler* in FS Aicher 676.

[87] *Würdinger* in MüKoBGB § 319 mn 14 ff.

legal history, new insights can also be gained for legal institutions of modern economic life.

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