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Trends and Developments

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KNOETZL is one of Austria's first large-scale dispute resolution powerhouses dedicated to high-profile and significant cases. The firm is best known for taking the approach of providing a diverse team of highly skilled lawyers and legal advisers from Austria, Argentina, Cuba, Bosnia, Russia, Serbia, Greece, India and the USA to offer truly international and focused advice in high-end dispute resolution. Litigation is the core of the firm's practice and its diverse skill set covers civil, commercial, sovereign and criminal litigation and investigations, focusing on liability claims, corporate disputes, banking, insurance and financial derivatives cases, investor protection, business crime, energy, technology and life sciences. Firm services also include asset-tracing and effective provisional measures, such as freeze orders and attachments, in the domestic and international context, and effective enforcement of foreign judgments.

Authors

Bettina Knoetzl is one of the founding partners at KNOETZL. She is a trial lawyer with 25 years' experience in international and Austrian matters of high profile, scoring notable and reported successes in criminal defence work in insider trading, price-fixing, fraud and corruption cases. Bettina is the president of Transparency International (Austrian Chapter), the exclusive Austrian representative of the ICC-FraudNet and lectures in the Austrian Lawyers' Academy (AWAK) in dispute resolution. She is heavily engaged in the International Bar Association, where she co-chaired the global Litigation Committee throughout 2016-17.

Judith Schacherreiter is distinguished as a rising star in the fields of litigation and asset tracing. Judith provides strategic and academic-practical support to our asset-tracing team and advises at the intersection of civil and criminal law. She began her career as a teacher and researcher at the University of Vienna Law Faculty, where she developed her widely recognised legal drafting skills. Judith has now been an effective, practicing trial lawyer for several years, handling national and cross-border litigation cases. Judith brings a distinguished academic background to KNOETZL and frequently publishes on civil, private international and international procedural law.

Katrin Hanschitz is an experienced first-chair litigator with a strong background in M&A, finance transactions and ancillary disputes. Her primary focus is on corporate and transactional litigation and arbitration, including all forms of shareholder disputes, manager liability, governance issues and disputed M&A transactions. Katrin regularly represents clients from various industries. She has been particularly active in representing life sciences clients in court, including multinational pharmaceuticals. She is also experienced in complex, disputed matters in advertising, investment banking and international insolvency. Katrin is a member of the American Bar Association and co-chair of the International Life Sciences and Health Laws Committee.

In recent years, the caseload in Austrian courts regarding civil and commercial litigation has decreased by approximately 20%, from 0.5 first instance litigation cases pending per 100 inhabitants in 2010 to 0.4 in 2016. In comparison, cases in Germany have doubled and Italy and Croatia have had almost ten times as many commercial and civil disputes (see CEPEJ Studies No 26, Edition 2018).

It is fair to assume that this decrease is largely the result of the courts having cleared the disputes resulting from the financial crisis, particularly the large-scale investors' claims that blocked entire court departments for years at a time.

Factors keeping the caseloads low are the Austrian court fee system and the continuing popularity of ADR methods.

Austria is the only European jurisdiction in which the court fees paid by the parties not only cover the costs of the judicial system, but even generate a plus for the state's treasury. The court fees are based on the amount in dispute and, for proceedings in first instance, amount to approximately 1.2%. Appeal proceedings and proceedings in front of the Supreme Court cost even more. While Austrian lawyers' fees are limited to a certain amount, there is no cap for court fees at a certain amount of dispute, making high-volume disputes prohibitively expensive. To address the concerns voiced by private practitioners about the prohibitively expensive court fees, a recent legislative amendment has reduced court fees by half if the dispute is settled in course of the first oral hearing at the latest. This amendment is welcome as a first step, yet not enough. A cap for higher amounts in dispute is still missing.

The benefit of almost worldwide enforceability continues to make arbitration clauses popular in cross-border transactions. The rise of specialty arbitration, particularly in construction and post-M&A disputes, is also drawing disputes away from the state courts, with parties benefiting from the choice of industry experts as arbitrators and the better confidentiality in arbitration proceedings.

Additionally, mediation is garnering increasing interest from businesses, particularly as the Commercial Court and the Civil Court actively refer cases to mediation when the parties agree. Thus, the first step is done by the court rather than by one party. Also, in the context of cross-border supply transactions and M&A deals, a new trend is visible; in the past, pre-litigation/arbitration mediation procedure clauses were often dealt with summarily, but heightened cost-sensitivity regarding legal spending seems to have triggered a greater willingness by corporate counsel to participate actively in the pre-trial mediation proceedings, rather than sitting out the mediation period and suing in court.

However, the ever-improving enforceability of EU judgments has to some extent encouraged businesses operating mainly within the EU to opt for state courts to avoid the costs and appeal restrictions associated with arbitration. To what extent this trend will continue and which sectors of the market will be most affected remains to be seen.

In contrast to the general decline in litigation activity, some areas are showing significantly increased activity, particularly at the intersection between public and private enforcement.

In the last two to three years, the increasingly sophisticated compliance systems that were implemented in domestic and international corporations active in Austria over the last decade have made their mark. Coupled with the various governmental whistle-blowing systems guaranteeing absolute anonymity – the Antitrust Whistle-blowing System, the Financial Markets Authority's whistle-blowing scheme, the anonymous notification system of the Central Office for Prosecuting Economic Crimes and Corruption – many damaging actions ("cans of worms") have been brought to light that previously would have remained undiscovered, with resulting commercial litigation against management, staff and business partners. This has affected all industries in recent years, particularly the construction industry and public tenders of all kinds, and might become even more relevant after the implementation of the "Whistleblower-Directive" (Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law).

The above development has, in the area of antitrust, been supplemented by the recent amendments to the Austrian Antitrust Act (Kartellgesetz) in the implementation of the EU "Antitrust Damages" Directive 2014/104/EU. The new private enforcement rules include substantially improved access to a public authority's files, a longer prescription period and a shift of the burden of proof to defendants. These amendments have increased and will presumably continue to increase general appetite for private enforcement litigation. Public authorities and large businesses have begun asserting substantial damages claims following antitrust prosecutions against their suppliers and customers.

While Austria does not have a US/UK-style class action system, third-party litigation funders are working on closing this gap in private enforcement funding; it remains to be seen how successful they become in motivating consumers to private enforcement claims. Moreover, the Austrian government has invested significant sums in building up highly effective antitrust authorities. Their activities uncover wrongdoings, often paving the way to enforcement of damages claims. For the coming years, due to increased private enforcement, the legal community expects a certain slowdown of public enforcement activities, which in the past was to a significant part triggered by a co-operative party aiming to take advantage of the existing leniency programmes. This

kind of fully co-operative behaviour might not be encountered as frequently as before, as awareness of civil liability exposure has clearly increased and compliance programmes are showing positive effects.

In addition to the ever more effective whistle-blowing schemes, Austria has seen a general increase in the quality and level of prosecution of white-collar crime in recent years, with large white-collar crime cases (damages over EUR5 million) being prosecuted by a highly effective, specialist, public prosecutor, the Central Office for Prosecuting Economic Crimes and Corruption (WKStA). Consequently, civil litigation arising from such white-collar crime cases has been on the rise.

Moreover, the significant presence of Russian and Ukrainian expats in Austria has affected the Austrian litigation environment. Specialist "asset recovery" governmental agencies established by CIS governments have brought a notably high volume of cases before the Austrian courts, pursuing large-scale money laundering claims.

Law firms with a particular focus on high-stakes disputes and white-collar crime, such as KNOETZL, have felt the impact of these developments directly, with their caseloads increasing exponentially. This may or may not be representative of the whole market.

Austria, like several European jurisdictions, disallows contingency fee arrangements by which lawyers are entitled to a portion or percentage of the amount recovered in litigation (quota litis). This, in combination with the lack of an effective US/UK-style system of class actions, has left something of a gap in the Austrian litigation market, especially with regard to consumer and small investor litigation, but also in high-volume commercial disputes. Third-party litigation funders have become increasingly active in filling this gap in recent years, with numerous new players entering the market.

Third-party litigation funders generally show interest in disputes with amounts in excess of approximately EUR10 million or in class action-style cases. In the past, "Austrian-style" class actions – often litigated via a series of test cases – have been facilitated by third-party litigation funders, including, in particular, investor claims through filing mass actions at the Commercial Court of Vienna; for example, against AWD, AMIS, Meinl Bank, Immoeast-Immofinanz and, most recently, Volkswagen. Currently, interest is strong in the higher-volume claims against the Trucks Cartel.

While the purchase of distressed receivables by commercial businesses is not yet a common practice in Austria, several instances have been observed and more may be in store in the coming years.

Austria, the first country in the world to do so, established Electronic Legal Communication (ELC) for the electronic transmission of documents to and from the courts. Since then, the Austrian judicial system has continued to invest a portion of its (substantial, see above) revenues in an ongoing process of innovation in "e-Justice".

To a litigator, ELC means that all written communications between the courts and the parties are electronic and that the "external"' court files can be accessed electronically. Further e-Justice mainstays for litigators are the electronic Land Register and Companies Register (including electronic documents archives), the Database of Official Publications (Ediktsdatei) and the Federal Law Information System (RIS, which contains all higher court and some lower court judgments). Since 1 January 2019, lawyers will also obtain access to the judicial Enforcement Register.

Particularly welcome is the current practice of the Central Office for Prosecuting Economic Crimes and Corruption of providing electronic file copies on data carriers. Parties that have a legal right to access the file are simply provided – upon request – with a DVD containing the respective parts of the file. This system is not only cheaper and faster, it means that the file becomes accessible to all users, letting the traditional way of making paper copies appear almost archaic. While paper copies are made, access to the file is otherwise blocked for all users. In complex white-collar crime files, this process can take up to several weeks. The legal community is therefore awaiting a comprehensive overhaul of the system for all sections of the court system, as the players have learned that working with the electronic files is much more efficient.

Courts profit from various additional electronic tools such as the "Justice Intranet", the electronic platforms for court-appointed experts and the IT Application for the European Payment Order.

The next step in the eJustice programme is the "Justice 3.0 Initiative", which is aimed at a completely digital file management by the courts. Since the 2016 pilot project in the Viennese Labour Court, the project has been extended to various other courts, including the Commercial Court of Vienna. Judges are equipped with a tablet, two large touch screens and a signature module, all of which are connected

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to the Electronic Integration Portal (eIP). The court file can be accessed from anywhere, including from the courtroom, where selected content can also be displayed on various screens, both by the judge and by counsel. Forward-thinking firms are already adapting their own technological tools and litigation strategy to the new "electronic courtroom", which will have been fully implemented by 2020.