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Litigation

Austria
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KNOETZL

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Law and Practice

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1. General

1.1 General Characteristics of the Legal System

Austrian Civil Law System

The Austrian legal system is a civil law one. Laws are based on codes and statutes. Civil procedure provides an adversarial process with inquisitorial elements: the proceedings and the judge are limited to the factual allegations of the parties. The judge is not a mere "referee" (eg, in the judge's inquisitorial role, he or she will be the primary interrogator of parties and witnesses).

Obligatory Public Hearings

A public hearing is obligatory. The judge will determine all relevant facts of the case in the hearing, hear parties and witnesses, discuss the content of documents and – if needed – appoint and hear expert witnesses. Parties and lawyers are entitled to interrogate witnesses and experts. The underlying principle is that the judge (as the finder of fact) should get an immediate and personal impression of the parties, the witnesses and the case.

1.2 Court System

Court Hierarchy

Austrian courts are organised on four levels: District Courts, Regional Courts, Higher Regional Courts and the Supreme Court. District Courts are the courts of first instance for cases with a maximum amount in dispute of up to EUR15,000 and, irrespective of the amount in dispute, on certain subject matters (mainly family and tenancy law). Regional Courts have jurisdiction over first instance rulings on all legal matters not assigned to District Courts. They are also competent to rule on appeals from District Court decisions. Higher Regional Courts are appellate courts for decisions of Regional Courts.

Specialised Commercial Courts

Commercial matters are decided by commercial courts. In the capital city, Vienna, a separate Commercial District Court and Commercial Regional Court are established. In other provinces, the Regional (District) Courts also function as commercial courts.

The Supreme Court

The Supreme Court is the court of highest review. No further (domestic) remedy is possible over its decisions. Its function is to preserve the uniform application of law throughout Austria. Although lower courts are not legally bound by its decisions, the case law of the Supreme Court has effective precedential character.

1.3 Court Filings and Proceedings

Court filings are not public. Hearings, however, are open to the public. Public access may only be restricted if, for example, this is necessary to maintain public order, protect certain categories of information (such as banking secrecy, business or state secrets), or if the hearing deals with personal family matters.

1.4 Legal Representation in Court

For certain legal disputes, the parties must be represented by a lawyer admitted to the Austrian Bar and cannot represent themselves. A foreign lawyer may not represent a party in these cases.

This limitation applies to:

- disputes of first instance before Regional Courts;
- disputes before District Courts if the amount in dispute exceeds EUR5,000; and
- all appeal proceedings.

In all other proceedings, the parties may (with a few exceptions) be represented by any person, including by a foreign lawyer.

2. Litigation Funding

2.1 Third-Party Litigation Funding

The permissibility of third-party litigation funding was the subject of fierce debates in the early 2000s. At present, third-party litigation funding is an accepted tool in Austria and is recognised without any particular restrictions. The political reason for this is the limited possibility of collective suit in Austria, which is compensated by third-party financing and "Austrian-type mass claims" (see **3.7 Representative or Collective Actions**).

The state provides legal aid for parties, including legal entities unable to afford litigation.

2.2 Third-Party Funding: Lawsuits

There are no formal restrictions of litigation funding, but, generally, funding will only be available to plaintiffs or defendants in lawsuits regarding cash-value civil claims.

2.3 Third-Party Funding for Plaintiff and Defendant

In most cases, funders provide their financial support to the plaintiff, but it is also allowed for defendants.

2.4 Minimum and Maximum Amounts of Third-Party Funding

It is common practice that litigation funding companies fund cases with a significant financial impact, as they tend to be compensated for their services with a significant portion of the proceeds (approximately one third of them). This portion must cover both the risk undertaken by the funder and the costs of their own lawyers. Therefore, cases with low financial impact

tend only to attract funders if multiple, similar cases are likely to emerge and collective action can be brought.

2.5 Types of Costs Considered under Third-Party Funding

Generally, litigation funding agreements cover all legal fees or costs that arise in the proceedings (ie, court fees, lawyer's fees, fees for expert witnesses and/or translators and travel expenses for witnesses). The opponent's legal fees are usually also covered to provide for the scenario in which the funded party loses the case and thus becomes required to reimburse its opponent for its legal fees or costs. The litigation funder will usually reserve the right to terminate the agreement at any time to prevent covering further costs while bearing the costs already incurred.

2.6 Contingency Fees

It is prohibited for members of the legal profession to enter into a pactum de quota litis (contingency fees arrangement) with their clients, but this rule does not apply outside the legal profession. Thus, a third-party funder's remuneration is generally based on a percentage of the amount recovered. Other fee structures may also be permissible as long as they are not excessive, against good morals or contradictory to consumer protection legislation. A success fee arrangement is possible, if it concerns only a certain portion of the fee agreement.

2.7 Time Limit for Obtaining Third-Party Funding

Litigation funding is available at the commencement of litigation as well as in ongoing proceedings (eg, for appeal procedures). It should be remembered that entering into a litigation funding agreement often takes several weeks, while procedural deadlines and limitation periods continue to run.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

General Rule

There is no prerequisite to filing a lawsuit. Nevertheless, it may be advisable to send a letter to the potential defendant requesting compliance regarding the dispute, because, for example, if the potential defendant immediately performs upon initiation of the lawsuit or does not dispute the claim, this can lead to a cost decision ordering the successful plaintiff to bear the costs for the (unnecessary) proceedings. The defendant is not obliged to respond to such a letter.

Exceptions

In a limited number of cases relating to:

- neighbourly disputes;
- tenancy disputes; and
- disputes between members of certain professional groups subject to a code of conduct (eg, architects, lawyers, medical doctors),

alternative dispute resolution mechanisms are foreseen as a prerequisite to filing a lawsuit. If the claimant does not comply with this prerequisite, the claim may be rejected.

3.2 Statutes of Limitations

Limitation Periods

Statutes of limitations applied to civil suits are fixed by substantive law. The limitation periods generally commence when a right could have been first exercised and, as a rule, are 30 years. However, due to numerous, specified exceptions, most claims, including damage claims, are subject to a shorter limitation period of three years. In the case of damage claims the three-year period starts with knowledge of the damage and the identity of the party that caused the damages. For contractual claims, the statute of limitations generally begins when the claim is due.

Specific Rules

There are a number of shorter or longer limitation periods. For example, a negligence claim against a managing board member can be brought within five years.

Interruption and Suspension

There are different reasons for interruption and suspension of the limitation period. An acknowledgement, for example, interrupts the limitation period, and settlement negotiations suspend the expiry; the claim must be filed within a reasonable period after the negotiations have failed.

Procedural Aspects

The fact that a claim is time barred must be raised by the defendant. It will not be imposed by the court sua sponte.

3.3 Jurisdictional Requirements for a Defendant

Relevant Rules

In domestic cases, the jurisdiction of Austrian courts is determined by the Law on Jurisdiction (*Jurisdiktionsnorm*). In most international cases, the jurisdiction of Austrian courts is determined by Regulation (EC) 1215/2012 (the recast Brussels Regulation).

These provisions establish the jurisdiction of all types of courts. Whether a specific court is competent to hear a case may also depend on other factors such as the type of dispute (eg, to establish the competence of the commercial courts to hear a case).

Jurisdiction at the Seat of the Defendant

The general rule is that Austrian courts have jurisdiction if the defendant has its seat in Austria. In addition, there are numerous other factors that are considered to establish the jurisdiction of Austrian courts, including:

- whether Austria is the place of performance of a contract;
- the place where the damage occurred; or
- when the dispute relates to real estate located in Austria.

Jurisdiction Clause

The jurisdiction of Austrian courts can also be established by means of a forum selection clause.

3.4 Initial Complaint

Filing the Claim

Proceedings commence with the filing of a statement of claim. Unless the amount in dispute is below EUR5,000, or concerns matters (such as family and real estate) that are allocated to the District Courts irrespective of the amount in dispute, the statement of claim must be signed and filed by a lawyer through the official electronic filing system (Web ERV).

Content of the Claim

Moreover, the statement of claim must clearly identify the competent court, the parties to the dispute, their occupations, their addresses, their roles in the proceedings, their representatives (if any), the subject matter of the dispute and the exhibits attached (including whether the exhibits are submitted in their original from or as copies).

The statement of claim should state the main facts on which the claim is based, and the relief sought. While it is not necessary for all evidence to be attached, the statement of claim should indicate the evidence on which it relies.

Amendment of the Claim

The plaintiff may amend its claim at any time prior to service on the defendant. After service, an amendment affecting either the relief requested or introducing a different legal basis for the claim must be agreed to by the defendant or permitted by the court. The decisive factors are whether the amendment affects the jurisdiction of the court and whether proceedings could be significantly prolonged by the amendment.

Additional Submissions to the Claim

Presentation of new facts and evidence, or additional submissions substantiating the claim, are not considered amendments, and are thus admissible unless they could have been submitted earlier and their late introduction will significantly prolong proceedings. The final cut-off date for any new facts, evidence or pleading is the end of the oral hearing. In appellate proceedings, no new facts or evidence may be presented.

3.5 Rules of Service

Service by Court

The statement of claim is served on the defendant(s) by the court, together with an order to file an answer to the statement of claim within four weeks. The means of service shall ensure proof of receipt. In most cases, the court will effect service by using registered mail.

Service Abroad

A party that is located outside of Austria can be served either in accordance with Regulation (EC) 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (within the European Union) or in accordance with bilateral treaties containing provisions on the service of documents (outside the European Union).

Austrian law also provides supplementary rules, according to which service of documents is allowed by means of postal service in a number of states. Otherwise, service is effected through diplomatic channels (ie, embassies or consulates).

3.6 Failure to Respond

If the defendant has been served with the statement of claim but fails to respond or to attend the hearing, the plaintiff can request a default judgment. Various remedies are available to the defendant to reinstate proceedings but these must be filed within 14 days after service of the default judgment on the defendant or – if the defendant was prevented from responding for reasons beyond its control – within 14 days after the impediment ceases to exist.

3.7 Representative or Collective Actions

No Class Actions but Sample Lawsuits

Austrian law does not provide for class actions. However, it does provide for representative test case actions, in which certain (consumer protection) organisations may file a case on behalf of a consumer and – irrespective of the amount in dispute – bring it before the Supreme Court. While the judgment only has legal effect regarding the specific case, the lower courts will generally observe the decision of the Supreme Court as a practical precedent. Consumer protection organisations may also file injunctions pursuant to the Directive (EC) 98/27 on injunctions for the protection of consumers' interests.

Austrian-Type Mass Claims

Otherwise, Austrian law prohibits representative actions. Only a party that has a claim in substantive law may be a plaintiff in proceedings. Therefore, in order to deal with mass claims, practice has established an Austrian-type mass claims procedure.

This avails itself of the concept that claims may be assigned for collection and that a plaintiff may file a single lawsuit to deal with multiple claims it has against the defendant. Thus, the single person/entity that has been assigned all claims can raise all claims against a single defendant in the same proceeding.

Trends and Upcoming Reforms

It should be noted that discussions are ongoing, and that the Austrian legislature has established a working group to draft a law that specifically allows for, and regulates, collective actions.

In summer 2020, an agreement was reached on the draft of a directive for EU-wide rules on collective redress for consumers. Member states are required to implement this directive over the next two years.

3.8 Requirements for Cost Estimate

There is no legal requirement to provide clients with a cost estimate of the potential litigation at the outset. In practice, clients will often ask counsel to provide such a cost estimate. It is advisable to address the issue in a timely fashion because, upon filing its claim, the plaintiff must pay an advance on the court fees that are calculated on the basis of the amount in dispute.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

There are only a few specified applications available that may be decided before the trial takes place, such as:

- request for injunctive relief (to secure future enforcement or to safeguard evidence, see **6. Injunctive Relief**);
- application for security of costs;
- application for legal aid;
- application to dismiss the claim for lack of jurisdiction; and
- intervention of a third party.

Otherwise, Austrian procedural law does not provide for pre-trial proceedings as known, for example, in Anglo-American jurisdictions.

4.2 Early Judgment Applications

Early, Interim and Partial Judgments

Before a substantive hearing of the claim takes place, an early judgment on some of the issues in dispute, or to dismiss the claim, is possible, particularly with respect to procedural grounds for dismissal, such as lack of jurisdiction or improper venue.

Also, interim and partial judgments are possible, but only during the main proceedings.

Time-Barred Claims

An important example of a pre-trial dispositive motion is where a party asks for an early dismissal because the claim is time-barred. If a claim is time-barred, the court may decide only this question without going into the merits of the matter.

Early Judgments on Procedural Grounds

Usually a defence on procedural grounds must be raised before pleading on the merits of the case. A significant number of procedural grounds are to be disregarded by the court if raised at a later point in time. Some very severe procedural defects can also be raised at a later stage, or can be observed by the court on its own without a party's express motion. For example, directly after receiving the claim, the court must determine and verify its jurisdiction a limine, even before service of the claim on the defendant. If the court lacks jurisdiction, the claim is dismissed immediately – before trial.

4.3 Dispositive Motions

Trial is commenced with a preparatory hearing. Most of the dispositive motions are brought beforehand and are discussed in such a hearing. They may be based on procedural grounds such as failure of jurisdiction or improper venue, or on substantive grounds such as the claim being time-barred or inconclusiveness of the complaint. A claim can be dismissed by the court during this first preparatory hearing, at which point no evidence will have been taken.

4.4 Requirements for Interested Parties to Join a Lawsuit

Legal Interest

A third party may join the proceedings on the side of the plaintiff or defendant if it has a legal interest in the success of that party. Legal interest is established if the decision will have a legal effect on the third party's position (eg, an insurer may join proceedings of an insured party against the damaging party).

Procedural Aspects

In practical terms, a joinder is effected by a written application of the third party that must be granted by the court. Admission of the joinder may be opposed by the parties but this opposition can be overruled by the court.

A third party may join the proceedings at any stage, even in appeal proceedings, up to the moment when the judgment becomes final.

4.5 Applications for Security for Defendant's Costs

If a foreign plaintiff is not an EU national and does not have domicile within the EU, the defendant may, in many cases, request an order compelling the plaintiff to secure the defend-

ant's costs (the same applies for companies that do not have a seat within the EU).

No order for security is granted in these cases if:

- this would be contrary to certain bilateral or international conventions;
- a cost award could be enforced in the country where the plaintiff has its domicile/seat; or
- the plaintiff has sufficient assets in the form of immovable property or registered rights in rem.

4.6 Costs of Interim Applications/Motions

In general, the "loser pays principle" applies. Depending on the subject of the interim motion, this principle applies for the final and binding decision concerning the interim motion, or the costs decision is made dependent on the outcome of the final decision in the main proceedings. In general, courts decide which party is required to pay costs along with their dispositive decision regarding the main claim.

Other decisions may include an order on costs if the obligation to compensate costs does not depend on the outcome of the proceedings (eg, dismissal of a third-party intervention or a challenge to a judge or expert witness on the basis of bias).

4.7 Application/Motion Timeframe

There is no fixed time limit within which a court has to deal with an application. Parties are nevertheless protected against an unreasonable delay by Article 6 of the European Convention on Human Rights and Article 47 on the European Charter of Human Rights, which guarantee an impartial tribunal within reasonable time. The court is thus obliged to provide prompt and effective action. If a court does not render a decision or order within reasonable time, the interested party may file a request to establish a deadline for the court.

5. Discovery

5.1 Discovery and Civil Cases

No Pre-trial Discovery

There are no (pre-trial) discovery procedures in Austria. Evidence can be secured under specific circumstances, but, otherwise, production of documents and taking evidence takes place in the proceedings.

Document Production in the Proceedings

In civil proceedings, a party may be ordered by the court to produce evidence at its disposal, if the court considers such evidence material, on the court's own initiative (this rarely occurs) or upon request by the other party.

If a party does not comply with the court order, there is no enforcement available. The court will consider the refusal in its assessment of evidence and adverse inferences may be drawn by the court as finder-of-fact.

5.2 Discovery and Third Parties

Prerequisites to Order a Third Party

A party may, in the proceedings, request the court to order a third party to provide a specific document if:

- substantive law requires the third party to hand the document over; or
- the document may be of joint use to the parties (eg, a contract).

The requesting party must:

- present plausible reasons for believing that the document is in the possession of the third party; and
- accurately describe the content of the document.

Enforcement

As opposed to the document production order addressed to one party, the production obligation of a third party is an enforceable court order. The court may impose a fine. Ultimately, contempt of court may even lead to imprisonment of up to two months. In practice, however, such orders to third parties are rarely issued.

5.3 Discovery in This Jurisdiction

There are no (pre-trial) discovery proceedings. Taking evidence is considered a sovereign task of the court and is conducted exclusively by the court at the request of the parties.

5.4 Alternatives to Discovery Mechanisms

Order for Document Production

In civil proceedings, a party may be ordered by the court to produce evidence at its disposal upon request by the other party or even without such a request (this rarely occurs).

The prerequisites for an order to produce documents upon request are that:

- the requesting party can present plausible reasons for the allegation that the document is in the possession of the other party; and
- the requesting party either provides a copy of the document it is requesting (to be produced in the original) or can accurately and fully describe the content of the document (it is not permissible to request a category of documents); and
- the requesting party must state which facts it expects to prove with the requested document.

Criminal Investigation

If there is a suspicion of criminal misconduct, discovery may also be achieved by initiating a criminal investigation. Evidence, particularly in the form of documents, obtained by the criminal authorities (eg, through house searches) may be obtained for use in civil proceedings. Any (potential) victim of a criminal offence as well as third parties with qualified legal interest may be granted access to the contents of a criminal file.

5.5 Legal Privilege

Austria recognises the concept of legal privilege. Members of legal professions – particularly attorneys-at-law – must refuse to testify with respect to any one of their mandates before any authority unless released by their client. Neither the party nor its counsel can be forced to produce client-attorney work product. No adverse inferences may be drawn by the court from such a refusal. Client-attorney correspondence and attorney work product are protected by legal privilege irrespective of where such documents are located.

5.6 Rules Disallowing Disclosure of a Document

A party ordered to produce a piece of evidence is entitled to object to the order in order to protect:

- family affairs;
- the party's duty of preserving honour;
- itself or third parties from criminal prosecution;
- legal privilege; or
- business secrets.

However, the requested party may not refuse to produce the requested evidence if:

- it previously referred to the piece of evidence (mostly documents) in the proceedings;
- substantive law requires the requested party to produce the evidence (this also applies to evidence in the possession of third parties); or
- the evidence is in the form of a document and may be considered to be of joint use with respect to both parties (eg, a contract), this also applies to evidence in the possession of third parties if the piece of evidence is of joint use with respect to the third party and either party to the litigation.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

Timing

The Austrian Enforcement Act provides for accelerated preliminary proceedings in which the court may order injunctive relief (preliminary injunctions) to prevent the frustration or significant obstruction of future enforcement. A creditor can apply for a preliminary injunction together with the claim initiating legal proceedings, prior to the actual initiation of legal proceedings, during legal proceedings and – if foreign courts have jurisdiction in the case – independently from legal proceedings in Austria.

Prerequisites

The Enforcement Act distinguishes between preliminary injunctions:

- for securing monetary claims;
- for securing other claims; and
- for securing a right.

For the purpose of securing monetary claims, injunctive relief may be awarded if:

- the creditor can credibly show its claim (compelling evidence is not necessary);
- the debtor is likely to frustrate or significantly obstruct enforcement by damaging, destroying, hiding or removing assets ("subjective endangering"); or
- if the judgment would have to be enforced in a state where enforcement is secured neither by international agreements nor by EU law ("objective endangering").

Injunctions for Securing Monetary Claims

Available injunctions for securing monetary claims are:

- orders for the deposit of money at the court;
- freezing orders regarding movable and immovable assets; and
- orders against third debtors (ie, debtors of the debtor) enjoining them not to pay the debtor.

By an order against the respective bank, bank accounts can also be frozen.

Practice

Courts are typically reluctant to assume that a party is likely to damage, destroy, hide or remove assets and therefore require a strong and concrete likelihood in this regard.

No Anti-suit Injunctions

Austrian law does not provide for injunctions to prevent parallel proceedings in another jurisdiction. If the same case is pending in different courts, the principle of priority applies – similar to the system of the Brussels Regulation.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Injunctive relief is granted in accelerated preliminary proceedings. Depending on the concrete circumstances, injunctive relief can sometimes be obtained within 24 hours, sometimes the applicant has to wait for 14 days, or even more.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

Upon request of the applicant, injunctive relief can be awarded ex parte. The respondent will not be heard to avoid frustration of the intended – interim – enforcement act. If injunctive relief is granted ex parte, the respondent's right to be heard is satisfied only in the challenge proceedings.

6.4 Liability for Damages for the Applicant

The applicant can be held liable for damages suffered by the respondent if the respondent later successfully discharges the injunction. In order to compensate possible damages to the respondent, the court may order a preliminary injunction subject to posting security by the applicant. This applies irrespective of whether the proceedings were ex parte.

6.5 Respondent's Worldwide Assets and Injunctive Relief

Whenever Austrian courts have international jurisdiction for a claim to be secured, they also assume international jurisdiction to issue the preliminary injunction. This also applies if the asset subject to the preliminary injunction is situated in another country. The enforcement of such an Austrian injunction in foreign jurisdictions has to be checked for each jurisdiction individually. The new regime of the recast Brussels Regulation substantially facilitates the recognition and enforcement of interim measures.

6.6 Third Parties and Injunctive Relief

It is a general principle that a preliminary injunction must not interfere with the rights of a third party. It is, however, possible to obtain injunctive relief against a third-party debtor, affirmatively enjoining them from making any payments to the debtor. In this way, it is possible to freeze bank accounts.

6.7 Consequences of a Respondent's Non-compliance

In order to enforce a preliminary injunction, a further request for enforcement is not required. The decision on the injunction implies the approval of enforcement. If necessary, the court can enforce the injunction with the help of an enforcement officer. Compliance with an injunction is therefore assured.

7. Trials and Hearings

7.1 Trial Proceedings

Preparatory Hearing

Once proceedings have been initiated with a statement of claim served on the defendant, the court will set a date for a preparatory hearing in which the court maps out a schedule and decides a plan for the course and content of the proceedings. This is also an occasion on which the court is required to explore the possibility of an amicable settlement.

Exchange of Written Submissions and the Oral Hearing

Usually, the next step is a further exchange of written submissions prior to the oral hearing. The hearing mainly serves to take evidence, in accordance with the principle that judgments can be based only on evidence taken by the court. Witnesses must appear before the court. Written witness statements and affidavits are used only in preliminary proceedings, where the general level of proof is intentionally lowered to allow for a speedy decision, or when the interrogation of a witness or party is practically impossible; for example, because of a prolonged absence or sickness.

Simplified Proceedings for Smaller Claims

For monetary claims not in excess of EUR75,000, the proceedings are also significantly simplified. A payment order will be issued, based on the claimant's request, only. If the defendant raises an objection, regular proceedings will be initiated. Otherwise, the payment order becomes enforceable.

7.2 Case Management Hearings

The two main purposes of an oral hearing are:

- case management at the beginning of proceedings; and
- the taking of evidence in the main hearing.

Parties may file written submissions presenting facts, offering evidence and presenting legal issues at any time prior to one week before the main hearing.

Case Management Hearing

The case management hearing is referred to as a "preparatory court session" and focuses on structuring the taking of evidence following this court session. It is also set to explore the possibility of an amicable settlement.

Second Part of the Hearing

The second part of the hearing focuses on the witnesses and experts. The process (including the direct examination of witnesses) is led by the judge. The parties and/or their counsel are allowed to interrogate witnesses only after the court has finished

its direct examination. Once the taking of evidence is completed, the judge will formally close the oral hearing.

7.3 Jury Trials in Civil Cases

Jury trials are not available in Austrian civil cases.

7.4 Rules That Govern Admission of Evidence

The Court's Role and the Burden of Proof

The court will take evidence as requested (eg, witnesses) and/or submitted (eg, documents) by the parties. The court may disregard evidence it considers to be immaterial, or if it is already sufficiently convinced of a certain fact. The general rule is that each party is responsible for discharging its burden of proof and providing the court with the evidence that may establish the facts favourable to its position. There are some specific rules available, such as those regarding prima facie evidence, which shift the need to establish certain facts to the other side.

Types of Evidence

Evidence may be in the form of documents, visual inspection of places or things, witnesses, experts, and the testimony of the parties.

Evidence obtained by illegal means may be used in civil proceedings. Judges will evaluate the evidence before them and state the reasons for their evaluation.

7.5 Expert Testimony

Court-Appointed Experts

Austrian civil procedure relies on court-appointed experts who owe their duties primarily to the court and are statutorily required to be neutral. If there are doubts as to neutrality or competence, court-appointed experts can be challenged. The same rules apply as for judges. Even the mere appearance of lack of neutrality can suffice for a successful challenge.

Party-Appointed Experts

Party-appointed experts are permitted, but are regarded in the same light as witnesses. They do not have the same special status as court-appointed experts, and their testimony may be disregarded at the discretion of the court.

7.6 Extent to Which Hearings are Open to the Public

Hearings are open to the public, varied only upon application of a party and in specific circumstances (eg, if personal issues are discussed or trade secrets are at stake). Transcripts of the hearing (usually a summary by the judge) are not made public.

7.7 Level of Intervention by a Judge

Active Role of the Judge

The judge has the predominant and most active role throughout the hearing and will not only govern the process of the entire hearing but also take the lead in examining witnesses. The judge also decides when to end the trial. The court may disregard open requests for taking evidence, such as hearing one of the witnesses, if it has been satisfied by the evidence already taken.

Timing of Judgments

While an immediate oral judgment at the end of the trial is possible, in practice, judgments are generally rendered in writing at a later point in time. This process may take several months from the time the oral hearing is closed.

7.8 General Timeframes for Proceedings

Average Duration

Proceedings before Austrian courts are generally efficient. In civil proceedings, most procedural steps are foreseen to be taken within two to four weeks of each other. The average duration of proceedings is one to one and a half years at the first level and from nine months to one year at the appellate stage.

Complex Duration

Complex disputes may take longer, however. Especially in more complex cases, the appellate court proceedings may reveal errors of the lower court proceedings and the case will be remanded to the lower court for repetition and/or completion of the taking of evidence. The judgment rendered in such a remand is also subject to appeal according to the general procedural rules. In such cases, it can take several years before a final, binding judgment is rendered.

8. Settlement

8.1 Court Approval

Austrian law distinguishes between extrajudicial and judicial settlements.

Extrajudicial Settlements

Extrajudicial settlements are concluded without a court being involved and – in order for the lawsuit to be stopped – the parties would need to agree to withdraw the claim or to an indefinite stay of proceedings. This is a common practice.

Judicial Settlements

Judicial settlements are concluded before the court and are immediately enforceable. The parties are not limited by the pending dispute and may also agree on matters that have not yet been part of the dispute. This could trigger additional court fees, however. The court will only review if the subject matter in

dispute is capable of being settled (eg, something that is fundamentally within the authority of the parties). Some courts also check whether the terms of the settlement are specific enough to be enforced. In practice, courts are open to recording a settlement in the form reached by the parties.

Costs

The conclusion of a settlement agreement triggers a specific settlement tax duty, a concept which is not known in many other jurisdictions. Parties should consult with their local lawyer before concluding a settlement under Austrian law.

If the legal dispute is settled at the first hearing, the court fees are halved.

8.2 Settlement of Lawsuits and Confidentiality

Parties can agree to keep their settlements confidential.

The confidentiality of settlements concluded during a trial is somewhat limited by the principle of public court hearings. In practice, however, there are suitable ways to maintain confidentiality. For example:

- a settlement may be negotiated by the parties outside of the public hearing;
- a confidentiality clause can be included in the settlement agreement; and
- during the hearing, the judge may exchange the text of the settlement for approval by the parties only in writing.

The parties and their counsel sign the court agreement and the judge makes it part of the court records. Third parties can access the court records only if they can establish a legal interest.

8.3 Enforcement of Settlement Agreements

Judicial settlements (concluded before the court) are enforceable in the same manner as judgments. An extrajudicial settlement is simply treated as a contract and cannot be directly enforced. Claims arising from a disputed extrajudicial settlement agreement must be pursued before the competent courts.

8.4 Setting Aside Settlement Agreements

Revocation Clauses

It is general practice to conclude a judicial settlement subject a revocation clause. Such clauses enable legal representatives to conclude a settlement and create the possibility of consulting their client, and it provides the parties with a period for reflection or time to take care of the necessary internal approvals, for instance by the supervisory board or by the insurer of that claim.

Limitations to Challenges

The substantive reasons to challenge settlement agreements are significantly fewer than those available to challenge other agreements, as they are limited to severe mistakes or deceit.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

A successful litigant may obtain a judgment:

- ordering performance;
- enjoining a certain action;
- creating or altering the legal status; or
- ordering declaratory relief.

A performance judgment may order, for example:

- the payment of an amount of money;
- the transfer of a certain object; or
- the submission of a certain declaration.

An enjoining judgment orders a party to stop or to omit a certain act. A divorce is an example of a judgment altering legal status. Declaratory judgments may be obtained regarding the existence of a certain legal relationship or a certain claim.

Civil courts limit their decisions to the relief requested by the plaintiff.

9.2 Rules Regarding Damages

Monetary and Declaratory Judgments

There are no special rules regarding awards in damage proceedings. The most important forms of awards for damages are monetary judgments (ordering the payment of money) and declaratory judgments regarding foreseeable future damages. For such damages, declaratory judgments may be necessary to avoid the expiry of a limitation period.

No Punitive Damages

Austrian tort law is based on the principle of compensation, and provides for damage claims only in so far as the plaintiff actually suffers damages. Punitive damages are not available. Contractual penalties are nevertheless allowed, and intellectual property law provides for lump sum damages which are deemed to have a partly punitive element.

There are no general rules which limit the amount of maximum damages as such. However, some provisions of substantive law establish maximum amounts for particular types of damages, particularly in cases of strict liability.

9.3 Pre and Post-Judgment Interest

Amount of Interest

Under Austrian civil law, the debtor has to compensate the creditor for the damage caused by delay of the payment, together with legal interest. If not otherwise agreed by the parties, legal interest amounts to 4% per annum. Between entrepreneurs it amounts to 9.2 basis points above the base interest rate if the default is attributable to the debtor's negligence. The base rate applicable is the base rate that was effective on the first day of the relevant half year (January 1st for first half, July 1st for the second half) and is published on the website of the Austrian National Bank. The creditor can also claim, in addition to the legal interest, compensation for other damages caused by late payment.

Starting Date

The starting date for interest accrual is the date when the payment obligation was due. It is owed from the day after the payment obligation was due until the day of actual payment. This applies both to pre-judgment and post-judgment interest.

9.4 Enforcement Mechanisms of a Domestic Judgment

Types of Enforcement

Different enforcement rules apply:

- to monetary claims on the one hand and claims for specific performance on the other; and
- depending on the assets against which the claim is to be enforced.

For monetary claims, the following types of enforcement are available: enforcement on movables, real estate, receivables, claims for delivery and other pecuniary rights (eg, patents or company shares).

In claims for specific performance, the following methods can be considered:

- eviction;
- substitute performance; or
- penalties for contempt (fines and, ultimately, imprisonment up to a maximum of two months).

Assets Subject to Enforcement

An executory title cannot be enforced on the overall assets of the debtor. It is rather up to the enforcing creditor to identify the asset against which enforcement is to be applied (a specific plot of land, a specific bank where the debtor has bank accounts, etc).

It is nevertheless possible:

- to enforce on the movables in the custody of the debtor (ie, at its premises) without further specification; and
- to request enforcement on any bank account at any Austrian bank by simply listing all Austrian banks (if necessary in two steps, first the most, then the less important banks).

9.5 Enforcement of a Judgment from a Foreign Country

As to recognition and enforcement of foreign titles in Austria, a distinction must be drawn between titles under the Brussels Regulation and titles which do not fall under this regime.

Enforcement under the Brussels Regulation

Under the Brussels Regulation, a judgment of an EU member state shall be recognised in other member states without any special procedure being required. A judgment rendered in a member state and enforceable in that state shall be enforced in another member state without any declaration of enforceability being required and under the same conditions as a domestic judgment.

Enforcement outside the Scope of the Brussels Regulation

For titles which do not fall under the regime of the Brussels Regulation, it is necessary to initiate exequatur proceedings and to obtain a "declaration of enforceability". The application for the declaration of enforceability may be joined with the application for the authorisation of enforcement itself. If the applications are joined, there is only one proceeding and the relevant decisions are made at the same time.

A declaration of enforceability is only granted if the foreign judgment is enforceable according to the law of the state where it was issued and if reciprocity is guaranteed by international conventions, treaties or by regulations. This means that there must be a legal basis confirming that Austria and the other state mutually recognise each other's court decisions. If a court is uncertain in this regard, in practice, it will turn to the Austrian Ministry of Justice for determination and guidance.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

There are two appeal levels, one to the court of appeal and one to the Supreme Court. An appeal to the Supreme Court is limited to matters of significance for the judicial system (see **10.5 Court-Imposed Conditions on Granting an Appeal**).

10.2 Rules Concerning Appeals of Judgments

Admissibility of an Appeal to the Supreme Court

Parties may appeal first instance decisions, to Regional Courts which hear appeals from decisions of District Courts, and to Regional Appellate Courts in cases of appeals from Regional Court decisions. The decision of the court of appeal will include a statement on whether its judgment is open to an appeal to the Supreme Court.

If it does not allow for an appeal to the Supreme Court, the party seeking further appeal may challenge the court of appeal's decision and request permission to seek further appeal to the Supreme Court. In such cases, the challenge must (i) contain the challenge of the decision of the court of appeal denying further appeal to the Supreme Court but (ii) also set forth the actual appeal.

No Factual Findings by the Supreme Court

If the Supreme Court accepts its competence, it will only review questions of (material and/or procedural) law. Factual findings are never subject to revision by the Supreme Court. Factual findings and the assessment of the evidence can only be challenged before the courts of appeal.

10.3 Procedure for Taking an Appeal

The service of the judgment triggers a four-week period during which the partly or entirely unsuccessful party may file an appeal. The opponent may respond thereto within four weeks of service of the appeal. These time periods cannot be extended.

10.4 Issues Considered by the Appeal Court at an Appeal

Grounds of Appeal

The appellant may claim errors of procedural and/or material law, errors of fact and/or nullity (which rarely occurs).

Procedure before the Court of Appeal

The court of appeal may retake evidence (mostly rehearing witnesses) if it decides to reassess certain evidence. But it will not rehear the entire case. In practice, the court of appeal rarely conducts an oral hearing or takes evidence itself, but rather upholds or changes the decision, or remands the case to the first instance to rehear (parts of) the case.

The appeal proceedings serve to review the correctness of the judgment at first instance, but not to raise any new facts or bring new claims. The court of appeal must disregard new allegations and new evidence.

10.5 Court-Imposed Conditions on Granting an Appeal

The possibility of seeking a review of second instance decisions by the Supreme Court is highly restricted.

Appeals on the points of (material and/or procedural) law may only be brought if the decision upon such points of law is of significant importance to ensure uniformity or certainty of legislation, or to its development. Also, there may be further restrictions with regard to the amount (still) in dispute. The second instance court issues a (contestable) decision on the admissibility of an appeal on the point of law to the Supreme Court, to which the Supreme Court is not bound. Consequently, the Supreme Court may still dismiss an appeal considered admissible by the second instance or allow one considered inadmissible by the second instance as long as that appeal is not in any case inadmissible by law (eg, because the amount (still) in dispute does not exceed EUR5,000).

10.6 Powers of the Appellate Court after an Appeal Hearing

In practice, the court of appeal rarely conducts an oral hearing (see **10.4 Issues Considered by the Appeal Court at an Appeal**).

The court of appeal may, on the grounds of a procedural deficiency:

- set aside the judgment and refer the case back to the court of first instance; or
- complete the proceedings and decide by judgment on the merits.

In the event of an incorrect legal assessment, the court of appeal may confirm or amend the first instance judgment.

If the procedure/judgment is null and void, the court of appeal will nullify the procedure/judgment and refer the case back to the first instance.

As a rule, the Supreme Court decides on the merits by confirming or amending the appeal judgment. On the grounds of procedural deficiency and if factual findings are missing, the Supreme Court will set aside the judgment and refer the case back to the court of appeal or of first instance.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

Austrian law operates under the loser pays principle. Accordingly, every party is required to pay its own costs during the proceedings. At the end of proceedings, the court will render a decision on costs, ordering the unsuccessful party to reimburse the cost expenditures of the other party.

Legal costs and fees consist of:

- court fees (to be paid by the plaintiff when filing a claim or an appeal);
- lawyers' fees; and
- cash expenses such as expert/translator costs and travel costs of witnesses.

The reimbursable fees for lawyers are fixed according to a tariff, depending on the amount in dispute and the procedural steps taken by the lawyer. The actual fees a lawyer charges a client often exceed the tariff. The winning party may still end up having to pay the excess amount.

11.2 Factors Considered When Awarding Costs

The court's decision on costs depends on which party prevails and in what proportion.

11.3 Interest Awarded on Costs

No interest is awarded on costs.

12. Alternative Dispute Resolution

12.1 Views of Alternative Dispute Resolution within the Country

Alternative dispute resolution (ADR) and, in particular, mediation is viewed positively in Austria. The Law on Mediation Regarding Civil Claims (*Zivilrechts-Mediations-Gesetz*), enacted in 2004, aims to promote and facilitate access to mediation by setting out the basic standards to conduct mediation procedures. It defines the qualifications of certified mediators, provides that mediation conducted by a certified mediator prevents the limitation period from expiring, and that certified mediators may not be asked to testify in court proceedings. In many points the Austrian Law on Mediation Regarding Civil Claims preempted most of the provisions foreseen by the (EC) Directive 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

12.2 ADR within the Legal System

The prevailing opinion in Austria is that parties should engage in ADR proceedings voluntarily. There are only a few situations in which mediation is compulsory by law. These cases mainly relate to:

- disputes between neighbours;
- tenancy disputes;
- disputes between members of certain professional groups subject to a code of conduct (eg, architects or lawyers).

Judges increasingly encourage parties to consider ADR, in particular mediation. Some Austrian courts have engaged in a pilot project in which, at the beginning of the proceedings, parties are strongly encouraged to enter into mediation. If mediation fails because of lack of co-operation on the part of one or both of the parties, there are no adverse consequences.

12.3 ADR Institutions

Several organisations offer and promote ADR in Austria, including the Bar Association. In international cases, the Vienna International Arbitral Centre of the Federal Economic Chamber (VIAC) is the leading institution.

In January 2016, VIAC revised its ADR rules to offer a flexible procedural framework that optimally caters to clients' needs. To promote understanding and use of ADR, VIAC also published a Handbook in 2016, which provides guidance on ADR proceedings under its new mediation rules.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

If the seat of the arbitration is in Austria, the arbitration proceedings will be governed by the Austrian arbitration law which is contained in the Fourth Chapter of the Austrian Code of Civil Procedure (Sections 577–618).

Since 2006, the legislation governing arbitration in Austria has been strongly based on the UNCITRAL Model Law, with a few minor deviations. Significantly, Austrian arbitration law does not differentiate between domestic and international arbitration.

13.2 Subject Matters Not Referred to Arbitration

Under Austrian arbitration law, the definition of arbitrability is broad. The general rule is that claims involving an economic interest are considered arbitrable. Claims not involving an economic interest are considered arbitrable if the parties have the capacity to enter into a settlement agreement with regard to the

specific claim. Disputes that fall under the competence of the administrative authorities are not arbitrable.

As a specific exception, family law matters, as well as all claims based on contracts that are – even only partly – subject to the Tenancy Act (*Mietrechtsgesetz*) or to the Non-Profit Housing Act (*Wohnungsgemeinnützigkeitsgesetz*), as well as all claims concerning condominium property may not be made the subject of an arbitration agreement. In addition, certain (collective) labour and social security matters are not arbitrable. Furthermore, disputes involving consumers or employees may only be made the subject of an arbitration agreement (with additional formal requirements) after the dispute has arisen. The additional formal requirements are extensive and lead to a very high threshold to validly conclude an arbitration agreement with consumers or employees, rendering arbitration agreements in these areas impracticable.

13.3 Circumstances to Challenge an Arbitral Award

Within three months of the receipt of an arbitral award, a party is entitled to file an action that the award be set aside based on one (or more) of the following grounds.

- A valid arbitration agreement does not exist, the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement, or a party was incapable of concluding a valid arbitration agreement under the law governing its personal status.
- A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was for other reasons unable to present its case.
- The award deals with a dispute not covered by the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement or the plea of the parties for legal protection; if the default concerns only a part of the award that can be separated, only that part of the award shall be set aside.
- The composition or constitution of the arbitral tribunal was contrary to a provision of this chapter or with an admissible agreement of the parties.
- The arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (ordre public).
- The decision was based on a fraudulent action or forged document or a criminal verdict that has since been reversed (the three-month period to file the action for setting aside does not apply to this ground).
- The subject matter of the dispute is not arbitrable under Austrian law.
- The arbitral award conflicts with the fundamental values of the Austrian legal system (ordre public).

Additional grounds are available if a consumer or an employee was involved.

The action to set aside an award is to be filed with the Austrian Supreme Court, which decides as first and last instance (ie, without possibility of a further appeal). Practice has shown that a well-reasoned decision will be rendered within a comparatively short period of six to eight months on average.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Jurisdiction on Enforcement

Arbitral awards are deemed equivalent to judgments of state courts and will be enforced the same way by means of application to the District Court where (i) the respondent has its seat or (ii) the object, asset or third-party debtor, which shall serve to satisfy the claimant's request for enforcement, is registered or located.

Prerequisites

An authenticated original or a duly certified copy of the arbitral award must be submitted together with the application for enforcement. The original or a certified copy of the arbitration agreement must only be presented upon a request by the court.

Enforcement of foreign arbitral awards (ie, where the seat of arbitration was outside Austria) is governed by international treaties to which Austria is a party, including:

- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- the Geneva Convention on the Execution of Foreign Arbitral Awards;
- the European Convention on International Commercial Arbitration; and
- the Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States.

14. Recent Developments

14.1 Proposals for Dispute Resolution Reform

In the summer of 2020, negotiators acting on behalf of the European Parliament and Council reached an agreement on the draft directive for collective redress for consumers. The directive contemplates that consumer associations can sue for performance on behalf of injured consumers and introduces, for the first time, an avenue for collective redress throughout the EU. Member states will be required to implement this directive over the next two years. There will therefore be reforms in this regard in the near future.

14.2 Impact of COVID-19

Rules in Place During the Lockdown

In Austria, the first laws regarding the effects of COVID-19 on the justice system were passed shortly after the lockdown of mid-March 2020. They regulated, among other things, interruption of procedural deadlines, postponement of oral hearings and stay of prescription periods. These measures were put into force until 30 April 2020. On 1 May 2020, hearings started again, procedural deadlines began to run anew, and prescription periods resumed.

Rules After the Lockdown

Since May, new rules on the use of videoconferencing in hearings have come into place, at least until the end of 2020. They permit entire evidentiary hearings to be conducted via videoconference, provided that all parties agree in advance. Consent of the parties is an important principle. There are exceptions, such as enforcement and insolvency proceedings where the court can conduct its hearings via videoconference even without the consent of the parties, provided that they have the necessary technical means to participate. Parties, witnesses and other participants (eg, experts or interpreters) may request a videoconference if they belong to a risk group or are in necessary (professional or private) contact with someone in a risk group.

The use of videoconferencing is not totally new in Austrian Civil Procedure. In the past, it had been possible to examine witnesses or parties via videoconference. However, it was previously not possible to conduct the entire oral hearing via videoconference.

Video hearings are now called at the courtroom, which is itself accessible to the public, provided attendees comply with the public health rules (physical spacing rules, masks, etc). It is not contemplated that videoconferences will be made available online to the public.

KNOETZL is Austria's first large-scale dispute resolution powerhouse dedicated to prevailing in high-profile cases. KNOETZL's diverse expertise encompasses civil, commercial, sovereign, corporate and fraud litigation, focusing significantly on liability claims, corporate (including M&A, financing and joint venture disputes) banking, insurance and financial derivatives cases, investor protection, digital transformation, data protection and social media, business and political crime, asset-tracing and provisional measures, such as freezing orders and attachments, in the domestic and international contexts, and in enforcement of foreign judgments and arbitral awards. The firm's practice covers international commercial arbitration, investment protection and arbitration-related court proceedings, mediation and ADR. KNOETZL is well regarded for its disputes work at the intersection of civil and criminal matters. Elite international law firms, corporate decision-makers and general counsels frequently turn to KNOETZL to act as their Austrian disputes counsel.

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Trends and Developments

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COVID-19

In 2020, virtually no area of private or professional life has remained untouched by the COVID-19 pandemic.

As has been true in most of the world, both the virus and the measures taken by the Austrian government to limit its spread have had a significant impact on court proceedings and the substantive legal issues the courts can be expected to encounter in the coming months and years.

Litigation during the pandemic

Court proceedings during COVID-19 – new technology, new rules

From the beginning of the coronavirus crisis in Austria, and the resulting "lockdown" that came into effect on 16 March 2020, the Austrian justice system has experienced a fundamental disruption of its day-to-day business. During the period of "total lockdown", until 30 April 2020, most procedural deadlines were suspended and almost all oral hearings postponed. After 30 April 2020, these measures were replaced by less restrictive rules, accompanied by the gradual re-opening of the courts. Oral hearings were resumed in May 2020, and the use of videoconferencing in hearings has increased significantly.

One of the most important Austrian principles of civil procedure is that evidence is required to be admitted orally and directly before the adjudicating judge. Accordingly, oral hearings are the cornerstone of Austrian trials. This fundamental principle made the implementation of a "safe" way of hearing cases during the pandemic of paramount importance. While Austrian civil procedural rules had already provided that witnesses or parties could be heard via videoconference under certain conditions (inter alia, in cases of incapacity to travel), before COVID-19, little use was made of this option. This was partly due to the lack of sufficient technology in the courts.

The COVID-19 crisis has acted as a catalyst, provoking the digitalisation of Austria's judicial system. Under new rules that are applicable (at least) until the end of 2020, it is now possible, for the first time, for entire hearings to be held utlilising "appropriate means of technical communication", provided that all parties agree. This includes word and image transfer via videoconference (audio conferences are permitted in exceptional cases, as well). Parties have the right to request a videoconference if they belong to a risk group or are in necessary (professional or private) contact with someone in a risk group. As an exception, the consent of the parties is not required in insolvency and enforcement hearings. Courtrooms remain open to any members of the general public who wish to avail themselves of the right to attend a hearing, where they can follow the hearing remotely, on screens and subject to safety rules (distance rules, protective masks, etc). Online participation of the public in hearings (eg, via link) is not contemplated.

Online hearings

While the eJustice programme in Austria has been progressing, with the eventual aim of a completely digital file management throughout the entire court system, not all courts have been fully equipped yet. One of the biggest challenges for video hearings results from fewer than all judges having access to a videoconference system. Sometimes judges find it necessary to bring their own laptops to court proceedings because there are too few laptops allocated per court. This often results in connection difficulties, so that in "mixed proceedings" not every participant can hear every other participant.

A central challenge for lawyers in a video trial, besides the intrinsic challenge of pleading persuasively digitally, is the impaired ability to communicate confidentially with the client during an online hearing. In a "normal" trial, the lawyer and client sit next to each other and can exchange information in whispers, and even non-verbally. This is difficult in video hearings, where every word and every facial expression is heard and seen by everyone (or nobody).

On a positive, note, since judges are generally better equipped as a result of the pandemic, it is anticipated that they will continue to make more use of videoconferencing, if only to hear witnesses and parties who would otherwise be required to travel by air.

Physical hearings during the pandemic

Most hearings still take place in person. Precautionary measures include wearing a mask or face shield in the court building, maintaining safe interpersonal distances, restrictions on the use of elevators, and temperature readings at the entrances to court buildings.

It is currently up to the individual judge to determine how to handle "anti-COVID-19" measures during a trial. The bench itself is protected by plexiglass screens. Many judges permit the

removal of masks during the hearing if all parties consent. Many judges also waive the distance rules between lawyers and their clients. Criminal judges, on the other hand, generally require all participants to wear masks, sometimes with the exception of the person testifying, who is often required to wear a transparent face shield.

Since few courtrooms are large enough to accommodate the precautionary measures, proceedings in Austria are currently slower than usual, with generally three to six months between hearing dates.

Relief for economic hardship

In an attempt to alleviate the economic hardship faced by a population plagued by the lockdown and subsequent restrictions on movement and customer contact, various forms of relief have been made available to both businesses and consumers, with some forms of relief being extended repeatedly, most recently until January 2021, with further extensions anticipated.

Relief for tenants

Special protection was adopted for residential leasehold tenants whose economic capacity has been impaired by the COVID-19 crisis, to the extent of causing default in rental payments due in the period from 1 April 2020 to 30 June 2020. Landlords cannot, until the end of 2020, terminate the tenant's lease on the grounds of the arrearage nor force payment of the overdue rent in court.

Relief re loans

Relief is available for consumers and "microentrepreneurs" (enterprises which employ fewer than ten persons and whose annual turnover or annual balance sheet total does not exceed EUR2 million) who are in arrears with the repayment of a loan agreement concluded before 15 March 2020 due to the COVID-19 crisis, in the form of statutory extensions of loan repayment deadlines, where otherwise the borrower's livelihood would be at risk. The extension of loan repayment deadlines has been further extended until 31 January 2021.

COVID-19 fund

There is a special COVID-19 fund, for companies suffering from a significant decrease in revenues due to the crisis. This is not linked to specific industries but, rather, to a generally associated loss in revenues.

Enforcement proceedings

Enforcement can be postponed at the request of an affected debtor if he or she is in economic difficulty as a result of COVID-19 and enforcement would imperil his or her economic existence. Evictions can also be postponed, provided the tenant requires the leased apartment for immediate residential purposes and the eviction is not necessary to avoid grave personal or economic distress to the landlord. The COVID-19 crisis itself is, however, not otherwise a reason for postponement of enforcement proceedings.

Insolvency

Relief is available to over-indebted debtors: in the event of over-indebtedness occurring between 1 March 2020 and 31 January 2021, the obligation to file for insolvency protection has been extended to the later of 60 days after 31 January 2021 and 120 days after the debtor became over-indebted.

Payment default

If a contracting party, whose economic performance is significantly affected by the COVID-19 crisis, defaults on payment obligations that became due in the period of 1 April 2020 to 30 June 2020, that party will not be required to pay compensation for out-of-court collection measures that were carried out before 1 July 2020. In addition, interest on arrears up to that date is limited to 4% per annum. This regulation applies to payment obligations arising from all contracts concluded before 1 April 2020, both for business/consumer transactions and for other legal transactions.

Corporate law

Taking into account the difficulties facing companies caused by the pandemic, the Austrian COVID-19 legislation allows virtual meetings of shareholders and board members of all company forms until 31 December 2020. This means that not only stock corporations (where virtual meetings were already possible) but also other company forms such as the limited liability company (*Gesellschaft mit beschränkter Haftung*, or GmbH) and unlimited companies such as the general company (*Offene Gesellschaft*, or OG) are able to meet and make decisions, virtually. Various deadlines have also been extended. These includes the deadline for the general assembly, for determining the annual accounts and for filing annual accounts, which have generally been extended to 12 months after the end of the financial year.

Coronavirus-related litigation

Force majeure

A major issue that will be at the heart of many disputes related to COVID-19 is the legal uncertainty around the question of whether the pandemic, and the resulting governmental response, constitute "force majeure". To date, there is no legal definition of force majeure in Austrian law and the very sparse case law is mostly not only many decades old but also is entirely insufficient to resolve the current issue. This legal uncertainty is anticipated to lead to a rise in contractual disputes, at least until the Supreme Court has decided case law for various precedential scenarios.

Of the further specific coronavirus-related issues that can be expected to keep the Austrian courts busy in the coming years, rental disputes and employment disputes will certainly make up a large percentage.

Business rentals

A provision of the Austrian General Civil Code that has been little regarded to date has gained sudden importance due to the COVID-19 crisis in Austria. Under this rule, rent for business premises can be reduced or cancelled if the property cannot be used due to these extraordinary circumstances. The law explicitly refers to the impossibility of using business premises due to fire, wars, flooding, or epidemics.

In the absence of case law, it is not entirely clear how this provision is to be applied to situations arising from the coronavirus. Tenants wishing to reduce or cancel their rent need to pay particular attention to the reason the business premises could not be used. For example, whether a restaurant could not be opened due to an order to close by the competent authorities (where the tenants' position on rent reduction/cancellation is strong), or whether a business owner is simply not using their office because they have prudently required their employees to work from home.

The general recommendation is that the tenant should continue to pay rent to prevent the landlord from terminating on the basis of non-payment. The payment should be made subject to a reservation in order to maintain the potential entitlement to a rent reduction. Once the Supreme Court has begun deciding these cases and providing guidance on the allocation of the commercial risk between landlords and tenants, we expect to see many of these matters being settled out of court.

Employment

While government measures and subsidies have promoted "short-time work" (*Kurzarbeit*) in an attempt to prevent large-scale terminations of employment, the economic crisis resulting from COVID-19 and the government response has caused – and presumably will continue to cause – many businesses to let employees go. Under Austrian employment law, social criteria limit the employer's right to terminate employment contracts, requiring that the disadvantages to the employee (in particular more than eight months' search for a new job on similar terms) be balanced against the employer's commercial and operational requirements. Since the pandemic will make finding new employment more difficult, a higher rate of court challenges to employment terminations is likely.

Coronavirus-related actions against the Republic of Austria

Tyrol, and in particular the ski resort Ischgl, as a significant early COVID-19 "hotspot", is a further source of coronavirus-related litigation. Recently, the Austrian consumer protection association filed four public liability claims as test cases, claiming that public authorities, both locally and in the central federal government, mismanaged the crisis. According to the Austrian consumer protection agency they are also planning to file an "Austrian-style" class action in 2021. To date 6,000 individuals from 45 countries have registered as potential plaintiffs, most of whom tested positive for the coronavirus. In addition to the civil claims, the consumer protection association has also filed a criminal complaint due to the delay in closing the ski resorts. Litigation funding for these cases is under discussion, but has not yet been secured for the class action.

Litigation funders are already involved in coronavirus-related litigation elsewhere. Such funding is being offered for certain tourism businesses that suffered financial losses as a result of being closed down by the administrative authorities to pursue claims under the Austrian Epidemic Act.

Other Significant Litigation Trends

White-collar crime cases and resulting litigation

Since the beginning of the pandemic, cybercrime offences and fraud have been particularly prevalent. Cybercrime attacks (data and equipment theft as well as banking fraud) are likely to increase, as working from home is still very popular and home offices, data and equipment are often less well protected.

Recent examples of (cyber)fraud have included cases of fraud as simple as shipping sand instead of the ordered goods and more complex cases connected to medical goods and protective gear during the crisis (deliveries are not made, the quality is not as promised, etc). Whether this will translate into higher levels of civil litigation will depend on the extent to which perpetrators can be physically located, often one of the greatest hurdles in cybercrime-related litigation.

Some of the largest litigation cases in Austria resulting from white-collar crime are, however, not COVID-19-related. A detailed whistle-blower report in 2019 resulted in criminal investigations that led to the closing of a regional bank in the east of Austria, the *Mattersburg Commerzialbank*. In the ensuing insolvency proceedings, 373 creditors filed claims aggregating to over EUR800 million. The criminal investigations into large-scale fraud of bank managers and corruption of numerous supervisory authority officials are pending. A series of further civil proceedings has already been announced by the receiver, including claims against the bank's auditor for EUR20 million and public liability claims against the Republic of Austria and the Province of Burgenland for mistakes made by the supervisory authorities.

Time will tell whether the FinCEN Files, in which over 800 transactions with Austrian banks between 2007 and 2017 were classified as suspicious by US banks, with a total of more than USD1 billion being transferred to or from Austria, will lead to further criminal investigation and litigation.

Class actions in Austria/litigation funders

While discussions regarding class actions continue, particularly in connection with the newly proposed wording of the European Collective Redress Directive, progress within the EU has slowed during the pandemic. In summer 2020, negotiators acting on behalf of the European Parliament and Council reached an agreement on the wording of the draft of a Directive for collective redress for consumers. The Directive provides that consumer associations can sue for performance on behalf of injured consumers and thus introduces, for the first time, an instrument of collective redress throughout the EU. After formal approval, the member states will be required to implement this directive over the next two years. There will therefore be reforms in this regard in the near future.

"Opt-out" type class actions will, however, continue to be unavailable under Austrian procedural law. Litigation funders continue to utilise the measures that are available under Austrian procedural law (namely, Austrian-style class actions and test cases).

Austrian jurisdiction for emissions scandal claims

Another series of cases – unrelated to the coronavirus – that can be expected to keep Austrian courts busy in the coming years are those arising from the well-known manipulation of exhaust emissions by certain car manufacturers. On 9 July 2020, the ECJ clarified that the meaning of "where the harmful event occurred", within Article 7 No 2 of Brussels I Regulation Recast, is the location where the car was purchased by the injured party. This means that all buyers who bought their cars in Austria can seek damages before the Austrian courts.

Litigation funders are offering participation in "class actions" for the shareholders of the respective car manufacturers.

Outlook

The year 2020 has seen unprecedented changes to the litigation environment as well as more broadly to the economic landscape of Austria and Europe. Time will tell which of these changes will burden the courts and businesses for years and decades to come and which changes could, in fact, prove beneficial in the long run.

For pure litigation firms, the already-significant increase in demand since the first lockdown seems set to continue apace, with the courts unlikely to face a second lockdown and law firm business continuing to boom.

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KNOETZL is Austria's first large-scale dispute resolution powerhouse dedicated to prevailing in high-profile cases. KNOETZL's diverse expertise encompasses civil, commercial, sovereign, corporate and fraud litigation, focusing significantly on liability claims, corporate (including M&A, financing and joint venture disputes) banking, insurance and financial derivatives cases, investor protection, digital transformation, data protection and social media, business and political crime, asset-tracing and provisional measures, such as freezing orders and attachments, in the domestic and international contexts, and in enforcement of foreign judgments and arbitral awards. The firm's practice covers international commercial arbitration, investment protection and arbitration-related court proceedings, mediation and ADR. KNOETZL is well regarded for its disputes work at the intersection of civil and criminal matters. Elite international law firms, corporate decision-makers and general counsels frequently turn to KNOETZL to act as their Austrian disputes counsel.

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