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# International Fraud & Asset Tracing 2022

Austria: Law & Practice  
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## Law and Practice

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## 1. FRAUD CLAIMS

### 1.1 General Characteristics of Fraud Claims

There are different variants of fraud in criminal and civil law.

#### Criminal Law

##### *Fraud*

Fraud is committed by anyone “who by deceiving another about material facts causes the other person to do, tolerate, or omit an act which causes a financial or other material loss to the other person or to a third person and who has the intention to thereby gain an unlawful material benefit for himself, herself or a third person” (Section 146 Austrian Criminal Code).

If fraud results in damages of more than EUR5,000 or is committed, for example, by using false documents or data, it is categorised as aggravated fraud and entails a higher punishment. Another limit is EUR300,000, which increases the punishment even more.

Special rules apply to fraudulent misuse of data processing (Section 148a), wrongfully obtaining services (Section 149), insurance fraud (Section 151) and misuse of funds (Section 153b Austrian Criminal Code).

##### *Offences of dishonesty and misappropriation*

The offence of dishonesty is committed by “any person who knowingly abuses his or her authority to dispose of property of another or to engage another thus causing a financial detriment to the other person.” A “person abuses his authority if the person violates rules that serve to protect the economic interests of the other person” (Section 153 Austrian Criminal Code). This offence is committed, for example, by a manager abusing the company’s assets to the disadvantage of the company.

The offence of misappropriation is committed by any “person who applies property that was entrusted to the person to his or her own use or to the use of a third person with the intention to gain an illegitimate material benefit from himself, herself, or a third person” (Section 133 Austrian Criminal Code).

##### *Untenable representation of financial information on companies*

Offences involving false statements include the offence of untenable representation of fundamental information concerning certain corporations and the offence of untenable accounts of auditors, committed by a decision-maker or auditor who falsely or incompletely represents, in an untenable manner, the financial position of a company, including in their audit report (Sections 163a, 163b Austrian Criminal Code).

##### **Corruption**

Offences involving corruption include:

- passive bribery, by any “person being an office bearer or adjudicator who demands or accepts a promise of benefit for himself, herself, or a third person in return for the unlawful execution or omission of official duties” (Section 304 Austrian Criminal Code);
- acceptance of undue advantages, by “an office bearer or adjudicator who demands a benefit for himself, herself, or a third person, or accepts the promise of an undue advantage in return for the lawful execution or omission of official duties” (Section 305 Austrian Criminal Code);
- acceptance of benefits for the purpose of interference, committed by any “person being an office bearer or adjudicator who, except in cases under Sections 304 or 305, demands a benefit for himself, herself, or for a third person, or accepts the promise of an undue advantage intending that his or her role as

an office bearer be influenced” (Section 306 Austrian Criminal Code); and

- acceptance of gifts by persons in authority, by any “person who accepts a more than minor financial or other material benefit that was offered for the execution of authority to dispose of the property of another or to engage another, where that authority was granted by law, official order, or legal transaction, and who breaches his or her duty by not transferring the benefit” (Section 153a Austrian Criminal Code).

A person who makes or offers an illicit advantage commits the offence of active bribery (Section 307 Austrian Criminal Code) or giving undue advantages (Section 307a Austrian Criminal Code) or of creating undue advantages for the purpose of interference (Section 307b Austrian Criminal Code).

#### *Conspiracy and criminal association*

Conspiracy is a crime only in connection with felonies such as murder or kidnapping (Section 277 Austrian Criminal Code). A mere conspiracy to commit a fraud is not punishable – if it does not qualify as a criminal association, ie, a longer-term affiliation of more than two persons with the aim that one or more of its members commit a crime (Section 278 Austrian Criminal Code).

#### **Civil Law**

##### *Civil law fraud*

Someone induced to enter a contract by deception may challenge the contract and/or recover damages from the person who deceived such person (Sections 870, 874 Austrian Civil Code). “Deception” means intentionally misleading by making false statements, preventing the injured person from knowing the true facts, or failing to provide the required information.

#### *Damages for making false statements*

Apart from deceit, liability for false statements (information, advice, recommendations, etc) is only incurred if the false statements cause a breach of main or secondary contractual obligations or if the false information is given against better knowledge (Sections 1295, 1300 Austrian Civil Code).

#### *Damages due to violation of criminal law norms*

If someone commits a crime, any injured person may make a claim for damages provided that the criminal norm violated protects their interests (Section 1311 Austrian Civil Code).

### **1.2 Causes of Action after Receipt of a Bribe**

An agent who accepts bribes and does not act in the interest of the principal but, rather, in their own interest, may be guilty of the offence of dishonesty, misappropriation, fraud or – as an office bearer – bribery (see **1.1 General Characteristics of Fraud Claims**).

Criminal law aside, accepting bribes is illegal under civil law. An agent may not accept benefits from third parties in connection with the principal’s affairs without the consent of the principal (Section 1013 Austrian Civil Code). If an agent violates this prohibition, the principal can enforce surrender of the benefit (Section 1009 Austrian Civil Code). Additionally, the principal may make a claim for damages against the agent and any third party who paid the bribe (Sections 1012, 1295 Austrian Civil Code).

### **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**

#### **Civil Law**

Several tortfeasors co-operating jointly and intentionally are jointly and severally liable for the resulting damage (Section 1302 Austrian Civil Code). This also applies to assistants and insti-

gators. The prerequisite is that they have made some contribution toward causing the damage (even if only psychological, eg, by helping plan the fraud).

A person who receives fraudulently obtained assets without having made a causal contribution to the fraud itself may be subject to a claim for restitution under property law or the law of unjust enrichment (see **6. Privileges**) but not to a claim for damage resulting from the fraud.

## Criminal Law

An immediate perpetrator and any person directing another, or contributing in any other way to the commission of an offence, is presumed to have committed that offence. Each offender is punished according to such person's individual culpability (Sections 12, 13 Austrian Criminal Code).

Any person who receives fraudulently obtained assets may be charged with:

- the offence of fencing, committed by any “person who aids the perpetrator of an offence against the property of another after that offence in concealing or utilising any thing obtained through that offence” and by “any person who purchases, takes possession or procures such a thing” (Section 164 Austrian Criminal Code); or
- the offence of money laundering, committed by:
  - (a) any person who converts or transfers to another person any assets that are the proceeds of certain offences, including aggravated and commercial fraud, aggravated dishonesty and misappropriation and bribery, with the intent to hide or conceal their illegal origin or to assist another person involved in such criminal activity to escape the legal consequences of their act and by any person who hides

or conceals the origin of any assets that are the proceeds of certain offences;

- any person who hides or conceals the origin of any assets that are the proceeds of the specific offences mentioned above; or
- any person who knowingly acquires, possesses, transforms, transfers to a third person or in any other form utilises any assets that are the proceeds of one of the specific offences (Section 165 Austrian Criminal Code).

## 1.4 Limitation Periods

### Limitation Periods for Civil Law Claims

#### *Periods of 30 and three years*

As a rule, the limitation period is 30 years but through numerous exceptions, most claims are subject to a shorter period of three years. The statute of limitations period generally commences when a right could have first been exercised.

#### *Claims for damages*

Time-wise, there are two restrictions to bringing damage claims.

First, there is the “subjective” limitation period. This starts with knowledge of the damage and the identity of the party that caused the damage (Section 1489 Austrian Civil Code) and ends after three years, unless the damage was caused by a crime above a certain threshold in severity (such as aggravated fraud or commercial fraud, see **1.1 General Characteristics of Fraud Claims**). In this case, a 30-year period applies (Section 1489 Austrian Civil Code).

Independent of any knowledge by the victim, after 30 years, any compensation claim is time-barred.

According to settled case law, the 30-year period applies only to the perpetrator but not to third parties who are liable for other person's actions. However, according to recent case law,

a company can be held liable for the conduct of its director for up to 30 years if such conduct is attributable to the company under the Act on Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz*) (Austrian Supreme Court 6 Ob 239/20w).

### *Claims for unjust enrichment*

Claims for unjust enrichment are subject to the 30-year limitation period. It starts on the day of the unjust enrichment.

### **Limitation Periods for Criminal Law Claims**

The statute for criminal liability depends on the level of the penalty (Section 57 Austrian Criminal Code). For felonies such as murder, there is no statute of limitations. For crimes like fraud, the statute of limitations is, for example:

- ten years for aggravated fraud or dishonesty causing damage of more than EUR300,000, or bribery involving payment of more than EUR50,000;
- five years for aggravated fraud committed by using falsified documents or causing damage of EUR5,000–300,000, or bribery involving payments of between EUR5,000–50,000; and
- one year for “normal” fraud causing damage of less than EUR5,000.

The period commences with completion of the offence.

## **1.5 Proprietary Claims against Property**

In circumstances where a claimant seeks recovery of property misappropriated or fraudulently induced to be transferred, the following rules apply.

### **Civil Law**

Where a transfer of ownership is induced through deception, the transfer is voidable. Section 870 Austrian Civil Code provides that the contract is deemed void ab initio, and the transfer is inef-

fective. The victim can claim the return of the property in rem, which primes competing insolvency creditors.

However, third parties can acquire a fraudulently obtained item in good faith from a fraudster (Section 367 Austrian Civil Code). In such a case, the victim is left with a claim for damages and/or unjust enrichment against the fraudster, a claim in personam which does not take precedence in insolvency.

If a fraudster benefits from the fraudulently obtained thing (sells it at a profit, earns interest, etc), the victim can claim for surrender of these benefits based on unjust enrichment (claim in personam).

If the fraudulently obtained things are mixed with other fungible assets of the fraudster (eg, similar goods in a warehouse or money in an account), the victim loses ownership of its individual things (Section 370 Austrian Civil Code).

However, if the victim’s assets can be distinguished from the fraudster’s assets (eg, in a warehouse) and quantity ownership is identifiable in this distinguishable unit, the claim (in rem with precedence in insolvency) may lie for a separate share in the mixed assets (“quantum vindication”, Sections 371, 415 Austrian Civil Code).

On the other hand, if a fraudster has sold the goods or if the money becomes part of the general account from which payments are made, the victim no longer has a claim in rem, but only a claim for unjust enrichment and/or damages (claim in personam).

### **Criminal Law**

Subsidiary to a victim’s claims, profits from fraud (and other criminal acts) are subject to forfeiture under criminal law. According to Section 20

Austrian Criminal Code, any “assets acquired for or through an offence are to be forfeited to the court [...]. Forfeiture also extends to any benefits and replacement value of assets that are to be forfeited.”

## 1.6 Rules of Pre-action Conduct

There is no general prerequisite to filing a lawsuit. Nevertheless, it is standard practice to send a demand letter to the potential defendant requesting restitution. If the potential defendant immediately complies upon receipt of the lawsuit or does not dispute the claim, the successful plaintiff risks bearing the costs for the (unnecessary) proceedings.

In some cases, alternative dispute resolution mechanisms are foreseen as a prerequisite to filing a lawsuit. These exceptions are, however, not relevant for victims of fraud; they relate, for example, to disputes between members of professional groups subject to a code of conduct (eg, lawyers or medical doctors) or to specific types of claims (eg, against a landlord).

## 1.7 Prevention of Defendants Dissipating or Secreting Assets

There are different instruments available in civil and criminal law.

### Civil Law

#### *Request for injunctive relief*

The Enforcement Act provides for injunctive relief to prevent frustration of future enforcement (Section 378 et seq).

A creditor can apply for a preliminary injunction together with its claim (without extra court fees), or prior to initiation of formal legal proceedings, during such proceedings and – if foreign courts have jurisdiction – independently from legal proceedings in Austria. The court fees for such an independent injunction request are 50% of the court fees for a lawsuit.

#### *Available injunctions*

The Enforcement Act distinguishes between preliminary injunctions for securing monetary claims, securing other claims or rights.

Injunctions for securing monetary claims are available for: orders to deposit monies at court, freeze orders affecting movable and immovable assets, and orders against third-party debtors (ie, debtors of the defendant) enjoining them not to pay the defendant. By order against the applicable bank, bank accounts can also be frozen (Section 379 paragraph 3 Enforcement Act).

#### *Effects and sanctions*

Freeze orders regarding immovable assets are registered in the land register and have an in rem effect. Freeze orders regarding movable assets do not have an in rem effect. If the debtor or a third party against whom the order is directed violates an injunction, the court may impose fines or, in extreme cases, order imprisonment (Section 355 Enforcement Act).

#### *Requirements*

Injunctive relief for the purpose of securing monetary claims requires that the judgment would have to be enforced in a state where enforcement is not secured neither international agreements or by European Union law or that the debtor is likely to frustrate or significantly obstruct enforcement by damaging, hiding or removing assets (Section 379 paragraph 2 Enforcement Act). Austrian courts require that the particular conduct of a party indicates a strong and concrete likelihood in this regard.

#### *Damages*

If the relief sought is ultimately rejected and the defendant suffers damage as a result of an interim injunction, the claimant is strictly liable for the damages caused by the injunction. A court may grant an injunction under the condition of



a security for this possibility (Sections 390, 394 Enforcement Act).

### **Criminal Law**

A victim can secure claims by filing a criminal complaint. Provided the public prosecutor starts criminal proceedings, the victim can join these proceedings as a party. The private parties have the right to request securing and seizure, among other things, for the purpose of securing private law claims or to secure forfeiture. These measures may be ordered in the form of a temporary establishment of the power of disposition over items, the prohibition to surrender, to pawn or sell items, real estate or other assets (Sections 109, 110 Criminal Procedure Code).

## **2. PROCEDURES AND TRIALS**

### **2.1 Disclosure of Defendants' Assets**

#### **Civil Law**

Procedures to require a debtor to give disclosure of their assets are only available in enforcement proceedings, if enforcement on movable property or an inquiry with social security (see next paragraph) were unsuccessful (Sections 47, 48 Enforcement Act).

In enforcement proceedings, certain third parties may also be requested to disclose assets of the debtor, in particular, social security agencies regarding salaries and other types of income (Section 295 Enforcement Act), banks regarding the debtor's account and other third-party debtors (Section 294 Enforcement Act). For a request to a bank, the creditor does not have to provide an account number but only the name of the bank. The creditor may request information from a list of banks at which they suspect the debtor holds an account. Case law allows the creditor to provide a list of 12 banks; beyond that number, the request could be dismissed as

an impermissible suspicion seizure. A list of 12 banks certainly covers the most important players in the banking market.

Moreover, a creditor may claim rendering of accounts in respect of certain transactions. For example, a principal may claim rendering of accounts from their agent (Section 1012 Austrian Civil Code). However, this action does not serve to secure claims, but rather, to quantify monetary claims, and the court reaches the final decision on this question in "normal" civil proceedings.

### **Criminal Law**

Criminal law provides the disclosure of information contained in the registry of bank accounts and disclosure of information about bank accounts and bank transactions (Section 116 Criminal Procedure Code). Such an inquiry has to be made by the public prosecutor and approved by the competent criminal court. It is permissible if it appears necessary to enquire about criminal offences above a certain level of severity (such as fraud with damages of more than EUR5,000).

### **2.2 Preserving Evidence**

Quick preservation of evidence is often critical to enforce claims in fraud cases. In Austria, while civil proceedings provide some measures to preserve evidence, criminal proceedings are considerably more effective.

### **No Pre-trial Discovery**

Under Austrian procedural rules, the taking of evidence is regarded as a sovereign act, only performed by the courts. There is no pre-trial discovery by the parties to obtain disclosure from the opposing party or from third parties, or to preserve evidence.



## Search by Parties

Austrian law does not allow parties to conduct physical searches at a defendant's residence or place of business. If such searches were to be undertaken without the defendant's consent, they would trigger criminal liability.

## (Pre-trial) Evidence Preservation

Where there is a risk that evidence might be lost, the use of evidence might be impaired, or if for any other reason the current condition of evidence needs to be determined, a party may request the initiation of pre-trial preservation proceedings (*Beweissicherung*). Evidence preservation can also be requested during a trial.

Evidence protection proceedings are similar in speed and scope to interim injunction proceedings. Evidence protection orders can be issued ex parte where risk is imminent (*periculum in mora*). The court may only take those steps that are necessary to preserve the evidence – eg, to perform and document a visual inspection of physical evidence, or hear a material witness – for later use in court proceedings.

The evidence to be preserved must be freely accessible; evidence preservation proceedings do not provide any coercive measures that could force the opponent or any third party to co-operate.

Evidence preservation is not available for documents. There is no controlling case law on whether electronic evidence and hard drives – which are often central pieces of evidence in cases of fraud – qualify as documents.

Where evidence preservation is not available – eg, for documents, or where the evidence is in the hands of an unco-operative third party or opponent – Austrian case law allows interim injunctions for the same purpose (see **2.3**

## Obtaining Disclosure of Documents and Evidence from Third Parties).

### Available Measures in Criminal Proceedings

The public prosecutor may (upon authorisation by the criminal court) order house searches and the securing or seizure of objects (including letters and other documents) that might serve as evidence or to secure civil claims, the monitoring of a suspect's communication, etc.

Any person injured by a criminal offence is entitled to access to the criminal file and to make use of such evidence in subsequent civil proceedings. However, for purposes of a criminal investigation in its early (pre-trial) stage, access to files is often subject to certain restrictions.

### Suppression of Evidence Is a Criminal Offence

Suppression of any type of evidence that may potentially be subject to disclosure in foreseeable civil, criminal or administrative proceedings is a criminal offence (Section 295 Austrian Criminal Code). Accordingly, as soon as it becomes clear that certain evidence is intended for use in such proceedings, the holder is forbidden to undertake any action that could make such evidence unavailable. This does not apply where the holder has all the rights to the evidence (ie, is the unencumbered sole owner).

## 2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

### General Principles of Obtaining Evidence from Third Parties

In Austrian civil proceedings, it is each party's responsibility to produce the evidence necessary to support its case. There are only a few circumstances in which the opposing party or third parties may be obliged to disclose evidence upon one party's request. Since a request for third-party disclosure of documents (see next paragraph) must be made during the main pro-

ceedings, it will always come to the immediate attention of the opposing party.

While third parties can be ordered by the court to provide documents, it is even more difficult to obtain access to other forms of evidence from third parties.

#### *Obtaining disclosure of documents from third parties during ongoing proceedings*

In ongoing civil proceedings, a party may request the court to order a third party to provide a specific document if:

- substantive law requires the third party to produce the document; or
- the document qualifies as a “joint deed” of the third party and the party requesting disclosure (eg, a contract).

The requesting party must:

- substantiate that the document is in the possession of the third party; and
- accurately describe the contents of the document.

The court may exercise coercive means should a third party fail to comply with a relevant court order. This is noteworthy because a party’s failure to comply with a production order does not trigger any coercive measures. The only consequence if a party to the proceedings fails to produce documents as ordered is the risk of a potentially adverse inference being drawn when the court weighs the availability of the evidence.

These rules of disclosure are also fully applicable to so-called “objects of information” (*Auskunftssachen*), ie, with no written manifestation of thoughts, such as a sound recording. They are not, however, applicable to “objects of visual inspection” (*Augenscheinsgegenstand*), ie,

objects that do not represent thoughts, such as a disk or hard drive (see next paragraph).

#### *Preserving evidence in the hands of third parties*

Evidence other than documents that is in the hands of third parties can be preserved by way of an interim injunction. The scope is, however, quite restrictive. Such interim injunction is only available where the third party has an obligation to the opposing party (eg, an obligation to deliver the evidence to the opposing party). The interim injunction may not interfere with any rights the third party may have or require the third party to undertake any acts. Where evidence preservation is available (eg, for physical evidence, see **2.2 Preserving Evidence**), evidence preservation rules take priority.

The use of preserved evidence requires that there is an enforceable claim against the third party under substantive law.

#### *Criminal investigations*

If there is a suspicion of criminal conduct, discovery may also be obtained by initiating a criminal investigation. Evidence, particularly in the form of documents, obtained by the criminal authorities (eg, through house searches) may be used 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.

## **2.4 Procedural Orders**

### **Ex Parte Orders**

As a general principle, the intended defendant has a right to be heard before any procedural orders regarding evidence are issued. Ex parte orders can, however, be obtained in limited cases in which the applicant is able to substantiate that there is an imminent risk that the evidence will otherwise be suppressed, destroyed or impaired (*periculum in mora*).

## **Evidence preservation**

Evidence preservation orders can be obtained ex parte, ie, without notice to the respondent, where the applicant substantiates that there is imminent risk (*periculum in mora*), ie, that the evidence will otherwise not be available for reasons outside of the applicant's sphere. In such cases, the court may issue the evidence preservation order without hearing the respondent. It may, moreover, order that the evidence be preserved/taken before the order is served on the respondent.

Where respondents are not heard before the order is issued, they have the right to be heard in the appeal proceedings.

## **Interim injunctions**

Upon request of the applicant, injunctive relief can also 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 has a full right to be heard upon challenge (*Widerspruch*); such proceedings do not, however, suspend the enforceability of the interim injunction.

If the respondent raises an appeal, the court may, upon application, suspend the effect of the interim injunction if the damage to the applicant is “not disproportionate” and otherwise the purpose of the appeal would be frustrated.

Applicants face a no-fault damage claim if the claim in the main proceedings fails or the applicant fails to initiate main proceedings within the deadline set by the court, or if the interim injunction turns out to be unjustified for any reason. Moreover, the court may issue a penalty if the application was frivolous.

## **Value of Evidence Obtained Ex Parte**

If evidence was preserved/obtained without the intended defendant's participation – eg, if a visual inspection is undertaken in the absence of the defendant – the value of the evidence will generally be considerably lower, which the court must weigh.

## **2.5 Criminal Redress**

### **Private Party Joinder (Privatbeteiligung)**

Besides filing a claim for damages in a civil court, an injured party that is the victim of a criminal offence from which it has suffered damages, can join the criminal proceedings as a private party (Section 65 paragraph 2 Austrian Code of Criminal Proceedings).

A request for a victim's accession through private joinder can be submitted to the prosecution authority or the police and – after an indictment – to the criminal court.

During court proceedings, a criminal court may award damages if:

- the perpetrator is found guilty;
- taking evidence regarding the private joinder does not substantially delay the proceedings; and
- the amount of the claim can easily be assessed by the court.

In practice, this is a timely and cost-effective way to seek redress. While a private joinder is pending in criminal proceedings, civil claims will not be time-barred if the civil lawsuit is swiftly (ie, without delay) submitted to the civil court once the criminal proceedings have been terminated or where the court failed to award damages. If suspicion of a criminal offence arises in ongoing civil proceedings, the civil court may order an interruption of the proceedings until the criminal proceedings have been terminated (Section 191 Austrian Code of Civil Proceedings). However,

this is subject to the prerequisite that the investigation and conclusion of the criminal proceedings are likely to have a decisive influence on the decision of the civil proceedings. Under case law, the interruption of the civil proceedings is regarded as an exception to the ordinary course of conduct.

## 2.6 Judgment without Trial

### Civil Proceedings

#### *Default judgment*

When a statement of claim is initially filed with an Austrian court, the court will, if it has jurisdiction, serve the statement of claim on the defendant together with an order to respond within four weeks (regional courts) or to attend the preparatory hearing (district courts). If a defendant fails to respond within the deadline or to attend the hearing, the court must issue a default judgment based on the allegations in the statement of claim if requested by the plaintiff, provided process was duly served on the defendant.

The defendant may file a challenge (*Widerspruch*) within two weeks, or an appeal within four weeks of service of the default judgment. Otherwise, the default judgment becomes fully enforceable.

Default judgments can also be obtained through failure of one of the parties to respond at a later stage of the proceedings. This, however, is rare.

#### *Failure of defendant to duly argue its case*

Provided the defendant has, at a minimum, filed a response to the statement of claim (regional courts) or participated in the preparatory hearing (district courts), the court may not award a claim merely on the basis of the plaintiff's allegations, ie, without a trial. It must base the judgment on the available evidence, applying its own legal assessment.

#### *Burden of proof*

Substantive burdens of proof and allegations govern which party – plaintiff or defendant – must allege and prove which elements of the relevant claim. The initial burden of proof is typically on the party wishing to rely on the fact it seeks to establish.

### Criminal Proceedings

A criminal judgment may be issued in the absence of the defendant only if:

- the charge is a misdemeanour (threat of punishment not exceeding three years' imprisonment);
- the defendant has been questioned on the charge before trial, ie, in the course of the criminal investigations; and
- the defendant has been personally served with the summons to the trial.

## 2.7 Rules for Pleading Fraud

### Professional Ethics Rules for Filing Criminal Complaints

Under Austrian professional ethics rules, lawyers may not allege criminal acts or (threaten to) file a criminal complaint without having conscientiously reviewed the facts and legal aspects. Accordingly, when informed by clients of a criminal act such as fraud, the lawyer is required to review plausibility. It will often be necessary to make certain simple queries. Additionally, criminal complaints may not be filed where to do so would be disproportionate to the claims being pursued.

### Civil and Criminal Liability for Libel and Defamation

Allegations of criminal acts such as fraud may also trigger civil liability for libel or defamation of business reputation. The injured party can also request (interim) injunctive relief. If the statement is made in public, the injured party can demand that the allegation is publicly withdrawn.

Moreover, defamation can trigger criminal liability under various offences, depending on whether:

- the allegation qualifies as a false accusation, where the injured party is at risk of official prosecution (Section 297 Austrian Criminal Code, up to five years' imprisonment);
- the false allegation damages or jeopardises the credit or professional life of the injured party (damage to credit under Section 152 Austrian Criminal Code, up to six months' imprisonment); or
- the false allegation is made publicly and degrades the other person in public opinion (defamation under Section 111 Austrian Criminal Code, up to six months' imprisonment).

## 2.8 Claims against “Unknown” Fraudsters

In civil proceedings it is not possible to file claims against “unknown parties”.

Criminal complaints, on the other hand, can be filed against “unknown” suspects.

## 2.9 Compelling Witnesses to Give Evidence

### Compelling Witness Testimony in Civil Proceedings

#### *Compelling appearance in court*

Under Austrian civil procedural rules, parties cannot be compelled to subject themselves to an examination by the court. Their failure to do so is, however, taken into consideration by the court when weighing the evidence.

Witnesses domiciled in Austria are obliged to respond to a witness summons. If a summons has been duly served on a witness, but that witness fails to appear without an excuse, the court must issue a further summons and impose a fine. If the witness fails to appear at the next hearing, the court must double the fine (maximum EUR2,000), issue further summons for another

hearing and order that the witness be brought to court by the police.

These consequences must already be specified in the initial summons; the templates used by the Austrian courts include this admonition.

The court may also order a witness to pay costs incurred by their failure to appear (eg, if a further hearing becomes necessary solely for that witness' testimony). The witness is also liable under civil law for damages incurred.

#### *Compelling testimony*

If the witness appears but refuses to respond to questions without justification, the court can issue a fine of up to EUR100,000 per order or even imprisonment of up to six weeks.

The law defines a multi-step procedure before issuing a fine in a hearing, in order to ensure that the witness is entirely aware that they do not have the right to refuse testimony and that the witness has been duly heard. Imprisonment is very rare.

### Compelling Witness Testimony in Criminal Proceedings

In criminal proceedings, the provisions concerning witnesses are identical to those of civil proceedings, apart from (i) witnesses may be fined up to EUR10,000 or face imprisonment for up to six weeks for unjustified refusal to testify; and (ii) the defendant may be placed on the alert list and arrested to be brought before the court if they fail to appear for questioning or for the trial.

### 3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

#### 3.1 Imposing Liability for Fraud on to a Corporate Entity

##### Attribution of Knowledge and Unlawful Acts to the Company under Civil Law

Unlawful and culpable acts undertaken by officers of a limited liability company or stock corporation (managing directors, members of the supervisory board and “representatives”) are attributed to the company they represent, provided these acts were undertaken in the performance of their duties to the company. An objective connection suffices. Accordingly, any fraudulent acts perpetrated by such officers and representatives are attributable to the company.

Any knowledge of managing directors/members of the management board is directly attributed to the company, regardless of where such knowledge was obtained and whether they have single or collective powers of representation or decision. Only knowledge obtained by supervisory board members and other “representatives” in the context of their official function is attributed to the company.

##### Attribution of Unlawful Acts to the Company under Criminal Law

Austrian criminal law is historically based on the general principle that only humans – and not legal fictional persons – are capable of criminal acts. Since 2006, the Act on the Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz*) has provided that legal entities are criminally liable if “decision makers” are guilty of a criminal act:

- that was undertaken for the benefit of the company; or

- that violated obligations incumbent on the company.

“Decision makers” include:

- managing directors/members of the management board;
- holders of powers of procura;
- members of the supervisory board; and
- other persons with a decisive influence on the management of the company.

In comparison, the liability of other staff is much reduced. In their case, the prosecution authority must show, among other things, the absence of a robust compliance system.

The public prosecutor must consider the conduct of the corporation before and after the alleged offence. A robust compliance system along with full co-operation of the legal entity might provide sufficient reason for the prosecutor to terminate the criminal proceedings without imposing a fine. In addition, an employer’s directives requiring employees to adhere to the law are recognised as a mitigating factor for sentencing purposes.

#### 3.2 Claims against Ultimate Beneficial Owners

The (direct or indirect) shareholders of a stock corporation and of a company with limited liability are generally not personally liable for the acts or liabilities of the company.

##### Piercing the “Corporate Veil”

The “corporate veil” is, however, pierced in the following – exceptional and rare – circumstances:

- material undercapitalisation – where a company is manifestly and clearly undercapitalised to the extent that the failure of the



- company is highly probable, the shareholders may become liable for that company's debts;
- where the personal assets of the shareholder(s) and of the company are so co-mingled that they cannot be separated (generally only in cases with a single shareholder);
  - where a shareholder acts as a factual or "shadow" director and decisively interferes with the management of the company, especially if this causes insolvency; or
  - where critical assets are withdrawn or business opportunities are appropriated by shareholders in such a way that insolvency results.

Accordingly, where a shareholder acts as a "shadow" director of the company perpetrating the fraud, for example, or where the company was initially established (and materially underfinanced) specifically in order to perpetrate fraud, there is a possibility that the shareholders will be held liable for victims' claims under civil and corporate law.

### **3.3 Shareholders' Claims against Fraudulent Directors**

#### **Derivative Actions for Damages**

The general rule is that fraudulent directors are liable for damages incurred by the company only to the company itself, and not to shareholders. This includes any damage in the value of the company that results in "reflexive" damage to the value of the shares in the company. Such claims are pursued directly by the company.

#### **Limited liability company**

Shareholders of an Austrian company can bring a specific form of derivative action: if a limited liability company (GmbH) refuses to pursue claims against the officers, shareholders holding a minority share of at least 10% or over EUR700,000 can directly enforce such damages claims themselves on behalf of the company. In other words, the claimants must request pay-

ment to the company and directly to the claimants, themselves.

#### **Stock corporations**

There is no corresponding *actio pro socio* for stock corporations (AG). Claims on behalf of the stock corporation can only be brought by the company itself, if enforcement of such claims is decided with a simple majority in the general assembly or is demanded by a minority of 5% respective 10%.

#### **Further minority rights**

These rights are accompanied by further minority rights, such as the right to demand appointment of special auditors, the right to block waivers or settlement of claims against directors and the right to enforce dismissal of supervisory board members or managing directors for cause.

#### **Direct Harm to Shareholders**

Where the directors harm the shareholders directly – and not just by reducing the value of their participation in the company – the shareholders may directly hold the officers liable; the case law on this is developing. Cases include violation of "protective laws" (*Schutzgesetze*) such as financial disclosure requirements, embezzlement or fraud.

Recently, many such claims have been based on money laundering. However, case law currently gives no guidance defining the circumstances in which money laundering creates a legal basis for a civil damage claim by victims of the predicate offence.



## 4. OVERSEAS PARTIES IN FRAUD CLAIMS

### 4.1 Joining Overseas Parties to Fraud Claims

#### Civil Proceedings

##### *General*

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 (EU) No 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).

##### *Establishing jurisdiction*

The general rule is that Austrian courts have jurisdiction if the defendant has its seat in Austria. In addition, numerous other factors 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
- if the dispute relates to real estate located in Austria.

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. Following service of the claim, the (overseas) defendant may bring dispositive motions based, eg, on procedural grounds such as failure of jurisdiction or improper venue.

##### *Service abroad*

A party that is located outside Austria can be served either in accordance with Regulation (EC) No 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (within the European Union), or in accordance with the Hague Convention for Service of Process or 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).

##### **Criminal Proceedings**

Offences committed abroad are subject to Austrian criminal law if:

- the offence is also punishable under the law in the location of the offence;
- the offender is Austrian or is arrested in Austria and cannot be extradited; and
- none of the exceptions in Section 65 paragraph 4 of the Austrian Criminal Code apply.

Austrian jurisdiction also applies for certain offences of significant importance, regardless of the criminal law in the location of the offence, eg, corruption, economic espionage, terrorism and particular other major crimes, criminal offences, and offences against an Austrian government official (Section 64 Austrian Criminal Code).

The power of the Austrian criminal authorities ends at the Austrian border. Therefore, Austrian authorities and courts rely heavily on international co-operation for the enforcement of their authority outside the country. In the area of co-operation within the EU, for example, the Federal Law on Judicial Co-operation in Criminal Matters

with the Member States of the European Union (EU-JZG) stipulates extensive possibilities for cross-border enforcement and the execution of orders freezing property or evidence.

## 5. ENFORCEMENT

### 5.1 Methods of Enforcement

#### Enforcement Proceedings

Austrian enforcement proceedings are bifurcated into two steps: (i) authorisation proceedings (*Exekutionsbewilligung*), and (ii) the actual enforcement (*Exekutionsvollzug*). Both fall within the competence of the enforcement court.

Once a creditor has obtained an enforceable title, it can apply for enforcement at the competent district court (*Bezirksgericht*) at the debtor's domicile. If the debtor has no domicile in Austria, the court where the asset that is the subject of the enforcement has jurisdiction (in the case of garnishment orders – at the third-party's domicile). The court where immovable property is registered always has jurisdiction for enforcement pertaining to immovable property.

The application for enforcement is done by means of official standard forms. The court of enforcement will only examine the formal requirements based upon the application and – if it is satisfied that all formal requirements are met – will authorise enforcement by means of a court order.

In Austria, actual enforcement, ie, implementation of the enforcement measures, also falls within the competence of the court and its officers. There is no private enforcement.

#### Enforcement Measures

Austrian law provides a number of enforcement measures and allows the creditor to choose which enforcement measures will be imple-

mented. The creditor may also combine several measures, if this is appropriate. The law provides for certain bundles of enforcement measures for monetary claims: a “small bundle” (movable goods and securities, attachment of salary, affidavit), which applies unless the creditor opts out, and an “extended bundle” (additionally all further assets and any other receivables). If the latter is chosen, an enforcement administrator – similar to an insolvency receiver – is appointed, whose function it is to enforce against all available assets until the creditor has achieved full satisfaction. For higher-value claims, creditors may choose to request an administrator.

Only those enforcement measures listed in the Enforcement Act are available. Furthermore, certain enforcement measures are only available for certain types of claims. The available enforcement measures are categorised according to whether they serve to enforce (i) the monetary claims or (ii) the specific actions of the debtor.

#### *Enforcement of monetary claims*

Monetary claims can be enforced by means of measures directed against immovable property, movable property, claims of the debtor against third parties, or rights such as intellectual property.

Immovable property is real estate, including the buildings on it, unless these are non-permanent structures. The predominant enforcement measures available are:

- establishment of lien;
- foreclosure; and
- administration.

Movable property refers to all objects that can be moved from one place to another without damage:

- attachment and auction; and

- surrender of specific property.

The monetary claims of the debtor against third parties are, in most cases, claims against the banks holding accounts of the debtor and attachment of earnings (salary or wages) of the debtor. For these cases, the creditor is not obliged to name a specific bank account or name the employer, instead the court will order the bank or request the social security agencies to provide this information.

#### *Attachment and collection*

This measure consists of two orders:

- one, forbidding the third-party debtor to make payment to the debtor (prohibition of payment); and
- another, forbidding the debtor to dispose of their claim against the third-party debtor (prohibition of disposal).

The collection (and then transfer to the creditor) is generally effected by bank transfer.

Rights or intangible assets of the debtor may also be the subject of enforcement proceedings. The most common cases are intellectual property or shares in companies.

#### *Enforcement of non-monetary claims*

Non-monetary claims are, in general, specific actions that the debtor is obliged to undertake (or cease and desist from).

- Substitution – this measure obliges the debtor to undertake an act within a specified time. If the debtor fails to do so, the creditor may have this act performed by another person and request enforcement of the costs incurred as a monetary claim.
- Penalisation – if the act can only be performed by the debtor or the debtor violates its obligation to cease and desist, the court will

first threaten and can then impose penalties in the form of fines or imprisonment.

## **6. PRIVILEGES**

### **6.1 Invoking the Privilege against Self-incrimination**

#### **Civil Proceedings**

##### *Oral testimony*

In Austrian civil proceedings, the principle of the privilege against self-incrimination is well established. As a party to the proceedings, the defendant cannot be forced to testify.

In so far as the defendant refuses to answer questions without sufficient reason (eg, to protect themselves or family members from criminal prosecution), the court may take this refusal into account in its decision-making process, carefully considering all the circumstances.

##### *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.

The 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 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.

If a party does not comply with the court order to produce, no enforcement is 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.

## Criminal Proceedings

Accused individuals or companies have a right to avoid self-incrimination. In the case of a corporation, the managers (persons in charge) as well as the employees suspected of having committed an offence are treated as if accused and can rely on the right to avoid self-incrimination.

It is forbidden to use coercive measures (or promises or misleading statements) to induce the accused to make a statement (Section 7 paragraph 2 Austrian Code of Criminal Proceedings). According to Section 166 of the Austrian Code of Criminal Proceedings, forced testimony is classed as prohibited evidence and is therefore deemed null and void.

## 6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

### Civil Proceedings

#### Discovery

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. A party may be ordered by the court to produce evidence at its disposal. The prerequisites for an order to produce documents upon request are:

- the requesting party can present plausible reasons for the allegation that the document is in the possession of the other party;
- 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.

#### 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. At least in theory, 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. In practice, parties often feel compelled to waive their privilege, to avoid the impression that there is something being improperly hidden.

### Criminal Proceedings

Attorney work product and attorney-client communications are protected in several ways. Attorneys (and a small number of other professionals) have a legal duty of confidentiality and a right to refuse to give evidence (Section 157 Austrian Code of Criminal Proceedings). The duty may not be circumvented. This prohibits the seizure of attorney documents and the information con-

tained therein at the attorney's premises and, since 2016, also at the premises of clients under suspicion, or accused, in criminal proceedings. Attorney-client confidentiality only extends to (i) the attorney's work product, and (ii) attorney-client communications created for the purpose of defending the client; not to previously existing evidence.

Concerning the seizure of attorney documents at the attorney's premises, any person subject to or present during such action may object to the implementation of the measure. In that case, documents and data carriers must be sealed and presented to a court, which must decide promptly whether the evidence is protected by attorney-client confidentiality (Section 112 Austrian Code of Criminal Proceedings).

## 7. SPECIAL RULES AND LAWS

### 7.1 Rules for Claiming Punitive or Exemplary Damages

The concept of punitive damages is foreign to Austrian law (as it is to many other continental European jurisdictions). Punitive damages, if contained in a foreign judgment, may be considered to be against public policy and may therefore be unenforceable in Austria.

### 7.2 Laws to Protect "Banking Secrecy" Banking Secrecy in Austria

The Austrian banking secrecy obligation is strict. The statutory obligation contained in Section 38 of the Austrian Banking Act prohibits credit institutions, their shareholders, members of the credit institutions' corporate bodies, employees and all other individuals acting on behalf of the credit institution from disclosing, or making use of, secret information that has been entrusted or made accessible to the institution solely due

to the institution's business relationship with the customer.

Consequently, persons subject to banking secrecy are obliged not to disclose, or make use of, secret information most specifically related to customers' names and account information like balances or transactions. Once the obligation is established, it may only be disregarded under certain conditions, particularly when there is a specific legal justification for doing so or the client provides express written consent prior to any disclosure.

#### *Exemptions*

The obligation to maintain banking secrecy does not apply, inter alia, if the bank's customer explicitly agrees in writing that certain confidential data may be disclosed, or if there is a legal justification that requires disclosure. Such customer's waiver of the secrecy obligation requires the explicit prior written consent of the client. Thus, a general consent contained in the general terms and conditions of the bank is not deemed to be sufficient.

In addition, Section 38, paragraph 2 of the Austrian Banking Act contains a list of exemptions when otherwise-protected information can be disclosed. Inter alia, this applies:

- vis-à-vis public prosecutors (with regard to basic account information) and the criminal courts (with regard to basic and extensive account information) in connection with criminal proceedings; or by the fiscal authorities in connection with initiated criminal proceedings for intentional fiscal offences, excluding fiscal misdemeanours;
- in the case of disclosure obligations in connection with anti-money laundering provisions (eg, according to Section 41 paragraphs 1, 2 Austrian Banking Act); and

- in the case of obligations to provide information to the Austrian Financial Market Authority pursuant to the provisions of the Austrian Securities Supervision Act 2007 and the Austrian Stock Exchange Act.

The list of exemptions in Section 38, paragraph 2 of the Austrian Banking Act is not exhaustive. Additional exemptions to the banking secrecy obligation may also be made exceptionally on a case-by-case basis by considering and weighing the interests of the credit institution (or also, of a third person) in disclosing the secret, against the customer's interests in keeping the secret.

### 7.3 Crypto-assets

The Austrian criminal law understands the concept of property as the totality of all economically significant and arithmetically ascertainable values. Crypto-assets are regarded as such values and, accordingly, are treated as property. As a consequence, crypto-assets are potential objects involved in criminal offences protecting the property.

In the past, crypto-assets had faced some protection issues: some offences included in the Austrian Criminal Code protect only physical

things, an unlawful “taking away” of crypto-assets as non-physical objects could not be punished as theft (Section 127 Austrian Criminal Code). Moreover, the legal definition of “non-cash means of payment” (Section 74 Austrian Criminal Code) did not specifically encompass crypto-assets as such. This issue has been solved as of 2021, through the implementation of the Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment: the definition of non-cash means of payment (Section 74 Austrian Criminal Code) has now been extended to include virtual currencies. Since implementation, crypto-assets are covered by the provision as non-cash means of payment effective as of December 2021. Thus, the taking away of crypto-assets is covered by the offences utilising non-cash means of payment (Section 241a et seq Austrian Criminal Code).

The Austrian criminal law understands cryptocurrencies as digital means of payment to which the subject has access solely through the use of electronic keys, thus cryptocurrencies are regarded as data. According to Section 112 of the Criminal Procedure Code, the public prosecutor's office is entitled to seize data.



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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 banking (including M&A, financing and joint venture disputes), 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 attach-

ments, 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, arbitration-related court proceedings and mediation, and 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 counsel frequently turn to KNOETZL to act as their Austrian disputes counsel.

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