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# Litigation 2024

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## **Austria: Law & Practice**

Bettina Knoetzl, Katrin Hanschitz,  
Dr Kirstin McGoldrick and Natascha Tunkel  
KNOETZL

## **Austria: Trends & Developments**

Bettina Knoetzl, Katrin Hanschitz  
KNOETZL



# AUSTRIA

## Law and Practice

### Contributed by:

Bettina Knoetzl, Katrin Hanschitz, Dr Kirstin McGoldrick and Natascha Tunkel  
**KNOETZL**



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**KNOETZL** is Austria's first large-scale disputes resolution powerhouse dedicated to high-profile, important and complex cases. The firm'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 freeze orders and attachments, in the domestic

and international contexts; and the enforcement of foreign judgments and arbitral awards. **KNOETZL**'s practice also covers international commercial arbitration, investment protection and arbitration-related court proceedings, mediation and ADR. The firm is well-recognised for its disputes work at the intersection of civil and criminal matters. Distinguished international law firms, corporate decision-makers and general counsel frequently turn to **KNOETZL** to act as counsel in their significant disputes with an Austrian nexus.

## Authors



**Bettina Knoetzi** is a founding partner at **KNOETZL**. She has over 25 years' experience in high-profile international and Austrian matters, specialising in high-stakes international and

commercial litigation, focusing on investor protection, liability claims, corporate disputes, and fraud and asset recovery. She led clients from banking, finance, life science, and energy industries to remarkable successes. Bettina successfully defended against class action lawsuits, and represents corporate and investor clients in shareholder disputes. She counsels government institutions and designed and led successful defences of ultra-high net worth individuals. She led the International Bar Association (IBA) multi-committee AI showcase in Paris, 2023, is president of Transparency International, Austrian Chapter, vice president of the Vienna Bar, and lectures on dispute resolution.



**Katrin Hanschitz** is a partner at **KNOETZL** and, as co-chair of the international litigation committee, an active member of the American Bar Association. She is an experienced first-chair

litigator with expertise in M&A, finance transactions and ancillary disputes. In addition to corporate and post-transactional litigation, her primary focus is on shareholder disputes, managerial liability, governance issues and disputed M&A transactions, as well as contentious insurance coverage, financing, international trade and international insolvency matters. She regularly represents multinational clients from a wide range of industries, with an emphasis on banking, construction, (renewable) energy and life sciences. She has experience handling complex, disputed cases in the fields of advertising, competition law, international insolvency and insurance.

Contributed by: Bettina Knoetzl, Katrin Hanschitz, Dr Kirstin McGoldrick and Natascha Tunkel, **KNOETZL**



**Dr Kirstin McGoldrick** is counsel at KNOETZL. She focuses her practice on all areas of arbitration and litigation. Kirstin is specialised in complex matters, often involving multi-

jurisdictional and multi-contract disputes. She has represented private commercial parties in a broad range of cases involving such industries as automotive, banking and finance, construction and engineering, insurance, as well as in matters of corporate and civil law. Prior to joining KNOETZL, she was a senior researcher at the Austrian Notarial Institute, a legal research institute of the Austrian Chamber of Notaries, where she gained significant experience in delivering legal opinions on highly complex issues of civil, company and private international law.



**Natascha Tunkel** is a partner at KNOETZL with over a decade of experience in the field of complex dispute resolution, advising clients through all stages of a dispute. Her focus is

on commercial matters where she acts as counsel, arbitrator, and mediator in disputes from a wide array of industry sectors, including technology, life science, energy, engineering, and intellectual property. She has a strong background in insolvency and reorganisations and heads the Investigations practice at KNOETZL. Natascha is the Austrian delegate to the ICC Taskforce on arbitration and ADR, a member of the VIAC Mediation Advisory Board, and an officer of the IBA Mediation Committee.

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## KNOETZL

Herrengasse 1  
A-1010  
Vienna  
Austria

Tel: +43 1 3434 000 212  
Fax: +43 1 3434 000 999  
Email: [office@knoetzl.com](mailto:office@knoetzl.com)  
Web: [www.knoetzl.com](http://www.knoetzl.com)

# KNOETZL

## 1. General

### 1.1 General Characteristics of the Legal System

#### Austrian Civil Law System

The Austrian legal system is steeped in civil law. Laws are based on codes and statutes. Civil procedure contemplates an adversarial process with inquisitorial elements: The proceedings and the judge are limited to the factual allegations of the parties, however, the judge is not a mere “referee” (eg, in the judges’ inquisitorial role, they 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 consider 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 at four levels: District Courts, Regional Courts, Higher Regional Courts and the Supreme Court. The District Courts are the courts of first instance in matters involving a maximum amount in dispute of EUR15,000 and, regardless of the amount in dispute, in certain subject matters (primarily family law 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 adjudicate appeals from Regional Court decisions.

#### 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 highest court of appeal. There is no further (domestic) remedy available with respect to its decisions. Its function is to ensure uniform application of the law throughout Austria. Although lower courts are not legally bound by its decisions, the Supreme Court’s law has an effective precedential value.

### 1.3 Court Filings and Proceedings

Court filings are not public. Hearings, however, are open to the public. It is only possible to restrict public access if, for instance, such restrictions are necessary for maintaining public order, protecting certain categories of information (such as banking secrets, business secrets or state secrets), or if the hearing involves personal family matters.

### 1.4 Legal Representation in Court

In certain legal disputes, the parties must be represented by a lawyer admitted to the Austrian Bar and they may not 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 foreign counsel.

## 2. Litigation Funding

### 2.1 Third-Party Litigation Funding

The permissibility of third-party litigation funding was the subject of fierce debate 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 a 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 to 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 permitted for defendants.

### 2.4 Minimum and Maximum Amounts of Third-Party Funding

Litigation funding companies often fund cases with significant financial impact, as they tend to be compensated for their services with a significant proportion of the proceeds (approximately one third). This proportion must cover the risk undertaken by the funder, the costs of their own

lawyers, overhead, and investor profit. Therefore, cases with low financial impact tend to attract funders only if there are multiple, similar cases that can be aggregated through collective action.

### 2.5 Types of Costs Considered Under Third-Party Funding

Litigation funding agreements generally cover all legal fees and court costs incurred by the party being funded 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 a scenario in which the funded party loses the case and must reimburse the opponent for its legal fees or costs. The litigation funder will usually reserve the right to terminate the agreement at any time in order to avoid having to cover further costs while bearing the existing costs.

### 2.6 Contingency Fees

Members of the legal profession are prohibited from entering into a pactum de quota litis (contingency fee arrangement) with their clients, but this rule does not apply to those outside of the legal profession. Accordingly, a third-party funder’s compensation is generally determined by a percentage of the amount recovered. Other fee structures may also be permissible as long as they are not excessive, contrary to good morals or violate consumer protection laws. A success fee arrangement is possible, if it constitutes 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 or during 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 notify a potential defendant, demanding satisfaction of 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, requiring 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 (ADR) mechanisms are contemplated as a prerequisite to filing a lawsuit. If the plaintiff does not comply with applicable prerequisites, 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 limitations periods generally commence when a right could have been first exercised and, as a general rule, are 30 years. However, due to numerous, specified exceptions, most claims, including for damages,

are subject to a shorter limitations 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 causing the damage. For contractual claims, the statute of limitations generally begins when the claim is due.

#### Specific Rules

There are numerous shorter or longer limitations periods. For example, a negligence claim against a managing board member may only be brought within five years.

#### Interruption and Suspension

There are different reasons for interruption and suspension of the limitations period. An acknowledgement, for example, interrupts the limitations period, and settlement negotiations suspend the expiry; the claim must be filed within a reasonable period after the negotiations giving rise to such tolling 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 guided by Regulation (EC) 1215/2012 (the recast Brussels Regulation).

These provisions establish 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 nature of the 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 will 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; and
- when the dispute relates to real estate located in Austria.

### Jurisdiction Clause

The jurisdiction of Austrian courts can also be agreed 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 licensed to practice in Austria through the official electronic filing system (Web ERV).

### Content of the Claim

Moreover, the statement of claim must clearly identify the following:

- the competent court;
- the parties to the dispute;
- their occupations, addresses, roles in the proceedings, and representatives (if any);
- the subject matter of the dispute; and

- the exhibits attached (including whether the exhibits are submitted in their original form or as copies).

The statement of claim should state the principal 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 identify 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 upon 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 delay the proceedings. The final cut-off date for any new facts, evidence or pleading is at 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 must 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) 2020/1784 on the service of judicial and extrajudicial documents in civil or commercial matters (within the European Union) or in accordance with bilateral or multilateral treaties containing provisions on the service of documents (outside the European Union), such as the Hague Service Convention (HCCH 1965).

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 provided by 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 Austrian Legal Tradition

Austrian law has not historically provided a vehicle for class actions. Traditionally, the class action in the Anglo-American style has even been viewed as contrary to Austrian legal culture, based on individual action and individual parties who assert their own individual claims. However, as a result of the Directive (EU) 2020/1828 on representative actions for the protection of collective interests of consumers, all that is about to change.

## No Class Actions but Representative Actions and Sample Lawsuits

Currently, Austrian law only provides for representative sample lawsuits in which certain organisations (eg, consumer protection organisations or the Chamber of Labour) may file a case on behalf of an individual and – irrespective of the amount in dispute – bring it before the Supreme Court. Such a claim must be assigned to the organisation and must fall within its scope of responsibility (eg, consumer claim assigned to a consumer protection organisation). While the judgment only has legal effect regarding the specific case, the lower courts will generally honour the decision of the Supreme Court as a practical precedent. The judgment does not affect the limitations periods of other claims.

The same organisations may also file for injunctions against the use of unlawful general terms and conditions and against business practices that violate unfair competition practices (so-called representative actions). With this instrument, the Austrian legislature implemented the Directive (EC) 98/27 on injunctions for the protection of consumers' interests.

## Austrian-Type Mass Claims

Austrian law currently prohibits representative actions. Only a party with a claim in substantive law may be a plaintiff in proceedings. Consequently, in cases of mass claims, an “Austrian-type mass claims procedure” has become established by practice. This concept enables claims that may be assigned for collection to be filed, and a plaintiff may file a single lawsuit to deal with multiple claims it may have against the defendant. Thus, the party that has been assigned all claims can raise all such claims against a single defendant in the same proceeding.

## Trends and Upcoming Reforms

The implementation of Directive (EU) 2020/1828 on representative actions for the protection of collective interests of consumers is still in progress in Austria. While member states were required to adopt and publish, by 25 December 2022, the laws necessary to comply with the Directive and apply them from 25 June 2023, Austria, like other member states, is late in implementing the Directive. However, a draft law with wide-reaching effects is expected soon. (See **14.1 Proposals for Dispute Resolution Reform**).

## 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. Nevertheless, 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 a trial takes place, such as:

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

Otherwise, Austrian procedural law does not provide for pre-trial proceedings as are 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 one in which 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 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 motion. For example, directly after receiving the claim, the court must determine and verify its jurisdiction *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

The trial begins with a preparatory hearing. Most of the dispositive motions are brought before-

hand 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 the “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 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 defendant’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 final and binding decisions upon the interim motion. Alternatively, the decision regarding costs is made dependent upon 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 pay 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 must deal with an application. Parties are nevertheless protected against 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 within 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 such a 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 copy of a specific document if:

- substantive law requires the third party to produce the document; or
- the document may be of joint use to the parties (as in the case of a written 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 contents of the document.

#### Enforcement

In contrast 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 are rarely issued against third parties.

### 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;
- 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 pursued 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 written 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 may 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 granted 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
- 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

Injunctions available for securing monetary claims include:

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

By an order against a debtor’s 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 showing of 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 in 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 an applicant, injunctive relief can be awarded ex parte. The respondent will not be heard, in order 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 challenge proceedings.

## 6.4 Liability for Damages for the Applicant

The applicant may 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 that a preliminary injunction be subject to posting security by the applicant. This applies irrespective of whether the proceedings are 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 a preliminary injunction. This also applies if the asset subject to the preliminary injunction is situated in another country. It is necessary to check with each applicable jurisdiction individually whether an Austrian injunction is enforceable in foreign jurisdictions. 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 payments to the debtor. In this way, it is also possible to freeze bank accounts.

## 6.7 Consequences of a Respondent's Non-compliance

In order to enforce a preliminary injunction, no further request for enforcement is required. The injunction implies the approval of enforcement. If necessary, a 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 a plan for the course and content of the remaining proceedings. This is also an occasion on which the court is required to explore the possibility of a settlement.

### Exchange of Written Submissions and the Oral Hearing

Usually, the next step involves 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 are only based on evidence taken by the court. It is mandatory for witnesses to appear before the court. Written witness statements and affidavits are used only in preliminary proceedings, where the general level of proof is intentionally lowered so that a speedy decision can be reached, or when the interrogation of a witness or party is

practically impossible, for example, due to a prolonged absence or illness.

### Simplified Proceedings for Smaller Claims

For monetary claims not in excess of EUR75,000, proceedings are significantly simplified. A payment order will be issued, predicated only on the plaintiff's request. If the defendant objects, 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", which structures how evidence will be taken 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 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. The judge will formally close the oral hearing once the taking of evidence is completed.

### 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, witness testimony) 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, witness testimony, 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 basis of 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 required by statute to be neutral. If there are doubts as to neutrality or competence, court-appointed experts may be challenged. The same rules apply regarding 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 as other 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 a hearing and will not only preside in the process of the hearing but will also take the lead in examining witnesses. The judge 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 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 stage and from nine months to one year at the appellate level.

## Complex Duration

Complex disputes may take longer. Especially in more complex cases, appellate court proceedings may reveal errors in the lower court proceedings and the case will then 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 common in practice.

#### Judicial Settlements

Judicial settlements are concluded before the court and – unless they contain a specifically agreed revocation clause (see **8.4 Setting Aside Settlement Agreements**) – are immediately enforceable. The parties are not limited by the pending dispute and may also agree on matters that have yet to be a part of the dispute. This, however, could trigger additional court fees. 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 unknown 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, but 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. Within the European Union, judicial

settlements can, upon application, be certified as a European Enforcement Order which can be directly enforced under Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004, creating a European Enforcement Order for uncontested claims. To the extent that an extrajudicial settlement is drawn up in the form of an “authentic instrument”, such as a notarial deed by which content and signature of the extrajudicial settlement are confirmed with public authority, certification as a European Enforcement Order is possible. Otherwise, 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 a competent court.

## 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 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 a 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 desist from a certain act. A divorce is an example of a judgment that alters 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 expiration of a limitations period.

### No Punitive Damages

Austrian tort law is based on the principle of compensation and provides for damage claims only insofar 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 be partly punitive in nature. Moreover, the European Court of

Justice has ruled in connection with the “Diesel” matters that, under certain circumstances, a compensation of 5% to 15% of the purchase price of the car should be paid by the car producer to the car owner independent of actual damage. In 2023, the Austrian Supreme Court adopted this ruling, in essence granting punitive damages.

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

### 9.3 Pre-judgment and Post-judgment Interest

#### Amount of Interest

Under Austrian civil law, the debtor is required to compensate the creditor for the damage caused by any delay of 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 percentage points above the base interest rate if the default is attributable to the debtor’s negligence. As a rule, the base rate applicable is the base rate that was in effect on the first day of the relevant half year (1 January for the first half and 1 July for the second half) and is available on the Austrian National Bank’s website. The creditor can also claim, in addition to the legal interest, compensation for other damage caused by late payment.

#### Starting Date

The starting date for interest accrual is the date when the payment obligation is due. It is owed from the day after the payment obligation becomes 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 for up to a maximum of two months).

#### Assets Subject to Enforcement

Creditors can choose to enforce against real property or other specific assets (eg, a specific bank account, a specific share); or, alternatively, to request enforcement in the form of:

- a “small bundle”, which includes enforcement against movables and the attachment of salary from existing employment; or
- if the claim is in excess of EUR10,000 or the small bundle proved insufficient, an “extended bundle”, which also includes all other assets with the exception of real property (in this case, an administrator is appointed by the court to investigate and to realise the assets).

## 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 apply to 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 rendered 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 it is not within a court’s discretion to determine reciprocity but 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, 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 Higher Regional 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 contain the challenge of the decision of the court of appeal denying further appeal to the Supreme Court but 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 independently assess certain evidence. However, 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 court of 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 (i) uniformity, or (ii) certainty of legislation, or (iii) to allow for its development.

The appellate court must include in its decision a determination on the admissibility of an appeal on the point of law to the Supreme Court. This determination can be contested by the parties and is not binding for the Supreme Court. Consequently, the Supreme Court may still dismiss an appeal determined as admissible by the appellate court or allow an appeal determined as inadmissible by the court of second instance provided that the appeal is not inadmissible by law for other reasons (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 rendered 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 appellate 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 the court 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 legal costs 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 may, and often do, 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

By law, Section 54a Austrian Code of Civil Procedure, and without the need for being explicitly stated in the decision on costs, the party liable to pay compensation shall be obliged to pay statu-

tory default interest on the amount of costs from the date of the decision on costs.

## 12. Alternative Dispute Resolution (ADR)

### 12.1 Views of ADR Within the Country

ADR and, particularly, mediation, is viewed positively in Austria. Yet, mediation is still rarely used to settle commercial disputes. Parties to complex commercial and corporate disputes prefer to sue in court or to initiate arbitration proceedings, thereby delegating the resolution of the dispute to judges or arbitrators. However, nowadays a good number of judges are aware of and appreciate the power of mediation and actively refer parties to mediation.

The Law on Mediation Regarding Civil Claims (*Zivilrechts-Mediations-Gesetz*), enacted in 2004, aims to promote and facilitate access to mediation by setting out basic parameters for mediation. It establishes required qualifications of certified mediators, provides that mediation conducted by a certified mediator prevents the limitation period from expiring, and sets out that certified mediators shall not be required to testify in court proceedings. In many areas, the Austrian Law on Mediation Regarding Civil Claims pre-empted most of the provisions foreseen by the (EC) Directive 2008/52 of 21 May 2008 regarding certain aspects of mediation in civil and commercial matters.

### 12.2 ADR Within the Legal System

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



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

Judges increasingly encourage parties to consider ADR, generally in the form of mediation. Some Austrian courts have engaged in a pilot project in which, at the beginning of the court proceedings, parties are informed about the option to engage in mediation. In the event that one or both parties refuse to engage in mediation or fail to co-operate in mediation proceedings, no adverse consequences arise.

## 12.3 ADR Institutions

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

VIAC offers ADR rules that provide a flexible procedural framework that caters to the need of commercial clients. To promote understanding and use of ADR, VIAC published a handbook, which gives guidance on ADR proceedings under the auspices of VIAC. In addition, VIAC does not charge administration fees more than once should the parties wish to switch from arbitration to mediation (or vice versa), thereby providing an incentive to consider hybrid forms of ADR.

## 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 pecuniary claims are usually considered arbitrable. Non-pecuniary claims are considered arbitrable if the parties have the capacity to enter into a settlement agreement addressing the specific claim.

As a specific exception, family law matters, and all claims based on contracts that are – even partially – subject to the Tenancy Act (*Mietrechtsgesetz*) or to the Non-Profit Housing Act (*Wohnungsgemeinnützigkeitsgesetz*), as well as all claims concerning condominium property, are precluded from being subject to an arbitration agreement.

Moreover, certain collective labour and social security matters are not arbitrable.

Although they are generally arbitrable, disputes involving consumers or employees may only be made subject to 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 receiving an arbitral award, a party is entitled to file an action to set the award 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, contains decisions on matters beyond the scope of the arbitration agreement or exceeds the relief requested; if the defect 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 Austrian arbitration law or with a permissible agreement of the parties.
- The arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (procedural *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 (substantive *ordre public*).

Additional grounds are available if a consumer or an employee is involved. Otherwise, the grounds are exhaustive. It is firmly established in the case law of the Austrian Supreme Court that there is no *révision au fond* of the merits of the case.

An action to set aside an award is 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

Under Austrian law, 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:

- the award debtor has its seat; or
- the object, asset or third-party debtor, which shall serve to satisfy the award creditor, 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.

If the arbitration was seated outside Austria, the award will first have to be formally recognised and declared enforceable by the District Court that is competent for enforcement. The application for recognition can be made together with the request for enforcement, and the courts will decide simultaneously on both requests. After

being declared enforceable, the foreign award is treated as a domestic arbitral award – ie, equivalent to the judgment of an Austrian Court.

Recognition and 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. Outlook

### 14.1 Proposals for Dispute Resolution Reform

#### Implementation of the Collective Redress Directive

The EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers is about to be implemented

in Austria. The EU member states are obliged to adopt and publish the laws, regulations, and administrative arrangements necessary to comply with the directive. This implies changes in the Austrian legal system, which has not, to date, provided for true class actions.

It is the intention of Austrian lawmakers to provide an expansive tool for consumers to seek redress as provided by EU Directive 2020/1828, leading to a significantly changed landscape in the civil procedural law, as well as substantive tort law provisions; most notably, a revised interruption of the statute of limitations.

Even though the details of the new regulations are not yet clear, it is fair to assume that the benefits to, and the leverage of, parties eligible to seek redress for damages in such a collective redress action, will be substantial. Affected parties seeking to pursue such an action now, may wish to consider waiting for the implementation of this new law – unless a time bar forces earlier action. Conversely, defendants, who wish to avoid being sued under the claimant-friendly new regime, might consider ways to create *lis pendens* in advance of the effectiveness of the new law.

## Trends and Developments

### Contributed by:

Bettina Knoetzi and Katrin Hanschitz  
**KNOETZL**

**KNOETZL** is Austria's first large-scale disputes resolution powerhouse dedicated to high-profile, important and complex cases. The firm'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 freeze orders and attachments, in the domestic

and international contexts; and the enforcement of foreign judgments and arbitral awards. **KNOETZL**'s practice also covers international commercial arbitration, investment protection and arbitration-related court proceedings, mediation and ADR. The firm is well-recognised for its disputes work at the intersection of civil and criminal matters. Distinguished international law firms, corporate decision-makers and general counsel frequently turn to **KNOETZL** to act as counsel in their significant disputes with an Austrian nexus.

## Authors



**Bettina Knoetzi** is a founding partner at **KNOETZL**. She has over 25 years' experience in high-profile international and Austrian matters, specialising in high-stakes international and

commercial litigation, focusing on investor protection, liability claims, corporate disputes, and fraud and asset recovery. She led clients from banking, finance, life science, and energy industries to remarkable successes. Bettina successfully defended against class action lawsuits, and represents corporate and investor clients in shareholder disputes. She counsels government institutions and designed and led successful defences of ultra-high net worth individuals. She led the International Bar Association (IBA) multi-committee AI showcase in Paris, 2023, is president of Transparency International, Austrian Chapter, vice president of the Vienna Bar, and lectures on dispute resolution.



**Katrin Hanschitz** is a partner at **KNOETZL** and, as co-chair of the international litigation committee, an active member of the American Bar Association. She is an experienced first-chair

litigator with expertise in M&A, finance transactions and ancillary disputes. In addition to corporate and post-transactional litigation, her primary focus is on shareholder disputes, managerial liability, governance issues and disputed M&A transactions, as well as contentious insurance coverage, financing, international trade and international insolvency matters. She regularly represents multinational clients from a wide range of industries, with an emphasis on banking, construction, (renewable) energy and life sciences. She has experience handling complex, disputed cases in the fields of advertising, competition law, international insolvency and insurance.

## KNOETZL

Herrengasse 1  
A-1010  
Vienna  
Austria

Tel: +43 1 3434 000 212  
Fax: +43 1 3434 000 999  
Email: office@knoetzl.com  
Web: www.knoetzl.com

# KNOETZL

## Turbulent Times

### Introduction

The past two years have seen the world rocked by an energy crisis, galloping inflation and the Russian-Ukrainian war. The impact on commercial activity and on litigation has been immediate in Austria, as in other parts of the world, and will continue to shape the litigation landscape for years to come. At the same time, artificial intelligence is set to revolutionise the world, and with it the future practice of litigation.

The Austrian court system has a solid foundation to meet the upcoming challenges and is developing in the right direction, maintaining high efficacy through wide use of IT technology while gearing up for the age of AI.

## Current Litigation Environment

### Insolvencies

The past year has seen a widespread failing of businesses that had been artificially kept alive by various public subsidies and tax and accounting extensions during and after the COVID-19 crisis, with numerous businesses unable to sustain the additional challenges of exploding energy and resource costs, high inflation, repeatedly increasing interest rates and the acute scarcity of qualified staff putting enormous pressure on the costs of HR. The number of insolvencies in

2022 increased by 57,4% vs 2021. Notably, the number of “worst case” scenarios, where businesses were unable to scrape together even the EUR4,000 for the cost of insolvency proceedings, doubled in comparison to 2021. These numbers saw a further rise in the first six months of 2023.

Consumer trade, construction and hospitality have been hit the hardest. In particular, the construction industry is hammered by its high percentage of variable interest loans leading to a consolidation of the market. The percentage of Austrian businesses, which missed out entering into fixed interest loans, while the interest rates were still negative, is notably high.

### Litigation trends

These economic challenges are driving the number and types of litigation that are keeping the court busy. On a general note, economic uncertainty is a prime driver of litigation. Where funds are tight and future finances are uncertain, banks and businesses are unwilling to compromise or to wait for due payments.

Insolvency-related disputes with receivers either in the plaintiff or defendant role are on the rise. Litigators are becoming ever more familiar with pending proceedings being interrupted by insol-

veny proceedings and subsequently being continued by/against receivers.

Many M&A transactions, and in particular real estate deals, that looked attractive in 2021 soured in the market conditions in 2022/23. This is leading to a marked increase of post-M&A disputes, often triggered by buyers eager to minimise payments or to kill deals entirely. M&A and transaction service professionals (brokers, advisors etc) are similarly having to resort to the courts to obtain payment for their services.

Construction-related disputes that traditionally form a large percentage of commercial litigation – in the Vienna Commercial Courts up to 20% of pending cases – are anticipated to increase even further as optimistic calculations that were defensible in 2020 and 2021 are leading to losses and disincentivising due performance.

Following the market interruptions caused by the pandemic, numerous businesses in the supply chain that suffered damages are appealing to the courts to recover their losses. Pandemic-related disputes (eg, disputes related to testing centres and medical supplies, data protection issues, force majeure issues) remain pending with numerous courts.

Similar effects have been triggered in 2022 and 2023 by supply chain interruptions caused by sanctions put in place against and by Russia.

A further continuing trend is follow-on litigation resulting from cybercrime attacks. Cybercrime remains one of the fastest-developing crime sectors. Phishing attacks, ransomware, digital supply chain attacks, etc, cause billions of euros of damage every year. Courts are being asked to decide who bears the risks of these kinds of damages. For example, if a business partner

has been hacked and the hacker sends emails demanding payment to a money-mule account, who bears the loss if the payment is duly made to the money-mule? To what extent can managing directors be held liable if they fail to ensure the staff is sufficiently trained to withstand cyber-attacks? In particular, where sufficient insurance coverage is not available, many such questions are anticipated to end up in court, at least until Supreme Court case law is available.

Litigators are anticipating a wave of claims of tenants against their landlords based on a recent Supreme Court decision. Austria has a remarkably high number of renters, with approximately 50% of the population living in rented properties. Most contracts have an indexed-linked rent, which has allowed landlords to pass a large part of the inflation – in the past two years about 10% per year – on to the tenants. The Supreme Court judgment found provisions used in many standard rental contracts which allow the landlord to increase the rent based on the consumer price index to be non-transparent and thus invalid. This has led to litigators organising “Austrian-style” class actions, claiming that landlords have been collecting unlawful rent increases under hundreds of thousands of contracts for the past 30 years.

## *Developments in the judicial system*

### *Collective redress*

Indeed, such claims against landlords are strong candidates for class actions under the new Austrian class action rules, once they are introduced.

To date, Austria has no official collective redress system. Instead, practitioners have had to develop the so-called “Austrian-style” class action, with multiple claims being assigned to a plaintiff for collection. This system has been reasonably effective for many decades and forms the

basis *inter alia* for 16 actions on behalf of 10,000 VW, Audi, Škoda and Seat car owners currently pending in eight Austrian courts. It does not, however, provide the consistent access to justice envisaged by the Collective Redress Directive that was to have been implemented by EU member states by the end of 2022, with the new laws coming into effect by 25 June 2023.

Like a number other EU members, Austria is late in implementing this Directive. Stakeholders in Austria have been unable to reach a consensus on even a ministerial draft, despite broad criticism and despite the German draft having been available since February 2023. This reluctance comes as little surprise to litigation insiders who have seen numerous initiatives on collective redress in the past decades reach a dead end, despite constantly increasing demand.

The crux is that the implementation is set to significantly change Austrian civil procedural law and substantive tort law provisions, including a revised interruption of the statute of limitations. This has led to significant – also political – resistance. The details of the new regulations are expected to include:

- an “opt-in” model for individual claimants;
- the right to file class actions being restricted to certain “qualified entities”, such as those currently allowed to seek injunctive relief for third parties (in particular consumers and competitors);
- significant legal benefits to individuals who join a class action; and
- allowing for redress for claims based on any legal grounds, not only for the specific claims included in the EU Directive catalogue.

In view of the significant cost of litigation for individual claimants and the restricted availability of

litigation funding in Austria for smaller claims, Austria’s reluctance to proceed has led to strong criticism, in particular from consumer protection organisations. The EU Commission is forcing the issue by initiating infringement proceedings against Austria.

### *Strategic justice 3.0 initiative/e-justice*

On a more positive note, the Austrian Justice Ministry continues to be exemplary in implementing its long-term, leading-edge digitalisation initiative. The roll-out of the Digital Judicial Workplace to civil and criminal courts and public prosecutor’s offices countrywide was concluded in June 2023. This allows judges and court staff to easily interface with the Electronic Legal Communications System (ERV, via which parties and counsel communicate with the court and submit and receive court documents and obtain remote access to court files) and with numerous other task and file management, case automation and submissions systems. The ERV that was initially launched in 1990 has now almost completely replaced paper communication with courts and other public authorities, with over 15 million transmissions in 2022. Public electronic access to court and prosecution files and decisions is extensive, with over 120 million cases and proceedings available online. The Land Register, Company Register, Enforcement Register and further public registers have long been accessible online, providing invaluable resources in litigation and in particular enforcement proceedings.

In line with the current focus on AI, the justice ministry is currently developing an AI tool to generate and suggest text blocks to judges based on this extremely extensive judicial database.

Contributed by: Bettina Knoetzi and Katrin Hanschitz, **KNOETZL**

## *Trial by videoconference*

Videoconferencing is one of the tools that found more widespread use during the pandemic. Permanent rules have now been introduced that allow judges to hold certain hearings via videoconference, provided all parties consent. In civil litigation, this mainly comprises preparatory hearings and hearings to discuss expert opinions. Taking witness testimony via videoconferencing is only possible where domestic or foreign legal assistance would otherwise be required. In all cases, it is at the judge's discretion to require the physical presence of all parties; the judge must in any event be physically present in the courtroom to ensure that justice remains open to the general public. The rules applicable to enforcement and insolvency proceedings are broader and permit trial by videoconferencing without the parties' consent.

## *Court efficiency*

The high level of investment into the judicial system and into digitalisation continues to bear dividends. Austria remains one of the speediest and more efficient civil and commercial litigation systems in Europe, with high clearance rates and low disposition time. Civil and commercial litigation proceedings remain fast with an average of:

- 156 days for the trial court;
- 77 days for appeal proceedings; and
- 118 days for the Supreme Court proceedings.

In comparison, the median disposition time for all European countries is almost 200 days slower in total, with:

- 237 days for the trial court proceedings;
- 177 days for appeal proceedings; and
- 172 days for proceedings in the highest instance (CEPEJ Report 2022).

The Federal Ministry for Justice will need to continue investing in ensuring that it can meet the considerable challenge of duly replacing the current wave of retiring court staff and judges.

## *Court fees*

While Austrian litigators and their clients appreciate the efficiency of court proceedings and effective use of technology, they remain critical of the high court fees for high-value disputes. The court fee scheme is structured to allow broad access to justice by staggering the court fees depending on the value of the dispute. While it is fair that low-value disputes trigger low fees, the bone of contention is the lack of a cap for high-value disputes. The Austrian legal system easily finances itself, with EUR1.7 billion of income (and EUR1.8 billion of expenditure including the penal system), so these high fees are not necessary to support the judicial system. A revision is long overdue.

## *Future trends*

### *Artificial intelligence*

AI is set to entirely change the landscape of the practice of law and of litigation in Austria as elsewhere in the world. While statutory parameters have yet to catch up, litigators and counsel who are quick to adapt their practices by engaging with the new AI tools are likely to profit from this development. Traditional time-intensive document review and analysis, legal research and to some extent even drafting can be enhanced and accelerated using AI tools, freeing practitioners up to concentrate on strategy, client care and creative solutions.

Moreover, the use of AI-generated tools will likely create a huge number of disputes. The Austrian Supreme Court, as many other courts worldwide, has already dealt with AI-related disputes several times. Currently, the public notaries are



trying to challenge an AI-based tool that provides standardised notarial services, such as confirmation of a document's origin.

The Austrian courts, themselves highly digitalised, appear to embrace the global trend. In a judgment handed down in June 2023, the Austrian Supreme Court held that an AI-based system that automatically matches certain disputes with certain specialised law firms and moreover undertakes research, generates recommendations and drafts briefs for the matched law firm is lawful, provided the work product provided by the AI platform is subsequently reviewed by qualified lawyers.

Further AI-related questions – eg, concerning authorship, ownership and lawful use of content in connection with AI platforms are likely to begin hitting the courts in the coming years. Artists and illustrators who have opted out of text and data mining on contents they have published on the internet (Article 4 of Directive 2019/790) are anticipated to be amongst the first wave of plaintiffs to sue OpenAI (ChatGPT) and similar platforms for using content they generated to train their AI systems.

## *Outlook*

Turbulent market conditions make for busy litigators. In Austria – as in much of Europe – litigation activity remains high. As the new world of AI arrives and begins to affect all areas of commercial activity, new challenges will need to be met by all members of the commercial community and the litigation community in order to continue to thrive.

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