

Litigation 2018

# Austria

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### Overview

#### 1 Court system

Describe the general organisation of the court system for civil litigation.

The Austrian Constitution provides for a strict separation of powers. This means that Austrian courts are strictly independent of the legislative and administrative branch. The Austrian court system is organised on the federal level. Hence, there are only federal and no state courts in Austria. Judges are appointed by the president or by the minister of justice after having completed a four-year training as a judge-apprentice and after being proposed for appointment by the judiciary. There are currently around 1,700 judges in Austria. Judges are independent and irremovable.

Civil and commercial proceedings in first instance will either be conducted before one of the 116 district courts or, if the amount in dispute is higher than €15,000, before one of the 20 regional courts. Both at the level of district and regional courts, there are specialised courts for commercial and labour-related matters. In second instance, appeals are either heard by a regional court, if the court of first instance was a district court, or by a higher regional court, if the court of first instance was a regional court. There are four higher regional courts in Austria. There is a second level of appeal, mainly limited to errors of law, to the Austrian Supreme Court. If constitutional rights are violated, a complaint before the Austrian Constitutional Court may be possible. Under EU law, Austrian courts have the right, and in some cases also the duty, to refer matters of EU law to the European Court of Justice.

Proceedings will generally be heard by a single judge. If the amount in dispute exceeds €100,000 and a party so requests, a senate of three professional judges will decide in general civil matters and a tribunal consisting of two professional judges and one lay judge in commercial matters. However, such requests are very rare in practice. Appeals in the second and third instance are always decided by a tribunal of judges. In civil and commercial matters, there are no juries.

A court is not legally bound by its earlier decisions or decisions of other courts. In practice, courts usually follow former decisions of other courts situated higher up in the court hierarchy. The Supreme Court usually follows its earlier decisions, unless it specifically intends to reverse an earlier line of its own judicature.

#### 2 The legal profession

Describe the general organisation of the legal profession.

To be admitted as a lawyer in Austria, in a first step one has to complete legal studies and obtain at least a master equivalent degree. In a second step, one has to complete a five-year practical legal training of which at least seven months must be spent at court in form of a clerkship and at least three years at a law office. Lastly, one has to pass a bar exam conducted under the auspices of the relevant higher regional court.

There is no distinction between solicitors and barristers in Austria. Lawyers admitted to the Austrian Bar may appear before every Austrian court, including the Supreme Court, without limitation. Lawyers admitted in other EU member states may also appear before Austrian courts but only with the written permission of an Austrian lawyer. Furthermore, lawyers admitted in other EU member states are admitted to the Austrian Bar either after practising for three years in Austria on Austrian legal matters or after passing a specific exam. In practice, a substantial number of German lawyers so gained their admission to the Austrian Bar. Due to the language barrier, lawyers from other EU jurisdictions seldom appear as counsel before Austrian courts or apply for admission to the Austrian Bar. Generally, non-EU lawyers are not allowed to appear before Austrian courts.

#### 3 General

Give a brief overview of the political and social background as it relates to civil litigation.

Generally, Austrians have a high degree of trust in the court system. Judges are independent and irremovable. This is respected by the government and the administration, and they do not interfere in the conduct of proceedings. Historically, the current Austrian Code of Civil Procedure came into force in 1895 and has since been constantly amended and updated. Hence, Austria has a long tradition of civil litigation conducted by an independent judiciary in a modern sense.

Austrian courts are among the faster ones in Europe. The median duration of court proceedings (meaning that half of the proceedings were shorter and half of the proceedings were longer) in first instance are 5.9 months before district courts and 12.2 months before regional courts. While the caseload of some Austrian courts may be high, so far judges are by and large able to handle the matters before them in an efficient manner.

Currently, there are no planned major reforms of the Austrian Code of Civil Procedure. However, limited amendments to the Code of Civil Procedure are rather frequent.

## Jurisdiction

### 4 Jurisdiction and venue

#### What are the criteria for determining the jurisdiction and venue of the competent court for a civil matter?

The international jurisdiction of Austrian courts is either governed by European law, when the defendant is domiciled in another EU jurisdiction, or by the Austrian Jurisdictional Code if both parties are Austrian or the defendant is domiciled outside of the European Union.

If Austrian courts do have international jurisdiction, generally any natural or legal person can be sued before the courts of its domicile or legal seat. There are a number of alternative venues a plaintiff may choose in specific situations, for example the court at the place of performance of a contractual obligation or the court at the place a damage has occurred. For certain types of disputes, certain courts have exclusive jurisdiction, for example the court at the legal seat of a limited liability company or a corporation regarding the appeal against shareholders' resolutions.

As already set out under question 1, generally if the amount in dispute is lower than €15,000, an Austrian district court will be competent. If the amount in dispute is higher than €15,000, an Austrian regional court will be competent.

Generally, in commercial matters the parties can agree upon a specific court under both Austrian and EU law. However, this does not apply if consumers are involved.

### 5 Forum shopping

#### Does your jurisdiction commonly attract disputes that have a nexus with other jurisdictions?

In international transactions involving an Austrian entity, parties often agree to bring their disputes before Austrian courts in particular before the Commercial Court of Vienna. However, if no Austrian party is involved this is uncommon. In such cases, Vienna is, however, frequently chosen as a seat of arbitration.

### 6 Pendency in another forum

#### How will a court treat a request to hear a dispute that is already pending before another forum?

If the dispute is already pending before an Austrian court, another court seized in the same matter shall dismiss the claim.

Where a dispute is pending before a court of another EU member state, the Austrian court must stay its proceedings until the court first seized decides its jurisdiction. This does not apply if the Austrian court has exclusive jurisdiction.

If the dispute is pending before a court of a non-EU Member state, the action of the Austrian court will primarily depend upon any multilateral or bilateral treaty in place. If the decision rendered by the foreign non-EU court can be recognised in Austria, the Austrian court will likely dismiss the claim.

### 7 Deference to arbitration

#### How will the courts treat a dispute that is, or could be, subject to an arbitration clause or an agreement to arbitrate, including in interim proceedings?

Austrian courts are arbitration-friendly and defer to arbitration agreements if the existence of such agreement is invoked in the court proceedings. In such case, the court will render a decision on its own jurisdiction. However, if a party fails to raise the objection that a certain matter is subject to an arbitration agreement at the earliest possible stage, the agreement is considered waived and the proceedings before courts ensue.

### 8 Judicial review of arbitral awards on jurisdiction

#### May courts in your country review arbitral awards on jurisdiction?

Yes. According to the case law of the Austrian Supreme Court, an arbitral tribunal can only decide on its jurisdiction in the form of an arbitral award. Section 611 Austrian Code of Civil Procedure expressly states that a request for setting aside may be lodged against all awards including those "by which an arbitral tribunal has ruled on its jurisdiction".

### 9 Anti-suit injunctions

#### Are anti-suit injunctions available?

There are no specific provisions on anti-suit injunctions and there is no tradition of anti-suit injunctions in Austria.

### 10 Sovereign immunity

#### Which entities are immune from being sued in your jurisdiction? In what circumstances? In what circumstances can creditors enforce a court judgment or arbitral award against a sovereign or a state entity?

Issues of sovereign immunity are regulated in international treaties by which Austria abides. Another sovereign may not be sued for acts of public authority but only for commercial activities. Some persons are largely immune to being sued due to their diplomatic status. The same applies for embassies or apartments of diplomatic personnel or the seats of international organisations.

Since no express provisions of statutory laws as to the extent of sovereign immunity exist, the local courts responsible for the enforcement proceedings apply public international law, and particularly customary international law. The question, whether a state or state entity may claim immunity at the enforcement stage depends on whether it has separately waived its immunity for these proceedings. If so, the Austrian Supreme Court rules that only such property of a state is subject to enforcement proceedings, which is destined for a business and not a sovereign purpose (*res extra commercium*). Under case law, eg, the proof that a bank account is kept by a consular or diplomatic mission bars its funds from enforcement.

## Procedure

### 11 Commencement and conduct of proceedings in general

#### How are proceedings commenced? To what extent will a court actively lead the proceedings and to what extent will the court rely on the parties to further the proceedings?

Proceedings are initiated by a statement of claim. The plaintiff has to file the statement of claim directly to the court of first instance. The court will then determine in a first step whether the procedural requirements for hearing the claim are met. These procedural requirements are, among others, the jurisdiction of the court, the capacity of the parties to sue and be sued and the formal requirements of a statement of claim (see question 12).

If these requirements are met and the proceedings are conducted before a regional court and the amount in dispute is above €75,000 (before district courts and for disputes below €75,000 the Austrian Code of Civil Procedure stipulates several procedural simplifications), the court will deliver the claim to the defendant indicated in the statement of claim. The defendant may then file a statement of defence (see question 13) within four weeks directly to the court and, simultaneously, to the plaintiff. If the defendant fails to timely file a statement of defence, the plaintiff may apply to the court to issue a judgment granting the plaintiff's claim. If the defendant timely files a statement

of defence the court will schedule a preparatory hearing. The court may also order an exchange of further briefs. In case the court does not order further briefs, both parties may file a further brief up until one week before the preparatory hearing takes place. The purpose of the preparatory hearing is to evaluate possibilities for a settlement and, if no settlement can be reached, determine the further conduct of the proceedings and schedule the evidentiary oral hearing.

While it is upon the parties to present their case and to submit evidence, Austrian courts take an active role in the proceedings. For example, the court summons the witnesses requested by the parties and decides in which order they should be heard. Usually, the court also takes the lead in questioning the witnesses. Experts are always appointed by the court and the parties only have very limited influence on the person to be appointed as expert. Furthermore, Austrian judges have the duty to evaluate possibilities for a settlement and take an active role in this regard. Austrian law only knows extremely limited production of documents and even within these narrow limits the production of documents is very seldom ordered. An exception applies in the field of competition litigation, where the new implementation of a European directive provides for more extensive document production also from third parties.

## 12 Statement of claim

**What are the requirements for filing a claim? What is the pleading standard?**

The statement of claim must indicate the amount in dispute and the relief sought. Furthermore, the statement of claim must fully set out the factual basis on which the relief sought is based and substantiate the pleadings by offering evidence. The evidentiary exhibits themselves need not be submitted with the statement of claim; however, this is most regularly done. Notice pleading is not sufficient. The plaintiff must also set out all relevant facts on which it bases the jurisdiction of the court. There is no need to provide legal reasoning, which in more complex cases, however, is regularly done and also advisable.

## 13 Statement of defence

**What are the requirements for answering claims? What is the pleading standard?**

The pleading standard is substantially the same as in the statement of claim. The statement of defence must include the request for the dismissal of the claim, a concise statement of the facts on which this request is based and state the evidence on which the defendant relies. Further, if the defendant wishes to object to the jurisdiction of the court, the statement of defence must include such objection as the lack of jurisdiction might otherwise heal.

## 14 Further briefs and submissions

**What are the rules regarding further briefs and submissions?**

Usually there is a second round of submissions. Parties may file a second submission either at latest one week before the first oral hearing or within the time limit granted by the court. The law prohibits further written submissions after the first oral hearing but parties may plead orally in course of a hearing. In practice, however, many but not all courts regularly accept later written submissions depending on the circumstances of the case.

A party may amend factual assertions and its legal evaluation of the case until the close of the oral hearings. The plaintiff may limit its request for relief also until the close of the oral hearings. The plaintiff may amend its request for relief otherwise until the statement of claim is served onto the defendant; thereafter the plaintiff either needs the

agreement of the defendant or a decision of the court allowing such amendment, which is regularly given.

## 15 Publicity

**To what degree are civil proceedings made public?**

The court file, including the submissions of the parties and the submitted evidence, is not open to the public but only to the parties of the proceedings (also in an electronic form on the internet). Anonymised judgments rendered by the Austrian Supreme Court are published on the internet on the legal website of the Republic of Austria ([www.ris.bka.gv.at](http://www.ris.bka.gv.at)). Judgments of courts of lower instances may also be published on that platform by discretion of the respective court. In practice, this is quite rare. By contrast, oral hearings are generally open to the public except for specific situations, for example, to protect privacy or business secrets. TV cameras, the taking of pictures or the use of recording devices is not allowed.

## Pretrial settlement and ADR

### 16 Advice and settlement proposals

**Will a court render (interim) assessments about any factual or legal issues in dispute? What role and approach do courts typically take regarding settlement? Are there mandatory settlement conferences between the parties at the outset of or during the litigation?**

Austrian judges are legally obliged to explore settlement options in the first preparatory hearing. In practice, most judges will continue to do so in the course of the proceedings.

Judges will regularly discuss the case, including the strengths and weaknesses of both sides, with the parties during the oral hearings. Such discussions often facilitate settlement. Sometimes judges will render a not-binding, interim oral assessment of the case, but this is not particularly common.

### 17 Mediation

**Is referral to mediation or another form of ADR an option, or even mandatory, before or during the litigation?**

There is no mandatory mediation or ADR for general commercial matters. The parties are free to engage in mediation or other forms of ADR during an ongoing litigation. Increasingly, Austrian courts also point out to the parties the existence and form of such alternative dispute resolution mechanisms.

## Interim relief

### 18 Forms of interim relief

**What are the forms of emergency or interim relief?**

Austrian law provides for three categories of interim relief: preventive measures, regulatory measures and performance measures. Preventive measures may be granted to secure the enforceability of either a monetary or other claims such as a freezing order directed at a bank, regulatory measures attempt to create a tolerable temporary state of affairs until full judicial protection is guaranteed and performance measures provide preliminary fulfilment of an alleged obligation in order to prevent imminent violence or irrecoverable damage, but only insofar as the desired factual position is reversible.

### 19 Obtaining relief

**What must a petitioner show to obtain interim relief?**

First, an applicant has to credibly demonstrate the existence of an underlying claim. If a request for an interim measure is filed at the same time as the lawsuit, a mere reference to the claim is sufficient.

Second, the applicant must credibly demonstrate actual circumstances indicating a threat to the underlying claim. The following distinction must be made:

- Interim measures in order to secure the enforceability of monetary claims may be granted in two cases. First, an interim measure may be ordered if it is probable that without the requested measure the defendant would impede or considerably exacerbate the enforcement of the claim, eg, by relocating assets. Second, the applicant may base its application on the fact that a judgement would have to be enforced in a state where enforcement is not guaranteed by European or international law.
- An application for an interim measure in order to secure the enforceability of a non-monetary claim must show credibly that there is a concrete objective threat to the enforceability of a claim, whereby the cause of the threat is not limited to the conduct or attitude of the defendant but may result simply from the circumstances of the case.

The application for interim relief has to be submitted to the court in writing if the applicant is represented by legal counsel. The application has to include, among others: the facts relevant to establish jurisdiction, the requested measure and its duration, specifics of the underlying claim and the specific threat to the underlying claim that can be prevented by the interim relief sought.

In case of an unjustified interim measure, the defendant may successfully seek damages if the interim measure was not justified from the outset.

## Decisions

### 20 Types of decisions

What types of decisions (other than interim relief) may a court render in civil matters?

There are two types of court decisions: judgments and court orders.

Austrian law knows four types of judgements: A final judgment rendered at the end of the proceedings, which decides all claims between the parties; a partial judgment whereby the court finally decides a distinct part of the dispute, for example, in case of multiple claims; an interim judgment, which may be rendered on the issue of liability if both liability and quantum are disputed or on questions regarding the statute of limitation; and a supplementary judgment, which upon application of a party a court must render if its final judgment did not decide the claims in their totality or if the court has failed to decide on the reimbursement of all or a part of the procedural costs.

Regularly, court orders deal with procedural questions only. In some cases, however, court orders also contain decisions on the merits of a case, in particular court orders regarding fees of witnesses or regarding a party's application for legal aid.

### 21 Timing of decisions

At what stage of the proceedings may a court render a decision? Are motions to dismiss and summary judgment available?

The court is required to render a final judgment as soon as the case is ripe for a decision. This may already be directly after the statement of claim has been filed if the court does not have jurisdiction or if the statement of claim is incoherent. Alternatively, a case may only be ripe for a decision after extensive oral hearings. Different judges take very different approaches to the question when a case is ripe for decision. Typically, well organised judges are likely to close a case rather sooner than later and render a decision, while other judges let a case unnecessarily drag along, sometimes in the hope that it will settle.

### 22 Default judgment

Under which circumstances will a default judgment be rendered?

Default judgments may only be rendered in specific situations upon application of a party.

In proceedings before regional courts the court can issue a default judgment if the defendant does not file a statement of defence within four weeks upon having received the statement of claim or if one of the parties fails to appear at the first hearing despite having filed a timely statement of defence.

In proceedings before district courts the parties usually do not enter the dispute by submitting written pleadings but by arguing their case at the preparatory hearing. Therefore, the party present at a hearing can apply for the issuance of a default judgment if the other party does not appear before pleading orally in court.

### 23 Duration of proceedings

How long does it typically take a court of first instance to render a decision?

As already stated, the median duration of court proceedings in first instance are 5.9 months before district courts and 12.2 months before regional courts. However, some cases may take more than two or, very rarely, more than three years.

For any specific case, the duration will generally depend on three factors: First, on the judge in particular on how busy he or she is and on how efficiently he or she conducts the case. Second, on the conduct of the parties. Third, on the complexity of the dispute and, in particular, if the appointment of an expert becomes necessary.

## Parties

### 24 Third parties – joinder, third-party notice, intervenors

How can third parties become involved in proceedings?

Austrian law provides that third parties may join the proceedings if they have a legal interest in the success of one of the parties. They may then join on the side of such party. A third party may file an application for joinder on its own initiative or after being formally notified by one of the parties of the proceedings.

A third party entitled to join the proceedings can do so at any stage until the final judgment becomes binding. In order to join the proceedings, the third party must file a written application with the court stating that it wishes to join the proceedings and that it has a legal interest in the outcome of the case. After a formal examination of the request, the court delivers the request to the parties. By this delivery, the joinder becomes valid. The parties can, however, request that the application for joinder is dismissed. In this case, the court will decide whether the third party has a valid legal interest for a joinder and may join the proceedings also against the will of the parties.

After the joinder of the third party, its legal position depends on whether the third party merely has a legal interest in the outcome of the proceedings or whether the judgment will have a direct effect on the third party. In the former case, the third party is merely assisting the main party and must accept the proceedings in the status they are in when joining. The main party may override procedural applications made by the third party. In the latter case, the third party and the main party have equal rights.

A third party, which joins the proceedings or received a notice to join the proceedings but failed to join, is bound by the judgment to the extent that it is precluded from raising points in any following proceedings which contradict this judgment. For example, a sub-contractor that has joined the proceedings between the employer and the contractor as third party or failed to join the proceedings upon receiving



a notice to join could not argue that the works were not defective if later sued by the contractor in separate proceedings, if the court in the former proceedings held that this was the case.

## Evidence

### 25 Taking and adducing evidence

**Will a court take or initiate the taking of evidence or will it rely on the parties to request the taking of evidence and to present it?**

It is the parties' duty to present evidence to the court it wishes to rely upon. In particular, a party has already to substantiate in its submission why certain evidence is relevant to the case and, as far as documents are concerned, also highlight in colour the parts of any specific document that it considers relevant for the case. Among the evidence offered the court will rely on the evidence it considers relevant for its decision. The court is not in any case obliged to hear all witnesses requested by the parties but may close the proceedings as soon as it deems the case ripe for decision.

### 26 Disclosure

**Is an opponent obliged to produce evidence that is harmful to it in the proceedings? Is there a document disclosure procedure in place? What are the consequences if evidence is not produced by a party?**

Austrian law only contains a limited possibility of document disclosure, which is rather seldom used. In short, a party (or a third party) is obliged to disclose and produce documents to the other party which it is obliged to hand over under substantive law or which a so-called common documents, that is documents which document a mutual agreement or which were drafted in the interest of both parties. Beyond that, a party (or a third party) may also be obliged to disclose and produce documents if the requesting party asks for the disclosure of a specific document. If such a court order is not followed, the court may draw a negative interference.

### 27 Witnesses of fact

**Please describe the key characteristics of witness evidence in your jurisdiction. Is witness preparation allowed?**

With regard to witness testimony, Austrian law differentiates between parties to the proceedings (which includes, among others, the directors of a legal person) and witnesses. Some rules regarding the hearing of witnesses do not apply to the hearing of parties.

Witnesses, as well as parties, may only testify orally before the court. There are no written witness statements, affidavits or the like. Witnesses are obliged to appear before the court if they are summoned. Further, witnesses are under an obligation to tell the truth and failure to do so might result in criminal penalties. Parties are not under such obligation. Each party and each witness is to be heard individually in the absence of (other) witnesses, but a party may stay in the courtroom throughout the proceedings. Contradicting witnesses may be confronted with each other.

Generally, the judge takes the lead in the questioning of parties and witnesses. Thereafter, the parties, respectively the parties' legal representatives, may ask further questions. A judge may reject the admission of inappropriate questions. A witness may refuse to answer to a question if the answer would cause it reputational or financial harm, if the witness would violate an acknowledged duty of confidentiality, if the answer would contain information obtained by the witness professionally in his role as a lawyer or representative of a labour union, if the answer would contain confidential business information or if the question relates to the witness' vote in secret elections.

A witness may also testify in front of a delegate judge at another court if the examination before the competent court might be an unreasonable burden. Furthermore, the use of video conferencing is also allowed.

The question on admissibility of witness preparation is regulated by the professional ethics rules applicable to the acting attorney. In accordance with section 18 of the directive on professional practice, attorneys registered with the Austrian Bar may have contact with witnesses before and during proceedings. However, each form of "inadmissible influence" is prohibited. The question to what extent witness preparation is admissible hence hinges on the interpretation of the term "inadmissible influence". While encouraging a false testimony is clearly prohibited, the rehearsal of facts may already be seen as a borderline case. In general, the prevailing view among practitioners is that attorneys should seek contact with witnesses as little as possible to avoid the appearance of undue influence and potential ethics charges.

### 28 Expert witnesses

**Who appoints expert witnesses? What is the role of experts?**

If a party wishes to rely on expert testimony, it must make a request to the court to appoint an expert. The court will then determine which person to appoint from a list of experts and will assign the appointed expert a set of questions posed by the court. The expert will then render a report. The parties have the right to examine the expert at a hearing and to pose additional questions.

Austrian law does not set out the possibility of presenting a party-appointed expert. A party may, nevertheless, submit an expert report. However, this report does not have the same legal relevance than the opinion of the court appointed expert. In practice, the expert report submitted by a party may become relevant as the court appointed expert will have to deal with the findings therein.

There is a strong critique in practice that Austrian judges rely on expert reports of court-appointed experts too strongly and seldom second-guess such expert report. Furthermore, as the payment of court-appointed experts is not especially good, the quality of their reports sometimes – but not necessarily in most cases – leaves a lot to be desired.

### 29 Party witnesses

**Can parties to proceedings (or a party's directors and officers in the case of a legal person) act as witnesses? Can the court draw negative inferences from a party's failure to testify or act as a witness?**

Parties, which includes directors of a legal person, may orally testify before the court and regularly do so. However, under Austrian law they are subject to other rules than witnesses (see already question 27). In particular, parties are not under a criminally sanctioned duty to tell the truth. Furthermore, parties can refuse to testify before the courts. In such case, the court may draw a negative interference.

### 30 Foreign law and documentation

**How is foreign law or foreign-language documentation introduced into the proceedings and considered by the courts?**

Austrian courts are obliged to apply foreign law. Thereby, the court may also rely on the participation of the parties, information of the Austrian Ministry of Justice and legal expert opinions. If the foreign law cannot be determined in due time, the court must apply Austrian law.

### 31 Standard of proof

What standard of proof applies in civil litigation? Are there different standards for different issues?

The general Austrian standard of proof is if an allegation can be determined to a 'high degree of probability'. This does not mean that the facts have to be proven to the extent of near certainty. However, it is also not sufficient if an assertion is more likely true than false.

This standard of proof does not apply universally. In some cases, the standard is increased (eg, in cases to determine the biological father of a child), in others decreased.

Under Austrian law the standard of proof is a procedural issue. This means that Austrian courts always apply the Austrian standard of proof, even when applying a foreign substantive law.

## Appeals

### 32 Options for appeal

What are the possibilities to appeal a judicial decision? How many levels of appeal are there?

A party may appeal against a judgment of a court of first instance to a higher court (see question 2). The appeal has to be filed within a period of four weeks after the judgment has been served. Currently, there is no possibility to extend this four-week period, but this is discussed. If an appeal is timely filed, the other party has the right but not the duty to file a reply to the appeal. Theoretically, thereafter the court of appeal may order an oral hearing, which is however extremely rare in practice. Then the court of appeal will issue its decision. It may either dismiss the appeal, accept it and overturn the decision of the court of first instance, or set aside the judgement and retry the case itself (extremely seldom) or, in the alternative, send the case back to the court of first instance for retrial (common). A judgment of a court of first instance can be appealed against for a number of reasons, particularly for procedural errors, for an incorrect determination of the facts of the case or for wrong application of the law.

The decision of the court of appeal can, under far more limited circumstances, be appealed against before the Austrian Supreme Court. In practice, a wrong application of the law is by far the most important ground for appeal to the Supreme Court. Generally, the Supreme Court does not hear cases based on the allegation that the facts have been incorrectly determined. Decisions of the Supreme Court are final and binding and not subject to a further appeal.

### 33 Standard of review

What aspects of a lower court's decisions will an appeals court review and by what standards?

See question 32.

### 34 Duration of appellate proceedings

How long does it usually take to obtain an appellate decision?

In contrast to the proceedings in first instance there does not seem to be a statistic on the average duration of appellate proceedings in Austria. From experience, it usually takes between two and eight months for the court of appeal to render a decision upon having received the file from the lower court.

The average duration of proceedings before the Supreme Court, which is well staffed by 60 judges (civil and criminal) and in addition judicial clerks, is only 3.4 months.

## Special proceedings

### 35 Class actions

Are class actions available?

Under Austrian law there are no class actions. Only a party that has a claim may raise this claim.

However, in practice aggrieved investors have regularly assigned their damage claims to one party, which then is itself entitled to raise these claims. This practice allows for numerous aggrieved parties to collectively pursue their claims.

In the near future there might be some changes with regard to consumer claims. The European Commission recently announced that a new European directive will be published to strengthen EU consumer rights and enforcement, including a mechanism for collective redress.

### 36 Derivative actions

Are derivative actions available?

There are no specific rules on derivative actions in Austria.

### 37 Fast-track proceedings

Are fast-track proceedings available?

For claims for payment of amounts up to €75,000 against defendants domiciled in Austria, the court will not deliver the statement of claim to the defendant but will issue a payment order to the defendant. The defendant then has either two weeks to pay the amount indicated in the payment order or object to it within four weeks.

In theory, there are also special documentary proceedings where a provisional judgment may be rendered based on documentary evidence alone. This kind of proceedings have lost their practical relevance. Furthermore, there are expedited proceedings regarding checks or bills of exchange.

### 38 Foreign-language proceedings

Is it possible to conduct proceedings in a foreign language?

No. Proceedings are conducted in German, which is the official language of Austria.

## Effects of judgement and enforcement

### 39 Effects of a judgment

What legal effects does a judgment have?

A judgment generally only binds the parties to the dispute or their legal successors. Only in exceptional cases a judgment can bind third parties not involved in the proceedings.

Furthermore, judgments have a *res iudicata* effect. This effect must be considered by courts not only upon application of a party but also *sua sponte*.

Third parties that have been asked to join the proceedings may be bound by a judgment (see question 24).

### 40 Enforcement procedure

What are the procedures and options for enforcing a domestic judgment?

The procedures for the enforcement of a judgment depend upon the type of judgment and the assets to be seized. Property is usually attached or, in case of moveable property, seized and sold by the court bailiff sometimes in public auctions. The proceeds are used to satisfy the creditor. Regularly the employer of the debtor is ordered by the court to pay the amount awarded directly to the creditor.

Some assets may not be attached and sold, for example, assets that the debtor needs to maintain his professional practice (eg, computers, desks), assets that have a personal value such as a wedding ring or

family photographs as well as assets or income which the debtor needs for a modest livelihood.

#### 41 Enforcement of foreign judgments

**Under what circumstances will a foreign judgment be enforced in your jurisdiction?**

The most relevant instrument for the enforcement of foreign judgments in Austria is the Brussels Regulation 44/2001, which governs the enforcement of judgments from other EU member states. The enforcement of judgments rendered in other EU member states is straightforward and simple.

Outside the scope of the Brussels Regulation, foreign judgments will only be enforced in Austria if reciprocity is guaranteed by a bilateral or multilateral treaty.

### Costs

#### 42 Costs

**Will the successful party's costs be borne by the opponent?**

Under Austrian law, in general the losing party must reimburse the costs of the successful party in proportion to its success. This applies to the court fees, the further costs (eg, costs of translation) and the costs of legal representation by a lawyer. However, the costs of legal representation are not calculated pursuant to the actual costs incurred but pursuant to a detailed fee schedule of the Austrian Lawyer's Tariff Act.

#### 43 Legal aid

**May a party apply for legal aid to finance court proceedings? What other options are available for parties who may not be able to afford litigation?**

A court will grant legal aid if a party is in financial need and the claim or defence has a reasonable chance of success. Legal aid may cover the

court fees. In cases where representation by a lawyer is mandatory or otherwise essential, a lawyer will be summoned to represent the party pro bono. Legal aid is quite common in Austria. In addition, legal cost insurance is available and quite common.

#### 44 Contingency fees

**Are contingency fee arrangements permissible? Are they commonly used?**

Austrian law prohibits lawyers from concluding a quota litis agreement; that is to accept a percentage of the amount awarded in the proceedings. Subject to extremely strict limitations, lawyers may agree to act on the basis of a contingency fee. Such fee arrangements are uncommon.

#### 45 Third-party funding

**Is third-party funding allowed in your jurisdiction?**

Litigation funding is becoming increasingly common in Austria. Regularly, the funding company will provide pays for the costs of the proceedings and receive a share of the amount awarded. The validity of such fee agreements has not yet been subject to a decision of the Supreme Court and it is not entirely clear whether and to what extent the prohibition stipulated for lawyers to accept fees on a quota litis basis could also apply to litigation funding.

#### 46 Fee scales

**Are there fee scales lawyers must follow? Are there upper or lower limits for fees charged by lawyers in your jurisdiction?**

The Austrian Lawyer's Tariff Act sets out a fee scale that applies between a lawyer and his client if there is no other agreement. In commercial matters, hourly rates are usually agreed upon. There are no specific upper or lower limits of hourly rates. Quota litis agreements are forbidden and contingency fees subject to strict limitations.





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Markus Schifferl is a specialist in contentious proceedings before the national courts, domestic and international arbitration and company law. He advises clients in all areas, with a particular focus on disputes regarding corporations and private foundations, post-M&A, joint ventures and construction law. Moreover, he sits regularly as arbitrator. He has experience in arbitration under the ICC, UNCITRAL, VIAC, DIS and ON-Rules, as well as in ad hoc arbitrations.

Markus is a member of the ICC Commission on Arbitration and ADR. He is the author of numerous legal publications and regularly talks about arbitration, litigation and corporate law. He is a listed arbitrator of VIAC (Internationales Schiedsgericht der Wirtschaftskammer Österreich).

Markus was admitted to the Austrian Bar in 2008. He obtained a PhD of the University of Vienna (2006, with distinction), an LLM in dispute resolution from University College London (2004, with merit) and a master's degree of the University of Graz (2002). He also studied at Sciences-Po Paris.



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