

Austria

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Litigation

1 Court system

What is the structure of the civil court system?

The civil court system in Austria provides for proceedings in three instances. In general, first instance proceedings are conducted before district courts. District courts have jurisdiction for general civil law matters where the amount in dispute is below €15,000. Moreover, district courts handle disputes concerning family law, alimony, trespass, rental and lease matters, even if the amount in dispute exceeds €15,000.

Regional courts have jurisdiction in the first instance for all general civil law matters that do not fall within the responsibility of the district courts, in particular those with an amount in dispute exceeding €15,000. Moreover, regional courts, inter alia, have jurisdiction for matters such as labour law and public liability disputes, as well as certain commercial disputes.

Appeals from district courts are heard before regional courts. If a regional court was acting as first instance, appeals against its decision are heard by one of the higher regional courts. In cases that require a decision on legal issues of fundamental importance, a further appeal may be made to the Supreme Court as third and final instance.

The courts have specialised departments for commercial and labour law matters, both at the district and regional level. In Vienna, there are stand-alone specialised commercial courts at the district and regional level as well as a specialised labour and social law court. Currently, the Austrian judiciary comprises 116 district courts, 20 regional courts, four higher regional courts and the Supreme Court.

Proceedings are either decided by a single judge or a tribunal. All proceedings in district courts and most proceedings before regional courts are held before a single judge. In first instance, proceedings will only be decided by a senate of three judges upon the request of a party and in case the amount in dispute exceeds €100,000. Tribunals in commercial matters comprise two professional judges and one lay judge and tribunals in labour law matters comprise one professional and two lay judges.

2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

As in most civil law jurisdictions, Austrian judges take on an inquisitorial role in civil proceedings, thus summoning and examining witnesses, requesting documents and appointing experts. Hence, it is for the judge to ensure that the relevant facts are examined and established. Only after the judge has taken all testimony considered relevant for rendering a decision are the parties given the opportunity to put further questions to the witnesses.

There are no juries in civil proceedings. In labour law proceedings, the tribunal is composed of two lay judges and one professional judge; one lay judge being an employee's representative and one an employer's representative. Similarly, in commercial disputes, the tribunal is composed of one lay judge from a business profession and two professional judges.

Professional judges are Austrian civil servants, whose independence is guaranteed by the Constitution. In order to become a professional judge, law graduates have to gain practical experience as judge

candidates for approximately five years. Moves to promote diversity on the bench have been fairly successful and as of 2017, more than 50 per cent of professional judges are women (in comparison with 43 per cent in 2006). However, the percentage of women in leading positions in the Austrian judiciary is still a mere 35 per cent.

3 Limitation issues

What are the time limits for bringing civil claims?

Austrian law provides for a limitation period of 30 years except where special provisions provide otherwise. A shorter limitation period of three years applies to most civil law claims, such as claims for damages, claims for specific performance and claims for the delivery of goods.

In general, the limitation period will commence when the right could first have been exercised. For instance, claims for damages will become time-barred three years after the injured party becomes aware of the injuring party and the damage. Statutes of limitations cannot be waived in advance. But, statutes of limitations are not observed ex officio and thus need to be argued in court.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

Austrian law does not stipulate any obligatory pre-action procedures. It is customary to request a debtor to fulfil its obligations before commencing legal proceedings, for example by having one's attorney send a letter to the debtor. However, such request is not a prerequisite for commencing proceedings.

If a party fears the frustration of its rights before proceedings will be concluded, it may request a court to issue a preliminary injunction for securing monetary or other claims as well as to secure a right or legal relationship.

There is no pre-action disclosure under Austrian law. In any event, a party intending to bring a claim should ascertain it has the evidence necessary to prove its claims, since requests for evidence production during the proceedings are rather limited (especially in comparison to document production possibilities in common law jurisdictions).

5 Starting proceedings

How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings are commenced by the submission of a statement of claim to a court. The statement of claim needs to contain the following:

- the name and address of the court to which it is submitted;
- the names and addresses of the parties and their representatives;
- the matter and amount in dispute;
- the relief sought and the facts on which the relief sought is based; and
- the number of exhibits submitted with the statement of claim.

A statement of claim must be signed. It does not need to contain any legal reasoning. Similarly, there is no requirement to present evidence

at this stage. However, both might be helpful if the claim is of a complex nature. In any event, it should be argued why the respective court has jurisdiction to hear the case.

When filing a statement of claim a court fee has to be paid. The amount of the fee depends on the amount in dispute. If the formal and procedural requirements are fulfilled and the court fee has been paid, the court will transmit the statement of claim to the respondent. Otherwise, the court will reject the claim or order the party to correct its submission.

Austrian courts have sufficient capacity to deal with the caseload and decisions are usually made within a reasonable time.

6 Timetable

What is the typical procedure and timetable for a civil claim?

In proceedings before district courts, after forwarding the statement of claim to the respondent, the court will fix a date for a preparatory hearing. Although not required to submit a statement of defence, the respondent may submit such statement.

In proceedings before regional courts, the respondent will be ordered to file a statement of defence within four weeks. After receiving the written submission, the court will schedule a preparatory hearing. If a party fails to file a statement of defence where required to do so or fails to attend a scheduled hearing, the other party may request the court to issue a default judgment.

The court may render a judgment (and thereby close the proceedings) after the preparatory hearing. However, usually several evidentiary hearings are scheduled to take the evidence necessary for rendering a judgment. The taking of evidence may, inter alia, include witness and expert examination, object inspections and presentation of documents. The parties can introduce new facts and evidence until the oral proceedings in the first instance are formally closed.

After concluding the evidentiary hearing, the court evaluates the submitted evidence and closes the oral hearing, thereby also ending the parties' right to file new written submissions. Subsequently, the court will render its judgment.

7 Case management

Can the parties control the procedure and the timetable?

It is for the court to set out the procedure and the timetable of the proceedings. However, a party can apply for the extension of time limits or the postponement of fixed dates such as oral hearings. If the parties agree, proceedings can also be suspended for a minimum of three months.

8 Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

In general, there is no duty to preserve documents and other evidence, although certain laws and regulations stipulate the preservation of documents. For example, entrepreneurs are obliged to preserve records for a minimum of seven years, including correspondence and accounting records. If a lawsuit is already pending, it is within the court's competence to preserve evidence. Thus, as a matter of precaution, a court may order that evidence shall be taken in case it would otherwise be lost.

There is also no general duty to share documents that are unhelpful to a party's own case. However, any documents shared with the court must also be presented to all other parties of the proceedings.

9 Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

It has to be borne in mind that there is no discovery under Austrian law. However, a party may request the court to order its opponent to present a specific document to the court. The opposing party may refuse the production of the document on a number of grounds, such as protecting business secrets or risking exposure to criminal prosecution.

Austrian attorneys are under an obligation of professional secrecy. Nevertheless, contrary to the common-law concept of privilege, correspondence between a lawyer and a client is not protected by attorney-client privilege. Similarly, internal communication with in-house-lawyers is not protected. This might be of particular relevance with regard to raids at the client's premises. However, in accordance with ECJ case law, privilege protecting the communication between attorney and client exists in the context of European competition law.

10 Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

It is not permitted to submit written witness statements in court. Rather, witnesses shall provide oral testimony before the court. Although expert witnesses should generally also provide oral testimony, it is permitted and customary to submit written expert reports.

11 Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

Documentary evidence is usually introduced to the proceedings as a copy, which is submitted both to the court and the opposing party. As mentioned in question 11, both witnesses and experts shall appear before the court and provide oral testimony. First, the judge will examine the witnesses and experts. Subsequently, the parties may put further questions to the witnesses. The court may also conduct inspections and hear oral testimony from the parties.

12 Interim remedies

What interim remedies are available?

Interim remedies may be granted by the courts to protect the enforceability of a claim or to protect a party from irreparable harm. The Austrian Enforcement Act distinguishes three types of interim measures: interim measures to secure a monetary claim, interim measures to secure a claim for specific performance and interim measures to secure a right or a legal relationship. To secure a monetary claim, the following means are available:

- order for the deposit of money or custody or administration of moveable assets;
- prohibition on selling or pledging moveable property;
- prohibition directed towards a third party;
- order putting immovable property under administration; and
- prohibition on transferring or charging immovable property.

With regard to interim measures securing claims for specific performance or rights, other means such as establishing a right of retention or ordering the debtor to refrain from any action adversely affecting the claim, right or object are available.

To grant interim remedies in support of foreign proceedings, the foreign judgment to be rendered needs to be enforceable under Austrian law. Similarly, interim remedies ordered by a foreign court or arbitral tribunal may be enforced if they comply with Austrian law.

13 Remedies

What substantive remedies are available?

Substantive remedies may take the form of judgments ordering performance, declaratory judgments and constitutive judgments. Judgments ordering (specific) performance are most common and include cease-and-desist orders. Declaratory judgments are considered subsidiary to judgments ordering performance since an application for a declaratory judgment is inadmissible if a claim for performance can also be filed. Constitutive judgments alter a legal relationship. Punitive damages are not available under Austrian law.

Interest in the amount of 4 per cent is payable on money judgments. In the event both parties are entrepreneurs, a substantially higher interest rate will apply. The rate depends on the base interest rate published by the Austrian National Bank and is set at 9.08 per cent at the time of writing.

14 Enforcement**What means of enforcement are available?**

The means of enforcement will depend on the title to be enforced and the type of assets the enforcement is directed at. Enforcements will be undertaken by a bailiff. Typical means for the enforcement of judgments are the seizure of moveable and immovable property, the attachment and transfer of receivables, as well as judicial auction. Executory titles directed at specific performance may be enforced by eviction, substitute performance or the issuance of penalties.

15 Public access**Are court hearings held in public? Are court documents available to the public?**

In principle, court hearings are held in public. However, in certain cases the public may be excluded from the hearing (eg, to safeguard public morals or official secrecy). Court documents are not available to the public.

16 Costs**Does the court have power to order costs?**

The court renders its decision on costs together with the decision on the merits. In general, Austrian law provides that the winning party has to reimburse the losing party for all costs. If neither party fully succeeds, only partial reimbursement will be ordered. Costs to be reimbursed include legal and court fees as well as certain expenses. Legal fees are calculated in accordance with the official lawyer's tariff, which might be lower than the fees individually agreed upon between attorney and client.

17 Funding arrangements**Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?**

Contingency and conditional fee arrangements (*pacte de quota litis*) are prohibited under Austrian law. However, other arrangements such as lump-sum bonus agreements may be agreed upon between lawyers and their clients.

Third-party funding is common and has been explicitly approved by the Austrian Supreme Court in 2013. There are, however, no specific provisions under Austrian law dealing with third-party funding. Thus, no restrictions exist as to the arrangement between funder and litigant. Similarly, there are no disclosure obligations for litigants or funders.

18 Insurance**Is insurance available to cover all or part of a party's legal costs?**

Legal costs insurance is available and relatively common. Depending on the individual insurance policy, insurance may cover all of a party's costs and its potential liability for the opponent's costs. After-the-event litigation insurance is not a common occurrence in Austria.

Parties may also seek legal aid in the event they lack sufficient funds for bringing or defending a claim. However, especially with regard to funding a claim, Austrian courts tend to be restrictive and will only confirm legal aid if the claim has a sufficient chance of success.

19 Class action**May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?**

Strictly speaking, Austrian law does not provide for class actions. There is, however, a form of group litigation referred to as the 'Austrian model of class action', which allows multiple claimants to assign their claims to an association. Typically, these will either be the Consumer Information Association or the Chamber of Employees. This type of class action has been successful in the past, in particular with regard to

cases against banks for charging excessive interest rates on loans and unsuitable investment advice.

Against the background of consumer-related scandals such as the VW emission fraud, the Austrian Ministry of Justice has recently set up a working group on class actions considering reforms to the current system of collective redress.

20 Appeal**On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?**

Reasons for appealing against a judgment of a court of first instance include nullity (serious procedural errors), procedural irregularities, the wrong establishment of facts or an incorrect legal assessment.

A party may file an appeal within four weeks after the original judgment has been served. The opposing party may file a reply to the appeal. Although the court of appeal may order an oral hearing, in practice oral hearings on appeals rarely occur. In deciding on the appeal, the court of appeal may either:

- dismiss the appeal;
- accept the appeal and amend the original decision;
- set aside the judgment and retry the case itself; or
- set aside the judgment and refer the case back to the court of first instance for a retrial.

A decision of the court of appeal may be appealed against before the Austrian Supreme Court. However, such appeal may only be filed in very limited circumstances. First, the Supreme Court only admits appeals as to the legal reasoning of a judgment. Moreover, an appeal to the Supreme Court either needs to concern a substantial question of law the Supreme Court has not yet decided upon or there must be a departure from the Supreme Court's existing case law by the court of appeal. Decisions of the Supreme Court are final and binding.

21 Foreign judgments**What procedures exist for recognition and enforcement of foreign judgments?**

Foreign judgments may be enforced in accordance with bilateral and multilateral treaties. To be considered enforceable, foreign judgments first require a formal declaration of enforceability (*exequatur*). A declaration will be granted if the foreign judicial act is enforceable according to the laws of the foreign state, and reciprocity is guaranteed. If no reciprocal agreement exists, Austrian courts will not grant enforcement.

A judgment rendered in another member state of the EU will be enforced in Austria under the Brussels regime (EU Regulation No. 1215/2012) and does not require separate recognition. Judgments rendered in Switzerland, Norway and Iceland will be recognised without requiring any special procedure in accordance with the revised Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 2007.

22 Foreign proceedings**Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?**

In the European Union, procedures for obtaining evidence from foreign countries have been considerably facilitated by the introduction of the Evidence Regulation (EC Regulation No. 1206/2001). According to the Regulation, judicial assistance requests are transmitted directly between the courts. The regulation applies to both oral as well as documentary evidence. Outside of a European context, the Hague Convention on Civil Procedure of 1954 and other bilateral treaties might apply.

Arbitration**23 UNCITRAL Model Law****Is the arbitration law based on the UNCITRAL Model Law?**

The Austrian arbitration law is set out in sections 577 to 618 of the Code of Civil Procedure. In 2006, the law underwent a major reform, which predominantly based the Austrian arbitration regime on the Model Law.

Although closely following the structure of the Model Law, a few important distinctions can be found. First and foremost, Austrian arbitration law does not distinguish between national and international arbitrations or between commercial and non-commercial arbitrations, but provides a uniform arbitration law for any type of arbitral proceeding. It also includes additional provisions regarding consumer and labour law-related matters as well as a separate provision on arbitrability. Similarly, there is a distinct provision on the allocation of costs which cannot be found in the original text of the Model Law. What is more, according to Austrian arbitration law procedural errors only lead to the setting-aside of the arbitral award if Austrian procedural public policy has been violated.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The formal requirements for validly concluding an arbitration agreement resemble those stipulated in the Model Law. In accordance with section 583 of the Code of Civil Procedure, an arbitration agreement must be in writing (ie, in a written document signed by both parties or in letters, faxes, emails or other forms of communication that prove the existence of the agreement).

Aside from the writing requirement, in order to be enforceable, an arbitration agreement must also fulfil certain substantive requirements, such as identifying the parties and clearly expressing their intention to specifically submit a dispute to arbitration.

25 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the parties have not agreed on a specific number of arbitrators, Austrian arbitration law provides for a tribunal of three arbitrators as a default rule. In this case, each party shall appoint one arbitrator and the two party-appointed arbitrators shall jointly appoint the third arbitrator, who will act as chair of the arbitral tribunal. If a party fails to appoint an arbitrator or the parties fail to reach an agreement on a sole arbitrator, the appointment will be made by the courts.

In general, arbitrators can be challenged if there are justifiable doubts as to their impartiality or independence, or if they do not fulfil the requirements set out by the parties' agreement. Party-appointed arbitrators can only be challenged by their appointing party for reasons that become known to the appointing party after the appointment has been made.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Austrian arbitration law does not impose any default requirements as to the characteristics of an arbitrator. However, the parties are free to agree upon requirements the arbitrators have to fulfil (eg, certain professional qualifications or background).

27 Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

The parties can agree on the arbitral procedure and the arbitral tribunal must follow the rules agreed upon by the parties. Failing such agreement, the arbitral tribunal can proceed in any manner it considers appropriate. Being the seat of the Vienna International Arbitral Centre (VIAC), many cross-border arbitrations seated in Austria provide for institutional arbitration under the VIAC Rules.

However, there are a number of mandatory rules that always have to be complied with, such as the parties' right to be heard, the independence and impartiality of the arbitral tribunal or the requirement that the arbitral award has to be in writing.

Update and trends

Since 2014, proceedings to set aside arbitral awards fall within the exclusive jurisdiction of the Austrian Supreme Court as the first and final instance, thus providing a one-stop-shop principle for arbitral proceedings. In addition, the Supreme Court also exclusively decides on the existence or non-existence of an arbitral award and has jurisdiction over judicial measures accompanying arbitral proceedings, such as the appointment of substitute arbitrators. As can already be witnessed, these amendments further strengthened Austria's position as the arbitration hub in central and eastern Europe.

In the wake of the upcoming enactment of the recast of the European Regulation on insolvency proceedings (EU Regulation 2015/848) in July 2017, a number of accompanying laws are currently under consideration. These will, inter alia, include an expansion of the competencies of judicial officers with regard to insolvency proceedings.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Under Austrian arbitration law, the courts only have very limited powers to intervene during an arbitration and may only do so on a party's or the tribunal's request. In particular, a party may request a court:

- to appoint an arbitrator if the parties cannot agree or a party fails to do so;
- to grant an interim or protective measure;
- to decide the challenge of an arbitrator; or
- to intervene if an arbitrator's mandate has been terminated and the arbitrator does not resign or the other party does not agree to the termination.

Also, the arbitral tribunal itself can request judicial assistance from a court:

- to enforce an interim or protective measure; or
- to gather evidence for which the arbitral tribunal has no authority (eg, to apply coercive measures).

Of the above grounds, the following are mandatory: the competence of courts to issue interim measures upon a party's request, a party's right to challenge an arbitrator before a court, and judicial assistance by courts. All other powers can be overridden by agreement.

29 Interim relief

Do arbitrators have powers to grant interim relief?

As a general rule, arbitrators may order any interim relief they deem appropriate. Interim relief can be requested from both the courts and the arbitral tribunal. As a prerequisite, the relief needs to be granted in respect of the subject matter of the dispute and, without granting the relief, the enforcement of the claim would be frustrated or considerably impeded, or a risk of irreparable harm would arise.

30 Award

When and in what form must the award be delivered?

The award must be delivered in writing, signed by the arbitrators and state the date on which it was rendered. The award must state the reasons on which it is based, unless the parties have agreed otherwise. Austrian law does not provide for a time limit for delivering an award. However, the parties may agree on a time limit either by explicitly providing for a time limit in the arbitration agreement or by referring to institutional rules.

31 Appeal

On what grounds can an award be appealed to the court?

The grounds for challenging an award are set out in section 611(2) of the Code of Civil Procedure. The grounds closely follow those provided by article V of the New York Convention and article 34 of the Model Law. The list is exhaustive and there is no right to a further appeal. Since

2013, the Austrian Supreme Court acts as the only instance in proceedings for challenging an award. The grounds are as follows:

- the invalidity of an arbitration agreement or a lack thereof;
- a party's incapacity to conclude an arbitration agreement;
- a violation of the right to be heard;
- the subject matter is beyond the scope of the arbitration agreement;
- a failure in the constitution or composition of the tribunal;
- the proceedings violate Austrian public policy;
- the requirements for an action for revision have been fulfilled (see Code of Civil Procedure, section 530);
- the matter in dispute is not arbitrable; and
- the award violates Austrian public policy.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Domestic awards are enforced in the same way as other domestic titles in accordance with the Austrian Enforcement Act. Enforcement requests fall within the jurisdiction of the district court where the obliged is domiciled or the district court where the enforcement will be undertaken.

Foreign arbitral awards are enforced by Austrian courts pursuant to the New York Convention and other multilateral treaties. Foreign awards must first be declared enforceable (recognised) by the courts. A request for recognising the award can be combined with a request for enforcement and the courts will decide simultaneously on both requests. After being declared enforceable the foreign award is treated as if it were a domestic award.

33 Costs

Can a successful party recover its costs?

Pursuant to section 609 of the Code of Civil Procedure, the arbitral tribunal shall decide upon the obligation to reimburse the costs of the proceedings, provided the parties have not agreed otherwise. The arbitral tribunal shall take into account the circumstances of the case, in particular the outcome of the proceedings. The decision has to be made in the form of an arbitral award.

Austrian arbitration law does not define the types of costs a party can recover, but merely notes that the obligation to reimburse may include any and all reasonable costs appropriate for bringing the action or defence.

Alternative dispute resolution

34 Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

Although there is a refined legal framework for ADR procedures under Austrian law, resolving disputes by means of ADR has not yet gained significant approval by the Austrian business community. Hence, mediation, although popular, is mainly used in family and labour law disputes.

The Austrian Mediation Act has established a mediation council with the Austrian Ministry of Justice, which specifies vocational programmes for mediators and sets out the requirements for becoming a certified mediator.

In 2016, VIAC presented the new Vienna Mediation Rules, which provide a procedural framework for ADR by defining procedural standards not only for mediation proceedings but ADR proceedings in general. The rules also cater to parties wishing to combine ADR proceedings (eg, 'med-arb') or an early neutral evaluation before the commencement of arbitral proceedings.

Furthermore, the Austrian courts have launched pilot projects in which judges are supposed to propose the initiation of mediation proceedings prior to commencing litigation, if deemed appropriate.

35 Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is no general requirement under Austrian law to consider ADR before commencing arbitration or litigation. Only with regard to certain tenancy disputes shall specific conciliation panels have exclusive jurisdiction.

Miscellaneous

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

In general, Austria is gaining importance as a hub for international arbitration. This is owed to its modern arbitration law, its geographic location and the work of VIAC. Similarly, Austrian state courts provide reliable and comparatively fast proceedings. The quality of decisions is usually high and specialised commercial panels and courts ensure that adjudicators understand complex commercial issues.



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