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Litigation

Austria: Law & Practice

Vavrovsky Heine Marth Rechtsanwälte

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Law and Practice

Contributed by Vavrovsky Heine Marth Rechtsanwälte

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Vavrovsky Heine Marth Rechtsanwälte has offices in Vienna and Salzburg and supports corporates and private clients in all aspects of commercial life. The firm's main focuses are controversy and real estate, while its Salzburg office is specialised in insolvency, restructuring and private client work. In controversy, Vavrovsky Heine Marth guides clients through all aspects of adversarial matters. The firm's experts offer strategic advice in the contract negotiations and drafting phase to pre-empt problems and prevent possible disputes. They act for clients in any kind of forum: the partners successfully represent clients before courts and authorities and are also sought-after as counsels and arbi-

trators in international arbitration proceedings and ad hoc tribunals. In addition to litigation and arbitration, the firm offers the same high-quality service in all other forms of alternative and consensual dispute resolution, especially in commercial mediation. Vavrovsky Heine Marth's portfolio extends to all key industry sectors including corporate and commercial law, M&A transactions, capital markets, banking, insurance, TMT and unfair competition as well as real estate, construction and infrastructure. As the exclusive Austrian member of ALLIURIS – the Alliance of International Business Lawyers – clients of Vavrovsky Heine Marth have access to over 450 legal experts worldwide.

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1. General

1.1 General Characteristics of Legal System

Austria is a civil law jurisdiction. Its laws are generally codified.

Civil proceedings follow an adversarial model with features of an inquisitorial model. It is primarily for the judge to interrogate the parties and witnesses. After being interrogated by the judge, witnesses and experts may be examined and cross-examined by the parties and, respectively, their counsel. The court's decision is limited to the parties' arguments.

The proceedings usually comprise both written submissions and oral arguments. In general, legal proceedings have mandatory public hearings in which the judge hears the parties and witnesses in order to determine the relevant facts. Written submissions are exchanged in preparation for the hearings and (when requested) by the court or the parties.

1.2 Structure of Country's Court System

Austria's civil court system consists of three instances.

In the first instance, either District or Regional Courts are competent, depending on the amount in dispute and the subject matter of the dispute. District Courts are competent for cases with a maximum amount in dispute of EUR15,000, as well as for certain subject matters such as tenancy or family law. Regional Courts are competent for any amount in dispute above EUR15,000, as well as matters such as competition or intellectual property law, irrespective of the amount in dispute.

In the second instance, Higher Regional Courts are competent for appeals against first instance rulings of Regional Courts, whereas Regional Courts are competent for appeals against rulings of District Courts.

The third and final instance is the Supreme Court, to which an appeal is only possible in limited circumstances. Its function is to ensure a consistent interpretation and application of the law.

In addition, Austrian courts have specialised departments for commercial and labour matters. In Vienna, there are two stand-alone specialised commercial courts. Resorting to these specialised departments or courts may be advantageous in complex, large or international proceedings.

1.3 Court Filings and Proceedings

As a matter of principle, court hearings are open to the public. If the proceedings concern matters such as family law or other sensitive information (eg, business secrets), access may be restricted. Contrary to court hearings, written submissions and other court filings are never accessible to the public.

1.4 Legal Representation in Court

If the amount in dispute exceeds EUR5,000, parties have to be represented by an attorney admitted to the Austrian bar. In all other proceedings, parties are free to choose their representation.

Lawyers admitted to practice law in another member state of the European Union may also practice law in Austria. However, if the amount in dispute exceeds EUR5,000 they need to work under the supervision of an Austrian attorney and prove such supervision to the court. Lawyers from other EU member states may request admittance to the Austrian bar after having practiced in Austria for three years.

2. Litigation Funding

2.1 Third-party Litigation Funding

Third party funding is becoming more common and has been explicitly approved by the Austrian Supreme Court. There are, however, no statutory rules governing third party funding. This also means that there are no restrictions as to how arrangements between funders and litigants are made, and there is no obligation to disclose a funding arrangement. Restrictions may apply if attorneys act as third party funders, since quota litis agreements, in which a percentage of the awarded amount is promised to the attorney in advance, are prohibited under Austrian law.

2.2 Third-party Funding of Lawsuits

There are no restrictions to third party funding in Austria. Therefore, all types of lawsuits are available for third party funding.

2.3 Third-party Funding for Plaintiffs and Defendants

Third party funding is available to both plaintiffs and defendants.

2.4 Minimum and Maximum Amounts of Third-party Funding

There is no restriction as to the amount a third party funder may provide.

2.5 Third-party Funding of Costs

Usually, third party funding covers all fees and expenses, including costs for legal representations and court fees. Moreover, agreements tend to include the eventual costs of the opposing party, which will have to be borne by the funded party in case it loses the case.

2.6 Contingency Fees

Certain restrictions may apply if attorneys themselves act as third party funders since contingency and conditional fee arrangements (pactum de quota litis), which give a part of the

proceeds to the attorney, are prohibited between attorneys and clients under Austrian law.

2.7 Time Limit for Obtaining Third-party Funding

There are no restrictions as to when a party may obtain the services of a third party funder.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

There are no legal requirements to initiate any pre-action procedures. In particular, there is no mandatory mediation or alternative dispute resolution mechanism for general commercial matters.

However, it is recommended and common practice to request a debtor to fulfil its obligations before commencing legal proceedings. Otherwise the court may order the plaintiff to bear the court fees and its legal costs, if the defendant immediately complies with the claim or does not contest it.

3.2 Statutes of Limitations

Austrian law sets out a general statute of limitations 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.

The limitation period generally commences when the respective right could first have been exercised. By way of example, claims for damages become time-barred three years after the injured party has become aware of the injuring party and the damage.

Statutes of limitations cannot be waived in advance and are not addressed by the courts on their own motion but have to be brought forward by the parties (ie, the defendant).

3.3 Jurisdictional Requirements for a Defendant

As a general rule, to be subject to suit in Austria, a defendant must have its domicile or registered seat of business in Austria. In addition, other connecting factors – such as the place of contractual performance or occurrence of damage – may establish the jurisdiction of Austrian courts.

Once a claim has been filed with an Austrian court, the court examines whether international, subject-matter and territorial jurisdiction exists on its own motion. In doing so, the court solely relies on the information provided by the plaintiff in the claim, unless there are indications that the provided information is incorrect.

The question of international jurisdiction of Austrian courts is either governed by EU law, such as the Brussels I Regulation (if the defendant is domiciled in another EU member

state) or by the Austrian Jurisdictional Code (if the defendant is domiciled outside of the European Union).

In commercial matters, parties are free to agree on a particular forum in commercial matters under both EU and Austrian law. However, the validity of such clauses is restricted when consumers are involved.

3.4 Initial Complaint

A lawsuit is initiated by the submission of a statement of claim. The statement of claim has to be in the German language and needs to contain the following:

- name and address of the court to which the claim is submitted;
- names and addresses of the parties and their representatives (if known);
- the matter and amount in dispute; and
- the relief sought and the facts on which the relief sought is based.

A statement of claim must be signed. It may – but does not have to – contain legal reasoning and supporting evidence. However, in more complex cases it is advisable to provide both already with the statement of claim.

Before the statement of claim has been served on the defendant, the plaintiff is free to amend its claim. Subsequently, amendments concerning the relief requested or the legal basis for the claim may only be made with the consent of the defendant or the court.

3.5 Rules of Service

Under Austrian law, service is generally the responsibility of the courts. The plaintiff is to file the statement of claim with the court, who will then examine whether the procedural requirements are met. If so, it is for the court to serve the claim on the defendant.

Within the territory of the European Union, the service of judicial and extrajudicial documents in civil or commercial matters is governed by EU Regulation No 1393/2007.

Service of claims outside of the European Union follows the rules of the applicable bilateral or multilateral agreements between Austria and the relevant state, if any. If no such treaty exists, service may be done via diplomatic channels.

3.6 Failure to Respond to a Lawsuit

If the defendant does not respond within four weeks after receipt of the statement of claim, or – in proceedings before a District Court – does not attend the first oral hearing, the plaintiff may request the court to issue a default judgement.

The defendant has a number of options to remedy the default judgment, depending on the reason for its failure to

respond. If the defendant was prevented from responding due to reasons beyond its control, it may request the court to reinstate the proceedings within 14 days after the impediment ceases to exist.

3.7 Representative or Collective Actions

Technically speaking, Austrian law does not provide for class actions. However, Austrian law provides for a group litigation which is commonly referred to as an “Austrian type of class action”. This allows multiple claimants to assign their claim to a third party, typically an association representing consumer rights, with the intention that the third party raises the individual claims in one lawsuit on behalf of the assignors against a single defendant.

In recent years, endeavours were made to introduce an effective class action mechanism in Austria. In 2016, a working group was set up by the Austrian Ministry of Justice in this regard, but no political consensus was found. The conservative Austrian People’s Party (ÖVP), which secured first place in the 2017 parliamentary elections, is opposed to collective redress mechanisms, which makes it unlikely that a class action mechanism will be introduced in the near future.

3.8 Requirement for a Costs Estimate

There are no requirements to provide clients with a cost estimate under Austrian law. However, it is generally advisable to discuss the estimated costs before commencing proceedings. Costs will be calculated subject to the agreement between the client and the attorney. For example, costs may be calculated on the basis of hourly rates or on the fees set out in the Attorney Tariff Act.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

Austrian civil procedure law provides for a limited number of interim applications a party may file before a trial commences. These remedies are granted by the courts and are not limited to case management issues.

Most importantly, these include preliminary injunctions to protect the enforceability of a claim or to protect a party from suffering irreparable harm. Other interim remedies include motions for the protection of evidence and security for costs. A party may also request to receive legal aid before the trial commences.

4.2 Early Judgment Applications

In certain circumstances a party may be entitled to apply for an early judgment. Most importantly, if the other party fails to participate in the proceedings a party may request the court to issue a default judgment. The procedural requirements for issuing a default judgment depend on the type of court that is hearing the case. For instance, if a defendant

fails to submit its statement of defense in a timely manner in proceedings before the Regional Courts as courts of first instance, a plaintiff may immediately submit a motion for the issuance of a default judgment.

If the claim does not fulfill the minimum procedural requirements, a court may also dismiss a case on its own motion before the first hearing on the merits takes place. In particular, these procedural requirements concern the jurisdiction of the court, the capacity of the parties to sue and be sued as well as formalities regarding the statement of claim.

Also, a defendant may request an early dismissal of the claim, if the claim is already time-barred, inconclusive, or if the minimum procedural requirements are not fulfilled. In general, defenses on procedural grounds need to be raised before a party first pleads on the merits of the case. Otherwise, missing procedural requirements may be considered as healed and thus cannot be argued at a later stage.

Moreover, under certain circumstances the courts may issue interim or partial judgments during the course of the proceedings, if parts of the matter in dispute can already be decided upon.

4.3 Dispositive Motions

The first oral hearing is called a preparatory hearing. Usually, it serves as a case management hearing in which issues such as the timetable of the proceedings are discussed and in which the judge clarifies the possibility of settlement talks.

However, motions to dispose may also be brought to the court’s attention in the course of the preparatory hearing. These motions may relate to a wide range of subjects such as procedural grounds (eg, lack of jurisdiction) or substantive grounds (eg, that the claim is time-barred).

4.4 Requirements for Interested Parties to Join a Lawsuit

Third parties may join the proceedings if the party can show a legal interest in the success of the party they are joining. To join proceedings, third parties may file an application for joinder or may be formally invited by one of the main parties. A joinder needs to be approved by court.

Parties may request that a joinder is dismissed, but the court can nevertheless approve the joinder against the parties’ will. A joinder is possible at any stage of a proceeding up to the rendering of the final judgment.

Austrian procedural law distinguishes between two different kinds of third party intervention. If the third party merely has a legal interest in the outcome of the proceedings, its role is limited to assisting the main party and it does not have the same procedural rights as the main party. If the prospective judgment will have a direct effect on the third party, the third

party is treated equally and has the same legal position (and rights) as the main party.

4.5 Applications for Security for Defendant's Costs

In cases where the plaintiff is not a national of a member state of the European Union, the defendant may request that the court orders the foreign party to provide security for costs incurred by the defendant, unless an international convention provides otherwise.

However, security for costs will not be granted (i) if the foreign plaintiff has its domicile in Austria, (ii) if the decision on costs of the Austrian court is enforceable in the plaintiff's state of residence, or (iii) if the plaintiff has sufficient assets in Austria.

4.6 Costs of Interim Applications/Motions

Under Austrian law, the general principle is that the unsuccessful party bears the costs of the proceedings. This also applies to interim applications and motions. Usually, the decision on the costs regarding interim applications and motions will be made with the final decision. However, if the application or motion does not depend on the final outcome of the proceedings, the respective cost decision may differ from that of the final ruling and may also be rendered earlier.

4.7 Application/Motion Timeframe

Although courts are not required to render a judgement within a particular timeframe, decisions have to be made within a reasonable time pursuant to Article 6 of the European Convention on Human Rights as well as Article 47 of the European Charter of Human Rights. If a court fails to decide within reasonable time, the parties may request the court of higher instance to set out a deadline.

5. Discovery

5.1 Discovery and Civil Cases

Discovery evidence is not admissible in Austria, and therefore a motion to take evidence with the sole purpose of clarifying certain aspects of the case will be rejected by the court.

A party intending to file a claim should ascertain it has the evidence necessary to prove its claims, since requests for evidence production during proceedings are limited (especially in comparison to document production possibilities in common law jurisdictions). It is possible to secure evidence if a party claims that the opponent is in possession of a document and provides sufficient reasons for that allegation. The court may then order the production of the document.

5.2 Discovery and Third Parties

The court may request a document from a third party if the party is required to do so under substantive law or if the document is of joint use to the involved parties. The party

requesting a document has to describe the content of the document and present its reasons for assuming that the third party has the document at its disposal. If the third party is ordered to produce the document and fails to comply with such order, the court has the power to impose fines on the party for contempt of court.

5.3 Discovery in this Jurisdiction

There is no discovery under Austrian law. However, if considered necessary, courts may order a party to produce evidence.

5.4 Alternatives to Discovery Mechanisms

As a general rule, evidence is taken only during the proceedings, but not before. The taking of evidence is conducted by the court during the oral hearing and the court freely evaluates the evidence provided. However, documentary evidence may only be presented if at least one party has referred to it. Moreover, documentary evidence may not be admitted or witnesses heard if both parties object.

The judge may instruct parties to produce certain evidence. A party may refuse to comply with such instruction in order to protect its reasonable interests, such as family affairs or business secrets. However, instructions to provide evidence cannot be refused, if the evidence has been referred to before, is considered a joint document between the parties or a party is required to provide such evidence under the law.

Witnesses as well as parties need to testify orally before the court. Depositions, written witness statements or affidavits are not permitted.

It is for the court to decide whether expert evidence is required and to select and appoint an expert. Experts render their reports in writing and the parties are allowed to question experts at a hearing.

5.5 Legal Privilege

Austria recognises the concept of attorney-client privilege. Attorneys are not allowed to testify before authorities with regard to their mandates without the prior consent of their client. Moreover, courts are not allowed to draw any conclusion from the fact that attorneys refuse to testify.

Attorney-client privilege also covers work products, including the attorneys' files as well as correspondence between an attorney and his or her client, irrespective of their location.

5.6 Rules Disallowing Disclosure of a Document

If ordered to produce a document by the court, a party may refuse its production for the following reasons:

- attorney-client privilege;
- family affairs;
- business secrets;

- irreparable damage to the parties' reputation; and
- to protect itself or a third party from criminal prosecution.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

Austrian courts may issue preliminary injunctions before or during proceedings, in order to prevent imminent danger of irretrievable damage to the plaintiff. Austrian law distinguishes between the following 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.

Monetary claims may be secured, *inter alia*, by an order for the deposit of money or moveable assets, an order prohibiting the selling of moveable property or an order prohibiting the transferring or encumbering of immoveable property.

In order for injunctive relief concerning monetary claims to be awarded, the creditor is required to show it has a plausible claim (the provision of conclusive, hard evidence is not necessary) and that the debtor is likely to hinder enforcement or that the final judgment would need to be enforced in a state where enforcement is unlikely.

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

Moreover, courts can issue freezing orders on bank accounts or the attachment of the defendant assets. Courts may even order third parties to refrain from paying the debts they owe to the defendant.

Austrian courts may also grant interim remedies in support of foreign proceedings if the prospective foreign judgment is enforceable under Austrian law. Similarly, interim remedies ordered by a foreign court or arbitral tribunal may be enforced if they comply with Austrian law.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

If the circumstances are urgent, injunctive relief may be obtained in accelerated proceedings. Depending on the individual case it might be granted within 24 hours.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

It is possible to obtain injunctive relief on an *ex parte* basis, if the court considers it necessary to avoid frustration by the

opponent of the intended enforcement. The opponent may only challenge the decision after it has been rendered.

6.4 Applicant's Liability for Damages

The applicant may be held liable for damages suffered by the opponent as a result of the injunction, in case the opponent successfully challenges the injunctive relief. It is common that the applicant is ordered to provide security before an injunctive relief is granted. This also applies in cases where the injunctive relief is granted *ex parte*.

6.5 Respondent's Worldwide Assets and Injunctive Relief

As a general rule, Austrian courts have jurisdiction to issue a preliminary injunction if they have jurisdiction for the underlying claim, irrespective of the location of the asset. Within the territory of the European Union, enforcement of injunctive relief is done pursuant to the Brussels I Regulation, whereas enforcement outside of the EU will need to be reviewed individually.

6.6 Third Parties and Injunctive Relief

Injunctive relief may be obtained against third-party debtors, ordering them to directly pay to the creditor. It is common to request such relief from insurances or employers. Other than that, injunctive relief may not interfere with the rights of third parties.

6.7 Consequences of a Respondent's Non-compliance

Injunctive relief is directly enforceable. The assistance of an enforcement officer can be requested from the court. Depending on the injunction, infringement of preliminary orders may also be penalised by ordering fines (eg, for failure to comply with injunctions for specific performance).

7. Trials and Hearings

7.1 Trial Proceedings

Proceedings in Austria are initiated by submitting a statement of claim to the court of first instance. An action is officially pending upon receipt by the competent court. Statements of claims (and other documents) are usually submitted via an electronic communication system, which legal professionals have been obliged to use since 2007.

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

In proceedings before regional courts, the respondent will be ordered to file a statement of defense within four weeks.

After receiving the written submission, the court will schedule a preparatory hearing.

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 necessary evidence for rendering the 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.

There is also a mandatory simplified procedure for monetary claims up to an amount in dispute of EUR75,000. In such cases, the plaintiff does not need to file a full statement of claim, but merely needs to fill out a standardised formal request for payment. The court will then issue a payment order upon the plaintiff's request. The payment order becomes enforceable, unless the defendant raises an objection to the order. In that case, regular proceedings will be initiated.

7.2 Case Management Hearings

The court may schedule hearings for interim motions if it considers a hearing necessary. However, it is not obliged to do so.

In general, the party's written submissions serve as preparation for oral hearings. Additionally, a preparatory meeting will be conducted at the beginning of the oral hearings, where the structure and schedule of the proceeding and the possibility of an amicable settlement will be discussed.

7.3 Jury Trials in Civil Cases

There are no jury trials in civil cases in Austria.

7.4 Rules That Govern Admission of Evidence

As a general rule, each party has to furnish proof for all facts and matters supportive of their submissions. Austrian substantive law sets out further evidential rules such as a reversal of the burden of proof in certain cases, which will also have to be obeyed by the court.

Austrian civil procedural law provides five types of evidence, namely documentary evidence, witness testimony, expert evidence, inspections and the hearing of the parties. However, other types of evidence are theoretically also admissible.

The court freely evaluates the evidence. With its judgment the court must state the grounds for its evaluation of the evidence. Evidence obtained by illegal means is in principle admissible in civil proceedings. The court may disregard evi-

dence if it is already sufficiently convinced of a certain fact or considers the taking of such evidence to be unnecessary. Discovery is not admissible under Austrian law.

7.5 Expert Testimony

Expert witnesses play a crucial role in Austrian litigation. It is for the court to decide whether expert evidence is required and to select and appoint an appropriate person as expert. Usually, experts render their reports in writing and the parties are entitled to question the expert at a hearing. Court-appointed experts are required to be independent and impartial and may be challenged under the same conditions as judges can be challenged.

The parties may also appoint expert witnesses themselves. However, party-appointed experts do not have the same status as court-appointed experts. Their expert testimony will be freely evaluated by the court, similar to that of other witnesses.

7.6 Extent to Which Hearings are Open to the Public

Court hearings are generally open to the public. However, the public may be excluded for particular reasons – for example, in order to protect business secrets or if private and personal issues are touched upon.

Transcripts of court hearings are not made public. Likewise, court files and documents are only available to the parties and not to the public.

7.7 Level of Intervention by a Judge

Austrian judges take on a dominant role in civil proceedings. The judge takes the lead in examining witnesses and questions every witness individually and in the absence of other witnesses. Only afterwards are the parties and their legal representatives given the opportunity to ask further questions.

It is for the judge to decide when the matter is ready for rendering a decision and to close the hearing. Usually, judgments will be handed down in writing at a later point in time. Only in very straightforward cases are oral judgments expected to be given immediately at the closing of the hearing.

7.8 General Timeframes for Proceedings

Austrian civil courts are consistently ranked among the most efficient in the European Union. The average duration of proceedings at the District Court level is six months, whereas the average duration for proceedings at Regional Courts is 13 months. For appellate proceedings the average duration ranges from nine months to one year. Complex proceedings may take over a year.

8. Settlement

8.1 Court Approval

Court approval is not required to settle a lawsuit.

It is possible to settle a dispute in court, as well as out of court; both kinds of settlements are enforceable. Whereas court settlements are enforceable instantly, out-of-court settlements need to be certified by a notary public or the court itself to become enforceable. However, before being certified, they are nevertheless binding under Austrian law. Out-of-court settlements can be made through mediation or other means of amicable dispute resolution. To ensure their enforceability, it is important that settlement agreements are sufficiently specific.

8.2 Settlement of Lawsuits and Confidentiality

Settlements may be kept confidential if the parties agree so. However, judicial settlements might become public as a result of the principle that hearings are generally open to the public. Should the parties wish to ensure confidentiality, it is advisable to negotiate the settlement out of court and include a confidentiality clause.

8.3 Enforcement of Settlement Agreements

The way of enforcing settlement agreements depends on whether the settlement was done in or out of court. Judicial settlements are treated like judgments when it comes to enforcement. Extrajudicial settlements are enforceable only if they have been verified by a notary public or the court. Without such verification, a party needs to file a claim based on the settlement agreement.

8.4 Setting Aside Settlement Agreements

There are only a few substantive grounds on which settlement agreements may be set aside. For example, if both parties are mistaken about the basis of the settlement, or a party is mistaken about the other party or the subject matter. For this reason, settlement agreements often contain revocation clauses, which allow the parties to revoke a settlement within a certain period of time.

9. Damages and Judgment

9.1 Awards Available to a Successful Litigant

A successful litigant may obtain a judgment ordering the following:

- specific performance;
- permanent injunction;
- creation/alteration of a legal status; and
- declaratory relief.

A judgment may order different types of relief. However, the court is restricted to the relief requested by the plaintiff.

9.2 Rules Regarding Damages

There are no special rules regarding damages under Austrian law. However, it is important to note that Austrian tort law is based on the principle of compensation, which foresees that damages are only awarded to the extent they have actually been suffered. There are thus no punitive damages under Austrian law. However, contractual penalties are allowed, even though they might be subject to judicial review. For claims arising out of intellectual property disputes, lump-sum damages might also be awarded.

9.3 Pre- and Post-judgment Interest

In Austria, a debtor is required to compensate a creditor for any damage resulting from a delay in payment.

In the absence of an agreement to the contrary by the parties, the interest rate is set at 4% per annum between private persons, and at 9.2% above the base rate provided by the Austrian National Bank between entrepreneurs.

Interest is accrued from the date the claim was first due until the day of the actual judgment. The due date for damage claims is the day a demand notice has been received.

9.4 Enforcement Mechanisms for a Domestic Judgment

The means of enforcement will depend on the judgment that is 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.

9.5 Enforcement of a Judgment From a Foreign Country

Enforcement of foreign judgments is regulated in the Austrian Enforcement Code and in bilateral and multilateral treaties.

Within the European Union, enforcement of foreign judgments in commercial and civil matters is done pursuant to the Brussels I Regulation. Enforcement of judgments rendered in an EU member state is straightforward as it does not require a separate declaration of enforceability and is subject to the same conditions as Austrian judgements. Likewise, judgments that have been rendered in Switzerland, Norway or Iceland will be recognised without requiring a declaration of enforceability in accordance with the revised Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

Apart from the above, enforcement of foreign judgments requires a formal declaration of enforceability (exequatur proceeding). Such declaration is only granted if the judgment in question is enforceable according to the law of the foreign state and if reciprocity is guaranteed by a bilateral or multilateral treaty. If no reciprocity agreement has been concluded, Austrian courts will not grant enforcement of a foreign judgment.

10. Appeal

10.1 Levels of Appeal or Review Available to a Litigant Party

The Austrian Code of Civil Procedure provides for two levels of appeal. First, appeals are made to the respective appellate courts, which is either the Regional or Higher Regional Court, depending on the court of first instance. Second, the decision of the appellate court may be appealed to the Austrian Supreme Court.

A party may file an appeal against the judgment of a court of first instance within four weeks after the judgment has been served. The opposing party may file a response within four weeks of the appeal being served.

A second appeal against the decision of the appellate court may be brought before the Supreme Court within four weeks after service of the decision. However, such appeal is only possible if a substantial question of law, which has not yet been decided by the Supreme Court, is concerned, or if the decision of the appellate court deviates from the Supreme Courts' existing decision-making practice. The opposing party may reply to this second appeal within four weeks.

Mirroring the appeal procedure, a party may file a complaint and a second-level complaint against a court order. However, certain court orders can only be contested in conjunction with an appeal against the rendered judgment, while others cannot be appealed against at all. Complaints usually have to be filed within 14 days after service. As with second appeals, a second complaint to the Supreme Court is limited to substantial questions of law.

10.2 Rules Concerning Appeals of Judgments

Decisions of the courts of first instance may be appealed to the Regional Courts (if a District Court ruled in the first instance), and to a Higher Regional Court (if a Regional Court ruled in the first instance).

The appellate court's judgment has to contain a decision on whether an appeal to the Supreme Court, which is called "revision", is admissible or not. In case the appellate court does not approve such "ordinary revision", the appealing party may challenge the decision on admissibility and at the same

time file the actual revision, which is then called "extraordinary revision".

In any event, certain thresholds as to the amount in dispute need to be considered, which depend on the subject matter of the dispute, and a substantial question of law needs to be concerned.

However, the Supreme Court itself is in no way bound by the appellate court's decision, and is thus free to decide whether it considers the case admissible or not.

10.3 Procedure for Taking an Appeal

After the judgment has been served, the (partly) losing party may file an appeal within four weeks. The other party is then allowed to respond within four weeks.

10.4 Issues Considered by the Appeal Court at an 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 appellate court may order an oral hearing, in practice oral hearings on appeals rarely occur.

In deciding on the appeal, the appellate court may:

- 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 appellate court 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 (i) concern a substantial question of law the Supreme Court has not yet decided upon, or (ii) there must be a departure from the Supreme Court's existing case law by the appellate court. Decisions of the Supreme Court are final and binding.

10.5 Court-imposed Conditions on Granting an Appeal

In general, a second level appeal to the Supreme Court must concern points of law that are of a significant importance and need to be reviewed to ensure the uniform interpretation of law. In addition, certain thresholds as to the amount in dispute apply.

The appellate court's judgment has to contain a decision on whether an appeal to the Supreme Court is admissible or not. In case the appellate court does not approve the appeal, the appealing party may challenge the decision on admissibility and at the same time file the actual appeal.

10.6 Powers of the Appellate Court After an Appeal Hearing

With its decision on the appeal, the appellate court may:

- 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.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

The winning party is entitled to a full reimbursement of all costs accrued in proportion to its success. This means that if neither party fully succeeds, the court divides the costs on a pro rata basis and orders only partial reimbursement.

Reimbursement is granted for court fees, expenses and legal fees. Legal fees are, however, only reimbursed in the amount determined pursuant to the official lawyer's tariff, irrespective of the arrangement between a lawyer and its client. Therefore, the actual lawyers' costs of a prevailing party are often higher than the amount reimbursed. The decision on costs is an integral part of the court's final decision and can be contested separately.

11.2 Factors Considered When Awarding Costs

The court will award the costs in accordance with the outcome of the proceedings. The winning party is generally entitled to a full reimbursement of all costs accrued in proportion to its success. If a party only succeeds partly, the costs will be split accordingly.

11.3 Interest Awarded on Costs

Interest is awarded on costs from the date the judgment becomes enforceable. Between private persons the interest rate is set at 4% per annum; between entrepreneurs it is set at 9.2% above the base rate provided by the Austrian National Bank.

12. Alternative Dispute Resolution

12.1 Views on ADR in this Jurisdiction

ADR is generally viewed positively in Austria and there is a refined legal framework for ADR procedures under Austrian law. For example, the Austrian Mediation Act, which

sets out basic mediation procedures and provides inter alia that mediation proceedings hinder limitation periods. The Act also established a mediation council within the Austrian Ministry of Justice, which specifies vocational programmes for mediators and sets out the requirements for becoming a certified mediator.

Although ADR has mainly been used in family and labour disputes in the past, in recent years mediation is gaining significant approval by the Austrian business community.

In 2016, the Vienna International Arbitration Centre 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.

12.2 ADR Within the Legal System

In general, ADR proceedings are only conducted voluntarily in Austria. Nevertheless, ADR has gained significant approval in recent years. This is partly due to initiatives by the judiciary. For instance, Austrian courts have launched pilot projects in which judges propose the initiation of mediation proceedings prior to commencing litigation, if deemed appropriate.

12.3 ADR Institutions

The Vienna International Arbitral Centre of the Federal Economic Chamber ("VIAC") is a leading institution in international ADR cases and provides rules for mediation and arbitration proceedings. The VIAC Mediation Rules have recently been revised and offer a made-to-measure framework for business mediations.

Several other organisations, including bar associations and business interest groups, also offer administration of ADR proceedings in Austria.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitrations

Austria is a very arbitration-friendly jurisdiction. A legal framework for arbitral proceedings has been in place since the late 19th century and forms part of the Austrian Code of Civil Procedure.

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.

The last big revision of Austrian arbitration law took place in 2014. Since then, proceedings to set aside arbitral awards fall within the exclusive jurisdiction of the Austrian Supreme Court as the first and final instance. In addition, the Supreme Court has jurisdiction over judicial measures accompanying arbitral proceedings.

Arbitral awards rendered in proceedings seated in Austria are enforced in the same way as court judgments. Enforcement is requested at the district court where the obliged is domiciled or the district court where the enforcement will be undertaken. The award (or a notarised copy thereof) needs to be presented to the court.

Foreign arbitral awards are enforced by Austrian courts pursuant to the New York Convention or other multilateral and bilateral treaties. Foreign awards first have to 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.

13.2 Subject Matter not Referred to Arbitration

All pecuniary claims may be subject to arbitration. All non-monetary claims may be subject to arbitration, as far as the parties are capable, to settle them. Family and tenancy law claims are, however, not to be decided through arbitration.

13.3 Circumstances to Challenge an Arbitral Award

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.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

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.

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