

Complex Commercial Litigation

Contributing editors
Simon Bushell and Daniel Spendlove



2019

GETTING THE
DEAL THROUGH

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Simon Bushell and Daniel Spendlove
Signature Litigation LLP

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Preface

Complex Commercial Litigation 2019

Second edition

Getting the Deal Through is delighted to publish the second edition of *Complex Commercial Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Nigeria and the United Arab Emirates.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Simon Bushell and Daniel Spendlove of Signature, the contributing editors, for their assistance in devising and editing this volume.

GETTING THE 
DEAL THROUGH

London
October 2018

Austria

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Background

1 How common is commercial litigation as a method of resolving high-value, complex disputes?

Commercial litigation is the most common dispute resolution mechanism in Austria, if an amicable settlement cannot be reached.

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

However, other dispute resolution mechanisms such as arbitration or mediation are becoming more and more popular as well, especially if international aspects are concerned.

2 Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

In general, before district courts, cases tend to be more regional. Approximately 8.9 per cent of the cases that were brought before courts of first instance had cross-border implications in 2016, whereas the percentage of these cases brought before courts in 2017 slightly increased to 9.9 per cent.

3 What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Austria is a civil law jurisdiction, meaning that its laws are generally codified and that it considers case law as being secondary and subordinate to statutory law. Commercial litigation is primarily governed by the following three sets of procedural rules:

- The Austrian Jurisdiction Act governs the organisation and jurisdiction of courts.
- The Austrian Code of Civil Procedure sets out the rules for contentious proceedings before civil courts and provides a framework for national and international arbitration proceedings.
- The Austrian Enforcement Code governs the enforcement of judgments as well as of arbitral awards and interim reliefs.

Even though Austria is a civil law jurisdiction, in practice thorough knowledge of the relevant case law remains essential, as it is the main source for the interpretation and application of the codified laws.

In addition, EU Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EuGVVO) may be relevant in cross-border cases taking place within the European Union (EU).

Bringing a claim - initial considerations

4 What key issues should a party consider before bringing a claim?

There are two key elements that should definitely be considered before filing a claim: the costs assessed against the backdrop of estimated duration of the proceedings and the probability of success. It is recommended that a party balance the estimated costs of court proceedings against the costs of an out-of-court settlement before submitting a

claim to court. If confidentiality is an issue, arbitration might be a good alternative to the ordinary court system.

It must be emphasised that there is no pre-action disclosure under Austrian law. A party intending to file a claim should therefore ascertain it has the evidence necessary to prove its claim as requests for evidence production during the proceedings are rather limited (especially compared to document-production possibilities in common law jurisdictions).

5 How is jurisdiction established?

Once a claim is filed with the court, the judge examines ex officio whether international, subject-matter and territorial jurisdiction exists. In doing so, the court solely relies on the information provided by the plaintiff unless the court already knows that the information provided is incorrect.

The question of international jurisdiction of Austrian courts is either governed by European law (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). 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. However, there are a number of alternative venues a plaintiff may choose in specific situations, and for some types of disputes certain courts do have exclusive jurisdiction.

In commercial matters district courts will be competent if the amount in dispute is lower than €15,000, and regional courts if the amount in dispute exceeds €15,000, or irrespective of the amount in dispute if certain matters, such as IP disputes, are concerned. Under both Austrian and European legal provisions, parties can – and often do – agree on a choice of forum in commercial matters. However, the validity of choice of forum clauses is restricted if consumers are involved.

After assessing all claims and documents a court decides on its jurisdiction; legal remedies can be brought against this decision, mostly in connection with remedies against the final decision.

In general, any objection against the jurisdiction of a court might be possible, for example the existence of an arbitration agreement or clause, lack of international jurisdiction, lack of *ratione loci* or *ratione materiae* (or both). These objections will be assessed in the course of the proceedings.

6 Res judicata: is preclusion applicable, and if so how?

Rules on preclusion are codified in article 411 of the Austrian Code of Civil Procedure. The European Lugano Convention and the EuGVVO determine the recognition and enforcement of decisions of courts in EU member states. If a decision has been made within the EU, a second claim concerning the same subject matter between the same parties would be dismissed. Judgments passed by courts of non-EU member states only have *res judicata* effect if they are recognised in Austria.

7 In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

In general, Austrian and European conflict of law rules acknowledge choice of law agreements. Austrian law applies without question if both parties are domiciled in Austria and no choice of law exists. In case of commercial disputes with a cross-border element, the applicable law in

question is either governed by Austrian rules on conflict of laws – provided that Austria’s jurisdiction is given and no choice of law exists – or European regulations.

If at least one of the contracting parties is domiciled in an EU member state, the Rome I and II Regulations determine the applicable law with respect to contractual and non-contractual obligations (such as claims for damages or unjustified enrichment) in civil and commercial matters. Outside the scope of EU law, the Austrian Act on International Private Law provides an answer to the issue of applicable law.

8 What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves ‘judgment proof’?

According to the Austrian Enforcement Act, it is possible to seek preliminary injunctions to safeguard one’s claims by accelerated preliminary proceedings. Parties can apply for preliminary injunctions before the beginning, but also in the course of, the proceedings. Whereas these measures are usually taken by the claimant, it is also possible that along with the preliminary injunction the claimant might be obliged to deposit a security fee, due to the financial risks the defendant faces through the preliminary injunction.

The only legal opportunity to become ‘judgment proof’ is an insolvency; however, deliberate insolvency might lead to criminal proceedings.

9 When is it appropriate for a claimant to consider obtaining an order freezing a defendant’s assets? What are the preconditions and other considerations?

A temporary injunction may be issued if the claimant can prove that there is a probable risk of confiscation of assets. Further possibilities include bans on exploitation and encumbrance. The prerequisite for these measures is the risk of imminent irreparable damage or the thwarting or complicating of the assertion of the claim. A possible and common step to safeguard assets is the preliminary injunction (see question 11).

10 Are there requirements for pre-action conduct and what are the consequences of non-compliance?

There are no legal requirements to initiate any pre-action procedures regarding civil and commercial disputes. However, it is recommended and common practice to request a debtor to fulfil its obligations before commencing legal proceedings. This is because 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.

11 What other forms of interim relief can be sought?

In order to prevent imminent danger of irretrievable damage to the claimant, Austrian courts may issue preliminary injunctions before or during litigation. 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 movable assets, an order prohibiting the selling of movable property or an order prohibiting the transferring or encumbering of immovable property. Regarding securing claims for specific performance or rights, measures – 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. Furthermore, it is possible to 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.

12 Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

There is no mandatory mediation or alternative dispute resolution (ADR) mechanism for general commercial matters. However, according to article 258 of the Austrian Civil Procedure Code, in the course of the first hearing the judge will inform the parties about the possibility to settle their dispute and, if the parties are in agreement, the judge will usually try to settle it in this initial hearing.

13 Are there different considerations for claims against natural persons as opposed to corporations?

In order to file a claim against a legal person and in particular a corporation, the claimant must gather essential information about the corporation. This information includes, inter alia, the identity of the legal representatives and the place of incorporation. It is advisable to obtain an extract from the commercial register before filing a claim against a company.

In Austria, natural persons as well as legal entities do have legal capacity. In cases of partnerships (ie, GesbR, KG, OG), the partners themselves – not the partnership, in contrast to legal entities possessing legal personality – may be held liable directly.

14 Are any of the considerations different for class actions, multi-party or group litigations?

Austrian law provides for a specific type of collective redress that is different from typical class actions. The ‘Austrian class action’ operates indirectly through the medium of a third party, to which the multiple claimants will assign their respective claims. This third party is usually a specific association, such as the Consumer Information Association or the Chamber of Employees. Once this association is vested with the rights to bring the claim, that third party will start one proceeding on behalf of the assignors against a single defendant.

That being said, Austrian law prohibits other forms of class actions due to the fact that only a party which has *ius standi* may act as a plaintiff in a proceeding. Against the background of EU recommendations and various consumer-related scandals, a working group is currently studying the possibility of reforming Austria’s current collective redress system.

15 What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Third-party funding is getting more common and has been explicitly approved by the Austrian Supreme Court. There are, however, no statutory rules governing third-party funding. Therefore, there are no restrictions as to arrangements between funders and litigants and there is no obligation to disclose a funding arrangement. Certain restrictions might 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.

The claim

16 How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Proceedings are initiated by submitting a statement of claim directly to the court of first instance. An action is officially pending upon receipt by the competent court. Nowadays, claims (and other documents) are usually submitted to the competent court via an electronic communication system. Legal professionals have been obliged to use such a system since 1 July 2007.

The statement of claim has to be written in German and must, at least, contain the following requirements:

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

In addition, all documents necessary to support the alleged facts need to be attached to the pleadings. The length of written pleadings varies greatly from case to case. It should be noted that with respect to monetary claims up to €75,000 a simplified procedure is mandatory, where the claimant simply has to fill out a standardised template (as a statement of claim), on receipt of which the court will issue a payment order.

17 How are claims served on foreign parties?

In the European context, the service of judicial and extrajudicial documents is governed by EU Regulation No 1393/2007 (which, inter alia, provides for direct service, service by postal services or transmission by consular or diplomatic agencies).

Service of claims outside of Austria is executed in accordance with the provisions of the relevant bilateral or multilateral agreements applicable between Austria and the relevant state. Service to international organisations or foreigners enjoying immunities under international law is to be executed with the mandatory assistance of the Austrian Ministry of Foreign Affairs.

18 What are the key causes of action that typically arise in commercial litigation?

Breach of contract is one of the main causes of commercial litigation, especially relating to disruptions in performance.

19 Under what circumstances can amendments to claims be made?

Amendments to claims are admissible as long as the legal prerequisites for bringing the claims remain unaffected. An amendment may be introduced until the closing of the hearing of first instance, either by a written submission or by an oral presentation during the hearing. As long as a proceeding is pending (ie, when the claim has been served upon the defendant), the claimant can freely amend his or her pleadings. Afterwards, any amendment requires the consent of the defendant. However, it is possible to substitute the required consent of the defendant by that of the court if it is expedient to do so and the amendment doesn't affect the court's competence. Austrian courts tend to adopt a rather liberal approach in this respect and generally tend to agree to amendments.

20 What remedies are available to a claimant in your jurisdiction?

A claimant may file a claim for:

- performance – the defendant shall be obliged to perform, tolerate or cease and desist something;
- declaration – the existence or non-existence of a legal relationship or a right shall be determined by the court; and
- establishing, amending or repealing a legal relationship.

21 What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

In general, as a principle of Austrian law, a party may not be put in a more favourable position by the award of damages. Hence, there are no punitive damages in Austria. Pure financial losses and – under certain circumstances – futile expenses may be recoverable. Non-material damages can only be compensated if explicitly provided for by law (eg, damages for pain and suffering).

Responding to the claim

22 What steps are open to a defendant in the early part of a case?

After having received a statement of claim, the court serves the claim on the defendant together with an order to file a statement of defence, within four weeks following the service. A defendant may file for an early dismissal of the claim, if the claim is already time-barred or inconclusive, or if procedural requirements are missing (ie, lack of jurisdiction).

In general, the first step in responding to a claim is the written defence. The defendant can include all relevant information that supports its position, and whether it is directed towards rejection (on formal or material grounds) or merely reduction of the claim. It is also possible for the defendant to raise a counterclaim, in which they can dispute the cause of action but also the amount claimed by the claimant.

In a case where the defendant brings an independent claim before the same court against the same claimant, and that claim is closely connected to the initial claim brought against them by the claimant, they can file a counterclaim.

In the written defence, the defendant may also bring forward a claim for set-off.

If the defendant fails to present a defence to the claim brought against them, the court may issue a default judgment.

23 How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

A statement of defence needs to be filed within four weeks of service of the statement of claim. If the defendant misses this four-week deadline, the plaintiff may request a default judgment. In proceedings at the district-court level, a simplified procedure applies and a statement of defence is not required.

In general, a statement of defence contains the counterarguments to the statement of claim and therefore needs to fulfil roughly the same criteria as a statement of claim (eg, signed by an attorney).

The statement of defence also needs to contain the defendant's specific request (such as a dismissal or reduction of the plaintiff's claim), supported by all relevant legal and factual elements which underpin such objections and requests, as well as an identification of the evidence that the defendant wishes to present to the court.

Please note that the defendant can raise jurisdictional objections solely at the stage of its statement of defence, while other types of objections can be raised at a later stage.

24 Under what circumstances may a defendant change a defence at a later stage in the proceedings?

It is possible to add new arguments up to the closing of the oral procedure.

Afterwards, it is no longer allowed that new evidence be presented. Settled case law, however, does allow amendments to further prove (or rebut) procedural violations. Conversely, new legal arguments brought in support of a claim are allowed at any time.

25 How can a defendant establish the passing on or sharing of liability?

In general, Austrian law does not provide any mechanisms by which a defendant can pass on liability to a third party.

The right to participate in legal proceedings is tied to one's legal interest (*jus standi*). Once a defendant thinks a third party is liable and it can take recourse against this party, the defendant can serve a third-party notice. Thus, the third party has to decide whether it wants to join the pending proceedings. If the third party refuses to join the proceedings, the judgment regarding the claimant's and defendant's proceedings will also be binding in a subsequent proceeding between the defendant and the third party.

26 How can a defendant avoid trial?

Motions to dismiss a claim or jurisdictional objections are usually filed with the statement of defence submitted in answer to the statement of claim.

Additionally, it is possible to settle a dispute both in court as well as out of court. Out-of-court settlements can be made through mediation or other means of amicable dispute resolution. Both in-court settlements and out-of-court settlements (as long as they are certified by a notary public) are enforceable like a judgment.

27 What happens in the case of a no-show or if no defence is offered?

If any party fails to file a legal document, such as a statement of defence, within due time or fails to attend a scheduled hearing, the other party may request the court to issue a default judgment.

In case of an unforeseen or inevitable event, a party may, within 14 days, file for *restitutio in integrum*. Concurrently, the party needs to execute the omitted act.

28 Can a defendant claim security for costs? If so, what form of security can be provided?

If a foreign party initiates legal proceedings before an Austrian civil court, the respective (domestic) 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, this does not apply if the (foreign) claimant has its domicile in Austria or if the decision on costs of the Austrian court is enforceable in the claimant's state of residence.

Moreover, all claimants who are citizens of EU member states are exempt from the security for costs provision due to the principle of non-discrimination of EU citizens.

The defendant must submit an application for security for costs before it makes further submissions on the merits of the claim.

Progressing the case

29 What is the typical sequence of procedural steps in commercial litigation in this country?

After a claim has been filed and served on the defendant, he or she may submit an answer in the form of a statement of defence if disputing the claim.

Following the exchange of written submissions, an oral hearing will be scheduled, where all motions will be pleaded orally and where both parties and witnesses will be interrogated.

The judge then proceeds to close the oral hearing, and a judgment will either be rendered directly after the hearing or will be issued later in writing.

Within the allocated time limit, either party has the right to appeal the judgment.

As soon as a judgment becomes *res judicata*, it can be legally enforced.

30 Can additional parties be brought into a case after commencement?

An additional party may join an ongoing proceeding in support of the claimant or defendant, at any stage until a final judgment is rendered.

However, third-party intervention requires that the third party has a legal interest in the success of the joined party. In order to join a proceeding, the third party may file an application for joinder on its own or it may be formally invited to join by one of the main parties of the proceeding. A joinder needs to be approved by the court. The parties may request that a joinder is dismissed, but the court can nevertheless approve the joinder against the parties' will.

Austrian law distinguishes between two kinds of third-party intervention. If a third party has a mere legal interest in the outcome of a proceeding, the joining party's role is limited to assisting the joined 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 and the joined party are treated equally and have the same legal rights positions.

31 Can proceedings be consolidated or split?

Consolidation of two (or more) proceedings pending before the same court and involving the same parties is possible for cost- and time-saving reasons. A court's decision to consolidate proceedings cannot be appealed by the parties and may be revoked by the court at any time. Despite the consolidation, a final judgment may be announced separately for each of the proceedings once it is ready for decision. Otherwise, a joint judgment is rendered.

On the other hand, Austrian courts also have the authority to split proceedings in order to hear the claims separately, even though they were originally filed together.

32 How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

As a matter of principle, each party is responsible to allege and furnish proof for all facts and arguments supporting its submissions. Only in exceptional cases, Austrian substantive law provides for a reversal of the burden of proof or even sets out legal assumptions that render the provision of further proof obsolete.

The question of the applicable standard of proof is one of procedural law. Therefore, Austrian courts always apply Austrian rules on evidence.

Regarding the required standard of proof, a judge must be fully convinced of the truth of the factual allegations made. Proof is considered to be given if there is such a high degree of probability, tantamount to certainty, that any reasonable person familiar with the circumstances would not harbour any further doubts.

However, in certain cases the standard of proof is reduced and a mere attestation of trust will be sufficient – meaning that the judge

must merely be convinced of the preponderant probability of a certain factual allegation.

33 How does a court decide what judgments, remedies and orders it will issue?

The Austrian Code of Civil Procedure distinguishes between two types of decisions: judgments and court orders. Any decision concerning the merits of a claim will be issued in the form of a judgment rendered on behalf of the Republic of Austria; all other decisions that do not have to be rendered in the form of a judgment are court orders.

However, certain exemptions to this rule exist. For instance, in proceedings that are not governed by the Austrian Code of Civil Procedure (such as enforcement proceedings or insolvency proceedings) decisions on the merits are also issued in the form of orders.

34 How is witness, documentary and expert evidence dealt with?

As a principle rule, evidence is taken only during the course of the litigation, not before. The taking of evidence is conducted by the court during the oral hearing and the court freely evaluates the provided evidence. 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. Evidence obtained through illegal means (eg, unauthorised eavesdropping) is, in principle, admissible.

Witnesses as well as parties need to testify orally before the court. Depositions, written witness statements or affidavits are not permitted. Unlike in other legal systems, witness preparation is not common in Austria.

Usually the judge may instruct parties to produce certain evidence. 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.

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. In practice, judges tend to rely (too) heavily on expert opinions, especially in complex litigation.

35 How does the court deal with large volumes of commercial or technical evidence?

There are no specific rules regarding the court's dealings with large volumes of evidence. Frequently, courts will take the necessary time to review and evaluate the evidence as far as it is considered relevant. If the court has to deal with advanced commercial or technical evidence, it may consult an expert.

36 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Although EU Regulation No. 1206/2001 has facilitated the taking of evidence abroad, there is no authority to force foreign witnesses to testify before Austrian courts.

In case of an extradition treaty with the foreign state, the accused person may be extradited, but this does not apply to witnesses.

If a summons is served to a foreigner, the procedural disadvantages may be stressed in case of absence, but penalties or other disadvantages – such as bringing the person to court – need not be feared.

37 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Duly summoned witnesses are obliged to appear, to testify and to tell the truth before the court. Failing to do so can result in fines or imprisonment, or both. The judge takes the lead in examining witnesses and questions every witness individually and in the absence of other witnesses. Thereafter, the parties or their legal representatives have the opportunity to ask further questions.

Contradicting witnesses may be confronted with each other. A witness may refuse to answer a question, if the answer would cause reputational or financial harm for the witness himself or close relatives. In certain cases, a witness may testify in front of a delegate judge or use video conferencing.

Opinions rendered by court-appointed experts are considered to be a specific kind of evidence under Austrian law. Reports submitted by party-appointed experts are permitted as well, but do not have the same status as opinions rendered by court-appointed experts. According to most recent case law, opinions by party-appointed experts are insofar relevant as court-appointed experts have to deal with their findings in their own reports.

38 How long do the proceedings typically last, and in what circumstances can they be expedited?

The average duration of first instance proceedings at the district court level is six months, and 13 months at the regional court level. Just around 2 per cent of civil proceedings take more than three years. The parties have no remedies for expediting the procedure.

If the plaintiff is only entitled to a payment of up to €75,000, the court will issue an order for payment without a detailed examination of the facts. This ensures a faster and cheaper procedure for the creditor. Only about 10 per cent of these actions are appealed.

39 What other steps can a party take during proceedings to achieve tactical advantage in a case?

Austrian procedural law does not leave much scope for means to gain tactical advantages unless the other party makes mistakes. Default judgments are only issued if the defendant does not appear for a hearing. Summary judgments do not exist in Austria.

40 If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

As a consequence of the loser pays principle, court proceedings entail a considerable cost risk for the parties. If a litigation funder is involved this may have an impact on the duration and final costs, and actually some cases could not even be tried without third-party funding.

41 How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

In the light of procedural economy the court shall combine proceedings for simultaneous hearings and judgments. Due to the binding effect, civil proceedings can be interrupted if another proceeding (including criminal) is dealing with a preliminary question.

In addition, there are adhesion procedures in which private-law claims are decided in criminal proceedings at the request of the legitimate party. It reduces costs, risks and duration for the claimant.

Trial

42 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

Usually there is an exchange of written pleadings in preparation for the oral hearing, which is typically divided over a couple of hearing dates. Civil litigations last on average six months at district courts and 13 months at regional courts. The length of commercial proceedings of course depends on the complexity of the case. However, Austrian courts are among the fastest in the EU.

43 Are jury trials the norm, and can they be denied?

In Austria, there are no jury trials in complex commercial litigation; jury trials are limited to criminal trials. In general, civil trials are conducted and decided by a single judge. In disputes exceeding €100,000 combined with the request of one party or in appeal procedures, cases are handled by a panel of judges (usually three judges).

44 How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Court files and documents are only available to the parties of a proceeding and not to the public. Court hearings are generally open to the public.

However, the public may be excluded from a hearing for certain reasons, eg in order to protect privacy or business secrets but only if one party submits a request in that regard.

In addition, witnesses have the right to refuse to testify orally in court when called upon for their testimonies whenever such refusal aims at preserving business secrets.

45 How is media interest dealt with? Is the media ever ordered not to report on certain information?

It is prohibited to make film or sound recordings during hearings of Austrian courts, but representatives of the press are allowed to attend court hearings.

46 How are monetary claims valued and proved?

Usually the assessment of damages takes place at the same time as the trial of the merits. There is, however, the possibility to first decide on the basis of the claim and only then rule on the amount of the claim ('action by stages').

The judge usually decides on the amount of the claim and is limited to the parties' requests in that regard. The judge can ex officio order an expert witness to provide their opinions, or parties can request expert opinions, concerning the value of the claim. Even though in practice judges do follow expert opinions in general, they are not obliged to.

Post-trial

47 How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Under Austrian law, the winning party is entitled to 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 partial reimbursement. The decision on costs is an integral part of the court's final decision and can be contested separately.

While all judgments are structured the same way – consisting of the verdict (including a decision on costs) and the decision-making rationale (including the established facts of the case, assessment of evidence, and legal assessment of the case) – their length can vary considerably.

Anonymised judgments rendered by the Austrian Supreme Court (and sometimes by lower courts as well) are published on the website of the Austrian legal information database at www.ris.bka.gv.at.

48 When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

The Austrian Code of Civil Procedure provides for two appeal levels. Firstly, to the respective court of appeals, and secondly, to the Austrian Supreme Court. A party may file an appeal against the judgment of a court of first instance within four weeks after said judgment has been served. Depending on which court has decided in the first place, the competent court of appeal is either a regional court or a higher regional court. The opposing party may file a response within four weeks of the appeal being served.

A party may file a second appeal against the decision of the appellate court to the Supreme Court within four weeks after service of said decision, if a substantial matter is given. This is the case 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 Court's existing decision-making practice. Again, the opposing party may respond to this second appeal within four weeks.

In principle, a party may file a complaint and even a second complaint against a court order. However, certain court orders can only be contested in conjunction with an appeal against the rendered judgment, while some cannot be appealed against at all. Complaints usually have to be filed within 14 days after service. As is the situation with second appeals, a second complaint to the Supreme Court is limited to substantial matters.

49 How enforceable internationally are judgments from the courts in your jurisdiction?

Within the EU, domestic judgments in commercial and civil matters are enforceable even without an exequatur proceeding due to the EuGVVO, which governs the enforcement of judgments of other EU member states. The recognition of domestic judgments outside the EU depends on bilateral or multilateral treaties that guarantee mutual enforceability.

50 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

Recognition and enforcement of foreign judgments are regulated in the Austrian Enforcement Code, in EU Regulations and in bilateral and multilateral treaties. The enforcement of judgments rendered in an EU member state does not require a separate declaration of enforceability and is subject to the same conditions as Austrian judgments.

Judgments rendered in Switzerland, Norway and 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.

Outside the scope of the EU and EFTA, the enforcement of foreign judgments requires a formal declaration of enforceability (exequatur proceeding). Such a 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.

Other considerations**51 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?**

The Austrian state courts rank amongst the most efficient in the European Union. This, combined with relatively moderate court fees (calculated by reference to the amount in dispute and capped at 1.2 per cent where the amount in dispute is exceptionally high), makes litigation an accessible dispute resolution tool.

Moreover, Austria has a well-tested e-government system in place. As far as the Austrian judiciary is concerned, court filings are made electronically (with very rare exceptions owing to document file sizes) and Austrian attorneys and notaries are even under a legal obligation to communicate with the courts exclusively via the electronic filing system WebERV. WebERV was first introduced in 2007.

As for the future, an increase in the use of technological tools in the preparation and conduct of proceedings, such as 3D animation tools or virtual-reality devices, is expected so as to allow for a more interactive scrutiny of the evidence, eg in construction litigation.

The database on insolvencies (www.edikte.justiz.gv.at) can be accessed for free and publishes insolvency proceedings, court auctions, decrees derived from penal and civil cases, notifications, publications and documents served, coercive court administration, voluntary sales offers, company publications and a list of mediators, sequestrations and courts.

Moreover, mandatory publications are made available through this database: recently, such edicts particularly concerning the Safekeeping and Seizure Act, as well as the publication of merger agreements and spin-off plans.

52 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

There is only very limited flexibility in Austrian state courts regarding the use of foreign languages, in particular English. While there are, of course, judges who have an excellent command of foreign languages, the Code of Civil Procedure requires that the proceedings are conducted exclusively in German.

This results in the involvement of professional translators/interpreters, which regularly contributes to elevated procedural costs in litigation proceedings involving a foreign party.

53 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

Many aspects have to be considered on an individual case-by-case basis before filing a claim, as well as during procedure.



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