



# The Legal 500 Country Comparative Guides

## Austria: Litigation

This country-specific Q&A provides an overview to litigation laws and regulations that may occur in Austria.

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## 1. What are the main methods of resolving commercial disputes?

The Austrian legal system provides two main dispute resolution methods: the ordinary court system and arbitration. In addition, other forms of alternative dispute resolution, in particular mediation, are also possible means for resolving commercial disputes.

## 2. What are the main procedural rules governing commercial litigation?

Commercial litigation is primarily governed by the following three sets of procedural rules:

- The Austrian Jurisdiction Act ("*Jurisdiktionsnorm*") determines the organisation and jurisdiction of courts.
- The Austrian Code of Civil Procedure ("*Zivilprozessordnung*") sets out the rules for contentious proceedings in civil courts and provides a framework for national and international arbitration.
- The Austrian Enforcement Code ("*Exekutionsordnung*") determines the enforcement of judgments as well as of arbitral awards and preliminary remedies.

## 3. What is the structure and organisation of local courts dealing with commercial claims? What is the final court of appeal?

In general, the Austrian civil court system has three instances. In the first instance, the competent court for civil and commercial disputes is either a district court ("*Bezirksgericht*") or a regional court ("*Landesgericht*") depending on the subject-matter and the value in dispute. It should be noted that commercial disputes are governed by the same procedural rules as civil law disputes.

District courts have jurisdiction in cases involving a value in dispute of up to EUR 15,000. Regional courts have jurisdiction over disputes exceeding EUR 15,000 as well as in all competition or intellectual property matters and with regard to specific statutes such as the Data Protection Act, irrespective of the amount in dispute.

In Vienna, two specialised commercial courts exist. One is the Commercial District Court Vienna and the other, the Commercial Court Vienna as regional court for commercial matters. Outside of Vienna, the above-mentioned ordinary courts decide as commercial courts.

Judgments of first instance may be appealed to either regional or higher regional courts depending on whether a district or regional court decided in the first place. A further appeal against that decision to the Austrian Supreme Court ("*Oberste Gerichtshof*") is possible in limited circumstances (for more information please see question 17 below).

## 4. How long does it typically take from commencing proceedings to get to trial?

In Austria, a trial starts with a preparatory hearing ("*vorbereitende Tagsatzung*"), in which the judge usually maps out a plan for the timing and content of the proceeding and elaborates possibilities for a settlement with the parties. The law sets no fixed timeline for proceedings and it is for the court to schedule oral hearings. Usually, it takes two to six months from the initiation of a process (i.e. the filing of a claim with the competent court) before a preparatory hearing is held, depending on available capacities.

**5. Are hearings held in public and are documents filed at court available to the public? Are there any exceptions?**

Court files and documents are only available to the parties of a proceeding and not to the public. Court hearings are in general open to the public. However, the public may be excluded from a hearing for certain reasons, e.g. in order to protect privacy or business secrets.

The Austrian Constitutional Court established in its case law the right to access the judgements rendered by the Austrian Supreme Court because of its importance for remedies. Those judgements (and sometimes judgements by the lower courts as well) are anonymised and published on the website of the Austrian legal information database (RIS) on [www.ris.bka.gv.at](http://www.ris.bka.gv.at).

**6. What, if any, are the relevant limitation periods?**

Limitation periods are determined by substantive law, which provides for a limitation period of 30 years as a default rule if no special provisions stipulate otherwise. The most relevant limitation period is, however, three years; it applies to most civil law claims such as claims for damages, claims for specific performance and claims for the delivery of goods. It needs to be noted that a number of specific provisions sets out other limitation periods.

The statute of limitations generally commences when a right could have been first exercised (e.g. for damage claims when the injured party becomes aware of the injuring party and the damage). Moreover, the statute of limitations is not observed ex officio, but must be pleaded by the defendant.

**7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?**

Generally, there are no legal requirements to initiate any pre-action procedures regarding commercial disputes. 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. 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.

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

#### **8. How are commercial proceedings commenced? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?**

Proceedings are initiated by submitting a statement of claim ("*Klage*") 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 as legal professions are obliged to use such system.

A claim has to be written in the German language and needs to contain the following minimum 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;
- the relief sought and the facts on which the relief sought is based.

A statement of claim may, but does not have to contain legal reasoning and it is not required to present evidence at this state.

After having received a claim, the court will examine whether the procedural minimum requirements for the hearing of a claim are met, and if so, will forward the claim to the defendant. Within Austria, claims are served by the court, usually via registered mail (or, once represented by a lawyer, via the mandatory electronic filing system that connects courts and law offices). Service outside of Austria is either governed by the EU regulation on the service of documents in civil or commercial matters (within the European Union) or by bilateral or multilateral agreements (outside of the European Union).

#### **9. How does the court determine whether it has jurisdiction over a claim?**

Once a claim is filed with the court, Austrian courts examine on their own motion whether international, subject-matter and territorial jurisdiction exists. In doing so, the court solely relies on the information provided by the plaintiff in the claim, unless the court already knows that the provided data 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, exclusive jurisdiction of certain courts exists. As already set out above under question 3, in commercial matters district courts will be competent if the amount in dispute is lower than EUR 15,000, and regional courts if the amount in dispute exceeds EUR 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. It is important to note that the validity of choice of forum clauses is restricted if consumers are involved.

#### **10. How does the court determine what law will apply to the claims?**

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 or European regulations; provided that Austrian jurisdiction is given and no choice of law exists.

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 ("*Internationales Privatrechtsgesetz*") provides an answer to the issue of applicable law.

#### **11. In what circumstances, if any, can claims be disposed of without a full trial?**

A court might dismiss a statement of claim ex officio before a hearing on the merits of the case takes place, if the claim lacks the procedural minimum requirements for a trial, such as jurisdiction of the court, the capacity of the parties to sue and be sued and the formal requirements of a statement of claim. Moreover, a defendant may file for an early dismissal, if the claim is already time-barred, inconclusive, or if procedural requirements are missing (i.e. lack of jurisdiction).

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

A simplified procedure applies with respect to monetary claims up to EUR 75,000

(*Mahnverfahren*). The plaintiff simply has to fill out a standardized form (as a statement of claim), on the basis of which the court then issues a payment order. The defendant has the choice to either pay the claimed amount or to raise an objection within four weeks of service of the payment order. If the defendant objects in due time, the payment order will be set aside and an ordinary proceeding will be initiated. However, if the defendant does not raise a valid objection, the payment order becomes binding and enforceable (like a final judgment) without any prior hearing on the merits of the case.

Moreover, under certain circumstances, the court may render interim and partial judgments during the course of a main proceeding. Additionally, a proceeding ends without a judgment on the merits if an amicable settlement is reached during an ongoing proceeding.

## 12. **What, if any, are the main types of interim remedies available?**

Austrian courts may grant preliminary injunctions in order to protect the enforceability of a claim or to protect a party from irreparable harm. The endangered party might file for a preliminary injunction together with the claim initiating a legal proceeding, or before the start or in the course of a pending proceeding.

The Austrian Enforcement Act distinguishes the following types of preliminary injunctions:

- to secure a monetary claim;
- to secure other claims; and
- to secure a right or a legal relationship.

In order 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 for putting immovable property under administration; and
- prohibition on transferring or mortgaging immovable property.

With regard to injunctions for securing other claims 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.

Austrian courts may 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.

## 13. **After a claim has been commenced, what written documents must (or can) the**

## **parties submit and what is the usual timetable?**

After having received a statement of claim by the plaintiff, the competent court serves the claim on the defendant together with an order to file a statement of defense within four weeks after service ("*Klagebeantwortung*"). If the defendant misses this four-week period, the plaintiff may request a default judgment. In proceedings at district-court level, a simplified procedure applies and a statement of defense is not required.

As a next step before the oral hearing(s), both parties have the possibility to submit further written statements in order to support their position until one week before the preparatory hearing takes place. Thereafter, the court may order the parties to submit further statements or to provide additional information if necessary.

As already outlined under question 11 above, a simplified procedure applies with respect to monetary claims up to EUR 75,000 (*Mahnverfahren*). The plaintiff simply has to fill out a standardized form (as a statement of claim), on the basis of which the court then issues a payment order. The defendant has the choice to either pay the claimed amount or to raise an objection within four weeks of service of the payment order. Objections against a payment order exceeding EUR 15,000 need to be in writing and must contain the elements of a statement of defense. In proceedings with an amount in dispute not exceeding EUR 15,000 (district-court level), an objection requires no reasoning and can be made orally before the court. If a valid objection is raised, the payment order will be set aside and an ordinary proceeding will be initiated, which means that a preparatory hearing will be scheduled. However, if the defendant does not raise a valid objection within due time, the payment order becomes binding and enforceable (like a final judgment).

## **14. What, if any, are the rules for disclosure of documents? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?**

In general, there are no pre-trial discovery proceedings in Austria as the production of documents and taking of evidence takes place in the course of the proceedings.

The court may order the production of a specific document by a party under limited circumstances. A party submitting a document request to the court has to present reasons as to why the document is in possession of the other party and what exactly it aims to prove with the requested document. General requests for handing over a certain category of documents are not permitted.

In a nutshell, a party is obliged to disclose and produce a specific document to the other party if there is an obligation to hand over said document under substantive law. A party may object the production of a document in order to protect itself or third parties from criminal prosecution, to protect family affairs or business secrets or to protect itself from being publicly ashamed.

However, a party in possession of a document cannot object its disclosure and production at all, if the party

- has expressly referred to the document in question as evidence for its own factual allegations during the proceedings;
- is obliged to hand over the respective documents under civil law provisions; or if
- the document is a so-called common document, a document, which records a mutual agreement between or was drafted in the interest of both parties.

Moreover, third-parties are also obliged to provide a specific document if either substantive law requires the third party to hand over the requested document, or if the document is considered to be of joint use to the parties, e.g. a contract. In all other cases, a third-party does not have to disclose documents in its possession.

**15. How is witness evidence dealt with in commercial litigation (and, in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?**

As a principle rule, evidence is taken only during the course of the litigation, not before. Therefore, witnesses as well as parties need to testify orally before the court. Depositions, written witness statements or affidavits are not permitted. It needs to be noted that Austrian law distinguishes between witness testimony and the testimony of parties as certain rules regarding the hearing of witnesses do not apply to the hearing of parties.

If called as witness, witnesses are obliged to appear, to testify and to tell the truth before the court. Failing to do so can result in fines and/or imprisonment being imposed. 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 are given 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. In certain cases, a witness may testify in front of a delegate judge or the use of video conferencing might be allowed. Moreover, the rules on the safeguarding of evidence provide that a witness may be heard already before the oral hearing(s) if the questioning of that witness might become very difficult or impossible at a later stage.

Unlike in other legal systems, witness preparation is not common in Austria. Austrian attorneys may have contact with witnesses before and during proceedings, but each form of “inadmissible influence” is prohibited, especially witness intimidation. Attorneys are therefore recommended to seek as little contact as possible with witnesses in order to avoid the appearance of undue influence and potential ethic charges.

**16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the**

## **court or the parties and what duties do they owe?**

Expert evidence plays a crucial role in Austrian litigation. It is for the court to decide whether expert evidence is required and to select and appoint a suited person as expert. However, the parties have an opportunity to state their views regarding the appointment of an expert. Reports rendered by court-appointed experts are considered to be a specific kind of evidence under Austrian law. Nonetheless, reports submitted by party-appointed experts are permitted as well, but do not have the same status as reports rendered by court-appointed experts. This difference can be seen, if the reports differ regarding the outcome, the court can rely without any further assessment on the court-appointed expert report. However, if it is not convinced by the court-appointed expert report, it cannot rely on the party-appointed report. Consequently, it has to appoint another court-appointed expert for a report. It is important to note that according to most recent case law, conclusions by party-appointed experts are insofar relevant as court-appointed experts have to deal with their findings in their own reports

Court-appointed experts function as assistants to the judge. They primarily owe a duty to the court and need to be impartial. Moreover, court-appointed experts can be rejected on the same grounds as judges (e.g. because of a lack of impartiality). The judge poses a set of questions to the appointed expert and instructs him or her with the delivery of a report within a certain time. 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 reports, especially in complex litigation.

### **17. Can final and interim decisions be appealed? If so, to which court(s) and within what timescale?**

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 ordinary appeal ("*Berufung*") 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 appeals is either a regional court or a higher regional court. The opposing party may file a response within four weeks of being served with the appeal.

A party may file a second appeal ("*Revision*") against the decision of an appellate court to the Supreme Court within four weeks after service, 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 Courts' 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 ("*Rekurs*") or a second complaint

("Revisionsrekurs") against a court order other than a judgment ("Beschluss"). 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. Like second appeals, a second complaint to the Supreme Court is limited to substantial matters.

An interlocutory injunction may be set aside by a complaint or an objection, which has to be filed within 14 days after service.

Other requests for relief from court decisions are known as extraordinary remedies (such as actions for annulment or actions for the reopening of proceedings).

## **18. What are the rules governing enforcement of foreign judgments?**

Recognition and enforcement of foreign judgments is regulated in the Austrian Enforcement Code and in bilateral and multilateral treaties. The most relevant instrument for the enforcement of foreign judgments in commercial and civil matters is the Brussels Regulation (EU-Regulation 1215/2012), which governs the enforcement of judgments of other EU member states. The 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. Judgements 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.

## **19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side?**

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 only partial reimbursement. Reimbursement is granted for court fees, expenses (such as fees for interpreters and witnesses or the parties' travelling expenses etc.) 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.

**20. What, if any, are the collective redress (e.g. class action) mechanisms?**

Austrian law provides for a kind of group litigation that differs from typical class action concepts like in the United States. The “Austrian type of class action” allows multiple claimants to assign their claim to a third party, usually a specific association such as the Consumer Information Association or the Chamber of Employees, with the intention that said organisation raises these claims in one lawsuit on behalf of the assignors against a single defendant.

That being said, Austrian law prohibits other forms of class actions, because only a party that has a substantive claim may act as a plaintiff in a proceeding. Against the background of EU recommendations and various consumer-related scandals, it is an ongoing discussion to reform Austria’s current collective redress system.

**21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings?**

Third-party intervention is possible, if 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 initiative 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. A joinder is possible at any stage of a proceeding until a final judgment is rendered.

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 position.

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 courts’ 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 ripe for decision. Otherwise, a joint judgment is rendered.

**22. Are third parties allowed to fund litigation? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?**

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 lawyers act as third-party funders since contingency and conditional fee arrangements (*pactum de quota litis*), which give a part of the proceeds to the lawyer, are prohibited between lawyers and clients under Austrian law.

**23. What, in your opinion, is the main advantage and the main disadvantage of litigating international commercial disputes?**

The Austrian state courts rank amongst the most efficient in the European Union. The average duration of first instance proceedings with cross-border implications at the district court level is 6 -12 months. This, combined with relatively moderate court fees (calculated by reference to the amount in dispute and capped at 1.2% where the amount in dispute is exceptionally high), makes litigation an accessible dispute resolution tool. On the negative side, there is only limited flexibility on the part of the Austrian state courts as regards 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. The resulting need to involve professional translation/interpretation service providers regularly contributes to elevated procedural costs in litigation proceedings involving a foreign party.

**24. What, in your opinion, is the most likely growth area for disputes for the next five years?**

In our opinion, the most likely growth areas lie in the fields of construction as well as banking and insurance. Due to the COVID-19 pandemic, we also experience a rise in disputes connected to corporate financial crisis.

**25. What, in your opinion, will be the impact of technology on commercial litigation in the next five years?**

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 owed to document file sizes) and Austrian attorneys and notaries public are even under a legal obligation to communicate with the courts exclusively via the electronic filing system "WebERV" (*web-basierter elektronische Rechtsverkehr*). WebERV was first introduced in 2007. As for the future, we may expect an increase in the use of technological tools in the preparation and conduct of proceedings, such as 3D animation tools or virtual reality devices to allow for a more interactive scrutiny of the evidence, e.g. in construction litigation.

**26. How have the courts in your jurisdiction dealt with the COVID-19 pandemic and have you seen particular types of disputes arise as a result of the pandemic?**

The COVID-19 pandemic has put a strangle hold on economic and public life in Austria. Similar to other countries, Austria has adopted rigorous measures to curb the spread of the

outbreak, including an effective suspension on most legal actions and court proceedings.

In March 2020, the 2. COVID-19 Law came into force, inter alia addressing judicial deadlines. Effective immediately, procedural deadlines were suspended until 30 April 2020, commencing anew from 1 May 2020. Material deadlines were interrupted until 30 April 2020 and restarted on 1 May 2020. In addition, the COVID-19 pandemic put a three months *de facto* halt on all proceedings.

In May 2020, courts resumed to hold hearings. However, because of strict safety regulations issued to prevent a further spread of COVID-19, there are not enough court rooms available as in many venues the legal requirements can simply not be fulfilled. As a result, provided the parties' consent, judges resort to hold hearings via Zoom or use sufficiently large conference rooms in law firms. However, we see a substantial backlog in cases and expect the Austrian court system to take months or even years to make up for the loss in time.

Due to the COVID-19 pandemic, we currently experience a rise in disputes connected to corporate financial crisis. Examples are disputes arising from financial distress but also disputes connected to receiving state aid and government funding or ongoing construction projects. Existing and potential litigants not willing to wait for the courts to resume normal operations more and more consider alternative dispute resolution (ADR) services to resolve their disputes in a timelier manner.

We experience a consequential rise in demand for commercial arbitration as it provides a flexible but effective and expedited way to obtain a final and binding decision on a dispute and is, thus, especially suitable. There is also an increasing demand for mediation as it is a relatively inexpensive but particularly future-oriented dispute resolution method. The same applies to arbitration or litigation combined with mediation as these hybrid instruments enable the solution of preceding conflicts while simultaneously creating the basis for future co-operation.