The Dispute Resolution Review

Thirteenth Edition

Editor
Damian Taylor

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THE DISPUTE RESOLUTION REVIEW

THIRTEENTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 28 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully, as well as overcoming challenges that life and politics throw up along the way. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different from those closer to home.

Looking back over 2020 from my study at home (this will provide a clue to the theme of this Preface), I cast my eye over words I wrote in last year's Preface:

> *All this leaves me writing this preface five days before 'Brexit Day', after an exhausting 2019 in which clients have not known whether to plan for the 'May deal', 'No deal', 'Boris's deal', a referendum (on Brexit and/or Scottish independence), no Brexit, or the extensive nationalisation of private industries and tax rises outlined in Labour's manifesto.*

Not a word about a pandemic about to sweep across the globe.

If 2019 was the year of Brexit, this year was undoubtedly the year of covid-19; the year of lockdowns, tiers, furlough and, finally and thankfully, unprecedented mainstream media scrutiny of the safety and efficacy of various vaccines. Lives have tragically been lost and many more have suffered from covid-19-related illness. Restrictions on personal freedoms that would have been unthinkable this time last year have been imposed, relaxed and imposed again. In the UK, we have seen everything from virtual total lockdown to being encouraged to 'eat out to help out' as the government picked up half the bill to support the hospitality industry. Throughout this period of enormous change, the law, courts and tribunals have had to adapt to rapidly changing circumstances and, for the most part, have kept pace.

Perhaps the most noticeable change in the legal sector has been the move to online and home working, which has emphasised the need to have strong and reliable IT systems. We have seen disputes increase around force majeure and cancellation and termination clauses, and businesses have had more cause than usual to check their insurance arrangements. The latter development is best illustrated in the UK though the Financial Conduct Authority test case to determine the scope of cover afforded by business interruption insurance policies to businesses that were affected by covid-19 and a variety of government advice and restrictions, a case that saw your editor spend an uncomfortably hot British summer 'attending' court from home and promising he would never complain about being cramped in court again, so long as it had air conditioning. See Chapter 6 for further details of the case.

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The question on many lawyers' lips is 'will we ever go back to life as it was before?' Some firms confidently predict the end of the working week and office environment (giving up their leases in the process); others talk of offices becoming the 'hub' with flexible working 'spokes'; and yet others urge a return to the status quo. Certainly courts and tribunals will have learned a lot during the pandemic, not least that electronic filing and short remote hearings can be efficient; but perhaps also that even the best video link cannot replace the special atmosphere that lends something intangible, but of great importance, to live, physically present advocacy and testimony. Perhaps one of the best lessons learned is that if you don't try something, you won't know which parts work and which parts don't.

A last word has to go to Brexit, as the UK and EU agreed a deal at the end of the year with only days to spare. This will have a lasting impact on the legal and political relationship, much of which is explored in more depth in the updated Brexit chapter.

This 13th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate a continually evolving legal landscape responsive to both global and local developments.

As always, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies can be found in Appendix 1 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
Harpenden
January 2021

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Chapter 2

AUSTRIA

Dieter Heine and Michael Schloßgangl[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Austria is a federally organised democratic republic and consists of nine federal provinces divided into over 2,000 municipalities.

The federal principle determines the separation of tasks between the nine federal states and the entire state, both in terms of legislation and enforcement. The allocation of responsibilities is set out in the Austrian Constitution. Jurisdiction, as part of the execution of criminal as well as civil law matters, is the sole responsibility of the confederation. It was only for the interests of administrative matters that a separate administrative jurisdiction from that of the federal provinces was established in 2014.

The Austrian legal system is largely based on codified provisions. Although the jurisprudence of the highest courts is essential for the interpretation of individual provisions, judge-made law is not considered as an independent source of law. Even though the substantive provisions of civil law are scattered throughout a multitude of laws, the General Civil Code dating from 1812 is still the most important legislation.

In cases where it is considered necessary to assert a claim under private law, assistance by the civil courts is required due to the fact that self-help is, apart from in a few exceptions, generally prohibited.

However, court proceedings should be the *ultima ratio*, and opponents are well advised to work towards an out of court proceeding. In this context, alternative dispute resolution (ADR) procedures play an important part and are enjoying increasing popularity. Therefore, it is also worth mentioning that the Austrian Civil Law Mediation Act is considered a type of pioneer legislation in the European area. It came into force in 2004, whereas the European Directive on certain aspects of mediation in civil and commercial matters was only adopted in 2008.

Other provisions governing ADR procedures are contained in the Federal law on alternative dispute resolution in Consumer Affairs.

Additionally, Regulation (EU) No. 524/2013 concerning online dispute resolution in consumer affairs has to be taken into consideration. Undoubtedly, these dispute resolution mechanisms have great potential to become an impactful alternative to litigation.[2] Furthermore, specific regulations governing mediation, arbitration and conciliation around the Austrian legal landscape exist: these are dealt with extensively in Section VI.

---

1 Dieter Heine is a partner and Michael Schloßgangl is an associate at Vavrovsky Heine Marth Rechtsanwälte.

2 *Marianne Stegner*, 'Online dispute resolution: The future of consumer dispute resolution?', Jahrbuch International Arbitration 2017, 347 (360).

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It is well known that out of court discussions do not always lead to a satisfactory outcome for all parties involved, which is why courts are ultimately indispensable for a final assessment, mainly because the enforcement of claims lies within the competence of the state.

The Austrian jurisdiction distinguishes between ordinary courts and other courts. The ordinary courts consist of 115 district courts, 20 regional courts, four higher regional courts and the Supreme Court, the highest instance in matters of civil and criminal law cases. These also include one district court in the matter of commercial law, one commercial court and one labour and social court. All of these are situated in Vienna, deal with specific categories and have some exclusive competences. Outside Vienna, these particular substantive law matters are carried out either by the district or regional courts in a special court composition. For instance, the decisive senate at the labour and social court consists of a professional judge and two expert lay judges, commonly one as a representative on the employer side and one on the employee side.

The ordinary jurisdiction is responsible for all matters concerning civil claims unless these are not expressly referred by law to other authorities or bodies such as special courts or administrative authorities.[3]

Apart from the ordinary courts there are two different kinds of special courts in Austria: the special courts of public law and the special courts in the field of private law. The former consist of 11 administrative courts dealing with cases between citizens and a state authority, including a Federal Fiscal Court, a Federal Administrative Court and nine administrative courts, one in each federal state. Furthermore, there are two higher public courts of law: the Superior Administrative Court and the Constitutional Court. Together with the Supreme Court these are the three Austrian High Courts, whose decisions become final and mark the end of a legal dispute.

The second, special courts of private law, consist of arbitration courts. These can be subdivided into institutional arbitration courts and private or occasional arbitration courts.

II THE YEAR IN REVIEW

i Supreme Court obliges Facebook to delete specified hate speeches worldwide

This decision[4] is of considerable interest for several reasons. In its explanation, the Supreme Court states that a hate speech posting shared on the social media platform Facebook has to be deleted by Facebook itself, not only in Austria but worldwide, and not just the incriminated posting, but also postings that were verbatim and in the spirit of the incrimination.

In the main proceedings, a private Facebook service user posted an article – along with a photograph of the former Austrian politician Glawischnig – and made comments below with, according to the findings of the Court, insulting and offending statements that were a violation of her honour. This posting was accessible to everyone. Glawischnig urged Facebook to delete it. This was unsuccessful, which resulted in a statement of claim filed by the politician against the Ireland-based company. The commercial court ordered Facebook Ireland by interim injunction to cease and desist with immediate effect from publishing or disseminating postings, including photographs of Glawischnig, in connection

3 *Ballon;Fucik;Lovrek* in Fasching/Konecny[3] § 1 JN (as of 30 November 2013, rdb.at), Rn 61.

4 OGH 15 September 2020, 6 Ob 195/19y.

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with defamatory insults or words of equivalent meaning, or both, until the judgment on the application becomes final. Following this, Facebook Ireland blocked access to this previous posting within the geographical borders of Austria.

The court of second instance stated that the appeal to the Supreme Court was admissible because there was no case law of the Supreme Court on the question of whether an injunction against a host provider who operates a social network with a large number of daily users could be extended to verbatim and synonymous statements not brought to his or her attention.

The Supreme Court considered that its decision depends on the interpretation of European Union law, therefore proceedings had to be interrupted and the case had to be submitted to the Court of Justice of the European Union (ECJ) for preliminary rulings. Any court or tribunal of a Member State of the European Union may refer questions of interpretation or validity of EU law to the ECJ. Courts of last instance are obliged to do so. The ECJ found that Facebook may be obliged to actively search for and remove postings that are identical in wording and meaning; furthermore, the ECJ considered that a global obligation to remove would be compatible with EU law. In this context, the Supreme Court judgment found, in accordance with the ECJ decision, that there is no general monitoring obligation for host providers to actively look for circumstances indicating illegal activity, but targeted monitoring obligations, issued by national authorities, are admissible. It should be noted that this is just the decision of the preliminary court proceedings, and the final decision in the main proceedings remains to be seen. Despite this, due to its global implications, it is worth discussing.

ii Constitutional Court recognises that it is unconstitutional to prohibit any kind of assisted suicide without exception[5]

At the request of several victims, including two seriously ill persons, the Constitutional Court repealed the provision that makes assisting suicide a punishable offence. This right to free self-determination includes the right to shape one's life as well as the right to die in dignity. The right to free self-determination also includes the right of the person who wishes to commit suicide to seek the help of a third party who is prepared to do so. The prohibition on suicide with the help of a third party can represent a particularly intensive encroachment on the individual's right to free self-determination.

If a decision to commit suicide is based on the free self-determination of the person concerned, this must be respected by the legislature. The Constitutional Court does not overlook the fact that free self-determination is also influenced by a variety of social and economic circumstances. Accordingly, the legislator must provide measures to prevent abuse so that the person concerned does not make his or her decision to commit suicide under the influence of a third party. Active euthanasia, however, remains a punishable offence. Although this is not a civil law decision, it is highly relevant concerning criminal law proceedings, and once again underlines the sociopolitically relevant position of the Constitutional Court in Austria.

5 VfGH 11 December 2020, G139/2019.

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III COURT PROCEDURE

i Overview of court procedure

The main sources of civil procedural law in dispute are the Act on the Judicial Procedure in Civil Disputes (ZPO) and the Act on the Exercise of Jurisdiction and Competence of the Ordinary Courts in Civil Cases (JN). They set out the essential rules to be considered by both the person who is intended to take legal action and the court itself. If the person is willing to file a claim and wants to find out which court is responsible for handling his or her complaint, the answer will be provided by the JN. If further information about the following course of action is needed, then the ZPO will be the guide.

Nemo iudex sine actore

An ordinary Austrian civil lawsuit can only be initiated by filing a statement of claim: its arrival at court marks the beginning of pending proceedings. Beyond that, it determines the parties involved and the matter in dispute. Before the defending party is informed, the court examines the process requirements on the basis of the claim. If the court considers the action to be conclusive and all other requirements are fulfilled, oral proceedings are scheduled immediately after the claim has been reviewed. This applies to district court proceedings. If an action is submitted to regional courts, before oral hearings, the competent judge orders the respondent to reply to the complaint within four weeks.

ii Procedures and time frames

The limitation period for claims is 30 years and starts after the claim arises and becomes due, unless statutory law provides otherwise. Although specific legislation on the statute of limitations has preferences, this is only a subsidiary, catch-all provision. Exceptions apply to damages, inheritance or rental fee claims, for instance. Claims for damages lapse within three years after those entitled to assert a claim have gained knowledge of the damage and of the liable party. Besides that, the general 30-period applies as well. In many cases, a combination is made between a short, subjective term and a long, objective one.

Definitely noteworthy is the fact that serious out of court settlement discussions lead to a suspension of the period of limitations. The suspension ends when negotiations fail. Hence, such discussions are not only useful to avoid upcoming legal proceedings; they can also be helpful to prevent a claim from becoming time-barred.

Some actions are also subject to a shorter time limit. For example, to comply with its peacekeeping function, an action for interference with possession must be brought within 30 days of knowledge of the interferer and the interference.[6]

Interim injunctions can be applied for both before and also during a dispute, but only effected upon request. For an injunction to be issued it is sufficient that the claim is certified. This means that evidence, and almost certainty, is not required: authentication of entitlement is enough. Due to European Court of Human Rights (ECHR) case law,[7] preliminary court proceedings are, in general, to comply with Article 6 ECHR (right to be heard), two-sided: only in urgent cases can a restraining order be issued without the other party being heard.

6 *Fucik* in Rechberger/Klicka (Hrsg), Kommentar zur ZPO[5] (2019) zu § 454 ZPO.

7 See *Micallef v. Malta* [GC], No. 17056/06.

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In the event the security application is requested during the procedure or combined with a lawsuit, the responsibility for approving the order lies within the trial court. If the claim should be protected before litigation, it is up to the district courts to examine if it is admissible.

These aforementioned measures have to be strictly distinguished from proceedings for the preservation of evidence, having a similar structure but different target setting. Both can be qualified as backup procedures, but the purpose of the interim injunction is to preserve the enforcement of a claim, whereas perpetuation of evidence serves as a precautionary measure by documenting the current state of proof. Austrian courts may order the preservation of evidence that would have to be conducted in foreign countries if this does not contravene international law or European Union law. This also applies if a foreign court has international jurisdiction for a future legal dispute.[8]

iii Class actions

A separate procedure for the effective enforcement of mass damage, like a civil procedural law comparable to the US class action, does not yet exist in the Austrian legal system. At present, this objective is still being pursued by filing collective actions brought by associations with legal standing, such as the Consumer Protection Association. Individuals who claim an essentially similar reason for a claim will transfer it to the association authorised to bring an action for collection. The latter sues subsequently in its own name, usually with the involvement of a litigation financier. This procedure is called an Austrian-style class action.

The Austrian-style class action has already gained a foothold, and it is particularly important in cases where many injured parties in the same or similar circumstances want to enforce claims against a common injuring party. Currently ongoing are proceedings in conjunction with the coronavirus pandemic and the potential negligence and failure of the state authorities. The preparation of this class action is also under way with the participation of a litigation financier. [9] At the European level, the proposal for a Directive ignites reform efforts within this area. However, the Austrian legislator has also increasingly focused on reforming class action law.[10] It remains to be seen how the implementation of the Directive will be structured, and whether the Austrian Parliament will be able to agree on an effective collective redress mechanism.

iv Representation in proceedings

In Austrian court proceedings, a litigant is able to represent itself in proceedings of first instance before the district courts if the amount in dispute is only up to €5,000. Representation by any other person is permitted as well. In some specific district court cases the litigant is not obliged to take legal representation, but in cases where he or she does so, this has to be an attorney-at-law. In front of the regional courts and appellate courts, all lawsuits can only be successfully conducted with the support of a lawyer: legal representation is mandatory.

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8 *Rassi* in Fasching/Konecny³ III/1 § 384 ZPO (as of 1 August 2017, rdb.at), Rn 9.

9 *Geroldinger*, Amtshaftung wegen Fehlern bei Bekämpfung der COVID-19-Epidemie?, JBl 2020, 523 (523).

10 *Schwamberger/Klever*, Sammelklage europäischer Prägung?, wbl 2019, 12 (12).

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Lawyers admitted to the Austrian Bar, on the contrary, are allowed to represent themselves in any possible proceeding and in front of every court, whereas foreign attorneys are not able to rely on this exception. In cases where representation by a litigator is mandatory, parties have to be represented by an Austrian attorney.[11]

Legal entities, regardless of whether established under public or private law, are entitled to the rights and subjected to the obligations of any kind in their own name, and are in principle equal to natural persons concerning their legal capacity, unless the law in question requires a natural person. However, legal persons are not able to authorise or commit themselves by their own actions: they need to act through organ representatives, and this has to be done by a natural person. The aforementioned rules apply to them in the same manner. Company representatives are only allowed to represent their entity in front of the courts if a lawyer is not obligatory or, where court proceedings demand one, the representative is a litigator by profession.

v Service out of the jurisdiction

For the service of official documents in both court and administrative proceedings, the Austrian Service Act is generally relevant. It states that for service abroad, international treaties are primarily decisive. In relation to EU Member States, European Community law takes precedence. Only for service in third countries will existing bilateral and multilateral conventions still apply.

Service of judicial and extrajudicial documents in civil or commercial matters within Member States of the EU is provided under the Service Regulation.[12] In addition, each Member State has to designate appropriate transmitting and receiving agencies for service, whereby documents generally should be served in the language of the state addressed; otherwise, the addressee may be entitled to refuse to accept these. The conditions and effects of service abroad are to be assessed according to the procedural law applicable in the state of service. In addition to service by transmitting and receiving agencies, service can also be effectively conducted through postal services. The method of service in a particular case is to be determined by the court.[13]

The government finally ratified the Hague Service Agreement (with the same material scope as the EU Service Regulation), which entered into force in relation to 76 other contracting states on 12 September 2020.[14]

With regard to all other states, the generally recognised rules of customary international law apply, unless international (bilateral) agreements exist.

Outside the scope of EU law, Austrian courts may also order parties and representatives who do not have a place of delivery nationally to designate an authorised representative for service. Both natural and legal persons are covered by these rules equally, although this could otherwise be effective under the domestic law of the receiving state.[15]

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11 *Zib* in Fasching/Konecny[3] II/1 § 28 ZPO (as of 1 September 2014, rdb.at).

12 Service Regulation (EC) No. 1393/2007.

13 *Berger*, Auslandszustellung (as of 2 October 2020, Lexis Briefings in lexis360.at).

14 *Frauenberger-Pfeiler* in Fasching/Konecny[3] II/2 § 11 ZustG (as of 1 July 2016, rdb.at).

15 *Stumvoll* in Fasching/Konecny[3] II/2 § 98 ZPO (as of 1 July 2016, rdb.at).

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vi Enforcement of foreign judgments

The main procedural rules are laid down in the Execution Order (EO). Amended in 2017, it now contains a separate part called international enforcement law and stipulates that acts and documents drawn up abroad require a declaration of enforceability in Austria in order to be enforced, unless they are enforceable under an international agreement or acts of the European Union.

The efforts of the European legislator essentially aim at ensuring that judicial decisions of Member States can circulate freely within the European Union and be enforceable without intermediate proceedings. Therefore, the procedure for the declaration of enforceability is largely omitted, and a foreign judgment is treated as if it originated from the executing state.[16] For this purpose, the party shall produce the judgment, a certificate from the court of origin and a translation of the certificate, both applicable for recognition of the judgment and enforcement in another Member State. These innovations are mainly due to the recasting of Regulation (EU) No. 1215/2012 on recognition and enforcement of judgments in civil and commercial matters. Concerning the same material scope of application, Regulation (EC) No. 805/2004 has even introduced a European enforcement order for uncontested claims.

If a declaration of enforceability is preconditioned in the absence of bilateral or multilateral international agreements, the governing rules are set out in Section 3 of the Execution Order. An application for such declaration may be combined with an application for authorisation of execution. Both fall within the jurisdiction of the locally responsible district court that rules both applications together. Once a declaration of enforceability has become final, the foreign execution order is to be treated as a domestic one. However, such order is never more effective than it is in the state of origin.

vii Assistance to foreign courts

In the European Union, judicial assistance is governed on the whole by the Regulation (EC) No. 1206/2001 (taking of evidence) and (EC) No. 1393/2007 (service of documents). The main sources concerning international judicial assistance to non-European Union Member States are bilateral judicial assistance agreements, the ratified Hague Convention on Civil Procedure 1954 or customary international law, following the principle of reciprocity. The transmission of a request for international legal assistance can take place in diplomatic or consular exchanges but also via direct channels between judicial authorities.[17]

viii Access to court files

The right of access to court files is laid down in the Rules of Procedure for Courts of First and Second Instance. In combination with the Code of the Civil Procedure it states that parties in relation to their case have the right to inspect all documents, with the exception of specific court internal documents, and may obtain copies and printouts thereof at their own expense. With the agreement of both parties to the procedure, third parties may also gain access. In the absence of consent, a third party may inspect the files if it is able to demonstrate

16 *Klauser/Kodek*, JN – ZPO[18] Art 39 EuGVVO 2012 (as of 1 September 2018, rdb.at).

17 *Deixler-Hübner/Meisinger*, Rechtshilfe (as of 26 March 2019, Lexis Briefings in lexis360.at).

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a substantiated legal interest. Legal interest can only be regarded as fulfilled if knowledge of the content has a favourable effect on the private or public law circumstances of the person inspecting it.[18]

Besides that, the fundamental right to data protection applies in this context, and the confidentiality interests of other persons must also be respected.

The further option of electronic file inspection relating to pending civil procedures is currently only possible for authorised legal representatives. However, this option is now to be provided to all citizens in the course of a strategic digitisation initiative entitled Justice 3.0.

Court records have to be stored for at least 30 years after proceedings have been completed; during this period of time, they can be inspected.

ix Litigation funding

For about 20 years now, litigation financing has increasingly been coming to the fore in Austria. Litigation financiers primarily and predominantly operate in connection with class actions. Damaged consumers are often faced with an overpowering and financially superior group of companies. Litigation financing is only provided by larger financing companies that examine an alleged claim for its chances of success. They offer potential claimants the prospect of assuming their costs and the risk of litigation on their behalf in a specific dispute. In return, they claim a share of the value in dispute if the case is won. Commonly, this is between 25 and 45 per cent of the amount in dispute. It should be noted, however, that only cases with good prospects of success are being financed. In addition to this, the creditworthiness of the opponent is checked in advance, so only a residual risk can be outsourced to a financier. Litigation financiers have established themselves above all in the area of capital market damages but also, for example, in enforcing flight delay rights.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

One of the main general principles of Austrian attorneys' professional ethics is to respect the obligation to refuse representation or even to give advice in cases of double representation. Lawyers are obliged to refuse representation if they have represented the other party in the same or a related matter; nor may they serve or advise both parties in the same case. This results from the duty of loyalty towards each client. Referring to settled case law,[19] even the appearance of double representation is to be avoided in the interest of clients.

The Austrian Bar Association is part of the Council of Bars and Law Societies of Europe. Austrian lawyers have to comply with the Code of Conduct for European Lawyers in their cross-border activities within the European Union, European Economic Area and the Swiss Confederation. This Code also consists of a duty that lawyers may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict or a significant risk of a conflict between the interests of those clients. Failure to comply with the rules that try to prevent conflicts of interest will result in disciplinary proceedings. Due to this fact and the strict Code of Conduct for attorneys, the application of Chinese walls is a rare phenomenon.

18 *Rassi* in Fasching/Konecny[3] II/3 § 219 ZPO (as of 1 October 2015, rdb.at), Rn 45.

19 *Csoklich/Scheuba* in Scheuba (Hrsg), Standesrecht der Rechtsanwälte[3] (2018) Materielles Standesrecht; OBDK 24 June 2013, 13 Bkd 2/13.

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ii Money laundering, proceeds of crime and funds related to terrorism

The provisions relating to money laundering and terrorist financing are largely based on European Union directives. The resulting requirements for lawyers have been transposed into national law by amending the Lawyers' Act. They can be divided into general and specific rules. The general ones relate to the analysis and organisation of law firms, depending on the specific business activity and type and size of a corporation. Accordingly, a lawyer is obliged to set up adequate and appropriate policies and procedures to prevent transactions related to money laundering or terrorist financing. This may contain the appointment of a lawyer belonging to the company as compliance officer. In addition, further steps have to be taken in the context of specific business transactions, for instance buying or selling real estate, money management or the founding of companies. These transactions must be checked particularly carefully, and it may even be necessary to prove and verify the identity of the parties involved and, if present, that of the beneficial owner.

iii Data protection

With the entry into force of the GDPR,[20] the Austrian data protection standards concerning personal data have been revised. The Regulation adopted by the European Union only addresses natural persons, whereas the Austrian data protection law also applies to legal persons. These are the two basic legal sources when it comes to data protection in Austria. Due to its primacy of application, the GDPR is the relevant legal basis for processing personal data. It only applies to information that is able to identify a person and is characterised by a rule-exception principle.

The scope of application of the GDPR has been extended by the marketplace principle also to suppliers without branches or registered offices in the EU. Suppliers from the US, Asia and Africa are also covered by the data protection regime of the GDPR when they address their goods or services to EU citizens. In addition, they are obliged to appoint representatives for the respective competent data protection authorities.[21]

When it comes to the sharing of personal data, irrespective of whether nationally or internationally, the data procession principles have to be observed by sovereign and non-sovereign processors similarly. These include principles of lawfulness, good faith and transparency. In addition, the sharing of personal data is allowed only for a specific purpose, to be determined before the commencement of processing. Earmarking is divided into the purpose specification and the compatible use element.[22] The admissibility of processing is determined by Article 6 GDPR, which contains an exhaustive list of six principles of legality under which processing is considered lawful. It is an indispensable condition that the processing is based on an admissibility criterion, such as the given consent of the data subject. These rules shall not be disregarded under any circumstances, as failure to comply with them may result in fines of up to €20 million or, in the case of a company, up to 4 per cent of its total annual worldwide revenue in the preceding financial year.

20 General Data Protection Regulation (EU) No. 2016/679.

21 *Leschanz/Wyrobek*, Datenschutz nach der Datenschutz-Grundverordnung, Sachverständige 2019, 210 (211).

22 *Hötzendorfer/Tschohl/Kastelitz* in Knyrim, DatKomm Art 5 DSGVO (as of 7 May 2020, rdb.at), Rn 20.

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For the enforcement of claims under data protection law, any data subject has the right to complain to the Austrian Data Protection Authority if he or she considers that the processing of personal data is in breach of the GDPR. Assuming that an infringement has taken place, the authority is entitled to impose the aforementioned fines.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

An essential component of a lawyer's professional activity is the lawyer's duty of confidentiality resulting from the duty of loyalty. The duty of confidentiality is thus closely related to the right to refuse to testify. This privilege – the right to refuse to give evidence – is not just relevant concerning criminal proceedings; it is carried out in various procedural laws as well. A lawyer shall be bound to secrecy with regard to matters entrusted to him or her and facts otherwise coming to his or her knowledge in his or her professional capacity, the secrecy of which is in the interest of his or her client. This right may also not be circumvented by confiscating documents. At EU law level, the protection of legal professional privilege even enjoys the status of a general principle of law with the character of a fundamental right.[23]

According to current Austrian law, there is no *ex officio* ban of interrogation. Before being questioned, a witness must be informed of the right to refuse to testify and subsequently decides whether to make use of this right. If the witness does not do so despite having been informed, the given statement can definitely be used as testimony.[24]

It is disputed to what extent foreign lawyers also have the right to refuse to testify in Austrian court proceedings. Whether the scope of the refusal now corresponds to that of Austria, or the foreign lawyer can invoke the equivalent of the provision from his or her home state, will probably have to be resolved according to the rules of private international law.[25] There are certainly efforts to strengthen the attorney–client privilege, such as absolute protection in the sense of protection independent of location and custody, as well as a comprehensive ban on the use of evidence.[26]

ii Production of documents

Each party bears the burden of proof concerning the existence of all the factual requirements of the legal rule favourable to it. The plaintiff thus is obliged to allege his or her facts giving rise to the claim and, if he or she deems it expedient, also to prove them by producing relevant documents. If a party relies on documentary evidence to prove its case, the relevant passages shall be highlighted before submission to the court. However, the court may also order the production of certain documents *ex officio*, if it is considered necessary.

Only admitted, obvious and legally presumed facts do not require proof.

Whether a document presented to prove a fact is considered relevant by the court is solely up to the deciding judge. This results from the principle of free consideration of evidence. The personal impression of a judge is essential for comprehensive clarification of the facts of a case, which is why the immediacy of the taking of evidence in front of the deciding

23 EuGH C-550/07 P.

24 *Georg E Kodek*, Das Aussageverweigerungsrecht von Rechtsanwälten - eine Bestandsaufnahme (FN 1), AnwBl 2019/7.

25 *Frauenberger* in Fasching/Konecny3 III/1 § 321 ZPO (as of 1 August 2017, rdb.at), Rn 23.

26 *Öner*, Die rechtsanwaltliche Verschwiegenheit im Verfassungs- und im Strafrecht, ÖJZ 2020/58.

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judge is indispensable. Therefore, it is also necessary for the judge to be able to inspect the content of a document. This also applies to documents stored overseas or electronically. If it appears impossible to produce the original document, a copy is also admissible.

If a document is held by a third party, the court may order the third party to produce the document. However, the third party is only obliged to produce the document if it is obliged to do so under the provisions of civil law. If the third party denies possession, the person providing the evidence must demonstrate that the third party is in possession of the document. A third party is any person other than the main parties, including subsidiary or parent companies that are not directly involved.

Electronic data storage does not fulfil the definition of a document in the sense of the Code of Civil Procedure due to its lack of written form. They are, however, part of the object of an inspection. Such evidence may only be used if direct evidence is not possible (i.e., a witness cannot be questioned directly by the court). Of course, within the scope of its duty to conduct proceedings, the court must maintain proportionality and carefully examine whether the requested evidence is relevant for a decision. The court has to assess whether the provision of not easily available electronic data is necessary with regard to a procedural economic approach, and also whether it is required to prevent unnecessary delays in the proceedings.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Even if a statement of claim has already been filed, an amicable settlement of disputes is possible at every stage of the proceedings. It is compulsory that at the very beginning of a hearing the decisive court asks the parties whether a peaceful extrajudicial settlement may be appropriate. This legal obligation for judges to work towards an amicable agreement can already serve as a first approach to alternative dispute resolution.

The most frequently used forms of alternative dispute resolution are mediation, conciliation and arbitration. The primary objective, solving problems by putting judicial disputes aside, remains the same; however, the manner of getting there differs.

ii Arbitration

If the seat of the arbitration is in Austria, certain rules of the Code of Civil Procedure shall apply to these proceedings.

The lex arbitri is largely dispositive; mandatory provisions are exceptions.

All arbitration proceedings are uniformly regulated. No distinction is made between international and domestic arbitration or between commercial and other disputes. Arbitration agreements are particularly widespread in complex commercial law contracts, especially those with cross-border elements. In Austria, the International Arbitration Court of the Austrian Federal Economic Chamber, the Vienna International Arbitral Centre (VIAC), is particularly worth mentioning. It was founded in 1975 and is considered one of the leading arbitration centres in Central and Eastern Europe.[27]

Concerning legal remedies, questions of competence and serious violations of minimum procedural requirements can be complained about. An award can be appealed to

27 https://www.viac.eu/de/ueber-uns/7-gruende-viac.

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the Supreme Court, the first and final instance for proceedings on the annulment of arbitral awards. An Austrian court may not set aside a foreign arbitral award but may decide whether it is domestically effective.[28]

Austria is one of the signatory states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Because of its ratification by more than 150 states, arbitral awards can be recognised and enforced worldwide much more easily than state judgments. The recognition and enforcement of foreign arbitral awards in Austria is carried out in accordance with international agreements in addition to the New York Convention also by the European Convention on International Commercial Arbitration. Accordingly, the provisions of the Execution Code shall apply to enforcement. Subject matter jurisdiction falls within the competence of the district courts.[29]

iii Mediation

The Austrian legal system consists of two regulations governing mediation, the first enacted for national affairs in the context of civil law matters and the other based on Directive No. 52/2008/EC about certain aspects of cross-border mediation related to civil and commercial matters in the European Union.

A characteristic feature of mediation according to both regulations is that in the respective procedures the parties work out a solution independently with the help of a neutral or impartial third party (mediator). According to the Austrian understanding, a mediator has no decision-making power whatsoever. The focus is clearly on promoting communication and de-escalation. New to this range is that VIAC launched a mediation initiative to restore economic relations following the covid-19-pandemic. In these challenging times, VIAC sees business mediation as the ideal means of resolving disputes unbureaucratically, efficiently and confidentially. Affected entrepreneurs can contact VIAC, which will then select a mediator according to the qualifications given.[30]

One disadvantage of mediation at present is the lack of international enforceability of the mediation outcome. However, this could change soon, as an international instrument on the recognition and enforcement of mediation results is currently being prepared within the framework of UNCITRAL.[31]

iv Other forms of alternative dispute resolution

Alongside arbitration and mediation, conciliation is one of the most widespread alternative dispute resolution procedures in Austria.

Conciliation is a procedure in which the parties to a dispute turn to an independent and impartial dispute resolution body that, after hearing both sides, draws up a proposal for a solution that can be accepted or rejected by the parties. In the event of rejection, both sides have the right to take legal action.

On some occasions, it is mandatory to call upon a conciliation body before initiating court proceedings: an action without this preliminary step would be rejected as inadmissible. This applies to neighbourhood or, in some cases, tenancy law disputes.

28 *Klauser/Kodek*, JN – ZPO[18] § 42 JN (as of 1 September 2018, rdb.at), E6.

29 *Czernich/Deixler-Hübner/Schauer*, Schiedsrecht (as of 1 May 2018, rdb.at).

30 https://www.viac.eu/de/mediation/mediationsinitiative-covid-19.

31 *Kommenda*, Vor Prozesswelle stehen Mediatorinnen in den Startlöchern, Die Presse 2020/17/02.

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Another conflict-solving model is collaborative law. Each party is represented by its own partisan and specially trained lawyer (collaborative lawyer). Conflict resolution takes place as a team, accompanied by mediative elements. Special communication and conflict resolution techniques are used and, if necessary, other experts from every conceivable professional field can be consulted.[32]

VII OUTLOOK AND CONCLUSIONS

Technological progress, which was already advancing rapidly, has taken another step forward, not least due to the covid-19 pandemic. To keep physical contact and thereby also the number of infections as low as possible, messaging services and video telephony have once again experienced an upswing. A wave of innovations will come via operators of large social media platforms in the near future. A lot is occurring, both at the European[33] and the national Austrian[34] level, to ensure Facebook, Twitter and others make good on their promises to take action against hate speech and abuse on the internet. In this regard, reference is also made to the decision cited in Section II.[35]

The credo of proponents of the 'the internet shall not remain a lawless space' argument is to be agreed with, but there are already numerous regulations that govern digital life just as thoroughly as real life. The tendency to hold internet platforms more accountable is certainly to be supported; however, the fundamental right to freedom of speech, which is highly respected on the European territory, should always be well observed. The freedom of one should only be restricted under strict conditions to protect the other.

32 https://www.avm.or.at/de-m/collaborative-law/beschreibung/.

33 Digital Services Act, COM (2020) 825.

34 Draft about the Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen (Kommunikationsplattformen-Gesetz – KoPl-G), 49/ME XXVII. GP.

35 OGH 15 September 2020, 6 Ob 195/19y.

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Appendix 1

ABOUT THE AUTHORS

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Dieter Heine is a founding partner at Vavrovsky Heine Marth and advises clients in all aspects of conflict prevention, management and resolution. He is an internationally recognised expert in commercial litigation, academically trained mediator and academically educated conflict manager. In his work, he strongly focuses on conflict management where he draws from all established methods of dispute resolution and advises clients in hybrid proceedings.

As a renowned specialist in competition law as well as IP, IT and media, Dieter regularly counsels clients on issues relating to innovative technologies as well as to social media or shared economy. He is often involved in politically or socially sensitive matters.

Dieter studied social and economic studies and holds a law degree from the University of Innsbruck, Austria. In addition, he received academic training as a mediator at the European University Viadrina Frankfurt (Oder), where he also completed the master's programme in mediation and conflict management. Dieter is a member of the Austrian Bar Association as well as several other industry associations. He regularly lectures and publishes in his fields of expertise.

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Michael Schloßgangl works as an associate in Vavrovsky Heine Marth's dispute resolution department with a strong focus on commercial litigation, competition law and IP.

A graduate of the University of Vienna, Austria, he has already worked as a legal trainee at the Federal Office for Foreigners and Asylum as well as in a Vienna business law firm and a notary's office before joining Vavrovsky Heine Marth. He completed his judicial practice at the Austrian courts prior to starting to work as an associate.

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