THE DISPUTE RESOLUTION REVIEW

Fourteenth Edition

Editor
Damian Taylor

THE LAWREVIEWS

THE DISPUTE RESOLUTION REVIEW

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 29 jurisdictions. The following chapters aim to equip the curious practitioner with an up-to-date and concise introduction to the framework for dispute resolution in each jurisdiction. Each chapter outlines the most significant legal and procedural developments of the past 12 months and the authors' views as to the big themes predicted for the year ahead. The publication will be useful to anyone facing disputes that cross international boundaries, which is ever more likely in a world that seems to be more interconnected with every passing year.

In compiling the 14th edition of *The Dispute Resolution Review*, I am reminded that despite the variety of legal systems captured in the publication, there is a clear common denominator. All systems are organised and operate to ensure parties have a means of resolving disputes that they cannot resolve themselves. I am reassured that, despite cultural, traditional and legal differences, the jurisdictions represented here are united by this common thread. It reflects an innate, international commitment to the rule of law and the rights of individuals. This edition will be a success if it assists parties to navigate different legal systems to achieve fair and efficient outcomes for whatever dispute they are facing.

Reflecting on the past year, I cannot help but add to the chorus of people who have noted how challenging, uncertain and tragic the events of the global pandemic have been, and continue to be (as I write this preface, the UK has returned recently to working from home in response to the Omicron wave). The law is a reflection of society, so naturally it has been shaped by these events. However, out of this tragedy has come some good. Our courts and tribunals have been quick to adopt new technology and processes to manage compounding caseloads and necessary new ways of working. As far as I can tell, this has been a global trend and – while there have undoubtedly been challenges – no court system has buckled and had to shut the door to justice. This is a tremendous achievement and a testament to the strength and resilience of courts around the world. It is encouraging to see that some of the emergency measures put in place to cope with the pandemic look set to become permanent features of dispute resolution in the year ahead. Here in my home jurisdiction, England and Wales, the use of remote hearings and electronic evidence, and the implementation of various pragmatic amendments to procedural rules, should make the justice system more accessible and efficient than it was pre-pandemic.

The year ahead, of course, brings new challenges, but also reasons for optimism. The fragility of our climate, and the pervasiveness of big data, will no doubt play more prominent roles in the legal sector's near future. Recent high-profile climate discussions such as COP26 have highlighted the growing urgency around curbing harm to the natural environment. The grassroots of this trend are evident as businesses and regulators set ambitious climate targets, and litigants face contractual, tortious and public law claims for climate-related matters. The

Okpabi litigation in the United Kingdom involving parent company tortious liability for an oil spill in Nigeria provides a prominent example of how the natural environment may play a greater role in our courtrooms in the year ahead.

I also suspect disputes relating to the use of data will be a theme in the legal sector in the near future. While the General Data Protection Regulation has set the basic framework for the protection of personal data, we are likely to see more claims relating to the use and abuse of personal data down the track. The United Kingdom Supreme Court in the *Lloyd v. Google* decision set out a path for group claimants to pursue collective actions in instances of unlawful processing of personal data (although the claimants in that matter, which involved the internet browsing history of 4 million Apple iPhone users, were ultimately unsuccessful). The global nature of big data suggests this trend will not be confined to the United Kingdom.

This 14th 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 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 2022

Chapter 1

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 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.

Nevertheless, not all out of court discussions 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 (OGH), 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.[2]

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

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

2 *Ballon;Fucik;Lovrek* in Fasching/Konecny3 § 1 JN (as of 30 November 2013, rdb.at), Rn 61.

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.

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 Foreign online gambling providers must compensate gambling losses[3]

In a recent decision, the OGH asserted that providers of online gambling services that do not hold a licence under the Austrian Gambling Act[4] operate unlawfully in Austria. Any gambling contracts they have concluded with Austrian players are invalid, and the latter are therefore entitled to a refund of their stake.

In the underlying case, the defendant, with a registered office in Gibraltar, offered online gambling in Austria. The defendant appealed the licence she obtained there for her services in Austria. The plaintiff suffered losses on the games offered by the defendant and sought compensation for the harm suffered. He accused the defendant of not having a licence under the Austrian Gambling Act, and that therefore she was carrying out her activities unlawfully in Austria. The defendant countered that the Austrian gambling monopoly violates European Union law and must remain inapplicable. Compensation for the incurred gambling losses therefore was not in question.

The OGH confirmed the decisions of the previous instances to grant the claim. Contrary to the defendant's allegation, Austrian gambling law does not violate European law. This has just recently been pronounced by the Constitutional Court, and the Administrative Court and the OGH have joined in on these judgments. Furthermore, the Court of Justice of the European Union has also ruled that the Austrian gambling monopoly is not contrary to EU law.[5] As the defendant did not succeed in rebutting this jurisdiction with new arguments, she must finally compensate the gaming losses suffered by the plaintiff.

ii Reference for a preliminary ruling on the interpretation of the term bodily injury in the Montreal Convention[6]

The OGH submitted the question of whether an accidentally caused mental impairment of a passenger, which reaches the level of illness, but without externally recognisable injuries, can be subsumed under the term bodily injury found in Article 17 Paragraph 1 of the Montreal Convention.[7] The second question submitted – which only comes into play if the first question is answered in the negative – was whether the Montreal Convention precluded a claim for damages that would possibly exist under the applicable national law.

3 OGH 22.06.2021, 1 Ob 229/20p.

4 Bundesgesetz vom 28 November 1989 zur Regelung des Glücksspielwesens (Glücksspielgesetz – GSpG), über die Änderung des Bundeshaushaltsgesetzes und über die Aufhebung des Bundesgesetzes betreffend Lebensversicherungen mit Auslosung, BGBl I Nr. 99/2020.

5 EuGH 18.5.2021, C-920/19 (*Fluctus sro v. Landespolizeidirektion Steiermark*).

6 OGH 28.01.2021, 2 Ob 131/20h.

7 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999).

The trigger for a mental impairment that reached the level of illness was the evacuation from an aircraft because an engine had exploded during take-off. In the course of the evacuation, the plaintiff passenger left the aircraft via the emergency exit. However, the other engine was still in operation and the jet blast threw her metres through the air, whereupon she subsequently hit the runway. Since then, she had suffered from sleep and concentration disorders, mood swings, sudden fits of crying, severe fatigue and stuttering. She was diagnosed with post-traumatic stress disorder. Thereupon she filed a claim for damages against the airline in front of the competent Austrian court, based, inter alia, under Article 17 Paragraph 1 of the Montreal Convention. If the case had not fallen within the scope of the Montreal Convention, the matter would have been decided in favour of the applicant long ago. In Austria, it has been recognised for quite some time that compensation can be claimed for mental impairments that reach the level of illness. The concept of bodily injury includes any impairment of physical or mental health and integrity. As soon as an impairment in the mental sphere also manifests itself in the form of physical symptoms that are to be regarded as a disease, there is no doubt that it is a case of bodily injury.

The answer to this question by the European Court of Justice (ECJ) is not only relevant for the case in the main proceedings and the claim of the plaintiff for compensation for the damage she has suffered; the final clarification of this legal question is rather of importance for the entire – at least European – air transport system. A European-initiated, progressive interpretation of Article 17 Paragraph 1 Montreal Convention could provide the impetus for a consistent interpretation in all contracting states to the Montreal Convention. In addition, this would provide a long-needed recognition of mental impairments; these should no longer be downplayed as negligible. It is already a recognised scientific–medical consensus that mental and physical wellbeing should be regarded as equally important parameters for assessing human health. The ECJ could be a pioneer in this respect.

The written statements provided for in the preliminary ruling procedure have already been submitted. It is now up to the ECJ to make its ruling.[8]

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

8 It is worth noting that the authors of this chapter are involved in the proceedings as legal representatives on the plaintiff's side.

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. In the literature, it is disputed whether the four-week time limit for the statement of defence can be extended or whether this is a non-extendable emergency time limit. The higher regional Court of Vienna has now affirmed the possibility of extension upon request.[9]

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.[10]

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,[11] 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. 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.[12]

9 In Rs 30 R 219/20a. *Kolmasch*, Verlängerung der Frist für die Klagebeantwortung, Zak 2021/616.

10 *Fucik* in Rechberger/Klicka (Hrsg), Kommentar zur ZPO5 (2019) zu § 454 ZPO.

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

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

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.

At the European level, the proposal for a directive ignites reform efforts within this area. In the meantime, agreement has been reached at European level on the text of the directive.[13] It will now also be possible in Austria to assert claims for damages from several injured consumers in one and the same action. The concrete implementation of the requirements of the directive into national Austrian law is still pending. A concrete legal text is not yet available at this time. Until 25 December 2022 Member States – and thus also Austria – have time to create an appropriate legal basis for implementation into the national jurisdiction.

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.

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.[14]

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.

13 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

14 *Zib* in Fasching/Konecny3 II/1 § 28 ZPO (as of 1 September 2014, rdb.at).

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.[15] 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.[16]

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.[17]

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.[18]

vi Enforcement of foreign judgments

The main procedural rules are laid down in the Execution Order (EO). Amended in 2017 and recently fundamentally changed again[19], 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. However, the latest amendments in 2021 primarily affect domestic execution procedures. The international enforcement law, which was recently amended, was not subjected to substantial changes in content.

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. 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.

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

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

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

17 *Frauenberger-Pfeiler* in Fasching/Konecny3 II/2 § 11 ZustG (as of 1 July 2016, rdb.at).

18 *Stumvoll* in Fasching/Konecny3 II/2 § 98 ZPO (as of 1 July 2016, rdb.at).

19 Gesamtreform des Exekutionsrechts – GREx, BGBl. I Nr. 148/2020.

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.[20]

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 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.[21]

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. The ministerial draft that launched the Justice 3.0 initiative to speed up digitalisation has already been adopted. Fees will no longer be charged for the inspection of files by way of query. In addition, it will be possible in future to waive copying fees altogether in some cases. The parliamentary evaluation period, to which different institutions were able to bring their expertise, ended in September. The legislative process has not yet been completed.[22] The digital file management of the justice system, which is already established in Austria, is to be further advanced by this legislative proposal.

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

21 *Rassi* in Fasching/Konecny3 II/3 § 219 ZPO (as of 1 October 2015, rdb.at), Rn 45.

22 Ministerialentwurf eines Bundesgesetzes, mit dem die Jurisdiktionsnorm, die Zivilprozessordnung, das Arbeits- und Sozialgerichtsgesetz, das Gerichtsorganisationsgesetz, das Sachverständigen- und Dolmetschergesetz, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz, das E-Commerce-Gesetz und das Strafvollzugsgesetz geändert werden (Zivilverfahrens-Novelle 2021 – ZVN 2021).

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. In Austria, we have the *quota litis* prohibition. A *quota litis* agreement means that, if a lawyer wins a case, he or she receives a fixed percentage of the amount won as a fee. Such agreement regarding a share of a dispute is immoral and unethical according to Section 879 Paragraph 2 Subparagraph 2 of the general Austrian Civil Code (ABGB) and Section 16 Paragraph 1 of the Austrian Code of Conduct for Lawyers (RAO), and therefore inadmissible. The purpose of the prohibition is primarily to protect the client, because the client is usually unable to assess the prospect of litigation.[23]

In the literature, it is predominantly argued, that litigation financiers are not covered by the aforementioned prohibition, if they only carry out a preliminary examination of the prospects of success, subsequently hand the case to a lawyer and do not exert any direct influence on the proceedings. In a recent decision the OGH[24] agreed with the opinion, which is widely held in the literature. According to this judgment, litigation finance companies can therefore – within these limits – have a part of the recovered amount promised to them as a fee.

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,[25] 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.

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

23 *Brandstetter*, *quota litis* (as of 23 September 2021, Lexis Briefings in lexis360.at).

24 OGH 23.2.2021, 4 Ob 180/20d.

25 *Csoklich/Scheuba* in Scheuba (Hrsg), Standesrecht der Rechtsanwälte3 (2018) Materielles Standesrecht; OBDK 24 June 2013, 13 Bkd 2/13.

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,[26] 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.[27]

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.[28] 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.

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

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

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

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

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.[29]

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.[30]

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.[31] 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.[32]

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. 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.

29 EuGH C-550/07 P.

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

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

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

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.[33]

On 1 July, 2021, a new version of the VIAC Arbitration and Mediation Rules entered into force (Vienna Rules and Vienna Mediation Rules 2021). These Rules are applicable to all proceedings initiated after 30 June 2021.[34] With reference to Section III.ix, new rules regarding litigation funding, which is already used repeatedly in proceedings, have ben established. These are intended to ensure the independence and impartiality of the referees through appropriate disclosures.[35]

Concerning legal remedies, questions of competence and serious violations of minimum procedural requirements can be complained about. An award can be appealed to the OGH, 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.[36]

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

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

34 https://www.viac.eu/en/arbitration/content/vienna-rules-2021-online.

35 https://www.viac.eu/de/mediation/inhalte/alle-mediationsregeln-aenderungen-weiterlesen-20210701.

36 *Klauser/Kodek*, JN – ZPO18 § 42 JN (as of 1 September 2018, rdb.at), E6.

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.[37]

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.[38]

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.[39]

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.

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.[40]

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

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

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

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

VII OUTLOOK AND CONCLUSIONS

From a comparative legal perspective, Austria has been relatively reluctant to implement reforms in corporate law over the past two decades. This could change in the near future. The government programme currently in force contains plans to create Austrian Limited, which is intended to offer start-ups, especially those trying to gain a foothold in the international sector, a competitive and attractive alternative to the currently existing company forms. It shall offer founders a faster and less bureaucratic way to establish a company, which is based on the European Model Company Act (EMCA). The EMCA, which dates back to a German–Danish initiative, is a model regulation for a corporation, and a proposal to national legislators to adopt all or part of the regulations and adapt them for certain types of companies.[41]

On behalf of the Austrian Ministry of Economics, an expert opinion was commissioned on a regulatory concept for the introduction of a modern, start-up and investor-friendly form of company in Austria with the working title, Austrian Limited, which was published on 8 September 2020.[42]

Like many other projects, this one has fallen victim to the pooling of resources to tackle the crisis caused by the covid-19 pandemic, which affects all our lives still, and more than ever.

Opinions regarding the creation of a new form of company are not unanimously positive,[43] although probably nobody will oppose an attractive redesign and the creation of more flexibility, especially for new entrepreneurs. In this context, it is pointed out that the objectives pursued via Austrian Limited would also be sufficient through the progressive amendment and shaping of those regulations already existing for company forms.

Nevertheless, these efforts should be made and, whether in the form of an Austrian Limited or existing company form, the promising further development of Austrian company law should be promoted.

41 *Kalss*, Modellregelung für Austrian Limited steht bereit, Die Presse 2020/40/02.

42 *Reich-Rohrwig/Kinsky/Kraus*, Austrian Limited (2020).

43 *Torggler*, Brauchen wir eine Austrian Limited?, RdW 2021/1.

Appendix 1

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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.

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