

GAR KNOW HOW LITIGATION

Austria

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Overview

1 Describe the general organisation of the court system for civil litigation.

Pursuant to article 94 of the Austrian Federal Constitutional Law (B-VG) the judicial court system is strictly separated from the administration and legislation and serves as third independent pillar in the Austrian legal system. Within the court system, there are civil courts, criminal courts and courts dealing with administrative matters. All civil courts and criminal courts are federal courts, only for courts dealing with administrative matters federal courts and state courts exist. For civil courts, the Austrian law on jurisdiction (JN) stipulates the competences for the first instance courts (ie, district courts and regional courts). Pursuant to section 49 JN, district courts are competent to decide in commercial matters with an amount in dispute up to €15,000. In addition, district courts are competent to decide in (i) certain family law matters and (ii) certain disputes regarding lease agreements regardless of the amount in dispute (see section 49, paragraph 2 JN). Regional courts are competent to decide in all commercial matters exceeding €15,000 in dispute. For certain areas of law one category of court is solely competent to decide, such as (i) the courts dealing with commercial disputes between entrepreneurs or (ii) labour and social law courts.

Appeals can be filed to (i) the regional courts against decisions of the district courts or (ii) to one of the four Austrian higher regional courts against decisions of the regional courts. For legal questions that are of importance exceeding the respective dispute, a further appeal to the Austrian Supreme Court (OGH) can be filed as a third and final instance. In general, courts of first instances are bound by decisions of the Austrian Supreme Court or the appellate court regarding legal issues. Courts of the same level are not bound by decisions of another court of the same level.

In general, all judges are trained for five years within the judicial system and take an exam prior to being eligible to such an appointment. Under Austrian law, judges are independent and cannot be relocated once a judge has been appointed. In general, juries are only involved in criminal proceedings dealing with severe criminal charges, such as murder trials. However, the Austrian court system is familiar with the appointment of lay judges, who decide together with a professional judge, for example, in labour law and social law matters.

2 Give an overview of basic procedural principles that govern civil litigation in your jurisdiction.

One of the principles governing civil litigation is the principle of party disposition. Following this principle, parties are free to commence litigation as well as to end proceedings, for instance, by withdrawing their claims. However, once a proceeding has been initiated, the court will promote the conduct of the proceeding as a result of the principle of ex officio. The taking of evidence is governed by the principle of cooperation. As the parties are obliged to substantiate their claims, the court has to ascertain the truth and may require the parties to submit further evidence. Based on the principle of free appraisal of evidence, the court must decide freely (but not arbitrarily) whether or not a party's assertion is proven. In addition to the parties' right to be heard, the principle of equality of arms ensures that the parties are being treated equally. Generally, the conduct of proceedings is governed by the principle of public trial, the principle of orality, the principle of immediacy and the principle of procedural economy.

3 Describe the general organisation of the legal profession.

In Austria, lawyers can be admitted to the Austrian bar after five years of training and successfully taking the bar exam. Any lawyer needs to work for at least three years full time for an attorney prior to the admission to the Austrian Bar. Within the two additional years, the law clerkship of currently seven months needs to be served, and any extracurricular activities might be considered, such as doctorate studies or working at university, etc.

The Austrian bar exam is a general exam that covers all main areas of law (ie, civil law, criminal law and administrative law). At the beginning of training to become a lawyer, for the first 18 months of full-time employment any associate is only entitled to represent in civil cases in which the amount in dispute does not exceed €5,000 or in criminal cases in which the potential sentence does not exceed three years and the defendant is not imprisoned.

In Austria, only one bar for lawyers exists and no specialist bars. Therefore, each lawyer admitted to the Austrian bar is in general entitled to represent in all kinds of proceedings. Nonetheless, it is common practice in Austria that most of the lawyers specialise in a certain legal field and do not represent in all kinds of matters. Also, lawyers admitted to the bar in another EU country are entitled to be registered as European lawyers and can practise as lawyers in Austria.

4 Give a brief overview of the political and social background as it relates to civil litigation.

In general, the Austrian court system can be described as cost and time efficient. Austrian courts generally have a good reputation. The latest available statistics published by the Austrian judiciary show that roughly 75 per cent of contentious civil proceedings before district courts and roughly 50 per cent of regional court proceedings were decided within 12 months. Only 3.4 per cent of all contentious civil proceedings had a duration of more than three years.

Jurisdiction

5 What are the sources of law and rules governing international jurisdiction in civil matters?

In general, international jurisdiction of Austrian courts in a civil matter is governed by EU law, international treaties and domestic provisions. Despite numerous exceptions, the primary approach of these provisions is to depend on the domicile of the defendant to establish international jurisdiction. Within the EU, the main source is EU Regulation (No. 1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. If jurisdiction is not established by international treaties or EU law, the Austrian law on jurisdiction applies (JN). Both Austrian and EU law allow parties to agree on a choice of forum in civil and commercial matters.

6 What are the criteria for determining the jurisdiction and venue of the competent court for a civil matter?

In general, parties can agree on a specific forum to decide their dispute. The parties can either decide to use alternative dispute resolution tools, such as arbitration or mediation or can agree that specific courts are competent to decide about certain disputes between the parties. However, certain limitations exist with regard to consumers, as consumers can only validly agree to a forum clause once a dispute has already arisen or the dispute resolution clause foresees the jurisdiction of the court where the consumer is domiciled.

If no specific forum has been chosen by the parties, the international jurisdiction needs to be determined pursuant to the Brussels Ia Regulation (if one of the parties is foreign) and pursuant to the law on jurisdiction (see question 1 for details).

7 Does your jurisdiction commonly attract disputes that have a nexus with other jurisdictions?

In general, the Austrian court system works highly efficient considering the average duration and costs of proceedings. Therefore, often parties with a slight connection to Austria decide to choose Austria as venue. However, in case one party intends to delay proceedings, the parties rather refrain from choosing Austria as forum for their dispute resolution mechanism.

8 How will a court treat a request to hear a dispute that is already pending before another forum?

Pursuant to article 29, paragraph 3 of the Brussels Ia Regulation any court other than the court first seised shall decline jurisdiction in favour of that court, as soon as the jurisdiction of the court first seised is established. Consequently, the same dispute between the same parties cannot be decided in two (Austrian) court proceedings. As soon as an Austrian court becomes aware that the same dispute between the same parties is already pending before another (Austrian) court, the court will dismiss the claim pursuant to section 233 Austrian Civil Procedure Code (ZPO). Pursuant to Austrian law a dispute is pending as soon as the statement of claim has been served to the defendant (section 232 ZPO). The same applies to pending disputes in non-EU member states. However, if a decision of such a non-EU member state court could not be enforced in Austria, the Austrian court would be competent to decide about this dispute.

9 How will the courts treat a dispute that is, or could be, subject to an arbitration clause or an agreement to arbitrate, including in interim proceedings?

Pursuant to section 584 ZPO, the court shall dismiss a claim, if the dispute is subject to an arbitration clause or an agreement to arbitrate, unless the defendant raises arguments to the merits of the case or attends an oral hearing without objecting to the court's jurisdiction. Such an objection to the court's jurisdiction needs to be raised at the first opportunity (ie, either in the first written submission or the first oral court hearing).

If the court comes to the conclusion that the arbitration agreement does not exist or is unenforceable, the court shall not dismiss the claim. However, even if court proceedings are still pending and the court has not dismissed the claim, arbitration proceedings may nevertheless be commenced or continued and an award may be rendered (see section 584 ZPO). If an arbitration has already been initiated neither another arbitral tribunal nor an Austrian state court can decide about the already pending dispute (section 584 para 3 ZPO).

Pursuant to section 585 ZPO, a party can also apply to a court to order interim or protective measures before initiation of or during the arbitral proceedings. Further, if an arbitral tribunal orders interim measures, Austrian courts can be required to assist in the enforcement of such interim measures (see section 593 ZPO).

10 May courts in your country review arbitral awards on jurisdiction?

Yes, within the limits of section 611 ZPO the Austrian Supreme Court can also review an arbitral award on jurisdiction.

11 Are anti-suit injunctions available?

No, Austrian law does not provide for anti-suit injunction. In addition, these would contradict EU case law.

12 Which entities are immune from being sued in your jurisdiction? In what circumstances? In what circumstances can creditors enforce a court judgment or arbitral award against a sovereign or a state entity?

Austrian law recognises the immunity of foreign states and national banks to the extent the foreign state and the national bank is exercising official authority. Austrian law also recognises immunity of the main representative of a foreign state, diplomats (to the extent no private property is subject of the dispute) and international organisations.

This also applies to enforcement measures to be taken against these entities.

Procedure

13 How are proceedings commenced? To what extent will a court actively lead the proceedings and to what extent will the court rely on the parties to further the proceedings?

Generally, proceedings are commenced by party initiative (eg, by submitting an application or filing a statement of claim). Civil proceedings are governed by the principle of party autonomy to the extent that the party initiating the proceedings can decide to withdraw its claim, conclude a settlement or decide to suspend the court proceedings. The court is obliged to conduct the proceedings in a cost-efficient and timely manner, by setting date(s) for the oral hearings, summoning the witnesses nominated by the parties or timely rendering a judgment.

14 What are the requirements for filing a claim? What is the pleading standard?

The statement of claim has to include (i) a specific request for relief, (ii) the facts that provide the basis for the claim and (iii) why the seised court has jurisdiction (see section 226 ZPO). In general, a substantiation of the claim is required. If a statement of claim is inconsistent, the court has to order a correction of the statement of claim. If the claim remains inconsistent, the court will dismiss the claim.

15 What are the requirements for answering claims? What is the pleading standard?

The statement of defence has to include (i) a specific request for relief, (ii) why the facts in the statement of claim are incorrect and (iii) if the defendant contests the jurisdiction of the seised court, an objection to the court's jurisdiction.

16 What are the rules regarding further briefs and submissions?

Prior to serving the statement of claim to the defendant, the claimant can amend its claim. After the claim has been served to the defendant a party can only amend its claim, if the defendant agrees to the amendment of the claim. However, if the seised court also has jurisdiction regarding the amended claim and deems that the amendment of the claim does not lead to a significant delay of the proceedings, the court can overrule an objection of the defendant and order that the amendment of the claim is admissible (see section 235 ZPO).

If a claim is only amended regarding the quantum of the claim, such an amendment is in any event admissible, to the extent such an amendment does not exceed the jurisdictional competence of the court. This means that if the monetary claim is pending before a district court, the amended quantum of the claim may not exceed €15,000, as otherwise the Regional Court would have jurisdiction.

As long as the amendment of facts does not lead to an amendment of the claim, the claimant is entitled to state additional facts and change its legal evaluation. Under Austrian law, it is in general not required to provide the court with a legal evaluation of the facts.

Any amendment of the claim is in any event only admissible until the court of first instance closes the proceedings. This event occurs after the court of first instance has heard all evidence provided by both parties.

17 To what degree are civil proceedings made public?

In general, all hearings held in civil matters are public and can be attended by the public. TV cameras or photographers are not allowed to film or take photos during the oral hearings. Civil court filings are not publicly available. If a third party can argue that it has a legal interest (not an economical interest) in the proceedings, the court may grant this third party access to the court file. If judgments are made publicly available, the parties are anonymised. All judgments rendered by the Austrian Supreme Court are publicly available via <https://www.ris.bka.gv.at/Jus/>. After a judgment has become final and binding a third party it has a legal interest in the judgment can request a redacted version of the judgment from the respective court.

Pretrial settlement and ADR

18 Will a court render (interim) assessments about any factual or legal issues in dispute? What role and approach do courts typically take regarding settlement? Are there mandatory settlement conferences between the parties at the outset of or during the litigation?

Under Austrian law, the principle of avoidance of unexpected decisions prevails. Therefore, Austrian courts of first instance have to provide the parties with their considerations regarding the facts and their preliminary legal assessment of the case. The court provides such an assessment in the first oral hearing, the preparatory hearing. In this preparatory hearing, the court also discusses with the parties the possibility of an amicable settlement and the agenda for the oral hearings.

19 Is referral to mediation or another form of ADR an option, or even mandatory, before or during the litigation?

The court can in the preparatory hearing (or even at a later stage) suggest to the parties the option of mediation. However, in general, a mediation is not mandatory before or during litigation.

Interim relief

20 What are the forms of emergency or interim relief?

In general, under Austrian law upon application by a party the following interim measures can be requested:

- for securing monetary claims (to the extent no enforcement measures are available), (see section 379 Enforcement Act);
- for securing a claim for a particular performance (including acceptance and omission) (see section 381 No. 1 Enforcement Act); or
- for securing a right or a legal relationship (see section 381 No. 2 Enforcement Act).

The court can, inter alia, order (i) the depositing of movable assets with the court or with a depository, (ii) taking or refraining from taking specific actions, (iii) the prohibition the sale, encumbrance or pledge of an immovable property or (iv) a third party to refrain from fulfilling a claim towards the opposing party, if the party opposing the requested interim measure has a claim against this third party.

Such a request for an interim measure can either be filed together with a statement of claim or within an already pending litigation or prior to filing a statement of claim.

21 What must a petitioner show to obtain interim relief?

For securing monetary claims the party requesting the interim measure needs to prove with a predominant probability that:

- it holds a monetary claim against the party opposing the interim measure and
- it has an interest of securing this claim.

The interest of securing a claim can either be a subjective or objective risk. The subjective risk being that the party opposing the requested interim measure might take actions that would prevent the petitioner from recovering the claim. The objective risk is that a judgment would have to be enforced in states where the enforcement of the claim is not secured either by international treaties or by EU law.

For securing a claim for a particular performance (including acceptance and omission) the party requesting the interim measure needs to prove with a predominant probability that there is an objectively verifiable risk that without the order of an interim measure the enforcement or implementation of the asserted claim would be significantly impeded or even hindered, in particular by a change of the currently existing status quo. The same applies for an interim measure securing a right or a legal relationship. However, in this case the court has to examine the facts of the case particularly detailed and has to weigh and balance both parties' interests. Examples for cases in which such a measure is granted could be, inter alia, in the case of imminent health injuries.

Decisions

22 What types of decisions (other than interim relief) may a court render in civil matters?

The Austrian Civil Procedure Code generally names two forms of court decisions: (i) judgments and (ii) other orders, especially decisions not ruling on the merits of the case (eg, procedural decisions).

Judgments can be classified based on the:

- type of the decision taken: (partially) granting, (partially) dismissing judgments;
- type of the asserted claims: judgments on performance, declaratory judgments and judgments aimed at the direct establishment, amendment or cancellation of legal relationships;
- parties' assertions: two-sided or one-sided judgments;
- scope of the judgment: final judgment deciding on the merits of the case; and
- interlocutory judgments, judgments partially deciding on the merits of the case or supplementary judgment.

23 At what stage of the proceedings may a court render a decision? Are motions to dismiss and summary judgment available?

The court will render a decision as soon as it deems to have gathered all necessary facts and evidence to rule on the merits of the case. Instead of rendering a final judgment the court may choose to render a judgment only ruling on certain parts of the merits or it may even render an interlocutory judgment (holding, for example, that the objection of an alleged statute of limitation is dismissed).

Motions to dismiss or summary judgments are not available.

24 Under which circumstances will a default judgment be rendered?

Generally, a default judgment can be rendered if the defendant fails to submit its statement of defence or either party fails to attend the preparatory hearing.

A default judgment will only be rendered upon application by a party and if the following requirements are met:

- the general procedural requirements (eg jurisdiction) are fulfilled;
- the claim is sufficiently substantiated;
- the service of the summons to the preparatory hearing must be evidenced; and
- the absent party was not prevented from attending the preparatory hearing based on inevitable events known by the court.

25 How long does it typically take a court of first instance to render a decision?

Generally, section 415 ZPO provides for a four-week-deadline for the court to render its written judgment upon closing of the hearings. The parties, however, are limited to apply for a deadline to be set for the court to render its decision. The parties cannot derive any rights from the court's (general) obligation to render its decision within four weeks.

Nevertheless, statistics show that Austrian courts perform very well in international comparisons regarding the duration of proceedings.

Statistics for 2016 show that more than three-quarters of all civil proceedings are settled and finally decided within a few weeks by the issuance of an order for payment. The average duration of contentious civil proceedings amounted to six months for district courts and 13 months for regional courts. Only 2.3 per cent of contentious civil proceedings had a duration of more than three years.

Parties

26 How can third parties become involved in proceedings?

In general, only the parties of a dispute are bound by the judgment rendered in these proceedings. Subject to the limitation period and to the extent a party still has a claim, a party can still initiate a claim against a third party not involved in the prior proceedings. Austrian law provides for the possibility to also involve third parties in the proceedings. However, the effect that the decision will be binding for this third-party and thereby becoming a party to the proceedings is only possible in very limited cases (eg, in the case of a shareholder dispute), if not all shareholders are already parties to the proceedings (see section 20 ZPO).

In any event, it is necessary to notify the third party of the pending dispute and establish why this party holds a legal interest (not only a purely economic interest) in the outcome of the proceedings.

The third party has the possibility to intervene in pending proceedings until a judgment is rendered and becomes final and binding. Even without a notice by one of the parties of the dispute, a party can intervene, if it holds a legal interest (not only a purely economic interest) in one party succeeding in these proceedings. If a party was notified of a pending dispute by a court, this party is also bound by the necessary factual findings of the first court, in case a party of the first proceedings files a claim for redress against this third party.

Fact-Finding and Evidence

27 Describe the rules of fact-finding in your jurisdiction.

In general, the party relying on a legal provision, carries the burden of proof. In Austria, the taking of evidence takes place during the court hearing. Once the taking of evidence has started, the judge is free to evaluate the submitted evidence as an outcome of the principle of the free appraisal of evidence.

28 Will a court take or initiate the taking of evidence or will it rely on the parties to request the taking of evidence and to present it?

Civil proceedings are governed by the principle of ex officio proceedings and the principle of limited investigative powers.

Based on the principle of ex officio proceedings, the court will summon witnesses, appoint experts and will, in general, further the conduct of the initiated proceedings. Based on the principle of limited investigative powers the parties are generally obligated to assert their claims and objections as well as submit the relevant evidence to support their respective positions. The court has the obligation to ascertain the truth and may request additional evidence from the parties.

29 Is an opponent obliged to produce evidence that is harmful to it in the proceedings? Is there a document disclosure procedure in place? What are the consequences if evidence is not produced by a party?

Generally, the parties in civil proceedings are obligated to tell the truth. Based on certain grounds, the court can order the opposing party or even a third party to produce specific documents. The opposing party cannot object to the production of specific documents if (i) the opposing party itself relies on the document to prove its position, (ii) the opposing party is obligated by certain provisions of civil law to hand out the document and (iii) if the requested document is qualified as joint document (eg, the contract in dispute).

The principle of free assessment of evidence applies. If relevant evidence is not produced by a party, the court will draw adverse inferences.

30 Please describe the key characteristics of witness evidence in your jurisdiction. Is witness preparation allowed?

A witness will testify on own perceptions. Witnesses are obligated to appear before the court and to tell the truth. Written witness statements are not admissible in Austrian civil proceedings. Generally, attorneys are permitted to contact and communicate with witnesses. However, attorneys must avoid any form of undue influence of the witnesses. Extensive witness preparations as known in international arbitrations or common law jurisdictions will, therefore, not be conducted.

The court will first inform the witness of its obligation to tell the truth and about possible criminal law repercussions based on giving false evidence. The witness will then be asked about its relationship to the parties. The court will lead with questions posed to the witness, followed by questions by both parties. Suggestive questions are inadmissible.

31 Who appoints expert witnesses? What is the role of experts?

Expert witnesses are appointed by the court. Generally, parties are allowed to submit expert reports (eg, to demonstrate weaknesses of the report rendered by the court-appointed expert).

32 Can parties to proceedings (or a party's directors and officers in the case of a legal person) act as witnesses? Can the court draw negative inferences from a party's failure to testify or act as a witness?

Under Austrian law, both witnesses and parties can be examined. A party's director of a legal person will be examined as a party, not a witness. Contrary to a witness giving false testimony, a party giving false testimony will not be punishable pursuant to section 288 of the Austrian Penal Code. The party (representative) may still be punishable for fraud (pursuant to section 146 of the Austrian Penal Code).

The party will first be questioned by the court followed by questions by both parties (parties' attorneys). Contrary to a witness, a party is not obligated to appear before the court or even testify. However, the court may draw conclusions from the party's absence or unwillingness to testify within the limits of the principle of the free assessment of evidence.

33 How is foreign law or foreign-language documentation introduced into the proceedings and considered by the courts?

Foreign law is to be determined ex officio. Admissible aids for this purpose include the cooperation of the parties involved, information from the Federal Ministry of Justice and legal expert opinions. If the foreign law cannot be determined within a reasonable period despite significant efforts, Austrian law shall apply.

Generally, proceedings are conducted in German (limited exceptions apply). Therefore, documents submitted in a foreign language must generally be translated. In practice, more and more courts allow the production of English documents.

34 What standard of proof applies in civil litigation? Are there different standards for different issues?

In general, in civil litigation the standard of proof that applies is the principle of the judge's conviction of the probability. This standard requires that the judge is convinced of the high probability of the certainty of the facts.

However, there are several exemptions to this general standard in which already the standard of providing sufficiently credible evidence is sufficient. This means that it is sufficient that a court comes to the conclusion that a fact has been proven with a predominant probability. This lowered standard of proof is applied by the courts in interim proceedings.

Appeals

35 What are the possibilities to appeal a judicial decision? How many levels of appeal are there?

Decisions of the district courts may be appealed before the regional courts. If the amount in dispute does not exceed €2,700 the decision may only be appealed on grounds of nullity and on ground of incorrect legal assessment of the case. Decisions of the regional courts may be appealed before the higher regional courts.

Decisions of appellate courts may only be appealed if the amount in dispute exceeds €5,000. If the amount in dispute does exceed €5,000 but not €30,000 an appeal to the Austrian Supreme Court as third and final instance is subject to the appeals court granting leave to appeal. In general, an appeal to the Austrian Supreme Court is only admissible if the decision depends on the solution of a question of substantive or procedural law which is of considerable importance for maintaining legal unity, legal certainty or legal development.

36 What aspects of a lower court's decisions will an appeals court review and by what standards?

An appeals court will review a lower courts' decision with regard to formal defects (procedural defects) and substantive defects.

Formal defects include grounds for nullity (eg, violations of the right to be heard) and substantial procedural violations (ie, violations that prevented an exhaustive and thorough assessment of the case).

Grounds for appeal based on substantive defects include the incorrect legal assessment and the incorrect finding of facts based on facts obviously contrary to the record or an incorrect consideration of evidence.

37 How long does it usually take to obtain an appellate decision?

Depending on the complexity of the case, an appellate decision is usually obtained within three to six months after receipt of the appeal and reply to the appeal.

Role of Domestic Courts In Arbitration Matters

38 In which conditions does your domestic arbitration law apply? Does it apply equally to purely domestic and international arbitrations, and to commercial and investor-state arbitrations?

The Austrian Civil Procedure Code incorporates provisions on arbitration proceedings in Austria. These provisions apply to domestic and international arbitration as well as commercial and non-commercial arbitration. However, the majority of the provisions are only applicable if the seat of arbitration is Austria.

39 Give an overview of instances in which state courts come into play in domestic and international arbitration proceedings.

The fourth chapter of the Austrian Civil Procedure Code provides all instances in which state courts come into play in arbitration proceedings, irrespectively of whether the seat of arbitration is in Austria or not. For instance, parties of an arbitration proceeding seeking interim relief can request the arbitral tribunal as well as an Austrian court to take necessary measures. The competent district court is determined by section 387 of the Austrian Enforcement Act. Also, Austrian courts can provide legal assistance in matters in which the arbitral tribunal has no authorisation, such as requesting a witness to take an oath. Finally, Austrian law provides for a restrictive annulment procedure to set aside arbitral awards. The claim initiating this procedure is to be brought before the Austrian Supreme Court.

40 Describe the rules governing recognition and enforcement of arbitral awards in your jurisdiction. To what extent do domestic courts review arbitral awards on the substance?

Domestic arbitral awards have the same effect and are treated the same way as domestic court decisions, ie, these do not need to be recognised in an additional proceeding. Foreign arbitral awards will have to be recognised based on bilateral or multilateral conventions, eg, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In general, the recognition and enforcement court is not allowed to review arbitral awards in substance to the extent that the court would violate the prohibition of *révision au fond*. Although a court will generally only refuse to recognise a foreign award based on refusal grounds listed in the respective conventions, parties seeking recognition and enforcement should also be aware of the strict Austrian jurisdiction on formal requirements.

Special proceedings

41 Are class actions available?

In general, Austrian law neither recognises a US-style class action nor a group action. Also, it is not permitted to assign the right to file a claim, to litigate on behalf of another person. However, Austrian case law recognises a group action Austrian style (collective claim). Under this method claims are assigned for collection to one single claimant and are being dealt with (procedurally joined but in substance individually) in one single proceeding.

The collective claim is based on section 227 ZPO that stipulates the objective accumulation of claims. Under this provision, multiple claims of one claimant against the same defendant may be asserted in a single lawsuit if certain prerequisites are met. In essence, these prerequisites are concurrence of (i) jurisdiction, (ii) type of proceedings, (iii) cause of action, and (iv) factual or legal issues. Section 227 ZPO only names the first two prerequisites and was originally not designed for collective claims. Case law has developed the two further prerequisites in the landmark decision of the Austrian Supreme Court 4 Ob 116/05w. In this decision, the Austrian Supreme Court held that a collective claim was admissible, since:

- all claims assigned were subject to the jurisdiction of the same court;
- all claims were subject to the same proceedings (adversary proceedings);
- all claims were essentially based on damages (same cause of action); and
- all claims were essentially connected to damages suffered as a result of allegedly void interest rate agreements (same factual and legal issues).

42 Are derivative actions available?

Under Austrian law, no specific provisions for derivative actions exist. However, within insolvency proceedings the insolvency administrator is entitled to assert claims on behalf of the insolvent company.

43 Are fast-track proceedings available?

For solely monetary claims not exceeding an amount of €75,000 a fast-track proceeding in the form of an application for a payment order is obligatory (see section 244 ZPO). The party filing a claim needs to (i) assert the facts on which it bases its payment claim and (ii) offer evidence to prove its claim. The court renders a payment order (which resembles as legally binding judgment) without conducting an oral hearing or offering the defendant the opportunity to be heard prior to the issuance of the payment order.

A litigation proceeding including the taking of evidence will only be initiated, if the defendant objects to the payment order within four weeks upon receipt of the payment order. If the defendant fails to object in time to the payment order the payment order becomes enforceable.

Within the European Union for monetary claims to be asserted in another EU member state Regulation (EC) No. 1896/2006 creating a European order for payment procedure provides a fast-track proceeding. An application for a European order for payment is not limited with regards to the amount of the monetary claim. The court renders a European order for payment without hearing the defendant.

Upon receipt of a European order for payment, the defendant may lodge a statement of opposition within 30 days (see article 16, paragraph 1, EU Regulation creating a European order for payment procedure).

If a European order for payment is rendered and becomes final and binding (since it is not opposed by the defendant), this decision is enforceable within the entire EU (except for Denmark) without any further procedure for recognition and declaration of enforceability.

44 Is it possible to conduct proceedings in a foreign language?

In general, litigation proceedings conducted before Austrian courts are to be conducted in German language (for details see question 30).

Effects of judgment and enforcement

45 What legal effects does a judgment have?

Generally, only the parties are bound by a final judgment. In limited cases the binding effect of a judgment also extends to third parties (eg, in shareholder disputes, in tenancy disputes, certain judgments rendered in enforcement proceedings, disputes in which a third party was given proper notice).

By reason of *res iudicata*, the parties are barred from relitigating the same issue between the same parties again. However, only the operative part of a judgment becomes binding. The reasoning of the judgment and also the findings of fact do not become binding.

If the operative part of a judgment constitutes a preliminary question in a further proceeding between the same parties, the court is bound by the operative part of the prior judgment.

46 What are the procedures and options for enforcing a domestic judgment?

Enforcement proceedings must be initiated by a party. Numerous enforcement measures are available and are differentiated depending on whether the judgment ruled on a payment obligation of a party or on a performance obligation (ie, that a party must take a specific action).

Based on a judgment ruling on a payment obligation, the applicant for enforcement can take enforcement measures on movable and immovable assets of the obligated party.

Based on a judgment ruling on a performance obligation, such the required action is enforced by forced purchase, substitute performance or fines.

47 Under what circumstances will a foreign judgment be enforced in your jurisdiction?

Pursuant to the Brussels I Regulation (Council Regulation 1215/2012), judgments rendered by courts of other EU member states will be recognised and enforced in Austria without any special procedure being required.

Judgments of non-EU member states will be recognised and enforced in Austria if the following two requirements are met:

- the foreign judgment must be enforceable according to the laws of the state in which the judgment was rendered; and
 - reciprocity must be guaranteed by regulations or international treaties between Austria and the foreign state.
- Costs and Funding

48 Will the successful party's costs be borne by the opponent?

In general, the successful party's costs must be borne by the opponent to the extent a party was successful in the proceedings. If a claimant was successful with 60 per cent of its claim, the defendant will have to compensate 60 per cent of the court fees, expert fees, costs for translators, etc.

Regarding lawyers' fees, irrespective of the fee arrangement between the party and its own lawyer, the opponent will only be obliged to compensate the costs incurred based on the Austrian Statutory Act on Lawyer's tariffs (RATG). For each necessary act within litigation proceedings the RATG determines based on the amount in dispute and the complexity of the performed procedural act a reasonable amount for remuneration. In addition, if a party only succeeds with 60 per cent of its claim, it is deemed

that the opponent succeeded to the extent of 40 per cent. In such a case, only 20 per cent (60–40 per cent) will be compensated by the opponent of the successful party.

49 May a party apply for legal aid to finance court proceedings? What other options are available for parties who may not be able to afford litigation?

If a party is unable to finance its proceedings, the party can apply for legal aid. To receive legal aid, the party requesting legal aid has to provide a full statement listing all assets, income and mandatory expenses, such as alimony (see section 63 ZPO et seq). In general, also companies are eligible to receive legal aid, if neither the company nor its economic stakeholders have sufficient financial means to finance the proceedings (see section 63, paragraph 2 ZPO).

Legal aid can encompass the exemption from paying court fees, fees of an expert and if necessary for a translator. In addition, if the complexity of the case requires it or the representation by a lawyer is mandatory, legal aid can also encompass the representation by a lawyer. In this case, the lawyer is appointed by the Austrian bar association. Each lawyer admitted to the Austrian bar is obliged to provide legal aid services. Due to an agreement between the Austrian government and the Austrian Bar Association lawyers do not receive a remuneration for legal aid representations but the Austrian government provides payments to the Austrian lawyers' retirement fund.

If the party receiving legal aid recovers financially within three years after the proceedings have been terminated, the party is obliged to pay the costs of the proceedings (including the lawyer's fees).

50 Are contingency fee arrangements permissible? Are they commonly used?

No. Contingency fee arrangements are not permissible under Austrian law and, in particular, Austrian bar rules. Clients can agree with their lawyers on an additional success fee in case of success in the proceedings and a reasonable reduced lawyers' fee to be paid irrespective of any success in the proceedings.

51 Is third-party funding allowed in your jurisdiction?

In general, it is permissible for a party to use the services of a third-party funder in order to finance proceedings. The limits within which the validity of a litigation funding agreement are assessed can be derived from section 879, paragraph 1 Austrian Civil Code (ABGB). If a litigation funding agreement violates (Austrian) law or is deemed unethical, such a litigation funding agreement is void. In general, the party acting as claimant in the proceedings conducts the proceedings irrespective of any funding. From a practical perspective, even though the funder is not entitled to act within the proceedings, a party receiving third party funding will likely discuss strategic decisions with the funder.

It is disputed whether section 879, paragraph 2 no. 2 ABGB ([partial] removal of the disputed claim) applies to litigation funders, as litigation funders are not acting as lawyers and are, therefore, not representing the financed party in the proceedings.

52 Are there fee scales lawyers must follow? Are there upper or lower limits for fees charged by lawyers in your jurisdiction?

In general, lawyers are free to agree with their clients on their own fee arrangements based on hourly rates or lump-sum agreements. However, any a fee arrangement is subject to a review pursuant to section 879, paragraph 1 ABGB and deemed to be void if it violates (Austrian) law or is deemed unethical. In this case, a lawyer is only entitled to receive a reasonable remuneration.

The reasonableness of remuneration is assessed under the Austrian Statutory Act on Lawyer's tariffs (RATG) and the General Criteria for Lawyer's fees (AHK), which are adopted by the Austrian Bar Association. The RATG sets forth what is deemed to be a reasonable fee for a service based on the amount in dispute. The AHK provides general guidelines, including for the assessment of a reasonable amount in dispute.



Nikolaus Pitkowitz
Pitkowitz & Partners

Dr Nikolaus Pitkowitz is a founding partner and head of the dispute resolution team at Pitkowitz & Partners. He holds law degrees from the University of Vienna (JD and PhD) and University of Sankt Gallen, Switzerland (MBL) and is also qualified and certified as a mediator.

His practice of over 30 years as an attorney has always been predominantly international. While he started his career with transactional and real estate work in Austria and the CEE region, he now holds a particular focus on litigation, arbitration and mediation. Dr Nikolaus Pitkowitz acted as counsel in many complex and high-profile litigations in front of Austrian Courts and the European Court of Justice, among others in the two largest ever pending class actions in Austria. He has an impressive record of successes achieved in front of the Austrian Supreme Court.

Dr Nikolaus Pitkowitz acted as arbitrator and party counsel in over 100 international disputes, in a range from smaller to multibillion cases. Particularly noteworthy is his role as party counsel in the largest arbitration ever pending in Austria, with a dispute value of several billion euros.

Dr Nikolaus Pitkowitz is Vice-President of the Vienna International Arbitral Centre (VIAC), arbitrator and panel member of all leading arbitration institutions, and Fellow of the Chartered Institute of Arbitrators (FCIArb). He also acts as Vice-chair of the International Arbitration Committee of the Section of International Law of the American Bar Association (ABA) and as Court Member of the Casablanca International Mediation and Arbitration Centre (CIMAC).

Dr Nikolaus Pitkowitz speaks frequently at seminars and is the author of over 50 publications. He is co-editor of the Austrian Yearbook on International Arbitration and co-organiser of the Vienna Arbitration Days.

Prior to the formation of Pitkowitz & Partners in 2021, Dr Nikolaus Pitkowitz was a founding partner at Graf & Pitkowitz for over 25 years.



Roxanne de Jesus
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Roxanne de Jesus is a founding partner in the dispute resolution team of Pitkowitz & Partners.

Roxanne mainly advises international clients in complex cross-border litigation and arbitration proceedings. She is experienced in joint venture disputes involving multi-jurisdictional legal aspects and has a considerable track record of advising private clients as well as clients operating in the construction sector. Her broad experience further includes numerous successes with the Austrian Supreme Court in securing the recognition and enforcement of foreign court decisions as well as foreign arbitral awards based on international treaties. Roxanne's clients also appreciate her know-how in white-collar crime.

Roxanne is a member of the Young Austrian Arbitration Practitioners (YAAP) and of the International Association of Young Lawyers (AIJA). She studied at the University of Vienna and the University of Wolverhampton.

Pitkowitz & Partners

Pitkowitz & Partners, based in Vienna, is a leading commercial law firm. The firm's focus is on international arbitration and complex litigation, as well as on real estate and construction law. Pitkowitz & Partners forms one of the largest dispute resolution teams nationwide and has been recognised as one of the leading disputes practices in Austria for years. With its involvement in cases spanning the globe and a myriad of industries, including, amongst others, construction, energy, real estate, technology, and media, the firm has acclaimed a stellar international reputation. Pitkowitz & Partners is listed in the GAR 100 ranking of the world's leading arbitration firms. The firm's team can rely on more than 120 years of professional experience.

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