

The Legal500: Country Comparative Guide on Litigation, in association with Damian Taylor of Slaughter and May

Commercial litigation

LEGAL 500 – AUSTRIA LITIGATION

1 What are the main methods of resolving disputes in your jurisdiction?

P&P ANSWER	In Austria, the parties are generally free to agree on a forum for their disputes. They may choose to refer a current or future dispute to alternative dispute resolution such as arbitration or mediation. The main methods for resolving disputes in Austria would be state court litigation or arbitration.
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2 What are the main procedural rules governing litigation in your jurisdiction?

P&P ANSWER	<p>The main procedural rules governing litigation in Austria are</p> <ul style="list-style-type: none"> • The Austrian Code of Civil Procedure (<i>Zivilprozessordnung – ZPO</i>), which comprehensively codifies the main procedural rules for civil litigation in Austria • The Austrian Code on Jurisdiction (<i>Jurisdiktionsnorm – JN</i>), governing jurisdictional and organisational aspects of civil procedure • The Austrian Enforcement Act (<i>Exekutionsordnung – EO</i>), which governs the enforcement of court decisions (as well as arbitral awards) and notably also interim measures.
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3 What is the structure and organisation of local courts dealing with claims in your jurisdiction? What is the final court of appeal?

P&P ANSWER	<p>The Austrian court system consists of district courts (<i>Bezirksgerichte</i>), regional courts (<i>Landesgerichte</i>), higher regional courts (<i>Oberlandesgerichte</i>) and the Austrian Supreme Court (<i>Oberster Gerichtshof – OGH</i>). There are also specialised courts, such as the District Court for Commercial Matters Vienna (<i>Bezirksgericht für Handelssachen Wien</i>) and the Commercial Court Vienna (<i>Handelsgericht Wien</i>) and the Court for Labor and Social law matters (<i>Arbeits- und Sozialgericht</i>).</p> <p>The jurisdiction of the courts is mainly determined by the amount in dispute or by the legal matter.</p> <p>The courts of first instance in commercial matters are either the district courts (amount in dispute up to EUR 15,000) or regional courts (amount in dispute exceeding EUR 15,000).</p>
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	<p>Appeals can be filed to the courts of second instance which are</p> <ul style="list-style-type: none"> (i) regional courts: competent for appeals against first instance decisions by district courts, or (ii) higher regional courts: competent for appeals against first instance decisions by regional courts; <p>The Austrian Supreme Court is the third and final instance and can only be addressed in extraordinary cases if the resolution of a legal question is of importance exceeding the respective dispute. This is the case if the OGH has not yet decided on the matter, the court of second instances deviated from the OGH's established jurisprudence or only inconsistent jurisprudence exist.</p>
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4 How long does it typically take from commencing proceedings to get to trial in your jurisdiction?

<p>P&P Answer</p>	<p>There is no publicly available data on the average time until a court hearing is scheduled. Pursuant to Section 257 (1) ZPO, the court shall provide the parties with a minimum of three weeks to prepare until the date of the hearing. Generally, the parties are provided with even more preparation time by the courts.</p> <p>In 2020 the average duration for civil proceedings was 9.4 months for district proceedings and 18 months for regional court proceedings.</p>
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5 Are hearings held in public and are documents filed at court available to the public in your jurisdiction? Are there any exceptions?

<p>P&P Answer</p>	<p>It is a fundamental principle of Austrian law that civil proceedings must be public. However, exceptions and limitations exist. While it is allowed for the general public to attend hearings, filming, live streaming or taking photographs during a hearing is not allowed.</p> <p>Furthermore, the judge may – and in some cases must – exclude the public. Any party may also request the exclusion of the public from (parts of) the hearing if, e.g. business secrets are discussed.</p> <p>All judgments of the Austrian Supreme Court are anonymized and published at https://www.ris.bka.gv.at/Jus. Third parties may also request anonymized decisions of lower courts if they can argue legal interest. They may even be granted access to a case file (of not yet finally decided proceedings) if they can argue that they have a valid legal interest in the proceedings (an economic interest alone, however, will generally not suffice).</p>
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6 What, if any, are the relevant limitation periods in your jurisdiction?

<p>P&P Answer</p>	<p>The general statute of limitations in Austria is 30 years. However, most claims are subject to the short limitation period of 3 years. This generally includes claims for damages.</p>
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	Notably, the court does not examine whether a claim is time-barred <i>ex-officio</i> . Any such objection must be raised by a party.
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7 What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

P&P Answer	There are generally no pre-action requirements that must be fulfilled in Austria. In case a defendant does not dispute a claim and immediately complies, there is the chance that the judge will not award costs to the plaintiff, however. It is thus advisable to not “pre-maturely” file a claim.
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8 How are proceedings commenced in your jurisdiction? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

P&P Answer	<p>Proceedings are commenced by party initiative (eg, by submitting an application or filing a statement of claim). Attorneys must file their submissions digitally with the courts using a special system of electronic file transfer called “WebERV”. Notably, the service of court documents to attorneys is likewise effected via WebERV. The service of claims is effected through the court using the Austrian Postal Service.</p> <p>Claims are served pursuant to the Service of Documents Act (<i>Zustellgesetz</i>), or within the EU pursuant to the European Regulation No 1393/2007 on the service of judicial and extrajudicial documents, or outside the EU pursuant to international agreements.</p>
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9 How does the court determine whether it has jurisdiction over a claim in your jurisdiction?

P&P Answer	<p>The parties are generally free to choose the specific forum for their dispute. Exceptions on the choice of forum exist eg for cases involving consumers. Absent party agreement the court will determine whether it has jurisdiction over the claim based on a cursory evaluation of the claim.</p> <p>If a party objects to the jurisdiction of the called court, it must raise such objection before pleading on the merits. Otherwise, the court will assume jurisdiction as both parties have engaged in the proceedings.</p>
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10 How does the court determine which law governs the claims in your jurisdiction?

P&P Answer	Parties are generally free to agree on the law applicable to their dispute under the Austrian and European provisions on conflict of law. Absent such party agreement the European Regulations Rome I (applicable to civil and commercial matters) and Rome II (applicable to non-contractual obligations) and subsidiarily the Austrian Act on International Private Law (<i>Internationales Privatrechtsgesetz</i>) will determine the applicable law on the merits.
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11 In what circumstances, if any, can claims be disposed of without a full trial in your jurisdiction?

P&P Answer	The court may dismiss a case <i>a limine</i> without a hearing and without even serving the claim to the defendant if certain minimum requirements for a claim are not met. Claims may also be dismissed <i>a limine</i> for lack of international jurisdiction of the Austrian courts.
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	<p>If a party's claim merely exists of monetary claims up to EUR 75,000, a simplified procedure must be followed (<i>Mahnklage</i>). A form has to be filled out and, subsequently, a payment order is issued by the court ordering payment without a hearing. Only if the defendant objects to the payment order, conventional proceedings will be opened.</p> <p>Another way proceedings might end without a full trial are default judgements. If a party does not reply to a claim or fails to attend an oral hearing the opposing party can request a default judgement. There are ways available, however, to appeal such judgement.</p>
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12 What, if any, are the main types of interim remedies available in your jurisdiction?

<p>P&P Answer</p>	<p>Parties may request interim measures before a claim has been filed, simultaneously with filing a claim or during pending litigation.</p> <p>Interim measures in Austria are available to:</p> <ol style="list-style-type: none"> 1. secure monetary claims (to the extent no enforcement measures are available), (section 379 EO); 2. secure a claim for a particular performance (including acceptance and omission) (section 381 No. 1 EO); or 3. secure a right or a legal relationship (section 381 No. 2 EO). <p>To safeguard the requesting party's position, the court may order</p> <ol style="list-style-type: none"> (i) the deposit of movable assets with the court or with a depository, (ii) taking or refraining from specific actions, (iii) the prohibition of 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.
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13 After a claim has been commenced, what written documents must (or can) the parties submit in your jurisdiction? What is the usual timetable?

<p>P&P Answer</p>	<p>In proceedings before regional courts the defendant is served with the claim by the court and ordered to submit its (written) reply within four weeks. This procedure is not mandatory before district courts. Rather, a hearing can be scheduled right away.</p> <p>Up until one week before the preparatory hearing, the parties may submit additional documents, pleadings or applications for evidence in a preparatory writ (<i>Vorbereitender Schriftsatz</i>). The court can also order or invite the parties to file further submissions or documents.</p>
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14 What, if any, are the rules for disclosure of documents in your jurisdiction? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

P&P Answer	<p>In general, the parties have to submit documents in support of their case as each party generally bears the burden of proof for their respective positions. Parties must prove their case based on the evidence in their possession and can only to a very limited extent request the production of documents from the opposing party.</p> <p>A party must produce a document upon request if</p> <ul style="list-style-type: none"> (i) it itself relies on the document to prove its case (ii) it is obligated by certain provisions of civil law to produce the document or (iii) the requested document is qualified as a joint document (e.g., the contract in dispute). <p>Any other documents do not have to be produced. A valid reason not to disclose documents may be that they contain business secrets or this would lead to a violation of confidentiality obligations.</p> <p>The court may, however, draw adverse inference if a document is not produced, based on the principle of free assessment of evidence.</p>
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15 How is witness evidence dealt with in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

P&P Answer	<p>Parties are free to nominate witnesses to support their case. If the court is satisfied that the witness may provide evidence relevant to the proceedings, the respective witness is ordered to appear in court. Safe where both parties object to it, the court may also order witnesses to appear on the court's own initiative.</p> <p>Witnesses must attend court hearings when ordered and must tell the truth when being examined. There are only limited reasons a person may be excused from appearing as a witness or may be excused from answering specific questions. For example, if answering the question would lead to self-incrimination or giving evidence would pertain to a breach of a statutory confidentiality obligation. Witnesses who breach these obligations face (significant) penalties.</p> <p>As evidence must generally be taken in the presence of the court, written witness statements are not admissible in Austria. Any witness will first be questioned by the court and then thereafter by the parties.</p>
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16 Is expert evidence permitted in your jurisdiction? If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)?

P&P Answer	<p>Expert evidence often plays a significant part in litigation proceedings in Austria. The court appoints expert witnesses and instructs them on the scope of their appointment. The expert is usually ordered by the court to produce a written report.</p>
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	<p>The parties may challenge the appointment of an expert, e.g., for lack of qualifications in the matter to be determined or for being biased.</p> <p>While parties are free to also submit expert evidence, it is generally not given substantial consideration compared to the evidence given by a court appointed expert.</p>
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17 Can final and interim decisions be appealed in your jurisdiction? If so, to which court(s) and within what timescale?

P&P Answer	<p>Two types of Austrian court decision have to be differentiated in this regard:</p> <ul style="list-style-type: none"> (i) judgements dealing with the merits of the case (<i>Urteile</i>) and (ii) court orders dealing with procedural matters (<i>Beschlüsse</i>). <p>Judgements of first instance courts can be appealed within four weeks from being served with the decision. Depending on the court of first instances such appeals are filed with the regional court (district court as first instance) or higher regional court (regional court as first instance). Decision of the second instance courts may – in exceptional cases – be appealed before the Austrian Supreme Court.</p> <p>The Austrian Supreme Court is the third and final instance and can only be addressed in extraordinary cases if the resolution of a legal question is of importance exceeding the respective dispute. This is the case if the OGH has not yet decided on the matter, the court of second instances deviated from the OGH’s established jurisprudence or only inconsistent jurisprudence exist.</p> <p>If the amount in dispute is below EUR 5,000.- the second instance decision may not be appealed before the Austrian Supreme Court.</p> <p>Court orders may generally be appealed within 14 days from service of the decision. Some court orders may only be appealed together with an appeal a following decision on the merits.</p>
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18 What are the rules governing enforcement of foreign judgments in your jurisdiction?

P&P Answer	<p>The recognition and enforcement of foreign judgements depends on whether it has been rendered in an EU member state or a non-EU member state.</p> <p><i>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.</i></p> <p><i>Judgments of non-EU member states will be recognised and enforced in Austria if the following two requirements are met:</i></p> <ul style="list-style-type: none"> • <i>the foreign judgment must be enforceable according to the laws of the state in which the judgment was rendered; and</i> <p>reciprocity must be guaranteed by regulations or international treaties between Austria and the foreign state.</p>
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19 Can the costs of litigation (e.g. court costs, as well as the parties’ costs of instructing lawyers, experts and other professionals) be recovered from the other side in your jurisdiction?

<p>P&P Answer</p>	<p>Austrian law follows the “costs follow the event”-approach. Hence, the successful party will usually be awarded the recovery of its costs corresponding to its rate of success. Costs include legal fees, court fees, fees for translators, etc.</p> <p>Court fees are generally paid upfront by the claimant and are ultimately borne by the losing party. Reimbursement of legal fees is determined based on the Austrian Statutory Act on Lawyer’s Tariffs (<i>Rechtsanwaltstarifgesetz</i>), irrespective of a party’s fee arrangement with its legal counsel. Only costs for necessary acts of legal representation are recoverable and are determined based on the amount in dispute and the complexity of the case.</p>
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20 What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

<p>P&P Answer</p>	<p>Austria does not have a codified regime for US-style class actions or group actions. In the early 2000’s a way to bring collective actions was developed in Austrian case law that since has become known as the “Austrian style class action”. There has been a noticeable increase of such actions in the recent years.</p> <p>The Austrian style class action is based on the assignment of claims from multiple people to one claimant, who then brings the claims jointly against one defendant. The claims must thereby fulfil the following criteria and share:</p> <ul style="list-style-type: none"> (i) jurisdiction (ii) the type of proceedings (iii) the cause of action (iv) factual and legal issues. <p>Usually, the costs of such proceedings are borne by a third party funder that seeks a share of the proceeds in case of success.</p>
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21 What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

<p>P&P Answer</p>	<p>The joinder of third parties can be requested by either party of the dispute or by a third party on its own initiative by filing a request with the court. For the court to approve the joinder of a third party it must demonstrate a legal – not (only) economic – interest in the outcome of the case. Based on the extend of the effect of the judgement on the third party it will either become a full party to the proceedings (<i>streitgenössische Nebenintervention</i>) or merely aid in the proceedings with limited involvement (<i>einfache Nebenintervention</i>).</p> <p>A third party that is requested to join may refuse to do so or also join on the side that did not request it to join.</p> <p>The court may – at its discretion – join multiple proceedings between the same parties if this will speed up the proceedings and be more efficient.</p>
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22 Are third parties allowed to fund litigation in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

P&P Answer	<p>In general parties may use the services of a third-party funder for proceedings in Austria.</p> <p>Funding agreements are evaluated to the same standard as any other contracts and void if found to be against the law or against good morals. Furthermore, there have been some discussions whether third-party funding would fall under the prohibition of <i>pacta de quota litis</i> in Austria. This prohibition is only applicable to attorneys, however. A third-party funder that does not have an active role in proceedings, i.e., that is not representing a party, thus does not fall under this prohibition.</p> <p>Recently the Austrian Supreme Court has held – in an obiter dictum – that third-party funding is permissible.</p> <p>The funder as a third-party is not liable for costs incurred by an opposing party.</p>
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23 What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction (and in particular, have the courts adopted remote hearings and have there been any procedural delays)?

P&P Answer	<p>During the pandemic hearings were allowed to be held remotely. There have been ongoing discussions to provide for this possibility even after the pandemic.</p> <p>Regarding arbitration hearings, Austria was on the forefront when the Austrian Supreme Court decided on the admissibility of remote hearings even if one party objected thereto.</p>
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24 What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

P&P Answer	<p>The Austrian judiciary enjoys a great reputation among EU member states. Advantages of litigating commercial disputes in Austria are the overall high level of efficiency and legal certainty.</p> <p>Also, Austrian courts have great statistics to show for regarding the overall duration of proceedings. Overall, roughly 75% of contentious civil proceedings before district courts and roughly 50% of regional court proceedings were decided within 12 months in the years 2019/2020. Only 3.4% of all contentious civil proceedings had a duration of more than three years.</p> <p>A disadvantage may be seen in the limited recovery of legal costs.</p>
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25 What is the most likely growth area for commercial disputes in your jurisdiction for the next 5 years?

P&P Answer	<p>Until the end of the year 2022 Austria has to implement the EU directive on collective redress into national law (Directive No. 2020/1828). For the last years Austrian style class actions have already gained popularity. It is thus expected that this development will only receive a boost in the years to come.</p>
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	Due to the COVID-19 pandemic disputes regarding the delayed delivery of goods and in general disputes relating to supply chains are expected to rise in number. Restructuring matters and insolvency-related disputes will likely become more as well.
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26 What, if any, will be the impact of technology on commercial litigation in your jurisdiction in the next 5 years?

<i>P&P Answer</i>	Austria has been on the forefront of implementing technology into the judiciary compared to other states. In particular through the implementation of the electronic file transfer system WebERV. Attorneys must file their submission electronically through this system and are also served court documents this way. Furthermore, more and more courts files are kept electronically.
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27 What, if any, will be the long –term impact of the COVID-19 pandemic on commercial litigation in your jurisdiction?

<i>P&P Answer</i>	Although courts have mainly gone back to in-person hearings for now, they have gained experience in holding remote hearings and there have been ongoing discussions to allow remote hearings without the pandemic. A general possibility to resort to remote hearings after the pandemic has not yet, however, been implemented into Austrian law.
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