

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

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AUSTRIA

Responses submitted by:

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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Civil code jurisdiction.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

The Austrian civil procedure law uses a hybrid system. While the parties are solely responsible to present their arguments, both the court and the parties collect the necessary evidence. In particular, the court is allowed to *ex officio* take evidence in order to explore the true facts of the case (secs 182 para 1, 183 and 371 para 1 CPC). However, in practice, the court's decision is heavily dependent on the information and evidence provided by the party who bears the burden of allegations and of proof.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Professional judges have to hold a degree in law and to undergo another four years formation until they are appointed by the Federal Minister of Justice on behalf of the Federal President and have permanent status. In civil procedures decisions are made either in panels or by a single judge. Lay judges may decide along with professional judges in commercial, labour and social security law matters. Furthermore, lay judges may be part of the panel in criminal procedures and in the case of very serious crimes a jury trial has to take place.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

In general, specialized courts apply the same set of rules as general civil courts. However, there are specific provisions in cheques or tenancy law which intend to shorten the proceedings (secs 555 to 576 CPC). Regarding labor and social security law matters, the Labor and Social Courts Act (“LSCA”) provides specific provisions, for instance on the composition of the court. Civil courts do not deal with environmental law as the decision on environmental matters belongs to administrative authorities. Appeals thus may be filed with the Administrative Courts. These courts follow a special code on procedure which is not identical with the CPC.

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5. Is arbitration an option and when? If so, what rules are typically used?

In general, arbitration is an option for disputes which either relate to pecuniary claims or are capable of settlement. However, a number of matters are excluded from arbitrability (e.g. claims for dismissal of a member of a foundation board). The Austrian arbitration law (secs 577 et seqq CPC) is based on the UNCITRAL Model Law. Restrictions apply regarding consumer (sec 617 CPC) and labor law (sec 618 CPC). The most commonly used rules include the rules by the VIAC (Vienna Rules), the ICC or, for investment disputes, the ICSID.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Generally, the court will reject a claim that is the subject of an arbitration agreement. However, if the defendant makes submissions on the substance of the dispute or orally pleads before the court without making an according objection, the court has jurisdiction (sec 584 para 1 CPC).

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

In general, mediation is not mandatory. Only very rare exceptions exist, e.g. for divorces or the area of the law concerning the respective interests of neighbors (disputes pursuant to sec 364 para 3 Civil Code ("CC") regarding the extraction of light or air by someone else's trees or plants).

8. What is the process for pre-hearing fact discovery (if any)?

Under the Austrian law of civil procedure no pre-hearing fact discovery exists. Such obligation to disclose is unknown to its legal order. However, the CPC provides preliminary taking of evidence prior to the start of the proceedings or in the pre-hearing phase if loss or difficulties regarding the use of evidence are to be feared or if there is a relevant legal interest in the declaration of the current state of an object (secs 384 seqq CPC).

(a) *Are there provisions for mandatory document disclosures?*

No.

(b) *Is there provision for oral examinations of the parties or others?*

No.

(c) *Are there limits on the length of oral examinations?*

N/A

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(d) *Are witness statements or summaries to be provided before the hearing?*

No.

9. What is the process for pre-hearing expert disclosure (if any)?

See question 8.

(a) *Are expert reports or written summaries required to be exchanged?*

No.

(b) *Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?*

No.

(c) *Are there provisions requiring experts to meet and narrow issues before the hearing?*

No.

10. Are there other notable discovery rules?

Discovery is not permitted to explore facts of which one party has no knowledge. In other words, applying for taking evidence in order to disclose hitherto unknown evidence (*Erkundungsbeweis*) is not allowed.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

No, in Austria a pre-hearing conference does not exist. Yet, the first court hearing, the so called preparatory hearing, is a means for settlement, ruling on objections, discussing the parties' arguments and how to proceed (see question 20).

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

No.

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13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

No.

14. What is the standard for admissibility of expert evidence?

If a judge does not have the required expert knowledge he/she has to appoint an expert (sec 364 CPC). In general, any qualified person may be appointed as an expert. In practice, however, courts tend to choose a person accredited with the Federal Ministry of Justice. Experts may be challenged on the same grounds as judges (sec 355 para 1 CPC). Opinions rendered by court appointed experts are subject to the court's free assessment of the evidence (*freie Beweiswürdigung*). In practice, courts tend to follow such expert opinions. Furthermore, any party may choose to submit to the court opinions rendered by private experts (*Privatgutachten*) as evidence for a certain fact or matter. However, due to the fact that the private expert is on the submitting party's payroll, in practice opinions rendered by such experts are only of reduced probative value.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

As mentioned above, if a judge lacks the relevant expertise he/she has to appoint an expert (sec 364 CPC). Such an *ex officio* appointment is even possible against the will of both parties.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Under Austrian law communications between an attorney and his/her client are protected, unless the client waives this right. Attorneys have the right to refuse to testify in court regarding information they gained from their client in their capacity as attorney (sec 321 para 1 no 4 CPC). From an attorney's perspective, the right to refuse to testify is closely interwoven with the obligation of professional secrecy (sec 9 para 2 and 3 Austrian Lawyers' Code of Professional Conduct). This attorney-client privilege is not applicable to in-house counsels. As opposed to the Anglo-American concept of privilege, correspondence between the client and his attorney itself is not protected. This aspect may be of relevance with regard to searches conducted directly at the client's premises or even the premises of a third party.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

See question 16.

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18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

The court decides if the requirements for the refusal to testify laid down in sec 321 CPC are met (sec 324 para 1 CPC).

19. Briefly describe the trial process?

(a) Are there opening submissions, in what form and of what length?

Yes. In general, opening submissions are very short, because the parties or their legal representatives just reference their statement of claim or the statement of defense.

(b) What is the order of presentation of witnesses?

As part of their duty to assure the progress of the case (*Prozessleitungspflicht*) judges have to determine the order of presentation of witnesses. However, the parties have the right to be heard regarding this matter (sec 180 and sec 258 para 1 no 4 CPC).

(c) Who conducts examination and in what order?

Asking questions is first and foremost the task of the judge deciding the case. After the judge has finished his/her interrogation, the parties may, in theory, address their questions to the judge who will then either pass them on to the witness or expert, or reject the question due to inadequacy (sec 289 para 1 and sec 341 CPC). In practice, the judge typically allows parties or their legal representatives to directly ask the witness or expert.

(d) What is the process for closing submissions?

In civil proceedings there are no closing submissions.

20. Please identify any other notable trial procedures.

The first hearing in Austria is a preparatory hearing. The purpose of such a preparatory hearing is to conduct a first evaluation of the parties' factual and legal submissions, the joint discussion of possible settlement options and finally, if no settlement has been reached, the determination of a detailed hearing schedule for the further course of the proceedings (sec 258 CPC).

In principle, even illegally obtained evidence is admissible in Austria. This is based on the idea that the judge should have all the relevant information at his/her disposal in order to render a just decision.

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Please note that in criminal law a different set of procedural rules is applicable (Austrian Code of Criminal Procedure (“CCP”). The CCP differs in many ways from the Austrian civil procedure laws, e.g. a jury trial is possible.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

In general, it is up to each party to allege and furnish proof for all facts and matters justifying its submission. Thus, in liability cases, the burden of proof is in principle on the injured person. However, in some cases Austrian substantive law provides for a reversal of the burden of proof (e.g. in cases of contractual liability (sec 1298 CC)) or even sets out legal assumptions which render the provision of further proof obsolete (e.g. in warranty cases it is assumed that the relevant goods were already defective at the time of handover (sec 924 CC)). In such cases the defendant has to bring forward convincing evidence to refute the legal assumption.

The usual standard of proof in the CPC requires high probability. However, sometimes the standard of proof is reduced. In such cases, the mere attestation of the truth is sufficient, meaning, that the judge merely has to be convinced of the preponderant probability of a certain factual allegation. Concerning liability, causation and damages, the usual standard of proof is applicable. However, if there is a typical course of events for which experience of life suggests a specific causal link or fault, these conditions may be deemed to be proved on the basis of *prima facie* evidence.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

The claimants’ financial loss is recoverable. In contrast, losses which cannot be measured in money are only replaced if the substantive law expressly states this, e.g. compensation for pain and suffering (secs 1325, 1328 and 1329 CC). Loss of profit is part of the financial loss.

The replacement of pre-judgment interest is possible (secs 1333, 1000 para 1 CC and sec 456 Austrian Commercial Code).

Punitive damages are not available in Austria.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Not applicable.

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24. Are there time limits for bringing claims? Responding to claims? Please describe.

No. However, if the claim has already become time barred at the time the lawsuit is filed, the lawsuit will not be successful. According to Austrian statutory provisions the general statute of limitations is 30 years. However, there are certain exceptions to this general rule. The major exception is applicable e.g. to the sale of goods and the provision of services, where a statute of limitations of only 3 years (from the date when payment is due) applies. Attention should be paid to the fact that the statute of limitation is treated as a matter of substantive law in Austria, hence the defendant has to raise a statute of limitations defense.

The statutory time limit for submitting a statement of defense is four weeks (sec 230 para 1 CPC).

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

Austrian courts are competent if they have international jurisdiction. In the absence of applicable European law and public international law, international jurisdiction is established by venue of an Austrian court (sec 27a Austrian Jurisdiction Act ("JN")). Venue of a specific court in Austria is due to various factors (see JN), most notably the defendant's legal or habitual residence and the place where the object giving rise to the lawsuit is situated. If the provisions of the JN grant several venues and none of them is exclusive (secs 76 to 84 JN), the plaintiff can choose to file his claim with any of the courts. In general, the parties to a dispute are able to conclude agreements on jurisdiction (international jurisdiction as well as venue; sec 104 JN), but sometimes the circumstances of the case command compulsory jurisdiction of a particular court.

A defendant can only request the delegation to another Austrian court, if this place was more appropriate (sec 31 JN). The main reason for a successful delegation would be the shortening of the proceedings, for example to hold a trial at the place of the occurrence of damage. Other than that, the defendant has no possibility to change jurisdiction or venue (without the cooperation of the claimant).

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

Yes. There is the possibility to officially notify a third party of the lawsuit (*Streitverkündung*). This notification is delivered by the court (sec 21 CPC). The notified party can then decide whether to enter the lawsuit or not. If a third party intends to join the lawsuit, it must submit to the court a formal pleading in which it expressly states its intention of joining and point out its legal interest in the outcome of the proceedings (secs 17 et seqq CPC). Without legal interest the court will reject such an intervention. The role of an intervening party (*Nebenintervenient*) is limited to supporting the main party on the side of which he entered the proceedings. The intervening party has to accept the status quo of the proceedings at the time of his intervention. The intervening party and third parties, which have been officially notified of the lawsuit and did not join them, are bound by the main elements of the judgment rendered.

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27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

In civil procedures in Austria the loser pays costs system applies. Consequently, the losing party has to reimburse the necessary costs of the proceedings to the prevailing party (sec 41 CPC). Regardless of other agreements between a client and his legal representative (e.g. hourly rates), the losing party is obliged to reimburse legal fees of the prevailing party only to the extent prescribed in the Attorneys' Fees Act ("AFA"). The AFA stipulates categories of standard rates for different types of procedural acts performed by an attorney. Within those categories, the relevant rates are calculated on the basis of the amount in dispute. Further, court fees are calculated based on the amount in dispute. If each party partially wins and loses the case, the reimbursement depends on the degree by which the parties prevailed in the proceedings.

28. Are contingency fees allowed?

No (sec 879 para 2 no 2 CC). However, it is possible to agree upon a reduced fee in the case of defeat as long as the amount is not disproportionate to the fee stipulated for winning the lawsuit. However, the fee must not be charged based on the adjudicated recovery (*quota litis* prohibition) and has to be suitable in relation to the regular legal fees.

29. Is third party funding of claims permitted? Under what circumstances?

Yes, as long as the third party is not himself a lawyer, notary, tax consultant, accountant or auditor.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

The CPC does not provide a provision governing class actions. However, the Austrian Supreme Court accepted a so called "class action with a specific Austrian character" (*Sammelklage mit österreichischer Prägung*). This class action is based on sec 227 CPC and works in a way that the beneficiaries assign their claims to an organization (in practice, mainly to the Consumer Information Association or the Austrian Chamber of Labor). The organization then files one single lawsuit for all individual claims. Generally, there is also a litigation funder involved. The parties have to explicitly agree to join such proceedings (no "opt-out" procedure).

Furthermore, pursuant to sec 11 CPC a plurality of persons may jointly sue or be sued as joined parties
(1) if they form a community of interest with regard to the disputed right, or if they are entitled or obligated joint and several or for the same factual cause (*materielle Streitgenossenschaft*);
(2) if similar claims or obligations form the subject matter in dispute and such claims are based on an essentially similar factual cause and the court has jurisdiction regarding each defendant (*formelle Streitgenossenschaft*).

Moreover, sec 14 CPC regulates the necessary joinder (*einheitliche Streitpartei*). In the case of such a necessary joinder the

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judgment has to be consistent for all claimants/defendants involved.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Yes, in certain cases representative actions filed by an association (*Verbandsklage*) are possible. In particular, this applies to lawsuits against unfair practices of businesses (sec 14 Austrian Law Against Unfair Competition) and illegal terms and conditions (secs 28 et seqq Austrian Consumer Protection Act). Entitled associations are for example the Consumer Information Association and the Austrian Economic Chamber. Furthermore, the entitled associations are able to file a representative test case action (*Verbandsmusterklage*).

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

The preparatory hearing is approximately three months after the filing of the claim. The time frame until the final hearing varies strongly from case to case (on average approximately 9 months). In this respect, the main factor is taking of evidence (e.g. how many witnesses have to be heard, is expert evidence required, how many trial days are needed, etc).

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Under the Austrian law of civil procedure a two-stage set of legal remedies is available: first appeal against judgments (*Berufung*), second appeal against judgments (*Revision*), first appeal against other decisions of the courts (*Rekurs*) and second appeal against other decisions of the courts (*Revisionsrekurs*). In general, appeals shift the case to the next higher instance.

Duly lodged appeals typically prevent judgments from becoming enforceable. If there is need for interlocutory measures, the application is, in principle, to be filed with the cognizant court of the main proceedings (sec 387 Austrian Enforcement Act).

Appeals are heard by professional judges (sometimes together with lay judges). For their qualification see question 3 above.

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Witnesses can testify by video conference. However, documents and transcripts cannot be presented on computer monitors.

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This is due to the fact that in Austria the court files are in paper form and not electronic. Although the transmission of pleadings between lawyers and the courts have to be carried out electronically, all documents are printed and filed by the court at some point.

New facts and new evidence may generally not be introduced in appellate proceedings. Consequently, in appellate proceedings taking of evidence is no longer possible. Courts of second instance can, however, decide to hear certain witnesses again.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

In practice, graphics (e.g. chart of an index) are sometimes used in written submissions in courts of first instance. Power point slides are occasionally used as evidence, however, attorneys themselves do not use power point in trials. Regarding other electronic means, see question 34 above.

In respect of appeals, see question 34 above.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

There is no solicitor / barrister distinction in Austria. Consequently, the lawyer at the trial is also responsible regarding the pre-trial procedures.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

If the injured party was partly responsible for the damage, the tortfeasor has to compensate the damage proportionally, depending on the degree of contributory negligence (sec 1304 CC). Furthermore, sec 1304 states that damages are split equally if the court is not able to determine the scale of the contributory negligence.

Multiple tortfeasors are joint and several liable, if they acted deliberately or if the proportions cannot be determined. If proportions can be assessed, the tortfeasors are only liable for their respective amounts of damage dealt (sec 1302 CC). Thus, a plaintiff's negligence can reduce the liability of the defendant. However, the burden of proof for contributory negligence lies with the defendant.

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38. Is service of a complaint issued outside your country permitted in your country by “informal” means, or must the Hague Convention be followed?

Austria is no signatory to the Hague Service Convention. Consequently, a US claim has to be delivered through judicial assistance. Note that service directly through the parties directly is not permitted in Austria.

Between EU Member States the EU Service Regulation applies.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

Privacy rules in general do not prevent judicial assistance. European law provides for judicial assistance regarding the gathering of evidence between member states (see EU Taking of Evidence Regulation). As Austria is no signatory to the Hague Evidence Convention, judicial assistance between any other countries would require a provision under international law (for example bilateral treaties).

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

Not applicable.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

No.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

No notable.

