AUSTRIA

Global litigation guide

DLA PIPER

About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

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Austria

Last modified 07 July 2023

Overview of court system

Austrian courts operate under the civil law system. This means that the majority of substantive and procedural laws are codified in legal statues which take precedence over case law. Although case law is not legally binding, it has persuasive authority, and lower courts are bound by the decisions of higher courts.

The Austrian court system comprises 116 District Courts (*Bezirksgerichte*) as well as 20 Regional Courts (*Landesgerichte*). The District Courts and Regional Courts are both courts of first instance, but their jurisdiction to hear matters depends on the quantum of the claim and the subject matter in dispute. Second instance courts can be either Regional Courts, (referred to above) or one of the four Higher Regional Courts (*Oberlandesgerichte*). For civil proceedings, the final court of appeal is the Supreme Court in Vienna (*Oberster Gerichtshof*).

Specialized courts are established to deal with matters relating to commercial law, antitrust law, labor and social law. These special courts are either divisions within the above-mentioned courts or are self-standing special courts, such as the Labor and Social Court (*Arbeits-und Sozialgericht*) in Vienna.

The official court language in Austria is German. In addition, the minority languages Croatian, Slovenian and Hungarian are official languages in some regions of Austria.

Limitation

In general, under Austrian law, limitation periods run from the first day on which the claimant could have brought the matter to court. In terms of duration, Austrian law distinguishes between long and short limitation periods. Unless statutory law provides for a shorter limitation period, long limitation periods of 30 years are the default. Short limitation periods are generally three years. For reasons of legal certainty, the 30-year periods are absolute.

With regards to time limits (for instance, limitation periods or preclusion periods), Austrian law draws a distinction between the time limits applicable to substantive and procedural law matters respectively. The rules for the calculation of time limits in respect of substantive law matters are laid down in the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). They apply, inter alia, to time limits that result from unilateral legal acts, and to statutory time limits, such as limitation periods or preclusion periods. However, there are also specific limitation periods which displace those set out under the Austrian Civil Code, e.g. within the framework of capital market law, the limitation period for bringing a claim is ten years after completion of the offer, which is subject to prospectus requirements. The ten-year limitation period under capital market law is absolute and applies regardless of the knowledge of the claimant.

Procedural steps and timing

Civil proceedings are generally initiated by a statement of claim (*Klage*) which must be filed with the competent court via an electronic filing system (WebERV). In certain circumstances, claimants must be represented by an attorney. Such circumstances are:

- first instance proceedings at the Regional Court level;
- district court proceedings involving an amount in dispute exceeding EUR5,000; and

- appeal proceedings.

After the statement of claim is filed, the court will decide whether it has jurisdiction to hear the case. If the court considers the claim admissible, it will serve the statement of claim on the defendant and order it to file a written statement of defense within four weeks. The written statement of defense defines the scope of the subject matter and the specific issues in dispute. A written statement of defense is, however, not required in proceedings of first instance before a District Court.

Once the exchange of pleadings is complete, the court usually summons the parties to a preliminary hearing (*Vorbereitende Tagsatzung*) within the next few weeks or months. In this preliminary oral hearing, the parties discuss the facts of the case and try to reach a settlement. The court may issue a judgment and close the proceedings after the preliminary hearing. However, usually, there are subsequent evidential hearings, the number of which depends on the scope and complexity of the case. The dates of such hearings are usually agreed between the parties and the judge at the preliminary hearing.

The claimant is allowed to withdraw its claim without a waiver of claims before the defendant submits its statement of defense. Once the statement of defense has been filed, the claim may only be withdrawn with the consent of the defendant(s). However, if the claimant is willing to waive its claims, it may seek to discontinue the proceedings at any time before the trial or oral hearings are closed. The main consequence of such a discontinuance would be that the claimant must pay all costs already incurred in the proceedings.

Monetary claims not exceeding EUR75,000 must be pursued in the form of a so-called default action (*Mahnverfahren*). If the claim meets the necessary conditions to be classed as a default action, the court will issue a conditional order for payment (*Zahlungsbefehl*) without hearing the defendant's case. The defendant then has the right to submit an objection within four weeks, otherwise the conditional order for payment will become legally binding. Providing the objection is raised within the specified timeframe, the payment order will become invalid and ordinary civil proceedings will be initiated.

Timeframes for each stage of proceedings vary considerably depending on the complexity of the case as well as the court and the parties' availability. The court will exercise its case management powers to determine the procedure and timetable for the proceedings. The average duration of civil proceedings is around nine months in the District Courts and 17 months in the Regional Courts.

The parties can, at any stage, agree to suspend (or stay) the proceedings. In this situation, they must jointly notify the court. The reasons for an agreed suspension can vary. For instance, parties may choose to stay proceedings to facilitate settlement negotiations or because a settlement has been reached. Save in the event of an agreed settlement, the proceedings can be resumed (i.e. the stay lifted) upon the request of either party after a minimum three month period. It is also possible for the parties to agree on a permanent suspension. This is regarded by the courts as a material waiver by the parties, which means that the proceedings cannot be resumed.

Disclosure and discovery

The Austrian Code of Civil Procedure (*Zivilprozessordnung*) lists the following five types of evidence:

- documentary evidence;
- witness testimony;
- expert evidence;
- inspections; and
- the hearing of the parties.

Each party must offer all evidence necessary to substantiate the statements included in its respective pleadings. Documentary evidence is normally adduced to the court by the submission of the document and a reference made to it in the party's written or oral argument. The Austrian Code of Civil Procedure is based on the legal principle of the free evaluation of evidence (*Freie Beweiswürdigung*), which means that Austrian courts enjoy wide discretion as to how they assess the submitted evidence. The court may not, however, admit evidence that it considers irrelevant to the matters in dispute, or which appears to have been submitted with the intention of delaying the proceedings.

During proceedings, a party may ask the court to order the other party to disclose a particular document in its possession so that it can be relied on as evidence in the proceedings. In the context of discovery requests, evidence may be obtained by the court ex parte.

The requesting party must state the contents of the requested document as precisely and completely as possible, and indicate all facts and matters which are to be proven by the document. The requesting party also must prove that the document is in the possession of

the opposing party. A distinction is made between joint documents and other documents. A joint document is drawn up in multiple people's interests or records mutual legal relations. If the court orders that a joint document be disclosed, the obligation to present the document is final and cannot be avoided by the opposing party. If the document in question is not a joint document, the party opposing disclosure may refuse to present the document by invoking one of the grounds for refusal listed in Section 305 of the Austrian Code of Civil Procedure, e.g. if the content concerns matters of family life, if the disclosure of the document would be disgraceful to the party or third parties or would involve the risk of criminal prosecution, etc. The refusal to present a document can also be justified in specific circumstances, such as where it contains commercially sensitive information.

On the other hand, Section 304 of the Austrian Code of Civil Procedure lists certain grounds which, if present, are determinative in favor of disclosure, e.g. if the party opposing disclosure has referred to the document in the proceedings, committed itself under civil law to deliver or present the document, or if the document concerned is a joint document.

In accordance with the jurisprudence of the Austrian courts, no discovery / disclosure process exists. Further, even evidence obtained through illegal means is, in principle, admissible in proceedings, save where it was obtained in violation of constitutionally guaranteed fundamental rights.

Default judgment

If the defendant does not appear at the first oral hearing or file its statement of defense on time, the claimant can request a default judgment. In such circumstances, the remedies sought by the claimant will be granted unless the court considers them to be clearly unreasonable. The defendant can appeal within fourteen days after it has been notified of the judgment.

The court does not examine the merits of the claim. However, the court will not give default judgment if it deems that:

- a procedural requirement has not been met;
- the claim is inconclusive;
- the service of summons or the order to answer is not proven;
- a party has been prevented from performing the procedural act due to unavoidable events, e.g. due to natural disasters; or
- the appearing party cannot immediately provide evidence of a circumstance to be taken into account ex officio.

Appeals

Unless a dispute is settled, proceedings usually end with a judgment (*Urteil*). Judgments are final decisions on the subject matter of the dispute and deal with material legal issues raised in the parties' written statements and the oral hearings. The written judgment will be distributed to the parties. Generally, parties will have four weeks after notification of the judgment to file an appeal against it. A judgment may be appealed on points of fact, law, or procedure. If the judgment is handed down in writing, the four week period for bringing an appeal starts to run from the day following the handing down. Oral judgments are very rare. If, however, the judgment is issued orally at the end of the hearing and in the presence of both parties, the party wishing to file an appeal must enter a notice of appeal either:

- orally immediately after the judgment is pronounced; or
- in writing within two weeks calculated from the day following service of the transcript of the hearing.

The jurisdiction of the appellate court depends on whether the appeal was made against a decision of a District Court or a Regional Court. First instance judgments given by the District Courts can be appealed to the Regional Courts, whereas first instance judgments given by the Regional Courts must be appealed to one of the four Higher Regional Courts. Appeals against first instance judgments and some appeals against second instance judgments have suspensive effect.

Not all cases can be appealed to the Supreme Court. Only legal questions of considerable importance can be referred to the Supreme Court. There are also restrictions relating to the amount in dispute. The second instance court has jurisdiction to decide whether a matter can be appealed a second time, i.e. to the Supreme Court. An appeal to the Supreme Court usually requires a case to contain a legal question of considerable importance to ensure legal unity, security, and development, as well as an amount in dispute of more than EUR5,000. If the court declines the opportunity to appeal for a second time, there is still an opportunity to file an extraordinary second appeal to the Supreme Court. An extraordinary second appeal requires an amount in dispute of more than EUR30,000 or the dispute to be of a particular nature, such as family law or labor and social law. Second appeals must be filed within four weeks from the date of the appeal

decision. Appeals are typically resolved within four to six months after the appeal of the first instance judgment is filed. Supreme Court decisions might take up to 12 months.

On appeal, no new claim or other objection may be raised. The parties may only submit new facts in the first instance. The appeal proceedings are limited to a review of the facts and submissions of the parties up to the end of the first instance proceedings. As such, the Supreme Court's jurisdiction is purely legal in nature.

The resolutions of a court (*Beschlüsse*) can also be appealed. These resolutions are not judgments and typically concern the conduct of the proceedings and procedural issues. The appeal must be brought against resolutions of the competent court of first or second instance within 14 days of the relevant resolution generally, but some appeals against special resolutions of the court can be made within four weeks of the relevant resolution.

Interim relief proceedings

Austrian law essentially provides three categories of interim (or temporary) relief measures:

- preventive measures, which are granted to secure the enforceability of an eventual judgment and may involve freezing a particular state of affairs or assets;
- regulatory measures, which are granted to regulate a temporary state of affairs; and
- performance measures, which provide a temporary performance of an alleged obligation.

However, this categorisation is of little practical importance. Despite specific provisions in certain legislation such as the Patent Act, the Copyright Act or the Trademark Act, interim relief measures are principally regulated by the Enforcement Act (*Exekutionsordnung*), which distinguishes between:

- execution for security; and
- interim injunctions.

Execution for security refers to the execution of an interim measure on the condition that the applicant pays security into court covering any potential damages to the respondent. To grant execution for security:

- the court must have issued an existing judgment, which will be the basis for execution;
- the claim must be a monetary claim; and
- the court must be convinced that:
  - without the execution for security, the enforcement of the monetary claim would be thwarted or considerably impeded; or
  - the judgment would most likely need to be enforced in states or another foreign jurisdiction in which the enforcement of the claim is not guaranteed either by international treaties or by Union law.

Interim injunctions are types of preventive measures granted to ensure immediate legal protection before, during or after trial. There are three types of interim relief injunctions, namely those for the purpose of securing:

- monetary claims;
- other claims; and
- a right or a legal relationship.

For further detail on interim injunctions, see below section on Prejudgment attachments and freezing orders.

Injunctive relief proceedings are commenced when one of the parties applies for injunctive relief at:

- the court where the substantive proceedings are pending; or
- where an injunctive measure is sought prior to the commencement of substantive proceedings, the District Court of the domicile (*Allgemeiner Gerichtsstand*) of the defendant.

The application will usually be accompanied by supporting evidence (evidence may be merely cited in the application but parties generally enclose it to avoid any delay in having to provide it subsequently). In specialized legal matters (family law disputes, labor and social law disputes, etc.), interim proceedings may also be initiated and granted ex officio.

For injunctive relief to be granted, the applicant must demonstrate that:

- it has a prima facie claim, and for this purpose, the applicant will need to (i) include precise allegations regarding their claim in the application; or (ii) where the application and the lawsuit are filed at the same time, refer to such precise allegations in the main lawsuit; and
- their claim risks being frustrated if no injunctive relief is granted by the court.

If the court considers that (i) the above requirements (along with other formalities) are satisfied; and (ii) granting injunctive relief would (a) be proportionate; and (b) not result in an irreversible state of affairs, the court will order the injunctive relief sought by the applicant. Further, the court may order that injunctive relief is made conditional on the applicant's payment of security into court.

The procedure for issuing injunctive relief is not public and, in principle (unless the claim relates to civil rights), will be conducted without hearing the opposing party. However, as the opposing party has the right to object to the court's decision once the injunction has been granted, the court will usually serve the application on the opposing party in order to avoid a subsequent opposition (provided that notice will not lead to a delay likely to defeat the purpose of the injunction). If notice has been given, the opposing party may reply to the application within a short deadline set by the court (usually ranging between three days to two weeks).

Generally, injunctive relief is granted within one week of the application, although in relation to urgent matters, the court can grant interim relief within two or three days.

The respondent can appeal against decisions of the court within fourteen days after the service of the order granting the interim measure. In general, interim measures do not have suspensive effect unless specifically granted by the court.

The costs of interim relief proceedings have to be advanced by the applicant. However, the applicant may be reimbursed for such costs by the opposing party if the applicant is successful in the main proceedings.

In certain circumstances, usually when the amount in dispute exceeds EUR5,000, legal representation is mandatory. If represented by an attorney, the application for injunctive relief must be submitted to the court in writing. Otherwise, the application may be made orally, and a transcript will be taken.

Prejudgment attachments and freezing orders

Austrian courts may grant interim relief measures equivalent to prejudgment attachments and freezing orders.

Preventive injunctions

As noted in the section above on Interim relief proceedings, Austrian courts may grant a series of preventive measures to secure the enforceability of an eventual judgment, which may involve freezing a particular state of affairs or assets.

Like other interim injunctions, they can be sought prior to the commencement of proceedings, during proceedings or after trial. The competent court to hear such an application is the court where the substantive proceedings are pending or, when such a measure is sought pre-action, the competent court is the District Court of the domicile (*Allgemeiner Gerichtsstand*) of the respondent.

In addition to the requirements for injunctive relief specified in the section above on Interim relief proceedings, preventive interim injunctions for monetary and non-monetary claims may be granted when:

- it is probable that without the requested measure the respondent would thwart or considerably impede the enforcement of a claim (e. g. by damaging, destroying or relocating assets); or
- the respondent has no assets in Austria, and enforcement is not guaranteed by European or international law.

In addition, for monetary claims, the applicant will need to prove its:

- entitlement to the claim; and

- interest in the disposal of the claim.

Parties may request the following preventive injunctions in respect of monetary claims:

- the deposit or administration of movable goods by the court;
- the prohibition on the disposal or pledging of movable assets;
- the prohibition on third parties from providing payments to a person;
- the administration of a property; and
- the prohibition on the disposal and pledging of property or certain rights arising from a registration in the Land Register; and

In respect of a non-monetary claim, there is no exhaustive list of measures. Accordingly, the court may order all the above as well as orders requiring:

- the applicant to retain custody of the respondent's property / asset, or;
- the respondent to take action to preserve the property / asset or prohibit him from taking actions that may adversely affect such property / asset.

In the majority of cases, decisions on applications for preventive injunctions occur in ex parte proceedings (i.e. without notice to the respondent).

The application for a preventive injunction must contain:

- the names of the parties concerned;
- the facts establishing the court's jurisdiction;
- the legal basis as to why the injunction is requested;
- the legal interest of the party seeking the injunction;
- the form of the requested interim relief; and
- the desired duration.

There is no specific timeframe in which the substantive claim should be brought. The preventive injunction is granted by the court for a certain period of time. After the expiry of this period, the preventive injunction ceases to apply. The creditor can be held liable for any damage suffered by the debtor if the court subsequently finds that the relevant preventive injunction was unjustified.

Preventive taking of evidence

In addition, orders attaching the respondent's assets or freezing bank accounts may also be granted following an application for the preliminary taking of evidence. These are types of interim injunctions seeking to prevent the loss, or difficulties regarding the use, of evidence or if the availability of the evidence is uncertain.

In the application, the applicant is required to identify:

- the opponent;
- the facts on which the taking of evidence is to be based;
- the evidence the applicant is seeking to be secured;
- the witnesses to be heard and any experts proposed; and
- the reasons for the application.

The application is usually filed with the court hearing the main proceedings. However, in urgent cases and / or if a legal dispute has not yet commenced, the application should be filed with the District Court where the object to be attached is located. In the case of a freezing order, the local jurisdiction shall be determined by reference to the seat of the credit institution that holds the assets to be frozen.

Costs

The Austrian civil procedure law provides a system of cost reimbursement. The unsuccessful party is required to reimburse the costs of the prevailing party; however, this is limited to costs that are necessarily incurred. The procedural costs are divided into court fees (which include the fees and expenses of witnesses, court-appointed experts and court interpreters), legal fees (e.g. fees of legal representation) and party expenses (which predominantly consist of travel expenses and loss of earnings due to attendance in court).

Court fees are subject to the Court Fees Act (*Gerichtsgebührengesetz*) and calculated on a graduated scale in accordance with the amount in dispute. Moreover, the costs depend on the court where the proceedings are pending. In cases involving amounts in dispute exceeding EUR350,000, court fees for first instance proceedings are 1.2% of the amount in dispute, plus EUR4,203. Court fees for appeal proceedings are calculated separately but are also based on the amount in dispute. The unsuccessful party is obliged to reimburse the court costs, but only to the degree prescribed in the Attorneys' Fees Act (*Rechtsanwaltstarifgesetz*).

As an exception to the principle that the unsuccessful party is to pay the procedural costs, the court can, in certain circumstances, also oblige one party to bear the costs of the entire proceedings or of a certain phase of the proceedings, regardless of whether that party was successful.

Class actions

Austrian law does not provide for a civil legal procedure comparable to “class actions”. The most important form of collective redress in Austria is a concept called “collective actions Austrian style” (*Sammelklage österreichischer Prägung*). This can either be commenced by an association that promotes the interest of a group of persons suffering damages, such as consumers or employees, or by several claimants who have the same interest in the proceedings. There is no limitation to a particular area of the law. The same interest does not need to arise out of the same action or transaction, but requires a shared interest in the determination of some question of law or fact. In contrast to the class action system in the US, Austrian claimants must take positive steps to get involved in a class action. The entitled parties assign their claims to an association or another legal person, which asserts the individual claims in a collective, comprehensive claim. On this basis, Austria operates an “opt-in” collective redress mechanism.

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