

## Dispute Resolution

## Austria

**1. INTRODUCTION TO AUSTRIAN LAW****1.1 LEGAL SYSTEM**

The Austrian legal system follows the Roman Law distinction between public law and private law, providing a fundamental structural element of the entire legal system. This distinction affects above all the competence of different organs to implement legal acts, in particular whether a legal provision is to be applied by an administrative authority (*Verwaltungsbehörde*), subject to instruction of superiors or by an independent court (*Gericht*). In case of doubt, private law matters are adjudicated by the ordinary courts, public law matters by administrative authorities.

**1.2 SOURCES OF LAW**

Austrian national law is primarily statutory law. The Austrian national legal system basically consists of national constitutional law and national “ordinary” law, constitutional law given a higher status as it requires a higher quorum for its adoption or amendment in the National Council (*Nationalrat*). As Austria is a federal state, legislative and executive powers are divided between the Federation (*Bund*) and the nine provinces (*Länder*), and the Austrian constitution does not contain a supremacy clause in favour of federal law.

Of course all EC legislation is binding on Austria. In case of a conflict with EC law, all Austrian courts and administrative authorities must disregard a national law that conflicts with EC law and have to apply the latter.

**2. ADMINISTRATION OF JUSTICE AND JUDICIAL FUNCTION****2.1 JURISDICTION**

In Austria jurisdiction is under the responsibility of the Federal Republic. In civil matters there are in principle two different sequences of courts, of which each may be divided into three stages. In the first instance, disputes are assigned to either the District Courts or to the Regional Courts. First-instance judgements may be challenged by means of an appeal on points of fact and law whereas second-instance judgements may only be challenged by means of an appeal on points of law and are subject to various other restrictions.

**3. LEGAL PROCEEDINGS****3.1 COURT SYSTEM - CIVIL PROCEEDINGS****3.1.1 District Court (*Bezirksgericht*)**

As a basic principle, District Courts have jurisdiction on monetary matters that do not exceed a

value of € 10.000. Also most family matters as matrimonial cases or child custody as well as inheritance matters and tenancy law are dealt with by the District Courts. An appeal on points of facts and/or law goes to the Regional Court, where either a single judge or an appeal panel decides on the appeal.

### **3.1.2 Regional Court (*Landesgericht*)**

Regional Courts have monetary jurisdiction in cases involving a value in dispute of more than EUR 10.000,-- and subject-matter jurisdiction pursuant to the unfair competition, breach of copyright and others. An appeal goes to the Court of Appeal and may be lodged on the grounds of invalidity or mistaken legal judgement, in specific matters or in any case above a value in dispute of EUR 2.700,-- on procedural errors or establishment of wrong facts.

### **3.1.3 Court of Appeal (*Oberlandesgericht*)**

The Courts of Appeal decide on appeals against a sentence issued by a first-instance court and may decide the case itself (either to confirm or to amend the judgement). Within the frame of the motions contained in the appeal, they may also repeat or extend all or parts of the proceeding, overturn the decision of the first-instance court and instruct the same to retry the matter.

### **3.1.4 The Supreme Court (*Oberster Gerichtshof*)**

The Supreme Court basically decides on matters that involve questions of substantial importance, which do not have been previously ruled on by the Supreme Court or if the decision of the court of second instance is at odds with prior Supreme Court decisions. The Supreme Court generally decides in panels of five. Supreme Court decisions only bind the parties to the dispute although they play an important role in the development of the legal system.

## **3.2 CIVIL PROCEDURE**

### **3.2.1 Ordinary Action**

Litigation is basically governed by the act on Jurisdiction (*Jurisdiktionsnorm*) and the Austrian Code of Civil Procedure of 1895 (*Zivilprozessordnung – ZPO*).

A civil suit is initiated by a claim filed with the competent court. A Claimant may claim a performance (e.g. payment), a declaratory judgement or a change in a legal right or status. A properly filed suit interrupts the prescription period.

### **3.2.2 Corporate litigation procedure**

With respect to commercial matters, a special Commercial Court exists only in Vienna. Apart from that, the ordinary courts decide as commercial courts. Commercial matters are, for example, actions against businessmen or entities in connection with commercial transactions, unfair competition matters, etc.

### 3.2.3 Interim measures

Following a respective application by a party, the court may order interim or precautionary measures against the debtor's assets. The purpose of these measures is to anticipate the final judgment on the merits for a certain period in order to ensure that it will be possible to enforce it. The debtor may either be prevented from disposing of his assets, or charges are registered on them so that if he does dispose of them they can be recovered from subsequent acquirers (examples: provisional remedy, preliminary seizure, attachment by means of a mortgage on real property, business assets and valuable securities).

### 3.2.4 Enforcement Proceedings

Most enforcement cases concern pecuniary claims. Execution concerning movable property is carried out by means of attachment and subsequent sale by the court's execution officer acting on the creditor's request. Execution into immovable property may be carried out by entering a mortgage in favour of the creditor in the land register, forced administration and ultimately forced sale in court auction.

### 3.2.5 Enforcement of Foreign Decisions

According to Council Regulation EC 44/2001, judgments given in any EU Member State and enforceable there can be enforced in another Member State after being declared enforceable there on application by anybody who has an interest in the matter.

The procedure for enforcement of non EU judgments is governed by the Enforcement Code (*Exekutionsordnung*) and in bilateral and multilateral treaties.

## 4. ARBITRATION

### 4.1 ARBITRATION IN AUSTRIA

Arbitration within the Austrian legal system is governed by the Austrian Code of Civil Procedure of 1895. Regarding the provisions for arbitration, sects. 577 – 618 apply to all institutional and ad-hoc arbitrations if the place of arbitration is in Austria.

These rules have been amended on three occasions, the latest amendment entered into force on **July 1, 2006** (*Schiedsrechtsänderungsgesetz 2006*) and governs all arbitration proceedings that were initiated on or after 1 July 2006. **and contains a complete reform of the Austrian arbitration law based on the UNCITRAL model law.**

### 4.2 PROCEDURE

An arbitration agreement under Austrian law is an agreement by the parties to submit to arbitration all ascertained disputes which have arisen or which may arise between them in respect of a defined legal relationship. In principle, any proprietary claims are arbitrable except claims in family law as well as disputes relating to the lease of property and to cooperative apartment ownership. Most employment law disputes and disputes involving consumers are only arbitrable if the parties enter into an arbitration agreement once the dispute has arisen.

An **arbitration agreement has to be in writing** either as a document signed by the parties, or as an exchange of letters, telex, e-mail or any other means of communication which constitutes a record of the agreement. If a separate document of a contract refers to an arbitration clause, such arbitration clause is valid if this reference incorporates the separate document as part of the contract.

The new arbitration law has not erased a special Austrian feature regarding the power of attorney. In order to conclude an arbitration agreement on behalf of a third party, a special power of attorney is required (sec. 1008 ABGB Austrian Civil Code). The power of attorney must be in writing. Therefore the form requirements for an arbitration agreement (telegram, telefax and electronic data transmission) also apply to the power of attorney. Since 1 January 2007 this requirement does not apply to commercial disputes as a new commercial code came into force on that date.

The new Austrian law does not distinguish between domestic and international arbitrations and between commercial and non-commercial arbitrations. If a dispute is governed by an arbitration procedure, Austrian courts may only act in specific cases, for example assisting with the establishment of the arbitral tribunal or regarding the challenge of an arbitrator (ss. 586 – 591).

Any objections as to the validity of an arbitration clause have to be raised at an early stage of the arbitration proceedings. **A formal defect in an arbitration agreement is deemed to be remedied if a party pleads to the merits of a case in an arbitration without simultaneously raising the issue of the invalidity of the arbitration agreement.**

An arbitral tribunal is entitled, after having heard both parties to order **interim or protective measures** against a party. The measure can only be issued if either the enforcement of a claim would be frustrated or materially hampered or if one of the parties would risk incurring irrecoverable damage. The arbitral tribunal may also require any party to provide appropriate security in connection with an interim or protective measure. Both measures by domestic and foreign arbitral tribunals are enforceable in Austria.

Even if an arbitration agreement exists, an Austrian court still retains jurisdiction to grant interim measures of protection.

#### **Constitution of an arbitral tribunal**

An arbitral tribunal may consist of one or more arbitrators, depending on the agreement between the parties. In absence of such an agreement the number of arbitrators is free. If in a multi-party arbitration, co-claimants or co-respondents fail to agree on the appointment of the arbitrator and the parties are not bound by agreement (in the arbitration clause), all arbitrators are appointed by the court.

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubt as regards the arbitrator's impartiality or independence or if the arbitrator does not have the qualifications the parties have agreed upon. Regarding the conduct of the arbitration proceedings, the parties shall be treated fairly, meaning in accordance with Article 6 of the European Convention on Human Rights. The parties have to be heard, meaning that they have to be given an opportunity to present their facts and to comment on any fact presented by the other party as well as to any evidence introduced into the proceedings by either of the parties or the arbitral tribunal.

Austrian law requests the arbitrators to make a reasoned award in writing which must be signed by at least the majority of the arbitrators. It must contain the date on which it was issued as well as the seat of the arbitral tribunal. It does not, however, stipulate any time-limit for the delivery of the arbitral award. Upon request of any party to the arbitration proceedings, the award has to contain the confirmation that it is final and enforceable.

The new arbitration law also stipulates that the **arbitral tribunal has jurisdiction to decide on the costs.**

#### 4.3 SETTING ASIDE AN AWARD

Section 611 ZPO provides that recourse to a court against an arbitral award may be made only by application to set aside the arbitral award. The application to set aside the award shall be filed within three months of the day on which claimant has received the arbitral award or the additional award. The grounds for setting aside an arbitral award are very limited and are amongst others: lack of a valid arbitration agreement, violation of the principle of due process or fair trial, violation of Austrian public policy principles.

Enforcement of foreign and domestic awards

In Austria, arbitral awards are enforced by Austrian courts in the same way as judgements of State courts (e.g. seizure of movables or immovables as well as of money claims of the defendant against third parties). Since Austria is a party to New York Convention, the Washington Convention and the Geneva Convention, enforcement of foreign awards is also subject to these State treaties.

### 5. ALTERNATIVE EXTRA-JUDICIAL DISPUTE RESOLUTION

#### 5.1 ALTERNATIVE DISPUTE RESOLUTION

Austrian civil law differentiates between those methods of extra judicial settlement of disputes which are **institutionalised in statutory form** and those which work **without statutory basis.**

**Settlements of disputes provided for by statute** include “**praetorian**” settlements. These do take place with the engagement and participation of the courts, but they do not lead to a decision by the courts. According to Austrian Civil Law procedure, a praetorian settlement presupposes an intended petition relating to already existing conflicts which are cleared up by one of the parties invoking the aid of the court in order to attempt an amicable settlement of the dispute, backed up by the aid and advice of a judge.

Another possible form of extra judicial settlement of disputes is the establishment of a **notarial instrument** which is enforceable by execution. Further statutory institutions of extra judicial settlement of disputes are **conciliation boards in housing matters, conciliation boards in telecommunications matters and local authority mediation offices.**

## 5.2 MEDIATION

On 1 May 2004, the Act on Mediation in Civil Law Matters (*Zivilrechtsmediationsgesetz*) entered into force. This law provides for a legal framework for mediation. The Mediation Act is intended to ensure the legal and technical skills of mediators by introducing certain qualification requirements.

Mediators with special training and qualification in accordance with the Austrian Mediation Act can be listed in a public register as accredited mediators. The register is administered by the Ministry of Justice which also monitors the professional education and registration requirements.

In a mediation procedure, the mediator as a neutral intermediary, helps the parties to reach a mutually satisfactory settlement of the dispute.

As long as mediation proceedings are being pursued by an accredited mediator, no time bars will apply. A mediator must not be a representative or adviser, whether present or previous, of one of the parties to the dispute. However, after the dispute has seized, the mediator may, in the course of his other professional obligations, be involved in the implementation of the result of the mediation process, provided that he has the consent of the parties concerned.

The principal characteristics of mediation are: Non-binding, interest-based and confidential procedure controlled by the parties.

## Authors

**Peter Klein**  
**Veronika Mochar**  
Petsch Frosch Klein Arturo  
Vienna, Austria

E-mail [peter.klein@pfka.eu](mailto:peter.klein@pfka.eu)  
E-mail [veronika.mochar@pfka.eu](mailto:veronika.mochar@pfka.eu)

Tel. +43 1 586 21 80

## To contact PLG

Julienne Laveaux  
PLG Secretariat  
PANNONE LAW GROUP E.E.I.G.  
avenue de Sumatra 41  
1180 Brussels  
Belgium

Tel. +32 2 374 88 46  
Fax: +32 2 374 90 61  
E-mail [plg@plg.be](mailto:plg@plg.be)  
[www.plg.eu.com](http://www.plg.eu.com)

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