

Chapter 3

Litigating in Austria .; Are Costs and Fees Worth It?

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3.1 Introduction

This article follows the structure of the Gerieral Report on "Cost and Fee Allocation in Civil Procedure" by addressing the three main questions of who has to pay, how much and whether the Austrian legal system facilitates access to justice through cost distribution.

The system of cost and fee allocation in Austrian civil procedure has proven reliable: it ensures' a maximum of predictability of litigation costs and guarantees access to justice by providing legal aid. Nevertheless, the risk of losing the case, which is generally associated with high costs, may act as a deterrent for parties to commence civil proceedings.

3.2 Who Has to Bear the Costs?

3.2.1 "MaJor Shifting" as the Basic Rule in Austria

The basic rule of cost and fee allocation in Section 41(1) of the Austrian Code of Civil Procedure (*Zi'Vilprozessordnun~*) provides that the loser has to pay all costs - Court fees, the fees of attorney and expert fees, and the costs of the parties - but only as far as these costs were reasonable and necessary. For example, costs for consulting an attorney or a detective are considered necessary, whereas costs arising from filing a lawsuit with a court lacking jurisdiction or for correcting a deficient written pleading are

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not.' The same is true for costs; which have been incurred due to excessive caution; they can also not be reimbursed.e

Under the loser-pays principle, the law treats court costs and attorney fees alike. The amount of these expenses, however, is regulated in two specific statutes and in distinct ways: according to the Court Fees Act (*Gerichtsgebührengesetz*), the court charge is a general-fee depending on the amount in dispute. Under the Attorneys' Tariff Act (*Rechtsanwaltstarijgesetz*), by contrast, counsel has to be paid for each individual performance he or she makes in the course of the proceedings.

According to the basic rule' that the loser pays all, the defeated party also has to hear the costs of experts and witnesses, together with all other costs of the litigation, at the end of the proceedings. Under Austrian law, every witness and expert can recover the necessary costs for travel and accommodation as well as loss of income. In the course of the proceedings, the party who proffers evidence of a witness or expert has to advance the respective costs if they are likely to exceed €200 (ca. \$280).³ If both parties proffer the evidence of the same witness or expert, each party has to advance half the costs." Whether or not the costs' for taking evidence are a significant factor in the overall litigation bill depends on the kind of evidence as well as on the particular case. Obtaining an expert opinion, e.g., can be expensive.

The rules of cost and fee allocation also apply for appeals in the courts of second instance and third instance, pursuant to Section 50 of the Austrian Code of Civil Procedure. Thus, the losing party in the COurt of last instance has to pay the entire legal costs, regardless of whether he or she has won below.

The primary justification for the basic rule can be seen in the fundamental principle that the winning party should not have to suffer any loss from the proceedings, i.e., that the party prevailing should not be burdened by any court costs or fees.⁵

The Austrian Code of Civil Procedure gives judges ample opportunity during the entire proceedings to promote a settlement, for example, in the preliminary hearing (*Vorbereitende Tagsatzung*), according to Section 258(1), subparagraph 4, of the Austrian Code of Civil Procedure. In case of settlement, 'the parties normally agree that each .has to bear its own

1 *Fucik in Rechberger (Ed.)*, KO-IIIwntar zur ZPO, 3rd edition, Springer Verlag 2006, § 41 margo No 5.

2 *Rechberger and Kodek in Blanpain, 'Colucci, and Taelman (Eds.)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 66.

3 Exchange rate at the time of data gathering: €1 = \$1.4.

4 Sections 40, 365, and 332 of the Austrian 'Code of Civil Procedure (cf *Obermeier*, Das Kostenhandbuch. Kostenersatz imZivilprozess und im Verfahren au.\er Streit, 57 et seq.).

5 *Chnista*; Prozesskostenrecht, Manz 2001, 13 et seq.

expenses. Moreover, the parties frequently agree that as the plaintiff has to pay the entire court fees in advance, the defendant will reimburse half of these fees to the plaintiff on an amortized basis. If the parties to a settlement do not agree on an allocation of costs, Section 47(1), Sentence 2, of the Austrian Code of Civil Procedure sets forth that the entire costs are offset.

3.2.2 *Exceptions and Modifications to the Basic Rule*

There are certain statutory exceptions to the basic rule that the loser has to pay, reflecting the idea that the party who is responsible for certain acts in court has to bear the costs associated with these acts, irrespective of the outcome of the proceedings. For example, the costs resulting from re-opening a case or from setting aside a default judgment have to be paid by the party responsible for creating the situation, regardless of fault (Sections 154, 397a(4) of the Austrian Code of Civil Procedure). In other cases, a party may be liable because he or she acted in a culpable manner: if the litigation becomes more costly because the party has filed an application or other brief missing a deadline, or because the party has protracted proceedings maliciously, he or she has to bear the resultant costs (*Koetenseporasum*, Section 48 of the Austrian Code of Civil Procedure).⁸ Finally, in cases where a defendant has not given reasonable cause for the action, and recognizes the plaintiff's claim on the first occasion in the proceedings, the plaintiff has to bear all costs even though he or she wins the case on the merits (Section 45 of the Austrian Code of Civil Procedure).⁸

Party agreements allocating costs and fees in case of litigation are not common in Austria. Even if such an agreement is reached, it is only valid between the parties, i.e., that it cannot bind the court. As a result, if one of the parties wants to enforce such an agreement, it will have to pursue a separate action after the proceedings on the merits of the main case.⁹

⁶ Roth in *Verschraegen* (Ed.), *Austrian Law - An International Perspective: Selected Issues*, Jan Sramek Verlag 2010, 135.

⁷ *Deixler-Hilbrier and Roth*, *Der Zivilprozess in der Praxis*, 4th edition, LexisNexis ARD Orac 2006, 20.

⁸ *Rechberger and Kodek in Blanpain, Colucci, and Taelman* (Eds.), *International Encyclopaedia of Laws. Civil Procedure. Austria*, Kluwer Law International 2005, 66.

⁹ *Deixler-Hilbrier and Roth*, *Der Zivilprozess in der Praxis*, 4th edition, LexisNexis ARD Orac 2006, 19 et seq.

3.3 The Calculation and Determination of Costs and Fees

In Austria, cost allocation rules have the function of preventing careless and unnecessary civil proceedings. The risk of losing a Case has a deterrent effect - especially for the plaintiff - and can thus be seen as impeding access to justice. The likelihood of such deterrence increases with the amount in dispute: the higher the amount in controversy, the higher the legal costs and the greater the impact of potential economic imbalance between the parties, especially between consumers and companies.¹⁰

Usually, each party has to bear its own costs for the time being during course of the proceedings, and the winning party can only subsequently claim compensation from the opponent.¹¹ In particular, upon filing a lawsuit, the plaintiff has to pay the court fees in advance. Paying attorney fees up front, especially a retainer, is not required by law but an attorney may demand that the client pay a certain amount prior to initiating the litigation.

3.3.1 Court Costs

Court costs consist of a general and comprehensive fee the size of which depends on the amount in dispute. They are regulated in the Court Fees Act (*Gerichtskosten-Gesetz*). The Act stipulates that when the amount in dispute is under \$490,000 (ca. £350,000) the fee is a lump sum. Above this amount, the fee is calculated at 1.2% of the value of the case, plus a fixed sum of \$2,940 (ca. £2,100); in cases involving an amount of controversy of \$490,000 (ca. £350,000), this amounts to a fee of \$8,820 (ca. £6,300).

3.3.2 Attorney Fees

Attorney fees are also determined by statute, i.e., the Attorneys' Tariff Act (*Rechtsanwaltstarifgesetz*). Under this law, the attorneys' fees also depend on the amount in controversy: the higher the amount, the higher the fees. Yet, attorney fees in Austria are not lump sums; rather, attorneys are paid for their various acts during the course of the litigation. Hence the ultimate sum depends, inter alia, on the number of written statements, and on the number and length of hearings.¹²

¹⁰ Wagner, *Rechtsprobleme der Fremdfinanzierung von Prozessen* (I), *Juristische Blätter* 2001, 416.

¹¹ Rechberger and Jodrk in *Blanpain, Colucci, and Taelman (Eds.)*, *International Encyclopaedia of Laws. Civil Procedure. Austria*, Kluwer Law International 2005, 66.

¹² Heller in *Colman (Ed.)*, *Encyclopedia of International Commercial Arbitration*. Austria, Wolters Kluwer 2009, A3.33.

The statutory tariff is always used to determine how much the losing party has to pay to the winner. Between themselves, attorneys and clients are free to enter into any form of fee arrangement that is not totally beyond the scope of what is customary; they can thereby increase or decrease the statutory rates by consent. In such negotiations, the main criteria for increasing or decreasing the rates are the rules of supply and demand, of business competition, and of the overall status of an attorney, i.e., such as his or her reputation, seniority, and success rate in litigation. In order to protect inexperienced clients, the Austrian Bar Association exercises some control over such fee arrangements. If no arrangement has been made, reasonable fees may be charged.¹³

Representation by an attorney is not, however, required in all cases. Parties are free to represent themselves." e.g., in proceedings before the district (i.e., lower first instance) courts, if the value of the case does not exceed €5,000 (ca. \$7,000). If the amount in controversy exceeds this sum, as well as in all cases before regional (i.e., higher first instance) courts, and in all appellate proceedings, including proceedings before the Austrian Supreme Court, representation by an attorney is mandatory (*absoluter Anwaltszwang*, Section 27(1) of the Austrian Code of Civil Procedure).¹⁴ There are a few exceptions: an application for legal aid does not require representation by an attorney (Section 72(3) of the Austrian Code of Civil Procedure) nor does the conclusion of a settlement before the district court, if the amount in dispute exceeds €5,000 (Section 27(3) of the Austrian Code of Civil Procedure).¹⁵

In all the cases where the parties are free to represent themselves, they can either do so in person or appoint a non-professional representative; who is, however, not allowed to take a fee (Section 29(1), (3) of the Austrian Code of Civil Procedure).

Parties in proceedings before labor and social courts do not have to engage an attorney. Instead, they may opt for representation by an employee of the Chamber of Commerce (*Wirtschaftskammer*) or the Chamber of Employees (*Kammer für Arbeiter und Angestellte*) respectively (Section 40 of the Austrian Labor and Social Courts Act).¹⁶

¹³ Heller in Colman (Ed.), Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.30; Roth in Verschraegen (Ed.), Austrian Law - An International Perspective: Selected Issues, Jan Sramek Verlag 2010, 141.

¹⁴ Under Austrian law, in terms of representation by an attorney, there is no distinction made between barristers and solicitors. An Austrian attorney has the right to advise his/her clients in all legal matters and to represent them before any court or administrative authority within the country (Heller in Colman (Ed.), Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.1 and A3.19).

¹⁵ Deixler-Hübner and Roth, Der Zivilprozess in der Praxis, 4th edition, LexisNexis ARD Orac 2006, 4.

¹⁶ Heller in Colman (Ed.), Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.25.

In some other cases - particularly in cases pertaining to marriage and divorce - a party can choose to either represent himself or to be represented. If the party chooses to be represented, however, the representative has to be an attorney, provided that at least two attorneys are registered in the respective location (*irelaticer Anwaltszwang*, Section 29(1) of the Austrian Code of Civil Procedure).

3.3.3 Who Determines the Amount?

The court finally determines the particular amount to be awarded to the parties. In order to obtain reimbursement, each party has to file a breakdown of its costs until the end of the oral proceedings (Sections 52 and 54(1) of the Austrian Code of Civil Procedure). If the counterparty does not accept the other party's statement, it has to file an objection within 14 days (Section 54(1a) of the Austrian Code of Civil Procedure). Based on this material, the court rules on the costs by means of a court order (*Beschluss*).¹⁸ This decision is an integral part of the final judgment (Section 52(1) of the Austrian Code of Civil Procedure). If the parties have to bear their own expenses regardless of the outcome of litigation, however, a separate court order will be made. The court has discretion as to what extent the costs were necessary, but it is bound by the tariff as to the amounts awarded.¹⁹

3.4 Instruments of Cost Distribution

3.4.1 Success-Oriented Fees

For the protection of clients, success-oriented fees such as contingency fees are basically forbidden according to Section 879(2)(2) of the General Austrian Civil Code (*quota litis*).²⁰ Yet, a success premium or a lump sum fee calculated as a percentage of the amount in dispute is allowed, as long as it is not calculated as a percentage of the sum won.²¹

¹⁷ *Deixler-Hubner and Roth*, *Der Zivilprozess in der Praxis*, 4th edition, LexisNexis ARD Orac 2006, 4.

¹⁸ *Rechberger and Kuderk in Blanpain, Culucci, and Taelman (Eds.)*, *International Encyclopaedia of Law. Civil Procedure. Austria*, Kluwer Law International 2005, 7.

¹⁹ *Id.* at 66.

²⁰ *Apathy and Riedler in Schwimann*, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol IV, 3rd edition, LexisNexis 2006, Section 879 of the General Austrian Civil Code, margo No. 16; also refer to Section 16(1) of the Attorneys' Tariff Act.

²¹ *Krejci in Ruinmel*, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd edition, Manz 2000, Section 879 General Austrian Civil Code, margo No. 209.

If the winning party has negotiated a special fee with the attorney (which may be higher or lower than the statutory tariff), the losing party is not bound by such an arrangement but simply has to pay the tariff.

3.4.2 Sale of Claims

It is not permissible to sell claims for purposes of litigation to an attorney (Section 879(2)(2) of the General Austrian Civil Code). Private corporations, such as Advofin, however, do finance litigation and assume the financial risk. Such agreements are not considered *quota litis* arrangements and therefore legal under Austrian law since Section 879(2)(2) of the General Austrian Civil Code only addresses attorneys but not corporations financing litigation, such as Advofin.²²

3.4.3 Litigation Insurance

Insurance against the overall costs of litigation is increasingly popular in Austria. According to statistics provided by the Austrian Underwriting Association (*Osterreichischer Versicherungsverbund*), a total of 2,975,359 insurance contracts for litigation protection existed in 2008. This number includes policies held by businesses as well as private persons, but excludes legal protection in connection with automobile liability insurance. In most cases, plaintiffs filing a lawsuit carry legal cost insurance.²³

Automobile insurance and homeowners insurance may cover legal assistance in litigation in that particular area. In most cases, one has to buy litigation cost coverage separately. In recent years though, a few companies providing automobile liability insurance include automatic legal protection.

In practice, the plaintiff or his or her attorney must notify the insurance company of the intended litigation. The insurer will then verify whether the case is covered by the respective policy and whether the total amount insured is exceeded. If all terms and conditions are fulfilled, the insurance company will provide a note of coverage to its client.²⁴

²² Refer to Judgment of 23 February 1999, Austrian Supreme Court, SOb 28/99z; RS 0016814 T 2.

²³ *Hausmaninger*, The Austrian Legal System, 3rd edition, Manz 2003, 222.

²⁴ *Roth in Yerschraegeri (Ed.)*, Austrian Law - An International Perspective: Selected Issues, Jan Sramek Verlag 2010, 144; *Wandt*, Versicherungsrecht, 5th edition, Heymann 2010, para. 938.

3.4.4 Legal Aid

Legal aid is available to any natural person who is unable to bear the expenses of participation in legal proceedings without endangering his or her livelihood, regardless of whether the applicant is a plaintiff or defendant, national or alien' (Sections 63(1) of the Austrian Code of civil Procedure). An applicant for legal aid has to prove that his or her income is too low and that he or she does not own sufficient property to engage in civil proceedings without jeopardizing his or her basic maintenance. In these conditions are fulfilled, the judge has to grant legal aid, unless the party obviously cannot win the case.²⁵

Since 1 July 2009, Section 63(1) of the Austrian Code of Civil Procedure was amended so that only natural persons, but no longer corporations or other legal persons, are entitled to apply for legal aid.²⁶ The European Court of Justice, however, recently held that according to Article 47(3) of the European Charter of Fundamental Rights, legal aid shall in principle be available to legal persons as well.²⁷ This ruling has provided strong support for the critics of the 2009 amendment of the Austrian Code of Civil Procedure:²⁸

Legal aid consists mainly of a waiver of court fees by the state and - if required under the rules of representation (Sections 26 et seq. of the Austrian Code of Civil Procedure) - of the appointment of an attorney by the Bar Association. Hence, legal aid is not offered by a special organization, but rather by each attorney free of charge. Every attorney is assigned between five and ten legal aid cases each year. The court decides whether or not, and in which form, legal aid should be granted. If the court grants free representation by an attorney, the Bar Association assigns counsel according to its internal distribution system. An attorney so assigned may not refuse to take the case without good cause. Hence, within the system of legal aid, Austrian attorneys have a legal obligation provide free legal assistance in a certain number of cases.²⁹

²⁵ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds.)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 152; *Heller in Colman (Ed.)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.26.

²⁶ Until 1 July 2009, legal aid was available to natural and legal persons alike.

²⁷ European Court of Justice 22.. 12.20]0, C-279/09, *DEB Deutsche EnergieberatuTlgsge-sellschaft: mbH Bundesrepublik Deutschland*.

²⁸ *Slanina*, Verfahrenshilfe für juristische Personen: Ein Weihnachtsgeschenk des EuGI-I?, *ecolex* 2011, p. 410 et seq.

²⁹ See *supra* 3.2. .

³⁰ *Heller in Colman (Ed.)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.1.7; *Clvcoستا*, Prozesskostenrecht, Manz 2001, 14 et seq.

Irrespective of, and in addition to, legal aid available to persons in need, free legal advice is provided by the district courts (*called Amtsta-*,) and the Bar Association on special days of the week.³¹

3.5 Conclusion

Austria belongs to the majority of countries whose systems can be defined as "major shifting". Accordingly, the Austrian Code of Civil Procedure follows the loser-pays principle, which has been embraced since the Code's enactment in 1895. The system is designed so that all three categories of costs - namely court costs, lawyer fees and evidence' expenses - are shifted on to the loser with only few exceptions.

Like most countries in continental Europe, Austria has a statutory tariff for lawyers: the Attorneys' Tariff Act ensures predictability of costs and limits the losers' liability for the winners' attorney fees to the legal tariff. Moreover, the Court Fees Act provides predictability, of litigation costs by stipulating general sums depending on the amount in dispute. Beyond a certain amount, a statutory percentage - using the value of the case as a calculation basis - has to be paid.

The risk of losing a case and thus being charged with the costs of litigation functions as a deterrent to commence civil proceedings in Austria and thus may be seen as impeding access to justice. The right to have common access to justice is supported, however, by various instruments of cost distribution, particularly by the rules on public legal aid.

In Austria, legal aid is granted in the form of a waiver of court fees as well as in the form of free advice and representation by lawyers. By providing legal aid to parties who lack the financial means to litigate, the Austrian Code of Civil Procedure pays attention to the due process requirements of equality before the law and of a fair trial as set forth in Article 6 of the European Convention on Human Rights.³²

³¹ Article 1 Section S4 Bylaws for the Courts of 1. and II. Instance; <http://www.srak.at/service-informationenservice/1-anwal-tl-auskunft>,

³² *Choosta*, Prozesskostenrecht, Manz 2001, 14 et seq.