

THE ASSET TRACING
AND RECOVERY
REVIEW

FIFTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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AND RECOVERY
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The Asset Tracing and Recovery Review

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AUSTRIA

Stefan Albiez and Thomas Hartl¹

I OVERVIEW AND CURRENT DEVELOPMENTS

As a result of its comprehensive civil-law system, Austria generally provides victims of fraud with effective legal remedies in the field of fraud litigation and the connected legal areas. Given that Austria has been a member of the European Union (EU) since 1995, the legal options for victims of fraud also comprise various possibilities on a transnational level. Above all, the cross-border cooperation between authorities increasingly offers effective ways to follow and freeze the proceeds of fraud.

Largely due to recent international developments and initiatives on a European level,² Austrian legislators have been introducing new laws and adopting existing laws in order to tackle the increasing challenges of fraudulent conduct and money laundering. By way of example, the following recent measures set by Austrian authorities have positively affected transparency, and assist victims in the enforcement of their claims:

- a* As of 1 January 2014, non-listed stock companies are no longer entitled to issue bearer shares and are obligated to provide records with the identity and banking details of their shareholders.
- b* As of 1 March 2015, financial institutions are obligated to report transactions exceeding €50,000 to the Austrian Ministry of Finance.
- c* As of 5 October 2016, all current accounts, saving accounts and securities accounts are registered with the Austrian Ministry of Finance. Courts, the public prosecutor's office and fiscal authorities are entitled to access this register for professional purposes.
- d* By 2018, all legal entities (including foundations and trusts) shall be obliged to report detailed information on their beneficial owners to a central register managed by the Austrian Ministry of Finance.

It is assumed that these recent developments will further improve the legal position of fraud victims in Austria and assist them to retrieve misappropriated assets with the legal remedies in place.

1 Stefan Albiez is a partner and Thomas Hartl is an attorney at Binder Grösswang Rechtsanwälte GmbH.

2 Most recently, the introduction of the Fourth Anti-Money Laundering EU-directive (Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) and its ongoing incorporation into national law.

II LEGAL RIGHTS AND REMEDIES

i Civil remedies

General

Regarding civil law disputes, the amount in dispute generally determines the competent court of first instance in Austria. The courts' competence is divided between district courts (up to €15,000) and regional courts (exceeding €15,000). Additionally, specific competences are determined by the matter in dispute (e.g., labour law, commercial law, injunctions for preliminary relief).

Depending on the matter and amount in dispute, the Austrian judicial system generally offers two stages of appeal (with a total of three successive stages) for civil proceedings. If the judgment of first instance is rendered by the district court, appeals can be filed with the regional court. If the judgment of first instance is rendered by the regional court, appeals can be filed with the higher regional court. Matters involving questions of fundamental legal importance may be brought before the Austrian Supreme Court as the third and final instance.

The duration of civil proceedings in Austria largely depends on the complexity of the matter in dispute. Generally, Austrian civil courts have a reputation for working rather fast. It is not unusual to receive a decision of the court in first instance within one year after filing the claim. However, if the matter in dispute requires the collection of comprehensive evidence (e.g., hearing of various witnesses, obtaining an expert opinion), it may take years until a first instance judgment is reached.

The statutory court fees, which fall due at the time of filing of the claim, depend on the amount in dispute. Because there is no cap, these fees may reach a significant amount.³ Initially, each party must bear his or her own costs; however, the party losing the lawsuit is obligated to (proportionally) reimburse the litigation costs of the opposing party (the 'loser-pays principle') within the limits set by the Lawyers' Tariff Act.

Claims for damages

In general, a party may assert claims for damages under Austrian law if he or she can prove that the damage was caused by a culpable and unlawful action of the tortfeasor.⁴ This includes damages due to a breach of contract as well as other forms of (non-contractual or pre-contractual) tortious misconduct (e.g., violation of duty of due care or duty to inform). This also includes damages caused by fraudulent conduct and similar means.⁵ In the latter case, the burden of proof is reversed, so that it is for the damaging party to prove that he or she did not act negligently.⁶

In case of contractual obligations, principals are liable for their agents (i.e., all persons that are deployed for the performance of the contract), independent of whether the principal

3 Court fees are roughly 1.2 per cent of the amount in dispute at first instance, 1.8 per cent at second instance and 2.4 per cent at third instance.

4 Section 1295 et seq. Civil Code.

5 Section 1311 Civil Code; Austrian Supreme Court of 26 June 2001, 1 Ob 16/01m.

6 Austrian Supreme Court of 2 September 1999, 2 Ob 76/97h.

acted wrongfully ('vicarious liability').⁷ In the absence of contractual relations, liability of the principal is, however, limited and generally only applies if the principal (knowingly) employs an unfit or dangerous person for the task.⁸

Liability of legal entity

Legal entities – including corporations, partnerships as well as foundations and trusts – are liable for damages inflicted by their representatives while acting within their area of responsibility. The term 'representative' comprises all statutory bodies (e.g., management board, supervisory board) as well as any person that holds a similar function with autonomous management or supervisory powers. Liability of the legal entity may also result from the failure of the representatives to ensure a proper internal organisation and supervision of the employees.

Legal entities may claim damages from their legal representatives based on negligent or intentional violations of due care. In case of misconduct, the law stipulates a liability towards the company (and in some cases towards third parties) for any damages resulting therefrom.⁹

Amount of damages

The amount of damages that may be claimed is limited by the damage actually sustained. In practice, courts compare the financial situation of the victim after the damaging action with the (hypothetical) financial situation without the damaging action. Therefore, lost profits (i.e., lost business opportunities) and expenditures in connection with the judicial and extrajudicial pursuit of the claims and its enforcement can also be asserted. There are generally no punitive damages under Austrian tort law.

Annulment of contract and restitution of assets

If the victim of fraud was led to conclude a contract based on wrong information intentionally presented by the fraudster, he or she may file for an annulment of the contract.¹⁰ The same is true in cases where the fraudster intentionally fails to disclose significant information prior to the conclusion of the contract. In both cases the victim may claim damages sustained due to this misinformation.¹¹

Independent of whether a contract was concluded or not, claims for (financial) restitution can be based on the provisions for unjust enrichment.¹² Alternatively, the defrauded party may claim back physical assets based on property law regulations (action of ownership).¹³

7 Section 1313a Civil Code.

8 Section 1315 Civil Code.

9 For example, Section 25 Law on Limited Liability Companies and Section 84 Stock Corporation Act.

10 Section 870 Civil Code.

11 Section 874 Civil Code.

12 In particular, Section 1431 and 877 Civil Code.

13 Section 366 Civil Code.

ii Criminal remedies

General

Criminal investigations are initiated and directed by the public prosecutor's office.¹⁴ Any person may file a complaint with the public prosecutor's office or any police station. The complaint can also be filed anonymously and against an unknown suspect. The public prosecutor's office is obligated to investigate any suspicion of a criminal offence *ex officio*. Upon completion of the preliminary investigative proceedings, the public prosecutor's office decides whether the suspect is to be charged or not.

The jurisdiction in criminal matters in the first instance is divided between district courts and regional courts, and generally depends on the crime that the offender is indicted of. Additionally there are specific competences for some criminal offences. There is only one stage of appeal (two successive stages in total) in criminal proceedings. Appeals may be lodged with the higher regional court or the Austrian Supreme Court.

The duration of criminal proceedings in Austria varies significantly depending on the facts of the case. Criminal proceedings involving suspicions of white-collar crime in particular typically require extensive investigations, often on a cross-national level involving judicial assistance. It is thus not unusual that investigations in such cases last for several years, before the prosecution finally decides on whether to file charges or not.

Claims for damages

Acts classified as 'fraudulent conduct' may also constitute criminal violation under Austrian law. In practice, the most relevant criminal offences in this regard are all sorts of fraud, breach of trust and money laundering.

Fraud is committed by a person who has the intention of enriching himself or herself or a third person, and therefore deceives another person, which causes this person to act in a way that financially harms the deceived person or a third party.¹⁵ Accounting fraud involves all kinds of misrepresentations within the business records of a company.¹⁶ Whoever knowingly abuses his or her power of representation and thereby causes financial harm to the person represented is guilty of committing an offence of dishonesty (breach of trust).¹⁷

Victims of fraud

Victims of criminal violations are entitled to join the criminal proceedings during the investigative stage, and have access to the investigation file (the public prosecution can, however, restrict access for specific parts of the file in order not to endanger ongoing investigations).¹⁸ During ongoing criminal proceedings, victims may also assert claims for financial compensation for any damages sustained due to the criminal conduct.¹⁹ In this case, the victim joins the criminal proceedings as a civil claimant and above all has the right to request that specific evidence is being taken and considered by the public prosecution.

14 Exceptions are offences subject to private charges (e.g., industrial espionage or defamation).

15 See in particular Sections 146 (Fraud), 147 (Aggravated Fraud), 148 (Commercial Fraud) and 148a (Fraudulent Misuse of Data Processing) Criminal Code.

16 Section 163a et seq. Criminal Code.

17 Section 153 Criminal Code.

18 Sections 65 and 66 Criminal Code.

19 Section 67 Criminal Code.

Criminal violations of company representatives may also lead to a criminal liability of the company itself, provided that:

- a* the crime has been committed in favour of the company; or
- b* that the criminal offence constitutes a violation of the company's duties.²⁰

Further requirements are that the misconduct was performed either by the managing body or an employee of the company. In the latter case, the company is only criminally liable if the misconduct of the employee was enabled due to organisational negligence. If the company is found criminally liable, it may be fined up to €1.8 million. Furthermore, the court can order specific measures to be fulfilled by the company.

If charges are brought against the suspect, the criminal court does not only have to decide on the guilt of the suspect, but also on the civil claims asserted until the end of the criminal proceedings. If the suspect is found guilty, the criminal court either awards (parts of) the damages claimed to the civil claimant or refers the damaged party to the civil courts. In the latter case the damaged party must file a separate action with the competent civil court within due time.

In case of a conviction, the court may order the confiscation of objects that were used to commit the criminal offence or that have originated from this offence.²¹ Confiscation is, however, only admissible with regard to objects that legally belong to the convicted person. Additionally, the court may order the forfeiture of assets received for or while committing the criminal deed.²² In such case it is not necessary that these assets are the legal property of the perpetrator.

iii Defences to fraud claims

Possible defences to civil damage claims in particular involve objections to the basic preconditions for any such claim as outlined above. In practice, the party facing the claim will first of all argue that the claim is unjustified due to lack of damage, causation, wrongfulness or fault.

Apart from that, concerned parties often fight the claims invoking statute of limitations. Austrian civil law recognises two main limitation periods. Generally, contractual and non-contractual damage claims are subject to a three-year statute of limitations, starting with the date the claimant becomes aware of the damage and the party responsible for the damage. If the injured party does not have knowledge of either the damage or the damaging party, or if the damaging action constitutes an intentional criminal offence (e.g., fraudulent conduct), a 30-year limitation period applies.²³ However, according to settled case law, the injured party has the responsibility to make further inquiries if there are substantial indications for the injured party that he or she may have been damaged.

With respect to criminal liability, limitation may apply if persecution measures are not initiated by the criminal authorities within a specific period of time after the crime was

20 See Austrian Act on Corporate Criminal Liability.

21 Section 19a Criminal Code.

22 Section 20 Criminal Code.

23 Section 1489 Civil Code.

committed. The limitation period lies between one and 20 years, depending on the crime committed and the respective penalty for this crime. No limitation period applies to crimes that are punishable by law with life imprisonment or a sentence of 10 to 20 years.²⁴

Other common objections include contributory negligence,²⁵ a lack of standing to sue or to be sued, or a lack of (international) competence.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Austrian law offers two main options for securing assets in the case of (suspected) fraudulent conduct: preliminary injunctions and coercive measures by the law enforcement authorities.

Preliminary injunctions

The main precondition for a party to ask the court for interim relief under Austrian law is that he or she can demonstrate to the court that the enforcement of specific claims would be endangered if no interim measure was granted.²⁶ When assessing the presence of 'endangerment', courts above all consider the behaviour and recent actions of the debtor as well as any specific circumstances of the case at hand.

Preliminary injunctions may be granted for securing pecuniary and non-pecuniary claims as well as disputed legal relations. The possible interim measures granted are stipulated by law and comprise judicial custody of physical assets, forced administration of real estates or prohibition of the sale or attachment of assets.

Preliminary injunctions are granted or dismissed in expedited proceedings. The court may even refrain from hearing the opposing party, if the purpose of the preliminary measure was otherwise impeded. In practice, courts often allow the opposing party to submit a written statement, but set a very tight deadline. A lower standard of proof applies, so that parties only have to present 'plausible proof' for their allegations.

European Account Preservation Order

As of 18 January 2017, creditors domiciled within the EU can also apply for a European Account Preservation Order (EAPO) in order to secure claims.²⁷ This interim measure is available before and after proceedings have been initiated or a judgment has been granted. The EAPO is directed at the seizure of bank accounts within the EU and is available for all sorts of pecuniary claims including claims relating to tort, delict or quasi-delict and civil claims for damages or restitution that are based on an act giving rise to criminal proceedings.

Generally, the opposing party is neither informed about the creditor's application nor heard prior to the granting of the EAPO. The claimant has to provide sufficient evidence for the endangerment of the enforcement of the claim. If the creditor has not yet obtained

24 Section 57 Criminal Code.

25 Section 1304 Civil Code.

26 Section 378 et seq. Enforcement Act.

27 Regulation (EU) No. 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

a judgment, the competent court will have to decide within 10 working days after the application has been filed. An EAPO issued in an EU Member State is automatically recognised in all other participating EU Member States.

Other coercive measures

During ongoing criminal investigations, the public prosecutor is entitled to apply various coercive measures necessary for the clarification of the facts and prosecution of the suspected crime. Above all, assets may be seized and preliminary injunctions may be issued.²⁸

ii Obtaining evidence

Litigation in Austria does not involve pre-trial discovery. Rather, both parties bear the burden of proof for their allegations and have to present relevant evidence (documents, witnesses, expert opinions, on-site inspection) during the proceedings. If a party refers to a specific document in written or oral statements, the opposing party may request the court to order that this document be presented.²⁹ In return, if a document that is required as evidence is (only) in the hands of the opposing party or a third party, the court may – under very narrow conditions – order that the opposing party presents said document.³⁰ However, such presentation of documents is not enforceable. Thus, should the opposing party refuse to present those documents, the court can only take such behaviour into account in its free assessment of the evidence presented.

In practice, parties in Austria regularly face difficulties in gathering the necessary evidence to assert their civil claims. To overcome this hurdle, parties often try to gain additional evidence through criminal proceedings (i.e., by joining ongoing criminal proceedings or filing a criminal complaint). The coercive measures available to Austrian criminal law enforcement authorities are manifold and include the seizure of potential evidence, the tracking of locations and movements, covert investigations as well as optical and acoustic surveillance. The public prosecution may – on the basis of a court order – also initiate house searches and request financial institutions to submit information on bank accounts and financial transactions.³¹

Generally, there are no provisions under Austrian law that limit the use of improperly obtained evidence (e.g., illegally obtained recordings) in civil proceedings. There are, however, restrictions for the hearing of specific people as witnesses (i.e., mentally handicapped persons, members of the clergy, public officials and mediators). A breach of these restrictions may constitute a procedural violation.³²

The same rules apply to criminal proceedings, more or less. The limitations for the admissibility of witness examinations are, however, more strict and are divided into two groups. The first group (i.e., mentally handicapped persons and members of the clergy, public officials or members of parliamentary committees of inquiry who have not been released from their duty of confidentiality) may under no circumstances be interrogated. The second group, which includes relatives of the suspect, defence counsel and specific types of physicians, have the right to refuse testimony.³³

28 Section 109 et seq. Criminal Procedure Act.

29 Section 82 Civil Procedure Act.

30 Section 303 et seq. Civil Procedure Act.

31 Sections 116 and 119 et seq. Criminal Procedure Act.

32 Section 320 Civil Procedure Act.

33 Section 155 et seq. Criminal Procedure Act.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Mainly initiated by the implementation of the 4th Money Laundering Directive,³⁴ the Austrian legislator recently introduced new regulations intended to improve the legal framework for addressing the issue of money laundering.

Hiding, concealing or transferring proceeds from criminal actions may constitute a violation of the Austrian criminal provisions against money laundering.³⁵ The prosecution of suspected violations with respect to money laundering is concentrated within a separate unit (the Financial Intelligent Unit) of the department for white-collar crime at the Austrian Federal Office of Criminal Investigation.

The Financial Markets Money Laundering Act contains provisions on the prevention of money laundering for credit institutions and financial institutions.³⁶ The core of the regulation is the 'know your customer' principle. Banks are obligated to gather comprehensive information on their customers and the processed business transaction, including the beneficial owners of accounts, nature and purpose of business relation and origin of the funds used. All business relations and transactions have to be continuously supervised and every suspicion of money laundering (and terrorist financing) has to be reported immediately.

Additionally, starting in 2018, all legal entities (including foundations and trusts) must report detailed information on their beneficial owners to a central register managed by the Austrian Ministry of Finance.

ii Insolvency

The Austrian Criminal Code also penalises fraudulent conduct in connection with a debtor's inability to satisfy creditors. Fraudulent insolvency is committed by whoever conceals, hides, sells or damages parts of his or her assets with the intention of obstructing or impairing the satisfaction of creditors.³⁷ It is also forbidden to favour one of the creditors to the disadvantage of other creditors, while already being in a state of insolvency.³⁸

The Austrian Insolvency Act contains several provisions in order to ensure equal treatment of all creditors. In particular, specific legal transactions or legal acts by the debtor conducted prior to the opening of the insolvency proceedings to the detriment of the creditors may be challenged by the insolvency administrator (avoidance claims).³⁹

Directors of an Austrian company have a duty to apply for initiation of insolvency proceedings without delay (i.e., 60 days after the company is illiquid or over-indebted, at the latest).⁴⁰ A breach of this duty may result in a personal liability of the directors either towards the insolvency administrator or the creditors of the company.

34 Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

35 Section 165 Criminal Code.

36 BGBl I No. 118/2016.

37 Section 156 Criminal Code.

38 Section 158 Criminal Code.

39 See Section 27 et seq. Insolvency Act.

40 Section 69 Insolvency Act.

Formal initiation of insolvency proceedings has a statutory effect on ongoing civil proceedings and business relations.⁴¹ Above all, preliminary injunctions are voided after initiation of insolvency proceedings.

iii Arbitration

Arbitral awards rendered based on proceedings influenced by specific criminal violations by one of the parties may be challenged.⁴² The relevant violations of criminal law are, in particular, fraud and the falsification of documents.⁴³

Interim measures may also be granted by an arbitral tribunal.⁴⁴ In contrast to preliminary injunctions granted by state courts under Austrian law, the possible measures of interim relief granted by an arbitral tribunal are not defined by law. It is thus for the applying party to prove that the enforcement of specific claims would otherwise be endangered, if no interim measure was granted.

iv Fraud's effect on evidentiary rules and legal privilege

There are no specific regulations in Austria leading to an adjustment of the general evidentiary rules or the provisions concerning legal privilege in case of fraud-related investigations or proceedings. However, the principle of legal privilege – which, as far as extent goes, is not comparable to legal privilege as established in various other jurisdictions – is derogated if there are grounds for suspicion of money laundering.

Any criminal proceedings are governed by the *in dubio pro reo* principle.⁴⁵ Thus, the public prosecutor has to prove in any proceedings that the defendant has committed a crime (e.g., fraud) beyond any reasonable doubt. In contrast, in civil proceedings the courts decide their cases using the 'balance of probabilities' principle.

Any judgment obtained by specific criminal offences – *inter alia* fraud – may be set aside and lead to a retrial.⁴⁶

V INTERNATIONAL ASPECTS

Within the EU, all aspects of law involving cross-border relations are governed or significantly influenced by European Community Law. There is a steady development of legislation at this level, as regulations and directives are constantly introduced or renewed.

i Conflict of law and choice of law in fraud claims

After receipt of the claim, the Austrian court performs an assessment of its jurisdiction with respect to subject-matter and location, based on the information stated in the action. In cross-border disputes where the defendant is domiciled within the EU, international

41 Section 6 Insolvency Act.

42 Section 611 Paragraph 2 Recital 6 Civil Procedure Act.

43 See Section 530 Civil Procedure Act.

44 Section 593 Civil Procedure Act.

45 Section 14 Criminal Procedure Code.

46 Section 530 Paragraph 1 Recital 3 Civil Procedure Act.

jurisdiction is, in particular, determined by the (recast) Brussels I Regulation (Brussels I).⁴⁷ Under the Brussels I regime, claims generally have to be brought before the court of the defendant's domicile. However, under specific circumstances, defendants may also be sued before the courts of other EU Member States. For instance, according to Article 7 Paragraph 2 Brussels I, in matters relating to tort, delict or quasi-delict, defendants may also be sued in the courts of the place where the harmful event occurred. Civil claims for damages or restitution that are based on an act giving rise to criminal proceedings may be brought before the courts of the EU Member State responsible for the ongoing criminal proceedings.⁴⁸

Particularly with regard to disputes that do not fall within the scope of European provisions, Austrian law offers other forums based on the matter in dispute and the concerned parties. If the defendant for instance has no residence in Austria, he or she may still be sued before an Austrian court, if assets of the defendant are located in Austria.⁴⁹

In case of disputes with an international connection, the applicable law is determined by Austrian courts in particular pursuant to Austrian international civil law as well as Rome I⁵⁰ and Rome II Regulation.⁵¹

ii Collection of evidence in support of proceedings abroad

Within the EU, the most important legal framework for legal assistance in civil and commercial matters is the EU-Evidence Regulation.⁵² With respect to criminal matters, the EU Convention on Mutual Assistance in Criminal Matters between Member States of 2000 provides additional guidelines.⁵³ Also, the Hague Evidence Convention offers rules for collecting evidence abroad.⁵⁴ Additionally, Austria has signed various bilateral agreements regarding judicial assistance with countries outside of the EU.

Austrian criminal authorities may thus grant judicial assistance to foreign authorities based on various international agreements and specific national regulations.⁵⁵ Depending on the specific kind of legal assistance (e.g., service or orders, interrogation of individuals, imprisonment, execution of house searches, etc.), competence for legal assistance lies with the local state prosecutor or the local court, in whose district the legal act shall be performed.

47 Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. All claims filed before 10 January 2015 fall under the former Brussels I-Regulation (Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

48 Article 7 Paragraph 3 Brussels I.

49 Section 99 Jurisdiction Act.

50 Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations. For contracts signed before 17 December 2009 the Convention on the law applicable to contractual obligations of 1980 applies.

51 Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations.

52 Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

53 Council Act of 29 May 2000 established in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; BGBl III 65/2005.

54 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

55 See, for example, the Extradition and Legal Assistance Act (ARHG), the Austrian Act on Judicial Cooperation in Criminal Matters within the European Union (EU-JZG) and the Police Cooperation Act (PolKG).

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Austrian law provides for a specific procedural tool that allows courts to issue preliminary injunctions on the grounds of a (not yet legally binding) court decision awarding the claim. Thus, during pending civil proceedings, victims of fraud who litigate against the fraudster may request such pre-enforcement to secure the monetary claims.⁵⁶

Apart from that, Austrian courts may also issue preliminary injunctions to secure monetary claims either in the course of pending civil proceedings or even before initiation of regular civil proceedings. One of the general preconditions of granting such preliminary injunction is 'subjective endangerment', namely, the risk that the opponent will substantially try to prevent the claimant from successfully pursuing the claim (e.g., by hiding, moving, destroying or relocating assets).⁵⁷

However, such pre-enforcement measures and preliminary injunctions will only be granted if a future or final judgment is enforceable in Austria. Thus, in the absence of enforceability (due to the lack of respective treaties, conventions or reciprocity) or assets located in Austria, any such request of the victim will very likely fail.

iv Enforcement of judgments granted abroad in relation to fraud claims

The enforcement of judgments granted by courts within the European Union in Austria is governed by the Brussels I regulation. The process of recognition and enforcement is simplified and parties only have to provide a copy of the foreign judgment and confirmation of its enforceability by the foreign court using a standardised form (Annex I of the Brussels I regulation). The enforcement of judgments from non-EU Member States is more complex and first of all requires a declaration of general enforceability by an Austrian court.⁵⁸

v Fraud as a defence to enforcement of judgments granted abroad

A declaration of enforceability for a foreign judgment may not be granted by the Austrian court, if the content of the judgment constitutes a severe violation of the fundamentals of the Austrian legal order. However, as the defendant has no standing in the proceedings on the enforceability of the judgment, he or she will be able to invoke the fact that the judgment was fraudulently obtained only after its enforceability has already been granted. Together with the remedy against the enforceability of the judgment, the defendant may request a deferral of the execution process.

56 Section 370 Enforcement Act.

57 Section 379 Enforcement Act. The required 'subjective endangerment' may be reduced to a simple 'objective endangerment' (i.e., risk that does not result from the opponent's behaviour) in specific constellations and in relation to specific countries.

58 Section 403 et seq. Enforcement Act.



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