

Group litigation in Austria

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Civil litigation initiated by, or on behalf of, a large number of plaintiffs has become a highly relevant, and controversial, issue in Austria over the past years. Cases include damage claims, mostly but not necessarily based on tort, put forward by

- (i) the unfortunate victims, or their relatives, of the Kaprun ski train disaster,
- (ii) hundreds of hotel guests who had fallen ill almost simultaneously, due to polluted drinking water,
- (iii) well over a thousand bank customers who had been overcharged on their loan interest rates, and
- (iv) more than 3,000 small private investors who had lost their money in a large fraud case and who, subsequently, sued the bank whose employees had contributed to the cover-up.

The Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) does, at present, not provide for a special proceeding for such complex cases. Plaintiffs and their counsel have only limited options at hand, including:

- A Single action by each plaintiff individually (*Einzelklagen*)
- B Consolidation of individual proceedings (*Verbindung von Verfahren*)
- C Model or test action (*Testprozess*)
- D Joinder of proceedings (*Streitgenossenschaft*)
- E The so-called “class action Austrian style” (*Sammelklage nach österreichischem Recht*)

A. Single action by each plaintiff individually (*Einzelklagen*)

Asserting claims individually, i.e. in a separate lawsuit for each plaintiff, is often unfavorable from the economical perspective. That is true particularly for small damage claims because the possible costs incurred by the plaintiff are usually manifestly out of proportion to the potential yield. Consequently, such cases are hardly ever brought before the courts thus failing to achieve the preventive effect that should be inherent to the law. Even if filed the drawbacks are evident: Enormous aggregate costs of proceedings, repeated assessment of identical topics by the courts and, consequently, the possibility or even probability of contradicting judgments.

B. Consolidation of individual proceedings (*Verbindung von Verfahren*)

Consolidating proceedings just slightly mitigates the effects mentioned above. It also presupposes that all the relevant proceedings are already pending before the very same court. Above all, consolidating proceedings under Austrian law does not change their status as *individual* proceedings with all the drawbacks already mentioned. The costs of the proceedings may grow excessive, because all amounts

in dispute must be added to a total and attorneys' and court fees rise proportionately. Reaching an agreement with the defendant on the amount in dispute may bring relief, but this option is of course only feasible if and to the extent the parties co-operate.

C. Model or test action (*Testprozess*)

Even though Austrian courts do not have to abide by former precedents as under the common law system, any lawsuit may serve as a model or test case. However, waiting too long may jeopardize a claim on the grounds of statute of limitations. Therefore, conducting model proceedings requires co-operation of all parties involved, i.e. the defendant must be willing to waive using this defense. Such co-operation may or may not be achievable. Also, the judgment handed down in the model proceeding has no binding authority on third parties who did not participate (unless the parties have agreed otherwise).

D. Joinder of proceedings (*Streitgenossenschaft*)

Under certain conditions, a multitude of plaintiffs may put forward their claims in one single action. The requirements are, in particular, a very high degree of homogeneity of all claims and of the underlying factual setting. Therefore, only few of the disadvantages described above in connection with individual actions can be effectively avoided.

E. "Class action Austrian style" („*Sammelklage nach österreichischem Recht*“)

Although, technically, Austrian law does not (yet) provide for a class or group action in the strict sense, Austrian consumer organizations (*Verein für Konsumenteninformation/VKI* and the Federal Chamber of Labour/*Bundesarbeitskammer*) have, over the past years, put a new vehicle to the test in order to pursue claims of hundreds or even thousand of consumers in an efficient and effective manner. This method consists in assigning all individual claims against the same defendant to one single person (e.g., the consumer organization itself). The assignee, subsequently, brings one single action, over the aggregate amount of all claims, in its own name. This technique, soon labelled as "class action Austrian style", allows for a significant reduction of overall costs. While defendants and, some times, lower courts have considered this method inadmissible, the Austrian Supreme Court, in a recent judgment, has confirmed the "class action Austrian style" to be in conformity with the law, under the condition that all claims are essentially based on the same grounds. Nevertheless, the "class action Austrian style" has its downsides. Despite noticeable cost reduction such a proceeding will still be expensive if the amount in dispute is high. In international cases, consumers may risk losing the benefit of *forum actoris*. Most disconcerting, though, is the fact that effective group redress depends on the claimants assigning their claims to a third person.

Drafting a new law

The Austrian Parliament has therefore, unanimously, requested the Austrian Federal Minister for Justice to examine the possibility of new legislation providing for a cost-effective and appropriate way to deal with mass claims. Together with the Austrian

Ministry for Social Security, Generations and Consumer Protection, the Justice Ministry opened the discussion with a conference held in Vienna in June, 2005 (*Massenverfahren – Reformbedarf für die ZPO?*). Georg E. Kodek, who was only recently appointed Justice at the Austrian Supreme Court, presented a draft set of rules for a genuine group litigation proceeding.¹ With the aid of a group of experts from many fields, the Justice Ministry began drafting the new law in September, 2005. With the individual positions varying greatly, the process is still pending.

¹ Georg E. Kodek, Möglichkeiten zur gesetzlichen Regelung von Massenverfahren, in *Gabriel/Pirker-Hörmann* (ed.), *Massenverfahren – Reformbedarf für die ZPO?*, Vienna (2005).