THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW

FIFTH EDITION

Editors
Oliver Browne, Ian Felstead, Mair Williams
and Aisling Billington

THE LAWREVIEWS

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PREFACE

Litigation is, on one analysis, all about telling stories to impartial decision makers. Complex commercial litigation means that those stories are more detailed, more involved and more intricate. That means that telling the best story, in the most effective fashion, requires an incredible amount of preparation, research and skill.

But telling the best story is only part of the battle: every good story requires a strong foundation.

That is the purpose of *The Complex Commercial Litigation Law Review*.

As the editor of previous editions has noted, the world is becoming increasingly small, and disputes increasingly cross national borders. That means that the stories we tell are increasingly multi-jurisdictional, and playing a proper role in litigation (which now often makes us venture into new and uncharted territory to serve our clients and other stakeholders properly) requires an understanding of the different approaches each jurisdiction takes to important issues.

Addressed in these pages are the components required to provide a strong foundation to allow us to enhance our understanding of the ways in which complex commercial litigation works in different jurisdictions. From contract formation and interpretation (contracts being at the heart of the overwhelming majority of complex commercial litigation) to explaining the dispute resolution process, the remedies that might be sought and the defences that might be presented in response, this volume details the different approaches taken around the world to the resolution of complex commercial disputes.

We are very fortunate to have had considerable assistance fulfilling the purpose of this edition of *The Complex Commercial Litigation Law Review* from colleagues around the globe who are leading practitioners in their various jurisdictions. They come from some of the most respected law firms, and we are privileged to have the benefit of their insight into the ways in which complex commercial litigation arises and is addressed, as well as recent developments, in the countries in which they practice.

Ultimately, whether you are a corporate counsel, a business executive, a private practitioner, a government official or simply an interested bystander, and whether you are facing litigation, arbitration, mediation or some other form of dispute resolution (or simply wanting to understand litigation risk), we hope this edition provides useful insight and guidance. If it makes your foundations stronger, and your stories more informed and more effective, then we will have achieved our objectives.

Finally, please remember Abraham Lincoln's wise words: 'Discourage litigation. Persuade your neighbours to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.'

Litigation is not always the answer – but where it is unavoidable, we hope this edition provides assistance.

Oliver Browne, Ian Felstead, Mair Williams and Aisling Billington
Latham & Watkins
London
November 2022

Chapter 2

AUSTRIA

Sara Khalil and Andreas Natterer[1]

I OVERVIEW

Austria has a civil law system; the codification of the main civil law provisions, the Civil Code (ABGB), includes core concepts of contract law and dates back more than 200 years. The ABGB governs legal relationships between consumers as well as consumers and companies.

Similarly, the Commercial Code (UGB), which regulates business relationships between companies and entrepreneurs, and amends and expands the ABGB regarding business-to-business relationships, was introduced in 1938 under a slightly different name, whereas its predecessor in the German Confederation dates back to 1862. Both are comprehensive codifications of substantive law as they regulate the rights and duties of the parties to a contract; therefore, contract law is largely ruled by statute and Supreme Court case law, interpreting the statutory provisions.

From a procedural point of view, the Civil Procedure Code is a comprehensive set of rules for state court proceedings, from the filing of the claim to appeals to the Supreme Court. The judge's role is to issue a judgment on the facts of the case by applying the codified legal provisions and the Supreme Court's case law, which interprets and substantiates the codified provisions.

II CONTRACT FORMATION

The ABGB contains provisions for certain 'standard' types of contracts, such as sales contracts, loan agreements, donations, and rental or lease agreements. Austrian contract law is ruled by the fundamental principle of freedom of contract.

Section 861 of the ABGB stipulates that any individual who declares that he or she intends to transfer his or her rights to someone else (which means they will allow or give them something, do something for them or refrain from something to their benefit) makes a promise; however, if the other person validly accepts the promise, a contract is concluded by mutual consent. As long as the negotiations are pending and a promise has not yet been made or has neither been accepted in advance nor afterwards, no contract is established.[2] A contract is thus concluded by one party making an offer and the other party accepting the offer.

An offer is binding as soon as it reaches the other party, and it remains binding for the time specified by the party making the offer or for a reasonable period.[3]

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1 Sara Khalil is an attorney-at-law and Andreas Natterer is a partner at Schoenherr Attorneys at Law.

2 Peter Eschig and Erika Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code*, 2nd edn, Austria, LexisNexis, 2021, Section 861 ABGB.

3 Herbert Hausmaninger, *The Austrian Legal System*, 4th edn, Vienna, Manz, 2011, p. 251.

Consent to a contract must be declared freely, seriously, in a determined fashion and clearly in accordance with Section 869 of the ABGB. Offer and acceptance must be definite and must express the parties' intent to be legally bound by the effect of their declaration (declaration of will). The offer is definite and precise if it includes the key terms, such as goods and price for sales contracts.[4] Certain limited types of contracts, such as safekeeping contracts, require actual delivery of the goods.

Most contracts may be concluded without complying with any special form: an oral offer and acceptance suffice. Some contracts, such as suretyships, require a written form; others, such as donations not handed over immediately, must be conducted by notarial deed.

Especially where actual delivery of goods is required, preliminary agreements may be concluded. A preliminary agreement is an agreement to conclude a (main) contract in the future. It is only binding if the key terms of the main contract and the time of the conclusion of the main contract are determined. One party can sue the other for conclusion of the main contract within one year of the date of the intended conclusion of the main contract stipulated by the preliminary agreement; otherwise, the right lapses.[5]

Contracts may benefit a third party who is not party to the contract; however, third parties must not be burdened with any duties. Contracts benefiting a third party may either grant the third party the right to demand delivery in his or her own right or only entitle one of the parties to the contract to demand performance to the third party.[6]

III CONTRACT INTERPRETATION

If the parties to a contract agree on its terms, there is no need to interpret the contract. Even if the parties use different terminology, the contract is concluded if the parties meant the same thing (principle of *falsa demonstratio non nocet*).[7]

If the contract's terms are unclear and the parties disagree, a court will first look at the common literal meaning of the wording of the contract.[8] If the contract's wording is not clear enough, or the parties in hindsight cannot agree what certain words mean or should have meant (which is often the case), the courts interpret the contract by applying the 'reliance theory' to determine the true intention of the parties at the time of the conclusion of the contract.[9] The court aims to determine how the meaning of the declaration of intent could have been objectively understood by its recipient.[10] A judge may also consider the relevant practice of fair dealing. If the wording of the contract does not give way for a succinct interpretation, non-mandatory statutory law may fill in any gaps. As a third step, if an issue arises that the parties did not provide for in the contract, the court tries to determine what fair and reasonable parties would have negotiated.[11]

If interpretation cannot solve the vagueness of the contract, Section 915 of the ABGB stipulates that if contracts are only obligatory for one party, it is assumed in doubt that the

4 Stefan Perner, Martin Spitzer and Georg E Kodek, *Bürgerliches Recht*, 7th edn, Vienna, Manz, 2022, p. 59 ff.

5 Michael Schwimann and Georg E Kodek (eds), *ABGB Praxiskommentar*, 5th edn, Austria, LexisNexis, 2021, Section 936, ABGB margin 21 ff.

6 Hausmaninger, *The Austrian Legal System*, p. 254.

7 OGH 5 December 2000, 10 Ob 310/00m.

8 Section 914 of the ABGB.

9 Section 915 of the ABGB.

10 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 62 f.

11 id., p. 64 f.

obliged party wanted to accept the lesser rather than the more cumbersome burden. In the case of contracts that are obligatory for both parties, an unclear expression is interpreted to the detriment of the party who used the expression;[12] thus, it should be kept in mind that imprecise or ambiguous language, while often employed to give the parties certain flexibility in their dealings, could affect the party drafting the imprecise or ambiguous clause negatively in the end.

If the court cannot unequivocally determine the contract's meaning, the contract is void.

IV DISPUTE RESOLUTION

i Court system

Contractual claims can be filed with a district court or a regional court. There are no minimum amounts in dispute – small claims may be brought; technically, a €1 claim would be possible.

District courts are competent for cases where the amount in dispute exceeds €15,000, as well as for marital and family law disputes, disputes on the violation of human dignity on the internet (cease and desist order), property disturbance disputes and disputes regarding immovables or properties.[13]

Regional courts are competent for an amount in dispute exceeding €15,000, as well as unfair competition claims and intellectual property disputes (such as copyright infringements).[14]

The parties may appeal any first instance judgments within four weeks of the day the judgment was served. The appeal must be signed by a member of any of the nine regional Austrian Bar Associations. An appeal to the Supreme Court is only admissible if certain prerequisites are met, such as the amount in dispute (in second instance) exceeding €30,000.[15] A Supreme Court appeal is entirely inadmissible if the amount in dispute (in second instance) does not exceed €5,000 (with exceptions, such as in family law matters).[16]

Monetary claims up to €75,000 may be filed using a simplified procedure: the judicial payment procedure. The court first issues a conditional court order as soon as the claim is filed and serves the payment order. The defendant may pay the claimed amount within 14 days of service or object to the payment order within four weeks of service. If the defendant does not object, the payment order is enforceable.

The commercial courts are the competent courts in commercial law matters, especially business-related transactions where the defendant is registered in the company register, disputes between the shareholders of a company or between the company and its shareholders, product liability disputes and disputes with regard to cheques and bills of exchange.[17] Two specialised courts for commercial matters have been established in Vienna: the district court for commercial cases and the regional court for commercial cases.

12 Eschig and Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code*, Section 915 ABGB.

13 Section 49 of the Jurisdictional Rules.

14 Section 51(2) of the Jurisdictional Rules.

15 Georg E Kodek and Peter G Mayr, *Zivilprozessrecht*, 5th edn, Vienna, facultas, 2021, margin 1089 ff.

16 Walter H Rechberger and Daphne-Ariane Simotta, *Zivilprozessrecht*, 9th edn, Vienna, Manz, 2017, margin 1110 ff.

17 Kodek and Mayr, *Zivilprozessrecht*, margin 216 ff.

Labour and social law disputes are handled by the regional court for labour and social law in Vienna.

If a commercial claim or a labour claim is brought outside of Vienna, the regional court or district court (depending on the amount in dispute in commercial law matters) decides as a commercial court or as a regional labour and social law court.

ii Territorial jurisdiction

Territorial jurisdiction differentiates between the place of general jurisdiction, which is the place of domicile or habitual residence of a natural person or the seat of a company, and places of special jurisdiction – places of either exclusive jurisdiction (i.e., claims regarding a certain property) or elective jurisdiction (i.e., place of performance). Certain places of compulsory jurisdiction exist, such as an entrepreneur's claim against a consumer.[18] Furthermore, Regulation (EU) No. 1215/2012 (Brussels 1a) must be taken into consideration.[19]

iii Jurisdiction and arbitration clauses

Parties to a contract may agree on a different forum; however, in some cases a different forum cannot be chosen in advance (e.g., an entrepreneur's claim against a consumer). If another forum is selected, Austrian law provides that when in doubt, such a chosen forum represents only an additional forum and not the sole forum, where any claims must be exclusively filed; thus, a jurisdiction clause under Austrian law should include a phrase determining that the chosen forum is the place of exclusive jurisdiction. In contrast, in accordance with Article 25 of Brussels 1a, a chosen forum under Brussels 1a is generally seen as a place of exclusive jurisdiction.[20]

The parties may also choose to include an arbitration clause in a commercial contract. The arbitration clause may apply to all or certain disputes that have arisen or may arise in the future between the parties to the contract. Section 582 of the Civil Procedure Code contains a general rule that states that every claim involving an economic interest may be decided by an arbitral tribunal; therefore, any actions in connection with public or administrative law, falling within the jurisdiction of administrative authorities, the Austrian Constitutional Court or the Administrative Court of Austria, as well as any criminal proceedings, are not arbitrable. Certain types of claims, such as family law claims, cannot be arbitrated either (Section 582, Paragraph 2 of the Civil Procedure Code).

Alternatively, parties may also include a mediation clause in a commercial contract. The Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber introduced the Vienna Mediation Rules in January 2016 (revised on 1 July 2021). VIAC is thus competent to administrate any alternative dispute resolution proceedings supported by a neutral third party.[21] The parties may also agree on a multi-tiered dispute resolution clause, as long as the multi-tiered clause is precise and not immoral; in particular, the duration of a

18 Section 14 of the Consumer Protection Act.

19 As this chapter only covers Austrian law, we will not go into the EU Regulations.

20 Dietmar Czernich in Dietmar Czernich, Georg E Kodek and Peter G Mayr (eds), *Europäisches Gerichtsstands- und Vollstreckungsrecht*, 4th edn, Austria, LexisNexis, 2015, Article 25, margin 96.

21 VIAC website: www.viac.eu/en/mediation (last accessed: 14 September 2022).

mediation attempt (before bringing a claim in front of a state court) should not exceed six months; otherwise, it might be argued that the clause delays the party's right to ordinary legal procedures.[22]

iv Court fees

To file a claim, the claimant must first settle the court fees in accordance with the Court Fees Act. The court fees are taxed on the amount in dispute; for example, if the amount in dispute is €500,000, the court fees due at filing amount to €10,203.

Other than that, the prevailing party may recover its costs of legal representation in the proceedings (and any court fees or costs of expert witnesses) based on the Lawyers Tariff Act; this Act provides tariff rates depending on the amount in dispute – not hourly rates.

v Preparation of claim or evidence

Austrian civil procedure law is not familiar with any specified rules of evidence; however, proper documentation gives any claimant a solid advantage in the proceedings. Naturally, Austrian courts hear witnesses, but it is entirely up to the judge whom he or she believes. The judge must substantiate in the judgment why he or she believes a certain witness and not the other; however, only the court of first instance hears all the facts and witnesses. Neither the Court of Appeal nor the Supreme Court generally hears witnesses; they only receive the minutes of the hearing dictated by the first instance judge.

V BREACH OF CONTRACT CLAIMS

Austrian contract and tort law are based on a fault-based liability system. A claimant generally must prove that damage occurred and that it was caused by the other contracting party. Furthermore, the claimant carries the burden of proof of the unlawfulness of the other party's behaviour; a breach of contract indicates unlawful behaviour.

As a fourth step, the defendant's fault must be proven. In contractual matters, slight negligence of the defendant is assumed. If liability for slight negligence is contractually excluded, the defendant must prove that he or she did not act in a grossly negligent way (Section 1298 ABGB). The defendant thus carries the burden of proof with regard to culpability.[23]

Contractual damages claims are privileged compared with tort claims (delict). First, Section 1313a of the ABGB provides for extensive vicarious liability; anyone is liable for the fault of their legal representatives as well as persons he or she employs to deliver the performance of services – even if those persons are entrepreneurs.

Second, the injured party must usually prove that the other party is at fault; however, contractual liability differs because in this case the injuring party must prove that it is not at fault (see above).

Third, pure pecuniary loss is generally not compensated in tort.

22 Bettina Knötzl and Judith Schacherreiter, 'Schlichtungsvereinbarungen: Gültigkeit, Wirkung und Musterschlichtungsklausel', *AnwBl* 9, 2016, p. 445 [446 f].

23 Ernst Karner in Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds), *ABGB: Kurzkommentar*, 6th edn, Austria, Verlag Österreich, 2020, Section 1298, margin 5.

According to Section 1315 ABGB, a person who uses an incompetent or knowingly dangerous person to manage his or her affairs is liable for the damage he or she causes to a third party in this capacity. They may be employed on a permanent basis, but they may also be employed only once. A prerequisite for being an assistant, however, is the integration of the person in question into the sphere of control or organisation of the person potentially liable under Section 1315.[24]

i Non-performance

If the performance of the contract has (accidentally) become impossible before the contractually agreed date of delivery, the contract falls apart, and the parties must return any benefits already received. If a party is at fault, the infringed party may either stick with the contract, perform its part of the contract and then demand the value of the (meanwhile) impossible consideration, or it may rescind the contract and demand the balance between its own performance and due consideration. The infringed party may claim damages for any disadvantages suffered by the non-performance of the contract.[25]

Any other non-performance, such as mere non-delivery, constitutes a breach of contract and gives rise to damages claims.

ii Delay

One party's failure to perform within the agreed time frame, to deliver at the agreed place or to fulfil the contract in the determined manner entitles the other party to insist on performance of the contract or to set a grace period and to rescind the contract. Usually, it is not too difficult to determine whether a party failed to deliver at a certain point in time or at a certain place; however, failure to fulfil the contract in the determined manner is harder to establish.

If a party to a contract does not deliver the contracted goods, no matter if the goods delivered are completely different or just faulty, the other party to the contract may reject delivery or accept delivery under reservation. If the party accepts delivery, it may only assert warranty claims (see below).[26] If the party in delay of performance is at fault, the injured party may additionally claim for damages caused by delay.

iii Warranties

Statutory warranty against defects applies to any non-gratuitous contract under Austrian law. Statutory warranty must not be mistaken for a contractual guarantee (or warranty). Statutory warranty law is governed by three different regimes following the transposition of Directives 2019/771 on Sales of Goods and 2019/777 on Digital Services: contracts subject to the ABGB (business-to-business and consumer-to-consumer), consumer contracts on sales of goods or digital services subject to the ABGB and the new Consumer Warranty Act (VGG) and any other consumer contracts not subject to the VGG (e.g., contracts for work or real

24 Reischauer in Rummel, *ABGB*, 3th edn, Section 1315 ABGB, Austria, Manz, 2004.

25 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 171.

26 Michael Gruber in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON1.06*, Austria, Manz, 2019, Section 918, margin 5 ff.

estate contracts).[27] The VGG only applies between entrepreneurs and consumers. Certain types of contracts are explicitly excluded, such as contracts for the sale of livestock, health services, gambling and financial services.[28]

Section 922 of the ABGB stipulates that: (1) the party selling goods is liable for the asset having the agreed or generally assumed qualities; (2) the goods must conform to the description, a sample or a model; and (3) the goods can be used in line with the nature of the transaction or the concluded agreement.[29] Thus, any deviation from the contractually agreed service or goods, or what is usually expected from the contracted services or goods, may be a defect. The VGG differentiates similarly between contractually agreed properties (Section 5 VGG) and objectively required properties (Section 6 VGG).

There are defects of legal title and quality or quantity defects. In the first case, the debtor failed to transfer the promised right (partially or fully); in the second case, the debtor does not deliver enough or delivers an insufficient quality of goods.

For goods with digital elements and digital services, the VGG now stipulates an update obligation. According to Section 7 VGG, an entrepreneur is liable to provide – after prior information – any updates necessary for continued compliance of the goods or digital service with the contract for the agreed time frame or as long as the consumer may reasonably expect but for goods with digital elements at least two years after delivery.[30] A consumer may expressly and separately agree to a deviation of the update obligation upon conclusion of the contract after having been specifically informed. The update obligation also applies to B2B contracts.[31]

According to Section 924 of the ABGB, it is assumed that any defects appearing within six months of the date of delivery were already present at the time of delivery. For consumer contracts within scope of the VGG, the deadline is one year (instead of six months). Especially for highly technical products it can be very difficult to prove that they were defective at delivery; therefore, the assumption is practically relevant.[32] The creditor may primarily request repair or replacement of the goods. If repair or replacement is impossible, disproportionate, inconvenient for the creditor, unreasonable for the debtor or if the debtor fails to perform entirely, the creditor may request a price reduction or the rescission of the contract. The VGG details several additional reasons for a consumer to rely on price reduction and recission of the contract, such as severity of the defect.[33]

In recent years, the Supreme Court has ruled that a party repairing or replacing contracted goods or services before the debtor has been given a second chance to perform any warranty work has to pay the full price but does not have to pay the amount that the debtor saved by not repairing or replacing the contracted goods or services.[34]

27 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 191.

28 Section 1 (2) VGG.

29 Eschig and Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code*, Section 922 ABGB.

30 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 19.

31 Section 1 (3) VGG.

32 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 19.

33 id., p. 192.

34 id., p. 194 ff.

In accordance with statutory law, entrepreneurs must give the other party, if said party is also an entrepreneur, notice of any defects within an appropriate time frame; otherwise, the right of warranty or damages claim relating to the defect is lost.[35]

Instead of asserting a warranty claim, a party may file a damages claim; the advantage is that the damages claim becomes time-barred within three years of the time the party becomes aware of the damage and the identity of the damaging party (see below),[36] whereas the warranty period for movables is only two years (with a three-month period to assert the right for certain types of defects).[37]

iv Other breaches of contract

If negligent defective performance causes any consequential damage to a party to a contract or a damage is caused by a negligent violation or breach of ancillary obligations, the injured party may recover these consequential damages as contractual damages claims.[38]

v Pre-contractual liability

Even if the parties do not conclude a contract, a party may be liable for damages if the party negligently breaches pre-contractual duties of protection and care or any pre-contractual disclosure obligations (*culpa in contrahendo*). The parties are free to discontinue negotiations of a contract at any given time; however, they must act in good faith and may not end negotiations arbitrarily if the other party was induced to rely on the conclusion of the contract and damages would ensure from the discontinuance of the negotiations.[39] The injured party may then claim the damages the party suffered owing to its reliance on the conclusion of the contract.

VI DEFENCES TO ENFORCEMENT

i Initial impossibility

Evident initial impossibility of a contract, such as the legally impossible or ridiculous (e.g., sale of a unicorn), means that a contract cannot be validly concluded. The contract is void. If one party knew or had to know about the impossibility, the other party, who was unaware of the fact, may claim reliance interest.[40]

ii Subsequent impossibility

See Section V.i.

35 Ernst Kramer and Claudia Martini in Manfred Straube, Thomas Ratka and Roman Alexander Rauter (eds), *UGB* I4 Section 378, Austria, Manz, 2020, margin 1 ff.

36 Perner, Spitzer and Kodek, Bürgerliches Recht, p. 207 ff.

37 id., p. 192 ff.

38 Hausmaninger, The Austrian Legal System, p. 256.

39 id., p. 51.

40 Perner, Spitzer and Kodek, Bürgerliches Recht, p. 85.

iii Frustration

The basis of a contract is defined as typical circumstances, which the parties usually assume at the time of the conclusion of the contract and see as the basis of the contract without expressly including them in the contract. The parties' intention to conclude a contract is based on the idea of the existence of future occurrence of certain circumstances.[41] If those circumstances change fundamentally (e.g., a major earthquake at a future holiday destination), the contract may be challenged.

iv Laesio enormis

If one party has not even received half of the fair market value of what he or she transferred to the other party, the infringed party may demand rescission or reinstatement. The other party is entitled to pay the remaining amount up to the fair market value to keep the contract. The objective value at the time the contract was concluded is relevant.[42]

This principle only applies to contracts with a certain consideration (e.g., not donations). Entrepreneurs may contractually exclude this provision at their own expense.[43]

v Limitation of liability

Liability may be limited by party agreement; however, parties may not exclude any possible liability. Entrepreneurs may limit their liability in non-consumer contracts except for personal injuries, damage caused with intent and blatant gross negligence. Entrepreneurs may only limit their liability with regard to consumers for slight negligence, but even then not for personal injuries. Limitation of liability clauses in consumer cases should be carefully considered on a case-by-case basis.[44]

vi Statute of limitations

The ABGB recognises two different limitation periods. The default limitation period is 30 years and applies if statutory law does not provide for a shorter (or, seldom, longer) limitation period. A three-year period applies, for example, to damages claims, starting from the time the party becomes aware of the damage and the identity of the damaging party,[45] as well as contractual damages claims such as damages for error, where the statute of limitations starts at the time of the conclusion of the contract.[46] The statutory warranty period is two years for movable objects and three years for immovable objects.

41 id., p. 107.

42 Section 934 of the Civil Code.

43 Section 351 of the Commercial Code.

44 Georg Graf in Kletečka and Schauer (eds), ABGB-ON1.06, Section 879 margin 303 ff; Peter von Apathy in Schwimann and Kodek (eds), *ABGB Praxiskommentar*, Section 6 Consumer Protection Act margin 41ff.

45 Section 1489 of the Civil Code.

46 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 232.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Illegality and immorality

Section 879, Paragraph 1 of the ABGB acts as a catch-all rule: a contract that violates a legal prohibition or public policy is void. According to jurisprudence, anything that contradicts the sense of justice of the legal community is immoral (i.e., against public policy). This leaves vast room for interpretation and hundreds, if not thousands, of different cases, including the following:

a According to jurisprudence, contracts are immoral if the weighing of interests results in a gross violation of legally protected interests, or if there is a gross imbalance between the interests violated and those promoted in a conflict of interests.[47]

b Contractual penalties are immoral if they unduly impair the debtor's economic freedom of movement or clearly favour the creditor without cause.[48]

c Risk transfer clauses are ineffective if they pass on an unforeseeable or nevertheless incalculable risk to the opponent without corresponding compensation.[49]

d When examining long-term contractual commitments, the dissolution interest of one party must be weighed against the existing interest of the other, and the content and purpose of the contract must be taken into account in addition to the term of the contract.[50]

e Whether an immoral or illegal contract is deemed void or contestable depends on the severity of the illegality or immorality; whether a party has to claim illegality or immorality, or if the court can take it up on its own, also depends on the severity.

ii Fraud and duress

Deceit and duress (illegal and well-founded fear) invalidate any contract. A deceived party may contest the contract within 30 years. A party who agreed to an agreement under duress can contest the agreement within three years of the threat being dropped.[51]

iii Error

Error is a misconception of reality. According to jurisprudence, a material error is an error concerning the nature of the matter or an essential quality or the other party to the contract. The contract may be challenged within three years of the conclusion of the contract if one of the following applies:

a the error was caused by the other party to the contract;

b the error should have been noticed by the other party by taking into the account the specific surrounding circumstances; or

47 Bollenberger in Koziol, Bydlinski and Bollenberger (eds), *ABGB: Kurzkommentar*, Section 879 ABGB margin 5; OGH 29 November 2013, 8 Ob 112/13y.

48 OGH 20 June 2006, 4 Ob 113/06f; Bollenberger in Koziol, Bydlinski and Bollenberger (eds), *ABGB: Kurzkommentar*, Section 879 ABGB margin 7.

49 Bollenberger in Koziol, Bydlinski and Bollenberger (eds), *ABGB: Kurzkommentar*, Section 879 ABGB margin 9.

50 OGH 22 February 2001, 6 Ob 322/00x; OGH 20 January 2016, 3 Ob 132/15f; Bollenberger in Koziol, Bydlinski and Bollenberger (eds), *ABGB: Kurzkommentar*, Section 879 ABGB margin 7.

51 Section 870, 1487 of the Civil Code.

c the mistaken party informs the other party in good time of the error (particularly, before the contractual partner has acted in reliance on the declaration).[52]

Entrepreneurs may exclude reliance on error upfront if the other party to the contract is an entrepreneur as well, and the error has not been caused with intent or grossly negligent.[53]

VIII REMEDIES

There are no punitive damages. Damages should compensate actual losses suffered and not serve as a punishment for wrongful behaviour.

Section 1323 of the ABGB provides that everything must be restored to its former condition or, if that is not possible, the estimated values must be reimbursed to provide compensation for damage caused. This primarily means restitution; more often than not, restitution in kind is not possible or feasible. The Supreme Court decided that restitution in kind is already unfeasible if the injuring party's interest to provide monetary compensation significantly outweighs the injured party's interest for restitution in kind. If restitution in kind is possible, the claimant may choose whether he or she prefers monetary compensation or restitution in kind.[54]

The claimant is either awarded compensation for the actual loss but not lost profits or full compensation, including any lost profits. The extent of compensation awarded depends on the degree of culpability – if the defendant's wrongful behaviour was slightly negligent, the claimant only receives damages for actual loss; if he or she was grossly negligent, the claimant receives full compensation. If the claimant and the defendant are both entrepreneurs, full compensation, including lost profits, must also be paid if the defendant acted only with slight negligence.[55]

Non-material damage – any damage that cannot be measured in money, such as loss of reputation – is generally not compensable. Only in very specific instances does the ABGB provide for such compensation; for example, compensation for pain and suffering or the lost enjoyment of one's holidays.

Jurisprudence has been quite reluctant to grant any kind of immaterial damage; however, during the past few years, secondary opinion has discussed non-material damage claims in connection with wrongful birth and mourning losses.[56] Since Article 82 of the General Data Protection Regulation provides for possible compensation for non-material damages, claims for non-material damages have been filed. A decision of the Innsbruck Higher Regional Court held that 'actual impairment of the emotions of the injured party' is required.[57]

Parties can provide for contractual penalties. A contractual penalty should induce the debtor to perform the contract correctly and simplify the creditor's claim for damages from a breach of contract. It is due even if no damage has occurred at all, unless otherwise agreed. Although the contractual penalty is, in principle, only triggered if the debtor culpably did not perform at all or performed deficiently, a contractual penalty could be due in the event

52 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 100 ff.

53 Andreas Riedler in Schwimann and Kodek (eds), *ABGB Praxiskommentar*, Section 879 margin 12.

54 Monika Hinteregger in Kletečka and Schauer (eds), *ABGB-ON1.06*, Section 1323 margin 9–11.

55 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 318.

56 Hinteregger in Kletečka and Schauer (eds.), *ABGB-ON1.06*, Section 1325 margin 1ff.

57 OLG Innsbruck 13 February 2020, 1 R182/19b.

of a non-culpable breach of contract if the parties provide for it.[58] If the actual damage exceeds the contractual penalty, the excessive amount may be claimed among entrepreneurs. A mandatory judicial right of moderation exists.[59]

IX CONCLUSIONS

The contractual provisions and concepts described in this chapter have been developed over the past 200 years and have only been amended to adapt to modern law requirements, such as consumer law. Other than that, the main core of contract and commercial law has remained quite unchanged in the past 200 years (the ABGB was introduced in 1812 and amended in 1914, 1915 and 1916).

A few years ago, a revision of Austrian tort law was attempted, but failed; therefore, Austrian contract law only gradually changes whenever a new EU legislation case law requires it. Even though case law develops and clarifies certain issues, the main legal concepts are the same. A definite trend is that courts are increasingly consumer-friendly.

58 Karl-Heinz Danzl in Koziol, Bydlinski and Bollenberger (eds), *ABGB: Kurzkommentar*, Section 1336 ABGB margin 3.

59 Perner, Spitzer and Kodek, *Bürgerliches Recht*, p. 162.

Appendix 1

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