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The Legal 500 Country Comparative Guides

Austria

INSURANCE DISPUTES

Contributor

GRAF ISOLA



G GRAF-ISOLA

Sebastian Mahr

Partner | s.mahr@grafisola.at

Sarah Micheuz

Associate | s.micheuz@grafisola.at

Fabian Püschner

Associate | f.pueschner@grafisola.at

This country-specific Q&A provides an overview of insurance disputes laws and regulations applicable in Austria.

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AUSTRIA

INSURANCE DISPUTES



1. What mechanism do insurance policies usually provide for resolution of coverage disputes?

Austrian insurance policies typically provide for both judicial and extra-judicial resolution of coverage disputes. Judicial proceedings are conducted on the basis of the Austrian Code of Civil Procedure (**ZPO**). Extra-judicial resolution mechanisms are becoming increasingly popular, particularly for specialised types of insurance such as W&I or reinsurance.

2. Is there a protocol governing pre-action conduct for insurance disputes?

Austrian law does not have a specific pre-litigation protocol for insurance disputes, comparable to some common law jurisdictions. However, insurers and policyholders follow certain pre-litigation practices, in particular the formal notification of a claim. Failure to give proper notice of a claim to the opposing party prior to filing a claim with the competent court may have negative consequences in terms of the court's decision on costs.

3. Are the Courts in your region adept at handling complex insurance disputes?

Although there are no specific chambers or bodies specialising in insurance disputes, Austrian courts (in particular the Commercial Court Vienna) are generally well equipped to deal with complex insurance disputes.

4. Is alternative dispute resolution mandatory in your jurisdiction?

Austria encourages alternative dispute resolution methods, but they are not mandatory. Parties may voluntarily choose methods such as arbitration to resolve their disputes. In case consumers are involved, certain restrictions must be observed.

5. Are successful policyholders entitled to recover costs of insurance disputes from insurers?

The allocation of costs in civil proceedings (including insurance disputes) is governed by the ZPO. In general, each party must initially bear the costs incurred by its participation in the proceedings. In the event of a successful outcome, the losing party is obliged to reimburse the successful party for the costs incurred in the course of the proceedings. While the court fee must be reimbursed in full, the attorneys' fees are reimbursed on the basis of the Austrian Attorneys' Fees Act (**RATG**). This provides for payments to be made for each stage of the proceedings, e.g. for written preparation, for each court appearance, etc., but still on the basis of the amount in dispute. As a result, the fees do not necessarily directly reflect the costs incurred. If the parties have been successful in some of their claims and unsuccessful in others, the costs will be set off against each other or shared proportionally on the basis of the lawyer's tariff. For example: If A succeeds in 75% of his claim, he is entitled to recover 75% of his costs, whereas B is entitled to recover 25% of his costs - the two claims are therefore set off against each other, so that in the end A is entitled to recover 50% of his costs from B.

6. Is there an appeal process for Court decisions and arbitral Awards?

Austrian civil procedure law provides for a structured appeal procedure against court decisions. Decisions of courts of first instance may be appealed to higher regional courts. Under certain conditions, a further appeal may be possible to the Austrian Supreme Court.

The first appeal in civil matters (Berufung) is based on facts and points of law, whereas the second appeal (Revision) can only be based on points of law (important point of procedural or substantive law, see section 502 ZPO) and can only be made to the Supreme Court. This appeal to the Austrian Supreme Court must involve a value in dispute of more than €5,000 (section 500 ZPO).

Both appeals are largely written procedures and representation by a lawyer is mandatory (§ 463 (2) ZPO).

With respect to arbitral awards, the parties may request the Austrian Supreme Court to set aside an arbitral award on certain grounds (section 611 ZPO), such as a violation of the right to be heard.

7. How much information are policyholders required to disclose to insurers prior to inception of the policy?

Before concluding an insurance contract, policyholders must disclose to the insurer all circumstances known to them that are material to the assumption of the risk. Material circumstances are those risk circumstances that are likely to influence the insurer's decision to conclude the contract at all or on the agreed terms (section 16 (1) of the Austrian Insurance Act - **VersVG**). The scope and detail of the required disclosures can vary, but typically include past claims, financial information and known risks.

8. What remedies are available for breach of the duty of disclosure, and is the policyholder's state of mind at the time of providing the information relevant?

In the event of incorrect or omitted information, the insurer may be entitled to (i) cancel the contract and (ii) refuse cover for claims. However, such refusal will depend on whether the non-disclosure was intentional or negligent.

If it is established that the policyholder did not understand the consequences of his actions at the time of the conclusion of the contract (lack of capacity), this may serve as a ground for invalidating the insurance contract in court.

9. Does the duty of disclosure end at inception of the policy?

The duty of disclosure applies primarily before the policy is taken out. However, even after the insurance policy has been taken out, the insurer must be informed immediately of any change that may affect the insured risk. If a (subsequent) increase in risk is not reported, the insurance company may be able to terminate the contract with immediate effect and claim exemption from payment in the event of an insured event.

10. Are certain types of provisions prohibited in insurance contracts?

In Austrian insurance contracts, certain types of clauses are considered as inadmissible or prohibited. These include, for example, clauses which

- (1) violate statutory provisions;
- (2) are grossly unfair to the policyholder; or
- (3) contain misleading information.

Unfair contract terms may be void.

11. To what extent is a duty of utmost good faith implied in insurance contracts?

Although there is no statutory regulation of the principle of good faith in insurance law, the insurance relationship between the policyholder and the insurer is to a large extent governed by the principle of good faith according to case law. The principle of good faith requires both parties to act in good faith and not to deceive or withhold material information from the other party.

12. Do other implied terms arise in consumer insurance contracts?

The Austrian Consumer Protection Act contains specific provisions for the protection of consumers in insurance contracts. These provisions give rise to implied terms in consumer insurance contracts which ensure fairness and transparency.

13. Are there limitations on insurers' right to rely on defences in certain types of compulsory insurance, where the policy is designed to respond to claims by third parties?

In compulsory insurance, such as motor insurance, the insurer's right to rely on certain defences to protect the interests of third parties is limited. In cases where the insurer is released from the obligation to pay to the policyholder (e.g. due to a breach of pre-contractual duties of disclosure, a breach of duties following an increase in risk, etc.), the obligation to the third party remains in force (§ 158c (1) VersVG). The third party is thus fully protected.

14. What is the usual trigger for cover

under insurance policies covering first party losses, or liability claims?

The usual trigger for coverage under insurance policies varies depending on both the type of insurance and the terms and conditions of the policy.

In the case of first-party losses, the trigger for coverage is the occurrence of a loss, such as fire, theft or other specific perils or events, to the insured property.

In the case of pure financial losses, cover is usually triggered by the occurrence of the event that ultimately caused the loss (damaging event). In certain types of insurance (e.g. reinsurance and D&O), the claim must be made before the expiry of the insurance period (or a subsequent period).

15. Which types of loss are typically excluded in insurance contracts?

Typical exclusions depend on the type of insurance and may include wilful misconduct, pre-existing claims, fraud, illegal activities or breaches of statutory regulations, contractual liability, consequential loss and fines or penalties.

16. Does a 'but for' or 'proximate' test of causation apply, and how is this interpreted in wide area damage scenarios?

The test to be applied is whether the loss would still have occurred in the absence of the alleged causal event, and if the answer is no, then the alleged event is the cause of the loss. However, as in the common law, not every causal link gives rise to liability despite the existence of cause and effect. Rather, only causes that are foreseeable, not too remote and not outside the "ordinary course of things" can give rise to liability. Austria therefore follows a proximate cause approach, examining whether the claimed loss is directly attributable to an insured risk. In complex scenarios, such as widespread damage, the dominant cause of the loss is analysed.

17. What is the legal position if loss results from multiple causes?

In cases involving multiple causes, Austrian courts assess the primary cause contributing to the loss in order to determine insurance liability. The analysis follows established legal principles on proximate

causation.

18. What remedies are available to insurers for breach of policy conditions?

In the event of a breach of policy conditions by the insured, the insurer has a number of remedies available, depending on the nature of the breach and the terms of the policy: termination of the insurance contract, exemption from liability in the event of a specific claim and adjustment of the premium.

19. Are insurers prevented from avoiding liability for minor or unintentional breach of policy terms?

Austrian law typically does not allow insurers to avoid liability for minor or unintentional breaches of policy terms. If policy terms (obligations) are not breached with the intention of influencing the insurer's obligation to indemnify or of influencing the determination of circumstances that are material for the insurer's obligation to indemnify, the insurer is not in a position to avoid liability, provided that the breach had no influence on the determination of the insured event or the insurer's obligation to indemnify.

20. Where a policy provides cover for more than one insured party, does a breach of policy terms by one party invalidate cover for all the policyholders?

In general, the consequences of a breach of duty relate solely to the acts or omissions of the policyholder (section 6 VersVG). If several policyholders also have several independent interests (as in liability insurance), one policyholder is not liable for the breaches of obligations of the others. If, on the other hand, there is a similar and undivided interest of all policyholders (as is often the case in property insurance), breaches of obligations by one policyholder also affect the others, although exceptions are possible in the case of a clear co-ownership.

If there are co-insured persons, they are also obliged to fulfil the obligations (section 78 VersVG). If these obligations are breached, the insurer is not liable to pay benefits to the co-insured parties. However, the policyholder cannot be held liable for a breach of obligation by a co-insured person.

21. Where insurers decline cover for claims, are policyholders still required to comply with policy conditions?

After insurers have declined to cover a claim, policyholders may still be required to comply with certain policy conditions, particularly those relating to mitigation and cooperation in the investigation of the claim.

22. How is quantum usually assessed, once entitlement to recover under the policy is established?

In general, the insurer is only liable up to the amount of the sum insured (section 50 VersG). Quantum in insurance claims is usually assessed based on the actual loss incurred and the terms of the policy. The insured is obliged to provide the insurer with supporting documentary evidence in order to quantify the loss. In complex cases insurers appoint experts to assess the damage.

23. Where a policy provides for reinstatement of damaged property, are pre-existing plans for a change of use relevant to calculation of the recoverable loss?

In principle, the insurer is obliged to restore the situation prior to the loss. In the case of damaged property, the compensation payment will be calculated on the basis of the costs for rebuilding the property. Pre-existing plans for a change of use might be taken into account if they affect the value or the cost of rebuilding the damaged property.

24. After paying claims, to what extent are insurers able to pursue subrogated recoveries against third parties responsible for the loss?

A claim for damages to which the policyholder would be

entitled against a damaging third party is transferred to the insurer by operation of law to the extent that the insurer has compensated the policyholder for the damage (section 67 VersVG). The insurer thus acquires the right of recourse against the injuring third party after payment to the policyholder.

25. Can claims be made against insurance policies taken out by companies which have since become insolvent?

In case insolvency proceedings are opened in respect of the policyholder's assets, third parties (injured parties) who have claims against the policyholder may demand separate satisfaction from the policyholder's claim for compensation against the insurer (section 157 VersVG).

26. What are the significant trends/developments in insurance disputes within your jurisdiction in recent years?

Recent trends in Austrian insurance disputes include increased litigation related to business interruption and cyber insurance claims, especially in the context of COVID-19 and the digital transformation of businesses.

In addition, some insurers are already experimenting with AI in order to improve efficiency in claims handling (document and operational workflow automation, automated settlement, etc.) and risk assessment. Another use case for AI in claims handling is fraud detection and prevention.

27. Where in your opinion are the biggest growth areas within the insurance disputes sector?

The biggest growth areas within the insurance disputes sector in Austria include cyber insurance, due to the rising number of cyberattacks, and climate change-related claims, reflecting the global shift towards environmental awareness and sustainability. In addition, other growth areas may arise as a result of a broadening of the risk spectrum, including political risk, cryptocurrency risk and sharing economy risk.

Contributors

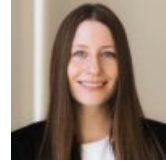
Sebastian Mahr
Partner

s.mahr@grafisola.at



Sarah Micheuz
Associate

s.micheuz@grafisola.at



Fabian Püschner
Associate

f.pueschner@grafisola.at

