

# Service of Process Abroad

Austria

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## *I. Introductory Remarks.*

Before entering into the particulars of the topic at hand, it seems advisable to make some observations of a general nature concerning some principals of the Austrian law, especially with regard to those aspects where a basic difference between the American and the Austrian law system exists.

One of the most important differences is the fact, that Austria is a country of codified law and of codified law only<sup>1</sup>; there is not such a thing as "common law" (or "equity") in the sense of judiciary law. According to the Austrian Constitution, "law" is a legal provision set forth by the legislature (and only by the legislature), not vetoed by the President, *and* published in the official "Law Gazette" ("Bundesgesetzblatt", the federal law gazette, or, as the case might be, "Landesgesetzblatt", the law gazette of the "Laender", the provinces, comparable with the U.S. sister states, except that the autonomy of the provinces and their own legislature is not as far reaching as that of the American sister states). Another kind of law does not exist; section 12 of the Civil Code sets forth expressly that judgments, even of the highest court, the Supreme Court in Vienna, are, while they amount to the "law of the case" (in case of remanding the lower courts are bound by the judgment and its arguments of the higher court), shall never be considered as a "law". That excludes, of course, judiciary law by precedents. While precedents are frequently referred to in briefs

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<sup>1</sup>The expression "statutory law" is purposely avoided, in order to evade misunderstandings; a "statute" in the American meaning is a legal provision to be interpreted strictly and restrictively, with the rules set forth by common law hovering in the background. In the countries of written law, among them Austria, necessary interpretations, left to the courts, are broad; but the courts are not free in their interpretation of the codified law; they are bound by certain rules set forth in sections 6 and 7 of the Civil Code. However, details thereof would lead too far and are therefore omitted.

and also in judgments, they may affect a later decision by their persuasive force, but never as a "law" and time and again also lower courts swerve from precedents in similar cases. Thus the Austrian lawyer (and Judge) looks up the codified law at first; then he may resort to textbooks, commentaries and/or monographs; and only, thereafter, to other decisions.

Another basic difference is the lack of the maxim of "jurisdiction in personam" and "jurisdiction in rem". The Austrian Law on Civil procedure (*Zivilprozessordnung*, short ZPO) resp. the Law on Jurisdiction (Jurisdiction's norm "JN") recognize two different sorts of "competence" as it is called (comparable up to a certain degree to our "jurisdiction"); to wit "competence as to the subject matter" ("sachliche Zuständigkeit") and "competence as to locality (oertliche Zuständigkeit" comparable with our "venue"). If the Austrian jurisdiction is given at all, the former provisions set forth the kind of court (District Court, Provincial Court, Commercial Court etc.) to be invoked with the subject matter, and the latter, which of the (equal) courts should be invoked, i.e. the court in which locality. There are many details, but they must be omitted, since this article deals only with the method of service. It shall, in this connection, only be mentioned that parties to a contract may stipulate that in case of litigations out of a specific contract they subject themselves to a certain (Austrian) court; and there is the "competence of property" which is not restricted to real estate.<sup>2</sup> These are also examples of a procedure where the defendant might live abroad and must, therefore, be served abroad.

There is nothing in Austrian law comparable to "special appearance" or to "appearance" in general. If a defendant was legally served upon, and decides not to participate in the proceedings, judgment by default will be entered against him. If he wants to fight the jurisdiction (or, rather, the competence of the court), he must record his exception, mostly at the so-called "first hearing", and, at the trial thereafter this question will be dealt with before the merits of the case. If the exception is dismissed, the court will continue with the merits of the case. There is no "summons and complaint" in Austria, but only the complaint. It is (with one exception, see later) up to the court to take care of the service. And to the services of the complaint the court will add a form, summoning the defendant to appear personally at the "first hearing" or send an attorney with a power of

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<sup>2</sup>Whenever property of the presumable defendant is found—even if only forgotten by him—the competent court of this place can be invoked. Whether, if the defendant resides abroad, the country of residence would acknowledge such jurisdiction, is another question. Many countries refuse such acknowledgment and even where treaties of mutual enforcement exist, the case of "competence of property" is frequently expressly excluded from acknowledgment.

attorney, duly executed in writing.<sup>3</sup> Thus, service is performed by or through the court with the help of the postal institutions. There exists an optional possibility of "service between attorneys" without court interference, but it is resorted to only in exceptional cases and very seldom.

## *II. Rules about Service.*

### A. General Provisions.

Since all the (more or less formal) questions arising from the doctrine of jurisdiction in personam or in rem are absent in Austrian law, the purpose of the service may be stated in a very short way: The other party (defendant) shall obtain knowledge of the proceedings pending against him and thus be enabled to participate therein and to defend himself. On the other hand the party invoking the court shall be protected against evading maneuvers of his adversary. The provisions concerning service are generally set forth in Sections 87–122 ZPO. There are also some special provisions in other laws, but they may be omitted here as exceptional ones.

Complaints (with the summons for the "first hearing") are, as a rule, to be served upon the addressee personally (Sect. 106 ZPO). The same applies to certain ex parte documents, e.g. Orders to pay in matters of letters of exchange, ejection orders, and similar ones, against which the obligated party may have certain remedies; also provisional injunctions issued ex parte. The Law on Groundbooks (land registers) contains also provisions for personal service.<sup>4</sup> All other documents shall be, of course, served upon the addressee, but they may, if he is not present, be served upon his relatives or servants living with him (especially also summons to appear as a witness) and known as such by the server, or, in business matters, upon employees of the store or the office of the addressee. (It is then up to them to notify the addressee); they may even be served upon the landlord or his deputy, but only, if these persons (the latter category) are willing to accept such service.

In general the server is the regular mailman. He is an employee of the Government, under oath of office, and he is specifically instructed about his rights and duties as a server. Communications from the court are made by registered mail. The documents to be served are in specific envelopes, discernible as issued by a court, and are outfitted with a special printed

<sup>3</sup>The Austrian attorney at law is not an "officer of the court"; on the contrary, the laws dealing with this profession, stress his absolute independence of the courts. An attorney at law, appearing for a client, must submit to the court a written power of attorney.

<sup>4</sup>Details about the "Groundbook" (land register) see Baeck *The Groundbook in Europe* REPORTS OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW, 1963 et. seq.

form of receipt, connected with the envelope by a perforated flap. The form contains the nature of the document (e.g. "complaint"), the file number of the court, and space for the signature of the addressee. The latter signs it in the mailman's presence, the mailman countersigns it, and the receipt is, thereupon, detached by the mailman and returned by mail to the court, where it is preserved in the files in question as a proof of service. If the addressee is a legal entity, the personal service must be made upon such persons who are appointed either by law in care of public bodies as the State, the Provinces, cities and other public communities, or by bylaws (published in the commercial courts) in case of private corporations.

Once attorneys at law have appeared by submitting to the court a written power of attorney, service must be made to the attorneys and not to the clients. In case a person to be served personally is evading the service, the following proceedings are prescribed: The evader is asked by a printed form to be present at a certain time in order to receive the document in question; this form must be put into the letterbox, at the door, if there is any; if there is no letterbox, the form must be fastened outside at the door. In case the addressee is not present at the indicated time, the envelope with the document is to be deposited with the post office of the district with the effect of a legal service; a form, indicating this, must be fastened at the door (Section 106 ZPO). If the addressee is present but refuses illegally the acceptance, the document is to be left with him. If no personal service is required but service cannot be made upon the addressee, the document is to be left with a person mentioned *supra* (relatives, employees, clerks, etc.). If that is not possible, the document is to be deposited with the post office of the district and this fact is to be notified to the addressee by a form to be fastened at the door of the residence or the office of the addressee.

All these supplementary resp. fictitious kinds of services have the effect of a normal, legal service.

## B. Special Provisions.

(a). If the addressee resides abroad and a treaty exists between Austria and the country involved, the provisions of such a treaty must be applied. If no treaty exists, the foreign authorities shall be requested to make the service and to notify the Austrian courts thereof. Also the Austrian Consulates may be requested to attempt the service by inviting the addressee to appear and to accept the document; but that is on a voluntary basis and cannot be enforced. If such service is not possible (e.g. in the United

States) service may be made by registered mail with international return receipt (Section 121 ZPO). If the assistance of foreign authorities is required, certified translations must be added (see also Decree on Legal Assistance—“Rechtshilfe-Erlass”).

If, however, none of the aforementioned methods is practicable, service is made by publication, and, in cases, when the abode of the addressee is unknown or service abroad can be made only under difficulties and great costs, a “curator” (a kind of guardian ad litem) is appointed upon motion, who has to take care of the interests of the absent as best as he can and has, of course, to attempt to get in touch with him. He represents his ward until the latter appears or entrusts a representative of his own with his affairs. The fees and costs are at the ward’s charge but must be advanced by the moving party. Service is made validly upon “the curator” (Sect. 116 ZPO). Moreover a copy of the document to be served must be affixed at the publication board of the court involved (Sect. 115 ZPO).

(b). A special facilitating provision was enacted by an amendment of Sect. 108 ZPO. The heading of this section reads now: “Heading of defective service” and the wording of Sect. 108 ZPO is in translation: “Service not complying with the legal provisions is to be considered accomplished at the moment when the document actually reached the addressee.”— If, therefore, it can be proved that the document to be served was actually received by the addressee, it is considered legal service in spite of possible preceding irregularities.

It is the opinion of this author that service of a document by an American process server within the U.S., whereby the latter swears before a notary public that he handed over the document to the addressee, and the notary’s signature having been duly authenticated up to an Austrian Consulate, would comply with the provision of section 108 ZPO and would include the proof that the addressee actually got the document destined for him. Since American courts refuse legal assistance by performing service for foreign authorities, this method may afford a working way out of these difficulties. I go even so far as to believe that such service might be performed by any person, because the essential thing is the oath that the document was, in fact, handed over to the addressee.

(c). The Austrian courts (mostly District Courts) are also acting in not litigated matters, as e.g. decedents estate proceedings, guardianship, adoption and the like<sup>5</sup>. These activities are subject to a special law to wit “The Proceedings in Not Litigated Matters”. With respect to service the said

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<sup>5</sup>A certain similarity exists to the Surrogate’s proceedings in New York.