Austria

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SECURITY AND PRIORITIES

1. What are the most common forms of security taken in relation to immovable and movable property? Are any specific formalities required for the creation of security by companies?

Immovable property

The most common forms of security over immovable property are:

- **Mortgage (*Hypothek*).** A mortgage is the transfer of an interest in property to a creditor as a security for a debt. The debtor has a right of redemption if the terms of the mortgage have been satisfied or performed.
- **Security transfer (*Sicherungsübereignung*).** Ownership is transferred from the transferor (debtor) to the transferee (creditor). However, the transferee holds the property as trustee for the transferor. Full ownership reverts to the transferor when it fulfils its obligations.

Both types of security can be enforced by either of the following means:

- Auctioning the property.
- Putting the property under forced administration.

If the creditor wants to recover its claims in the form of income from rental or lease fees, it must choose forced administration.

Movable property

The most common forms of security over movable property are:

- **Pledge (*Pfand*).** A pledge is a way of creating security by delivering an asset to a creditor to hold until an obligation is performed. The creditor takes possession of the asset while the debtor retains ownership. The creditor can sell the pledged asset if the obligation is not performed. Claims can also be pledged. Since no physical possession of a claim is possible, they are pledged by notifying the third party debtor.
- **Security transfer.** In a security transfer, ownership is transferred from the debtor as transferor to the creditor as transferee, while the object remains in possession of the transferor. The advantage over the pledge is that the object can still be used by the debtor.
- **Assignment (*Sicherungsabtretung*).** A debtor can assign claims it has against a third party. The assignment is usually not disclosed to the third party. If the debtor defaults, the creditor can disclose the assignment and seek payment directly from the third party.

Formalities

- **Mortgages and transfers of title in property.** These must be notarised and registered with the Land Registry (*Grundbuch*).
- **Pledges.** A claim can only be pledged if the third party debtor is sufficiently notified of the pledge. If a physical asset is being pledged it must be transferred to the pledgee.
- **Security transfers and assignments.** There are no specific formalities for assignments and security transfers.

2. Where do creditors and shareholders rank on the insolvency of a company?

Claims already in existence at the start of insolvency proceedings are treated equally.

However, the following claims must first be satisfied in full:

- The costs of the insolvency proceedings.
- The costs of administration of the assets in bankruptcy and related taxes.
- Employee claims originating after the start of bankruptcy proceedings.

Payments to all other creditors are made in the following order of priority:

- **Secured creditors.** These fall into two categories:
  - **Separation of property (*Aussonderungsrecht*).** Property of third parties caught in the insolvency proceedings must be returned to those third parties;
  - **Separate satisfaction (*Absonderungsrecht*).** Separate satisfaction is granted to creditors whose claims are secured by a lien or otherwise either by law or agreement. An insolvency administrator can initiate auctions or forced administration of the insolvency estate's immovable assets even if the asset is subject to a right of separate satisfaction.

- **Post-bankruptcy claims.** Creditors whose claims originate after the start of bankruptcy proceedings.
- **Unsecured creditors.**
- **Shareholder loans.** Shareholders with a controlling interest of more than 25% who make payments to a company or provide security for third party loans to the benefit of a company fall within this category where the company is in crisis (*Act on Equity Replacement (Eigenkaptitalersetzende Gesellschafterdarlehen 2004)*).

Shareholders are only paid their equity after all creditors are satisfied.

3. Are there any mechanisms used by trade creditors to secure unpaid debts?

Unpaid debts can be secured by:

- **Retention of title (*Eigentumsvorbehalt*).** Retention of title allows the seller to retain ownership over the goods supplied until such time as certain contractually defined conditions are met, therefore providing the seller with a form of security against the buyer's default or insolvency.
- **Extended retention of title (*erweiterter Eigentumsvorbehalt*).** In an extended retention of title, a seller grants the buyer the power to transfer ownership in the goods and the buyer assigns its claims towards its customers arising out of such ownership transfer to the seller as security.
- **Statutory liens (*gesetzliche Pfandrechte*).** Statutory liens are granted by law to certain types of creditors (for example, craftsmen) over debtors' goods in their possession. These creditors can seek satisfaction of their claims from these goods.

4. Are there any procedures (other than the formal rescue or insolvency procedures described in *Question 5*) that can be invoked by creditors to recover their debt?

An unpaid creditor can bring proceedings against a debtor seeking a judgment for the unpaid debt. If the debt is undisputed, judgment can be sought on a summary basis.

If certain requirements are met, transactions entered into by the debtor can be declared null and void. For more details see *Question 7*.

RESCUE AND INSOLVENCY PROCEDURES

5. Please briefly describe rescue and insolvency procedures that are available in your jurisdiction. In each case, please state:

- **The objective of the procedure and, where relevant, prospects for recovery.**
- **Companies to which it can potentially apply.**
- **How it is initiated, when and by whom.**
- **Substantive tests that apply (where relevant).**
- **How long it takes.**
- **The consents and approvals that are required.**
- **The effect on the company, shareholders and creditors.**
- **How the procedure is formally concluded.**

Austrian bankruptcy law is primarily creditor oriented. The following insolvency procedures are available:

- Insolvency proceedings (*Konkursverfahren*).
- Compulsory reorganisation (*Zwangsausgleich*).
- Court-controlled reorganisation (*Ausgleich*).

The dominant form of bankruptcy proceedings in Austria are insolvency proceedings under the Bankruptcy Act.

Out-of-court reorganisations of insolvent businesses are difficult to achieve in Austria. The main reasons for this are:

- The short statutory deadline to file insolvency proceedings (which leaves little time for negotiating a unanimous settlement). An additional motivational factor for managing directors to file for insolvency proceedings in a timely manner is that failure to do so may also subject them to criminal sanctions.
- The risks of civil sanctions arising from the principle of equal treatment of creditors (*see Question 7*).

The Business Reorganisation Act (*Unternehemnsreorganisationsgesetz*), which came into effect in 1997, included a new form of out-of-court reorganisation. However, in practice this new form of reorganisation has not found acceptance.

Insolvency proceedings

- **Objective.** Insolvency proceedings lead to the winding-up of the debtor's estate.
- **Companies.** Insolvency proceedings are available to any individual, corporation or unincorporated company.
- **How, when and by whom.** Either debtor or a creditor can file for insolvency proceedings. However, insolvency must be filed

by the debtor's managing directors without undue delay, and no later than 60 days from the day the company becomes insolvent or over-indebted. Right after the opening of insolvency proceedings the debtor can file a motion for compulsory reorganisation (*see below, Compulsory reorganisation*).

- **Substantive tests.** See above, *How, when and by whom*.
- **How long.** The court schedules a first creditors' meeting 60 to 90 days after opening the insolvency proceedings, during which the administrator (*Masseverwalter*) can decide to accept or reject each creditor's claim. In case of rejection, a creditor must file for examination proceedings (*Prüfungsprozess*). An examination proceeding is modelled after a regular civil proceeding. In larger cases, the creditors can elect a creditors' committee.

  At the creditors' meeting, the administrator informs the creditors whether a compulsory reorganisation will be accomplishable. If so, the company's business will be continued by the administrator. If the creditor has not already filed a motion for compulsory reorganisation, it is given the opportunity to do so within a certain period of time.

  In a motion for compulsory reorganisation, the debtor's assets may not be liquidated until 90 days after the creditors' meeting. In a liquidation the administrator must dispose of the debtor's assets and distribute the proceeds to the creditors. This procedure may take several years.
- **Consents and approvals.** A debtor's business is carried out by an administrator (*Masseverwalter*), who is supervised by the court and in larger cases by a creditors' committee.
- **Effect.** The insolvency estate's property is administered by the administrator. After the formal opening of insolvency proceedings, creditors can only enforce their claims under the rules provided for by the proceedings. Debtors' estate property is sold and the proceeds distributed among the creditors.
- **Conclusion.** In case of liquidation of the debtor's assets, the insolvency proceedings are closed as soon as the debtor's estate property is entirely sold and all proceeds are distributed to the creditors.

Compulsory reorganisation

- **Objective.** Compulsory reorganisation during an insolvency proceeding is modelled after court-controlled reorganisation and the proceedings aim to provide the debtor with debt relief while preserving its business.
- **Companies.** Any debtor can apply for a compulsory reorganisation during insolvency proceedings (*see above, Insolvency proceedings*).
- **How, when and by whom.** Only the debtor can file a motion for compulsory reorganisation, which is the key component of any successful compulsory reorganisation. The debtor can file the motion right after the opening of the insolvency proceedings. In the creditors' meeting, the administrator informs the creditors whether a compulsory reorganisation will be accomplishable. If so, the company's business is continued by the administrator. If the creditor did not file a motion for compulsory reorganisation earlier, it is given the opportunity to do so within a certain period of time.
- **Substantive tests.** A motion for compulsory reorganisation can only be approved if it offers to pay at least 20% of the debts within five years. Because this quota is more favourable to the debtor than the 40% quota in court-controlled reorganisation proceedings, the latter has only limited practical relevance.
- **How long.** A motion for compulsory reorganisation must be approved or rejected by the creditors in a reorganisation meeting (*Ausgleichtagsatzung*) which has to take place within six weeks after the creditors' meeting.
- **Consents and approvals.** A motion for compulsory reorganisation must be accepted by a double majority; that is, creditors representing both:
  - 75% in value of the outstanding claims;
  - a majority of the creditors present at the reorganisation hearing.
- **Effect.** Once a motion for compulsory reorganisation has been approved, it enters into effect as defined in the motion for court-controlled reorganisation.
- **Conclusion.** Following approval of the motion for compulsory reorganisation, insolvency proceeding are closed. The right to dispose of the insolvency estate vests back with the debtor. If the debtor defaults on the terms set out in the payment plan, the insolvency proceedings are reopened.

Court-controlled reorganisation

- **Objective.** Court-controlled reorganisation aims to provide debt relief for the debtor while preserving its business.
- **Companies.** Court-controlled reorganisation is available to all legal entities.
- **How, when and by whom.** If the conditions for the opening of bankruptcy proceedings are met (*see above, Insolvency proceedings: How, when and by whom*) the debtor may alternatively apply for court-controlled reorganisation.
- **Substantive tests.** See above, *How, when and by whom*.
- **How long.** Court-controlled reorganisation usually takes from three to six months, depending on the complexity of the case.
- **Consents and approvals**. A motion for court-controlled reorganisation must be accepted by a majority of creditors representing 75% in value of the outstanding claims as well as a majority of the creditors present at the reorganisation hearing. A motion for court-controlled reorganisation can only be approved if it offers to pay at least 40% of the debts within two years. Because this quota is less favourable to the debtor than opening insolvency proceedings and making a motion for compulsory reorganisation (20% quota applies), court-controlled reorganisation is of limited practical relevance.

- **Effect.** Once the motion for court-controlled reorganisation is approved by the creditors, it enters into effect as defined in the motion for court-controlled reorganisation.
- **Conclusion.** After approval, the court immediately concludes the reorganisation proceeding. However, if the debtor defaults on the terms set out in the motion for court-controlled reorganisation, the court may open insolvency proceedings (*Anschlusskonkurs*).

Voluntary liquidation

- **Objective.** Voluntary liquidation is used to wind up a business. Assets are sold and the proceeds are distributed to the creditors. If the proceeds do not cover the creditors' claims, the management must file for insolvency or endeavour to persuade major creditors to waive or subordinate their claims.
- **Companies.** Voluntary liquidation is a standard way of terminating a company's business where it is insolvent.
- **How, when and by whom.** A voluntary liquidation is initiated by a shareholders' resolution. A liquidator is appointed to organise the sale of assets and distribute the proceeds.
- **Substantive tests.** There are no substantive tests.
- **How long.** The liquidation cannot be concluded and the shareholders cannot be paid the remaining proceeds until a minimum of one year after the announcement of the liquidation has expired.
- **Consents and approvals.** Only a shareholders' resolution is necessary to start a voluntary liquidation.
- **Effect.** The effect is the winding-up of the company. If creditors do not waive their claims and their claims are not satisfied, insolvency proceedings must be filed for.
- **Conclusion.** The company must inform the court of the winding-up. It is removed from the commercial register.

LIABILITY AND TRANSACTIONS

6. Are there any circumstances in which a director, parent company (domestic or foreign) or other party can be held liable for the debts of an insolvent company?

Managing directors

In a bankruptcy, the debtor or the debtor's managing directors can be held criminally liable for failing to observe the equal treatment of equal ranking creditors. After the debtor has become illiquid or over-indebted, the preferential treatment of some creditors over others may trigger criminal sanctions. Managing directors may be held liable not only for intentional or fraudulent conduct, but also for prejudicing creditors' interests in a grossly negligent manner.

Managing directors may be held liable to the company for any failure to perform their function with diligence. This may lead to the managing director's civil liability for the company's debts. This is especially the case concerning creditors' losses due to the managing director's failure to file for insolvency proceedings in a timely manner. In relation to new creditors, managing directors are also liable for damages arising from actions they have taken which have misled any new creditors as to the company's bankruptcy status.

Managing directors are personally liable (up to EUR100,000 (about US$128,170) per individual) if they fail to file for business reorganisation proceedings (*Reorganisationsverfahren*), having been informed by the company's auditor that the company needed reorganisation (*Business Reorganisation Act*). Indicators are an equity ratio of less than 8% and a settlement of debts period exceeding 15 years.

Parent companies

Parent companies generally have no liability. However, liability may arise in extreme cases of interference with the subsidiary's business. In addition, the insolvency administrator often tries to set aside payments made by a subsidiary in favour of its parent company.

Supervisory board

There has been much discussion in legal literature about the scope of liability of supervisory board members. There has been a trend in case law towards increased exposure of supervisory board members to liability.

7. Can transactions that are effected by a company that subsequently becomes insolvent be set aside?

If contracts are not mutually fulfilled on or before the date insolvency proceedings are started, the insolvency administrator can choose between performance or non-performance of the contract. There are special rules for leases and employment contracts.

Certain transactions can be declared void as regards the creditors where a successful challenge is made (*Bankruptcy Act*). The grounds for voidability are:

- **Discriminatory intent (*Benachteiligungsabsicht*).** This applies if the debtor acted with the intent to create a disadvantage for its creditors and the transaction partner either:
  - knew of this intent (up to ten years preceding the initiation of bankruptcy proceedings);
  - should have known of this intent (up to two years preceding the initiation of bankruptcy proceedings).
- **Squandering of assets (*Vermögensverschleuderung*).** A transaction can be challenged if it is seen as squandering the company's assets. The other party to the transaction must have known or should have known that this was the case (up to one year preceding the initiation of bankruptcy proceedings).
- **Gifts made by the company (*Schenkung*).** Gifts made by the company can be challenged if made in the two years before the start of bankruptcy proceedings.
- **Preferential treatment of creditors (*Begünstigungsabsicht*).** Acts that favour one creditor over another can be set aside if they occurred in the 60 days before insolvency or after the start of bankruptcy proceedings.

- **Post-insolvency transaction.** Transactions taking place after insolvency can be declared void if the creditor knew or should have known about the insolvency (*Kenntnis der Zahlungsunfähigkeit*).

Any disposition of a company's property by the debtor made after the insolvency proceedings have started is void, since only the administrator is authorised to represent the debtor.

8. Please set out any conditions under which a company can continue to carry on business during insolvency or rescue proceedings. In particular:

- **Who has the authority to supervise or carry on the company's business?**
- **What restrictions apply?**

During insolvency proceedings the company's business is carried on by an administrator (*Masseverwalter*) appointed by the court. The debtor's management must support the administrator. However, it has no executive powers.

In major insolvency proceedings the court appoints a creditors' committee (*Gläubigerausschuss*) consisting of three to seven members. The creditors' committee has the authority to supervise the insolvency administrator. Transactions with a value of more than EUR35,000 (about US$44,860), as well as certain other legal actions undertaken by the insolvency administrator, must be approved by the creditors' committee.

In court-controlled reorganisation proceedings, business is carried on by the debtor's management.

INTERNATIONAL CASES

9. Please state whether:

- **Courts in your jurisdiction recognise insolvency and rescue procedures in other jurisdictions.**
- **Courts co-operate where there are concurrent proceedings in other jurisdictions.**
- **There are any international treaties relating to insolvency to which your jurisdiction is a signatory.**
- **There are any special procedures that apply to foreign creditors.**

- **Recognition.** Austria is bound by Regulation (EC) No. 1346/2000 on insolvency proceedings (Insolvency Regulation) and must recognise any insolvency proceedings started in other member states, except Denmark. Therefore various treaties with Germany, France, Italy and Belgium are no longer applicable. Insolvency proceedings in other countries are recognised on an individual basis under section 63 of the Bankruptcy Act.
- **Concurrent proceedings.** The Insolvency Regulation requires Austrian courts to automatically recognise insolvency proceedings started in other EU member states and contains detailed provisions on concurrent proceedings in different member states. Proceedings in other countries are not automatically recognised and do not hinder Austrian courts from opening bankruptcy proceedings.
- **International treaties.** Austria is not a party to the UNCITRAL Model Law on Cross-Border Insolvency.
- **Special procedures for foreign creditors.** There are no special procedures for foreign creditors.

PROPOSED REFORMS

10. Are there any proposals for reform to insolvency law in your jurisdiction?

An expert group is currently working on a reform of the Bankruptcy Act with a focus on insolvencies of business entities, the results of which are very much open. However, no proposals have thus far been published. Results are expected later this year.

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