The Legal 500 Country Comparative Guides

Austria: Restructuring & Insolvency

This country-specific Q&A provides an overview to restructuring & insolvency laws and regulations that may occur in Austria.

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1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

   Under Austrian law, the following security instruments can be granted over assets: pledges (*Pfand*), transfers of securities (*Sicherungsübereignungen*), assignments of securities (*Sicherungszessionen*), and reservations of title (*Eigentumsvorbehalte*). Pledges are intended to secure the individual claim of a creditor and grant the creditor the right to receive the proceeds realized after the sale of the pledged property. With a pledge, the ownership of an asset remains with the debtor, whereas a transfer of security aims to transfer the ownership of the asset to the creditor, who will only transfer the asset back to the debtor once the debt is fully paid. With an assignment of securities, the debtor assigns claims it has against a third party to the creditor. The valid granting of securities generally requires a valid title and a corresponding act of transfer. Possible underlying titles include not only contracts but also title by operation of law. What act of transfer is necessary depends on the type of security to be granted. For example, pledges and transfers of securities require registration with the land register where the asset concerned is real property.

2. **What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?**

   Secured creditors either have claims of separation to receive assets (*Aussonderungsanspruch*) and/or claims of separation to receive the proceeds of enforcement after sale (*Absonderungsanspruch*). Neither of these claims is affected by the opening of insolvency proceedings – apart from possible voidance claims (*Anfechtung*). The secured creditor merely has to inform the insolvency administrator to assert its claim. If the insolvency administrator does not acknowledge the claim the creditor has to file a lawsuit in order to enforce the senior security. However, secured creditors are subject to the restraint that no secured claim can be fulfilled within six months from the opening of insolvency proceedings in case such claims might jeopardise the business continuity of the debtor. Only if the enforcement is vital to prevent severe economic disadvantage to the secured creditor may this provision be disregarded.

3. **What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?**

   Under the Austrian Insolvency Act, a debtor is deemed insolvent, if the debtor is illiquid or over-indebted. According to Austrian case law and commentary, a debtor is illiquid if the debtor lacks the means of payment in order to pay all claims due and will not be able to obtain the necessary means to do so in the foreseeable future. A debtor is over-indebted if the following criteria are met:

   - the debtor’s liabilities exceed its assets; and
   - a positive going-concern prognosis is not feasible.

If a debtor is illiquid or over-indebted, the legal representatives are obliged to file for insolvency without undue delay, and generally no later than 60 days after having determined that the debtor is insolvent. If the debtor's insolvency is caused by a natural disaster like an epidemic or pandemic such as the Coronavirus, the 60-day period is doubled to 120 days. In the course of the Corona crisis, the obligation to file for insolvency due to over-indebtedness was temporarily suspended until 30 June 2020, if a valid going-concern prognosis could not be set-up due to the uncertain market situation caused by Corona and the over-indebtedness occurred in the period of 1 March 2020 to 30 June 2020.

If the entity is illiquid or over-indebted and the legal representatives fail to file for insolvency in time, the legal representatives expose themselves to possible civil and criminal charges for impairment of creditors' interests.

4. **What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?**

   In Austria, the following three types of insolvency procedures are available for business entities:

   - reorganisation proceedings with debtor in possession: The main focus of these proceedings lies in the continuation of the debtor's business or parts thereof. The debtor retains, generally and subject to certain restrictions, control over the estate's assets and is only monitored by a court-appointed insolvency administrator;
   - reorganisation proceedings without debtor in possession: The main focus of these proceedings also is the continuation of the debtor's business, but the insolvency administrator takes control; and
   - liquidation (bankruptcy) proceedings: the court-appointed insolvency administrator takes control of the task of selling the estate's assets at a maximum value, with the proceeds being paid out to the creditors.

   Reorganisation proceedings with and without debtor in possession usually take a few months to complete, whereas bankruptcy proceedings may take up to a few years.

5. **How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?**

   In all three types of insolvency proceedings under the Austrian Insolvency Act claims are classified and ranked in the following order of priority:

   1. Secured Creditors

The first rank is taken by secured creditors, who either have claims of separation to receive assets and/or claims of separation to receive the proceeds of enforcement after sale (for further details see Question 2).

2. Estate Claims

Ranked behind secured creditors are estate claims (*Masseforderungen*), which are claims that arise after the opening of insolvency proceedings and include the costs of the insolvency proceedings; the expenses of the management and administration of the estate; and claims for labour, services and goods furnished to the estate post-filing. Preferential creditors of estate claims share in such claims on a pro rata basis.

3. Insolvency Claims

The third rank is taken by insolvency claims (*Insolvenzforderungen*), which are claims of unsecured creditors and have to be filed with the competent court within a time period after the opening of insolvency proceedings as fixed by the court. Those insolvency creditors who filed a claim that was acknowledged by the insolvency administrator also share in such claims on a pro rata basis.

4. Subordinate Claims

In general, subordinate creditors only participate in the insolvency proceedings, if a surplus for distribution is generated. Subordinate claims may arise from contractual provisions or from statutory provisions.

6. **Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?**

Legal acts and transactions that have taken place within certain time periods prior to the opening of insolvency proceedings, and which relate to the debtor's assets, can be challenged by the insolvency administrator.

The general prerequisites for any avoidance under Austrian insolvency law are the following:

- the avoidance results in an increase of the insolvency estate (*Befriedigungstauglichkeit*); and
- the challenged legal act or transaction caused a discrimination of creditors (*Gläubigerbenachteiligung*).

A transaction can be challenged for intent to discriminate (*Benachteiligungsabsicht*), squandering of assets (*Vermögensverschleuderung*), free-of-charge disposal (*unentgeltliche Verfügung*), preferential treatment of creditors (*Begünstigung*) and based on knowledge of illiquidity (*Kenntnis der Zahlungsunfähigkeit*). The look-back period is different from provision to provision, ranging from a maximum of ten years for intent to discriminate, to 60 days prior to the commencement of insolvency proceedings for preferential treatment of creditors.

Voidance claims need to be asserted by the insolvency administrator on behalf of the estate within a time period of one year from the opening of insolvency proceedings. Furthermore, the administrator may raise the defense of voidance in claims made against the insolvency estate without any time limit.

If a pre-insolvency transaction is successfully challenged, it is invalid. Thus, the addressee of avoidance is obliged to return the debtor's assets, alternatively to provide value replacement. If the addressee of avoidance has paid any consideration on the basis of the challenged legal transaction, he generally is entitled to reclaim such consideration.

7. **What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?**

The commencement of insolvency proceedings automatically leads to a stay of all legal proceedings by and against the debtor in Austria, which relate to the insolvency assets. Whether the opening of insolvency proceedings also causes a stay of legal proceedings within the European Union depends on the law of the EU member state in which the legal proceedings are pending. In addition, enforcement proceedings cannot be commenced or continued due to the opening of insolvency proceedings. However, secured creditors generally are not affected by the commencement of insolvency proceedings.

8. **What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

As stated above in Section 4, there are two kinds of reorganisation proceedings available, either with or without debtor in possession.

In order for the provisions of reorganisation proceedings to be applicable, the debtor must submit to the court a restructuring plan (*Sanierungsplan*) and financial records of the past three years that show the debtor's ability to pay 20% of its debt to unsecured creditors within a period of two years. If the debtor can prove that he is able to pay 30% of its debt within a period of two years, the debtor may additionally apply for debtor in

possession.

The approval of a suggested restructuring plan is subject to a “double majority requirement” of the creditors in the restructuring plan hearing. The proposal for the restructuring plan is accepted by the creditors if (i) the majority of the creditors present at the hearing and entitled to vote approves and (ii) if the total sum of claims of the creditors approving the proposal for the restructuring plan amounts to more than 50% of the total sum of the claims of the creditors present at the hearing . Fully secured creditors are not entitled to vote.

After the creditors have approved the restructuring plan, the insolvency court also has to confirm the restructuring plan. There are certain prerequisites that have to be fulfilled so that the court can confirm the restructuring plan, for example that all creditors are treated equally. Once the restructuring plan is approved, confirmed and legally binding, the debtor is relieved of the obligation to pay to the creditors the amount exceeding the quota as provided in the reorganisation plan. The effects of the legally binding restructuring plan also apply to those creditors that did not approve the restructuring plan or who did not participate at all.

If a debtor defaults on the payment of a quota according to the restructuring plan, the respective creditor’s claim comes into effect again, but only proportional to the unpaid quota.

If the statutory criteria for insolvency are not met yet, a debtor may file for the opening of reorganisation proceedings under the Austrian Business Reorganisation Act (*Unternehmensreorganisationsgesetz*). However, these proceedings are not relevant in practice as the consent of all creditors is required

9. **Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?**

   It is usually the shareholders who provide new financing to the debtor during restructuring proceedings. Shareholders cannot request the repayment of the loans granted to the debtor as long as the debtor is not restructured. This repayment ban does not apply if third parties such as banks grant the debtor a loan.

10. **Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?**

    Austrian law does not provide for a release of claims against non-debtor parties.

11. **Is it common for creditor committees to be formed in restructuring proceedings and**

what powers or responsibilities do they have? Are they permitted to retain advisers and, if so, how are they funded?

Generally, it is at the court's sole discretion whether to appoint a creditors' committee (also upon request of the creditors), if the characteristics or the particular scope of the debtor's business seem to make it appropriate. However, the court must appoint such a committee if the debtor's business is to be sold. The creditor's committee consists of three to seven members who are chosen by the court at its sole discretion, but the creditors, representatives of the works council and other special interest groups have a right to propose certain members.

It is the task of the creditors' committee to supervise and support the insolvency administrator. In general, the insolvency administrator must obtain the opinion of the creditors' committee for all important actions. In addition, the insolvency administrator must obtain the approval of the creditors' committee (as well as of the insolvency court) for certain actions (such as the sale of the debtor's entire business or of real property).

Any member of the creditors' committee can file a motion for removal of the insolvency administrator at any time, whereby such motion must contain a reason for removal. Prior to rendering a decision, the court may hear the members of the creditors' committee, and the insolvency administrator, if feasible.

Members of the creditors' committee may engage representatives for the performance of their duties at their own risk and expense.

12. **How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?**

In case of liquidation and reorganisation proceedings without debtor in possession, the withdrawal or assumption from contracts is reserved for the insolvency administrator. In reorganisation proceedings with debtor in possession, the debtor is entitled to decide whether to assume or withdraw from existing contracts, but these actions require the approval of the insolvency administrator. The insolvency administrator / the debtor may only decide to assume or withdraw from specific contracts, for example from contracts with a mutual obligation to perform, where not all the parties have fully performed at the time of the opening of the insolvency proceedings. If a contract is assumed, both parties are obliged to continue to perform their obligations.

Contractual provisions that grant the contracting partner of the debtor the right to terminate the contract remain in force. However, the Austrian Insolvency Act stipulates a six-month moratorium in case a contracting partner wants to terminate a contract with the debtor that is essential for business continuation. These contracts may only be terminated for good

cause, whereby a deterioration of the economic situation of the debtor or default of payment of claims which were due before the opening of insolvency proceedings are not considered to constitute such good cause.

In general, retention of title provisions also remain in force. Creditors who have been granted a retention of title have claims of separation to receive assets (for details see Section 2 above).

The possibility of set-off of claims is not affected by the opening of insolvency proceedings if such claims have already been subject to compensation according to general civil law at the time of commencement of insolvency proceedings. However, set-off is not possible for claims that arose within the last six months prior to the commencement of insolvency proceedings if the creditor knew (or negligently did not know) of the debtor's insolvency.

13. **What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?**

In bankruptcy proceedings as well as reorganization proceedings without debtor in possession, it is the insolvency administrator's responsibility to realise the debtor's assets. Also, in reorganization proceedings with debtor in possession, essential realisation measures are reserved for the insolvency administrator, who, however, requires the debtor's consent for realization. In general, the sale of the debtor's company or parts thereof, of the main movable assets as well as of real property requires the approval of the insolvency court as well as the creditors' committee. As long as reorganization proceedings are pending, the debtor's business essentially may not be sold.

In general, the purchaser acquires the assets free and clear of third-party claims and liabilities. The release of security does not require the creditor's consent.

Austrian law does not provide for credit bidding or prepackage sales.

14. **What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?**

Also in times of crisis of the company, managing directors must exercise their duties with the diligence of a prudent businessman. In particular, during a crisis of the company the managing directors must comply with the following duties:

(i) In general, the managing directors must convene the general meeting if the welfare of the

company so requires. If one-half of the share capital is lost or if the reorganisation criteria pursuant to the Austrian Business Reorganisation Act (equity ratio below 8% and notional debt repayment period of more than 15 years) are met, this must be done immediately.

(ii) The managing directors must report without undue delay to the supervisory board on circumstances which are of considerable importance for the profitability or liquidity of the company and to the chairman of the supervisory board, if there is an important reason to do so.

(iii) The managing director must deal more intensely with the economic development of the company and take appropriate restructuring measures.

(iv) If the company is insolvent pursuant to the Austrian Insolvency Act or the reorganisation criteria pursuant to the Austrian Business Reorganisation Act are met, shareholder loans may not be repaid as long as the company is not restructured.

(v) The occurrence of material insolvency triggers the insolvency application period, which generally is 60 days (for details see question 3 above).

If the managing directors breach any of the above-mentioned obligations, they may be liable to the company. Only in exceptional cases may the managing directors be held liable for damage inflicted on the company's creditors, for example for delay in insolvency. Also, shareholders may only be held liable to the company's creditors in exceptional cases, for instance if they lead the managing directors not to apply for the opening of insolvency proceedings, even though the conditions are met.

15. **Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?**

Under Austrian law, restructuring or insolvency proceedings do not have the effect of releasing directors and other stakeholders from liability for previous actions and decisions.

16. **Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?**

As to EU member states, any judgment opening insolvency proceedings passed by a court of a member state must be recognised without any process for recognition in all the other member states from the time that it becomes effective in the member state where the proceedings were opened. Any other proceedings opened subsequently after the

opening of main insolvency proceedings are secondary insolvency proceedings, which only concern the debtor's assets in the member state where the secondary proceedings were opened.

With regard to non-member states, judgments opening insolvency proceedings must be recognized automatically if amongst others the centre of the debtor's main interests is in the state, in which the insolvency proceedings were opened and these proceedings are comparable to Austrian insolvency proceedings. If, however, insolvency proceedings have already been opened in Austria, judgments opening insolvency proceedings in a non-member state are not recognized in Austria.

The UNCITRAL Model Law on Cross Border Insolvency as well as the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements have not been adopted in Austria yet.

17. **Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?**

Debtors incorporated in an EU member state can enter into restructuring or insolvency proceedings in Austria, if they have their centre of main interests (COMI) in Austria. The COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In general, debtors incorporated outside the European Union can enter into restructuring or insolvency proceedings in Austria if they operate a business or have a branch office in Austria.

18. **How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?**

Under Austrian law, a group of companies has no legal capacity and thus is not capable of going bankrupt. The insolvency proceedings must therefore be conducted separately for each individual group company. With regard to national group insolvencies and cross-border group insolvencies, the same rules apply to the communication and cooperation between the various insolvency administrators and courts. Under these provisions, the insolvency administrator as well as the insolvency courts shall cooperate with each other to facilitate the effective administration of these proceedings.

19. **Is it a debtor or creditor friendly jurisdiction?**

Austrian insolvency law has become more debtor-friendly in recent years. For example, the minimum rate that a debtor operating a business must pay in order to obtain residual debt discharge has been reduced from 40% to 20%. In addition, the continuation of the

debtor’s business has been facilitated. Nonetheless, Austrian insolvency law also contains provisions that are creditor friendly. Creditors have certain rights of participation in the insolvency proceedings such as the right to approve or deny the debtor’s proposal for a restructuring plan.

20. **Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?**

Sociopolitical factors generally do not give additional influence to certain stakeholders in restructurings or insolvencies in Austria. For significant insolvencies the state may be open to state support, always to be measures against permissibility within the confines of EU state aid rules.

With respect to the corona crisis, the state has offered distressed companies with various packages of special support, including assumption of liabilities nad granting of fixed-cost subsidies to distressed companies, which suffered financial difficulties due to the Corona crisis.

21. **What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?**

Austrian insolvency law was comprehensively reformed in 2010 and since then offers efficient and effective restructurings to insolvent companies. However, there is a need for reform in the area of pre-insolvency restructuring since residual debt discharge is protracted or difficult to obtain. The barriers to efficient and effective restructurings in the pre-insolvency phase will be reduced due to the Directive (EU) 2019/1023 on restructuring and insolvency for further harmonisation of the insolvency laws, which requires the Austrian legislator to reform pre-insolvency law by June 2021. The respective Directive lays down amongst others rules on preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency.