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Insolvency

Austria
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Law and Practice

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1. Market Trends and Developments

1.1 The State of the Restructuring Market

Company Insolvencies

In 2019, as in 2018 and 2017, the number of insolvent companies in Austria remained at a low level, though compared to 2018 the number of insolvent companies increased slightly by 2.98% to approximately 5,300. In the first half of 2020, despite the massive economic slump due to the COVID-19 pandemic, the number of company insolvencies in Austria did not rise. On the contrary, in the first half of 2020, the number of corporate insolvencies decreased by about 25% to approximately 2,000 cases, compared to the same period of the previous year. However, it must be noted that these figures do not reflect the actual situation of companies in Austria. The decrease in the number of insolvent companies was due to the measures that the Austrian federal government adopted to combat the COVID-19 crisis, such as the granting of short-time work, the granting of fixed-cost subsidies, the assumption of liabilities as well as the temporary suspension of the obligation to file for insolvency.

At the same time, the amount of overall liabilities involved in insolvency proceedings increased by 86% to approximately EUR1.6 billion. This was due to the fact that larger insolvencies tend to be filed by the companies themselves, which also occurred in the course of the COVID-19 crisis. However, the Austrian tax offices and health insurance funds, which are the main applicants for the opening of insolvency involving smaller liabilities, have not filed insolvency applications since the outbreak of the COVID-19 crisis. As a result, there were far fewer smaller insolvency cases in the first half of 2020 than was the case in the previous year. But as a result of the higher number of larger insolvencies filed by the companies themselves, 10,300 employees were affected, which is a significant increase of 27% compared to the first half of 2019. In the first half of 2020, there were several major insolvencies (such as the insolvency of the bank Anglo Austrian AAB AG and the industrial plant constructer Kremsmüller Group).

Private Insolvencies

Similar to company insolvencies, in the first half of 2020 the number of private insolvency proceedings decreased by 33% to around 3,350 cases compared to the first half of 2019. The reason for this decrease was that, on the one hand, the insolvency courts operated in crisis mode and, on the other, that there was a lack of personal advice available to debtors, especially during lockdown, which played a significant role in the debt regulation of consumers.

EU Directive

On 20 June 2019, the European Parliament and the Council passed the long-discussed Directive (EU) 2019/1023 on restructuring and insolvency for further harmonisation of the insolvency statutes of the member states. The respective Directive lays down rules on preventive restructuring frameworks available to debtors in financial difficulties when there is a likelihood of insolvency similar to the US Chapter 11 proceedings. The Directive includes procedures leading to discharge of debt incurred by insolvent entrepreneurs and measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt. Austria and the other EU member states are obliged to implement this Directive by June 2021.

National Legislative Measures

At the national level, several legislative changes were adopted in the field of insolvency law to mitigate the economic consequences of the COVID-19 pandemic. Besides the temporary suspension of the obligation to file for insolvency (see **2.3 Obligation to Commence Formal Insolvency Proceedings**), the Austrian legislator decided that bridge loans, which were taken out in the period between 1 March 2020 and 31 January 2021 to pre-finance the salaries of employees on short-time work, as well as their immediate repayment upon receipt of the short-time working assistance, cannot be challenged pursuant to Section 31 of the Austrian Insolvency Act, if the loan was not secured by the borrower's assets and the lender was not aware of the borrower's illiquidity when the loan was granted (for details regarding avoidance under Austrian Insolvency Law, see **11. Transfers/Transactions That May Be Set Aside**). In addition, certain shareholder loans, which were granted to overcome short-term liquidity shortages in the period between 1 March 2020 and 31 January 2021 for not more than 120 days, are not regarded as equity substituting and thus, are not treated as subordinate claims in insolvency proceedings (for details regarding the statutory waterfall of claims, see **5.1 Differing Rights and Priorities**).

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

The legal framework for insolvencies of business entities (as well as individuals) in Austria is codified in the Insolvency Act.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Within this legal framework, three different types of proceedings are provided:

- reorganisation proceedings with debtor in possession (the debtor retains, basically and subject to certain restrictions, control over the estate's assets);
- reorganisation proceedings without debtor in possession (a court-appointed 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).

2.3 Obligation to Commence Formal Insolvency Proceedings

The legal representatives of an entity must file for insolvency in a case where the entity is "insolvent" according to the meaning in the Insolvency Act. The criteria are met if the debtor is illiquid or over-indebted. Although the Insolvency Act does not provide a legal definition for illiquidity and over-indebtedness, legal literature and case law have broadly defined "illiquidity" as a situation where the debtor lacks sufficient cash (including existing credit lines) to meet its current needs and obligations. The Supreme Court of Austria has ruled that illiquidity shall be assumed when the debtor is unable to pay more than 5% of its debt obligations that are due and payable. Over-indebtedness is held to have occurred when liabilities on the debtor's balance sheet exceed the debtor's assets. However, a company's substantive over-indebtedness (*materielle Überschuldung*) does not automatically obligate it to file for the commencement of insolvency proceedings – the company must also not have a positive going-concern prognosis (see **10.1 Duties of Directors**).

A debtor is obligated to file for insolvency with the competent court, without undue delay, once its financial situation meets the statutory criteria for insolvency, and no later than 60 days after it has been determined that the debtor is insolvent. If the debtor's insolvency is caused by a natural disaster such as an epidemic or pandemic (including COVID-19), the 60-day period is doubled to 120 days.

Due to the COVID-19 pandemic, the obligation to file for insolvency due to over-indebtedness is temporarily suspended until 31 January 2021, if the over-indebtedness occurred in the period between 1 March 2020 and 31 January 2021. If the debtor is over-indebted at the end of 31 January 2021, it must file for the opening of insolvency proceedings without undue delay, but at the latest within 60 days after the end of 31 January 2021 or 120 days after the date of determination of over-indebtedness, whichever period ends later.

2.4 Commencing Involuntary Proceedings

Apart from a company's legal representatives, any creditor is entitled to file for insolvency in the form of liquidation (bankruptcy) proceedings, provided such creditor has a claim (irrespective of its maturity date) against the debtor. The form of reorganisation proceeding, however, can only be filed by the debtor. Where a delay in filing for insolvency by a legal representative of an insolvent entity is influenced by a shareholder of the entity, the shareholder could also face claims for damages by the creditors and could also be found to be criminally liable.

2.5 Requirement for Insolvency

Insolvency proceedings are to be opened by the insolvency court at the request of the debtor or a creditor, if the debtor is illiquid or over-indebted. Reorganisation proceedings can already be initiated if there is a danger of illiquidity. For the definition of illiquidity and over-indebtedness, see **2.3 Obligation to Commence Formal Insolvency Proceedings**.

2.6 Specific Statutory Restructuring and Insolvency Regimes

In principle, legal entities as well as individuals can be subject to insolvency proceedings under the Insolvency Act. However, neither reorganisation proceedings with, nor reorganisation proceedings without, debtor in possession apply to credit institutions, insurance companies and pension funds as there are specific provisions for these entities (under the Banking Act, Insurance Company Supervision Act and the Pension Fund Act).

With respect to credit institutions, the Bank Recovery and Resolution Directive (BRRD) is implemented in Austria through the Austrian Recovery Bank and Resolution Act (*Sanierungs- und Abwicklungsgesetz* – BaSAG), which came into force in January 2015. The resolution process of former Hypo Alpe-Adria-Bank was the first to take place in Austria under this regime.

Entities that are not insolvent but that are having financial difficulties, can apply for statutory restructuring of their business under the Business Reorganisation Act. However, the Business Reorganisation Act is in practice "dead law" as entities do not make use of this.

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

Austrian law does not provide a legal framework for out-of-court restructuring proceedings, and preliminary mandatory and consensual restructuring negotiations are not provided for in the Insolvency Act.

3.2 Consensual Restructuring and Workout Processes

As mentioned in **2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations**, in a case where the insolvency of a debtor is established (ie, over-indebtedness or illiquidity in terms of the Insolvency Act), the legal representatives must file for insolvency with the competent court within a time period of 60 days at the latest. Any attempts at out-of-court restructurings have to observe this deadline as well, which means that such restructuring without the involvement of the court must take place (and be legally enforceably settled) prior to insolvency or within the 60 days' time limit.

3.3 New Money

This is not applicable in Austria.

3.4 Duties on Creditors

This is not applicable in Austria.

3.5 Out-of-Court Financial Restructuring or Workout

In practice, out-of-court restructurings may be attempted by way of voluntary debt relief (including subordination), economic reorganisation of the business or equity injections, all according to the provisions of private law. Creditors might decide to grant debt relief in order to avoid formal insolvency proceedings and the negative effect this might have on the entity's public image. A prerequisite for such "quiet relief" is that all the creditors affected must be prepared to grant relief. However, each creditor can independently decide whether to initiate enforcement proceedings (*Exekutionsverfahren*) or insolvency proceedings. Therefore, creditors often bind their consent to the consent of the rest of the creditors as a pre-condition for their support.

Apart from the necessity to gain the consent of all the creditors, a potential disadvantage of out-of-court restructurings is the risk of voidance of agreements that were concluded at a time when the debtor was already insolvent, which can diminish the estate. An advantage of out-of-court restructuring is that these proceedings are not registered in the insolvency database. Furthermore, out-of-court restructuring is potentially much faster, provided that all the parties participate.

4. Secured Creditor Rights, Remedies and Priorities

4.1 Liens/Security

In accordance with statutory provisions, Austrian law recognises the following as security instruments over assets: pledges (*Pfand*), transfers of securities (*Sicherungsübereignungen*), assignments of securities (*Sicherungszessionen*), and reservations of title (*Eigentumsvorbehalte*).

4.2 Rights and Remedies

Whereas pledges are intended to secure the individual claim of a creditor and the ownership of an asset remains with the debtor, 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. These two types of securities require registration with the land register where the asset concerned is real property. Priority is granted according to the chronological entry in the land register.

The Austrian Supreme Court recently ruled that the transfer of security in movable property validly acquired in Germany still exists after the movable property is moved to Austria, even if the publication requirements for its continued existence in Austria are not met.

With an assignment of securities, the debtor assigns claims against a third party to the creditor. This type of security requires strict acts of publication (eg, notification of third-party debtors or annotation in the books). Priority depends on the date on which the publicity requirement is met.

4.3 Special Procedural Protections and Rights

As to the enforcement of secured creditors' rights, see **5. Unsecured Creditor Rights, Remedies and Priorities**.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

In all three types of proceedings provided for in the Insolvency Act (reorganisation proceedings with debtor in possession, reorganisation proceedings without debtor in possession, and liquidation proceedings), claims are classified and ranked in the following order of priority:

Secured Creditors

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 commence-

ment of insolvency proceedings – apart from possible voidance claims (*Anfechtung*). The secured creditor merely has to inform the administrator and, lacking acknowledgement of the claim, potentially file a lawsuit against the insolvency administrator in order to enforce the senior security. However, secured creditors are subject to the restraint that no secured claim can be paid within six months from the commencement 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.

Estate Claims
The next rank is taken by estate claims (*Masseforderungen*), which, according to the statutory provisions, are to be satisfied prior to other insolvency claims. Estate claims encompass, inter alia, the costs of the insolvency proceedings; the expenses of management and administration of the estate; claims for labour, services and goods furnished to the estate post-filing; and the costs of the insolvency administrator. Preferential creditors of estate claims share in such claims on a pro rata basis.

Insolvency Claims
Ranked behind estate claims are insolvency claims (*Insolvenzforderungen*), which are claims of unsecured creditors and may be filed with the competent court within a time period after the commencement of insolvency proceedings as fixed by the court. Those insolvency creditors who filed a claim that was not contested by the insolvency administrator also share in such claims on a pro rata basis.

Subordinate Claims
Subordinate claims may result from contractual provisions or from statutory provisions. Subordinate creditors do not participate in the insolvency proceedings in general, but only if a surplus for distribution is generated.

5.2 Unsecured Trade Creditors
The commencement of formal in-court insolvency proceedings automatically leads to a stay against all actions of unsecured creditors, whereas secured creditors are generally not affected by the opening of insolvency proceedings.

5.3 Rights and Remedies for Unsecured Creditors
Insolvency creditors can commence legal proceedings against a court-appointed insolvency administrator if the insolvency administrator contests the creditor's claim (see **7.2 Distressed Disposals**). Estate claims are to be paid by the insolvency administrator without any filing procedure. If estate claims are not paid by the insolvency administrator, estate creditors may apply to the insolvency court for remedy (*Abhilfeantrag*) or assert their claims by bringing an action against the insolvency administrator.

5.4 Pre-judgment Attachments
This is not applicable in Austria.

5.5 Priority Claims in Restructuring and Insolvency Proceedings
In insolvency proceedings, claims are classified and ranked in the order of priority as described in **5.1 Differing Rights and Priorities**.

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

6.1 Statutory Process for a Financial Restructuring/Reorganisation
Reorganisation Proceedings
The Insolvency Act provides for two kinds of reorganisation proceedings, either with or without debtor in possession (see **2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations**). The main focus of these proceedings is the continuation of the debtor's business or parts thereof. In order for the provisions of reorganisation proceedings to be applicable, the debtor has to be the one who files for the opening of these proceedings and the debtor must provide a restructuring plan (*Sanierungsplan*) to the court. For proceedings with debtor in possession, the management remains in place and the debtor retains control over the estate's assets within the scope of ordinary business. Nonetheless, a court-appointed insolvency administrator monitors management of the debtor and the business situation. Also, specific actions such as the review of claims and the contesting of transactions (avoidance) are reserved for the administrator.

As opposed to out-of-court restructuring, in reorganisation proceedings the debtor is protected from the commencement of enforcement proceedings and may be granted partial debt relief via a majority decision.

However, as with liquidation proceedings, the debtor has the possibility to use the conclusion of a restructuring plan as an opportunity to rehabilitate its business. Where such restructuring plan is agreed upon in the course of liquidation proceedings, the debtor pays the quota agreed, which then leads to a residual debt discharge (*Restschuldbefreiung*). This possibility to rehabilitate plays an important role in practice.

Restructuring Plan

For restructuring proceedings, a restructuring plan by the debtor must be submitted to the court with 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 a payment of 30% within a period of two years is feasible, the debtor may additionally apply for debtor in possession. The restructuring plan must further provide for full payment of all estate claims (*Masseforderungen*) and evidence of the debtor's ability to fund the estate claims for a period of 90 days following the filing for the commencement of restructuring proceedings. The debtor must provide such restructuring plan within 90 days of the opening of insolvency proceedings.

In general, the approval of a suggested restructuring plan is subject to a "double majority requirement" of the creditors in the restructuring plan hearing, which is set by the court and made public by way of a formal edict of the court. Not only is it necessary to achieve a majority of those insolvency creditors who are present and entitled to vote (no specific quorum applies), but a majority of approving creditors also has to be reached on the admitted and present aggregate insolvency claims. Fully secured creditors are not entitled to vote.

If the creditors approve a restructuring plan, the insolvency court – as a second step – also has to confirm the restructuring plan. A possible reason for the court to deny confirmation would be an infringement of the principle of equal treatment of the creditors by granting preferential treatment to a specific creditor.

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 outlined in the reorganisation plan, which also includes the limitation on the creditors to set off their claims against this quota where general requirements are met. The effects of the legally binding restructuring plan also apply to those creditors that did not vote for the restructuring plan or did not participate at all. The insolvency proceedings are thus concluded. However, any rights of secured creditors that either have claims of separation to receive assets (*Aussonderungsanspruch*) and/or claims of separation to receive the proceeds of enforcement after sale (*Absonderungsanspruch)* must not be affected by the restructuring plan. Also, the restructuring plan may provide for the appointment of a trustee to either supervise the execution of the restructuring plan (*überwachter Sanierungsplan*) or to manage the estate with the mandate to fulfil the restructuring plan (*Treuhändersanierungsplan mit Vermögensübergabe*).

If a debtor defaults on the payment of a quota as provided for in the restructuring plan, the respective creditor's claim comes into effect again, but only proportional to the unpaid quota.

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

Austrian law does not contain specific provisions on pre-packaged sales or debt-for-equity swaps.

6.2 Position of the Company

As stated in **6.1 Statutory Process for a Financial Restructuring/Reorganisation** and in **2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations** there are two types of reorganisation proceedings, namely reorganisation proceedings with debtor in possession and reorganisation proceedings without debtor in possession. In both proceedings, the main focus lies in the continuation of the debtor's business or parts thereof. Whereas in reorganisation proceedings with debtor in possession the debtor retains, basically and subject to certain restrictions, control over the estate's assets and is only monitored by the insolvency administrator, in reorganisation proceedings without debtor in possession the insolvency administrator takes control.

6.3 Roles of Creditors

In reorganisation proceedings, claims are classified and ranked in the order of priority as described in **5.1 Differing Rights and Priorities**. The Insolvency Act provides for a court-appointed creditors' committee, which is explained in detail in **9.3 Selection of Officers**.

6.4 Claims of Dissenting Creditors

If the restructuring plan suggested by the debtor is approved by the required majority of creditors and also confirmed by the insolvency court (for details, see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), the debtor must pay only the agreed quota to the dissenting creditors.

6.5 Trading of Claims Against a Company

According to the Austrian Supreme Court, the trade of an insolvency claim against a company during insolvency proceedings is to be recognised. In the event of the acquisition of a claim after the opening of insolvency proceedings, the acquirer generally enters into the insolvency participation claim (*Konkursteilnahmeanspruch*) of the former creditor.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group
This is not applicable in Austria.

6.7 Restrictions on a Company's Use of Its Assets
The sale or lease of the debtor's company or parts thereof, the sale or lease of all or the main movable fixed assets and current assets, as well as the sale or lease of real property requires the approval of the insolvency court as well as the creditors' committee. As long as reorganisation proceedings are pending, the debtor's business basically may not be sold.

6.8 Asset Disposition and Related Procedures
It is the insolvency administrator's responsibility to realise the debtor's assets. The Insolvency Act does not provide specific deadlines or timelines to be observed by the insolvency administrator in the course of liquidation proceedings when realising the assets. When all the proceeds have been distributed among the creditors, the insolvency proceedings are concluded.

6.9 Secured Creditor Liens and Security Arrangements
This is not applicable in Austria.

6.10 Priority New Money
This is not applicable in Austria.

6.11 Determining the Value of Claims and Creditors
This is not applicable in Austria.

6.12 Restructuring or Reorganisation Agreement
This is not applicable in Austria.

6.13 Non-debtor Parties
This is not applicable in Austria.

6.14 Rights of Set-Off
The Insolvency Act provides for the possibility of set-off of claims if such claims have already been subject to compensation according to general civil law at the time of commencement of the restructuring proceedings, irrespective of the fact that such claims might not have been due or might have been subject to a condition at the time of commencement of the proceedings. Furthermore, creditors have to consider that a set-off is not possible for claims that arose within the six months prior to the commencement of insolvency proceedings if the creditor knew (or negligently did not know) about the insolvency. Claims subject to set-off do not need to be formally filed in insolvency proceedings.

If the creditor does not make use of the right to set off during the restructuring proceedings, the creditor may basically only set off against the restructuring plan quota of their claim after final confirmation of the restructuring plan and cancellation of the restructuring proceedings.

6.15 Failure to Observe the Terms of Agreements
As stated in **6.1 Statutory Process for a Financial Restructuring/Reorganisation**, if a debtor defaults on the payment of a quota as provided for in the restructuring plan, the respective creditor's claim comes into effect again, but only proportional to the unpaid quota.

6.16 Existing Equity Owners
This is not applicable in Austria.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings
As opposed to restructuring proceedings with or without debtor in possession under the Insolvency Act, liquidation proceedings aim to realise the assets of the estate and distribute the proceeds among the creditors. Restructuring proceedings that fail are transformed into liquidation proceedings.

As explained in **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, the legal representatives of an entity must file for insolvency in a case where the entity is insolvent within the meaning of the Insolvency Act (ie, if the debtor is over-indebted or illiquid). A debtor is obliged to file for insolvency proceedings with the competent court without undue delay once its financial situation meets the statutory criteria for insolvency, and no more than 60 days after it has been determined that the debtor is insolvent. Apart from the legal representatives, any creditor is entitled to file for the commencement of insolvency proceedings in the form of liquidation proceedings, provided such creditor has a claim (irrespective of its maturity date) against the debtor.

7.2 Distressed Disposals
The commencement of insolvency proceedings leads to an ex lege discontinuance of any legal procedure to which the debtor is party and with respect to any enforcement actions being taken against the debtor.

In liquidation proceedings the court appoints an insolvency administrator to assume control. The management of the debtor can no longer engage in any legal acts on behalf of the debtor from the time of the opening of insolvency proceedings. The court issues an official edict to be disclosed on the electronic

noticeboard of the courts (*Ediktsdatei*), in which the examination hearing is determined. Until this date, creditors may file their claims with the court. The court-appointed insolvency administrator decides in the examination hearing whether a creditor's claim is contested or not; if it is contested, the respective creditor must commence legal proceedings in order to obtain an insolvency claim. The main focus of the insolvency administrator lies with the realisation of assets and the distribution of the proceeds among creditors according to the quota. When realising assets by way of sale of the debtor's company, the insolvency administrator must first establish whether the continuance is not possible, in which case, the creditors' committee has to agree and the confirmation of the insolvency court is required.

7.3 Organisation of Creditors or Committees

In general, the creditors' committee has to be consulted for each significant action of the insolvency administrator. Furthermore, certain actions have to be communicated to the insolvency court (such as settlement agreements or the fulfilment or termination of bilateral agreements where one party has not fulfilled its contractual obligations at the time of commencing insolvency proceedings) and others have to be confirmed by the insolvency court (such as the sale of the entire business of the debtor).

In addition to the insolvency administrator, the Insolvency Act provides for a court-appointed creditors' committee, which is explained in detail in **9.3 Selection of Officers**.

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection with Overseas Proceedings

The Insolvency Act provides for recognition of the effects of insolvency proceedings opened in a non-EU member state (irrespective of an international treaty or the reciprocity principle), as well as decisions rendered in such proceedings, where the centre of main interests (COMI) of the debtor is located in the respective foreign country and the insolvency proceedings are comparable to such proceedings in Austria, in particular, if Austrian creditors are treated in the same manner as creditors from the state of the opening of proceedings. However, recognition is denied if insolvency or composition proceedings have already been opened in Austria, or interim measures have been ordered, or recognition leads to a result that clearly conflicts with public policy.

With regard to EU member states, the EU Insolvency Regulation stipulates that any judgment opening insolvency proceedings handed down by a court of an EU member state which has jurisdiction shall be recognised in all other EU member states from the moment that it becomes effective in the state of the opening of proceedings. The courts of the member state, within the territory of the debtor's COMI, have jurisdiction to open insolvency proceedings. 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. The debtor's COMI is determined at the time of filing for insolvency. Therefore, debtors can influence the international jurisdiction, and thus the applicable insolvency law, by timely shifting the COMI to another EU member state in order to achieve easier debt relief.

8.2 Co-ordination in Cross-Border Cases

In cross-border cases, Austrian insolvency courts as well as insolvency administrators co-operate with foreign administrators by way of disclosure of information relevant to the foreign insolvency proceedings and by granting the foreign administrator the opportunity to participate in the decision of the realisation of assets located in Austria or the realisation of reorganisation plans.

8.3 Rules, Standards and Guidelines

As stated in **8.1 Recognition or Relief in Connection with Overseas Proceedings**, with regard to insolvency proceedings in a non-EU member state, the Austrian Insolvency Act determines which jurisdiction's decisions, rulings or laws govern or are paramount. In respect to EU member states, the EU Insolvency Regulation applies.

8.4 Foreign Creditors

Foreign creditors are not dealt with in a different way in insolvency proceedings in Austria.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

Where insolvency proceedings under the Insolvency Act are initiated by the debtor and are conducted as reorganisation proceedings with debtor in possession, the management remains in place and the debtor retains control over the estate's assets within the scope of ordinary business. Nonetheless, a court-appointed insolvency administrator (or in the case of reorganisation proceedings with debtor in possession, a reorganisation administrator) monitors the management of the debtor and the business situation, at the same time preventing the discrimination of creditors. Also, specific actions such as the review of claims and the contesting of transactions (avoidance) are reserved for the reorganisation administrator.

9.2 Statutory Roles, Rights and Responsibilities of Officers

In case of liquidation and reorganisation proceedings without debtor in possession, the estate is administered by a court-appointed insolvency administrator.

Specific actions are reserved for the insolvency administrator. For example, with regard to contracts with a mutual obligation to perform, where not all the parties have fully performed at the time of the commencement of insolvency proceedings, the insolvency administrator may elect to assume or withdraw from such contract. Furthermore, if the debtor is a tenant, the insolvency administrator can decide to terminate the lease contract as long as they respect the statutory notice period or a shorter contractual notice period. If the debtor is a landlord, the insolvency administrator steps into the contract without requiring additional special termination rights. Also, the insolvency administrator may terminate employment contracts upon a partial or total shutdown of the business. In case of such shutdown, the insolvency administrator only has to observe the statutory notice periods and, if applicable, the collective bargaining agreement. A contractually agreed longer notice period to terminate employment contracts is not applicable. Moreover, the Insolvency Act provides for 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, and the deterioration of the economic situation of the debtor or default of payment of claims which were due before the commencement of the insolvency proceedings are not considered to constitute such good cause.

9.3 Selection of Officers

Appointment of Insolvency Administrator

In general, insolvency administrators are selected by the court from the official list of insolvency administrators. Under the Insolvency Act, an administrator must be a respectable and reliable person experienced in business with proficiency in insolvency matters, including commercial law and business management, where business entities are involved. Furthermore, the insolvency administrator must be independent of the debtor and the creditors.

Remuneration of Insolvency Administrator

On the one hand, in case of liquidation the insolvency administrator is statutorily remunerated with a percentage of the gross revenues realised from the liquidation. On the other hand, in the event of continuation, the insolvency administrator is entitled to a special remuneration. With the 2017 amendment of the Insolvency Act the minimum remuneration for the insolvency administrator has been increased.

Public Information

The identity of the insolvency administrator is made public with the official notice of the court, to be disclosed on the electronic noticeboard of the courts (*Ediktsdatei*), which also contains information on the type of insolvency proceedings to be opened, and the timeline for the meeting of the creditors and the examination hearing regarding the claims registered by the creditors.

Removal of Insolvency Administrator

The insolvency administrator is monitored by the insolvency court, who can remove the administrator from office for good cause, either ex officio or upon request. A motion for removal can be filed at any time by the debtor or any member of the creditors' committee and 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.

Creditors' Committee

The Insolvency Act provides for a further statutory body, a court-appointed creditors' committee, consisting of three to seven members, which supervises and supports the insolvency administrator. In general, it is at the court's sole discretion whether to install a creditors' committee (also upon request of the creditors), if the characteristics or the particular scope of the debtor's business make it imperative. However, the court is obligated to appoint such a committee if the debtor's business is to be sold. The members of the creditors' committee are also 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. The members of the creditors' committee are to be disclosed on the electronic noticeboard of the courts.

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

10.1 Duties of Directors

Under the Insolvency Act, a prerequisite for the filing of insolvency proceedings is the illiquidity or over-indebtedness of the debtor. Where one of these criteria is met, the entity is deemed insolvent. For lack of a legal definition of the term, Austrian case law and commentary define illiquidity as a situation where a debtor lacks the means to pay all claims due and will not be able to obtain the necessary means to do so in the foreseeable future. Over-indebtedness is measured according to a two-step process:

- firstly, a potential material insolvency is established by calculating whether the liabilities of the debtor exceed its assets; and
- secondly, if the entity is materially insolvent, only in a case where a positive going-concern prognosis is not feasible is the relevant entity deemed to be over-indebted under the Insolvency Act.

In general, a managing director must act in a diligent manner. Any failure to act diligently exposes the managing director to liability vis-à-vis the company. The corresponding claims of the company, which may not be settled in a case where payments by the managing directors are required for the satisfaction of the creditors, are subject to a five-year limitation period.

10.2 Direct Fiduciary Breach Claims

If a debtor meets one of the above-mentioned criteria for insolvency under the Insolvency Act, see **10.1 Duties of Directors**, the legal representatives are obliged to file for insolvency without undue delay, and no later than 60 days after having determined that the debtor is insolvent. If the entity is illiquid or over-indebted and the legal representatives fail to file for insolvency without undue delay – or in any event, no later than within the 60-day time period – the legal representatives expose themselves to possible civil and criminal charges (including fraud or undue preference for a creditor) for impairment of the creditors' interests. Disregarding the 60-day time limit is one of the few cases where a legal representative of a limited liability company may be held personally liable for damage inflicted on the company's creditors (a possible reduction of the insolvency quota). Furthermore, the legal representatives may be liable to the entity for any payments executed while already in a state of insolvency.

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

The provisions of the Insolvency Act dealing with voidance rights aim at safeguarding the insolvent estate with respect to the satisfaction of creditors. Legal acts and transactions that have taken place within certain time periods prior to the commencement of insolvency proceedings over the assets of the debtor, and which relate to the assets of the insolvent (illiquid or over-indebted) debtor, can be contested by the insolvency administrator. Therefore, the satisfaction of a pledgee can never be detrimental to the debtor's assets as the creditor only obtains the equivalent of what would be the outcome of a sale in the course of insolvency proceedings.

The general prerequisites for 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 the direct or indirect discrimination of creditors (*Gläubigerbenachteiligung*).

The discrimination of creditors will only be affirmed if the settlement fund (*Befriedigungsfonds*) available to creditors in the insolvency proceedings has been reduced in comparison with the amount available at the time of the contested legal act.

11.2 Look-Back Period

A transaction can be contested for intent to discriminate (*Benachteiligungsabsicht*), squandering of assets (*Vermögensverschleuderung*), free-of-charge disposal (*unentgeltliche Verfügung*), preferential treatment of creditors (*Begünstigung*) and knowledge of illiquidity (*Kenntnis der Zahlungsunfähigkeit*). The look-back period varies 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, whereas certain periods are shortened where the third party knew or should have known (ie, negligently did not know) the respective facts.

11.3 Claims to Set Aside or Annul Transactions

Voidance claims are asserted by the insolvency administrator on behalf of the estate only (independent of the type of insolvency proceedings), within a time period of one year from the opening of insolvency proceedings. Furthermore, the administrator may raise the plea of voidance without any time limit.

Fellner Wratzfeld & Partners has a team of more than 70 lawyers and associates, advising clients in all areas of reorganisation and restructuring, and also with respect to insolvency law issues. The team provides comprehensive advice to companies and creditors, and leads restructuring negotiations on behalf of all insolvent parties. Its work in this area also includes the acquisition of companies from insolvent estates, their reorganisation and their return to profitability. While fwp was for many years better known as acting mostly on behalf of credit institutions, the practice has more recently increasingly advised on the side of corporates.

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