The International Comparative Legal Guide to:

Corporate Recovery and Insolvency 2013
7th Edition

A practical cross-border insight into corporate recovery and insolvency work

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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Austria?

Austrian law recognises pledges (Pfandrechte), security transfers (Sicherungsübereignungen) and security assignments (Sicherungsübereignungen).

In order to create a valid and perfected (and, by this, enforceable) security interest, not only the parties’ agreement but also certain principles must be respected:

As a general rule, Austrian law does not recognise security interests over a fluctuating pool of assets (no floating charge). Any collateral asset must be specified (bestimmt) or at least specifiable (bestimmbar).

In order for a security to be valid in addition to an agreement, a public act is required (Publizitätsprinzip). In case of real estate, this happens through notification in the public real estate register (Grundbuch).

In order to fulfil the publicity requirements for movables, possession of the asset must be transferred to the creditor/pledgee. The publicity requirements for non-corporal assets are satisfied by either notifying the debtor of the claim (third party) or by annotation in the accounting records of the pledgor.

A pledge (Pfandrecht) will only be valid if the principle of accessoriness (Akzessoriätät) – i.e. the dependence on the existence of a secured debt – is adhered to. In particular: (i) the pledgee (Pfandrechner) must be a creditor of the secured obligation; and (ii) upon a (temporary) discharge of the secured obligation the pledge will cease to exist.

It should also be noted that only monetary claims (geldwerte Forderungen) may be secured by a pledge (Pfandrecht). Pledges, security transfers and security assignments are possessory security interests. As such, the effective possession by the pledgee/secured party (or its custodian (Besitzmitte)) is a pre-condition for perfection and maintenance of the respective security interest.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

Transactions may be subject to an avoidance claim by an insolvency administrator according to the avoidance rules of the Austrian Insolvency Act (Insolvenzordnung – IO).

A condition to an assertion of avoidance rights is that:

(i) the challenged legal act took place within a certain “suspect period” prior to the commencement of insolvency proceedings;

(ii) the challenged legal action caused a discrimination of the other creditors (Gläubigerbenachteiligung); and

(iii) the effect of a successful avoidance claim would be to increase the insolvent’s estate (Befriedigungstauglichkeit).

Intentional discrimination (Benachteiligungsabsicht)

Transactions concluded in order to discriminate against other creditors may be challenged if they were entered into within 10 years preceding the opening of insolvency proceedings and such bad intent was known by the beneficiary. This period is shortened to two years if the beneficiary did not have positive knowledge of the discrimination but should have known. For the “familia suspecta”, the burden of proof regarding the knowledge of the discrimination is reversed. The “familia suspecta” includes relatives and in-laws. In case of a company as debtor, it may also include directors and shareholders.

Squandering of assets (Vermögensverschleuderung)

Transactions may be challenged if the insolvent party’s action within the last year preceding the initiation of insolvency proceedings was seen as squandering of assets and if such squandering was known or deemed to be known by the counterparty.

Dispositions free of charge (Unentgeltliche Verfügungen)

Any transactions concluded free of charge or deemed to be free of charge may be challenged if they were made within the last two years before the opening of insolvency proceedings.

Preferential treatment (Begünstigung)

Transactions concluded within the last year preceding the opening of insolvency proceedings but after material insolvency or a motion on the initiation of insolvency proceedings or in the last 60 days may be challenged if the transaction was either objectively preferential or was intended to be preferential. A transaction is qualified as objectively preferential if a creditor acquires a security or satisfaction to which he is not entitled at all, or in this form or at this time. A transaction is qualified as intended to be preferential if the beneficiary knew or was deemed to know of the intent of the insolvent party to favour a certain creditor. Material insolvency means illiquidity (Zahlungsunfähigkeit) or over-indebtedness in terms of insolvency law (Insolvenzrechtliche Überschuldung) (see question 2.2).

Knowledge of insolvency (Kenntnis der Zahlungsunfähigkeit)

Legal acts (Rechtshandlungen) carried out within the last six months preceding the opening of insolvency proceedings but after material insolvency or a motion on the initiation of insolvency proceedings may be challenged if (i) the legal act constitutes satisfaction or securing of a creditor (Befriedigung oder
Schoenherr Austria

Sicherstellung), or (ii) the act is considered to be a disadvantageous legal transaction (nachteiliges Rechtsgeschäft). The legal act by which a creditor’s claim is satisfied or secured may be challenged if the creditor knew or was negligent in not knowing of the debtor’s insolvency or pending insolvency petition. Disadvantageous legal transactions of the debtor that are directly disadvantageous to the creditors may be challenged if (i) the other party knew or was negligent in not knowing of the debtor’s insolvency or pending insolvency petition, and (ii) the disadvantage for the insolvency estate was objectively predictable at the time of insolvency or pending insolvency petition, and (ii) the disadvantage to creditors may only be challenged if (i) the other party knew or was negligent in not knowing of the debtor’s insolvency or pending insolvency petition. Legal transactions are considered as being directly disadvantageous if the parties’ considerations are objectively unbalanced. Disadvantageous legal transactions of the debtor that are indirectly disadvantageous to creditors may only be challenged if (i) the other party knew or was negligent in not knowing of the debtor’s insolvency or pending insolvency petition and (ii) the disadvantage for the insolvency estate was objectively predictable at the time of the transaction. Such objective predictability is, in particular, on hand if a restructuring plan is obviously unqualified (offensichtlich untaugliches Sanierungskonzept). A legal transaction is considered as indirectly disadvantageous (mittelbare Nachteiligkeit) if the transaction is objectively balanced at the time of its conclusion but becomes objectively unbalanced later on.

1.3 What are the liabilities of directors (in particular, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Austria?

If the company is insolvent, each director is (severally) obliged to file for insolvency proceedings without culpable delay – within 60 days at the latest. If a director violates his duty to (timely) file for insolvency proceedings, he is liable towards the creditors for any damages arising out of insolvency procrastination. Towards existing creditors (Altgläubiger) he is liable for the quota damage, i.e. for the difference between any damage actually occurred and any (minor) damage which would have occurred had the managing director filed for insolvency on time. As for the so-called “new creditors” (Neugläubiger) – i.e. creditors who contracted with the company in statu cridae – the managing director is liable for the negative interest. The creditor must be put in a position as if the relevant transactions had never been concluded with the subsequently insolvent debtor.

According to the Austrian Act on Limited Liability Companies (Gesetz über Gesellschaften mit beschränkter Haftung – GmbHG), the managing director shall pay damages to the company (represented by the insolvency administrator) if he made payments after the point in time when he was obliged to file an insolvency petition. From the date the managing director is obliged to file a insolvency petition, he may not make further payments, except for payments matching with deliveries, payments to secured creditors up to the amount of the security, payments against adequate consideration or payments which are necessary to prevent the company’s immediate collapse (e.g. rental payments, taxes, social security contributions, wages) and which will not reduce the company’s assets.

The managing directors may also be liable for unpaid taxes and social security contributions owed by the company. There are several criminal offences stated in the Austrian Criminal Code (Strafgesetzbuch – StGB) that might affect directors for acts committed in connection with insolvency. The most important provision regards the grossly negligent encroachment of a creditor’s interest (Groß fahrlässige Beeinträchtigung von Gläubigerinteressen, § 159 StGB). This includes effectuating insolvency in a grossly negligent manner. There are provisions for fraudulent interference with creditor’s claims (Betrügerische Krida, § 156 StGB), withholding of social security duties (Vorenthalten von Dienstnehmerbeiträgen zur Sozialversicherung, § 153c StGB) and preferential treatment of creditors (Begünstigung eines Gläubigers, §158 StGB).

Persons convicted of the aforementioned offences may be disqualified from obtaining a business permit (Gewerbeberechtigung).

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Austria?

In Austria, there is a unified Insolvency Code (Insolvenzordnung) governing the insolvency proceedings against companies. Depending on whether or not a restructuring plan (Sanierungsplan) is presented with the application for the opening of insolvency proceedings, insolvency proceedings are called restructuring proceedings (Sanierungsverfahren), otherwise they are called bankruptcy proceedings (Konkursverfahren). A debtor may also present such a restructuring plan in the course of a bankruptcy proceeding resulting in the bankruptcy proceeding to be continued as restructuring proceeding. The term ‘insolvency proceedings’ used in the Insolvency Code covers both restructuring proceedings and bankruptcy proceedings.

2.2 What are the tests for insolvency in Austria?

A company is qualified as insolvent if it is illiquid (zahlungsunfähig) or over-indebted in terms of insolvency law (insolvenzrechtlich überschuldet). Illiquidity (Zahlungsunfähigkeit) means that the debtor is unable to pay all its debts in due time and is not in a position to acquire the necessary funds to satisfy its due liabilities within a reasonable period of time. The examination of illiquidity must refer solely to matured liabilities. A forecast is not required and liabilities maturing in the future can be disregarded. A company is considered to be over-indebted in terms of the insolvency law if the company’s liabilities exceed its assets and the company has a negative prospect (negative Fortbestehensprognose). For the determination of over-indebtedness, a special over-indebtedness balance sheet (Insolvenzstatus) must be drawn up. In this over-indebtedness balance sheet, the company’s assets and liabilities have to be evaluated by assuming the liquidation of the company. The liquidation values of the company’s assets shall be compared with the company’s liabilities.

If the over-indebtedness balance sheet based on the liquidation values shows over-indebtedness of the company, it will be the management’s responsibility to examine whether such over-indebtedness constitutes over-indebtedness in terms of the insolvency law (insolvenzrechtliche Überschuldung) by drawing up a forecast on the company’s continued existence (Fortbestehensprognose). This forecast examines whether the company will be solvent and thus viable in the future.

2.3 On what grounds can the company be placed into each procedure?

Bankruptcy proceedings (Konkursverfahren) must be opened by the court whenever it has been established that a corporation is illiquid (zahlungsunfähig) or is overindebted in the meaning of the insolvency law (insolvenzrechtlich überschuldet) (see question 2.2). Restructuring proceedings (Sanierungsverfahren) may also be
initiated if the risk of the debtor’s inability to pay its debts is at least imminent (drohende Zahlungsunfähigkeit) and the debtor files an application for the opening of restructuring proceedings.

2.4 Please describe briefly how the company is placed into each procedure.

The application for the opening of bankruptcy proceedings may be filed with the competent court either by the debtor himself or by a creditor. A creditor applying for the opening of insolvency proceedings is required to substantiate that the debtor is insolvent or over-indebted. Restructuring proceedings may only be opened upon a petition filed by the debtor.

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

The court edict which states the opening of the formal proceedings is published online on the official insolvency data base (www.edikte.justiz.gv.at). This edict must contain:

- the name and address of the debtor;
- the name and address of the insolvency administrator;
- the date, place and purpose of the first creditor assembly;
- the request to all creditors to file their claims within a certain deadline (Anmeldungsfrist);
- the request to all privileged creditors to claim their privilege within this deadline;
- instructions on the consequences of failure to adhere to this deadline;
- a possible court order of closing of business; and
- time and place of the examination hearing (Prüfungstagsatzung) and the report hearing (Berichtstagsatzung) in case of the continuation of business.

The opening of insolvency proceedings takes effect as of 0:00 hours of the day following the publication of the court edict. After the opening of insolvency proceedings, the examination period begins, the purpose of which is to establish the future fate of the debtor. This is decided in the report hearing at the latest. During the examination period, creditors shall file their claims with the insolvency court.

2.6 Are “pre-packaged” sales possible?

Austrian insolvency law does not provide for a “pre-packaged” sale as an arrangement under which the sale of all or part of a company’s business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

Unsecured creditors are entitled to file their claim against the debtor including interest until the opening of the insolvency proceedings. They are satisfied only pro rata according to the insolvency quota. Once formal proceedings have been opened, it is not possible to obtain an executive lien anymore. All execution proceedings against the debtor are suspended.

3.2 Can secured creditors enforce their security in each procedure?

The rights of secured creditors (Absonderungsberechtigte) such as pledges remain unaffected by the opening of insolvency proceedings. The rights of secured creditors may, however, be affected by the application of the insolvency avoidance rules (see question 1.2). Furthermore, executive liens obtained within the last 60 days before formal proceedings were opened, expire. Secured creditors may not enforce their preferential claims within six months after the opening of insolvency proceedings, if the enforcement could jeopardise the continuation of the business. This does not apply if the enforcement is indispensable to prevent severe personal or economic drawbacks of the secured creditor who could not, or presumably cannot, get full satisfaction by the enforcement in other assets.

Secured creditors are entitled to preferential satisfaction with respect to proceeds gained by the realisation of the relevant assets provided as collateral. They exclude unsecured creditors from satisfaction with respect to these assets.

In insolvency proceedings, it has to be taken into account that the relevant assets still form a part of the insolvency estate and that they basically have to be administered and realised by the administrator. Only if the creditor himself is holder of the relevant assets, he may either realise the security in accordance with the provisions of the Enforcement Act (Exekutionsordnung – EO) or according to the agreed extrajudicial enforcement of the security.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

Claims that can be offset against claims of the debtor at the time of the opening of formal proceedings must not be claimed in the proceedings. The creditor simply declares his intention to offset.

In order to avoid abuse, set off is not permitted if:

- the creditor became a debtor after the opening of formal procedures;
- the debtor obtained his claim after the opening of formal procedures; or
- the creditor obtained his claim within the last six months before the opening of formal procedures and at this point had knowledge, or should have had knowledge, of the insolvency.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

If the debtor applies for the opening of the insolvency proceedings and presents certain qualified documents and a restructuring plan offering a quota of at least 30 per cent, he is entitled to self-administration (Eigenverwaltung). He can dispose of his assets independently. However, he is monitored by a restructuring administrator (Sanierungsverwalter), to whom certain transactions are reserved.

Unless the debtor meets the requirements for self-administration, the debtor is deprived of his rights to dispose of the assets subject to insolvency, i.e. the insolvent’s estate (Insolvenzmasse) with the opening of insolvency proceedings.
Together with its decision on the opening of insolvency proceedings, the court appoints an insolvency administrator (Insolvenzverwalter) and, if it deems this necessary in view of the size of the debtor’s business, a creditors’ committee (Gläubigerausschuss) to assist the administrator. After the opening of insolvency proceedings without self-administration, only the administrator is entitled to act on behalf of the insolvency estate.

The director(s) of the debtor is (are) required to support the administrator in his duty to act as the estate’s attorney. One of the main tasks is to assist the administrator by issuing a list of assets and a balance sheet. The directors are also required to attend the examination hearing.

### 4.2 How does the company finance these procedures?

The costs for the formal procedures are considered preferential claims (see question 5.2). They must therefore come from the company’s assets. In order to initiate formal proceedings there must, at least, be sufficient assets to cover the costs of the proceedings. If the competent court denies the opening of formal proceedings due to the lack of sufficient funds, the proceedings may be opened if a creditor is willing to advance the initial costs.

In restructuring proceedings under self-administration (see question 4.1), the debtor must provide a financing plan outlining how the costs of the restructuring proceedings will be covered for the following 90 days by the expected receipts and expenditures. Should the business continue, further costs (e.g. wages, rent) must come from operative revenues. It is the administrator’s responsibility to ensure the financial feasibility of continuing the business.

### 4.3 What is the effect of each procedure on employees?

The opening of insolvency proceedings itself does not affect existing employment contracts. However, the resignation of the employee after the opening of the insolvency proceedings is ineffective if it is solely based on the fact that the salary has (partly) not been paid.

In case the company’s business is shut down or shall, in the course of the insolvency proceedings, not be continued, (i) the employees may resign from the employment contract for a good cause, and (ii) the administrator may terminate the employment contract. This favoured possibility of termination is also possible within four months after the opening of the insolvency proceedings, if a report hearing has not taken place and the continuation of the business has not been published in the insolvency database.

If only parts of the company’s business are shut down, the employee’s right to resign from the employment contract for a good cause as well as the administrator’s right to terminate the employment contract only applies with respect to those employees that are employed in these parts of the company’s business.

In restructuring proceedings with self-administration, the debtor may terminate the employment contract within one month after the opening of the proceedings if the restructuring administrator approves.

### 4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

With respect to contracts that have not been fully performed by both parties upon institution of insolvency proceedings, the administrator may either decide to perform the contract on behalf of the debtor and request the other party to perform its part, or rescind from the contract. The contract will remain in force until the administrator’s decision. Upon an application of the counterparty, the insolvency court will ask the administrator to make this decision within a certain time, otherwise he will be assumed to have rescinded from the contract.

If the debtor owes a performance other than payment, the administrator has to make his decision within five working days after the request, otherwise he will be assumed to have rescinded from the contract.

If the termination could jeopardise the continuation of the business, the counterparty may only terminate the contract within six months after the opening of insolvency proceedings for a good cause. A good cause is neither the deterioration of the economic situation of the debtor, nor the debtor’s default of payment regarding claims having fallen due prior to the opening of insolvency proceedings. This does not apply if the termination is indispensable to prevent severe personal or economic drawbacks, as for the right of payment based on a loan agreement and regarding employment contracts. Agreements granting a special right of withdrawal or providing for the automatic termination upon the opening of insolvency proceedings are inadmissible.

### 5 Claims

#### 5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

Unsecured creditors shall file their claim with the insolvency court within the time period set out by the insolvency court in the court edict (usually two to three months).

The filed claims will be examined by the administrator and the debtor. At the so-called examination hearing (Prüfungstagsatzung), which is held at the insolvency court, the administrator has to declare whether he acknowledges or contests a filed claim. If the creditor’s claim is acknowledged, this creditor is entitled to participate in the insolvency proceedings, which means that he will finally receive the quota that is paid to the unsecured creditors. If a creditor’s claim is contested, the creditor has to assert his claim in civil proceedings in order to maintain his right to participate in the insolvency proceedings. Secured creditors do not have to file their secured claim with the court but usually do so to inform the administrator, the debtor and the court of their collateral. The rights of secured creditors remain unaffected by the opening of insolvency proceedings (see question 3.2).

#### 5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

Claims of unsecured creditors in insolvency proceedings which arose prior to the opening of these proceedings are called insolvency claims (Insolvenzforderungen). These claims rank pari passu. Taxes, social security contributions, wages and salaries are not, as such, privileged or preferential claims under Austrian insolvency law.

Claims which lawfully arose against the debtor’s estate after the opening of the proceedings, so-called privileged claims (Masseforderungen), or claims which are subject to a real security, so-called preferential claims (besicherte Forderungen), enjoy priority in insolvency proceedings.

In essence, privileged claims are, inter alia, the costs of the insolvency proceedings including the insolvency administrator’s
fees, court expenses, expenses of the administration and realisation of the assets and claims arising from the continuation of the debtor’s business.

5.3 Are tax liabilities incurred during each procedure?

The opening of formal procedures does not have an effect on the general tax regime. Insolvent companies are therefore required to continue to pay taxes.

6 Ending the Formal Procedure

6.1 What happens at the end of each procedure?

Formal procedures must be repealed by court order and do not end automatically. Such an order may be enacted if inter alia: (i) all assets have been distributed; (ii) it becomes clear during insolvency proceedings that there are not sufficient assets to finance the proceedings; or (iii) a restructuring plan has become final and all privileged claims have been settled.

7 Restructuring

7.1 Is a formal procedure available to achieve a restructuring of the company’s debts in Austria?

As outlined in question 2.1 above, Austrian law provides for a formal restructuring proceeding. In such procedure, the debtor may propose a restructuring plan to his creditors. The debtor has to offer at least a quota of 20 per cent to the unsecured creditors, payable within two years. In case of restructuring proceedings with self-administration the minimum quota is 30 per cent.

7.2 If such a procedure is available, is a debt for equity swap possible and how are existing shareholders dealt with?

Austrian law does not provide for a debt for equity swap in such procedure.

7.3 Can dissenting creditors be crammed down?

A qualified simple majority of unsecured creditors must approve the restructuring plan. Qualified simple majority means that the simple majority of unsecured creditors in number present at the restructuring plan hearing must vote in favour of the restructuring plan and that the total sum of these unsecured creditors’ claims must amount to 50 per cent of the unsecured claims present at the hearing. If the restructuring plan is accepted by the creditors, confirmed by the court and fulfilled by the debtor, the latter is released from the rest of his debts. An approved restructuring plan also affects creditors who voted against the plan.

7.4 Is consent needed from other stakeholders for a restructuring?

Under Austrian law, there is no need for any further consent other than that outlined in question 7.3 above.

8 International

8.1 What would be the approach in Austria to recognising a procedure started in another jurisdiction?

Cross-border insolvency proceedings are recognised based on two main sources: The EU Regulation 1346/2000 requires the recognition of all proceedings opened in a fellow Member State without a formal recognition procedure from the time that it becomes effective in the State of the opening of the proceedings. The provisions on international insolvency law in the Austrian Insolvency Code state that the effects of insolvency proceedings opened in another State and the decisions issued in these proceedings are recognised in Austria if: (i) the debtor’s centre of main interest is in that other state; and (ii) these insolvency proceedings are comparable to Austrian proceedings, in particular Austrian creditors are treated equal to creditors from the state in which proceedings were opened. Notwithstanding such foreign insolvency proceedings, insolvency proceedings may be opened and conducted in Austria with respect to the assets located in Austria. Insolvency proceedings conducted abroad are not recognised in Austria if: (i) insolvency proceedings were opened in Austria or preliminary injunctions were ordered; or (ii) the recognition of proceedings would lead to a result which apparently contradicts the fundamental values of the Austrian legal system.
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Recent insolvency & restructuring related experience includes advising:

- Group of some 40 senior creditors (lenders, bondholders and hedge counterparties) in connection with the restructuring of bauMax AG including the negotiation and execution of an over EUR 1 billion financial restructuring package for the entire bauMax group.
- One of Austria’s leading timber industry companies and its subsidiaries on negotiations and the execution of a standstill and restructuring agreement for its approximately EUR 300 m loan portfolio, granted by UniCredit Bank Austria AG, Raiffeisen-Landesbank Steiermark AG and RAIFFEISENLANDESBANK Niederösterreich-Wien AG.

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