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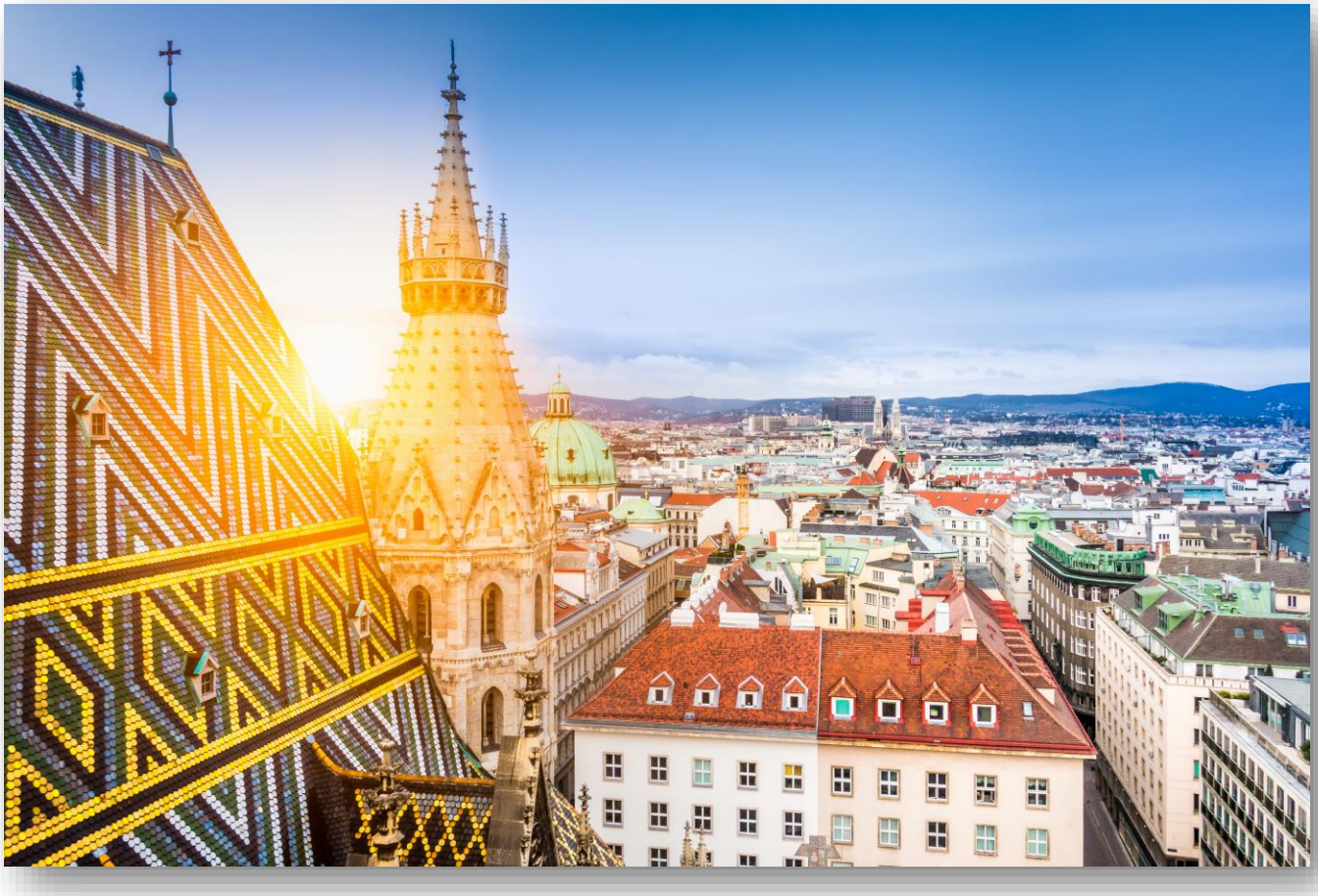

BRAUNEIS KLAUSER PRÄNDL

Bankruptcy, Insolvency & Rehabilitation Proceedings in Austria

ILN RESTRUCTURING & INSOLVENCY GROUP

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER AUSTRIAN LAW

1. Introductory Remarks on Austria's legal system

Austria has a **civil law system**, as opposed to the common law system of, e.g., the United States or the United Kingdom. Practically all law is codified in statutes. The most important statute in the field of civil law is the Austrian General Civil Code and in the field of commercial law it is the Austrian Code of Commerce.

Austria is part of the EU. At this time there are still 28 member states of the EU. They have 28 distinct and often very different insolvency laws, i.e. the core of the insolvency law is still different from country to country.

Austrian insolvency law is primarily codified in **the Austrian Insolvency Act.**[1] There also is a Business Reorganization Act of 1997. This act contains provisions for the restructuring of a non-insolvent debtor's business. It does not affect creditors' rights (no stay of proceedings, no preferential conditions for voiding contracts) and, in spite of its title, is not an insolvency statute in the strict sense. Insolvency related provisions are also found in the Criminal Code, in the Act on the Protection of Wages in Insolvencies, and in the Equity Replacement Act.

Cross-border insolvencies are regulated in the (revised) **European Regulation on insolvency proceedings** (applicable Vis-à-vis EU countries except Denmark), the **Austrian Insolvency Act** and bilateral treaties. **Austria did not ratify the UNCITRAL Model Law on Cross Border Insolvencies.**

The name of **EU regulation** („Regulation on insolvency proceedings ") is misleading because it **deals only with cross-border (CB) issues of insolvency, namely**

I: International jurisdiction, applicable law

II: Recognition of foreign insolvency proceedings

III: Secondary insolvency proceedings

IV: Information for creditors; lodgement of claims

V: Groups

VI: Data protection

VII: Final provisions

The substantive rules on insolvency and the rules on procedure still differ from country to country.

However, an EU preventive restructuring directive is expected to be published in the official Journal of the EU in June/July 2019. Member states will have 2/3 years to implement the directive. Under this directive, member states will be obliged to provide debtors with access to a preventive[2] restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability.

Some key features of the planned EU restructuring directive include:

- The debtor will stay in control (in most cases).

[1] Insolvency-related provisions are also to be found in other statutes (e.g. regarding banks, insurance companies).

[2] I.e. at a time where there is a likelihood of insolvency but where the debtor is not yet insolvent as defined by national law.

- The debtor will be able to apply for a time-limited moratorium against enforcement.
- Any mandatory insolvency **filing rules for directors will be suspended during the period of the stay.**
- New and interim financing as well as other transactions concluded in close connection with a restructuring plan are protected in a restructuring.

2. Different types of insolvency proceedings under Austrian law and their main characteristics

Austrian insolvency law is still primarily creditor oriented.

The Austrian Insolvency Act provides for different types of proceedings.

Austrian Insolvency law however also provides for a **court-controlled reorganization proceeding (Sanierungsverfahren)**. Its goal is to rescue the insolvent debtor's business by enabling the debtor to continue his business activities and, eventually, to be discharged from a part of its debts.

The conditions for a discharge are quite strict. If the **debtor wants to remain in possession** (Sanierungsverfahren mit Eigenverwaltung), there is a **minimum quota** requirement of at least **30% within a maximum period of two years**. If a debtor stays in possession, a reorganization administrator is appointed. The scope of his duties is more limited than a general administrator (more of a supervisory role).

If a **debtor** does **not** wish to stay **in possession** (Sanierungsverfahren ohne Eigenverwaltung) a regular insolvency administrator is appointed. This insolvency administrator then acts on behalf of the insolvency estate. This kind of reorganization proceeding is possible with a **minimum quota of 20% over a maximum period of two years**.

In both cases the acceptance of the submitted reorganization plan (Sanierungsplan) requires that the majority of the creditors vote in favor of the reorganization plan (double majority i.e. both by headcount and by value of debt).

There also is a **classic liquidation or winding-up-proceeding.** In this kind of proceeding the debtor's assets are realized and subsequently distributed to the creditors. However, bankruptcy proceedings also contain elements of debtor protection and rescue of the debtor's business.

The Austrian Insolvency Act also **provides for a specific consumer insolvency proceeding**. It enables natural persons to achieve, under certain circumstances, an eventual discharge of debts (usually within five years or earlier).

Out-of-court reorganizations of insolvent businesses (informal workouts) are possible in principle but difficult to achieve in practice. The main obstacles are the need for a unanimous solution and tight statutory deadlines to file for court insolvency proceedings.

Under Austrian insolvency law, a corporation (such as a GmbH) is deemed to be insolvent (as defined in the Austrian insolvency act) if it is either illiquid or over-indebted.

3. Obligation to file for Insolvency

1. <u>Illiquidity</u>

Under Austrian insolvency law, a company is insolvent if it is unable to meet due claims in as they fall due ("illiquidity"). This is also the case if the creditors don't press for payments. In some borderline-cases the concept of a mere delay in payment ("Zahlungsstockung") might be

applicable. The company is seen as illiquid if it cannot pay more than approx. 5% of all due debts.[3] If a debtor is not able to pay (all) his debts as they fall due due to a lack of ready means of payment and if the debtor cannot obtain the necessary means of payment immediately, it is deemed to be insolvent.

2. Over-indebtedness

In case of a corporation (such as a GmbH), not only illiquidity constitutes "Insolvency" in the sense of the Austrian Insolvency Act, but also a state of over-indebtedness.

Please note that under Austrian insolvency law a company is over-indebted if it has a negative asset status at break-up values (balance sheet over-indebtedness at break-up values).

Even if a company is over-indebted according to the applicable (very strict) standard, it might not be deemed to be insolvent under Austrian law if a prognosis (forecast) of its continued viability (henceforth short: "continuation forecast") demonstrates a positive result: As part of a continuation forecast, the probability of the Company's future is to be examined with the aid of careful analysis of the causes of losses, a financing plan and the Company's future prospects. Planned restructuring measures can be included in these considerations.

The prognosis of the continued existence thus constitutes a possibility to avoid "insolvency" in the sense of Austrian insolvency law (with all associated legal consequences) in spite of balance sheet over-indebtedness.

The subject of the prognosis for the continued existence of the company is the assessment of

- the future solvency of the company within the primary planning period (primary forecast)
- and the company's ability to survive beyond this (secondary forecast).

The future solvency and viability of a company are the two decisive criteria for the survival prognosis.

The prognosis of the company's continued existence must result in a well-founded statement as to whether the company will predominantly be able to continue its business activities in the future in compliance with its payment obligations. The forecast must be prepared on the basis of suitable planning instruments under various aspects. The scope of a forecast of the company's continued existence depends above all on the size and special features of the company in question.

3. Legal obligation under Austrian law to file for formal, court-controlled insolvency proceedings if the corporation is illiquid or over-indebted (in the sense of Austrian insolvency law), risks of personal liability of directors

If a corporation is either illiquid or over-indebted (in the sense of Austrian insolvency law), an application for the initiation of court-controlled insolvency proceedings must be filed as soon as possible ("without culpable delay"). The maximum period of 60 days may only be used in justified exceptional cases (expedient and probably successful restructuring negotiations) and, important to note, creditors must also be treated equally within this period.

[3] Austrian Supreme Court = "Oberstar Gerichtshof", short: OGH, decision 3 Ob 99/10w.

In the event of insolvency (in the sense of Austrian insolvency law), the managing director(s) are obliged to apply for the opening of insolvency proceedings without culpable hesitation (maximum being sixty days after the occurrence of the insolvency). This 60-day period may only be used if management makes appropriate efforts to avert the insolvency and only if this undertaking is not to be seen as futile from the outset.

If management does not apply for the opening of insolvency proceedings in due time and creditors suffer damages as a result, management may be held personally liable for the damages which creditors suffer as a result of the late filing and which would not have arisen if the insolvency proceedings had been opened in due time. Regarding "old creditors", i.e. creditors whose claims had arisen before the material insolvency (illiquidity or over-indebtedness), management will be liable for any deterioration in the insolvency dividend (so-called quota damage) if a managing director fails to file for insolvency in good time. Regarding "new creditors", i.e. creditors whose claims only arose after the material insolvency occurred, management can be held liable in the event of late filing for insolvency for the entire possible losses.

Furthermore, the following rules must be observed in a situation of insolvency (under Austrian insolvency law):

- The debtor must not incur any new debts.
- The debtor must not pay any old debts (as this would lead to a preferential treatment of creditors).
- Any goods or services needed to uphold the basic operation may only be purchased if payment for such goods or services is rendered immediately.

4. Protection granted to the debtor against its creditors

The Austrian Insolvency Act provides for an **automatic stay of proceedings** as soon as insolvency proceedings have been opened over the insolvent's estate. This is true for both reorganization and liquidation-oriented proceedings (Konkursverfahren and Sanierungsverfahren mit/ohne Eigenverwaltung).

There are **special rules and regulations for rights of segregation and separation** (they are generally speaking not affected by the opening of insolvency proceedings; certain exceptions might apply). Also, there are special rules on rent agreements regarding business premises etc. In order for some of those exceptions to be applicable a court decision might be necessary.